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Should Criminal Justice Reformers Care About Prosecutorial Ethics Rules?

Bruce A. Green[*] & *Ellen Yaroshefsky*[**]

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I. INTRODUCTION

Criminal justice reformers have plenty to try to fix—bail,[1] sentencing,[2] and prison conditions,[3] to name a few.[4] Among reformers' targets are prosecutors' conduct—both prosecutors' discretionary

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1. *See, e.g.*, Russell M. Gold, *Jail as Injunction*, 107 GEO. L.J. 501, 507 (2019) (discussing the need for bail reform); Insha Rahman, *Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration*, 46 FORDHAM URB. L.J. 845, 851-52 (2019) (same).

2. *See, e.g.*, Mirko Bagaric et al., *Mitigating America's Mass Incarceration Crisis Without Compromising Community Protection: Expanding the Role of Rehabilitation in Sentencing*, 22 LEWIS & CLARK L. REV. 1, 6 (2018) (offering proposals for sentencing reform); Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J.F. 791, 795-96 (2019) (discussing successful sentencing reform efforts).

3. *See, e.g.*, Hopwood, *supra* note 2, at 795-96 (discussing successful prison reform efforts); Michael Jacobson et al., *Beyond the Island: Changing the Culture of New York City Jails*, 45 FORDHAM URB. L.J. 373, 379 (2018) (discussing the need for jail reform in New York City).

4. *See generally* Barry Scheck, *The Integrity of Our Convictions: Holding Stakeholders Accountable in an Era of Criminal Justice Reform*, 48 GEO. L.J. ANN. REV. CRIM. PROC. iii, iv (2019). On strategies for criminal justice reform, *see* Susan N. Herman, *Getting There: On Strategies for Implementing Criminal Justice Reform*, 23 BERKELEY J. CRIM. L. 32, 33 (2018). For an argument that reform proposals are superficial and deceptive in that they will leave structural deficiencies intact, *see* Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform"*, 128 YALE L.J.F. 848, 851 (2019).

decision making (for example, punitive charging and plea bargaining policies that contribute to over-incarceration)[5] and prosecutors' obligations in their advocacy role (for example, the scope of prosecutors' disclosure obligations and how they are enforced).[6] Proponents of criminal justice reform call both for more demanding laws governing prosecutors' conduct and more effective oversight and enforcement of prosecutors' compliance with their legal obligations.

In the context of a national awakening to the deficiencies of the criminal justice process, institutions with an influence over the legal profession such as the American Bar Association (ABA), state bar associations, courts, and disciplinary authorities have examined the role of professional regulation in influencing prosecutors' conduct. In some states, following the ABA's lead, the judiciary has expanded prosecutorial ethics rules.[7] Some bar associations, and especially the ABA, have issued advisory opinions interpreting these rules and calling lawyers' attention to their significance.[8] And some disciplinary authorities appear to have stepped up the rules' enforcement.[9] These efforts have been buoyed by burgeoning academic literature exploring the potential significance of the professional regulation of prosecutors.[10]

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5. *See generally* Note, *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748, 750 (2018) (describing efforts to elect "progressive prosecutors" who will exercise prosecutorial discretion less harshly than conventional prosecutors).

6. *See generally* Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 75-78 (2016) (discussing efforts to reform prosecutors' disclosure obligations).

7. *See generally* Bruce A. Green, *Prosecutorial Ethics in Retrospect*, 30 GEO. J. LEGAL ETHICS 461, 468-73 (2017) (describing the development of ABA Model Rule 3.8, governing prosecutors' distinctive professional obligations); Laurie L. Levenson, *The Politics of Ethics*, 69 MERCER L. REV. 753 (2018); Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427 (2009); Michele K. Mulhausen, Comment, *A Second Chance at Justice: Why States Should Adopt ABA Model Rules of Professional Conduct 3.8(g) and (h)*, 81 U. COLO. L. REV. 309 (2010).

8. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 486 (2019) (discussing prosecutors' obligations under ABA Model Rule 3.8 in dealing with unrepresented defendants); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 454 (2009) (discussing prosecutors' disclosure obligation under ABA Model Rule 3.8(d)); N.Y. City Bar Comm. on Prof'l Ethics, Formal Op. 2 (2018) (discussing prosecutors' post-conviction obligations); N.Y.C. Bar Comm. on Prof'l Ethics, Formal Op. 3 (2016) (discussing prosecutors' disclosure obligation).

9. *See* Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 157-63 (2016) (identifying "signs that . . . disciplinary authorities may be taking prosecutorial misconduct more seriously").

10. *See, e.g.*, Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2091 (2010); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 963 (2009); H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability and a Modest Proposal*, 63 CATH. U. L. REV. 51, 56 (2013); Green, *supra* note 7, at 462-63; Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WISC.

And yet, when it comes to influencing prosecutors' work, prosecutorial ethics rules do not rank high on criminal justice reformers' wish list. For example, the National Association of Criminal Defense Lawyers (NACDL), which has spent years working to expand prosecutors' pretrial disclosure obligations, has focused on legislative reform.[11] Notwithstanding legislative victories in New York, Virginia, California, Texas, Louisiana, Ohio, and North Carolina,[12] prosecutors' disclosure obligations in federal proceedings and in many other states remain too limited from the defense bar's perspective. The NACDL knows that when legislative reform efforts falter, prosecutorial disclosure might be expanded through the interpretation and enforcement of professional conduct rules that are already in place in every jurisdiction: The NACDL has taken note of decisions interpreting state counterparts to Rule 3.8(d) of the ABA Model Rules of Professional Conduct (Model Rules)[13] to be more demanding than prosecutors' constitutional obligations under constitutional case law,[14] and has published articles encouraging defense lawyers to try to obtain court orders based on these decisions.[15] But it was not until 2019 that the NACDL added Rule

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L. REV. 399, 400-01 (2006); *Model for Judicial Oversight and Regulation of the* Brady *Disclosure Duty*, 46 HOFSTRA L. REV. 87, 89 (2017); Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies That Prove That Assumption Wrong*, 80 FORDHAM L. REV. 537, 539 (2011); Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 LEWIS & CLARK L. REV. 573, 579 (2017); Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1591 (2010); Bradley T. Tennis, Note, Uniform Ethical Regulation of Federal Prosecutors, 120 YALE L.J. 144, 148 (2010).

11. *See Discovery Reform Proposals*, NAT'L ASS'N CRIM. DEF. LAW. (Mar. 9, 2020), https://www.nacdl.org/criminaldefense.aspx?id=31327&libID=31296.

12. *See Discovery Reform Legislative Victories*, NAT'L ASS'N CRIM. DEF. LAW. (Apr. 25, 2019), https://www.nacdl.org/criminaldefense.aspx?id=31324&libID=31293.

13. MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2020) provides:

> The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

14. *See, e.g.*, N.Y.C. Bar Comm. on Prof'l Ethics, Formal Op. 3 (2016); *In re* Disciplinary Action Against Feland, 820 N.W.2d 672, 681 (N.D. 2012). *But see In re* Riek, 834 N.W.2d 384, 392-93 (Wis. 2013); Disciplinary Counsel v. Kellogg-Martin, 923 N.E.2d 125, 131 (Ohio 2010).

15. *See* Barry Scheck & Nancy Gertner, *Combatting Brady Violations with an 'Ethical Rule' Order for the Disclosure of Favorable Evidence*, THE CHAMPION, May 2013, at 40; Irwin H. Schwartz, *Beyond Brady: Using Model Rule 3.8(d) in Federal Court for Discovery of Exculpatory Information*, THE CHAMPION, Mar. 2010, at 34; *Legislation, Model Laws, Ethics Rules & Commentary*, NAT'L ASS'N CRIM. DEF. LAW. (Apr. 25, 2019), https://www.nacdl.org/criminaldefense.aspx?id=19571; *see also* Theresa Newman & James E. Coleman Jr., *The Prosecutors Duty of Disclosure Under ABA Model Rule 3.8(d)*, THE CHAMPION, Mar. 2010, at 20.

3.8(d) to its own reform agenda by filing an amicus brief encouraging a state court to adopt a broad interpretation of that rule.[16]

Similarly, the national Innocence Project, while focusing significant attention on prosecutors' obligation to correct wrongful convictions, has not made a priority of Model Rules 3.8(g) and (h), which address prosecutors' post-conviction obligations by calling on prosecutors to disclose and investigate significant new exculpatory evidence and to attempt to rectify wrongful convictions.[17] The organization takes justifiable pride in its efforts to promote law reform directed at procedural deficiencies that contribute to wrongful convictions, including erroneous eyewitness identifications, unreliable forensic evidence, false confessions, perjurious informant testimony, police and prosecutorial misconduct, and incompetent defense representation.[18] It also pursues law reform to make it easier to detect and correct wrongful convictions, including laws to enhance access to post-conviction DNA testing.[19] In publicizing its reform efforts, the Innocence Project does not credit whatever efforts it undertakes to encourage state courts to adopt ethics rules, based on Model Rule 3.8(g) and (h).[20] Moreover, the organization's efforts to hold prosecutors accountable for misconduct only recently expanded to include promoting more rigorous disciplinary enforcement.[21]

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16. *See* Brief of Amici Curiae in Support of the Board of Professional Responsibility, *In re*: Petition to Stay the Effectiveness of Formal Ethics Op. 2017-F-163 and Petition to Vacate Formal Ethics Op. 2017-F-163, 582 S.W.3d 200 (Tenn. 2019) (No. M2018-01932-SC-BAR-BP), https://www.nacdl.org/getattachment/6f9ae87c-9805-428f-8cf0-dc541a9a4783/in-re-petition-to-stay-effectiveness-of-formal-ethics-opinion-2017-f-163-and-petition-to-vacate-formal-ethics-opinion-2017-f-163.pdf.

17. MODEL RULES OF PROF'L CONDUCT r. 3.8(g) provides:

> (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
>
> (1) promptly disclose that evidence to an appropriate court or authority, and
>
> (2) if the conviction was obtained in the prosecutor's jurisdiction,
>
> (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
>
> (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

MODEL RULES OF PROF'L CONDUCT r. 3.8(h) provides:

> When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

18. *See Policy Reform*, INNOCENCE PROJECT, https://www.innocenceproject.org/policy/ (last visited Feb. 17, 2020).

19. *Id.*

20. *See id.*

21. Deborah Becker, *Innocence Project Calls for Probe into 2 Former State Prosecutors in Amherst Drug Lab Scandal*, WBUR NEWS (July 21, 2017), https://www.wbur.org/news/2017/

Criminal justice reform groups typically explore multiple avenues for improving the law and legal processes. Therefore, even if legislative reform might seem preferable from any number of perspectives, one might expect organizations such as the NACDL and the Innocence Project to also explore possibilities for influencing prosecutors' work through the disciplinary process—that is, by encouraging courts and disciplinary bodies to adopt, interpret, and enforce professional conduct rules so as to demand more of prosecutors. But there are a host of reasons, including the following, why advocates of criminal justice reform might instinctively overlook or disfavor prosecutorial ethics rules and their enforcement as a potential instrument of change.

First, there is a well-founded skepticism among defense lawyers about the utility of prosecutorial ethics rules. Many in the defense bar perceive that disciplinary authorities have historically been disinclined to initiate proceedings against prosecutors, and commentators have substantiated this perception.[22] While some disciplinary bodies may now be taking prosecutorial misconduct more seriously,[23] the change has not been significant enough to alter defense lawyers' perception.

Second, and perhaps in part because of how rarely prosecutors are sanctioned, many in the defense bar do not even perceive professional conduct rules to be a meaningful source of legal obligation for prosecutors. Instead, they assume that professional conduct rules establish "ethical" responsibilities, not legal responsibilities, and therefore do not legally bind prosecutors. This is, however, at least a partial misunderstanding.

