Denver Law Review

Volume 92
Issue 3 *Tenth Circuit Survey* Article 10

December 2020

# Vol. 92, no. 3: Full Issue

Denver University Law Review

Follow this and additional works at: https://digitalcommons.du.edu/dlr

Part of the Law Commons

Recommended Citation
92 Denv. U. L. Rev. (2015).

This Full Issue is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.

Published by the
University of Denver
Sturm College of Law

2015 Volume 92 Issue 3

# DENVER UNIVERSITY LAW REVIEW

## RECENT DEVELOPMENTS IN THE TENTH CIRCUIT

### ARTICLES

Disquieting Discretion: Race, Geography & The Colorado Death Penalty in the First Decade of the Twenty-First Century ............ *Meg Beardsley, Sam Kamin, Justin Marceau & Scott Phillips* 431

Innovations in Mobile Broadband Pricing ........................ *Daniel A. Lyons* 453

When Targeting Becomes Secondary: A Framework for Regulating Predictive Surveillance in Antiterrorism Investigations ................. *Shaun B. Spencer* 493

### COMMENTS

*SEC v. Shields*: For Investors, A Bad Presumption Yields Bad Results .................................... *Joshua Eihausen* 539

Jurisprudence vs. Judicial Practice: Diminishing *Miller* in the Struggle Over Juvenile Sentencing ................................................ *Amanda Huston* 561

*Luster v. State* and *Starkey v. Oklahoma*: Modern Scarlet Letter Regulations and the Courts' Cold Shoulder .............................................. *Colton Johnston* 613

Pristine Solitude or Equal Footing? *San Juan County v. United States* and Utah's Larger Bid to Assert Control Over Public Lands in the Western United States .................................. *Lucas Satterlee* 641

*Graham v. Sheriff of Logan County*: Coercion in Rape and the Plight of Women Prisoners .......................................................... *Kristen Seddiqui* 671

# DISQUIETING DISCRETION: RACE, GEOGRAPHY & THE COLORADO DEATH PENALTY IN THE FIRST DECADE OF THE TWENTY-FIRST CENTURY

BY MEG BEARDSLEY, SAM KAMIN, JUSTIN MARCEAU & SCOTT PHILLIPS†

ABSTRACT

This Article demonstrates through original statistical research that prosecutors in Colorado were more likely to seek the death penalty against minority defendants than against white defendants. Moreover, defendants in Colorado's Eighteenth Judicial District were more likely to face a death prosecution than defendants elsewhere in the state. Our empirical analysis demonstrates that even when one controls for the differential rates at which different groups commit statutorily death-eligible murders, non-white defendants and defendants in the Eighteenth Judicial District were still more likely than others to face a death penalty prosecution. Even when the heinousness of the crime is accounted for, the race of the accused and the place of the crime are statistically significant predictors of whether prosecutors will seek the death penalty. We discuss the implications of this disparate impact on the constitutionality of Colorado's death penalty regime, concluding that the Colorado statute does not meet the dictates of the Eighth Amendment to the Constitution.

TABLE OF CONTENTS

INTRODUCTION: THE DEATH PENALTY IN COLORADO TODAY ............ 432
I. THE CONSTITUTIONALITY OF THE DEATH PENALTY ..................... 433
II. PRIOR STUDIES ON RACE, GENDER, AND THE DEATH PENALTY .... 436
III. METHODOLOGY AND DESIGN ........................................................ 442
IV. THE COLORADO DEATH PENALTY: RARE AND UNFAIR ................ 443
*A. Race, Place, and the Disparate Use of Discretion* .................... 443
*B. Exploring Legitimate Explanations* .......................................... 446
1. The "More" Argument ......................................................... 446
2. The "Worse" Argument ........................................................ 447

† Meg Beardsley (J.D. Washington and Lee University School of Law 2007) was formerly a law clerk in Colorado state district court and is presently a federal judicial law clerk in Washington, D.C. Sam Kamin is a professor at the University of Denver Sturm College of law where he teaches Criminal Law, Criminal Procedure, and Death Penalty Jurisprudence among other courses. Justin Marceau is the Animal Legal Defense Fund Professor of Law at the University of Denver. Scott Phillips is an associate professor in the Department of Sociology and Criminology at the University of Denver where he teaches Capital Punishment, Wrongful Conviction, Criminology, and Statistics. The authors wish to thank Mark Cassell for his editing and analytical assistance and Bonnie Stewart for her tireless dedication to researching and organizing much of the data upon which the study is based.

CONCLUSION ........ 450
APPENDIX I. DEATH PENALTY PROSECUTIONS, CASES FILED JANUARY 1, 1999 THROUGH DECEMBER 31, 2010 ........ 452

## INTRODUCTION: THE DEATH PENALTY IN COLORADO TODAY

The death penalty has taken center stage in Colorado politics in recent years. In the past, debate over capital punishment tended to focus on moral or theological issues.[1] Today, however, the discussion is largely about the practical application of the death penalty.

A number of facts about Colorado's death penalty stand out. One immediate and inescapable initial observation is that the use of the death penalty is in steep decline in Colorado, to the point that it is now virtually nonexistent. To describe the penalty's use in Colorado as rare is an extreme understatement. Since 1967, only one person has been executed during a period in which more than 8,100 homicides have been committed.[2] At present, there are only three men on Colorado's death row, arising from just two criminal incidents: one man convicted of a multiple murder of four people that occurred in 1993[3] and two men convicted of involvement in a double murder that occurred in 2005.[4] All three of these men are African-American and were very young—under 21 years old—at the time of the crimes. All are from the same county, and in fact, all attended the same high school in Aurora, Colorado.[5]

When Colorado Governor John Hickenlooper issued a temporary reprieve to Nathan Dunlap in 2014, forestalling indefinitely his execution, the Governor quoted a Colorado judge who had said to him: "[The death penalty] is simply the result of happenstance, the district attorney's choice, the jurisdiction in which the case is filed, perhaps the race or

---

1. *See generally, e.g.*, CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 51–57 (Aaron Thomas ed., Aaron Thomas & Jeremy Parzen trans., Univ. of Toronto Press 2008) (1764); JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT 168–197 (Robert Heward, Wellington St., Strand 1917) (1830); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 88–89, at 47–48 (C.B. Macpherson ed., Hacket Publ'g Co. 1980) (1690); JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 32–34 (G.D.H. Cole trans., E.P. Dutton & Co. 1950) (1762), Hugo Adam Bedau, *Capital Punishment*, *in* MATTERS OF LIFE AND DEATH 148, 148, 167–69 (T. Regan ed., Random House 1980).

2. Gary Davis was executed in 1997 for a murder he and his wife committed in 1986. *See* People v. Davis, 794 P.2d 159, 167 (Colo. 1990). Homicide rates are provided by DisasterCenter.com using data from FBI Annual Crime Reports, which shows 8,117 murders committed in the years 1967 through 2013. *Colorado Crime Rates 1967–2013*, DISASTERCENTER.COM, http://www.disastercenter.com/crime/cocrime.htm (last visited April 9, 2015).

3. *See* People v. Dunlap, 975 P.2d 723, 733 (Colo. 1999).

4. *See* People v. Ray, 252 P.3d 1042, 1044 (Colo. 2011); People v. Owens, 228 P.3d 969, 970 (Colo. 2010).

5. Ivan Moreno, *Personal Stories Grip Lawmakers On Death Penalty*, CBS DENVER, (Mar. 17, 2013, 1:18 PM), http://denver.cbslocal.com/2013/03/17/personal-stories-grip-lawmakers-on-death-penalty.

economic circumstance of the defendant."[6] Citing a recent study of the Colorado death penalty conducted by authors of this Article (the Colorado Narrowing Study),[7] the Governor added that, since the time that Dunlap had been sentenced in 1996, "we now have the benefit of information that exposes an inequitable system."[8]

Indeed, we do. This Article demonstrates that the imposition of the death penalty in Colorado depends to an alarming extent on the race and geographic location of the defendant. Moreover, we use empirical data and statistical analysis to definitively rebut the argument that these racial and geographic disparities within Colorado's death penalty system are simply the result of racial or geographic disparities in homicide commission. This study demonstrates that both the race of the defendant and the geographic location of the crime are statistically significant predictors of whether a death penalty prosecution will be pursued against a statutorily eligible defendant. In conjunction with the Colorado Narrowing Study,[9] we demonstrate two critical failures in the Colorado death penalty system: (1) the system does not sufficiently narrow the class of death-eligible defendants at the stage of statutory definition;[10] and (2) there is a statistically significant disparity between death prosecutions against whites and non-whites, and among judicial districts.

## I. THE CONSTITUTIONALITY OF THE DEATH PENALTY

The Eighth Amendment's prohibition on cruel and unusual punishments has been construed as imposing a variety of procedural requirements on the lawful imposition of a death sentence.[11] Beginning in 1972, in the groundbreaking *Furman v. Georgia*[12] decision, the Court announced its concern, as a constitutional matter, with arbitrariness in the death sentencing procedures of the states.[13] Although *Furman* was a plurality decision producing ten separate opinions from the Court's nine Justices, Justice Stewart provided perhaps the most memorable summary of the Court's reasoning in striking down the death penalty in the United States; he explained that when the death penalty is imposed on only a "random handful" of the defendants who are statutorily eligible for the punishment, then the death penalty is "cruel and unusual in the same way

6. OFFICE OF THE GOV., STATE OF COLO., Exec. Order D2013-006, at 2 (May 22, 2013) (alteration in original) (internal quotation marks omitted), *available at* http://www.colorado.gov/cs/Satellite/GovHickenlooper/CBON/1251650380954.

7. Justin Marceau, Sam Kamin & Wanda Foglia, *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. Colo. L. Rev. 1069 (2013). We refer to this study as the Colorado Narrowing Study.

8. OFFICE OF THE GOV., STATE OF COLO., *supra* note 6, at 2–3.

9. *See* Marceau et al., *supra* note 7.

10. This is the finding of the Colorado Narrowing Study. *See id.* at 1113; Sam Kamin & Justin Marceau, *Waking the* Furman *Giant*, 48 U.C. DAVIS L. REV. 981, 1014–16 (2015).

11. For a more thorough summary of the background Eighth Amendment law, see Marceau et al., *supra* note 7, at 1075–76.

12. 408 U.S. 238 (1972) (per curiam).

13. *See id.* at 243–48 (Douglas, J., concurring).

that being struck by lightning is cruel and unusual."[14] That is, for Justice Stewart—as well as Justices Douglas and White[15]—the infrequency with which the death penalty was imposed was sufficient reason to invalidate the punishment on constitutional grounds.

Even more relevant for present purposes, the decision to invalidate the capital punishment systems at issue in *Furman* rested in large part on a fear that too much discretion in the hands of prosecutors and juries would lead to the arbitrary and racially disparate application of the death penalty. Justice Douglas explicitly linked the constitutional problem of arbitrariness to the death penalty's racially disparate application. Douglas observed, "It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices."[16] Douglas went on to say that death penalty systems that did not sufficiently narrow death eligibility through *statutory criteria* "are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."[17]

In short, the *Furman* Court was concerned that the rarity of death sentences relative to statutory eligibility raised the specter of racial discrimination.[18] In light of the fact that the death penalty in Colorado is

14. *Id.* at 309–10 (Stewart, J., concurring). Although *Furman* was only a plurality the Court itself has subsequently grappled with the precedential value of the decision on multiple occasions. A dissent by Justice Scalia provides a summary of the Court's subsequent treatment of *Furman*:

> In *Furman,* we overturned the sentences of two men convicted and sentenced to death in state courts for murder and one man so convicted and sentenced for rape, under statutes that gave the jury complete discretion to impose death for those crimes, with no standards as to the factors it should deem relevant. The brief *per curiam* gave no reasons for the Court's decision, other than to say that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." To uncover the reasons underlying the decision in *Furman,* one must turn to the opinions of the five Justices forming the majority, each of whom wrote separately and none of whom joined any other's opinion. Of these opinions, [Justice Brennan's and Justice Marshall's] rested on the broadest possible ground—that the death penalty was cruel and unusual punishment in all circumstances. A third, that of Justice Douglas, rested on a narrower ground—that the discretionary capital sentencing systems under which the petitioners had been sentenced were operated in a manner that discriminated against racial minorities and unpopular groups. The critical opinions, however, in light of the subsequent development of our jurisprudence, were those of Justices Stewart and White.

Walton v. Arizona, 497 U.S. 639, 657–58 (1990) (Scalia, J., dissenting) (citations omitted), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002).

15. *Id.* at 254–56 (Douglas, J., concurring); *id.* at 311 (White, J., concurring). *See* James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 8 (2007) (describing the opinions of Justices Douglas, Stewart, and White as the controlling holdings in *Furman*).

16. *Furman*, 408 U.S. at 242 (Douglas, J., concurring).

17. *Id.* at 256–57.

18. Marceau et al., *supra* note 7, at 1073 n.9 ("Scholars have observed that the Court's conclusion that the death penalty was unconstitutional in *Furman* was based in large part on the low death sentencing ratios—that is, the low percentage of defendants who were eligible for the death

imposed in only a small fraction of the cases in which it is statutorily available,[19] the next question is whether, as Justice Douglas predicted, the broad definition of death eligibility has, in fact, created a death penalty system that is tainted by racially disparate application. Previous scholars have suggested that low death sentencing rates can be expected to produce a death sentencing system that is racially disproportionate.[20] This Article provides data and analysis to confirm this hypothesis. Colorado's death penalty, because it fails to provide a meaningful mechanism for narrowing in the legislative definition, opens the door to disparate impact.

In 1986, in a discussion of the role of race in capital jury sentencing, the United States Supreme Court made an observation that is equally applicable to exercises of prosecutorial discretion at the death penalty charging stage. In *Turner v. Murray*,[21] the Court noted that, while issues of race can theoretically enter into any case, there are exceptional concerns in a death penalty case because of the vast amount of discretion involved:

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. . . .
>
> . . . .
>
> . . . [T]he risk of racial bias at sentencing hearings is of an entirely different order, because the decisions that sentencing jurors must make involve far more subjective judgments than when they are deciding guilt or innocence.[22]

---

penalty that were actually sentenced to death."); *see, e.g.*, Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for* Furman*?*, 72 N.Y.U. L. REV. 1283, 1287 ("The Court's determination in *Furman* that the death penalty was being applied to a 'random handful' was grounded in empirical data concerning death sentence ratios at the time." (footnote omitted)); *id.* at 1288 ("In *Furman*, the Justices' conclusion that the death penalty was imposed only infrequently derived from their understanding that only 15–20% of convicted murderers who were death-eligible were being sentenced to death."); *see also* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 415 (1995) ("[T]he class of the death-eligible should not be tremendously greater than, say, five or ten percent of all murderers. What was intolerable at the time of *Furman* and what remains intolerable today is that the ratio of death-eligibility to offenses-resulting-in-death is much closer to ninety-to-one than five or ten-to-one.").

19. *See infra* notes 45–46 and accompanying text.

20. Marceau et al., *supra* note 7, at 1115; *see, e.g.*, Chelsea Creo Sharon, Note, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L. L. REV. 223, 247 n.138 (2011) ("In particular, the Baldus group's study of racial discrimination in Georgia, relied upon by the petitioner in *McCleskey v. Kemp*, reached this conclusion. The study found that, among cases with nearly universal death sentencing, there was only a 2% difference between death-sentence rates for black and white defendants with white victims. Among less aggravated cases, where death sentences were imposed only 41% of the time, this racial variation rose to 26%."(citation omitted)).

21. 476 U.S. 28 (1986).

22. *Id.* at 35, 38 n.12.

The same risk of undetected, perhaps even unconscious, racial bias[23] is not restricted to jury decision making; the death penalty charging decisions being made by Colorado prosecutors have a strong racially disparate impact.

## II. PRIOR STUDIES ON RACE, GENDER, AND THE DEATH PENALTY

Since the Supreme Court issued its opinion in *Furman*, numerous empirical studies have been designed to assess how, and whether, the race of murder defendants and victims affects the likelihood that a death sentence will be imposed.[24] In 1990, for example, the General Accounting Office (GAO) conducted a review of studies of the administration of

---

23. *See, e.g.*, Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (2006); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 822 (2012) ("[T]here are compelling reasons to believe that prosecutors unwittingly display implicit racial bias at a variety of decision points.").

24. *See, e.g.*, DAVID C. BALDUS, GEORGE G. WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY 140–88 (1990) [hereinafter BALDUS ET AL., EQUAL JUSTICE]; David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1421 (2004) [hereinafter Baldus & Woodworth, *Reflections*] (discussing the apparent decline, post-*Furman*, of race-of-defendant discrimination in exercises of prosecutorial discretion); David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999)*, 81 NEB. L. REV. 486, 590 (2002) [hereinafter Baldus et al., *Nebraska Experience*]; David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1763–64, 1767 (1998) [hereinafter Baldus et al., *Findings from Philadelphia*] (examining death prosecutions in Philadelphia between 1983 and 1993 and finding that, after controlling for the severity of the crime and the defendant's criminal background, the rate at which death-eligible black defendants were sentenced to death was 38% higher than the rate for other eligible defendants; finding also that death sentences were most likely to be imposed in cases involving black defendants and nonblack victims, and least likely to be imposed in cases involving nonblack defendants and black victims); David C. Baldus, Charles A. Pulaski, Jr. & George Woodworth, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133, 147 (1986) [hereinafter Baldus et al., *Challenge*] (including data from Colorado); John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. EMPIRICAL LEGAL STUD. 637 (2014); Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978–1999*, 4 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 13–14 (2004); Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides: 1990–1999, The Empirical Analysis*, 46 SANTA CLARA L. REV. 1, 36–37 (2005); Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988–1997*, 81 OR. L. REV. 39, 67 (2002); Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1, 33 (1991); John J. Donohue, Capital Punishment in Connecticut, 1973–2007: A Comprehensive Evaluation from 4686 Murders to One Execution 1 (June 8, 2013) [hereinafter Donohue, Capital Punishment in Connecticut] (unpublished manuscript), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1095&context=john_donohue (analyzing murders in Connecticut from 1973 to 2007); ISAAC UNAH & JOHN CHARLES BOGER, RACE AND THE DEATH PENALTY IN NORTH CAROLINA: AN EMPIRICAL ANALYSIS: 1993–1997, at 2 (2001), *available at* http://www.unc.edu/~jcboger/NCDeathPenaltyReport2001.pdf; *see also* David C. Baldus & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 501, 501 (James R. Acker et al. eds., 2d ed. 2003) [hereinafter Baldus & Woodworth, AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT] (providing another good overview of the multiple studies documenting the race effect).

the death penalty in various states to determine whether the race of the victim and the defendant were affecting capital sentencing.[25] The GAO survey found that 82% of the studies selected as worthy of review had shown that the race of the victim affected charging or sentencing decisions or both.[26] According to GAO's review, although "legally relevant variables, such as aggravating circumstances, were influential . . . [they] did not explain fully the racial disparities researchers found."[27]

The GAO's conclusion is corroborated by research conducted in jurisdictions throughout the country, nearly all of which have documented strong race-of-victim correlations and some of which have also demonstrated race-of-defendant correlations with death prosecution and sentencing.[28] The first comprehensive empirical study of Colorado's death penalty was published in 2003 and was authored by Professor Michael Radelet; the research covered the period from 1859 to 1972.[29] In a subsequent article, Professor Radelet, Stephanie Hindson, and Hillary Potter continued that analysis, considering death penalty prosecutions for crimes that occurred from 1980 through 1999.[30] Radelet, Hindson, and Potter examined "all cases where the death penalty was imposed, 1972–2005, and ... all cases where the death penalty was sought, 1980–1999."[31] The data revealed that Colorado death penalty prosecutions were extremely rare, having been sought only 110 times between 1980 and the end of 1999.[32] Radelet, Hindson, and Potter found that:

> the odds of [a death prosecution] were much higher for those suspected of killing whites than for those suspected of killing blacks or Hispanics, and much higher for those suspected of killing white women than for other homicide suspects in the 110 cases where the death penalty was sought between 1980 and 1999.[33]

---

25. U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO SENATE AND HOUSE COMMITTEES ON THE JUDICIARY, GAO/GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 1 (Feb. 1990) [hereinafter DEATH PENALTY SENTENCING]; *see also* U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEMS: A STATISTICAL SURVEY (1988–2000), at 30–32 (2000), *available at* http://www.justice.gov/sites/default/files/dag/legacy/2000/09/13/_dp_survey_final.pdf (last visited July 23, 2015) (concluding that, between 1995 and 2000, 48% of death cases charging white defendants were resolved by plea, while 25% of death cases charging black defendants were resolved by plea—a 23 percentage point difference).

26. DEATH PENALTY SENTENCING, *supra* note 25, at 5.

27. *Id.* at 6.

28. *See supra* note 24.

29. Michael L. Radelet, *Capital Punishment in Colorado: 1859–1972*, 74 U. COLO. L. REV. 885 (2003).

30. Stephanie Hindson, Hillary Potter & Michael L. Radelet, *Race, Gender, Region and Death Sentencing in Colorado, 1980–1999*, 77 U. COLO. L. REV. 549 (2006).

31. *Id.* at 552.

32. *Id.* at 567.

33. *Id.* at 553. Hindson, Potter, and Radelet identified Colorado cases in which the death penalty was sought and compared this "death-prosecuted" pool of murders to the general pool of homicides in Colorado for the period 1980–1999. These researchers demonstrated that, statistically speaking, the odds of a death prosecution were greater in cases involving white murder victims (especially female victims) than in cases involving minority murder victims. *Id.* at 577–78. "While non-Hispanic white victims accounted for 54 percent of all homicide victims from 1980 to 1999,

Our work picks up where the Radelet studies left off. Our analysis of the race and geographic location of defendants found guilty of the most serious murders in Colorado involves two steps. First, it is necessary to identify the most aggravated murders—those for which death is a valid punishment under Colorado's capital statute.[34] This task was taken up by two of the authors of this article, along with another researcher in the Colorado Narrowing Study, through an in-depth study of all concluded murder cases that had been filed in the Colorado district courts over a twelve-year period (January 1, 1999 through December 31, 2010).[35] The Colorado Narrowing Study required the researchers to examine the facts of each murder case during this period in order to determine which cases were statutorily eligible for prosecution under the Colorado Death Penalty Statute.[36] In particular, the study identified a pool of Colorado aggravated murders in which the death penalty was sought or legally could have been sought—those cases in which a jury's finding of first-degree murder and aggravating factors would have been upheld on appeal.[37] These murders are referred to herein as "statutorily death-eligible"—they are murders for which the death penalty was permitted as a matter of law under the Colorado first-degree murder and death penalty statutes.[38] Having identified the statutorily death-eligible cases, we then compared these cases to those in which death was actually sought to determine what percentage of statutorily death-eligible cases were actually prosecuted as such.

Stated differently, the primary purpose of the Colorado Narrowing Study was to assess whether or not Colorado's statutory death penalty scheme fulfills the constitutional task assigned to it by the Supreme Court in such cases as *Furman v. Georgia*,[39] *Gregg v. Georgia*,[40] and *Zant v. Stevens*.[41] In those cases the Court repeatedly required the states

they account for 81.8 percent of victims in cases where the death penalty was sought." *Id.* at 578 (emphasis omitted). The researchers found that the death penalty was "pursued against those who kill white women at almost twice the rate as their rate of homicide victimization." *Id.* at 577. These researchers suggested that future efforts should focus on particular characteristics of the murders in those cases where the death penalty was sought ("death prosecutions") and those in which prosecutors sought alternative lesser penalties, such as life imprisonment without parole. *Id.* at 582. The researchers explained their focus on the victim's attributes (race, gender, and ethnicity) as follows: "Because the vast majority of research on the relationship between race and death sentencing conducted over the past three decades has found that death sentencing is correlated with the victim's race and ethnicity, and not the defendant's, we focus herein primarily on victim attributes." *Id.* at 552.

34. COLO. REV. STAT. § 18-1.3-1201(5) (2012).

35. *See infra* Part III. For additional study parameters, see Marceau, et al., supra note 7, at 1098-1108.

36. *See infra* Part III. *See also* COLO. REV. STAT. § 18-1.3-1201(5) (2012).

37. Marceau et al., *supra* note 7, at 1072.

38. We use the phrase "statutorily death-eligible" for precision. Prior scholarship has demonstrated the confusion surrounding the terms "eligibility" and "narrowing" in the death penalty context. *See* Kamin & Marceau, *supra* note 10, at 1002–04.

39. 408 U.S. 238 (1972) (per curiam).

40. 428 U.S. 153 (1976) (plurality opinion).

41. 462 U.S. 862 (1983).

to establish a statutory basis for *narrowing* the few cases in which the death penalty is imposed from the many cases in which it is not.[42]

The Colorado Narrowing Study produced a number of notable findings. First, it showed that over 91% of murders during the study period either were or could have been prosecuted as first-degree murders.[43] Second, and even more significantly, the data showed that in over 90% of all cases that were or could have been charged as first-degree murder, one or more aggravating factors was present. That is to say, the study demonstrated that more than nine out of ten first-degree murderers were statutorily death-eligible.[44] Finally, because the Supreme Court in *Furman* had focused on the risk of disparate treatment that occurs when a death *sentence* rate is less than 15%–20%,[45] the study calculated Colorado's death sentencing rate for the period and determined it to be just "3 of 539, or 0.56%."[46]

On the basis of these data, the study concluded that Colorado's statutory sentencing scheme "has failed to produce legislative standards capable of genuinely narrowing the class of death-eligible offenders."[47] On the basis of these findings alone— the fact that nearly every murderer in Colorado could have been charged with first-degree murder and that nearly every first-degree murderer could have been sentenced to death – the Colorado Narrowing Study concluded that Colorado's capital sentencing regime was not meeting its Eighth Amendment obligations.

In response, proponents of the death penalty have asserted that the findings of the Colorado Narrowing Study are largely irrelevant to the question of the Colorado capital statute's constitutionality. Statutory narrowing, they argue, is unnecessary, because the prosecutors themselves take great care to ensure that the death penalty system in the state oper-

42. *Zant*, 462 U.S. at 862–63; *Gregg*, 428 U.S. at 196–97; *Furman*, 408 U.S. at 299–301, 304–05 (Brennan, J., concurring). *See* Marceau et al, *supra* note 7 at 1072 ("[T]he Supreme Court has emphasized that a State's capital sentencing statute must serve the 'constitutionally necessary function . . . [of] circumscrib[ing] the class of persons eligible for the death penalty' such that only the very worst are eligible for the law's ultimate punishment." (alterations in original) (quoting *Zant*, 462 U.S. at 878)).

43. Marceau et al., *supra* note 7, at 1109.

44. *Id.* at 1110 (finding that in approximately 90% of first-degree murder convictions, a finding of at least one aggravating factor would have been upheld on appeal).

45. Steven F. Shatz & Nina Rivkind, The California Death Penalty Scheme: Requiem for Furman?, 72 N.Y.U. L. Rev. 1283, 1288 (1997) ("In Furman, the Justices' conclusion that the death penalty was imposed only infrequently derived from their understanding that only 15-20% of convicted murderers who were death-eligible were being sentenced to death.").

46. Marceau et al., *supra* note 7, at 1112. It bears noting that one Colorado District Court found that, following an extensive review of these results, the prosecution effectively concurred and had no objection to the court's reliance on these statistical findings. *See* People v. Montour, No. 02CR782, at 2 (Douglas County District Court of Colorado May 2, 2013) ("The prosecution found that the aggravating-factor rate was 88.49%, and the death-sentence rate was 0.57%.") (on file with author); *id.*, at 2 n.5 ("The Court will use the defense's statistics . . . to resolve this motion on the merits, because the parties' statistics are similar, and because the prosecution stipulated to the defense's numbers for purposes of this motion.").

47. *Id.* at 1113.

ates in a fair, rational, and non-arbitrary manner. Illustrative are the comments of Eighteenth Judicial District Attorney George Brauchler, who addressed the role of prosecutorial discretion in death prosecutions during a March 19, 2013 hearing, held before the Colorado General Assembly's House Committee on the Judiciary on House Bill 13-1264, which concerned a proposed repeal of Colorado's death penalty.[48] When asked whether the dearth of defendants on death row—in contrast with the "thousands" of murder convictions that had been obtained in Colorado—constituted evidence that the death penalty was being imposed arbitrarily and capriciously, Mr. Brauchler responded, "No . . . . In fact, what it is, it's the exercise of discretion. . . . [T]he fact that we don't pursue [the death penalty] on a greater percentage of murder cases only shows you the amount of discretion that these District Attorneys exercise in seeking it."[49] Mr. Brauchler further stated:

> It's false to say that every first degree murder case could arguably be the death penalty. . . . In fact, it requires more than existence of an aggravating factor. . . . [O]ne of the hallmarks of a free people and the best criminal justice system in the country is something that's called prosecutorial discretion. And it is because we have 22 separately-elected District Attorneys throughout this state, by the populations, over which they will impose laws of this State.[50]

The fact that the death penalty was frequently available but rarely used was, in Brauchler's view, a demonstration of the success of Colorado's death penalty system rather than evidence of its infirmity. Brauchler reasoned that although there was a great disparity between those eligible for the penalty and those who receive it, this was evidence merely of the careful use of discretion by the state's prosecuting attorneys.

At the same legislative hearing, some attempted to excuse the racially disparate operation of Colorado's death penalty by noting that nonwhites commit more of the violent crime in our state and that, as a result, "African American[s] tend to be just easier to convict."[51] Fourth Judicial District Attorney Dan May explained that the racial disparities in the capital punishment system are all "outside of the criminal justice area" because "when you really look at how many people commit robberies, how many are in prison, how many commit murders, how many in prison, they parallel quite a bit."[52] The debate about Colorado's death penalty, then, has been shaped by an intuition—often explicit—that racial mi-

---

48. *Proposal of Repeal of the Death Penalty: Hearing on H.B.13-1264 Before the Comm. on the Judiciary*, 2013 Leg., 69th Reg. Sess. 260–61 (Colo. 2013) (statement of George Brauchler, Dist. Att'y, 18th Judicial District).

49. *Id.* at 260–61.

50. *Id.* at 248–49.

51. *Id.* at 302 (question posed by Rep. Jovan Melton, discussing race and the death penalty with Dan May, Dist. Att'y, 4th Judicial District); *see also id.* at 273–74 (discussion with George Brauchler, Dist. Att'y, 18th Judicial District).

52. *Id.* at 303 (testimony of Dan May, Dist. Att'y, 4th Judicial District).

norities commit more (and more heinous) offenses than their white counterparts. In this Article we examine whether the "more" and "worse" arguments that have been advanced by legislators and district attorneys can account for the impact of race and geographic location on the administration of the Colorado death penalty.

At the outset, it is important to note that there are insurmountable constitutional problems with a capital sentencing regime that leaves to prosecutors the task of ensuring a non-arbitrary, Eighth Amendment-compliant death penalty regime.[53] Prosecutorial discretion alone can never satisfy the Eighth Amendment requirements of *statutory* narrowing—that narrowing must be done by statute, either in the definition of first-degree murder or in the enumeration of statutory aggravating factors.[54] That is, no matter how carefully prosecutors exercise their discretion about when to seek the death penalty, their exercise of discretion cannot substitute for the legislative narrowing required by the Constitution or save an otherwise unconstitutional capital statute. But this Article sets that larger constitutional issue to the side. Assuming *arguendo* that prosecutorial discretion could cure the problem of arbitrariness suggested by the Colorado Narrowing Study (and it cannot), this Article seeks to examine the data and expose the realities of prosecutorial discretion in Colorado. This Article examines the results of the broad discretion afforded prosecutors under Colorado's capital statute.

If prosecutors were, in fact, using their discretion to prevent the arbitrary imposition of the death penalty, one would expect that only the most heinous murderers would face death penalty prosecution. One would also expect that neither race nor geography would be statistically relevant predictors of whether a death sentence is sought. Such care and thoughtfulness is certainly consistent with the narrative provided by prosecutors in Colorado. Repeatedly, prosecutors have claimed that the vast discretion afforded to them under Colorado's sentencing statue is a force of good—that discretion ensures that only the worst are sentenced to death.[55] A careful study of the data, however, reveals a very different picture. The severity of the defendant's crime is not the most important factor in determining whether someone will be sentenced to death in Colorado. Instead, as this Article's original statistical research demonstrates, prosecutors were more likely to seek the death penalty against minority defendants than against white defendants. Moreover, defendants in Colorado's Eighteenth Judicial District were more likely to face a

---

53. Kamin & Marceau, *supra* note 10, at 992–94.

54. *See* Zant v. Stephens, 462 U.S. 862, 878 (1983); Kamin & Marceau, *supra* note 10, at 993–94.

55. *See, e.g.*, George Brauchler, *Death Penalty Is a Tool of Justice*, DENVER POST, March 31, 2013, http://www.denverpost.com/opinion/ci_22895409/death-penalty-is-tool-justice ("[O]ur elected prosecutors prudently exercise discretion as to which few murder cases truly warrant the pursuit of the death penalty."); *supra* note 48–52 and accompanying text.

death prosecution than defendants across the remainder of the state. Our look at the data shows that even if we control for the differential rates at which different groups commit statutorily death-eligible murders, non-white defendants and defendants in the Eighteenth Judicial District are more likely than others to face a death penalty prosecution.[56]

## III. METHODOLOGY AND DESIGN

The Colorado Narrowing Study analyzed hundreds of murder convictions obtained during a twelve-year time period.[57] From this extensive data pool, the Colorado Narrowing Study identified 524 cases which, based on their specific facts, could have been prosecuted as death penalty cases under the Colorado Death Penalty Statute based on a first-degree murder finding and the factual existence of one or more statutory aggravating factors[58] but in which the death penalty was not actually sought.[59] In addition to the 524 statutorily death-eligible cases in which the prosecution exercised its discretion and did not seek the death penalty, there were 22 cases in which the death penalty was actually sought by the prosecution during the twelve-year period of the Colorado Narrowing Study (death prosecutions).[60] These 22 death prosecutions, when added

56. *See infra* Part IV.

57. For a detailed description of the methodology, see Marceau et al., *supra* note 7, at 1098–1108. The requirement for a conviction ensures that cases are not utilized in which the defendant was actually innocent. This requirement, dubbed the "controlling fact finder" rule, is standard practice in empirical murder studies. The exclusion of cases under the controlling fact finder rule, like the requirement that the death prosecution not be legally barred, best prevents misattribution of a non-death penalty outcome to mere prosecutorial discretion or the possibility that the case was simply a factually weak one. *See* David Baldus et al., *Empirical Studies of Race and Geographic Discrimination in the Administration of the Death Penalty: A Primer on the Key Methodological Issues*, *in* THE FUTURE OF AMERICA'S DEATH PENALTY 153, 165–66 (Charles S. Lanier et al. eds., 2009). Such a case is

> properly excluded from any analysis of death sentencing outcomes. However, if on the basis of credible evidence, the prosecution viewed such a case as death-eligible, as evidenced by the advancement of the case to trial with the government seeking a death sentence, it would be appropriate to include the case in the sample of death-eligible cases that is used to model prosecutorial decision making.

*Id.* at 166. In other words, a prosecutor's decision to seek death tells us something about the prosecutor's exercise of discretion, even when the defendant was factually innocent or even when the prosecution was later barred on legal grounds.

58. Once a first-degree murder prosecution is commenced, the only additional requirement placed upon the prosecution to trigger a death penalty prosecution is the filing of a Notice of Intent and filing of a Notice of Statutory Aggravating Factors. COLO. REV. STAT. § 18-1.3-1201(3)(a) (2012); COLO. R. CRIM. P. 32.1(b). The statute includes a list of seventeen aggravating factors that may be alleged, and an allegation of any one of them is sufficient to commence the death penalty prosecution. COLO. REV. STAT. §18-1.3-1201(5) (2012). A death sentence may not be imposed unless a unanimous jury (or a judge if jury is waived) finds beyond a reasonable doubt that at least one of the aggravating factors was present. *Id.* § 18-1.3-1201(2)(a)(I). This finding is necessary, but not alone sufficient, for imposition of a death penalty. *See id.* § 18-1.3-1201(2)(a)(II)–(III).

59. See Marceau et al., supra 7, at note 195.

60. The death-prosecuted cases are catalogued in Appendix I below. Seventeen of these twenty-two death prosecutions resulted in a first-degree murder conviction. In five cases (*Jimenez, Wilkinson, Sweeney, Melina*, and *Perez*), the defendants were acquitted at trial of the first-degree murder charge. *See* Marceau et al., *supra* note 7, at 1101 n.163. In two of the remaining seventeen cases (*Vasquez* and *Hagos*), the death penalty was legally barred after the prosecution filed its notice of intent to seek death. *See id.* at 1105 n.179. As Baldus explained, such cases are useful indicators

to the 524 cases in which death was not sought, form a larger pool of 546 statutorily death-eligible murders that either were prosecuted for death at the outset of the case, or could have been under the Colorado statute. These 546 cases are the focus of this Article.[61]

By taking a closer look at the pool of offenders who, under the Colorado statute, are statutorily eligible for a death penalty prosecution, we are able for the first time to make comparisons between the demographics of the large number of statutorily death-eligible Colorado murders and the much smaller number of killings actually selected for death penalty prosecution. As will be seen, this descriptive comparison reveals disturbing disparities in the operation of the Colorado death penalty system. While it is beyond the scope of this Article to identify or isolate the causes of this disparity,[62] which is left for future research, the existence of such disparity is undeniable.

## IV. THE COLORADO DEATH PENALTY: RARE AND UNFAIR

### *A. Race, Place, and the Disparate Use of Discretion*

As previously noted, all three inmates on Colorado's death row are African-Americans convicted in the Eighteenth Judicial District (the

---

of prosecutorial discretion occurring at the outset of the case, even if they are not as useful in explaining system outcomes. *See* David Baldus et al., *Empirical Studies of Race and Geographic Discrimination in the Administration of the Death Penalty: A Primer on the Key Methodological Issues*, *in* THE FUTURE OF AMERICA'S DEATH PENALTY 153, 165–66 (Charles S. Lanier et al. eds., 2009). Because the Colorado Narrowing Study focused on constitutional "narrowing," it excludes all seven of these death prosecutions. *See, e.g.*, Marceau et al., *supra* note 7, at 1110 (reporting "539 cases in which we found one or more aggravating factors, including the death-noticed cases for which the prosecution actually sought (and was legally permitted to seek) the death penalty"). This was an extremely conservative approach that would tend to ultimately favor a finding that the statute was constitutional, by not "penalizing" the system for failing to produce death sentences in cases in which the defendants were actually innocent or the death prosecution legally barred. Even with this conservative approach, the Colorado Narrowing Study conclusively demonstrated the unconstitutionality of the Colorado Death Penalty Statute. *See id.* at 1113.

61. An alternative approach is to include only the seventeen death prosecutions that resulted in first-degree murder convictions, because in each of the 524 statutorily death-eligible cases in which death was not sought, the defendant was actually convicted of first-degree murder. At first blush, this methodology appears to offer the elegance of comparing two sets of convicted murder cases, rather than comparing one set of convicted murders (the 524 non-death prosecuted cases) and another set of murder cases that includes both convicted and acquitted defendants (the set of twenty-two death prosecutions, including the five death-prosecuted "acquittal" cases). The problem with the alternative approach is that it underreports the cases in which a prosecutor exercised her discretion to seek death. Because ultimately our goal was to examine the impact of prosecutorial decision making at the very early stages of the process and to evaluate the race and place effect of prosecutorial discretion, we opted for the inclusive approach (using all twenty-two death prosecutions). Inclusion of all twenty-two death prosecutions is warranted when our focus is on prosecutorial charging decisions. When reporting on system outcomes, we appropriately take into account the five acquittals and the two legally barred cases. It is nonetheless important to note that the substantive findings are the same under either approach.

62. We recognize that such disparities might be the result of implicit biases as opposed to explicit showings of racial discrimination. "Implicit biases are discriminatory biases based on implicit attitudes or implicit stereotypes," and "they can produce behavior that diverges from a person's avowed or endorsed beliefs or principles." Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (2006).

Eighteenth Judicial District is comprised of four counties: Arapahoe, Douglas, Elbert, and Lincoln). This fact makes a discussion of race and place inescapable. Indeed, if we are to have a real discussion about the death penalty in Colorado in the twenty-first century, then it is important to know whether prosecutorial discretion contributed to such an unusual and disquieting pattern of death sentencing. To investigate, we use conventional statistical methods to examine the relationship between race, place, and the decision to seek death in Colorado between 1999 and 2010.

Focusing initially on place, Table 1: Panel A reveals that prosecutors sought death against 11.7% of the death-eligible defendants in the Eighteenth Judicial District, while prosecutors in the state's remaining judicial districts sought death against only 3.1% of the death-eligible defendants.[63] Put simply, statutorily death eligible defendants in the Eighteenth Judicial District were nearly four times more likely to face death than were similar defendants elsewhere.

Race also matters.[64] Table 1: Panel B demonstrates that prosecutors throughout Colorado sought death against 5.6% of eligible minority defendants (20/358), compared to just 1.1% of eligible white defendants (2/188).[65] Thus, Colorado prosecutors were about five times more likely to seek death against minority defendants than they were to seek it against whites. Disaggregating minority defendants into distinct race/ethnic groups in Panel C shows that each group was treated more punitively than white defendants: prosecutors sought death against 4.8% (7/146) of eligible black defendants, 5.8% (11/190) of eligible Latino defendants, and 9.1% (2/22) of eligible "other" defendants (Asian and Native American).[66]

Given the independent effects of place and race, we also examined potential interaction effects: are there particularly pronounced disparities among certain groups in certain places? Table 1: Panel D provides an affirmative answer: from among statutorily death eligible defendants, prosecutors sought death against 15.9% of minority defendants in the Eighteenth Judicial District (7/44), compared to 4.1% of minority defendants outside the Eighteenth Judicial District (13/314), 1.2% of white defendants outside the Eighteenth Judicial District (2/172), and 0% of white defendants in the Eighteenth Judicial District (0/16). Table 1: Panel E demonstrates that prosecutors outside the Eighteenth Judicial Dis-

63. The relationship is statistically significant at $p \leq .01$. Statewide, prosecutors sought the death penalty for 4.0% (22/546) of the statutorily death-eligible murders. *See* Table 1: Panel A.

64. We use the term "minorities" to describe both racial and ethnic minorities and the term "whites" to describe non-Hispanic whites. We use the term "race" to connote both racial and ethnic minorities.

65. The relationship is statistically significant at $p \leq .01$.

66. The relationship is statistically significant at $p \leq .05$. "Other" defendants are not included in the test of statistical significance because the expected cell count is too small.

trict were about four times more likely to seek death against minority defendants than against white defendants (4.1% versus 1.1%), and strikingly, prosecutors in the Eighteenth Judicial District were about fourteen times more likely to seek death against minority defendants than against white defendants (15.9% versus 1.1%).[67] The disparities found at the intersection of place and race suggest that prosecutorial discretion is not a reliable force for ensuring the even-handed administration of the death penalty in Colorado.

**Table 1. Place, Race, and the Distribution of Possible and Actual Death Prosecutions**

***Panel A. Place***

| | Potential Death Prosecutions | | Actual Death Prosecutions | | Likelihood of Actual Death Prosecution |
|---|---|---|---|---|---|
| | Number | Percentage of Statewide Total | Number | Percentage of Statewide Total | |
| 18th Judicial District | 60 | 11% | 7 | 32% | 11.7% |
| All Other Judicial Districts | 486 | 89% | 15 | 68% | 3.1% |
| Total | 546 | | 22 | | |

***Panel B. Race***

| | Potential Death Prosecutions | | Actual Death Prosecutions | | Likelihood of Actual Death Prosecution |
|---|---|---|---|---|---|
| | Number | Percentage of Statewide Total | Number | Percentage of Statewide Total | |
| Minority | 358 | 66% | 20 | 91% | 5.6% |
| White | 188 | 34% | 2 | 9% | 1.1% |
| Total | 546 | | 22 | | |

***Panel C. Race Disaggregated***

| | | | | | |
|---|---|---|---|---|---|
| White | 188 | 34% | 2 | 9% | 1.1% |
| African American | 146 | 27% | 7 | 32% | 4.8% |
| Latino | 190 | 35% | 11 | 50% | 5.8% |
| Other (Asian, Native American) | 22 | 4% | 2 | 9% | 9.1% |
| Total | 546 | | 22 | | |

***Panel D. The Intersection of Place and Race***

| | Potential Death Prosecutions | | Actual Death Prosecutions | | Likelihood of Actual Death Prosecution |
|---|---|---|---|---|---|
| | Number | Percentage of Statewide Total | Number | Percentage of Statewide Total | |
| Minority in 18th JD | 44 | 8% | 7 | 32% | 15.9% |
| Minority Outside 18th JD | 314 | 58% | 13 | 59% | 4.1% |
| White Outside 18th JD | 172 | 31% | 2 | 9% | 1.2% |
| White in 18th JD | 16 | 3% | 0 | 0% | 0% |
| Total | 546 | | 22 | | |

67. The relationship is statistically significant at $p \leq .01$.

| Panel E. The Intersection of Place and Race – White Defendants Statewide as a Baseline | | | | | |
|---|---|---|---|---|---|
| | Potential Death Prosecutions | | Actual Death Prosecutions | | Likelihood of Actual Death Prosecution |
| | Number | Percentage of Statewide Total | Number | Percentage of Statewide Total | |
| Minority in 18th JD | 44 | 8% | 7 | 32% | 15.9% |
| Minority Outside 18th JD | 314 | 58% | 13 | 59% | 4.1% |
| White Statewide | 188 | 34% | 2 | 9% | 1.1% |
| Total | 546 | | 22 | | |

### *B. Exploring Legitimate Explanations*

#### 1. The "More" Argument

According to some prosecutors, minorities are more likely to face death in Colorado because they commit more murders, or worse murders, than whites.[68] The question of "more"—if more is interpreted to mean raw numbers—is the wrong question, however. The correct question is one of proportions: Did prosecutors pursue death disproportionately against minority defendants? To avoid confusion, we examine both raw numbers and proportions. As Table 1: Panel B demonstrates, minorities were convicted of more statutorily death-eligible murders than whites: 358 versus 188. But the raw numbers do not tell the entire story. Given the fact that minorities were convicted of 66% of the death-eligible murders (358/546), and whites were convicted of 34% of the death-eligible murders (188/546), one would expect the distribution of death prosecutions to be roughly similar if the system were colorblind. Yet, 91% (20/22) of the death prosecutions were brought against minority defendants while only 9% (2/22) of the death prosecutions were brought against white defendants.[69] The same logic holds true for place in Table 1: Panel A. The Eighteenth Judicial District had far fewer statutorily death eligible cases (60/546) and fewer actual death prosecutions (7/22) than the rest of the state. Yet, the Eighteenth Judicial District accounted for a disproportionate share of death prosecutions: the Eighteenth Judicial District was the site of 11% of the potential death prosecutions[70] but 32% of the actual death prosecutions.[71] As previously mentioned, the Eighteenth

68. *See, e.g.*, *supra* note 52 and accompanying text.

69. The relationship is statistically significant at $p \leq .01$.

70. In the Eighteenth Judicial District, there were seven death prosecutions and fifty-three statutorily death-eligible murder convictions that were not prosecuted for the death penalty. Six of the seven death prosecutions resulted in a first-degree murder conviction; if only convictions are used in both the numerator and denominator, the result is essentially the same (59/541 = 10.9%).

71. The relationship is statistically significant at $p \leq .01$. There were seven death prosecutions in the Eighteenth Judicial District during the study period, out of a total of twenty-two statewide death prosecutions. However, only six of the seven Eighteenth Judicial District death prosecutions, and eleven of the fifteen death prosecutions across the remainder of the state, resulted in a conviction for first-degree murder. Thus, the Eighteenth Judicial District was responsible for six of the seventeen statewide death prosecutions that resulted in a conviction, i.e., 35%.

Judicial District was also the site of 100% of the state's death sentences.[72]

2. The "Worse" Argument

Evaluating the "worse" argument—that the death penalty is used disproportionately against certain groups because those groups commit worse crimes—requires a different approach. To begin, we must determine which murders are the "worst." Prior studies have used different metrics of heinousness, such as the number of statutory aggravators present in each case, or non-statutory factors that evince heinousness, or determining whether the victim was tortured prior to death.[73] We use an approach that is both simple and objective: in each case we inquire whether the defendant killed multiple victims—defined as killing multiple victims in a single criminal incident or killing multiple victims across multiple criminal incidents. Using multiple killings as a proxy for the worst murders is particularly relevant because each inmate currently on Colorado's death row is linked to more than one death—suggesting that prosecutors and juries agree that multiple killings are indicative of the worst of the worst. Moreover, as a general matter, it seems incontestable that killing more than one person is worse than killing just one person.[74]

Focusing on place, the data indicate that 22% of the death-eligible defendants in the Eighteenth Judicial District killed multiple victims, compared to 12% of the defendants across the rest of the state.[75]So by this metric, killings in the Eighteenth Judicial District were in fact worse than those committed elsewhere. And not surprisingly, statewide, prosecutors were more apt to seek death against defendants who killed multiple victims than a single victim—10% versus 3%.[76]

But this empirical pattern also raises a key question: Does the higher concentration of especially heinous murders in the Eighteenth Judicial

72. One might wonder whether the disproportionate pursuit of death in the Eighteenth Judicial District is a response to disproportionate violence. But the data suggest that the Eighteenth Judicial District is not exceptional. From 1999 to 2008, the Eighteenth Judicial District comprised 16% to 18% of the state population compared to 13% of the murder victims in statutorily death-eligible cases in which a conviction entered. *See Historical Census Population*, COLO. DEP'T OF LOCAL AFFAIRS, https://dola.colorado.gov/demog_webapps/hcpParameters.jsf (last visited Jan. 23, 2015). In this calculation, we focus on the period from 1999 to 2008 because we had a sufficiently robust data set for those years.

73. *See, e.g.*, Scott Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era*, 50 HOUS. L. REV. 131, 147–48 (2012) [hereinafter Phillips, *Continued Racial Disparities*]; Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. 807, 824–26 (2008) [hereinafter Phillips, *Racial Disparities*]; Donohue, Capital Punishment in Connecticut, *supra* note 24, at 11.

74. We were precluded from using other methods, such as counting the total number of aggravating factors in a case, because the prior research—the Colorado Narrowing Study—did not analyze *how many* aggravating factors were present in each case, but rather it considered *whether any* aggravating factor was present in each case.

75. The relationship is statistically significant at $p \leq .05$.

76. The relationship is statistically significant at $p \leq .01$.

District explain the geographical disparity identified above? Perhaps prosecutors were more likely to seek the death penalty in the Eighteenth Judicial District simply because defendants in that district were more likely to kill multiple victims. To answer the question, we used logistic regression to examine the relationship between judicial district and the decision to seek death both *before* and *after* controlling for the heinousness of the murders, what we call the reduced model and the full model.[77] If the higher concentration of especially heinous murders explains the geographical disparity, then the disproportional use of the death penalty in the Eighteenth Judicial District will subside substantially and become statistically non-significant in the full model; in short, the effect will disappear when the heinousness of the crime is taken into account. Table 2: Model 1A demonstrates that the odds of the prosecutor seeking death are 4.1 times higher in the Eighteenth Judicial District than the rest of the state *before* controlling for the heinousness of the murders.[78] Table 2: Model 1B demonstrates that the odds of the prosecutor seeking death are 3.7 times higher in the Eighteenth Judicial District than the rest of the state *after* controlling for the heinousness of the murders.[79] Thus, when the heinousness of the crime is taken into account the odds ratio does drop slightly but remains large and statistically significant—the geography effect does not disappear. The fact that prosecutors were more likely to seek the death penalty in the Eighteenth Judicial District simply cannot be explained away by the fact that more heinous murders occurred in the Eighteenth Judicial District than occurred elsewhere.

77. Logistic regression is the appropriate multivariate statistical model because the dependent variable is dichotomous: whether or not the prosecutor sought death.

78. The odds ratio is the odds for one group relative to the odds for another group. Odds are calculated as follows: the number of times an event did occur divided by the number of times an event did not occur (the number of times the prosecutor did seek death divided by the number of times the prosecutor did not seek death). The odds for defendants in the Eighteenth Judicial District are 7/53 (.132075). The odds for defendants across the rest of the state are 15/471 (.031847). Thus, the odds ratio is 4.1 (.132075/.031847). The odds ratio is interpreted as follows: the odds of a prosecutor seeking the death penalty are 4.1 times higher in the Eighteenth Judicial District than the rest of the state before controlling for the heinousness of the murders. The relationship is statistically significant at $p \leq .01$. After controlling for the heinousness of the murders, the logistic regression model adjusts the odds ratio for the Eighteenth Judicial District upward (the true geographical disparity is larger than the original estimate) or downward (the true geographical disparity is smaller than the original estimate). An odds ratio of one denotes no relationship (the odds of the event happening are the same for both groups). Here, the odds ratio is adjusted downward, because the true geographical disparity is slightly smaller than the original estimate. Nevertheless, the odds ratio remains large and statistically significant. The authors have the logistic regression model on file and are willing to share it with future researchers upon request.

79. The relationship is statistically significant at $p \leq .01$.

**Table 2. Odds Ratios from the Logistic Regression of Seek Death on Place and Race (n = 546)**

| | Model | | Model | | Model | Model | |
|---|---|---|---|---|---|---|---|
| | 1A (R) | 1B (F) | 2A (R) | 2B (F) | 3 | 4A (R) | 4B (F) |
| 18th JD | 4.1*** | 3.7*** | | | 3.6*** | | |
| Minority Defendant | | | 5.5** | 5.8** | 5.7** | | |
| Minority Defendant in 18th JD | | | | | | 17.6*** | 18.1*** |
| Minority Defendant Outside 18th JD | | | | | | 4.0* | 4.2* |
| Heinousness (Multiple Victims) | | 2.9** | | 3.4*** | 3.2** | | 3.4** |
| P values: * p ≤ .10; ** p ≤ .05; *** p ≤ .01 (two-tailed tests) | | | | | | | |

We use the same approach to determine whether the impact of race holds up after controlling for the heinousness of the murders. It is certainly possible that minority defendants are more likely to be prosecuted in capital cases because they commit more aggravated homicides than do white defendants. But the facts belie this theory: 13% of minority defendants killed multiple victims compared to 14% of white defendants (this is not statistically significant). In other words, minority group members in our study were actually less likely to kill multiple victims than were whites. Thus, controlling for the heinousness of the murders in a logistic regression model will necessarily increase—not decrease—the impact of race on case selection; prosecutors were substantially more likely to seek the death penalty against minority defendants despite the fact that such defendants were slightly less likely to commit the worst murders. Table 2: Models 2A and 2B, illustrates the point: the odds ratio for minority defendant *increases* from 5.5 in the reduced model to 5.8 in the full model.[80] So the odds of a prosecutor seeking death are 5.8 times higher against minority defendants than against white defendants after taking the heinousness of the murders into account.

Model 3 confirms that the findings remain unchanged if all the predictors—race, geography, and heinousness—are included in the model simultaneously (the impact of race remains statistically significant after controlling for both place and heinousness; the impact of place remains statistically significant after controlling for both race and heinousness). Finally, we extend the analysis to consider the interplay of race and place. The combined influence, evinced in Models 4A and 4B, is potent: even after controlling for the heinousness of the murders, the odds of the prosecution seeking death against a minority defendant are 4.2 times

80. Both odds ratios are statistically significant at $p \leq .05$.

higher outside the Eighteenth Judicial District and 18.1 times higher within it, compared to white defendants statewide.[81]

We now have an answer to the question that drove our analysis: Do prosecutorial decisions to seek death have a disproportionate impact on defendants of particular races and in certain geographic locations? The results are unequivocal. During the time period under consideration, among statutorily death eligible defendants, prosecutors statewide were more likely to seek the death penalty against minority defendants than against white defendants. Moreover, prosecutors in the Eighteenth Judicial District were more likely to seek the death penalty than were prosecutors elsewhere. Finally, the intersection of race and place is particularly fateful—remarkably, statutorily death-eligible minority defendants in the Eighteenth Judicial District were fourteen times more likely to face a death prosecution than their white counterparts statewide (15.9% versus 1.1%). Moreover, we have shown that these differences *cannot* be explained by differences in the number or seriousness of the killings committed by minorities. Race and place are statistically significant predictors of whether the death penalty will be sought Colorado.

## CONCLUSION

In Colorado, it is "exceedingly rare"[82] for a prosecutor to seek death or for a condemned prisoner to be executed. The contraction in the use of the death penalty has been steady for over three decades, ever since the return of the death penalty to Colorado in 1979. Indeed, there has been only one execution in the state since the 1960s. As was noted in the Colorado Narrowing Study, the very rarity of the death penalty is cause for concern; a jurisdiction in which very few of the defendants statutorily eligible for the death penalty actually receive that penalty is constitutionally suspect for that reason alone. Colorado imposes the death penalty on fewer of its death-eligible defendants than any other state that has been

81. The former odds ratio is statistically significant at $p \leq .10$ and the latter is statistically significant at $p \leq .01$. We created additional logistic regression models to ensure that the substantive findings were robust. Specifically, we controlled for the presence of a female victim and the presence of a child victim, and changed the measure of heinousness from whether the defendant killed multiple victims (a dichotomous indicator) to a count of the number of victims. Statewide, of the seventy-three defendants who killed multiple victims, sixty-one killed two victims, ten killed three victims, and two killed four victims. The findings for place, race, and the interaction of place and race were the same regardless of model specification. Thus, we present the most parsimonious models (doing so is particularly important because of limited variation in the dependent variable; death was only sought against 22 of the 546 death-eligible defendants). The additional models are available upon request.

82. *See* Graham v. Florida, 560 U.S. 48, 67 (2010) (considering the extreme rarity of a penalty when determining whether that penalty has become unconstitutional). In *Graham*, the United States Supreme Court ruled that imposition of a sentence of life imprisonment without parole upon a juvenile offender who did not murder violates the Eighth Amendment to the United States Constitution. *Id.* at 82. The Court relied in part upon *Atkins v. Virginia*, 536 U.S. 304 (2002), in which it had abolished the death penalty for persons with intellectual disability based in part upon the rarity of that practice. *Id.* at 65.

investigated.[83] Many Colorado killers are eligible for the death penalty—Colorado has an extraordinarily broad first-degree murder statute and over 90% of first-degree murderers are statutorily eligible for the death penalty[84]—but an increasingly small number of them face that ultimate punishment.

Colorado's system is thus based on a capital statute that vests extraordinary discretion in the hands of prosecutors. We now know that this essentially unfettered discretion has been exercised in ways that should trouble anyone interested in the even-handed application of justice. We have demonstrated that the location of a murder and the color of the killer's skin have far more to do with whether the death penalty is sought than whether a defendant's crime is among the worst of the worst, as measured by examining whether the defendant has killed multiple victims.

One understandable reaction to the data reported in this study might be to suggest that prosecutors should target more white men or women for death penalty prosecutions or that prosecutors outside the Eighteenth Judicial District should seek death more often. In that way, the reasoning goes, the administration of the death penalty would be rendered slightly less unfair. But, of course, this would miss the point and would constitute the very targeting and arbitrariness that any system of justice should abhor. Defendants should be selected for death based on desert, not according to a quota system that operates on the basis of race, geography, or any other factor extraneous to the defendant's moral culpability.

It is true that implicit bias is everywhere—in our hiring decisions, our social relationships, and throughout our criminal justice system. We need a criminal justice system, of course, and we have no choice but to tolerate some discrimination there even as we work to minimize it. But such discrimination in the exercise of a capital sentencing regime is significantly more problematic. This Article demonstrates that, in addition to being used infrequently, the death penalty is being applied disproportionately against certain groups in ways that have nothing to do with the seriousness of the offense. This infrequency, and the penalty's arbitrary application across racial and geographic lines compel the conclusion that the death penalty in Colorado is not constitutionally tolerable.

83. *See* Kamin & Marceau, supra note 10, at 1015.

84. Marceau et al., *supra* note 7, at 1110.

## APPENDIX I. DEATH PENALTY PROSECUTIONS, CASES FILED JANUARY 1, 1999 THROUGH DECEMBER 31, 2010[85]

| No. | County | Judicial District | Case Number | Defendant | Defendant Race/Ethnicity | Gender of Victim |
|---|---|---|---|---|---|---|
| 1 | Denver | 2 | 1999CR189 | Omar Ramirez | Hispanic | F, M |
| 2 | Denver | 2 | 1999CR2325 | Cong Than | Asian | F, M |
| 3 | El Paso | 4 | 1999CR3818 | Anthony Albert | Black | M |
| 4 | Denver | 2 | 1999CR2029 | Donta Paige | Black | F |
| 5 | Denver | 2 | 1999CR2738 | Abraham Hagos | Black | M |
| 6 | Teller | 4 | 2000CR178 | Anthony Jimenez | Hispanic | F |
| 7 | Adams | 17 | 2000CR1675 | Manuel Melina | Hispanic | M |
| 8 | Adams | 17 | 2000CR634 | John Sweeney | Hispanic | M |
| 9 | Adams | 17 | 2000CR638 | Jesse Wilkinson | White | M |
| 10 | Morgan | 13 | 2000CR200 | Cruz Palomo | Hispanic | F |
| 11 | Adams | 17 | 2000CR1491 | Leandro Lopez | Hispanic | M |
| 12 | Arapahoe | 18 | 2001CR1744 | Edward Brown | Black | M |
| 13 | Lincoln* | 18 | 2002CR95 | Edward Montour | Hispanic/Native American | M |
| 14 | Adams | 17 | 2002CR2231 | Jimmy Vasquez | Hispanic | F |
| 15 | Weld | 19 | 2002CR457 | Allen Bergerud | White | F, M |
| 16 | Rio Grande | 12 | 2005CR65 | Michael Medina | Hispanic | child |
| 17 | Lincoln | 18 | 2005CR73 | David Bueno | Hispanic | M |
| 18 | Lincoln* | 18 | 2005CR74 | Alejandro Perez | Hispanic | M |
| 19 | El Paso | 4 | 2006CR5870 | Marco Lee | Black | M |
| 20 | Douglas | 18 | 2006CR636 | Jose Rubi-Nava | Hispanic | F |
| 21 | Arapahoe | 18 | 2006CR705 | Sir Mario Owens | Black | F, M |
| 22 | Arapahoe | 18 | 2006CR697 | Robert Ray | Black | F, M |

*Venue was changed to a different county for trial. This is the venue in which the case was commenced.

85. The following five death prosecutions were commenced after 2010, and as such were beyond the scope of the Colorado Narrowing Study. They are included here only for thoroughness. As of this writing, there are two ongoing death penalty trials in Colorado: In Denver County, a black man (Dexter Lewis) is charged with killing five women and one man (Denver Cnty., No. 2012CR4743), and in Arapahoe County, a white man (James Holmes) has been convicted of killing twelve men and women (Arapahoe Cnty, No. 2012CR1522). In 2015, two white defendants (Cassandra Rieb (female) and Brendan Johnson (male)) in Logan County pleaded guilty for the killing of Johnson's grandparents (Logan Cnty., Nos. 2014CR98, 2014CR99), and in 2012, a white man (Josiah Sher) pleaded guilty in a double homicide in Douglas County that left one man and one woman dead (Douglas Cnty., No. 2011CR106).

# INNOVATIONS IN MOBILE BROADBAND PRICING

DANIEL A. LYONS†

## ABSTRACT

The FCC's net neutrality rules sought to limit interference by broadband service providers in markets for Internet-based content and applications. But to do so, the Commission significantly reduced the amount of innovation possible in the broadband service market. Within limits, broadband providers may offer different plans that vary the *quantity* of service available to customers, as well as the *quality* of that service. But they generally cannot vary the service itself: with limited exceptions, broadband providers must offer customers access to all lawful Internet traffic, or none at all.

This Article explores the way in which this all-or-nothing homogenization of the American broadband product differs from innovative experiments taking place in other countries. In various parts of the world, customers are offered several alternatives to the unlimited Internet model, including social media plans, feature phone partnerships, bundled apps, and free premium content. It also examines the positive role that vertical agreements may play when promoting innovation and competition within a market.

Undoubtedly, the FCC can and should intervene to stop anticompetitive practices, including anticompetitive vertical foreclosure. But these determinations should be made on a case-by-case basis based on proof of market power and consumer harm. This approach would allow wireless providers to experiment with new and different Internet business models without risking an unnecessary regulatory response.

---

† Associate Professor of Law, Boston College Law School. This paper was funded in part by grants from the Mercatus Center at George Mason University and from the BC Law School Fund, support which is gratefully acknowledged. Special thanks to Jerry Brito, Joe Kennedy, Roslyn Layton, Crystal Lyons, Geoff Manne, participants at TPRC 42, and two anonymous commenters for their helpful comments and suggestions, and to Jonathan Hu for invaluable research assistance.

TABLE OF CONTENTS

INTRODUCTION .......... 454
I. NET NEUTRALITY: A BRIEF OVERVIEW .......... 458
II. BROADBAND PRICING INNOVATION .......... 465
*A. Innovation Within the Confines of Net Neutrality* .......... 465
*B. Voice-Plus and Social Media Plans* .......... 467
1. Social Media Plans .......... 468
2. Email .......... 469
*C. "Feature Phone Access" Partnerships* .......... 469
1. Facebook Zero .......... 470
2. Google Free Zone .......... 471
*D. Co-Marketing and Cross-Promotional Agreements* .......... 472
1. VoIP Partnerships .......... 472
2. WhatsApp .......... 473
3. Opera .......... 474
*E. Premium Content and Carrier Upselling* .......... 475
*F. Equipment Subsidies* .......... 476
*G. Innovation Within the United States* .......... 477
III. REGULATING VERTICAL AGREEMENTS .......... 479
*A. Applying Net Neutrality to Alternative Business Models* .......... 480
*B. Ambiguous Effects of Vertical Agreements* .......... 483
*C. Operational Efficiencies and Promoting Competition* .......... 485
*D. Product Differentiation* .......... 486
*E. Rule-of-Reason Analysis and Market Power* .......... 488
*F. The Need for Greater Flexibility in Wireless Broadband Markets* .......... 490
CONCLUSION .......... 491

## INTRODUCTION

Through its ongoing net neutrality efforts, the Federal Communications Commission seeks to limit interference by broadband service providers in markets for Internet-based content and applications. But to do so, the Commission has significantly reduced the amount of innovation possible in the broadband service market. Net neutrality permits broadband providers to offer different plans that vary the *quantity* of service available to customers, as well as the *quality* of that service (within certain parameters). But they generally cannot vary the service itself: with limited exceptions, broadband providers must offer customers access to all lawful Internet traffic, or none at all, and on relatively equal terms.

This all-or-nothing homogenization of the broadband product places America increasingly at odds with the rest of the world. This is especially true with regard to mobile networks. In various parts of the world, customers are offered a variety of alternatives to the unlimited-Internet

model that may or may not violate American net neutrality norms. These alternative models include voice-plus plans with social-media functionality; cross-promotional agreements in which wireless providers and content providers work together to sell additional services; and premium service plans that give wireless customers preferred or exclusive access to certain online content.

The diverse array of wireless innovations happening globally illuminates the tradeoffs inherent in the Commission's ongoing net neutrality efforts. To protect Internet content and application providers (often called "edge providers" because they provide service at the edge of the network), the Commission generally requires broadband providers to grant access to all lawful Internet endpoints at all times from all devices. Conventional wisdom suggests this arrangement benefits consumers as well. But in international markets, consumer demand and carrier innovation are challenging that wisdom by introducing competitive and popular alternatives to the traditional net-neutral model. As Christopher Yoo and others have noted, consumers are increasingly accessing the Internet through multiple devices, which suggests less need for every device to provide the same comprehensive service.[1] Internationally, companies are using that flexibility to develop alternative service bundles that appeal to a broad base of consumers. But the long shadow of the Commission's net neutrality proceeding may limit the ability of Americans to share in the global revolution currently taking place for mobile services.

MetroPCS offers a prime example of this chilling effect. In early 2011, MetroPCS was in a bind. It was a small player in a highly competitive market, with neither the scale nor the margins to compete effectively against industry giants such as Verizon and AT&T.[2] As the industry began the capital-intensive transition to 4G networks, MetroPCS launched an innovative new pricing policy to gain share and escape its fifth-place market position.[3] The company offered a base plan of unlimited voice, text, and web-browsing services for only $40 per month.[4] As an added bonus, the plan also included free access to YouTube, courtesy of an arrangement with Google whereby the search giant helped optimize YouTube content for MetroPCS's capacity-constrained networks.[5] For an

1. *E.g.*, CHRISTOPHER S. YOO, THE DYNAMIC INTERNET 122–23 (2012).

2. *See* Thomas W. Hazlett, *FCC Net Neutrality Rules and Efficiency*, FIN. TIMES (Mar. 29, 2011, 1:57 AM), http://www.ft.com/intl/cms/s/0/f75fd638-5990-11e0-baa8-00144feab49a.html.

3. *See id.*

4. Ryan Kim, *MetroPCS LTE Plans to Charge More for VoIP & Streaming*, GIGAOM (Jan. 4, 2011, 9:26 AM), http://gigaom.com/2011/01/04/metropcs-lte-plans-charge-more-for-skype-and-streaming.

5. Hazlett, *supra* note 2. In a letter to the Commission, MetroPCS explained that because of the limited broadband throughput of its 1xRTT CDMA (2G and 3G) networks that most customers relied upon, it could offer web services such as HTML browsing, but advanced broadband services such as multimedia did not work well. Letter from Carl W. Northrop of Paul, Hastings, Janofsky & Walker LLP, to Julius Genachowski, Chairman, Fed. Commc'ns Comm'n 5, 11 (Feb. 14, 2011), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021029361 [hereinafter Northrop Letter].

additional $10 or $20 per month, customers could receive additional services, including turn-by-turn navigation and data access.[6] While these plans were more restrictive than the broadband plans of the larger carriers (in the sense that customers could not access non-YouTube streaming video and other bandwidth-intensive services), they were only one-third the cost.[7] Through these plans, MetroPCS sought to bring mobile Internet use to its core market of customers unable or unwilling to pay large carrier rates—thus fulfilling its marketing promise of providing "[w]ireless for [a]ll."[8]

But rather than cheering this creative attempt to narrow the mobile-digital divide, many consumer groups condemned MetroPCS for violating net neutrality, despite the fact the first iteration of the Commission's rules had not yet taken effect and would not do so for another eleven months.[9] Net neutrality supporters accused MetroPCS of "restrict[ing] consumer choice and innovation in a developing mobile market, all for the sake of further padding its bottom line."[10] In a letter to then-Commission Chairman Julius Genachowski, a coalition of groups such as the Center for Media Justice, Free Press, Media Access Project, and the New America Foundation urged the Commission to "investigate MetroPCS's behavior, and act to remedy its disparate treatment of mobile broadband services."[11]

From an antitrust perspective, this demand for regulatory intervention seemed puzzling. At the time, MetroPCS had approximately eight million subscribers, a customer base "less than one-tenth the size" of industry leader Verizon Wireless.[12] The company had no market power and was in no position to extract super-competitive profits or otherwise harm consumers.[13] As Thomas Hazlett notes, its customers were mostly

---

And the company's limited spectrum posed similar challenges for the 4G LTE network that it had recently launched. *Id.* at 6–7. Because YouTube content was a "competitive necessity" to keep pace with larger carriers, MetroPCS worked with Google to compress its content to consume less bandwidth when accessed over the company's networks. *Id.* at 6, 11–12.

6. Kim, *supra* note 4.

7. *See* Hazlett, *supra* note 2.

8. *See, e.g.*, *MetroPCS Introduces Wireless For All(SM) Nationwide Service Plans with No Hidden Taxes or Regulatory Fees*, BUS. WIRE (Jan. 19, 2010, 5:51 PM), http://www.businesswire.com/news/home/20100112005629/en/MetroPCS-Introduces-Wireless-SM-Nationwide-Service-Plans.

9. *See* Preserving the Open Internet, 76 Fed. Reg. 59192, 59192 (Dec. 1, 2011) (codified at 47 C.F.R. pts. 0, 8). The Commission originally released the Open Internet order in December 2010, but due in part to interagency review, the final rule did not take effect until November 2011. *Id.* These rules were codified in part as Preserving the Open Internet, 47 C.F.R. § 8 (2015).

10. Press Release, Free Press, Free Press Urges FCC to Investigate MetroPCS 4G Service Plans (Jan. 4, 2011) (quoting a statement by M. Chris Riley, Policy Counsel for Free Press), *available at* http://www.freepress.net/press-release/2011/1/4/free-press-urges-fcc-investigate-metropcs-4g-service-plans.

11. Letter from M. Chris Riley et al., Counsel, Free Press, to Julius Genachowski, Chairman, Fed. Commc'ns Comm'n 5 (Jan. 10, 2011), *available at* http://newamerica.net/sites/newamerica.net/files/profiles/attachments/metropcs_letter_NAF_et_al.pdf.

12. Hazlett, *supra* note 2.

13. *Id.*

price-sensitive "cord-cutters" who had little use for the bells and whistles of larger carrier plans, especially at higher price points.[14] MetroPCS's plan was poised to bring wireless web browsing and YouTube access to this market segment. But instead it found itself facing the threat of agency action because its plan did not match net neutrality proponents' preconceived notions of what the wireless broadband experience should be.

So MetroPCS's pricing experiment ended, not with a bang, but with a whimper. The company formally disputed the notion that its plans violated the pending net neutrality rule.[15] But, perhaps uninterested in being the test case for the Commission's newly minted rules, the company ultimately shifted to a higher-priced data plan that did not treat streaming video and other data-intensive applications differently.[16] In the meantime, MetroPCS joined Verizon's lawsuit challenging the Commission's net neutrality rules in court.[17] Ultimately, competitive pressures led the company to merge with fellow upstart T-Mobile, thus reducing the number of national facilities-based wireless providers from five to four.[18]

The MetroPCS case illustrates the chilling effect that even the Commission's "light touch" wireless net neutrality rules could have on broadband innovation. Meanwhile, outside the United States, broadband companies are increasingly innovating with regard to the bundles they provide to consumers, especially in the wireless sector. This Article examines some of the diverse business models emerging in international markets, discusses the nascent attempts to bring some of these innovations to the United States, and analyzes how these models might fare under a new net neutrality regime. Part I offers a brief summary of the Commission's recent net neutrality decisions. Part II offers a non-exhaustive glance at various international offerings in the wireless broadband marketplace that differ from the traditional net-neutral model. Part III uses these consumer-friendly alternative models to critically assess the Commission's net neutrality efforts. While the Commission may well be correct that broadband providers have incentives to interfere anticompetitively in upstream markets for Internet content and applications, its remedy should allow room for consumer-friendly innovations that would allow American consumers to share in the global revolution currently taking place for mobile broadband services.

---

14. *See id.* (internal quotation marks omitted).

15. *See* Northrop Letter, *supra* note 5, at 11–20.

16. *See* Adi Robertson, *MetroPCS Adds $70 a Month Pricing Tier for Unlimited LTE Data, Caps $60 Plan at 5GB*, VERGE (Apr. 3, 2012, 11:00 AM), http://www.theverge.com/2012/4/3/2922425/metropcs-4g-lte-unlimited-data-pricing-change.

17. Stacey Higginbotham, *MetroPCS Joins Verizon in Suing FCC over Net Neutrality*, GIGAOM (Jan. 25, 2011, 12:14 PM), http://gigaom.com/2011/01/25/metropcs-joins-verizon-in-suing-fcc-over-net-neutrality.

18. *See* David Goldman, *T-Mobile and MetroPCS to Merge*, CNN MONEY (Oct. 3, 2012, 12:25 PM), http://money.cnn.com/2012/10/03/technology/mobile/t-mobile-metropcs-merger.

## I. NET NEUTRALITY: A BRIEF OVERVIEW

At the core of the net neutrality debate is the principle that Internet service providers should not favor certain Internet content and applications over others.[19] Rather, proponents argue broadband providers should grant consumers access to all lawful Internet content and should route all data packets to customers in a similar fashion, regardless of the identity of the sender or the nature of the content inside.[20] Professor Tim Wu coined the term in a 2003 article, in which he argued that such a rule was necessary to guard against the risk that broadband providers could leverage their control over the Internet access market to distort upstream markets for Internet content (such as online video).[21] Since then, the concept has been the subject of substantial debate among academics, engineers, policymakers, and industry participants.

The Commission first adopted rules codifying net neutrality principles in December 2010.[22] The proceeding focused primarily upon fixed broadband providers such as Verizon and Comcast, which provide high-speed wire-based Internet access to residential and business customers. These providers were subject to three basic requirements. The first dealt with transparency: broadband providers were required to "publicly disclose accurate information regarding the network management practices, performance, and commercial terms" of their services "sufficient for consumers to make informed choices" among providers.[23] Second, fixed broadband providers "shall not block lawful content, applications, services, or non-harmful devices."[24] The Commission's order clarified that "[t]he phrase 'content, applications, services' refers to all traffic transmitted to or from end users of a broadband Internet access service, including traffic that may not fit cleanly into any of these categories."[25]

The third and final rule required that fixed providers "shall not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband Internet access service."[26] Although the Commission did not provide a definition of "unreasonable discrimination," it noted that such practices would include "discrimination that harms an actual or potential competitor[,] . . . impairs free expression[,]" or "inhibit[s] end users from accessing the content, applications, services, or de-

---

19. *See, e.g.*, *Net Neutrality*, PUB. KNOWLEDGE, https://www.publicknowledge.org/issues/net-neutrality (last visited Feb. 19, 2015).

20. *See, e.g.*, Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141, 145 (2003) (defining a "neutral network" as one "that does not favor one application (say, the world wide web), over others (say, email)").

21. *See id.*

22. *See* Preserving the Open Internet: Broadband Indus. Practices, 25 FCC Rcd. 17905 (2010) [hereinafter *2010 Rules*], *vacated in part*, Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

23. *Id.* para. 54; *see also* 47 C.F.R. § 8.3 (2015).

24. *2010 Rules*, *supra* note 22, para. 63; *see also* 47 C.F.R. § 8.5(a) (2015).

25. *2010 Rules*, *supra* note 22, para. 64.

26. *Id.* para. 68; *see also* 47 C.F.R. § 8.7 (2015).

vices of their choice" online.[27] The Commission explicitly cited "pay-for-priority" agreements, whereby an edge provider such as Netflix would pay for preferential treatment over the network, as an example of a practice that would likely be considered unreasonable, because it would give the provider a competitive advantage over its rivals when delivering its product to consumers.[28]

The Commission imposed somewhat less onerous rules on wireless broadband providers such as Verizon Wireless and Sprint. The Commission recognized mobile broadband was a less mature technology than its fixed counterpart.[29] It noted that "[t]he mobile ecosystem is experiencing very rapid innovation and change" and is "rapidly evolving."[30] Moreover, the wireless marketplace is more competitive than fixed broadband, with consumers able to choose from a wide range of nationwide and regional wireless providers.[31] Finally, the Commission noted that because wireless providers depend upon spectrum for communication, they face "operational constraints that fixed broadband networks do not typically encounter," which suggest wireless providers may need greater flexibility when managing network traffic.[32] But at the same time, the Commission reiterated that "[t]here is one Internet, which should remain open for consumers and innovators alike, although it may be accessed through different technologies and services."[33] Moreover, the Commission's rationale for ordering the rules is "for the most part as applicable to mobile broadband as they are to fixed broadband."[34]

In recognition of the differences between mobile and fixed broadband service, the Commission applied a modified version of its Open Internet rules to wireless providers. Like fixed broadband providers, wireless broadband companies were bound by the obligation to make their network practices transparent.[35] But the Commission applied its no-blocking rule less stringently. Under the rules, wireless broadband companies "shall not block consumers from accessing lawful websites."[36] The Commission found wireless web browsing was sufficiently "well-developed" to justify regulation.[37] Consumers "expect to be able to access any lawful website through their broadband service, whether fixed or mobile."[38] Because mobile applications are a less mature technology, the Commission recognized that downloading and running an application

27. *2010 Rules*, *supra* note 22, para. 75.
28. *Id.* para. 76.
29. *Id.* para. 94.
30. *Id.*
31. *Id.* paras. 94–95.
32. *Id.* para. 95.
33. *Id.* para. 93.
34. *Id.*
35. *Id.* para. 97; *see also* 47 C.F.R. § 8.3 (2015).
36. *2010 Rules*, *supra* note 22, para. 99; *see also* 47 C.F.R. § 8.5(b) (2015).
37. *2010 Rules*, *supra* note 22, para. 100.
38. *Id.*

may present network management issues.[39] But the Commission also recognized that mobile broadband providers had incentives to interfere with apps that competed against the carrier's own services. Therefore, the rules also prohibited providers from "block[ing] applications that compete with the provider's voice or video telephony services."[40] The Commission explained that it intended to "proceed incrementally" with the wireless market and would "closely monitor developments in the mobile broadband market" to determine whether more regulations are required to admonish "any provider behavior that runs counter to general open Internet principles."[41]

In January 2014, the decision of the U.S. Court of Appeals for the D.C. Circuit in *Verizon v. FCC*[42] invalidated the Commission's net neutrality rules, based on a nuance in the Communications Act.[43] Section 153(51) of the Act prohibits the Commission from imposing common carriage obligations on services that are not considered "telecommunications services" under Title II of the Act.[44] The Commission had previously determined broadband Internet access should be classified as an "information service" governed by Title I of the Act, rather than as "telecommunications services" governed by Title II.[45] The court held that because the net neutrality rules required broadband networks "to serve the public indiscriminately" without fee, they amounted to common carriage and thus were barred by Section 153(51) from being applied to non-Title II services.[46]

But the *Verizon* decision left the door open for the Commission to regulate some broadband network practices, in two ways. First, the court held that Section 706 of the Communications Act gave the Commission some jurisdiction to regulate broadband networks, including the power "to promulgate rules governing broadband providers' treatment of Internet traffic."[47] The court found that the Commission's findings that broadband providers might interfere with Internet traffic and that net neutrality rules would promote Internet innovation were "reasonable and supported by substantial evidence."[48] Therefore, the Commission could use Section 706 to impose restrictions on broadband networks to promote

---

39. Both the fixed and mobile broadband rules were subject to exceptions for "reasonable network management," meaning a practice that is "appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service." *Id.* para. 82; *see also* 47 C.F.R. §§ 8.5, 8.7 (2015).

40. *2010 Rules*, *supra* note 22, para. 99; *see also* 47 C.F.R. § 8.5(b) (2015).

41. *2010 Rules*, *supra* note 22, paras. 104–05.

42. 740 F.3d 623 (D.C. Cir. 2014).

43. *Id.* at 628.

44. *Id.* at 650 (quoting 47 U.S.C. § 153(51) (2012)).

45. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 977–78 (2005).

46. *Verizon*, 740 F.3d at 655–56 (quoting Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 642 (D.C. Cir. 1976)) (internal quotation marks omitted).

47. *Id.* at 628.

48. *Id.*

net neutrality, so long as the regulations do not amount to common carriage.

Alternatively, the court suggested that the Commission could reclassify broadband networks as Title II telecommunications services rather than Title I information services.[49] The *Verizon* decision hinged upon Section 153(51)'s language prohibiting the Commission from imposing common carrier obligations on companies that are not common carriers. Reclassification would subject broadband providers to the common carriage regime originally developed to discipline the Bell Telephone monopoly in the 1930s. Although a more significant regulatory step, this reclassification would formally label broadband providers as "common carriers" and thus render Section 153(51) inapplicable.[50]

The Commission initially chose the former path. In mid-2014, it promulgated a notice of proposed rulemaking to preserve the Open Internet under Section 706 through rules consistent with the *Verizon* decision.[51] For fixed broadband providers, the Commission proposed reenacting the 2010 no-blocking rule verbatim, while allowing broadband providers to engage in individualized bargaining with edge providers who seek more than a minimum level of access to consumers.[52] In lieu of the problematic unreasonable discrimination rule, the Commission proposed a rule prohibiting "commercially unreasonable" practices,[53] as determined by a multifactor test including the impact of the challenged practice on present and future competition, consumers, speech and civic engagement; technical characteristics; good faith negotiation; and industry practices.[54] This standard, which would be applied on a case-by-case basis, was consistent with the *Verizon* court's holding that any restrictions leave "substantial room for individualized bargaining and discrimination in terms."[55] For wireless providers, the Commission effectively proposed re-enacting its 2010 rules with minimal changes: wireless providers would be prohibited from blocking lawful websites or "applications that compete with the . . . providers' . . . voice or video

---

49. *Id.* at 650 ("Given the Commission's still-binding decision to classify broadband providers not as providers of 'telecommunications services' but instead as providers of 'information services,' such treatment would run afoul of Section 153(51)." (citation omitted)); *see also* id. ("[G]iven the manner in which the Commission has chosen to classify broadband providers, the regulations cannot stand.").

