Rock and Hard Place Arguments

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Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to.[1]

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1. JOSEPH HELLER, CATCH-22, at 55 (1961). Catch-22 situations are a subset of rock and hard place dilemmas. *See infra* note 139.

This Article explores what we coin "rock and hard place" (RHP) arguments in the law, and it aims to motivate mission-driven plaintiffs[2] to seek out such arguments in their cases.[3] The RHP argument structure helps plaintiffs win cases even when the court views that outcome as unfavorable.

We begin by dissecting RHP *dilemmas* that have long existed in the American legal system. As Part I reveals, prosecutors and law enforcement officials have often taken advantage of RHP dilemmas and used them as a tool to persuade criminal defendants to forfeit their constitutional rights, confess, or give up the chance to present mitigating evidence. Part I not only describes these dilemmas but also explains how the courts have largely, though imperfectly, curtailed their impacts. Part II turns to civil

2. Throughout this Article, we use the term "mission-driven plaintiffs" to reference plaintiffs represented by firms with "a social justice goal that looks beyond merely advancing the interests of particular clients." *Private Public Interest Law and Plaintiff's Firm Guide*, HARV. L. SCH., https://hls.harvard.edu/dept/opia/private-public-interest-law-and-plaintiffs-firm-guide/ [https://perma.cc/8E6N-5JGQ].

3. The origin of the term, of course, is the expression "(caught) between a rock and a hard place," which refers to a dilemma in which an actor must choose between two unfavorable options. *Be (Caught) Between a Rock and a Hard Place*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/be-caught-between-a-rock-and-a-hard-place [https://perma.cc/BG8L-9RDH].

law. It explains how RHP dilemmas can defeat plaintiffs' mission-driven litigation—particularly their ability to overcome justiciability hurdles.

Part III switches gears from RHP *dilemmas* to RHP *arguments*; it introduces the need for mission-driven plaintiffs to turn the tables by crafting RHP dilemmas for defendants and judges. It uses logical syllogisms and hypotheticals to introduce different RHP constructions that plaintiffs can implement. It then provides two real-world examples of how plaintiffs used RHP arguments to overcome jurisdictional hurdles in *New York v. Department of Labor* and *Natural Resources Defense Council v. United States Department of the Interior*. Part IV provides an in-depth case study of *American Anti-Vivisection Society v. United States Department of Agriculture*, a case in which mission-driven plaintiffs implemented two simultaneous RHP arguments and thereby forced the Department of Agriculture to implement regulations protecting birds.[4] This case highlights the efficacy of RHP arguments because the plaintiffs succeeded after decades of failed legislative reforms and prior litigation. Part V addresses several surprisingly liberal decisions from the Supreme Court of the United States' 2019 term and proposes that a unique type of RHP argument drove the outcome in these cases. Finally, Part VI highlights areas of the law where mission-driven plaintiffs are likely to find success using RHP arguments and recommends future litigation strategies.

I. FROM WITCH TRIALS TO THE ELUSIVE "FAIR TRIAL": ROCK AND HARD PLACE DILEMMAS IN THE CRIMINAL JUSTICE SYSTEM

For as long as legal systems have existed, "rock and hard place" situations have existed within them. There is perhaps no better example than the historical practice of "trial by water" for accused witches, prevalent in England in the sixteenth and seventeenth centuries.[5] The practice involved stripping the accused, binding her thumbs to her toes, and throwing her into a body of water to "test" whether she was a witch.[6] If she floated, she would be deemed a witch, removed from the water, and executed, often by burning.[7] If she sank, she would be deemed innocent,

4. Am. Anti-Vivisection Soc'y v. U.S. Dep't of Agric., 946 F.3d 615, 620 (D.C. Cir. 2020).

5. Russell Zguta, *The Ordeal By Water (Swimming of Witches) in the East Slavic World*, 36 SLAVIC REV. 220, 221–22, 224 (1977).

6. *Id.* at 221. The idea was that "water, the pure and cleansing element, the instrument of baptism, would refuse to receive those tainted with crime." *Id.* (citing HENRY CHARLES LEA, SUPERSTITION AND FORCE: TORTURE, ORDEAL, AND TRIAL BY COMBAT IN MEDIEVAL LAW 247 (Barnes & Noble 1996) (1870))).

7. *Id.* at 221–22.

but would suffer permanent health consequences from being submerged—or even die from drowning—unless she was pulled up in time.[8]

Following in the footsteps of witch trial arbiters (albeit more subtly), American law enforcement officers and prosecutors have, throughout history, pressed suspects and criminal defendants into various RHP dilemmas. Some noteworthy examples are dilemmas that (1) force a defendant to forfeit a constitutional right, (2) coerce a suspect into confessing to a crime, or (3) force a defendant to forgo the chance to present mitigating evidence at a death penalty proceeding. Over time, courts developed rules that eliminated many of these dilemmas. Even so, courts and legislators have allowed some unfortunate RHP dilemmas to persist.

A. Dilemmas that Force a Defendant to Forfeit a Constitutional Right

Before the Supreme Court intervened, RHP dilemmas often forced defendants to forfeit established constitutional rights such as the Fourth Amendment right to privacy or the Fifth Amendment privilege against self-incrimination. The Fourth Amendment protects against "unreasonable searches and seizures"; the government cannot search or confiscate a suspect's property without adequate justification and, in many cases, a warrant.[9] If the government obtains evidence through a search or seizure that violated a criminal defendant's Fourth Amendment rights, the defendant can file a motion to "suppress the evidence," meaning the government cannot use the evidence against the defendant at trial.[10] The Fifth Amendment prevents the government from forcing witnesses to give

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8. In at least some cases, ropes would be tied around the waists of the accused so that they could be pulled out of the water if they proved themselves "innocent" by sinking. *Id.* at 221; Dhwty, *Trial By Ordeal: A Life or Death Method of Judgement*, ANCIENT ORIGINS (Oct. 30, 2018), https://www.ancient-origins.net/history/trial-ordeal-life-or-death-method-judgement-004160 [https://perma.cc/Q2FA-DYXY]. However, women still died or suffered severe health consequences from spending time submerged in water. Zguta, *supra* note 5, at 228 ("One of the victims of the Dzhurkovo [trial by water] suffered permanent loss of hearing while several others fell seriously ill as a result of the ordeal."); Dhwty, *supra* (noting that "accidental drowning deaths did occur").

9. U.S. CONST. amend. IV; *see* Grady v. North Carolina, 575 U.S. 306, 310 (2015) ("The Fourth Amendment prohibits only *unreasonable* searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations."); Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1644 (1998) ("More typically (and formalistically) . . . the Court considers the legality of a search to turn exclusively on whether there is a warrant supported by probable cause to believe that evidence of a criminal offense is present in a given location.").

10. *See* Weeks v. United States, 232 U.S. 383, 397–98 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961), *and overruled in part by* Elkins v. United States, 364 U.S. 206 (1960) (holding that in a federal prosecution, the Fourth Amendment barred the use of evidence secured through an illegal search and seizure); *Mapp*, 367 U.S. at 678 (holding that the *Weeks* exclusionary rule also applies in state prosecutions).

testimony that could be used to convict them of a crime.[11] Two main implications of this are that (1) criminal defendants have the right not to testify during the trial on their guilt or innocence and (2) *all* witnesses have the right to refuse to answer self-incriminating questions in *any* court proceeding, unless they are promised that the testimony will not be used as evidence against them in a criminal trial.[12]

1. The First Dilemma: Admit to Ownership of Illegally Seized Evidence and Waive the Fifth Amendment, or Allow the Prosecution to Use the Illegally Seized Evidence and Surrender a Fourth Amendment Claim

Despite the clear constitutional commands, criminal defendants were once caught between the rock of forfeiting their Fourth Amendment rights and the hard place of giving up their Fifth Amendment privilege when deciding whether to file a motion to suppress evidence. This dilemma was especially acute for defendants charged with possessory crimes.[13] When possession of contraband (such as drugs) is an essential element of a crime, the government often seeks to prove its case by introducing seized contraband into evidence and explaining where it was found, thereby connecting the contraband to the defendant.[14] If the government seized the contraband during a search that violated the Fourth Amendment, the defendant might wish to file a motion to suppress to exclude the critical evidence.[15] Importantly, a defendant cannot succeed on his suppression

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11. U.S. CONST. amend. V; *see* Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) ("The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."). If the state wishes to make a witness to testify (outside the presence of a jury deciding his own guilt or innocence), it can do so without violating the Fifth Amendment if it grants the testifying witness "use and derivative use" immunity, meaning that neither the testimony nor evidence derived from it can be admitted as evidence against him in any trial on his own guilt or innocence. Kastigar v. United States, 406 U.S. 441, 453 (1972). Another option is for the state to grant the witness "transactional immunity," a broader protection "which accords full immunity from prosecution for the offense to which the compelled testimony relates." *Id.*

12. *See Kastigar*, 406 U.S. at 453–54.

13. *See, e.g.*, Jones v. United States, 362 U.S. 257 (1960), *overruled by* United States v. Salvucci, 448 U.S. 83 (1980).

14. *E.g.*, *id.* at 258–59 (the government obtained narcotics and narcotics paraphernalia through a search and sought to introduce this evidence and connect it to the defendant to prove possession of narcotics); Defendant's Motion to Suppress & Dismiss Charges at 2, State v. Huynh, No. DC-2017-98 (Mont. Dist. Ct. 2018) (the State charged the defendant with possession of dangerous drugs with intent to distribute, basing its case on drugs found in the defendant's rental car during a police search).

15. *E.g.*, *Jones*, 362 U.S. at 259 ("Prior to trial petitioner duly moved to suppress the evidence obtained through the execution of the search warrant on the ground that the warrant had been issued without a showing of probable cause."); Defendant's Motion to Suppress & Dismiss Charges, *supra* note 14.

motion unless he demonstrates that he has "standing"[16] to file the motion—and he cannot establish standing unless he proves that he has an ownership interest in the premises searched or in the seized contraband.[17]

In 1960, when *Jones v. United States* was decided, if a defendant made any statements in support of his motion to suppress, the government could use the statements as evidence against him during trial.[18] The defendant thus faced an RHP dilemma. Testifying that he had an ownership interest in the premises would bolster the government's case by enabling the prosecutor to say, "The defendant admitted to owning the place where the police found the contraband." Testifying that he owned the seized contraband would be even worse—it would be equivalent to proving his own guilt of possession.[19] In other words, the defendant could not offer any explanation for why he had Fourth Amendment standing without incriminating himself and thus forfeiting his Fifth Amendment privilege. But if the defendant failed to testify that he had Fourth Amendment standing, he would allow the prosecutor to use unlawfully seized evidence to secure his conviction.

Recognizing that courts were "pinion[ing]" defendants with this "dilemma,"[20] the Supreme Court in *Jones* provided the first solution[21]: automatic Fourth Amendment standing.[22] The Court found that "[t]he same element in this prosecution which has caused a dilemma, i[.e]., that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged."[23] In other words, under *Jones*, a defendant charged with a possessory crime automatically had standing to file a motion to suppress evidence of possession.[24] He therefore had the opportunity to keep

16. "Fourth Amendment standing is another way of saying that the person who wants to complain about a Fourth Amendment violation is the one (or among those) whose own Fourth Amendment rights were violated." Sherry F. Colb, *Rental Cars, Privacy, and Suppression of Evidence*, JUSTIA: VERDICT (June 20, 2018), https://verdict.justia.com/2018/06/20/rental-cars-privacy-and-suppression-of-evidence [https://perma.cc/2GV6-BWF4].

17. *Jones*, 362 U.S. at 261.

18. *Id.* at 262.

19. *Id.* at 261–62.

20. *Id.* at 262.

21. As discussed *infra*, the Court overruled *Jones* when its later cases provided an alternative solution to the RHP dilemma of choosing between the waiver of Fourth and Fifth Amendment rights.

22. *Jones*, 362 U.S. at 263–64; Simmons v. United States, 390 U.S. 377, 391 (1968) ("We eliminated that Hobson's choice in Jones v. United States . . . by relaxing the standing requirements."). "Hobson's choice" is another term used for an RHP dilemma. *See Hobson's Choice*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969).

23. *Jones*, 362 U.S. at 263.

24. Darlene Stosik, *The Death Knell of Automatic Standing—Another Blow to Fourth Amendment Privacy*, 35 U. MIA. L. REV. 361, 362 (1981). *Jones* also had an alternative holding. *See*

the evidence out without having to incriminate himself by claiming ownership.

A later Supreme Court case, *Simmons v. United States*, provided an alternative solution to the RHP dilemma that defendants face when seeking to suppress illegally seized evidence—a solution that extended even to non-possessory cases. The *Simmons* defendants faced charges for armed robbery of a bank.[25] The government sought to introduce a suitcase containing money wrappers from the victimized bank into evidence against one of the defendants, Garrett.[26] Garrett filed a Fourth Amendment motion to suppress the evidence.[27] Because the *Jones* automatic-standing rule did not apply to defendants charged with non-possessory crimes such as armed robbery, Garrett testified that he owned the suitcase to demonstrate that he had standing to file the motion.[28]

The Supreme Court found that "[t]estimony of this kind, which links a defendant to evidence which the Government considers important enough to seize and to seek to have admitted at trial, must often be highly prejudicial to a defendant."[29] In other words, the *Simmons* Court recognized that defendants charged with *any* crime face an RHP dilemma if their options are to either (1) allow incriminating, unconstitutionally seized evidence in or (2) testify that they own incriminating evidence or a place where incriminating evidence was found, when that testimony could itself be used as evidence against them.[30] The Court recognized that Option One required defendants to give up their right to raise a Fourth Amendment claim, while Option Two required defendants to give up their Fifth Amendment privilege against self-incrimination.[31] Finding "it intolerable that one constitutional right should have to be surrendered in order to assert another," *Simmons* fashioned an effective new solution extending to all defendants.[32] Appearing to rest its decision on one or both of the two amendments at issue,[33] the Court held that when defendants

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Jones, 362 U.S. at 265 ("As a second ground sustaining 'standing' here we hold that petitioner's testimony on the motion to suppress made out a sufficient interest in the premises to establish him as a 'person aggrieved' by their search.").

25. *Simmons*, 390 U.S. at 379.

26. *Id.* at 391.

27. *Id.* at 382.

28. *See id.* at 391.

29. *Id.*

30. *Cf. id.* at 393 ("In such circumstances, a defendant with a substantial claim for the exclusion of evidence may conclude that the admission of the evidence, together with the Government's proof linking it to him, is preferable to risking the admission of his own testimony connecting himself with the seized evidence.").

31. *Id.* at 393–94.

32. *Id.* at 394.

33. The Court did not explicitly state what the constitutional ground for its decision was (i.e., what constitutional provision mandated the decision the Court reached), but it discussed each

testify to establish Fourth Amendment standing, their testimony is not admissible against them on the question of guilt.[34] Thus, under *Simmons*, defendants no longer have to worry that they will incriminate themselves by alleging that they meet Fourth Amendment standing requirements; they no longer have to surrender the Fifth to claim the advantages of the Fourth.[35]

In 1980, *United States v. Salvucci* concluded this saga. *Salvucci* acknowledged that *Simmons* effectively eliminated "[t]he 'dilemma' identified in *Jones*."[36] With this RHP dilemma resolved, the Court found that "the cornerstone of the *Jones* opinion" no longer existed, and the need for the *Jones* automatic-standing rule disappeared.[37] *Salvucci* thus reaffirmed what *Jones* and *Simmons* already made clear: Supreme Court decisions can turn on whether an RHP dilemma leaves defendants unable to assert one right without relinquishing another,[38] even though the Constitution does not expressly prohibit such dilemmas.[39]

Amendment and the undesirability of forcing a defendant to choose between one constitutional protection and another. *Id.* at 392–94; *cf.* Peter Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741, 761 n.59 (1981) ("[A]lthough we may have difficulty knowing *which* of the two constitutional grounds supports the judgment (if not both), we know for certain that the compelled election in *Simmons* was unconstitutional under either the fifth amendment privilege against self-incrimination or the fourth amendment, if not under both.").

34. *Simmons*, 390 U.S. at 394.

35. The holding in *Simmons* effectively clothed defendants' testimony during Fourth Amendment suppression hearings with "use and derivative use" immunity, meaning that defendants would not waive their Fifth Amendment privilege by testifying in support of a suppression motion because their testimony could not be used against them on the issue of guilt or innocence. See *supra* note 11 for further explanation of "use and derivative use" immunity and how it relates to the Fifth Amendment privilege against self-incrimination.