It is true that the Model Rules themselves are not enforceable law but are simply the ABA's proposal for rules to be adopted by

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07/21/innocence-project-foster-kaczamarek-drug-lab; Innocence Staff, *Innocence Project Files Lawsuit to Open Former ADA's Disciplinary Records*, INNOCENCE PROJECT (May 22, 2019), https://www.innocenceproject.org/innocence-project-files-lawsuit-to-open-former-adas-disciplinary-records; *see also* Mensah M. Dean, *Complaint: Prosecutor Knew Witnesses Were Lying During Retrial of Innocent Man*, PHILA. INQUIRER (Aug. 23, 2018), https://www.inquirer.com/philly/news/crime/prosecutor-misconduct-michael-wright-dna-evidence-innocence-project-20180823.html; Nina Morrison, *What Happens When Prosecutors Break the Law?*, N.Y. TIMES (June 18, 2018), https://www.nytimes.com/2018/06/18/opinion/kurtzrock-suffolk-county-prosecutor.html; Katie Mulvaney, *Journal Exclusive–Free After Quarter-Century in Prison, Raymond 'Beaver' Tempest Wants Prosecutor Disciplined*, PROVIDENCE J. (July 27, 2019, 10:18 AM), https://www.providencejournal.com/news/20190727/journal-exclusive---free-after-quarter-century-in-prison-raymond-beaver-tempest-wants-prosecutor-disciplined.

22. *See, e.g.*, Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 277 (2007); Rudin, *supra* note 10, at 541-42, 547-48, 560-63, 572; Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC L. REV. 275, 277-78 (2004).

23. *See* Green & Levine, *supra* note 9, at 157-63 (discussing cases signaling that disciplinary agencies are regulating prosecutors more rigorously than in the past).

state courts. Likewise, "ethics opinions" published by the ABA and state and local bar associations have no legal authority but merely reflect the view of bar associations' ethics committees regarding the meaning and application of professional conduct rules. But states' professional conduct codes most assuredly are "law."[24] For example, New York prosecutors have a legal obligation to comply with applicable provisions of the New York Rules of Professional Conduct, just as they must comply with constitutional law, statutes, procedural rules, and other court rules. Adopted by courts in their rule-making capacity, the states' professional conduct codes are part of the "law of lawyering." They are enforceable against lawyers by the state courts through their disciplinary processes. In interpreting and applying their professional conduct rules, courts often give weight to bar associations' ethics opinions.[25]

Third, even if defense lawyers understand that professional conduct rules are "law" that may be enforced against prosecutors, at least in disciplinary proceedings, they may not regard these rules as law that is of utility to their clients, who have no stake in the professional discipline of prosecutors. This is largely—but not entirely—a correct understanding.

The stated purpose of professional conduct codes is not to establish parties' rights—for example, whether a client has a malpractice claim against a lawyer or whether a lawyer's wrongdoing in litigation entitles an opposing party to a remedy—but simply to establish standards of professional conduct to be used in lawyer discipline proceedings.[26] One might therefore assume that courts in criminal

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24. *See* Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73, 90-98 (2009) (explaining why it is a mistake to regard ethics rules "as weak or inconsequential law").

25. For differing views on the utility of ethics opinions, *see generally* Jorge L. Carro, *The Ethics Opinions of the Bar: A Valuable Contribution or an Exercise in Futility?*, 26 IND. L. REV. 1 (1992); Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67 (1981); Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731 (2002); David G. Trager, *Do Bar Association Ethics Committees Serve the Public or the Profession? An Argument for Process Change*, 34 HOFSTRA L. REV. 1129 (2006).

26. *See* MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2020) (quoting the Preface of the MRPC):

> Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a law-

cases will leave the enforcement of prosecutorial ethics rules to disciplinary authorities, whose lax enforcement of these rules leaves prosecutors free to ignore them. As a general matter, there is legitimacy to this concern. Although courts sometimes enforce or give weight to the professional conduct rules in the course of adjudication, including criminal adjudication,[27] they rarely do so.[28] In pretrial or trial practice, courts generally look to case law rather than ethics rules to determine prosecutorial disclosure obligations and rarely do courts refer prosecutors who have violated ethics rules to disciplinary authorities.[29] Particularly in post-conviction proceedings, courts are unlikely to provide remedies for prosecutorial misconduct that violates disciplinary rules but that does not violate constitutional or statutory provisions.[30] Indeed, even constitutional and statutory violations are not necessarily remediable, but may be subject to harmless error analysis and other doctrines that limit the availability of remedies in order to promote finality and judicial economy.[31] The utility of professional conduct rules, from any individual criminal defendant's perspective, may depend on persuading trial judges in criminal cases to enforce them, and that may be a heavy lift.

Further, if disciplinary authorities and courts were to enforce prosecutorial ethics rules more rigorously in the disciplinary process, where they are meant to be enforced, criminal defendants might be harmed more than helped. Punishing a prosecutor provides no direct benefit to a defendant harmed by the prosecutor's

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yer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.

27. *See, e.g.*, State v. Miller, 600 N.W.2d 457, 468 (Minn. 1999) (suppressing evidence as remedy for prosecutor's violation of MINN. RULES OF PROF'L CONDUCT r. 4.2 (MINN. BAR ASS'N 1993)).

28. *See, e.g.*, United States v. Hammad, 858 F.2d 834, 842 (2d Cir. 1988) (finding that suppression was not a permissible remedy for prosecutor's violation of the rule forbidding communications with represented parties); United States v. Guerrerio, 675 F. Supp. 1430, 1433 (S.D.N.Y. 1987) ("Although suppression necessarily results from a constitutional violation, the same result is not a foregone conclusion in the case of an ethical violation by a prosecutor.").

29. *See, e.g.*, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1972–77, 2005–06, 2011–13, 2018–22, 2033 (2010) [hereinafter *New Perspectives on Brady: Report of Working Groups*].

30. *See, e.g.*, House v. State, 947 S.W.2d 251, 253 (Tex. Crim. App. 1997).

31. *See, e.g.*, John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating* Bagley *Materiality,* Strickland *Prejudice, and Cumulative Harmless Error*, 95 J. CRIM. L. & CRIMINOLOGY 1153, 1155 (2004) (discussing ineffective assistance of counsel claims and *Brady* violations that do not lead to reversal because of the harmless error doctrine); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WISC. L. REV. 35, 56 (2005) (discussing violations of substantive constitutional rights resulting in wrongful convictions are often not remediable due to the harmless error doctrine).

misconduct and it may not provide an indirect benefit either, because disciplinary cases against prosecutors are often brought years after the prosecutorial conduct in question, and then only after the impropriety of the prosecutor's conduct has already been adjudicated in court proceedings. An increased risk of discipline for professional misconduct may encourage future prosecutors to comply more carefully with their legal and ethical obligations, if the possibility of discipline comes to seem less remote. But then, there may be unintended harms that make other enforcement mechanisms preferable to disciplinary enforcement. Relations between opposing lawyers in criminal cases can be fraught,[32] and discipline ups the ante.[33] It is hard to think of anything more provocative than an accusation of professional misconduct, and the bad feeling it produces may disadvantage not only the current client but future clients with cases against the accused prosecutor or others in the prosecutor's office.[34] Further, an accusation of professional misconduct may encourage retaliation, putting the defense lawyer on the defensive.

Fourth, even if professional conduct rules were enforced, their reach might be too limited to make much of a difference. By their very nature, the normative standards set by professional conduct rules are meant to be a "floor."[35] That is, the rules define the least that lawyers can get away with to avoid being subject to a disciplinary sanction—for example, the least that a lawyer must do to be

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32. *See* Bruce A. Green, *The Right to Two Criminal Defense Lawyers*, 69 MERCER L. REV. 675, 687 (2018) ("In some jurisdictions, individual or institutional relationships between defense lawyers and prosecutors are mistrustful or even hostile.").

33. Levenson, *supra* note 7, at 768 ("[D]efense lawyers must resist the temptation to turn every prosecutorial mistake into an ethical violation. While defense lawyers have a duty to act zealously on behalf of their clients, prosecutors who feel attacked are less likely to act in a collaborative manner, especially when such collaboration might benefit a defendant.").

34. The New York Association of Criminal Defense Lawyers established the Prosecutorial and Judicial Complaint Center (PJCC) as an investigative and reporting center for such misconduct. The PJCC's was created because criminal defense lawyers historically were loath to file complaints against prosecutors, fearing potential repercussions against future clients and themselves. The PJCC, despite public pronouncements of its work and repeated informal complaints made by defense lawyers and judges, has received few formal complaints from defense lawyers about prosecutorial misconduct. The perception is that disciplinary authorities will not act to sanction prosecutors. *Prosecutorial and Judicial Complaint Committee*, N.Y. ST. ASS'N CRIM. DEF. LAW., https://nysacdl.site-ym.com/page/PJCC (last visited Feb. 17, 2020).

35. *See, e.g.*, N.Y.C. Bar Comm. on Prof'l Ethics, Formal Op. 2 (2018) ("[T]he Rules governing conduct of prosecutors were adopted solely for purposes of professional discipline. Like other rules, they 'state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.' These Rules are not meant to state the limit of what prosecutors and their offices can or should do to rectify wrongful convictions." (quoting N.Y. RULES OF PROF'L CONDUCT ¶ 6 (N.Y. BAR ASS'N 2018))).

regarded as competent,[36] to avoid assisting a client's criminal act,[37] or to avoid using perjury at trial.[38] Reformers do not want to establish *minimal* requirements for prosecutors but to establish rigorous requirements for prosecutors to prevent and correct wrongful convictions. A legislative reform effort invariably holds out promise to achieve more demanding normative requirements. Moreover, once norms governing prosecutors' conduct are codified in criminal procedure rules or statutes, they are often enforceable through the disciplinary process: a prosecutor's deliberate violation of a procedural obligation is likely to be subject to sanction under the professional conduct rules;[39] indeed, even a prosecutor's negligent failure to fulfill a procedural obligation may be sanctionable, at least in theory.[40] Consequently, if one were confident of success, a defense effort aimed at reforming prosecutorial conduct would always favor legislative over disciplinary reform. Disciplinary reform may seem to be worth pursuing only if legislative reform is likely to be unavailing.

Further, professional conduct rules typically address lawyers' professional conduct at a level of generality and focus on areas of conduct that might be thought to implicate lawyers' ethics; they do not address social or criminal-justice policy per se. This, too, inherently limits their reach and scope. The more detailed, technical, and restrictive the rules become—that is, the more they look like legislation—the less legitimacy they have as professional conduct or "ethics" rules, and the more difficult it becomes to persuade courts to adopt them and uphold them in the face of legal challenges.[41] On the other hand, rules that are sufficiently vague to

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36. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2020).

37. *See id.* r. 1.2(d).

38. *See id.* r. 3.3.

39. *See, e.g.*, *id.* r. 3.4(a).

40. *See id.* r. 1.1; *see also* Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 13-28 (2009) (discussing the potential role of the competence rule in regulating prosecutors).

41. Model Rule 3.8(e), which some state courts have declined to adopt, is a case in point. Its premise is straightforward—namely, that prosecutors should not chill defense lawyers' relationship with counsel and defendants' willingness to confide in their lawyers by needlessly subpoenaing defense lawyers to testify about their clients. The underlying idea that lawyers should not intrude on the opposing party's confidential relationship with counsel finds expression in various rules, including Rule 4.2, which restricts communications with represented persons, and Rule 4.4(b), which requires the disclosure of another party's inadvertently disclosed information. But Rule 3.8(e) is drafted at a level of detail that makes it seem, at least to some, more legislative than ethical. *See, e.g.*, Stern v. U.S. Dist. Court, 214 F.3d 4, 20 (1st Cir. 2000) ("Local Rule 3.8(f) [the counterpart to current ABA Model Rule 3.8(e)], though doubtless motivated by ethical concerns, has outgrown those humble beginnings. . . . As written, Local Rule 3.8(f) is more than an ethical standard. It adds a novel procedural step—the opportunity for a pre-service adversarial hearing—and to compound the matter, ordains that the hearing be conducted with new substantive standards in mind.").

gain judicial acceptance as ethics rules are likely to leave room for prosecutors to interpret and apply them liberally in ways that weaken their significance.