50. *But see* Daniel A. Lyons, *Net Neutrality and Nondiscrimination Norms in Telecommunications*, 54 ARIZ. L. REV. 1029, 1031 (2012) (noting that the 2010 rules imposed greater restrictions than traditionally required under Title II common carriage regime).

51. Protecting and Promoting the Open Internet, 29 FCC Rcd. 5561, para. 24 (proposed May 15, 2014) [hereinafter *2014 NPRM*].

52. *Id.* paras. 94–95.

53. *Id.* para. 116.

54. *Id.* paras. 122–35 (outlining the proposed multifactor test and its rationale).

55. Verizon v. FCC, 740 F.3d 623, 652 (quoting Cellco P'ship v. FCC, 700 F.3d 534, 548 (D.C. Cir. 2012)).

telephony services,"[56] but would be exempt from the "commercial reasonableness rule."

But these proposed rules were heavily criticized by net neutrality proponents because they permitted broadband providers to differentiate among different types of traffic. Consistent with the *Verizon* court's mandate, the proposed rules would have allowed broadband providers to enter paid prioritization agreements, whereby an Internet content or application provider could pay for its packets to be delivered at a guaranteed minimum speed or to be given priority in the event of network congestion.[57] Proponents argued that this raised the possibility of dividing the Internet into "fast lanes" for those who could afford prioritization and "slow lanes" for everyone else.[58] Comedian John Oliver implored viewers of his HBO show "Last Week Tonight" to complain to the Commission, which prompted enough comments to crash the Commission's servers.[59] Ultimately, the Commission received a record 3.7 million comments on its proposed rules, most of which argued the rules did not go far enough to protect the Open Internet.[60] And as the comment period closed, President Obama released his own statement criticizing the Commission's proposed rules and calling upon the agency to adopt more stringent net neutrality restrictions by taking the alternative road implied by the *Verizon* decision: reclassifying broadband providers as Title II common carriers.[61]

Responding to this criticism, the Commission changed course and in February 2015 enacted binding regulations that placed greater restrictions on broadband providers than either its 2010 rules or its 2014 proposed rules.[62] The final rules prohibit three specific practices that the Commission has deemed a threat to the Open Internet:

- ***Blocking***: Broadband providers "shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management."[63]

---

56. *2014 NPRM*, *supra* note 51, para. 105.
57. *Id.* paras. 95–96.
58. *See, e.g.*, Public Knowledge, Benton Found.,& Access Sonoma Broadband, Comments on Protecting & Promoting the Open Internet 34–35 (July 15, 2014), *available at* https://www.publicknowledge.org/assets/uploads/blog/Public_Knowledge_NN_NPRM_comments_2014_FINAL.pdf.
59. Soraya Nadia McDonald, *John Oliver's Net Neutrality Rant May Have Caused FCC Site Crash*, WASH. POST, June 4, 2014, http://www.washingtonpost.com/news/morning-mix/wp/2014/06/04/john-olivers-net-neutrality-rant-may-have-caused-fcc-site-crash.
60. Protecting and Preserving the Open Internet, 30 FCC Rcd. 5601 (2015) [hereinafter *2015 Rules*],
61. Presidential Statement on Internet Neutrality, 2014 DAILY COMP. PRES. DOC. 841 (Nov. 10, 2014), *available at* https://www.whitehouse.gov/the-press-office/2014/11/10/statement-president-net-neutrality.
62. *See 2015 Rules*, *supra* note 60.
63. *Id.* para. 15.

- ***Throttling***: Broadband providers "shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management."[64]
- ***Paid Prioritization***: broadband providers "shall not engage in paid prioritization," defined as "directly or indirectly favor[ing] some traffic over others, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party or (b) to benefit an affiliated entity."[65]

The order supplements these bright-line prohibitions with a "catch-all" standard, under which broadband providers shall not "unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users."[66] This standard allows the Commission to investigate practices that may threaten the Open Internet but do not fall within the specific prohibitions described above. Importantly, the Commission applied the rules to fixed and wireless broadband providers alike, thus reversing its earlier policy of applying a lighter touch in the wireless space.[67] To establish its authority to enact such far-reaching rules and to avoid the pitfall of the *Verizon* decision, the Commission reclassified broadband providers as Title II telecommunications carriers.[68]

Through net neutrality, the Commission sought to prohibit broadband providers from erecting barriers to innovation among edge providers. As the Commission explained, the framework is intended "to protect and promote the 'virtuous cycle' that drives innovation and investment on the Internet."[69] The Commission explained that an Open Internet enables "innovations at the edges of the network [which] enhance consumer demand, leading to expanded investments in broadband infrastructure that, in turn, spark new innovations at the edge."[70] Without such rules, broadband providers may "act as gatekeepers standing between edge providers and consumers" and "reduce the rate of innovation at the edge and, in turn, the likely rate of improvements to network infrastructure."[71]

64. *Id.* para. 16.
65. *Id.* para. 18.
66. *Id.* para. 21.
67. *Id.* para. 25.
68. *Id.* para. 331.
69. *Id.* para. 2.
70. *Id.* para. 7.
71. *Id.* para. 20 (quoting *2010 Rules*, *supra* note 22, para. 14).

But to promote innovation by Internet-based edge providers, the rules inhibit innovation by the broadband providers that bring the Internet to consumers. The 2010 rules were explicit about the Commission's desire to prevent broadband providers from changing their business models:

> These rules are generally consistent with, and should not require significant changes to, broadband providers' current practices, and are also consistent with the common understanding of broadband Internet access service as a service that enables one to go where one wants on the Internet and communicate with anyone else online.[72]

Numerous commentators have faulted the Commission for biasing the market in favor of existing models, arguing it is myopic to sacrifice potential advancements that we might otherwise achieve from network diversity. Professor Christopher Yoo had long suggested that network differentiation, rather than network neutrality, may be the best approach to increasing consumer welfare.[73] In comments filed in the 2010 proceeding, Yoo noted the Internet is an incredibly complex phenomenon that exhibits growing heterogeneity among users, meaning a one-size-fits-all access model is unlikely to meet customer needs.[74] As the market becomes saturated, providers must be free to innovate to deliver increasing value to this disparate array of consumers.[75] Yoo highlighted the wireless broadband market in particular, which faces unique physical characteristics that may demand greater flexibility.[76] Companies often test new business models without a firm and clear understanding of the model's benefits. Instead, they rely on a trial-and-error process to identify better methods of delivering value to consumers.[77] Given this framework, Yoo and others advocated for a more flexible model that would allow broadband providers to experiment with different business models and would intervene only in the event that a particular model caused actual consumer harm.[78]

The *Verizon* court found the Commission's conclusion that net neutrality promotes innovation was reasonable and supported by the evidence.[79] But as the MetroPCS anecdote suggests, these restrictions foreclose many potential avenues for innovation within the broadband indus-

---

72. *2010 Rules*, *supra* note 22, para. 43.
73. Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1, 25–26 (2005).
74. CHRISTOPER S. YOO, PRESERVING THE OPEN INTERNET: BROADBAND INDUSTRY PRACTICES 13, 21–22 (comments before the FCC regarding 24 FCC Rcd. 13064 (proposed Oct. 22, 2009)), *available at* http://apps.fcc.gov/ecfs.
75. *Id.* at 26.
76. *Id.* at 13–26 (noting, for example, that the physics of wave propagation, the need for congestion management, and the heterogeneity of mobile devices suggest the need for greater flexibility when regulating the mobile access market).
77. *Id.* at 33.
78. *Id.* at 42–43.
79. Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014).

try. In international markets, which are not bound by these rules and where heterogeneous demand is perhaps more easily observed, providers are engaging in precisely the type of experimentation Yoo suggests: testing a wide range of potential business models through a trial and error process to determine empirically which models best deliver the most value to consumers. The next section of this Article offers a nonexhaustive glimpse into this increasingly rich and diverse market for broadband access services.

## II. BROADBAND PRICING INNOVATION

### *A. Innovation Within the Confines of Net Neutrality*

Within the United States, firms have taken advantage of opportunities to offer innovative solutions that likely do not violate the Commission's net neutrality rules, though at times their efforts to do so have drawn criticism from net neutrality proponents. Notably, the rules do not impose a completely homogenous product on all providers. Rather, the Commission prohibited practices that "*unreasonably* interfere with or unreasonably disadvantage the ability of consumers to reach the Internet content, services, and applications of their choosing or of edge providers to access consumers using the Internet."[80] It is unclear precisely how much flexibility this reasonableness standard affords to broadband providers, although the Commission offered a multi-factor test including whether the practice allows end-user control, whether the practice is use-agnostic, the effect the practice has on innovation and broadband deployment, and whether it has negative competitive effects.[81] Firms are increasingly experimenting with different models that likely do not run afoul of the Commission's restrictions.

For example, some American broadband providers have introduced usage-based pricing plans, which charge on the basis of the amount of data a customer consumes each month.[82] One may describe such plans as varying the *quantity* of broadband service. Usage-based pricing models are most robust in the wireless sector, where tiered service plans are the norm.[83] Most firms offer an array of plans, each of which offers a specific amount of data (usually in gigabytes) per month for a fixed rate.[84] These plans typically involve some penalty for exceeding monthly plan limits, such as an overage charge or (less commonly) a degradation of network speed.[85] Some fixed broadband providers offer similar pricing plans, either imposing a single monthly limit on all consumers with an

80. *2015 Rules*, *supra* note 60, para. 135 (emphasis added).

81. *Id.* paras. 138–40, 142, 144.

82. *See, e.g.*, Daniel A. Lyons, *Internet Policy's Next Frontier: Usage-Based Broadband Pricing*, 66 FED. COMM. L.J. 1, 4 (2013).

83. *Id.* at 11–12.

84. *See id.*

85. *Id.*

overage charge for exceeding the limit, or offering consumers a choice among various tiers of monthly limits. Because fixed broadband networks have more capacity than wireless networks, plan limits tend to be much higher than wireless tiers. For example, Comcast is currently testing a 300 gigabyte limit in several markets,[86] while Time Warner Cable has experimented with lower tiers alongside its traditional unlimited-data plan.[87]

Many consumer groups have criticized usage-based pricing.[88] The Commission has historically endorsed this form of experimentation. For example, in the 2010 rules, it explained:

> [P]rohibiting tiered or usage-based pricing and requiring all subscribers to pay the same amount for broadband service, regardless of the performance or usage of the service, would force lighter end users of the network to subsidize heavier end users. It would also foreclose practices that may appropriately align incentives to encourage efficient use of networks. . . . The framework we adopt today does not prevent broadband providers from asking subscribers who use the network less to pay less, and subscribers who use the network more to pay more.[89]

The 2015 order is somewhat less charitable. In it, the Commission reserved judgment on whether usage-based pricing was reasonable, noting some commenters' assertions that monthly limits can be used anticompetitively.[90] But tiered pricing seems likely to meet the Commission's standard, at least in the absence of evidence of actual anticompetitive effects. It enhances end-user control by charging customers based upon the data they actually use, without interfering with the consumer's ability to reach the Internet content of his or her choice.

In addition to varying the quantity of broadband service, American providers are also experimenting with speed-based pricing tiers, which one may describe as varying the *quality* of the broadband product. Rather than paying for a fixed amount of gigabytes monthly, the customer chooses among different maximum download and upload rates.[91] For

86. *See What XFINITY Internet Data Usage Plans Will Comcast Be Launching?*, COMCAST, http://customer.comcast.com/help-and-support/internet/data-usage-what-are-the-different-plans-launching (last visited Nov. 8, 2015).

87. Jeff Simmermon, *Launching an Optional Usage-Based Broadband Pricing Plan in Southern Texas*, TIME WARNER CABLE (Feb. 27, 2012), http://www.twcableuntangled.com/2012/02/launching-an-optional-usage-based-pricing-plan-in-southern-texas-2.

88. *See, e.g.*, ANDREW ODLYZKO ET AL., KNOW YOUR LIMITS: CONSIDERING THE ROLE OF DATA CAPS AND USAGE BASED BILLING IN INTERNET ACCESS SERVICE 48–53 (2012), *available at* https://www.publicknowledge.org/files/UBP%20paper%20FINAL.pdf (criticizing usage-based pricing).

89. *2010 Rules*, *supra* note 22, para. 72.

90. *2015 Rules*, *supra* note 60, para. 153.

91. *See, e.g.*, Daniel A. Lyons, *We Should Promote Broadband Pricing Innovation*, COMPUTERWORLD (June 18, 2013, 9:17 AM),

example, Comcast's "Performance Starter" Internet service offers up to six megabits per second (Mbps) download speed.[92] But customers can upgrade to premium plans offering download speeds of 25, 105, 150, or more megabits per second.[93] Some broadband providers offer unlimited monthly data at various speeds, while others offer plans that vary both maximum speed and monthly data limits.[94] Like tiered service plans, tiered speed plans help differentiate customers in use-agnostic ways and therefore are likely to be considered reasonable network management practices.

While the net neutrality rules allow providers to vary the *quantity* and *quality* of the broadband service, there is an important dimension of innovation that the rules foreclose: varying the *nature* of the service itself. The Commission's conception of net neutrality generally requires providers to offer all users the opportunity to reach the entire Internet, which may be costly and may not fit the needs of consumers interested in visiting only a handful of the Internet's myriad destinations. International providers are increasingly innovating along this dimension as well, offering a wide range of services to customers uninterested in overpaying for access they would not use.

*B. Voice-Plus and Social Media Plans*

One increasingly common model internationally is a "voice-plus" plan that offers traditional voice service (or voice and texting services) along with access to selected online content or apps. A variant of this model is the "social media plan," which couples traditional service with access to popular social media networks such as Facebook and Twitter. Other plans pair traditional voice service with basic Internet functionality, such as email access.

Voice-plus plans can serve two different segments of the market. First, they expand the array of services available to customers who would like to engage in some activities online but are unwilling or unable to pay for access to the entire Internet. Second, they serve as introductory-level plans to give customers reluctant about mobile broadband a low-cost

---

http://www.computerworld.com/s/article/9240126/We_should_promote_broadband_pricing_innovation; Michael Weinberg, *Price Discrimination and Data Caps Are Not the Same Thing*, ALL THINGS D (Apr. 8, 2013, 3:26 PM), http://allthingsd.com/20130408/price-discrimination-and-data-caps-are-not-the-same-thing.

92. *Shop: XFINITY Internet*, COMCAST, http://www.comcast.com/internet-service.html (last visited Feb. 19, 2014).

93. *Id.*

94. For example, in some markets, Comcast offers several tiers of service at different speeds, but in other markets, each tier is subject to a soft monthly data cap and an overage charge for exceeding the plan. *See* Teff Baumgartner, *Comcast, TWC Try on Data Caps*, MULTICHANNEL NEWS, Aug. 5, 2013, *available at* 2013 WLNR 19139706; *What XFINITY Internet Data Usage Plans Will Comcast Be Launching?*, *supra* note 86. By comparison, Verizon offers multiple speed tiers with unlimited monthly consumption at each tier. *See Verizon FiOS Internet Plans*, VERIZON, http://www.verizon.com/home/fios-fastest-internet/fastest-internet-plans/ (last visited Feb. 19, 2015).

opportunity to sample the benefits of online access. As customers get more comfortable with using their phones to access Internet content, the provider can try to upsell them to plans with more comprehensive access to Internet content and applications.

1. Social Media Plans

Starting in 2010, Turkey's Turkcell offered a free Facebook promotion in which all Turkcell customers were given access to a text-only version of Facebook on their phones, free of charge.[95] In 2012 the company launched a similar "Twitter Zero" promotion.[96] In both campaigns, once the promotional period ended the company replaced the free, stripped-down service with a paid package that included unlimited Facebook or Twitter access for a set fee.[97] Currently, Turkcell customers can add unlimited Twitter use to a basic voice plan for 3 TL/month, unlimited Facebook access for 4 TL/month, or unlimited Twitter and Facebook, plus 20 megabytes of data, for 5 TL/month.[98]

According to company representatives, the goal of these campaigns was to get existing customers more comfortable with the idea of using mobile data.[99] Turkcell gambled that giving technophobes free or low-cost opportunities to sample mobile broadband would erode their apprehension and drive more of them to adopt plans that include some form of broadband access. And it seems to have worked. Although it is difficult to determine what proportion of the population would have adopted mobile social media even without the promotion, Turkcell reported the free Facebook offer helped spark an 820% increase in mobile Facebook use in 2010.[100] By the end of the year, 6.5 million Turkcell customers were accessing Facebook on their phones each month.[101] And Twitter Zero led to a 340% increase in mobile Twitter use.[102] These translated into significant upselling opportunities for the company. Turkcell sold 30,000 social media packages in the first week the add-on was available, and 600,000 in the first four months.[103] Turkcell reported this promotion increased average revenue per customer by nine percent.[104]

Nor is Turkcell alone in leveraging the popularity of social media to expand its revenue base. In early 2013, Facebook announced it had struck similar deals with eighteen wireless-service providers in fourteen

95. TURKCELL ANNUAL REPORT 2010, at 26 (2010), *available at* http://yatirimci-2010-eng.turkcell.com.tr/downloads/Turkcell-EN-FR-2010.pdf.

96. @TurkcellNews, *TURKCELL News*, TWITTER (June 26, 2012, 5:22 AM), https://twitter.com/TurkcellNews/status/217578634221862912.

97. *See* OPENET, REAL WORLD EXAMPLES OF INNOVATIVE DATA CENTRIC OFFERS 4 (2013).

98. *See id.* ("5 TL/month (approx., US $2.80).").

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

countries, including partners in Portugal, Ireland, India, Bulgaria, Azerbaijan, and Indonesia, to secure free or discounted data plans for Facebook users.[105] Similar programs have proven wildly popular in Latin America, where wireless provider Claro brought free Facebook access to 66.5 million subscribers, 48.5 million of whom access the site *each day*.[106] Twitter-based promotions are also popular, the most recent of which was recently announced by Ucell in Uzbekistan.[107]

2. Email

Wireless providers have long bundled traditional services with email access. For example, in 2007 Safaricom Kenya partnered with Google to offer Google's Gmail service to Safaricom mobile phone users in conjunction with its rollout of 3G services across the country.[108] The company credits the partnership with raising the number of people in Kenya with mobile Internet access from 2.7 million to 4.4 million that year.[109]

*C. "Feature Phone Access" Partnerships*

One related area of innovation is in wireless carrier partnerships with edge providers to make stripped-down versions of their products available on an ongoing basis for feature-phone customers. Although smartphones dominate the postpaid market in the United States and Europe, worldwide they command only twenty-five to thirty percent of the total market.[110] Particularly in the developing world, most customers have previous-generation "feature phones," which lack much of the computing power and flexibility of smartphones and are, therefore, limited in their ability to access Internet content and applications.[111] Most lack data plans, and if they have Internet access at all, it is through a protocol developed nations abandoned several years ago.[112] To bring the

---

105. *See Facebook Offering Mobile Deal in 14 Countries, CNBC Reports*, ARKA TELECOM (Feb. 26, 2013, 11:45 AM), http://telecom.arka.am/en/news/internet/facebook_offering_mobile_deal_in_14_countries_cnbc_reports.

106. *Brazil: Claro Partners with Facebook*, IT DIG. (S. AM.), Aug. 2, 2013, *available at* 2013 WLNR 19138975.

107. *See Ucell Activated New Service Twitter Zero*, UZ DAILY (Apr. 5, 2013), http://www.uzdaily.com/articles-id-22618.htm.

108. Joyce Joan Wangui, *Kenya: Safaricom, Google in Internet Partnership*, ALL AFRICA (Nov. 21, 2007), http://allafrica.com/stories/200711210365.html.

109. *See id.*

110. Kevin Fitchard, *Ericsson: Global Smartphone Penetration Will Reach 60% in 2019*, GIGAOM (Nov. 11, 2013, 9:42 AM), http://gigaom.com/2013/11/11/ericsson-global-smartphone-penetration-will-reach-60-in-2019.

111. *See, e.g.*, Nicole Lee, *The 411: Feature Phones vs. Smartphones*, CNET (Mar. 1, 2010, 5:14 PM), http://www.cnet.com/news/the-411-feature-phones-vs-smartphones.

112. Christopher Mims, *Facebook's Plan to Find Its Next Billion Users: Convince Them the Internet and Facebook Are the Same*, QUARTZ (Sept. 24, 2012), http://qz.com/5180/facebooks-plan-to-find-its-next-billion-users-convince-them-the-internet-and-facebook-are-the-same. The abandoned protocol is known as Wireless Application Protocol or WAP. *See id.* Feature phones with WAP browsers can access websites that are specifically tailored to use the protocol. *See id.* In the US and

Internet to these consumers, wireless companies are partnering with edge providers to design code that would extend their products to feature phone users on limited-capacity networks.[113]

1. Facebook Zero

Facebook was one of the first edge providers to move into this space. In 2010, the company launched Facebook Zero—0.facebook.com—which offered a basic version of the company's ubiquitous social networking service.[114] The service was primarily text-based and lacks photos, graphics, and other features of the general service.[115] Facebook negotiated with fifty wireless carriers around the world to allow feature phones on their networks to access the service without charge.[116] The company followed this in July 2011 with Facebook for Everyone, a Java app designed to run on eighty percent of all mobile phones in existence.[117] The company updated Facebook Zero in 2012 with Facebook by Fonetwish, a program developed in conjunction with Malaysian company U2opia Mobile that can create a Facebook graphic interface on even the most basic devices.[118]

The service proved popular, particularly in Africa, where most consumers are on prepaid plans and are attracted to services that do not debit one's prepaid account.[119] In the first eighteen months after launching the service in Africa, Facebook saw a 114% increase in the number of Africans using the service.[120] It is also popular in the Philippines, Vietnam, and Latin America.[121] Six of the top ten countries with the most Facebook users are in the developing world, and five of those offer a free Facebook Zero service through at least one prominent wireless carrier.[122]

---

Europe WAP has largely disappeared, because mobile browsers now support HTML, CSS, and Javascript, thus obviating the need to use the separate WAP protocol. *See id.*

113. *See id.*

114. Robin Wauters, *Facebook Launches Zero, a Text-Only Mobile Site for Carriers*, TECHCRUNCH (Feb. 16, 2010), http://techcrunch.com/2010/02/16/facebook-launches-zero-a-text-only-mobile-site-for-carriers.

115. *See id.*

116. Matt Hicks, *Fast and Free Facebook Mobile Access with 0.facebook.com*, FACEBOOK (May 18, 2010, 3:20 PM), https://www.facebook.com/blog/blog.php?post=391295167130.

117. *See* Mims, *supra* note 112.

118. *Id.*

119. *See id.*

120. *Id.*

121. *Id.*

122. *Id.* The exception is Mexico, which lacks Facebook Zero access but nonetheless has a sizeable Facebook population, partly as the result of significant direct investment by the company. *Id.*

2. Google Free Zone

Perhaps not to be outdone, Google launched its own stripped-down bundle of services for feature phones in 2012.[123] Google Free Zone offers feature phone users access to Gmail, the Google Plus social network application, and Google search results.[124] Like Facebook Zero, the service is free to the customer as a result of agreements with participating wireless carriers.[125] If a customer clicks on links within any of the programs (including the results of a Google search), the customer receives a warning that he or she is leaving the free zone and may incur additional charges.[126]

The service launched in the Philippines in late 2012 as a partnership with wireless provider Globe.[127] Since then, the company has partnered with providers in several other countries, including India's Airtel, Sri Lanka's Dialog, and Thailand's AIS.[128] The service also launched in South Africa in partnership with Telekom Mobile/8ta, though at the end of its trial run in May 2013, the program was terminated.[129]

Neither Facebook nor Google has disclosed the conditions under which it is making these services available in the developing world. A Facebook spokesperson recently hinted that the company does not pay for the data Facebook Zero users consume.[130] This implies that the companies are making the services available for free and convincing participating wireless partners of the wisdom of extending a form of Internet access to customers who are not yet connected. For wireless providers, these arrangements provide an inexpensive way to offer additional services to feature phone customers and perhaps entice them to migrate to more profitable smartphone plans. For edge providers, it is an investment in penetrating their brands further into the developing world, where future growth may be found. Each company is positioning itself to be the first point of contact between the consumer and the digital world.

---

123. Geoff Duncan, *Is Google 'Free Zone' Internet Altruistic Service for Emerging Economies or Something Else?*, DIGITAL TRENDS (Nov. 12, 2012), http://www.digitaltrends.com/mobile/google-free-zone-placeholder.

124. *Id.*

125. *Id.*

126. *Id.*

127. Paul Lilly, *Google Free Zone Offers Free Internet Connectivity for Feature Phones*, HOTHARDWARE (Nov. 12, 2012), http://hothardware.com/News/Google-Free-Zone-Offers-Free-Internet-Connectivity-For-Feature-Phones.

128. *Are You in the Free Zone?*, GOOGLE FREE ZONE, http://googlefreezone.com/ (last visited Feb. 19, 2105); Prashant Reddy, *Poke Me: Why Consumers, Not Companies, Should Be Kings of Internet*, ECON. TIMES (Jul. 24, 2013, 7:06 PM), http://articles.economictimes.indiatimes.com/2013-07-24/news/40771834.

129. *Free Zone Powered by Google Is No More*, MYBROADBAND (June 4, 2013), http://mybroadband.co.za/news/internet/79371-free-zone-powered-by-google-is-no-more.html.

130. *See* David Talbot, *Around the World, Net Neutrality Is Not a Reality*, MIT TECH. REV. (Jan. 20, 2014), http://www.technologyreview.com/news/523736/around-the-world-net-neutrality-is-not-a-reality.

Many net neutrality proponents have criticized these initiatives as watered-down, "walled garden" experiences that are pale imitations of true Internet access.[131] Professor Susan Crawford argues, "'[f]or poorer people, Internet access will equal Facebook. That's not the Internet—that's being fodder for someone else's ad-targeting business' . . . . 'That's entrenching and amplifying existing inequalities and contributing to poverty of imagination—a crucial limitation on human life.'"[132] But among users in the developing world, for whom some connectivity is better than none, the services are popular and have few critics.[133]

*D. Co-Marketing and Cross-Promotional Agreements*

In more developed markets, wireless providers are also signing agreements with edge providers to use the wireless platform as a promotional tool for Internet-based services. And, contrary to the concerns about anticompetitive behavior that gave rise to the Commission's net neutrality order, many of these partnerships are with app developers whose products supplant traditional wireless revenue sources: voice and text messaging. The subsections below provide a representative sample of such agreements.

1. VoIP Partnerships

TELUS, Canada's third-largest wireless provider, has signed a strategic partnership with Microsoft to promote Voice-over-Internet-Protocol (VoIP) provider Skype on many of its network's smartphones.[134] The Skype app runs on both Wi-Fi and the wireless network, and although use on the latter incurs data charges, TELUS customers receive unlimited Skype-to-Skype voice calls and instant messages.[135] TELUS allows customers the option to purchase Skype credit and have the charge turn up on their monthly TELUS bills.[136] The companies celebrated the 2011 launch of their partnership by offering a special, new, Skype-friendly version of the Optimus Black handset, which came with Skype preinstalled and sixty minutes of Skype international calling free.[137]

In February 2013, Internet-based VoIP and messaging provider Viber announced it wished to enter into revenue-sharing agreements with

131. *See* David Talbot, *Facebook and Google Create Walled Gardens for Web Newcomers Overseas*, MIT TECH. REV. (Mar. 21, 2013), http://www.technologyreview.com/news/512316/facebook-and-google-create-walled-gardens-for-web-newcomers-overseas.

132. *See* Talbot, *supra* note 130.

133. *Id.*

134. *See* Press Release, TELUS Co., TELUS and Skype Sign Agreement to Offer the Best Customer Service for On-the-Go Skype Users (Sept. 6, 2011, 7:00 AM), *available at* http://about.telus.com/community/english/news_centre/news_releases/blog/2011/06/09/telus-and-skype-sign-agreement-to-offer-the-best-customer-experience-for-on-the-go-skype-users.

135. *See id.*

136. *Id.*

137. *Id.*

wireless providers.[138] The 175-million-user service struck an agreement with Axis, an Indonesian wireless provider, which allows Axis customers to use Viber at a discounted rate without Viber use counting against the customers' monthly data or voice limits.[139]

2. WhatsApp

Wireless providers are also bundling traditional services with access to the popular WhatsApp program. WhatsApp is a cross-platform instant-messaging subscription service for smartphones that offers users unlimited messaging for $0.99 each year.[140] Though not popular in the United States, WhatsApp boasts over 300 million active users worldwide[141] and claims to process 50 billion messages each day.[142]

The service is a substitute for traditional text-messaging services, which have historically been a significant profit center for wireless providers.[143] Despite this fact, some wireless firms have been eager to capitalize on the app (which is the most popular paid app in over 100 countries)[144] to attract market share and boost revenue, particularly in more competitive markets. In September 2012, the Hong Kong wireless company 3HK started bundling WhatsApp in plans that did not have full Internet access, for $1 per month—revenue that the firm is sharing with WhatsApp.[145] This partnership helped WhatsApp achieve over fifty percent penetration of the Hong Kong wireless market—over three million users.[146] Shortly thereafter, Malaysian provider Digi held a promotion allowing customers five consecutive days of unlimited WhatsApp ac-

138. Mike Dano, *Viber: We Want to Share Revenues with Wireless Carriers*, FIERCEMOBILEIT (Feb. 26, 2013), http://www.fiercemobilecontent.com/story/viber-we-want-share-revenues-wireless-carriers/2013-02-26.

139. *Axis Launches Viber Package*, TELECOMPAPER (Sept. 6, 2013, 2:09 PM), http://www.telecompaper.com/news/axis-launches-viber-package--965242.

140. Francis Bea, *Rumor: Google Negotiating $1 Billion Acquisition of WhatsApp*, DIGITAL TRENDS (Apr. 5, 2013), http://www.digitaltrends.com/social-media/google-acquiring-whatsapp/.

141. Liz Gannes, *The Quiet Mobile Giant: With 300M Active Users, WhatsApp Adds Voice Messaging*, ALL THINGS D (Aug. 6, 2013, 2:15 PM), http://allthingsd.com/20130806/the-quiet-mobile-giant-with-300m-active-users-whatsapp-adds-voice.

142. Tyler Lee, *WhatsApp Processes More Than 50 Billion Messages a Day, Might Have Overtaken SMS*, ÜBERGIZMO (Jan. 20, 2014), http://www.ubergizmo.com/2014/01/whatsapp-processes-more-than-50-billion-messages-a-day-might-have-overtaken-sms/.

143. *See* Brian X. Chen, *Apps Redirect Text Messages, and Profits, from Cellular Providers*, N.Y. TIMES, Dec. 5, 2012, at B1.

144. Bea, *supra* note 140.

145. *Id.*; Press Release, 3 Hong Kong, 3 Hong Kong Partners with WhatsApp to "Free the World" with the First Ever "WhatsApp Roaming Pass" (Sept. 12, 2012), *available at* http://www.three.com.hk/website/appmanager/three/home?_nfpb=true&_pageLabel=P20047039121 95677105948&lang=eng&pageid=0031c0912.

146. *See* Gannes, *supra* note 141; Alan Yu, *Facebook's WhatsApp Blasted for Failing to Protect Users' Rights*, S. CHINA MORNING POST (June 22, 2015), http://www.scmp.com/tech/social-gadgets/article/1824929/facebooks-whatsapp-blasted-failing-protect-users-rights.

cess,[147] and SingTel of Singapore recently began bundling WhatsApp with its tiered pricing plans.[148]

As noted above, these joint ventures may surprise regulators who might have expected broadband providers to block such services. But it is consistent with the evolution of the wireless broadband industry in the developed world from traditional voice and text services to data. Even in the United States postpaid market, voice and text messaging are often treated as unlimited throw-ins to packages that are priced based on total data consumed each month. From this perspective, wireless providers and app developers have aligned interests to entice consumers to consume more data.

The TELUS-Skype deal also shows that app developers can be a source of supplemental revenue for carriers. In addition to cross-marketing, TELUS provides billing services for the VoIP provider, presumably for a fee. These back-office service agreements are the natural outgrowth of another traditional revenue source for telecommunications providers, which have long provided fee-based billing and collection services for text-soliciting charities, 1-900 numbers, and other entities that use the telecommunications network to make money.

3. Opera

Norway's Opera Software has also forged partnerships with wireless carriers worldwide to enhance the customer's mobile Internet experience while growing market share for the company's products. The company is most famous for its Opera Mini web browser, an app that uses cloud-based compression technology to reduce the amount of data a consumer uses when surfing the web on his or her mobile device.[149] Opera claims its techniques can compress webpages by up to ninety percent, which both reduces the customer's data usage and alleviates congestion on a carrier's wireless network.[150] For this reason, the company has successfully partnered with 130 mobile operators worldwide to introduce co-branded versions of the Opera Mini browser and other Opera services to over 250 million customers.[151]

One noteworthy service available through the Opera Mini browser is the Opera Web Pass, which allows consumers to purchase mobile Internet access in amounts other than those offered by traditional monthly

---

147. *DiGi Partners with WhatsApp*, MALAYSIAN WIRELESS (Oct. 22, 2012), http://www.malaysianwireless.com/2012/10/digi-partners-with-whatsapp.

148. *SingTel Partners with WhatsApp, Rolls-Out Plans for Prepaid Customers*, SING. GOV'T NEWS, Aug. 6, 2013, *available at* 2013 WLNR 19347009.

149. *See Opera Mini*, OPERA SOFTWARE, http://www.operasoftware.com/products/opera-mini (last visited Feb. 19, 2015).

150. *See id.*

151. *See id.*

or prepaid plans.[152] Customers of participating carriers can use Opera Software to purchase short-term access for weekly, daily, hourly, or even three-minute intervals, each at a different price.[153] Opera allows the customer to purchase full Internet access or to purchase access only to specific sites such as Facebook or Twitter.[154] And in a throwback to dial-up era marketing plans here in the United States, the Opera Sponsored Web Pass helps operators partner with companies to grant customers a free web pass after viewing a short advertisement by a sponsoring company.[155]

*E. Premium Content and Carrier Upselling*

To gain an advantage on competitors, many wireless providers around the world have also forged partnerships with edge providers to offer their subscribers exclusive or preferred access to attractive content. For example, from 2011 until 2013 French telecommunications provider Orange offered Swapables, a premium data package that allowed top-tier customers free access to one or two subscription-based services from a wide menu of popular content including Sky Sports TV, the Deezer music service, and the Times newspaper.[156] Orange fixed the value of this service at £20 per month.[157] The company noted that these additional services increased customer loyalty: customers with an active Deezer connection, for example, were half as likely as others to terminate their plans.[158] T-Mobile also allows its customers in the Netherlands discounted Deezer services with a subscription,[159] and in Canada, TELUS has bundled some of its plans with streaming service Rdio free of charge.[160]

In Denmark, access to premium content has become a significant plane of competition among mobile providers. Strand Consult's Roslyn Layton notes it is the only country in the world in which every major mobile operator offers a package that includes music: incumbent TDC offers its own Play service, while wireless company 3 offers Deezer, and

---

152. *Opera Web Pass*, OPERA SOFTWARE, http://www.operasoftware.com/products/web-pass (last visited Feb. 19, 2015).

153. *See id.*

154. *See id.*

155. *See id.*

156. OPENET, *supra* note 97, at 9.

157. *Id.*

158. STÉPHANE RICHARD & GERVAIS PELLISSIER, FRANCE TELECOM ORANGE: 3Q12 RESULTS AND OUTLOOK 25 (2012), *available at* http://www.orange.com/en/content/download/7459/108306/version/2/file/Q3%2712+presentation_+VDEF_ENG_sans+speakers.pdf.

159. Press Release, Deezer Unveils Exclusive Partnership with T-Mobile in The Netherlands (May 7, 2012), *available at* http://www.prnewswire.com/news-releases/deezer-unveils-exclusive-partnership-with-t-mobile-in-the-netherlands-150437275.html.

160. Press Release, TELUS and Rdio to Partner to Take the Social Media Experience to the Next Level (July 7, 2011, 11:30 AM), *available at* http://about.telus.com/community/english/news_centre/news_releases/blog/2011/07/07/telus-and-rdio-to-partner-to-take-the-social-music-experience-to-the-next-level.

Telia offers Spotify.[161] Service provider Telmore has gone even further: in addition to offering a streaming music service free with all wireless packages, Telmore offers a plan with premium content including digital movies, television, newspapers, and magazines, for €33 per month.[162] Strand estimates the included content would cost €127 monthly if ordered a la carte.[163]

In the United States, companies are experimenting with such partnerships on a much smaller scale. For example, AT&T has partnered with airport Wi-Fi provider Boingo to allow certain AT&T subscribers 1GB of access each month on Boingo hotspots.[164] And in mid-2013, Verizon Wireless paid $1 billion to allow its subscribers to watch National Football League games on Verizon-network phones through 2017.[165] Neither would seem to raise net neutrality problems. But as noted above, MetroPCS's aborted partnership with YouTube raised significant red flags, in part because YouTube was the only streaming video that customers could access under the plan.

Carriers themselves have also begun to expand into upstream markets for services sold as add-ons to broadband. On the fixed broadband side, cable providers in the United States and Canada are increasingly marketing home-security monitoring systems, long a mainstay of independent companies that used the telephone network to watch people's homes. On the wireless side, AT&T offers a Smart Limits parental-control service for $4.99 per month that monitors kids' online use and sets limits regarding when they can go online, for how long, and where they can go on the Web.[166]

*F. Equipment Subsidies*

Finally, many broadband companies abroad have contracted with providers to influence their customers' online use in exchange for financial assistance in constructing and maintaining the network. Perhaps most famously, Clearwire signed a strategic alliance with Bell Canada in 2005 in conjunction with Clearwire's rollout of wireless broadband ser-

161. Roslyn Layton, *Apple iTunes Downloading vs. Spotify Streaming: Which Will Prevail in the Playlist Economy?*, TECHPOLICYDAILY.COM (Aug. 29, 2014, 6:00 AM), http://www.techpolicydaily.com/communications/apple-itunes-vs-spotify-streaming.

162. *The Mother of No Frill MVNOs, Denmark's Telmore, Sets a New Standard for Bundled Mobile Traffic and Content. A package of Premium Content Worth €127 Goes for €11/month.*, STRAND CONSULT, http://strandreports.com/sw6174.asp (last visited Feb. 14, 2015).

163. *Id.*

164. OPENET, *supra* note 97, at 11.

165. Mike Ozanian, *Verizon and NFL Score with New $1 Billion Wireless Deal*, FORBES (July 25, 2013, 11:30 AM), http://www.forbes.com/sites/mikeozanian/2013/07/25/verizon-and-nfl-score-with-new-1-billion-mobile-deal/.

166. *AT&T Smart Limits*, AT&T, http://www.att.com/esupport/article.jsp?sid=KB92823 (last visited Feb. 15, 2015).

vice in the United States.[167] Bell Canada invested $100 million in Clearwire, much of which was used to deploy network architecture.[168] In exchange, Clearwire named Bell Canada its exclusive strategic partner for VoIP and other IP services in the United States.[169] It was unclear what precisely this agreement required from Clearwire; rival VoIP provider Vonage alleged in 2005 that Clearwire was interfering with customer use of Vonage services over the Clearwire network, but no official action was ever taken.[170] If in fact the arrangement required Clearwire to give Bell Canada preferential treatment over other VoIP providers on its network, the Commission may have investigated whether the agreement violated the net neutrality rules. But it was never tested, because the two companies terminated their strategic alliance by 2008, three years before the rules took effect.[171]

### *G. Innovation Within the United States*

Wireless carriers within the American market have also begun exploring alternative business models that might deliver Internet-based content and applications to consumers in different and potentially more efficient ways. In late 2013, Verizon had floated the possibility of entering into "toll-free data" agreements with providers of popular Internet content.[172] Under such agreements, a particular edge provider would pay a fee to the carrier, which would allow the carrier's customers to access the edge provider's services without incurring data charges toward the customer's monthly data allotment.[173] In January 2014 AT&T formally launched a similar program, known as "Sponsored Data."[174] The company developed a program with which any interested edge provider could have its traffic "zero-rated" on the AT&T network, meaning customers could download the provider's content without incurring data charges.[175] Instead, the program allows AT&T to bill the edge provider for the cost

---

167. BELL CAN. ENTERPRISES, 2006 ANNUAL INFORMATION FORM 20 (2007), *available at* http://www.bce.ca/assets/Uploads/Documents/archivesAnnualReport/BCE/2006/BCE_aif_2006_en.pdf.

168. *Id.*

169. *Id.*

170. Ben Charny, *Vonage Says Clearwire Interfered with VoIP Calls*, CNET (Apr. 6, 2005, 1:04 PM), http://news.cnet.com/Vonage-says-Clearwire-interfered-with-VoIP-calls/2100-7352_3-5657386.html.

171. *See* Tricia Duryee, *Bell Canada Picks LTE for 4G Despite Investments in WiMax and Clearwire*, MOCONEWS.NET (Oct. 10, 2008), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/10/10/AR2008101002840.html ("[A]lthough Bell Canada continues to be a shareholder, the company no longer uses Bell Canada's VoIP technology and [Bell Canada CEO Michael] Sabia will leave the board once Clearwire finalizes its merger with Sprint.")

172. *See* Sue Marek, *Verizon's Shammo: Content Providers See Value in Toll-Free Data Model*, FIERCEWIRELESS (May 22, 2013), http://www.fiercewireless.com/story/verizons-shammo-content-providers-see-value-toll-free-data-model/2013-05-22.

173. *Id.*

174. *See* Press Release, AT&T, AT&T Introduces Sponsored Data for Mobile Data Subscribers and Businesses (Jan. 6, 2014), *available at* http://www.att.com/gen/press-room?pid=25183.

175. *See Messaging APIs (SMS and MMS) FAQs*, AT&T, http://developer.att.com/support/faqs/messaging-apis-faqs (last visited Feb. 19, 2015).

of the customer's data.[176] These agreements are valuable to carriers seeking to develop the other side of the two-sided market for broadband access. And they can be valuable for participating Internet edge providers as well, as a way to differentiate their content from that of their rivals online.[177]

Seattle-based startup Syntonic Wireless seeks to develop more comprehensive alternative methods of enabling the delivery of mobile content to consumers. The company has developed proprietary technology known as the Connected Services Platform to provide application-specific bandwidth to mobile devices.[178] In August 2014, the company leveraged that technology, in conjunction with AT&T Wireless, to launch the Freeway app, "a one-stop shop for AT&T mobile customers to access free or premium mobile content without incurring data charges."[179] Companies ranging from large edge providers like Expedia to small startups like BBA Studios are using Freeway to deliver content to loyal customer bases and to find new customers by allowing them to sample that content without cost.[180]

Syntonic has also launched On-Ramp Educational Services, a service designed to bring increased connectivity to school districts.[181] Through On-Ramp, school districts can distribute 4G-enabled laptops to students, which are specially calibrated to access only curriculum-approved applications and content.[182] Using On-Ramp, a school district can leverage mobile broadband to improve the educational experience both in the classroom and at students' homes, while avoiding the costs and security risks of unauthorized personal use of district-provided devices.[183] The service launched with Highline School District in Washington State in September 2014.[184]

Going forward, the company envisions using its technology to deliver Internet-based content to a wide range of devices that can be con-

---

176. *See* Daniel Lyons, *Rethink Possible When It Comes to Wireless Pricing Plans*, TECHPOLICYDAILY.COM (Jan. 20, 2014, 6:00 AM), http://www.techpolicydaily.com/communications/rethink-possible-comes-wireless-pricing-plans.

177. *See id.*

178. *See* GARY S. GREENBAUM, FRAMEWORK FOR BROADBAND INTERNET SERVICE: OPEN INTERNET RULEMAKING at 4 (reply comments before the FCC regarding GN Docket Nos. 10-127 & 14-28 (Sept. 3, 2014)) [hereinafter Greenbaum, Syntonic Reply Comments], *available at* http://apps.fcc.gov/ecfs/document/view?id=7521827783; Press Release, Syntonic Wireless, Syntonic Wireless(TM) Introduces Sponsored Content Store (July 10, 2014), *available at* http://www.marketwatch.com/story/syntonic-wirelesstm-introduces-sponsored-content-store-2014-07-10.

179. Greenbaum, Syntonic Reply Comments, *supra* note 178, at 9.

180. *See id.*; *see also* Alex Samuely, *Expedia Reduces Friction for Mobile Engagement with Sponsored Data*, MOBILE MARKETER (Oct. 28, 2014), http://www.mobilemarketer.com/cms/news/advertising/19013.html.

181. Greenbaum, Syntonic Reply Comments, *supra* note 178, at 11.

182. *See id.*

183. *Id.*

184. *Id.*

nected to a wireless network but are not covered by data plans, or which the provider would want exempted from the consumer's data plan.[185] These may include streaming entertainment or navigation content to wireless-enabled automobiles; monitoring a medical patient's health and vital signs remotely, around the clock; and helping employers manage bring-your-own-device policies by providing a suite of workplace-specific applications that an employee could access on a personal mobile device without incurring charges on his or her monthly data plan.[186]

As part of its ongoing efforts to distinguish itself from its competition, T-Mobile has targeted American consumers interested in receiving streaming music.[187] T-Mobile's Simple Choice Plan not only offers unlimited talk and text along with a monthly allotment of data, but also includes unlimited streaming from selected Internet-based streaming audio services such as Pandora and iHeartRadio.[188] The top-tier Simple Choice Plan also includes a subscription to Rhapsody's unRadio service for devices compatible with the service.[189] The zero-rating and bundling of certain streaming audio content mirrors the partnerships T-Mobile and others have entered into in European wireless markets to differentiate themselves from their competition.

Sprint has also announced plans to offer a differentiated wireless broadband access plan. In a press release, the company indicated it will soon test-market social media and other voice-plus plans under its Virgin Mobile brand, which will offer customers unlimited talk and text, plus access to a limited suite of mobile broadband services, such as Facebook, Twitter, Instagram, or Pinterest.[190] The press release suggests a desire to import the alternative access models that Turkcell and others have used effectively to reach those consumers who are interested in accessing some Internet services on mobile devices, but who are unwilling or unable to buy a traditional full-access wireless data package.

## III. REGULATING VERTICAL AGREEMENTS

Given the growing number of business models cropping up worldwide, and the tentative exploration of alternative models by American companies, it is important to consider how these plans will fare under the Commission's new net neutrality rules. As noted above, the rules explic-

---

185. *See* SYNTONIC, http://www.syntonicwireless.com (last visited Feb. 19, 2015).

186. *See id.*

187. *See* Thomas Gryta, *T-Mobile Will Waive Data Fees for Music Services*, WALL ST. J. (June 18, 2014, 9:51 PM), http://www.wsj.com/articles/t-mobile-will-waive-data-fees-for-music-service-1403142678.

188. *The Simple Choice Plan*, T-MOBILE, http://www.t-mobile.com/cell-phone-plans/individual.html (last visited Feb. 19, 2015).

189. *Id.*

190. Ryan Knutson, *Sprint Will Sell a $12 Wireless Plan that Only Connects to Facebook or Twitter*, WALL ST. J. BLOG (July 30, 2014, 9:04 AM), http://blogs.wsj.com/digits/2014/07/30/sprint-tries-a-facebook-only-wireless-plan.

itly favor the traditional broadband model.[191] The Commission seems willing to entertain the notion that some innovation is permissible within the broadband space, cabined by its awkward and amorphous "no unreasonable interference/disadvantage" standard.[192] But it has also emphasized the need to "protect" and "preserve" the Open Internet, rhetoric that suggests a bias toward the status quo.[193]

*A. Applying Net Neutrality to Alternative Business Models*

Of the alternative business models discussed in Part II above, the ones that seem most at risk under the Open Internet rules are those involving only partial web access, such as voice-plus or social media plans. In the 2010 rules, the Commission suggested a company offering access to only a portion of the Internet would be suspected of trying to evade the rules:

> A key factor in determining whether a service is used to evade the scope of the rules is whether the service is used as a substitute for broadband Internet access service. For example, an Internet access service that provides access to a substantial subset of Internet endpoints based on end users preference to avoid certain content, applications, or services; Internet access services that allow some uses of the Internet (such as access to the World Wide Web) but not others (such as e-mail); or a "Best of the Web" Internet access service that provides access to 100 top websites could not be used to evade the open Internet rules applicable to "broadband Internet access service."[194]

It is likely that this analysis remains relevant today, given that the Commission explained that the record "overwhelmingly supports the . . . readopting of the original [2010] rule" and that it therefore intends the existing rule to be "[s]imilar to the 2010 no-blocking rule."[195] Throughout the order, the Commission repeatedly emphasized the importance of allowing consumers to reach all lawful Internet content,[196] and importantly, the duty now applies fully to wireless as well as fixed broadband providers.[197] Under this rule, the Commission could reasonably find plans such as those proposed by Sprint, which provide access to a select number of online services, effectively block consumers from reaching other websites that are not included within the limited package.

Chile has expressly interpreted its net neutrality rules in just this fashion. Chile famously enacted the world's first net neutrality rule in

191. *See supra* Part II.A.
192. *See supra* text accompanying note 66.
193. *See, e.g.*, *2015 Rules*, *supra* note 60, paras. 74, 102.
194. *2010 Rules*, *supra* note 22, para. 47 (footnote omitted).
195. *2015 Rules*, *supra* note 60, paras. 112, 113.
196. *See, e.g.*, *id.* para. 111.
197. *Id.* para. 117.

2010.[198] Subtel, the nation's telecommunications regulator, ruled that promotional plans coupling traditional voice service with access to selected online content, violate the law and mandated that broadband providers cannot "arbitrarily block, interfere with, discriminate, hinder, or restrict the right of any Internet user to use, send, receive, or offer any content, application, or legal service through the Internet."[199] Subtel's concern is that by granting free access to Facebook, wireless providers are handicapping a hypothetical future competitor to the social media giant, which consumers would not be able to reach for free unless this new competitor struck a similar deal with carriers.[200]

Similarly, it is unclear whether sponsored data and other zero-rated data agreements survive the Commission's "no unreasonable interference/disadvantage" standard. The 2015 order explicitly refused to decide the issue. As with usage-based pricing, the Commission noted that the record reflected "mixed views" about the desirability of the practice.[201] On the one hand, the Commission noted, zero-rated data can "increase choice and lower costs for consumers" by offering them free content above and beyond their monthly data allotments.[202] It also creates a point of differentiation among edge providers, allowing a way by which one edge service can distinguish itself from its competition.[203] On the other hand, the Commission explained, zero-rating certain data can distort competition in favor of those who can afford to pay their customers' data charges and may disadvantage less-well-funded edge providers.[204]

Many net neutrality advocates have been less ambivalent, arguing that such agreements should be barred.[205] Shortly after Sprint announced its future plans, Free Press decried the fact that the alternative business model "'helps lock in the existing choices and not let the new ones grow more organically' . . . . 'That's just not the way the Internet has worked.'"[206] Similarly, Public Knowledge described T-Mobile's streaming music plans as, "the latest example of ISPs using data caps to under-

---

198. *Chile: First Country to Legislate Net Neutrality*, GLOBAL VOICES (Sept. 4, 2010, 2:49 PM), http://globalvoicesonline.org/2010/09/04/chile-first-country-to-legislate-net-neutrality.

199. Daniel Lyons, *In Chile, Net Neutrality Widens the Digital Divide*, TECHPOLICYDAILY.COM (June 2, 2014, 6:00 AM), http://www.techpolicydaily.com/communications/chile-net-neutrality-widens-digital-divide (quoting a translation of Chile's net neutrality law, Law No. 20.453, Augusto 26, 2010 (Chile), *available at* http://bcn.cl/1087) (internal quotation marks omitted).

200. *Id.*

201. *2015 Rules*, *supra* note 60, para. 151.

202. *Id.*

203. *Id.*

204. *Id.*

205. *See, e.g.*, Michael Weinberg, *AT&T's New Sponsored Data Scheme Is a Tremendous Loss for All of Us*, PUB. KNOWLEDGE (Jan. 8, 2014), http://www.publicknowledge.org/news-blog/blogs/attas-new-asponsored-dataa-scheme-tremendous.

206. Ryan Knutson, *Sprint Tries a Facebook-Only Plan*, WALL ST. J. (July 30, 2014, 6:03 PM), http://online.wsj.com/articles/sprint-tries-a-facebook-only-plan-1406724847 (quoting Matt Wood, Free Press policy director).

mine net neutrality. . . . [T]his type of gatekeeping interference by ISPs is exactly what net neutrality rules should be designed to prevent."[207] And both have condemned sponsored data as "a [l]ose-[l]ose for [c]ustomers and [a]pp [m]akers"[208] and a "tremendous loss for all of us."[209] These commenters and others have pressed the Commission to enact more stringent rules on wireless broadband providers. If their efforts are successful, these agreements may also be restricted or prohibited outright.

More promisingly, the 2015 rules seem to create a space for experimentation with targeted services and specialized devices such as Syntonic's On-Ramp Educational Service and its proposed business-oriented solutions. As the "Internet of Things"[210] expands to include more wired devices, an increasing portion of the nation's wireless networks will be dedicated to devices that need only limited connectivity. The Commission explained that it will not apply its content-based net neutrality rules to "services offered by broadband providers that share capacity with broadband Internet access service over providers' last-mile facilities" but that fall outside the Commission's definition of "broadband Internet access service."[211] Included on this list of so-called "non-BIAS services" are facilities-based VoIP service and IP-based cable programming, which many broadband providers offer as separate businesses and which few have thought should be subject to net neutrality rules.[212] The rules helpfully offer a non-exhaustive list of other excluded services, including Internet connectivity bundled with e-readers, connected heart monitors and energy sensors, and "services that provide schools with curriculum-approved applications and content."[213] Although these app-specific offerings are not explicitly subject to the Open Internet rules, the Commission has retained jurisdiction to review complaints that such offerings are "providing a functional equivalent of broadband Internet access service" or are otherwise undermining Open Internet principles.[214]

At a minimum, the Commission's new rules cast doubt upon the legality of numerous alternative wireless broadband business models that are currently available and popular in international markets. The amorphous "no unreasonable interference/disadvantage" standard potentially sweeps broadly to encompass a wide range of possible broadband busi-

---

207. Michael Weinberg, *T-Mobile Uses Data Caps to Manipulate Competition Online, Undermine Net Neutrality*, PUB. KNOWLEDGE (June 19, 2014), https://www.publicknowledge.org/news-blog/blogs/t-mobile-uses-data-caps-to-manipulate-competition-online-undermine-net-neut.

208. Press Release, Free Press, AT&T Sponsored Data Scheme is a Lose-Lose for Customers and App Makers (Jan. 6, 2014), *available at* http://www.freepress.net/press-release/105490/att-sponsored-data-scheme-lose-lose-customers-and-app-makers.

209. Weinberg, *supra* note 207.

210. *See Internet of Things*, WHATIS.COM, http://whatis.techtarget.com/definition/Internet-of-Things (last visited Feb. 19, 2015).

211. *2015 Rules*, *supra* note 60, para. 207.

212. *Id.* para. 208.

213. *Id.*

214. *Id.* para. 210.

ness models. As innovators such as Syntonic have noted, the shadow of regulation can discourage companies from testing new ideas. Even if the rules ultimately bar only voice-plus plans, the net effect would be to limit consumer choice and deprive the American market of options that are proving popular internationally.

Underlying the net neutrality initiative is the implication consumers are better served by a legal regime in which all Internet connections reach all Internet endpoints.[215] But developments in the wireless marketplace suggest this implication may be fallacious. The proliferation of Internet-connected devices means consumers have multiple ways of reaching the Internet, and do not necessarily need every device to access every Internet endpoint at all times. Moreover, as an increasing amount of our daily activities migrate online, different customers are likely to demand different services from their network providers. Allowing broadband providers to tailor offerings to customers' particular preferences can be more efficient than forcing them into one-size-fits-all plans that are ill-suited to their needs. In an increasingly diverse Internet ecosystem, innovative new broadband models can potentially enhance consumer welfare. Before enforcing rules that would retard these innovations, the Commission should consider carefully the rationale for reducing opportunities for experimentation in this space.

### *B. Ambiguous Effects of Vertical Agreements*

At its base, net neutrality stems from concerns about vertical foreclosure. The Commission and its supporters fear that broadband providers will use control of broadband networks to disrupt competition in upstream markets for Internet content and applications. The Commission's response was to adopt a strict rule that prohibits the ability of broadband providers to change their business models in ways that make only part of the Web available to consumers.

As the *Verizon* court noted, the Commission raised a legitimate concern. Firms sometimes have incentives to engage in anticompetitive vertical foreclosure.[216] A vertically integrated firm, for example, may leverage market power in one segment to improve its position in another segment.[217] Many commentators suggest these motives were present in the Madison River case, which the Commission cited to support its net neutrality order. Madison River Communications paid a $15,000 fine to the Commission in 2005 to settle allegations that it blocked third-party VoIP services from operating on its network, allegedly because these

---

215. *See* YOO, *supra* note 1, at 122–23.

216. Verizon v. FCC, 740 F.3d 623, 629 (D.C. Cir. 2014).

217. *See, e.g.*, Jonathan E. Nuechterlein, *Antitrust Oversight of an Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate*, 7 J. TELECOMM. & HIGH TECH. L. 19, 41 (2009).

VoIP services competed against Madison River's traditional telephone service.[218]

But these instances are likely the exception rather than the rule. Under the principle of internalization of complementary externalities (ICE), a firm that is free from rate regulation will usually deal fairly with independent companies in complementary upstream markets, because failure to do so will reduce the value of the firm's product.[219] In more concrete terms, a customer will likely pay more for a broadband service that reaches all Internet content and applications than one that reaches only part of the Web—which means broadband providers have incentives to allow open access to all Internet content and applications. The ICE principle does not mean broadband companies will never block certain Internet content or applications, but it suggests if they do limit access, there is usually a procompetitive rationale for doing so.[220]

There are many ways a vertical agreement can be procompetitive. For example, Brent Skorup and Adam Thierer highlight Apple's (in)famous control over its ecosystem.[221] Apple exercises significant control over which apps may be made available for the iPhone and iPad, in stark contrast to its primary rival, Android.[222] Despite this control, which limits consumer choice and arguably distorts competition in the app market, a sizeable share of the market continues to favor Apple's walled garden over more open systems.[223] Skorup and Thierer argue the reason, in part, is Apple's selectivity reduces the consumer's costs of information and excessive searching.[224] Apple-oriented consumers rely on the company to sift the wheat from the chaff among application developers, and value the fact the iOS operating system is well integrated with the suite of apps that Apple promotes.[225]

Vertical agreements can also promote competition among companies. Prior to 2011, AT&T was the exclusive U.S. provider of Apple's popular iPhone, which provided the company with a competitive advantage over Verizon Wireless and other competitors.[226] But the Commission never foreclosed these contracts despite some calls to do so, perhaps because this vertical agreement was a net positive for consumers. It woke up a sleepy smartphone market, as AT&T advertised the product

218. Madison River Commc'ns, LLC and Affiliated Companies, 20 FCC Rcd. 4295, 4297 (2005).

219. Nuechterlein, *supra* note 217, at 41.

220. *Id.*

221. Brent Skorup & Adam Thierer, *Uncreative Destruction: The Misguided War on Vertical Integration in the Information Economy*, 65 FED. COMM. L.J. 157, 169 (2013).

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, 26 FCC Rcd. 9664, 9753 (2011).

for which it paid so dearly, and Verizon responded to the competitive threat by helping develop and market the rival Android platform as an Apple alternative.

At a minimum, one can say that vertical agreements have ambiguous effects on consumer welfare.[227] One significant empirical study explains that according to the data, "efficiency considerations overwhelm anticompetitive motives in most contexts" and even in natural monopolies or oligopolistic markets, "the evidence of anticompetitive harm is not strong."[228] Therefore, "under most circumstances, profit-maximizing vertical-integration decisions are efficient, not just from the firms' but also from the consumers' point of view."[229] Antitrust scholar Herbert Hovenkamp similarly notes that in most cases, vertical integration "is either competitively neutral or affirmatively desirable because it promotes efficiency."[230] He further explained "tying," an agreement that requires customers to purchase one product in order to get access to another, more popular product, is "rarely competitively harmful" in the view of "most economists and others interested in antitrust law."[231] Tying, of course, is the type of vertical agreement most common in broadband markets.

In the case studies above, one can see several related potentially procompetitive justifications for wireless broadband carriers' efforts to engage in non-net-neutral practices.

### *C. Operational Efficiencies and Promoting Competition*

Vertical agreements may allow companies to share resources and leverage one another's strengths, which can achieve greater operational efficiencies and reduce costs. In the information economy, these efficiency gains could come in either the broadband or edge provider market. Many co-marketing agreements analyzed above were signed because each party helped the other achieve a goal more efficiently. For example, TELUS offers Skype a platform to operate its service, free marketing and outreach to reach an installed base of potential Skype customers, and back-office billing support, an area in which TELUS has significant expertise.[232] In exchange, Skype allows TELUS to grow both its customer base and average revenue per user. Skype integration is an advantage TELUS can advertise over Rogers Communications and other Canadian

---

227. *See* James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 643–47 (2005).

228. Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LITERATURE 629, 677 (2007).

229. *Id.* at 680.

230. PHILLIP E. AREEDA & HERBERT HOVENKAMP, 3B ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 756a, at 9 (3d ed. 2008).

231. Herbert Hovenkamp, *Clayton Act (1914)*, *in* MAJOR ACTS OF CONGRESS 123, 125 (Brian K. Landsberg ed., 2004).

232. *See supra* text accompanying notes 134–37.

providers, and existing TELUS customers who use Skype may be enticed to migrate to larger and more expensive data plans.

Significantly, many co-marketing agreements can promote greater competition within broadband markets by allowing smaller broadband providers who lack the scale and infrastructure to compete against entrenched incumbent providers, by changing the rules of the game. As noted above, Orange leveraged bundled services to boost its market share in the United Kingdom by offering a wireless plan with premium content for one low price, below the cost of the two services separately, setting its brand apart from its competitors.[233] T-Mobile is attempting a similar strategy in the United States, holding itself out as the "un-carrier" in part by bundling its plans with unlimited streaming music.[234]

This bundling can also promote greater competition among edge providers by providing a useful avenue for a start-up Internet company to shake up the online status quo. Orange's inclusion of Deezer as a Swapable option coincided with Deezer's launch into the United Kingdom.[235] Although popular in its native France, Deezer faced an uphill battle gaining traction in the British online streaming market, which was dominated by market leader Spotify.[236] The partnership was thus lucrative for Deezer, which received built-in delivery over the Orange network, easy access to Orange's installed customer base, and low-cost marketing in conjunction with the Swapables offer. Thus the Orange-Deezer partnership offered both a way for Orange to expand its presence in the wireless market and for Deezer to make a splash in the streaming music market.

*D. Product Differentiation*

Vertical agreements can also improve consumer welfare through product differentiation. Differentiation enhances the level of competition between firms by increasing the faces upon which they may compete against one another. Greater points of competition mean more options available to consumers, which increases the likelihood of identifying a business model that is more efficient than those currently in the market. Encouraging standardization of the product, as net neutrality does, removes a plane upon which firms can compete and, thus, gives an advantage to large incumbent players against upstarts that are looking for places to distinguish themselves.

Broadband product differentiation may expand the number of providers in this capital-intensive industry by increasing the opportunities to

---

233. *See supra* text accompanying notes 156–60.
234. *See supra* text accompanying notes 187–89.
235. *See* Tim Bradshaw, *Deezer Takes On Spotify with Orange Deal*, FINANCIAL TIMES (Sept. 7, 2011), http://www.ft.com/cms/s/2/66bdfd5c-d939-11e0-bd7e-00144feabdc0.html#axzz3p1nlygDb.
236. *Id.*

seek investment capital from those looking for an advantage in return.[237] The Clearwire deal exemplifies this: by being able to offer Bell Canada a preferred partnership arrangement (whatever the ultimate terms of the deal entailed), Clearwire was able to entice Bell Canada to provide it with much-needed capital to start building its network.[238] Without the opportunity to offer Bell Canada an advantage, Clearwire likely would not have received the money it needed from Bell Canada, and reduced competition in the American wireless broadband market. This type of angel-funding agreement would be difficult under the Commission's conception of net neutrality.

Moreover, broadband differentiation may help narrow the digital divide. By offering a lower-quality product at a lower price point, broadband providers could extend service to those who cannot afford, or otherwise do not wish to buy, full broadband access at the market rate. Facebook Zero and the Google Free Zone are good examples. By reducing the quality of the service, developers and broadband providers offered a product that had value for low-tech customers, without risking cannibalization of revenues from those already paying for more advanced services. In the process, such programs help introduce people to the Internet, making them more familiar with the perks of Internet access and helping ensure that if they continue to decline full Internet access, it is not because of lack of familiarity with the product.

Finally, differentiation allows companies to cater to niche markets whose needs are imperfectly met by traditional broadband offerings. In the United States, the net neutrality rules generally limit customers to purchasing full Internet access or none at all. But the worldwide success of voice-plus plans like social media plans shows there is demand internationally for products that fall between these poles. Sprint's plan to offer social media plans in the United States suggests the company believes there is pent-up demand for such a product in America as well. There may be a large population of consumers who purchase unlimited-access service only to reach a handful of websites or apps each month. These consumers would be better off with a reduced-access plan that would give them a discount in exchange for giving up the power to visit sites that they generally will not visit anyway. Similarly, there are likely consumers who choose not to purchase unlimited-access data plans at existing price points, but would be willing to pay less for limited additional functionality such as the ability to access Facebook or Twitter. The success of Turkcell's social media plans in Turkey suggests that this differentiated model can be attractive to certain customers. If the amount these

---

237. *See, e.g.*, Christopher S. Yoo, *Would Mandating Broadband Network Neutrality Help or Hurt Competition? A Comment on the End-to-End Debate*, 3 J. TELECOMM. & HIGH TECH. L. 23, 64–66 (2004).

238. *See supra* Part II.F.

customers are willing to pay is more than the provider's cost of providing the service, then it is inefficient not to serve this niche market.

In other contexts, the Commission has shown a significant appreciation of the value of catering to niche markets. When it approved satellite radio in 1997, the Commission noted one of the benefits of augmenting local radio with satellite transmissions is that satellite radio can reach niche audiences that local broadcasters could not.[239] Individually, local populations around the country interested in a particular genre of music may not be numerous enough to support stations in that genre in every town where there is interest. But satellite radio could unite these pockets by giving them all one nationwide station dedicated to their interests—in the meantime generating the efficiencies that make the station economical. The Commission found it was in the public interest to meet those needs if it was economical to do so, and the same analysis should control here.

*E. Rule-of-Reason Analysis and Market Power*

Because vertical agreements have ambiguous effects on overall welfare, antitrust law rarely pronounces them illegal per se, and instead analyzes the effects under the rule of reason doctrine, which states only unreasonable agreements are actionable under antitrust law.[240] Judge Kavanaugh addressed this at length in a recent concurring opinion about vertical restraints in the market for cable programming, another area where the Commission has long feared bottleneck discrimination by network operators.[241] He noted that in most cases, "vertical integration 'is either competitively neutral or affirmatively desirable because it promotes efficiency.'"[242] Such agreements "[are] ubiquitous in our economy and virtually never pose[] a threat to competition when undertaken unilaterally and in competitive markets."[243]

Market power is an important component when analyzing the risks of vertical foreclosure. As noted above, the ICE principle suggests that normally, a firm that engages in anticompetitive vertical foreclosure will devalue its product compared to its rivals. Absent market power, the firm is likely to face significant backlash from consumers, who will desert to rivals in search of a substitute good that is not tainted by anticompetitive foreclosure.

239. Establishment of Rules and Policies for the Digital Audio Radio Satellite Serv., 12 FCC Rcd. 5754, 5760 (1997).

240. Leegin Creative Leather Prods. Inc. v. PSKS, Inc., 551 U.S. 877, 907 (2007); Skorup & Thierer, *supra* note 221, at 165; *see* Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 143 (1984).

241. Comcast Cable Commc'ns, LLC v. FCC, 717 F.3d 982, 990 (D.C. Cir. 2013) (Kavanaugh, J., concurring).

242. *Id.* (quoting AREEDA & HOVENKAMP, *supra* note 230, ¶ 756a, at 9).

243. *Id.* at 990–91 (quoting AREEDA & HOVENKAMP, *supra* note 230, ¶ 755c, at 6) (internal quotation marks omitted).

Because consumers can punish firm behavior in competitive markets, the Supreme Court has repeatedly affirmed that vertical agreements are generally legitimate in the absence of market power.[244] As Judge Kavanaugh explained,

> Vertical integration and vertical contracts become potentially problematic only when a firm has market power in the relevant market. That's because, absent market power, vertical integration and vertical contracts are *procompetitive*. Vertical integration and vertical contracts in a competitive market encourage product innovation, lower costs for businesses, and create efficiencies—and thus reduce prices and lead to better goods and services for consumers.[245]

He concluded, "[T]his Court's case law has stated that vertical integration and vertical contracts are procompetitive, at least absent market power."[246]

Viewed in this light, the Commission's insistence on prophylactic net neutrality rules to forestall possible anticompetitive foreclosure seems somewhat alarmist, at least in the wireless market. The Commission has repeatedly issued reports analyzing the competitiveness of the wireless sector.[247] The industry is marked by four significant national networks, and a variety of resellers and regional or local carriers that compete vigorously for consumer attention. Interestingly, the Commission found the 2011 weighted average Herfindahl-Hirschman Index, a widely used metric of industry concentration, was 2873, which suggests a highly concentrated market.[248] But as the Commission explained, high concentration does not necessarily imply market power if there are other indicia of price and nonprice rivalry between competitors.[249] Geoffrey Manne has noted that wireless telephone prices have fallen significantly over the last ten years, and network investment has risen each year.[250] Providers continue to build and upgrade their networks and are engaged in vigorous price competition, including T-Mobile's move in 2011 to decouple handset sales from service contracts and offer postpaid service on a no-contract basis. Lacking market power, wireless providers are unlikely to be able to sustain alternative business models that are harmful

---

244. *Leegin*, 551 U.S. at 898; *see* State Oil Co. v. Khan, 522 U.S. 3, 17–19 (1997); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 725 (1988); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53–59 (1977).

245. *Comcast*, 717 F.3d at 990 (Kavanaugh, J., concurring).

246. *Id.* at 991.

247. Implementation of §§ 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, 28 FCC Rcd. 3700, 3704 (2013).

248. *Id.* at 3718.

249. *Id.* at 3759.

250. Geoffrey A. Manne et al., The Law and Economics of the FCC's Transaction Review Process 30 (Aug. 23, 2013) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2242681 (cited with author's permission).

to consumers, as adversely affected consumers are likely to simply defect to a competitor.

*F. The Need for Greater Flexibility in Wireless Broadband Markets*

As noted above, the Commission has long recognized the value of permitting greater regulatory flexibility in wireless markets. And its original reasons for applying a light regulatory touch in 2010 remain relevant in today's market. First, the wireless environment is a more dynamic and growing segment of the broadband market. Chairman Tom Wheeler has noted that the number of LTE users has grown from 200,000 in 2010 to over 120 million by the end of 2014.[251] And the market has shown no signs of slowing to maturity: Sandvine estimates that median mobile data use rose by 20% in the first half of 2014 alone, from 84 to 102 megabytes per month.[252] Moreover, these users' online patterns are growing more differentiated; the top 1% of users are responsible for 19% of upstream and 12% of downstream traffic, while the bottom half of users together comprise less than 2% of total network volume.[253] Given the relatively young and dynamic nature of the marketplace, rigid net neutrality rules risk eliminating potentially innovative proconsumer business models.

Second, as noted above, the wireless market remains competitive. Unlike fixed broadband, which in most markets is dominated by two providers, most Americans have four national wireless carriers to choose from, plus regional and niche players. And the evidence suggests they are actually competing for customers; the rise of no-contract plans and promotions offering to pay off new customers' early termination fees shows that customers wish to—and do—change wireless providers often, and firms are responding to that demand. This suggests less need for prophylactic rules to protect consumers, as companies lack market power and consumers facing potentially problematic business practices can simply defect to an alternative provider relatively easily.

Finally, wireless companies face unique capacity constraints that are not present on fixed broadband networks. Spectrum is a limited resource.[254] While wireless companies can research technology to use existing spectrum more efficiently, they generally cannot solve congestion by adding more spectrum, the way that fixed broadband providers can

251. *See* Stephen Lawson, *FCC May Put Mobile Under Same Net-Neutrality Rules as Wired Broadband*, PCWORLD (Sep. 9, 2014), http://www.pcworld.com/article/2604980/fcc-may-put-mobile-under-same-netneutrality-rules-as-wired-broadband.html.

252. SANDVINE, INTELLIGENT BROADBAND NETWORKS: GLOBAL INTERNET PHENOMENA REPORT 1H 2014, at 8 (2014), *available at* https://www.sandvine.com/downloads/general/global-internet-phenomena/2014/1h-2014-global-internet-phenomena-report.pdf (last visited Feb. 19, 2015).

253. *Id.* at 9.

254. *See, e.g.*, Syracuse Peace Council, 2 FCC Rcd. 5043, 5054–55 (1987) (discussing spectrum scarcity).

lay more cable. Providers must deal with interference from other wireless devices. And while Commission studies show fairly consistent peak periods for fixed broadband traffic,[255] wireless traffic patterns are less predictable than fixed traffic, which has fairly consistent peak periods.[256] Together, these operational constraints suggest the need for wireless providers to have greater flexibility when engaging in network management.

## CONCLUSION

The Commission's Open Internet initiative has unquestionably targeted an important issue. Broadband networks are important gateways to Internet-based content and applications, and regulators should remain vigilant to safeguard against the risk of anticompetitive foreclosure. But the wide range of vertical agreements occurring internationally, including those profiled in this Article, testify to the fact that not all agreements between broadband and edge providers are harmful to consumers. To paraphrase Justice Blackmun, the Commission must make sure its efforts to safeguard the public from harm do not amount to "launch[ing] a missile to kill a mouse."[257]

Federal Trade Commissioner Joshua Wright has rightly warned about the potential harm of overreaching in pursuit of an Open Internet. Commenting on the 2010 rules, Commissioner Wright explained:

> What the theoretical literature and empirical evidence demonstrates . . . is that vertical contracts, including those captured by the Neutrality Order, are not always anticompetitive and in most cases are procompetitive. This is a critical observation for answering the question: "what kind of regulatory regime and legal rules governing this behavior will best serve consumers?"[258]

Commissioner Wright's emphasis on *consumers* provides some important guidance to the Open Internet proceeding. The Commission's first significant pronouncement on broadband practices came in the 2005 Internet Policy Statement, a non-binding document that ultimately launched the Open Internet proceeding. That statement was largely focused on consumer welfare, emphasizing "*consumers* are entitled to access the lawful Internet content of their choice," to "run applications and use services of their choice," and "connect their choice of legal device[]"

---

255. FCC, 2012 MEASURING BROADBAND AMERICA JULY REPORT: A REPORT ON CONSUMER WIRELINE BROADBAND PERFORMANCE IN THE U.S. 8 (2012), *available at* http://transition.fcc.gov/cgb/measuringbroadbandreport/2012/Measuring-Broadband-America.pdf.

256. *See* Lyons, *supra* note 82, at 35–36 (discussing wireless congestion unpredictability and citing studies).

257. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1036 (1992) (Blackmun, J., dissenting).

258. Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Broadband Policy & Consumer Welfare: The Case for an Antitrust Approach to Net Neutrality Issues 12 (Apr. 19, 2013) (transcript available at http://www.ftc.gov/public-statements/2013/04/broadband-policy-consumer-welfare-case-antitrust-approach-net-neutrality).

to the network.[259] But as the 2005 Policy Statement gave way to the 2010 rules and the current rules, the Commission's focus has shifted from the welfare of consumers to that of edge providers. The Supreme Court has long emphasized that antitrust law protects "*competition*, not *competitors*."[260] The protection of edge providers should not be a goal in itself, but only if it is a tool to protect consumers from harm.

Consumer welfare has been, and should continue to be, the lodestar guiding the Commission's efforts to preserve the Open Internet. The Commission may be correct that there is a risk of anticompetitive foreclosure in broadband markets. And that risk may be sufficiently large to warrant a regulatory response. But any effort to promote the Open Internet should allow for companies to experiment with innovative new ways to bring Internet content and applications to consumers, because this experimentation is likely to give rise to consumer-beneficial alternatives to traditional broadband access models. The Commission should seek to promote innovation that enhances consumers' ability to access the content and services they desire—no matter where in the Internet ecosystem this innovation occurs.

---

259. FCC, FCC 05-151, APPROPRIATE FRAMEWORK FOR BROADBAND ACCESS TO THE INTERNET OVER WIRELINE FACILITIES, para. 4 (Sept. 23, 2005) (emphasis added), *available at* https://www.publicknowledge.org/pdf/FCC-05-151A1.pdf.

260. Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110 (1986) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)) (internal quotation mark omitted).

# WHEN TARGETING BECOMES SECONDARY: A FRAMEWORK FOR REGULATING PREDICTIVE SURVEILLANCE IN ANTITERRORISM INVESTIGATIONS

BY SHAUN B. SPENCER†

ABSTRACT

The National Security Agency's bulk data collection programs disclosed in 2013 suggest a new model of surveillance. This "predictive surveillance" model will apply the emerging field of predictive analytics to the vast datasets in the hands of third parties. Unlike traditional surveillance, predictive surveillance will not begin by targeting individuals based on particularized suspicion. Instead, predictive surveillance will first collect and analyze all available data to find patterns that could predict future events. In light of the NSA's emphasis on data analysis and its existing stores of telephone and Internet communications metadata, it seems inevitable that the government will eventually advocate for predictive surveillance in antiterrorism investigations. This Article contends that the existing framework of surveillance regulation cannot adapt to predictive surveillance because the existing framework presumes that surveillance begins with targeting. The Article next assesses whether predictive surveillance could comply with the Fourth Amendment. After rejecting arguments that the Fourth Amendment should not apply to information gathered from third parties or in public spaces, the Article proposes a narrow basis for authorizing predictive surveillance. The initial data collection would be reasonable under the Supreme Court's balancing approach in domestic security investigations and under the Court's approval of suspicionless searches in its special needs cases. This approach, however, would only uphold surveillance used for antiterrorism investigations, rather than ordinary law enforcement purposes. Finally, the Article proposes a new regulatory framework that postpones the assessment of particularized suspicion, requires prior judicial approval of the initial data collection and analysis, limits use of the database to antiterrorism investigations, and imposes substantial oversight and transparency.

---

† Assistant Professor, University of Massachusetts School of Law – Dartmouth. I am grateful for comments on drafts of this Article from Lawrence Friedman, Alexander Goebel, Lisa Laplante, Mark Noferi, Rita Resende, Richard Peltz-Steele, Jordan Singer, and Jeffrey Skopek. Thanks as well to the University of Massachusetts School of Law Junior Faculty Scholarship Exchange and to the New England Regional Junior Faculty Scholarship Workshop at New England Law | Boston.

TABLE OF CONTENTS

INTRODUCTION .......... 495
I. BIG DATA AND PREDICTIVE ANALYTICS .......... 498
II. THE ROLE OF TARGETING IN TRADITIONAL SURVEILLANCE AND PREDICTIVE SURVEILLANCE .......... 501
*A. Traditional Surveillance Begins by Targeting Based on Particularized Suspicion* .......... 501
*B. Predictive Surveillance Begins Without Any Targeting or Particularized Suspicion* .......... 504
1. Government Has Used Predictive Analytics for Crime Prevention, Regulatory Enforcement, and Fraud Detection .......... 505
2. Predictive Analytics Have Successfully Predicted Terrorist and Insurgent Activity .......... 506
3. The NSA's Bulk Collection Programs Preview the Potential of Predictive Surveillance .......... 507
III. THE EXISTING REGULATORY FRAMEWORK'S INABILITY TO REGULATE PREDICTIVE SURVEILLANCE .......... 510
*A. The Existing Regulatory Framework Presumes That Surveillance Begins with Targeting* .......... 510
*B. The Perils of Shoehorning Predictive Surveillance into the Traditional Regulatory Framework* .......... 511
1. The Risk of Rejection Without Regard for the Potential Value of Predictive Surveillance .......... 511
2. The Risk of Authorizing a Highly Intrusive Surveillance Program Without Adequate Safeguards .......... 512
3. The Risk of Authorizing a Highly Intrusive Surveillance Scheme with No Political Mandate .......... 516
IV. THE CONSTITUTIONALITY OF PREDICTIVE SURVEILLANCE IN ANTITERRORISM INVESTIGATIONS .......... 516
*A. Deciding Whether the Initial Data Collection Constitutes a Fourth Amendment Search* .......... 517
1. Data Collected from Third Parties .......... 517
2. Data Collected in Public Spaces .......... 521
*B. Applying the Fourth Amendment's Reasonableness Requirement in Antiterrorism Investigations* .......... 522
1. The *Keith* Case and Domestic Security Investigations .......... 522
2. Suspicionless Searches and Special Needs Cases .......... 524
V. A NEW REGULATORY FRAMEWORK FOR PREDICTIVE SURVEILLANCE IN ANTITERRORISM INVESTIGATIONS .......... 527
*A. Regulating Bulk Data Collection and the Use of Predictive Analytics* .......... 527
*B. Regulating Subsequent Targeting Based on the Results of Predictive Analytics* .......... 528
*C. Prohibiting All Secondary Uses of the Comprehensive Database* .......... 530
*D. Limiting the Time Period That the Data Can Cover* .......... 531

*E. Security Against Internal Misuse and Abuse* .... 531
*F. Security Against Data Breaches* .... 533
*G. Increased Oversight and Transparency* .... 533
CONCLUSION .... 536

## INTRODUCTION

I started work on this Article after Edward Snowden disclosed the existence of the National Security Agency's (NSA) bulk collection of metadata about our domestic and international telephone calls. I assumed that, with a comprehensive archive of telephone metadata available, the NSA was analyzing the entire database for patterns that could indicate potential terrorist activity. Subsequent reports, however, left me feeling vaguely disappointed in the NSA. It turned out that the NSA's searches began with specific telephone numbers that they believed to be associated with terrorist activity and expanded out several degrees of separation to encompass people who had communicated with the target and people who had communicated with those people.[1] I was disappointed for two reasons. First, the NSA might be able to do far more with this vast store of data. And second, the NSA could have accomplished these targeted searches nearly as efficiently by seeking orders targeted at each of the telephone numbers they believed to be associated with terrorist activity, thus accomplishing the same goal with far less harm to privacy and the public trust. Recent reports revealed that the NSA has found it more and more challenging to collect the metadata. Part of the challenge has been the lack of a protocol to exclude the cell site location data embedded in the telephone metadata from cell phone providers.[2] As a result, the percentage of metadata collected had fallen to less than 30% in early 2014.[3]

Regardless of the current practical or political limitations, the bulk telephone metadata program and others like it point to a new model of surveillance. This "predictive surveillance" model will apply the emerging field of predictive analytics to the vast datasets in the hands of third parties. Unlike traditional surveillance, predictive surveillance will not begin by targeting individuals based on particularized suspicion. Instead, predictive surveillance will first collect and analyze all available data to find patterns that could predict future events. In light of the NSA's emphasis on data analysis and its existing stores of telephone and Internet communications metadata, one can envision a strong temptation to use

1. These are the first two "hops" in the NSA's chaining analysis. In "very few instances," the NSA would make a third "hop." PRESIDENT'S REVIEW GRP. ON INTELLIGENCE & COMMC'NS TECHNOLOGIES, LIBERTY AND SECURITY IN A CHANGING WORLD 102–03 (2013), *available at* http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.