36. United States v. Salvucci, 448 U.S. 83, 89 (1980).

37. *Id.* at 90. The Court also found that the second rationale of *Jones* had been undercut by recent decisions. *Id.*

38. In the aftermath of *Simmons*, the Supreme Court and lower courts have made other decisions on the basis of the same rationale: that no person should be forced to choose between two constitutional rights. *See, e.g.*, Lefkowitz v. Cunningham, 431 U.S. 801, 807–08 (1977) ("Section 22 is coercive for yet another reason: It requires appellee to forfeit one constitutionally protected right as the price for exercising another." (citing *Simmons*, 390 U.S. at 394))). However, as Peter Westen discusses in his article *Incredible Dilemmas*, the Court sometimes dismisses the *Simmons* argument and refrains from intervening when a person is faced with forfeiting one constitutional right or the other. Westen, *supra* note 33, at 743 ("When the Court is willing to allow constitutional rights to be so conditioned, it dismisses *Simmons* with the observation that the 'legal system is replete with situations requiring "the making of difficult [choices]."'"). Thus, the Court has not had an entirely consistent approach to dealing with the type of RHP dilemma addressed in *Simmons* and discussed in this subsection. *See id.*

39. *See generally* U.S. CONST. *See also* Westen, *supra* note 33, at 758 ("Contrary to a suggestion that is sometimes made, the mere 'juxtaposition' of two constitutional rights does not *itself* create a constitutional issue: the so-called 'tension' between two constitutional rights is not itself a constitutional problem apart from the effect of the compelled election on the two respective rights."). Because of this, Westen argues that if the forced choice between two constitutional rights (compelled election) "violates the constitutional 'policies' underlying one or more of the two rights, the election is invalid for that reason alone; if, on the other hand, the compelled election does not violate either of

2. The Second Dilemma: Testify and Forfeit the Fifth Amendment Privilege, or Allow the Jury to Infer Guilt

Criminal defendants also face a second important RHP dilemma with respect to exercising the Fifth Amendment privilege against self-incrimination. At every criminal trial, the defendant confronts this dilemma when deciding whether to testify: he either must (1) forfeit his Fifth Amendment privilege and take the stand or (2) remain silent, inviting jurors to think, "If he is really innocent, why doesn't he just tell us that?"[40] If he chooses Option One, he not only forfeits a constitutional right but also risks hurting his case during his testimony, even if he is innocent. An innocent defendant might be a nervous speaker who would have a hard time telling his story persuasively, especially to a jury that he knows is judging his every word.[41] He might simply be no match for a savvy prosecutor who could easily trip him up on cross-examination[42] or prejudice the jury against him by asking him about his prior convictions.[43] But if he chooses Option Two, he takes on the burden of overcoming many

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the two rights, the Constitution can have nothing more to say about it." *Id.* (footnote omitted). In Westen's view, then, when a defendant is forced to choose between two rights, rather than automatically viewing that situation as an unconstitutional RHP dilemma (as the Court seems to suggest in *Simmons*), the Court should conduct two separate analyses: (1) whether the pressure the dilemma places on a defendant violates the policies and interests underlying Constitutional Right #1, and (2) whether the pressure the dilemma places on a defendant violates the policies and interests underlying Constitutional Right #2. *Id.* at 759. In conducting these analyses, the Court (according to Westen) should make "particularized assessments" of how the dilemma both benefits the state and burdens each relevant constitutional right. *Id.* We do not attempt to argue for the wisdom of the *Simmons* approach over Westen's approach (or vice versa) but simply observe that the Supreme Court has been persuaded to act based on the mere existence of an RHP choice between waiving one constitutional right or the other. Westen recognizes as much and admits that the "rock and whirlpool," "Hobson's choice," and "dilemma" language used in *Simmons* has strong persuasive appeal and has continued to be used successfully in litigation. *Id.* at 762, 741 n.14.

40. *See* Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 426 (2018) ("The data also suggest that juries punish defendants for remaining silent at trial with a 'silence penalty.'"); John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 478 (2008) ("Most people think: 'If it were me, and I were charged with a crime I did not commit, I would put my hand on the Bible, get up on that witness stand, look those jurors dead in the eye, and tell them that I didn't do it. Only guilty people don't testify.'").

41. *See* GERRY SPENCE, WIN YOUR CASE 212 (2005) ("Innocent defendants are most often helpless to defend themselves—their fear, their anger at being charged with a crime they did not commit, their inability to match wits with a seasoned prosecutor makes it almost impossible for the defendant to take the stand and convince the jury of his innocence.").

42. *Id.* at 141 ("When a skillfully prepared cross-examination is complete[,] the prosecutor will often leave the most innocent appearing to be guilty—a murderer, a thief, a two-bit fraud, and a dastardly liar, which, in the hierarchy of all crime, and to many jurors, is the worst crime of all, since we have been taught that only the guilty lie.").

43. *See* Bellin, *supra* note 40, at 398 (describing how, by testifying, a defendant opens the door to the government introducing evidence of his prior crimes on cross-examination, which makes the jury "more likely to convict").

jurors' presumption that silence equates to guilt. His attorney can explain to the jury that an innocent defendant might not want to testify for many reasons,[44] but no matter what the attorney says, some jurors may still think the defendant would have taken the stand if he had a true story of innocence to tell.[45]

While the Supreme Court cannot entirely resolve this dilemma,[46] the Court has at least prevented prosecutors from exploiting it by holding that the government cannot encourage the jury to equate silence with guilt. In *Griffin v. California*, the defendant chose not to testify at the trial on his guilt or innocence, claiming the protections of the Fifth Amendment.[47] During the State's closing argument, the prosecutor repeatedly commented on the defendant's silence, suggesting to the jury that if the defendant had an innocent explanation for the evidence against him, he would have taken the stand.[48] The Court found that "comment on the refusal to testify" "is a penalty imposed by courts for exercising a constitutional privilege" that "cuts down on the privilege by making its assertion costly," violating the Fifth Amendment.[49] By holding that imposing a costly penalty on the exercise of a constitutional right violates the Constitution, the Court again expressed the view that the government should not use RHP dilemmas to pressure defendants to forfeit their rights.

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44. Many defense attorneys use voir dire or closing statements to address this issue. *E.g.*, Jeffery P. Robinson, *Sacrifice Control to Learn What Jurors Really Think*, *in* NAT'L ASS'N OF CRIM. DEF. LAWS., HIGH ALTITUDE TRIAL SKILLS FROM THE MASTERS OF ADVOCACY 1, 10 (2015) (including the following sample voir dire question: "If some people on the jury may think that a person who testifies can't be trusted because their freedom is on the line, and others think that if a person doesn't testify they are hiding something, how does an innocent person resolve that conflict? Have you ever heard the expression 'between a rock and a hard place?'"); SPENCE, *supra* note 41, at 185 (providing a sample portion of a closing argument addressing this issue: "[The defendant] is not skilled in dealing with the likes of Mr. Prosecutor over there, who would love to bombard him with those clever questions that can confuse and confound and make the most innocent person look guilty. How could [the defendant], with an eighth-grade education, ever compete with this prosecutor who is skilled in this business of cross-examination? It's for these reasons that our founders have protected us [with the Fifth Amendment]. I have decided as his lawyer that it is best for Jimmy to let me speak for him as best I can"). See *supra* notes 41, 42, and 43 for sources discussing the reasons a defendant might not want to testify, aside from guilt.

45. Bellin, *supra* note 40, at 426.

46. As the text accompanying *supra* note 44 suggests, it is impossible to fully prevent jurors from thinking, "If he were innocent, he would talk." Thus, no matter what solution the court devises, defendants will face a dilemma when choosing whether to testify.

47. Griffin v. California, 380 U.S. 609, 609–10 (1965).

48. *Id.* at 610–11.

49. *Id.* at 614. The decision also, similarly, held that the court could not instruct the jury that the defendant's silence could be used as evidence against him. *Id.* at 615.

B. Dilemmas that Coerce Confessions

Government officials have used RHP dilemmas not only to pressure defendants into forfeiting their constitutional rights but also to elicit confessions.[50] During the most egregious interrogations, detectives have forced suspects to choose between the rock of confessing and the hard place of physical torture.[51] Other detectives have elicited confessions by warning that suspects will face violence from third parties if they do not confess.[52] Still others have convinced suspects to confess by suggesting that if they remain silent, they will face a longer prison sentence[53]

50. Forcing a suspect to confess during interrogation could be seen as forcing the suspect to forfeit his Fifth Amendment privilege against self-incrimination, provided that the suspect was not granted immunity. *Cf.* Miranda v. Arizona, 384 U.S. 436, 478 (1966) (holding that the Fifth Amendment privilege against compulsory self-incrimination applies in custodial interrogations); Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CALIF. L. REV. 465, 491 (2005) (arguing that courts should use the Fifth Amendment Self-Incrimination Clause to regulate the methods used to elicit confessions "because [the Clause] unambiguously speaks to the issue by banning the use of compulsion to obtain self-incriminating statements that are later admitted at trial against the suspect"). However, confessions have long been governed by "voluntariness" doctrines—first, the common law voluntariness doctrine, and later, the Due Process voluntariness doctrine—that are not rooted in the Self-Incrimination Clause. *Cf.* Miller v. Fenton, 474 U.S. 104, 110 (1985) ("Indeed, even after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogations [in] *Miranda*[,] . . . the Court has continued to measure confessions against the requirements of due process."). *See generally* Laurence A. Benner, *Requiem for* Miranda*: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 99 (1989) (discussing development of the common law voluntariness doctrine and Due Process voluntariness doctrine). These doctrines are based *not* on the idea that the government should not force the waiver of a constitutional right, but on the idea that inducing confessions through RHP dilemmas is problematic for other reasons: such confessions are unreliable, and eliciting them is unfair. *See infra* Section I.B. It is for this reason that we discuss dilemmas coercing confessions separately from dilemmas forcing the forfeiture of a constitutional right.

51. *E.g.*, Brown v. Mississippi, 297 U.S. 278, 282 (1936) ("[T]he two last named defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed . . . .").

52. *E.g.*, Payne v. Arkansas, 356 U.S. 560, 564 (1958) (the defendant "testified, concerning the conduct that immediately induced his confession, as follows: 'I was locked up upstairs and [the detective] . . . told me that I had not told him all of the story—he said that there was 30 or 40 people outside that wanted to get me, and he said if I would come in and tell him the truth that he would probably keep them from coming in'").

53. *E.g.*, Wyatt Kozinski, Comment, *The Reid Interrogation Technique and False Confessions: A Time for Change*, 16 SEATTLE J. SOC. JUST. 301, 312 (2017) (describing how interrogators commonly use a method known as the Reid Technique to make suspects believe they will receive a longer sentence if they refuse to confess, *inter alia*).

or the death penalty;[54] have their kids taken away;[55] lose their job;[56] or undergo endless, incommunicado detention, perhaps without adequate food and water.[57]

In all these examples, the overall strategy of the interrogator is to make the accused believe that confessing is the lesser of two perils. This strategy is very effective—so effective that it can lead people to confess to crimes they did not even commit[58] because innocent suspects, just like guilty suspects, often decide whether to confess by "consciously or unconsciously" weighing the costs and benefits of their options.[59] If interrogators paint a picture of a hard place that seems more costly than confessing, it makes sense for the (often scared and overwhelmed) innocent suspect to confess.[60] This can be true even when, objectively

54. *E.g.*, Lauren Morehouse, *Confess or Die: Why Threatening a Suspect with the Death Penalty Should Render Confessions Involuntary*, 56 AM. CRIM. L. REV. 531, 532 (discussing the Norfolk Four case, in which four men falsely confessed to the rape and murder of a young woman because the police "threatened the men with the death penalty during the interrogations[, and] told them that the only way to avoid the death penalty was to confess").

55. *E.g.*, Lynumn v. Illinois, 372 U.S. 528, 534 (1963) ("It is thus abundantly clear that the petitioner's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate.'").

56. *E.g.*, Garrity v. New Jersey, 385 U.S. 493, 494 (the defendants, who worked as police officers, confessed after they were told that if they "refused to answer [they] would be subject to removal from office").

57. *E.g.*, Haynes v. Washington, 373 U.S. 503, 514 (1963) ("The petitioner at first resisted making a written statement and gave in only after consistent denials of his requests to call his wife, and the conditioning of such outside contact upon his accession to police demands. Confronted with the express threat of continued incommunicado detention and induced by the promise of communication with and access to family Haynes understandably chose to make and sign the damning written statement."); Reck v. Pate, 367 U.S. 433, 441 (1961) (the accused "was, for all practical purposes, held incommunicado," without access to his friends and family or adequate food or water, until he finally confessed).

58. Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 986 (1997) ("Investigators elicit the decision to confess from the innocent in one of two ways: either by *leading them to believe that their situation, though unjust, is hopeless and will only be improved by confessing*; or by persuading them that they probably committed a crime about which they have no memory and that confessing is the proper and optimal course of action." (emphasis added)). According to Ofshe and Leo, the techniques used by interrogators to elicit confessions "work[] effectively by controlling the alternatives a person considers and by influencing how these alternatives are understood." *Id.* at 985. In essence, they make even the innocent suspect believe that the rock of confessing is better than the hard place of the punishment the suspect will experience if he refuses to confess. *See also False Confessions Happen More Than We Think*, INNOCENCE PROJECT (Mar. 14, 2011), https://www.innocenceproject.org/false-confessions-happen-more-than-we-think/ [https://perma.cc/ZNA2-SUH4] ("In approximately 25% of the wrongful convictions overturned with DNA evidence, defendants made false confessions, admissions or statements to law enforcement officials.").

59. Alan Hirsch, *Threats, Promises, and False Confessions: Lessons of Slavery*, 49 HOW. L.J. 31, 35–36 (2005).

60. *Id.* A famous example of this is the "Central Park Five" case. Evan Nesterak, *Coerced to Confess: The Psychology of False Confessions*, BEHAV. SCIENTIST (Oct. 21, 2014), https://behavioralscientist.org/coerced-to-confess-the-psychology-of-false-confessions

speaking, the hard place is actually less costly than confessing. For example, confessing when innocent is almost certainly more costly than having to spend an hour alone with a detective in an interrogation room, but a frightened child might see an hour of incommunicado interrogation, separated from their family, as the worst imaginable situation. Thus, when the government uses *any* RHP dilemma to corner a suspect into confessing, the confession has questionable value as evidence—it could mean that the suspect is guilty, but it could also mean that the suspect simply thought confessing was the easiest way out of the dilemma, in spite of his innocence.[61]

Early U.S. courts recognized that such confessions are unreliable and refused to admit them into evidence under the common law voluntariness doctrine.[62] This doctrine was an evidentiary rule that trial courts applied to exclude any confession that the government[63] "induced . . . by a promise or threat."[64] The rule applied even when the government only implied the promise or threat; any tactic inducing hope or fear would generally render a confession inadmissible.[65] Thus, the rule accounted for the two main

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[https://perma.cc/96Y8-CJCC]; *see also When They See Us*, NETFLIX (May 13, 2019) (miniseries based on the "Central Park Five" and their false confessions). Five New York teenage boys each confessed to involvement in the brutal rape of a jogger in Central Park and implicated one another, even though none of the boys were actually involved in the rape. Nesterak, *supra*. Each boy experienced "14–30 hours of interrogation under tremendous pressure" and was "[led] to believe that he would get to go home if he confessed." *Id.*

61. *See supra* notes 58 and 60. Of course, there are some cases where such a confession is corroborated by outside evidence, mediating concerns about reliability. For example, if the suspect confesses to stabbing the victim to death and explains where the detectives can find the knife, the detectives find a knife at the described location, and forensic analysis shows that the knife was the one used in the crime, there is little reason to doubt the veracity of the suspect's confession.

62. Benner, *supra* note 50, at 93–94 (observing that "the concern with 'voluntariness' stemmed from the recognition that a tortured confession might be false" and "reflected a concern with the reliability of such a confession").

63. The rule was also often applied when the promises or threats were made by third parties (not the government) because the courts recognized that the same reliability concerns are present regardless of who performs the questioning. Godsey, *supra* note 50, at 482.

64. United States v. Charles, 25 F. Cas. 409, 410 (C.C.D.C. 1813) (finding confession "induced . . . by a promise or threat" and subsequent confession "of the same, or like facts" inadmissible); Benner, *supra* note 50, at 99; *see* THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 43 (Abraham Small 5th ed. 1824) (1804) ("[B]ut if any threats or promises have been made to induce [the defendant] to confess, no evidence of such confession is admitted[.]"); Wilson v. United States, 162 U.S. 613, 622 (1896) (stating in dicta the common law rule that confessions "are inadmissible if made under any threat, promise, or encouragement of any hope or favor").

65. *See, e.g.*, State v. Drake, 18 S.E. 166, 166 (N.C. 1893) (holding confession inadmissible when an officer told the defendant, "If you are guilty, I would advise you to make an honest confession. It might be easier for you. It is plain against you," because "[t]here was in what was then said to the prisoner a hope held out to him that a confession would make his punishment the lighter, and confessions thus induced by hope 'are, of all kinds of evidence, the least to be relied on, and are therefore to be entirely rejected'" (citation omitted)); *Charles*, 25 F. Cas. at 410 (finding confession inadmissible when it "had been made under the impression of fear and hope excited by the

ways that interrogators manipulate RHP dilemmas to elicit confessions. First, it accounted for interrogators' use of direct threats: telling suspects that they will face a hard place—e.g., torture, a harsh sentence, or endless interrogation—if they do not confess.[66] Second, it accounted for interrogators' use of the more subtle approach of making suspects believe that they will likely be convicted if they do not confess and then implying that they might receive leniency or understanding if they confess.[67] This approach makes the suspect believe the rock of confessing is better than the hard place of likely being convicted without confessing. When interrogators cannot use express or implied threats or promises, they can employ neither of these interrogation strategies. Thus, by removing these tools from the interrogator's toolbox, early courts largely prevented the government from using RHP dilemmas to elicit confessions[68] (at least on the record[69]).

Eventually, the Supreme Court constitutionalized the voluntariness doctrine[70] and, in subsequent cases, gradually began to change its focus and scope. In *Bram v. United States*,[71] the Court controversially held that

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observations of the magistrate"); State v. Roberts, 12 N.C. (1 Dev.) 259, 261 (1827) ("[Confessions] are called voluntary, when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breast of every man . . . .").

66. *See* Benner, supra note 50, at 98–99 (discussing how the common law voluntariness doctrine incorporated "the Gilbert rule (confessions extorted by pain and force are not dependable)").