Fifth, from a historical perspective, efforts to employ the professional conduct rules as a means of reining in prosecutorial excess have not been hugely successful. For example, ABA Model Rule 3.8(e), designed to curb prosecutors' practice of subpoenaing lawyers for evidence about their clients, has not been rigorously enforced in states that have adopted it.[42] Likewise, efforts to persuade courts to interpret and apply the no-contact rule to restrict police investigations made only a marginal impact.[43]

For these reasons and perhaps others, criminal justice reformers might intuitively favor legislative reform—and, perhaps, even the reform of judicial decisional law—over the amendment and enforcement of professional conduct rules. And they would be right, in general, to see legislative reform as more promising and significant. By way of example, many years of reform efforts in New York recently culminated in the adoption of a new criminal procedure law which, among other things, expanded defendants' discovery rights in criminal cases.[44] The law details what prosecutors must provide to the defense and establishes timing requirements as well as procedural consequences for prosecutors' failure to comply.[45] By their nature, professional conduct rules could never be as demanding or effective.

Does this mean, however, that reformers should not expend any energy encouraging state courts to adopt and enforce prosecutorial ethics rules? This article examines that question, focusing on the rules noted above—those governing prosecutors' pretrial disclosure obligations and their post-conviction obligations. It examines the case for expanding reform efforts to take advantage of the professional conduct rules. As Part II discusses, prosecutors throughout the country are already subject to a version of Model Rule 3.8(d),

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42. *See supra* note 41; *see also* Green, *supra* note 7, at 471 ("Although many states have Rule 3.8(e) on the books, it is questionable whether the provision has an impact in the federal grand jury investigations at which it was principally directed."). For a recent and rare exception, *see* Office of Disciplinary Counsel v. Fina, No. 2624, 2020 Pa. LEXIS 1056 (Pa. Feb. 19, 2020).

43. *See* Green, *supra* note 7, at 475-76.

44. N.Y. CRIM. PROC. LAW § 245 (eff. 1/01/2020); *see* Barry Kamins, *Bail, Discovery and Speedy Trial: The New Legislation*, N.Y.L.J. (May 31, 2019, 12:30 PM), https://www.law.com/newyorklawjournal/2019/05/31/bail-discovery-and-speedy-trial-the-new-legislation/ (analyzing new discovery statute, which replaced "one of the most regressive in the nation").

45. *See* Kamins, *supra* note 44.

which requires prosecutors to disclose evidence that "tends to negate the guilt of the accused;" reformers might attempt to persuade courts to interpret the rule to demand broader and/or earlier disclosure than does the *Brady* case law. Additionally, as Part III discusses, prosecutors in only 19 states are subject to a version of Rules 3.8(g) and/or 3.8(h); reformers might try to persuade other state judiciaries to adopt one or both provisions. In both cases, one might wonder whether the effort is worthwhile given the prospects for success and the potential payout. While the likelihood of success presumably varies from jurisdiction to jurisdiction, success in some jurisdictions is demonstrably achievable, and, we argue, successful efforts will be meaningfully rewarded.

II. PROSECUTORS' PRETRIAL DUTY OF DISCLOSURE

Among the most contentious issues in criminal practice is the extent of prosecutors' disclosure obligations. Although the term "Brady obligations" is sometimes used as a shorthand, prosecutors' obligations to disclose evidence and information to the defense derive from various sources including federal and state constitutional provisions (as interpreted by courts), federal and state statutes, court rules and orders, and professional conduct rules. Prosecutorial disclosure serves an essential role, enabling defense lawyers to counsel their clients about the decisions they must make, to negotiate effectively, to defend their clients competently in court, and to make effective sentencing arguments. Prosecutors' obligations vary from jurisdiction to jurisdiction and are often uncertain in scope, but, in general, defense lawyers perceive both that prosecutors' disclosure obligations are too narrow and that prosecutors often fail to fully comply with them. Consequently, prosecutorial disclosure is a significant target of criminal justice reform efforts.

The starting point for discussions of prosecutors' pretrial disclosure, and a focus of the defense bar's dissatisfaction, is the constitutional obligation established in *Brady v. Maryland*[46] and subsequent decisions. The judicial decisions generally address the question of whether a conviction must be overturned because of the prosecution's failure to disclose favorable evidence to the accused for use in defending the case at trial. *Brady*, the leading United States Supreme Court decision, held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due

46. 373 U.S. 83 (1963).

process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[47] A later decision, *United States v. Bagley*,[48] defined "material to guilt or punishment" as a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[49] The materiality standard is the source of significant and ongoing controversy because, in most jurisdictions, this standard for reversal on appeal is also utilized as the standard for defining prosecutors' initial constitutional duty to provide pretrial disclosure of information.[50] In these jurisdictions, the prosecution does not have to produce favorable evidence to the defense if the evidence is deemed unlikely to contribute to an acquittal.[51] One might argue that prosecutors are constitutionally obligated to disclose all favorable evidence before trial because the materiality standard, like a harmless error standard, applies only post-trial and is designed to avoid the unnecessary expenditure of resources when it is a foregone conclusion that a retrial will result in another conviction. But only a few courts agree.[52] The Department of Justice (DOJ) endorses the pretrial "materiality" standard while urging prosecutors to err on the side of disclosure.[53] The ABA,

47. *Id.* at 87.

48. 473 U.S. 667 (1985).

49. *Id.* at 682.

50. *See* Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321, 1334-35 (2011).

51. *See, e.g.*, United States v. Coppa, 267 F.3d 132, 140 (2d Cir. 2001); *see also* United States v. Causey, 356 F. Supp. 2d 681, 696 (S.D. Tex. 2005) (adopting materiality as the standard).

52. *See* United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005) ("[T]he government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed—with the benefit of hindsight—as affecting the outcome of the trial."); United States v. Acosta, 357 F. Supp. 2d 1228, 1233 (D. Nev. 2004) ("Simply because 'material' failures to disclose exculpatory evidence violate due process does not mean only 'material' disclosures are required."); United States v. Carter, 313 F. Supp. 2d 921, 925 (E.D. Wis. 2004) (same); United States v. Sudikoff, 36 F. Supp. 2d 1196, 1199 (C.D. Cal. 1999) ("Because the definitions of materiality as applied to appellate review are not appropriate in the pretrial discovery context, the Court relies on the plain meaning of 'evidence favorable to an accused' as discussed in *Brady*.").

53. U.S. DEP'T JUSTICE, JUSTICE MANUAL § 9-5.001(B)(1) (2010) ("Exculpatory and impeachment evidence is material to a finding of guilt—and thus the Constitution requires disclosure—when there is a reasonable probability that effective use of the evidence will result in an acquittal. Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence. While ordinarily, evidence that would not be admissible at trial need not be disclosed, this policy encourages prosecutors to err on the side of disclosure if admissibility is a close question." (citations omitted)).

in contrast, takes the view that prosecutors should disclose favorable evidence regardless of whether it appears to be material.[54] The practice among state prosecutors varies.[55] Defense lawyers lack confidence that prosecutors correctly assess whether favorable evidence is material and believe that prosecutors, based on erroneous assessments, often withhold favorable evidence that is in fact material.[56]

Another source of defense lawyers' dissatisfaction is prosecutors' delay in disclosing evidence and information. Although most federal and state discovery laws and rules require prosecutors to make "timely disclosure," some courts regard disclosure to be sufficiently timely if it is made on the eve of trial, in time for the defense to offer it into evidence.[57] Some courts permit even longer delay if favorable evidence is useful only to impeach prosecution witnesses.[58] Another sore point is whether favorable evidence must be disclosed at all if a case ends in a guilty plea, not a trial. Defense lawyers perceive that favorable evidence is needed not only to prepare for trial but to advise the accused whether to plead guilty, but many courts disagree.[59]

Reformers' efforts over the past two decades to expand prosecutors' disclosure obligations have taken place against the background of cases in which prosecutors failed even to meet *Brady*'s minimal constitutional requirement. Perhaps most significant was the 2009 trial of Senator Ted Stevens in which federal prosecutors withheld exculpatory material, which, when discovered after the trial, resulted in the government's agreement to set aside the jury's

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54. *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION Standard 3.5-4 (AM. BAR ASS'N 2017) ("Before trial of a criminal case, . . . regardless of whether the prosecutor believes it is likely to change the result of the proceeding, . . . [a prosecutor should disclose] all information in the possession of the prosecution or its agents that tends to negate the guilt of the accused, mitigate the offense charged, impeach the government's witnesses or evidence, or reduce the likely punishment of the accused if convicted.").

55. *See* Schwartz, *supra* note 15, at 34-35.

56. Alafair S. Burke, *Improving Prosecutorial Decision Making*: *Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1590-91 (2006) (discussing irrationality in human decision making as it affects prosecutors); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases,* 2006 WISC. L. REV. 291 (2006) (discussing tunnel vision that leads to failure to disclose information and other issues); Bennett L. Gershman, *Litigating* Brady v. Maryland*; Games Prosecutors Play*, 57 CASE W. L. REV. 531, 538 (2007) (discussing various ways in which prosecutors fail to comply with disclosure obligations).

57. *See* Yaroshefsky, *supra* note 50, at 1337.

58. *See, e.g.*, United States *ex rel.* Lucas v. Regan, 503 F.2d 1, 3 n.1 (2d Cir. 1974) ("Neither *Brady* nor any other case we know of requires that disclosure under *Brady* must be made before trial.").

59. *See* Peter A. Joy & Kevin C. McMunigal, *Prosecutorial Disclosure of Exculpatory Information in the Guilty Plea Context: Current Law*, CRIM. JUST., Fall 2007, at 50, 50.

guilty verdict and end the prosecution.[60] The trial judge, District Judge Emmett Sullivan, later observed that he had "never seen mishandling and misconduct like what I have seen" committed by DOJ's trial prosecutors,[61] and he initiated the practice of issuing a "standing *Brady* order" in every criminal case so that future prosecutors who deliberately violated their *Brady* obligations could be held in contempt of court.[62] Elsewhere around the country, a federal judge in Boston excoriated federal prosecutors for discovery failures and issued an order to show cause why they should not be sanctioned,[63] and federal judges in Florida and Montana chastised other federal prosecutors who withheld key evidence.[64] Cases such as these spurred proposed federal legislation to expand federal prosecutors' disclosure obligations,[65] but the proposal stalled in the face of DOJ opposition.

Some state legislatures were more responsive to high profile cases of prosecutors' discovery misconduct. Most significantly, the wrongful prosecution of members of the Duke University lacrosse team on sexual assault charges in 2006 ultimately led to the disbarment of District Attorney Michael Nifong for withholding exculpatory evidence, among other wrongdoing,[66] and then to North Carolina legislation liberalizing the state's disclosure rules.[67] In Texas,

60. *See* Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 VAND. L. REV. 297, 315-17 (2019) (discussing prosecutorial misconduct in the Ted Stevens prosecution and its significance to discovery reform efforts); *see also* Bennett L. Gershman, *Subverting* Brady v. Maryland *and Denying a Fair Trial: Studying the Schuelke Report*, 64 MERCER L. REV. 683, 683-86 (2013) (describing a report of prosecutorial misconduct in the Ted Stevens case).

61. Neil A. Lewis, *Tables Turned on Prosecution in Stevens Case*, N.Y. TIMES (Apr. 7, 2009), http://www.nytimes.com/2009/04/08/us/politics/08stevens.html.

62. Emmett G. Sullivan, *Enforcing Compliance with Constitutionally Required Disclosures: A Proposed Rule,* CARDOZO L. REV. DE NOVO 138, attachment 3 (2016) (Order).