2. *See* Ellen Nakashima, *NSA Is Collecting Less than 30 Percent of U.S. Call Data, Officials Say*, WASH. POST, Feb. 7, 2014, http://www.washingtonpost.com/world/national-security/2014/02/07/234a0e9e-8fad-11e3-b46a-5a3d0d2130da_story.html.

3. *Id.* The intelligence agency's goal, however, remains 100% collection. *Id.*

predictive surveillance in antiterrorism investigations. This Article contends that existing surveillance regulation framework cannot adapt to predictive surveillance because the existing framework presumes that surveillance begins with targeting. The Article proposes a new regulatory framework that postpones the assessment of particularized suspicion, requires prior judicial approval of the initial data collection and analytics, limits use of the analytics to antiterrorism investigations, and imposes substantial oversight and transparency.

Part I describes the convergence of two important phenomena: the explosion of data about all aspects of our lives and the emerging field of predictive analytics. Viktor Mayer-Schönberger and Kenneth Cukier describe how these phenomena have led to the rise of "Big Data" in their recent book by the same title.[4] In the age of Big Data, statisticians need not rely on sampling datasets to analyze past behavior. Instead, with complete datasets at their disposal, they may use a variety of new predictive techniques capable of building highly accurate predictive models. Predictive analytics are already in widespread use in the private and government sectors. They have been used to predict such diverse outcomes as when a machine will fail, which manhole covers are at highest risk of explosion, and where flu outbreaks are emerging.[5]

Part II contrasts traditional surveillance with predictive surveillance and uses the NSA's recently disclosed bulk collection programs to illustrate the differences. Under the traditional model, law enforcement first decides on a subject to target. For example, in the bulk telephone metadata collection program, the NSA queried the database with a telephone number associated with a foreign terrorist organization. Thus, the process begins with particularized suspicion about a subject, and the surveillance targets information about that subject. Under the predictive surveillance model, however, the process would be quite different. The NSA's first step would be to analyze all of the telephone metadata in order to identify patterns associated with past terrorist activity. If meaningful patterns emerged, only then would the NSA move to targeted surveillance by investigating subjects whose metadata corresponded with patterns correlated with past terrorist activity. Part II also details how the government already uses predictive surveillance to predict high-crime locations and detect fraud, as well as how researchers have used predictive analytics to predict terrorist and insurgent activity overseas. Finally, Part II explains how the NSA's current bulk collection programs set the stage for predictive surveillance.

Part III explains that existing surveillance regulation framework cannot adapt to predictive surveillance because the existing framework

4. VIKTOR MAYER-SCHÖNBERGER & KENNETH CUKIER, BIG DATA: A REVOLUTION THAT WILL TRANSFORM HOW WE LIVE, WORK, AND THINK 7–8, 11–12, 15 (2013).

5. *See infra* Part I; *see also* MAYER-SCHÖNBERGER & CUKIER, *supra* note 4, at 1–2.

depends on assessing whether the initial targeting decision is based on sufficient particularized suspicion. For example, in the law enforcement context, the Fourth Amendment presumes a search in which there is probable cause to believe the subject is involved in criminal activity. Even in foreign intelligence investigations, which are exempt from the Fourth Amendment's warrant requirement, the courts still consider "whether the protections afforded to the privacy rights of targeted persons are reasonable in light of" the government's interest in preventing foreign terrorism.[6] The statutory limits on surveillance also begin by assessing the targeting decision. The Electronic Communications Privacy Act prohibits wiretapping absent probable cause that the target has committed or will commit a crime[7] and prohibits compelled disclosure of Internet Service Provider (ISP) records unless those records are "relevant and material to an ongoing criminal investigation."[8] Similarly, to approve a wiretap under the Foreign Intelligence Surveillance Act (FISA), a court must find probable cause that the target is "an agent of a foreign power."[9] All of the foregoing tests presume that the government has already targeted someone specific.

Part III also explains why the government should not try to shoehorn predictive surveillance into the existing regulatory framework. First, applying the old framework to predictive surveillance could mean that predictive surveillance is rejected because of the lack of particularized suspicion. If predictive surveillance has any value as an intelligence tool, we should not let a lack of imagination about surveillance regulation deny those potential benefits. Second, given the potential of predictive surveillance, there is a significant risk that the government would bend or even break the rules in the existing framework in order to reap those benefits. In that case, predictive public surveillance would not be subject to safeguards necessary to deal with the comprehensive datasets it requires. By way of illustration, such a shoehorning appears to have taken place with regard to the bulk collection of telephone metadata under Section 215 of the USA PATRIOT Act.[10] Because it was authorized through a statute never designed for bulk collection, the program operated in total secrecy—until the Snowden disclosures—with inadequate congressional oversight, minimal judicial approval, and no meaningful opportunity for appellate review.

Part IV considers whether the Fourth Amendment would prohibit use of predictive surveillance in antiterrorism investigations. For data

6. *In re* Directives [redacted text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1012 (FISA Ct. Rev. 2008).

7. 18 U.S.C. § 2516(1) (2012).

8. 18 U.S.C. § 2703(d) (2012).

9. 50 U.S.C. § 1805(a)(2)(A) (2012).

10. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107–56, § 215, 115 Stat. 272, 287–88 (codified as amended at 50 U.S.C. § 1861 (2012)).

collected from private entities, such as telecommunications providers, the government would try to justify the collection under the third-party doctrine. And for data collected in public spaces, such as license plate readers, the government would argue that individuals have no reasonable expectation of privacy in public spaces. This Article argues, however, that the courts should reject those arguments and hold that the initial data collection constitutes a search within the meaning of the Fourth Amendment. The Article next argues that this initial data collection would nevertheless be reasonable under the relaxed Fourth Amendment requirements in domestic security investigations under the *Keith* case,[11] as well as under the U.S. Supreme Court's approval of suspicionless searches in its special needs cases. The initial collection, however, could only survive under these theories if the program were limited to antiterrorism investigations, as opposed to ordinary law enforcement uses.

Finally, Part V proposes the elements of a regulatory scheme for predictive surveillance in antiterrorism investigations. First, the government would have to seek an order from the Foreign Intelligence Surveillance Court (FISC) for the initial collection. The FISC could only issue such an order if the government made a *Daubert*-style showing that the proposed statistical techniques were scientifically valid and likely to yield a meaningful result. This examination of the collection decision would take the place of the traditional evaluation of the targeting decision. Second, the government would have to report to the FISC on the results of its data analysis and would have to seek an additional order from the FISC to investigate subjects whose current data matched the prior patterns. That is where the review of the targeting decision would take place. Third, the government could not use the raw database for any purpose other than the antiterrorism investigation. Fourth, the framework would mandate the most advanced security possible against outside intrusion and would impose substantial penalties for internal misuse of the data. Finally, the framework would impose substantial judicial and legislative oversight as well as public transparency.

## I. BIG DATA AND PREDICTIVE ANALYTICS

The term "predictive surveillance" envisions surveillance that gathers and analyzes all available data—for example, the metadata for all telephone calls from the major telecommunications carriers.[12] Gathering and analyzing all the data, rather than merely gathering a sample, is the

11. United States v. U.S. District Court (*Keith*), 407 U.S. 297 (1972).

12. *See* PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 8–11 (2014), *available at* https://www.pclob.gov/Library/215-Report_on_the_Telephone_Records_Program.pdf.

trend that Mayer-Schönberger and Cukier explore in their recent book, *Big Data.*[13]

A 2012 New York Times article about Big Data described the "drift toward data-driven discovery and decision-making" in many different fields.[14] Gary King, director of the Institute for Quantitative Social Science, called the Big Data movement a "revolution."[15] King continued, "[T]he march of quantification, made possible by enormous new sources of data, will sweep through academia, business and government. There is no area that is going to be untouched."[16]

Why all the hype? Mayer-Schönberger and Cukier use the term Big Data as shorthand for the convergence of two important developments. The first development is the data explosion itself. Data are multiplying at an almost unimaginable rate,[17] and new tools are emerging to convert previously unquantifiable phenomena into digital data. In many cases, we are able to process all of the data regarding a given phenomenon.

This data explosion provides the datasets needed for the second development: the emerging field of predictive analytics. This methodology predicts future behavior based on the patterns that emerge from vast datasets.[18] For centuries, practical limitations made it impossible for scientists to collect observations concerning every member of a population. So statisticians devised sophisticated techniques to (1) draw representative samples from the population, and (2) extrapolate from an analysis of the sample to an analysis of the population. When reporting their results, statisticians use a lower-case "*n*" to indicate the size of their sample and an upper-case "*N*" to indicate the size of the population. As Mayer-Schonberger and Cukier explain, in a play on these statistical abbreviations, in Big Data, *n=all.*[19] Big Data researchers need not rely on samples. Instead, they use new analytical techniques to find patterns in observations of the entire population and then use those patterns to predict future behavior.

Gathering "all the data" makes new predictive techniques possible. Evidence of causation has long been the touchstone of scientific research. With predictive analytics, however, causation is far less relevant. By using predictive analytics to study large datasets with many variables,

---

13. MAYER-SCHÖNBERGER & CUKIER, *supra* note 4, at 12–13.

14. Steve Lohr, *The Age of Big Data*, N.Y. TIMES, Feb. 12, 2012, at SR1.

15. *Id.* (internal quotation mark omitted).

16. *Id.* (internal quotation mark omitted).

17. For example, as recently as 2000, only one quarter of the world's stored information was in digital form. MAYER-SCHÖNBERGER & CUKIER, *supra* note 4, at 9. The rest were stored in analog form, "on paper, film, vinyl LP records, magnetic cassette tapes, and the like." *Id.* But by 2007, only 7% of the world's stored data were analog; the rest were digital. *Id.* at 8–9. By 2013, the digital analog spread had widened to 98% digital versus 2% analog. *Id.* at 9.

18. ERIC SIEGEL, PREDICTIVE ANALYTICS: THE POWER TO PREDICT WHO WILL CLICK, BUY, LIE, OR DIE 11 (2013).

19. MAYER-SCHÖNBERGER & CUKIER, *supra* note 4, at 26.

analysts can build extremely accurate predictive models based on strong correlations in the data, regardless of why those correlations may exist.[20] This technique can reveal correlations one might not have imagined if one were looking for causation.

For example, predictive analytics can generate models that predict when a given mechanical device, like a motor or a bridge, will fail. The models are based on vast amounts of data from sensors monitoring patterns in the data that the devices emit, "such as heat, vibration, stress, and sound."[21] It is far less important to know why the device may fail than it is to know, before the fact, that it will probably fail.[22] Eric Siegel's *Predictive Analytics* gives us many examples of what predictive analytics can show us.[23] "Suicide bombers do not buy life insurance."[24] Crime rises after upset losses in college football.[25] "Phone card sales predict [massacres] in the Congo."[26] Mac users spend "up to 30 percent more than [PC] users when booking" online hotel reservations.[27] In these cases, government and businesses use correlations to predict future behavior.

Predictive analytics capitalizes on the proliferation of digital technologies and the fact that data can invariably be combined with other data and put to new uses. Often these secondary uses yield the most valuable large-scale data analyses. For example, a team of Columbia University statisticians set out to help solve New York City's "exploding manhole[]" cover problem.[28] A few hundred times a year, fires would break out beneath manhole covers, sometimes sending the heavy cast-iron covers several stories high.[29] Con Edison's random manhole inspections were ineffective in heading off the problem.[30] The team from Columbia gathered every kind of data imaginable.[31] Various types of inconsistent data existed in handwritten form dating back to the late 1800s.[32] After the team had gathered all the data and written computer algorithms to interpret the data, patterns emerged.[33] Using data from the late 1800s through 2008—data that were never intended to predict manhole cover explosions—the team sorted through 106 predictors and produced a model in which "[t]he top 10 percent of manhole [covers] on their

---

20. *Id.* at 6–7, 13–14.
21. *Id.* at 58.
22. *Id.* at 59. For a comprehensive discussion of predictive analytics, see SIEGEL, *supra* note 18.
23. SIEGEL, *supra* note 18, at 80–86.
24. *Id.* at 85.
25. *Id.* at 86.
26. *Id.*
27. *Id.* at 81.
28. MAYER-SCHÖNBERGER & CUKIER, *supra* note 4, at 68.
29. *Id.*
30. *Id.*
31. *Id.* at 68–70.
32. *Id.* at 68.
33. *Id.* at 69.

["watch"] list contained . . . 44 percent of [all of] the [covers] that ended up having severe incidents" in 2009.[34]

Another example of unexpected uses involved the large amounts of location data that cellular phone providers have about their subscribers. One researcher "combined location data of prepaid cell phone subscribers in Africa with the amount of money [the subscribers] spent when they topped off their accounts."[35] This unexpected combination of data yielded the surprising finding that slums in Africa can "act as economic springboards" for residents' socioeconomic status.[36]

The next Part examines how the rise of Big Data and predictive analytics could give rise to a new surveillance model—predictive surveillance—that does not require targeting specific individuals.

## II. THE ROLE OF TARGETING IN TRADITIONAL SURVEILLANCE AND PREDICTIVE SURVEILLANCE

### *A. Traditional Surveillance Begins by Targeting Based on Particularized Suspicion*

Under the traditional surveillance model, the government first decides to target a particular subject based on some degree of particularized suspicion. In some cases, that particularized suspicion may be quite high. For example, when criminal investigators pursue a wiretap under the Wiretap Act, they must demonstrate to a court that there is probable cause to believe that the interception will reveal evidence of a felony offense listed in section 2516.[37] Similarly, when criminal investigators install a GPS device to track a suspect's car, they must first obtain a warrant based on probable cause to believe that the tracking will reveal evidence of a crime.[38]

In other cases, the particularized suspicion can be significantly lower. For example, under the Stored Communications Act, the government may compel an ISP to produce subscriber information based on "specific and articulable facts showing that there are reasonable grounds to believe that the . . . records or other information sought[] are relevant and material to an ongoing criminal investigation."[39] And when foreign intelligence investigators seek a court order to intercept electronic communications under the Foreign Intelligence Surveillance Act, they need only

34. *Id.* at 68–70.
35. *Id.* at 91.
36. *Id.*
37. 18 U.S.C. § 2518(3)(a)–(b) (2012).
38. *See* United States v. Jones, 132 S. Ct. 945, 949, 954 (2012).
39. 18 U.S.C. § 2703(d) (2012).

show probable cause to believe that "the target of the electronic surveillance is a foreign power or an agent of a foreign power."[40]

At first blush, the NSA's recently disclosed mass-surveillance programs may appear to represent this new surveillance model. At their core, however, they employ traditional, targeting-based techniques. For example, since 2006 the government has relied on Section 215 of the USA PATRIOT Act to collect metadata on telephone calls made to or from telephone numbers in the United States.[41] This metadata includes the "originating and terminating telephone number," the time of the call, and the duration of the call, but does not include the call's contents.[42] The program stored metadata on U.S. phone calls for five years.[43] Although the program collected "'closer to 100' percent" of all call records in 2006, as time passed the percentage of phone records collected fell below 30% because the NSA cold not keep up with cell phone use.[44]

Minimization procedures drafted by the Attorney General limit the circumstances under which the NSA can search the telephone metadata that it collects.[45] A search may only begin with a specific identifier, like a telephone number, that the NSA suspects is associated with one of the

---

40. 50 U.S.C. § 1804(a)(3)(A) (2012).

41. PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., *supra* note 12, at 42. The bulk telephone metadata program began in 2001, after the September 11 terrorist attacks. *Id.* at 37. From 2001 until 2006, the program proceeded without any legislative or judicial authorization. *See id.* Instead, President Bush issued a presidential authorization in October 2001, based on a finding of an extraordinary emergency because of the September 11 terrorist attacks. *Id.* That authorization directed the bulk collection of "'metadata[]' about telephone and Internet communications," as well as the collection of the contents of international communications (later known as the Terrorist Surveillance Program). *Id.* President Bush renewed the authorization every thirty to sixty days. *Id.* After the New York Times reported on the previously secret Terrorist Surveillance Program in December 2005, the administration became concerned that the bulk collection of telephone metadata would also be exposed. *Id.* at 40. In May 2006, the administration obtained authority from the Foreign Intelligence Surveillance Court to conduct bulk collection of telephone metadata under Section 215 of the USA PATRIOT Act. *Id.* at 40, 42.

42. *In re* Application of the F.B.I. for an Order Requiring the Prod. of Tangible Things from [Redacted], No. BR 13-109, 2013 WL 5741573, at *1 n.2 (FISA Ct. Aug. 29, 2013). The Foreign Intelligence Surveillance Court noted that "[t]he sole purpose of this production is to obtain foreign intelligence information in support of [redacted] individual authorized investigations to protect against international terrorism and concerning various international terrorist organizations." *Id.* at *1.

43. Scott Shane, *N.S.A. Violated Rules on Use of Phone Logs, Intelligence Court Found in 2009*, N.Y. TIMES, Sept. 11, 2013, at A14.

44. Ellen Nakashima, *NSA Is Collecting Less Than 30 Percent of U.S. Call Data, Officials Say*, WASH. POST, Feb. 7, 2014, http://www.washingtonpost.com/world/national-security/nsa-is-collecting-less-than-30-percent-of-us-call-data-officials-say/2014/02/07/234a0e9e-8fad-11e3-b46a-5a3d0d2130da_story.html. According "to current and former U.S. officials," the NSA was unable to keep up with expanding cellphone use for several reasons. *Id.* First, the NSA must "prepare its database to handle . . . cellphone data," which contain "different data [] than land-line calls" and often "contain geolocation data, which the NSA" may not receive. *Id.* And second, NSA resources were diverted from preparing its databases during 2009 by review and compliance issues arising from breaches documented by the FISC and from responses to congressional inquiries in the wake of the Snowden disclosures. *Id.* Nevertheless, the officials indicated that the government is attempting to restore collection to previous levels. *Id.*

45. 50 U.S.C. § 1861(b)(2)(B), (c)(1), (g)(1) (2012).

terrorist organizations under investigation.[46] In 2012 the "NSA queried 288 unique identifiers" that, in the NSA's view, met the requisite "reasonable, articulable suspicion" standard for association with a terrorist organization.[47]

The NSA uses the vast database of telephone metadata to perform what it calls "link analysis."[48] First, the NSA gathers data about the telephone numbers that have been in contact with the suspected terrorist's number—the first hop.[49] Next, in most cases, the NSA adds numbers in contact with those first hop numbers—the second hop.[50] And finally, in very few instances, the NSA adds numbers in contact with those second hop numbers—the third hop.[51] If each number at issue "called or was called by 100 phone numbers over the course of" five years, then the first hop would produce a list of 100 phone numbers, the second hop would "produce a list of 10,000 phone numbers," and the third hop would produce a list of 1,000,000 phone numbers.[52]

This link analysis is intended to identify networks of terror cells.[53] The Obama administration claims that NSA analysis of these searches "has generated and continues to generate investigative leads for ongoing efforts by the FBI and other agencies to identify and track terrorist operatives, associates, and facilitators."[54] Yet the White House's own NSA review panel concluded that metadata "was not essential to preventing attacks and could readily have been obtained in a timely manner using conventional section 215 orders."[55]

The post-Snowden modifications that President Obama proposed for the Section 215 bulk collection program reaffirm that the Section 215 program is traditional, target-based surveillance. First, the President proposed allowing the metadata to be held by a third party or by the telecommunications companies themselves.[56] Second, the President proposed limiting the number of hops from the target's number from three to

46. PRESIDENT'S REVIEW GRP. ON INTELLIGENCE & COMMC'NS TECHNOLOGIES, *supra* note 1, at 98.

47. *Id.* at 98, 102.

48. Charlie Savage, *Extended Ruling by Secret Court Backs Collection of Phone Data*, N.Y. TIMES, Sept. 18, 2013, at A1 (internal quotation marks omitted).

49. PRESIDENT'S REVIEW GRP. ON INTELLIGENCE & COMMC'NS TECHNOLOGIES, *supra* note 1, at 102.

50. *Id.* at 103.

51. *Id.*

52. *Id.*

53. Savage, *supra* note 48.

54. ADMINISTRATION WHITE PAPER: BULK COLLECTION OF TELEPHONY METADATA UNDER SECTION 215 OF THE USA PATRIOT ACT 4 (2013), *available at* https://info.publicintelligence.net/DoJ-NSABulkCollection.pdf.

55. PRESIDENT'S REVIEW GRP. ON INTELLIGENCE & COMMC'NS TECHNOLOGIES, *supra* note 1, at 104.

56. *Id.* at 17; *see also* Press Release, The White House, Office of the Press Sec'y, Fact Sheet: Review of U.S. Signals Intelligence (Jan. 17, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/01/17/fact-sheet-review-us-signals-intelligence.

two.[57] Third, the President directed the Attorney General to develop a procedure with the FISC so that the database could not be queried without a judicial order.[58] These proposed reforms confirm that the program is a traditional, targeting-based effort to identify the people with whom a specific subject has been talking, rather than a broad, pattern-based analysis. Thus, despite the "*n*=all" aspect of the bulk collection, the actual queries target specific identifiers about which the NSA has particularized suspicion.

The Drug Enforcement Agency (DEA) has run a similar, although less publicized, program in cooperation with AT&T.[59] The DEA's Hemisphere Project searches decades of AT&T telephone records in an effort to catch drug dealers.[60] Drug dealers routinely switch phones or phone numbers to evade investigation.[61] They use so-called "'burner' phones" to make calls to their subordinates and discard the phones before police can track their behavior.[62] The DEA uses the drug dealer's past calls from his old number to identify his associates.[63] The DEA then uses the pattern of calls from his associates to identify the drug dealer's new number.[64] The program places DEA employees in AT&T offices so that the DEA can quickly execute subpoenas for phone records searches—often in as little as an hour.[65] The records available to the DEA include phone numbers, time and duration of calls, and the location from which the call was made.[66] Thus, like the NSA's bulk telephone metadata program, the Hemisphere program is a traditional, targeting-based surveillance technique.

### *B. Predictive Surveillance Begins Without Any Targeting or Particularized Suspicion*

Under the predictive surveillance model, instead of targeting particular suspects, the government would instead analyze data to find patterns that correlate with past terrorist activity. Then, based on those patterns, the government could use traditional targeted surveillance to investigate similar patterns in the emerging data. Although there is no indication that the NSA has plans to use predictive surveillance in antiterrorism investi-

---

57. Press Release, The White House, Office of the Press Sec'y, *supra* note 56.

58. *Id.*

59. The program is likely less publicized because the government does not engage in the initial step of bulk collection of everyone's telephone metadata. Instead, it leaves the metadata in the hands of AT&T and queries the data as needed. Scott Shane & Colin Moynihan, *Drug Agents Use Vast Phone Trove, Eclipsing N.S.A.'s*, N.Y. TIMES, Sept. 2, 2013, at A1.

60. *Id.*

61. *Id.*

62. *Id.*

63. Mike Levine, *DEA Program Puts Phone Company Inside Government Offices*, ABC NEWS (Sept. 1, 2013, 9:06 PM), http://abcnews.go.com/blogs/headlines/2013/09/dea-program-puts-phone-company-inside-government-offices/.

64. *Id.*

65. *Id.*

66. Shane & Moynihan, *supra* note 59.

gations, both federal and local government agencies have used predictive analytics in other contexts.

1. Government Has Used Predictive Analytics for Crime Prevention, Regulatory Enforcement, and Fraud Detection

Police departments have turned to predictive analytics to target their resources at specific areas at high risk for crime. For example, in Memphis, police operate a program called Blue CRUSH (an acronym for Crime Reduction Utilizing Statistical History).[67] The program "provides police officers with relatively precise areas of interest in terms of locality (a few blocks) and time (a few hours during a particular day of the week)."[68] This allows the police to better target their limited resources.[69] Police departments in Los Angeles, Chicago, Santa Cruz, and Vineland, New Jersey, have used similar techniques to predict crime location.[70] Police in Richmond, Virginia use predictive analytics to correlate crime with variables like payday for large employers and the dates of large sporting events and concerts.[71]

New York City recently used predictive analytics to make efficient use of city inspectional services investigators faced with an avalanche of complaints about illegal apartment conversions.[72] These illegal conversions involve dividing apartments into many smaller units and often cause unsafe conditions such as fire hazards.[73] Predictive analytics helped the city triage the overwhelming number of complaints and focus on the ones that posed the most risk. Previously, only 13% of inspections had found conditions severe enough to merit a vacate order.[74] After using the predictive analytics, that rate rose to 70%.[75]

The government also uses predictive analytics to identify likely instances of fraud. The Internal Revenue Service (IRS), for example, analyzes its data to rank tax returns for audits based on the likelihood of tax evasion.[76] Its system enabled the IRS to find "25 times more tax evasion, without increasing the number of investigations."[77] The Department of Defense Finance and Accounting Service used data analysis to detect

---

67. MAYER-SCHÖNBERGER & CUKIER, *supra* note 4, at 158.
68. *Id.*
69. *Id.*
70. SIEGEL, *supra* note 18, at 51.
71. MAYER-SCHÖNBERGER & CUKIER, *supra* note 4, at 158.
72. *Id.* at 186.
73. *Id.*
74. *Id.* at 188.
75. *Id.*
76. SIEGEL, *supra* note 18, at tbl.5.
77. *Id.*; *Government: Our Work*, ELDER RESEARCH, INC., http://dataminginglab.com/solutions/industries/government (last visited Feb. 5, 2014) ("ERI data miners built predictive models for a large government revenue agency to find tax refund fraud which led to a 25-fold increase in the hit rate of fraud found per analyst hour. Based on these highly successful results, the predictive models built by ERI were deployed ahead of schedule to all 10 fraud-detection centers.").

97% of known fraud cases.[78] And the United States Postal Service uses data analysis to rank instances of suspected contract fraud in order to direct its internal investigations.[79]

Similarly, a private firm called Xoom detected a criminal group's credit card fraud scheme by analyzing all international money transfer data.[80] The firm "noticed a slightly higher than average number of Discover Card transactions originating from New Jersey. 'It saw a pattern where there shouldn't have been a pattern.'"[81] The firm detected this pattern by analyzing all of the data; mere sampling may have missed the pattern.[82]

2. Predictive Analytics Have Successfully Predicted Terrorist and Insurgent Activity

A leader in the predictive analytics field is the Laboratory for Computational Cultural Dynamics (LCCD), part of the University of Maryland's Institute for Advanced Computer Studies.[83] The LCCD developed a model to predict the successors of captured terrorist leaders. The system is called Shaping Terrorist Organisation Network Efficacy (STONE).[84] The system relies on data about individual terrorists and connections between terrorists. The individual terrorist data include their rank, role, and expertise at planning or executing attacks. The connections include attending the same school or training camp, involvement in the same attack, or attending the same meeting.[85] Developers tested the system on leaders removed from several terrorist groups, including al-Qaida. The STONE system usually returned three or four possible replacements, and in 80% of the cases, the replacement was one of STONE's suggestions.[86]

The LCCD also created a model that can predict future attacks by a particular terrorist group. "The analytic technologies that the University of Maryland team applied to terrorism are similar to data mining analytics commonly used by Amazon and big box retailers to predict customer

78. SIEGEL, *supra* note 18, at tbl.5.
79. *Id.*
80. MAYER-SCHÖNBERGER & CUKIER, *supra* note 4, at 27–28.
81. *Id.* (quoting John Kunze, CEO of Xoom).
82. *Id.*
83. *Welcome to the LCCD*, LAB. FOR COMPUTATIONAL CULTURAL DYNAMICS, http://www.umiacs.umd.edu/research/LCCD/ (last visited Mar. 28, 2015).
84. V.S. Subrahmanian, *Introducing the Software That Can Predict New Leaders of Terror Groups*, THE OBSERVER (London), Sept. 15, 2013, http://www.theguardian.com/world/2013/sep/15/al-qaida-terrorist-leader.
85. *Id.*; *see also* Mark Rockwell, *Who's the Next Head of Hezbollah? New Platform Has Some Predictions*, FCW (Aug. 27, 2013), http://fcw.com/articles/2013/08/27/stone-predictive-analytics.aspx.
86. Subrahmanian, *supra* note 84; *see also* Rockwell, *supra* note 85.

activity."[87] The model relies on data on 770 variables from more than 20 years of the group's activities.[88] The data come from "a variety of primary sources including open-source news articles from local magazines and newspapers, and scholarly publications on terrorism in South Asia."[89] LCCD's algorithms found that there was an 88% chance of the terrorist group LeT attacking local security forces if "between five and 24 LeT operatives had been arrested and LeT operatives were on trial in either India or Pakistan."[90] The program generated hundreds of similar rules, including "predictors for terrorist attacks on civilians, professional security forces, transportation centers, security installations, and symbolic or tourist locations."[91]

Predictive analytics also helped predict improvised explosive device attacks in Iraq in the early 2000s. While working on the legal team prosecuting Saddam Hussein, attorney Mike Flowers needed to ensure that witnesses brought into the Green Zone avoided the all too common IED attacks.[92] Based on data from intelligence analysis about field reports and past IED attacks, Flowers's team predicted the safest routes into the Green Zone on a given day.[93]

The programs above involve either information already in the agency's possession or information available from public sources. Predictive surveillance programs, in contrast, would first need to engage in large-scale data collection in order to gather the data to be analyzed. With that in mind, this Article turns next to how the NSA's existing bulk-data collection programs hint at what true predictive surveillance programs would look like.

### 3. The NSA's Bulk Collection Programs Preview the Potential of Predictive Surveillance

The bulk collection of telephone metadata under Section 215 of the USA PATRIOT Act suggests how the NSA might someday conduct predictive surveillance. By collecting telephone metadata for all calls originating in or terminating in the United States, the NSA has created a prototypical Big Data dataset in which $n$=all.[94] To conduct predictive surveillance using this dataset, the NSA's first step would be to identify past incidents of known terrorist activity. These need not be terrorist attacks; they could also be instances of entry into the country, recruitment efforts,

87. Neal Ungerleider, *A Computer Program That Predicts Terrorist Attacks*, FAST COMPANY (Sept. 17, 2012, 10:00 AM), http://www.fastcoexist.com/1680540/a-computer-program-that-predicts-terrorist-attacks.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. MAYER-SCHÖNBERGER & CUKIER, *supra* note 4, at 185.

93. *Id.*

94. *Id.* at 26.

meetings of known terrorist cells, or preparations for attacks. The next step would be to analyze all of the telephone metadata in order to identify patterns that correlate with past foreign terrorist activity. If such patterns emerged, the NSA could then search emerging data for similar patterns. Only after finding a significant pattern in the emerging data would the government move to targeted surveillance, most likely by tasking the FBI to investigate potential targets whose telephone metadata formed part of the emerging pattern.

Another NSA program, code named Co-Traveler, hints at how the NSA could engage in predictive surveillance—although for now, this program remains a traditional, targeting-based program. The NSA collects billions of cellular phone location records per day by tapping into the telephone links of major telecommunications providers, including some providers in the United States.[95] The NSA then uses sophisticated analytics to find "co-travelers—unknown associates who might be traveling with or meeting up with a known target."[96]

To find these co-travelers, the NSA uses a suite of tools called "Co-Traveler Analytics."[97] For example, one tool "examines movements on a global scale in order to identify new suspects who might have shared . . . similar movements with a person of interest, such as passing through the same location within a 1 hour window."[98] Another tool uses the "average travel velocity between pairs of travelers in order to determine whether it would be practically possible for the travelers to have traveled together."[99] Still another searches for "when targets might have been seen in the same city as the target over a given time frame."[100]

One technique in particular signals the potential of predictive surveillance. The "DSD Co-Travel Analytic" analyzes location information "to predict potential points of intersection—projecting into the future all the individuals that may 'cross paths' with a given target. Plans are also underway to identify targets based on suspicious behaviors such as iden-

95. Barton Gellman & Ashkan Soltani, *NSA Tracking Cellphone Locations Worldwide, Snowden Documents Show*, WASH. POST, Dec. 4, 2013, http://www.washingtonpost.com/world/national-security/nsa-tracking-cellphone-locations-worldwide-snowden-documents-show/2013/12/04/5492873a-5cf2-11e3-bc56-c6ca94801fac_story.html.

96. *How the NSA Is Tracking People Right Now*, WASH. POST, http://apps.washingtonpost.com/g/page/national/how-the-nsa-is-tracking-people-right-now/634/ (last visited Feb. 9, 2015). For a video illustrating how the NSA identifies unknown associates traveling with the target, see Osman Malik, *How the NSA Uses Cellphone Tracking to Find and 'Develop' Targets*, WASH. POST (Dec. 4, 2013, 3:04 PM), http://www.washingtonpost.com/posttv/national/2013/12/04/d9114d52-5d1f-11e3-95c2-13623eb2b0e1_video.html.

97. Ashkan Soltani & Barton Gellman, *New Documents Show How the NSA Infers Relationships Based on Mobile Location Data*, WASH. POST (Dec. 10, 2013), http://www.washingtonpost.com/blogs/the-switch/wp/2013/12/10/new-documents-show-how-the-NSA-infers-relationships-based-on-mobile-location-data/.

98. *Id.*

99. *Id.*

100. *Id.*

tifying mobiles that are turned off right before two people meet."[101] This planned method is an example of a surveillance technique that is not premised on targeting a specific individual. Instead, the analysis identifies a behavioral pattern that the NSA believes may be associated with wrongdoing and then searches the data for that pattern.

With the rise of today's surveillance society,[102] the government has vast datasets at its disposal for predictive surveillance. First, government could collect the vast troves of data that we have shared with third parties, such as GPS location from our phones and cars,[103] the content of our telephone calls and emails,[104] metadata about our telephone calls and Internet communications,[105] and mobile app activity[106] from telecommunications and ISPs. Second, government could collect raw data itself by, for example, imaging our license plates or our faces, whether from fixed video cameras, moving police cars, or airborne drones. The groundwork for this type of data collection already exists. Police departments across the country have already deployed automatic license plate reading systems, and California has become the first state to adopt digital license plates.[107] The city of Boston recently tested "situational awareness" software that used existing security cameras to monitor the crowds at an outdoor music festival.[108] Situational awareness software can monitor for

---

101. *Id.* For the NSA White Paper describing the entire suite of Co-Traveler Analytics, see NAT'L SEC. ADMIN., SUMMARY OF DNR AND DNI CO-TRAVEL ANALYTICS (2012), *available at* https://s3.amazonaws.com/s3.documentcloud.org/documents/888734/cotraveler-tracking-redacted.pdf.

102. Shaun B. Spencer, *The Surveillance Society and the Third-Party Privacy Problem*, 65 S.C. L. REV. 373, 390–91 (2013).

103. AM. CIVIL LIBERTIES UNION, YOU ARE BEING TRACKED: HOW LICENSE PLATE READERS ARE BEING USED TO RECORD AMERICANS' MOVEMENTS 7–11 (2013), *available at* https://www.aclu.org/files/assets/071613-aclu-alprreport-opt-v05.pdf (reporting on governmental and private industry use of license plate readers); Ellen Nakashima, *NSA Had Test Project to Collect Data on Cellphone Locations*, WASH. POST, Oct. 3, 2013, at A15 (reporting testimony by General Keith Alexander, NSA Director, about 2010 NSA test project gathering "'samples' of cellphone location data 'to test the ability of its systems to handle the data format, but that data was not used for any other purpose'").

104. PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., *supra* note 12, at 37, 40 (describing how President Bush unilaterally authorized the NSA to collect content of international telephone calls and emails); PRESIDENT'S REVIEW GRP. ON INTELLIGENCE & COMMC'NS TECHNOLOGIES, *supra* note 1, at 133–34 (describing how President Bush unilaterally authorized the NSA to conduct surveillance on telephone and email communications of people inside the United States).

105. PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., *supra* note 12, at 8, 37–46 (describing the bulk telephone metadata collection program, first pursuant to Presidential authorizations, and then pursuant to orders of the Foreign Intelligence Surveillance Court under Section 215 of the USA PATRIOT Act and the Foreign Intelligence Surveillance Act).

106. James Glanz et al., *Spy Agencies Tap Data Streaming from Phone Apps*, N.Y. TIMES, Jan. 28, 2014, at A1.

107. AM. CIVIL LIBERTIES UNION, *supra* note 103, at 12–15 (reporting on the proliferation of governmental and private industry use of license plate readers to collect and store hundreds of millions of datapoints that include location information about Americans' vehicles); Jessica Renee Napier, *California to Pilot Electronic License Plates*, GOV'T TECH., http://www.govtech.com/transportation/California-to-Pilot-Electronic-License-Plates.html (Oct. 9, 2013) (describing legislative approval for DMV to implement electronic license plate pilot program).

108. Nestor Ramos, *City Used High-Tech Tracking Software; $650,000 Spent at '13 Hub Event*, BOS. GLOBE, Sept. 8, 2014, at B1, 13 (internal quotations omitted). The program was a pilot

relatively innocuous occurrences like unattended packages and illegally parked vehicles, or engage in facial recognition and track people as they move through crowds. City officials indicated the pilot project involved only the former category.[109]

Predictive surveillance promises substantial benefits but poses substantial risks to privacy. The next Part explains why existing surveillance regulations are not calibrated to regulate predictive surveillance.

## III. THE EXISTING REGULATORY FRAMEWORK'S INABILITY TO REGULATE PREDICTIVE SURVEILLANCE

### *A. The Existing Regulatory Framework Presumes That Surveillance Begins with Targeting*

Existing surveillance laws do not address predictive surveillance. Like the proverbial generals prepared to fight the last war, the existing system of surveillance regulation presumes that the government is targeting a specific suspect.

The Supreme Court's Fourth Amendment jurisprudence begins by evaluating the target's expectation of privacy.[110] If the target enjoys no reasonable expectation of privacy in the information at issue, then the Fourth Amendment does not apply.[111] This inquiry, of course, requires that the government select a specific target. Similarly, the Fourth Amendment requires that a warrant issue only upon probable cause to believe the target is involved in criminal activity or that the search will reveal evidence of criminal activity.[112] Even in the domestic context, the Fourth Amendment still requires a showing of probable cause, although that standard may be less restrictive than in the law enforcement context.[113]

Like the constitutional framework, the statutes regulating surveillance also presume that government's first step is to choose a target. For example, to conduct electronic surveillance under FISA, the government must show that "the target . . . is a foreign power or an agent of a foreign power."[114] Although FISA requires a lower showing to obtain business records, that showing is still target specific. The government must demonstrate "reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation[,] . . . to obtain foreign

project in which IBM demonstrated surveillance software that the city was considering purchasing. *Id.* The city did not disclose the project's existence; the project only came to light when an IBM employee uploaded data about the project to a public server. *Id.*

109. *Id.*

110. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

111. *Id.*

112. Dunaway v. New York, 442 U.S. 200, 213 (1979).

113. United States v. U.S. District Court (*Keith*), 407 U.S. 297, 321–22 (1972).

114. 50 U.S.C. § 1805(a)(2)(A) (2012).

intelligence information[,] . . . or to protect against international terrorism."[115]

The Electronic Communications Privacy Act also requires an assessment of the government's targeting decision. To intercept wire or electronic communications, law enforcement must show probable cause to believe that the target has committed or will commit a specified offense.[116] To compel an ISP to produce subscriber information, the government must produce "specific and articulable facts showing that there are reasonable grounds to believe that the . . . records or other information sought . . . are relevant and material to an ongoing criminal investigation."[117]

This targeting-based approach to surveillance regulation cannot adapt to a predictive surveillance model in which the first step is to analyze *all* the data for patterns that could yield individualized suspicion. The next Part explains why the government should not attempt to fit the square peg of predictive surveillance into the round hole of targeting-based surveillance regulation.

### B. *The Perils of Shoehorning Predictive Surveillance into the Traditional Regulatory Framework*

#### 1. The Risk of Rejection Without Regard for the Potential Value of Predictive Surveillance

There are three reasons why the government should not force predictive surveillance into the traditional regulatory framework. First, a literal application of targeting-based regulation to predictive surveillance might result in its summary rejection, regardless of the benefits that predictive surveillance might provide. Imagine, for example, that the NSA's bulk telephone metadata collection program were designed differently; that it collected all telephone metadata and then analyzed that data to find patterns associated with past terrorist activity. If successful, such a program could provide a valuable tool in attempts to thwart future terrorist attacks. However, a literal application of Section 215 of the Patriot Act could foreclose such a tool entirely.

Under Section 215,[118] the government may not obtain business records under FISA without showing "reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation . . . to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelli-

115. *Id.* § 1861(b)(2)(A).
116. 18 U.S.C. § 2518(3)(a) (2012).
117. *Id.* § 2703(d).
118. USA PATRIOT Act § 215, 50 U.S.C. § 1861 (2012).

gence activities."[119] If the government sought an order for all telephone metadata records to facilitate predictive surveillance, the court could reasonably hold that every citizen's records could not possibly be relevant to an authorized investigation. Instead, the court could reason that, until the government has a specific target in mind, there cannot be any authorized investigation. Similarly, the court could reason that, if every record of every telephone call were deemed relevant, then the term relevant would be stretched beyond recognition. And finally, the court could reason that Congress intended the relevance provision to limit Section 215 orders to instances of particularized suspicion for an ongoing investigation and did not intend the term to authorize a fishing expedition.[120]

2. The Risk of Authorizing a Highly Intrusive Surveillance Program Without Adequate Safeguards

On the other hand, if the government successfully shoehorned predictive surveillance into the existing regulatory scheme, it could put privacy at substantial risk. The traditional regulatory scheme lacks the necessary safeguards to guard against the unique risks of predictive surveillance. The Section 215 bulk metadata collection program offers an excellent illustration of how this risk could arise.

For many years, the only court to consider whether Section 215 authorizes bulk collection was the Foreign Intelligence Surveillance Court, which upheld bulk collection under Section 215.[121] As a result, the NSA now has a five-year database of American citizens' telephone records.[122] Yet the available evidence suggests that Congress never intended Section 215 to authorize such vast data collection. Instead, according to Representative James Sensenbrenner, a former Republican House member

---

119. *Id.* § 1861(b)(2)(A).

120. These arguments were advanced by the ACLU and by former Representative, and USA PATRIOT Act drafter, James Sensenbrenner, in *ACLU v. Clapper*. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 9–15, ACLU v. Clapper, 959 F. Supp. 2d 724 (S.D.N.Y. 2013), *vacated*, 785 F.3d 787 (2d Cir. 2015) (No. 13 Civ. 3994 (WHP)); Brief Amicus Curiae of Congressman F. James Sensenbrenner, Jr. in Support of Plaintiffs at 4–6, *Clapper*, 959 F. Supp. 2d 724 (No. 13 Civ. 3994 (WHP)). The court in *Clapper*, however, rejected these arguments and held that the Section 215 bulk telephone metadata collection met the "relevant to an authorized investigation" standard. *Clapper*, 959 F. Supp. 2d at 746–49. The Foreign Intelligence Surveillance Court reached a similar decision. *In re* Application of the FBI for an Order Requiring the Prod. of Tangible Things from [Redacted], No. BR 13-109, 2013 WL 5741573, at *6–7 (FISA Ct. Aug. 29, 2013).

121. *See In re Application of FBI*, 2013 WL 5741573, at *9–10. In the wake of the Snowden disclosures, the Southern District of New York reached the same conclusion as the FISC and held that the bulk telephone metadata collection met Section 215's "relevant to an authorized investigation" standard. *Clapper*, 959 F. Supp. 2d at 746–49 (dismissing plaintiffs' complaint). The Second Circuit, however, vacated the District Court's order and held that Section 215 does not authorize bulk collection of telephone metadata. *Clapper*, 787 F.3d at 821 (holding that bulk metadata collection program violated Section 215's requirement that the tangible items collected be "relevant" to an "authorized investigation").

122. Shane, *supra* note 43.

and the drafter of the USA PATRIOT Act, Congress intended to *prevent* the government from using Section 215 to engage in bulk collection.[123] For example, when Congress reauthorized Section 215 in 2006, five years after its enactment in 2001, Congress limited its scope.[124] In 2001, Section 215 had only required that the records at issue be "sought for an [authorized] investigation."[125] In 2006, Congress attempted to resolve any uncertainty by amending Section 215 to require that the records be "relevant to an authorized investigation."[126] In addition, the 2006 revisions added three illustrations of records that are presumptively relevant to an authorized investigation: records that pertain to

> (i) a foreign power or an agent of a foreign power;
> (ii) the activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or
> (iii) an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation.[127]

None of these examples are consistent with the notion that every American's telephone records are "relevant" to an ongoing investigation.

Because Congress did not intend bulk collection under Section 215, the law lacks the institutional safeguards necessary to protect such a sensitive dataset. First, given the unprecedented scope of the telephone records database, the executive branch should not be in charge of developing its own minimization procedures. Yet under Section 215, with regard to any nonpublic information obtained about a U.S. person, the Attorney General is responsible for drafting the minimization procedures that will, presumably, prevent abuse and misuse by the executive.[128] And nothing prevents the Attorney General from scaling back the minimization procedures over time. Section 215 required that the Attorney General promulgate a general set of minimization procedures by 2006 but did not prevent the Attorney General from modifying those procedures from time to time.[129]

Second, there is no meaningful review of the Attorney General's minimization procedures. The only entity in a position to examine the

---

123. Brief Amicus Curiae of Congressman F. James Sensenbrenner, Jr., *supra* note 120, at 2–4.

124. *Compare* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109–177, § 106, 120 Stat. 192, 196 (2006) (codified as amended at 50 U.S.C. § 1861 (2012)), *with* H.R. REP. NO. 107-236, pt. 1, at 61 (2001).

125. H.R. REP. NO. 107-236, at 9. Representative Sensenbrenner stated in a committee report that this meant the records had to be "relevant" to an ongoing foreign intelligence investigation. *Id.* at 61.

126. USA PATRIOT Improvement and Reauthorization Act § 106.

127. USA PATRIOT Act § 215, 50 U.S.C. § 1861(b)(2)(A) (2012).

128. Section 215 requires the Attorney General to adopt procedures that "minimize the retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the [Government's] need . . . to obtain, produce, and disseminate foreign intelligence information." *Id.* § 1861(g)(2)(A).

129. *See id.* § 1861(g)(1).

minimization procedures is the secret Foreign Intelligence Surveillance Court. However, the FISC's assessment of the minimization procedures is merely pro forma. Section 215 does not require the FISC to review the substance of those minimization procedures.[130] Instead, before issuing a Section 215 order, the FISC need only ensure that the FBI's application "enumerat[es]" the relevant minimization procedures.[131] The only FISC opinion that has suggested that the FISC can review the minimization procedures for statutory compliance was Judge Eagan's decision, prepared and released publicly in the aftermath of the Snowden revelations.[132] In a pre-Snowden opinion, the FISC merely noted that the minimization procedures existed and were similar to procedures authorized in earlier Section 215 orders.[133] And in the earliest publicly disclosed Section 215 order, the FISC did not evaluate the minimization procedures at all; it simply noted their existence.[134]

Third, Section 215 immunizes bulk collection from meaningful review because the only entities that can challenge the bulk collection are the parties receiving the collection orders: the telecommunications companies.[135] The hundreds of millions of Americans whose records are collected and potentially queried cannot dispute the collection order under the statute.[136] To date, no telecommunications company has challenged a Section 215 order.[137] Nor are such challenges in the telecommunications companies' best interest, given that they compete for substantial government contracts.[138] And even if a telecommunications company chal-

---

130. *See id.* § 1861(b)(2)(B), (c)(1).

131. *Id.* In the unlikely event of an appeal from a Section 215 production order, even the Foreign Intelligence Surveillance Court of Review would merely assess whether the order met the requirements of Section 215, rather than assessing whether the minimization requirements satisfied the statutory mandate. *Id.* § 1861(f)(2)(B).

132. *In re* Application of the FBI for an Order Requiring the Prod. of Tangible Things from [Redacted], No. BR 13-109, 2013 WL 5741573, at *3 (FISA Ct. Aug. 29, 2013) (stating that FISA court "may not authorize the production [under Section 215] if the minimization procedures are insufficient").

133. *In re* Application of the FBI for an Order Requiring the Prod. of Tangible Things from [Redacted], No. BR 09-13, 2009 WL 9150914, at *1 (FISA Ct. Sept. 3, 2009) (noting that the government's application enumerated the minimization procedures, and the procedures were "similar to the minimization procedures approved and adopted as binding" in an earlier Section 215 authorization).

134. *In re* Application of the FBI for an Order Requiring the Prod. of Tangible Things from [Redacted], No. BR 06-05, 2006 WL 7137486, at *2 (FISA Ct. Aug. 18, 2006) (ordering that use of the bulk telephone metadata "shall occur solely according to the procedures described in the application").

135. 50 U.S.C. § 1861(f).

136. ACLU v. Clapper, 959 F. Supp. 2d 724, 741 (S.D.N.Y. 2013) ("[S]ection 215 does not provide for any person other than a recipient of an order to challenge the orders' legality or otherwise participate in the process.").

137. *In re* Application of the FBI for an Order Requiring the Prod. of Tangible Things from [Redacted], No. BR 13-109, 2013 WL 5741573, at *5 (FISA Ct. Aug. 29, 2013).

138. Telecommunications companies certainly have cause for concern. When Quest Communications refused the Bush Administration's request to voluntarily participate in a warrantless telephone surveillance program in early 2001, the government reportedly cancelled a lucrative NSA contract in retaliation. Ellen Nakashima & Dan Eggen, *Former CEO Says U.S. Punished Phone Firm*, WASH. POST, Oct. 13, 2007, at A01.

lenged a collection order, that challenge would be conducted secretly, under seal.[139] Even the existence of the collection order is secret; recipients of collection orders are prohibited from disclosing that they have received an order.[140]

Fourth, Section 215 did not require sufficient disclosure to Congress to facilitate meaningful congressional oversight. Section 215 merely requires annual reporting to the House and Senate Select Committees on Intelligence and the Senate Judiciary Committee of (1) the number of production orders requested, (2) the number of production orders granted, modified, or denied, and (3) the number of production orders granted, modified, or denied, that related to library records, firearms sales, tax returns, educational records, and medical records containing personally identifying information.[141] Section 215 also requires annual reports to Congress as a whole of the total number of production orders requested, granted, modified, and denied.[142] But neither of these reports requires disclosure of the massive volume of information to be collected. Just a few production requests could yield phone records concerning hundreds of millions of Americans.

Representative Sensenbrenner's Amicus Brief in *ACLU v. Clapper*[143] explained why these minimal reporting obligations failed to apprise Congress of the scope of the bulk collection program under Section 215. Throughout the entire program, the only report that even hinted at the massive nature of the program was a five-page report made available to members of Congress to read in a secure location in 2009 and 2011.[144] That report was merely a summary and did not disclose any of the FISC orders.[145] "Moreover, the report was not made available to House Members in 2011."[146] The one sentence hinting at the scope of collection read as follows: "The orders generally require production of the business records (as described above) relating to substantially all of the telephone calls handled by the companies, including both calls made between the United States and a foreign country and calls made entirely within the United States."[147]

139. 50 U.S.C. § 1861(f)(5).

140. *Id.* § 1861(d). The only exceptions to this gag order are for disclosures necessary to comply with the order, disclosures to an attorney to obtain legal advice concerning the order, and disclosures specifically permitted by the FBI. *Id.*

141. *Id.* § 1862(b).

142. *Id.* § 1862(c).

143. 959 F. Supp. 2d 724 (S.D.N.Y. 2013).

144. Brief Amicus Curiae of Congressman F. James Sensenbrenner, Jr. in Support of Plaintiffs, *supra* note 120, at 9.

145. *Id.*

146. *Id.*

147. *Id.* at 9 n.3 (quoting the defendant's motion to dismiss) (internal quotation marks omitted).

In sum, by forcing a mass-collection program into the traditional model of surveillance regulation, the executive branch left the people inadequately protected.

### 3. The Risk of Authorizing a Highly Intrusive Surveillance Scheme with No Political Mandate

A third reason not to shoehorn predictive surveillance techniques into existing legislative schemes is the absence of political support. Again, the Section 215 bulk telephone metadata collection helps illustrate this risk. Snowden's revelation of the Section 215 program generated substantial public outcry.[148] That outcry stemmed partly from the secret nature of the Section 215 program and the other programs that Snowden disclosed.

This Article does not advocate that Congress enact the regulatory scheme described below. Instead, the Article explores whether such a scheme could be constitutional and how such a scheme should be constructed. But part of the value of enacting legislation targeted at this new form of surveillance would flow from the public debate that would take place. Congress would ensure that the public had the opportunity to voice its approval, or disapproval, in light of the proposed security benefits. Today, in the wake of the surprising Snowden disclosures, public support for authorizing predictive surveillance programs seems highly unlikely. But developments in both technology and security may change public perception over time.

## IV. THE CONSTITUTIONALITY OF PREDICTIVE SURVEILLANCE IN ANTITERRORISM INVESTIGATIONS

A new regulatory framework is necessary to accommodate the unique needs and risks associated with predictive surveillance. This framework should recognize that there are multiple stages to Big Data analysis. A framework to regulate predictive surveillance must recognize the analytical distinctions between collecting the data, building a predictive model, and using that model to target an investigation. At the same time, the framework must also recognize and guard against the very real risks posed by predictive surveillance.

---

148. *See, e.g.*, PEW RESEARCH CENTER, OBAMA'S NSA SPEECH HAS LITTLE IMPACT ON SKEPTICAL PUBLIC 1 (2014), *available at* http://www.people-press.org/files/legacy-pdf/1-20-14%20NSA%20Release.pdf (reporting Pew Research Center/USA Today poll finding that 53% of Americans oppose the NSA's bulk telephone and Internet metadata collection programs, while only 40% support them); Adam Gabbatt, *Protestors Rally for 'The Day We Fight Back' Against Mass Surveillance*, THE GUARDIAN (Feb. 11, 2014 1:12 PM), http://www.theguardian.com/world/2014/feb/11/day-fight-back-protest-nsa-mass-surveillance (discussing international protest of mass surveillance programs that involved tens of thousands of calls and emails to Congress, physical protests planned in fifteen countries, and participation by leading technology companies such as Google, Facebook, and Microsoft).

### *A. Deciding Whether the Initial Data Collection Constitutes a Fourth Amendment Search*

#### 1. Data Collected from Third Parties

The NSA could use predictive analytics on data that the government collects from third parties or on data that the government collects on its own.[149] For data collected from third parties, the Fourth Amendment may not apply at all. Currently, under the third-party doctrine, one cannot expect privacy in information shared with third parties, "even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."[150] For example, in *Smith v. Maryland*,[151] police suspected Smith of robbery and of placing obscene and harassing phone calls to the robbery victim.[152] The police asked the telephone company to install a pen register[153] at the company's central offices to record the numbers dialed from the phone in Smith's home.[154] The pen register revealed a call to the victim's home, and police subsequently obtained a warrant to search Smith's home.[155] At trial, Smith moved to suppress all evidence obtained and derived from the pen register.[156] The trial court denied the motion and convicted Smith after a bench trial.[157]

The Supreme Court held that Smith had no reasonable expectation of privacy in the numbers that he dialed.[158] The Court reasoned that "[a]ll telephone users realize that they must 'convey' phone numbers to the telephone company" when they make a call and that the phone company records the numbers dialed and uses them for a variety of reasons.[159] Smith, therefore, "assumed the risk" that the telephone company would reveal to the police the numbers that he dialed.[160]

Several courts have considered whether the third-party doctrine applies to the NSA's bulk collection of telephone metadata from the tele-

---

149. *See supra* Part II.B.3.

150. United States v. Miller, 425 U.S. 435, 443 (1976) (citing United States v. White, 401 U.S. 745, 752 (1971); *see also* Hoffa v. United States, 385 U.S. 293, 302 (1966); Lopez v. United States, 373 U.S. 427, 438 (1963)).

151. 442 U.S. 735 (1979).

152. *Id.* at 737.

153. *Id.* at 735. The Court noted that "[a] pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed." *Id.* at 736 n.1 (quoting United States v. N.Y. Tel. Co., 434 U.S. 159, 161 n.1 (1977)) (internal quotation marks omitted).

154. *Id.* at 737.

155. *Id.*

156. *Id.*

157. *Id.* at 737–38.

158. *Id.* at 743 (citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

159. *Id.* at 742.

160. *Id.* at 745.

communications companies. In *Klayman v. Obama*,[161] Judge Leon held that the third-party doctrine did not apply and that the plaintiff's Fourth Amendment claim was likely to succeed on the merits.[162] Judge Leon distinguished *Smith v. Maryland* because circumstances had changed since 1979.[163] Judge Leon reasoned that "the evolutions in the Government's surveillance capabilities, citizens' phone habits, and the relationship between the NSA and telecom companies" justified distinguishing *Smith*.[164]

Judge Leon relied in part on the massive aggregation of data that the bulk collection program involved.[165] He drew a parallel to *United States v. Jones*,[166] where five Justices emphasized the significance of aggregating GPS data about a target.[167] Prior to *Jones*, the Court had held in *United States v. Knotts*[168] that tracking the defendant's car on a public highway did not violate the Fourth Amendment because there was no expectation of privacy in one's travels on public roads.[169] In *Jones*, however, the Court reached the opposite result.[170] Five Justices reasoned that law enforcement conducted a Fourth Amendment search by using a GPS tracking device to track the defendant's vehicle twenty-four hours a day for a month.[171] These five Justices relied on the aggregation of data over a month to find that the tracking violated a reasonable expectation of privacy.[172]

Judge Leon applied the same aggregation idea to distinguish *Klayman* from *Smith v. Maryland.* The pen register in *Smith* only tracked a single defendant's telephone metadata for a day.[173] But the Section 215 bulk collection program built a comprehensive, five-year record of Americans' phone calls.[174] For Judge Leon, this was a difference not merely in degree, but in kind.[175]

---

161. 957 F. Supp. 2d 1 (D.D.C. 2013), *vacated on other grounds*, 800 F.3d 599 (D.C. Cir. 2015) (reversing preliminary injunction based on plaintiffs' failure to demonstrate likelihood of success on standing issue).

162. *Id.* at 37, 41.

163. *Id.* at 31–37.

164. *Id.* at 31.

165. *Id.* at 32.

166. 132 S. Ct. 945 (2012).

167. *Klayman*, 957 F. Supp. 2d at 31 (citing *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring); *Jones*, 132 S. Ct. at 964 (Alito, J., concurring joined by Ginsburg, Breyer & Kagan, JJ.)).

168. 460 U.S. 276 (1983).

169. *Id.* at 281.

170. *See* 132 S. Ct. at 954–56 (Sotomayor, J., concurring); *id.* at 964 (Alito, J., concurring).

171. *Id.* at 954–56 (Sotomayor, J., concurring); *id.* at 958, 964 (Alito, J., concurring).

172. *Id.* at 956 (Sotomayor, J., concurring) (stating that people do not "reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on"); *id.* at 964 (Alito, J., concurring) (stating that society does not expect law enforcement to "secretly monitor and catalogue every single movement of an individual's car for a very long period").

173. Smith v. Maryland, 442 U.S. 735, 737 (1979).

174. *Klayman*, 957 F. Supp. 2d at 32.

175. *Id.* at 32–37.

On the other hand, the Southern District of New York and the Foreign Intelligence Surveillance Court have held that the third-party doctrine shields the bulk metadata collection program from Fourth Amendment scrutiny.[176] In *ACLU v. Clapper*, Judge Pauley of the Southern District of New York held that the bulk metadata collection program was analogous to the pen register upheld in *Smith v. Maryland*, which applied the third-party doctrine to telephone numbers that the defendant dialed.[177] Judge Pauley rejected the idea that building a massive database of every American's telephone records for the past five years changed the analysis: "The collection of breathtaking amounts of information unprotected by the Fourth Amendment does not transform that sweep into a Fourth Amendment search."[178] Judge Pauley also rejected the ACLU's argument that the database gave the government a "rich mosaic" of each person's life.[179] Judge Pauley reasoned that merely collecting the numbers did not paint that mosaic because the government cannot query the database without tying that query to an approved target.[180] Moreover, the results of the query simply tell the government who has had telephone calls with the target—but not who uses those telephone numbers.[181] The Foreign Intelligence Surveillance Court engaged in a very similar analysis of the issue when it approved a production order under the Section 215 bulk telephone metadata collection program.[182]

This Article proposes that the third-party doctrine should not apply to the type of mass collection necessary for predictive analytics. As I have argued elsewhere, the third-party doctrine is flawed because it represents an "all or nothing" approach to privacy that ignores reality in several significant ways.[183] First, the third-party doctrine fails to distinguish third parties as ends from third parties as means.[184] In the case that

176. ACLU v. Clapper, 959 F. Supp. 2d 724, 749–52 (S.D.N.Y. 2013), *vacated*, 785 F.3d 787 (2d Cir. 2015) (holding that Section 215 did not authorize bulk collection); *In re* Application of the FBI for an Order Requiring the Prod. of Tangible Things from [Redacted], No. BR 13–109, 2013 WL 5741573, at *2–3 (FISA Ct. Aug. 29, 2013).

177. *Clapper*, 959 F. Supp. 2d at 749–50, 752.

178. *Id.* at 752. This sentiment, however, ignores the approach of five Justices in *United States v. Jones*. For those Justices, short-term tracking of one's public movements did not trigger the Fourth Amendment, but long-term tracking of those same movements did. *Jones*, 132 S. Ct. at 957–58, 964 (Alito, J., concurring joined by Ginsburg, Breyer & Kagan, JJ.); *id.* at 954–56 (Sotomayor, J., concurring) (agreeing with Justice Alito that long-term GPS tracking violates the Fourth Amendment's reasonable expectation of privacy).

179. *Clapper*, 959 F. Supp. 2d at 750–53.

180. *Id.* at 750–52.

181. *Id.* at 751.

182. *See In re* Application of the FBI for an Order Requiring the Prod. of Tangible Things from [Redacted], No. BR 13–109, 2013 WL 5741573, at *2–3 (FISA Ct. Aug. 29, 2013). The circuit courts may never reach the Fourth Amendment issue because Section 215 sunset on June 1, 2015, and was replaced by the USA FREEDOM Act, which prohibits bulk collection and takes effect on November 28, 2015. *See* Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015, Pub. L. No. 114-23, 129 Stat. 268; In re Application of the FBI, Bankr. No. 15-75, 2015 WL 5637562, at *4-5 (FISA Ct. June 29, 2015).

183. Spencer, *supra* note 102, at 401.

184. *Id.* at 401–02.

first gave rise to the third-party doctrine, *United States v. Miller*,[185] the Court relied on its earlier "misplaced trust" cases.[186] Under those cases, the Court warned that people who share information with acquaintances take risk that those acquaintances may abuse their trust and tell others, including the police.[187] But by extending that logic to the telephone numbers dialed in *Smith v. Maryland*,[188] the Court ignored the difference between ends and means. In the misplaced trust cases, the communication to an untrustworthy acquaintance is both end and means. But the telephone company's record of the numbers that I dialed are merely the means to a different end—the communication with an acquaintance.[189]

Second, the third-party doctrine ignores what I have called the "anti-aggregation norm."[190] This visceral, societal fear of pervasive surveillance is a common theme in both literature and legal commentary.[191] And it figured prominently in the concurring opinions that rejected long-term, warrantless GPS tracking in *United States v. Jones*. Justice Alito reasoned that people simply do not expect that the government can "secretly monitor and catalogue every single movement of an individual's car for a very long period."[192] And Justice Sotomayor reasoned that people should not have to "expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on."[193]

The anti-aggregation norm also lies at the heart of *Riley v. California*,[194] where the Court rejected law enforcement's attempt to subject cell phone data to the search incident to arrest doctrine.[195] Under that doctrine, when law enforcement officers arrest a suspect, they may search personal property on the arrestee's person or within his immediate control without a warrant.[196] This exception to the probable cause requirement exists for two reasons: (1) to protect the arresting officers from

185. 425 U.S. 435 (1976).

186. *Id.* at 443–44 (1976) (citing United States v. White, 401 U.S. 745, 751–52 (1971); Hoffa v. United States, 385 U.S. 293, 302 (1966); Lopez v. United States, 373 U.S. 427, 438 (1963)).

187. *White*, 401 U.S. at 751–52; *Hoffa*, 385 U.S. at 302; *Lopez*, 373 U.S. at 438.

188. *See* Smith v. Maryland, 442 U.S. 735, 741–46 (1979).

189. *See* Commonwealth v. Augustine, 4 N.E.3d 846, 861–63 (Mass. 2014) (refusing to apply the third-party doctrine to cell site location information because individuals do not intend to voluntarily transmit their location to the cell service provider when making a call and location information bears no relation to the communicative purpose of the call).

190. Spencer, *supra* note 102, at 402–03 (discussing privacy themes in George Orwell's *Nineteen Eighty-Four* and Franz Kafka's *The Trial*).

191. *Id.*

192. United States v. Jones, 132 S. Ct. 945, 964 (2012) (Alito, J., concurring).

193. *Id.* at 956 (Sotomayor, J., concurring); *accord Augustine*, 4 N.E.3d at 862–63 (declining to apply the third-party doctrine to cell site location data obtained from a cell phone provider and reasoning that "even CSLI limited to the cell site locations of telephone calls made and received may yield a treasure trove of very detailed and extensive information about the individual's 'comings and goings' in both public and private places").

194. 134 S. Ct. 2473 (2014).

195. *Id.* at 2485.

196. *Id.* at 2482–84.

harm, and (2) to prevent the destruction of evidence.[197] The Court distinguished cell phones for several reasons. First, the Court reasoned that searching a cell phone would not serve the doctrine's purposes, because a cell phone neither threatens officer safety nor triggers a need to preserve evidence.[198] Second, the Court reasoned that the vast aggregation of data found within a cell phone rendered a cell phone search far more intrusive than a physical search of objects on one's person.[199] As the Court explained:

> [A] cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.[200]

Finally, the third-party doctrine rests on a flawed assumption that the third-party disclosure constitutes consent for further use of the information disclosed.[201] In *United States v. Miller*, the Court relied on the notion that bank and telephone customers voluntarily assume the risk that third parties will disclose their information.[202] If this reasoning ever justified an all-encompassing third-party doctrine, it does not hold true today. First, consumers do not have a meaningful choice about whether to use services that involve exchanging data with third parties.[203] And second, even if consumers had a choice, they would lack the information needed to exercise that choice.[204]

Given the risks posed by mass-surveillance programs, Judge Leon's approach would offer much-needed privacy protection. As described below, if predictive surveillance programs are subject to Fourth Amendment scrutiny, they would likely survive if used for antiterrorism purposes, but not if used for ordinary law enforcement purposes.[205]

2. Data Collected in Public Spaces

For information that the government collects on its own, such as video of license plates or people's faces in public spaces, there is no third-party doctrine issue. Instead, the initial question would be whether people enjoy any reasonable expectation of privacy in information exposed to the public. On this issue, the Supreme Court's decision in *United States v. Jones* would again be instructive.

---

197. *Id.* at 2483–84.
198. *Id.* at 2485–87.
199. *Id.* at 2488–91.
200. *Id.* at 2491.
201. Spencer, *supra* note 98, at 404–05.
202. 425 U.S. 435, 442–43 (1976).
203. Spencer, *supra* note 98, at 404–05.
204. *Id.* at 405–06.
205. *See infra* Part IV.B.2.

Proponents of predictive surveillance could rely on the proposition, tracing back to *Katz v. United States*,[206] that people enjoy no expectation of privacy in information that they knowingly expose to public view.[207] Based on *Katz* and subsequent cases, these proponents could argue that one has no reasonable expectation of privacy in one's license plate or face, at least when exposed to public view. Opponents of predictive surveillance, however, could emphasize the massive aggregation of data that such programs require. In *United States v. Jones*, the thirty-day aggregation of location data about a single individual was enough to overcome the general rule that one lacks an expectation of privacy in public spaces.[208] But the aggregation in *Jones* would pale in comparison to the massive aggregation necessary for predictive surveillance. For example, the Section 215 program collected and stored five years of metadata on American telephone users' calls.[209] Similarly, a national network of automatic license plate readers could create a catalog of where every car in the country traveled for as long as the program operated.[210] Gathering these searchable dossiers of location data on all drivers would likely be enough to trigger a Fourth Amendment search.

As discussed in the next section, finding that the initial data collection constitutes a Fourth Amendment search does not end the inquiry. The court must next determine whether the collection of such information in an antiterrorism investigation is a reasonable search under the circumstances.

### B. *Applying the Fourth Amendment's Reasonableness Requirement in Antiterrorism Investigations*

#### 1. The *Keith* Case and Domestic Security Investigations

In the law enforcement context, reasonableness under the Fourth Amendment generally requires that officers obtain a warrant supported by probable cause that the search will reveal evidence of a particular crime.[211] In the context of domestic security and foreign intelligence investigations, however, the reasonableness requirement is more nuanced.

The Supreme Court discussed how the Fourth Amendment applies beyond ordinary law enforcement investigations in *United States v. United States District Court* (the *Keith* case).[212] The government investigated the defendant, Plamondon, in connection with the bombing of a CIA

206. 389 U.S. 347 (1967).
207. *Id.* at 351.
208. 132 S. Ct. 945, 955–57 (2012) (Sotomayor, J., concurring); *id.* at 964 (Alito, J., concurring).
209. Shane, *supra* note 43.
210. For a discussion of widespread uses of automatic license plate readers, see generally AM. CIVIL LIBERTIES UNION, *supra* note 103, at 7–15.
211. United States v. Leon, 468 U.S. 897, 913–15 (1984).
212. 407 U.S. 297 (1972).

office in Michigan.[213] During the investigation, the government engaged in warrantless wiretapping of Plamondon's phone.[214] Rather than obtain court approval, "the Attorney General approved the wiretaps 'to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government.'"[215]

On the facts before it, the Court held that the government should have obtained prior judicial approval for the wiretaps, although the Court did not specify exactly what form that prior approval had to take.[216] More broadly, the Court recognized that domestic security investigations involve different interests than law enforcement investigations.[217] In domestic security investigations, targets may be more difficult to identify, investigations may be less precise, and the emphasis is often on preventing harmful acts or preparing for a future crisis.[218]

In light of those differences, the Court reasoned, the Fourth Amendment may apply more flexibly in domestic security investigations than in law enforcement investigations.[219] The procedures must be "reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens."[220] The "application and affidavit showing probable cause need not follow the exact requirements of [the Wiretap Act] but should allege other circumstances more appropriate to domestic security cases."[221] Ultimately, the Court held that the type of domestic surveillance at issue—wiretaps—required prior judicial approval "in accordance with such reasonable standards as the Congress may prescribe."[222]

Although the Court expressed no opinion on "the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country,"[223] lower courts have recognized a foreign intelligence exception to the warrant requirement.[224] However, mass-collection programs would largely involve data about ordinary

213. *Id.* at 299.
214. *Id.* at 300–01.
215. *Id.* at 300.
216. *Id.* at 323–24.
217. *Id.* at 322.
218. *Id.*
219. *Id.* at 322–23.
220. *Id.*
221. *Id.* at 323.
222. *Id.* at 323–24.
223. *Id.* at 308.
224. *See, e.g.*, *In re* Directives [redacted text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1011 (FISA Ct. Rev. 2008) ("Applying principles derived from the special needs cases, we conclude that this type of foreign intelligence surveillance possesses characteristics that qualify it for such an exception."); United States v. Truong Dinh Hung, 629 F.2d 908, 913 (4th Cir. 1980) ("[T]he needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following *Keith*, 'unduly frustrate' the President in carrying out his foreign affairs responsibilities.").

Americans in the United States, rather than individuals overseas or agents of foreign powers. For example, as the FISC itself has observed, under the Section 215 bulk telephone metadata program, "the vast majority of the call-detail records provided are expected to concern communications that are (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls."[225] For that reason, predictive surveillance programs cannot credibly fall within the foreign intelligence exception.

No court to date has applied the *Keith* domestic security approach to bulk data collection, as opposed to targeted surveillance. Although the Foreign Intelligence Surveillance Court repeatedly issued Section 215 orders, it appears that the FISC simply relied on the argument that the third-party doctrine removed the metadata from the Fourth Amendment entirely. For example, Judge Eagan's opinion in the wake of the Snowden disclosure considered only third-party doctrine and held that the collection did not constitute a Fourth Amendment search.[226] Similarly, although both Judge Leon and Judge Pauley assessed the constitutionality of the bulk telephone metadata program, neither of them considered the *Keith* case's Fourth Amendment framework.[227] Judge Pauley did not reach the question of how to apply the Fourth Amendment's warrant requirement because he held that the metadata were subject to the third-party doctrine.[228] And after Judge Leon distinguished *Smith v. Maryland* and rejected the third-party doctrine as inapplicable to bulk telephone metadata collection, he did not consider how the *Keith* case framework might apply.[229] Instead, Judge Leon relied on cases holding that warrantless searches could be authorized in cases of special needs beyond ordinary law enforcement.[230] Here, although Judge Leon recognized antiterrorist investigations as a special need, he reasoned that there was no need to collect the metadata in bulk.[231] It could achieve the same results by seeking targeted orders from each of the telecommunications providers.[232]

2. Suspicionless Searches and Special Needs Cases

Given the dearth of authority, a court reviewing a predictive surveillance program would have to consider how the Court has treated other

225. *In re* Application of the FBI for an Order Requiring the Prod. of Tangible Things from [Redacted], No. BR 06–05, 2006 WL 7137486, at *1 n.1 (FISA Ct. Aug. 18, 2006).

226. *In re* Application of the FBI for an Order Requiring the Prod. of Tangible Things from [Redacted], No. BR 13–109, 2013 WL 5741573, at *2–3 (FISA Ct. Aug. 29, 2013).

227. *See* ACLU v. Clapper, 959 F. Supp. 2d 724, 749–52 (S.D.N.Y. 2013), *vacated*, 785 F.3d 787 (2d Cir. 2015); Klayman v. Obama, 957 F. Supp. 2d 1, 30–42 (D.D.C. 2013), *vacated*, 800 F.3d 599 (D.C. Cir. 2015).

228. *Clapper*, 959 F. Supp. 2d at 749–52.

229. *Klayman*, 957 F. Supp. 2d at 30–42.

230. *Id.* at 38–39.

231. *Id.* at 39–41.

232. *Id.* at 40–41.

suspicionless surveillance practices. Ordinarily, a search is unreasonable without particularized suspicion.[233] The Court, however, has recognized that "special needs" beyond ordinary law enforcement can justify exceptions to the particularized suspicion requirement.[234] The Court's suspicionless checkpoint cases offer a useful analogy to predictive surveillance.[235]

Although the Court rejected suspicionless checkpoints for ordinary law enforcement purposes,[236] the Court approved checkpoints that served special government interests such as border enforcement and deterring drunk driving.[237] For example, in *United States v. Martinez-Fuerte*,[238] the Court considered Fourth Amendment challenges to immigration checkpoints on highways less than 100 miles from the Mexican border.[239] To determine whether reasonable suspicion was required before conducting such a routine checkpoint stop, the Court balanced the interests at stake.[240]

The Court recognized the significant governmental interest in policing the nation's borders against illegal immigration and drug trafficking.[241] The Court also noted that it was impractical to require reasonable suspicion for stops on major routes because the speed and volume of traffic rendered it impractical to give cars particularized study to discern

---

233. *See, e.g.*, Chandler v. Miller, 520 U.S. 305, 308 (1997).

234. For example, the Court's drug testing cases involve suspicionless searches based on "special needs, beyond the normal need for law enforcement." *E.g.*, Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)) (upholding random drug testing of student-athletes); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665–66 (1989) (upholding drug tests for United States Customs Service employees seeking transfer or promotion to certain positions); Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 619 (1989) (upholding drug and alcohol tests for railway employees involved in train accidents or found to be in violation of particular safety regulations). Administrative searches are another area where suspicionless searches are permitted, provided that those searches are appropriately limited. *See, e.g.*, New York v. Burger, 482 U.S. 691, 702–05 (1987) (upholding warrantless administrative inspection of premises of "closely regulated" business); Camara v. Mun. Court of S.F., 387 U.S. 523, 534–39 (1967) (upholding administrative inspection to ensure compliance with city housing code). Neither drug testing nor administrative searches offer a meaningful analogy to pervasive data collection because they are targeted at a very limited segment of the population.

235. *See In re* Sealed Case, 310 F.3d 717, 745–46 (FISA Ct. Rev. 2002) (per curiam) (analogizing to Supreme Court's checkpoint cases to find that USA PATRIOT Act's "significant purpose" amendment to FISA did not violate Fourth Amendment).

236. City of Indianapolis v. Edmond, 531 U.S. 32, 40–42 (2000).

237. United States v. Martinez-Fuerte, 428 U.S. 543, 560–65 (1976) (relying on state's interest in deterring illegal immigration and cross-border drug trafficking to affirm suspicionless highway checkpoints); Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451, 455 (1990) (relying on state's significant interest in deterring drunk driving to affirm brief, suspicionless stops at highway sobriety checkpoints so that police could detect signs of intoxication and remove impaired drivers from the road); *cf.* Delaware v. Prouse, 440 U.S. 648, 658–60 (1979) (suggesting in dicta that a generally applicable roadblock at which police could check all motorists' license and registration would be supported by a legitimate interest in roadway safety, rather than a general interest in law enforcement).

238. 428 U.S. 543 (1976).

239. *Id.* at 545.

240. *Id.* at 556.

241. *Id.* at 556–57.

whether they were transporting illegal aliens or drugs.[242] Thus, a requirement of reasonable suspicion would frustrate the government's interest.[243]

In contrast, the Court found that the checkpoint stops effected a "quite limited" intrusion on Fourth Amendment interests because the stops required only a response to a brief question or two and production of a document evidencing a right to be in the United States.[244] There was no search of the vehicle's interior beyond what could be seen in plain view.[245] The Court distinguished roving-patrol stops as more intrusive because roving-patrol stops often took place at night on secluded roads and had the potential to frighten motorists.[246] In addition, routine checkpoint stops were less disruptive to traffic than roving-patrol stops because checkpoint locations are known to motorists and checkpoints involve less discretionary enforcement activity and less potential for abusive or harassing stops.[247]

Collecting bulk data for predictive surveillance in antiterrorism investigations presents several parallels to the checkpoint searches in *Martinez-Fuerte*. First, the government interest in disrupting terrorist attacks is more compelling than its interest in deterring illegal immigration and drug trafficking. And requiring particularized suspicion before collecting bulk data would make predictive surveillance not merely impracticable, as was the case in *Martinez-Fuerte*, but impossible because predictive surveillance requires collecting all of the data first.

In addition, as long as the program contains the stringent safeguards described below,[248] the government could characterize the interference with Fourth Amendment interests as relatively minimal. Although the predictive analytics will search for patterns in all of the metadata, the only individuals whose data would ultimately be investigated would be those who match a pattern that correlates with past terrorist activity. In this regard, the initial data collection may be less intrusive on Fourth Amendment interests than the routine checkpoint stops in *Martinez-Fuerte*, where motorists faced suspicionless detention and questioning.[249]

If, however, the program lacked adequate safeguards, there would be a real risk that it could be used not merely for antiterrorism purposes, but for general law enforcement purposes. Such an expansion would distinguish the predictive surveillance program from the suspicionless checkpoints that the Court has approved in the past. Accordingly, predic-

242. *Id.*
243. *Id.* at 557.
244. *Id.* at 557–58.
245. *Id.* at 558.
246. *Id.*
247. *Id.* at 559.
248. *See infra* Part V.
249. 428 U.S. at 561–63.

tive surveillance must be supported by a strict regulatory system, which is proposed in the next Part.

## V. A NEW REGULATORY FRAMEWORK FOR PREDICTIVE SURVEILLANCE IN ANTITERRORISM INVESTIGATIONS

The surveillance scandals of 2013 read like a laundry list of the public's fears about surveillance: secret surveillance programs, government employees abusing their access for personal reasons, and massive breaches of security.[250] Surveillance harms have been catalogued in many different ways, but they fall into two distinct categories. "Data harms" flow from the data themselves, through such mechanisms as unwanted secondary uses, internal abuses, and security breaches.[251] In contrast, "chilling effects" flow from the mere act of surveillance itself.[252] If the government were to pursue predictive surveillance programs aimed at deterring terrorism, it would have to create a new regulatory scheme that accounts for not only the general risks of government surveillance, but also the unique risks posed by predictive surveillance and the massive databases that it requires.

### *A. Regulating Bulk Data Collection and the Use of Predictive Analytics*

As discussed above, the traditional surveillance model requires particularized suspicion about the target before a neutral magistrate can issue a warrant. Such particularized suspicion is impossible in the case of predictive surveillance since the analytical techniques require collecting data about everyone, most of whom will have no connection to the terrorist activity at issue.

Nevertheless, in light of the massive databases required for predictive surveillance, prior judicial approval must be required. That judicial approval cannot be premised on probable cause that the collection will reveal evidence of a crime[253] or that the target is an agent of a foreign

---

250. *See generally* Siobhan Gorman, *NSA Officers Spy on Love Interests*, WALL ST. J. (Aug. 23, 2013, 8:45 PM), http://blogs.wsj.com/washwire/2013/08/23/nsa-officers-sometimes-spy-on-love-interests/; Glenn Greenwald et al., *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, THE GUARDIAN (June 11, 2013, 9:00 AM), http://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance; Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, THE GUARDIAN (June 6, 2013, 6:05 AM), http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order.

251. *See, e.g.*, Justin Brookman & G.S. Hans, *Why Collection Matters: Surveillance as a De Facto Privacy Harm*, *in* BIG DATA & PRIVACY: MAKING ENDS MEET 11, 11–12 (Future of Privacy Forum & Stanford Law School Ctr. for Internet & Soc'y eds., 2013), *available at* http://www.futureofprivacy.org/wp-content/uploads/Big-Data-and-Privacy-Paper-Collection.pdf; Shaun B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 SAN DIEGO L. REV. 843, 878–90 (2002) (discussing how secondary uses and inadequate security threaten to erode privacy).

252. *See, e.g.*, Brookman & Hans, *supra* note 251, at 12–13.

253. *See* Texas v. Brown, 460 U.S. 730, 742 (1983) (plurality opinion) (describing probable cause standard).

power.[254] Instead, the Foreign Intelligence Surveillance Court should not authorize bulk collection without (1) specific enumeration of the prior terrorist activities that will be used to find patterns in the data, and (2) expert testimony establishing a statically valid methodology to search for those patterns. In addition, the FISC order should prohibit the government from conducting any analysis beyond what the FISC explicitly approved and should prohibit the government from attempting the approved analysis more than once without FISC approval.

To establish a statistically valid methodology, the government should be held to the *Daubert*[255] standard governing the admissibility of scientific evidence. That is, the government must persuade the FISC that the proposed methodology is scientifically valid and can properly be applied to the data to be collected. To assess scientific validity, the FISC would consider (1) whether the technique can be tested; (2) whether the technique has been subjected to peer review and testing; (3) the technique's known or potential error rate; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the technique has attracted widespread acceptance within a relevant scientific community.[256] These procedures should be conducted under seal to the extent necessary to avoid disclosure of information that could harm efforts at predictive or traditional surveillance of terrorist activity.

Given the successes of predictive analytics in a variety of contexts,[257] demonstrating a scientifically valid methodology should not prove onerous.[258] The purpose of this initial requirement is to prevent the government from engaging in a fishing expedition.

### *B. Regulating Subsequent Targeting Based on the Results of Predictive Analytics*

Once the government has executed its court-approved analysis, it must report its findings to the FISC—regardless of whether or not the searches revealed any significant patterns. This follow-up reporting will ensure that the FISC remains informed as to what techniques do and do not yield significant results.

If the technique revealed patterns associated with past terrorist activity, the government could rely on those patterns to seek an order from the FISC to conduct targeted surveillance on individuals whose metadata match those patterns. As in the pre-collection phase, the government would have to present the FISC with scientifically valid evidence that the patterns were statistically significant.

254. 50 U.S.C. § 1805(a)(2)(A) (2012).
255. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592–95 (1993).
256. *See id.*
257. *See supra* Part II.B.1–3.
258. SIEGEL, *supra* note 18, at 4–9 (discussing widespread use of predictive analytics).