67. The facts of the 1813 case *United States v. Charles* provide an illustration of this. In *Charles*, a magistrate "told [the accused] there was evidence enough to commit him at all events, and therefore he had better confess the who[l]e truth, and that probably he would fare the better for it." 25 F. Cas. at 409. He thus made the accused believe that he had a choice between (A) the rock of confessing and (possibly) being convicted but receiving leniency and (B) a worse hard place of being convicted and receiving no leniency because of his refusal to own up to his "guilt." *See id.* The accused chose the rock of confessing, likely to avoid the even less desirable hard place. *See id.* at 410. For other examples, see Reg. v. Croydon, 2 Cox C.C. 67 (1846) (finding confession inadmissible when the suspect was told, "I dare say you had a hand in it. You may as well tell me all about it"); Rex v. Thomas, 6 C. & P. 353 (1833) (finding confession inadmissible when the suspect was told, "You had better split, and not suffer for all of them," suggesting he would be found guilty and receive a greater sentence if he did not confess and implicate co-conspirators); *see also* Green v. State, 15 S.E. 10, 10 (Ga. 1891) (rebuking interrogators for misleading suspects about the consequences of confessing versus the consequences of remaining silent—"It is a gross and inexcusable abuse of authority on the part of men occupying official positions, or assuming to act officially, to thus take advantage of the helplessness or ignorance of persons charged with crime . . . .").

68. *See* Benner, *supra* note 50, at 106 ("As the commentators of that period asserted, even the slightest influence of hope or fear operated to render a confession inadmissible.").

69. *See* Kozinski, *supra* note 53, at 306−07 (describing how, prior to the 1930s, law enforcement officers often used off-the-record third-degree tactics that would not leave a physical mark, since recording equipment did not exist).

70. Godsey, *supra* note 50, at 477 n.60; *see* George E. Dix, *Promises, Confessions, and Wayne Lafave's Bright Line Rule Analysis*, 1993 U. ILL. L. REV. 207, 207, 213 (1993) (describing how "in *Bram*, the Court read the Fifth Amendment as embodying the common-law voluntariness rule" and constitutionalized a bright-line "prohibition against the use of 'promises' to induce a confession").

71. Bram v. United States, 168 U.S. 532, 534 (1897).

the Fifth Amendment's Self-Incrimination Clause required voluntariness, "equating the 'compulsion' proscribed by the [F]ifth [A]mendment with the English common law voluntariness test."[72] However, the Fifth Amendment voluntariness doctrine did not limit the admissibility of confessions in state court because, at the time of *Bram* and through the mid-1960s, the Fifth Amendment only applied to the federal government.[73]

Because of this, starting in 1936 with *Brown v. Mississippi*, the Supreme Court used the Due Process Clause of the Fourteenth Amendment to develop a separate doctrine limiting the admissibility of confessions in state courts.[74] Unlike the common law voluntariness doctrine, the Fourteenth Amendment Due Process voluntariness doctrine is based primarily on concerns about fundamental fairness rather than reliability.[75] Early Fourteenth Amendment voluntariness decisions like *Brown* were concerned with the imposition of especially egregious hard places that are "revolting to the sense of justice," such as physical torture.[76] As the doctrine evolved, it became focused on whether a "defendant's will was overborne at the time he confessed"[77] and recognized that many different types of "coercive police conduct"[78] can lead to an involuntary confession. Even after the Supreme Court incorporated the Fifth Amendment against the states,[79] the Fourteenth Amendment Due Process

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72. Benner, *supra* note 50, at 107; *see* Godsey, *supra* note 50, at 478 ("Rather than examine the text [of the Fifth Amendment], the Court [in *Bram*] simply borrowed the voluntariness test from a line of early English and American common law cases and used it in place of the compulsion paradigm textually delineated within the self-incrimination clause. . . . confus[ing] two distinct confession doctrines . . . ."); *Bram*, 168 U.S. at 542.

73. Godsey, *supra* note 40, at 488.

74. Brown v. Mississippi, 297 U.S. 278, 287 (1936) (holding that the state violated the Due Process Clause by eliciting confessions from three defendants through torture).

75. *E.g.*, *id.* at 286 ("The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926))); Lisenba v. California, 314 U.S. 219, 236 (1941) ("The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false.").

76. *Brown*, 297 U.S. at 286. In *Brown*, one of the defendants was hung from a tree and severely whipped until he confessed, and the other two defendants were stripped and severely whipped until they confessed. *Id.* at 282.

77. Lynumn v. Illinois, 372 U.S. 528, 534 (1963); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

78. Colorado v. Connelly, 479 U.S. 157, 164 (1986).

79. In *Malloy v. Hogan*, 378 U.S. 1, 6 (1964), the Supreme Court incorporated the Fifth Amendment Self-Incrimination Clause against the states through the Due Process Clause of the Fourteenth Amendment—the same clause forming the basis of the Due Process voluntariness doctrine. As this could generate some confusion, it is important to note that the Due Process doctrine that governed (and continues to govern) confessions in state courts is not merely the *Bram* Fifth Amendment voluntariness test applied to states, but it is an independent doctrine that is not rooted in

voluntariness doctrine continued to govern the admissibility of confessions in state courts,[80] and the Court developed an analog (based on the Due Process Clause of the Fifth Amendment[81]) that supplanted the *Bram* doctrine to govern confessions in federal courts.[82] This Article, in the tradition of other scholarship, refers to the Fourteenth Amendment Due Process voluntariness doctrine and the identical Fifth Amendment Due Process voluntariness doctrine cumulatively as the "Due Process voluntariness doctrine."[83]

The shift away from the *Bram*/common-law voluntariness test to the Due Process voluntariness test was significant because it meant that the manipulation of RHP dilemmas through threats and promises was no longer per se impermissible.[84] To determine whether a "defendant's will

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the Fifth Amendment Self-Incrimination Clause and predated the incorporation of the Fifth Amendment. *See* Bram v. United States, 168 U.S. 532, 534 (1897).

80. *Connelly*, 479 U.S. at 163 ("The Court has retained this due process focus, even after holding, in *Malloy v. Hogan*, that the Fifth Amendment privilege against compulsory self-incrimination applies to the States." (citation omitted)); *see also* Miller v. Fenton, 474 U.S. 104, 110 (1985) ("Indeed, even after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogations [in] *Miranda v. Arizona*, and is binding on the States, [in] *Malloy v. Hogan*, the Court has continued to measure confessions against the requirements of due process." (citation omitted)). In *Miranda*, the Court had suggested a return to using the Fifth Amendment Self-Incrimination Clause to govern the admissibility of confessions, issuing a prophylactic rule to protect a suspect's privilege against self-incrimination during custodial interrogations. Godsey, *supra* note 50, at 499−501. Under this prophylactic rule, a confession elicited during custodial interrogation is inadmissible unless the interrogator reads "*Miranda* warnings" to a suspect, and the suspect subsequently waives his "*Miranda* rights," including his right to remain silent. *Id.* at 501. However, many suspects are read the warnings and waive their rights; the confessions of these suspects are then governed under the Due Process voluntariness standard. Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1218 (2001). The Due Process doctrine thus continues to dominate the admissibility of confessions. *See* Godsey, *supra* note 50, at 508 ("What we are left with at the foundation of confession law is a return to the basic rule of decades past that involuntary confessions are inadmissible under notions of due process.").

81. As distinct from the Self-Incrimination Clause of the Fifth Amendment, which *Bram* had relied on.

82. Godsey, *supra* note 50, at 489 ("After creating this due process involuntary confession rule, the Supreme Court began using it to suppress involuntary confessions not only in state cases but in federal cases as well. The Court relied on the due process clause of the Fourteenth Amendment in state cases and the nearly identical due process clause of the Fifth Amendment in federal cases."); *see also* discussion in *supra* note 80.

83. *See generally* Godsey, *supra* note 50, at 489 (using the term "due process involuntary confession rule" throughout to refer to the rule applied under the Fourteenth Amendment Due Process Clause and under the identical Fifth Amendment Due Process Clause).

84. *Cf. id.* at 490 (describing how the Due Process voluntariness rule is more "police-friendly" than the *Bram*/common-law rule because "the involuntary confession rule became more subjective than it had been under *Bram*"). Godsey observes how the elimination of *Bram*'s per se prohibitions on threats and promises allows law enforcement officers to use more interrogation tactics:

> In *Bram*, the Court had stated that "[t]he law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and, therefore excludes the declaration if any degree of influence has been exerted." During the due process era, however, the Court ignored its own warnings from an earlier era and boldly ventured into

was overborne" by police questioning, courts applying the Due Process voluntariness test attempt to ascertain whether the suspect actually *felt* forced to confess, engaging in a subjective totality of the circumstances inquiry.[85] The Supreme Court has found certain tactics involving the use of severe hard places—such as physical brutality, extremely prolonged incommunicado interrogation, or deprivation of physical necessities such as food and water—coercive as applied to any suspect.[86] But courts have begun to permit other less severe RHP dilemmas when applied to a suspect of typical mental fortitude,[87] while sometimes prohibiting the same dilemmas when applied to an especially susceptible suspect, such as an intellectually disabled person or minor.[88] The flaw with this approach is that it is impossible to determine just how costly or undesirable a given hard place seems to an individual suspect by simply looking at his age and

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> an analytic quagmire by attempting to measure the level of force used against a suspect and the effect of such force on the suspect's state of mind. This move allowed the Court to greatly expand the levels of force permissible before a confession would be considered involuntary.

Id.; *see also* Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 297 (2006) ("Legal scholars criticize the [Due Process] 'voluntariness' test as subjective, amorphous, and incapable of consistent judicial administration.").

85. *See supra* note 80.

86. Brown v. Mississippi, 297 U.S. 278, 287 (1936) (physical brutality); Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944) (continuous thirty-six-hour interrogation); Brooks v. Florida, 389 U.S. 413, 414−15 (1967) (per curiam) (deprivation of physical necessities).

87. *See* Feld, *supra* note 84, at 297 n.217 ("[I]n the absence of extreme cases of threats, force, or prolonged interrogation, voluntariness focuses on interrogators practices and individual's characteristics with no determinative factors."); *see also* discussion in *supra* note 84.

88. *Compare* Blackburn v. Alabama, 361 U.S. 199, 207 (1960) (rejecting confession obtained after eight to nine hours of sustained interrogation where the suspect was likely "insane and incompetent at the time he allegedly confessed"), *with* Stein v. New York, 346 U.S. 156, 167–68, 185 (1953), *overruled in part on other grounds by* Jackson v. Denno, 378 U.S. 368 (1964) (upholding confessions obtained after twelve hours of intermittent questioning "stretched out over a 32-hour period" where the suspects were "not young, soft, ignorant or timid"; one suspect was arrested at 9 AM, interrogated for four to five hours starting at 9 PM, and then interrogated for eight more hours starting at 10 AM the next day; the other suspect was arrested at 2 AM, questioned for an hour the next morning, for another two hours after lunch, and then for seven hours from 7 PM to 2 AM). *Compare In re* Elias V., 188 Cal. Rptr. 3d 202 (Cal. Ct. App. 2015) (finding a 13-year-old's confession involuntary where the Reid Technique was used), *with* JOHN E. REID & ASSOCS., WHAT DO THE COURTS SAY ABOUT THE REID TECHNIQUE?, http://www.reid.com/pdfs/wtcs.pdf [https://perma.cc/Z2XN-HBSK] (listing excerpts from court cases permitting the use of the Reid Technique). *But see* Reck v. Pate, 367 U.S. 433, 442 (1961) (distinguishing from *Stein* based on the suspect's "youth, his subnormal intelligence, and his lack of previous experience with the police," *inter alia*); Haley v. Ohio, 332 U.S. 596, 599–600 (1948) ("A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest.").

mental competency[89]—so permitting the use of *any* RHP dilemmas during interrogation runs the risk of producing inaccurate confessions.

Perhaps because the Due Process voluntariness doctrine is not concerned with ensuring reliability, the Supreme Court has accepted this risk. Modern courts routinely allow interrogation tactics (once prohibited under the common law voluntariness doctrine) such as making suspects believe they face the hard place of probable conviction and implying that they will receive leniency only if they "cooperate" by confessing.[90] In fact, one of the most commonly used modern interrogation techniques, the Reid Technique, relies on this type of manipulation of an RHP dilemma, toying with a suspect's hope and fear in the exact ways that the common law voluntariness doctrine warned would lead to false confessions.[91]

The Reid Technique generally involves both (1) assurances that the law enforcement officers know the suspect is guilty and that the state already has a strong case against him and (2) implied promises or suggestions that confessing will improve the suspect's situation.[92] To

89. *Cf.* Bram v. United States, 168 U.S. 532, 543 (1897) ("[T]he law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted." (quoting 3 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 478 (Horace Smith & A.P.P. Keep eds., 6th ed. 1896))).

90. *E.g.*, Frazier v. Cupp, 394 U.S. 731, 737–38 (1969) (upholding the validity of a confession where the police first created a hard place by telling the defendant "falsely, that [his confederate] had been brought in and that he had confessed" and then implied that the government might be understanding if the defendant confessed by "sympathetically suggest[ing] that the victim had started a fight by making homosexual advances"); Miller v. Fenton, 796 F.2d 598 (3d Cir. 1986) (permitting the police to manipulate a suspect by telling lies and making an implied promise that the suspect would not be prosecuted, but would instead receive psychiatric treatment, if he confessed); *see* Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 101, 115 (2006) ("Interrogations . . . where interrogators have misled suspects to believe that police possessed inculpatory evidence, including physical evidence or accomplices' confessions have generally been held to be voluntary."); Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCH. 215, 224 (2005) (describing how innocent people "succumb to pressures to confess when isolated, trapped by false evidence, and offered hope via minimization and the leniency it implies" in a report on the effects of widely used interrogation techniques on innocent suspects); Feld, *supra* note 84, at 221 ("Misrepresenting facts, presenting false evidence, lying, and deceit are part and parcel of the interrogation process.").

91. *See* Kozinski, *supra* note 53, at 307 n.32 ("*Bram* swept so broadly that, were it good law today, it would almost certainly vitiate many of the tactics used by police in applying the Reid Method."); *see also* Gohara, *supra* note 90, at 127 ("Pursuant to Reid's technique, convincing a suspect that incriminating himself will inure to his benefit requires both persuading the suspect that the benefits of confession are relatively high (e.g. internal peace, more lenient punishment, end of interrogation) and that the costs of confession are relatively low (e.g. futility of continued denial, possibility that the crime was morally justified).").

92. Kozinski, *supra* note 53, at 311–12 (describing three major components of the Reid Technique: "(1) tell the suspect you already know for sure he committed the crime, and cut off any attempts on his part to deny it; (2) offer the suspect more than one scenario for how he committed the crime, and suggest that his conduct was likely the least culpable, perhaps even morally justifiable (minimization); (3) overstate the strength of the evidence the police have inculpating the suspect—by

implement the first tactic, the interrogator may use false evidence ploys,[93] which can lead even innocent suspect to believe that his fate is sealed against him and that he will face years in prison if he does not cooperate.[94] To implement the second tactic, the interrogator may suggest that he will be sympathetic to the suspect if he tells a certain story of how and why he committed the crime or "that the interrogator will intercede with the prosecutor or the judge on the suspect's behalf so that he'll get away with a light sentence or perhaps no sentence at all."[95] Overall, the Reid Technique is aimed (often successfully[96]) at altering the suspect's cost-benefit analysis so that he believes the rock of confessing is better than the hard place of inevitably being convicted without confessing.[97]

Despite the Supreme Court's apparent acceptance of interrogators manipulating RHP dilemmas through the Reid Technique, in one Due Process voluntariness decision, *Garrity v. New Jersey*, the Court reasoned that RHP situations are inherently coercive.[98] It did so to reach a conclusion protecting police officers[99]: a class of accused individuals that the Court perhaps favors. In *Garrity*, before questioning police officers about whether they were involved in fixing traffic tickets,[100] the interrogator warned each officer "(1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer he would be subject to removal from office."[101] The officers answered the questions, effectively confessing their involvement with the traffic fixing scheme.[102] The Supreme Court found that the threat of removal from office forced the defendants to make

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inventing non-existent physical evidence or witness statements, for example—and assuring him he'll get convicted regardless of whether he talks").

93. *Id.*

94. Gohara, *supra* note 90, at 127.

95. Kozinski, *supra* note 53, at 312.

96. *See id.* ("The Reid organization claims that upwards of 80 percent of those interrogated according to the Reid Method confess.").

97. *Cf.* Gohara, *supra* note 90, at 126 ("To this end, the Reid Technique requires interrogators to convince suspects that the benefits of confession will be relatively high (e.g. lenient sentencing, end of stressful interrogation, release from custody) and that the costs of his confession will be relatively low (e.g. he will be convicted anyway because there is enough other evidence to prove the case against him).").

98. Garrity v. New Jersey, 385 U.S. 493, 498 (1967) ("Where the choice is 'between the rock and the whirlpool,' duress is inherent . . . .").

99. *See id.* at 500.

100. *Id.* at 494. Traffic ticket-fixing occurs when police officers destroy the traffic tickets of friends or family members as a favor. Bennett L. Gershman, *Ticket-Fixing: It Isn't "Professional Courtesy," It's Racketeering*, HUFFPOST (Dec. 31, 2011), https://www.huffpost.com/entry/ticketfixing-it-isnt-prof_b_1068374 [https://perma.cc/G46B-BD6J].

101. *Garrity*, 385 U.S. at 494.

102. *Id.* at 495.

"'a choice between the rock and the whirlpool' which made the statements products of coercion in violation of the Fourteenth Amendment."[103] According to the Court, the officers faced the impossible decision either to incriminate themselves or lose their jobs.[104] This set of options, the Court found, "is the antithesis of free choice to speak out or to remain silent."[105] The Court concluded that presenting an individual with an RHP dilemma is "likely to exert such pressure upon an individual as to disable him from making a free and rational choice," making his confessions involuntary and inadmissible as evidence under the Fourteenth Amendment.[106]

Garrity is interesting for two reasons. First, *Garrity* treats RHP dilemmas that coerce confessions as closely analogous—if not identical—to RHP dilemmas that force suspects to forfeit their Fifth Amendment privilege against self-incrimination.[107] In reaching the conclusion that the police officers' confessions were involuntary, the Court relied on previous decisions that held it is impermissible to penalize the exercise of the Fifth Amendment privilege with the "deprivation of a livelihood."[108] *Garrity* also repeatedly uses Fifth Amendment language

103. *Id.* at 496.