63. *See* United States v. Jones, 620 F. Supp. 2d 163, 185 (D. Mass. 2009); *see also* United States v. Jones, 686 F. Supp. 2d 147, 149 (D. Mass. 2010).

64. United States v. Shaygan, 661 F. Supp. 2d 1289, 1322, 1324 (S.D. Fla. 2009); United States v. W.R. Grace, 455 F. Supp. 2d 1122 (D. Mont. 2006).

65. *See* Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 641 (2013) (discussing the proposed Fairness in Disclosure of Evidence Act of 2012).

66. *See* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 306 (2008); Duff Wilson, *Prosecutor in Duke Case Is Disbarred for Ethics Breaches*, N.Y. TIMES (June 16, 2007), http://www.nytimes.com/2007/06/16/us/16cnd-nifong.html.

67. *See* N.C. GEN. STAT. § 15A (2019).

similar reforms followed the highly publicized exoneration of Michael Morton,[68] who was convicted of murdering his wife and imprisoned for a quarter century before his conviction was overturned based on the prosecution's suppression of exculpatory evidence.[69]

Where courts cannot be persuaded to interpret the constitution more demandingly and legislatures cannot be persuaded to adopt more demanding statutory requirements, reformers might turn their attention to professional conduct rules as a basis for broader prosecutorial disclosure obligations. Model Rule 3.8(d) calls for prosecutors to disclose evidence and information "that tends to negate the guilt of the accused,"[70] as did an earlier provision of the ABA Code of Professional Responsibility,[71] and every state ethics code now includes a corresponding provision.[72] For decades, commentators have pointed out that the professional conduct rule is more demanding than the constitutional case law,[73] and the United States Supreme Court itself acknowledged as much, observing that "the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical . . . obligations" than under Brady[74] and that Brady" requires less of the prosecution than" does Model Rule 3.8(d).[75]

The ABA drew attention to the potential significance of the rule in 2009, when its Standing Committee on Ethics and Professional Responsibility issued Opinion 09-454,[76] which discussed how Model Rule 3.8(d) differs from, and is in some respects more demanding

68. Michael Morton Act, 2013 Tex. Gen. Laws 106 (codified as amendment to TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2019)).

69. Molly Hennessy-Fiske, *Inquiry Sought for Texas Prosecutor over Wrongful Conviction*, L.A. TIMES (Dec. 20, 2011, 12:00 AM), http://articles.latimes.com/2011/dec/20/nation/la-na-texas-prosecutor-20111220.

70. Model Rules of Professional Conduct r. 3.8(d) (Am. Bar Ass'n 2020), requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."

71. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(B) (AM. BAR ASS'N 2020).

72. The last state to adopt a version of Rule 3.8(d) was California, which adopted the provision in 2018 over significant opposition by the California District Attorneys' Association, *see* Letter from Patrick McGrath, President, Cal. Dist. Attorneys' Ass'n, to Chairpersons of the Commission for the Revision of the Rules of Professional Conduct (Oct. 1, 2015) (on file with the author). *See* Don J. DeBenedictis, *State Could Soon Impose Ethics Rules on Prosecutors*, the Daily Journal, April 30, 2015 (quoting Chief Justice: "It is time to have a uniform standard with uniform pressure on prosecutors to disclose information in a timely fashion.")

73. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 454 (2009).

74. Cone v. Bell, 556 U.S. 449, 470 n.15 (2009).

75. *Kyles v. Whitley, 514 U.S. 419, 437 (1995).*

76. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 454.

than, the *Brady* line of decisions.[77] Most importantly, the opinion concluded that Rule 3.8(d) "does not implicitly include the materiality limitation recognized in the constitutional case law," stemming from *Brady v. Maryland*, but instead "requires prosecutors to disclose favorable evidence so that the defense can decide on its utility."[78] Additionally, the opinion explained that the rule's requirement of "timely disclosure" required prosecutors to disclose favorable evidence "as soon as reasonably practical."[79] This means that disclosure must be made in time for the defense to take account of favorable evidence in conducting pretrial investigation, developing strategy, and advising the accused whether to plead guilty. In these respects, prosecutors' disclosure obligation under the rule is more demanding than under the constitutional case law in most jurisdictions. On the other hand, the opinion recognized an important respect in which the rule is less demanding—namely, it requires disclosure only of evidence and information "known" to the prosecutor and does not obligate the prosecutor to seek out favorable information in the hands of investigators or other government agents.[80]

The ABA's interpretation of its model rule, although potentially influential, is not authoritative. Although states' rules of professional conduct corresponding to Model Rule 3.8(d) are identically or similarly worded, state courts are free to interpret their rules differently. Prosecutors can be expected to urge their state courts to do so. For example, the DOJ has consistently argued that interpreting Rule 3.8(d) more broadly than other law will create a "confusing double standard" and would let defendants "engage in blind fishing expeditions through the government's files."[81] Unless their state judiciary has issued a decision or other authoritative writing adopting the ABA's interpretation, many or most prosecutors freely ignore the ABA opinion.

The question of whether a state's version of Rule 3.8(d) imposes requirements independent of those set forth in state and federal statutes and case law may arise in any of a number of ways. A state

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77. The ABA opinion rejected the argument, which some courts have adopted, that the professional obligation under Rule 3.8(d) is coextensive with prosecutors' disclosure obligations under *Brady*. *Id.* at 3. After reviewing the history and wording of the Model Rule, the opinion concluded that the drafters of Model Rule 3.8(d) "made no attempt to codify the evolving constitutional case law." *Id.*

78. *Id.* at 2.

79. *Id.* at 6.

80. *Id.* at 5-6.

81. Eli Hager & The Marshall Project, *DOJ is Challenging Tennessee Ethics Opinion on Prosecutors Obligation to Disclose Evidence*, ABA J. (Aug. 16, 2018, 2:00 PM), http://www.abajournal.com/news/article/doj_is_challenging_tennessee_ethics_opinion_on_prosecutors_obligations_to_d.

or local bar association might issue an advisory opinion interpreting its state's rule broadly; in some states, these opinions would be reviewable by the state's high court.[82] Alternatively, a state disciplinary authority relying on a broad interpretation of the state's rule might proceed against a prosecutor who withheld favorable evidence from the accused.[83] Or a defense lawyer in a criminal trial might ask the trial judge to order the prosecutor to make disclosure in compliance not only with relevant case law, statutes, and procedural rules but also with the state's version of Rule 3.8(d), as broadly construed.[84]

So far, authorities in only around a quarter of United States jurisdictions have considered whether its jurisdiction's counterpart to Model Rule 3.8(d) is more demanding than the constitutional case law or is merely coextensive with prosecutors' other legal duties. Those authorities have reached different conclusions. State courts and ethics committees in New York, California, Texas, North Dakota, Utah, and Washington, D.C. have agreed with the ABA's Opinion 09-454 that prosecutors' ethical duty under the rule is independent of, and in some ways more extensive than, prosecutors' other legal obligations.[85] For example, rejecting the DOJ's position, a court in Washington, D.C. disciplined a federal prosecutor under that jurisdiction's Rule 3.8(d), concluding that the rule did not include a materiality limitation.[86] Likewise, the Supreme Court of Massachusetts added a comment to its amended version of Rule 3.8 to clarify that "[t]he obligations imposed on a prosecutor by the

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82. *See, e.g.*, *In re:* Petition to Stay the Effectiveness of Ethics Op. 2017-F-163, 582 S.W.3d 200, 211 (Tenn. 2019) (vacating ethics opinion issued by the state's Board of Professional Responsibility and holding that, in general, "the ethical obligations under Rule 3.8(d) of Tennessee's Rules of Professional Conduct are coextensive in scope with the obligations of a prosecutor as provided by applicable statute, rules of criminal procedure, our state and federal constitutions, and case law").

83. *See, e.g.*, *In re* Kline, 113 A.3d 202, 213 (D.C. Cir. 2015).

84. *See supra* note 15 (citing articles discussing this strategy).

85. *See* N.Y.C. Bar Comm. on Prof'l Ethics, Formal Op. 3 (2016); *In re* Larsen, 379 P.3d 1209, 1216 (Utah 2016); Kline, 113 A.3d at 213 (concluding that the Washington, D.C. version of the rule does not include a "materiality" limitation); Schultz v. Comm'n for the Lawyer Discipline of the State Bar of Tex., No. 55649, 2015 WL 9855916, at *1 (Tex. Bd. Disciplinary App. Dec. 17, 2015) (concluding that Texas Rule 3.09(d) is "broader than *Brady*"); *In re* Disciplinary Action Against Feland, 820 N.W.2d 672 (N.D. 2012) (rejecting the argument that the North Dakota equivalent to New York Rule 3.8(b) is coextensive with Brady); People v. Gonzalez, 800 P.2d 1159, 1206-07 (Cal. 1990) (finding ethical violation based on, in part, the prosecutor's failure to timely comply with discovery obligations regardless of whether the belated failure violated the constitutional duty to disclose evidence under *Brady*).

86. *Kline*, 113 A.3d at 213. For other notable examples of discipline for failure to comply with prosecutorial disclosure obligations, *see* Green & Yaroshefsky, *supra* note 6, at 82.

rules of professional conduct are not coextensive with the obligations imposed by substantive law."[87]

However, other courts, including in Colorado, Ohio, Oklahoma, Wisconsin, Louisiana, and most recently, Tennessee, have held that, despite its wording, the rule implicitly codifies other law and demands nothing more.[88] In general, these courts reason that prosecutors would find it too difficult to have to comply with yet one more source of discovery law. For example, the Louisiana Supreme Court expressed concern about the imposition of inconsistent disclosure requirements upon prosecutors.[89] The Tennessee Supreme Court, in turn, cited this opinion and explained, "[t]o say that our ethical rules require prosecutors to consider different standards than their constitutional and legal requirements has the potential to bring about a myriad of conflicts."[90]

The question for reform groups such as the NACDL is whether to expend energy promoting the ABA's interpretation in the many states where there is no authoritative decision regarding the scope and application of Rule 3.8(d). Individual defense lawyers might also present the interpretive question, but they would obviously benefit from organizational support. Reform groups might ask the state bar's ethics committee or the state bar itself to interpret Rule 3.8(d) to require prosecutors to disclose favorable evidence known to them regardless of whether it is material in the constitutional sense, and to do so as soon as reasonably practical. But, in the end, only the judiciary can authoritatively interpret the rule.[91] While a

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87. MASS. RULES OF PROF'L CONDUCT r. 3.8 cmt. 3A.

88. *See State ex rel. Okla. Bar Ass'n v. Ward, 353 P.3d 509, 521 (Okla. 2015)* (declining to adopt the ABA Committee's interpretation of Model Rule 3.8(d) and construing the Oklahoma version of rule as "consistent with the scope of disclosure required by applicable law"); *In re* Riek, 834 N.W.2d 384, 390 (Wis. 2013) (declining to construe Wisconsin version of rule "to impose ethical obligations on prosecutors that transcend the requirements of Brady"); Disciplinary Counsel v. Kellogg-Martin, 923 N.E.2d 125, 130 (Ohio 2010) (declining to adopt an ethical duty that would "threaten prosecutors with professional discipline for failing to disclose evidence even when the applicable law does *not* require disclosure"); *see also In re* Petition to Stay the Effectiveness of Ethics Op. 2017-F-163, 582 S.W.3d 200 (Tenn. 2019). *See generally* David L. Hudson Jr., *Split Intensifies over Prosecutors' Ethical Disclosure Duties,* ABA J. (Oct. 2, 2019, 8:30 AM), http://www.abajournal.com/web/article/split-over-prosecutors-ethical-disclosure-duties-intensifies.

89. *In re* Seastrunk, 236 So. 3d 509, 519 (La. 2017); *see also Ethics Op. 2017-F-163*, 582 S.W.3d at 200.

90. *Ethics Op. 2017-F-163*, 582 S.W.3d at 209.