This two-stage approach has some basis in recent NSA history. In the 1990s, NSA analyst William Binney and his team developed ThinThread, a program that would intercept global phone and Internet data and analyze it for patterns to help identify terrorists.[259] Although the system focused on international communications, it inevitably captured domestic communications as well.[260] To protect Americans' privacy, ThinThread encrypted the data before conducting pattern analysis.[261] Once the system found a strong enough pattern, agents could seek a warrant to decrypt the relevant data.[262] Binney, however, was unable to persuade top NSA officials to deploy the program.[263] In 2000, the NSA rejected the system because of constitutional concerns raised by collecting domestic communications, regardless of the encryption.[264]

Conducting a search based on a statistically significant pattern is somewhat analogous to relying on profiles to conduct airline passenger screening. In *United States v. Sokolow*,[265] the Court held that DEA agents' use of DEA profiles as part of the basis to stop a suspected drug courier did not render a *Terry* stop inappropriate.[266] This Article's proposed regulatory framework includes more constitutional safeguards than were imposed on the officer in *Sokolow*. Because the agents could make an on-the-spot decision, there was the risk that they might take into account inappropriate characteristics such as race.[267] But this proposed predictive surveillance framework would involve no such risk since the FISC would oversee the decision to target an individual based on the predictive model. In addition, this proposed predictive surveillance framework would involve judicial oversight of the process used to generate the predictive model. In contrast, there appeared to be no prior judi-

259. JULIA ANGWIN, DRAGNET NATION: A QUEST FOR PRIVACY, SECURITY, AND FREEDOM IN A WORLD OF RELENTLESS SURVEILLANCE 34 (2014); Jane Mayer, *The Secret Sharer: Is Thomas Drake an Enemy of the State?*, NEW YORKER, May 23, 2011, at 46.

260. Mayer, *supra* note 259, at 46.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* This objection seems ironic in light of the NSA's post-9/11 role in warrantless wiretapping. *Id.* Instead of the relatively nimble ThinThread, the NSA implemented a privately built system called Trailblazer that would have analyzed the NSA's massive data stores without using encryption. *Id.*; ANGWIN, *supra* note 259, at 34. The NSA eventually abandoned Trailblazer after "massive cost overruns and technical failures." *Id.*

265. 490 U.S. 1 (1989).

266. *Id.* at 10–11. In *Terry v. Ohio*, the Court held that the police may conduct brief investigative stops based on reasonable suspicion supported by articulable facts that criminal activity "may be afoot." 392 U.S. 1, 30–31 (1968).

267. *Cf. Sokolow*, 490 U.S. at 12 (Marshall, J., dissenting) (noting that requiring reasonable suspicion protects innocents from "'overbearing or harassing' police conduct carried out solely on the basis of imprecise stereotypes of what criminals look like, or on the basis of irrelevant personal characteristics such as race" (citing *Terry*, 392 U.S. at 14–15 & n.11)).

cial approval of the drug courier profiles in *Sokolow*, which the DEA developed on its own.[268]

*C. Prohibiting All Secondary Uses of the Comprehensive Database*

One of Big Data's primary benefits is that existing data can often be used to solve new problems.[269] That benefit, however, can also be a curse because data holders face constant temptation to use their data for as many purposes as possible. In one recent example, Ohio residents were surprised to learn in 2013 that over 26,000 state and federal government employees had been authorized to run facial recognition searches in the photos in Ohio's drivers license registry.[270] Authorized users included employees of the Federal Bureau of Investigation, Internal Revenue Service, Pennsylvania State Police, and several Kentucky police departments.[271] Roughly 1,000 users were outside the state of Ohio. There were even authorized users in the Department of Defense, the State Department, and the Department of Education.[272] Most of the authorized users were employees of Ohio police departments and courts.[273] Ohio's Attorney General implemented the facial recognition program with no authorizing legislation, no public warning or input, and no prior review of security protocols.[274]

Given the sensitive nature of a single database containing all citizens' phone metadata or location information, any predictive surveillance regulation must prohibit all secondary uses of the underlying database. Otherwise, the public's fear could render a predictive surveillance program politically infeasible.[275] The government would not be permitted to use the database for any purpose other than to build the predictive model. This prohibition would hold the government to its representation that the predictive surveillance program was necessary to prevent terrorism, rather than for general law enforcement purposes. Only the information gathered after the court-approved targeting phase could be used in any subsequent investigation or prosecution.

---

268. *See id.* at 10 & n.6 (noting that "the DEA has trained narcotics officers to identify drug smugglers on the basis of the sort of circumstantial evidence at issue here").

269. *See* Spencer, *supra* note 251, at 880–85 (discussing how data collected for one use are inevitably put to secondary uses).

270. Chrissie Thompson & Jessie Balmert, *Face-Check Access Goes Beyond Ohio*, CINCINNATI ENQUIRER, Oct. 25, 2013, at A8.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *See, e.g.*, Gabbatt, *supra* note 148 (discussing international protest of mass surveillance programs that involved tens of thousands of calls and emails to Congress, physical protests planned in fifteen countries, and participation by leading technology companies such as Google, Facebook, and Microsoft); Susan Page, *Poll: Most Americans Now Oppose the NSA Program*, USA TODAY (Jan. 20, 2014, 3:10 PM), http://www.usatoday.com/story/news/politics/2014/01/20/poll-nsa-surveillance/4638551/ (citing USA Today/Pew Research Center poll finding that 53% of Americans oppose the NSA's bulk telephone and Internet metadata collection programs, while only 40% support them).

*D. Limiting the Time Period That the Data Can Cover*

The greater the period of time that the data represent, the greater the risk of abuse or misuse.[276] For example, a database of cell phone records covering thirty days may pose far less temptation for abuse than the same database covering a five-year period. This is because the five-year database can paint a far more detailed picture of its subjects. Yet there is a tension at play because predictive analytics will usually yield better results from data covering a longer time period. And the necessary retention period will likely vary depending on the specific issues being analyzed. Accordingly, legislating a fixed retention period would likely be unsound policy. Instead, the new regulatory scheme should require the judge issuing the order to specify the time period that the data may cover, based on the time period supported in the government's initial *Daubert* showing.[277]

*E. Security Against Internal Misuse and Abuse*

Any collection of data is suspect to internal abuse.[278] This is not a new problem. Historians have chronicled how powerful government actors have abused their access to information.[279] J. Edgar Hoover used government data to intimidate and blackmail from the 1920s through the early 1970s.[280] The Kennedy Administration authorized the House Committee on Un-American Activities to request individuals' tax returns.[281] A military intelligence project in the early 1970s compiled dossiers on thousands of U.S. citizens opposed to the Vietnam War.[282] And President Nixon habitually abused government resources for personal political gain.[283]

Government databases are vulnerable to abuse by relatively low-level employees. Such low-level abuses often serve personal or voyeuristic urges. For example, an internal IRS audit documented over 1,500 instances from 1994 to 1995 in which employees browsed "the confidential tax records of friends, relatives, and celebrities."[284] Similarly, a New York City police officer was convicted of accessing the National Criminal Information System to compile dossiers on women as he sought a

276. *See generally* Omer Tene, *What Google Knows: Privacy and Internet Search Engines*, 2008 UTAH L. REV. 1433, 1482 (discussing risks of data retention and recognizing that the mere existence of a database creates risks from "government investigators, private litigants, data thieves, and commercial parties").

277. *See supra* Part V.A.

278. Spencer, *supra* note 251, at 886–90 (discussing historical abuses of personal information in government and in the private sector).

279. *See id.* at 889–90.

280. *Id.* at 889 & n.264.

281. *Id.* at 889.

282. *Id.*

283. *Id.* at 890.

284. *Id.*

potential victim to kidnap.[285] That story is one of a number of recent corruption cases in which NYPD officers were accused of using the NCIC database to "cyber snoop on co-workers, tip off drug dealers, stage robberies and—most notoriously—scheme to abduct and eat women."[286]

The NSA is not immune from these types of abuses, as evidenced by the NSA's recent "LOVEINT" scandal. The term LOVEINT is a play on the NSA's practice of abbreviating different types of intelligence—SIGINT for signals intelligence and HUMINT for human intelligence.[287] The NSA revealed in August 2013 that its employees "had violated privacy rules on nearly 3,000 occasions in a one-year period."[288] These violations involved overseas communications. Typically, employees were spying on a partner or spouse.[289]

The Section 215 bulk telephone metadata collection program suffered from substantial misuse almost from its inception. FISC Judge Reggie Walton noted in March 2009 that, for the prior two-and-a-half years, the NSA had searched all incoming metadata using an "alert list" of identifiers potentially associated with terrorists.[290] But that alert list had been created for another purpose, and almost 90% of the numbers on the list did not meet the "reasonable articulable suspicion" standard that governed the Section 215 collection program.[291] In addition, as a result of inadequate training, "31 NSA analysts had queried the [business records] metadata during a five day period in April 2008 '*without being aware they were doing so*.'"[292] These "accidental" queries relied on 2,373 foreign telephone identifiers for which there had been no prior determination of reasonable articulable suspicion.[293] Judge Walton concluded that the minimization procedures had been "so frequently and systematically violated that it can fairly be said that this critical element of the overall [business records] regime has never functioned effectively."[294]

In light of these vulnerabilities, any predictive surveillance program must make security a top priority. The President's Review Group recommended improvements to the process of vetting personnel for security clearances and improvements to the security classification system itself.[295] And, perhaps in direct response to the Snowden disclosures, the

285. Tom Hays, *NYC Cases Show Crooked Cops' Abuse of FBI Database*, ASSOCIATED PRESS, July 7, 2013.

286. *Id.*

287. Gorman, *supra* note 250.

288. *Id.*

289. *Id.*

290. *In re* Prod. of Tangible Things from [redacted], No. BR 08–13, 2009 WL 9150913, at *2–4 (FISA Ct. Mar. 2, 2009).

291. *Id.* at *2 (internal quotation marks omitted).

292. *Id.* at *4.

293. *Id.*

294. *Id.* at *5.

295. PRESIDENT'S REVIEW GRP. ON INTELLIGENCE & COMMC'NS TECHNOLOGIES, *supra* note 1, at 233–34.

President's Review Group recommended that "security clearances should be more highly differentiated, including the creation of 'administrative access' clearances that allow for support and information technology personnel to have the access they need without granting them unnecessary access to substantive policy or intelligence material."[296]

*F. Security Against Data Breaches*

The risk of external data breaches is undeniable.[297] Governments are just as vulnerable to breaches as private organizations. Comprehensive databases like the ones required for predictive surveillance could present extremely attractive targets for hackers. The harms that can flow from external breaches include identity theft, financial fraud, and emotional distress.[298] Breaches can occur when external agents hack into databases, but they can also occur when insiders disclose data unintentionally—as when an employee loses a laptop computer or USB drive[299]—or intentionally—as when a systems analyst downloads top-secret, classified documents, flees the country, and shares them with the global media.[300]

Given these risks, no predictive surveillance program should be authorized unless the NSA secures its hardware, software, and procedures against external threats. The President's Review Group recommended that networks carrying classified data be equipped with programs that "record network traffic for real time and subsequent review to detect anomalous activity, malicious actions, and data breaches."[301] The group also recommended that agencies expand their use of procedures that limit employees' access to data for which they are specifically authorized.[302]

*G. Increased Oversight and Transparency*

The prospect of a vast database containing information about every citizen would raise serious public concerns about misuse and abuse of power. Given our nation's history of intelligence abuses, the public will be reluctant to accept such pervasive data collection without strong over-

296. *Id.* at 234.

297. Brookman & Hans, *supra* note 251, at 2.

298. *Id.*

299. For example, the Department of Health and Human Services offers an online tool allowing the public to find notice of data breaches involving unsecured medical information affecting over 500 people. *See Breaches Affecting 500 or More Individuals*, U.S. DEP'T OF HEALTH & HUM. SERVICES OFF. FOR CIV. RTS., https://ocrportal.hhs.gov/ocr/breach/breach_report.jsf (last visited Feb. 12, 2015). A search for breaches involving lost or stolen laptops reveals scores of breaches in 2013, the top two of which affected a combined 1.5 million people. For a comprehensive and searchable chronology of data breaches, see *Chronology of Data Breaches Security Breaches 2005–Present*, PRIVACY RIGHTS CLEARINGHOUSE, http://www.privacyrights.org/data-breach/ (last updated Dec. 31, 2013).

300. *See, e.g.*, Greenwald et al., *supra* note 250.

301. PRESIDENT'S REVIEW GRP. ON INTELLIGENCE & COMMC'NS TECHNOLOGIES, *supra* note 1, at 247–48.

302. *Id.* at 248.

sight by the other branches of government and without enough transparency to allow the public to know that the program is working properly.

The first step toward both oversight and transparency would be to introduce a public advocate into the FISA system. Currently, FISA requires that proceedings before the FISC are ex parte so the FISC hears only from the government.[303] The President's Review Group found that, when FISA was first enacted, Congress assumed that the FISC "would resolve routine and individualized questions of fact, akin to those involved when the government seeks a search warrant."[304] Since 1978, however, changes in law and technology have presented challenging and novel issues that would benefit from the adversarial system that is the norm in American courts.[305]

The President's Review Group recommended, therefore, that Congress amend FISA to include a Public Interest Advocate who would appear before the FISC.[306] Similarly, Congressman Adam Schiff has introduced legislation that would require the Privacy and Civil Liberties Oversight Board (PCLOB) to appoint attorneys to serve as public interest advocates before the FISC.[307] The proposed legislation would also require the PCLOB to appoint "technical experts" to advise the advocates on issues likely to arise in FISA cases, such as "computer networks, telecommunications, encryption, and cybersecurity."[308] And the proposed legislation would require that the FISC appoint a privacy advocate in "any matter before a covered court involving a significant interpretation or construction of a provision of this Act, including any novel legal, factual, or technological issue or an issue relating to the Fourth Amendment."[309]

Predictive surveillance programs by their nature would pose significant risks to privacy and civil liberties. Accordingly, independent advocates should represent the public interest by testing the government's initial data collection application and proposed methodology, as well as the government's subsequent petitions to conduct surveillance based on its findings.

303. 50 U.S.C. § 1805(a) (2012) (referencing ex parte orders).
304. PRESIDENT'S REVIEW GRP. ON INTELLIGENCE & COMMC'NS TECHNOLOGIES, *supra* note 1, at 203.
305. *Id.*
306. *Id.* at 202–03.
307. Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (2013).
308. *Id.* at § 2(a)(1)(D).
309. *Id.* at § 2(b)(i)(1). There are other proposed solutions as well. For example, Representative Steven Lynch introduced the Privacy Advocate General Act of 2013, which would establish an Office of the Privacy Advocate General in the Executive branch and would allow the Chief Justice and the senior Associate Justice to jointly appoint the Privacy Advocate General for seven-year terms. H.R. 2849, 113th Cong. § 2(a) (2013). For a discussion of potential constitutional issues surrounding the appointment of a public advocate, see ANDREW NOLAN ET AL., CONG. RESEARCH SERV., R43260, INTRODUCING A PUBLIC ADVOCATE INTO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT'S COURTS: SELECT LEGAL ISSUES *passim* (2013).

Second, the FISC's decisions should be made public so that Congress and the people could consider how the FISC was interpreting a predictive surveillance program. During the Patriot Act reauthorization debate in 2011, Senator Ron Wyden tried and failed to attach an amendment forcing the Attorney General to disclose the government's secret interpretation of Section 215, the business records provision.[310] Instead, the government's broad interpretation of relevance in Section 215 remained secret until the administration's declassification of certain FISC decisions in the wake of the Snowden disclosures.[311] To avoid such unpleasant surprises, FISC opinions should be made public, redacted as necessary to protect national security.[312] Obviously there will be highly sensitive information that must be redacted. Otherwise, the FISC opinions should be released to the public. We have seen the declassification and public disclosure of over twenty-five FISC orders in the wake of the Snowden disclosures.[313] Some have been heavily redacted, but the redactions appear sensible—such as redacting information about the selectors that the NSA can use to query the database.[314] These releases suggest that FISC opinions could be routinely redacted as needed and released to the public.

Third, the program should require frequent and detailed reporting to Congress. As described above, most members of Congress were not informed of the details of the Section 215 bulk telephone metadata program until it became public.[315] A predictive surveillance program must never be allowed to operate under Congress's radar. The disclosures must be sufficiently detailed to enable Congress to balance the program's benefits against the threat to civil liberties. Relevant details would include the numbers of individual records collected, the types of predictive analytics employed, the results of each instance of data analysis,[316] the number of targeted searches that were conducted as a result of the data analysis, the outcomes of investigations in which those targeted searches were used, and the extent to which the predictive analytics played a role in those outcomes.

310. Spencer Ackerman, *There's a Secret Patriot Act, Senator Says*, WIRED (May 25, 2011, 4:56 PM), www.wired.com/2011/05/secret-patriot-act.

311. Ellen Nakashima & Carol D. Leonnig, *Declassification of FISC Document Being Urged*, WASH. POST, Oct. 13, 2013, at A05.

312. The President's Review Group recommended declassification reviews of FISC opinions. PRESIDENT'S REVIEW GRP. ON INTELLIGENCE & COMMC'NS TECHNOLOGIES, *supra* note 1, at 201.

313. *IC on the Record*, OFF. OF THE DIR. OF NAT'L INTELLIGENCE, http://icontherecord.tumblr.com/tagged/declassified (last visited Feb. 13, 2015) (releasing selected court documents, testimony, and position papers relating to activities of the intelligence community).

314. *See, e.g.*, *In re* Application of the FBI for an Order Requiring Prod. of Tangible Things from [Redacted], No. BR 14-01, slip op. at 8-12 (FISA Ct. Jan. 3, 2014), *available at* http://www.dni.gov/files/documents/BR%2014-01%20Redacted%20Primary%20Order%20(Final).pdf (last visited Feb. 13, 2014).

315. *See supra* notes 310–11 and accompanying text.

316. Those results would already be reported to the Foreign Intelligence Surveillance Court. *See supra* Part V.B.

Finally, to maximize the opportunity for legislative oversight and give the people an ongoing voice in the process, legislation authorizing a predictive surveillance program should require frequent reauthorization.[317] The prospect of reauthorization would ensure periodic debate and would give the intelligence community a strong incentive to be as forthcoming as possible in order to persuade Congress of the merits of reauthorization. The most recent authorization of the Section 215 program was a four-year authorization.[318]

## CONCLUSION

There is nothing new about predictive analytics. The techniques have been in use for years in the private and public sectors. But the government uses to date have involved data already in the government's hands. What the NSA's bulk surveillance programs added to the picture was the government's potential to collect and store pervasive data on a global scale. Although bulk collection may face technological and political obstacles today, those obstacles likely will not last forever. When the government gains the technological ability and political will, we will face a new model of predictive surveillance—a model that may have potential benefits but that poses a tremendous threat to privacy.

To mitigate the privacy threat while still yielding the potential benefits, we will need a new regulatory scheme. Because the first step of predictive surveillance will be to collect all the data, we cannot rely on the traditional first step of having the judge assess the justification for the government's targeting decision. Instead, the judge must ensure that the data collection and analysis are supported by a scientifically valid theory, and the people must have their privacy interests represented by a public advocate during this stage. Beyond these two new features, the remaining elements of the regulatory scheme are merely very stringent versions of existing regulatory schemes that involve rigorous independent oversight and transparency.

If predictive surveillance ever demonstrates real potential to deter terrorism, it is difficult to imagine the courts holding that predictive surveillance cannot be constitutional under any circumstances. Recognizing that reality, this Article offers a narrow theory on which predictive surveillance might comply with the Fourth Amendment. Relying on the *Keith* case and the special needs cases will allow courts to draw a line between antiterrorism efforts and the inevitable attempts to expand the predictive surveillance uses to ordinary law enforcement needs. The special needs aspect of this Article's approach would also translate well to

---

317. For example, Section 215 of the USA PATRIOT Act, as modified by the USA PATRIOT Improvement and Reauthorization Act of 2005, will sunset on June 1, 2015. PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, § 2(a), 125 Stat. 216, 216 (2011).

318. *Id.*

government data collection efforts on a local scale, rather than a global one. For example, systems of automated license plate readers might be constitutional when used for purposes such as collecting tolls and monitoring traffic patterns. However, the programs would exceed their constitutional mandate if government sought to expand them to ordinary law enforcement investigations. Given the reality that courts are unlikely to strike down suspicionless data collection programs in their entirety, this Article's narrow and pragmatic approach may offer the best course to protecting privacy.

# *SEC v. Shields*: For Investors, A Bad Presumption Yields Bad Results


## Abstract

Everyone knows the old saying about what happens when you assume. But when you presume, and the presumption is bad, the results are even worse. Currently, there is a presumption that general partnerships and joint ventures are not securities. Therefore, if the difficult burden of rebutting that presumption is not met, an investor who purchases a general partnership or joint venture is not protected by federal securities laws.

This Comment argues the presumption goes against the entire reason federal securities laws were created: to protect inexperienced investors from fraud in the securities industry. The presumption creates a potential loophole to federal securities laws. A promoter can create a product, structure and describe it as a general partnership or joint venture, and the product is presumably not a security and not subject to federal securities laws. If something goes wrong, the burden falls on the investor to rebut the presumption and prove the product is a security. This burden ranges from extremely difficult to meet to impossible, depending on the circuit.

A better presumption, and one more consistent with the securities industry as a whole, is to focus not only on the product being sold, but also on who is purchasing the product. If the purchaser is an inexperienced investor, the individual should be protected by federal securities laws. They were specifically designed to protect the inexperienced investor, so no presumption should take that protection away. The only benefit of the current presumption is a savvy promoter can get around federal securities laws simply by naming a product a general partnership or joint venture. No promoter should have that power.

TABLE OF CONTENTS

INTRODUCTION .......... 540
I. BACKGROUND .......... 541
*A. Securities Acts* .......... 541
*B.* SEC v. W.J. Howey Co. .......... 542
*C.* Williamson v. Tucker .......... 544
II. *SEC V. SHIELDS* .......... 548
*A. Facts* .......... 548
*B. Procedural History* .......... 550
*C. Majority Opinion* .......... 550
III. ANALYSIS .......... 553
*A. Circuit Court Split* .......... 553
*B. What Is in a Name?* .......... 555
*C. How Will the United States District Court for the District of Colorado Decide the Case on Remand?* .......... 557
CONCLUSION .......... 560

## INTRODUCTION

In *SEC v. Shields*,[1] the United States Court of Appeals for the Tenth Circuit addressed the issue of whether particular Joint Venture Agreements (JVAs) soliciting investments in oil and gas exploration and drilling were investment contracts subject to federal securities regulations as defined by the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act) (collectively, the Securities Acts).[2] If not, the JVAs were not securities over which the SEC could exercise jurisdiction.

The Securities Acts were designed to protect inexperienced investors from fraud. Currently, a presumption exists that general partnerships and joint ventures are not securities subject to the Securities Acts.[3] This presumption creates an extremely difficult burden, which, unless overcome, denies inexperienced investors the very protection the Securities Acts were designed to provide, simply because the promoter was savvy enough to call the product a general partnership or joint venture.

Part I of this Comment summarizes the Securities Acts and two significant cases the court relied on in reaching its decision: *SEC v. W.J.*

1. 744 F.3d 633 (10th Cir. 2014).
2. *Id.* at 636.
3. *See, e.g.*, Banghart v. Hollywood Gen. P'ship, 902 F.2d 805, 807 (10th Cir. 1990) (per curiam).

*Howey Co.*,[4] and *Williamson v. Tucker.*[5] Part II presents the facts of *Shields*, the procedural history, and the majority opinion. Part III discusses the circuit court split regarding if and how the *Williamson* test is applied, as well as the power of the name and structure of an investment in determining whether the Securities Acts apply, and also examines how the district court might decide the case on remand.

## I. BACKGROUND

### *A. Securities Acts*

After the stock market crash of 1929, which led to the Great Depression, two important pieces of federal legislation were passed to regulate the securities markets[6]: the Securities Act of 1933[7] and the Securities Exchange Act of 1934.[8] The Securities Act, often called the "truth in securities" law, "has two basic objectives: [1] requir[ing] that investors receive financial and other significant information concerning securities being offered for public sale; and [2] prohibit[ing] deceit, misrepresentations, and other fraud in the sale of securities."[9]

Requiring securities to be registered with the Securities and Exchange Commission (SEC) accomplishes the goal of disclosing important financial information about a security.[10] Although there are certain exceptions and exemptions, generally securities sold in the United States must be registered.[11] Registration statements and prospectuses are filed with the SEC and made publically available on the EDGAR.[12] These documents contain "a description of the company's . . . business; a description of the security to be offered for sale; information about the management of the company; and financial statements certified by independent accountants."[13]

The Exchange Act created the SEC and gave the agency "broad authority over all aspects of the [U.S.] securities industry."[14] The Exchange

---

4. 328 U.S. 293 (1946).

5. 645 F.2d 404 (5th Cir. 1981).

6. W. Taylor Marshall, Note, *Securities Law—The Securities Exchange Act of 1934—'Round and 'Round We Go: The Supreme Court Again Limits the Circumstances in which Federal Courts May Hold Secondary Actors Liable Under Section 10(b) and SEC Rule 10b-5.* Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., *128 S. Ct. 761 (2008).*, 31 U. ARK. LITTLE ROCK L. REV. 197, 200 (2008).

7. 15 U.S.C. § 77a–aa (2012).

8. 15 U.S.C. § 78a–pp (2012).

9. *The Laws That Govern the Securities Industry*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/laws.shtml#secexact1934 (last visited Nov. 18, 2014) (internal quotation marks omitted).

10. *Id.*

11. *Id.*

12. *Id.* (explaining that the EDGAR database allows users to search for companies and view any registration documents and periodic company reports filed with the SEC at www.sec.gov).

13. *Id.*

14. *Id.*

Act gives the SEC the power "to require periodic reporting . . . by companies with publically traded securities," to "identif[y] and prohibit[] certain types of conduct," and gives the SEC "disciplinary power[] over regulated entities and [individuals] associated with [those entities]."[15] These entities include brokerage firms, transfer agents, clearing agencies, and securities agencies such as the New York Stock Exchange, the NASDAQ Stock Market, and the Chicago Board of Options.[16]

*B.* SEC v. W.J. Howey Co.

In *W.J. Howey Co.*, the United States Supreme Court granted certiorari to determine if a particular investment involving a citrus grove was an investment contract subject to the Securities Acts.[17] The Howey Company owned large tracts of citrus groves in Florida and planted approximately 500 acres of citrus groves per year.[18] Half of the acreage the Howey Company kept for itself and the other half was offered to the public in an effort to finance further development.[19] In the offering, each potential customer was given a land sales contract and a service contract to tend to the land.[20] The Howey Company said it was not feasible to invest in a grove unless service arrangements were made.[21] Although the service contracts allowed a purchaser to make arrangements with any service company, the Howey Company stressed the superiority of Howey-in-the-Hills Service, Inc., a corporation under the same direct control and management as the Howey Company.[22]

The land sales contract provided a price per acre and conveyed the land by warranty deed to the purchaser.[23] Each purchaser received a tract of land not separately fenced from the adjacent land owned by other purchasers.[24] In fact, "the sole indication of several ownership [was] found in small land marks intelligible only through a plat book record."[25]

The service contract gave Howey-in-the-Hills Service, Inc. a lease interest on each tract of land and "full and complete" possession.[26] This gave the company full discretion to use its skilled personnel and full inventory of equipment to cultivate, harvest, and market the crops.[27] The purchaser had no right to market the crops because there was no right to

15. *Id.*
16. *Id.*
17. 328 U.S. 293, 294 (1946).
18. *Id.* at 295.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 296 (internal quotation marks omitted).
27. *Id.*

specific fruit.[28] Instead, all fruit was pooled together for sale and each purchaser was entitled to a portion of the profit.[29] Most purchasers were not residents of Florida, and did not possess the "knowledge, skill and equipment necessary for the care and cultivation of citrus trees."[30] Instead, they were attracted by the potential for significant profits from their investments.[31]

There are many different types of investment interests included in the definition of a security subject to registration with the SEC.[32] In an alleged violation of the Securities Acts, the SEC sought to restrain the Howey Company "from using the mails and instrumentalities of interstate commerce in the offer and sale of unregistered and nonexempt securities."[33] The district court denied the injunction and the Fifth Circuit affirmed on the basis that "an investment contract is necessarily missing where the enterprise is not speculative or promotional in character and where the tangible interest which is sold has intrinsic value independent of the success of the enterprise as a whole."[34]

The Supreme Court held that the land sales contracts were securities, rejecting the Fifth Circuit's reasoning, and stated:

> The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. If that test be satisfied, it is immaterial whether the enterprise is speculative or non-speculative or whether there is a sale of property with or without intrinsic value.[35]

The Court recognized the need for a broad definition of the term investment contract to encompass the many different types of instruments that needed to fall within the scope of a security under the Securities Acts. That definition, "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."[36]

The Supreme Court ultimately held the transactions were investment contracts and reversed the decision of the lower courts.[37] The lower courts had treated the land sales contract and the service contract "as

---

28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. 15 U.S.C. § 77b(a)(1) (2012).
33. *Howey*, 328 U.S. at 294.
34. *Id.* at 301.
35. *Id.*
36. *Id.* at 299.
37. *Id.* at 301.

separate transactions involving no more than an ordinary real estate sale and an agreement by the seller to manage the property for the buyer."[38]

The Supreme Court disagreed, stating they were investment contracts because the Howey Company was offering more than an interest in land or a farm coupled with management services.[39] Rather, it was offering, to persons who lived in different parts of the country and lacked the equipment and expertise to successfully operate a citrus farm, an opportunity to invest in and share the profits of a professionally managed citrus fruit enterprise.[40] These persons had no interest in developing the land themselves, or even occupying it.[41] They were "attracted solely by the prospects of a return on their investment."[42]

The Court called it a "profit-seeking business venture . . . . The investors provide[d] the capital and share[d] in the earnings and profits; the promoters manage[d], control[led] and operate[d] the enterprise."[43] Finally, the Court made it clear the structure of an offering, not the name, would determine whether it is an investment contract, and that an investment contract can take on many forms:

> It follows that the arrangements whereby the investors' interests are made manifest involve investment contracts, regardless of the legal terminology in which such contracts are clothed. The investment contracts in this instance take the form of land sales contracts, warranty deeds and service contracts which respondents offer to prospective investors.[44]

### *C.* Williamson v. Tucker

In *Williamson v. Tucker*, the issue before the United States Court of Appeals for the Fifth Circuit was whether certain real estate joint venture interests were securities within the definition of the Securities Acts.[45] Between 1969 and 1971, through a series of different transactions, the land interests were sold to the defendants in three separate but similar joint ventures.[46] Here, the defendants owned a tract of land in Texas near the site of the newly announced Dallas/Fort Worth airport.[47] The transactions were all arranged by Godwin Investments, and the defendants invested in each separate joint venture.[48] Each joint venture had approxi-

38. *Id.* at 298.
39. *Id.* at 299.
40. *Id.* at 299–300.
41. *Id.* at 300.
42. *Id.*
43. *Id.*
44. *Id.*
45. 645 F.2d 404, 416 (5th Cir. 1981).
46. *Id.* at 407–08.
47. *Id.* at 407.
48. *Id.* at 408.

mately fifteen investors, including the defendants.[49] The purchases were each financed by a promissory note issued by the respective joint venture.[50]

Godwin Investments created marketing materials that analyzed the development of other major airport areas and suggested this was a similar opportunity, "[o]f course, an international airport of this immense size will undoubtedly have a tremendous effect on the values and development of nearby land, and its eventual economic contribution might be far greater than the public's ability to presently comprehend!"[51]

In addition to marketing, Godwin Investments represented it would "perform all management duties, including efforts to have the land rezoned from single-family residential to its best uses."[52] Although Godwin Investments performed these activities, the participants in each of the joint ventures retained substantial control and could vote to remove Godwin Investments as the property manager.[53] Despite maintaining these joint venture rights, all plaintiffs claimed to have relied entirely on Godwin Investments until late 1975 when they began to hold joint venture meetings.[54]

The court recognized the proper starting point for analysis of investment contracts is the *Howey* test and broke it into "three distinct elements: (1) an investment of money; (2) in a common enterprise; and (3) on an expectation of profits to be derived solely from the efforts of individuals other than the investor."[55] The third element, specifically the word "solely," was the focus of the court's analysis.[56] Relying on a decision from the Ninth Circuit, the court said a broad definition of "solely" was appropriate.[57] The Ninth Circuit held that, "the word 'solely' should not be read as a strict or literal limitation on the definition of an investment contract, but rather must be construed realistically, so as to include within the definition those schemes which involve in substance, if not form, securities."[58] The rationale was that too strict an interpretation of the word "solely" would provide a loophole to avoid federal securities laws: by requiring investors to contribute some minimal effort, investors would not be relying "solely" on the efforts of others, and therefore an investment contract finding would be automatically precluded.[59]

49. *Id.*
50. *Id.*
51. *Id.* (internal quotation mark omitted).
52. *Id.*
53. *Id.* at 408–09.
54. *Id.* at 409.
55. *Id.* at 417.
56. *See id.* at 418 (internal quotation marks omitted).
57. *Id.* (citing SEC v. Glenn W. Turner Enters., Inc., 474 F.2d 476 (9th Cir. 1973)).
58. *Glenn W. Turner Enters.*, 474 F.2d at 482.
59. *Id.*

*Williamson* further pointed out "the Supreme Court has altogether omitted the word 'solely' in its most recent formulation of the investment contract definition."[60] The court referenced *United Housing Foundation, Inc. v. Forman*,[61] which summarized the *Howey* test as "the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others."[62]

The issue in *Williamson* became whether the powers possessed by the investors in the joint venture agreements were enough to preclude a finding that the joint ventures were securities.[63] There is a circuit court split on this issue—discussed in detail below—and this issue was a matter of first impression for the Fifth Circuit.[64] After analyzing a plethora of cases over various circuits,[65] the court found the Eighth[66] and Tenth Circuits'[67] approach to be most appropriate:

> [T]he actual control exercised by the purchaser is irrelevant. So long as the investor has the right to control the asset he has purchased, he is not dependent on the promoter or on a third party for "those essential managerial efforts which affect the failure or success of the enterprise."[68]

Accordingly, general partnerships and joint partnerships generally cannot be investment contracts under the Securities Acts.[69] However, "the mere fact that an investment takes the form of a general partnership or joint venture does not inevitably insulate it from the reach of the federal securities laws."[70] There is a presumption "that the investor-partner is not in fact dependent on the promoter or manager for the effective exercise of his partnership powers."[71] In order to rebut that presumption, the investor-partner must show the partnership powers were "inadequate to protect him from the dependence on others which is implicit in an investment contract."[72]

An investor who lacks the necessary experience to intelligently exercise partnership power may be dependent on the manager.[73] Reliance

---

60. *Williamson*, 645 F.2d at 418.
61. 421 U.S. 837 (1975).
62. *Id.* at 852.
63. *Williamson*, 645 F.2d at 419.
64. *Id.*
65. *Id.* at 419–21.
66. *Id.* at 420–21 (analyzing *Schultz v. Dain Corp.*, 568 F.2d 612 (8th Cir. 1978), and *Fargo Partners v. Dain Corp.*, 540 F.2d 912 (8th Cir. 1976)).
67. *Id.* at 421 (analyzing Mr. Steak, Inc. v. River City Steak, Inc., 460 F.2d 666 (10th Cir. 1972)).
68. *Id.* at 421.
69. *Id.*
70. *Id.* at 422.
71. *Id.*
72. *Id.* at 423.
73. *Id.*

on irreplaceable expertise on the part of the manager may force dependence on the part of the investor.[74] Inexperienced members of the general public who had partnership powers but were led to expect profits derived from the efforts of others may be able to show dependence.[75] In essence, "a legal right of control would have little value if the partners were forced to rely on the manager's unique abilities."[76]

However, hiring someone else to manage an investment does not fulfill the reliance requirement.[77] "It is not enough, therefore, that partners in fact rely on others for the management of their investment; a partnership can be an investment contract only when the partners are so dependent on a particular manager that they cannot replace him or otherwise exercise ultimate control."[78] This makes fulfilling the reliance requirement very difficult.

The court recognized how difficult this was, saying "an investor who claims his . . . joint venture interest is an investment contract has a difficult burden to overcome."[79] In order to overcome the presumption that dependence does not exist because investors in partnership agreements retain control:

> An investor must demonstrate that, in spite of the partnership form which the investment took, he was so dependent on the promoter or on a third party that he was in fact unable to exercise meaningful partnership powers. A . . . joint venture interest can be designated a security if the investor can establish, for example, that (1) an agreement among the parties leaves so little power in the hands of the partner or venturer that the arrangement in fact distributes power as would a limited partnership; or (2) the partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers; or (3) the partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers.[80]

None of those factors were present.[81] First, the partnership agreements gave the plaintiffs ultimate control over the joint venture.[82] Second, the plaintiffs were all high level executives at Frito-Lay and had participated in other joint ventures, so they had the necessary experience and

74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 424.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*

knowledge to adequately exercise those powers.[83] Finally, the plaintiffs did not allege Godwin Investments was uniquely qualified to manage the property or that their dependence on Godwin Investments made them incapable of finding a replacement.[84] Without one of those three factors, "meaningful powers possessed by joint venturers under a joint venture agreement do indeed preclude a finding that joint venture interests are securities."[85]

## II. *SEC V. SHIELDS*

*Williamson* focused on the reliance element of *Howey* specifically with respect to joint ventures, but courts continue to look to *Howey* as the starting point when examining whether an investment is an investment contract within the purview of the Securities Acts. *Howey* is regarded as "the seminal U.S. Supreme Court case that defined and gave life to the term 'investment contract.'"[86] In *SEC v. Shields*, the Tenth Circuit adopted the *Williamson* approach and applied its three-factor test to rebut the presumption that a general partnership is not a security.[87]

### *A. Facts*

In September 2009, Mr. Shields formed GeoDynamics, a Colorado corporation.[88] The SEC alleged Mr. Shields sold over five million dollars of interests in oil and gas joint ventures between January 2010 and May 2011.[89] Marketing the interests involved making thousands of cold calls to the general public.[90] Potential investors were enticed by promises of annual returns between 256% and 548%.[91] At the height of the operation, Mr. Shields supervised dozens of salespersons who each made over 400 cold calls per day.[92] As a result, the joint ventures were made up of investors who had never met, never had contact with one another, and were spread out across the country.[93]

Members of the general public with little or no experience in the oil and gas industry were specifically targeted, and "Mr. Shields and his staff would specifically emphasize 'the capabilities and unique qualifications of GeoDynamics as an experienced oil and gas driller and operator.'"[94] Anyone who seemed interested was sent offering documents in-

---

83. *Id.* at 424–25.
84. *Id.* at 425.
85. *Id.*
86. S. Scott Lasher & Eric B. Liebman, *The Application of* SEC v. W.J. Howey Co. *in Colorado and Other Jurisdictions*, 31 COLO. LAW. 73, 73 (2002).
87. 744 F.3d 633, 644–45 (10th Cir. 2014).
88. *Id.* at 637.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 638.

cluding a memo explaining how the venture would operate, a joint venture agreement, and a document that outlined the expected profits.[95]

> The offering documents state[d] "the Venturers will have all of the rights and will be subject to all of the liabilities of a General Partner under" Texas law, and also note[d] that GeoDynamics, as managing venturer, "takes the position that the joint venture interest[s] are not securities." Under the agreements, investors "expressly delegate[d] management of the day-to-day Operations of the Joint Venture[s]" to GeoDynamics as managing venturer.[96]

Under the agreements, GeoDynamics had broad powers and no investor had any binding power.[97] Investors had the right to vote, the right to terminate the partnership or amend the partnership agreement, the right to inspect accounting records and company reports, and the right to call partnership meetings.[98] The SEC alleged that Mr. Shields denied report requests and lied to investors to "keep them misinformed, raise more money, and prevent them from challenging his actions."[99]

According to the offering documents, each venture was to have its own separate account where each investor's money was deposited to cover the costs of the oil and gas exploration and drilling associated with each respective venture.[100] Instead, according to the SEC, all investments were comingled and deposited into accounts controlled by Mr. Shields.[101] Of the five million dollars, Mr. Shields spent two million on general business expenses, which was much more than the offering documents allowed, and spent over two million more on personal expenses.[102]

> These expenditures included: $747,685 on a private Learjet; $236,444 on luxury automobiles; $31,537 on limousine and helicopter rentals; $200,206 on rent for multiple residences; $104,734 on sporting events; $26,434 on clothing and lingerie; $2,062 on jewelry; $68,223 on home furnishings; $14,987 on electronics; $39,205 on travel; and $467,129 to Mr. Shields via "cash withdrawals, checks, or transfers to his personal bank accounts."[103]

Of the five million dollars raised, only $613,494 went to actual oil and gas exploration.[104] GeoDynamics never finished drilling, never produced

95. *Id.*
96. *Id.* (fourth and fifth alterations in original) (citations omitted).
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 638–39.
101. *Id.* at 639.
102. *Id.*
103. *Id.* at 639 n.5.
104. *Id.* at 639.

any commercial quantities of oil or gas, and did not make a single payment to any investor in any of the four joint ventures.[105]

### B. Procedural History

In September 2011, the SEC filed suit alleging violations under several provisions of the Securities Acts.[106] The SEC sought injunctions, disgorgement plus interest, an asset freeze, and recovery of assets transferred to relieve defendants.[107] The defendants filed a Rule 12(b)(6) motion to dismiss, which the district court granted without prejudice.[108] The district court held that "the SEC's allegations were 'insufficient to state a plausible claim that the joint venture interests at issue' were securities."[109] The SEC filed an appeal, which argued the district court erred in granting the motion to dismiss, claiming the joint ventures were investment contracts, and therefore securities subject to the Securities Acts.[110]

### C. Majority Opinion

Judge Seymour authored the opinion of the Tenth Circuit, reversing the district court "[b]ecause it cannot be said as a matter of law that the investments at issue are not 'investment contracts.'"[111] A motion to dismiss is not appropriate if a complaint stated a plausible claim for relief.[112] The SEC's allegations were sufficient to defeat a motion to dismiss.[113] On appeal, the issue was whether the oil interests sold by Mr. Shields and GeoDynamics were investment contracts subject to federal securities laws.[114]

To provide background to the decision, the court described why the Securities Acts were created:

> Congress enacted the Securities Acts in response to "serious abuses in a largely unregulated securities market," and for the purpose of regulating "investments, in whatever form they are made and by whatever name they are called." Congress "painted with a broad brush" in defining a "security" in recognition of the "virtually limitless scope of human ingenuity, especially in the creation of 'count-

105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 639–40.
109. *Id.* at 640 (quoting SEC v. Shields, No. 11-CV-02121-REB, 2012 WL 3886883 (D. Colo. Sept. 6, 2012)).
110. *Id.*
111. *Id.* at 636.
112. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)) (internal quotation mark omitted).
113. *Shields*, 744 F.3d at 647.
114. *Id.* at 641.

> less and variable schemes devised by those who seek the use of the money of others on the promise of profits . . . .'"[115]

The court made it clear Congress did not intend for the Securities Acts to cover all fraud, and it was up to the SEC and the courts to decide which transactions are covered.[116]

Neither side disputed that the first two elements of the *Howey* test were satisfied because investors gave money directly to Mr. Shields as a part of a common investment scheme.[117] The focus of the case was the third element of the *Howey* test: "whether the investment was 'premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.'"[118]

The court noted the JVAs were labeled as general partnerships, and in the Tenth Circuit there is a strong presumption that a general partnership is not a security because investors retain significant control.[119] The SEC argued the court should apply the *Williamson* factors to the third element of the *Howey* test to rebut that presumption.[120] The court agreed and noted that the three factors in *Williamson* were a non-exhaustive list.[121] "[W]e view the *Williamson* approach as a supplement to controlling Supreme Court and circuit precedent in determining if allegations are sufficient to raise a fact question regarding whether a particular investment is a security."[122]

The Tenth Circuit held that the district court erred in granting the motion to dismiss[123] because the SEC's allegations were "clearly sufficient to rebut the presumption that the purported general partnerships here are not securities, and to raise a fact issue concerning whether investors were relying on the efforts of Mr. Shields and GeoDynamics to significantly affect the success or failure of the ventures."[124]

The issue became "whether the investors actually had the type of control reserved under the agreements to obtain access to information necessary to protect, manage, and control their investments at the time they purchased their interests."[125] From there, each of the three factors

115. *Id.* (emphasis omitted) (citation omitted) (quoting Reves v. Ernst & Young, 494 U.S. 56, 60–61 (1990) (quoting SEC v. W.J. Howey Co., 328 U.S. 293, 299 (1946))).
116. *Id.* at 642.
117. *Id.* at 643.
118. *Id.* (quoting United Hous. Found., Inc. v. Forman, 421 U.S. 837, 852 (1975)).
119. *Id.*
120. *Id.*
121. *Id.* at 644–45.
122. *Id.* at 645.
123. *Id.* at 641, 648.
124. *Id.* at 645.
125. *Id.*

from *Williamson* were analyzed to see if they were sufficiently pleaded.[126]

First, a joint venture could be a security if the agreement gave the investor so little power that the agreement operates as a limited partnership.[127] The SEC alleged the investors lacked the control of general partners and actually had the rights of limited partners.[128] The JVAs locked investors into turnkey contracts solely with GeoDynamics as the contractor.[129] Although the JVAs gave investors voting rights, including the right to remove GeoDynamics as the managing partner, investors still had to rely on GeoDynamics as the contractor per the turnkey contracts.[130] Therefore, the "turnkey contracts were key to the success of the enterprise and profits for the investors, regardless of the venturers' power, because they were the only way these oil and gas investments could generate money."[131]

The SEC also alleged Mr. Shields marketed the investments to individuals "with little or no experience in the oil and gas industry," and he served as their only source of information.[132] Accordingly, the SEC's allegations were enough to defeat a motion to dismiss on the issue of whether the investors here meaningful control.[133]

Second, the court considered "whether 'the partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers.'"[134] Again, the court focused on the allegations of marketing to inexperienced investors: "The allegations that Mr. Shields marketed these oil and gas interests nationwide to investors with little, if any, experience in the oil and gas industry by means of over 400 cold calls a day clearly supports this conclusion."[135]

Third, the court considered "whether 'the partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers.'"[136] The SEC alleged that during his sales pitches Mr. Shields specifically emphasized GeoDynamics' unique expertise in the oil and gas industry.[137] He claimed that GeoDynamics' experience was "so unique that he was able

126. *Id.* at 645–47.
127. *Id.* at 646.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 646–47.
132. *Id.* at 647.
133. *Id.*
134. *Id.* (quoting Williamson v. Tucker, 645 F.2d 404, 424 (5th Cir. 1981)).
135. *Id.*
136. *Id.* (quoting *Williamson*, 645 F.2d at 424).
137. *Id.*

to offer—and investors depended on him for—estimated annualized profits between 256% and 548%."[138] These allegations, combined with the fact investors had no experience in the industry and relied solely on GeoDynamics per the turnkey contracts, sufficiently "raise[d] a fact issue as to whether the investors had any practical alternative to GeoDynamics."[139] The court stated:

> The district court focused only on the form of the JVAs themselves without considering the economic realities of the transactions and the investors' lack of access to information needed in order to actually use the powers reserved to them under the JVAs. When the allegations here are instead viewed in their totality, they state a plausible claim that the powers were illusory, which is sufficient to rebut the presumption that a general partnership is not a security.[140]

The court reversed the district court and remanded for further proceedings because it could not be proved that the oil interests are not investment contracts.[141]

## III. ANALYSIS

The *Shields* decision answered one question, but several remain. The Tenth Circuit adopted the full *Williamson* three-factor test, which may rebut the presumption that general partnerships and joint ventures are not securities. However, a circuit court split remains as to whether and to what extent the *Williamson* test is applied. Remaining questions involve the implications of naming and structuring an investment as a general partnership or joint venture, the effect of the presumption and the standard that must be met to rebut the presumption, and how the district court will handle the decision on remand.

### *A. Circuit Court Split*

The *Shields* decision made one thing clear; the Tenth Circuit agreed with the Fifth Circuit's approach and adopted the three examples from *Williamson* that can be used to rebut the presumption that a general partnership is not a security.[142] *Shields* called the examples "non-exhaustive"[143] by pointing to language in *Williamson*,[144] but did not provide any other examples that may rebut the presumption.

---

138. *Id.* at 647–48.
139. *Id.* at 648.
140. *Id.*
141. *Id.*
142. *Id.* at 644–45; *see supra* notes 68–69, 80 and accompanying text.
143. *Id.* at 644.
144. *Id.* at 645 ("[N]oting that other factors could 'also give rise to such a dependence on the promoter or manager that the exercise of partnership powers would be effectively precluded.'" (quoting Williamson v. Tucker, 645 F.2d 404, 424 n.15 (5th Cir. 1981))).

Perhaps the court neglected to expand that list because of the treatment of the *Williamson* approach in other circuits. The court cited cases from the Second, Sixth, Ninth, and Eleventh Circuits that followed the *Williamson* approach;[145] however, the Third and Fourth Circuits have followed different approaches.[146]

> [T]he Third Circuit took a legalistic approach, and established a bright-line rule (i.e., an irrebuttable presumption) that a general partner's interest cannot qualify as a security "because the role of a general partner, by law, extends well beyond the permitted role of a passive investor." Although the general partner alleged that the partnership agreement distributed control with respect to certain general partners as though they were limited partners, and therefore that the interests could be securities under *Williamson*, the court ruled that the Uniform Partnership Act "puts its own limitations on the extent to which a general partner can be so restricted" and that even "the most draconian restrictions on the rights of non-management partners" would not eliminate the "quantum of powers and responsibilities" which would preclude the interest from constituting a security.
>
> . . . .
>
> . . . [T]he Fourth Circuit embraced the *Williamson* presumption, but expressly rejected the second and third *Williamson* rebuttal factors. The court stated that a broad application of the *Williamson* factors "would undercut the strong presumption that an interest in a general partnership is not a security" and "would unduly broaden the scope of the Supreme Court's instruction that courts must examine the economic reality of partnership interests."[147]

Each circuit presumes a general partnership is not a security, but each takes a different approach to the question of how that presumption can be rebutted, if at all: the Second, Sixth, Ninth, Tenth, and Eleventh Circuits embracing the Fifth Circuit's full three-part *Williamson* approach;[148] the Fourth Circuit limiting the test to the first part of the *Williamson* three-part approach;[149] and the Third Circuit taking the position the presumption cannot be rebutted.[150]

---

145. *Id.* at 644 n.9 (citing United States v. Leonard, 529 F.3d 83, 90–91 (2d Cir. 2008) (applying *Williamson* and finding investment contract notwithstanding documents gave investors powers of control similar to general partnership); SEC. v. Merch. Capital, LLC, 483 F.3d 747, 755–57 (11th Cir. 2007) (same); Stone v. Kirk, 8 F.3d 1079, 1086 (6th Cir. 1993) (same); Koch v. Hankins, 928 F.2d 1471, 1476–81 (9th Cir. 1991) (applying *Williamson* to analyze whether general partnerships were investment contracts)).

146. J. William Callison, *Changed Circumstances: Eliminating the* Williamson *Presumption that General Partnership Interests Are Not Securities*, 58 BUS. LAW. 1373, 1376–77 (2003).

147. *Id.* (emphasis omitted) (footnotes omitted) (first quoting Goodwin v. Elkins & Co., 730 F.2d 99, 103, 107 (3d Cir. 1984); and then quoting Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc., 840 F.2d 236, 241 n.7 (4th Cir. 1988)).

148. *Shields*, 744 F.3d at 644 n.9.

149. Callison, *supra* note 146, at 1377.

150. *Id.* at 1376–77.

The Third Circuit created a loophole around the Securities Acts by completely rejecting the *Williamson* approach holding "that a participant who holds a general partnership interest in an enterprise . . . does not possess a security within the meaning of federal securities law."[151] This interpretation gives future promoters the power to decide, depending on how they structure and what they name their investment, whether it will be subject to the Securities Acts. No promoter should have this power. Rather, it is up to the SEC and the federal courts to decide which types of transactions involve securities and, therefore, have the protection of the Securities Acts.[152]

> Unless the courts abandon the presumption, it is likely that unscrupulous promoters will create limited liability partnerships in which vulnerable and unsophisticated general partners (the so-called "widows and orphans" that the securities laws were designed to protect) invest their money in schemes in which they rely on the promoter's efforts to generate profits. These transactions will be undertaken without the benefits of securities disclosure rules or regulatory agency oversight. When the scheme fails, the promoter will argue that there is a strong presumption that the interest is not a security and that the investor has the burden of proving on an individual-by-individual basis that he acquired an investment contract, thereby skirting rescission requirements and securities fraud liability.[153]

*B. What Is in a Name?*

The *Williamson* presumption has been "categorized as the last investment contract battlefield, i.e., whether or when interests in what are held out to be a 'general partnership' or 'joint venture' are investment contract securities."[154] However, no cases have said what a general partnership or joint venture actually is.[155] Unlike other business entities, general partnerships and joint ventures do not have to file certificates with the government, and the relationship among the parties to the agreement can be anything they choose to stipulate in the contract.[156]

Surely, naming an investment a general partnership or joint venture should be able to have as much power as it seems: "A promoter cannot evade the securities law simply by calling his otherwise obvious investment contract a 'general partnership' or 'joint venture' interest."[157] Outside of the Third Circuit, as stated in *Shields*, this is not the case, but the truth is not too far removed. There is a "strong presumption that an inter-

151. Goodwin v. Elkins & Co., 730 F.2d 99, 108 (3d Cir. 1984).
152. *See* United Hous. Found., Inc. v. Forman, 421 U.S. 837, 847–48 (1975).
153. Callison, *supra* note 146, at 1384.
154. 12 JOSEPH C. LONG & PHILIP A. FEIGIN, BLUE SKY LAW § 3:58 (2014).
155. *See id.*
156. *Id.*
157. *Id.*

est in a general partnership is not a security."[158] The Fifth Circuit reiterated this principle: "To sum up: . . . . [an investor has] an extremely difficult factual burden if they are to establish that the joint venture interests they purchased are securities."[159] Therefore, "by simply characterizing an operation as a 'general partnership' or 'joint venture,' the promoter seemingly automatically interposes a presumption that investment contracts are not involved, so that anyone claiming they are faces some very difficult obstacles to overcome it."[160]

One argument for this presumption is that sophisticated investors and institutions are normally the parties in these types of agreements and have equal bargaining power in creating general partnerships and joint ventures.[161] They understand the risks involved, should be able to transact as they see fit, and should not later be able to claim the protections of the Securities Acts to recover their loss if the investment does not perform as expected.[162] It is not against the law to make risky or even bad investments, and as long as the investor understands the risks, the Securities Acts cannot be a fallback simply because an investor lost money. The Securities Acts do not, and should not, afford that type of protection.[163]

But the Securities Acts should, and were designed to, protect inexperienced investors from fraud.[164] The courts should not impose such an extremely difficult burden, which could deny inexperienced investors the protection of the Securities Acts simply because the investment had a promoter savvy enough to call it a general partnership or joint venture.

It would not be difficult for the courts to distinguish between a situation involving sophisticated investors or institutions and one involving salesmen making hundreds of daily cold calls to thousands of members of the general public whom they have never met.[165] Accordingly, based on the experience of the investor, it would not be difficult to decide whether the Securities Acts applied. A presumption should exist, but the presumption should also focus on the investor, not only the name and structure of the investment. When an inexperienced investor purchases something that looks and acts like a security, it should be presumed to be a security protected by the Securities Acts.

158. SEC v. Shields, 744 F.3d 633, 643 (10th Cir. 2014) (quoting Banghart v. Hollywood Gen. P'ship, 902 F.2d 805, 807 (10th Cir. 1990) (per curiam)) (internal quotation marks omitted).

159. Williamson v. Tucker, 645 F.2d 404, 425 (5th Cir. 1981).

160. LONG & FEIGIN, *supra* note 154.

161. *Id.*

162. *Id.*

163. *See id.*

164. *The Laws That Govern the Securities Industry*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/laws.shtml#secexact1934 (last visited Nov. 18, 2014).

165. *See* LONG & FEIGIN, *supra* note 154.

The idea of subjecting different types of investors who invest in the same product to different rules, is not a new idea in the securities industry. The JOBS Act[166] recognized the difference between sophisticated investors and unsophisticated investors and created exemptions to certain rules if an issuer sells to an investor deemed wealthy and sophisticated enough to be "accredited."[167] Therefore, there is precedent to apply different rules to investors with different levels of wealth and sophistication.[168]

> The reasoning for the exemptions [for sophisticated investors] seems to be that offerings involving small amounts of money and/or small numbers of investors pose less of a threat to the investing public, and the investors involved are more likely to be sophisticated enough to understand the risks of investment and are better suited to protect themselves and bear the risk of loss.[169]

The JOBS Act places the burden on the issuer to prove investors are accredited and, therefore, sophisticated and wealthy enough to invest in a product not subject to the Securities Acts.[170] If an investor is not accredited, the issuer is liable if it sells that type of product to an unaccredited investor.[171]

Similarly, the difficult burden should be on the promoter to prove the investors, who bought a general partnership, were sophisticated enough that the Securities Acts need not apply. Reasonable persons would not argue that inexperienced investors deserve the protection of the Securities Acts. A presumption focused on the investor, as well as the investment being sold, would result in a more organic application of the Securities Acts to the type of persons the Acts were designed to protect.

This is not to suggest investors do not have a duty to protect themselves. If an investment sounds too good to be true, it probably is. It should be a gut feeling, almost instinctual. Similarly, if it feels like the Securities Acts should apply, they probably should.

### *C. How Will the United States District Court for the District of Colorado Decide the Case on Remand?*

In *Shields*, the Tenth Circuit reversed the district court's decision granting the motion to dismiss and remanded for further proceedings consistent with its opinion.[172] But the question remains whether the oil

---

166. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

167. *See* Joseph E. Richotte & Jennifer E. Consiglio, *Benefits, Pitfalls, and Possibilities in the JOBS Act*, *in* RECENT DEVELOPMENTS IN SECURITIES LAW (2015 ed.), *available at* 2014 WL 5465772, at *9.

168. *See id.*

169. *Id.*

170. *Id.*

171. *Id.* at *4.

172. SEC v. Shields, 744 F.3d 633, 648 (10th Cir. 2014).

and gas interests sold by Mr. Shields and GeoDynamics were investment contracts, and therefore securities, subject to the Securities Acts.[173] The Tenth Circuit analyzed each part of the *Williamson* approach and found the SEC's allegations under each were sufficient to raise an issue of fact sufficient to defeat a motion to dismiss,[174] but the decision may have done more than that.

Through an in-depth analysis of each of the three-part *Williamson* test, the Tenth Circuit all but told the district court what its decision should be on remand. The court said the SEC's allegations were "clearly sufficient to rebut the presumption that the purported general partnerships here are not securities."[175] While the allegations were found sufficient to defeat the motion to dismiss, the claim that the oil and gas interests were investment contracts must still be proved in the district court. However, the court's in-depth analysis of each part suggests the interests were, at least in its opinion, conclusively investment contracts.

The first part of the *Williamson* test provides a joint venture may be a security if "an agreement among the parties leaves so little power in the hands of the partner or venturer that the arrangement in fact distributes power as would a limited partnership."[176] The court found that even if the investors had exercised their power to remove GeoDynamics as managing partner, they still had to rely on GeoDynamics for the success of the joint venture because "[t]he turnkey contracts were key to the success of the enterprise and profits for the investors . . . [and] they were the only way these oil and gas investments could generate money."[177] The court did not explain if this was enough to meet the first part of the *Williamson* test, but it is reasonable to so infer.

In regard to the first and third parts of the *Williamson* test, it held the SEC's allegations raised issues of fact sufficient to defeat a motion to dismiss.[178] The court was even more transparent in its analysis of part two of the *Williamson* test. However, the court's analysis of the second part was not phrased in terms of sufficiency but of legal conclusion..[179]

> Second, we consider whether "the partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers." The allegations that Mr. Shields marketed these oil and gas interests nationwide to investors with little, if any, experience in the oil and gas

173. *Id.*
174. *Id.* at 645–48.
175. *Id.* at 645.
176. Williamson v. Tucker, 645 F.2d 404, 424 (5th Cir. 1981).
177. *Shields*, 744 F.3d at 646–47.
178. *Id.* at 647–48.
179. *Id.* at 647.

> industry by means of over 400 cold calls a day *clearly supports this conclusion.*[180]

By making this statement the court reached a conclusion of law, effectively finding that one of the *Williamson* factors had been met.[181] Importantly, the *Williamson* test is a factors test, not an elements test, so a joint venture interest can be designated a security if the investor can establish any one of the *Williamson* factors.[182] The court did not expressly state this was enough to meet the second part of the *Williamson* test, but saying that it *clearly* supported that conclusion rather than saying it was sufficient to defeat a motion to dismiss, as it did when discussing the other two parts of the *Williamson* test, is a powerful message to the district court.

The third part of the *Williamson* test provides a joint venture may be a security if "the partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers."[183] The court focused on allegations that Mr. Shields emphasized expertise "so unique that he was able to offer—and investors depended on him for—estimated annualized profits between 256% and 548%."[184] Further, investors had no experience in the industry and were "totally reliant on GeoDynamics and the turnkey drilling contracts for a profitable investment."[185] The court did not say this was enough to meet the third part of the *Williamson* test, but, as in the analysis of the part one, it is a reasonable inference.

*Shields* all but wrote the district court's opinion. Only time will tell if the lower court follows the not-so-subtle guidance of this decision, but it is difficult to imagine how it could reach a conclusion that the oil and gas interests were not investment contracts. Likely, determining that the oil and gas interests were investments contracts subject to the Securities Acts will be the easy part of the district court's decision. The more difficult part will be determining which sections of the Securities Acts were violated. Hopefully, the district court delivers an opinion that punishes Mr. Shields for what clearly appears to be fraud, assuming the SEC's allegations are proved, and provides precedent that furthers Congress's intent behind enacting the Securities Acts in the first place: to protect inexperienced investors from serious abuses in the securities markets.

---

180. *Id.* (emphasis added) (citation omitted) (quoting *Williamson*, 645 F.2d at 424).
181. *Id.*
182. *Williamson*, 645 F.2d at 424.
183. *Id.*
184. *Shields*, 744 F.3d at 647–48.
185. *Id.* at 648.

## CONCLUSION

Currently, the presumption that general partnerships and joint ventures are not securities remains. The *Williamson* test gives investors a small chance to rebut that presumption if they can overcome, what even the Supreme Court called, an extremely difficult burden.[186] Even so, there is a circuit split on how to apply *Williamson*, if at all. Unfortunately, the circuit split is not a simple disagreement as to whether general partnerships and joint ventures are securities. Perhaps then the circuits would be divided enough that the Supreme Court would step in and provide a better presumption to protect inexperienced investors, or at least provide some certainty. The irrebuttable presumption in the Third Circuit is the biggest outlier, and likely the only reason the Supreme Court may address the issue. However, the lower courts, to some degree, agree on the current presumption. Right or wrong, the Securities Acts currently do not apply to most transactions involving general partnerships and joint ventures. For now, buyers beware.

*Joshua Eihausen*[*]

---

186. *Williamson*, 645 F.2d at 424.

* J.D. Candidate 2016. I would like to thank Lindsey Dunn and the entire *Denver University Law Review* staff, Professor Ferguson, Professor Wells, and Steve Price for your assistance and guidance. Thank you to my family and friends for your continued love and support. Thank you Jaci, for putting up with me, setting me straight, and never letting me give up. You inspire me, motivate me, and make me a better person. I love you.

# JURISPRUDENCE VS. JUDICIAL PRACTICE: DIMINISHING *MILLER* IN THE STRUGGLE OVER JUVENILE SENTENCING

ABSTRACT

Using a case from the Kansas Supreme Court, *State v. Brown,* as an illustrative case, this Comment discusses the incremental dilution of the Supreme Court's holding in *Miller v. Alabama* and explores the constitutional consequences of this dilution. Juvenile sentencing jurisprudence reflects a long-standing tradition of treating juveniles differently than adults, the rationale for which is based on principles of reduced juvenile culpability. While previous courts imposed categorical bans on particular sentences as applied to juveniles, *Miller v. Alabama* combined two lines of precedent to strike down mandatory life without parole, affecting the process by which courts may sentence young offenders. Using the existing Eighth Amendment principle of diminished juvenile culpability and infusing the analysis with death penalty jurisprudence, the *Miller* Court required individualized consideration of a juvenile offender's mitigating circumstances before imposition of life without parole. Though *Miller*'s narrow holding is limited to mandatory life without parole, the broader *Miller* rationale is applicable to all juvenile sentencing proceedings. Juveniles are categorically less mature, less able to assess risk, and more capable of reform than adults, warranting individualized consideration of the mitigating circumstances of youthfulness prior to sentencing. However, subsequent courts have incrementally diminished *Miller*'s prospective strength using transfer decisions and declining to extend *Miller*'s narrow holding to its rational end. *State v. Brown* illustrates this incremental attack. Affirming the transfer of thirteen-year-old Brown to adult court and upholding Brown's hard twenty life sentence for felony murder, the *Brown* court diluted *Miller*. Representative of post-*Miller* court decisions, *Brown* exemplifies the ways in which subsequent courts limit *Miller*'s broader rationale and diminish the constitutional line between juveniles and adults.

TABLE OF CONTENTS

INTRODUCTION ..... 562
I. BACKGROUND ..... 566
*A. Juvenile Sentencing and the Eighth Amendment* ..... 566
1. Juveniles in the Law: Delinquency vs. Criminal Charges ..... 567
2. Juvenile Sentencing and the Eighth Amendment ..... 569
II. *MILLER V. ALABAMA* INTRODUCES INDIVIDUALIZED SENTENCING ... 572
*A.* Miller*'s Broad Rationale for Individualized Consideration is Applicable to All Juvenile Sentencing Proceedings* ..... 573
1. Individualized Consideration at the Core of Sentencing Juvenile Offenders ..... 574
i. *Miller*'s Focus on the Individual Juvenile Offender ..... 575
ii. *Miller*'s Rationale Applies to Other Mandatory Sentencing Schemes ..... 577
2. Standards for Individualized Consideration: Youthfulness as a Mitigating Factor ..... 580
III. *STATE V. BROWN* ..... 581
*A. Facts* ..... 581
*B. The Kansas Supreme Court's Analysis* ..... 583
IV. STATES ARE SLOWLY DISMANTLING *MILLER* ..... 585
*A. Incrementally Avoiding* Miller ..... 586
1. Transfer Mechanisms—Out of *Miller*'s Reach: When Mandatory Juvenile Sentencing Depends on Charging Juveniles as Adults ..... 587
i. Transfer Mechanism in *State v. Brown* ..... 590
a. The Lower Court ..... 591
b. The Kansas Supreme Court ..... 595
ii. Transfer Mechanisms in Other States ..... 597
2. Refusing to Extend *Miller*: The Narrow Holding Versus the Broad Rationale ..... 598
*B. One-Step-Down-But-Still-Mandatory Schemes* ..... 600
*C. Non-Mandatory Out: Unbridled Discretion Fails* Miller *and Amounts to De Facto Life Sentences Without Parole.* ..... 602
*D. Aggregated Sentences* ..... 605
*E. Other Ways: Felony Murder* ..... 606
V. THE CONSEQUENCES OF IGNORING *MILLER* ..... 607
CONCLUSION ..... 610

## INTRODUCTION

Juveniles are different than adults. They are less capable of assessing risk and consequence, more irrational, more malleable, and there-

fore less culpable.[1] Our nation's justice system recognizes this diminished responsibility and reflects a well-established practice of treating juveniles differently.[2] Based on categorical differences between youth and adults, the Eighth Amendment's prohibition on "cruel and unusual punishment,"[3] invokes a separate and lower threshold with regard to the treatment of juvenile offenders and proportionality in juvenile sentencing practice.[4] But how low should the threshold go?

Despite conflicting legislation at the state level,[5] modern juvenile sentencing jurisprudence has not waivered when answering this question; juveniles, being less culpable than adults, must be sentenced differently.[6] While legal treatment of juvenile offenders has evolved to reflect increased scientific insight into the development and maturation of the human brain,[7] these advances only confirm the lessened culpability of youthful offenders and encourage a system that mitigates, rather than punishes, the criminal behavior of youth.[8] Based on this rationale—that

1. Miller v. Alabama, 132 S. Ct. 2455, 2464–65 (2012) ("We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" (quoting Graham v. Florida, 560 U.S. 48, 68–69 (2010))); *see also* Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 118–21 (2013); Nick Straley, Miller*'s Promise: Re-Evaluating Extreme Criminal Sentences for Children*, 89 WASH. L. REV. 963, 970–76 (2014).

2. Elizabeth S. Scott, *"Children Are Different": Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 72 (2013) ("The Eighth Amendment opinions offer two consistent messages—that juveniles who commit offenses are less culpable than their adult counterparts and that they are more likely to reform."); *see also* Straley, *supra* note 1, at 965 ("[P]hysiological differences between teenagers and adults carry constitutional significance and require that children be sentenced differently—a principle firmly rooted in recent science and longstanding legal distinctions between children and adults."); Andrea Wood, Comment, *Cruel and Unusual Punishment: Confining Juveniles with Adults After* Graham *and* Miller, 61 EMORY L.J. 1445, 1469 (2012) ("The United States has long recognized that the differences between juveniles and adults require separate processing and treatment for juvenile offenders.").

3. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

4. Scott, *supra* note 2, at 72 ("These conclusions are based on a proportionality analysis that draws on behavioral and neurobiological research to delineate the attributes of adolescence that distinguish teenage offending from adult criminal activity: these traits include adolescents' propensity for taking risks without considering future consequences; their vulnerability to external influences, particularly of peers; and their unformed characters.").

5. *Id.* at 92–94 ("The hostility and fear that characterized attitudes toward young offenders in the 1990s resulted in policies and decisions driven primarily by immediate public safety concerns and the goal of punishing young criminals.").

6. Sean Craig, Note, *Juvenile Life Without Parole Post-*Miller*: The Long, Treacherous Road Towards A Categorical Rule*, 91 WASH. U. L. REV. 379, 386–91 (2013) ("Since the Court decided *Thompson* twenty-five years ago, its notions of what it means to be a juvenile have expanded, but the fundamental message has gone unchanged. Juveniles, by definition, are not adults, and the reality of their lives and growth make it unfair to treat them exactly as if they were."); *see also* Straley, *supra* note 1, at 966 ("In a trilogy of recent cases, the Supreme Court has recognized that juveniles differ from adults in their psychosocial and neurological makeups and therefore must be sentenced differently—even when those children have committed heinous crimes.").

7. Scott, *supra* note 2, at 81–82.

8. Christopher Slobogin, *Treating Juveniles Like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction*, 46 TEX. TECH L. REV. 103, 106 (2013); *see also* Straley, *supra* note 1, at 965–69, 976 ("The Court in *Roper*, *Graham*, and *Miller* relied upon a wealth of relatively recent neurological and psychosocial research in finding that children must be sentenced differently

youthfulness translates into lesser culpability—the United States Supreme Court has championed the creation of tangible differences between juveniles and adults in our legal system.[9] Accordingly, juvenile sentencing jurisprudence has led to a shrinking pallet of sentencing options from which courts may choose in punishing young offenders.[10]

As part of this long-standing tradition, *Miller v. Alabama*[11] widened the margin between juveniles and adults with regard to sentencing schemes by invalidating mandatory life without parole as applied to juveniles.[12] The *Miller* holding, however, did more than pick up where the previous jurisprudence left off. Rather than imposing a flat prohibition on a particular sentence as applied to juveniles, the Court announced a new way in which juveniles must be considered in the process of imposing a sentence.[13] In fact, *Miller* combined and simultaneously extended two lines of precedent:[14] on one hand, *Miller* relied on existing rationale that juveniles are constitutionally different from adults; on the other hand, the Court used adult death penalty jurisprudence as a comparative springboard to mandate individualized consideration of youthfulness when imposing the harshest sentences, such as life without the possibility of parole.[15]

While *Miller*'s narrow holding only invalidated mandatory life without parole as applied to juveniles, the Court's broader rationale is applicable in most juvenile sentencing hearings.[16] If juveniles are cate-

---

than adults. . . . And finally, barring a child from ever living outside a prison's walls 'forswears altogether the rehabilitative ideal.' It reflects 'an irrevocable judgment about [an offender's] value and place in society, at odds with a child's capacity for change.'" (second alteration in original) (quoting *Miller*, 132 S Ct. at 2465)).

9. Scott, *supra* note 2, at 72–73 ("The Court has created a special status for juveniles through doctrinal moves that had little precedent in its earlier Eighth Amendment cases. In its willingness to find severe adult sentences to be excessive for juveniles, the Court elevated the prominence of proportionality, setting aside the deference to legislatures that is a strong theme in modern Eighth Amendment law and molding constitutional doctrine in a new direction.").

10. *See* Andrew Tunnard, Note, *Not-So-Sweet Sixteen: When Minor Convictions Have Major Consequences Under Career Offender Guidelines*, 66 VAND. L. REV. 1309, 1327 (2013).

11. 132 S. Ct. 2455 (2012).

12. *See* Scott, *supra* note 2, at 76.

13. Recent Case, 127 HARV. L. REV. 1252, 1254 (2014).

14. *Id.* at 1254 n.22 ("Although the Court in *Miller* relied on two strains of precedent, . . . neither dictated the outcome: The first line of precedent—adopting categorical bans on sentencing practices that were excessively severe for a certain class of offenders—had never before been extended to include juveniles convicted of murder. The second line of precedent—requiring individualized sentencing in the capital context—had never before been applied beyond the imposition of the death penalty.").

15. Scott, *supra* note 2, at 75–76 (discussing the holding that "harsh sentence[s] could only be imposed on a juvenile after the youth had the opportunity to produce evidence of mitigation," because of the "constitutional principle announced in *Miller*—'children are different.'" (quoting *Miller*, 132 S Ct. at 2470)).

16. Alex Dutton, Comment, *The Next Frontier of Juvenile Sentencing Reform: Enforcing* Miller*'s Individualized Sentencing Requirement Beyond the JLWOP Context*, 23 TEMP. POL. & CIV. RTS. L. REV. 173, 197 (2013) ("The notion that juveniles are developmentally different from adults has no limit. . . . [T]he Court has relied on this doctrine to require that youth be treated differently than adults by the justice system. The doctrine applied with equal weight to the juvenile death penal-

gorically less culpable than adults, sentencing structures must reflect this principle; an offender's youthful status should be used to mitigate on behalf of the juvenile sentence.[17]

Despite *Miller*'s broad applicability, courts have found numerous ways to limit the application of *Miller*'s rationale. In any given case, state and circuit courts will make multiple, incremental decisions that appear reasonable in-and-of-themselves, but which produce unreasonable, even absurd results in light of *Miller*'s broad rationale. The effect of this incremental decision making is a slow dilution of *Miller*'s profound contribution to juvenile sentencing jurisprudence. And the practical outcome of diminishing *Miller* is that post-*Miller* courts will continue to make juvenile sentencing indistinguishable from that of adults.[18]

The tendency of courts to limit *Miller*'s broad rationale is illustrated, in part, by *State v. Brown*,[19] a recent Kansas Supreme Court case that ultimately declined to extend *Miller*'s narrow holding.[20] Using charging decisions (which involve a determination of whether to charge a juvenile as an adult) and a straight-line reading of *Miller*'s comparison of juvenile sentences to the harshest adult sentences, the *Brown* court held a hard twenty life sentence—an indeterminate life sentence without the possibility of parole for twenty years—did not violate the Constitution when imposed on a juvenile offender.[21] The court reasoned that a hard twenty life sentence was not the harshest punishment available for a juvenile and, therefore, not within *Miller*'s reach.[22] *Miller* used a comparison between imposing life without parole on juveniles and imposing the death penalty on adults as a springboard for requiring individualized sentencing before imposing life without parole on a juvenile. Ironically, the *Brown* court employed this same comparison to justify its conclusion that a hard twenty life sentence was not unduly harsh for a juvenile; this is, however, in direct opposition to the broader *Miller* rationale.[23]

---

ty as it did to JLWOP and juvenile *Miranda* rights. The imposition of mandatory sentences on juvenile offenders must comply with these entrenched constitutional findings." (footnotes omitted)).

17. Scott, *supra* note 2, at 74 ("Implicit in this generalization is a broader principle that the same attributes of adolescence that mitigate the culpability of the youths whose crimes the Court has reviewed reduce the blameworthiness of juveniles' criminal choices generally.").

18. *See* Ioana Tchoukleva, Note, *Children Are Different: Bridging the Gap Between Rhetoric and Reality Post* Miller v. Alabama, 4 CAL. L. REV. CIRCUIT 92, 101–02 (2013) (arguing that through transfer laws and harsh, mandatory sentences "the current system treats [children] as if they are as culpable as adults. . . .To bridge the gap between rhetoric and reality, the Court needs to take the reasoning in *Miller* to its logical conclusion."). *But see* Scott, *supra* note 2, at 95 (stating that there "is a growing tendency among lawmakers and the public to accept (once again) that young offenders are different from adults").

19. 331 P.3d 781 (Kan. 2014).

20. *Id.* at 797.

21. *Id.*

22. *Id.*

23. *See id.* ("The parallels between life-without-parole sentences and the death penalty that made *Woodson* applicable in *Miller* are not present in this case. A hard 20 life sentence does not irrevocably adjudge a juvenile offender unfit for society.").

This Comment examines the ineffectiveness of *Miller* in light of a national tendency to avoid or contain its rationale in juvenile sentencing. Using the Kansas Supreme Court holding in *State v. Brown* as an illustrative case, this Comment explores the ways in which courts have diluted *Miller*'s strength to the detriment of our constitutionally enshrined principle that juveniles are different from adults. Part II of this Comment explores the background of juvenile sentencing that contributed to the evolution of modern juvenile sentencing jurisprudence. Part III provides an analysis of the *Miller v. Alabama* holding and explores the Court's broader rationale, as applied to all juvenile sentencing. Part IV then reviews the narrow holding in *State v. Brown*, installing the case as a springboard for discussion of juvenile sentencing. Referencing *State v. Brown*, Part V analyzes the ways in which the *Miller* rationale has been incrementally diluted by transfer mechanisms and subsequent rulings, which decline to extend *Miller*. Part VI then discusses the implications of ignoring *Miller*, as it diminishes the constitutional line between juveniles and adults. Ultimately, this Comment explores the ways in which subsequent court decisions undermine the *Miller* rationale and offend the longstanding tradition of treating juveniles differently.

## I. BACKGROUND

### A. *Juvenile Sentencing and the Eighth Amendment*

Since 1899, when the first juvenile court was established in Illinois, the United States has recognized juveniles as constitutionally different from adults.[24] Before then, "juvenile offenders generally were treated by the law in the same manner as adults."[25] Yet, with rising concerns regarding the imposition of adult punishments on juveniles, states invoked a "parens patriae" role that allowed the state to be a "protector [of juveniles] rather than punisher."[26] Under this rationale, "a separate court system . . . replaced traditional notions of punishment with a 'clinical' approach emphasizing rehabilitation and treatment."[27] That is, although exclusion from criminal laws did not render juveniles exempt from all consequences, juvenile proceedings were "civil in nature, rather than criminal or adversarial."[28] This system of separation, in "reject[ing] con-

24. *See* Sara E. Fiorillo, Note, *Mitigating After* Miller*: Legislative Considerations and Remedies for the Future of Juvenile Sentencing*, 93 B.U. L. REV. 2095, 2098–99 (2013).

25. Laoise King, *Colorado Juvenile Court History: The First Hundred Years*, 32 COLO. LAW. 63, 63 (2003).

26. Kristina H. Chung, Note, *Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails*, 66 IND. L.J. 999, 1011 (1991) (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982)).

27. *Id.* at 1009.

28. *Id.* at 1010.

cepts of criminal responsibility and punishment,"[29] codified differences between juveniles and adults with regard to culpability.[30]

1. Juveniles in the Law: Delinquency vs. Criminal Charges

This approach implicated modern day notions of charging and sentencing where the axis of both concepts turned not on the crime, but rather on the juvenile.[31] This is evidenced by the fact that juvenile cases, no matter what offense a juvenile committed, were delinquency proceedings—involving determination as to whether a minor required "supervision of the court"—as opposed to the criminal proceedings imposed on adult offenders.[32] Here, "the purpose of the juvenile court was to focus on the offender" within the scope of delinquency.[33] As a result, criminal courts imposed punitive sentences based on the committed crime while juvenile courts instituted corrective measures based on the juvenile's needs.[34] This became a powerful distinction, because it saved juveniles from adult sentences by deliberately placing youth on a rehabilitative, rather than retributive track.[35]

Though forty-six states, as well as the District of Columbia, instituted juvenile courts by 1925,[36] this principle of separation enjoyed little practical effect as a result of charging decisions and sentencing schemes, which are inextricably linked. With regard to charging decisions, the law began recognizing some juveniles were "unfit for such programs, [and] thus . . . require[ed] adjudication in adult courts."[37] As such, juvenile courts were allowed to transfer juvenile offenders to face charges in

---

29. Wood, *supra* note 2, at 1468.

30. Alison Powers, Note, *Cruel and Unusual Punishment: Mandatory Sentencing of Juveniles Tried as Adults Without the Possibility of Youth as a Mitigating Factor*, 62 RUTGERS L. REV. 241, 246–47 (2009) (exploring rationale for separate juvenile courts, as juveniles had "less than fully developed moral and cognitive capacities" (quoting HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT, at 94 (2006), http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf) (internal quotation mark omitted)).

31. *See* Jennifer Taylor, Note, *California's Proposition 21: A Case of Juvenile Injustice*, 75 S. CAL. L. REV. 983, 986 (2002); *see also* Candace Zierdt, *The Little Engine That Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track*, 33 U.S.F. L. REV. 401, 420 (1999) ("A hallmark of the juvenile court, however, has always been indeterminate sentencing, which allows a judge to focus on the juvenile instead of the crime." (footnote omitted)).

32. Taylor, *supra* note 31, at 986.

33. *Id.* (quoting Sara Raymond, Comment, *From Playpens to Prisons: What the Gang Violence and Juvenile Crime Prevention Act of 1998 Does to California's Juvenile Justice System and Reasons to Repeal It*, 30 GOLDEN GATE U. L. REV. 233, 239 (2000)) (internal quotation mark omitted).

34. *Id.*

35. *See* Zierdt, *supra* note 31, at 407 ("[I]t is evident that over the years the juvenile court came to be seen as a benevolent institution, designed to help and rehabilitate children instead of to simply punish them.").

36. Wood, *supra* note 2, at 1468.

37. Brice Hamack, *Go Directly to Jail, Do Not Pass Juvenile Court, Do Not Collect Due Process: Why Waiving Juveniles into Adult Court Without a Fitness Hearing Is a Denial of Their Basic Due Process Rights*, 14 WYO. L. REV. 775, 785 (2014).

criminal court.[38] Although this waiver of juvenile jurisdiction over the young offender was to be used "only in exceptional cases,"[39] the exception has become the ever-expanding rule as more juveniles are tried as adults in the widening net of state transfer mechanisms.[40]

First, states expanded the options available for transferring a juvenile to adult criminal court, providing mechanisms for transfer by "either judicial waiver, legislative waiver, mandatory judicial waiver, or prosecutorial waiver."[41] This left juvenile offenders more exposed to prosecution as an adult.[42] What is more, most states have "once an adult, always an adult" provisions that "automatically exclude[] minors from juvenile court adjudication once they have been tried and convicted in criminal court."[43] The most common waiver, a judicial waiver, often requires the juvenile judge to consider particular factors with regard to the transfer determination, though juvenile judges have considerable discretion in deciding whether to transfer the juvenile.[44] However, in the aftermath of a violence scare during the 1980s and 90s, a new "'get tough' mentality . . . spilled over into the juvenile court system,"[45] resulting in even more statutorily prescribed transfers to limit this discretion.[46] It is clear now that "[c]urrent state law favors mandatory transfers over discretionary transfers of serious juvenile offenders to adult criminal court."[47]

---

38. Brian J. Fuller, Case Note, *Criminal Law—A Small Step Forward in Juvenile Sentencing, but Is It Enough? The United States Supreme Court Ends Mandatory Juvenile Life Without Parole Sentences;* Miller v. Alabama, *132 S. Ct. 2455 (2012)*, 13 WYO. L. REV. 377, 379–81 (2013).