104. *Id.* at 497.

105. *Id.*

106. *Id.* at 497–98 (quoting language from a prior Supreme Court decision: "Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other" (citation omitted)).

107. Perhaps because of this, the Supreme Court later spoke of *Garrity* as if it were a decision not about coerced confessions but about compelled testimony that would violate the Fifth Amendment unless the police officers were granted "use and derivative use" immunity. Steven D. Clymer, *Compelled Statements from Police Officers and* Garrity *Immunity*, 76 N.Y.U. L. REV. 1309, 1317–20, 1342 (2001) (describing how the *Garrity* Court "determined that the due process protection for coerced confessions . . . required suppression," but the Supreme Court's later decision *Lefkowitz v. Turley* "offered a different rationale for the result in *Garrity*: The police officers' compelled statements were analogous to immunized testimony and thus inadmissible under the Fifth Amendment privilege" (quoting Kastigar v. United States, 406 U.S. 441, 453 (1972))); *see* Lefkowitz v. Turley, 414 U.S. 70, 82 (1973) ("It seems to us that the State intended to accomplish what *Garrity* specifically prohibited—to compel testimony that had not been immunized."). See *supra* note 11 for a discussion of Fifth Amendment immunity. Some scholars have also described *Garrity* as a Fifth Amendment decision, in spite of *Garrity*'s explicit reliance on the Fourteenth Amendment Due Process voluntariness doctrine. *See* Godsey, *supra* note 50, at 494 ("The [*Garrity*] Court held that the imposition of this penalty rendered [the officers'] statements compelled in violation of the self-incrimination clause . . . ."). This confusion reflects both *Garrity*'s repeated references to Fifth Amendment cases and principles and the general murkiness surrounding the line between when the Due Process voluntariness doctrine governs and when the Fifth Amendment governs.

108. Spevack v. Klein, 385 U.S. 511, 514 (1967) (holding that the Fifth Amendment "should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it"); *see Garrity*, 385 U.S. at 497 (citing *Spevack*, 385 U.S. at 514). The Court later discussed whether the police officers had somehow waived the protection of the Fourteenth Amendment Due Process voluntariness requirement by accepting state employment. *Garrity*, 385 U.S. at 498–99. It resolved the issue by looking to a case about using the "threat of discharge" to elicit

when describing the coercive RHP dilemma faced by the police officers, framing it as a choice between "self-incrimination" and job loss.[109] This suggests that while courts generally apply the Due Process voluntariness doctrine (rather than Fifth Amendment doctrine) in confession cases,[110] some judges and justices may still view the suspect's decision to confess as the forfeiture of his privilege against self-incrimination (unless he is granted immunity).[111] In this way, the modern Due Process voluntariness doctrine effectively operates not only to promote fundamental fairness and discourage tactics that result in unreliable confessions, but also to limit attempts of law enforcement officers to force suspects to waive the Fifth Amendment privilege during interrogation.[112]

Second, *Garrity* is significant because if the Supreme Court applied *Garrity*'s reasoning—that forcing a defendant to choose between "the rock and the whirlpool" is inherently coercive—more broadly, the Due Process voluntariness doctrine would look more like the *Bram*/common law voluntariness doctrine. However, in the years since *Garrity*, courts have continued to allow interrogators to use various tactics manipulating RHP dilemmas to obtain confessions.[113] This is likely because courts recognize

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forfeiture of the Fifth Amendment, finding that case more relevant than other cases about conditioning employment on the waiver of a constitutional right. *Id.* at 499.

109. *E.g.*, *id.* at 496 ("[The question is] whether, valid or not, the fear of being discharged . . . for refusal to answer on the one hand and the fear of self-incrimination on the other was 'a choice between the rock and the whirlpool' which made the statements products of coercion in violation of the Fourteenth Amendment. . . . The choice imposed on petitioners was one between self-incrimination or job forfeiture.").

110. *See* Miller v. Fenton, 474 U.S. 104, 110 (1985) ("Indeed, even after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogations [in] *Miranda v. Arizona* . . . the Court has continued to measure confessions against the requirements of due process."). This is true unless there is a *Miranda* issue—e.g., if the suspect was subject to a custodial interrogation, and the interrogators failed to read the *Miranda* warnings. *See supra* note 80.

111. *Cf.* Godsey, *supra* note 50, at 509 ("The self-incrimination clause's ban on compelled confessions remains applicable to interrogations, but the Court has not clearly defined its meaning. As a result, many have undoubtedly assumed that the test under the self-incrimination clause is now identical to the due process involuntary confession rule and that both doctrines overlap and simultaneously prohibit the admission of involuntary confessions. Dicta and 'loose language' in several Supreme Court opinions may support this assumption."). For a more detailed discussion on the relationship between the voluntariness doctrine and the Fifth Amendment privilege, see *supra* note 50.

112. *See supra* note 50.

113. *See, e.g.*, Frazier v. Cupp, 394 U.S. 731, 737–38 (1969) (decided just two years after *Garrity*, upholding the validity of a confession where the police first created a hard place by telling the defendant "falsely, that [his confederate] had been brought in and that he had confessed" and then implied that the government might be understanding if the defendant confessed by "sympathetically suggest[ing] that the victim had started a fight by making homosexual advances"); *see also* other cases and tactics discussed in *supra* note 90.

that such tactics can be a powerful tool for interrogators[114] and fear a decline in confessions if police officers are entirely banned from using them. These courts may have forgotten that, for the same reasons RHP dilemmas are effective at convincing the guilty to confess, they are also effective at convincing the innocent to confess.[115] Perhaps the best solution is for the criminal justice system to move away from a reliance on confessions as evidence because confessions elicited during interrogation often say more about how defendants handle RHP dilemmas than about their guilt or innocence.[116]

C. Dilemmas at Death Penalty Proceedings

Prior to *Penry v. Lynaugh*, jury instructions at Texas death penalty proceedings placed intellectually disabled defendants[117] between a rock and a hard place. Under Texas law, during a death penalty sentencing hearing, the jury had to answer three questions (or "special issues").[118] Of relevance to the intellectually disabled defendant's dilemma, Special Issue 1 asked whether the defendant acted "deliberately" in causing the victim's death, and Special Issue 2 asked whether the defendant would likely pose a danger in the future.[119] If the jury answered "yes" to all of the special issues, the defendant would receive the death penalty.[120]

An intellectually disabled defendant had two options: (1) introduce evidence of his disability in hopes of earning a "no" on Special Issue 1 or (2) conceal the evidence in hopes of earning a "no" on Special Issue 2. Each option carried its own risks. If the defendant pursued Option One, he could use the evidence to argue that he was not capable of acting deliberately (Special Issue 1). However, the prosecutor could then argue that if the defendant was indeed disabled, his disability made him more likely to pose a danger in the future (Special Issue 2) by preventing him

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114. *See* Kozinski, *supra* note 53 (describing the high success rate of the Reid Technique); Ofshe & Leo, *supra* note 58, at 985−86 ("Police [successfully] elicit the decision to confess from the guilty by leading them to believe that the evidence against them is overwhelming, that their fate is certain (whether or not they confess), and that there are advantages that follow if they confess.").

115. *See supra* note 58 and accompanying text.

116. *Cf.* THE *MIRANDA* DEBATE: LAW, JUSTICE, AND POLICING 56 (Richard A. Leo & George C. Thomas III eds., 1998) ("[B]y any standards of human discourse, a criminal confession can never truly be called voluntary. With rare exception, a confession is compelled, provoked and manipulated from a suspect by a detective who has been trained in a genuinely deceitful art.").

117. "The mental health community has provided clear criteria for a finding of intellectual disability: significant limitation in intellectual ability and adaptive behavior, manifesting itself prior to the age of 18." *Intellectual Disability*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/intellectual-disability [https://perma.cc/A3U2-6VUF].

118. Penry v. Lynaugh, 492 U.S. 302, 310 (1989), *holding modified by* Boyde v. California, 494 U.S. 370 (1990), *and abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

119. *Id.* Special Issue 3 is not relevant to the dilemma discussed.

120. *Id.*

from learning from his mistakes.[121] The jury might decide that the defendant was impaired enough to pose a future danger but not enough to be incapable of acting deliberately.[122] Fearing the defendant might commit another violent crime, the jury might then answer "yes" to all the special issues. To try to avoid this risk, the defendant could opt for Option Two and choose not to introduce the evidence. But then the jurors would have no reason to doubt the deliberateness of the defendant's actions and would likely answer "yes" to Special Issue 1, and they might still answer "yes" to Special Issue 2. Thus, the defendant was stuck between a rock and a hard place: Evidence of his intellectual disability was, as the Supreme Court put it, a "two-edged sword" that "may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future."[123] The intellectually disabled defendant had little chance of escaping the death penalty without using that sword—yet if he used the sword, he risked being killed by his own blade.

In *Penry*, the Supreme Court sought to improve the intellectually disabled defendant's situation. It required that the trial court judge make it clear that the jury could consider evidence of intellectual disability as mitigating evidence.[124] In response to *Penry*'s mandate, Texas revised its jury instructions for death penalty sentencing proceedings, adding an issue that asked "whether . . . there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed."[125] This change did not resolve the intellectually disabled defendant's RHP dilemma. If the defendant introduced evidence of intellectual disability as a "mitigating circumstance," he would still risk the jury fearing his future dangerousness all the more on account of his disability.[126] A skilled prosecutor could easily make an RHP argument, e.g., "Even if Defendant is intellectually disabled, that just means he isn't going to learn his lesson and will likely

121. *See id.* at 323–24 ("The prosecutor argued at the penalty hearing that there was 'a very strong probability, based on the history of this defendant, his previous criminal record, and the psychiatric testimony that we've had in this case, that the defendant will continue to commit acts of this nature.'").

122. *See, e.g.*, Pia Quimson-Guevarra & Tyler G. Jones, *Post*-Atkins *Determination of Intellectual Disability in a Death Penalty Case in Oregon*, 44 J. AM. ACAD. PSYCHIATRY & L. 394, 395 (2016) (describing case where jury determined that intellectually disabled defendant acted deliberately).

123. *Penry*, 492 U.S. at 310.

124. *Id.* at 328.

125. Peggy M. Tobolowsky, *Texas and the Mentally Retarded Capital Offender*, 30 T. MARSHALL L. REV. 39, 60 (2004).

126. Atkins v. Virginia, 536 U.S. 304, 321 (2002) ("As *Penry* demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.").

commit more violent crimes—the only way to ensure he hurts no one else is to put him to death." Because the revised instructions gave the jury full discretion to decide whether any mitigating circumstances warranted a reduced sentence, a fearful jury could follow the prosecutor's lead and condemn an intellectually disabled defendant to the death penalty, even if the defendant proved his disability.

In *Atkins v. Virginia*, the Supreme Court at last eliminated the RHP situation by taking the decision of whether to execute an intellectually disabled defendant out of the jury's hands. The Court held that, under the Eighth Amendment proportionality analysis,[127] the death penalty is a constitutionally excessive punishment for *any* intellectually disabled[128] defendant—meaning that if a defendant proves his disability, the jury can no longer choose to condemn him to death.[129] To comply with *Atkins*, trial courts now have special evidentiary hearings focused exclusively on whether a defendant is intellectually disabled and therefore ineligible for the death penalty.[130] At these hearings, defendants can present evidence of intellectual disability without worrying about that choice backfiring. Modern law therefore protects intellectually disabled defendants from the unique RHP situations that once posed a danger to their ability to achieve justice.

II. ROCK AND HARD PLACE DILEMMAS THAT KEEP PLAINTIFFS OUT OF COURT

Courts have also recognized RHP dilemmas that civil plaintiffs face and even, in limited circumstances, offered remedies. Many of these RHP dilemmas are hurdles that prevent plaintiffs from ever getting into court. In this section, we review four such dilemmas. In Subsection A, we describe a case in which the Supreme Court eliminated an RHP dilemma that plaintiffs faced while seeking to bring cases under the Takings Clause[131] in federal court. Then, in the remaining subsections, we address two RHP dilemmas that the Court has enforced rather than eliminated. In Subsection B, we review how RHP dilemmas often operate to the

127. *Id.*

128. The term "mentally retarded" was used at the time of *Atkins*. *Id.* at 306; *see* Anthony P. Wartnik, *Intellectual Disability: The Death Penalty and* Atkins v. Virginia*: Not the Solution, but the Beginning of the Solution . . . and the Beat Goes On! (Part II)*, 5 FORENSIC SCHOLARS TODAY, no. 1, 2019, at 1, 1 (discussing how in *Atkins*, "the U.S. Supreme Court barred the execution of individuals who have an intellectual disability (formerly referred to as mentally retarded)").

129. *Atkins*, 536 U.S. at 304.

130. *See, e.g.*, *Supreme Court Orders* Atkins *Hearing for Louisiana Death Row Prisoner*, A.B.A. (June 1, 2015), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2015/summer/supreme-court-orders-atkins-hearing-for-louisiana-prisoner/ [https://perma.cc/39BV-RGPK] (discussing how *Atkins* hearings work).

131. U.S. CONST. amend. V.

detriment of plaintiffs seeking standing. Most frequently, plaintiffs find themselves stuck between losing a case for failing to assert standing on the one hand and losing for failure to state a claim on the other. In addition, plaintiffs—climate activists in particular—have found themselves unable to simultaneously satisfy the different prongs of Article III standing. In Subsection C, we explain an RHP dilemma that some plaintiffs have faced when trying to sue states.

A. Knick v. Township of Scott*: An Example of a Rock and Hard Place Dilemma that the Court Addressed*

The Takings Clause of the Fifth Amendment prevents private property from being "taken for public use, without just compensation."[132] However, prior to *Knick v. Township of Scott*,[133] an RHP dilemma "precluded [plaintiffs] from ever bringing a Fifth Amendment takings claim"[134] in federal court, making the Takings Clause difficult to enforce. *Williamson County Regional Planning Commission v. Hamilton Bank* required a plaintiff to exhaust all possible remedies in the relevant state regulatory agency and state court before suing for "just compensation" in federal court.[135] At the same time, under *San Remo Hotel v. City and County of San Francisco*, a final state court decision in a takings case precluded the plaintiff from relitigating the same issue in federal court.[136] In a law review article expertly describing the dilemma, Professor Ilya Somin commented that it was "virtually impossible to bring a takings case in federal court without first going to state court. But going to state court itself made it impossible to file a case in federal court afterwards."[137]

In *Knick*, the Supreme Court overturned *Williamson County*, eradicating this RHP dilemma by allowing takings plaintiffs to go directly to federal court.[138] Writing for the Court in *Knick*, Chief Justice Roberts acknowledged this explicitly, observing that under *Williamson*, "[t]he takings plaintiff . . . f[ound] himself in a Catch-22: He [could not] go to federal court without going to state court first; but if he [went] to state court and los[t], his claim [would] be barred in federal court. The federal

132. *Id.*

133. Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019).

134. Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 130 (2d Cir. 2003), *abrogated by* San Remo Hotel v. City of San Francisco, 545 U.S. 323 (2005).

135. Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186–97 (1985), *overruled by Knick*, 139 S. Ct. at 2162.

136. *San Remo Hotel*, 545 U.S. at 326–27.

137. Ilya Somin, Knick v. Township of Scott*: Ending a Catch-22 that Barred Takings Cases from Federal Court*, 18 CATO SUP. CT. REV. 153, 156 (2019).

138. *Knick*, 139 S. Ct. at 2167.

claim [would] die[] aborning."[139] Although the *Knick* Court did away with this dilemma, the courts enforce, rather than rectify, most other RHP dilemmas that plaintiffs face.

B. Rock and Hard Place Arguments that Plaintiffs Face While Seeking Standing

Plaintiffs often find themselves confronted with RHP situations when seeking standing in civil suits. To be successful in a lawsuit, a plaintiff must both show that she has standing and present a winning argument on the merits. Standing doctrine finds its roots in Article III of the Constitution, which restricts federal courts to hearing "actual cases or controversies," as opposed to abstract harms and advisory opinions.[140] It is the reason that Hillary Brooke cannot sue Bud Abbott for hitting Lou Costello; Costello has to raise his own complaint.[141] To prove standing, a plaintiff must allege that (1) she has suffered a concrete, particularized injury or that such an injury is imminent, (2) her injury is traceable to the defendant's misconduct (traceability), and (3) her injury is redressable, meaning that a favorable outcome in the case would remedy her injury (redressability).[142]

Many scholars have critiqued standing as arbitrary and ineffective on the theory that plaintiffs can recharacterize a claim to overcome standing hurdles.[143] However, recharacterizing the claim has an important

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139. *Id.* Catch-22 situations are a subset of RHP dilemmas. In a typical RHP dilemma, an actor is caught between two choices, which we can refer to as *A* and *B*, each of which leads to a negative outcome. In a Catch-22 situation, both *A* and *B* lead to the *same* negative outcome *C*, which is generally maintaining the status quo. There is no way for the person facing the dilemma to escape *C*. This may be because *A* and *B* are mutually dependent, so the person cannot succeed at doing either (i.e., he cannot succeed at *A* without first doing *B*, and he cannot succeed at *B* without first doing *A*); or it may be because both *A* and *B* simply lead back to *C*. *See Catch-22*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/catch-22 [https://perma.cc/59TD-NNUG] (defining Catch-22 as "a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule" and providing the example of "the show-business *catch-22*—no work unless you have an agent, no agent unless you've worked"). In this Article's introductory example, Orr faces a Catch-22 situation because no matter whether he (A) voluntarily continues to fly or (B) asks to be grounded, he is unable to escape the negative outcome *C*—maintaining the status quo of flying. Both *A* and *B* lead back to *C*. *See* text accompanying *supra* note 1.

140. U.S. CONST. art. III, § 2.

141. *Abbott and Costello: Who's on First?* (ABC television broadcast Oct. 6, 1938). For younger readers, Abbott and Costello was a slapstick comedy, and Abbott often smacked Costello around. Hillary Brooke was their neighbor. We recommend watching an episode when you finish reading this Article!

142. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

143. *See, e.g.*, Cass R. Sunstein, *Article II Revisionism*, 92 MICH. L. REV. 131, 132 n.9 (1993) ("In *Lujan* [(a key case where the plaintiff was denied standing)], the injury could have been recharacterized in opportunity-like terms, and, in that event, there would have been no problem with injury in fact, causation, or redressability."); Christopher T. Burt, Comment, *Procedural Injury*

downside: It often erects a hurdle to bringing a successful claim on the merits. Although plaintiffs can usually find *something* that can be characterized as a concrete, particularized injury, many harms that may be de facto injurious will not give rise to a substantive legal claim.[144]

Consider, as one example, a tort plaintiff who brings a federal diversity action claiming that a defendant (e.g., a landlord, school district, or employer) failed to adequately mitigate risk from lead paint or asbestos exposure.[145] If the plaintiff has already developed an illness due to the exposure, then the plaintiff has an easy case for damages.[146] On the other hand, a plaintiff who does not yet exhibit symptoms cannot demonstrate the same injury in fact. Therefore, to surmount the standing hurdle, the plaintiff must recharacterize the harm that she has suffered.

The clearest way for the plaintiff in our example to establish injury in fact is to assert that the harm she suffered is the exposure itself. In certain states, plaintiffs can sue for damages such as medical monitoring costs, whereas in other states, tort law does not create a cause of action for mere exposure.[147] In states like Michigan and Kentucky that do not recognize medical monitoring costs,[148] recharacterizing the injury to surmount the Article III threshold removes the plaintiff's claim for liability under state law. Therefore, depending on the choice of law provision that the federal court applies, a plaintiff will face an RHP dilemma: She can

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Standing After Lujan v Defenders of Wildlife, 62 U. CHI. L. REV. 275, 296 (1995) (noting that cases in the affirmative action context "suggest that the Court will recognize the claims of procedural injury plaintiffs if they satisfy the redressability criteria by recharacterizing their injuries as injuries to opportunity"); Heather Elliott, *The Misfit Between Standing Doctrine and Its Purposes*, ADMIN. & REGUL. L. NEWS, Spring 2009, at 13 ("Numerous critics have assailed standing jurisprudence, and dissenting members of the Court have described the extremes of standing analysis as a 'word game played by secret rules . . . .'"); *cf.* Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 171 (2011) ("A standard critique of standing doctrine holds that the doctrine is so malleable that courts have unseemly opportunities to implement their policy preferences under the guise of a jurisdictional dismissal.").

144. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 755 (1984) (discussing that plaintiffs' stigmatic harm did not constitute a legal injury), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).

145. Michael C. Dorf, Professor, Cornell L. Sch., Federal Courts Lecture (Sept. 2019).

146. For example, the plaintiff may use hospital records and medical bills as evidence to present their claim.

147. *Compare, e.g.*, Friends for All Child., Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 837–38 (D.C. Cir. 1984) (interpreting District of Columbia law to allow medical monitoring injuries), *and* Doe v. City of Stamford, 699 A.2d 52, 55, 55 n.8 (Conn. 1997) (allowing medical monitoring for workers compensation), *and* Petito v. A.H. Robins Co., 750 So. 2d 103, 106–07 (Fla. Dist. Ct. App. 1999) (recognizing medical monitoring as an injury for negligence claims), *and* Burns v. Jaquays Mining Co., 752 P.2d 28, 33–34 (Ariz. Ct. App. 1987) (allowing medical monitoring claims where plaintiff has asserted an environmental tort), *with, e.g.*, Henry v. Dow Chem. Co., 701 N.W.2d 684, 686 (Mich. 2005) (rejecting monitoring claims without present injury), *and* Wood v. Wyeth-Ayerst Lab'ys, 82 S.W.3d 849, 859 (Ky. 2002) (same).

148. *See supra* note 147.

either (1) argue that her injury is physical, but provide scant evidence of physical symptoms and therefore face dismissal for lack of standing or (2) classify her injury as exposure, in which case a court will dismiss her case for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

Not only does the interplay between standing and Rule 12(b)(6) create an RHP dilemma, but many plaintiffs also face an RHP dilemma within the framework of Article III standing itself. Climate change litigation provides an example of this. Ever since the public became aware of the detrimental effects of global warming on both humans and the environment,[149] plaintiffs have raised a number of different theories to challenge federal actions that accelerate climate change.[150] Many of these plaintiffs can provide evidence that they have experienced concrete, particularized injuries resulting from climate change[151] and have colorable claims that federal actions contributing to climate change are unlawful.[152] However, courts rarely reach the merits of these claims because the "traceability" and "redressability" prongs of Article III standing leave such climate-change plaintiffs stuck between a rock and a hard place.

If plaintiffs try to take on federal actions one-by-one, they will almost certainly fail to demonstrate traceability because they cannot prove that just one federal action caused (or was a "substantial factor" in causing) a global phenomenon like the rapid acceleration of climate change and the harms resulting from it.[153] To avoid this issue, they can take the approach

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149. *E.g.*, *The Effects of Climate Change*, NASA: GLOBAL CLIMATE CHANGE, https://climate.nasa.gov/effects/ [https://perma.cc/NT5E-2B84] ("Effects that scientists had predicted in the past would result from global climate change are now occurring: loss of sea ice, accelerated sea level rise and longer, more intense heat waves."); Anthony J. McMichael, Rosalie E. Woodruff & Simon Hales, *Climate Change and Human Health: Present and Future Risks*, 367 LANCET 859, 859 (2006) ("Climate change will affect human health in many ways—mostly adversely.").

150. *See* Jacqueline Peel & Hari M. Osofsky, *Climate Change Litigation*, 16 ANN. REV. L. & SOC. SCI. 21 (2020) (discussing how "[c]limate change litigation has grown exponentially in the last decade").

151. *See* Juliana v. United States, 947 F.3d 1159, 1168 (9th Cir. 2020). The Ninth Circuit in *Juliana* affirmed the district court's finding that plaintiffs demonstrated "concrete and particularized injuries" from climate change; one plaintiff was forced to leave her home on the Navajo Reservation because of water scarcity, while another "had to evacuate his coastal home multiple times because of flooding." *Id.*; *see also* Mary Kathryn Nagle, *Tracing the Origins of Fairly Traceable: The Black Hole of Private Climate Change Litigation*, 85 TUL. L. REV. 477, 481 (2010) (discussing how various climate change plaintiffs were able to allege injury-in-fact because "[a]s a result of climate change, these plaintiffs have lost money, businesses, their sources of food, their homes, their coastlines, or in the case of the Native Village of Kivalina—their entire community").

152. *See Juliana*, 947 F.3d at 1171 (plaintiffs advanced the theory that the "government ha[d] violated their constitutional rights, including a claimed right under the Due Process Clause of the Fifth Amendment to a 'climate system capable of sustaining human life'").

153. *Cf.* Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 868, 880 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012) (finding that the plaintiffs, who sued "twenty-four oil, energy and utility companies," failed to satisfy the traceability prong of Article III standing because "the genesis of global warming is attributable to numerous entities which individually and

of the plaintiffs in *Juliana v. United States* and reframe their lawsuit as an attack on *all* the federal policies that have the cumulative effect of increasing fossil-fuel use and accelerating climate change.[154] However, plaintiffs then run into an issue with redressability, as the Ninth Circuit's *Juliana* opinion makes clear.[155] Because the *Juliana* plaintiffs argued that a full "host of federal policies"[156] were responsible for their climate-related injuries, the Ninth Circuit found that remedying the harm would involve a massive reworking of federal policy, which the court could not order without impermissibly interfering with the authority of the political branches.[157] Because of this, the court determined that the judiciary did not have the power to remedy the plaintiffs' injuries and remanded the lawsuit to the district court with instructions to dismiss for lack of Article III standing.[158] Thus, in designing a claim that would get them around the rock of dismissal on traceability grounds,[159] the *Juliana* plaintiffs ended up confronting the hard place of dismissal for lack of redressability.[160]

C. Rock and Hard Place Arguments and Abrogation of Sovereign Immunity

Standing is not the only jurisdictional issue that creates RHP dilemmas for plaintiffs seeking their day in court. Plaintiffs trying to get around the hurdle of state sovereign immunity have also sometimes found themselves stuck between a rock and a hard place. Under the Eleventh Amendment, states inherently have sovereign immunity, which prevents

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cumulatively over the span of centuries created the effects they now are experiencing"); U.N. ENVIRONMENT PROGRAMME, THE STATUS OF CLIMATE CHANGE LITIGATION: A GLOBAL REVIEW 29 (2017) (describing how traceability poses an issue in U.S. climate change litigation); Kathryn Nagle, *supra* note 151, at 514 (discussing how the modern traceability doctrine "threatens to leave climate change victims with absolutely no recourse in the courts," even in the aftermath of the promising Supreme Court decision *Massachusetts v. EPA*). *But cf.* Massachusetts v. EPA, 549 U.S. 497, 523 (2007) (finding that "EPA's refusal to regulate [greenhouse gas] emissions [from new motor vehicles] 'contributes' to Massachusetts' injuries" from climate change).

154. *Juliana*, 947 F.3d at 1165 ("The operative complaint accuses the government of continuing to 'permit, authorize, and subsidize' fossil fuel use despite long being aware of its risks, thereby causing various climate-change related injuries to the plaintiffs.").

155. *Id.* at 1171.

156. *Id.* at 1169.

157. *Id.* at 1169–71 (finding that the plaintiffs failed to demonstrate redressability because, *inter alia*, "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan . . . [which] would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches").

158. *Id.* at 1171, 1175.

159. *See id.* at 1169 ("The district court also correctly found the Article III causation requirement satisfied for purposes of summary judgment.").

160. *Id.* at 1171, 1175.

plaintiffs from suing a state for monetary damages in federal court.[161] A state may, however, waive its sovereign immunity by consenting to a particular lawsuit or agreeing to be sued in general.[162] Additionally, the states all implicitly consented to suit by the federal government by ratifying the U.S. Constitution.[163] Thus, the federal government effectively has an exemption from state sovereign immunity and can bring lawsuits against states.[164] Further, in limited circumstances, Congress may abrogate state sovereign immunity and thereby permit citizens to sue states[165]—for example, the Fourteenth Amendment gives Congress the power to pass legislation preventing state discrimination against protected classes and to abrogate state sovereign immunity from suits enforcing such legislation.[166] To abrogate state sovereign immunity, Congress must make a clear legislative statement of its intent to allow certain lawsuits to proceed against states.[167]

This "clear statement" rule posed a hurdle to the plaintiffs in *Blatchford v. Native Village of Noatak and Circle Village*, who sought damages against the state of Alaska under a federal statute.[168] Because the statute was somewhat ambiguous about whether Congress intended to abrogate state sovereign immunity, the plaintiffs had a losing abrogation argument.[169] The plaintiffs tried to get around this hurdle by creatively[170]

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161. Hans v. Louisiana, 134 U.S. 1, 20 (1890). Plaintiffs can, however, seek a prospective injunction against actions by state officers that would violate the Constitution or federal law. *Ex parte* Young, 209 U.S. 123, 159 (1908); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 73 (1996) ("[S]ince our decision in *Ex parte Young*, we often have found federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to 'end a continuing violation of federal law.'" (citations omitted)).

162. *Hans*, 134 U.S. at 17.

163. United States v. Texas, 143 U.S. 621, 646 (1892).

164. Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 785 (1991) (referring to the "Federal Government's exemption from state sovereign immunity").

165. Congress cannot broadly abrogate state sovereign immunity from all lawsuits. Rather, it can only abrogate state sovereign immunity from lawsuits enforcing Acts of Congress passed pursuant to certain constitutional provisions. *See Seminole Tribe*, 517 U.S. at 59 ("Thus our inquiry into whether Congress has the power to abrogate unilaterally the States' immunity from suit is narrowly focused on one question: Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?").

166. *E.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) ("We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.").

167. *E.g.*, *Blatchford*, 501 U.S. at 786 ("We have repeatedly said that this power to abrogate can only be exercised by a clear legislative statement."); Dellmuth v. Muth, 491 U.S. 223, 227–28 (1989); *Seminole Tribe*, 517 U.S. at 57 n.9.

168. *Blatchford*, 501 U.S. at 786–87.

169. *Id.*

170. The Court was not impressed with the plaintiffs' creativity. *See id.* at 786 ("The delegation theory is entirely a creature of respondents' own invention.").

recharacterizing the statute as a "delegation" of the federal government's exemption from state sovereign immunity, instead of an abrogation of state sovereign immunity.[171] They argued that through the statute, the federal government delegated its exemption to Native American tribes, such as the plaintiffs.[172] However, the plaintiffs then faced a hard place: the federal government likely cannot constitutionally delegate its exemption, so (in accordance with principles of constitutional avoidance) the Court refused to read the statute as an attempted delegation.[173] The Court found that state sovereign immunity barred the plaintiffs' claims for damages and, cornered by an RHP dilemma, the plaintiffs did not get their day in court.[174]

Since *Blatchford*, other plaintiffs have (unsuccessfully) attempted to get around the rock of a weak abrogation argument by recharacterizing a statute as a delegation of the federal government's exemption from state sovereign immunity. In the recent case *In re PennEast Pipeline Co.*,[175] a pipeline company sought to exercise eminent domain against a nonconsenting state under the Natural Gas Act (NGA).[176] The plaintiff company chose not to bring an abrogation argument, likely recognizing that such an argument would fail because Congress passed the NGA pursuant to its Commerce Clause authority, and Congress lacks the power to abrogate state sovereign immunity when acting under the Commerce Clause.[177] Instead, it characterized the NGA as a delegation of the federal government's eminent domain power against states—which it claimed inherently included the government's exemption from state sovereign immunity—to pipeline companies.[178] However, in making this argument,

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171. *Id.* at 785 ("[O]ur cases require Congress' exercise of the power to abrogate state sovereign immunity, where it exists, to be exercised with unmistakable clarity. To avoid that difficulty, respondents assert that § 1362 represents not an abrogation of the States' sovereign immunity, but rather a *delegation* to tribes of the Federal Government's exemption from state sovereign immunity.").

172. *Id.*

173. *Id.* at 785 ("We doubt, to begin with, that that sovereign exemption can be delegated . . . .").

174. *Id.* at 788.

175. *In re* PennEast Pipeline Co., 938 F.3d 96, 99 (3d Cir. 2019), *as amended* (Sept. 19, 2019), *cert. granted*, PennEast Pipeline Co., v. New Jersey, 2021 WL 357257 (U.S. Feb. 3, 2021) (No. 19-1039).

176. *Id.* at 99 (describing how the NGA, a federal statute, "allows private gas companies to exercise the federal government's power to take property by eminent domain, provided certain jurisdictional requirements are met. This appeal calls on us to decide whether that delegation of power allows gas companies to hale unconsenting States into federal court to condemn State property interests").

177. *Id.* at 108; Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996). The Third Circuit noticed and commented on the plaintiff's strategic choice to take the "easier road" of avoiding making a weak abrogation argument. *In re PennEast Pipeline Co.*, 938 F.3d at 104.

178. *In re PennEast Pipeline Co.*, 938 F.3d at 105 ("To maintain these suits, then, PennEast had to offer a different answer [than abrogation] for why its suits do not offend New Jersey's sovereign immunity. But, as just noted, the only reason it gives – an argument of implied delegation of the federal

the plaintiff confronted a hard place: the Supreme Court had already expressed skepticism about the constitutionality of delegation in *Blatchford*. Therefore, the Third Circuit hesitated to pioneer a holding that the federal government can delegate its exemption to private parties.[179] The court also recognized that if it sanctioned the delegation theory, it would effectively give Congress a way to work around abrogation requirements and open the door to a slew of new litigation against states.[180] Thus, like the Supreme Court in *Blatchford*, the Third Circuit refused to read the statute as a delegation and found that state sovereign immunity applied.[181]

III. CRAFTING ROCK AND HARD PLACE ARGUMENTS

This Part shifts from examining rock and hard place *dilemmas* to exploring rock and hard place *arguments*. More specifically, we discuss how mission-driven plaintiffs do not always have to be the victims of RHP dilemmas. Instead, they can turn the tables by constructing a pair of arguments that creates an RHP dilemma for the judge, pressuring (or even forcing) him to rule in their favor. Throughout Parts III through V of this Article, it is important to delineate which argument is the "rock" and which is the "hard place." The "rock" argument refers to the plaintiff's winning argument. The "hard place" is the alternative to the winning argument—often in the form of a losing argument—that persuades the judge or justice to accept the plaintiff's winning argument.

A. Rock and Hard Place Arguments as Syllogisms

By definition, rock and hard place arguments are mutually reinforcing. In their strongest and most basic terms, RHP arguments are a simple form of the disjunctive syllogism:

Either *A* or *B*.

If *A*, then *C*.

If *B*, then *C*.

As the syllogism demonstrates, when perfectly implemented, RHP arguments create a world in which a judge must select between

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government's Eleventh Amendment exemption under the NGA – ignores rather than confronts the distinction between the federal government's eminent domain power and its exemption from Eleventh Amendment immunity.").

179. *See id.* at 106 ("But the Supreme Court's statements in *Blatchford* had . . . everything to do with the Court's deep doubt about the 'delegation' theory itself.").

180. *See id.* at 108 ("Yet accepting PennEast's delegation theory would dramatically undermine the careful limits the Supreme Court has placed on abrogation.").

181. *Id.* at 113.

two possible scenarios, *A* and *B*. From there, all roads lead to *C*—the plaintiff winning.

To demonstrate the efficacy of this kind of argument, it is helpful to compare it to the classic approach of arguing in the alternative. A diagram of arguments in the alternative is:

If not *A*, then *B*.

If not *B*, then *C*.

If not *C*, then *D*.