91. For example, in the process leading up to California's adoption of a provision based on Rule 3.8(d), proponents urged an interpretation consistent with Opinion 454. *See, e.g.*, Letter from Laurie Levinson, Professor of Law, Loyola Law Sch., and Barry C. Scheck, Professor of Law, Cardozo Sch. of Law, to the Cal. Comm'n for Revision of the Rules of Prof'l Conduct (April 10, 2015) (on file with author) ("Rule 3.8(d) is designed to be broader and independent of Brady, requiring 'timely' and prophylactic disclosure of all information that could be Brady or impeachment evidence [anything that 'tends to negate guilt or mitigate

state trial judge might be asked in a criminal prosecution to order the prosecutor to comply with Rule 3.8(d), as interpreted by the ABA, the judge may be reluctant to do so. Likewise, while disciplinary authorities might be asked to proceed against a prosecutor who withheld evidence that was favorable but not material in order to achieve an authoritative interpretation, disciplinary authorities may be similarly reluctant. These are not the only options, however. In states where the court adopts interpretive Comments to the professional conduct rules, a reform group might petition the judiciary to add a Comment codifying the ABA's interpretation of Rule 3.8(d). Alternatively, an organization might urge the judiciary to codify this interpretation in a court rule or order. For example, in response to lobbying by the Innocence Project and other organizations, the New York judiciary has adopted a standing order regarding prosecutors' disclosure obligations that is more demanding than existing case law and that tracks the language of Rule 3.8(d).[92] A willful violation of the order may be sanctioned as a contempt of court.[93]

punishment'] in order to make sure Brady violations do not occur. . . . Additionally, the rule promotes judicial efficiency by eliminating subjective 'materiality' evaluations prior to trial.").

92. The court directive and order (1) spells out three broad categories of information that should be disclosed to the defense—exculpatory, impeaching, and those relevant to suppression—precisely tailored to existing state and federal case law requiring disclosure as well as New York ethical rules; (2) makes specific reference to types of evidence that are required to be disclosed, including any benefits or promises made to witnesses for their cooperation, prior inconsistent statements and uncharged criminal conduct or convictions, and information regarding a witness's mental or physical illness or substance abuse; (3) encourages early disclosure by reminding prosecutors to produce information as soon as "reasonably possible," and presumptively no later than 30 days before the start of a felony trial and 15 days before the start of a misdemeanor trial; and (4) allows for personal sanctions against prosecutors who engage in "willful and deliberate" violations of the order. Press Release, N.Y. State Unified Court Sys., Chief Judge DiFiore Announces Implementation of New Measure Aimed at Enhancing the Delivery of Justice in Criminal Cases (Nov. 8, 2017), http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/PR17_17.pdf. The order was adopted by more than 80% of New York's lower state courts. The statewide debate about the Order contributed to the significant law reform efforts that resulted in legislation that imposes sweeping changes to disclosure practices in New York as of January 2020. The new law requires prosecutors to produce categories of information and evidence that are encompassed by Rule 3.8 (d). *See also infra* text accompanying note 93.

93. *See* Scheck & Gertner, *supra* note 15, at 41; *see also* Nancy Gertner & Barry Scheck, *How to Rein in Rogue Prosecutors*, WALL ST. J., https://www.wsj.com/articles/SB10001424052702304692804577281852966541834 (last updated Mar. 15, 2012, 7:31 PM) ("A direct order by a judge to follow the ethics rule and disclose all evidence that 'tends to negate guilt' will act as a deterrent to the overzealous prosecutor. Disobedience of a direct court order is contempt, which is an ongoing offense. So contempt prosecutions of unscrupulous prosecutors whose suppression of exculpatory evidence is discovered many years after the act won't be derailed by statute-of-limitations problems (which have been a significant obstacle to prosecuting prosecutors).").

It seems obvious that criminal defendants will benefit if the court determines that the prosecutorial obligation under Rule 3.8(d) is more demanding than the constitutional and statutory disclosure obligations. The benefit is that defendants will receive more, and prompter, disclosure. Prosecutors who do not currently comply with the admonition to resolve doubts about materiality in favor of disclosure might be expected to comply with a judicial decision that says that all favorable evidence must be disclosed under Rule 3.8(d), even if it is not material, and that this information must be disclosed as soon as reasonably practicable. This is true even though a violation of the rule in itself will probably not be remedied by the reversal of a criminal conviction. Most prosecutors presumably want to comply with professional obligations for their own sake,[94] and some of those remaining will be motivated by the risk of a disciplinary prosecution. Wholly apart from prosecutors' personal responsibility to keep current regarding their disclosure obligations,[95] prosecutors' offices can be expected to train prosecutors regarding obligations imposed by Rule 3.8(d), as interpreted by the court. Further, prosecutors can be reminded of the professional obligation in defense lawyers' pretrial requests for disclosure and discovery motions, and trial courts can be expected to issue reminders and orders referring to the distinct obligation under Rule 3.8(d) once it is established in the jurisdiction.

Even if reformers ultimately favor expanding prosecutors' disclosure obligations through legislation and constitutional decision making, their reform efforts can be enhanced by persuading state courts to adopt the ABA's interpretation of Rule 3.8(d), which accords with the plain language of the rule. The position adopted by the ABA—that prosecutors should disclose favorable evidence even if it is not material, and that this evidence should be disclosed promptly and before a guilty plea—is consistent with the positions taken by organizations pursuing discovery reform in criminal

94. For a more skeptical view, *see* United States v. Olsen, 737 F.3d 625, 630 (9th Cir. 2013) (Kozinski, J., dissenting):

> Due to the nature of a *Brady* violation, it's highly unlikely wrongdoing will ever come to light in the first place. This creates a serious moral hazard for those prosecutors who are more interested in winning a conviction than serving justice. In the rare event that the suppressed evidence does surface, the consequences usually leave the prosecution no worse than had it complied with *Brady* from the outset. . . . If the violation is found to be material (a standard that will almost never be met under the panel's construction), the prosecution gets a do-over, making it no worse off than if it had disclosed the evidence in the first place.

95. *See* Connick v. Thompson, 563 U.S. 51, 65-67 (2011).

cases.[96] When constitutional arguments are advanced and legislation is proposed that would embody the ABA's position, prosecutors push back, contending that broader disclosure will undermine the public interest by leading to obstruction of justice, excessive administrative burdens, or other harms. But prosecutors' argument becomes less credible every time a state court adopts the ABA's interpretation of Rule 3.8(d) and that state's prosecutors then start making broader disclosure without suffering demonstrably harmful consequences. Therefore, even if a state court opinion interpreting Rule 3.8(d) broadly is unlikely to be any reform group's ultimate objective, such an opinion may be an intermediate step toward a more impactful constitutional decision or statute.[97]

III. PROSECUTORS' POST-CONVICTION OBLIGATIONS

In 2008, in the wake of the innocence movement, the ABA amended the Model Rules to address prosecutors' post-conviction obligations.[98] Rule 3.8(g) established new obligations for a prosecutor who "knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted."[99] At minimum, the prosecutor must "promptly disclose that evidence to an appropriate court or authority."[100] Additionally, "if the conviction was obtained in the prosecutor's jurisdiction," the prosecutor has two further obligations[101]—the prosecutor must "promptly disclose that evidence to the defendant unless a court authorizes delay"[102] and must "undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit."[103] Finally, if the

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96. *See* text accompanying note 16, *supra*.

97. For example, West Virginia's Supreme Court issued a landmark decision recognizing prosecutors' constitutional obligation to disclose exculpatory evidence during plea bargaining—a stage when prosecutorial power is relatively unchecked. Buffey v. Ballard, 782 S.E.2d 204, 221 (W. Va. 2015) (overturning conviction predicated on guilty plea where prosecutors suppressed favorable DNA test results). A constitutional decision such as this one is preferable to a comparable interpretation of Rule 3.8(d) because a constitutional violation can result not only in professional discipline but in the reversal of a criminal conviction.

98. *See generally* Stephen A. Saltzburg, *Changes to Model Rules Impact Prosecutors*, CRIM. JUST., Spring 2008, at 1.

99. Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873 (2012); *see also* Wayne D. Garris, Jr., *Model Rule of Professional Conduct 3.8: The ABA Takes a Stand against Wrongful Convictions*, 22 GEO. J. LEGAL ETHICS 829 (2009).

100. MODEL RULES OF PROF'L CONDUCT r. 3.8(g)(1) (AM. BAR ASS'N 2020).

101. *Id.* r. 3.8(g)(2).

102. *Id.* r. 3.8(g)(2)(i).

103. *Id.* r. 3.8(g)(2)(ii).

investigation establishes clear and convincing evidence that the defendant was convicted of a crime of which the defendant is innocent, Rule 3.8(h) requires the prosecutor to attempt to rectify the wrongful conviction.[104]

As of this writing, nineteen state courts have incorporated a version of either Rule 3.8(g) or Rule 3.8(h), or both, into their professional conduct rules.[105] In late 2018, Michigan became the most recent adopter.[106] Michigan's rule was promoted by the Michigan Innocence Clinic[107] and supported by a letter from the national Innocence Project[108] as well as one from former Michigan prosecutors.[109] But in Michigan, as in some (but not all) other states, state and federal prosecutors opposed the provisions.[110] Presumably, as more state courts have adopted the rule, and time has passed without incident, prosecutors' opposition to the rule becomes increasingly less persuasive. Should reformers in the remaining states undertake comparable efforts, which may consume resources and ultimately may fail, or should they focus their efforts exclusively in other directions that they may consider to be more promising? In this instance, the payoff of a successful effort is less clear: as Section A acknowledges, there are multiple reasons to doubt the value of Rules 3.8(g) and (h). We argue in section B, however, that these provisions, and efforts to adopt them, have virtues that reformers may be overlooking.

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104. *Id.* r. 3.8(h).

105. Those states are: Alaska, Arizona, California, Colorado, Delaware, Hawaii, Idaho, Illinois, Massachusetts, Michigan, New Mexico, New York, North Carolina, North Dakota, Tennessee, Washington, West Virginia, Wisconsin, and Wyoming. *See* Letter from Bruce A. Green, Louis Stein Chair of Law, Fordham Univ. Sch. of Law, to the Justices of the Mich. Supreme Court (Sept. 11, 2018) (on file with author) (addressing the proposed amendment of Rule 3.8 of the Michigan Rules of Professional Conduct).

106. *See* MICH. PROF'L CONDUCT R. 3.8(f), (g).

107. *See* Letter from Mich. Innocence Clinic, Mich. Law, to the Justices of the Mich. Supreme Court (Aug. 27, 2018) (on file with author) (addressing comments on proposed revisions to MCR 6.502(G) and MRPC 3.8).

108. *See* Letter from Innocence Project, Cardozo Sch. of Law, to the Clerk of the Mich. Supreme Court (Aug. 30, 2018) (on file with author) (addressing the proposed amendment of MCR 6.502 and MRPC 3.8).

109. *See* Letter from James S. Brady, Peter D. Houk & John Smietanka, Former Mich. Prosecutors, to the Justices of the Supreme Court of Mich. (on file with author) (addressing the prosecutors' support of the proposed amendments to MRPC 3.8).

110. *See* Letter from Prosecuting Attorneys Ass'n of Mich., to the Justices of the Supreme Court (Aug. 31, 2018) (on file with author) (addressing the amendment to MRPC 3.8); Letter from the U.S. Attorneys' Offices, E. and W. Dists. of Mich., to the Justices of the Mich. Supreme Court (Aug. 30, 2018) (on file with author) (addressing proposed revisions to MRPC 3.8). *See generally* Green, *supra* note 99, at 889-93.

A. Reasons for Skepticism

There are at least five reasons why reformers might hesitate to put their weight behind the post-conviction provisions.