39. Lisa A. Cintron, Comment, *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court*, 90 NW. U. L. REV. 1254, 1261 (1996) (quoting Jeffrey S. Schwartz, Note, *The Youth Offender: Transfer to the Adult Court and Subsequent Sentencing*, 6 CRIM. JUST. J. 281, 290 (1983)) (internal quotation marks omitted).

40. David Pimentel, *The Widening Maturity Gap: Trying and Punishing Juveniles as Adults in an Era of Extended Adolescence*, 46 TEX. TECH L. REV. 71, 86–89 (2013); *see also* Slobogin, *supra* note 8, at 103 ("Numerous states increased the types of crimes that trigger transfer and most also lowered the age at which it could occur . . . .").

41. Hamack, *supra* note 37, at 778; *see* Christine Chamberlin, Note, *Not Kids Anymore: A Need for Punishment and Deterrence in the Juvenile Justice System*, 42 B.C. L. REV. 391, 399 (2001) ("Between 1992 and 1997, forty-four states and the District of Columbia enacted legislation expanding the transfer of jurisdiction over juveniles.").

42. *See* Zierdt, *supra* note 31, at 414–22 ("Today, however, we are moving away from the rehabilitative ideal in juvenile court by making the juvenile court resemble an adult criminal court or by certifying juveniles to stand trial in adult court.").

43. Andrea Knox, Note, Blakely *and Blended Sentencing: A Constitutional Challenge to Sentencing Child "Criminals,"* 70 OHIO ST. L.J. 1261, 1274 (2009) (internal quotation marks omitted) ("Thirty-four states currently have 'once an adult, always an adult' provisions on their books.").

44. Zierdt, *supra* note 31, at 418.

45. Hamack, *supra* note 37, at 787–88.

46. *Id.* at 788; *see also* Slobogin, *supra* note 8, at 103 ("A third of the states also enacted statutes authorizing prosecutorial waiver or 'direct file,' while the number of jurisdictions that adopted 'automatic' transfer regimes for designated crimes (rather than leaving that decision to the discretion of the juvenile court or the prosecutor) more than doubled to thirty-one."); Zierdt, *supra* note 31, at 418 ("[B]ecause the public often views these judges as too lenient, a popular method of increasing transfers is to limit the judge's discretion in the transfer decision.").

47. Cintron, *supra* note 39, at 1254; *see also* Slobogin, *supra* note 8, at 104 ("While in the past several years some states have reduced the scope of transfer or have raised the age for criminal court jurisdiction, the latter number has stayed fairly constant since 2000." (footnote omitted)).

Second, while most statutes limit transfers "to juveniles of a minimum age who have been charged with specific offenses,"[48] states have consistently lowered this minimum age at which a juvenile may be charged as an adult, instituting a "trend of *lowering* rather than raising the age of juvenile criminal liability."[49] For example, in the late 1990's, Missouri lowered its minimum transfer age to twelve from fourteen; Indiana lowered its minimum age to ten from sixteen; and twenty-two states "no longer impose[d] any minimum age requirement for at least one method of transferring jurisdiction to adult court."[50] Many of these legislative changes were proffered in the wake of a perceived increase in violence, rising from the sensationalism of press, not from consideration of long-enduring tenets of the juvenile court or from consideration of the juveniles themselves.[51] As states widened their nets with regard to transfers, increasing numbers of juveniles became ensnared in the adult criminal system.[52]

In effect, "[t]he liberalization of transfer laws . . . seems to reflect this logic; the fact that someone is a juvenile is not itself a sufficient basis for granting the leniency afforded by the juvenile criminal justice system."[53] As a result, "many of the transfer statutes are keyed not to the maturity level of the offender, but to the seriousness of the offense,"[54] which not only offends the rehabilitative rationale underlying juvenile courts, but results in harsher sentences without achieving the hoped-for deterrence.[55]

2. Juvenile Sentencing and the Eighth Amendment

With state transfer laws funneling more juveniles into adult court,[56] which changed the sentencing schemes applied to those juveniles,[57] the

---

48. Chamberlin, *supra* note 41, at 400.

49. Thompson v. Oklahoma, 487 U.S. 815, 867 & n.3 (1988) (Scalia, J., dissenting) (citing multiple state laws lowering the applicable waiver age).

50. Chamberlin, *supra* note 41, at 399.

51. Zierdt, *supra* note 31, at 419.

52. Slobogin, *supra* note 8, at 104 ("In New York State alone, this move led to the adult prosecution of over 45,000 youths aged sixteen and seventeen in 2010. . . . [A]nd the number of juveniles under eighteen prosecuted as adults skyrocketed from somewhere between 10,000 and 15,000 a year to 250,000 a year." (footnotes omitted)).

53. Pimentel, *supra* note 40, at 89.

54. *Id.* at 91.

55. *See id.* at 86; *see also* Robert Anthonsen, Note, *Furthering the Goal of Juvenile Rehabilitation*, 13 J. GENDER RACE & JUST. 729, 741 (2010) (discussing numerous studies that show "adult criminal sentencing and the threat of adult criminal sentencing have proven ineffective in deterring juvenile crime and recidivism"); Cynthia R. Noon, Comment, *"Waiving" Goodbye to Juvenile Defendants, Getting Smart vs. Getting Tough*, 49 U. MIAMI L. REV. 431, 453–54 (1994) (discussing how legislative waivers are inconsistent with the rehabilitative goals of juvenile courts because "they focus on the offense rather than the individual juvenile's characteristics").

56. *See* Wendy N. Hess, *Kids Can Change: Reforming South Dakota's Juvenile Transfer Law to Rehabilitate Children and Protect Public Safety*, 59 S.D. L. REV. 312, 313 (2014) (stating there are about "250,000 children under age eighteen who are sent to the U.S. adult criminal system every year").

Supreme Court began to consider whether applying certain harsh adult sentences to juveniles was constitutional.[58] Specifically, the Court invoked the same rationale used to establish juvenile courts, insisting that youth were different from adults because "their irresponsible conduct is not as morally reprehensible as that of an adult" due to their lack of experience, education, and lesser intelligence,[59] and that such differences carried Eighth Amendment implications with regard to sentencing.[60] As a result of this rationale, the Court proffered a series of decisions, which incrementally explored the question: to what extent is criminal sentencing required to treat juveniles differently?

The Court began chipping away at harsh juvenile sentencing in *Thompson v. Oklahoma*,[61] a case in which a fifteen-year-old was convicted of homicide and sentenced to death.[62] Holding the death penalty for a juvenile offender under the age of sixteen is unconstitutional, the Court reasoned that "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage."[63] Accordingly, the Court weighed the need for "punishment [to] be directly related to . . . personal culpability,"[64] and assessed the "differences which must be accommodated in determining the rights and duties of children as compared with those of adults."[65] The Court found the death penalty, as applied to a fifteen-year-old, antithetical to the purpose of the penalty: "the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children" made principles of retribution "inapplicable" and notions of deterrence unfounded.[66] Here, the *Thompson* Court returned to the bedrock principles of juvenile courts, recognizing that "the Court ha[d] already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult."[67]

Following *Thompson*, the Court invoked this notion of reduced juvenile culpability to further limit juvenile sentencing options. In *Roper v.*

57. Chamberlin, *supra* note 41, at 403 ("Naturally, if jurisdiction over a juvenile is transferred to adult court and the juvenile is found guilty of the offense, the court may impose upon the juvenile the adult sanction appropriate for the offense.").

58. *See* Thompson v. Oklahoma, 487 U.S. 815, 824–35 (1988) (plurality opinion); *see also id.* at 867–69, 872 (Scalia, J., dissenting) (discussing the trend in lowering the age at which juveniles may be sentenced as adults, while considering whether the death sentence was unconstitutional as applied to a fifteen year-old).

59. *Id.* at 835 (plurality opinion).

60. *Id.* at 833–35.

61. 487 U.S. 815 (1988) (plurality opinion).

62. *Id.* at 818–19.

63. *Id.* at 834, 838 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

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

65. *Id.* at 823 (quoting Goss v. Lopez, 419 U.S. 565, 591 (1975) (Powell, J., dissenting)).

66. *Id.* at 836–37.

67. *Id.* at 835.

*Simmons*,[68] a seventeen-year-old was convicted of murder and sentenced to death.[69] The *Roper* Court held the death penalty, as applied to all persons under the age of eighteen, is unconstitutional.[70] Here, the *Roper* Court extended *Thompson*'s rationale by elaborating on the chasmic differences between juveniles and adults. First, the Court noted "[a] lack of maturity and an underdeveloped sense of responsibility . . . in youth more often than in adults . . . . result[ing] in . . . ill-considered actions and decisions."[71] Second, the Court reiterated the fact that juveniles are more "vulnerable or susceptible to negative influences and outside pressures."[72] Finally, the Court noted the malleability of juvenile character, explaining that the "personality traits of juveniles are more transitory, less fixed," and therefore more capable of reform.[73] For these reasons, the Court concluded, "juvenile offenders cannot . . . be classified among the worst offenders," as to warrant the "most severe punishment."[74]

In 2010, the Court again leveraged notions of diminished juvenile culpability to insulate youth from harsh sentences. In *Graham v. Florida*,[75] the Court reviewed a seventeen-year-old juvenile's sentence of life without the possibility of parole. The seventeen-year-old had been charged with robbery, "possessing a firearm, and . . . associating with persons engaged in criminal activity"—all violations of his 3-year probation for prior commissions.[76] The *Graham* Court held that life without the possibility of parole is unconstitutional when imposed on juveniles for nonhomicidal offenses.[77] In analyzing this "categorical challenge to a term-of-years sentence"[78] as applied to juvenile offenders, the Court continued the *Thompson* and *Roper* rationale that because juveniles possess "lessened culpability they are less deserving of the most severe punishments."[79]

However, the Court applied this rationale with specific reference to and concern for the severity of life without parole sentences as applied to juveniles convicted of nonhomicidal crimes.[80] Finding "[t]he age of the offender and the nature of the crime each bear on the analysis,"[81] the Court reasoned that life without parole was particularly ill-applied to

---

68. 543 U.S. 551 (2005).
69. *Id.* at 556.
70. *Id.* at 578.
71. *Id.* at 569 (first alteration in original) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)) (internal quotation marks omitted).
72. *Id.*
73. *Id.* at 570.
74. *Id.* at 568–69.
75. 560 U.S. 48 (2010).
76. *Id.* at 55, 57.
77. *Id.* at 74–75.
78. *Id.* at 61.
79. *Id.* at 68.
80. *Id.* at 68–75.
81. *Id.* at 69.

juveniles, when considering the "penological justifications for the sentencing practice" in light of a juvenile's diminished culpability and the nonhomicidal nature of the offense.[82] Specifically, the Court noted: "Life without parole is an especially harsh punishment for a juvenile," given the percentage of life a juvenile would spend incarcerated.[83] Because life without parole was the harshest sentence a juvenile offender could receive at that time, the Court likened this sentence to the most severe punishment available for adults—the death penalty.[84] Recognizing both sentences facilitated the same grave result,[85] and failed to satisfy penological goals of the criminal system, the Court found "the limited culpability of juvenile nonhomicide offenders" was "not adequate to justify life without parole for juvenile nonhomicide offenders."[86] In continuation of this rationale, the Court also concluded that while a state does not have to assure the ultimate release of juveniles convicted of nonhomicide crimes, it must provide those juveniles "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[87]

## II. *MILLER V. ALABAMA* INTRODUCES INDIVIDUALIZED SENTENCING

The most recent, and perhaps most controversial juvenile sentencing decision came on the heels of *Graham* in 2012. In *Miller v. Alabama*, the Supreme Court considered two cases on collateral review: two fourteen-year-olds were "convicted of murder and sentenced to life imprisonment without the possibility of parole."[88] The Court held that mandatory life without parole for juveniles was unconstitutional.[89] In making this determination, the Court relied on "the confluence of . . . two lines of precedent" expressed in *Roper* and *Graham*.[90] First, the Court reasoned, as it did in *Roper* and *Graham*, that "the distinctive attributes of youth" make children "constitutionally different from adults for purposes of sentencing."[91] The operation of this principle therefore "diminish[ed] the penological justifications for imposing the harshest sentences on juvenile offenders."[92] Second, the Court relied on *Graham*'s reasoning—drawing a parallel between life-without-parole sentences imposed on juveniles to the death penalty imposed on adults—to extend the rationale for individualized consideration of a juvenile before imposing life-without-parole."[93] Thus, and in light of this precedent, the Court concluded indi-

82. *Id.* at 63, 71–73.
83. *Id.* at 70–71.
84. *Id.* at 69–70.
85. *Id.* at 69 ("[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences.").
86. *Id.* at 71–75.
87. *Id.* at 75.
88. Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012).
89. *Id.*
90. *Id.* at 2464.
91. *Id.* at 2458, 2465.
92. *Id.*
93. *Id.* at 2466.

vidualized consideration of mitigating factors of youth is required when a juvenile faces life without possibility of parole.[94]

In combining the *Roper* and *Graham* precedents, the *Miller* Court concluded the difference between juveniles and adults is constitutionally pertinent because youth (1) lack mental maturity and responsibility; (2) are more susceptible to outside influences; and (3) are more capable of change, such that they may be rehabilitated.[95]

The Court held that because "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole,"[96] a "judge or jury must have the opportunity to consider certain mitigating circumstances before imposing the harshest possible penalty for juveniles."[97] These mitigating circumstances, laid down by the Court, included:

> "[C]hronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences," his "family and home environment," "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him," and the prospects for rehabilitation while incarcerated.[98]

### *A.* Miller*'s Broad Rationale for Individualized Consideration is Applicable to All Juvenile Sentencing Proceedings*

*Miller*'s broader rationale, despite its narrow holding, sparked a tug-of-war between the principles expressed in juvenile sentencing jurisprudence, and the actual, subsequent treatment of juvenile offenders in state and federal courts.[99] The *Miller* Court used a comparison between the death penalty, imposed on adult criminals, and life-without-parole as applied to juveniles to arrive at an individualization requirement.[100] This was a legal springboard catapulting juvenile sentencing jurisprudence forward into an individualization requirement. However, by making this comparison, *Miller* allowed subsequent courts to afford juveniles individualized protection only where a similarly situated adult criminal would receive such. To say, as this Comment does, that *Miller*'s broader rationale is being incrementally diminished, is to imply that such diminution is not warranted. It is therefore necessary to establish this founda-

---

94. *Id.* at 2467–68 ("*Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult.").

95. *Id.* at 2464; *see also* Straley, *supra* note 1, at 968 (footnotes omitted).

96. *Miller*, 132 S. Ct. at 2465.

97. *Id.* at 2475.

98. *Id.* at 2468.

99. *See* Tchoukleva, *supra* note 18, at 102 ("The Court's admission that 'children are constitutionally different from adults for purposes of sentencing' does not match the experience of juveniles in the criminal justice system." (quoting *Miller*, 132 S. Ct. at 2464)).

100. *Miller*, 132 S. Ct. at 2467.

tional premise—that the broader *Miller* rationale, rather than the narrow *Miller* holding, is an appropriately applicable standard in juvenile sentencing schemes—before exposing the lack of its proper treatment in subsequent judicial decisions.

1. Individualized Consideration at the Core of Sentencing Juvenile Offenders

The rationale expressed in *Miller*, though a continuation of the rationale used in *Thompson*, *Roper*, and *Graham*, introduced a new principle for juvenile sentencing: individualized consideration of a juvenile offender when imposing the harshest sentences.[101] Where the *Thompson* and *Roper* Courts focused on a particular sentence as applied to a category of offenders (juveniles),[102] and the *Graham* Court focused on a particular crime as disproportionate to a singular sentence with respect to that category of offenders,[103] the *Miller* Court broke new ground by focusing on the individual mitigating circumstances of the particular juvenile offender to prohibit mandatory imposition of life without parole.[104] While each Court imposed a categorical ban on particular sentences with regard to juvenile offenders, only the *Miller* Court combined this precedent with its individualization requirement to strike down the mandatory application of a particularly harsh sentence.[105] The focus on the harshest sentences is indicative of *Miller*'s intent to shape juvenile sentencing jurisprudence in a way that focuses on the individual and youthful status of a juvenile offender, rather than the crime committed or sentence applied.[106]

Though the *Miller* Court only required individualized consideration in cases where juveniles face life without parole,[107] the rationale, which justified and mandated the process of individualized sentencing, extends to all sentences imposed on juvenile offenders for two primary reasons. First, the *Miller* Court focused more on the individual circumstances of the juvenile offender than on the sentence itself, promoting a resurrection of juvenile-centered juvenile sentencing.[108] Second, the Court's rationale in requiring individualization can remain intact upon application to other mandatory juvenile sentencing schemes.

---

101. Scott, *supra* note 2, at 88.

102. Michael Barbee, Comment, *Juveniles Are Different: Juvenile Life Without Parole After* Graham v. Florida, 81 MISS. L.J. 299, 303–05, 307 (2011).

103. *Id.* at 310.

104. *See* Sonia Mardarewich, *Certainty in a World of Uncertainty: Proposing Statutory Guidelines in Sentencing Juveniles to Life Without Parole*, 16 SCHOLAR 123, 125 (2013) (implying the revolutionary nature of *Miller*'s holding).

105. Miller v. Alabama, 132 S. Ct. 2455, 2463–64 (2014).

106. Tchoukleva, *supra* note 18, at 97 (arguing that "the Court in *Miller* opened the door to a much more thorough challenge of the current system, namely the argument that *all* juveniles deserve individualized justice").

107. *Miller*, 132 S. Ct. at 2468.

108. *See id.* (discussing the rationale behind individualized sentencing for juveniles by saying "mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it").

i. *Miller*'s Focus on the Individual Juvenile Offender

Turning to *Miller*'s universally applicable rationale for individualized consideration, the Court's general focus on an offender's juvenile status is instructive in all juvenile sentencing proceedings. Rather than categorically banning life without the possibility of parole for all juveniles, the *Miller* Court held that the juvenile status of an offender triggers individualized consideration of that particular youth's mitigating circumstances in the imposition of such a sentence.[109] In a lengthy discussion of the offending juveniles, Miller and Jackson, the Court focused primarily on the mitigating circumstances attending their crimes rather than focusing on the crime.[110] Discussing Miller, the Court noted, "if ever a pathological background might have contributed to a 14-year-old's commission of a crime, it is here."[111] While acknowledging that there is no doubt he "committed a vicious murder," the Court quickly moved on to discuss how "Miller's stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times."[112]

In reference to Jackson, the Court points out that "his age could well have affected his calculation of the risk that posed, as well as his willingness to walk away" when he learned that his friend had a gun.[113] Noting that "[b]oth his mother and his grandmother had previously shot other individuals," the Court pays special attention to the individual "circumstances [that went] to Jackson's culpability for the offense."[114] Ultimately, the Court applies a great deal of weight to the individual circumstances of each offender in determining the sentence is too harsh.[115]

In turning judicial attention away from the crime and corresponding sentence towards the juvenile offender himself, the Court discusses the need for individualized consideration, saying, "At the least, a sentencer should look at such facts before depriving a 14-year-old of any prospect of release from prison."[116] Regardless of whether the Court was actually exercising "judicial minimalism"[117] in making this determination instead

---

109. *Id.* at 2469 (saying "[b]ecause that holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles," while asserting its expectation that such sentences would be "uncommon.").

110. *Id.* at 2468–69.

111. *Id.* at 2469.

112. *Id.*

113. *Id.* at 2468.

114. *Id.*

115. *Id.* (discussing how "[b]oth cases before [the Court] illustrate the problem" that arises when "imposing a State's harshest penalties [because] a sentencer misses too much if he treats every child as an adult").

116. *Id.* at 2469.

117. *See* Mary Berkheiser, *Developmental Detour: How the Minimalism of* Miller v. Alabama *Led the Court's "Kids Are Different" Eighth Amendment Jurisprudence Down A Blind Alley*, 46 AKRON L. REV. 489, 491 (2013).

of imposing a categorical ban, the door to this particular rationale was nonetheless opened and left deliberately wide open.[118]

This is especially true where a categorical ban on life without parole seems more minimalistic in effect than a lengthy combination of two precedential lines that so curiously and obviously baits the extension of individualization requirements in all juvenile sentencing. For example, had the Court imposed a categorical ban on life without parole as applied to juveniles, it could have simply extended Eighth Amendment jurisprudence in light of "the evolving standards of decency that mark the progress of a maturing society."[119] While foreclosing all opportunity to impose life without parole on juveniles, which is arguably more immediately effective,[120] a categorical ban would have left untouched a nationwide practice of treating juveniles like adults, aside from the small subset of categorically forbidden sentences. It would not have infused the sentencing inquiry with an individualization requirement, and courts would not be obliged to meaningfully consider youthfulness as a mitigating factor.[121] As a result, the door to meaningful consideration of a juvenile offender's youthfulness before the imposition of other sentences would remain closed.[122]

However, because the Court chose to build on the jurisprudence requiring individualized sentencing, lower courts should take note and begin following suit—considering juveniles as juveniles.[123] This opened the door to forward thinking that could—and arguably does—require individual consideration of juveniles before imposing any sentence.

---

118. *See* Piper Waldron, Case Comment, *Youth Matters:* Miller v. Alabama*'s Implications for Individualized Review in Juvenile Sentencing*, 46 LOY. L.A. L. Rev. 775, 776 (2013) ("*Miller* expands the Eighth Amendment as it is applied to juveniles, since its reasoning may challenge other mandatory laws that negate individualized sentencing.").

119. *Miller*, 132 S. Ct. at 2463 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)) (internal quotation marks omitted).

120. Fuller, *supra* note 38, at 392–93 ("The Court, however, should have engaged fully in the Eighth Amendment proportionality analysis and adopted a categorical rule prohibiting life without parole sentences for all juveniles. A categorical rule would still give sentencing judges ample discretion to impose a severe punishment that fulfills the penological goals of retribution, deterrence, and incapacitation while properly focusing on the juvenile offender's rehabilitation and taking youth into account as a mitigating factor." (footnotes omitted)).

121. *Id.* at 394 (noting that, while *Miller* did not provide proper guidance for subsequent courts, "courts are now required to consider youth as a mitigating factor").

122. *See id.* at 393 ("The State could best comply with *Miller* in one of two ways. First, the state can require judges to consider mitigating factors at the sentencing hearing. Second, the state can simply eliminate life without parole for juveniles." (footnotes omitted)).

123. *See id.* at 403–04 (discussing that, although, "the Court did not address whether a lengthy term of years sentence for juvenile offenders would violate the Eighth Amendment as cruel and unusual," subsequent courts have interpreted *Miller* to implicate sentences other than mandatory life without parole).

ii. *Miller*'s Rationale Applies to Other Mandatory Sentencing Schemes

In addition to focusing on the individual circumstances of an offender because of his or her juvenile status, the Court's assertion that youthfulness is a justification for diminished juvenile culpability operates as a universally mitigating factor in juvenile sentencing.[124] This opens the door to individualized sentencing of all juvenile offenders. While the Court does state that rendering youth "irrelevant . . . poses too great a risk of disproportionate punishment," when imposing only the "harshest prison sentence,"[125] the Court's rationale is applicable to all mandatory sentencing schemes, as the mitigating factors of youth are inherently present in all sentencing considerations with regard to juvenile offenders.[126] For example, the Court's discussion of the "flaws [in] imposing mandatory life-without-parole" on juveniles reveals a transferrable justification with regard to the disproportionate effects of such sentences on less culpable, youthful individuals.[127] In saying that "[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it,"[128] the Court identifies common reality inherent in all mandatory sentences applied to juveniles. The Court further expresses dissatisfaction that

> [u]nder these schemes, every juvenile [would] receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. . . . [E]ach juvenile (including these two 14-year-olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses . . . .[129]

The rationale for mitigating all juvenile sentencing with consideration of an individual offender also has an important degree of logical transferability with regard to the Court's analysis of both punitive goals and youthfulness. The punitive goals of criminal sentencing and the principles of lessened culpability due to an offender's youthfulness are equally implicated in other mandatory sentencing schemes.[130] The Court rec-

---

124. *See Miller*, 132 S. Ct. at 2464.

125. *Id.* at 2469.

126. *Id.* at 2467 (discussing the application of the mitigating qualities of youth throughout juvenile sentencing jurisprudence and recognizing that "we insisted in these rulings that a sentencer have the ability to consider the 'mitigating qualities of youth.' Everything we said in *Roper* and *Graham* about that stage of life also appears in these [prior] decisions." (citation omitted) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993))); *id.* at 2466 (discussing how the "mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations").

127. *See id.*

128. *Id.*

129. *Id.* at 2467–68.

130. *See* Waldron, *supra* note 118, at 786–90; *see also* Powers, *supra* note 30, at 254 ("[M]andatory minimums clearly disserve the best interests of juveniles tried as adults in failing to

ognized that where "'[t]he heart of the retribution rationale' relates to an offender's blameworthiness," a mandatory imposition of life without parole is scarcely useful in sentencing a less culpable offender.[131] This same rationale applies to all mandatory sentencing schemes because such schemes not only preclude consideration of a juvenile's categorically lessened culpability, but preclude individualized consideration of that juvenile as well.[132] In addition, the punitive goal of deterrence is not likely achieved by any mandatory sentencing scheme, where the *Miller* Court itself asserted, "'the same characteristics that render juveniles less culpable than adults'—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment."[133] This rationale is applicable to any mandatory sentences, where any potential punishment is likely to have little effect on juvenile actions.[134]

The second piece of *Miller*'s rationale that applies to all mandatory juvenile sentencing is the juvenile's youthful characteristics. The *Miller* Court's rationale is transferable to other mandatory sentencing schemes as the same characteristics of youth are inherent in all juveniles. For example, the *Miller* Court leans heavily on the principles expressed in *Thompson*, *Roper*, and *Graham*: "youth is more than a chronological fact";[135] it is a time when people are "most susceptible to influence and to psychological damage";[136] "it is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness'";[137] "[a]nd its 'signature qualities' are all 'transient.'"[138] The Court's own rationale for requiring individualized consideration of juveniles when imposing the "[s]tate's harshest penalties," demands extension, as "a sentencer misses too much if he treats every child as an adult" in any sentencing scheme.[139] This is especially true where "[t]he features that distinguish juveniles from adults . . . put them at a significant disadvantage in criminal proceedings."[140] Juveniles tend not to trust adults and are unable to comprehend the processes and players associated with the justice system, such that juveniles do not cooperate in their own defense—this leads to diminished quality of advocacy on a juvenile's behalf.[141]

---

consider the distinct needs and developmental level of each child offender, while providing questionable benefits, if any, to the country as a whole." (footnote omitted)).

131. *Miller*, 132 S. Ct. at 2465 (alteration in original) (quoting Graham v. Florida, 560 U.S. 48, 71 (2010)).

132. Feld, *supra* note 1, at 129.

133. *Miller*, 132 S. Ct. at 2465 (quoting *Graham*, 560 U.S. at 72).

134. Dutton, *supra* note 16, at 200.

135. *Miller*, 132 S. Ct. at 2467 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)) (internal quotation marks omitted).

136. *Id.* (quoting *Eddings*, 455 U.S. at 115) (internal quotation mark omitted).

137. *Id.* (alteration in original) (quoting Johnson v. Texas, 509 U.S. 350, 368 (1993)).

138. *Id.* (quoting *Johnson*, 509 U.S. at 368).

139. *Id.* at 2468.

140. *Id.* (quoting Graham v. Florida, 560 U.S. 48, 78 (2010)) (internal quotation marks omitted).

141. *Graham*, 560 U.S. at 78.

The Court's rationale, focusing on the juvenile offender, is transferable to mandatory sentences other than a life without parole. In fact, the *Miller* Court recognized the inherent transferability of its own rationale, stating, "[N]one of what is said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific."[142] The transferability of *Miller*'s rationale to all juvenile sentencing schemes is critical because the same dangers underlying the Court's insistence upon individualized sentencing when considering the imposition of life without parole on a juvenile are present in all other mandatory juvenile sentencing schemes, including the imposition of undeserved and disproportionate sentences.[143] Public policy would generally necessitate an extension of the Court's rationale.[144]

The Court employs one crime-specific inquiry in *Miller*. In cases of mandatory life-without-parole sentences will juveniles serve "a *greater* sentence than those adults [convicted of homicide] will serve."[145] Though this consideration turns on the particular sentence rather than the juvenile's individual circumstances, this factor alone is not dispositive in light of the Court's broader rationale.

Therefore, when determining whether to contain *Miller*'s holding, it remains critical to focus on the broader rationale to which the Court devoted its attention. This requires understanding the difference between the legal argument the *Miller* Court used to extend individualized sentencing to juveniles and the overarching rationale the Court employs as the broader justification for such an extension. The Court first focused on the harsh nature of mandatory life without parole to bridge two lines of precedent and legitimize the extension of an individualized sentencing requirement under death penalty jurisprudence; the Court's subsequent discussion and stated reasons for extending the individualized sentencing requirement, however, focused on the lesser culpability and youthful status of the juveniles themselves. This is wholly transferable to all mandatory juvenile sentencing schemes and is not foreclosed just because the *Miller* Court was not asked to decide the constitutionality of such all mandatory schemes.[146] Subsequent courts must therefore be careful not to lose sight of the rationale the *Miller* Court employed in reaching its narrow outcome. To do so, would be to mistake the means—comparing

---

142. Marsha L. Levick & Robert G. Schwartz, *Practical Implications of* Miller *and* Jackson*: Obtaining Relief in Court and Before the Parole Board*, 31 LAW & INEQ. 369, 372 (2013) (quoting *Miller*, 132 S. Ct. at 2465) (internal quotation marks omitted).

143. *See Miller*, 132 S. Ct. at 2467–68 ("Under these [mandatory] schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one."); *see also* Dutton, *supra* note 16, at 199–200.

144. Waldron, *supra* note 118, at 783–90 (recognizing that children are different).

145. *Miller*, 132 S. Ct. at 2467–68.

146. *See* Slobogin, *supra* note 8, at 110 ("[T]he majority opinion in *Miller* focused on the inability of mandatory penalties to reflect individualized desert determinations, not on the absolute length of the sentence.").

life without parole and the death penalty to extend individualized sentencing—for the end, which is simply not the case.

2. Standards for Individualized Consideration: Youthfulness as a Mitigating Factor

Of course, such individualized consideration is not synonymous with loose or unbridled discretion; rather, it must be guided by the enumerated factors and overall spirit expressed in *Miller*.[147] These factors buttress, and cannot be divorced from, the Court's holding, and for that reason, should guide subsequent courts in consideration of juvenile offenders.[148] There may be some concern—arguably well-founded concern, given lower courts' application of *Miller*—that the *Miller* decision has opened the door to unbridled discretion when courts conduct individual considerations in sentencing juveniles to life without parole.[149] However, correct application of individualized sentencing under *Miller* limits this possibility and requires, at least, that the factors of youth mitigate the severity of the crime on behalf of a juvenile, not provide a basis to aggravate a sentence.[150]

The *Miller* Court, echoing jurisprudence, outlines four mitigating factors: (1) "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences";[151] (2) background, including family and home environment; (3) mental and emotional development; and (4) circumstances of the crime, "including the extent of his participation in the conduct and the way familial and peer pressures may have affected him."[152] It is important to note, the *Miller* Court assesses these factors with a careful eye towards how they advocate on behalf of a juvenile,[153] after noting the objective, scientific fact that youth have a "diminished culpability and heightened capacity for change."[154] Thus, while the Court engages a subjective analysis of the juvenile offenders' family background and environment and the particularities of the offenders' crimes, the Court focuses only on the

147. *Miller*, 132 S. Ct. at 2467; *see* Janet C. Hoeffel, *The Jurisprudence of Death and Youth: Now the Twain Should Meet*, 46 TEX. TECH L. REV. 29, 50 (2013) ("[I]ndividual assessments made without any guidance can lead to arbitrary and capricious decision-making, an issue that has plagued transfer decisions.").

148. *See* Waldron, *supra* note 118, at 775 (noting, in its discussion of *Miller* that "[i]ndividualized review is a comprehensive approach to juvenile sentencing, under which a court must consider mitigating factors such as susceptibility to peer pressure, underdeveloped brains, and traumatic life stories").

149. Berkheiser, *supra* note 117, at 510 ("*Miller*, with its mandate of individualized consideration at sentencing, reopens the door to all of the malignity of subjective decision-making and its fruits.").

150. *See Miller*, 132 S. Ct. at 2469 (requiring courts, before imposing sentences of life without parole, to "take into account how children are different").

151. Straley, *supra* note 1, at 995 n.181 (quoting *Miller*, 132 S. Ct. at 2468).

152. *Miller*, 132 S. Ct. at 2468.

153. *Id.* at 2468–69.

154. *See id.*

mitigating aspects of those factors. For example, the Court observed one of the offenders, Jackson, had a background of family "immersion in violence," after noting that a juvenile cannot remove himself from certain family situations, "no matter how brutal or dysfunctional."[155] This provides guidance as to how these factors should be weighed by subsequent courts, as the *Miller* Court appears to affirm the *Roper* Court's mandate that a juvenile offender's youthfulness not be "counted against him,"[156] but instead work on his behalf. There is no reason subsequent courts should fail to do otherwise,[157] and these factors, and their mitigating purpose, must be strictly employed by courts to mitigate harsh sentences, not exacerbate them.

## III. *STATE V. BROWN*

While *Miller*'s rationale for individualized consideration of youthful offenders is applicable to all juvenile sentencing proceedings, a wave of subsequent decisions reveal the tendency to limit *Miller*'s reach. Illustrating this trend is *State v. Brown*.[158] Interpreting *Miller*, the Kansas Supreme Court held that a mandatory hard twenty life sentence was not unconstitutional under Eighth Amendment principles.[159] In *Brown*, a juvenile offender appealed her conviction for "felony murder and attempted aggravated robbery."[160] The juvenile appealed on multiple grounds, including: (1) improper "juvenile jurisdiction waiver";[161] and (2) an unconstitutional sentence in light of the *Miller v. Alabama* ruling.[162]

### *A. Facts*

Keaira Brown was thirteen years old when she allegedly shot sixteen-year-old Scott Sappintgon, Jr. at point-blank range in an attempted robbery.[163] In light of fingerprints, DNA evidence, and eyewitness accounts connecting her to bloody clothing and to the scene of the crime, Brown was charged with felony murder based on the offense of attempted aggravated robbery.[164] The state sought "authorization to prosecute Brown as an adult,"[165] under a statute that presumed a juvenile to be a juvenile "unless good cause [was] shown to prosecute the juvenile as an

155. *Id.* at 2468.
156. Berkheiser, *supra* note 117, at 508 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)) (internal quotation mark omitted).
157. *See Miller*, 132 S. Ct. at 2468–69.
158. 331 P.3d 781 (Kan. 2014).
159. *Id.* at 797.
160. *Id.* at 785.
161. *Id.* at 785–86.
162. *Id.* at 786.
163. *Id.* at 785–86.
164. *Id.* at 786.
165. *Id.*

adult."[166] The district court waived juvenile jurisdiction using an eight-factor test that considered the following:

> "(1) The seriousness of the alleged offense and whether the protection of the community requires prosecution as an adult . . . ;
>
> "(2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
>
> "(3) whether the offense was against a person or against property[,] [with] [g]reater weight . . . given to offenses against persons . . . ;
>
> "(4) the number of alleged offenses unadjudicated and pending against the juvenile;
>
> "(5) the previous history of the juvenile, including . . . whether [prior] offenses were against persons or property . . . ;
>
> "(6) the sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living or desire to be treated as an adult;
>
> "(7) whether there are facilities or programs available to the court which are likely to rehabilitate the juvenile prior to the expiration of the court's jurisdiction . . . ; and
>
> "(8) whether the interests of the juvenile or of the community would be better served by criminal prosecution or extended jurisdiction juvenile prosecution.[167]

In consideration of these factors the court placed emphasis on the serious nature of the crime, as it was committed against another person and was particularly violent.[168] These conclusions were weighed against a finding that the evidence "fell short of establishing a likelihood Brown could be rehabilitated before juvenile jurisdiction expired."[169] The court found Brown could not be rehabilitated after testimony from a psychologist that Brown's numerous behavioral disorders could be rehabilitated in the seven years the system had left to "work with her,"[170] but that because she had "become[] aggressive at 13, [she had] a statistically greater risk of reoffending than one who becomes aggressive at 17."[171] With specific regard to the maturity factor, however, the court made oral findings that the evidence supported a "wash"; there were "aspects of Miss Brown that [were] 13 years of age, and there [were] aspects of her that

166. *Id.* at 789 (quoting KAN. STAT. ANN. § 38-2347(a)(1) (2014) (internal quotation mark omitted).

167. *Id.* (quoting KAN. STAT. ANN. § 38-2347(e) (2014)).

168. *Id.* at 788.

169. *Id.*

170. *Id.*

171. *Id.*

[were] an adult age."[172] Here "the court did not find the evidence of Brown's maturity level was enough to consider that factor in the analysis."[173] Brown's history also supported waiver of jurisdiction, where she had fired a gun and thrown rocks at a car in an altercation, hit her aunt with an iron, and sustained "57 disciplinary infractions" while housed in the juvenile detention center.[174] The court then made a more matter-of-fact finding that the community would be better protected through waiver of such jurisdiction.[175]

### *B. The Kansas Supreme Court's Analysis*

On appeal, Brown challenged three basic conclusions proffered by the lower court with regard to the waiver of juvenile jurisdiction. Brown argued: (1) the court improperly gave her the burden of proof with regard to showing the ability of rehabilitation; (2) the court erred in considering the seriousness, violence nature, and against-a-person factors separately, though their facts substantially overlapped; and (3) the court impermissibly relied on the nature of the crime and her "grooming habits" in determining that her maturity went "beyond that of juvenile."[176]

While the Kansas Supreme Court did not use *Miller* in reviewing the trial court's decision to transfer Brown, this Comment argues the court's deference to the trial court's runaway discretion, when viewed in light of the effects of juvenile transfer to adult court, nevertheless warrant the use of *Miller*'s individual consideration requirement in all juvenile sentencing. First, the Kansas Supreme Court found the district court did not improperly give Brown the burden of proof by considering statements made by Brown's psychologist on cross-examination; reliance on the psychologist's statements indicating various programs "could help rehabilitate Brown," but that she would be a "challenging case," did not fall outside the scope of permissible considerations in deciding the rehabilitation factor.[177] Notably, however, the court took no issue with the fact that Brown's age worked against her in that analysis.

Second, the court dismissed Brown's argument that separate consideration of the first three factors was "duplicitous," resulting in an unreasonable weight in favor of transfer.[178] The court framed each factor as an inquiry that "concern[ed] different subject matter," where the seriousness of the crime related to the gravity, and the violence of the crime

---

172. *Id.* at 790 (quoting the oral ruling of the district court).
173. *Id.* at 788.
174. *Id.* at 787.
175. *Id.* at 788.
176. *Id.* (emphasis omitted) (quoting State v. Stevens, 975 P.2d 801, 805 (Kan. 1999)) (internal quotation mark omitted).
177. *Id.* (quoting trial testimony from Brown's psychologist) (internal quotation marks omitted).
178. *Id.*

related to the manner in which a grave crime may be committed.[179] Here, the court found no error in focusing a substantial amount of the analysis on the crime, as long as each factor considered a theoretically different facet of that crime.

Finally, with regard to Brown's arguments that the lower court improperly considered her crime and dress habits in concluding that her maturity favored transfer, the court found both without merit.[180] First, the court permitted consideration of Brown's crime in relation to her maturity, because that factor was not given dispositive treatment by the lower court. However, four of the eight factors considered in the transfer decision already involved assessing the nature of Brown's crime. Thus, it is arguable that allowing one more factor to focus on the crime itself, which often tipped a particular factor in favor of transfer, was dispositive in effect, as it then pushed five of the eight factors towards transfer.[181] Second, the court found no abuse in the lower court's memorandum because the district court had specified that its oral findings, not the memorandum, were to control.[182] Here, while the memorandum indicated "that Brown's 'choice at her young age to adopt the grooming habits and clothing of a boy are . . . indications of a [more] mature attitude,'" the Kansas Supreme Court focused its review on the oral findings as directed by the lower court and found no abuse of discretion in those findings, however sparse the lower court's oral analysis had proved.[183] The court therefore affirmed the waiver of juvenile jurisdiction.[184]

At trial, Brown was convicted and sentenced to a mandatory "hard 20 life sentence for [felony] murder and a concurrent 32-month sentence for attempted aggravated robbery."[185] After affirming the waiver of juvenile jurisdiction, the court considered the constitutionality of Brown's mandatory hard twenty life sentence in light of *Miller*.

Brown argued that because she was a minor and the mandatory sentencing scheme failed to consider her age, the imposition of her hard twenty life sentence was unconstitutional under *Miller*.[186] Nonetheless, the Kansas Supreme Court held that such a sentence did not fall within the *Miller* holding.[187] To find "mandatory life-with-parole sentences [as applied to juveniles] are unconstitutional," it asserted, required an unwarranted extension of the *Miller* decision.[188] Specifically, the court rea-

179. *Id.*
180. *Id.* at 790–91.
181. *See id.* at 789, 791.
182. *Id.* at 788.
183. *Id.* at 791 (second alteration in original) (quoting memorandum opinion of the district court).
184. *Id.*
185. *Id.* at 786.
186. *Id.* at 796–97.
187. *Id.* at 797.
188. *Id.*

soned that *Miller* was premised on notions of lessened juvenile culpability and the analogous nature of "juvenile life without parole sentences to capital punishment."[189] Specifically, the court noted that a mandatory hard twenty life did not meet the same threshold of severity as to justify elevating the sentence to life-without-parole status and trigger *Miller*'s applicability; the "parallels between life-without-parole sentences and the death penalty" were not present in a life with parole sentence.[190] Therefore, the Kansas Supreme Court recognized the opportunity to extend *Miller*'s decision, yet found *Miller*'s rationale "inapplicable," where "[a] hard 20 life sentence [did] not irrevocably adjudge a juvenile offender unfit for society."[191]

## IV. STATES ARE SLOWLY DISMANTLING *MILLER*

In the aftermath of *Miller*, twenty-nine state sentencing statutes, imposing mandatory life without parole, were invalidated as applied to juveniles.[192] This requisite response, however, was not the end-all-be-all with regard to *Miller*'s reach in juvenile sentencing jurisprudence. Many courts and state legislatures have grappled, and will continue to grapple, with other pertinent issues implicated in *Miller*'s broad rationale.[193] As predicted, subsequent decisions by federal circuits, state supreme courts, and legislatures have created a tug-of-war over both the retroactivity of *Miller*,[194] the extent to which *Miller*'s principles extend, if at all, to pun-

---

189. *Id.* at 796–97.
190. *Id.* at 797.
191. *Id.*
192. Levick & Schwartz, *supra* note 142, at 396.
193. *See* Craig S. Lerner, *Sentenced to Confusion:* Miller v. Alabama *and the Coming Wave of Eighth Amendment Cases*, 20 GEO. MASON L. REV. 25, 38 (2012) ("At some point the Supreme Court may condescend to clarify whether long prison sentences should be deemed LWOP for purposes of *Graham* and *Miller*.").
194. While retroactivity is a separate, complex legal doctrine, it has been considered among the ways in which subsequent courts limit *Miller*'s reach by foreclosing all meaningful opportunity for release for juveniles sentenced to life without parole before *Miller*. Recent Case, *supra* note 13, at 1256 (noting the effects of not applying *Miller* retroactively: "[M]any defendants who were sentenced as juveniles—with all the mitigating propensities of youth—will not be afforded individualized sentencing hearings simply because of the timing of their decisions, rather than because they are not constitutionally entitled to such protection."); *see also* Mardarewich, *supra* note 104, at 125–26 (recognizing that *Miller* left courts "without guidance when considering whether this ruling should be applied retroactively").

The Supreme Court granted certiorari in *Montgomery v. Louisiana* in March 2015 to resolve the split amongst the states on this issue. State v. Montgomery, 141 So. 3d 264 (La. 2014) (mem.), *cert. granted, sub nom.* Montgomery v. Louisiana, 135 S. Ct. 1546 (2015). Some courts have declared that *Miller* applies retroactively. *See, e.g.*, Evans-Garcia v. United States, 744 F.3d 235, 240 (1st Cir. 2014) (finding, in light of the government's concession, a prima facie showing that *Miller* applies retroactively); In re Pendleton, 732 F.3d 280, 282 (3d Cir. 2013) (finding a "prima facie showing that *Miller* is retroactive"); Johnson v. United States, 720 F.3d 720, 721 (8th Cir. 2013) (finding, after the government conceded retroactivity, a *prima facie* showing that *Miller* applies retroactively); Casiano v. Comm'r of Corr., 115 A.3d 1031, 1037 (Conn. 2015) ("We conclude that the rule announced in *Miller* is a watershed rule of criminal procedure that must be applied retroactively."); Falcon v. State, 162 So. 3d 954, 962 (Fla. 2015) (finding *Miller* applies retroactively); State v. Ragland, 836 N.W.2d 107, 117 (Iowa 2013) (holding *Miller* applies retroactively); State v. Mantich, 842 N.W.2d 716, 731 (Neb. 2014) ("Because the rule announced in *Miller* is more substantive than procedural and because the Court has already applied that rule to a case on collateral review, we

ishments other than mandatory life without parole,[195] and even juvenile transfer decisions.[196]

As a result, the *Miller* decision has become the pinnacle of controversy and uncertainty regarding juvenile sentencing, not as much by reason of its holding, but rather, by reason of its potentially applicable rationale to further limit juvenile sentencing options.[197] Because "the Supreme Court failed to specify what sentencing guidelines should dictate . . . states and courts [are] without guidance when determining the appropriate sentence for juveniles convicted of violent crimes."[198] Now, three years after *Miller*, the instruction of hindsight reveals a wave of state and federal decisions reluctantly addressing *Miller* and limiting its reach by applying only its narrowest holding.

### A. *Incrementally Avoiding* Miller

State courts and legislatures have scrambled to find constitutionally viable sentencing schemes for juveniles convicted of murder "in place of mandatory life without parole."[199] Most states, indicative of both uncer-

conclude that the rule announced in *Miller* applies retroactively . . . ."); State v. Mares, 335 P.3d 487 (Wyo. 2014) (stating that *Miller* is, "despite its procedural aspects, a substantive rule"). Other courts have held that *Miller* does not apply retroactively. *See, e.g.*, Johnson v. Ponton, 780 F.3d 219, 226 (4th Cir. 2015) ("We therefore hold that the Supreme Court has not held the *Miller* rule retroactively applicable, and that the Court's holdings do not dictate retroactivity because the rule is neither substantive nor a watershed rule of criminal procedure."); In re Morgan, 713 F.3d 1365, 1368 (11th Cir. 2013) (finding *Miller* did not apply retroactively); People v. Tate, 352 P.3d 959, 972 (Colo. 2015) ("Because *Miller* is procedural in nature, and is not a "watershed" rule of procedure, it does not apply retroactively to cases on collateral review of a final judgment."); State v. Tate, 130 So. 3d 829, 831 (La. 2013) ("[W]e find *Miller* does not apply retroactively in cases on collateral review as it merely sets forth a new rule of criminal constitutional procedure . . . ."); Martin v. State, 865 N.W.2d 282, 292 (Minn. 2015) (holding "*Miller* does not apply retroactively to a juvenile whose LWOR sentence became final before the *Miller* rule was announced"); Chambers v. State, 831 N.W.2d 311, 331 (Minn. 2013) (concluding the defendant was "not entitled to the retroactive benefit of the *Miller* rule in a postconviction proceeding); Beach v. State, 348 P.3d 629, 642 (Mont. 2015) (holding *Miller* did not apply retroactively).

195. Kelly Scavone, Note, *How Long Is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After* Graham v. Florida *and* Miller v. Alabama, 82 FORDHAM L. REV. 3439, 3457–77 (2014); *see also* Elisabeth A. Archer, Note, *Establishing Principled Interpretation Standards in Iowa's Cruel and Unusual Punishment Jurisprudence*, 100 IOWA L. REV. 323, 325, 338 (2014) (arguing the Iowa Supreme Court failed when it agreed with "[d]efendant Denem Anthony Null [who] alleged that his 75-year sentence, with parole eligibility after 52.5 years, constituted cruel and unusual punishment in light of the United States Supreme Court's decision in *Miller v. Alabama*").

196. Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of* Miller v. Alabama *and* Graham v. Florida, 35 CARDOZO L. REV. 1031, 1060 (2014).

197. Scavone, *supra* note 197, at 3441–42 ("The narrow holding of *Miller* has left several residual questions regarding the future of juvenile sentencing and how states should incorporate both the *Miller* and *Graham* decisions into their sentencing structure. . . . Responses in state courts to the issue of virtual LWOP sentences after *Miller* and *Graham* have varied significantly." (footnote omitted)); *see also* Nancy Gertner, Miller v. Alabama*: What It Is, What It May Be, and What It Is Not*, 78 MO. L. REV. 1041, 1052 (2013) ("Some courts have refused to apply *Miller* at all, concluding that it is not retroactive. Other courts have ignored the decision's broad themes, focusing instead on its narrow holding and going so far as to reaffirm lengthy sentences for juveniles after an ostensibly 'individualized' determination." (footnote omitted)).

198. *See* Mardarewich, *supra* note 104, at 125–26.

199. Levick & Schwartz, *supra* note 142, at 389.

tainty and a refusal to see juvenile offenders as categorically different than adult criminals, have simply imposed the "next most severe statutory sentence available for that offense."[200] Under the guise of judicial minimalism, courts express an unwillingness to consider the *Miller* rationale in juvenile sentencing, making incrementally nominal decisions to avoid its application. This avoidance is most evident in transfer decisions and sentencing mechanisms, which have contained *Miller* to its narrow holding. This Comment first considers transfer mechanisms.

1. Transfer Mechanisms—Out of *Miller*'s Reach: When Mandatory Juvenile Sentencing Depends on Charging Juveniles as Adults

"A transfer order is described as the harshest sanction that may be imposed on a juvenile offender . . . ."[201] At first glance, this may appear to be an interesting assertion considering the notion that an actual term-of-years sentence is the traditional notion of a "sanction" imposed on criminal offenders.[202] However, this is only a surprising argument if charging and sentencing are viewed as two separate decisions, each existing in a vacuum.[203] But this is not the case. Charges dictate sentencing in the adult criminal system; they focus on the crime of an offender and trigger certain permissible or mandatory sentences corresponding to that crime once guilt is determined. Therefore, when a juvenile is transferred to adult jurisdiction, the effect is this: the focus shifts from the individual juvenile and their mitigating circumstances to the crime committed.[204] And as a result, charging a juvenile as an adult causes "significant adult sentences" to automatically attach to that youth upon conviction for the charged offense, regardless of individual circumstances.[205] For these rea-

---

200. *Id.*

201. Cintron, *supra* note 39, at 1261; *see also* Hess, *supra* note 56, at 317 ("The Court [has] recognized that the question of whether to transfer a child to adult court is 'critically important' because it involves 'tremendous consequences,' including that the 'child will be deprived of the special protections and provisions' of the juvenile court." (quoting Kent v. United States, 383 U.S. 541, 553–54 (1966))).

202. *See* Samuel Marion Davis, *The Criminalization of Juvenile Justice: Legislative Responses to "The Phantom Menace,"* 70 MISS. L.J. 1, 18 (2000) ("Punitive options are available to criminal courts . . . .").

203. *See* Tchoukleva, *supra* note 18, at 93–94, 101–04 (asserting that transfer mechanisms are the "processes that allow juveniles to be sentenced to lengthy sentences to begin with," and that "mandatory sentencing schemes [are invoked] upon transfer"); *see also* Joseph E. Kennedy, *Juries for Juveniles*, 46 TEX. TECH L. REV. 291, 292–94 (2013) (recognizing the inherent connection between juvenile transfer or charging decisions and subsequent adult sentences imposed on juveniles).

204. Hamack, *supra* note 37, at 791 ("Because these waiver schemes trigger transfer based on the charged offense and the juvenile's age, they fail to focus on the individualized needs of the juvenile over the offense allegedly committed, thus failing to value rehabilitation over punishment."); *see* Tunnard, *supra* note 10, at 1332 ("Transfer decisions often leave the judge a choice between the light punishment of the juvenile system and the standardized sentencing for adults. Since a judge making the transfer decision will likely determine that a minor deserves a harsher sentence than he would receive in juvenile court, the importance of a sentencing judge's consideration of juvenile mitigation becomes paramount." (footnotes omitted)).

205. Eric K. Klein, Note, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 391 (1998); *see also*

sons, transfer mechanisms are determinative of juvenile sentencing.[206] Transfer mechanisms not only implicate *Miller*'s rationale, but also serve to dismantle it by removing juveniles to a system that will not account for their individual, youthful circumstances.[207]

Though "challenges brought against mandatory transfer laws have largely failed on the notion that treatment in juvenile court is not a right," this does not foreclose application of *Miller*'s Eighth Amendment rationale where the logic and necessity to do so exist.[208] The *Miller* rationale should be applied to transfer mechanisms because juvenile transfers are determinative of sentencing:[209] The *Miller* rationale applies to harsh, mandatory sentencing schemes imposed on youth, and nothing triggers the harsh mandatory sentencing of a youth like transfer mechanisms.[210] Such mechanisms therefore fall within the contemplation of the *Miller* rationale, because where the "concerns [associated] with mandatory juvenile life without parole are the same as those with transfer," the need to focus on the youth's age as a mitigating factor in such decisions is just as critical.[211] And *Miller* is the polestar case, providing guidance for how courts must treat juveniles differently in transfer decisions.[212]

However, the *Miller* rationale is categorically undermined by state transfer mechanisms. Mandatory transfer schemes are the most obvious in their operation as instruments that are offensive to the *Miller* rationale since the lack of meaningful consideration with regard to a juvenile's status as a juvenile is prescribed in these transfers.[213] Of course, as the

---

Hoeffel, *supra* note 148, at 52 (referring to *Miller* in stating that "Miller had been transferred from juvenile court, found guilty, and automatically sentenced to life without parole")

206. *But see* State v. Mays, 18 N.E.3d 850, 861 (Ohio Ct. App. 2014) ("[M]andatory bindover does not equate to punishment any more than the mere prosecution of an adult in the common pleas court constitutes punishment." (quoting State v. Quarterman, No. 26400, 2013 WL 4506970 at *4 (Ohio Ct. App. Aug. 21, 2013) (Carr, J., concurring)) (internal quotation marks omitted)).

207. *See* Mariko K. Shitama, Note, *Bringing Our Children Back from the Land of Nod: Why the Eighth Amendment Forbids Condemning Juveniles to Die in Prison for Accessorial Felony Murder*, 65 FLA. L. REV. 813, 831 (2013).

208. *See* Hoeffel, *supra* note 148, at 51, 54 (asserting that the individualization rationale used in *Graham* and *Miller* is applicable to mandatory transfer of juveniles to adult court). *But see* Knox, *supra* note 43, at 1269 ("[S]tatutes in every state create a statutory entitlement to adjudication in courts specialized to deal with delinquency.").

209. *See* Hoeffel, *supra* note 148, at 51.

210. Tchoukleva, *supra* note 18, at 101 (discussing the effects of transfer mechanisms, saying that "[o]nce in adult proceedings, juveniles are subject to mandatory sentencing laws and, in some states, are incarcerated with adults").

211. Hoeffel, *supra* note 148, at 53 (noting that although the *Miller* Court was discussing mandatory sentencing, the same language would apply to juvenile transfer, where the Court finds "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." (quoting Miller v. Alabama, 132 S. Ct. 2455, 2462 (2012)) (internal quotation marks omitted)).

212. *Id.* at 30; *see* Hoeffel, *supra* note 148, at 32 (arguing for the application of death penalty jurisprudence to juvenile transfer to provide guidance to judges, where "the evidence is clear that both judges and prosecutors make arbitrary and capricious decisions").

213. *Id.* at 50 ("Both methods of mandatory transfer result in a juvenile's case being filed in adult court without a hearing and without individualized consideration of the juvenile's circumstances."); *see also* Shitama, *supra* note 209, at 830 ("The Supreme Court in *Miller* noted that of the

*Brown* case illustrates, regardless of whether automatic or permissible at the discretion of a judge or the prosecution,[214] all transfer mechanisms dictate the nature of available sentences to a juvenile offender, as the *Brown* court's transfer of Brown to adult court jurisdiction triggered her hard twenty sentence. Juvenile transfer should therefore trigger the same meaningful consideration of the mitigating factors of youthfulness referenced in *Miller*,[215] because meaningful individualized consideration is not guaranteed at the transfer stage, the adult sentencing process is not itself individualized, and the *Miller* rationale is equally undermined by the consequences of the transfer.[216] The offensive operation of mandatory transfers has already been addressed by academics in relation to the *Miller* decision.[217] Therefore, this Comment's discussion of state transfer mechanisms and their diluting effect on the *Miller* rationale is limited to discretion-based judicial waivers. These waivers effectively label juveniles as adults and preclude individualized consideration in sentencing. Even the *Miller* Court questions whether discretionary transfer laws "adequately address the unique characteristics of juvenile offenders,"[218] noting that discretionary transfer "has limited utility, because the decisionmaker typically will have only partial information about the child or the circumstances of his offense."[219]

Once juvenile jurisdiction has been waived, the already-attached "adult" label precludes more guided and informed consideration of the juvenile when it comes to sentencing, because "once [a juvenile is] convicted in adult court, mandatory sentencing laws proscribe age and other mitigating factors from weighing in the determination of a child offender's punishment."[220] This occurs even when the transfer decision involves the balancing of various individual-related factors, because the broad discretion of the court or prosecution is not effectively policed by clear legislative mandates, creating the risk that courts may make arbi-

---

twenty-nine jurisdictions that impose mandatory life without parole on juveniles, 'about half' have mandatory transfer laws that 'place at least some juvenile homicide offenders in adult court automatically, with no apparent opportunity to seek transfer [back] to juvenile court.'" (alteration in original) (quoting *Miller*, 132 S. Ct. at 2474)).

214. Davis, *supra* note 204, at 6–8 (discussing the circumstances under which "[t]he vast majority of states . . . provide for waiver by the juvenile court"); *see also* Tamara L. Reno, Comment, *The Rebuttable Presumption for Serious Juvenile Crimes: An Alternative to Determinate Sentencing in Texas*, 26 TEX. TECH L. REV. 1421, 1435 (1995) ("The increase in serious juvenile crime prompted at least twenty states in 1994 to attempt to reform their juvenile codes to prosecute more serious juvenile offenders as adults.").

215. *See Miller*, 132 S. Ct. at 2467.

216. Tchoukleva, *supra* note 18, at 94 ("[I]n order to give full effect to its reasoning in *Miller*, the Supreme Court needs to abolish . . . [even] discretion[ary] transfers, and mandatory sentencing schemes upon transfer."); *see also id.* at 105 ("Even if a judge deems that transfer is in the interest of the offender and society, juveniles should be exempt from mandatory sentencing schemes.").

217. *See, e.g.*, Shitama, *supra* note 209, at 830.

218. Tunnard, *supra* note 10, at 1332.

219. *Miller*, 132 S. Ct. at 2460.

220. Shitama, *supra* note 209, at 831.

trary and capricious decisions about who to send to adult court.[221] And, as demonstrated in *Brown*, review of transfer decisions usually involves deference to the lower court's analysis of the evidence.[222] Even if transfer decisions were more effectively guided by state law, it is often true that the "transfer hearing [itself is] an inadequate place for [a] judge to learn much about the juvenile before him in terms of his ultimate disposition in the adult system."[223] As a result, judges do not effectively consider mitigating circumstances and are not required, by statute, to do so.[224]

Despite the risks of wrongful transfer even when individualized consideration is given, a juvenile offender is irreversibly labeled an adult once transfer determinations are made. This forecloses any chance the youth may have at considerations of mitigating factors in the sentencing process, where sentences automatically attach upon conviction for particular crimes.[225] Other than the categorical bans on the death penalty and life without parole for nonhomicidal offenses, juveniles are adults in every sense of the word after the transfer order is issued.[226] In a system that ties the charged crime to a sentence and is dedicated to the motto, "[c]ommit an adult crime, do adult time,"[227] juvenile transfers have become a means of sentencing youth to the adult fate before they ever receive a term-of-years at a formal sentencing hearing. *Miller*'s rationale makes it clear that the harsh consequences of juvenile transfer must be mitigated by a more guided consideration of the offender's youthful status.

i. Transfer Mechanism in *State v. Brown*

*State v. Brown* illustrates the need for strict guidance in juvenile transfer. In *Brown*, the Kansas Supreme Court undermined *Miller*'s rationale by affirming the transfer of juvenile jurisdiction despite the arguably misguided use of discretion by the lower court and regardless of the decision's harsh consequence. The trial court ignored the presumption in favor of continued juvenile jurisdiction and failed to consider all statutorily prescribed factors in that light.[228] The Kansas Supreme Court, upon review for such abuse,[229] approved this unbridled judgment. As a result

221. *See* Hoeffel, *supra* note 148, at 47.
222. State v. Brown, 331 P.3d 781, 791 (Kan. 2014).
223. Hoeffel, *supra* note 148, at 60.
224. *See id.* at 56 ("[T]he courts and the states have put almost no work into guiding discretion in judicial transfer decisions.").
225. Shitama, *supra* note 209, at 831.
226. *See* Robert Visca, Comment, *An Evolving Society: The Juvenile's Constitutional Right Against a Mandatory Sentence of Life (and Death) in Prison*, 9 FLA. INT'L U. L. REV. 159, 167 (2013).
227. Klein, *supra* note 207, at 372.
228. *See* State v. Brown, 331 P.3d 781, 789 (Kan. 2014) ("The juvenile shall be presumed to be a juvenile unless good cause is shown to prosecute the juvenile as an adult." (quoting KAN. STAT. ANN. § 38-2347(a)(1) (2014))).
229. *Id.* at 787 ("On appeal, that decision is subject to a dual standard of review. The district court's factual findings are reviewed for substantial competent evidence. But the district court's

of these incremental decisions, Brown was charged as an adult for her crimes and received the corresponding mandatory sentence for those crimes, with no individual consideration of her youthfulness.[230]

a. The Lower Court

The *Brown* trial court did not give proper consideration to the juvenile-related statutory factors required in transfer decisions for juveniles.[231] Starting with a presumption of juvenile jurisdiction, the factors were designed to discourage transfer unless the circumstances, after considering each factor meaningfully, demanded otherwise.[232] However, the trial court considered each factor in relation to the crime thirteen-year-old Brown committed and not in light of her youthfulness,[233] thus failing to give the factors proper weight in terms of their mitigating effect and their presumption.[234]

Turning to the statutory factors, only four of the eight factors required consideration of the individual juvenile offender: the unadjudicated offenses pending against the youth; the history of the juvenile with regard to that juvenile's particular crimes; the maturity of the offender (which still allowed consideration of the committed crime, per the Kansas Supreme Court's ruling in *Brown*); and the possible rehabilitation of the offender.[235] These factors will be referred to as the "juvenile-related" factors. For the sake of leniency, one might suggest the final factor considered the individual juvenile, instructing the court to analyze whether the "interests of the juvenile or of the community would be better served by criminal prosecution."[236] However, as seen in *Brown*, this factor receives only lip service where the court limits its consideration to the interests of the community, not the best interests of Brown.[237] The remain-

---

assessment of the eight statutory factors, which is based upon proved facts, should be reviewed for an abuse of discretion." (citations omitted)).

230. *See id.* at 796.

231. *See* Hoeffel, *supra* note 148, at 56–60 (discussing the need for increased guidance within statutory factors, where such factors have become increasingly empty in light of unbridled judicial discretion).

232. KAN. STAT. ANN. § 38-2347(a)(1) (2014).

233. *See Brown*, 331 P.3d at 788 ("Ruling from the bench, the district court waived juvenile jurisdiction. It cited the seriousness of the offense; that the offense was committed in an aggressive, violent, and willful manner; that it was a person offense; that the evidence fell short of establishing a likelihood Brown could be rehabilitated before juvenile jurisdiction expired; and that the interest of the community, *i.e.*, community protection, would be better served waiving juvenile jurisdiction.").

234. This is arguably a statutory failure and a flawed manner in which to make transfer determinations. *See* Hoeffel, *supra* note 148, at 58–59 (discussing how statutory frameworks and criteria for determining transfer provide judges with "standardless discretion" (quoting Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, *in* CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFERS OF ADOLESCENTS TO THE CRIMINAL COURT 90, 90 (Jeffrey Fagan & Franklin E. Zimring eds., 2000)) (internal quotation mark omitted)).

235. *Brown*, 331 P.3d at 789.

236. KAN. STAT. ANN. § 38-2347(e)(8) (2014).

237. *See Brown*, 331 P.3d at 788.

ing statutory factors considered the crime committed and the criminal tendencies of the juvenile offender.

Using the four juvenile-related factors, the trial court dismissed substantial evidence of Brown's mitigating circumstances with regard to Brown's history, maturity, and potential for rehabilitation, while clinging to evidence regarding the crime itself.[238] Where the *Miller* Court discussed the history of abuse, family environment, and youthful inability to spot consequence as mitigating factors,[239] the trial court's analysis of the prior offenses factor was a one-dimensional consideration of Brown's prior behavioral problems. The analysis ignored possible age-related and background circumstances that perhaps informed Brown's offenses; her mother's incarceration and Brown's own "conduct disorder," accompanied by depression and multiple suicide attempts were left completely out of the analysis, and the court found that Brown's criminal history weighed in favor of transfer.[240] This is, at best, a superficial consideration of Brown's individual, mitigating circumstances,[241] and illuminates the need for strict guidance in juvenile transfer decisions.

The court also failed to give proper mitigating weight to evidence concerning Brown's maturity by focusing on her crime. Evidence of Brown's maturity from Brown's father and a psychologist supported juvenile jurisdiction, where at least some of Brown's behavior—and most of the evidence the trial court assessed, other than her crimes—was consistent with a girl her age and "inconsistent with someone trying to present themselves as equal to adults."[242] The court ruled the maturity factor a "wash."[243] In doing so, the court denied that it considered the nature of Brown's crime dispositive. However, the court primarily relied on the circumstances of the crime to determine Brown should be adjudicated as an adult.[244] This not only offends the *Miller* rationale, which recognizes the general lack of maturity of juvenile offenders,[245] but re-

238. *See id.*

239. Miller v. Alabama, 132 S. Ct. 2455, 2468–69 (2012).

240. *Brown*, 331 P.3d at 788.

241. *See* Shitama, *supra* note 209, at 850 (explaining, that in light of *Miller*, "trial courts should conduct these sentencing hearings with the understanding that 'full consideration' of evidence that mitigates against life without parole should be considered by the sentencing body so that it may 'give a reasoned moral response to the defendant's background, character, and crime'" (quoting Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Responses in Capital Sentencing*, 11 U. PA. J.L. & SOC. CHANGE 237, 243 (2007))).

242. *Brown*, 331 P.3d at 788.

243. *Id.* at 790 (quoting oral ruling of the district court).

244. *Id.* at 791 (discussing the maturity factor the *Brown* court asserts that "[t]he Court is careful not to rely too heavily on the adult-like nature of the crime charged. While the Court does believe that it is relevant to the factor, it is clear in a large majority of waiver cases the crime will fit, by level of violence or planning or some other measure, into adult-type behavior. In this case, it certainly did. For a person to arm themselves, calmly approach a scene, slay a young man and then calmly leave the scene and dispose of incriminating evidence all are very adult activities" (quoting memorandum opinion of the district court) (internal quotation mark omitted)).

245. *See* Hoeffel, *supra* note 148, at 53.

veals the lack of substantial evidence in favor of transfer when considering Brown apart from her crime.[246]

In addition, the court ignored evidence concerning Brown's potential for rehabilitation. Finding an "absence of evidence" with regard to the possibility of rehabilitation, the court ruled this factor weighed in favor of transfer.[247] This ruling, however, was contrary to testimony by a psychologist that "it was possible to change Brown's behavior because she was still in her formative years and the juvenile system still had almost 7 years to work with her."[248] While additional evidence indicated Brown would be a "challenging case,"[249] this did not substantiate a finding that the rehabilitation factor supported transfer, especially in light of a presumption in favor of juvenile jurisdiction. Therefore, the court's improper consideration of the juvenile-related factors not only offended the statutory presumption in Brown's favor, but directly undermined *Miller*'s mandate that individualized consideration mitigate on behalf of a juvenile offender.[250] While transfer orders—discretion-based transfers by judicial waiver—have the appearance of legitimacy in their individualized determination that a juvenile should not be a youth in the eyes of the law, such an order hardly embodies the meaningful consideration contemplated by *Miller* if it fails to appropriate proper weight to mitigating circumstances of the juvenile, as was the case in *Brown*.[251]

Also, the court committed an abuse of discretion by applying Brown's age when convenient to support a waiver.[252] Both the Kansas statute and common sense mandate that the presumption of youthfulness and lack of maturity exists with regard to a thirteen-year-old unless the evidence clearly indicates otherwise; the court, however, appeared to forego this presumption in favor of an unwarranted evidentiary stalemate with regard to Brown's maturity.[253] Brown was thirteen; she clearly "looked to her mother for responses during . . . evaluation[,] . . . something [her psychologist said] a girl her age would do and [something] inconsistent with someone trying to present themselves as equal to

246. *See Brown*, 331 P.3d at 791 (using a subsequent written report, to make its only finding as to Brown's maturity weighing in favor of transfer, where Brown's "choice at her young age to adopt the grooming habits and clothing of a boy [were] indications of a [more] mature attitude" (alteration in original) (quoting memorandum opinion of the district court) (internal quotation marks omitted)).

247. *Id.* at 790.

248. *Id.* at 788.

249. *Id.* at 790 (quoting trial testimony of Brown's psychologist) (internal quotation marks omitted) ("[C]onsidering that this factor weighed in favor of adult prosecution, the district court relied on Cappo's cross-examination concessions that Brown would be a 'challenging case' . . . ." (quoting trial testimony of Brown's psychologist)).

250. *See* Feld, *supra* note 1, at 135–36.

251. *See* Hoeffel, *supra* note 148, at 60 ("Given the stakes, the transfer hearing should, in fact, allow the judge to learn as much as possible about the juvenile and his potential exposure in the adult system before making the decision to transfer him.").

252. *See Brown*, 331 P.3d at 788.

253. *See id.* at 790.

adults."[254] However, instead of allowing Brown's young age to mitigate in favor of her lack of maturity, the court struck that factor from its analysis.[255] Should the evidence have actually been a "wash," the presumption in favor of juvenile jurisdiction should have tipped the scales in favor of that presumed jurisdiction.[256]

The trial court had no problem reinstituting Brown's age into its consideration of rehabilitation, however, when Brown's age conveniently served to aggravate the possibility of rehabilitation. It is logical to conclude that the statutory presumption in favor of juvenile jurisdiction is based on the rationale that younger children are more likely to undergo successful rehabilitation, due to the young age at which they enter the system.[257] Thus, where a seventeen-year-old would not have been entitled to the presumption of juvenile jurisdiction because the system had less time to rehabilitate that juvenile.[258] However, the court ignored this rationale, and instead, afforded a hypothetical seventeen-year-old more benefit of the doubt with regard to rehabilitation than thirteen-year-old Brown, concluding that the early age at which Brown began her criminal activity rendered her incapable of rehabilitation no matter how long the system had to pursue such efforts.[259] Regardless of the statutory presumption juvenile status afforded Brown as a thirteen-year-old offender, the court leveraged her youthfulness against her, saying such aggressiveness at her young age made the road to rehabilitation harder than if she would have been seventeen at the time of her crimes.[260] Here, the court inverted the presumption in favor of rehabilitating juveniles under the age of fourteen. This is indicative of runaway discretion, as the lower court gave only lip service to the text of the statute and completely ignored its spirit.[261] The presumption in favor of juvenile jurisdiction was not sufficiently rebutted as to support transfer by the preponderance of the evidence.

---

254. *Id.* at 788.

255. *See id.* at 790–91 ("I find—frankly that that [sophistication and maturity] factor is a wash. I think there are reasons to believe that there are—are aspects of Miss Brown that are 13 years of age, and there are aspects of her that are of an adult age. So I don't believe that is particularly helpful in this case." (quoting oral ruling of the district court) (internal quotation marks omitted)).

256. *See* Hoeffel, *supra* note 148, at 66.

257. *See id.* at 788, 790; *see also* Lisa S. Beresford, Comment, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 SAN DIEGO L. REV. 783, 799 (2000).

258. *See* Beresford, *supra* note 261, at 799–800.

259. *See Brown*, 331 P.3d at 788.

260. *See id.*

261. *See* Hoeffel, *supra* note 148, at 58 ("'[A]pplication of the [statutory] factors that are considered relevant to the amenability determination is often pretextual'; the judges are much more interested in culpability and dangerousness." (quoting Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 330 (1999))).

b. The Kansas Supreme Court

In reviewing the lower court's decision, the Kansas Supreme Court affirmed the lower court's decision, although the record did not support transfer by a preponderance of the evidence in light of a statutory presumption favoring juvenile jurisdiction. First, in reviewing the factual findings with regard to the statutory factors, the Kansas Supreme Court ignored "substantial competent evidence [that did] not support a finding of fact on which the [lower court's] exercise of discretion [was] based."[262] While the lower court's factual findings regarding the crime-related factors supported transfer, the lower court did not meaningfully consider material evidence as to the juvenile-related factors, which should have mitigated transfer.[263] Though the Kansas Supreme Court was not permitted to "reweigh the evidence," it is arguable the lower court did not weigh the evidence at all, but rather ignored, misinterpreted, or simply lacked evidence when making factual determinations with regard to Brown's maturity and ability to be rehabilitated. These failures are tantamount to substantial competent evidence not supporting the lower court's use of discretion.[264]

And without knowing how the lower court weighed certain factors in its analysis or by how much the evidence overcame the presumption in favor of juvenile jurisdiction by the preponderance of the evidence,[265] the Kansas Supreme Court could not be sure whether an error in as to any one factor would undermine the entire transfer determination. Nevertheless, the court quickly, and without discussion, disregards any error in the lower court's findings regarding Brown's maturity as not warranting reversal.[266]

Second, the Kansas Supreme Court affirmed the lower court's assessment of the statutory factors, despite the lower court's abuse of discretion. Abuse of discretion is a deferential standard,[267] and while this Comment does not dispute the standard of review,[268] failing to give full force to statutory factors and evaluating these factors incorrectly is an abuse no matter how broad the court's discretion. Although the lower court was "not constrained by the insufficiency of evidence to support one or more of the factors,"[269] the Kansas Supreme Court was silent as to the lower court's misapplication of factors, overreliance on the nature of

262. *Brown*, 331 P.3d at 791. ("Substantial competent evidence 'is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved.'" (quoting *In re* D.D.M., 249 P.3d 5, 11 (Kan. 2011))).

263. *See id.* at 787.

264. *See id.* at 787, 789–90.

265. *Id.* at 789.

266. *Id.* at 791.

267. *Id.* at 787.

268. This does, however, raise questions as to whether juvenile transfer decisions should be afforded a different standard of review, given their sentencing-like consequences.

269. *Brown*, 331 P.3d at 787.

the crime for five of the eight factors, and failure to consider the presumption in favor of juvenile jurisdiction.

For example, the Kansas Supreme Court took scant notice of the lower court's inversion of logic when considering the rehabilitation factor, which should have favored juvenile jurisdiction based on the statutory presumption associated with Brown's age. The court also affirmed the lower court's heavy reliance on Brown's crime to draw conclusions about her ability to be rehabilitated and to conclude her maturity was a "wash." When three of the eight factors involve assessing a juvenile's crime, the statute's failure to address the nature of the crime in the remaining factors appears deliberate, meaning courts must consider, at least, the rehabilitation and maturity factors apart from the crime. Otherwise, the factors would become so conflated as to render nearly all juvenile offenders deserving of transfer to adult court. The Kansas Supreme Court dismissed the lower court's overreliance on the nature of the crime, however, by reasoning that any consideration of the crime by the lower court was not dispositive.[270] This is incorrect, where the only evidence in favor of transfer with regard to this factor, was the nature of Brown's crime. Because this evidence contradicted evidence in Brown's favor, thus rendering the factor a wash, the nature of Brown's crime was arguably dispositive.

In addition, the Kansas Supreme Court affirmed an abuse of discretion where the lower court improperly concluded Brown's maturity was a "wash" in the analysis. The lower court found contradictory evidence of Brown's maturity level, and the factor was effectively stricken from the balancing process, despite suspicious contradictions between the lower court's oral findings and after-the-fact written report.[271] This should not have been the case. The statute mandates consideration of each factor as the Kansas Supreme Court itself pointed out in rebutting Brown's argument that the first three factors were repetitive.[272] While calling the maturity factor a wash is consideration in the most rudimentary sense, it is arguable that no factor is a wash in light of the statutory presumption favoring of juvenile jurisdiction. However, the lower court ultimately ignored the presumption in favor of juvenile jurisdiction to strike the factor from the analysis. This was a clear abuse of discretion.

As a result of transferring Brown without meaningful regard to her mitigating circumstances or the statutory presumption in her favor, the court effectively imposed a mandatory sentence based on the less-than-individual consideration she was given at the transfer stage. Where *Mil-*

---

270. *Id.* at 91.

271. *Brown*, 331 P.3d at 790–91.

272. *Id.* at 790 (quoting KAN. STAT. ANN. § 38-2347(e) (2014)). Arguably, this logic would lead to the conclusion that certain evidence pertaining to Brown's maturity—looking to her mom for responses—could also be used to show Brown was capable of being rehabilitated, but neither court went as far as to draw this conclusion.

*ler* insisted on using juvenile status to warrant consideration of individual, mitigating circumstances,[273] *Brown* used only the crime committed to warrant feigned consideration of juvenile status. Where transfer decisions are nearly tantamount to sentencing, the *Brown* Court undermined *Miller*.

ii. Transfer Mechanisms in Other States

Per *Brown*'s example, the situation repeats itself from state-to-state: the district court exercises unbridled discretion in weighing factors;[274] the reviewing court rewards this use of discretion by loosely reviewing the district court analysis for abuse; and the juvenile is transferred to adult court and receives a mandatory sentence associated with that crime, as long as it is not life without parole. Post-*Miller* courts and legislatures have simply failed to make changes to mandatory or discretionary waiver mechanisms and processes despite their harsh effect on juvenile sentences.

Pulling one example out of the many that exist, the Minnesota Court of Appeals upheld a lower court's extensive focus on the juvenile's crime and past crimes in deciding to transfer the youth to adult court.[275] First, the statutory factors themselves, though requisite safeguards to such discretionary transfers, made little room for the actual mitigating circumstances of youth to factor into the analysis.[276] Second, the court of appeals aggravated this imbalanced consideration where it upheld an analysis of each factor, especially culpability, based on the facts of the crime rather than the mitigating principle of diminished juvenile culpability laid out in *Miller* and juvenile sentencing jurisprudence.[277] Here, as in *State v. Brown*, the circumstances of youth actually worked against the juvenile offender.

Post-*Miller* courts have taken little interest in exercising more scrutiny upon review of lower court transfer decisions, allowing lower courts to disregard, as inapplicable, factors that are statutorily required for con-

---

273. Miller v. Alabama, 132 S. Ct. 2455, 2467 (2012).

274. *See* Shitama, *supra* note 209, at 826 ("This [judicial waiver] gave judges wide authority to intervene in the lives of juvenile offenders' in inconsistent and often intrusive ways.").

275. *In re* Welfare of C.K.R., No. A14-0514, 2014 WL 5507050, at *2–4 (Minn. Ct. App. Nov. 3, 2014).

276. *See id.* at *2 ("(1) [T]he seriousness of the alleged offense in terms of community protection, including the existence of any aggravating factors recognized by the Sentencing Guidelines, the use of a firearm, and the impact on any victim; (2) the culpability of the child in committing the alleged offense, including the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the Sentencing Guidelines; (3) the child's prior record of delinquency; (4) the child's programming history, including the child's past willingness to participate meaningfully in available programming; (5) the adequacy of the punishment or programming available in the juvenile justice system; and (6) the dispositional options available for the child." (quoting MINN. STAT. § 260B.125, subdiv. 4 (2012))).

277. *See id.* at *3–4 (ignoring testimony about the mitigating factors of lessened brain development in youth by concluding the particular juvenile offender "was not impaired and was not coerced").

sideration.[278] For example, prior to *State v. Brown*, the Kansas Supreme Court recognized the sufficiency of a statement by the trial court acknowledging the requisite factors a judge must consider before transferring a juvenile to adult court. Stating that a judge need not make a formal finding regarding each factor, the Kansas Supreme Court abdicated all meaningful review in allowing the following statement to satisfy the statutory requirements: "I am aware and did consider all of the statutory factors in making the decision to waive juvenile court jurisdiction and find the ones I put on the record outweigh the other factors if they're even applicable."[279] In that case, the only factors put on the record were conclusory statements that the "juvenile [was] not amenable to being treated further as a juvenile," and a quick reference to "[t]he seriousness of these offenses, the fact that this offense occurred ten days to less than two weeks after he was released from Larned Correctional Facility, [and] his long history with the court system."[280] In a lackadaisical review, the Kansas Supreme Court found this to be sufficient consideration of the evidence to show "he need[ed] to be treated as an adult."[281]

Moreover, post-*Miller* legislation has not changed as a result of a codified rationale in favor of more structured individualized consideration. "Currently, every state has at least one form of juvenile transfer, and most states have multiple ways of imposing adult sanctions on juvenile offenders."[282] Even worse, "forty-four states impose some form of mandatory waiver,"[283] where discretion is not even afforded a lower court, regardless of the strength of a particular juvenile offender's mitigating circumstances. As a result, *Miller* has had little effect on transfer decisions, even though transfer of juveniles to adult court is the necessary precursor to sentencing.[284]

2. Refusing to Extend *Miller*: The Narrow Holding Versus the Broad Rationale

As this Comment has argued, "[b]y mandating individualized sentencing for juveniles facing [life without parole], the Court in *Miller* opened the door to a much more thorough challenge of the current system, namely the argument that *all* juveniles deserve individualized jus-

278. *See, e.g.*, State v. Washington, No. C-130213, 2014 WL 4724684, at *5 (Ohio Ct. App. Sept. 14, 2014) ("Where there is no statutory requirement that the juvenile court separately identify factors that are not applicable, it does not err if it fails to do so, as long as it has indicated, in the record, the factors that it weighed in favor of or against transfer.").

279. Makthepharak v. State, 314 P.3d 876, 882 (Kan. 2013) (emphasis omitted) (quoting oral ruling of the district court) (internal quotation mark omitted).

280. *Id.* (quoting oral ruling of the district court).