Arguing in the alternative improves the plaintiff's odds of winning. It allows a plaintiff to bring a case under diverse legal theories, and, assuming all the arguments have some merit, two shots are better than one and three shots are better than two. Consider the following torts example in which a plaintiff sues a defendant for negligently hitting the plaintiff with his car. A defendant is negligent if he breaches a duty to the plaintiff by acting in a way that a reasonable person would not, and thereby harms the plaintiff.[182] For purposes of this hypothetical, the plaintiff's primary argument might be that the defendant was negligent because the defendant had severe narcolepsy and decided to drive anyway. A reasonable person would know that driving with severe narcolepsy would put foreseeable plaintiffs in harm's way. This seems like a strong argument, but if there is evidence of other possible claims, the plaintiff need not stop here. Maybe the police found an open bottle of pills in the defendant's car, and the bottle warns, "Never operate heavy machinery after taking this medication." And maybe witnesses can testify that the defendant was driving home after having drinks at a bar. Arguing in the alternative, the plaintiff could claim: (A) the defendant was negligent for driving with severe narcolepsy; (B) the plaintiff was negligent for driving while on medications; or (C) the defendant was negligent for driving after having several drinks. These arguments proceed in the alternative because the plaintiff argues that "even if" the plaintiff does not win on Claim A, she can still win on Claim B, and even if she does not win on Claim B, she can win on Claim C. The plaintiff's odds of winning the case increase with each argument, and there is little downside: the plaintiff need only win on one argument to recover damages, and there is no consequence if the other arguments fail.[183] If the

182. RESTATEMENT (SECOND) OF TORTS § 291 cmt. g (AM. L. INST. 1965).

183. This assumes the factfinder is a logical decision-maker prepared to work through complex arguments. In jury trials, jurors may sometimes be confused or distracted by alternative arguments; they may be more persuaded by one strong theory of the case because they want to feel like the attorney is telling them the one true story of what happened. Edward Marshall Hall, *Trial Mistakes—The "Even If" Catastrophe*, TRIAL PRAC. TIPS (Feb. 20, 2017), http://www.trialpracticetips.com/trial-mistakes-the-even-if-catastrophe/ [https://perma.cc/H9ZQ-PERG]; *see also* J. ALEXANDER TANFORD, *Closing*

defendant was driving drunk, that will be sufficient for the plaintiff to recover irrespective of the other claims.

The above hypothetical illustrates the basic concept and efficacy of arguing in the alternative. But arguing in the alternative is only impactful if the outcome is not (or just about) predetermined. Consider animal rights activists seeking to have animals released from a zoo that keeps the animals in small, cement cages in the sun without adequate access to food, water, or mental stimulation. Depending on the specific facts, plaintiffs might bring claims under habeas corpus,[184] the Endangered Species Act,[185] state nuisance laws, or a combination of these three claims.[186] All of these may be winning claims, but if a judge or jury is predisposed to think that zoos are perfectly acceptable and therefore legal, none of these arguments will have a better chance than any other. It is not difficult to contemplate more examples in other politically charged arenas. Plaintiffs seeking to expand abortion rights will not likely fare any better with three theories than with one if arguing in front of a pro-life judge, and gun rights activists will not likely fare better with three theories than with one in front of a judge with strong beliefs in gun control—unless one believes that all judges assess claims from a completely neutral vantage point at all times. For those who do not, a different strategy is desirable.

This brings us full circle back to rock and hard place arguments. Returning to the narcolepsy hypothetical, we now envision a plaintiff who makes the following arguments: (A) the defendant was negligent for driving with severe narcolepsy; or (B) the defendant was negligent for driving while under the influence of his narcolepsy medication, which has the warning, "Never operate heavy machinery after taking this medication." Using this set of arguments, the plaintiff's claims work together rather than independently, and she therefore sets up a win–win situation. Either (A) the defendant did not take medication, or (B) the defendant did take medication. In Scenario A, the defendant was negligent because he did not take the requisite measures to control his narcolepsy before driving. In Scenario B, the defendant was negligent because he took motor-impairing medication before driving. Regardless of whether the judge or jury believes A or B, C is true: the defendant was negligent for driving, and the plaintiff wins.

Argument, *in* THE TRIAL PROCESS: LAW, TACTICS, AND ETHICS 373, 373 (3d ed. 2002) (admonishing that in a jury trial, "you must commit yourself to a *single* theory"). This is less of a concern in bench trials and when attorneys are arguing legal issues during appellate litigation.

184. Nonhuman Rts. Project, Inc. *ex rel.* Tommy v. Lavery, 54 N.Y.S.3d 392, 392 (N.Y. App. Div. 2017).

185. Kuehl v. Sellner, 887 F.3d 845, 848 (8th Cir. 2018).

186. *Id.*

An important premise of this Article is that even if the alternative argument (Argument B above) is almost certainly a losing argument, it still has value. Its value comes from closing off the universe of possible defenses. Returning one final time to the above hypothetical, suppose that after the car accident, the police obtained a warrant to test the defendant's blood, and the toxicology report showed that there were no traces of the defendant's narcolepsy medication in his system. Here, the plaintiff has a strong argument that the defendant drove with severe narcolepsy without taking any precautions. That is likely the only argument that will be necessary to win the case: it is the "rock" argument. Moreover, arguing that the defendant was negligent because he took his medication before driving will almost certainly lose because, after the accident, there was no trace of the medication in his system. Nevertheless, the plaintiff benefits from bringing both claims. The claim that the defendant was negligent for driving on motor-impairing medication operates as the "hard place" claim. Without raising it, the plaintiff leaves the defendant with an escape route: The defendant can insist that he was taking narcolepsy medication regardless of what the toxicology report shows and hope he can convince the jury. Taking the medication is a valid defense to the plaintiff's claim that the defendant should have anticipated having a narcoleptic fit while driving, and the jury has no reason to find that there is anything wrong with driving on the defendant's narcolepsy medication if the plaintiff does not raise the hard place claim.

In this hypothetical, of course, there is no reason to suspect that a jury would find for a defendant who raises an implausible defense. Imagine, however, that despite all odds (and ignoring the realities of voir dire) every juror has narcolepsy, and they all empathize with the defendant. Such a jury might look for a way to find in favor of the defendant. Without the hard place claim, it may be unlikely—but it is not impossible—for such a jury to find for the defendant. By including the hard place claim, the plaintiff secures a win irrespective of the jury's inclinations.

By virtue of being oversimplified, the above hypothetical aims to illustrate the mechanisms of RHP arguments in the legal context. Legal arguments, however, are complex and rarely perfect syllogisms, so it is important to recognize several more common and more realistic iterations of the disjunctive syllogism. The first, and most common, is a slightly more complex elaboration called the constructive dilemma:

Either *A* or *B*.

If *A*, then *C*.

If *B*, then *D*.

Therefore, either *C* or *D*.

The constructive dilemma will be equally effective as the typical disjunctive syllogism so long as both *C* and *D* make a judge more likely to rule in the plaintiff's favor. In the above example, whether the defendant took or did not take medication, the defendant was negligent. But it is more likely that two different sets of circumstances would make a defendant liable under *different* causes of action. Sticking with the theme of defendants running plaintiffs over in their cars, imagine a plaintiff who argues either (A) you had your eyes on the road, you saw me lying hurt in the road, and you decided to run me over anyway; or (B) you were not looking at the road. If A (you were looking), then C (you hit me on purpose), and you committed the intentional tort of battery.[187] If B (you were not looking), then D (you were negligent). Under either theory, the defendant is liable.

The constructive dilemma can also operate in a slightly different manner: where *C* is a desirable outcome for the plaintiff, but *D* is an undesirable outcome to the judge for reasons unrelated to the case at hand.[188] The typical example is the slippery-slope or parade-of-horribles argument, which the late Justice Scalia deployed regularly, most famously in his dissenting opinion in *Lawrence v. Texas*.[189] In that case, which struck down a Texas statute prohibiting same-sex sexual conduct, Justice Scalia argued that the decision would be the end of all laws based on "moral choices," including "laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity."[190] Other undesirable outcomes for a judge or justice might include abandoning tenets of judicial interpretation, such as stare decisis or an interpretive method like textualism. We explore such RHP arguments in Part V, examining two unexpected Supreme Court decisions from the 2019 Term.

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187. *See generally* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 101 (AM. L. INST., Tentative Draft No. 1, 2015).

188. These types of dilemmas operate similarly to the RHP dilemmas that prosecutors use to coerce confessions. *See supra* Section I.B. Just as law enforcement officers (quite effectively) convince suspects to confess by making them believe they will otherwise face an undesirable outcome; plaintiffs can convince judges to rule in their favor by making the judges believe that ruling against the plaintiff will have undesirable consequences.

189. Lawrence v. Texas, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

190. *Id.* ("State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers* [*v. Hardwick*, 478 U.S. 186 (1986)]' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision[.]"). We wish that, rather than pushing back on the inevitability of this parade-of-horribles, at least one liberal justice had suggested that much of the parade (such as same-sex marriage) would not be so horrible.

Finally, we note that the above syllogisms often operate, in practice, with lawyerly caveats. In law, ensuring definite outcomes is nearly always impossible: it is almost always more accurate to characterize "if *A*, then *B*" as "if *A*, then most likely *B*." Even weaker forms of the syllogism are: "if not *A*, then *B* is more likely"; "if not *B*, then *A* is more likely." Although arguments will rarely fit into perfect syllogisms, these weaker forms can still prove effective.

B. Rock and Hard Place Arguments and Jurisdictional Hurdles

Standing is frequently a major threshold challenge for mission-driven plaintiffs, and not in the least because of the RHP dilemmas described in Section II.B. But plaintiffs can also employ RHP arguments to surmount this preliminary hurdle. Below are two examples from 2020 out of the Southern District of New York.

The first instance we consider is *New York v. United States Department of Labor*,[191] a case in which New York brought suit under the Administrative Procedure Act challenging the Department of Labor's (DOL) Final Rule implementing the Families First Coronavirus Response Act (FFCRA). The FFCRA "obligates employers to offer sick leave and emergency family leave to employees who are unable to work because of the pandemic."[192] New York argued that the DOL's Final Rule unduly restricted paid leave and, therefore, that the DOL exceeded its statutory authority under FFCRA in promulgating the rule.[193]

To argue that it had standing to challenge the DOL's regulations, New York implemented two RHP arguments. First, it established that New York had suffered injury-in-fact due to the challenged features of DOL's Rule. New York explained that if employees did not have access to paid leave, then they would face one of two options: take unpaid leave or go to work sick. If employees chose the former, New York's income-tax revenue would decrease because paid leave is taxable, whereas unpaid leave is not. This argument, standing alone, was likely sufficient to establish standing; as the court recognized, "some employees who need leave will . . . take unpaid leave"[194] and "all New York must show is that it will be injured, not the magnitude of its injury."[195] But New York's alternative argument cemented that it would suffer injury-in-fact regardless of whether any employees took unpaid leave. As New York's record evidence showed, if employees went to work sick instead of taking

191. New York v. U.S. Dep't of Lab., 477 F. Supp. 3d 1, 5–10 (S.D.N.Y. 2020).
192. *Id.* at 5.
193. *Id.* at 4.
194. *Id.* at 8.
195. *Id.*

unpaid leave, this would "escalat[e] the spread of the virus and thereby rais[e] the State's healthcare costs."[196] Therefore, regardless of how employees responded to lacking paid sick leave, the State would suffer concrete costs.

To craft its second RHP argument in this case, New York raised two distinct theories of standing. The first, as discussed above, was that New York suffered from pecuniary injury the same way any private party would. The second was that New York suffered injury to its "quasi-sovereign interests," which "encompass both 'the health and well-being —[]physical and economic—of its residents in general,' as well as the state's interest in 'not being discriminatorily denied its rightful status within the federal system.'"[197] In raising this second theory of standing, the State sued in its *parens patriae* capacity,[198] the analysis of which would force the court into a "legal thicket."[199] As Judge Oetken thoroughly detailed in the sixth footnote of his opinion, the law is unsettled as to whether the "*Mellon* Bar"[200] prevents states from establishing *parens patriae* standing to bring statutory (as opposed to constitutional) suits against the federal government.[201]

This second, *parens patriae* argument for standing created a hard place for New York's traditional, pecuniary injury argument. The court would have needed to delve into the "legal thicket" of the second standing theory—unless it ruled in favor of New York on its first theory. In this way, the complex second theory of standing incentivized the court to rule in New York's favor on its primary theory.[202]

A second contemporary case in which a cause-driven plaintiff used an RHP argument to establish standing is *Natural Resources Defense*

196. *Id.* at 7.

197. *Id.* (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982)) (second alteration in original).

198. A state sues in its *parens patriae* capacity when it sues to enforce quasi-sovereign interests. *See id.* ("Though the universe of 'quasi-sovereign interests' has never been comprehensively defined, it is understood to encompass both the 'health and well-being . . . of its residents in general,' as well as the state's interest in 'not being discriminatorily denied its rightful status within the federal system.'" (citations omitted)).

199. *Id.* at 9 n.6.

200. Massachusetts v. Mellon, 262 U.S. 447, 486 (1923) (holding that states do not have *parens patriae* standing in suits against the federal government, at least with respect to constitutional claims).

201. Judge Oetken describes the issue as "whether the state's congressionally conferred cause of action is capacious enough to support a *parens patriae* suit." *U.S. Dep't of Lab.*, 477 F. Supp. 3d at 9 n.6. In doing so, he adopts the framing of footnote 4 of *Lexmark International v. Static Control Components, Inc.*, 572 U.S. 118 (2014), which argues that whether a litigant has prudential standing is better characterized as whether a litigant has a cause of action.

202. *U.S. Dep't of Lab.*, 477 F. Supp. 3d at 19 (denying DOL's motion to dismiss).

Council v. United States Department of the Interior.[203] In December 2017, Daniel Jorjani, Principal Deputy Solicitor of the Department of the Interior (DOI), issued a memorandum that, in conflict with a longstanding interpretation of the Migratory Bird Treaty Act (MBTA), would allow the taking or killing of migratory birds, as long as the taking or killing was "incidental."[204] In response, various environmental interest groups and several states brought suit to vacate the memorandum, and the court, holding that the memorandum was contrary to the plain text of the statute, ultimately granted summary judgment in the plaintiffs' favor.[205]

Before reaching summary judgment, DOI moved to dismiss the case, arguing in part that the plaintiffs lacked standing. Specifically, DOI argued that any injury to the plaintiffs would not be traceable to the government memorandum or redressable by a favorable ruling.[206] The agency further argued that the plaintiffs' injury "depends on [speculative] assumptions about how potential violators of the MBTA will alter their behavior in response to the [O]pinion, and further assumptions about how that change in behavior will affect migratory birds."[207] Although a losing argument in this case, DOI correctly pointed out that "[w]here redressability 'hinge[s] on the response of the regulated . . . third party to the government action,' then 'much more is needed' and standing is 'substantially more difficult' to establish."[208]

Despite traceability and redressability being "substantially more difficult" to establish in suits demanding government regulation, the plaintiffs' RHP argument surmounted this hurdle. Judge Caproni eloquently acknowledged the RHP dilemma confronting the DOI, writing:

> Deputy Solicitor Jorjani asserted that changing DOI's interpretation of the MBTA to permit incidental take was justified in part because the Department's longstanding contrary interpretation, and its accompanying threat of prison time and a $15,000-per-bird fine, 'h[ung] the sword of Damocles' over private actors, creating a 'threat of prosecution' that inhibited 'a host of otherwise lawful and productive actions.' Now that the shoe is on the other foot,

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203. Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 397 F. Supp. 3d 430, 434 (S.D.N.Y. 2019).

204. *Id.*

205. Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 478 F. Supp. 3d 469, 472 (S.D.N.Y. 2020).

206. *Nat. Res. Def. Council*, 397 F. Supp. 3d at 439.

207. *Id.* (alterations in original).

208. Memorandum of Law of Defendants U.S. Dep't of the Interior, U.S. Fish & Wildlife Serv. & Daniel Jorjani in Support of Their Motions to Dismiss the Complaints at 21, Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 397 F. Supp. 3d 430 (S.D.N.Y. 2019) (No. 1:18-cv-04596-VEC) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 561–62 (1992)) (second and third alteration in original).

> Defendants cannot credibly dismiss as speculative the logic underlying the States' theory of injury.[209]

Broken down into our fundamental constructive dilemma, Judge Caproni recognized that either (A) by eliminating the threat of federal criminal prosecution under the MBTA, the Jorjani memorandum will significantly reduce deterrence and increase the risk that private actors will kill migratory birds; or (B) the memorandum will not impact the behavior of private actors. If *A* is true, then *C*, the DOI's actions create the alleged injury. If *B* is true, then *D*, the agency is conceding that it cannot justify its departure from the longstanding interpretation of the statute.

IV. A CASE STUDY OF *AMERICAN ANTI-VIVISECTION SOCIETY V. UNITED STATES DEPARTMENT OF AGRICULTURE*

After eighteen years (or fifty-four years by veteran Bruce Wagman's count),[210] the United States Department of Agriculture (USDA) will finally issue regulations to protect birds under the Animal Welfare Act.[211] In 2002, Congress explicitly required the USDA to issue such regulations, but the USDA never acted.[212] No matter what a human being does to torture a bird, the federal government does not have a mechanism to hold that person accountable. So, both the American Anti-Vivisection Society (AAVS) and the Avian Welfare Coalition sued the agency, demanding that it comply with Congress's mandate.[213] Initially, the district court dismissed their case for failure to state a claim.[214] But on January 10, 2020, D.C. Circuit Judge David Tatel reversed the lower court's order and held that the plaintiffs "adequately alleged that USDA has failed to take a 'discrete agency action' that it is 'required to take.'"[215] The D.C. Circuit remanded, ordering the lower court to decide whether this failure had persisted for a sufficiently long period of time to constitute an

209. *Nat. Res. Def. Council*, 397 F. Supp. 3d at 439–40 (alteration in original) (citations omitted).