First, as far as one can tell, no prosecutor has yet been disciplined for violating Rules 3.8(g) or (h). Indeed, the drafters and proponents considered it a selling point that, unlike Rule 3.8(d), these provisions were not intended, or expected, to become the basis of discipline.[111] In large part, the assumption was that prosecutors would simply comply with the rules, which seems like the ideal outcome. But the fact that prosecutors are not expected to be punished for violating these provisions might seem to be a deficiency from the perspective of those who doubt that prosecutors will universally adhere to the rules and who believe that punishing prosecutors is important to promote prosecutors' compliance with the law. For example, reformers regard the contempt conviction of former Texas prosecutor Ken Anderson, who withheld exculpatory evidence in an arson case, as a victory for their cause.[112] If the prosecutorial ethics rules governing prosecutors' post-conviction obligations are not meant to be employed against prosecutors in disciplinary proceedings, and they do not establish rights in the adjudicative process, then one might wonder what they are for.

Second, so far, courts have only infrequently referred to these provisions in their published decisions regarding defendants' post-conviction rights and remedies.[113] Published decisions suggest that courts are unreceptive to arguments that they should enforce the rules as a new source of defendants' discovery rights.[114] And there

111. Green, *supra* note 7, at 473 ("The drafters also emphasized that the provisions were not meant to target 'well-intentioned prosecutors who make considered judgments' about whether to reopen investigations or support motions to overturn convictions.") (quoting Saltzburg, *supra* note 98, at 14).

112. *Former Williamson County Prosecutor Ken Anderson Enters Plea to Contempt for Misconduct in Michael Morton's Wrongful Murder Conviction*, INNOCENCE PROJECT (Nov. 8, 2013), https://www.innocenceproject.org/former-williamson-county-prosecutor-ken-anderson-enters-plea-to-contempt-for-misconduct-in-michael-mortonaes-wrongful-murder-conviction/ ("Today's historic precedent demonstrates that when a judge orders a prosecutor to look in his file and disclose exculpatory evidence, deliberate failure to do so is punishable by contempt." (quoting Professor Barry C. Scheck, Professor of Law at Cardozo School of Law)).

113. *See, e.g.*, Warney v. Monroe Cty., 587 F.3d 113, 125, 125 n.15 (2d Cir. 2009) ("The advocacy function of a prosecutor includes seeking exoneration and confessing error to correct an erroneous conviction. Thus, prosecutors are under a continuing ethical obligation to disclose exculpatory information discovered post-conviction." (citing and quoting MODEL RULES OF PROF'L CONDUCT r. 3.8(g), (h) (AM. BAR ASS'N 2020)).

114. *See* Simpson v. United States, No. 1:16-cv-01354-JES, 2017 U.S. Dist. LEXIS 74091, at *7 (C.D. Ill. May 16, 2017) ("[A]lthough Simpson argues that the U.S. Attorney for the Central District of Illinois owed him a duty to investigate and follow the rules of professional conduct and ethical standards, the Court does not need to determine whether the duties of the U.S. Attorney are discretionary or ministerial, because here there is 'an adequate remedy

is no evidence that criminal defense lawyers see the rules as a significant potential source of rights, or even as rhetorically valuable.

Third, the rules fall far short of what reformers want prosecutors to do in the post-conviction setting. Reformers urge prosecutors to establish conviction integrity units that investigate wrongful convictions but have a broader role, instigate investigations when doubts are raised about a convicted person's guilt based on a standard that is less exacting than that of Rule 3.8(g), and incorporate procedural reforms that are not incorporated into the rules.[115] Reformers would not be satisfied with the minimal response captured by Rules 3.8(g) and (h).

Fourth, there may be little need to influence prosecutors to make post-conviction disclosures, conduct post-conviction investigations, and remedy wrongful convictions. Prosecutors' internal commitment to correcting wrongful convictions may suffice in many or most cases, making a rule unnecessary. Prosecutors who are not sufficiently self-motivated may be motivated by professional and societal expectations that are not necessarily codified by political considerations or by concerns about their reputations.

Fifth, even assuming prosecutors need a boost, it may be more effective and/or more easily achievable to accomplish legislative reform that enhances prosecutors' post-conviction obligations and their enforcement.

B. *The Utility of Ethics Rules to Reform Efforts*

In the face of reasons for criminal justice reformers generally to be indifferent to prosecutorial ethics reform, and reasons for them to be indifferent to Rules 3.8(g) and (h) in particular, why should

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other than mandamus.'") (citation omitted); Eden v. Ryan, No. CV-15-08020-PCT-DGC, 2016 U.S. Dist. LEXIS 32415, at *20 (D. Ariz. Mar. 14, 2016) ("[T]he question of whether the prosecutor complied with ER 3.8(g) and (h) of the Arizona Rules of Professional Conduct is not an appropriate issue for habeas review") (citations omitted); State v. Harris, 893 N.W.2d 440, 456-57 (Neb. 2017) ("After a case is closed, there may be ethical duties that require prosecutors to take action upon learning of evidence that creates a reasonable likelihood the defendant did not commit the crime. But Nebraska's post-conviction statutes provide relief only for constitutional violations that render a conviction void or voidable.") (citations omitted); *see also* State v. Harris, 893 N.W.2d 317, 340 n.56 (Neb. 2017) ("After a case is closed, there may be ethical duties that require prosecutors to take action upon learning of evidence that creates a reasonable likelihood the defendant did not commit the crime. But Nebraska's post-conviction statutes provide relief only for constitutional violations that render a conviction void or voidable.").

115. *See, e.g.*, Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215 (2010); INNOCENCE PROJECT, CONVICTION INTEGRITY UNIT BEST PRACTICES (2015), https://www.innocenceproject.org/wp-content/uploads/2016/09/Conviction-Integrity-Unit.pdf.

these provisions interest reformers? We would suggest a half dozen reasons.

First, expressions of professional norms matter to individual lawyers, including prosecutors. Certainly, courts and bar associations assume these expressions matter, regardless of whether the norms are enforceable, which is why they develop and promote civility codes, professionalism codes, and other writings memorializing professional norms that are not necessarily backed by enforceable law.[116] In the criminal justice context, the ABA has expended substantial resources over the course of a half century developing volumes of ABA Criminal Justice Standards that codify aspirational standards for the work of prosecutors, defense lawyers, judges, and others in the criminal justice process.[117] One of the objectives of law is expressive.[118] Even if a professional conduct rule is never enforced, it is law—not just an aspirational standard—that has expressive force in establishing judicial and professional expectations. For prosecutors who aspire to do "the right thing"[119]—presumably, the vast majority of prosecutors—a normative statement in the law should have some influence. Like most other lawyers, most prosecutors want to be considered law-abiding. Regardless of whether discipline is a realistic possibility, they will comply with professional ethics rules because they are law and because they express a professional consensus regarding how lawyers should behave.

Second, prosecutorial conduct rules may influence the culture of prosecutors' offices and the broader judicial and professional cultures within which prosecutors function. Different prosecutors and prosecutors' offices take different approaches to many of the problems they encounter.[120] Among these are post-conviction claims of

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116. *See, e.g.*, Bruce A. Green, *Developing Standards of Conduct for Prosecutors and Criminal Defense Lawyers*, 62 HASTINGS L.J. 1093, 1095-1100 (2011) (discussing the importance of ABA standards on the prosecution and defense functions); Melissa S. Hung, Comment, *A Non-Trivial Pursuit: The California Attorney Guidelines of Civility and Professionalism*, 48 SANTA CLARA L. REV. 1127, 1142 (2008) ("Although the Guidelines do not directly confront the roots of incivility, they still have the potential to positively affect the profession despite their optional character.").

117. *See generally* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, CRIM. JUST., Winter 2009, at 10 (discussing significance of the ABA's Criminal Justice Standards).

118. *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2021 (1996). *But see* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1364 (2000).

119. *See* DIST. ATTORNEYS ASS'N OF THE STATE OF N.Y., "THE RIGHT THING": ETHICAL GUIDELINES FOR PROSECUTORS (2016), http://www.daasny.com/wp-content/uploads/2016/02/2016-Ethics-Handbook.pdf.

120. *See, e.g.*, Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1668, 1672-73 (2018) ("[T]he wide range of motivations among working prosecutors complicates the reform plans of newly elected prosecutors.").

innocence: some prosecutors are more open than others to the importance of reviewing new evidence of innocence and conceding when an innocent person was convicted.[121] We have previously argued that the greatest influence on prosecutors' professional conduct—for example, whether they take a liberal or conservative approach to disclosing exculpatory evidence—is the culture of their offices.[122] Model Rules 3.8(g) and (h) may already influence the professional culture because they are included in the set of rules on which most law students are tested in law school classes on professional responsibility and on the national bar examination on professional responsibility. Comparably, once Model Rules 3.8 (g) and (h) are incorporated into state professional conduct codes, the rules are likely to have a more significant impact because they may be included in Continuing Legal Education programs for prosecutors in the state and in writings prepared for the state's prosecutors regarding their professional practices.

What is important about the provisions, from a cultural perspective, is that they give expression to the paramount importance of avoiding and correcting wrongful convictions. Much has been written about prosecutors' overly aggressive attitudes toward their work—for example, their desire just to secure convictions.[123] To the extent that prosecutors' offices can encourage a stronger commitment to a different ethos—one that puts avoiding wrongful convictions above securing convictions—prosecutorial practices will generally improve.

Third, Rules 3.8(g) and (h) impose minimal disciplinary standards that can be useful, particularly if they are understood to be intended as a legal and professional floor, because they provide the base on which advocates can seek to build. Lawyers do not ordinarily want to be minimally competent or minimally ethical—to be doing the bare minimum that they can get away with and still hold onto their licenses. Certainly, prosecutors do not want to regard

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121. *See, e.g.*, Lara Bazelon, *Ending Innocence Denying*, 47 HOFSTRA L. REV. 393, 458 (2018) ("A small but select group of prosecutors are innocence deniers, irrationally refusing to admit that a wrongful conviction has occurred in the face of overwhelming evidence that it has occurred.").

122. Ellen Yaroshefsky & Bruce Green, *Prosecutors' Ethics in Context*, *in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 269 (Leslie C. Levin & Lynn Mather eds., 2012); *see also* Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 326-27, 327 n.172 (2017) ("In a variety of contexts, it has been argued that the best way to achieve change in the criminal justice process is to change internal office culture, rather than imposing external legal requirements.") (citing authority).

123. *See, e.g.*, Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 388 (2001) ("In view of the institutional culture of prosecutor's offices and the culture of the adversary system generally, it is perhaps inevitable that the overriding interest of prosecutors would be winning.").

themselves, or be regarded by others in the profession, as aiming low. In advocating for prosecutors to re-open individual criminal cases based on new evidence, there may be a value to being able to press the prosecutor to rise above the disciplinary minimum.

Likewise, in promoting the development of other law, it may be useful to have Rules 3.8(g) and (h) in place as a foundation. The underlying premises of these rules are that convictions of innocent persons should not stand and that institutions of the state (in this case, prosecutors' offices) have a responsibility to uproot and remedy wrongful convictions. Rules 3.8(g) and (h) incorporate these normative understandings into the law. One can now argue that these principles, which are legally established, should be extended to other contexts in which they are relevant: their significance is not limited to the professional conduct of prosecutors.

For example, the principles codified in Rules 3.8(g) and (h) supported a claim that a convicted defendant should have access to the state's evidence in order to subject it to newly available forensic testing. Indeed, Justice Stevens referred to Rules 3.8(g) and (h) for just this purpose in a dissenting opinion, joined by three other justices, in *District Attorney's Office v. Osborne*.[124] His argument was that the defendant's claimed right of access to DNA testing gains strength not only from legislative developments but also from "recent trends in legal ethics recognizing that prosecutors are obliged to disclose all forms of exculpatory evidence that come into their possession following conviction."[125] The rules may bolster arguments for assertions of other post-conviction rights and remedies as well.[126]

Fourth, law that codifies professional expectations may influence prosecutors who might otherwise not accept those expectations. Prosecutors have sometimes opposed these rules on the ground that they are unnecessary because prosecutors accept the underlying normative premises of these provisions.[127] But that may not uni-

124. 557 U.S. 52, 94-95 (2009) (Stevens, J., dissenting).