281. *See id.*

282. Shitama, *supra* note 209, at 830.

283. *Id.*

284. Dutton, *supra* note 16, at 204 ("In *Miller*, the Court rejected the argument that transfer determinations—by judge, prosecutor, or legislature—are sufficient to cool the mandatory nature of the JLWOP sentences that were before the Court.").

tice."[285] The broader rationale of *Miller* is, "[i]n other words, [that] no sentencing scheme that ignores age and its attendant circumstances should determine the outcome of a juvenile case."[286] Yet, this is not the reach of *Miller*'s narrow holding, which struck down mandatory life-without-parole sentences for juveniles.[287] As a result, courts and legislatures have struggled with the vital correlation between *Miller*'s broader rationale and its narrow holding.[288] Of course, in an attempt to avoid the wide range of ramifications that ensue from the broader *Miller* rationale, subsequent decisions have effectively served to contain *Miller* to its most narrow application, however constitutionally questionable such containment may prove to be.[289]

Having already discussed the argument for extending *Miller*'s rationale to some of the more severe juvenile sentences, much of that argument rooted in the original rehabilitative cry of juvenile courts themselves,[290] it is necessary to discuss the well-crafted box courts and legislatures have used to enjoin *Miller* from expansion—focusing on courts and subsequent litigation of issues related to *Miller*.[291] The four sides of this box are representative of the primary ways courts decline to extend and undermine the *Miller* rationale: Side one will be discussed as the "one-step-down but still mandatory" approach; side two will be addressed as the "non-mandatory out" approach; side three will cover the "aggregated sentence" approach; and side four will discuss the other creative ways courts have withheld the *Miller* rationale from even its most narrow application. However, it is important to note that even while the narrow application of *Miller* undermines the *Miller* rationale in its own right, many "new" sentencing schemes go a step further: many ensure a functional equivalent of life without parole, revealing an insistence not only upon containing *Miller*, but demolishing it as well.[292]

In the wake of *Miller*, there was no doubt mandatory life without parole was barred, and more than twenty state laws imposing such a sen-

---

285. Tchoukleva, *supra* note 18, at 97.

286. *Id.*; *see also* Courtney Amelung, Endnote, *Responding to the Ambiguity of* Miller v. Alabama*: The Time Has Come for States to Legislate for a Juvenile Restorative Justice Sentencing Regime*, 72 MD. L. REV. ENDNOTES 21, 50 (2013) ("The Court's decision in *Miller* has given states the opportunity to legislate for restorative justice within the juvenile justice system.").

287. Lauren Kinell, Note and Comment, *Answering the Unanswered Questions: How States Can Comport with* Miller v. Alabama, 13 CONN. PUB. INT. L.J. 143, 145, 148–49 (2013).

288. *See* Mardarewich, *supra* note 104, at 125–26.

289. *See* Alexander L. Nostro, Comment, *The Importance of an Expansive Deference to* Miller v. Alabama, 22 AM. U. J. GENDER SOC. POL'Y & L. 167, 179–83 (2013).

290. *See* Fuller, *supra* note 38, at 379–81; *see also supra* Part I.

291. *See* David Siegel, *What Hath* Miller *Wrought: Effective Representation of Juveniles in Capital-Equivalent Proceedings*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 363, 368–69 (2013) (discussing how "the scope of the procedural protections—such as whether they are retroactive, whether they extend to sentences for which there is a theoretical but not meaningful possibility of parole, and whether they can apply to discretionary LWOP sentences—are currently being litigated" (footnotes omitted)).

292. *Id.*

tence were subsequently invalidated as applied to juveniles.[293] In response, and without the immediate enactment of new legislation, many courts are left to "remand . . . case[s] for further sentencing proceedings to permit the factfinder to assess [an] applicant's sentence at (1) life with the possibility of parole . . . or (2) life without parole after consideration of applicant's individual conduct, circumstances, and character."[294] While this posed minimal problems of interpretation within *Miller*'s narrow scope, questions arise as to the reach of *Miller*'s broad rationale when various mandatory and non-mandatory life-with-parole sentences are functionally equivalent to life without parole.[295]

*B. One-Step-Down-But-Still-Mandatory Schemes*

In light of such questions, courts and legislatures have nevertheless contained *Miller* by allowing the imposition of other, albeit lesser, mandatory sentences—the "one-step-down" approach. For example, in the absence of legislation that is compliant with *Miller*'s holding, courts have allowed prosecutors to simply "sever the unconstitutional language in [the sentencing codes] as applied to juveniles convicted of [a particular crime]" that originally called for mandatory life without parole.[296] Courts may simply "remand the case for [a juvenile offender] to be resentenced on his conviction under the sentencing range provided for [the same class felony], in accordance with the remaining language in [the] subsection,"[297] or sentence the juvenile in accordance with some other mandatory scheme supplied by the legislature after *Miller*.[298]

Depending on the statute, this approach may lead to the imposition of a mandatory term of years sentence or a sentence with a mandatory

---

293. Amelung, *supra* note 290, at 32; *see also* Fuller, *supra* note 38, at 401.

294. *Ex parte* Maxwell, 424 S.W.3d 66, 76 (Tex. Crim. App. 2014).

295. *See, e.g.*, State v. Riley, 110 A.3d 1205, 1213 (2015) (discussing that an aggregate sentence, imposed in the court's discretion and which was the functional equivalent of a sentence of life without the possibility of release,was unconstitutional under *Miller*, after reading *Miller* "as impacting two aspects of sentencing: (1) that a lesser sentence than life without parole must be available for a juvenile offender; and (2) that the sentencer must consider age related evidence as mitigation when deciding whether to irrevocably sentence juvenile offenders to a lifetime in prison"); *see also* Amelung, *supra* note 290, at 34.

296. Whiteside v. State, 426 S.W.3d 917, 920 (Ark. 2013); Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 286 (Mass. 2013).

297. *Whiteside*, 426 S.W.3d at 920; *see also* Commonwealth v. Brown, 1 N.E.3d 259, 268 (Mass. 2013) (excising the portion of the sentencing statute prohibiting parole eligibility when applied to a juvenile). *But see* People v. Tate, 352 P.3d 959, 965 (Colo. 2015) ("[W]e hold that the proper remedy after *Miller* is to vacate a defendant's LWOP and to remand the case to the trial court to determine whether LWOP is an appropriate sentence given the defendant's 'youth and attendant circumstances.'" (quoting Miller v. Alabama, 132 S. Ct. 2455, 2471 (2012)).

298. St. Val v. State, 174 So. 3d 447, 449 (Fla. Dist. Ct. App. 2015) (finding a mandatory minimum sentence of twenty-five years did not violate *Miller*); People v. Banks, 36 N.E.3d 432, 437 (Ill. App. Ct. 2015) (finding a mandatory minimum of forty-five years did not violate *Miller*); Commonwealth v. Lawrence, 99 A.3d 116, 121 (Pa. Super. Ct. 2014), *appeal denied*, 114 A.3d 416 (Pa. 2015) (holding a mandatory minimum of thirty-five years did not violate *Miller*, where an "argument against a mandatory minimum of 35 years presents the same concerns as would a mandatory minimum of 35 days' imprisonment," such that it would prohibit any mandatory scheme).

minimum and a discretionary range. For example, the Arkansas Supreme Court held the applicable sentencing range, after severing the unconstitutional language and remanding the case, was ten to forty years or life.[299] Even in cases where courts remand the case for consideration of an individual defendant's youthfulness to determine the appropriateness of life without parole, these courts may still apply a one-step-down approach if, on remand, it is determined that life without parole is inappropriate.[300]

This raises questions as to whether one-step-down mandatory sentencing schemes are unconstitutional under *Miller*, since all mandatory sentencing processes are implicated by the same rationale *Miller* employed to strike down mandatory life without parole.[301] However, many courts, like the *Brown* court, were not inclined to extend *Miller*'s holding to mandatory sentences other than mandatory life without parole. The Colorado Supreme Court held that life with the possibility of parole is an appropriate and constitutional sentence under *Miller* once a court determines, after individual consideration, that life without the possibility of parole is inappropriate.[302] Noting that *Miller* did not expressly address life with the possibility of parole, the Colorado Supreme Court declined to read *Miller* so broadly as to render the mandatory imposition of life with the possibility of parole unconstitutional.[303]

In making this determination, however, the court did not impose or suggest a constitutional limit on the mandatory term of years a juvenile offender may be required to serve before parole eligibility in a life without parole sentence.[304] In the absence of guidance, state courts may impose a sentence that teeters, arguably, on the side of the functional equivalent of life without parole.[305]

---

299. *Whiteside*, 426 S.W.3d at 921 (holding that "this discretionary sentencing range is acceptable under *Miller*, as long as on remand the jury is given the opportunity to take into account the offender's 'age, age-related characteristics, and the nature of his crime'").

300. Tate, 352 P.3d at 965 (holding that "if the trial court determines LWOP is not warranted after considering the defendant's 'youth and attendant characteristics,' the proper sentence is LWPP"); *see also* State v. Nathan, 404 S.W.3d 253, 271 (Mo. 2013) ("In that event, the trial court must set aside the jury's verdict finding Nathan guilty of first-degree murder and enter a finding that Nathan is guilty of second-degree murder. Nathan then should be sentenced for second-degree murder within the statutorily authorized range of punishments for that crime."); Lewis v. State, 448 S.W.3d 138, 146 (Tex. App. 2014), *cert. denied*, 136 S. Ct. 52 (2015) (holding that a mandatory life sentence for with the possibility of parole after forty years did not violate *Miller*).

301. *See* Straley, *supra* note 1, at 994 & n.180 (explaining how, in response to *Miller*, Washington's legislation, "requir[es] court[s] to consider *Miller* factors when setting minimum term for sixteen and seventeen-year-olds").

302. *Tate*, 352 P.3d at 970.

303. *Id.*; *see also* Bear Cloud v. State, 2014 WY 113, ¶ 40, 334 P.3d 132, 145 (Wyo. 2014) (recognizing "there is merit in the proposition that a mandatory life sentence for a juvenile is contrary to the rationale underlying the *Roper/Graham/Miller* trilogy, we will not find a phantom constitutional restriction that the United States Supreme Court has declined the opportunity to recognize").

304. *Tate*, 352 P.3d at 970.

305. *But see* Springer v. Dooley, No. 3:15-CV-03008-RAL, 2015 WL 6550876, at *5 (D.S.D. Oct. 28, 2015) (holding a 261-year sentence with the possibility of parole after thirty-three years was not a de facto life without parole sentence and did not violate *Miller*).

This imposition of a life sentence with a mandatory term-of-years before parole eligibility,[306] appears to be a comfortable place for post-*Miller* sentencing schemes:[307]

> *Miller* [only] stands for the proposition that a sentence of life imprisonment without the possibility of parole may not be mandatorily imposed upon a defendant who was a juvenile at the time of the crime without individual consideration of the mitigating circumstances. That did not occur in [a] case. . . . [where] the defendant received a sentence of life with the possibility of parole, albeit with consideration coming after fifty-one years.[308]

As such, states split *Miller* many different and unpredictable ways in determining the constitutional limits on mandatory life with parole sentences or mandatory term-of-year sentences.

### *C. Non-Mandatory Out: Unbridled Discretion Fails* Miller *and Amounts to De Facto Life Sentences Without Parole*

Some courts and legislatures have employed semantics to contain *Miller*, extracting the word "mandatory" to impose sentencing schemes that are the functional equivalent to mandatory life without parole.[309] This allows courts to comply[310] with *Miller* in a literal sense, while undermining the *Miller* rationale. First, by simply "[s]evering the mandatory nature of a life-without-parole sentence for a juvenile to provide for the ameliorative possibility of parole because of characteristics attendant to youth,"[311] courts have nonetheless kept their sentencing statutes in place, by simply infusing discretion into the sentencing process or prescribing enumerated factors courts may use to guide the sentencing, yet allowing unfettered discretion that often amounts to the same sentences.

---

306. *See* Banks v. People, No. 12SC1022, 2013 WL 3168752, at *1 (Colo. June 24, 2013).

307. *See, e.g.*, Ellmaker v. State, No. 108,728, 2014 WL 3843076, at *10 (Kan. Ct. App. Aug. 1, 2014) ("Considering the explicit way in which the United States Supreme Court has distinguished life without parole sentences and the death penalty and set them apart from all other sentences, we decline Ellmaker's invitation to extend this category to include a hard 50 sentence when imposed on juveniles. Thus, we reject Ellmaker's assertion that a hard 50 sentence on a juvenile offender is the functional equivalent of a life sentence without parole."); *see also* Ouk v. State, 847 N.W.2d 698, 701–02 (Minn. 2014) ("[T]he mandatory sentencing scheme at issue in Ouk's case does not violate the rule announced in *Miller* because it does not require the imposition of the harshest term of imprisonment: life imprisonment without the possibility of release."); People v. Aponte, 981 N.Y.S.2d 902, 905 (N.Y. Sup. Ct. 2013) ("Although both *Miller* and *Graham* held it was unconstitutional to impose life without parole on a person under the age of eighteen, the defendant received no such sentence. In fact, he is parole eligible. No doubt he is unhappy over the prospect that the aggregate mandatory minimum periods of imprisonment may preclude him from ever being paroled, he nevertheless remains eligible for it.").

308. Perry v. State, No. W2013-00901-CCA-R3-PC, 2014 WL 1377579, at *5 (Tenn. Crim. App. Apr. 7, 2014), *appeal denied*, Sept. 18, 2014.

309. *But see* Scavone, *supra* note 197, at 3477 (noting that the post-*Miller* "bill was aimed at comprehensive sentencing reform that takes virtual LWOP into account").

310. Amelung, *supra* note 290, at 34–35.

311. *Ex parte* Henderson, 144 So. 3d 1262, 1281 (Ala. 2013).

This is noticeable in *Ex parte Henderson*,[312] where the Alabama Supreme Court allowed juveniles to be charged for capital offenses under a statutory scheme calling for either death or life without parole.[313] The court upheld the statutory scheme by replacing its mandatory nature with a consideration of certain enumerated factors to put juveniles on "actual notice that, if convicted, they face a sentence of life without the possibility of parole as a 'ceiling.'"[314] The court goes on to say that "juveniles [then] have [additional] notice of the 'floor' as well, because *Miller* requires that a juvenile convicted of capital murder is entitled to have his life sentence reviewed for the possibility of parole."[315]

The California Supreme Court followed suit by validating its own statute that allowed a "juvenile convicted of special circumstance murder" to receive "life without parole or [twenty-five] years to life."[316] The California Supreme Court overruled the lower courts' interpretation of the statute, which originally "creat[ed] a presumption in favor of life without parole," holding that it satisfied *Miller*'s ban on mandatory life without parole.[317] Here, the court made its statute *Miller*-compliant by shifting semantics, insisting that it be "understood to not impose a presumption in favor of life without parole."[318] This, while technically complying with *Miller*, does not provide any meaningful consideration of youthfulness per the *Miller* Court's rationale.

In a similar effort to avoid *Miller*'s broad rationale, many state legislatures have simply added an option that allows a non-mandatory range of equally harsh sentences to be imposed on juveniles without instituting *Miller*'s particularized individual consideration test.[319] Here, courts and legislatures have taken advantage of the "uncertainty of what [was] meant by 'individualized sentencing,'" in *Miller*, though *Miller*'s rationale alone provides guidance.[320] For example, Pennsylvania, one of the first states to respond to *Miller* with legislation, infused its statutory scheme with allowable ranges, of course still including life without parole as an option.[321] As such, a juvenile may still receive a sentence of life without parole, but the judge or jury may choose an alternative sen-

312. *Id.*

313. *Id.*

314. *Id.* at 1281, 1284.

315. *Id.* at 1281.

316. People v. Gutierrez, 324 P.3d 245, 249 (Cal. 2014).

317. *Id.*

318. *Id.*

319. *See, e.g.*, State v. Griffin, 145 So. 3d 545, 548 (La. App. 2014) (appearing satisfied by Louisiana's post-*Miller* laws, which state that "a hearing shall be conducted prior to sentencing to determine whether the sentence shall be imposed with or without parole eligibility," though this sentence scheme simply allows the prosecution and defense to present mitigating and aggravating factors to support requested sentences; there is no requirement that the judge consider the enumerated factors in *Miller*).

320. *See* Lerner, *supra* note 195, at 27.

321. Amelung, *supra* note 290, at 33.

tence of either thirty-five years to life for juveniles at least fifteen years old, or a twenty-five years to life for juveniles under age fifteen.[322] There is, however, no requirement that youthfulness mitigate on behalf of the juvenile during the discretionary sentencing, which reeks of the possibility of discretionary abuses.

Applying this approach, courts avoid triggering the narrow *Miller* holding by asserting, "*Miller* is distinguishable because [a juvenile's] sentence of life without parole [is] *discretionary,* not mandatory."[323] Yet this approach fails to provide meaningful limits on sentencing discretion, as it lacks mandatory consideration of the mitigating factors of youth set out in *Miller*. Because judges have broad discretion when imposing a sentence and such decisions only are reviewed *de novo* for abuse of discretion[324] it cannot be guaranteed that *Miller*'s underlying principles—lessened culpability of juveniles requiring consideration of the mitigating circumstances of a juvenile offender—will be advanced.[325] As noted in *State v. Riley*, where the Connecticut Supreme Court held the trial court did not consider the mitigating factors in *Miller*:

> [T]he dictates set forth in *Miller* may be violated even when the sentencing authority has discretion to impose a lesser sentence than life without parole if it fails to give due weight to evidence that *Miller* deemed constitutionally significant before determining that such a severe punishment is appropriate.[326]

Where courts do consider mitigating factors, in imposing either life without parole or other functional equivalents, they are not required to contemplate any particular combination of mitigating circumstances enumerated by *Miller*, or afford such circumstances any specific weight.[327] As a result, courts may find that any individual consideration of a juvenile satisfies *Miller*'s mandate."[328] Here, a juvenile may receive

---

322. *Id.*

323. State v. Lane, No. 2013–G–3144, 2014 WL 1900459 at *12 (Ohio Ct. App. May 12, 2014).

324. Commonwealth v. Batts, 125 A.3d 33, 43, 50 (Penn. 2015) (refusing to "impose a heightened burden of proof, and a corresponding more stringent appellate review, in juvenile life without parole cases").

325. Berkheiser, *supra* note 117, at 508–10 (discussing how *Miller*, "with its mandate of individualized consideration at sentencing, reopens the door to all of the malignity of subjective decision-making and its fruits"); *see also* Fuller, *supra* note 38, at 402 (discussing how even when requiring consideration of mitigating circumstances, "state courts did not elaborate as to what must be included in this consideration").

326. State v. Riley, 110 A.3d 1205, 1213 (2015) (overruling appellate court's affirmation of an effective one hundred year sentence, where the appellate court affirmed the trial court's decision to not consider the *Miller* factors).

327. *But see* State v. Seats, 865 N.W.2d 545, 555–57 (Iowa 2015) (starting from a presumption that the imposition of life without parole should be uncommon and mandating the consideration of specific factors rooted in *Miller*'s rationale before imposing a sentence of life without parole).

328. Jones v. State, 769 S.E.2d 901, 905 (Ga. 2015) (affirming, on alternative grounds, the trial court's imposition of "two consecutive terms of life imprisonment plus [eighty-five] years," because "the trial court explicitly considered Appellant's relatively young age"); *see also* State v. Williams, 862 N.W.2d 701, 703–04 (Minn. 2015) (affirming the district court's discretionary imposition of

a sentence that is functionally equivalent to a sentence of life without the possibility of release, without any assurance that their sentence embodies the mitigating purpose of *Miller*.[329]

## *D. Aggregated Sentences*

Although not an issue in *Brown*, courts have also dismantled *Miller*'s rationale by allowing mandatory sentences to accumulate and effectively amount to life without parole.[330] While at least two state supreme courts have ruled an aggregate sentence that constitutes a *de facto* life sentence violates the Constitution under *Miller*,[331] other courts have found such aggregate sentences fall outside the scope of *Miller*.[332] These courts have declared that egregious term-of-years sentences do not qualify for *Miller* protection, despite the relatively same effect of mandatory sentences when applied in the aggregate.[333] While this scenario is not offensive to the literal *Miller* holding, it is certainly offensive to the broader rationale that should "trigger the protections afforded under *Miller*—namely, an individualized sentence hearing to determine the issue of parole eligibility" when imposing a "lengthy term-of-years sentence."[334] At least one state supreme court, Iowa, has concluded, albeit under Iowa's constitution, "all mandatory minimum sentences of imprisonment for youthful offenders are unconstitutional."[335] In any case, the

---

consecutive sentences, after the district court considered the aggravating circumstances of the juveniles' crimes in addition to the mitigation circumstances).

329. *See* Molly F. Martinson, Comment, *Negotiating* Miller *Madness: Why North Carolina Gets Juvenile Resentencing Right While Other States Drop the Ball*, 91 N.C. L. REV. 2179, 2198 (2013).

330. *E.g.*, State v. Williams, 862 N.W.2d 701, 702 (Minn. 2015) (affirming imposition of an "aggregate sentence of at least 74 years in prison").

331. Bear Cloud v. State, 334 P.3d 132, 144 (Wyo. 2014) (holding that the process of individualized consideration in *Miller* "must be applied to the entire sentencing package, when the sentence is life without parole, or when aggregate sentences result in the functional equivalent of life without parole"); *see also* Fuller v. State, 9 N.E.3d 653, 654 (Ind. 2014) ("[W]e exercised our constitutional authority and revised the 150-year sentence received by sixteen-year-old Martez Brown for two counts of murder and one count of robbery.").

332. *See, e.g.*, Nostro, *supra* note 293, at 176 ("In the immediate aftermath of the *Miller* decision, the Sixth Circuit held that an eighty-nine-year sentence created from multiple convictions was not the same as a life sentence for purposes of requiring consideration of a juvenile offender's age and mitigating factors of youth. In reaching its decision, the Circuit prioritized the *Miller* Court's focus on single-conviction sentencing practices to conclude that the Court did not intend for the punishment to apply to all forms of LWOP sentences." (footnote omitted)); *see also* Walle v. State, 99 So. 3d 967, 968 (Fla. Dist. Ct. App. 2012) (holding that sentences imposed by two different courts creating a ninety-two-year aggregate sentence was not the functional equivalent of a life sentence without the possibility of release); State v. Zuber, 442 N.J. Super. 611, 611 (N.J. Super. Ct. App. Div. 2015) (rejecting the argument that an aggregate sentence of fifty-five years without parole eligibility was the functional equivalent of life without parole).

333. People v. Reyes, 2015 Ill. App. 2d 120471, ¶ 25 (Ill. App. Ct. 2015) (finding juvenile offender's ninety-seven-year aggregate sentence did not offend *Miller*); Scavone, *supra* note 197, at 3463; *see also* People v. Lucero, 11CA2030, 2013 WL 1459477, at *2–4 (Colo. App. 2013) (citing *Miller* and *Graham* in finding aggregate sentence of eighty-four years did not violate the Constitution), *cert. granted*, 13SC624, 2014 WL 7331018 (Colo. Dec. 22, 2014).

334. State v. Null, 836 N.W.2d 41, 70–71 (Iowa 2013).

335. State v. Lyle, 854 N.W.2d 378, 400 (Iowa 2014).

next question always becomes "how [the] court should proceed in correcting [a defendant's] sentence[?]"[336] Without guidance, courts are free to work within vague perimeters.

*E. Other Ways: Felony Murder*

The last common approach that undermines the *Miller* rationale is the quiet operation of unfortunate doctrines such as felony murder. As an initial matter, there is little reason for this doctrine in the context of juvenile sentencing.[337] While those in favor of the felony-murder doctrine claim it deters the commission of the underlying crime, it is hard to justify as applied to juveniles, who are less able to foresee the consequences of their actions.[338] *Miller* recognized lower juvenile culpability based on factors that include "'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking."[339] This rational creates the possibility that the Court may later prohibit sentencing juveniles to life without parole based on felony murder principles of transferred intent.[340]

*Miller* recognizes that "defendants who do not kill, intend to kill, or foresee that life will be taken are *categorically* less deserving of the most serious forms of punishment than are murderers."[341] The *State v. Brown* ruling offends this rationale in its imposition of a hard twenty life sentence for thirteen-year-old Brown's felony murder conviction. The *Miller* Court recognized that "the criminal responsibility of juveniles who did not murder was doubly diminished,"[342] and "the rationale underlying felony murder is [therefore] utterly incompatible with our modern understanding of juveniles" especially when imposing such harsh sentences.[343]

This Comment does not take immediate issue with the concept of felony murder, though, by principle of transferred intent, it stands on shaky ground.[344] However, it must be argued that sentencing juveniles on the basis of felony murder convictions is contrary to the *Miller* rationale, where the application of this doctrine to youth reveals the most offensive ignorance of the critical differences between juvenile and adult ability to assess the spectrum of consequences associated with their actions.[345]

---

336. Whiteside v. State, 426 S.W.3d 917, 920 (Ark. 2013).

337. Erin H. Flynn, Comment, *Dismantling the Felony-Murder Rule: Juvenile Deterrence and Retribution Post-*Roper v. Simmons, 156 U. PA. L. REV. 1049, 1071 (2008).

338. *Id.*

339. Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).

340. Mardarewich, *supra* note 104, at 130.

341. *Miller*, 132 S. Ct. at 2481 (quoting Graham v. Florida, 560 U.S. 43, 50 (2010)) (internal quotation marks omitted).

342. Feld, *supra* note 1, at 125–26.

343. Shitama, *supra* note 209, at 845.

344. *See id.* at 842–48.

345. *See id.* at 846.

In *Brown*, the court took no issue with the application of the felony murder charge to thirteen-year-old Keaira Brown. The court simply noted that "[a]t the time of Brown's crimes, first-degree murder was defined as the killing of a human being committed, '(b) in the commission of, attempt to commit, or flight from an inherently dangerous felony' . . . ." and that "[a]ggravated robbery is an 'inherently dangerous felony.'"[346] While simplistic definition may be appropriate as applied to an adult criminal who is less impulsive and better able to understand the consequences of his or her actions, it is wholly inappropriate when considering both the goals of felony murder doctrine and the reduced culpability of juveniles.

The goals of the felony murder doctrine are deterrence and retribution.[347] Where "unforeseen acts . . . cannot logically be deterred," and "culpability should be based on an individual defendant's criminal intent . . . and not simply on harm caused in the commission of a crime," the justifications for the doctrine are unsubstantiated.[348] Consequently, the doctrine is even less warranted as applied to juveniles. It assumes, wrongfully so, that juvenile felons, who are less culpable because they inherently possess a "proclivity for risk, and inability to assess consequences,"[349] can "reasonably anticipate any resulting injury and should therefore be held liable when such injury in fact occurs."[350]

*Miller* stands for the proposition "that a juvenile is much less likely than an adult to recognize that his participation in a robbery or other felony could potentially result in death or injury," and is therefore "less likely to be deterred by the specter of even the most severe punishment."[351] Keaira Brown's felony murder conviction is therefore unwarranted based on this rationale. Here, while it is clear that "[t]he serious theoretical shortcomings of felony murder liability apply with exponentially greater force to juveniles,"[352] it must be noted, "almost every state prosecutes both children and adults for felony murder,"[353] contrary to *Miller*'s rationale.

## V. THE CONSEQUENCES OF IGNORING *MILLER*

Extending the *Miller* rationale to forbid mandatory sentencing in all juvenile cases, or at least in cases that implicate the most severe sentencing schemes, would create a splash in the modern adult criminal system, even as it could be extended to warrant the resurrection of a more "re-

346. State v. Brown, 331 P.3d 781, 792 (Kan. 2014) (quoting KAN. STAT. ANN. §§ 21-3401, 21-3436(4) (repealed 2010)).
347. Shitama, *supra* note 209, at 843.
348. *Id.* at 844.
349. Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012).
350. Shitama, *supra* note 209, at 843.
351. *Id.* at 845–46.
352. *Id.* at 845.
353. *Id.* at 844.

storative justice" scheme for juveniles.[354] Perhaps this is why state courts have taken to containing the *Miller* decision in the numerous ways previously discussed. The inherent effects of each decision to contain *Miller* are clear; however, it is necessary to take a step back to see the cumulative and detrimental effect of these decisions; "the practical result is at odds with the Supreme Court's clear trajectory toward [affording juveniles] greater [constitutional] protection and greater leniency . . . in the criminal context."[355] Operating together, every juvenile waiver, and every declination to extend *Miller* form the context in which the constitutional line between juveniles and adults slowly evaporates.

The first incremental step is transfer mechanisms. Of course, juvenile transfer decisions, at first glance, do not appear to implicate *Miller*, because the *Miller* holding addresses a mandatory sentence. However, mandatory and discretionary transfers operate in such a way that they precede imposition of the harshest adult sentences on youth; "a decision to send a juvenile to adult court is a decision to end his childhood."[356] Transfers effectuate a juvenile's transition, in the eyes of the law, from child to adult, and carry with them the "profound consequences" of doing "adult time," among other catastrophic effects.[357]

Tantamount to sentencing, juvenile transfer undercuts *Miller*'s contemplation of juveniles as different, where a youth may be transferred without ever "hav[ing] the opportunity to tell the juvenile court judge about his background, his mental health, or any other fact that might make him worthy of an opportunity to take advantage of what the juvenile court may have to offer."[358] Here, it is necessary to apply *Miller*'s broader rationale to transfer proceedings to properly defend the legal notion that juveniles are different than adults.[359]

The second incremental step in the dilution of *Miller*'s rationale often involves juvenile sentencing decisions, which are often nuanced and chip away at *Miller* in piecemeal fashion, making it difficult to identify any single sentencing scheme as the culprit. Despite *Miller*'s broader rationale with regard to reduced juvenile culpability, a literal interpretation of *Miller*'s narrow holding is not irrational per se.[360] Such decisions are sound from a purely legal standpoint: a non-mandatory life without

---

354. *See* Amelung, *supra* note 290, at 35 (stating, in response to *Miller*, "[t]he appropriate response for these—and all—states is to incorporate restorative justice sentences into the juvenile sentencing structure").

355. Recent Case, *supra* note 13, at 1252.

356. *Id.* at 30.

357. *Id.* at 34 (internal quotation marks omitted).

358. *Id.* at 54.

359. *See id.* (arguing for the application of *Miller* to transfer decisions because "[w]hile the Eighth Amendment itself might not apply directly to transfer proceedings, *Graham* and *Miller* indicate that juveniles are different and deserve a heightened due process akin to the kind of process that death penalty litigants have been given through the Eighth Amendment" (footnote omitted)).

360. *See* Nostro, *supra* note 293, at 181.

parole sentence without proper individualized consideration, "an eighty-nine-year prison sentence without parole," and a mandatory consecutive fixed-term sentence that is functionally equivalent to life without parole are all beyond the literal *Miller* holding.[361] It is only when recognizing *Miller*'s broader notion—that a juvenile's youthfulness warrants individualized consideration of that youth's mitigating circumstances—does "the reckless danger of a strict interpretation of *Miller*" reveal itself.[362]

Simply put, "[a] sentencing scheme that fails to consider a juvenile offender's potential for rehabilitation is at odds with the Supreme Court's stance on juvenile culpability."[363] And while *Miller* may or may not have ushered in the revitalization of restorative juvenile justice[364] by infusing our current process of juvenile sentencing with the individualization requirement, "the narrow application of *Miller*'s holding could . . . result in sentences that run afoul of the concerns over proportionality that are central to . . . *Miller*."[365] In the incremental dilution of *Miller*, our constitutional concept of juvenile is growing, where post-*Miller* courts make sentencing decisions in a legal vacuum, rather than considering the broader constitutional meaning and effect of *Miller*.[366] The ultimate effect is a dissipated line between juveniles and adults, where juveniles are transferred to adult court and sentenced as adults based on their crime without the court ever needing to assess their juvenile status.[367] The result? Juveniles *are* adults in the eyes of the law.

These effects and their attendant results are demonstrated by example. *State v. Brown* illustrates the unbridled discretion of judges in transferring a thirteen-year-old offender to adult court despite the presumption of juvenile jurisdiction. Per typical state transfer mechanisms, juvenile jurisdiction over Brown was waived "with little or no consideration of [her] child status or the mitigating circumstances surrounding [her] offense."[368] The broad discretion of the district court at the transfer stage, as it impeded a meaningful consideration of Brown's youth, is incremental step number one. The Supreme Court of Kansas affirmed this unguided and potentially hostile consideration, reviewing the decision with the deferential lens of abuse of discretion, while ignoring the presumption triggered by Brown's youthfulness.[369]

---

361. *Id.* at 180–83.
362. *Id.* at 181–82.
363. *Id.* at 189–90.
364. *See* Amelung, *supra* note 290, at 31–32 ("[T]he appropriate response for all states, including those not affected by the *Miller* decision, is to incorporate a restorative justice sentencing regime into the juvenile justice system.").
365. Nostro, *supra* note 293, at 180.
366. *See id.* at 179–86.
367. *See* Hoeffel, *supra* note 148, at 53–54.
368. *See* Shitama, *supra* note 209, at 830–31.
369. *See supra* Part I.

After being transferred to adult court, Brown was then charged with particular crimes (felony murder and robbery), which were attached to a specific, mandatory sentence—a sentence the court held did not violate *Miller*'s narrow holding, although it foreclosed any meaningful consideration of Brown's youthfulness.[370] Thus, immediately upon conviction "in adult court, [the] mandatory sentencing laws proscribe[d] age and other mitigating factors from weighing in the determination of [her] punishment . . . ."[371] Here, Brown's juvenile status not only failed to mitigate on her behalf during transfer, it could not even mitigate on her behalf after transfer.

In light of these incremental steps, it is now imperative to take a step back. The Court's reasoning, in the *Roper*, *Graham*, and *Miller* trilogy is this: juvenile offenders are less culpable and therefore less deserving of harsh adult sentences.[372] Allowing juveniles to undergo little or no consideration of mitigating factors at the transfer level, only then to be subjected to mandatory prison terms at the sentencing level is an expressway to "adulthood" the Supreme Court has slowly tried to foreclose.[373] *Miller* sought to distance juveniles from adult treatment by mandating individualized consideration when imposing the harshest sentences. The means chosen, however—the individual consideration mandate—indicate a return to the principles of the juvenile court.[374] That is, the Court recognizes that focusing on the crime in making a juvenile do adult time does not comport with the known scientific fact that juveniles are less able to asses risk, comprehend consequence, and resist peer pressure.[375] As such, where it is apparent that "[a]n offender's age has no bearing on the amount of harm caused—children and adults can inflict the same injuries. But youths' inability fully to appreciate wrongfulness or to control their behavior may reduce culpability and lessen blameworthiness for the harms they cause."[376]

## CONCLUSION

Juveniles are not adults, and "[t]he Court has explicitly stated that the Constitution may apply differently to juveniles and adults."[377] However, there is tension where juvenile sentencing jurisprudence recognizes the "culpability differences between juveniles and adults, and [courts]

370. Shitama, *supra* note 209, at 796.

371. *Id.* at 831.

372. *See* Bear Cloud v. State, 334 P.3d 132, 142 (Wyo. 2014); *see also* Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012).

373. *See Miller*, 132 S. Ct. at 2458–60, 2463–69.

374. *See* Amelung, *supra* note 290, at 24 ("While the Court's decision does not provide guidance for its implementation, it does provide a significant impetus to change the manner in which the legal system holds juvenile criminals accountable for their crimes.").

375. *See* Feld, *supra* note 1, at 113–21.

376. *Id.* at 113 (footnote omitted).

377. Wood, *supra* note 2, at 1467.

nonetheless subject[] them to the same sentencing schemes."[378] *Thompson*, *Roper*, *Graham*, and *Miller* established a tradition of treating juveniles differently using a common thread of reduced juvenile culpability to limit the availability of particular sentences as applied juvenile offenders.[379] *Miller*, in particular, introduced individualized consideration of an offender's youthful status before imposing life without parole, and the broader *Miller* rationale supports an individualization requirement in all juvenile sentencing proceedings.[380]

Post-*Miller* courts have effectively undermined this broad rationale, using loosely considered transfer decisions to trigger a myriad of mandatory sentences and severely limiting the application of *Miller*.[381] The *Miller* Court sought to re-establish the line between young offenders and adult criminals, barring sentencing schemes that impose mandatory life-without-parole on juveniles.[382] In announcing this new rule, the Court contemplated, or perhaps hoped, that "appropriate occasions for sentencing juveniles to this harshest possible penalty w[ould] be uncommon."[383] However, this has not been the case; where juveniles are continuously subjected to a sentence of functional equivalence, life without parole, as subsequent courts incrementally dismantle *Miller*'s rationale. This phenomenon is demonstrated effectively by the Kansas Supreme Court's decision in *State v. Brown*.

In *Brown*, an ill-considered transfer mechanism equalized a thirteen-year-old offender and adult criminals, undermining *Miller*'s contemplation of juveniles as less culpable than adults and warranting individualized consideration. With extreme deference afforded to lower courts, reviewing courts rarely reverse transfer decisions, even when an abuse is present. This is in spite of a constitutional principle of lessened culpability, the harsh consequences of transfer, and even a statutory presumption against transfer. As *Brown* also demonstrates, the most pronounced manner in which courts foreclose the operation of *Miller*'s rationale in juvenile sentencing jurisprudence is denying extension of *Miller* through a myriad of creative sentencing schemes that avoid *Miller*'s holding but offend its rationale. Courts may refuse to apply *Miller* in contexts other than mandatory life without parole. In minimally complying with *Miller*'s narrow holding, courts and legislatures employ a variety of creative strategies: some legislatures sever the mandatory nature of

---

378. Flynn, *supra* note 342, at 1073.

379. *See* Kelli E. Antes, Case Comment, *Taking a Life Without Taking a Life:* State v. Ninham *Violates the Eighth Amendment by Sentencing a Fourteen-Year-Old Juvenile to Life in Prison Without Parole*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 215, 241 (2013).

380. Hoeffel, *supra* note 148, at 53.

381. *See e.g.*, Nostro, *supra* note 293, at 176.

382. *See* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.").

383. *Id.*

life without parole while giving little effect to individual consideration before imposing life without parole; other courts impose the next most severe punishment that may operate as the equivalent to life without parole.

Our current legal system therefore suffers a bifurcation of juvenile sentencing philosophies. Juvenile jurisprudence insists youthfulness is a unique status with regard to legal treatment of criminal offenders, as seen most potently in *Miller*. A variety of states, however, dismantle *Miller*'s broad rationale; they "lump" juveniles into the adult criminal system and charge accordingly, with little or no regard for youthfulness as a categorically distinct status.[384] As a result of diminishing *Miller*'s reach, the constitutional line between juveniles and adults originating in the juvenile courts and advanced by *Miller* is inevitably and incrementally erased.

*Amanda Huston*[*]

384. Flynn, *supra* note 342, at 1072.

* J.D. Candidate, 2014. I want to extend my deepest gratitude to Professor Rebecca Aviel, who spent invaluable time providing such meaningful comments and insight on this Comment. In addition, I thank the *Denver University Law Review* Board, particularly Lindsey Dunn and Brittany Limes, for their helpful input throughout the editing process and in making this Comment publishable. Most importantly, I thank my remarkable husband, Zach Huston, for his enduring support and unwavering belief in my dream. Thank you for sharing this dream with me and for being my teammate through it all.

# *LUSTER V. STATE* AND *STARKEY V. OKLAHOMA*: MODERN SCARLET LETTER REGULATIONS AND THE COURTS' COLD SHOULDER


ABSTRACT

Sex offenders face a unique set of consequences that extend beyond their pronounced sentence. These consequences carry heavy social implications and inflict public humiliation. The malleability of sex offender registration laws, and the legislature's ability to extend the consequences as it sees fit, creates a difficult and potentially unfair situation for past offenders. The Ex Post Facto Clause of the United States Constitution does not allow retroactive punishment. However, this only applies to punitive law. The Supreme Court has provided a test, often called the "intent-effect" test, to determine if retroactive consequences are punitive. In *Luster v. State ex rel. Department of Corrections* and *Starkey v. Oklahoma Department of Corrections*, the Oklahoma Supreme Court analyzed the punitive intent and effect of Oklahoma's retroactive registration laws and concluded that the laws were in violation of the Ex Post Facto Clause. No other state in the Tenth Circuit has yet provided an adequate analysis of the punitive effect of its registration requirements.

This Comment argues that the Tenth Circuit states should follow the Oklahoma Supreme Court's example by carefully examining the punitive effect of each state's respective sex offender registration requirements. *Luster* and *Starkey* have shown that these laws may be unconstitutional. The rule of law under the Constitution favors predictability, and if legislatures are allowed to retroactively change the registration requirements, offenders will be kept in lifelong fear that their sentence may be extended at any time on the whim of the legislature. Therefore, each state court must be vigilant to ensure that the punitive effect of its laws is not excessive in relation to the nonpunitive intent of its legislature.

TABLE OF CONTENTS

INTRODUCTION ..... 614
I. BACKGROUND ..... 616
*A.* Smith v. Doe*: Determining Punitive Intent and Effect* ..... 616
*B. Colorado's Interpretation* ..... 620
*C. New Mexico's Interpretation* ..... 622
*D. Utah Application* ..... 624
*E. Wyoming Application* ..... 624
II. OKLAHOMA APPLICATION ..... 625
*A.* Luster v. State ex rel. Department of Corrections ..... 625
*B.* Starkey v. Oklahoma Department of Corrections ..... 626
1. Affirmative Disability or Restraint ..... 628
2. Historically Regarded as a Punishment ..... 628
3. Comes into Play Only on a Finding of Scienter ..... 629
4. Traditional Aims of Punishment: Retribution and Deterrence ..... 629
5. The Behavior is Already a Crime ..... 629
6. Rational Connection to a Nonpunitive Purpose ..... 629
7. Excessiveness ..... 630
*C. Dissenting Opinions* ..... 630
III. A PROPOSAL FOR THE TENTH CIRCUIT ..... 631
*A. Severe Consequences: Housing and Employment* ..... 632
*B. Predictability in the Law* ..... 636
CONCLUSION ..... 639

## INTRODUCTION

Everyone makes mistakes. Each mistake comes with consequences. Craig Reynolds, a Texas resident, has learned that some mistakes lead to unrelenting consequences.[1] Reynolds was convicted of a sex crime in 1990, before Texas had a requirement for sex offender registration.[2] One year later, Texas passed S.B. No. 259 establishing a registration requirement and consequences for failing to apply.[3] This amendment only applied to those convicted after September 1991.[4] Just six years later, after Reynolds had already served his five-year sentence, Texas enacted S.B. 875 requiring all sexual offenders convicted after 1970 to register if they were incarcerated or under supervision at the time the amendment was

1. Emily DePrang, *Criminal Court Punts on 'Retroactive Punishment' Question*, TEX. OBSERVER (Mar. 31, 2014, 12:59 PM), http://www.texasobserver.org/texas-court-criminal-appeals-retroactive-civil-penalties.
2. *Id.*
3. Sexual Offender Registration Program, S. 259, 72d Leg., Reg. Sess. (Tex. 1991).
4. *Id.*

passed.[5] Reynolds narrowly escaped this statute as he was no longer incarcerated, on probation, or on parole.[6] The striking blow, however, came in 2005 in the form of H.B. No. 867 requiring all sex offenders convicted after 1970, regardless of incarceration or supervision, to apply for sex offender registration.[7] Reynolds had been a free man for a decade, lived a clean life, and now he would be required to apply for public registration and endure its accompanying humiliation.[8] Is it fair to keep sex offenders, like Reynolds, in fear that the legislature may increase their registration requirements as it sees fit?

The United States Constitution explicitly prohibits ex post facto laws.[9] An ex post facto law is "one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed."[10] At first glance, it would seem that an amendment like that affecting Reynolds would clearly be retroactive and in violation of the Ex Post Facto Clause. However, "it has long been recognized . . . that the constitutional prohibition on *ex post facto* laws applies only to penal statutes . . . ."[11] The question then is what can properly be considered a penal law? The majority of courts, when hearing the issue of sex offender registration amendments and their retroactive application, have held the laws are civil and nonpunitive.[12] However, after *Smith v. Doe*,[13] a recent landmark Supreme Court case addressing this question, many courts have held sex offender registration laws invalid as punitive and in violation of the Ex Post Facto Clause.[14] This Comment examines the Tenth Circuit states' varying interpretations of this question. Nearly all of the Tenth Circuit states have found the law to be nonpunitive; however, Oklahoma did the most thorough analysis and held that the law did have a punitive effect. Following Oklahoma's lead, this Comment argues that each state's offenders should only be held to the registration requirements in effect at the time he or she pled or was found guilty.

---

5. Sex Offender Registration Program, TEX. CODE CRIM. P. art. 62.02(d), *amended by* S. 875, 75th Leg., Reg. Sess. (Tex. 1997); DePrang, *supra* note 1.

6. DePrang, *supra* note 1.

7. Sex Offender Registration Requirements, TEX. CODE CRIM. P. art. 62.002(a), *enacted by* H. 867, 79th Leg., Reg. Sess. (Tex. 2005); DePrang *supra* note 1.

8. Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1913 (1991) (explaining the shaming techniques used to punish offenders in the late 1600s including: forcing the accused to wear degrading signs, forcing the accused to confess in public, or branding the accused as permanent labeling); DePrang, *supra* note 1.

9. U.S. CONST. art. I, § 9, cl. 3.

10. Cummings v. Missouri, 71 U.S. 277, 325–26 (1866).

11. Collins v. Youngblood, 497 U.S. 37, 41 (1990).

12. *See* William M. Howard, Annotation, *Validity of State Sex Offender Registration Laws Under Ex Post Facto Prohibitions*, 63 A.L.R. 6th 351 (2011).

13. 538 U.S. 84 (2003).

14. Howard, *supra* note 12, §§ 3–4; *see also Smith*, 538 U.S. at 92 (describing the proper analysis to determine if a law is civil and nonpunitive, or punitive either in intent or effect).

Part I of this Comment provides a summary of the U.S. Supreme Court's ex post facto analysis of sex offender registration statutes. It then explains how the various state courts in the Tenth Circuit have applied this analysis and come to varying conclusions. Part II explores the analysis of two recent Oklahoma Supreme Court cases: *Starkey v. Oklahoma Department of Corrections*[15] and *Luster v. State ex rel. Department of Corrections*.[16] This Part shows how the Oklahoma Supreme Court applied the same test from *Smith* but came to a different conclusion. Part III describes the failure of the Tenth Circuit states to give a consistent and reliable answer to past sex offenders seeking relief. This part also shows the various consequences of sex offender registration in each state. Since law should be predictable,[17] Part III concludes by providing an argument for what the Tenth Circuit states should do to avoid the injustice of leaving offenders in fear of the legislature increasing their sentence.

## I. BACKGROUND

To clarify the reason for the courts' confusion as to the punitive nature of sex offender registration laws, Subpart A will summarize the analysis given in the landmark Supreme Court case *Smith v. Doe*. Subparts B through E will give a detailed description of the subsequent confusion put upon the state courts in applying the proper test. Specifically, these Subparts will address Colorado, New Mexico, Utah, and Wyoming's varying interpretations and applications of the *Smith* case. Kansas has not yet addressed this question in any published opinion.[18]

### *A.* Smith v. Doe: *Determining Punitive Intent and Effect*

In 1994, Megan Kanka, a seven-year-old girl in New Jersey, was assaulted and murdered by her neighbor, Jesse Timmedequas.[19] Unknown to the family, the neighbor had been previously convicted of sex crimes against children.[20] Megan's parents explained that if they had known their neighbor was a sex offender, their daughter would not have died.[21] This event stirred politicians and public activists to support "a change in the laws that [previously] allowed sex offenders and child molesters to live in secrecy amongst their potential victims."[22] In 1994, New

15. 305 P.3d 1004 (Okla. 2013).
16. 315 P.3d 386 (Okla. 2013).
17. EDWIN SCOTT FRUEHWALD, CHOICE OF LAW FOR AMERICAN COURTS: A MULTILATERALIST METHOD 52 (2001) (explaining that "any choice of law system should be as predictable as possible" so that citizens "know how the law governs their behavior so that they can conform their behavior to the law").
18. *See* State v. Donaldson, 331 P.3d 833 (Kan. Ct. App. 2014) (per curiam) (unpublished table decision).
19. Mary K. Evans, Megan's Law: Citizens' Perceptions of Sex Offender Community Notification in Nebraska 5–7 (Aug., 2007) (unpublished M.A. thesis, Graduate College of the University of Nebraska) (on file with the University of Nebraska Library system).
20. *Id.* at 6.
21. *Id.*
22. *Id.*

Jersey passed a law, nicknamed "Megan's Law," meant to inform the public about the presence of convicted sex offenders.[23] By 1996, every state had enacted its own version of Megan's Law, creating several different registration programs across the nation.[24] Alaska's version, the Alaska Sex Offender Registration Act (the Act), was the Supreme Court's main concern in the *Smith* case.

*Smith* involved two anonymous respondents (Doe I and Doe II).[25] Doe I and Doe II were both convicted of sexual abuse of a minor.[26] After being released from prison in 1990, they entered rehabilitative programs, which they both completed.[27] Aggravated sex offenders in Alaska, such as the respondents in *Smith*, were required to register for life under Alaska Statute 12.63.010.[28] Even though the statute was passed after Doe I and Doe II were convicted, it applied to them both retroactively.[29] The parties brought this action seeking for the Act to be held void under the Ex Post Facto Clause.[30]

The Supreme Court separated its analysis into two parts: (1) to "ascertain whether the legislature meant the statute to establish 'civil' proceedings," and if so (2) to "examine whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'"[31] If the Court had found that the legislature meant the statute to be punitive, there would be no need for further analysis.[32] The Court "ordinarily defer[s] to the legislature's stated intent,"[33] and "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."[34]

The Court easily determined that the legislature intended the Act to be nonpunitive by reading directly from its language: "'[S]ex offenders pose a high risk of reoffending,' and . . . 'protecting the public from sex offenders' [is] the 'primary governmental interest'"[35] Likewise, the Court explained that "[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil . . . scheme designed to

23. *Id.*
24. Smith v. Doe, 538 U.S. 84, 90 (2003).
25. *Id.* at 91.
26. *Id.*
27. *Id.*
28. ALASKA STAT. § 12.63.010(d)(2) (2008), *invalidated as applied by* Doe v. State, 189 P.3d 999 (Alaska 2008).
29. *Smith*, 538 U.S. at 91.
30. *Id.* at 91–92.
31. *Id.* at 92 (alteration in original) (quoting Kansas v. Hendricks, 521 U.S. 346, 361 (1997)) (internal quotation marks omitted).
32. *Id.*
33. *Id.* (quoting *Hendricks*, 521 U.S. at 361) (internal quotation marks omitted).
34. *Id.* (quoting Hudson v. United States, 522 U.S. 93, 100 (1997)) (internal quotation marks omitted).
35. *Id.* at 93 (quoting Act of May 12, 1994, 1994 Alaska Sess. Laws ch. 41, §§ 1(1)–(2)).

protect the public from harm."[36] Justice Kennedy, writing for the majority, struggled to show how the statute was meant to be nonpunitive when it accomplished the same goals as Alaska's criminal law, and it was partially codified within Alaska's criminal procedure.[37] With the issue hastily disposed of, the Court quickly moved on from the legislature's intent to the actual punitive effect of the statute.[38]

The Court analyzed the punitive effect of the Alaska statute using seven factors established in *Kennedy v. Mendoza–Martinez*.[39] These factors include:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, [and] whether it appears excessive in relation to the alternative purpose assigned . . . .[40]

Justice Kennedy started by explaining that registration is "of fairly recent origin," and thus cannot have historically or traditionally been regarded as punishment.[41] Even so, Justice Kennedy again struggled to clearly separate the consequences of online public disclosure from the public shaming historically cast upon those committing the same sexual crimes.[42] Next, Justice Kennedy refused to accept the Ninth Circuit's logical argument that offender registration created an affirmative disability and restraint both in employment and housing.[43] Justice Kennedy conceded that the court of appeal's argument had force, but he argued that offenders are "free to move where they wish and to live and work as other citizens."[44] A closer look at housing and employment consequences in more recent times suggests this statement from 2003 may no longer be accurate.[45]

---

36. *Id.* (alterations in original) (quoting *Hendricks*, 521 U.S. at 361) (internal quotation marks omitted).

37. *Id.*

38. *Id.* at 95.

39. *Id.* at 97; Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).

40. *Mendoza-Martinez*, 372 U.S. at 168–69 (footnotes omitted).

41. *Smith*, 538 U.S. at 97 (quoting Doe v. Otte, 259 F.3d 979, 989 (9th Cir. 2001), *rev'd sub nom.* Smith v. Doe, 538 U.S. 84 (2003)) (internal quotation mark omitted).

42. *Id.* at 97–99 (describing registration online as simply an easier way to search criminal history, and humorously adding that the "[w]eb site does not provide the public with means to shame the offender by, say, posting comments underneath his record").

43. *Id.* at 100.

44. *Id.* at 101.

45. *See infra* Part III.A (discussing housing and employment issues arising from offender registration).

The Court continued by admitting that offender registration deters future crime, which is a purpose of punishment.[46] However, Justice Kennedy felt that labeling a law as criminal just because it shared a similar purpose with criminal law—deterrence—would "undermine the Government's ability to engage in effective regulation."[47] The Court quickly transitioned into explaining that the court of appeals was wrong to say the Act's obligations were retributive.[48] The Ninth Circuit argued that the Act imposed a requirement based on "the extent of the wrongdoing, not by the extent of the risk posed."[49] However, Justice Kennedy rejected this reasoning, explaining that the length of reporting requirements was "reasonably related to the danger of recidivism" and therefore consistent with the regulatory and nonpunitive goals.[50] It seems that Justice Kennedy focused on the intent of the Act's requirements while avoiding the question of whether the effect of the registration requirements fulfilled retributive goals.

The Court considered the registration requirements' connection to a nonpunitive purpose to be one of the most significant factors.[51] It concluded that the registration served the purpose of public safety, and the court of appeals readily agreed.[52] The court of appeals alternatively argued that the requirement was overly broad because it applies "to all convicted sex offenders without regard to their future dangerousness."[53] However, Justice Kennedy felt this was unpersuasive in that sex offenders are dangerous "as a class."[54] The Court then explained that the dangers of recidivism justified the length of the reporting requirement, making it not excessive in relation to the nonpunitive goal of public safety.[55]

Justice Souter, in a concurring opinion, writes that for him "this is a close case, for I not only agree with the Court that there is evidence pointing to an intended civil characterization of the Act, but also see considerable evidence pointing the other way."[56] Justice Souter conceded that public safety should be given serious weight in the analysis, but then stated, "[I]t would be naive to look no further, given pervasive attitudes toward sex offenders."[57] He goes on to explain how widespread dissemination of offenders' names humiliates and ostracizes offenders and

---

46. *Smith*, 538 U.S. at 102.
47. *Id.* (quoting Hudson v. United States, 522 U.S. 93, 105 (1997)) (internal quotation mark omitted).
48. *Id.*
49. *Id.* (quoting Doe v. Otte, 259 F.3d 979, 990 (9th Cir. 2001), *rev'd sub nom.* Smith v. Doe, 538 U.S. 84) (internal quotation mark omitted).
50. *Id.*
51. *Id.*
52. *Id.* at 103.
53. *Id.* (citing *Doe v. Otte*, 259 F.3d at 991–92, *rev'd sub nom.*, Smith v. Doe, 538 U.S. 84).
54. *Id.*
55. *Id.*
56. *Id.* at 107 (Souter, J., concurring).
57. *Id.* at 108–09.

"bears some resemblance to shaming punishments that were used earlier in our history."[58] He finally concludes, "What tips the scale for me is the presumption of constitutionality normally accorded a State's law."[59] Lastly, Justice Stevens in a strong dissent states, "No matter how often the Court may repeat and manipulate multifactor tests . . . it will never persuade me that the registration and reporting obligations that are imposed on convicted sex offenders *and no one else* as a result of their convictions are not part of their punishment."[60]

Importantly, the *Smith* case only applied specifically to Alaska's registration requirement. Therefore, state supreme courts were given discretion to apply the Court's standards to their respective state registration statutes. Many states took this opportunity to discontinue the retroactive application of sex offender registrations in their jurisdiction.[61]

*B. Colorado's Interpretation*

Colorado's reaction to challenges of sex offender registration laws can be summarized with four seminal cases: *Jamison v. People*,[62] *People v. Tuffo*,[63] *People v. Sowell*,[64] and *People v. Durapau*.[65] These cases are all from the Colorado Court of Appeals; the Colorado Supreme Court has not yet taken the opportunity to clarify the issue. These cases show that Colorado, like the United States Supreme Court, has based its decisions on fear of recidivism rather than what would be just and fair.[66] In fact, studies have shown that sexual criminals tend to have the lowest recidivism rates amongst other criminals.[67] Still, stories like Megan Kanka's cause lawmakers to fear dangerous recidivists. While reading these sub-

58. *Id.* at 109.
59. *Id.* at 110.
60. *Id.* at 113 (Stevens, J., dissenting).
61. *See* Howard, *supra* note 12, § 4 (citing cases that have held offender registrations invalid under ex post facto analyses).
62. 988 P.2d 177 (Colo. App. 1999).
63. 209 P.3d 1226 (Colo. App. 2009).
64. 327 P.3d 273 (Colo. App. 2011).
65. 280 P.3d 42 (Colo. App. 2011).
66. *See* Kelsey Eagan, Casenote, *Forfeiting Sex Offenders' Constitutional Rights Due to the Stigma of Their Crimes?:* State v. Trosclair, 59 LOY. L. REV. 267, 267 (2013) (explaining how social stigma and fear of recidivism have caused the courts to turn a blind eye to offenders' constitutional rights).
67. *See* Johnna Preble, *The Shame Game: Montana's Right to Privacy for Level 1 Sex Offenders*, 75 MONT. L. REV. 297, 308–09 (2014) ("[S]ex offenders really do not recidivate more than other types of criminals. In 2002, researchers Langan and Levin found that within a three-year period recidivism rates were as follows: burglary, 76%; robbery, 70.2%; drug offenses, 66.7%; and rape, 46%." (footnote omitted)); *see also* Stephanie N.K. Robbins, Comment, *Homelessness Among Sex Offenders: A Case for Restricted Sex Offender Registration and Notification*, 20 TEMP. POL. & CIV. RTS. L. REV. 205, 216 (2010) ("Sex offender registration and notification laws are based on the faulty assumption that sex offenders are more likely to recidivate than other offenders."). *But see* Roger Przybylski, *Chapter 5: Adult Sex Offender Recidivism*, OFF. JUST. PROGRAMS, http://www.smart.gov/SOMAPI/sec1/ch5_recidivism.html#top (last visited Jan. 31, 2015) (acknowledging that many sex offenses go underreported).

parts, it is helpful to consider whether all criminals should have to register.

In *Jamison*, Mark Jamison had been convicted of sexual assault and sentenced to twenty-five years in 1988, six years before Colorado's Megan's Law became effective.[68] In 1994, C.R.S. § 18-3-412.5(1) was passed, requiring all convicted sex offenders released after 1991 to register with local law enforcement.[69] The Colorado Court of Appeals concluded that "the intent of the statute is remedial and not punitive."[70] The court did not consider whether the effect of the statute is in any way punitive.[71] In fact, the court merely concluded, with no supporting evidence, that the statute "does not disadvantage [the] plaintiff."[72] Being that his twenty-five years would have been fulfilled in 2013, Mr. Jamison is certainly disadvantaged now.[73] However, the court analyzed the constitutionality of a potentially ex post facto law merely by guessing at the legislature's implied intent.

Around a decade later, the court came out with its decision in *Tuffo*. Jason Tuffo pled guilty to a misdemeanor sexual assault, and if the court were to consider him a sexually violent predator, he would have had to register for life.[74] The court again simply concluded, with no analysis, that the law in no way disadvantaged Mr. Tuffo after the fact.[75] The court stated, "the registration and notification requirements established in the SVP statute are intended to protect the community rather than punish the offender."[76] Once again, the court remained silent as to the actual punitive, retroactive effect of these laws.

Two years later, the Colorado Court of Appeals heard *People v. Sowell*. Monty Sowell pled guilty to sexual assault on a child by one in a position of trust.[77] The plea agreement contained nothing regarding registration, and offenders were allowed at the time to "petition after a waiting period to discontinue the [registration] requirement."[78] Mr. Sowell did his time on probation, registered as a sex offender, and then petitioned in 2009 to discontinue registration.[79] Unfortunately, in 2001 (two years after he was completely released from supervision), the General Assembly changed the statute precluding these petitions and requiring

---

68. Jamison v. People, 988 P.2d 177, 179 (Colo. App. 1999).
69. *Id.*
70. *Id.* at 180.
71. *See id.* at 179.
72. *Id.* at 180.
73. *Id.*; *see* discussion *infra* Part III.A regarding the negative consequences of sex offender registration on employment and housing.
74. People v. Tuffo, 209 P.3d 1226, 1228 (Colo. App. 2009).
75. *Id.* at 1230.
76. *Id.*
77. People v. Sowell, 327 P.3d 273, 274 (Colo. App. 2011).
78. *Id.*
79. *Id.*

Sowell to register for life.[80] This statute was applied to Sowell retroactively, and as such, was at least potentially in violation of the Ex Post Facto Clause. Even so, eight years after the Supreme Court released its holding in *Smith*, the court of appeals still made no findings regarding the punitive effects of the registration statute. In fact, this court simply stated that the statute was constitutional under the holdings of *Jamison* and *Tuffo*, cases decided with no reference to the Supreme Court's analysis.[81]

Finally, the most recent Colorado case to address retroactive registration laws is *People v. Durapau.* Damon Durapau was charged with sexual assault but found not guilty by reason of insanity.[82] When Durapau was charged, there was no requirement that the court order the Defendant to register as an offender.[83] This changed with the addition of the word "shall" to C.R.S. 16-8-118(2)(a) in 2005, which required the court to order that Durapau register as a sex offender upon his release.[84] Finally, this court looked to the Supreme Court's analysis in *Smith* to determine if the 2005 amendment violated the Ex Post Facto Clause.[85] The court quoted the General Assembly, *Smith*, and the three cases discussed above as evidence that the legislature intended the statute to be a nonpunitive law geared toward public safety.[86] The court then concluded that the statute's amendment did not violate the Ex Post Facto Clause without any reference to its punitive effect.[87]

In these cases, the Colorado courts' analyses have been incomplete because they have failed to consider the punitive effect of retributive registration requirements. These retroactive laws share common goals of punishment: deterrence and retribution. Likewise, it is conceivable that each state's registration procedures would historically have been considered punishment. Without considering these factors, the Colorado courts leave this constitutional interpretation to speculation about the legislature's intent.

### *C. New Mexico's Interpretation*

New Mexico's application of the *Smith* analysis can be summed up under two landmark cases from the Court of Appeals of New Mexico: *State v. Druktenis*[88] and *ACLU of New Mexico v. City of Albuquerque.*[89] New Mexico, unlike Colorado, eventually applied the *Smith* test's puni-

80. *Id.*
81. *Id.* at 277.
82. People v. Durapau, 280 P.3d 42, 45 (Colo. App. 2011).
83. *Id.*
84. *Id.*
85. *Id.* at 48.
86. *Id.* at 48–49.
87. *Id.* at 49.
88. 86 P.3d 1050 (N.M. Ct. App. 2004).
89. 137 P.3d 1215 (N.M. Ct. App. 2006).

tive intent and effect factors. The tone of the conclusions and opinions in *Druktenis*, however, suggests the court may have felt conflicted about its conclusion.

*Druktenis* was the first case to properly apply the *Smith* analysis in New Mexico. Sean Druktenis pled guilty in 1998 to sex offenses that did not require him to register with local authorities at the time.[90] One year later, New Mexico amended its law, the Sex Offender Registration and Notification Act (SORNA), to retroactively apply to Druktenis.[91] Druktenis filed a motion to avoid applying for an exemption because it was in violation of the Ex Post Facto Clause.[92] The court laid out the *Smith* and *Mendoza-Martinez* factors and applied the Supreme Court's intent/effect test.[93]

The court of appeals first proclaimed that they "have no doubt that our Legislature's intent in enacting SORNA was to enact a civil, remedial, regulatory, nonpunitive law."[94] The court arrived at this conclusion by making cursory statements about six of the seven *Smith* factors without applying any facts to their analysis:

> [T]hese conclusions are obvious: the provisions of SORNA do not involve affirmative disability or restraint; have not historically been regarded as punishment; do not come into play only on a finding of scienter; only incidentally, if at all, promote traditional aims of retribution and deterrence; and have a rationally connected, nonpunitive purpose. In our view, that SORNA applies only to behavior that is already criminal is not a significant factor.[95]

The court then struggled with whether SORNA's requirements were excessive as they relate to the purpose of public safety.[96] The court cited *E.B. v. Verniero*[97] and *Russell v. Gregoire*[98] to show that offender registration has extreme consequences regarding employment and housing opportunities.[99]

After wading through the consequences of offender registration, the court came to the final conclusion that "[v]irtually all federal circuits and state jurisdictions considering this issue have rejected the argument that retroactive application of sex offender statute registration and notifica-

---

90. *Druktenis*, 86 P.3d at 1054.
91. *Id.*
92. *Id.* at 1055.
93. *Id.* at 1059–61.
94. *Id.* at 1060.
95. *Id.*
96. *Id.* at 1060–62.
97. 119 F.3d 1077, 1102 (3d Cir. 1997) (describing the harsh realities of the consequences sex offenders suffer with family, housing, and employment); *see* discussion *infra* Part III.A.
98. 124 F.3d 1079, 1092 (9th Cir. 1997) (conceding that registration requirements can have serious consequences through "humiliation, public opprobrium, ostracism, and the loss of job opportunities").
99. *Druktenis*, 86 P.3d at 1061.

tion requirements violates constitutional ex post facto prohibitions."[100] The court seemed unwilling to disavow precedent despite reservations about the potential injustice of retroactive application.

*ACLU of New Mexico* was a similar case brought by a civil rights group challenging the constitutionality of New Mexico's SORNA.[101] The various claims included violations of the Ex Post Facto Clause, double jeopardy, and cruel and unusual punishment.[102] The court did not examine the effect factors from *Mendoza-Martinez*. Rather, the court merely concluded that because *Smith* and *Druktenis* found these laws to be non-punitive, it would follow suit and find SORNA constitutional under all claims.[103] Like Colorado, New Mexico has yet to properly apply the constitutionality of its Megan's Law under the Supreme Court's analysis. Therefore, sex offenders are left with an unpredictable answer and no protection from retroactive punishments.

*D. Utah Application*

The Utah Court of Appeals has not yet decided a case using the *Smith* analysis. Even so, it is helpful to examine how the court has treated claims of unconstitutionality of Utah's Megan's Law. Utah's views can be seen through a summary of its most recent case in this matter, *State v. Trotter*.[104] *Trotter* remains Utah's guiding authority for this issue.

Kenneth Trotter pled guilty to having unlawful sexual conduct with a minor.[105] Later, he attempted to withdraw this plea because he was not advised or informed that he would be required to register as a sex offender.[106] Because this is the closest case on the matter to reach the Utah Supreme Court, it is clear that it has yet to hear an issue of ex post facto concern. Even so, the court used *Smith* to conclude, "[T]he registration requirement is intended to act not as a criminal punishment but as a prophylactic civil remedy."[107] Like other states in the Tenth Circuit, the Utah Supreme Court gave no analysis of whether the punitive effect of the registration statute negates the legislature's intent to deem it civil.

*E. Wyoming Application*

Wyoming has only had opportunity to hear one case on the issue of retroactive sex offender registration requirements. *Kammerer v. State*[108] involved an offender with a second-degree sexual assault charge from

---

100. *Druktenis*, 86 P.3d at 1062.
101. ACLU of N.M. v. City of Albuquerque, 137 P.3d 1215, 1220 (N.M. Ct. App. 2006).
102. *Id.* at 1221.
103. *Id.* at 1222.
104. 330 P.3d 1267 (Utah 2014).
105. *Id.* at 1269.
106. *Id.*
107. *Id.* at 1276. The court only used the *Smith* case in passing in a "see, e.g." citation.
108. 322 P.3d 827 (Wyo. 2014).

1993 in New Jersey.[109] Ronald Kammerer subsequently moved to Wyoming, and he was charged with failing to register in 2012.[110] Kammerer filed a motion to dismiss complaining that the registration laws were in violation of the Ex Post Facto Clause. Like most state courts, the Supreme Court of Wyoming quickly determined that the legislature intended the registration requirements to be nonpunitive.[111] Despite this quick conclusion, the court's opinion has a separate heading for "Punitive Effect" and gives a detailed analysis of the potentially punitive effects of Wyoming's registration requirements, concluding that the law was nonpunitive.[112]

Despite an analysis of the punitive effects, the Wyoming Supreme Court's opinion remained overly conclusive. For example, when discussing the "traditional aims of punishment," the court provides no further analysis than a direct quotation from the *Smith* opinion: "As in *Smith*, we find that the classification of offenders based on their crimes is not indicative of retributive intent."[113] In analyzing the "historically regarded as punishment" factor, the court deferred to the Third Circuit Court of Appeals and concluded: "We are in agreement with the analysis of these courts."[114] These conclusions would be acceptable only if identical statutes were in question. No progress can be gained by merely agreeing to another court's analysis when the law in question in those courts bares no relation to the law currently at issue in each state.

## II. OKLAHOMA APPLICATION

The Oklahoma application of the *Smith* analysis is the most detailed and thoughtful of any Tenth Circuit state. This is illustrated in two Oklahoma Supreme Court cases: *Starkey v. Oklahoma Department of Corrections* and *Luster v. State ex rel. Department of Corrections*. Both cases were split decisions, but they ultimately concluded that Oklahoma's Megan's Law was excessive and unconstitutional as ex post facto punishment.[115]

### *A.* Luster v. State ex rel. Department of Corrections

Christopher Luster pled guilty to sexual assault in April 1992 in Texas.[116] Luster then moved to Oklahoma and began registering with Oklahoma authorities in 2003.[117] At that time, Oklahoma's Megan's Law

109. *Id.* at 830.
110. *Id.*
111. *Id.* at 834.
112. *Id.* at 834–39.
113. *Id.* at 837–38.
114. *Id.* at 834–36.
115. Starkey v. Okla. Dep't of Corr., 305 P.3d 1004, 1030 (Okla. 2013) 2013; Luster v. State ex rel. Dep't of Corr., 315 P.3d 386, 391 (Okla. 2013).
116. *Luster*, 315 P.3d at 387.
117. *Id.*

would have required Luster to register for ten years.[118] In 2007, Oklahoma's Megan's Law was amended, requiring offenders like Luster to register for life.[119] In 2011, Luster petitioned the court and asked that he either be taken off the registry or, alternatively, that he only be required to register for the previously applicable ten years.[120] This case was then consolidated with several other plaintiffs who had filed similar actions.[121] "Luster requested the court issue an order finding . . . each consolidated plaintiff be required to register under the provisions of [SORNA] in effect at the time he or she pled guilty or was convicted . . . ."[122]

Eventually, the petition was granted and the Oklahoma Department of Corrections appealed.[123] In the interim, the *Starkey* case had been decided.[124] The court referred to *Starkey* saying that the requirements "which were enacted after Starkey entered Oklahoma were to be applied prospectively and not retroactively."[125] Interestingly, the same Justices, Justice Winchester and Justice Taylor, dissented in both cases.[126] In *Luster*, the dissent merely stated that they dissent for the same reasons each dissented in *Starkey*.[127] For this purpose, this Comment will focus on the analysis given in *Starkey* as it applies in both cases.

*B.* Starkey v. Oklahoma Department of Corrections

James Starkey's sex offender registration period was increased retroactively by a statute similar to those previously mentioned.[128] Starkey was charged with sexual assault upon a minor in Texas for an act that occurred in 1997.[129] Starkey moved to Oklahoma in 1998, and under the law at the time should have only been required to register for ten years.[130] This time was extended from an amendment to Oklahoma's Megan's Law in 1998.[131]

One of the most prominent differences in Oklahoma's Megan's Law from that of other states like Colorado is the existence of level designations, which create registration requirements dependent on the level of

118. *Id.*
119. *Id.*
120. *Id.* at 388.
121. *Id.* at 387.
122. *Id.* at 389.
123. *Id.* at 388–89.
124. *Id.* at 390–91.
125. *Id.* at 390.
126. *Id.* at 391 (Winchester & Taylor, JJ., dissenting); Starkey v. Okla. Dep't of Corr., 305 P.3d 1004, 1032 (Okla. 2013) (Taylor & Winchester, JJ., dissenting).
127. *Luster*, 315 P.3d at 387 (Taylor, J., dissenting).
128. *Starkey*, 305 P.3d at 1008.
129. *Id.*
130. *Id.*
131. *Id.* at 1009.

future risk each offender poses to the public.[132] The Supreme Court of Oklahoma explained those designations as follows:

> 1. Level one (low): a designated range of points on the sex offender screening tool indicating that the person poses a low danger to the community and will not likely engage in criminal sexual conduct;
>
> 2. Level two (moderate): a designated range of points on the sex offender screening tool indicating that the person poses a moderate danger to the community and may continue to engage in criminal sexual conduct; and
>
> 3. Level three (high): a designated range of points on the sex offender screening tool indicating that the person poses a serious danger to the community and will continue to engage in criminal sexual conduct.[133]

Level 3 offenders were required to register for life.[134] One year before Starkey's registration period would have expired, he was assigned a level 3 risk assessment and required to register for life.[135] The trial court held that the retroactive application of the law was unconstitutional, and the Department of Corrections appealed the judgment.[136]

The court first explained that the Ex Post Facto Clause was included in the body of the U.S. Constitution adopted in 1787 rather than putting it through the amendment process.[137] The court contended that this suggests the clause was "fundamental to the protection of individual liberty."[138] Additionally, the court quoted Justice Marshall saying "the *Ex Post Facto* Clause not only ensures that individuals have 'fair warning' about the effect of criminal statutes, but also 'restricts governmental power by restraining arbitrary and potentially vindictive legislation.'"[139] The court then transitioned into a deep analysis of the *Smith* and *Mendoza-Martinez* factors, which they call the "intent-effects" test.[140] The court added, "How we apply the 'intent-effects' test is not governed by how the federal courts have independently applied the same test under the United States Constitution as long as our interpretation is at least as protective as the federal interpretation."[141]

---

132. *Id.* at 1010.
133. *Id.* (citing OKLA. STAT. tit. 57, § 582.5(C)(1)–(3) (2014)).
134. *Id.* (citing OKLA. STAT. tit. 57, § 583(C)–(D) (2014)).
135. *Id.*
136. *Id.* at 1013.
137. *Id.* at 1018.
138. *Id.* at 1018–19.
139. *Id.* at 1019 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 266–67 (1994)) (internal quotation marks omitted) (examining Justice Stevens's analysis of the Ex Post Facto Clause, which quotes Justice Marshall's opinion in *Weaver v. Graham*, 450 U.S. 24, 28–29 (1981)).
140. *Id.* at 1021.
141. *Id.*

The court found that, like the Alaska version of Megan's Law in *Smith*, the legislative purpose in enacting Oklahoma's SORNA was civil: to identify sex offenders and alert the public when necessary.[142] It then went on to argue, "Although there is evidence pointing to a civil intent, there is considerable evidence of a punitive effect."[143] Finally, a state court realized the potential for the actual effect of these laws to be unconstitutional. The court then proceeded to analyze the seven *Mendoza-Martinez* factors to determine if there was enough proof to override the legislative intent, which deemed the law civil in order to transform it into a penalty.[144]

1. Affirmative Disability or Restraint

Unlike Alaska's version of SORNA, Oklahoma's SORNA requires registrants to apply "in person."[145] The court explained that the *Smith* Court had emphasized the lack of an "in-person" requirement as the reason Alaska's SORNA did not create an affirmative restraint.[146] The court also mentioned that Oklahoma has restrictions on where sex offenders may live.[147] In addition, Oklahoma sex offenders are required to renew their license or identification every year when normal residents do so every four years.[148] Lastly, the court discussed the "profound humiliation and community-wide ostracism" these afflicted registrants face, which was acknowledged in the dissents of *Smith* and *E.B. Verniero*.[149] Thus, the court found that SORNA "impose[d] substantial disabilities on registrants."[150]

2. Historically Regarded as a Punishment

Unlike *Smith*, the Oklahoma court looked to the historical practice of public shaming to show registration was traditionally a punishment.[151] The court compared the branding of "Sex Offender" on each registrants drivers license as their "scarlet letter" since they have to show this ID in day-to-day transactions.[152] The court also discussed how the state's housing restrictions closely resembled the community ousting that was traditionally practiced upon sexual offenders.[153] In sum, the court found that

142. *Id.* at 1020.
143. *Id.*
144. *Id.*
145. *Id.* 1021–22.
146. *Id.*
147. *Id.* at 1023 (providing the many housing restraints on sex offenders in Oklahoma).
148. *Id.*
149. *Id.* at 1024 (quoting Smith v. Doe, 538 U.S. 84, 115 (2003) (Ginsburg, J., dissenting)) (internal quotation mark omitted); *see also* E.B. v. Verniero, 119 F.3d 1077, 1102 (3d Cir. 1997).
150. *Starkey*, 305 P.3d at 1025.
151. *Id.*
152. *Id.* (internal quotation marks omitted).
153. *Id.* at 1026 (concluding that housing restrictions are "regarded in our history and traditions as punishment" (quoting Commonwealth v. Baker, 295 S.W.3d 437, 444 (Ky. 2009)) (internal quotation marks omitted)).

these consequences were "at least analogous . . . . to the traditional punishment of banishment."[154]

3. Comes Into Play Only on a Finding of Scienter

Some SORNA crimes, like statutory rape, do not require a finding of scienter.[155] This is because "it is not a defense that a defendant did not know the victim was under the age of consent."[156] Even so, because courts have considered this to be little proof of punitive effect, the Oklahoma Supreme Court, like in *Smith*, found that this factor "should be given little weight in our analysis."[157]

4. Traditional Aims of Punishment: Retribution and Deterrence

Here, the court again discussed how humiliation and housing restrictions assist in deterrence.[158] The court additionally explained that the registration times are based on the statute the offender was convicted of rather than their individual risk of recidivism.[159] The court maintained that this designation is retributive in nature, focusing on past actions rather than future risk, which supported the conclusion that SORNA has a punitive effect.[160]

5. The Behavior is Already a Crime

Like *Smith*, the Oklahoma court struggled with the awkward application of this factor because SORNA is only triggered when a crime is committed.[161] However, this is exactly the punitive characteristic the factor was created to prevent, and the court rightly concluded: "[T]he fact that [SORNA] applies only to behavior that is already a crime supports the conclusion this . . . factor has a punitive effect."[162]

6. Rational Connection to a Nonpunitive Purpose

Concededly, there is an obvious nonpunitive purpose behind sex offender registration, and the Oklahoma Supreme Court admitted this.[163] The goal of identifying dangerous sexual predators and alerting the public to avoid dangers of recidivism advances the civil purpose of public

154. *Id.*
155. *Id.*
156. *Id.* at 1026–27.
157. *Id.* at 1027.
158. *Id.*
159. *Id.* at 1028.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*

safety.[164] While this factor weighed in favor of constitutionality, the five factors favoring a punitive effect persuaded the court.[165]

7. Excessiveness

The court admitted yet again the importance of protecting the public from the risk of recidivism.[166] Even so, "[t]his non-punitive objective, while undeniably important, will not serve to render a statute so broad and sweeping as to be non-punitive."[167] The court described how, without any individual determination of Starkey's danger to the community, he was required to remain on the registry for life.[168] This was done leaving no chance of petitioning to be removed from the registry, a life sentence, no matter how rehabilitated Starkey may become.[169] The court then concluded with Justice Ginsburg's dissent in *Smith*, "What ultimately tips the balance for me is the Act's excessiveness in relation to its nonpunitive purpose. . . . The Act applies to all convicted sex offenders, without regard to their future dangerousness."[170] In sum, the court found that this factor suggests the law has a punitive effect.[171]

The court concluded that "there is clear proof that the effect of the retroactive application of [SORNA's] registration is punitive and outweighs its non-punitive purpose."[172] The court did not attempt to say that all sex offender registry laws were unconstitutional, but it limited its finding to retroactive applications of these Megan's Laws in unfairly humiliating and ousting past offenders.[173]

*C. Dissenting Opinions*

Justice Taylor wrote a dissenting opinion in *Starkey* suggesting that registration is merely "one of the many, many unpleasant lifetime civil consequences of being convicted of a felony."[174] What he failed to consider is that none of those other felonies require offender registration. Therefore, it is different in practice and effect and should be analyzed differently.

Justice Winchester then gave a detailed overview of his agreement with the *Smith* case in a dissenting opinion.[175] He explained that registration could not be historically regarded as punishment because it is of

164. *Id.*
165. *Id.* at 1030.
166. *Id.* at 1028.
167. *Id.* at 1028–29.
168. *Id.* at 1029.
169. *Id.*
170. *Id.* at 1029–30 (quoting Smith v. Doe, 538 U.S. 84, 116–17 (2003) (Ginsburg, J., dissenting)) (internal quotation mark omitted).
171. *Id.* at 1030.
172. *Id.*
173. *See id.*
174. *Id.* at 1032 (Taylor, J., dissenting).
175. *Id.* (Winchester, J., dissenting).

recent origin.[176] Still, the majority clearly explained that registration closely resembles the "scarlet letter" punishments in the seventeenth century.[177] Justice Winchester further argued that there is no affirmative disability or restraint because a routine background check would provide the same information as the registry.[178] Even so, the additional effects of the registry were explained by the majority saying, "Anyone at any time and for any reason can find the address and picture of a registered sex offender along with the statute under which the offender was convicted . . . ."[179] Does this fit the bill of a routine background check, or is the registry a new common place for future homeowners to gossip over their potential neighbors?

Justice Winchester admitted that offender registration promotes the traditional aims of punishment, but like the *Smith* Court explained, this factor alone does not make a statute punitive.[180] Justice Winchester agreed with *Smith* that a rational connection to a nonpunitive purpose is one of the most significant factors.[181] The majority admits that this factor weighs in favor of a non-punitive effect; however, the Justices explain that this is not dispositive of the issue.[182] Lastly, Justice Winchester describes the Supreme Court's analysis of excessiveness in relation to a non-punitive purpose providing that the state can regulate convicted sex offenders as a class without individual determinations of dangerousness.[183] The majority explains, in an effort to show the constitution protects individuals, that an individual determination is necessary to allow non-dangerous individuals their constitutional protections.[184] While Justice Winchester's arguments were rebutted by the majority opinion, it is notable that he gave victims of this status the just opportunity of a thorough analysis under *Smith*. The *Starkey* opinion, and the dissenting and concurring Justices in the *Smith* case, suggests that when this level of analysis is performed, it may result in a closer case than presented by other state courts in the Tenth Circuit.

## III. A PROPOSAL FOR THE TENTH CIRCUIT

The intent of this Part is to persuade the Tenth Circuit states that now is the time to provide predictability in the law. There will be no shortage of opportunities to hear these issues as the registry continues to

---

176. *Id.* at 1034.
177. *Id.* at 1025 (majority opinion) (internal quotation marks omitted).
178. *Id.* at 1035 (Winchester, J., dissenting).
179. *Id.* at 1024 (majority opinion).
180. *Id.* at 1035 (Winchester, J., dissenting).
181. *Id.* at 1036.
182. *Id.* at 1028 (majority opinion).
183. *Id.* at 1036 (Winchester, J., dissenting).
184. *Id.* at 1028–29 (majority opinion).

grow.[185] Subpart A provides a detailed analysis of the awful consequences that draconian registration requirements have placed upon their victims. Subpart B describes the importance of predictability in the law. Last, Subpart C is a call to action for the states of the Tenth Circuit to provide victims of retroactive offender registry a constitutionally proper analysis of ex post facto laws.

*A. Severe Consequences: Housing and Employment*

Wendy Whitaker engaged in oral sex with a fifteen-year-old when she was seventeen.[186] Ten years after her sodomy conviction, she was forced out of her home because it was too close to a child daycare center.[187] Even though she owned her home, a church nearby happened to have a child care system, and she was forced to leave within seventy-two hours.[188] Housing restrictions are a very serious penalty inflicted upon sex offenders who are forced to register. For example, the *New York Times* explains that defense lawyers have put together maps of Manhattan to show that nearly the whole city is off limits to sex offenders.[189] Many of these offenders seek accommodation in homeless shelters because they are unable to find adequate housing.[190] Unfortunately, even homeless shelters have been unable to receive sex offenders because of their proximity to childcare.[191] Many offenders end up as transients or living in encampments of trailers.[192] Carlos Bonilla, a sixty-five year old who has already completed his sentence, like many others in New York, has been kept in the custody of the corrections department because all potential housing arrangements would be in violation of statutory housing restrictions.[193]

Colorado likewise explained the issue with sex offenders and homelessness in a statement in the *Denver Post*.[194] "Rob McCallum, spokesman for the Colorado Judicial Branch, says probation first tries to find housing in the county where the defendant is sentenced, but it is not always possible considering that housing for sex offenders is difficult to

185. *See* Gary Taylor, *Number of Sex Offenders Soars—Experts Unsure of Reasons*, ORLANDO SENTINEL, Feb. 7, 2012, at A1 ("The numbers are growing across the nation . . . . [T]he U.S. has seen a 23 percent overall increase in the number of registered sex offenders . . . .").

186. Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism Through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMP. POL. & CIV. RTS. L. REV. 1, 25 (2012).

187. *Id.*

188. *Id.*

189. Joseph Goldstein, *Housing Rules Keep Sex Offenders in Prison Beyond Release Dates*, N.Y. TIMES, Aug. 22, 2014, at A18.

190. *Id.*

191. *Id.* (explaining that in New York City, only 14 of the 270 shelters can house sex offenders).

192. *Id.*

193. *Id.*

194. Felisa Cardona, *Supervising Sex Offenders: Array of Rules Tests Officials: An Adams on Denver Streets Offers an Example of Challenges Faced by Authorities*, DENVER POST, Nov. 20, 2011, at B-09.

find."[195] The question then arises: is it difficult, or is it impossible? The article continues by saying that registration doesn't accomplish its goal of protecting the public because the "people don't know if [homeless] sex offenders are truly living in the city where they register."[196]

Another Colorado reporter described a recent court order invalidating a 2006 ordinance passed by the city of Englewood, Colorado, restricting living arrangements for sex offenders.[197] "The order states that restrictive 'not in my backyard ordinances' can have a domino effect, eventually forbidding any sex offenders from living anywhere in Colorado."[198] The restriction kept Colorado sex offenders from living within 2,000 feet of any public school or park and within 1,000 feet of any daycare center.[199] Stephen Ryals, a Colorado resident and registered sex offender, and his wife bought a house in Englewood, CO, and were later told Stephen did not have the right to live there.[200] Is this really the civil remedy these past cases were suggesting?

Several southern states have also shown an increase in homelessness of sex offenders. "In 2009, nine homeless sex offenders, who had been ordered to live in the woods near an Atlanta office park after they could not find housing, were then forced to try to find somewhere else to live."[201] A makeshift camp in Miami houses as many as seventy of these offenders.[202] Additionally, some distance markers restricting residency 500 to 2,500 feet from schools "can effectively zone out sex offenders."[203] What's worse, studies show that there is "no correlation" between these restrictions and lowered recidivism.[204] Rather, these infected individuals are left without any chance of rehabilitation.[205]

In New Mexico, reporters explain that "changes will tighten registration requirements and close a loophole for out-of-state sex offenders. . . . [S]ome sex offenders registered in another state did not have to register upon moving to New Mexico."[206] One reporter quoted Regina Chacon of the State Department of Public Safety who said she understands the conflicting feelings about retroactive laws, "You have some-

195. *Id.*

196. *Id.*

197. Yesenia Robles, *A Shift in Residency Rules*, DENVER POST, May 5, 2014, at 4A .

198. *Id.*

199. *Id.*

200. *Id.*

201. Brian Griggs, Note, *Homeless Is Not an Address: States Need to Explore Housing Options for Sex Offenders*, 79 UMKC L. REV. 757, 767 (2011).

202. *Id.* at 767–68 (joking that this community may soon need its own governor).

203. Cassie Dallas, Comment, *Not in My Backyard: The Implications of Sex Offender Residency Ordinances in Texas and Beyond*, 41 TEX. TECH L. REV. 1235, 1246 (2009).

204. *Id.* at 1245–46 (citing a Colorado and a Minnesota study showing that there is "no correlation between residential proximity to schools or parks and sex offender recidivism").

205. *See id.* at 1244 ("[R]esidency restrictions limit the ability of offenders to reintegrate into society.").

206. *NM Tightens Sex Offender Registration Laws*, ALBUQUERQUE J. (June 28, 2013, 7:11 AM), http://www.abqjournal.com/215689/news/nm-tightens-sex-offender-registration-laws.html.

one who committed a sex crime 30-some years ago and hasn't been in trouble since. Is that fair, to register them now?"[207] Chacon went on, however, to put this off as a collateral consequence of a useful tool.[208]

In 2012, a Utah reporter discussed the State's willingness to allow a sex offender to escape the ill effects of registration.[209] The article quotes Representative Jack Draxler saying, "I am trying to bring some opportunity for redemption from someone who's really paid the price and tried to get their life back in order."[210] Is the jail sentence and corresponding probation time not paying the price enough? Another Utah reporter described the lack of a housing requirement in 2006.[211] He quotes Jeremy Shaw, a supervisor from the Department of Corrections, explaining that "an offender's residence proximity to places where children congregate has no correlation to reoffending. . . . A person can't live next to a school, but a pedophile can go stand in front of a school."[212] The difficulty in finding adequate housing has changed drastically "from 2003 when the *Smith v. Doe* Court commented, 'The Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences.'"[213]

Lack of housing is not the only negative effect from registration. Many sex offenders also suffer from a lack of employment opportunities.[214] *9News* in Colorado followed a story of an anonymous sex offender they called Brent.[215] Brent was a highly paid employee of Lockheed Martin when an undercover police officer contacted him pretending to be a thirteen-year-old and thereafter arrested him for "criminal intent of sexual assault."[216] Brent was fired from Lockheed after he was arrest-

---

207. Julia M. Dendinger, *New Mexico Explains Sex Offender Registration Guidelines*, BACKGROUND INVESTIGATOR (Feb. 2009), http://icioffshore.com/news/fulltext/News.asp?FTID=963&Title=New%20Mexico%20Explains%20Sex%20Offender%20Registration%20Guidelines (internal quotation marks omitted).

208. *See id.*

209. Ladd Brubaker, *Bill Allowing Some Sex Offender Off Register Early Approved*, DESERET NEWS (Jan. 25, 2012), http://www.deseretnews.com/article/700218666/Bill-allowing-some-sex-offender-off-register-early-approved.html.

210. *Id.* (internal quotation marks omitted).

211. Alan Choate, *Housing Restrictions for Sex Offenders*, DAILY HERALD (Sept. 20, 2006), http://www.heraldextra.com/news/local/housing-restrictions-for-sex-offenders/article_dd2ba905-b6f9-53d9-8926-998b69d296ce.html.

212. *Id.* (alteration in original) (quoting Jeremy Shaw, a supervisor in the Utah Department of Corrections adult probation and parole division) (internal quotation mark omitted).

213. Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1115 (2012) ("Changing jobs or relocating residences at will is no longer an option under super-registration schemes.").

214. Jacob Frumkin, Note and Comment, *Perennial Punishment? Why the Sex Offender Registration and Notification Act Needs Reconsideration*, 17 J.L. & POL'Y 313, 321 (2008) (considering the Catch-22 of requiring registration of employment and housing when it is "difficult, if not impossible, for sex offenders to find a home or an employer.").

215. Kevin Torres, *Inside the Life of a Registered Sex Offender*, 9NEWS (Feb. 22, 2014, 10:19 PM), http://archive.9news.com/rss/article/378732/222/Inside-the-life-of-a-registered-sex-offender.

216. *Id.*

ed.[217] The article explains, "Employers wouldn't consider Brent, neighbors turned on him and bills piled up."[218] It goes on to explain that Brent's actual sentence "pales in comparison to the personal sentence he deals with every day."[219] This sentence isn't imposed on any other criminals: not murderers, not thieves, and not domestic abusers.

In Utah, a reporter for the *Deseret News* quoted a defense attorney describing registration as "the modern-day scarlet letter."[220] The reporter added that it inhibits past offenders from trying to assimilate into society as it "hinders their ability to find housing and jobs."[221] Indeed, the article concludes that the excessive requirements "force offenders to go underground."[222] An Oklahoma news station describes the enormous relief felt by a past offender when he was told he would no longer have to register.[223] The report called the man Dave, and explained that he slept with a fourteen-year-old girl he thought was seventeen when he was also seventeen.[224] Dave served diligently on the registry for nineteen years, he lived with his mother upon release from prison because of housing restrictions, and he struggled to find a good job.[225] Dave also "has never been able to take his kids to the park or attend their activities at school."[226] When Dave started his time on the registry, he was told he would have to be registered for ten years, but in year seven he received a letter saying he would have to register for life.[227] Dave cried with joy when Oklahoma laws were amended and he learned he would be freed from his scarlet letter.[228]

The consequences facing these "habitual offenders" far exceed the civil, nonpunitive purpose the courts say these laws serve. Each offender deserves an opportunity to be assessed for individual danger of recidivism before enduring these penalties. Likewise, each offender has a right to live free of the undying fear that they may be retroactively restrained from living their lives.

---

217. *See id.*
218. *Id.*
219. *Id.*
220. Dennis Romboy & Lucinda Dillon Kinkead, *Does Sex Offender Registry Really Work?* DESERET NEWS (Mar. 19, 2008, 12:22 AM), http://www.deseretnews.com/article/695262647/Does-sex-offender-registry-really-work.html (internal quotation mark omitted).
221. *Id.*
222. *Id.*
223. Lori Fullbright, *Oklahoma Removes 2,400 Registered Sex Offenders After Supreme Court Ruling*, NEWS ON 6 (May 8, 2014, 7:19 AM), http://www.newson6.com/story/25469795/oklahoma-removes-2400-registered-sex-offenders-after-supreme-court-ruling.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*

*B. Predictability in the Law*

"If individuals can predict what the law will require of them, then, in principle, they are on notice and have the opportunity to conform their behavior to the law's demands."[229] Individual sex offenders are discouraged from attempting rehabilitation if at any point in the process they could be required to remove themselves from safe housing and comfortable jobs as a class. "Individuals need to know how the law governs their behavior so that they can conform their behavior to the law."[230] In order to provide an incentive for offenders to obtain counseling, avoid recidivism, and assimilate back into society, they must be given a predictable alternative to pursue.

Thomas Lundmark, Professor of Law at the University of Munster, Germany, writes that predictability may be in direct opposition to individual liberty.[231] He explains, "Opponents of predictability would say that it comes at the cost of individual justice."[232] The critics' problem with predictability is that unbending law applies commonly to all regardless of individual guilt. However, sex offenders suffer the opposite dilemma in retroactively applied registration regimes. After serving a sentence properly applied by a court of the United States, the unpredictability of registry laws leaves offenders in lifelong fear of a prolonged sentence.[233] The state can increase registration periods, create new housing restrictions, and impose more harsh employment limitations. Applying laws in a predictable manner need not be rigid. The courts can provide a predictable method of analysis that can be applied individually to avoid the cost of giving up individual justice.

"Among the many values that [the law] can secure, none is more important than legal certainty. . . ."[234] Predictability allows offenders to "know where they stand . . . free to plan and lead their lives as they please . . . [w]ithin the confines of their established duties to others."[235] The ability for individuals in society to know where they stand and what they can do while avoiding government intervention is "a signal virtue of civilized societies."[236] Therefore, the only way to create a fair and just

---

229. Lawrence B. Solum, *Indeterminacy*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 479, 487 (Dennis Patterson ed., 2d ed. 2010) (quoting Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 582 (1993)) (internal quotation mark omitted).

230. FRUEHWALD, *supra* note 17, at 52.

231. THOMAS LUNDMARK, CHARTING THE DIVIDE BETWEEN COMMON AND CIVIL LAW 122 (2012).

232. *Id.*

233. *See supra* Part III.A.

234. NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING 16 (2005).

235. THOMAS SCHULTZ, TRANSNATIONAL LEGALITY: STATELESS LAW AND INTERNATIONAL ARBITRATION 20 (2014) (alteration in original) (quoting MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS 41 (2003)) (internal quotation marks omitted).

236. MACCORMICK, *supra* note 234, at 12.

rule of law is to provide predictability and security and stand by it. Most importantly, "[i]n order for governmental actions and judicial decisions to be predictable so as to enable citizens to plan and lead their lives in accordance with the law, the law must be prospective. It must not impose *a posteriori* or *ex post facto* legal consequences."[237] Society teaches this value early on: we cannot change the rules in the middle of a game. The Government's ability to change the law to retroactively apply to sex offenders who have successfully assimilated back into normal life is precisely the unpredictability that these authors and theorists have criticized. While flexibility in the law may be important, "the more flexibility we permit, the less predictability we enjoy."[238]

*C. A Call to Action in the Tenth Circuit*

The purpose of judicial review is "to take vague constitutional generalities and give them a specific content appropriate to the times and circumstances by balancing the different considerations of social welfare involved."[239] The goal of the judiciary is to interpret the laws. "The goal of interpretation is to achieve the social goal of law."[240] It is not this Comment's purpose to persuade the Tenth Circuit that sex offender registries are per se unconstitutional. Rather, its purpose is to persuade the Tenth Circuit states that it is a closer call than can be determined through seven unsubstantiated and cursory conclusions.[241] Specifically, this comment asks courts to apply the *Smith* factors in a substantive analytical method that accounts for the realities of the lives of registered sex offenders. The effect of each state's Megan's Law must be given its individual and substantive constitutional analysis to determine if its actual retroactive effect is overtly punitive. The Oklahoma Supreme Court's analysis may not hold true for all states' statutory schemes, but it certainly showed the level of analysis that should occur. The negative consequences described above suggest it is time to balance the considerations of social welfare with the constitutional rights of sex offenders that me be violated by each Tenth Circuit state's SORNA laws.

The most important social concern voiced by the courts in the Tenth Circuit is public safety.[242] The concern is that sex offenders are more likely than other criminals to commit similar crimes: the fear of recidivism. This fear, however, is unwarranted.[243] First, these statistics are run

---

237. LUC B. TREMBLAY, THE RULE OF LAW, JUSTICE, AND INTERPRETATION 150 (1997).

238. JEFFREY F. BEATTY & SUSAN S. SAMUELSON, ESSENTIALS OF BUSINESS LAW 78 (2d ed. 2005).

239. CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW 276 (Rev. ed. 1994).

240. AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW, at xv (Sari Bashi, trans., 2005).

241. *See supra* Part I.C (discussing New Mexico's fact-empty conclusions in analyzing the punitive effect of its SORNA laws).

242. *See, e.g.*, Starkey v. Okla. Dep't of Corr., 305 P.3d 1004, 1028–30 (Okla. 2013).

243. *See CBI Sex Offender Registry Facts*, COLO. BUREAU INVESTIGATION, https://www.colorado.gov/apps/cdps/sor/faq.jsf (last visited Nov. 9, 2014) (stating that most sex offenders have no documented criminal history); *see also Sex and Kidnap Offender Notification and*

with sex offenders as a class without accounting for what specific crime was committed or what individual level of risk the offender poses to society.[244] One study of sex offenders shows "that while 36.2% of the sexual offenders generally recidivated, only 13.7% sexually recidivated and 14.3% violently recidivated."[245] Another study found that other crimes had significantly higher recidivism rates, as rapists were rearrested for general recidivism (within three years) at a much lower rate (46%) than those convicted of burglary (76%), robbery (70.2%), and drug offenses (66.7%).[246] Yet none of these other crimes require offenders to register. While public safety is a valid nonpunitive purpose, the only way to justify its registration requirement is to apply it to all criminal activity as all recidivate. Still, some sex offenders pose more of a threat of recidivism than others. This leads to the next suggestion: a detailed level designation, like Oklahoma's system, to give some separation between violent and habitual offenders, and one-time offenders who can be rehabilitated.

Oklahoma divides its offenders into three categories: low, moderate, and high risk.[247] These levels are not based solely on the crime committed, but rather on the individual risk each offender poses to the community.[248] The length of time that a person is required to remain on the registry increases according to individual risk of recidivism.[249] This system addresses Justice Ginsburg's worries in the *Smith* dissent that SORNA applies to offenders without an individualized determination of their future dangerousness.[250] Rather, each individual would be designated a level according to several factors: the crime committed, the number and seriousness of past offenses, and the mental state of the defendant. Additionally, offenders who have proven they can assimilate back into society should be allowed a chance to petition to lower their level designation after some specified period of time.[251]

Compare this to the Colorado Bureau of Investigation, which sets the duration of its registry requirements according to the statute violated.[252] For example, a Class 1, 2, or 3 felony requires twenty years of reg-

---

*Registration*, UTAH DEP'T CORR., http://www.communitynotification.com/cap_office_disclaimer.php?office=54438 (last visited Nov. 9, 2014) (explaining that being on the registry list "does not imply listed individuals will commit a specific type of crime in the future").

244. *See* Eagan, *supra* note 66, at 267–68.

245. LISA WILLIAMS-TAYLOR, INCREASED SURVEILLANCE OF SEX OFFENDERS: IMPACTS ON RECIDIVISM 54 (2012).

246. *See id.* at 53–81.

247. *See Starkey*, 305 P.3d at 1010.

248. *See id.*

249. *Id.*

250. Smith v. Doe, 538 U.S. 84, 116–17 (2003) (Ginsburg, J., dissenting).

251. *See Starkey*, 305 P.3d at 1010 (Starkey made an attempt to decrease his level 3 designation to a level 1 upon completion of his sentence).

252. *See CBI Sex Offender Registry Requirements*, COLO. BUREAU INVESTIGATION, https://www.colorado.gov/apps/cdps/sor/information.jsf (last visited Nov. 9, 2014).

istration, and a Class 4, 5, or 6 felony requires ten years of registration.[253] Colorado does not automatically remove offenders from the list, but requires them to petition to discontinue registration.[254] Each offender lives in fear that the legislature may increase this sentence as it sees fit. Is this predictability in the rule of law, or does it more closely resemble the ex post facto concerns that the founding fathers had in mind?

As in Colorado, Utah sets the registration time period according to the crime committed.[255] For instance: kidnapping, incest, and forcible sexual abuse require ten years; child kidnapping, rape, and aggravated sexual assault require registration for life.[256] This is done without any determination of individual risk of recidivism. The Utah DOC website admits that many of these time periods will extend beyond the supervision legally allowed to the Utah Department of Corrections.[257]

"Once a convict, always a convict" does not comply with the Ex Post Facto Clause of the United States Constitution. The Tenth Circuit states can and should take the time to at least give proper scrutiny to these issues. It is fundamentally unfair to enact a civil registration regime that has punitive effects but is not subject to the same constitutional safeguards as other punitive laws. As such, the Tenth Circuit states must not remain silent on this issue. It is the duty of the courts, with a special responsibility for the quality of justice, to ensure that the legislature does not unconstitutionally deny its citizens their individual liberty.

## CONCLUSION

The Ex Post Facto Clause was written with individual liberty as its fundamental purpose.[258] It was designed to protect the country's citizens from unfair and excessive punishment applied retroactively. Modern sex offender registry requirements applied retroactively cannot be justified as constitutional merely because of the legislature's perceived intent. Even if the legislature did intend for registration to be civil and nonpunitive, the effect of each state's Megan's Law is at least potentially punitive in effect. Therefore, refusing to give these laws a proper analysis as laid out

---

253. *Id.*

254. *Id.*

255. *Utah Laws Regulating Registered Sex Offenders*, UTAH DEP'T CORR., http://corrections.utah.gov/index.php?option=com_content&view=article&id=1062:utah-laws-regulating-registered-sex-offenders&catid=26:sex-offender-registry&Itemid=191 (last visited Nov. 9, 2014).

256. *Id.*

257. *Frequently Asked Questions*, UTAH DEP'T CORR., http://corrections.utah.gov/index.php?option=com_content&view=article&id=888:faqs&catid=2:uncategorised&Itemid=119 (last visited Nov. 9, 2014) (accessed by searching for "registry FAQ" on the Utah DOC website).

258. State v. Letalien, 985 A.2d 4, 13–14 (Me. 2009) (explaining that the Ex Post Facto Clause was "included in the original Constitution and [was] intended by the framers of the Constitution to protect individual liberty").

by the Supreme Court in *Smith* is a contravention of the courts' duties under the common law.

This Comment is not meant to suggest that Oklahoma was correct in its final conclusion that Oklahoma SORNA laws were punitive in effect. Instead, this Comment suggests that the Oklahoma Supreme Court must be applauded for its detailed and just application of the *Smith* intent/effects test. The Tenth Circuit state courts can and should follow suit by giving each SORNA law a fair analysis to determine if denying the individual rights of these offenders is truly nonpunitive in effect. If the laws are upheld, each state must consider the social implications and lessen the punitive effect of these laws through fair level designations.

"The stigma gone, Hester heaved a long, deep sigh, in which the burden of shame and anguish departed from her spirit. O exquisite relief! She had not known the weight, until she felt the freedom!"[259] May those that have offended be given a chance at redemption and an opportunity to feel this peace.

*Colton Johnston**

259. NATHANIEL HAWTHORNE, THE SCARLET LETTER 158 (Brian Harding, ed., Oxford University Press 2007) (1850).

* J.D. Candidate, 2016. I want to express my appreciation to all of those who have helped me polish this piece for publication. I want to thank my father, Coy Johnston (Arizona State Professor of Criminology and Criminal Justice), for his support and guidance. I would also like to thank Professor Alan Chen and Professor David Thomson for their patience and sound advice. Last, I would like to sincerely thank the *Denver University Law Review* Board and editorial staff for their contributions and friendship.

# PRISTINE SOLITUDE OR EQUAL FOOTING? *SAN JUAN COUNTY V. UNITED STATES* AND UTAH'S LARGER BID TO ASSERT CONTROL OVER PUBLIC LANDS IN THE WESTERN UNITED STATES

ABSTRACT

Within the Mining Act of 1866 there is a brief provision known as Revised Statute 2477 (R.S. 2477) that has reignited the anti-federal fervor of western citizens and states' rights advocates demanding a return of federal public lands to more localized management. R.S. 2477 granted counties and states a right-of-way across federal land through the public's use of a particular route. R.S. 2477 was repealed in 1976, but rights-of-way that vested prior to this date remain valid if claimants can provide proof of the route's historic use. Federal courts and land management agencies have struggled to decipher this statutory relic in a modern context. Of the states attempting to use R.S. 2477 as part of a broader effort to balance out the long-standing inequity over control of public lands within western states, Utah has been the most aggressive. In *San Juan County v. United States*, a controversy involving the National Park Service's decision to close a nine-mile trail along a riverbed in Canyonlands National Park to motor vehicles, the Tenth Circuit held that Utah and San Juan County failed to establish the requisite ten years of continuous public use of the Salt Creek road as a "public thoroughfare" prior to the reservation of Canyonlands in 1964. The court recognized that frequency is an important factor when analyzing the public's use and that use under a private right is not sufficient in determining whether a public highway has been established.

This Comment starts by looking at the larger dispute at play over the vast amounts of federally controlled public lands in the western United States. It then explores the history of R.S. 2477 and the Tenth Circuit's prior treatment of this old frontier law. The *San Juan* decision raises the bar for R.S. 2477 claimants by recognizing a more stringent test for demonstrating continuous use by the public—filling a much needed gap in R.S. 2477 jurisprudence. However, the heavy emphasis on evaluating historic evidence and uniqueness of every R.S. 2477 road is a reality that limits the reach of any one particular court decision. Nevertheless, the *San Juan* decision will have a significant effect on how litigants and other western states approach the thousands of R.S. 2477 disputes certain to emerge in the future.

TABLE OF CONTENTS

INTRODUCTION ........ 642
I. WESTERN STATES' HOSTILITY TOWARDS FEDERAL LAND MANAGEMENT ........ 645
II. R.S. 2477 FRAMEWORK ........ 650
*A. Ambiguous Terms: Congressional and Executive Attempts to Shape R.S. 2477's Application* ........ 651
*B. Judicial Attempts to Resolve the Controversy* ........ 653
III. *SAN JUAN V. UNITED STATES* ........ 655
*A. Facts* ........ 655
1. History of Use Along the Salt Creek Road ........ 655
2. Modern Use of Salt Creek Road and Events Leading to the Route's Closure ........ 656
3. Procedural History (SUWA Intervention and District Court Decision) ........ 657
4. Tenth Circuit Unanimously Affirms the District Court ........ 659
a. Quiet Title Act/Sovereign Immunity ........ 659
b. "Continuous Use" (Acceptance of the Salt Creek Road as a Public Right-of-Way) ........ 660
IV. ANALYSIS ........ 662
*A.* San Juan*'s Effect and Precedential Value* ........ 662
*B. Prevailing Uncertainty (and Potential Nonlitigation Alternatives)* ........ 666
*C. The Battle Over Control of Public Lands and R.S. 2477 Moving Forward* ........ 667
CONCLUSION ........ 668

## INTRODUCTION

In Edward Abbey's renowned book, *Desert Solitaire*, he asserted "No more cars in national parks. Let the people walk."[1] Abbey's 1968 autobiographical work about his various encounters as a park ranger in the Colorado Plateau region of the southwestern United States describes his philosophy of the desert ecosystem, and in particular, his view that vehicles traversing through the canyons disturb the harmony struck between nature and nothingness.[2] There are many Americans who share Abbey's perspective that motorized tourists are a fundamental threat to the national park idea, while many others believe road access through these spectacular landscapes is a right that is often unjustly curtailed by regulations imposed by federal land management agencies. Recently, in

1. EDWARD ABBEY, DESERT SOLITAIRE: A SEASON IN THE WILDERNESS 65 (Ballantine Books ed., 1968).

2. *Id.* (proclaiming that "desert canyons are holier than our churches," and since we do not drive cars into cathedrals and "other sanctums of our culture," we should keep automobiles out of national parks as well).

*San Juan*, the Tenth Circuit decided a longstanding dispute over access to a historic route that cuts through Canyonlands National Park on its way to the iconic natural rock formation known as Angel Arch.[3] The legal issue centers on a brief provision of the Lode Mining Act of 1866, known as Revised Statute 2477 (R.S. 2477).[4]

R.S. 2477 drew little attention for almost a century, but it has been thrust into the forefront of a contentious battle over access to "roads" within public land managed by federal government agencies, as well as western citizens' larger bid to assert claims over federal lands in favor of more localized management. R.S. 2477 provides that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."[5] This single clause, enacted without any legislative history, is only one sentence long and on its face appears to be rather straightforward.[6] Nevertheless, it has been a headache for lower courts, federal land agencies, and private property owners attempting to flesh out exactly how to apply the nineteenth century statute in the modern era.[7]

R.S. 2477 was passed during a time when the federal government sought to encourage western expansion by granting easements over unreserved public lands.[8] These rights-of-way were "subject only to state law and did not require specific federal approval."[9] In 1976, Congress repealed this statutory relic though the enactment of the Federal Land Policy Management Act (FLPMA), but it did not extinguish valid preexisting rights-of-way, which may exist "if claimants can prove an R.S. 2477 claim predating 1976."[10] As part of the broader anti-federal fervor that arose when public land management policy shifted "from expansion to preservation," conflicting issues over the 150-year-old mining law's application began to arise.[11] Now, state and local governments see R.S.

---

3. San Juan Cnty. v. United States, 754 F.3d 787, 790 (10th Cir. 2014).

4. An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for Other Purposes, ch. 262, § 8, 14 Stat. 251, 253 (1866) (repealed 1976).

5. *Id.*

6. Jacob Macfarlane, Note, *How Many Cooks Does It Take to Spoil a Soup?* San Juan County v. U.S. *and Interventions in R.S. 2477 Land Disputes*, 29 J. LAND, RESOURCES & ENVTL. L. 227, 228 (2009).

7. *See* Heidi McIntosh, *New Highways Under an Old Law? R.S. 2477 and Its Implications for the Future of Utah's Federal Public Lands*, 18 UTAH B.J., Mar./Apr. 2005, at 16. ("Little did Congress know when it enacted this little-known provision that it had sown the seeds for a controversy that would take us from the hoop skirts of the mid-19th century to the computer age.").

8. Macfarlane, *supra* note 6, at 229–30 (2009) (explaining the policies behind R.S. 2477 at the time of its enactment in 1866).

9. JAN, G. LAITOS ET AL., NATURAL RESOURCES LAW 324 (2d ed. 2012).

10. *Id.*

11. Macfarlane, *supra* note 6, at 227; *see also* Federal Land Policy and Management Act of 1976, Pub. L. No. 94–579, § 706(a), 90 Stat. 2743, 2793. Before the 1960s, development of natural resources on public land followed the principals of wise use and sustained yield management, but a new conservation ethic began to emerge that emphasized preservation over use. R. MCGREGGOR CAWLEY, FEDERAL LAND, WESTERN ANGER: THE SAGEBRUSH REBELLION AND ENVIRONMENTAL POLITICS 11 (1993).

2477 as part of their arsenal in a larger effort to balance out the long-standing inequity over management of public lands within their borders that is currently dominated by the federal government.[12] State and local officials argue that these rights-of-way are "crucial to economic prospects and quality of life" for rural citizens across the West who depend on access for their livelihoods.[13] Environmentalists, on the other hand, "view R.S. 2477 as an illegitimate means of defeating designation of wilderness areas, which must be roadless" and other non-economic values of public land.[14] Wilderness proponents and preservationists point out that many of these old routes claimed to be "highways" are really just "dirt tracks, stream bottoms, livestock trails, and other faint paths" that do not lead to any established anthropogenic destination.[15] After several legislative and administrative attempts failed to resolve the uncertainty surrounding R.S. 2477 ultimately failed, the federal courts became responsible for deciding the validity of R.S. 2477 claims.[16] Over the last fifty years federal courts have teased out various elements to provide guidance in R.S. 2477 disputes, but the effect of any court opinion is limited due to the unique history of every road, so resolving an R.S. 2477 dispute must still be determined on a road-by-road basis.[17]

In April of 2014, after decades of litigation and furious debate over the National Park Service's decision to close a nine-mile trail along a riverbed in Canyonlands National Park to motor vehicles, the Tenth Circuit decided Sa*n Juan County v. United States*.[18] In a unanimous decision, the court held that Utah and San Juan County failed to establish "ten years of continuous public use of the Salt Creek Road as a public thoroughfare prior to the reservation of Canyonlands National Park in 1964" based on historical evidence of cattle grazing, mining operations, and exploratory travel along the route.[19] The court confirmed that fre-

12. William F. Jasper, *Feds vs. the West*, NEW AM. (May 3, 2014), http://www.thenewamerican.com/usnews/item/18177-feds-vs-the-west ("[M]any of the Western states are demanding their 'equal footing' as sovereign states, free from the shackles of an oppressive federal 'landlord.'").

13. Brian Maffly, *Ruling Sticks: Salt Creek Not a County Highway*, SALT LAKE TRIB. (Sept. 9, 2014, 10:33 AM), http://www.sltrib.com/sltrib/politics/58389383-90/amp-court-roads-salt.html.csp?page=2 (reporting the Tenth Circuit's decision to deny an en banc rehearing and the dismay of Utah officials with the April 2014 decision).

14. 2 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 15:19 (2d ed. 2014).

15. *See* LAITOS, *supra* note 9, at 325.

16. Macfarlane, *supra* note 6, at 227; *see also* COGGINS & GLICKSMAN, *supra* note 14, at § 15:19 (discussing the fact that "[t]here is no formal administrative process by which persons claiming R.S. 2477 rights-of-way can solicit binding determinations from the Interior Department as to their existence and validity").

17. For a sampling of R.S. 2477 cases, see Kane Cnty. v. Salazar, 562 F.3d 1077 (10th Cir. 2009); S. Utah Wilderness Alliance v. BLM, 425 F.3d 735 (10th Cir. 2005); Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988) *overruled in part on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992); Kane Cnty. v. United States, No. 2:08–CV–00315, 2011 WL 2489819 (D. Utah June 21, 2011).

18. 754 F.3d 787 (10th Cir. 2014).

19. *Id.* at 801.

quency of public use is an important factor and that use under a private right is not sufficient in determining whether a public highway has been established.[20]

By looking at the *San Juan* decision, the aim of this Comment is to provide guidance for this murky body of law and to highlight the broader issues at play in the controversial debate over control and management of western public lands. Part I explores the larger debate over the vast amounts of federally controlled land concentrated in western states, and Utah's use of R.S. 2477 as a mechanism to retain control of roadways within the state's borders. Part II reviews the history of R.S. 2477, addresses prior Tenth Circuit cases, and provides context for the *San Juan* decision. Part III summarizes *San Juan*'s facts, procedural history, and the Tenth Circuit's unanimous decision. Part IV examines *San Juan*'s precedential value and its effect on R.S. 2477 cases going forward, explores potential nonlitigation alternatives for land management agencies looking for a more efficient way to resolve issues surrounding this old frontier law, and discusses *San Juan*'s potential implications for other western states looking to jump on the R.S. 2477 bandwagon.

## I. WESTERN STATES' HOSTILITY TOWARDS FEDERAL LAND MANAGEMENT

It is difficult to grasp the modern fallout and possible ramifications of R.S. 2477 without first understanding the political backdrop that drives such fierce debate on both sides of the controversy. The dispute over R.S. 2477 can easily be framed into larger arguments about federalism and the long-standing imbalance of federal land ownership that exists in the western United States. During the nineteenth century, when territory was added to the United States by purchase, treaty, or conquest, almost all of it became part of the unappropriated public domain.[21] Prospective western states, in exchange for land grants, relinquished claims to large swaths of unappropriated lands within their boundaries.[22] In a 2012 study, the Congressional Research Service reported that the federal government owns nearly 30% of the land in the United States, mostly in the West and Alaska.[23] With most of this federal ownership concentrated

---

20. *See id.* at 796.

21. Louis Touton, Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817, 818 (1980) ("In admitting new states, however, Congress retained 'unappropriated lands' within their borders and continued its policy of encouraging settlement and development.").

22. MICHAEL P. DOMBECK ET AL., FROM CONQUEST TO CONSERVATION: OUR PUBLIC LANDS LEGACY 10 (2003).

23. ROSS W. GORTE ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA, at *summary* (2012) ("62% of Alaska is federally owned, as is 47% of the 11 coterminous western states. By contrast, the federal government owns only 4% of lands in the other states.").

in the eleven coterminous western states,[24] controversies over land ownership and demands for more localized management are inevitable.[25]

For more than a century the federal government sought to dispose much of the public land in order to encourage settlement of the West, but eventually emphasis shifted to retention and preservation.[26] By the end of the nineteenth century, a conservation ethic began to emerge—sparked by the public's concern over federal land management practices.[27] Federal rangelands were greatly overgrazed, much of the prime hardwood forests had been clearcut without efforts to regenerate the timber supply, and "[c]oncerns continued to grow that mining, timber, and grazing interests had monopolized the frontier."[28] The passage of FLPMA in 1976, with its fundamental emphasis on public land conservation, was the first concrete recognition by Congress that the public domain should remain under federal control unless otherwise provided by agency planning.[29] However, the idea of permanent reservations was hard for many [Americans] to accept, and the concept was at odds with the entrenched ideal of Manifest Destiny that Americans had a right to conquer the land without government interference.[30] The conservation ethic was greeted with especially little fanfare in western states where large amounts of public land remained under federal control.[31] Constituents within these states came to view the federal government's reservation policy as "retarding their development, slowing down their progress, and keeping them in thralldom to a remote government not capable of understanding their needs."[32] From the perspective of local residents, environmentalists from far away had carved a dominant position of influence in federal land policy decisions, creating "an underlying bias in favor of preservation over development."[33]

---

24. Arizona, California, Idaho, Montana, Utah, Colorado, Oregon, Washington, Wyoming, Nevada, and New Mexico. *Id.*

25. For a comprehensive history of public land law, see PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 30 (1968) (explaining that many western representatives in Congress are very critical about the large proportion of the natural resources within their states which are still held by the Federal government).

26. *See* GORTE ET AL., *supra* note 23, at 2.

27. DOMBECK ET AL., *supra* note 22, at 16–17.

28. *Id.*

29. *Id.* at 26–27. Other relevant environmental statutes passed prior to FLPMA include the Endangered Species Act of 1973 and National Environmental Policy Act of 1969, which requires federal agencies to perform environmental impact statements (EIS) for all "major Federal actions significantly affecting the quality of the human environment." Patrick Austin Perry, Comment, *Law West of the Pecos: The Growth of the Wise-Use Movement and the Challenge to Federal Public Land-Use Policy,* 30 LOY. L.A. L. REV. 275, 292 (1996) (quoting 42 U.S.C. § 4332(C)) (internal quotation marks omitted).

30. *See* GATES, *supra* note 25, at 771.

31. *Id.* at 772.

32. *Id.*

33. *See* CAWLEY, *supra* note 11, at 9.

Western states demanding that the federal government hand over public land within their borders is not a new occurrence,[34] but when the emphasis shifted to retention and preservation, land rights advocates became more assertive in their hostility towards federal land management.[35] Throughout the 1970s and 1980s, land rights advocates who believed federal management policies had become overly responsive to environmental preservation concerns began to mobilize and organize a protest in what came to be known as the Sagebrush Rebellion.[36] In the early 1990s, a similar grass-roots effort, known as the County Supremacy Movement, sought to protect property rights and return governmental power to local officials.[37]

Part of this federalism-infused debate is rooted in arguments implicated by the "equal footing" doctrine.[38] The doctrine was upheld by several Supreme Court cases, most notably the Court's 1845 decision in *Pollard* v. *Hagan*,[39] and it stands for the principle that "each state . . . entered the Union on an equal constitutional footing with the original thirteen."[40] Because the equal footing doctrine establishes that states admitted to the United States are given the same legal rights as preexisting states, many western land rights advocates view the federal dominance of land ownership in their states as a violation of this constitutional principle.[41] However, equal footing only guarantees that states have "equal authority" within the federal system, and Congress may use its power to adapt legislation according to "diverse local needs" unique to each state.[42] Hence, without more than "purely economic considerations or unequal treatment, the equal footing doctrine provides no judicially enforceable remedy" to western states wishing to invoke it in an effort to divest the federal government of public lands within their borders.[43] Thus, the notion of public land belonging to all U.S. citizens has remained "a concept basic to the formation of the Union itself."[44] Nonetheless, anti-federal fervor still invokes passion among western officials and local land rights advocates, and as their efforts have increased in

34. "At the Western Governors' Conference in 1913 and 1914 a demand was voiced for the cession of all remaining public lands" to be given back to "states in which they were located." GATES, *supra* note 25, at 30.

35. *See* GATES, *supra* note 25, at 8.

36. *See* CAWLEY, *supra* note 11, at 14.

37. Alexander H. Southwell, Comment, *The County Supremacy Movement: The Federalism Implications of a 1990s States' Rights Battle*, 32 GONZ. L. REV. 417, 420–21 (1996–97).

38. *See generally* Carolyn M. Landever, *Whose Home on the Range? Equal Footing, the New Federalism and State Jurisdiction on Public Lands*, 47 FLA. L. REV. 557 (1995) (explaining that R.S. 2477 arguments lend themselves to easy extrapolation into larger arguments about federalism).

39. 44 U.S. 212 (1845).

40. Touton, *supra* note 21, at 833; *see also Pollard*, 44 U.S. at 228–29.

41. *See* Jasper, *supra* note 12.

42. Touton, *supra* note 21, at 834–35.

43. *Id.* at 835 (footnote omitted).

44. DOMBECK ET AL., *supra* note 22, at 10 ("The public lands belong to all the people.").

recent decades, they have looked for other mechanisms to pursue their objectives.[45]

In Utah, 66% of the land acreage is federally owned.[46] While other western states have been aggressive in their efforts to gain control over federally managed public land within their borders, Utah has relied most heavily on R.S. 2477 as a mechanism to fulfill this objective.[47] To analyze the controversy it is helpful to understand the geological makeup of the region and view the situation from the perspective of those who call the "Canyon Country"[48] home. The R.S. 2477 debate has been most intense in the southern part of the state, where the land is mostly arid desert, characterized by deep winding canyons and unique erosional forms in the colorful sedimentary rock.[49] As early settlers quickly found out, the landscape is much less hospitable to eastern farming practices and large community development than other parts of the country.[50] In fact, the 1.5 million acres within the Greater Canyonlands "makes up 'the largest remaining block of undeveloped land in the lower 48.'"[51] There has been historical grazing and a few oil and mineral booms in the region, but most residents today see tourism and recreation as the most promising economic venture in the region.[52] In 2012, "41 percent of all jobs in Canyon Country [where four of Utah's five national parks are located] were in the leisure and hospitality sector."[53] The red rock wil-

45. For example, on April 18, 2014, more than fifty political leaders and officials from nine Western states attended the Legislative Summit on the Transfer of Public Lands in Salt Lake City to discuss ways of retaining control of federal lands they consider to be poorly managed. Kristen Moulton, *Western Lawmakers Gather in Utah to Talk Federal Land Takeover*, SALT LAKE TRIB. (Apr. 19, 2014, 7:13 PM), http://www.sltrib.com/sltrib/politics/57836973-90/utah-lands-lawmakers-federal.html.csp.

46. GORTE ET AL., *supra* note 23, at 5.

47. In 2012, Utah enacted a statute authorizing the use of taxpayers to claim around 25,000 of these historical rights-of-way on federal land. Hillary Hoffmann & Sara Imperiale, *Recent Surge in "Ghost Roads" Litigation Threatens National Parks and Other Federally Protected Lands*, VT. J. ENVTL. L., http://vjel.vermontlaw.edu/topten/recent-surge-in-ghost-roads-litigation-threatens-national-parks-and-other-federally-protected-lands/ (last visited Feb. 27, 2015).

48. Jennifer Leaver, *The State of Utah's Tourism, Travel and Recreation Industry*, 73 UTAH ECON. & BUS. REV. 1 (2014), *available at* https://bebr.business.utah.edu/sites/default/files/uebr2013no4.pdf.

49. *San Juan County*, UTAH DIV. OF STATE HISTORY, http://ilovehistory.utah.gov/place/counties/san_juan.html (last visited Feb. 27, 2015).

50. DOMBECK ET AL., *supra* note 22, at 15.

51. RANDY T. SIMMONS & RYAN M. YONK, ECONOMIC IMPACTS OF SOUTHERN UTAH WILDERNESS ALLIANCE LITIGATION ON LOCAL COMMUNITIES 19 (2013), *available at* http://www.strata.org/wp-content/uploads/ipePublications/Economic-Impacts-of-Southern-Utah-Wilderness-Alliance-on-Lcoal-Comminities.pdf (quoting Brian Maffly, *Utah Democrats Call for Greater Canyonlands Protections*, SALT LAKE TRIB. (Feb. 5, 2013, 10:20 PM), http://www.sltrib.com/sltrib/politics/55771848-90/canyonlands-county-greater-landscape.html.csp).

52. UTAH DIV. OF STATE HISTORY, *supra* note 49.

53. *See* Leaver, *supra* note 48, at 5. Employment data based on detailed tourism-orientated NAICS codes are often unavailable at the county level, but one way to determine a region's dependence on the tourism industry is to calculate the area's share of leisure and hospitality jobs compared to total jobs.

derness is particularly valuable for recreational off-highway vehicle (OHV) use, and it is an important part of local economies.[54]

If OHV is limited by wilderness designation or other agency decisions, many local residents fear that tourism will decline, imposing an adverse economic effect on those communities.[55] A majority of residents in southern Utah are politically conservative, and agency decisions based on non-economic values of public lands (such as wilderness designation) often encounter fierce animosity from local residents.[56] In 2012 and 2013, the Utah state legislature passed several laws to petition the federal government to surrender control of the vast amounts of territory it controlled within the state.[57] One of the provisions authorized the use of taxpayer money and appropriated nearly $8 million from the state's Constitutional Defense Fund to assert thousands of R.S. 2477 claims on federal land.[58] Around the same time, the state of Utah and twenty-two counties began filing lawsuits against federal land management agencies, seeking rights-of-way over thousands of miles of old, pre-existing routes they claimed were historically in regular public use.[59] Other western states are watching how Utah's aggressive strategy fares in the courts,[60] which is

---

54. In the Mountain West, OHV recreation is common, "with a higher than average OHV participation rate of 28% of the population." SIMMONS & YONK, *supra* note 51, at 19.

55. *Id.* at 21. Wilderness designation can also eradicate the potential extraction of energy or developing recreational facilities. Brian C. Steed et al., *The Economic Costs of Wilderness*, ENVTL. TRENDS, June 2011, at 1, *available at* http://www.environmentaltrends.org/fileadmin/pri/documents/2011/brief062011.pdf (finding that "federally designated Wilderness negatively impacts local economic conditions," and that counties with wilderness experience lower household income, total payroll, and county tax receipts than counties without a wilderness presence).

56. Ed Quillen, *RS-2477: Old Roads and New Controversies*, COLO. CENT. MAG. (Mar. 2001), http://cozine.com/2001-march/rs-2477-old-roads-and-new-controversies. In Clinton's 1996 designation of Grand Staircase-Escalante National Monument, local residents and politicians complained they weren't consulted about the designation, which "closed off that land to any development of coal reserves." Michelle L. Price, *Herbert Hopeful for Utah Public Lands Deal*, WASH. TIMES (Sept. 17, 2014), http://www.washingtontimes.com/news/2014/sep/17/herbert-hopeful-for-utah-public-lands-deal/?page=all.

57. Cheryl K. Chumley, *Western States Seek Control of Federal Lands*, NEWSMAX (Apr. 21, 2014, 3:43 PM), http://www.newsmax.com/Newsfront/Cliven-Bundy-Western-federal-lands/2014/04/21/id/566804. On March 23, 2012, Utah Governor Gary R. Herbert signed House Bill 148, which demands the federal government make good on the promises made in Utah's 1894 Enabling Act (UEA) to extinguish title to federal lands in Utah. Kirk Johnson, *Utah Asks U.S. to Return 20 Million Acres of Land*, N.Y. TIMES (Mar. 23, 2012), http://www.nytimes.com/2012/03/24/us/utah-bill-asks-government-to-give-back-more-than-20-million-acres-of-land.html.

58. Gail Binkly, *Costly Claims: The Fight Over RS 2477 Roads*, FOUR CORNERS FREE PRESS (Sept. 2011), http://fourcornersfreepress.com/news/2011/091101.htm (explaining that HB 76 "establishes a federalism subcommittee of the Constitutional Defense Council to review federal laws applying to Utah, and encourages state officials to attack 'unconstitutional' laws and mandates, providing up to $1.2 million a year for them to do so").

59. Jodi Peterson, *Utah Denied Claim to Road in Canyonlands National Park*, HIGH COUNTRY NEWS (May 13, 2014), http://www.hcn.org/blogs/goat/utah-denied-claim-to-road-in-canyonlands-national-park.

60. *See* Hoffmann & Imperiale, *supra* note 47 (explaining that other western states "have earmarked funds for the study of 'potential'" 2477 claims and will likely increase funding if the Utah lawsuits prevail).

why cases reaching the Tenth Circuit will have ramifications for states looking for creative ways to assert control over federal public lands.

## II. R.S. 2477 FRAMEWORK

Passed just one year after the Civil War ended, R.S. 2477 provides: "[T]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."[61] Like other land grant statutes passed during the post-Civil War era,[62] the purpose of the act was to encourage settlement and development of unreserved public lands in the American West.[63] Therefore, R.S. 2477 essentially provided western pioneers with an implied license to construct roads in order to divest the government's ownership of vast amounts of federal lands.[64] In 1976, the enactment of FLPMA marked an express "180-degree shift" in the federal government's attitude to managing public lands, and the emphasis drifted away from encouraging expansion and towards federal retention using a conservation-based approach.[65] However, Congress also specified that FLPMA was subject to valid existing rights; thus, an R.S. 2477 right-of-way may be valid today if it vested prior to 1976.[66] With this change in the federal government's stance towards public land management, issues over R.S. 2477 have crept back into the debate over the future of western landscapes, and federal land agencies and lower district courts have struggled to agree on a consistent modern interpretation due to the "cryptic language and sparse legislative history" of this old mining law provision.[67] Much of the focus has been on federally managed lands, but R.S. 2477 also affects private property owners that took title from the federal government subject to preexisting rights-of-way.[68] For many, the

61. An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for Other Purposes, ch. 262, § 8, 14 Stat. 251, 253 (1866) (repealed 1976).

62. *See* DOMBECK ET AL., *supra* note 22, at 13, 15 ("The Homestead Act was passed in 1862 and provided free land" for up to 160 acres to settlers who "lived on the land and cultivated it for five years." "The Desert Land Act of 1877 enabled settlers to buy 640 acres of desert land for $1.25 per acre if they constructed irrigation systems.").

63. *See* McIntosh, *supra* note 7, at 18 (explaining that in the Homestead Act, the Desert Lands Act, and the Mining Act of 1872, Congress put forth a simple proposition to prospective landowners: "Work the land, and we will reward you with a property interest . . . . but specifically conditioned on the exertion of effort to create a lasting kind of development . . . that would contribute to the settlement of the west's open territory").

64. Lindsay Houseal, Comment, Wilderness Society v. Kane County, Utah*: A Welcome Change for the Tenth Circuit and Environmental Groups*, 87 DENV. U. L. REV. 725, 726 (2010).

65. Hillary M. Hoffmann, *Signs, Signs, Everywhere Signs:* The Wilderness Society v. Kane County *Leaves Everyone Confused About Navigating a Right-of-Way Claim Under Revised Statute 2477*, 18 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 3, 8–9 (2012) ("Instead of allowing and encouraging citizens to settle upon federal land . . . . FLPMA . . . required federal agencies to begin managing federal public lands using a conservation-based approach called 'sustained yield,' which contemplated planning around environmental values and objectives.").

66. LAITOS, *supra* note 9, at 324.

67. Bret C. Birdsong, *Road Rage and R.S. 2477: Judicial and Administrative Responsibility for Resolving Road Claims on Public Lands*, 56 HASTINGS L.J. 523, 527 (2005).

68. *See* McIntosh, *supra* note 7, at 17 (explaining private landowners have dealt with county officials claiming "routes that did not appear on title searches . . . were 'highways' established when the land was once owned by the federal government").

prospect of having the public traverse through their backyard destroys the attributes of isolation that make such land valuable to the owner in the first place.[69]

At the center of the dispute are conflicting views concerning the existence, extent, duration, and scope of these preexisting rights-of-way. Parties with vastly different interests and objectives disagree on how to define the statute's ambiguous terms such as "highway" or "construction" and to what degree state law should determine the scope of "acceptance" through "sufficient public use." Public-access advocates, state and local governments, and off-road vehicle enthusiasts prefer a broad interpretation of what actions are necessary in order to establish a public highway.[70] They argue for a more relaxed standard of what constitutes "continuous public use" because the roadways are often in sparsely populated rural communities.[71] Thus, even if the roadways' use may not have been considered continuous "according to an urban point of reference," the roads were still used as often as the local residents found necessary.[72] These state and local officials assert that road access through federal lands is especially important for economic prosperity in rural areas where R.S. 2477 roads support recreation activities, in addition to ranching and mining.[73] At the opposite end of the spectrum are environmentalists, who support stricter application of R.S. 2477 terminology, such as requiring extensive frequency of use by the pubic or mechanical construction of the roadway.[74] They dismiss the other side's economic-livelihood argument and suggest the hidden objective is to use R.S. 2477 as an illegitimate way to circumvent environmental laws and disqualify large spreads of land from wilderness designation, which must be roadless.[75]

*A. Ambiguous Terms: Congressional and Executive Attempts to Shape R.S. 2477's Application*

The Department of the Interior (DOI) controls nearly 640 million acres of federally owned land, most of which is managed by three agen-

69. For a list of 2477 claims on private lands, see *RS 2477: Impacts on Private Property*, S. UTAH WILDERNESS ALLIANCE (Feb. 9, 2011), http://www.suwa.org/wp-content/uploads/PrivateProperty_FactSheet.pdf.

70. *See* Houseal, *supra* note 64, at 727.

71. *See* Phil Taylor, *Utah, County Denied Rehearing in Canyonlands Roads Case*, GREENWIRE (Sept. 9, 2014), http://www.eenews.net/greenwire/stories/1060005472 (quoting Utah Association of Counties that "[s]parsely-populated landscape connected by seemingly empty roads are the geographic rule, not the exception, of the American West").

72. *Id.* ("Utah counties took exception to the 10th Circuit's frequency finding, calling it an 'urban-centric dismissal' of the rural West, where roads are less frequented . . . but are no less important to local residents.")

73. Alison Suthers, Note, *A Separate Peace?: Utah's R.S. 2477 Memorandum of Understanding, Disclaimers of Interest, and the Future of R.S. 2477 Rights-of-Way in the West*, 26 J. LAND RESOURCES & ENVTL. L. 111, 111 (2005).

74. *See* Houseal, *supra* note 64, at 727–28.

75. COGGINS & GLICKSMAN, *supra* note 14, § 15:19.

cies—the National Park Service (NPS), Bureau of Land Management (BLM), and Fish and Wildlife Service (FWS).[76] These agencies must conduct periodic planning "pursuant to their statutory mandates," and they are also charged with addressing issues that come up when conflicts erupt between competing land uses.[77]

For these federal land management agencies, the absence of any legislative history concerning R.S. 2477 makes the need for congressional and executive guidance crucial. Without consistent federal guidelines for interpreting and applying the statute, the ambiguity disrupts land use planning efforts, wilderness area designation, and private property titles are "clouded by potential [R.S. 2477] claims."[78] Unfortunately, past attempts to create an agency process for evaluating these preexisting claims have failed to provide any meaningful assistance.

In 1994, the DOI proposed regulations to create a formal administrative process by which persons claiming R.S. 2477 rights-of-way could solicit binding determinations as to the claim's existence and validity.[79] The regulations also put forth a timeframe for resolving such claims and provided more detailed definitions for statuory terms such as "construction" and "highway."[80] However, the DOI's efforts were ultimately blocked by Congress, and the polarizing politics surrounding the R.S. 2477 debate have prevented subsequent administrative efforts from providing much clarity to the controversy.[81]

In 2003, the DOI signed a Memorandum of Understanding (MOU) with the State of Utah, which provided a streamlined application process where the BLM would acknowledge the existence of an R.S. 2477 claim by issuing a "disclaimer of interest" if the application satisfied the terms of the MOU.[82] However, the MOU failed to garner widespread support since it was signed without involving input from the public and excluded claims involving "sensitive areas like national parks" or wilderness study areas.[83] Because the MOU was negotiated in a setting that included only parties from one side of the debate and incorporated an overly broad interpretation of what qualifies as a public highway, it is frequently at-

76. Hoffmann, *supra* note 65, at 16–17 (describing the confusion surrounding application of R.S. 2477 for federal land management agencies).

77. *Id.*

78. Macfarlane, *supra* note 6, at 252.

79. COGGINS & GLICKSMAN, *supra* note 14, § 15:19.

80. Michael S. Freeman & Lusanna J. Ro, *RS 2477: The Battle Over Rights-of-Way on Federal Land*, 32 COLO. LAW. 105, 106 (2003).

81. *Id.* (describing how the 1996 Congressional Moratorium stated that "without express Congressional approval, no final rule or regulation of any agency . . . pertaining to . . . 2477 shall take effect").

82. Memorandum of Understanding Between the State of Utah and the Dep't of the Interior on State & Cnty. Road1 Acknowledgment (Apr. 9, 2003), *available at* http://www.doi.gov/news/archive/03_News_Releases/mours2477.htm.

83. McIntosh, *supra* note 7, at 20.

tacked as an insufficient basis for asserting R.S. 2477 claims.[84] Consequently, costly and drawn-out litigation in federal courts has become the primary mechanism for resolving the more controversial R.S. 2477 claims like those within national parks or designated wilderness areas.[85]

*B. Judicial Attempts to Resolve the Controversy*

Land-access proponents and states attempting to establish routes through public lands use the Quiet Title Act (QTA) in conjunction with R.S. 2477 to sue the federal government.[86] "The QTA is a limited waiver of the United State's [sic] sovereign immunity which would otherwise protect the federal government from suit" where the claimant asserts an interest in real property against the United States.[87]

One of the first cases to reach the Tenth Circuit, and the leading opinion on R.S. 2477, was *Sierra Club v. Hodel*,[88] in which several environmental organizations sued the federal government and Garfield County, Utah, after the latter announced plans to widen portions of the Burr Trail.[89] Specifically, the county had proposed upgrading a former cattle trail into a two-lane gravel road that would provide access to a federal marina.[90] The Sierra Club sought an injunction against the road improvements because of the adverse effects the expansion would have on several adjacent wilderness study areas.[91] The Tenth Circuit majority decided that an R.S. 2477 right-of-way may be valid today if it vested prior to 1976, but that the scope of the preexisting right was to be measured by state law in effect at the time of repeal.[92]

A more recent case that helped define the requirements and scope of agency determination regarding R.S. 2477 was *Southern Utah Wilderness Alliance v. Bureau of Land Management* (*SUWA*).[93] The case was decided following the aftermath of President Clinton's establishment of Grand Staircase-Escalante National Monument in 1996.[94] Soon after the monument was dedicated tensions grew, and road crews from several southern Utah counties started grading various dirt trails in the monument without notifying the BLM.[95] When the BLM did nothing to stop

84. *See id.*
85. Macfarlane, *supra* note 6, at 243.
86. McIntosh, *supra* note 7, at 18–19.
87. *Id.* at 18.
88. 848 F.2d 1068 (10th Cir. 1988), *overruled in part on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).
89. *Id.* at 1068 (concluding that state law should control the scope of the right-of-way).
90. *Id.* at 1073.
91. *Id.* at 1074.
92. *Id.* at 1083–84.
93. 425 F.3d 735 (10th Cir. 2005).
94. Hoffmann, *supra* note 65, at 13–14 ("In September 1996, President Clinton . . . exacerbated the tensions by establishing the Grand Staircase-Escalante National Monument, pursuant to his authority under the American Antiquities Act, reserving almost two million acres . . . under BLM management." (footnote omitted)).
95. *Id.* at 14.

these activities, the Southern Utah Wilderness Alliance (SUWA), a nonprofit conservation group, filed an action in federal court against the BLM and several Utah counties.[96] After the district court held the counties did not require the BLM's permission to undertake routine maintenance on the roads, the Tenth Circuit reversed, and held that "the holder of an R.S. 2477 right-of-way across federal land must consult with the appropriate federal land management agency before it undertakes any improvements . . . beyond routine maintenance."[97] In essence, this clarified that counties could not simply drive bulldozers and other construction machines onto BLM land to conduct significant improvements without federal authorization.[98]

More importantly, elaborating on *Hodel*, the *SUWA* decision held that where the existence of the right-of-way is at issue, the BLM does not have primary jurisdiction over R.S. 2477 claims and that both perfection and scope of the preexisting right-of-way are determined by looking to state law.[99] However, the Tenth Circuit's ruling allowed the agency to make initial "administrative determinations" on the validity of an R.S. 2477 roadway for planning purposes only.[100] This meant the agency could issue its opinion as to the validity—but without carrying the force of law, the agency's determination "could be taken with a proverbial grain of salt."[101]

The court also briefly discussed the burdens of proof in an R.S. 2477 dispute. The court held that the party "seeking to enforce rights-of-way against the federal government" bears the burden of proof.[102] Thus, while the *SUWA* decision clarified which party bears the burden of proof, it did nothing to define what standard of evidence is used to satisfy the burden.

Finally, the Tenth Circuit created the "public use standard" for determining when and if an R.S. 2477 right-of-way had vested.[103] The court explained that under the common law, the establishment of a public right-of-way required two components: "the landowner's objectively manifested intent to dedicate property to the public use as a right of way,

96. *Id.*
97. *SUWA*, 425 F.3d at 745.
98. Hoffmann, *supra* note 65, at 15–16.
99. *SUWA*, 425 F.3d at 757. This holding lies in contrast to the Ninth Circuit approach "which has overlooked state law . . . regarding the [validity] of R.S. 2477 claims." Macfarlane, *supra* note 6, at 233.
100. *SUWA*, 425 F.3d at 757–58.
101. Hoffmann, *supra* note 65, at 17.
102. *SUWA*, 425 F.3d at 768–69 (quoting S. Utah Wilderness Alliance v. BLM, 147 F. Supp. 2d 1130, 1136 (D. Utah 2001)) (internal quotation marks omitted) (explaining the allocation of the burden of proof is consistent with "the established rule . . . that land grants are construed favorably to the Government" (quoting S. Utah Wilderness Alliance v. BLM, 147 F. Supp. 2d at 1136) (internal quotation mark omitted)).
103. *Id.*

and acceptance by the public."[104] The first requirement—intent to dedicate—could manifest "by express statement or [be] presumed from conduct."[105] Public acceptance has been more difficult to determine, but under Utah law, "[a] highway shall be deemed and taken as dedicated and abandoned to the use of the Public when it has been continuously and uninterruptedly used as a Public thoroughfare for a period of ten years."[106] The *SUWA* decision provided clarity on issues such as how to measure public use, which party bears the burden of proof, and defined several terms such as highway and construction.[107] However, the Tenth Circuit's decision still left much to be desired for lower courts attempting to flesh out this vexing frontier law and determine the merits of R.S. 2477 disputes. In 2014, the Tenth Circuit got another opportunity in a decade-long dispute over an old route winding its way through a streambed in the heart of Canyonlands National Park.

## III. *SAN JUAN V. UNITED STATES*

### *A. Facts*

#### 1. History of Use Along the Salt Creek Road

Salt Creek Canyon is considered as "one of the crown jewels of Canyonlands National Park,"[108] with its perennial stream providing an extensive riparian habitat for wildlife, as well as being the area with the highest recorded density of archeological sites in the park.[109] An old pioneer route located fifty miles from the nearest city winds its way through the canyon and "generally follows the course of Salt Creek."[110] Historical evidence gathered from maps, aerial photographs, geological surveys, the area's scant written history, and testimony from witnesses who visited the relevant landscape characterize the history of travel along the Salt Creek road.[111] Starting in the 1890s, a homesteader named Lee Kirk settled in an area south of the Salt Creek road, and it was supposed that he and his successors traversed the path to move supplies for farming activi-

---

104. *Id.* at 769.

105. *Id.*

106. *Id.* at 771 (quoting Lindsay Land & Live Stock Co. v. Churnos, 285 P. 646, 648 (Utah 1929)) (internal quotation marks omitted).

107. Hoffmann, *supra* note 65, at 18.

108. Stephen Bloch & Heidi McIntosh, *Tenth Circuit Denies State and San Juan County Petitions for Rehearing*, S. UTAH WILDERNESS ALLIANCE (Sept. 8, 2014), http://suwa.org/tenth-circuit-denies-state-san-juan-county-petitions-rehearing-2/.

109. Answering Brief of Defendants-Appellees at 7, San Juan Cnty. v. United States, 754 F.3d 787 (10th Cir. 2014) (Nos. 11-4146, 11-4149), 2012 WL 1074408, at *7 (explaining that "[s]urface and groundwater associated with the creek support the most extensive riparian ecosystem in Canyonlands, other than the Green and Colorado Rivers. Surface water and riparian habitat are among the rarest habitat types in the arid Canyonlands environment." (citation omitted)).

110. *Id.* at 9.

111. Appellant San Juan County's Opening Brief at 6, *San Juan Cnty.*, 754 F.3d 787 (Nos. 11-4146, 11-4149), 2011 WL 6179568, at *6.

ties.[112] Around the same period, ranchers began moving cattle along the Salt Creek road between winter and summer grazing seasons and continued to do so through the 1940s.[113] Most of the cattle-herding activities were conducted by the Scorup-Somerville Cattle Company, which carried out its operations pursuant to a grazing permit issued by the DOI.[114] There was also some evidence that uranium mining and oil drilling were conducted in the area, but there was very little, if any, evidence that the prospectors used the Salt Creek road for these extraction activities.[115] With the discovery of Angel Arch,[116] nascent uses by the general public along the claimed right-of-way began in the early 1950s.[117] Characterized as "exploration trips," these groups of tourists (boy scouts and curious travelers on horseback and in jeeps) ventured down the Salt Creek route for recreational purposes.[118] It was not until the latter half of the 1950s that the area saw a significant uptick in the number of visitors.[119]

2. Modern Use of Salt Creek Road and Events Leading to the Route's Closure

On September 12, 1964, Congress established Canyonlands National Park and reserved the lands within, including the Needles District where the Salt Creek road is located.[120] However, the reservation was "subject to valid existing rights," which included claims to R.S. 2477 rights-of-way.[121] Today, the nine-mile trail known as Salt Creek road "is the primary way for tourists to reach several scenic sites . . . including Angel Arch."[122] As it carves its way through the desert landscape, the unimproved road crosses the streambed many times, and for a long time jeep travel along the route was a popular choice for visitors not wishing to make the arduous trek by foot.[123] From 1980 to 2012, Canyonlands experienced the fastest growth in visitation among the state's national parks.[124] As the number of park visitors dramatically increased in the

112. Answering Brief of Defendants-Appellees, *supra* note 109, at 20–21.

113. *Id.* at 28.

114. Appellant San Juan County's Opening Brief, *supra* note 111, at 10; Answering Brief of Defendants-Appellees, *supra* note 109, at 20.

115. Answering Brief of Defendants-Appellees, *supra* note 109, at 22.

116. Angel Arch is a natural geological feature within Canyonlands National Park and is "considered by many people to be the most beautiful and spectacular arch in the park if not in the entire canyon country." S.W. LOHMAN, U.S. GEOLOGICAL SURVEY, GEOLOGICAL SURVEY BULLETIN 1327, THE GEOLOGIC STORY OF CANYONLANDS NATIONAL PARK (1974), *available at* http://www.cr.nps.gov/history/online_books/geology/publications/bul/1327/sec8.htm.

117. Answering Brief of Defendants-Appellees, *supra* note 109, at 23.

118. *Id.*

119. *Id.*

120. 16 U.S.C. § 271 (2012).

121. Appellant San Juan County's Opening Brief, *supra* note 111, at 5.

122. San Juan Cnty. v. United States, 754 F.3d 787, 790 (10th Cir. 2014).

123. Answering Brief of Defendants-Appellees, *supra* note 109, at 9 ("As the claimed Salt Creek road winds its way through [the] Canyon . . . it generally follows the course of Salt Creek . . . weaving in and out of the streambed and crossing the channel about 60 times.").

124. Canyonlands saw a 702% increase in visitation, followed by Arches (269%), Zion (165%), Bryce (142%) and Capitol Reef (96%). Leaver, *supra* note 48, at 6–7.

early 1990s, NPS officials began to notice that mounting jeep use was polluting the stream with engine fluids and degrading wildlife habitat in the Salt Creek ecosystem.[125]

In 1992, the NPS started developing its Back Country Management Plan (BMP) for Canyonlands, and there was considerable debate over how to balance the public's competing demands for vehicular access and preservation of Salt Creek's unique natural and cultural resources.[126] Upon the official release of the BMP in 1995, the NPS placed a permit gate on the Salt Creek road and limited the number of vehicles traveling on the route to twelve per day.[127]

The gate and permit system was not challenged by San Juan County or the state, but a complaint filed by SUWA against the NPS in earlier litigation resulted in an injunction that kept portions of the Salt Creek road closed to vehicular use.[128] Several off-road vehicle user groups successfully appealed the decision, and the Tenth Circuit vacated the injunction in 2000,[129] but the NPS decided to keep the road closed while it established a new policy regarding motor vehicle traffic on the Salt Creek road.[130] After conducting its environmental assessment in 2002, the NPS concluded that continuing to allow vehicle traffic would result in "adverse impacts to Salt Creek's ecosystem that would impair park resources and values."[131] This decision led the NPS to issue a final rule on June 14, 2004 that prohibited motor vehicles in Salt Creek Canyon above Peekaboo Spring, as well as the Park Service's administrative determination that an R.S. 2477 right-of-way did not exist.[132] That same day, San Juan County filed a suit to quiet title, claiming an alleged R.S. 2477 right-of-way along the Salt Creek road.[133]

3. Procedural History (SUWA Intervention and District Court Decision)

After the county filed its complaint asserting title to the alleged right-of-way, several environmental groups—SUWA, The Wilderness Society (TWS), and Grand Canyon Trust (GCT)—moved to intervene in the district court claiming that a decision to grant the R.S. 2477 right-of-

125. *See* Bloch & McIntosh, *supra* note 108 (discussing the Park Service's decision to close Salt Creek Canyon to vehicular use in 2004).

126. Answering Brief of Defendants-Appellees, *supra* note 109, at 15.

127. Appellant San Juan County's Opening Brief, *supra* note 111, at 2 ("From historically open travel that exceeded 60 vehicles per day . . . the BMP's permit gate reduced the number of vehicles . . . to no more than 10 private vehicles and 2 commercial tour vehicles per day.").

128. S. Utah Wilderness Alliance v. Dabney, 222 F. 3d 819, 822 (10th Cir. 2000).

129. *Id.* at 830.

130. Appellant San Juan County's Opening Brief, *supra* note 111, at 3.

131. Answering Brief of Defendants-Appellees, *supra* note 109, at 19–20.

132. Canyonlands National Park—Salt Creek Canyon, 69 Fed. Reg. 32,871, 32,876 (June 14, 2004) (codified at 36 C.F.R. § 7.44(a)).

133. Answering Brief of Defendants-Appellees, *supra* note 109, at 20.

way would seriously threaten their conservation interests.[134] The district court denied the intervention sought by the environmental advocacy groups, and the Tenth Circuit, sitting en banc, upheld the decision.[135] The court reasoned that while the conservation groups have an interest that may be impaired in the outcome of a title dispute involving an R.S. 2477 right-of-way, the federal government adequately represented those interests in the Salt Creek matter.[136] The environmental groups then moved for amicus status, and subsequently participated in litigation as "friends of the court," but not as parties.[137] This appeal only considered the intervention issue and did not consider the merits of the case.

Upon remand, the district court, after weighing all the historical evidence of use presented by both parties, ruled in favor of the United States.[138] Following R.S. 2477 precedent, the court looked to state common law to guide its determination of whether the public use amounts to acceptance as a public highway, and under Utah law, "[a] highway shall be deemed and taken as dedicated and abandoned to the use of the Public when it has been continuously and uninterruptedly used as a Public thoroughfare for a period of ten years."[139] According to the district court, "the evidence was not sufficient" to demonstrate that "the road had been in continuous public use as a public thoroughfare throughout a ten year period prior to the reservation of Canyonlands" in 1964.[140]

The district court disregarded the homesteading activities in the late nineteenth century, as there was "[v]ery little direct evidence" to the duration and extent of travel by these early pioneers along the claimed route.[141] The court also found it would strain the language of R.S. 2477 to characterize the cattle-grazing activities as public use because any evidence of sufficient use was conducted under a proprietary interest, pursuant to federal grazing permits.[142] As for the recreational activities that commenced in the 1950s, the court explained that the scenic tourism was "still in its embryonic stage" and "the sporadic trips along Salt Creek to Angel Arch . . . were still exploratory in nature."[143] Therefore, the dis-

134. San Juan Cnty. v. United States, 503 F.3d 1163, 1167 (10th Cir. 2007) (en banc). This earlier opinion dealt only with the issue of intervention and did not discuss the merits of the case.

135. *Id.* at 1167, 1207.

136. *Id.* at 1167–68.

137. Brief of Amici Curiae Southern Utah Wilderness Alliance, et al. in Opposition to the Petitions for Rehearing and Rehearing En Banc at 1–2, San Juan Cnty. v. United States, 754 F.3d 787 (10th Cir. 2014) (Nos. 11-4146, 11-4149), 2014 WL 3795351, at *1–2 [hereinafter Amici Brief for Southern Utah Wilderness Alliance]. The court may consider amicus filings but the extent and weight of such consideration is discretionary.

138. *San Juan Cnty.*, 754 F.3d at 791.

139. *Id.* at 791–92 (quoting Lindsay Land & Live Stock Co. v. Churnos, 285 P. 646, 648 (Utah 1929)) (internal quotation marks omitted).

140. *Id.*

141. San Juan Cnty v. United States, No. 2:04–CV–0552BSJ, 2011 WL 2144762, at *33 (D. Utah May 27, 2007).

142. *Id.* at *34.

143. *Id.* at *35.

trict court ruled in favor of the United States, explaining that while the state and county demonstrated a variety of historical uses, during the relevant period before 1954, "a visit to Salt Creek Canyon . . . was an experience marked by pristine solitude."[144]

4. Tenth Circuit Unanimously Affirms the District Court

On appeal, the United States Court of Appeals for the Tenth Circuit considered (1) whether the state and county's claims under the QTA were timely, and (2) and whether the state and county demonstrated acceptance through ten years of continuous public use prior to Canyonlands' reservation in 1964.[145]

a. Quiet Title Act/Sovereign Immunity

The United States contended that sovereign immunity deprived the district court of jurisdiction by claiming the limitation periods in the QTA had expired before the state and county could take advantage of the statute's limited waiver.[146] Because the sovereign immunity issue was jurisdictional, the Tenth Circuit addressed it first and held that the claims of both the state and county were timely.[147] The QTA establishes two different limitation periods for property claims brought against the federal government: "[A] general limitation period and a limitation period applicable only to claims brought by states."[148]

For claimants other than states, a claim needs to be filed within twelve years of the date of accrual, which means the statute of limitations started to run when the federal government gave San Juan County notice that it did not recognize the legitimacy of the county's use of the Salt Creek road.[149] The United States argued that several mid-1970s road closures south of the claimed road constituted sufficient notice to start the limitations period; by closing certain segments that connected to the Salt Creek Road, the U.S. gave notice by limiting the avenues of access to the claimed right-of-way.[150] The Tenth Circuit disagreed, explaining that despite the more restrictive management activities conducted by the federal agency, these earlier closures did not constitute an exclusive claim because "the public continued to have access to Salt Creek road consistent with the claimed right-of-way."[151] Thus, San Juan's claim was timely.

---

144. *Id.*
145. San Juan Cnty. v. United States, 754 F.3d 787, 792, 796 (10th Cir. 2014).
146. *Id.* at 792.
147. *Id.*
148. *Id.* at 793.
149. *Id.*
150. *Id.* at 793–94.
151. *Id.* at 794.

The Tenth Circuit then went on to address the timeliness of Utah's claim. For states, the notice requirement is different because "the trigger . . . requires more than fair notice; it requires substantial activity by the United States."[152] The court acknowledged that the United States had conducted "substantial activities" with respect to the right-of-way, but it nonetheless held that Utah's claim was timely since the limitation period applied to states only starts to run when the state "receive[s] notice" of the federal claims.[153] Because the route remained "fully accessible to the public" throughout all of the federal government's activities, and the first attempt to limit the public's access occurred after 1995 when the NPS proposed the permit system via the backcountry management plan, Utah's claim was not barred by the limitation period.[154]

b. "Continuous Use" (Acceptance of the Salt Creek Road as a Public Right-of-Way)

The state and county argued that the district judge erred in several ways by (1) requiring them to demonstrate greater frequency of public use than that which "the public finds . . . convenient or necessary," (2) disregarding evidence of cattle-grazing uses under a private right, (3) requiring a showing of a constructed or "discernible" road, and (4) concluding the burden of proof must be satisfied by clear and convincing evidence.[155]

The Tenth Circuit addressed the frequency of use argument first. The court held that "frequency or intensity of use is probative of the existence of a 'public thoroughfare,' and, to the extent recent changes to Utah law minimize the importance of this factor, it . . . remains pertinent under federal law."[156] The state and county were of the opinion that no particular frequency of use is required and the public use standard is fulfilled when the route's use "is as often as the public finds convenient or necessary during the ten-year period."[157] They based their argument on two cases decided by the Utah Supreme Court in 2008 that proclaimed a new interpretation of the public use standard where frequency of use is not a relevant consideration.[158] The Tenth Circuit reminded the parties that while federal courts may "borrow" from state law to aid in their determination of whether an R.S. 2477 right-of-way has been accepted, it "ceases to provide 'convenient and appropriate principles' when it con-

152. *Id.* at 795.
153. *Id.* (alteration in original) (quoting 28 U.S.C. § 2409a(i)).
154. *Id.* at 796.
155. *Id.* (alteration in original) (quoting Appellant San Juan County's Opening Brief, *supra* note 111, at 26, 30) (internal quotation marks omitted).
156. *Id.* at 797.
157. *Id.*
158. *Id.* at 798 (discussing *Wasatch County v. Okelberry*, 179 P.3d 768 (Utah 2008), and *Utah County v. Butler*, 179 P.3d 775 (Utah 2008), which held that a roadway becomes dedicated, and therefore accepted by the public, when it is created by a public user and held open for such use as is convenient or necessary for an uninterrupted ten year period).

travenes congressional intent."[159] The court explained that frequency and variety of use were both "critical common-law inquiries" when deciding whether a claimed right-of-way had been accepted by the public.[160] In addition, the relevant state law in this determination was the law in effect when the statute was repealed in 1976.[161] The court concluded that the Utah Supreme Court could not "retroactively broaden" the public use standard by applying a more lenient standard beyond what Congress intended when it preserved rights-of-way existing on the date of repeal.[162]

Next, the Tenth Circuit addressed the state and county's argument that cattle-grazing uses under a private right should have been given more weight in considering the existence of a public highway. The Tenth Circuit sided with the district court on this issue, explaining that these activities carried little probative value "because the users had 'proprietary interests in the upper Salt Creek'" pursuant to federal grazing permits and a deed to land in the adjacent area.[163] Therefore, the Tenth Circuit upheld Utah court decisions holding that use under private right is not sufficient to meet the public use standard.

The state and county also argued that the district court erred by requiring them to prove that a discernible jeep road had been "constructed."[164] The Tenth Circuit did not agree that an error had been committed and confirmed that although "mechanical construction is not necessary to prove a R.S. 2477 right-of-way[,] . . . 'evidence of actual construction . . . or lack thereof'" can be probative in determining what satisfies the requisite public use.[165]

Finally, the state and county argued that the district judge erred by applying the more stringent burden of proving acceptance by requiring a showing of clear and convincing evidence. They believed the correct standard needed to show the existence of a public thoroughfare should have been the more lenient preponderance of the evidence standard.[166] The Tenth Circuit declined to rule on this issue, stating that a resolution as to the proper evidentiary standard was unnecessary since the evidence failed to satisfy either standard.[167] Even so, the *San Juan* decision went further in reaching the merits of an R.S. 2477 claim than any Tenth Cir-

159. *Id.*
160. *Id.* at 799.
161. *Id.* (citing Sierra Club v. Hodel, 848 F.2d 1068, 1083 & n.14 (10th Cir. 1988), *overruled in part on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992), which held that scope is determined with respect to state law as of date of repeal of statute).
162. *Id.*
163. *Id.* at 799–800.
164. *Id.* at 800.
165. *Id.* at 800 (citation omitted) (quoting S. Utah Wilderness Alliance v. BLM, 425 F.3d 735, 777–78 (10th Cir. 2005), which held the presence of a discernible road can be considered when determining whether a public thoroughfare existed).
166. Appellant San Juan County's Opening Brief, *supra* note 111, at 21.
167. *San Juan Cnty.*, 754 F.3d at 801.

cuit decision before it. Yet, despite its historic outcome, the full precedential thrust of the decision remains to be seen.

## IV. ANALYSIS

### *A.* San Juan*'s Effect and Precedential Value*

On September 8, 2014, the Tenth Circuit denied San Juan County's and the state of Utah's petitions for a rehearing en banc, settling the issue for Salt Creek Canyon once and for all.[168] However, there are still thousands of potential R.S. 2477 claims that could have a profound impact on the future of the West's wild landscapes. It may take decades for courts to settle the many vexing questions surrounding R.S. 2477, but the *San Juan* decision did help to flesh out the meaning of continuous use and frequency when interpreting this frontier law in the modern era.

*San Juan* signals a victory for those sympathetic to federal retention and preservation of western landscapes, but the reach of the Tenth Circuit's decision and its precedential value moving forward is less clear. The decision provides clarity on some issues such as the statute of limitations and the different types of notice the federal government must give to potential claimants in order to start the limited waiver period.[169] It also reaffirmed that while evidence of a discernible road is neither a necessary nor sufficient element, it may be probative when determining whether the required extent of public use has been satisfied.[170] Because the Salt Creek road is regularly washed out by storms and seasonal runoff,[171] the decision might signal that establishing a discernible road requires more than temporary seasonal use. The Tenth Circuit did not pronounce any sort of bright-line rule regarding seasonal use, but by reaffirming the probative value of proving a discernible road, the decision might handicap parties attempting to establish the validity of other potential R.S. 2477 claims in the Colorado Plateau, where spring runoff and winter snow prevent year-round access.

Perhaps the most important result of this decision was the court's finding that frequency of use is still a probative consideration when evaluating the public use standard. It raises the bar for assembling the requisite historical evidence needed to prove an R.S. 2477 route was in continuous public use. Claimants relying on little more than ephemeral pro-

---

168. Order of Sept. 8, 2014, San Juan Cnty. v. United States, 754 F.3d 787 (10th Cir. 2014) (Nos. 11-4146, 11-4149), *available at* http://suwa.org/wp-content/uploads/San-Juan-County-and-Utah-v-US-9-8-14-order-denying-rehearing-en-banc.pdf.

169. *See generally San Juan Cnty.*, 754 F.3d 787.

170. *Id.* at 800.

171. State of Utah's Reply Brief on Appeal of Findings of Fact, Memorandum Opinion and Order of the U.S. District Court, for the District of Utah, the Honorable Bruce S. Jenkins, Presiding at 35, San Juan Cnty. v. United States, 754 F.3d 787 (10th Cir. 2014) (Nos. 11-4146, 11-4149), 2012 WL 1151679, at *35 [hereinafter Utah's Reply Brief] (explaining the topography of Canyonlands' "sedimentary and igneous formations" can make a road's seasonal use less discernible after periodic flooding and rechanneling of the riverbed).

spector use or cattle grazing pursuant to a federal permit may think twice before filing a claim. By disqualifying these cattle ranching activities as serving proprietary and not public uses, the *San Juan* decision will likely prevent a substantial number of old roads from being recognized as R.S. 2477 rights-of-way.[172]

The Tenth Circuit sent an important message when it proclaimed that state law cannot retroactively attempt to broaden the scope of continuous public use beyond that which was intended by Congress when it repealed R.S. 2477 in 1976.[173] The court properly followed circuit precedent by retaining the frequency of use requirement[174] and refusing to allow state courts to circumvent what Congress intended when it grandfathered preexisting rights-of-way over three decades ago.[175] Quoting *SUWA*, the court explained that frequency or intensity of use "has always been pertinent to establishing sufficient 'passing or travel' 'by the public.'"[176] Therefore, the frequency component remains relevant in determining whether a public thoroughfare existed, and recent Utah judicial precedents cannot alter that consideration.[177]

For other states and counties wishing to assert R.S. 2477 claims against the federal government, this decision will dictate how they move forward strategically.[178] Some believe the decision will have serious adverse consequences for local residents across the West who depend on access to public roads for their livelihoods.[179] However, it would be a mistake to think states like Utah will back down after the Tenth Circuit's ruling.[180] Many public access advocates disregarded the decision as an "urban-centric dismissal" of the views of rural western citizens, which

---

172. San Juan County was worried about the effect of dismissing the cattle-grazing operations as "proprietary interests" because "the logical extension of the concept . . . will set the stage to eliminate pretty much *every* public use of a road under R.S. 2477. What would qualify as public use if personal intent matters?" Appellant San Juan County's Reply Brief at 21–22, San Juan Cnty. v. United States, 754 F.3d 787 (10th Cir. 2014) (Nos. 11-4146, 11-4149), 2012 WL 2510472, at *21–22 (citation omitted).

173. *San Juan Cnty.*, 754 F.3d at 799.

174. *See* S. Utah Wilderness Alliance v. BLM, 425 F.3d 735, 762 (10th Cir. 2005) ("The laws of the United States alone control the disposition of title to its lands. The states are powerless to place any limitation . . . on that control." (quoting United States v. Oregon, 295 U.S. 1, 27–28 (1935) (internal quotation marks omitted))).

175. Amici Brief for Southern Utah Wilderness Alliance, *supra* note 137, at 11–12.

176. *San Juan Cnty.*, 754 F.3d at 798.

177. *See* COGGINS & GLICKSMAN, *supra* note 14, § 15:19.

178. Soon after the decision, the state of Utah began developing evidence of "frequency of use" in order to meet the proper standard reaffirmed by the Tenth Circuit. *See* Amy Joi O'Donoghue, *Courtroom Defeat Fails to Back Utah Off Roads Fight*, DESERET NEWS (Apr. 29, 2014, 9:15 AM), http://www.deseretnews.com/article/865601968/Courtroom-defeat-fails-to-back-Utah-off-roads-fight.html.