210. Mariann Sullivan, *Animal Law Podcast #61: The Case of the Forgotten Birds*, OUR HEN HOUSE (June 24, 2020), https://www.ourhenhouse.org/2020/06/animal-law-podcast-61-the-case-of-the-forgotten-birds/ [https://perma.cc/7EKK-PRJS]; *see infra* text accompanying note 222.

211. Order at 2–3, Am. Anti-Vivisection Soc'y v. U.S. Dep't of Agric., 351 F. Supp. 3d 16 (D.D.C. 2020) (No. 1:18-cv-01138-TNM) (order granting joint motion to stay and proposed rulemaking schedule).

212. *See* 7 U.S.C. § 2143(a)(1) (stating that the USDA "shall promulgate standards to govern the humane handling, care, treatment, and transportation of animals"). The term "animal" is defined as "any . . . warm-blooded animal . . . but such term excludes (1) birds . . . bred for use in research . . . ." 7 U.S.C. § 2132(g).

213. Am. Anti-Vivisection Soc'y v. U.S. Dep't of Agric., 351 F. Supp. 3d 16, 19 (D.D.C. 2018), *rev'd and remanded*, 946 F.3d 615 (D.C. Cir. 2020).

214. *Id.*

215. Am. Anti-Vivisection Soc'y v. U.S. Dep't of Agric., 946 F.3d 615, 621 (D.C. Cir. 2020).

unreasonable delay.[216] The circuit court's decision tipped the scales. Recognizing that a court would consider such a long delay unreasonable by any standard, the USDA folded and agreed to implement regulations.[217]

This case seems simple on its face: an agency fails to act in line with a direct congressional mandate for almost two decades, and eventually courts force the agency to act. Future plaintiffs who look to this case will likely not glean much beyond the basic takeaway about "unreasonable delay" claims under § 706(1) of the Administrative Procedure Act.[218] Such a takeaway, however, drastically oversimplifies the case; it is far from clear whether an unreasonable delay claim would have won the day under even slightly different circumstances. The brilliance of the Anti-Vivisection Society's lawyering was that the plaintiffs' *losing* claims cemented the victory. The history of the litigation illuminates this point.

A. The History of the Animal Welfare Act and the PETA Case

The Animal Welfare Act (AWA) provides imperfect protection for animals, and some scholars have even argued that its protections are counterproductive.[219] Whatever one's views on the efficacy of the Act, however, the AWA formally extends protections to "warm-blooded animals" and has done so since its inception.[220] Birds are warm-blooded.[221] This is why, to animal-law veterans, regulations protecting birds are fifty-four years overdue.[222] Nevertheless, since 1971, the USDA has refused to recognize that the AWA protects birds, rats, or mice.[223] Recognizing protection for these animals would drastically increase the USDA's workload because a vast majority of animals used in research are birds, mice, and rats; therefore, the agency was unlikely to ever recognize birds, mice, and rats on its own.[224] Realizing this, and perhaps deciding that some protection of birds is better than none, Congress, in 2002, amended the

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216. *Id.* at 617.

217. Order, *supra* note 211.

218. 5 U.S.C. § 706(1) ("The reviewing court shall compel agency action unlawfully withheld or unreasonably delayed.").

219. *See, e.g.*, Justin Marceau, *How the Animal Welfare Act Harms Animals*, 69 HASTINGS L.J. 925, 928 (2018) ("[A]nimal industries continually deploy the fact that they possess an AWA license as an argument against providing transparency in their animal handling practices, as a sound bite in the media to quell public concern, and even as a basis for defamation actions and related litigation against animal protection groups who criticize the treatment of confined animals.").

220. Animal Welfare Act of 1966, Pub. L. No. 89–544, § 2(h).

221. *See* Sutherland Simpson, *The Body Temperature of Birds*, 110 NATURE 566, 567–68 (1922).

222. *See* Sullivan, *supra* note 210.

223. *See* Am. Anti-Vivisection Soc'y v. U.S. Dep't of Agric., 946 F.3d 615, 617 (D.C. Cir. 2020) (citing 36 Fed. Reg. 24,917, 24,919 (Dec. 24, 1971)).

224. *See* Sue A. Leary, *The Exclusion of Mice, Rats, and Birds*, 125 AV MAG., no. 1, 2017, at 12, 12–13.

AWA to require the USDA to issue standards "govern[ing] the humane handling[] [and] care"[225] of "birds" not "bred for use in research."[226]

This amendment, though hardly satisfying to animal-rights activists, at least required the USDA to act. It meant that "when feral dogs attacked and killed several flamingos at a zoo," or when "15 parrots died in a fire," the USDA should have been in a position to respond.[227] Instead, over a decade passed, and the USDA failed to issue regulations for birds or take any action to protect them.

Such was the case in *People for the Ethical Treatment of Animals (PETA) v. United States Department of Agriculture*, when PETA sued the USDA demanding that the agency comply with the AWA's mandate.[228] PETA argued that, because the agency had not implemented new regulations for birds despite a decade-old mandate, it had to enforce existing AWA regulations against people who were mistreating birds. In other words, USDA's failure to enforce its general animal welfare standards with respect to birds constituted "unlawfully withheld" agency action under the Administrative Procedure Act.[229]

In one respect, the *PETA* case was a huge success: the court held that PETA had standing to bring its challenge, setting important standing precedent for non-profit organizations.[230] On the merits, however, the court rejected PETA's argument. The court held that "nothing in the AWA requires the USDA to apply the general animal welfare standards to birds . . . before finalizing its bird-specific regulations."[231]

In hindsight, it is easy to say that PETA ultimately brought the wrong challenge.[232] But such hindsight bias is not fair to PETA, nor is it helpful in guiding future litigants. The USDA seemed hellbent on excluding birds from protection, and the courts have supported the agency's discretion. In fact, after *PETA*, animal rights groups abandoned an administrative law strategy altogether. Before bringing its case in 2018, the AAVS

225. Animal Welfare Act, 7 U.S.C. § 2143(a)(1).

226. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10301, 116 Stat. 134, 491 (codified as amended at 7 U.S.C. § 2132(g)).

227. *See* Bruce Wagman, *Birds Are Finally About to Get the Protection They Deserve*, MARIN INDEP. J. (June 15, 2020), https://www.marinij.com/2020/06/15/birds-are-finally-about-to-get-the-protection-they-deserve/ [https://perma.cc/K8Q7-KSEN].

228. People for the Ethical Treatment of Animals (PETA) v. U.S. Dep't of Agric., 797 F.3d 1087, 1089 (D.C. Cir. 2015).

229. 5 U.S.C. § 706(1) ("The reviewing court shall compel agency action *unlawfully withheld* or unreasonably delayed." (emphasis added)).

230. *PETA*, 797 F.3d at 1093–95 (noting that the plaintiffs had standing under *Havens' Realty Corp. v. Coleman*, 455 U.S. 377 (1982)).

231. *Id.* at 1098.

232. Importantly, PETA abandoned two of its initial claims: (1) that the USDA unreasonably delayed enforcement in refusing to issue new regulations and (2) that the refusal to enforce existing regulations was arbitrary and capricious. The court explicitly noted these decisions. *Id.* at 1091 n.1.

approached the problem by suing the USDA for breach of contract under the Tucker Act.[233] Only after this challenge lost as well did the AAVS and the Avian Welfare Coalition take one more stab at a challenge under the Administrative Procedure Act.

B. Rock and Hard Place Arguments in American Anti-Vivisection Society v. USDA

In *American Anti-Vivisection Society*, as discussed above, the D.C. Circuit allowed the AAVS's "unreasonable delay" claim to proceed.[234] But, this is not because PETA had a losing claim (that the USDA had to apply general animal welfare standards to birds), whereas *Anti-Vivisection Society* had a winning claim. In *Anti-Vivisection Society*, unlike in *PETA*, the dispositive factor was that plaintiffs used "hard place" arguments. They did not choose among arguments that were different than PETA's; instead, they brought *two* challenges against *two* types of agency inaction. AAVS first argued that the USDA's refusal to *either* (1) promulgate new regulations for birds *or* (2) apply the general welfare regulations to birds was *either* (A) arbitrary and capricious final agency action *or* (B) unreasonable delay.[235] In its most basic form, this challenge breaks down into four distinct claims: (1) the USDA's refusal to promulgate new regulations for birds is arbitrary and capricious; (2) the USDA's refusal to promulgate new regulations for birds constitutes unreasonable delay; (3) the USDA's refusal to apply the general welfare regulations to birds is arbitrary and capricious; (4) the USDA's refusal to apply the general welfare regulations to birds constitutes an unreasonable delay. Taking each argument in turn, as we do below, reveals that the court could rule for the USDA under each and any of these arguments standing alone; there was no slam dunk claim that would cause a court to force the USDA to take action if the court was inclined not to force the USDA's hand. However, putting the arguments together created two different RHP dilemmas that prevented the court from ruling for the USDA.

The first pair of arguments involves the type of action that the AWA required the USDA to take. Because Congress, in the AWA, explicitly mandated that the USDA provide protections for birds,[236] the USDA either had to: (1) apply its existing regulations to protect birds; or (2) write new

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233. Mariann Sullivan, *Animal Law Podcast #8: What's Up with Birds and the Animal Welfare Act? With Bruce Wagman*, OUR HEN HOUSE (Jan. 27, 2016), https://www.ourhenhouse.org/2016/01/animal-law-podcast-8-whats-up-with-birds-and-the-animal-welfare-act-with-bruce-wagman/ [https://perma.cc/A5LH-M6CV].

234. Am. Anti-Vivisection Soc'y v. U.S. Dep't of Agric., 946 F.3d 615, 620 (D.C. Cir. 2020).

235. *Id.* at 618.

236. *See* Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10301, 116 Stat. 134, 491 (codified as amended at 7 U.S.C. § 2132(g)); *see also supra* note 212.

regulations to protect birds. If a plaintiff chose the first argument—that the USDA must apply existing regulations—the court could say, "The agency does not have to apply existing regulations. It has discretion to craft new regulations." Hence the holding in the *PETA* case. Alternatively, if a plaintiff argued that the USDA must create new regulations, the court could say, "The agency does not have to create new regulations. It has discretion to apply existing regulations." Only by bringing both claims together does a plaintiff force the court to pick an enforcement pathway (or tell the USDA to pick).

The second pair of arguments involves the agency's exact wrongdoing: namely, whether the agency has (A) taken inappropriate action or (B) failed to take appropriate action. Here too, if a plaintiff chose the first argument—the USDA made an arbitrary and capricious final decision that it would not issue new regulations to protect birds or apply existing regulations to birds—the court could say, "The agency has not taken final action." In the alternative, if a plaintiff chose the second argument—the USDA has waited too long to either apply existing regulations to birds or write new regulations for them—the court could say, "The agency has decided (for right or wrong) not to protect birds, and therefore, an unreasonable delay challenge is inappropriate, and the plaintiffs have failed to state a claim." By bringing both claims together, however, a plaintiff forces the court to hold the USDA accountable one way or another: either the USDA took final action in violation of the AWA, or the USDA did not take final action and the twenty-year delay is unreasonable.

The brilliance in recognizing—and raising—all of the arguments that the AAVS made is that AAVS made these arguments knowing it was impossible for all to win. First, it is impossible for an agency to have both (1) taken no action at all (as required for an unreasonable delay claim under § 706(1)) and (2) taken final action (as required for an arbitrary and capricious claim under § 706(2)). Likewise, it is impossible that the agency is required to both (A) apply general animal welfare standards to birds and (B) issue new regulations specifically for birds. But it is also impossible for all of these claims to lose, and that is far more important because winning only requires one winning claim. Therefore, by raising all four iterations, the AAVS forced the court to choose from among its desired outcomes.

V. ROCK AND HARD PLACE ARGUMENTS THAT DICTATED UNEXPECTED SUPREME COURT DECISIONS IN 2019

If the 2019 Supreme Court term taught movement lawyers anything, it is that hard place arguments need not be plainly legal arguments. This

Part of the Article argues that the two most unexpected decisions from the 2019 term—*Bostock v. Clayton County*[237] and *June Medical Services v. Russo*[238]—both resulted from a special RHP setup. This is the type of setup where the "rock" argument is (as usual) the winning argument, and the "hard place" alternative is a theory of jurisprudence that relevant justices wish to avoid.[239]

In *Bostock*, the Court held that Title VII of the Civil Rights Act of 1964, by prohibiting employment discrimination "because of . . . sex,"[240] prohibits discrimination because of employees' sexual orientation and gender identity.[241] Justice Gorsuch, writing for the majority, recognized that if employers draw distinctions on the basis of sexual orientation and gender identity, they are necessarily drawing them on the basis of sex. His opinion can largely be boiled down to the following statement: "[I]magine an applicant doesn't know what the words homosexual or transgender mean. Then try writing out instructions for who should check the box without using the words man, woman, or sex (or some synonym). It can't be done."[242]

Whether incensed or exuberant, Americans were largely shocked that a conservative-leaning Supreme Court ruled in favor of LGBT rights.[243] But as LGBT advocate Chase Strangio explained, the petitioners had briefed the case to elicit Justice Gorsuch's precise reasoning[244]—reasoning grounded in a strict adherence to textualism.[245] Numerous scholars have claimed that textualism was not necessary to reach the outcome in *Bostock*.[246] There were very strong arguments based on *McLaughlin v. Florida*[247] and *Loving v. Virginia*:[248] arguments that prohibitions on same-sex marriage discriminate based on sex, just as laws prohibiting interracial

237. Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020).

238. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2108 (2020).

239. *See supra* Section III.A and text accompanying note 188.

240. Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e.

241. *Bostock*, 140 S. Ct. at 1756.

242. *Id.* at 1746.

243. *See, e.g.*, Jane Coaston, *Social Conservatives Feel Betrayed by the Supreme Court — and the GOP that Appointed It*, VOX (July 1, 2020), https://www.vox.com/2020/7/1/21293370/supreme-court-conservatism-bostock-lgbtq-republicans [https://perma.cc/EKM5-TFNV].

244. *2020 Bingo Card*, STRICT SCRUTINY: THE APPEAL (June 22, 2020), https://strict-scrutiny.simplecast.com/episodes/2020-bingo-card [https://perma.cc/CZ6S-85YD].

245. Jonathan Skrmetti, *Symposium: The Triumph of Textualism: "Only the Written Word Is the Law,"* SCOTUSBLOG (June 15, 2020), scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/ [https://perma.cc/DU9H-3ZCP].

246. *See, e.g.*, Michael C. Dorf, *Does Justice Gorsuch's Magnificent Opinion in the Title VII Sexual Orientation and Gender Identity Cases Redeem Textualism?*, DORF ON LAW (June 16, 2020), http://www.dorfonlaw.org/2020/06/does-justice-gorsuchs-magnificent.html [https://perma.cc/ZM7K-MT2X].

247. McLaughlin v. Florida, 379 U.S. 184 (1964).

248. Loving v. Virginia, 388 U.S. 1 (1967).

cohabitation and marriage discriminate on the basis of race.[249] Likewise, there is a very strong argument that LGBT-discrimination is unlawful sex stereotyping under *Price Waterhouse v. Hopkins*.[250]

By focusing, however, on textualist arguments, the petitioners established a hard place for justices who adhere religiously to textualism. The constructive dilemma was as follows: If (A) the Court adheres to the plain meaning of Title VII's language, then (C) Title VII prohibits discrimination on the basis of LGBT status. If (B) the Court does not adhere to a textualist approach, then (D) textualism is not the logical and neutral form of interpretation that its proponents purport it to be. Some justices, of course, rejected the premise of this dilemma and asserted that Justice Gorsuch's opinion was not, in fact, a textualist interpretation.[251] But for Justice Gorsuch, the strictest textualist on the Court, the merits of the case did fundamentally pit his social conservative bent against his principles of judicial review. His questions during oral argument revealed his struggle with the dilemma of whether to look beyond the text:

> When a case is really close, really close, on the textual evidence, and I—assume for the moment I'm . . . with you on the textual evidence. . . . The judge finds it very close. At the end of the day, should he or she take into consideration the massive social upheaval that would be entailed in such a decision, and the possibility that—that Congress didn't think about it[?][252]

Ultimately unwilling to forego his textualist principles and leave his tenets of judicial review open to attack, Justice Gorsuch authored the opinion on behalf of himself, the Chief Justice, and the four liberal justices on the Court.[253]

A similar RHP dilemma motivated Chief Justice Roberts's ruling in *June Medical Services*.[254] In that case, abortion providers challenged a Louisiana statute that required all physicians performing abortions to have hospital admitting privileges within thirty miles of their clinic.[255] The

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249. *See* Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 148 (1988); *see also* Andrew Koppelman, Bostock v. Clayton County, ORAL ARGUMENT 2.0 (Oct. 8, 2019), https://argument2.oyez.org/2019/bostock-v-clayton-county/ [https://perma.cc/N6S5-AZDP].

250. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

251. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1755–56 (2020) (Alito, J., dissenting) ("It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated . . . .").

252. Oral Argument at 22:18, R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm'n, 140 S. Ct. 1731 (2020) (No. 18-107) (consolidated with *Bostock*, 140 S. Ct. 1731 (No. 17-1618)), https://www.oyez.org/cases/2019/18-107 [https://perma.cc/QJ5X-CCEY].

253. *Bostock*, 140 S. Ct. at 1737.

254. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2108 (2020).