125. *Id.*

126. Brief of Legal Ethics Scholars as Amici Curiae at 29, State v. Johnson, No. 22941-03706A-01 (Mo. Cir. Ct. Aug. 23, 2019), *appeal docketed*, Nos. ED108193, ED108223 (Mo. Ct. App. Sept. 4, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3475542 (discussing prosecutors' ethical, professional, and legal obligations as a minister of justice in taking steps to remedy a wrongful conviction).

127. *See, e.g.*, Memorandum from the U.S. Attorney of the W. Dist. of Tenn. to the Clerk of Tenn. Appellate Courts on Objections to Adoption of Proposed Tennessee Rules 3.8(g) and (h) (Dec. 14, 2009) (on file with author) ("The Department would not countenance the continued incarceration of someone who was convicted and later found to be innocent of the crime of which he or she was convicted. When confronted with credible evidence of a defendant's

formly be true. The recent history of efforts to expand pretrial discovery obligations and post-conviction efforts to exonerate convicted defendants based on new evidence and information has sometimes shown seemingly unfathomable resistance by prosecutors.[128] As has been amply demonstrated, prosecutors certainly resist additional pretrial disclosure obligations.[129] In the post-conviction setting, those who embrace the idea of reopening cases and rectifying wrongful convictions may believe that all other prosecutors do too, but criminal justice reformers believe otherwise. Some of those who might otherwise resist the idea may be influenced by disciplinary rules spelling out their post-conviction obligations, however undemanding the rules may be.

Fifth, it may be valuable in the context of a judicial rule-making process to provoke a public discussion and debate about prosecutors' obligations. To the extent that prosecutors oppose the rules based on a debatable conception of their role and responsibilities, their views can be challenged. If the judiciary adopts Rules 3.8(g) and (h) over prosecutors' objection, that may be viewed as an affirmation of prosecutors' duties and a rejection of prosecutors' contrary assertions.

With respect to Rules 3.8(g) and (h), in Michigan, the United States Attorneys' written objections to the proposed rules reflected debatable understandings of law and practice that federal prosecutors probably do not ordinarily express publicly. For example, federal prosecutors asserted that when they know of new, credible and material evidence creating a reasonable likelihood that an innocent person was wrongly convicted, federal law often precludes them from disclosing the evidence promptly, if at all,[130] and likewise precludes them from investigating to determine whether the person is in fact innocent.[131] They also asserted that federal prosecutors were

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innocence, therefore, the Department expects its attorneys to disclose this information to the defendant or the court whenever the information is obtained—pre-trial, during trial, or after conviction.").

128. *See generally* Bazelon, *supra* note 121.

129. *See supra* notes 60-69.

130. *See* Letter from the U.S. Attorneys' Offices to the Justices of the Mich. Supreme Court, *supra* note 110, at 2 ("Some disclosures are outright prohibited, some must wait for an investigation to run its course, some are permissible only with judicial or agency authorization.").

131. *See id.* at 2-3:

> Proposed Rule 3.8(f)(2)'s investigative requirements raise similar incompatibilities with federal law. Although existing investigative tools and resources will sometimes permit prosecutors to conduct or bring about the investigation contemplated by proposed Rule 3.8(f) (2), many times they will not. Federal law enforcement agencies have no statutory authority to conduct those types of investigations, and many investigative tools and resources are only permitted for specific violations of federal law. It may well

not free to take remedial measures when they ascertained conclusively that they had convicted an innocent person.[132] The Department of Justice and individual federal prosecutors may rethink the views expressed by Michigan's two United States Attorneys now that the Michigan Supreme Court has found them to be unconvincing.

Sixth, although serving as a potential basis for professional discipline may be one of the less important contributions of Rules 3.8 (g) and (h), the disciplinary consequences should not be overlooked. There may be prosecutors, however aberrational, who will ignore or bury significant new exculpatory evidence in order to avoid jeopardizing a conviction. Although such prosecutors may be subject to sanction under open-ended professional conduct rules, such as the prohibition on "conduct that is prejudicial to the administration of justice,"[133] courts may be reluctant to impose discipline without the more explicit mandate afforded by Rules 3.8(g) and (h).[134]

IV. CONCLUSION

Many legal academics think that professional regulation should play a bigger role in criminal justice reform, but reform groups appear to be unpersuaded that prosecutors' practices can be meaningfully improved through new professional conduct rules, broader interpretations of existing rules, and enhanced disciplinary and judicial enforcement of these rules. Efforts to reform prosecutorial practices have focused instead on legislation and judicial decision making. Reform groups' skepticism of professional regulation is understandable for reasons we have identified. But, on balance, we think professional regulation should not be overlooked as one among various approaches.

As we have shown, prosecutors' pretrial disclosure obligations can be expanded via professional regulation: in some jurisdictions, courts can be persuaded to adopt and enforce an interpretation of Rule 3.8(d), the prosecutorial disclosure rule, that is more demanding than constitutional case law. Likewise, courts can be persuaded to codify prosecutors' post-conviction obligations, which are now

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be that Congress will appropriate funds and legislatively enable agencies to investigate otherwise closed cases. But it has not yet done so.

132. *Id.* at 4.

133. MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (AM. BAR ASS'N 2020).

134. *See* Comm'n for Lawyer Discipline v. Hanna, 513 S.W.3d 175, 184 (Tex. App. 2016) (finding that although prosecutors owed a post-conviction duty to disclose evidence of innocence, they could not be sanctioned in the disciplinary process for violating that duty, because Texas had not adopted Rules 3.8(g) & (h)).

largely discretionary in most jurisdictions, by adopting a version of Rules 3.8(g) and (h). These two examples, on which we have focused, are certainly not the only ones. Courts might be persuaded to adopt a more robust approach to prosecutorial regulation in other respects as well. Of course, prosecutorial regulation is no panacea for the limitations and deficiencies of the criminal justice process; it is not even a panacea for the perceived problems of prosecutorial conduct. But, as we have shown, there are benefits to be gained from pursuing more robust prosecutorial regulation that can justify taking reform efforts into this additional direction.

Do Prosecutors Really Represent the People? A New Proposal for Civilian Oversight of Prosecutors

Laurie L. Levenson[*]

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For years, we have assumed that prosecutors represent the "People" in criminal prosecutions. At trial, prosecutors assume the mantle of the representatives of the community. Whether it is the "People v.," "Commonwealth v.," or "State v.," the prosecutor's responsibility is to be the voice of the community during a criminal prosecution. Prosecutors are charged with representing more than just the victim in a criminal trial. They must also represent the broader interests of justice and, in doing so, consider the impact of a case on all those they represent.

However, it is becoming increasingly apparent that prosecutors either cannot or may not choose to perform that role. For example, prosecutors have been criticized for not bringing charges against police officers when community members are concerned that police are using excessive force.[1] Another example has been the criticism

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1. *See* Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1447 (2016); Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 1 (2001); Caleb J. Robertson, Comment, *Restoring Public Confidence in the Criminal Justice System: Policing Prosecutions When Prosecutors Prosecute Police*, 67 EMORY L.J. 853, 854 (2018); German Lopez, *Cops Are Almost Never Prosecuted and Convicted for Use of Force*, VOX (Nov. 14, 2018, 4:12 PM), https://www.vox.com/identities/2016/8/13/17938234/

of prosecution offices for aggressively prosecuting drug crimes contrary to the interest of minority community members.[2] Finally, there has been a generalized critique that prosecutors give insufficient consideration to the interests of people of color when they evaluate cases.[3]

In light of these examples, and others, it is time to reexamine the assumption that prosecutors can be depended upon to represent the best interests of a community. If they cannot, a change is needed to make them better representatives. As this article proposes, that change is to create civilian oversight bodies for prosecution offices. This proposal is not nearly as radical as it may sound. Over the last decade, civilian oversight commissions have been adopted for law enforcement. They have also been used to monitor specific functions of prosecution offices, such as discovery compliance. Some prosecutors have voluntarily created advisory bodies to help them be more responsive to the needs of their communities. Whether appointed or elected, prosecutors need a mechanism by which they can receive continued input and feedback from their communities. Being selected or elected every few years provides insufficient oversight and accountability. The representatives of the "People" need more direct accountability to the "People." Civilian oversight can provide that.

This article begins with a review of the literature that portrays prosecutors as the "ministers of justice" and the "representatives of the community." This view is so engrained that it has persisted for decades with little challenge.[4] Yet, it is a misleading paradigm.

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police-shootings-killings-prosecutions-court; India Thusi, *Failure to Prosecute Cops Undermines Public Trust*, THE HILL (Dec. 4, 2016, 12:30 PM), https://thehill.com/blogs/pundits-blog/crime/308684-failure-to-prosecute-cops-undermines-public-trust; Caren Morrison, *How the Justice System Fails Us After Police Shootings*, NEW REPUBLIC (Dec. 10, 2015), https://newrepublic.com/article/125489/justice-system-fails-us-police-shootings.

2. *See* Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 257-58 (2009); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1156-57 (2000).

3. *See generally* K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System,* 27 GEO. J. LEGAL ETHICS 285 (2014) (discussing the impact of racial disparity in police and prosecution practices).

4. *See* Eric Gonzalez, *Using the Power of Prosecutors to Drive Reform,* CRIM. JUST., Fall 2019, at 9, 9. As noted by the first Latino District Attorney elected in New York State:

> [f]or decades prosecutors have routinely been both praised and criticized for their decisions, but until recently, the scope of prosecutorial decision-making authority —the sheer power granted to prosecutors—got little public scrutiny. Outside of legal practitioners, and defendants on the receiving end of prosecutorial discretion, many Americans have little conception of how much latitude DAs have in the criminal justice process. Consequently, many also underestimate how much responsibility prosecutors bear for profound system failures like mass incarceration, widespread racial disparities in the justice system, and the persistence of violent crime plaguing the same communities for whom the system is most punitive.

Once appointed or elected, many prosecutors have little contact with actual community members other than an occasional town hall meeting. Prosecutors assume that they and their deputies know what is in the public's best interest and can make decisions accordingly. There is little day-to-day input by the community into the functioning of the prosecutor's office. Zealous prosecutors eager to win their cases have a narrower focus. Except at the highest echelons (and often not even there), little consideration is given to how the prosecution's efforts are perceived by the diverse groups that may populate the jurisdiction. The model has become one in which prosecutors make decisions and the community reacts to them, rather than ongoing community input into the prosecutor's decisions.

Part Two of this article details the increasing rift between prosecutors and their communities. It identifies how ongoing community oversight can assist prosecutors in their decision-making while still respecting the need for a high degree of prosecutorial independence. Community oversight does not mean that an oversight body will necessarily dictate to a prosecutor when charges should be brought or dropped, though that could be part of its function. However, unlike a grand jury that traditionally evaluates one case at a time, a civilian oversight commission can help set prosecutorial priorities and identify ongoing problems in the prosecutor's decisions.

Finally, Part Three suggests some models for civilian oversight. Just as communities and their prosecutorial agencies differ in the United States, so may the model of civilian oversight. However, we can certainly do better than what we are doing today. This year's symposium has wisely chosen to focus on "A 2020 Vision of Criminal Prosecution and Defense." In this new decade, my vision of prosecution is one that includes real community involvement in prosecutorial decision-making. It is not enough to label prosecutors the "representative of the People." They must have the means and charge to perform this role. Just as civilian oversight has been implemented for law enforcement, it should take hold for prosecutorial agencies. Direct civilian involvement with prosecution offices can provide transparency and accountability that leads to a more honest and effective representation of the community by their prosecutorial agencies.

Currently, the reform movement for prosecutors has depended on the personal decisions of individual prosecutors to serve as change agents in their communities.[5] But their numbers are few and their

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Id.