179. *See* Appellant San Juan County's Reply Brief, *supra* note 172, at 22.

180. The Utah attorney general's office and county officials "say they intend to keep battling for local control over another 14,000 roads" within the state. Jodi Peterson, *Utah Denied Claim to Road in Canyonlands National Park*, HIGH COUNTRY NEWS (May 13, 2014), http://www.hcn.org/blogs/goat/utah-denied-claim-to-road-in-canyonlands-national-park.

may only fuel their growing hostile attitudes toward the federal government.[181]

One issue the Tenth Circuit did not resolve was the dispute over the proper evidentiary standard for proving the existence of a public thoroughfare. While the Tenth Circuit's earlier decision in *SUWA v. BLM* discussed which party bears the burden of proof, clarifying the proper evidentiary standard for an R.S. 2477 claim under the QTA was an issue of first impression before the court.[182] Because the outcome of an R.S. 2477 claim depends so much on weighing the evidence of historical public use, a ruling on the correct standard would have provided much-needed precedent. The district court believed the more stringent clear and convincing evidentiary standard was proper since that is the standard applied by Utah common law and because of the long-standing notion that federal land grant statutes are construed in favor of the United States.[183] The state of Utah argued for a "preponderance of the evidence standard," a more liberal construction in support of the policies behind R.S. 2477's enactment that encouraged private parties to settle the West and divest the federal government of public lands in the name of economic progress.[184] In other words, because the "condition of the country" in 1866 favored rapid western expansion and the creation of rights-of-way across public lands to facilitate that process, Congress intended a less restrictive standard of proof in establishing R.S. 2477 rights-of-way.[185] Although the *San Juan* decision went further in fleshing out R.S. 2477 jurisprudence at the circuit level than any case before it, the Tenth Circuit should have settled this issue. Perhaps the court thought it would be issuing an advisory opinion if it elaborated on the proper standard of proof, since it agreed with the district court judge that the evidence failed to satisfy either standard. However, it would not have merely been advisory because the decision would directly affect the rights and obligations of the county and state in hundreds, perhaps thousands, of other cases it was currently gathering evidence for.[186] In addition, appellate courts have a responsibility to guide lower courts and administrative agencies in their

181. *See* Taylor, *supra* note 71. Utah residents explain that "empty roads are the geographic rule, not exception, of the American West," and they take issue to dictating frequency of use according to an "urban point of reference." *Id.*

182. Appellant San Juan County's Reply Brief, *supra* note 172, at 16–17.

183. Answering Brief of Defendants-Appellees, *supra* note 109, at 32 ("[T]he clear and convincing evidence standard . . . . is compelled by the canon of construction that federal land-grant statutes are strictly construed in favor of the United States.").

184. Utah's Reply Brief, *supra* note 171, at 18–19, 21–22.

185. *Id.* at 21–22 ("[Se]ttlement was the sole interest of the federal government in the eighteenth and nineteenth centuries, and allowing individual access was such a given factor that is seldom discussed." (internal quotation mark omitted)).

186. Appellant San Juan County's Reply Brief, *supra* note 172, at 16–17 ("[L]egal predicate for further actions are not advisory.") (citing 13 FEDERAL PRACTICE & PROCEDURE, JURISDICTION AND RELATED MATTERS § 3529.1 (3d ed. 2011)).

application of legal principles to future cases or controversies.[187] The lower courts rely on appellate decisions as persuasive authority and would have benefitted from a simple determination of the correct standard to apply. With thousands of other potential claims lurking on millions of acres of public lands, the Tenth Circuit did a disservice to land management agencies trying to plan around this "very murky body of law."[188] Nevertheless, the higher standard of proving a public thoroughfare existed by clear and convincing evidence is probably the correct one. In Utah, this is the standard applied by the courts, and it is also consistent with the broad principle of sovereign immunity that doubts surrounding land grant issues are resolved in favor of the federal government.[189] Nevertheless, a circuit decision on this issue would be helpful to lower courts, land management agencies, and individuals deciding whether the pursuit of gathering vast amounts of historical evidence is worth the effort.

Assembling the requisite evidence to convince a court that an old pioneer trail is an R.S. 2477 public highway is no simple task. Because "rights-of-way were self-executing and required no formal approval from the federal government" under R.S. 2477, most antique routes are not recorded in public records.[190] It requires significant historical research, including an analysis of old land records, geological surveys, maps, aerial images produced from Global Positioning Satellites (GPS), and mining and grazing document assessments.[191] Many of these claims exist in memory only, and proving an R.S. 2477 right-of-way existed prior to 1976 typically involves an army of lawyers touring the state and taking depositions of elderly witnesses attesting to the route's use.[192] This makes pursuing an R.S. 2477 claim a costly endeavor.[193] While the *San Juan* case certainly set the bar higher, the fact that each R.S. 2477 route is unique and requires its own road-by-road analysis might limit the effect of the Salt Creek decision to some extent. The Tenth Circuit recognized that "[i]n the end, whether the public used the claimed road continuously . . . is a factual issue," alluding to the notion that any R.S. 2477 decision is difficult to predict until all the evidence unique to that par-

187. Hoffmann, *supra* note 65, at 20, 32 (discussing the Tenth Circuit's failure to decide on the merits of another contentious R.S. 2477 case involving four large parcels of federally managed land in Kane County, Utah).

188. *Id.* at 31.

189. Amici Brief for Southern Utah Wilderness Alliance, *supra* note 137, at 5 (explaining the state is wrong to suggest the policies behind R.S. 2477 require a more liberal construction).

190. Suthers, *supra* note 73, at 113.

191. Hoffmann, *supra* note 65, at 9.

192. *See* Maffly, *supra* note 13.

193. *See id.* (explaining that the state's R.S. 2477 effort "is among the costliest legal undertakings ever pursued by Utah officials").

ticular road is laid out before the court.[194] This might minimize the precedential value of any individual case.[195]

The next R.S. 2477 case decided by the Tenth Circuit was *Kane County v. United States*,[196] an appeal from a district court judge's 2013 ruling in favor of Kane County and Utah in their efforts to claim R.S. 2477 rights-of-way in the Bald Knoll area.[197] The district court awarded Kane County title to twelve of the fifteen claimed roads, four of which are located inside the Grand Staircase-Escalante National Monument.[198] The Tenth Circuit then awarded the state and county title to six of the twelve roads and held the court had no jurisdiction to hear claims regarding the remaining six because there was no dispute as to legal title.[199] Like the Salt Creek road, several of the routes are unimproved jeep trails and one is inside a wilderness study area.[200] However, the roads at issue in *Kane* connect to other roads and their historic use by the public was less disputed.[201] As the previous paragraph hypothesized, the merits of the *San Juan* case did not come into play, and the *Kane* case illustrates the limited effect of any individual case on the outcome involving roads that are have different characteristics and their own unique history of use.[202]

*B. Prevailing Uncertainty (and Potential Nonlitigation Alternatives)*

Despite the recent clarity provided by the Tenth Circuit on R.S. 2477 jurisprudence, the depth of evidentiary analysis in *San Juan* decision is the exception, not the rule. There still exists considerable uncertainty for federal land agencies attempting to establish wilderness management plans, private property owners struggling to sort out potential clouds on title, and local government officials planning for road use and development strategies.[203] Several DOI agencies attempted to provide a formal adjudication process in 1994, but Congress blocked the at-

194. San Juan Cnty. v. United States, 754 F.3d 787, 801 (10th Cir. 2014).

195. *Id.* (acknowledging that "[t]he state and county put on a strong case, but so did the United States. In the end . . . . [i]t is the role of the judge to weigh the evidence presented at a bench trial").

196. 772 F.3d 1205 (10th Cir. 2014).

197. Bloch & McIntosh, *supra* note 108; *Tenth Circuit Denies SUWA's Intervention in Kane R.S. 2477 Bald Knoll Appeal*, UTAH'S PUB. LANDS POLICY COORDINATING OFFICE (Sept. 15, 2014), http://publiclands.utah.gov/tenth-circuit-denies-suwas-intervention-in-kane-r-s-2477-bald-knoll-appeal/.

198. Phil Taylor, *Judges Seem Skeptical of U.S. in High-Stakes Utah Road Dispute*, GREENWIRE (Sept. 30, 2014), http://www.eenews.net/stories/1060006616.

199. *See Kane Cnty.*, 772 F.3d at 1212–13, 1222–23.

200. Bloch & McIntosh, *supra* note 108. The argument that use of a route by ranchers does not meet the law's requirement that the route be used by the broader public was also at issue in the appeal. *See id.*

201. *See* Taylor, *supra* note 198.

202. Conservationists had hoped the *San Juan* ruling that proprietary use doesn't count for determining the validity would come into play, but it did not. Taylor, *supra* note 198.

203. *See* Macfarlane, *supra* note 6, at 252.

tempt.[204] Utah's 2003 MOU has been discredited for its failure to include a provision for public involvement in the acknowledgement process, and some critics have questioned its legality.[205] Perhaps the *San Juan* decision provides a more thorough roadmap for agencies, but there are still other non-litigation approaches that could establish a more consistent framework to predict the validity and resolve future R.S. 2477 claims. One potential method that has been suggested is the use of agency arbitration using a tiered approach where agencies have the authority to resolve less controversial R.S. 2477 claims through a simple application process.[206] The DOI has used alternative dispute resolution before, which it credited with a "43 percent reduction in formal case filings between 1992 and 1993."[207] However, more controversial claims, such as those impacting wilderness designation, the need for public input, and judicial resolution would still require case-by-case litigation in federal courts.[208] This tiered approach would result in more efficient resolution of claims that are less disputed, while still allowing for input from public interest groups and government transparency in claims that are more politically controversial.[209] Using a nonlitigation alternative will not solve all the problems that make up the legal quagmire presented by this old frontier law, and agency arbitration might not find enough support in a polarized Congress, but it is worth considering its implementation as a mechanism to ease the burden on federal land management agencies trying to sort out the validity of future R.S. 2477 claims.

### *C. The Battle Over Control of Public Lands and R.S. 2477 Moving Forward*

In the case of Salt Creek, local governments spent over $1 million battling for this single dirt road.[210] It is unlikely the state of Utah has spent millions of taxpayer dollars simply to assist local residents wanting to drive their Jeeps to scenic sites like Angel Arch. It is more likely part of an experiment by the state to use R.S. 2477 as a mechanism to put its

---

204. COGGINS & GLICKSMAN, *supra* note 14, § 15:19 ("The BLM, the NPS, and the FWS in 1994 jointly issued proposed regulations to clarify the application of R.S. 2477 and provide a formal adjudication process by which validly acquired rights-of-way may be recognized and regulated. Congress thereafter prohibited the Department from finalizing the regulations . . . and the regulations were not issued." (footnotes omitted)).

205. *See* Patrick Parenteau, *Anything Industry Wants: Environmental Policy Under Bush II*, 14 DUKE ENVTL. L. & POL'Y F. 363, 400 (2004) (describing the MOU as a "sweetheart deal[]" and charging that "reliance on the recordable disclaimer regulations to provide the substantive criteria for what qualifies as a valid existing right under FLPMA, in the absence of the explicit authorization required by section 108, is probably illegal").

206. *See* Macfarlane, *supra* note 6, at 249–50 ("[M]any claims . . . lie at the ends of the spectrum and are either clearly valid or are clearly not valid. These outlying claims could be easily resolved through a simple application process, allowing those seeking to establish a right-of-way . . . to petition for an agency designation.").

207. *Id.* at 249.

208. *Id.* at 251.

209. *Id.* at 228.

210. Binkly, *supra* note 58.

hostility toward federal land management into legal action. Yet, despite the massive amounts of money poured into Utah's land grab efforts, state victories have been few thus far, especially regarding routes like Salt Creek that do not connect to other roads used by the general public.[211] Still, other western states are watching Utah's aggressive R.S. 2477 attempts, especially in New Mexico, Colorado, and Wyoming where many preexisting rights-of-way likely exist and where Tenth Circuit decisions are binding authority on federal courts in those states. In Colorado, potential R.S. 2477 claims threaten more than 300,000 acres of land in Moffat County alone.[212] The resolution of each case decided by the Tenth Circuit may deter or encourage these other states to pursue their own claims of routes on public lands depending on the outcome. However, to determine what constitutes a highway under the statute, courts look to state law and standards can vary from state to state.[213] For example, Colorado has no specific time frame for proving continuous use, while Utah does.[214] Even in other western states where Tenth Circuit decisions provide persuasive authority, many officials are eagerly waiting to "jump on the R.S. 2477 bandwagon" if the courts validate even a fraction of Utah's claims.[215] Several states have already allotted funds for the purpose of studying potential R.S. 2477 "highways," and it would not be a surprise if funding increased following any successful litigation involving Utah's claims.[216]

For this reason, environmentalists worry that a threat to one protected region presents risks to the environmental integrity of all wild landscapes burdened by adjacent pioneer routes with R.S. 2477 potential.[217] Some worry the hidden goal is to open up these protected areas to natural resource extraction after validated R.S. 2477 claims disqualify them from permanent preservation designations, since a road cannot bisect potential reserves such as wilderness study areas.[218] Regardless of the motives behind R.S. 2477's resurrection, these roads are sure to generate fundamental disagreements between the values of access and preservation.

## CONCLUSION

Besides marking a victory for federal control and environmental preservation advocates, the *San Juan* decision fills a much needed gap in R.S. 2477 case law and helps pave the way for other similar claims that

---

211. *See id.*
212. *R.S. 2477*, WILDERNESS SOC'Y, http://wilderness.org/sites/default/files/legacy/Complete-Congressional-Briefing-Book-09.pdf (last visited Jan. 10, 2015).
213. Binkly, *supra* note 58.
214. *Id.* ("In Utah . . . a route must have been used for 10 years continuously.").
215. Hoffmann & Imperiale, *supra* note 47.
216. *Id.*
217. *Id.*
218. *See id.* (explaining that once courts validate the claims, the state might be able to open up the land to oil and gas exploration and other extractive industries).

are sure to come before federal courts. While the Tenth Circuit helped to establish a working framework for determining the validity of such preexisting rights-of-way, the more recent *Kane County* case demonstrates the heavy emphasis on evaluating historical evidence and the uniqueness of each R.S. 2477 road is a potential obstacle that limits the reach of any one particular decision. It might take decades for courts to sort out questions relevant to evaluating the existence, scope, duration, and extent of use of the many preexisting frontier highways across the western United States. The use of agency arbitration in noncontroversial cases provides one mechanism that could ease the burden of land agencies and private property owners attempting to sort out these issues.

Future litigation will be determined by a careful analysis of the meaning and intent of R.S. 2477 and the evaluation of historical evidence of a route's use in each case, but it is hard to ignore the passionate feelings generated by "the magnificence of the natural wonders" at the end of each road, as well as the broader political ramifications at play.[219] Despite the uncertainty surrounding this vexing frontier law, one thing is certain: other western states wishing to retake federally owned lands within their borders are eagerly watching the battle taking place in Utah's federal courts. The outcome there may dictate how aggressively these other states decide to use R.S. 2477 as a mechanism to assert their hostility against federal land management.

*Lucas Satterlee*[*]

219. Utah's Reply Brief, *supra* note 171, at 36.

* J.D. Candidate 2016. I would like to express my sincere gratitude to the *Denver University Law Review* for making this article possible; to Professor Fred Cheever for all his assistance throughout the publishing process; and to my good friend Sam Little for making the arduous trek to camp with me along the Salt Creek. Journeying deep into the red rock wilderness helped me to appreciate why this desert creek instills such passion among those wishing to access its treasures.

# *GRAHAM V. SHERIFF OF LOGAN COUNTY*: COERCION IN RAPE AND THE PLIGHT OF WOMEN PRISONERS


## ABSTRACT

Sex between a prison guard and a prison inmate is usually considered rape, and is thus adjudicated as an Eighth Amendment excessive force claim. When the Tenth Circuit heard *Graham v. Sheriff of Logan County*, it was tasked with determining whether sex between a prison inmate and two guards constituted excessive force, but instead, the court ignored the issue of force and improperly held that the female inmate consented to intercourse.

This Comment utilizes feminist dominance theory as a backdrop for analyzing the Tenth Circuit's discussion of whether Stacey Graham was raped by two prison guards. Dominance theory argues that, in criminal rape, gender inequality is a form of coercion. However, gender inequality is also greatly relevant when evaluating rape as an Eighth Amendment violation. Instead of recognizing the extreme inequality and gender asymmetry that exists between male guards and female inmates in prison, the Tenth Circuit bestowed the power of consent upon the inmate-plaintiff in *Graham* and insisted that she had the voluntary right and ability to consent to intercourse with a male guard. By disregarding the power imbalance the prison created and discounting the role of both gender and social inequality, the Tenth Circuit's decision subordinates female prisoners who seek justice as victims of rape.

TABLE OF CONTENTS

INTRODUCTION ........ 672
I. BACKGROUND ........ 674
*A. The Social Framework of Prison and the Inmate Response* ........ 674
*B. The Criminal and Constitutional Violation of Rape* ........ 676
*C. Gender Inequality and Existing Rape Law* ........ 678
II. *GRAHAM V. SHERIFF OF LOGAN COUNTY* ........ 680
*A. Facts* ........ 680
*B. Procedural History* ........ 681
*C. Majority Opinion* ........ 682
III. ANALYSIS ........ 684
*A. The Tenth Circuit Misapplied the Law in* Graham ........ 685
1. The Tenth Circuit's Focus on Consent ........ 685
2. The Tenth Circuit's Decision to Ignore *Lobozzo* ........ 687
3. The Tenth Circuit's Dismissal of Cases Involving Sexual Conduct in Prison ........ 689
*B. The Court's Misguided Understanding of "Coercion" in Rape Law* ........ 691
*C. Commoditizing Sexuality in Prison: How and Why* ........ 694
CONCLUSION ........ 696

## INTRODUCTION

> *Under law, rape is a sex crime that is not regarded as a crime when it looks like sex.*
>
> —Catherine MacKinnon[1]

Under the traditional view of rape, criminal law requires intercourse, coercion, and nonconsent.[2] This three-pronged requirement assumes that women can consent to forced sex.[3] What traditional rape law neglects to consider, however, is that force can transcend physical aggression; a woman's failure to display physical resistance to force is not indicative of consent.[4]

---

1. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 172 (1989).
2. *Id.*
3. CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 131 (2005); *see also infra* Part I.B.
4. *See, e.g.*, State v. Robinson, 496 A.2d 1067, 1069 (Me. 1985), in which a jury questioned whether rape could occur post-penetration, to which the judge affirmed that "intercourse by compulsion" constitutes rape. The trial court continued, stating that "[t]he critical element there is the *continuation under compulsion*." *Id.* Thus, rape occurs based on compulsion, not necessarily based on a victim's physical displays of resistance to the offense. *Id.*

Feminist legal scholars find the deficiencies of rape law indicative of social inequality between men and women.[5] Gender asymmetry is exacerbated in prison where male guards have complete control over female inmates.[6] Under such circumstances, when rape occurs between a male guard and female inmate, the inmate is subordinated and powerless not only based on her gender, but further by her status as a prisoner.

In *Graham v. Sheriff of Logan County*,[7] Stacey Graham was a prisoner who claimed her male guards raped her in violation of the Eighth Amendment, which protects prisoners from cruel and unusual punishment.[8] The Tenth Circuit focused on the evidence of her consent to sex, holding that rape did not occur.[9] Though federal courts are split as to what constitutes consent to sex between prisoners and their guards, and whether consent may exist at all,[10] the Tenth Circuit's treatment of the matter disregarded both the power dynamic and gender asymmetry between female inmates and male guards, and the issue of evaluating force in rape. This Comment discusses how inequality is a form of coercion in rape and how the Tenth Circuit's decision in *Graham* subordinates wom-

---

5. Many consider traditional rape law, as with other laws, a reflection of patriarchal society. *See infra* notes 51–52 (describing patriarchy and its impact). The legal system is among the institutions in society affected by patriarchy. Additionally, when the legal system must evaluate allegations of rape, its evaluation of consent exemplifies the social inequality embedded in our society:

> In determining "consent," as in making judgments about force, fear, intimidation, and "reasonableness," law's vague, abstract standards are especially troubling in this respect. Law has not simply opted for a neutral solution to these socially contested issues. In each instance, law has chosen sides. The law gives priority to the interest (the predominantly male interest) in seeking sexual gratification through advances backed by physical strength and social power. And the law gives priority to protecting sexually assertive individuals (predominantly men) from the risk of conviction without clear warning in advance.

STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 67 (1998); *see also* NANCY LEVIT & ROBERT R.M. VERCHICK, FEMINIST LEGAL THEORY 10 (2006) (noting that "[d]ominance theorists cite the lack of legal controls on pornography and sexual harassment, excessive restrictions on abortion, and inadequate responses to violence against women as examples of the ways laws contribute to the oppression of women").

6. "Gender asymmetry" refers to the disproportional imbalance of equality between genders.

7. 741 F.3d 1118 (10th Cir. 2013).

8. *Id.* at 1124. The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. *See* Giron v. Corr. Corp. of Am., 191 F.3d 1281, 1290 (10th Cir. 1999) (holding that sexual abuse of an inmate by an officer is an Eighth Amendment violation); Graham v. Sheriff of Logan Cnty., No. CIV–10–1048–F, 2012 WL 9509373, at *6 (W.D. Okla. Nov. 1, 2012) (noting that "[b]ecause Graham was incarcerated at the time of the alleged events . . . her claim is properly analyzed as an Eighth Amendment excessive force claim"); Fisher v. Goord, 981 F. Supp. 140, 172 (W.D.N.Y. 1997) ("Sexual abuse may violate contemporary standards of decency and can cause severe physical and psychological harm. For this reason . . . sexual abuse of an inmate by a prison official can . . . constitute an Eighth Amendment violation."); *infra* notes 47–48, 120–21 and accompanying text; *cf.* Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 877 F. Supp. 634, 665 (D.D.C. 1994) (stating that rape is "simply not part of the penalty that criminal offenders pay for their offenses against society" (quoting Farmer v. Brennan, 511 U.S. 825, 834 (1994)) (internal quotation marks omitted)).

9. *Graham*, 741 F.3d at 1124.

10. *See infra* Part II.C.

en prisoners in the justice system by misapplying the law and failing to recognize the social constructs of gender in prison.

This Comment proceeds in three parts. Part I provides a background of postmodern dominance theory to explain how rape is a byproduct of institutionalized gender inequality. Further, by discussing how gender inequality is coupled with severe power dynamics in a restricted environment, Part I also demonstrates how the power imbalance is manifested in prison. Part II outlines the facts, procedural history, and unanimous majority opinion of *Graham*. Finally, Part III draws on the concepts of dominance theory to show how the Tenth Circuit improperly reviewed the issue of consent and to analyze how inequality between Graham and two guards functioned as a form of coercion to sex. Part III concludes by expanding the concepts of gender inequality to consider how Graham commoditized her sexuality in prison as a result of her extreme powerlessness.

## I. BACKGROUND

Knowledge of the social environment that a prison creates is critical to understanding whether an inmate can consent to sexual behavior in prison. Thus, this Part begins by establishing how prisons create a framework in which inmates have little control over their lives, and considers the ways in which inmates respond to that lack of control. This Part continues with a background to distinguish rape law as a constitutional violation from rape law in the criminal context and concludes with a brief introduction of feminist legal theory to analyze how existing rape law is grounded in patriarchy, a social structure that is exacerbated in prison.

### *A. The Social Framework of Prison and the Inmate Response*

When an inmate is admitted to prison, she must adjust to an environment where she faces high threat but lacks control.[11] Such an adjustment can result in severe psychological damage.[12] Prisoners respond to the lack of control in several ways, one of which is to suppress emotions and vulnerabilities to convince others that they are violent.[13] Despite suppressing emotion outwardly, one study revealed that internally, wom-

---

11. Craig Haney, *Psychology and the Limits to Prison Pain: Confronting the Coming Crisis in Eighth Amendment Law*, 3 PSYCHOL. PUB. POL'Y & L. 499, 535 (1997).

12. *Id.*; Barbara H. Zaitzow, *Pastel Fascism: Reflections of Social Control Techniques Used with Women in Prison*, 32 WOMEN'S STUD. Q. 33, 40 (2004) ("A woman inmate's feeling of inadequacy is heightened by the constant surveillance under which she is kept. The prisoner is confronted daily with the fact that she has been stripped of her membership in society at large, and then stands condemned as an outcast and outlaw such that she must be kept closely guarded and watched day and night. She loses the privilege of being trusted and her every act is viewed with suspicion by the guards.").

13. Haney, *supra* note 11, at 536–37 (citing prisoner research).

en inmates experience stages of grief comparable to those experienced by terminally ill patients.[14]

Beginning with denial, both patients and prisoners experience anger when they realize that they are no longer in control of their lives.[15] Because of the lack of control, the anger women experience during this stage is expressed through an increased need for self-assertion.[16] One way prisoners attempt to exercise control is by playing a game known as "being sneaky" in which they deceive guards to make them believe the women are doing what the guards want them to do.[17] Making a decision is deemed a luxury in prison; thus, the mere ability to decide when to play this game itself serves as an exercise of control.[18] As this Comment will show, the plaintiff in *Graham* often determined the amount and extent of inappropriate contact with her guards, which is reflective of her struggle for control as an inmate.[19]

While prisoners must cope to adapt to the psychological struggles of incarceration, prison guards present a separate but related challenge. Guards have nearly complete control within prisons, which allows them to exploit the power imbalance with inmates.[20] While in a free society, a woman can respond to harassment or abuse, in prison, inmates are forced to tolerate their guards' abuse because they depend on the guards for safety.[21] For example, inmates rely on guards for basic needs,[22] and

---

14. Christina Jose-Kampfner, *Coming to Terms with Existential Death: An Analysis of Women's Adaptation to Life in Prison*, 17 SOC. JUST. 110, 112–13 (1990).

15. *Id.* at 115.

16. *Id.* at 115–16 (quoting a study in which a researcher notes that, similar to the ways in which a dying patient yearns for control over their medication and food, an inmate searches for ways to assert control over basic facets of her own life).

17. *Id.* at 116–17 (explaining that inmates play the game of "being sneaky" in how they respond to officers' orders; for example, if an officer punishes an inmate by forcing her to eat food in her cell, the inmate seeks to make the officer believe she prefers eating in her cell instead of the dining room).

18. *Id.*

19. The game is not more than a response to complete powerlessness. It is not necessarily indicative of an inmate's desires or wants; rather, it is a mind game by which the prisoner experiences some level of control over her own acts and, in turn, the acts of others. By "being sneaky," women deceive guards and encounter a minute fraction of control in an environment that otherwise restricts their behavior. *See id.*

20. *See* Danielle Dirks, *Sexual Revictimization and Retraumatization of Women in Prison*, 32 WOMEN'S STUD. Q. 102, 107 (2004) (citing AMNESTY INT'L, "NOT PART OF MY SENTENCE": VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY 7 (1999), *available at* https://www.amnesty.org/en/documents/amr51/019/1999/en/; HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 43, 75 (1996), *available at* http://www.hrw.org/reports/1996/12/01/all-too-familiar) ("Correctional officers' absolute power over giving warnings, infractions, and punitive measures may provide opportunities for the development of exploitative relationships that hinge on 'favor-giving' and avoiding punishment."); Anthea Dinos, Note, *Custodial Sexual Abuse: Enforcing Long-Awaited Policies Designed to Protect Female Prisoners*, 45 N.Y.L. SCH. L. REV. 281, 282 (2001).

21. Katherine C. Parker, Note, *Female Inmates Living in Fear: Sexual Abuse by Correctional Officers in the District of Columbia*, 10 AM. U. J. GENDER SOC. POL'Y & L. 443, 444 (2002).

22. Zaitzow, *supra* note 12, at 39–40 ("The most obvious fact of life in women's prisons is that women are dependent on the officers for virtually every daily necessity, including food, showers, medical care, feminine hygiene products, and for receiving 'privileges' such as phone calls,

guards take advantage of that by often withholding goods and privileges to punish or compel behavior.[23]

Regardless of whether a guard actually withholds a prisoner's privileges, a guard's mere power to do so presents the same threat. Women inmates face both implicit and explicit threats if they disobey a guard's sexual advances.[24] Moreover, inmates may become emotionally attached to guards and find that sex with a guard is an opportunity to experience power and control.[25] Because a woman inmate faces complete powerlessness in prison, the decision to use her body as a commodity or trade sex for favors is an opportunity to exercise control.[26] In addition, because prisoners tend to have experienced physical or sexual abuse in past relationships, the power imbalance between inmates and guards often feels familiar and normal.[27] Prior victimization increases the likelihood that an inmate is influenced by a guard's control.[28]

In defining what constitutes legal and illegal force in sex, existing criminal rape law has established what is considered a "normal level of force."[29] By placing value on a male defendant's view of what constitutes rape, criminal law reflects the inequality between men and women, the role of patriarchy, and the legal subordination of women. The Tenth Circuit's analysis in *Graham* exemplifies this view, while reflecting the legal system's disregard for both the powerlessness of women prisoners and the social environment prison creates, where gender inequality is treated as an irrelevant factor to inmates.

*B. The Criminal and Constitutional Violation of Rape*

The crime of rape in the United States was originally adopted from English common law, which required use of force and lack of consent.[30]

---

mail, visits, and attending programs. To ask another adult for permission to do things or to obtain items of a personal nature is demeaning and humiliating. . . . The women prisoners, like children, are told when to get up, how to dress, what to eat, where to go, how to spend their time—in short, what to do and what not to do.").

23. Dinos, *supra* note 20, at 283.

24. *See* Kim Shayo Buchanan, Note, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 56 (2007).

25. *Id.* at 67 (discussing a Rathbone study that discussed a prisoner who had sex with guards and reported that it gave her a sense of power).

26. *Id.* at 57 (noting that power dynamics in prison are based on the dichotomy between those in power (the prison guards) and those without power (the inmates)). Such powerlessness "serves as a constant reminder to women in prison that they do not have autonomy over their own bodies or well-being in prison," and that power and gender imbalance in prison is exacerbated by the control male correctional officers have "as women must rely on men for basic necessities, phone privileges, and visiting privileges." Dirks, *supra* note 20, at 106–07; *see also supra* notes 21–23.

27. Buchanan, *supra* note 24, at 56; Dirks, *supra* note 20, at 110 ("Women who have had previous experiences of victimization in their lifetimes are more likely to have repeated experiences of trauma in their lives.").

28. Dinos, *supra* note 20, at 283.

29. MACKINNON, *supra* note 1, at 173.

30. Cynthia Ann Wicktom, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 401 (1988). Rape was initially

However, in determining what constitutes rape, different courts applied varied standards for the amount of force required and the necessary amount of resistance by the victim.[31] As rape law in the United States developed, state legislatures defined rape differently; while some focused on the element of nonconsent, others focused on requisite force.[32]

The traditional, criminal law view that rape requires intercourse, force, and nonconsent assumes that if sexual behavior involves two of the three elements, it would not constitute rape. For example, force during intercourse could be considered consensual, or nonconsensual intercourse could be acceptable absent force or coercion.[33] The existing laws imply that women may consent to forced sex.[34] By assuming this perspective, criminal law reveals the value of male dominance and the degraded status of both women themselves and their social worth.[35] While the law seeks to treat men and women equally, it arguably fails to realize social inequality between genders.

When requiring both physical force and nonconsent, the legal system suggests that nonconsensual sex is not rape or that forced sex may be consensual.[36] The Model Penal Code, which is among the leading rape reforms, defines rape as sexual intercourse that is compelled by either force, the threat of force, serious bodily injury, or extreme pain.[37] The Model Penal Code eliminates nonconsent as long as there is coercion.[38] While some states have followed the Model Penal Code's example by including coercion in their definition of force, the meaning of coercion has varied among jurisdictions.[39]

While the crime of rape is often adjudicated as a criminal offense, rape that occurs in prison may amount to a constitutional violation. A prisoner's treatment and the conditions of a prisoner's confinement must conform with the Eighth Amendment,[40] which states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual

---

defined as "the carnal knowledge of a woman forcibly and against her will." *Id.* at 401 n.16 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *210).

31. Timothy W. Murphy, *A Matter of Force: The Redefinition of Rape*, 39 A.F. L. REV. 19, 19–20 (1996).

32. Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147, 150 (2011); *see also* Ann T. Spence, Note, *A Contract Reading of Rape Law: Redefining Force to Include Coercion*, 37 COLUM. J.L. & SOC. PROBS. 57, 58–59 (2003) (discussing the various approaches states use to evaluate rape claims).

33. MACKINNON, *supra* note 1, at 172.

34. MACKINNON, *supra* note 3, at 131.

35. *Id.* at 129 ("Availability for aggressive intimate intrusion and use at will for pleasure by another defines who one is socially taken to be and constitutes an index of social worth.").

36. Spence, *supra* note 32, at 62 (citing examples).

37. MODEL PENAL CODE § 213.1(1)(a).

38. Murphy, *supra* note 31, at 20.

39. Spence, *supra* note 32, at 64–65.

40. Farmer v. Brennan, 511 U.S. 825, 832 (1994) (quoting Helling v. McKinney, 509 U.S. 25, 31 (1993)).

punishments inflicted."[41] Asserting that rape in prison violates the Eighth Amendment is an allegation of cruel and unusual punishment.

For sexual misconduct in prison, the Supreme Court's ruling in *Farmer v. Brennan*[42] defines the prohibition against cruel and unusual punishment.[43] In *Farmer*, the transsexual plaintiff claimed prison officials violated his Eighth Amendment rights by placing him in a male prison where he was beaten and raped.[44] The Court reasoned that while the Eighth Amendment prohibits prison officials from using excessive physical force against prisoners, it also imposes a duty on officials to ensure the safety of prisoners and that they are treated humanely.[45] To that end, the Supreme Court held that sexual abuse of a prison inmate by a prison official constitutes an Eighth Amendment violation.[46]

However, to distinguish any injury a prisoner may sustain in prison from being a constitutional violation, the Supreme Court has determined that an offense must meet both an objective and subjective element to amount to an Eighth Amendment violation.[47] To satisfy the objective element, a court must first decide whether the alleged harm was objectively serious enough to establish a violation.[48] For the subjective element, a court must find that the prison official had a culpable state of mind, defined as a "'deliberate indifference' to inmate safety."[49] While a rape allegation under the Eighth Amendment must satisfy the elements required under a criminal rape claim, i.e., sexual contact, nonconsent, and force, it is evaluated narrowly to also meet the requirements of a constitutional violation.

### *C. Gender Inequality and Existing Rape Law*

Some feminist theories hold that, because so much of our legal system and rules of civilization have been written by men, men exercise more control in society than women.[50] Postmodern feminist legal theory

---

41. U.S. CONST. amend. VIII.
42. 511 U.S. 825 (1994).
43. Cheryl Bell et al., Recent Developments, *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 YALE L. & POL'Y REV. 195, 211 (1999).
44. *Farmer*, 511 U.S. at 830; *see also* Cheryl Bell et al., *supra* note 43.
45. *Farmer*, 511 U.S. at 832.
46. *Id.* at 834 ("Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981))); *see also* Giron v. Corrs. Corp. of Am., 191 F.3d 1281, 1290 (10th Cir. 1999) (citing *Farmer*, 511 U.S. at 834).
47. Bell et al., *supra* note 43, at 212.
48. *Farmer*, 511 U.S. at 834.
49. *Id.* at 834–35 (quoting Wilson v. Seiter, 501 U.S. 294, 302–03 (1991)).
50. LEVIT & VERCHICK, *supra* note 5, at 15–16 ("All feminist theories share two things . . . . First, feminists recognize that the world has been shaped by men, particularly white men, who for this reason possess larger shares of power and privilege. All feminist legal scholars emphasize the rather obvious (but unspoken) point that nearly all public laws in the history of existing civilization were written by men. . . . Second, all feminists believe that women and men should have political, social, and economic equality. But while feminists agree on the goal of equality, they disagree about its meaning and on how to achieve it."). Levit and Verchick continue to describe various feminist

considers men's legacy of control as the basis for our society's patriarchal structure—which is manifested in the law's subordinate treatment of women who have been sexually violated through male dominance.[51]

Dominance theory finds that sexual violation is made possible by gender inequality.[52] Gender inequality is socially institutionalized and demonstrates the subordination of women.[53] For example, Catharine MacKinnon, a prominent feminist legal theorist, postulates that sexual assault occurs because of a hierarchy between the parties to the assault—in other words, the power of one gender over another.[54] A hierarchy existed in *Graham* not only because the plaintiff was a woman, but also because she was a prisoner, and the perpetrators were her male guards.

Nevertheless, awareness of a social hierarchy is seemingly absent in rape law where force is characterized by male dominance.[55] The defense of consent, for example, is focused on the *defendant's* belief of what a woman wanted, as opposed to the woman's understanding of the incident, which demonstrates the hierarchy between genders.[56] By discrediting the experience of the woman victim, rape law reflects how women

legal theories, including equal treatment theory, which is "based on the principle of formal equality . . . namely, that women are entitled to the same rights as men," *id.* at 16; cultural feminism, which "argues that formal equality does not always result in substantive equality," *id.* at 18; dominance theory, which "focuses on the power relations between men and women," *id.* at 22; critical race feminism, which "argue[s] that legal doctrines in various areas, such as rape, sexual harassment, and domestic violence, do not adequately address discrimination based on the intersections of these categories," *id.* at 26; and additional theories, including lesbian feminism, ecofeminism, pragmatic feminism, and postmodern feminism, *id.* at 29–36.

51. *Id.* at 23 ("Patriarchy means the rule or 'power of the fathers.' It is a system of social and political practices in which men subordinate and exploit women. The subordination occurs through complex patterns of force, social pressures, and traditions, rituals, and customs. This domination does not just occur in individual relationships, but is supported by the major institutions in society.").

52. *See* MACKINNON, *supra* note 3, 127–29. Catharine MacKinnon first introduced this particular postmodern view in 1979. LEVIT & VERCHICK, *supra* note 5, at 22. Dominance theory argues that women are subordinated due to "patterns of male domination" that have resulted from our culture and social institutions, thus reinforcing patriarchy. *Id.* at 22–23.

53. LEVIT & VERCHICK, *supra* note 5, at 22–23.

54. MACKINNON, *supra* note 3, at 246. For this reason, MacKinnon writes that rape is "a crime of sexualized dominance on the basis of sex." *Id.*

55. *Id.* at 244.

56. *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 842 (1990). In her article, Bartlett describes "the woman question," which is a method of exposing how the law subordinates women by "examining how the law fails to take into account the experiences and values that seem more typical of women than of men . . . or how existing legal standards and concepts might disadvantage women." *Id.* at 837 (internal quotation marks omitted). Bartlett points out that asking the woman question reveals that "the defense of consent focuses on the perspective of the defendant and what he 'reasonably' thought the woman wanted, rather than the perspective of the woman and the intentions she 'reasonably' thought she conveyed to the defendant," and such scrutiny reveals how the legal system subordinates women; thus, "the woman question helps to demonstrate how social structures embody norms that implicitly render women different and thereby subordinate." *Id.* at 842–43. In *Graham*, the court emphasized the defendants' impressions of consent rather than scrutinizing the intent of the victim. *See* Graham v. Sheriff of Logan Cnty., 741 F.3d 1118, 1123 (10th Cir. 2013).

are devalued in society.[57] Dominance theory adopts the view that force sufficient to overcome consent may transcend physical acts and include both nonphysical domination and psychological abuse.[58] The evidence presented in *Graham* exemplifies the need for courts to consider the dominance theory view that coercion can exist absent physical force.

## II. *GRAHAM V. SHERIFF OF LOGAN COUNTY*

### *A. Facts*

While Stacey Graham was imprisoned in solitary confinement at the Logan County Jail in Oklahoma, Rahmel Jefferies and Alexander Mendez, who were both prison guards, engaged in sexual intercourse with her.[59] While the intercourse was an isolated occurrence, both Jefferies and Mendez had separately associated with Graham beyond what is typical of a prison guard and an inmate.[60]

The relationship between Graham and Jefferies evolved over time.[61] The jail intercom system allowed a guard in a control tower to communicate with a prisoner in her cell, and Jefferies used the intercom system to have ongoing conversations with Graham.[62] Their conversations developed from discussing their families and interests to discussing sexual intercourse; eventually, the two also exchanged sexual notes.[63] At one point, Graham flashed her breasts at Jefferies; and on other occasions, Jefferies provided Graham with a candy bar and a blanket at her request.[64]

Graham's relationship with Mendez, on the other hand, was much more brief—it was limited to a matter of days before their sexual encounter.[65] A few weeks after Graham and Jefferies began communicating over the intercom, Mendez used the same intercom to initiate a conversation with Graham; he began to discuss his sexual fantasies and inquire about hers.[66] It was during that conversation that Graham told Mendez she wanted to "be with two men at the same time."[67] During that conversation, Mendez asked if he could look at Graham naked through the window of her cell, and she complied.[68]

57. Bartlett, *supra* note 56, 842–43 ("[Rape law] reveals how the position of women reflects the organization of society," thereby exposing "how social structures embody norms that implicitly render women different and thereby subordinate.").
58. LEVIT & VERCHICK, *supra* note 5, at 180.
59. *Graham*, 741 F.3d at 1120.
60. *Id.* at 1120–21.
61. *See id.*
62. *Id.* at 1120.
63. *Id.*
64. *Id.* at 1121.
65. *Id.*
66. *Id.*
67. *Id.* (quoting Graham in the record).
68. *Id.*

That night, Mendez brought Jefferies to Graham's cell and the three engaged in sexual conduct.[69] Graham and Jefferies had intercourse while Graham "simultaneously performed oral sex on Mendez."[70] Jefferies and Mendez then switched positions.[71] While Mendez was trying to have sex with her, he dropped his radio.[72] Graham attempted to stand up when the radio dropped, but Mendez pushed her head back down toward Jefferies as he muttered a profanity toward Graham.[73] When Graham heard another female inmate get up and a coughing noise, Jefferies and Mendez immediately left Graham's cell.[74]

The next day a jail administrator questioned Graham, Mendez, and Jefferies, but all three denied inappropriate contact.[75] A few weeks later, however, Graham confessed about the incident to the jail administrator, though she stated that intercourse was consensual.[76] During the resulting investigation, Jefferies and Mendez both admitted to the incident and were terminated from their positions.[77] Thereafter, Graham was transferred to another prison, where she displayed signs of depression, post-traumatic stress disorder, and received psychological care, noting to a psychologist that "she had been raped by two jailers."[78]

*B. Procedural History*

On September 24, 2010, Graham filed suit for relief under 42 U.S.C. § 1983[79] claiming that Jefferies and Mendez's acts violated both her Eighth[80] and Fourteenth[81] Amendment rights, and that the Sheriff of Logan County "fail[ed] to discipline, supervise, and train" both Jefferies and Mendez.[82] The U.S. District Court for the Western District of Oklahoma concluded that Graham's claim should be analyzed under the

69. *Id.*

70. *Id.*

71. *Id.*

72. Graham v. Sheriff of Logan Cnty., No. CIV-10-1048-F, 2012 WL 9509373, at *4 (W.D. Okla. Nov. 1, 2012), *aff'd* 741 F.3d 1118 (10th Cir. 2013).

73. *Id.*

74. *Graham*, 741 F.3d at 1121.

75. *Id.* at 1121–22.

76. *Id.* at 1122.

77. *Id.*

78. *Id.*; Appellant's Opening Brief at 9, *Graham*, 741 F.3d 1118 (No. 12-6302).

79. *See Procedural Means of Enforcement Under 42 U.S.C. § 1983*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 1058, 1059 (2011) (describing how 42 U.S.C. § 1983 enables a prisoner to "seek redress when a person acting under color of state law deprives the prisoner of rights guaranteed by the Constitution" (footnote omitted)).

80. For a brief overview of the Eighth Amendment, see *supra* note 8 and accompanying text; *see also* Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What Is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815, 1818–21 (2012) (describing that the Supreme Court has interpreted the Eighth Amendment as a means for prisoners to challenge their confinement while in custody, and to do so they must establish both the objective and subjective prong of an excessive force claim).

81. U.S. CONST. amend. XIV, § 1 (stating that a State shall not "deprive any person of life, liberty, or property, without due process of the law").

82. *Graham*, 741 F.3d at 1122.

Eighth Amendment.[83] The District Court granted summary judgment for the defendants, stating there was no Eighth Amendment violation because the sexual activity was consensual.[84]

On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the district court's decision.[85] The court found that summary judgment was proper because there was no dispute as to any material fact, since Graham was not forced to have sex.[86] While the court stated that "Graham's focus on appeal is . . . whether a prisoner can *legally* consent to sex" with a guard, the opinion notes that some form of coercion is required.[87] However, based on "the overwhelming evidence of consent," the court held that there was no Eighth Amendment violation.[88]

*C. Majority Opinion*

In a unanimous decision, the Tenth Circuit was convinced that Graham had consented to sexual activity and that her consent negated the claim of an Eighth Amendment violation.[89] When the court considered whether Graham presented a question of fact, it weighed the issue of consent against what would constitute an excessive force violation of the Eighth Amendment.[90]

First, the court briefly reviewed the two prongs of an excessive force claim—one objective, the other subjective.[91] The objective prong looks at whether the "alleged wrongdoing was objectively harmful enough to establish a constitutional violation," focusing on the nature of force used.[92] The subjective prong looks at the *mens rea* of the offender, under which Graham would need to show that the guards acted with a culpable state of mind, used force "maliciously and sadistically," and intended to cause the harm.[93] Without applying facts to either prong, the court quickly assessed that because Graham was not forced to have sex, "all other issues [are] irrelevant."[94]

---

83. Graham v. Sheriff of Logan Cnty., No. CIV-10-1048-F, 2012 WL 9509373, at *6 (W.D. Okla. Nov. 1, 2012) ("Because Graham was incarcerated at the time of the alleged events, the court concludes that her claim is properly analyzed as an Eighth Amendment excessive force claim." (discussing Smith v. Cochran, 339 F.3d 1205, 1210 n.2 (10th Cir. 2003))), *aff'd* 741 F.3d 1118 (10th Cir. 2013).

84. *Graham*, 741 F.3d at 1122; *see also Graham*, 2012 WL 9509373, at *9 (noting "the consensual sexual activity at issue in this case does not give rise to a violation of Graham's Eighth Amendment rights"). The court reasoned that pushing Graham's head down did not amount to excessive force. *Id.* at *9 n.4 (citing Hudson v. McMillian, 503 U.S. 1, 9–10 (1992)).

85. *Graham*, 741 F.3d at 1122.

86. *Id.* at 1123.

87. *Id.* at 1124–25.

88. *Id.* at 1126.

89. *Id.*

90. *See id.* at 1123.

91. *Id.*

92. *Id.* at 1123 (quoting Giron v. Corr. Corp. of Am., 191 F.3d 1281, 1289 (10th Cir. 1999)).

93. *Id.*

94. *Id.*

While Graham relied heavily on the Tenth Circuit's decision in *Lobozzo v. Colorado Department of Corrections*,[95] the court refused to apply the case, stating that its unpublished opinion was not binding precedent.[96] Nonetheless, the court clarified, "we read [*Lobozzo*] as saying at most that the parties agreed that consent was not a defense, a moot point since the defendants prevailed anyway."[97]

Because the court neglected the *Lobozzo* decision, Graham's case was declared to be a matter of first impression for the Tenth Circuit.[98] The court quickly summarized the approaches other courts have taken to the issue, but greatly emphasized the evidence of Graham's consent when coming to its holding.[99]

The Tenth Circuit cited *Hall v. Beavin*[100] and *Freitas v. Ault*[101] when mentioning that the Sixth and Eighth Circuits held consensual intercourse could not be an Eighth Amendment violation.[102] The *Graham* court then noted that lower courts have found "a prison guard has no consent defense in an Eighth Amendment civil-rights case alleging sexual relations"[103] because any form of sexual activity "serves no legitimate penalogical [sic] purpose" and is therefore "contrary to the goals of law enforcement."[104] The court's analysis closed by citing three remaining cases lower court that found prison guards have no consent defense.[105]

Before declaring that there is no consensus on whether an inmate can consent to intercourse, the Tenth Circuit visited the Ninth Circuit's "middle ground" approach reached in *Wood v. Beauclair*,[106] by which the Ninth Circuit created "a rebuttable presumption of nonconsent."[107] Though the "middle ground" approach offers a presumption of nonconsent, the Tenth Circuit's opinion focused on the instances suggesting Graham's consent. The court reasoned that, even if it adopted the Ninth Circuit's approach, "the presumption against consent would be overcome by the overwhelming evidence of consent," and concluded that there was no Eighth Amendment violation.[108]

---

95. 429 F. App'x 707 (10th Cir. 2011). *Lobozzo* also involved a female inmate who alleged an Eighth Amendment violation after sexual contact with a male prison guard. *See infra* Part III.A.2.
96. *Graham*, 741 F.3d at 1124.
97. *Id.*
98. *Id.* (noting that, because *Lobozzo* is not binding, "it is a matter of first impression in this circuit whether consent can be a defense to an Eighth Amendment claim based on sexual acts"),
99. *Id.* at 1124–26.
100. No. 98-3803, 1999 WL 1045694 (6th Cir. Nov. 8, 1999).
101. 109 F.3d 1335 (8th Cir. 1997).
102. *Graham*, 741 F.3d at 1124. *See infra* Part III.A.3.
103. *Graham*, 741 F.3d at 1125 (citing Cash v. Cnty. of Erie, No. 04–CV–0182–JTC(JJM), 2009 WL 3199558, at *2 (W.D.N.Y. Sept. 30, 2009)).
104. *Id.* at 1125 (quoting Carrigan v. Davis, 70 F. Supp. 2d 448, 454 (D. Del. 1999)).
105. *Id. See infra* Part III.A.3.
106. 692 F.3d 1041 (9th Cir. 2012).
107. *Graham*, 741 F.3d at 1125 (reviewing *Wood*, 692 F.3d 1041). *See infra* Part III.A.3
108. *Graham*, 741 F.3d at 1126.

To explain its decision, the court summarized the instances of Graham's consent reflected in the record: that she did not contest the prior sexual conversations; that she told Mendez she desired being with two men; that she allowed Mendez to look at her naked; and that she did not resist engaging in the sexual activity.[109] The court pointed out that Graham "stated repeatedly and consistently that almost all of the sexual acts that occurred were consensual."[110] In fact, because the court found so many instances of consent, it chose not to explore other potential factors of the violation,[111] noting that they "cannot undermine the other overwhelming evidence of consent."[112]

The *Graham* court issued a unanimous decision. Finding that Graham consented to sexual activity, the court determined that the sexual incident was not rape.[113] The court ultimately held that Graham's consent negated the possibility of an Eighth Amendment violation; thus, it concluded that if there is evidence that an inmate consented to sexual intercourse, the court will not find a constitutional violation.[114]

## III. ANALYSIS

In *Graham*, the Tenth Circuit concluded that the plaintiff did not have an Eighth Amendment claim because she consented to intercourse with two prison guards..[115] Consent, however, implies a voluntary permission; therefore, to give consent, a person must have free will and be treated with equality.[116] The *Graham* court disregarded that as a prisoner, Graham lacked both those things. When the court held that intercourse was consensual and there was no excessive force, it evaluated the circumstances of this case based on the laws of a society where all parties have equal rights, which is contrary to the prison environment.

When evaluating consent to sex, the *Graham* court did not consider whether the parties were social equals. As a result, the Tenth Circuit's decision manifests the ways in which the legal system affirms gender inequality and limits access to justice for female prisoners. By failing to review the power dynamic in prison, the court failed to consider the ways

---

109. *Id.* at 1123.
110. *Id.*
111. For example, the court did not discuss whether excessive force occurred, or whether Graham was coerced.
112. *Id.* at 1124.
113. *See id.* at 1126.
114. *Id.*
115. *See id.*
116. *See* M. Jackson Jones, *Power, Control, Cigarettes, and Gum: Whether an Inmate's Consent to Engage in a Relationship with a Correctional Officer Can be a Defense to the Inmate's Allegation of a Civil Rights Violation Under the Eighth Amendment*, 19 SUFFOLK J. TRIAL & APP. ADVOC. 275, 306 (2014). Because guards and inmates are in fundamentally unequal positions, where a guard typically holds most of the power, inmates lack the ability to consent to a sexual relationship. *See id.* (citing OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES 4 (2005), *available at* http://www.justice.gov/oig/special/0504/final.pdf).

in which inequality may function as coercion. As this Part will show, the *Graham* court thereby contributed to the legal system's subordination of women and disregard for female inmates.[117]

The Tenth Circuit's holding in *Graham* was ill-considered in three respects. Because the Tenth Circuit was so focused on whether there was consent, it failed to consider force. First, this Part begins by reviewing how the Tenth Circuit misapplied the case law dealing with sexual activity between prisoners and guards. Second, this Part will discuss how the Tenth Circuit's decision reflected the legal system's treatment of coercion in rape law. Because it employed a patriarchal definition of consent, the court ignored how Graham may have been coerced by the inequality and powerlessness she experienced as a female inmate. Third and finally, the court's decision treated the parties as equal and disregarded the gender asymmetry between a male prison guard and female prison inmate. Thus, this section ends by reviewing the power imbalance between male prison guards and female inmates and discussing how sex is commoditized in prison to postulate why sexual misconduct so frequently occurs.

### *A. The Tenth Circuit Misapplied the Law in* Graham

As it evaluated Graham's excessive force claim, the Tenth Circuit cursorily examined the legal precedent and improperly focused on consent rather than force. This Subpart argues that Tenth Circuit was so overwhelmed by the indication of Graham's consent to sex that it misapplied the law. First, this Subpart considers how the Tenth Circuit wrongly emphasized what it believed to demonstrate consent. Second, this subpart analyzes how the issue of consent drove the Tenth Circuit's disregard for its earlier ruling in *Lobozzo*. Finally, it concludes by discussing how the Tenth Circuit's review of existing case law was deficient.

#### 1. The Tenth Circuit's Focus on Consent

Unlike most crimes, rape is one in which the credibility of the victim is a decisive factor in determining whether any injury occurred.[118] In *Graham*, the Tenth Circuit focused much of its analysis on Graham's behavior as evidence of her consent to the sexual activity with Jefferies and Mendez rather than giving attention to whether any force or coercion occurred.[119] However, rather than focusing on her consent to the act of sex itself, the court emphasized her behavior before the sexual incident.[120] The court outlined Graham's behavior as evidence of her consent to sex, and by focusing on her behavior the court both undermined Graham's credibility as a victim and demonstrated the court's view that she

117. *See* MACKINNON, *supra* note 3, at 242.
118. *See* MACKINNON, *supra* note 3, at 131.
119. *See* Graham v. Sheriff of Logan Cnty., 741 F.3d 1118, 1123–24 (10th Cir. 2013).
120. *See id.* at 1120–21, 1123.

invited the sexual encounter.[121] By doing so, the court essentially suggested that Graham did not experience coercion, but instead invited the crime she alleged.[122]

The court began by describing the relationship between Graham and Jefferies over the intercom system; yet instead of looking at what Jefferies may have told her, the court focused on what Graham said to him: "Ms. Graham told Jefferies that she would like a man to make love to her."[123] The opinion continued to explain that Graham and Jefferies exchanged sexually explicit notes; yet instead of reviewing what Jefferies wrote to Graham, the court quoted a note that Graham wrote, but never gave, to Jefferies.[124] The court made a point to state that "[a]lthough the notes she had previously delivered to Jefferies were less explicit, they had suggested that she wished to have sexual intercourse with him."[125] The court's opinion failed to discuss Graham's interest in the other guard, Mendez.

Nonetheless, the court continued to justify both Jefferies and Mendez's acts by undermining Graham's position as a victim and establishing her consent. The court pointed out that Graham testified "that she enjoyed the conversations and note-writing," and that it gave her "something to do."[126] The court also stated that Graham once "flashed her breasts at Jefferies, *although he did not ask her to do so*."[127] By highlighting that Graham engaged in behavior that was not prompted by Jefferies, the court called attention to Graham's responsibility for her actions and failed to consider how Jefferies may have invited that behavior.[128] While the court mentioned Jefferies and Mendez's interaction with Graham, it failed to acknowledge whether they did anything to compel Graham's behavior or coerce her to act, except to mention that Jefferies once gave Graham "a candy bar and a blanket."[129] As a result of disregarding any wrongdoing by Mendez or Jefferies, the court allocated responsibility for any misconduct to Graham.

As the court discussed its reasoning for affirming the lower court, it shifted from its focus on Graham's behavior before the sexual encounter and concentrated on her indications of consent at the time of the incident: "She never told either [Jefferies or Mendez] that she did not want to have

121. *See id.* at 1123–24.

122. *See id.* at 1123.

123. *Graham*, 741 F.3d at 1120.

124. *Id.* at 1120–21. Both the Circuit Court and the District Court note that Graham and Jeffries exchanged notes, but neither court mentions what Jefferies may have written; the courts highlight only that, in her notes to Jefferies, Graham suggested having sex. *See id.*; Graham v. Sheriff of Logan Cnty., No. CIV-10-1048-F, 2012 WL 9509373, at *3 (W.D. Okla. Nov. 1, 2012).

125. *Graham*, 741 F.3d at 1121.

126. *Id.* at 1121 (internal quotation marks omitted).

127. *Id.* (emphasis added).

128. *Id.* at 1120–21.

129. *Id.* at 1121.

sex;"[130] "Although she has said that she did not want to have sex with Mendez[,] . . . she has not suggested that she indicated any reluctance to Jefferies or Mendez;"[131] "She did nothing to indicate lack of consent when the guards entered her cell, when they removed her clothing, or when they touched her. She never told either of them that she did not want to have sex."[132] Though the court briefly mentioned that Graham did not want to have sex with Mendez, it continued to hold that Graham consented because she did not say or do anything to indicate otherwise.[133]

By first focusing on Graham's earlier behavior, the court justified Jefferies and Mendez's understanding that the act was consensual. Rather than analyze Jefferies or Mendez's behavior and the ways in which such behavior may have coerced Graham, the court discussed Graham's behavior *prior* to the encounter to show that her consent was freely given *during* the encounter. After establishing what it found to be evidence of consent, the Tenth Circuit's quick review of case law shows its eagerness to conclude there was no violation.

2. The Tenth Circuit's Decision to Ignore *Lobozzo*

The Tenth Circuit's holding in *Lobozzo* established that an inmate could not legally consent to sex with a guard,[134] but the *Graham* court dismisses that holding by stating, "[U]npublished opinions are not binding precedent."[135] While the court is correct that unpublished opinions are not binding,[136] the failure to consider an unpublished opinion in an in an area of law that lacks any other precedent is contrary to the doctrine of precedent.[137] By allowing a judge to review a case with similar facts to a

130. *Id.* at 1123.

131. *Id.*

132. *Id.*

133. "Although she has said that she did not want to have sex with Mendez and that Mendez pushed her head down just before the encounter ended, she has not suggested that she indicated any reluctance to Jefferies or Mendez." *Id.*

134. Lobozzo v. Colo. Dep't of Corr., 429 F. App'x 707, 711 (10th Cir. 2011); *see also Graham*, 741 F.3d at 1124.

135. *Graham*, 741 F.3d at 1124; *see also* Erica S. Weisgerber, Note, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 GEO. L.J. 621, 623 (2009) ("Unpublished opinions are opinions that a court has designated as having non-binding precedential effect. They are written resolutions to specific cases, prepared exclusively for the involved parties, and they are intended to have no binding precedential effect—or even persuasive effect, for some jurisdictions—on future cases." (footnote omitted)).

136. Weisgerber, *supra* note 135, at 632 ("Even if litigants may now *cite* to unpublished opinions in their briefs, judges need not accord unpublished cases the same precedential treatment as published cases, or any precedential treatment at all.").

137. *Id.* at 632–33 ("This inferior treatment of unpublished opinions is contrary to the role and understanding of precedent in America's constitutional and legal history."); *see also id.* at 644 ("[I]f an area of law is unsettled, future cases dealing with the same area of law will surely arise in the future. If these future cases deal with the same material facts and same legal issues, the prior case will be on all fours with the subsequent case; in such an instance, the doctrine of precedent demands that the prior case be binding on the subsequent one.").

prior decision yet arrive at a separate and distinct conclusion, the judge may essentially determine which holding becomes law.[138]

In *Lobozzo*, a female inmate had sexual contact with her male prison guard and later alleged an Eighth Amendment violation claiming she had not been protected against sexual assault.[139] Under the objective element of an excessive force claim, courts must determine if the wrongdoing was harmful enough to amount to a constitutional violation.[140] The Tenth Circuit found that the objective element was satisfied because "[i]t [was] uncontested that Lobozzo, an inmate, could not legally consent to sexual activity with . . . a guard" and "rape is sufficiently serious to constitute a constitutional violation."[141] However, while the Tenth Circuit found that the objective element of the excessive force claim was met, it did not find the subjective element was satisfied.[142]

The Tenth Circuit's opinion in *Graham* neglected to elaborate on the similarities between Graham's circumstances and those of *Lobozzo*.[143] Because *Lobozzo* held that an inmate cannot consent to sex with a guard, relying on *Lobozzo* would have shown that, as a prisoner, Graham could not consent to intercourse. Just as the objective element of the excessive force claim was met in *Lobozzo*, because the inmate and guard had sexual contact, so too would the same claim be satisfied in *Graham*, simply based on Graham's status as a prisoner.

When it disregarded *Lobozzo*, the Tenth Circuit demonstrated its struggle in accepting Graham's behavior as a prisoner reacting to a socialized power imbalance;[144] instead, the court perceived Graham to be a woman asking for sex. The Tenth Circuit saw consent based on what it believed consent to look like—in a free environment with gender equality, consent means voluntary permission. Based on Graham's behavior, the court understood that she voluntarily granted permission to Jefferies and Mendez. However, in prison, behavior that looks like consent is not the product of free will; rather, it is the result of a situational power im-

138. *Id.* at 632–33.

139. *Lobozzo*, 429 F. App'x at 708–09.

140. M. Jackson Jones, *Power, Control, Cigarettes, and Gum: Whether an Inmate's Consent to Engage in a Relationship with a Correctional Officer Can be a Defense to the Inmate's Allegation of a Civil Rights Violation Under the Eighth Amendment*, 19 SUFFOLK J. TRIAL & APP. ADVOC. 275, 283 (2014).

141. *Lobozzo*, 429 F. App'x at 711.

142. Jones, *supra* note 116, at 288. To establish the subjective element was met, Lobozzo presented statistics on rapes that occur at Colorado Department of Corrections facilities, claiming that those statistics provided notice of the danger prisoners face. *Id.* (citing *Lobozzo*, 429 F. App'x at 711). The court reasoned that the statistics did not provide the officials with notice that Lobozzo's constitutional rights had been violated and stated "[t]he record simply does not support her allegations that the CDOC Defendants knew of and disregarded an excessive risk that she would be sexually victimized." *Lobozzo*, 429 F. App'x at 713.

143. *See Lobozzo*, 429 F. App'x at 711.

144. *See infra* Part III.B.

balance.[145] Unlike the *Lobozzo* court, the *Graham* court disregarded this fact because Graham's behavior satisfied its understanding of what consent looks like. As a result, the *Graham* court declared that *Lobozzo* did not apply and took *Graham* as an opportunity to revisit this contentious subject.

3. The Tenth Circuit's Dismissal of Cases Involving Sexual Conduct in Prison

While reaching its conclusion in *Graham*, the Tenth Circuit conducted a brief and cursory survey of case law from various jurisdictions. Though the court mentioned the Sixth and Eighth Circuits' holdings in *Hall* and *Freitas* that consensual intercourse could not constitute an Eighth Amendment violation, neither case explicitly involved intercourse.[146] The court then moved to a brief discussion of two district court cases, *Cash* and *Carrigan*, which held that consent is not a defense for guards having sexual contact with inmates.[147]

Both *Hall*[148] and *Freitas*[149] held that consensual intercourse was not a constitutional violation.[150] While the Eighth Circuit in *Freitas* explained in dicta that "welcome and voluntary sexual interactions . . . cannot as a matter of law constitute 'pain' as contemplated by the Eighth Amendment,"[151] the Tenth Circuit's reliance on both *Hall* and *Freitas* is misplaced, as neither decision explicitly discussed intercourse.[152] Instead, both cases deal with romantic relationships between guards and inmates—while the Sixth Circuit's decision in *Hall* references a "sexual relationship,"[153] the *Freitas* opinion discusses a nonsexual relationship.[154] Though the Tenth Circuit cited both opinions as instances in which other circuits reviewed consensual intercourse between prison guards and inmates, neither case involved a claim that rose beyond sexual harassment.[155]

The *Graham* decision also cited three lower court cases that found prison guards have no consent defense.[156] The court began by citing *Cash*

---

145. *See infra* Part III.C for a discussion on how the social hierarchy in prison impacts inmate behavior.

146. *See* notes 117–18 and accompanying text.

147. *See* notes 119–22 and accompanying text.

148. No. 98-3803, 1999 WL 1045694 (6th Cir. Nov. 8, 1999).

149. 109 F.3d 1335 (8th Cir. 1997).

150. *Graham*, 741 F.3d at 1124.

151. *Id.* at 1124 (quoting *Freitas*, 109 F.3d at 1339) (internal quotation mark omitted); *see also* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion) (explaining that the Eighth Amendment forbids excessive punishment that involves "the unnecessary and wanton infliction of pain" or is "grossly out of proportion to the severity of the crime").

152. Jones, *supra* note 116, at 285–88.

153. Hall v. Beavin, No. 98-3803, 1999 WL 1045694, at *1 (6th Cir. Nov. 8, 1999).

154. *See id.* at 285.

155. *Id.* at 285–87.

156. *Id.*

*v. County of Erie*,[157] in which the United States District Court for the Western District of New York relied on state law to determine that an inmate lacked the ability to consent to intercourse.[158] Similarly, the *Graham* court then turned to *Carrigan v. Davis*,[159] in which the United States District Court for the District of Delaware looked to state law to determine that any sexual act between an inmate and a prison guard is a per se violation of the Eighth Amendment, regardless of consent.[160]

While the Tenth Circuit rightfully considered cases that found inmates cannot provide consent, the problem with both *Cash* and *Carrigan* is that the courts' decision in each is reflective of local, state laws. In citing these two cases with little analysis, the Tenth Circuit failed to clarify how these two cases that were based in state laws applied to Graham's constitutional claim. Because the *Graham* court saw evidence of consent in Graham's behavior, it declined to seriously consider any case law that held that prisoners are not able to consent to sexual activity.[161] Moreover, the court failed to consider why other courts, such as the Ninth Circuit, deem consent between a guard and inmate virtually impossible to distinguish from coercion.[162]

The Tenth Circuit finally reviewed the Ninth Circuit's decision in *Wood v. Beauclair*[163] for creating "a rebuttable presumption of nonconsent."[164] In *Wood*, the plaintiff was a male inmate who engaged in a romantic but nonsexual relationship with Martin, a female guard, and later filed a claim alleging an Eighth Amendment violation for sexual harassment.[165] In determining whether Wood could consent to his relationship with Martin, the Ninth Circuit thoroughly addressed whether prisoners are capable of giving consent, citing the lack of control prisoners have over most aspects of their life[166] and the resulting power dynamics.[167]

157. *Cash* is a district court case in which the plaintiff claimed she was assaulted and raped as a pretrial detainee. Cash v. Cnty. of Erie, No. 04–CV–0182–JTC(JJM), 2009 WL 3199558, at *1 (W.D.N.Y. Sept. 30, 2009).

158. "Because plaintiff was incarcerated, she lacked the ability to consent to engage in sexual intercourse with Hamilton as a matter of law. Thus, even if Hamilton's defense was that the sexual intercourse with plaintiff was physically consensual, this may also constitute a constitutional violation." *Id.* at *2 (citation omitted) (citing N.Y. Penal Law § 130.05(3)(f)).

159. *Carrigan* is another district court case in which the plaintiff was an inmate and alleged that the defendant, Davis, sexually assaulted her in violation of the Eighth Amendment. Carrigan v. Davis, 70 F. Supp. 2d 448, 454 (D. Del. 1999).

160. *Id.* at 453.

161. *See supra* Part III.A.2.

162. *See* Graham v. Sheriff of Logan Cnty., 741 F.3d 1118, 1124–25 (10th Cir. 2013); Wood v. Beauclair, 692 F.3d 1041, 1047 (9th Cir. 2012).

163. 692 F.3d 1041 (9th Cir. 2012).

164. *Graham*, 741 F.3d at 1125 (reviewing *Wood*, 692 F.3d 1041).

165. Jones, *supra* note 116, at 289–90.

166. "They cannot choose what or when to eat, whether to turn the lights on or off, where to go, and what to do. They depend on prison employees for basic necessities, contact with their children, health care, and protection from other inmates." *Wood*, 692 F.3d at 1047.

167. A prisoner's ability to exercise free consent is inherently hindered by the power imbalance in prison. *Id.* ("The power dynamics between prisoners and guards make it difficult to discern consent from coercion. Even if the prisoner concedes that the sexual relationship is 'voluntary,' because

The Ninth Circuit therefore held a presumption of nonconsent for prisoners alleging sexual abuse by a guard.[168]

Though the Tenth Circuit mentioned the Ninth Circuit's "middle ground approach" in *Wood*, it failed to analyze the effect of the *Wood* holding in *Graham*. Had the Tenth Circuit relied on *Wood*, it would have given more consideration to whether Graham could actually consent as a prisoner, rather than focusing on how she gave consent as a woman. Moreover, the *Graham* court did not reconcile Graham's behavior as an inmate lacking basic freedoms and control over her life, and their impression of Graham as a woman, exercising control over her wants and desires by flirting and writing notes. Beyond the court's shallow consideration of related cases, the Tenth Circuit's focus on consent detracted from its consideration of the use of force in Graham's claim.

By failing to adequately consider related case law, the Tenth Circuit improperly neglected legal precedent. In reviewing Graham's claim, the court concentrated on whether Graham consented to sex, rather than scrutinizing if or how she experienced coercion. As the next section will show, gender inequality can function as coercion, and though traditional rape law often overlooks it, it is crucial to consider in the prison setting.

*B. The Court's Misguided Understanding of "Coercion" in Rape Law*

When considering rape in a criminal context, most courts require proof that there was coercion—that the threat of force or force itself resulted in penetration.[169] In adjudicating whether coercion occurred, several courts look to the victim's behavior and the extent to which the victim resisted the force, maintaining that the victim ought to have displayed physical resistance.[170] By requiring physical resistance, certain types of coercion are not evaluated in criminal rape cases.[171]

Very rarely have courts acknowledged that rape victims may be so overcome with fear, that their actions failed to resist the use of force against them or that there may be other explanations for a failure to struggle against the offender.[172] This Subpart begins by scrutinizing how the *Graham* decision examined the question of coercion when evaluating the excessive force claim and continues to consider dominance theory's

---

sex is often traded for favors (more phone privileges or increased contact with children) or 'luxuries' (shampoo, gum, cigarettes), it is difficult to characterize sexual relationships in prison as truly the product of free choice.")

168. *Id.* at 1049.

169. LEVIT & VERCHICK, *supra* note 5, at 182; *see, e.g.*, United States v. Youngman, 481 F.3d 1015, 1020 (8th Cir. 2007); Miles v. Yates, No. CV 05-5459 DOC(JC), 2010 WL 2569190, at *7 (C.D. Cal. May 6, 2010); Leyja v. Oklahoma, No. CIV–09–265–W, 2010 WL 1881462, at *15 (W.D. Okla. Apr. 7, 2010); Williams v. State, 10 So. 3d 1083, 1086 (Ala. Crim. App. 2008); State v. Bryant, 965 P.2d 539, 545 (Utah Ct. App. 1998).

170. LEVIT & VERCHICK, *supra* note 5, at 183.

171. *Id.* at 182.

172. *Id.* at 183.

arguments of how coercion occurs beyond what criminal rape law defines.[173] While reflecting on Graham's testimony and trial court records, this Subpart shows that, regardless of a cognizable criminal or constitutional claim, Graham experienced coercion based on the view that inequality constitutes force.

In reviewing a rape claim and the issue of a woman's consent, the legal system will often categorize a woman based on her relationship with the offender.[174] For instance, if a woman claims nonconsensual sex with a stranger, the law puts her into a category in which the lack of a relationship to the stranger means that, most likely, she was raped. For Graham, the court considered evidence of her prior interactions with Jefferies to indicate that she had consented to the sexual activity with both Jefferies and Mendez.[175] Yet when a court assumes that a woman's relationship to a man can evidence her consent, it overlooks the reasons why she may not display resistance during intercourse or rape.

The Tenth Circuit's discussion of coercion in the crime of rape is limited at best in the *Graham* opinion. Instead of discussing how Graham may have been coerced, the court only stated that some form of coercion is required to constitute an Eighth Amendment excessive force claim.[176] The court simply focused on what it believed to evidence Graham's consent and relied on her admission that she was not "forced or given any promises."[177] By mainly focusing on Graham's behavior and lack of resistance, the court concluded that the sexual activity was not coercive, and ended its analysis.

When a court only asks whether consent occurred, it fails to consider that inequality between the parties may prevent a woman from displaying her nonconsent.[178] When inequality is a reflection of power dynamics, its existence between the offender and the victim can constitute coercion because such inequality prevents the victim from displaying nonconsent.[179] A woman may be "too surprised or too terrified or too learned in passivity or wants to get it over with too badly" to resist force.[180]

173. This analysis will rely on Catharine MacKinnon's analysis, as her writings and research have brought the concerns of dominance theory into discussions of legal reform.

174. MACKINNON, *supra* note 1, at 175.

175. In the Oklahoma State Bureau of Investigation (OSBI) interview with Graham, she stated that the sex was consensual with Jefferies; "I didn't really want Mendez there." Graham v. Sheriff of Logan Cnty., 741 F.3d 1118, 1122 (10th Cir. 2013).

176. *See Graham*, 741 F.3d at 1123.

177. *Id.* at 1122.

178. MACKINNON, *supra* note 3, at 247 ("[S]ex under conditions of inequality can look consensual when it is not wanted . . . . Men in positions of power over women can thus secure sex that looks, even is, consensual without that sex ever being wanted, without it being freely chosen . . . .").

179. *Id.*

180. MACKINNON, *supra* note 1, at 35.

There is no doubt that the inherent power imbalance of the prison environment fostered the inequality between Graham, Jefferies, and Mendez. Graham was a prisoner; she had very little agency, with no control over what she ate for dinner, what time she went to bed at night, or any other basic need. Both Jefferies and Mendez were prison guards. The severe inequality was undoubtedly apparent to all parties, evidenced by the lack of control Graham had over basic aspects of her life and the complete control Jefferies and Mendez, as prison guards, retained over her life.[181] Graham was clearly cognizant of her unequal status, as she testified "her rights were taken from her when she was incarcerated" and "[s]he had no control over [the sexual activity]."[182] Had the court recognized that power inequality is a form of coercion, it would have found that coercion occurred because a lack of power prevented Graham from displaying her nonconsent.

Moreover, Graham's medical records and notes from her counseling sessions show that Graham had been in a similar position before—a position where she was made unequal to her offender and subjected to sexual acts. As Graham's medical records reflect, "She was molested as a child by older cousins and an uncle" and "[s]he lived with a very abusive mother."[183] An expert witness also confirmed "important considerations for her vulnerability," which included a "mental health history," a diagnosis of bipolar disorder, and at least two suicide attempts.[184] As a victim of child molestation, Graham had experienced nonconsensual sexual contact in her personal relationships. Had it closely considered Graham's history, the court could evaluate the reasons for her failure to resist and physically struggle against Jefferies and Mendez. Such a review may have shown that, to Graham, "force" was not only limited to physical violence, but also included the exercise of sexual dominance over her.[185]

As dominance theorists note, most existing criminal laws treat passive silence, acquiescence, or resigning to sex as consent.[186] Both criminal and constitutional laws regarding rape fail to recognize reasons why Graham did not fight against Mendez or Jefferies, and fail to consider that the power imbalance between them may have been one of those reasons.[187] Among the reasons Graham may have submitted to the sexual

---

181. Appellant's Opening Brief, *supra*, note 78, at 23–24 (discussing DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989), which stated: "[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause").

182. Appellant's Opening Brief, *supra* note 78, at 3.

183. *Id.* at 4.

184. *Id.* at 13.

185. SCHULHOFER, *supra* note 5, at 52.

186. MACKINNON, *supra* note 3, at 243.

187. There may be speculation that Graham and Jefferies's behavior indicated a genuine interest and connection between them. Unfortunately, a genuine connection amidst the institutionalized

activity, there may have been intimidation or pressure associated with Jefferies and Mendez's status and authority.[188] Yet criminal rape law ignores power relationships that may influence the sexual encounter, just as it ignores nonviolent coercion.[189] Evaluations of rape in prison as excessive force take the same approach, likewise ignoring nonviolent coercion.

By failing to consider if or why Graham did not verbalize or show her nonconsent, the court implicitly decided that Graham's lack of physical resistance meant there was no coercion on the part of Jefferies and Mendez. According to most courts, intercourse is not a crime unless it includes force that amounts to physical injury.[190] As dominance theory seeks to show, sex is often nonconsensual, but the narrow requirements of rape hide the reality of many factors that prevent a victim from exhibiting nonconsent.

### C. Commoditizing Sexuality in Prison: How and Why

In prison, a guard's extreme control contributes to his power over inmates and leaves inmates to control just one tangible good: their bodies.[191] As a result, women in prison use their bodies and sex as a commodity to exert some level of power, and evidence of Graham's behavior suggests she may have done the same. In addition, having received no "special treatment" from Jefferies or Mendez, Graham may exemplify non-tangible benefits inmates may receive for sexual contact with guards.[192]

It is possible that women prisoners are so used to being oppressed in past relationships and are so desperate for attention and love, that they

---

hierarchy is illusory, and an inmate's romance puts her at risk for exploitation. Dirks, *supra* note 20, at 110 (citing Agnes L. Baro, *Spheres of Consent: An Analysis of the Sexual Abuse and Sexual Exploitation of Women Incarcerated in the State of Hawaii*, 8 WOMEN & CRIM. JUST. 61, 78 (1997); HUMAN RIGHTS WATCH, *supra* note 20) ("Arguing that cases of sexual misconduct that involve 'romance' or some level of consensual contact are too difficult to prosecute, those in the legal arena choose to do nothing to aid women who have been exploited or abused by male prison staff."). "These legal standards also attempt to jeopardize women's victim status by stigmatizing them as 'inmates' or 'bad girls,' thus occluding any opportunity for their experiences to fall under the purview of 'real rape.'" *Id.* (citing SUSAN ESTRICH, REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO (1987); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence*, *in* VIOLENCE AGAINST WOMEN: THE BLOODY FOOTPRINTS 201 (Pauline B. Bart & Eileen Geil Moran eds., 1993)).

188. SCHULHOFER, *supra* note 5, at 52.

189. *Id.* at 59.

190. *Id.* at 71; *see also* MACKINNON, *supra* note 3, at 247 ("If force were defined to include inequalities of power, meaning social hierarchies, and consent were replaced with a welcomeness standard, the law of rape would begin to approximate the reality of forced and unwanted sex.").

191. Amy Laderberg, Note, *The "Dirty Little Secret": Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse*, 40 WM. & MARY L. REV. 323, 340–41 (1998).

192. While Graham received a candy bar and a blanket, the Tenth Circuit stated she did not get "special treatment." *See* Graham v. Sheriff of Logan Cnty., 741 F.3d 1118, 1120–21 (10th Cir. 2013).

are used to exchanging their bodies for attention.[193] While in prison, women tend to respond to male authority the same way they did before their incarceration.[194] A review of Graham's medical records shows that this may have been her own circumstance; not only was she molested and abused as a child, but she also married at fifteen years old.[195] This suggests she experienced oppression and abuse in her past relationships and may have believed that she needed to exchange her body for a sense of protection or attention.

Another explanation of why sex is commoditized in prison is because of the prisoner's own self-esteem.[196] Some inmates seek relationships with guards because of loneliness or as a way to pass time.[197] In *Graham*, the plaintiff testified that she felt "wanted and appreciated" when the defendant asked to see her naked.[198] She also testified that exchanging flirtatious notes with the guards was enjoyable and gave her something to do.[199] This demonstrates that, despite the circumstances, Graham found a way to get something else she needed through sex: self-esteem.[200] Women inmates are often unable to envision positive outcomes for themselves because of their powerlessness and the hopelessness of their situation;[201] thus, receiving attention from a guard can make a prisoner feel some self-worth.[202]

When a woman inmate uses her body to get what she needs—whether it is protection, safety, a piece of candy, or a fraction of confidence—she has not consented to sex. Prison creates an environment of coercion, and women are objectified not only because they are women, but further by virtue of their role as powerless inmates. Prisoners are deemed to lack entitlement to the rights accorded to ordinary citizens; they are deprived of their freedom to make choices or grant permission.[203] A lack of these basic freedoms includes lacking the capability to consent to intercourse.

---

193. *See* Laderberg, *supra* note 189, at 339–40.

194. *Id.*

195. Appellant's Appendix at 68, Graham v. Sheriff of Logan Cnty., 741 F.3d 1118 (10th Cir. 2013) (No 12-6302) (reproducing Stacey Graham's medical records).

196. Buchanan, *supra* note 28, at 56.

197. *Id.* ("For some women, 'it seems as if sex is the only thing that keeps time clicking by.'" (quoting CRISTINA RATHBONE, A WORLD APART: WOMEN, PRISON, AND LIFE BEHIND BARS 49 (2005)).

198. *Graham*, 741 F.3d at 1121.

199. *Id.*

200. Interacting with the guards likely contributed to Graham's sense of self-worth because she was engaged and received attention from them. Note that acts to build self-esteem are not synonymous to consenting to a particular sexual act, though Graham may have engaged in sexual contact because self-worth depended on a need to feel desired.

201. Laderberg, *supra* note 191, at 339–40.

202. HUMAN RIGHTS WATCH, *supra* note 20.

203. Deborah Labelle, *Bringing Human Rights Home to the World of Detention*, 40 COLUM. HUM. RTS. L. REV. 79, 83 (2008).

## CONCLUSION

When it determined that Graham consented to sex, the Tenth Circuit failed on several counts. First, the court misapplied the law. The Tenth Circuit was charged with evaluating an excessive force claim; but in reviewing Graham's claim the court neglected to evaluate excessive force; instead, it concentrated on Graham's consent.

Second, the court's review of Graham's consent was improper because the court focused only on Graham's behavior rather than considering her circumstances as a prisoner and the coercion she faced. As dominance theory reveals, the court used a patriarchal view of rape and consent. Its opinion overlooks how gender inequality results in coercion, especially in prison where women inmates are utterly powerless and incapable of consenting at all, and suggests that Graham invited the sexual conduct that was the basis of her claim.

Third, the court demonstrated the common disregard for both gender and social inequality when it placed the blame on Graham. The court did not give her status as a woman equal consideration or acknowledge how her status as a prisoner affected her behavior. Both existing criminal rape laws and courts evaluating rape as an excessive force claim ignore the power relationships that influence sexual encounters in prison. As a result of the power imbalance, inmates use their bodies as a commodity to experience control.*Graham* presents several challenges women prisoners face in the justice system—the limited definition of rape in criminal law, the inability to overcome institutionalized male dominance, and the struggle to assert control when all other personal rights have been restricted. Courts reviewing rape in prison under the Eighth Amendment must take a holistic and concentrated approach to the unique circumstances of the parties. A vital component to justice for prisoners depends on a comprehensive understanding of their plight. In order for women prisoners to gain autonomy and justice in the legal system, courts must come to terms with how prisons create an environment that interrupts how relationships are constructed. If a court tailors its analysis and opinion to fully acknowledge the experience of prisoners, women like Stacey Graham will have an opportunity for equality and justice in the legal system.

*Kristen Seddiqui*[*]

---

* J.D. Candidate, 2017. My heartfelt thanks go to the *Denver University Law Review* Board for the insight, contributions, and guidance that shaped this writing and made it publishable. I also give thanks to my family for the constant support and encouragement; and, above all, to Daniel for patiently believing in me.