255. *Id.* at 2112.

physicians argued that the statute placed an undue burden on a woman's right to seek an abortion because most abortion providers do not have (or need) hospital admitting privileges, and requiring them to obtain these privileges would have the practical impact of shutting down almost every clinic in Louisiana.[256] Prior to reaching the Supreme Court, the Fifth Circuit had reversed the district court and upheld the admitting-privileges requirement as constitutional.[257] Many pro-choice liberals feared that the conservative majority on the Supreme Court would side with the Fifth Circuit and significantly undercut the protections that *Roe v. Wade* famously guaranteed to women.[258]

Starting with the first sentence of their brief, the petitioners largely focused their argument on stare decisis.[259] They characterized the Fifth Circuit's ruling as contumacious, given that just four years prior, the Supreme Court had struck down an identical admitting-privileges requirement in Texas.[260] The petitioners argued that if the Court failed to respect its *Whole Woman's Health* holding from just four years prior, the decision would significantly undermine the integrity of the Court as an institution. In constructive dilemma terms, the petitioners asserted that either (A) the Court follows its recent holding in *Whole Woman's Health*, and (C) Louisiana's admitting-privileges requirement is unconstitutional; or (B) the Court refuses to follow its four-year-old precedent in *Whole Woman's Health* and (D) proves that the Court simply acts along partisan lines irrespective of precedent.

As they did in *Bostock*, several justices rejected the premise of the constructive dilemma. Here, they argued that *June Medical* and *Whole Woman's Health* were distinguishable cases.[261] The respondents in *June Medical* argued that the undue burden analysis is fact-specific and therefore must proceed case-by-case, and several dissenting justices in *June Medical*, latching onto this reasoning, concluded that the factual

256. *Id.*

257. June Med. Servs. L.L.C. v. Gee, 905 F.3d 787, 815 (5th Cir. 2018), *rev'd sub nom. June Med. Servs. L.L.C.*, 140 S. Ct. 2103.

258. *See* Melissa Murray, *Party of Five? Setting the Table for* Roe v. Wade, SCOTUSBLOG (July 24, 2019), https://www.scotusblog.com/2019/07/symposium-party-of-five-setting-the-table-for-roe-v-wade/ [https://perma.cc/DN9K-8RNQ].

259. Response & Reply Brief for Petitioners-Cross-Respondents at 1, *June Med. Servs. L.L.C.*, 140 S. Ct. 2103 (Nos. 18-1323, 18-1460) ("The State disregards stare decisis at every turn.").

260. *Id.*; *see also* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

261. *June Med. Servs. L.L.C.*, 140 S. Ct. at 2157 (Alito, J., dissenting) ("*Stare decisis* is a major theme in the plurality opinion and that of THE CHIEF JUSTICE. Both opinions try to create the impression that this case is the same as *Whole Woman's Health* and that *stare decisis* therefore commands the same result. In truth, however, the two cases are very different." (capitalization in original)).

scenario was different in Louisiana than it had been in Texas.[262] But the Chief Justice has, since his confirmation hearing, asserted the importance of maintaining the integrity of the judiciary.[263] Therefore, just as forsaking textualist principles was a hard place for Justice Gorsuch, undermining an impartial judiciary proved to be a legitimate hard place for the Chief Justice. In his concurring opinion, he provided the fifth vote to overturn Louisiana's admitting-privileges requirement, noting that the case too closely resembled *Whole Woman's Health* to rule otherwise.[264]

VI. SUGGESTIONS FOR MISSION-DRIVEN PLAINTIFFS AND CONCLUDING THOUGHTS

In this final Part, we suggest two additional areas of law in which RHP arguments may prove particularly effective for mission-driven plaintiffs, and we provide examples in each context. The first is in the context of administrative law, where an agency must *both* justify a regulatory decision by asserting it has economic benefits *and* downplay the negative externalities of the decision—regardless of whether the externalities fall on minority populations, the environment, animals, or any other underrepresented interest. These competing duties create the perfect opportunity for plaintiffs to employ RHP arguments because, when trying to justify their actions, agencies often make statements that plaintiffs can use against them. The Natural Resources Defense Council (NRDC) case from Section III.B provides one such example.

While NRDC's RHP argument was used to overcome a standing hurdle, plaintiffs can use a similar strategy to win on the merits.[265]

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262. *Id.*

263. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (opening statement by then-Judge John Roberts) ("I will remember that it's my job to call balls and strikes, and not to pitch or bat.").

264. *June Med. Servs. L.L.C.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring) ("The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore, Louisiana's law cannot stand under our precedents."). One of us has argued elsewhere that the Chief Justice's concurrence in *June Medical* left a roadmap for states to follow when seeking to restrict a woman's right to seek abortion, but the fact remains that *June Medical* was an important victory for pro-choice liberals. Jareb Gleckel, *What Chief Justice Roberts's* June Medical *Concurrence Tells Us About the Future of Abortion*, JUSTIA: VERDICT (June 30, 2020), https://verdict.justia.com/2020/06/30/what-chief-justice-robertss-june-medical-concurrence-tells-us-about-the-future-of-abortion [https://perma.cc/R99L-BSAR].

265. We can describe the RHP argument employed in *NRDC v. U.S. Dep't of the Interior* in the following simplified form: either (A) the agency action affects birds, and the plaintiffs have standing or (B) the agency action is unjustified. *See supra* Section III.B. The arguments we will propose in this section operate similarly: either (A) the agency action affects the environment, and the plaintiffs prevail on a National Environmental Policy Act claim or (B) the agency action is unjustified. In both cases, the agency is cornered by its attempts to explain and justify its actions. In *NRDC*, this prevents

Specifically, a plaintiff can pair a National Environmental Policy Act (NEPA)[266] claim as a rock with an "arbitrary [and] capricious"[267] Administrative Procedure Act (APA) claim as a hard place—particularly where the agency has failed to prepare an Environmental Impact Statement (EIS).[268] Consider the example of the Forest Service's (FS) recent Proposed Rule on Oil and Gas Resources, which would amend existing regulations to streamline the process of oil and gas leasing on National Forest lands.[269] If the FS follows through with its proposal, environmental organizations are likely to challenge the Rule as violating NEPA. These organizations could argue that the FS should have prepared an EIS because the changes "accelerat[e] new drilling in national forests" and thereby may have the significant environmental impacts of "worsen[ing] the climate crisis and hurt[ing] public health by further polluting our air and water."[270] The agency would likely respond to such an argument by claiming that it does not expect the changes to accelerate drilling.[271] However, if environmental organizations also make the "hard place" argument that the FS's changes are arbitrary and capricious in violation of the APA, they can corner the agency. The overall rationale that the FS gives for its proposed changes is that they "modernize existing procedures to streamline processes and promote efficiency."[272] By arguing that the FS's economic explanation is conclusory and not supported by evidence, plaintiffs could force the agency to articulate, on the record, *how* the changes "streamline" and increase efficiency and *why* that matters. Such a challenge is colorable because the FS did an exceedingly poor job of explaining its exact reasons

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the agency from dismissing the case for lack of standing; in the scenarios we propose, this allows the plaintiffs to prevail on a claim on the merits.

266. National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*

267. 5 U.S.C. § 706(2)(A).

268. NEPA requires federal agencies to prepare an EIS for all major actions that may significantly impact the environment, including amendments to regulations. 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.3 (2020).

269. Oil & Gas Resources, 85 Fed. Reg. 54,311, 54,311 (proposed Sept. 1, 2020).

270. Press Release, Emily Deanne & Anne Hawke, Nat. Res. Def. Council, Administration Relaxes Rules for Oil and Gas Drilling in National Forests (Aug. 31, 2020), https://www.nrdc.org/media/2020/200831 [https://perma.cc/X23C-7T8D]. We believe the Natural Resources Defense Council, an environmental nonprofit, would be a likely key player in the legal fight against the Proposed Rule if it is finalized. *See id.*

271. *See* U.S. DEP'T AGRIC., ENVIRONMENTAL ASSESSMENT FOR PROPOSED RULE TO REVISE CODE OF FEDERAL REGULATIONS 36 C.F.R. PART 228, SUBPART E: OIL AND GAS RESOURCES 35 (2019) (reasoning that "[t]he Forest Service does not expect that the regulatory revisions will drive a notable increase or decrease in the number of leases or in the rate at which lands are nominated for lease by the oil and gas industry," *inter alia*, to conclude that the Proposed Rule would have no significant environmental impacts and that, therefore, no EIS was needed).

272. Oil & Gas Resources, 85 Fed. Reg. at 53,411.

for certain changes.[273] But more importantly, if the agency articulates its "efficiency" reasoning, it will likely have to admit that it expects the changes to accelerate drilling projects, undermining its defense to the NEPA claim.[274] In other words, the real value of the APA claim is in how it would serve as a hard place, forcing the agency to undermine its NEPA argument by articulating its belief that the regulatory changes would actually have an effect.

This type of RHP argument could also work well in challenges to regulatory changes meant to benefit hunters or fishermen. Such changes are designed to make it easier for sportsmen to kill wildlife, yet government agencies often argue that they will not affect wildlife populations and therefore do not need to be assessed in an EIS.[275]

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273. Certain unexplained parts of the Proposed Rule (e.g., the removal of public notice and comment opportunities) look suspiciously like concessions to industry at the expense of the public. *See* Katherine Rogers & Grace Brosofsky, Comment Letter on Proposed Rule on Oil and Gas Resources 4 (Nov. 2, 2020), https://beta.regulations.gov/comment/FS-2020-0007-3786 [https://perma.cc/R6R5-JCVQ] ("Here, the Forest Service avoided providing *any* explanation for (or even acknowledgment of) the proposed rule's removal of public notice and comment opportunities in 36 C.F.R. § 228.107. In its [cursory] discussion of its proposed amendments to § 228.107, the FS . . . [gave] the misleading impression that the agency planned only to reorganize the section of code without making any substantive changes" to what the section required).

274. The agency almost undeniably *does* intend to accelerate drilling, and the phrase "streamline processes and promote efficiency" is a fairly transparent euphemism for this motive. *See* Memorandum from Sonny Perdue, Sec'y, U.S. Dep't of Agric., to Victoria Christiansen, Chief, U.S. Dep't of Agric., Forest Serv. 1 (June 12, 2020), https://www.fs.usda.gov/sites/default/files/2020-06/secretarial_memo_national_grasslands.pdf [https://perma.cc/3AX4-X8WP] (describing the need to "provide relief from burdensome regulations, improve customer service, and boost the productivity of our National Forests and Grasslands" by "streamlin[ing] processes and identify[ing] new opportunities to increase America's energy dominance and reduce reliance on foreign countries for critical minerals"). Comment letters written by industry groups make it apparent that oil and gas companies recognize this and also believe that the Proposed Rule will help them to conduct more drilling on federal lands at a faster rate. *See, e.g.*, Tripp Parks, Vice President, Gov't Affs., W. Energy All., Comment Letter on Proposed Rule on Oil and Gas Resources 1 (Nov. 2, 2020), https://www.westernenergyalliance.org/uploads/1/3/1/2/131273598/western_energy_alliance_comments_on_the_usfs_oil_and_gas_resources_regulations.pdf [https://perma.cc/Z32N-TMNN] ("Delays caused by the National Environmental Policy Act (NEPA) process discourage Alliance members from operating on USFS lands, thereby reducing revenues that would be generated for the federal government and limiting domestic energy production. . . . We greatly appreciate that U.S. Department of Agriculture Secretary Sonny Perdue understands the need to reduce these delays . . . .").

275. *Compare, e.g.*, Press Release, U.S. Dep't of Interior, Secretary Bernhardt Proposes Historic Expansion of Hunting and Fishing Opportunities (Apr. 8, 2020), https://www.doi.gov/pressreleases/secretary-bernhardt-proposes-historic-expansion-hunting-and-fishing-opportunities [https://perma.cc/ZF67-6NPK] ("'America's hunters and anglers now have something significant to look forward to in the fall as we plan to open and expand hunting and fishing opportunities across more acreage nationwide than the entire state of Delaware,' said Secretary Bernhardt. 'The U.S. Fish and Wildlife Service's Hunt Fish Chiefs have been instrumental in our effort over the past two years to streamline our regulations and identify new opportunities for sportsmen and women like no other previous administration.'"), *with* 2020–2021 Station-Specific Hunting and Sport Fishing Regulations, 85 Fed. Reg. 20,030, 20,044 (proposed Apr. 9, 2020) (to be codified at 50 C.F.R. pts 32, 36, and 71) (declining to perform NEPA analysis of the cumulative impacts of the same changes that the agency

Environmental and animal rights plaintiffs would do well to capitalize on this tension by arguing that either the decision is arbitrary and capricious, or the decision has environmental impacts that the agency must assess.

A second area of law in which RHP arguments may work especially well is the First Amendment context, particularly when it is unclear how much speech the government intends to restrict. In these cases, if plaintiffs challenge a government regulation as unconstitutional because it imposes on free speech, they may do well to couple their First Amendment claim with a claim that the statute is unconstitutionally vague because it fails to give "people 'of common intelligence' fair notice of what the law demands of them."[276] To illustrate the efficacy of this type of argument, consider state statutes prohibiting companies from "[m]isrepresenting . . . a product as meat that is not derived from harvested production livestock or poultry."[277] These statutes target the marketing of plant-based meat alternatives, such as Tofurky deli slices and the Impossible Whopper at Burger King, which use strictly plant-based ingredients to replicate the taste and texture of animal products.[278] Companies making plant-based products fear that they will be liable for using words like "meat" or "burger" on their labels to describe their products, and some states, like Arkansas, make this prohibition explicit.[279] Other states, however, like Missouri, have been less explicit and have unofficially backed off of this

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had referred to as a "historic expansion" in its press release); *compare* Press Release, U.S. Fish & Wildlife Serv., Proposed Public Use Regulations Improve Hunting, Fishing and Recreation Access (May 20, 2020), https://www.fws.gov/news/ShowNews.cfm?ref=proposed-public-use-regulations-improve-hunting-fishing-and-recreation-&_ID=36564 [https://perma.cc/3FC7-4L65] (describing the decision to allow brown-bear baiting in order to "increas[e] opportunities for consumptive use[,]" *inter alia*), *with* FISH AND WILDLIFE SERV., DRAFT ENVIRONMENTAL ASSESSMENT FOR AMENDMENT OF PUBLIC USE REGULATIONS AT KENAI NATIONAL WILDLIFE REFUGE 25 (June 11, 2020) (concluding that an EIS did not need to be prepared because "[i]t is unknown what impact, if any, the allowance of hunting of brown bear over bait would have on the population trend").

276. United States v. Davis, 139 S. Ct. 2319, 2325 (2019) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).

277. MO. REV. STAT. § 265.494(7) (2018). A number of states have passed (or at least proposed) statutes with similar language. *See, e.g.*, ARK. CODE ANN. § 2-1-305(6) (2019) (prohibiting "[r]epresenting the agricultural product as meat or a meat product when the agricultural product is not derived from harvested livestock, poultry, or cervids"); *see also* Lauren Handel, *New State Laws Restrict "Meat" Labeling for Cell-Cultured and Plant-Based Products*, HANDEL FOOD L. (June 21, 2019), https://www.handelfoodlaw.com/labeling/new-state-laws-restrict-meat-labeling-for-cell-cultured-and-plant-based-products/ [https://perma.cc/7LFB-7E9U] (listing statutes).

278. *See* Jareb A. Gleckel & Sherry F. Colb, *The Meaning of Meat*, 26 ANIMAL L. 75, 78 (2020).

279. ARK. CODE ANN. § 2-1-305(10) (2019) (prohibiting companies from "[u]tilizing a term that is the same or similar to a term that has been used or defined historically in reference to a specific agricultural product"). We note that Arkansas's statute may be unconstitutionally vague in different respects.

position, claiming instead that if companies make adequate disclosures that their products are vegan, they will not face liability.[280]

In several states, plant-based companies are challenging these statutes as violating their First Amendment rights.[281] A First Amendment claim alone was enough to procure a preliminary injunction in Arkansas, where the state left the court with little doubt of how aggressively it would implement the statute.[282] But in states where the nature of the prohibitions is less explicit, pairing First Amendment challenges with vagueness challenges will likely prove beneficial. Vagueness challenges not only add value on their own merit, but also help to flush out free speech restrictions, thereby teeing up plaintiffs' First Amendment claims. More specifically, when plant-based companies challenge a statute as unconstitutionally vague, the state must respond that the statute is clear—either because it prohibits the use of words like "meat" and "burger" or because it does not. If it does not, the statute does not have teeth because almost all vegan products contain disclosures that they are vegan, and when the products include such disclosures, they do not confuse consumers.[283] If the statute does prohibit the use of specific words, then the statute very likely violates the First Amendment.[284]

These examples are, of course, not meant to be exhaustive. Beyond providing specific litigation strategies, this Article aims to motivate mission-driven plaintiffs to seek out RHP arguments in their own cases. For centuries, RHP dilemmas have operated to the detriment of criminal defendants and mission-driven plaintiffs alike. Our goal has been to shed light on these dilemmas and then to highlight scenarios in which brilliant lawyers have turned the tables. We hope our Article encourages and facilitates the continuation of that practice.

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280. *See* Sherry F. Colb & Jareb A. Gleckel, *Dear Big Ag: We Don't Trust Your Motives*, DORF ON LAW (June 14, 2019), http://www.dorfonlaw.org/2019/06/dear-big-ag-we-dont-trust-your-motives.html [https://perma.cc/VN8N-QPXE] (discussing how the Missouri Department of Agriculture has issued statements to cabin the statutory language).

281. *See, e.g.*, Preliminary Injunction Order, Turtle Island Foods SPC v. Soman, 424 F. Supp. 3d 552 (E.D. Ark. 2019) (No. 4:19-cv-00514-KGB) (challenging Arkansas law).

282. *See* Turtle Island Foods SPC v. Soman, 424 F. Supp. 3d 552 (E.D. Ark. 2019).

283. *See* Jareb A. Gleckel, *Are Consumers Really Confused By Plant-Based Food Labels? An Empirical Study*, 12 J. ANIMAL & ENV'T L. (forthcoming 2021) (manuscript at 2) (on file with authors).

284. *See Turtle Island Foods*, 424 F. Supp. 3d 552.