5. *See* Liane Jackson, *Change Agents: A New Wave of Reform Prosecutors Upends the Status Quo,* AM. BAR ASS'N J., June 2019, at 40, 40.

success depends on their ability to navigate the internal politics of their offices and the reaction of their communities. Civilian oversight need not depend on the personality and popularity of the prosecutor. It can create a systemic mechanism to ensure that prosecutors perform their broader role of being a "representative of the community."

I. PROSECUTORS AS "REPRESENTATIVES OF THE COMMUNITY"

"Prosecutors are public officials who represent the residents of a community ('the People') and their interests in the criminal justice system."[6]

Prosecutors have classically represented their roles as government officials "who represent the people" of their jurisdiction.[7] "The prosecutor's constituency is generally understood to be 'the people' of the geographical division that the prosecutor has been elected or appointed to represent."[8] As a "minister of justice," it is assumed that prosecutors will competently and effectively represent the interests of their constituencies.[9] Yet, as others have observed, "the very concept of serving 'the people' is inevitably imprecise."[10] Placing prosecutors in the role of the community's representative gives them special authority in proceedings. They wear the white hats; we presume that they know what is best for the community and will do their best to achieve the community's goals.[11]

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6. Immanuel Kim, Note, *A Voice for One, or a Voice for the People: Balancing Prosecutorial Speech Protections with Community Trust*, 86 FORDHAM L. REV. 1331, 1332 (2017).

7. *See, e.g.*, *Office Overview*, L.A. COUNTY DISTRICT ATT'Y OFF., http://da.co.la.ca.us/about/office-overview (last visited Jan. 26, 2020). "Deputy district attorneys are prosecutors who represent the people of the State of California." *Id.* The American Bar Association Criminal Justice Standards for the Prosecution Function further elaborates:

> [t]he prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim. When investigating or prosecuting a criminal matter, the prosecutor does not represent law enforcement personnel who have worked on the matter and such law enforcement personnel are not the prosecutor's clients."

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.3 (2015).

8. Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 327 (2002).

9. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.3. "The public's interests and views should be determined by the chief prosecutor and designated assistants in the jurisdiction." *Id.*

10. Thompson, *supra* note 8, at 327; *see also* Susan W. Brenner & James Geoffrey Durham, *Towards Resolving Prosecutor Conflicts of Interest*, 6 GEO. J. LEGAL ETHICS 415, 471 (noting the challenges for prosecutors in not having a readily identifiable client).

11. *See generally* Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 54-55 (2016) (discussing the traditional rhetoric applied to prosecutors).

This elevated view of prosecutors has granted them great leeway in their decision-making. Constitutionally, prosecutors have broad discretion to make charging decisions.[12] As "representatives of the people," prosecutors decide who will be charged, what crimes they will be charged with, and the severity of those crimes.[13] While there are constitutional limits against charging individuals based upon their race, ethnicity, and exercise of First Amendment rights, prosecutors are otherwise entrusted to use their judgement on behalf of the community. Judges trust that a prosecutor who is appointed will act "solely to pursue the public interest in vindication of the court's authority."[14]

The Supreme Court enshrined this view of prosecutors with Justice Sutherland's famous quote in *Berger v. United States*:[15]

> [t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[16]

Thus, the paradigm established by the Supreme Court is that a prosecutor's goal is to serve the greater realm and to do so only in a way that will promote greater justice for all.

The quote is powerful but does not deal with the fundamental issues that arise where prosecutors act as representatives of a community. First, how does one define "the community?"[17] In many jurisdictions, the diverse nature of a community can pose challenges for prosecutors when deciding how to proceed on a case. For example, a call for zealous prosecution of drug offenses by some members of a jurisdiction may disproportionately affect other members. Community is a complex subject that involves a thoughtful examination of some of the most difficult issues in society, including those of race and socioeconomic norms.[18] The criminal justice system has a tendency to dash past these issues with generalizations

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12. *See* Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 380 (2d Cir. 1973) (explaining that prosecutor's charging power is based in constitutional separation of powers).
13. Young v. United States *ex rel.* Vuitton, 481 U.S. 787, 807 (1987).
14. *Id.* at 804.
15. 295 U.S. 78, 88 (1935).
16. *Id.*
17. *See* Alafair S. Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 WASH. L. REV. 985, 1023-24 (2003).
18. *See generally* Anthony v. Alfieri, *Community Prosecutors,* 90 CALIF. L. REV. 1465 (2002).

that a prosecutor represents everyone in a particular geographical realm, even if they have stark differences and interactions with the criminal justice system.[19]

"Community" involves a wide range of individuals, including those who, as the most marginalized, often have the biggest stake in the criminal justice system.[20] Consider how the homeless are viewed. By definition, they are considered as outsiders to the broader community.[21] Even when "community" courts are established, homeless offenders lack any true representation.[22] As noted by other scholars:

> [t]he ideal of prosecutorial representation has a baseline faulty assumption: that popular input happens, and happens well. The dichotomy between the people and the defendant assumes that because prosecutors and police chiefs are often elected, they are able to transform public sentiment into legal action. However, while prosecutorial and policing decisions surely reflect some popular sentiment, and possibly even the majority view of justice, studies have continually shown that they usually do not reflect the input of the most marginalized voices . . . .[23]

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19. As scholars have noted, it is undoubtedly somewhat misleading to claim that there is one "community" that is represented by our criminal justice institutions. *See* Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 NW. U. L. REV. 1565, 1595 (2017). Yet, there tends to be community consensus regarding some core issues regarding criminal justice and considering the positions of those who will be most affected by criminal legislation can reap important benefits, including harnessing the power of stigmatization and earning moral credibility with people to help avoid vigilantism. *Id.* "[T]he available evidence suggests not that community judgments of justice are an endless collection of individual disagreements but that there is strong agreement on a core of issues regarding the relative blameworthiness of a wide range of offenses and offenders." *Id.*

20. *See* Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 254 (2019); *see also* Thompson, *supra* note 8, at 353 (explaining that "the neighborhoods that most often experience the greatest incidence of crime tend to participate the least in the electoral process").

21. *See generally* Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4 (2016); Farida Ali, *Limiting the Poor's Right to Public Space: Criminalizing Homelessness in California*, 21 GEO. J. POVERTY L. & POL'Y 197 (2014).

22. *See* Maya Nordberg, *Jails Not Homes: Quality of Life on the Streets of San Francisco*, 13 HASTINGS WOMEN'S L.J. 261, 297 (2002).

23. Simonson, *supra* note 20, at 281. Several important articles have been written about the problems with the concept of democratizing criminal justice. *See* John Rappaport, Comment, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. (forthcoming 2020); Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 Nw. U. L. Rev. 1693 (2017). These studies and articles are important in understanding the overall issues regarding the relationship between the community and the criminal justice system. Yet, unlike this article, their focus tends to be more on law enforcement, judges, and juries,

Additionally, to what extent does "the community" include law enforcement officers within that community? "In our dominant contemporary conception of criminal procedure, the place of the public—'the People'—is on the side of the police and the prosecution" and the police, in conjunction with the prosecutors, speak as representatives of the local community.[24] Thus, it is not surprising that one of the areas that often causes great difficulty for local prosecutors is the decision whether to prosecute local law enforcement officials for mistreating residents in that community. If law enforcement officials are viewed as invested in protecting the interests of the community, it is particularly difficult to view those same officers as a threat to the community itself.[25]

Finally, how do prosecutors assess what is in the interest of the community? There is often no daily interaction of prosecutors with their community members. While election campaigns might draw prosecutors out of their offices, their decisions are made in a more insular setting—surrounded by other prosecutors. There is generally no mechanism, unless perhaps where a grand jury is involved, to even include community views in prosecutorial decisions. Prosecutors may misread an election vote as a vote of approval for all decisions that the elected prosecutor may make during her term. Thus, the election of a "get tough on crime" prosecutor provides, in essence, carte blanche to prosecutors even when their individual decisions would not stand up to a community poll.

Prosecutors often represent the community in concept only. They have broad discretionary power and little transparency. On a case-by-case basis, it is hard to assess which community interests were considered in their decision-making. As even their staunchest supporters will agree, prosecutorial power is complex and not well understood.[26] Finally, there is often a lack of transparency that makes

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with less attention on how community representation should play a role in the prosecutors' offices.

24. *See* Simonson, *supra* note 20, at 270.

25. Previously, there were strong arguments to the contrary and an open recognition of the differences between the police interests and those of the community. *See* Samuel Walker, *Governing the American Police: Wrestling with the Problems of Democracy*, 2016 U. CHI. LEGAL F. 615, 622-28 (2016). However, with the advent of "community policing," it is easier for the police to argue that are in tune with, and represent, the community's interests. *See id.*

26. *See* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 175, 203 (2019). Although arguing that the claim of prosecutorial power has been imprecisely made, Professor Bellin does concede an essential point regarding concerns about prosecutorial power. *Id.* at 206. As he states, "[i]t may simply be that prosecutors' lack of transparency and unwillingness to go against the political grain create an inflated perception of maneuverability." *Id.* Rather than fixating on the extent of prosecutorial "power," this article's proposal for civilian

it difficult for the community to see whose interests are prioritized and why.[27]

II. THE RIFT BETWEEN PROSECUTORS AND THEIR COMMUNITIES

While prosecutors are viewed and may view themselves as representatives of the community, their relationship with the community is actually much more complex. The immediate constituents for prosecutors are law enforcement officials who bring cases to them, together with victims who may directly or indirectly seek the prosecutor's involvement.

Conflicts between prosecutors and members of their community can arise in a variety of ways. Communities can push back against prosecutors because they believe that the prosecutors are only representing certain groups—often non-minority and affluent members of the community.[28] Mass incarceration creates an enormous divide between prosecutors and members of their community.[29] The rhetoric regarding prosecutors has shifted in the last twenty years with complaints ranging from prosecutors being corrupt to claims that they are out of touch with their own communities.[30] With no daily role in prosecutorial decision-making, the community can become frustrated and may vent that frustration in the form of public protests and demonstrations.

This is particularly true when allegations that the local police are using excessive force or racial profiling within the community. In such situations, members of the community often regard as fanciful the notion that the prosecutor represents their interest at all.[31] Instead, the prosecutor is seen as representing a dominant power structure against the interests of individuals in the community. As one commentator recently wrote:

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oversight bodies addresses the underlying concerns—transparency and whether a prosecutor's political interests may override those of the community.

27. Abby L. Dennis, Note, *Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power*, 57 DUKE L.J. 131, 136 (2007).

28. *See e.g.*, Jessica Pishko, *How District Attorney Jackie Lacey Failed Los Angeles*, THE APPEAL (Nov. 12, 2019), https://theappeal.org/how-district-attorney-jackie-lacey-failed-los-angeles/.

29. Vesla M. Weaver, *How Mass Imprisonment Burdens the United States with a Distrustful Civic Underclass*, SCHOLARS STRATEGY NETWORK (Oct. 1, 2012), https://scholars.org/brief/how-mass-imprisonment-burdens-united-states-distrustful-civic-underclass.

30. *See* Green & Yaroshefsky, *supra* note 11, at 67.

31. *See* Taylor Pendergrass, *How Bad Prosecutors Cause Bad Policing*, SLATE (Aug. 16, 2016, 2:09 PM), https://slate.com/news-and-politics/2016/08/how-bad-prosecutors-cause-bad-policing.html (prosecutorial practices that allow police abuses call into question the overall role of prosecutors in the criminal justice system).

> [w]e should abandon the idea that prosecutors act "for the People," eliminating it from formal case captions and colloquial speech alike. Instead, it is more honest to designate prosecutors as "the State," "the Commonwealth," or "the Government": they are state actors, wielding their state power to prosecute individual defendants. We might view them as a necessary role of the state, but when they act, they do so against part of the people as much as for them.[32]

In December 2018, the MacArthur Foundation issued its report on "*Prosecutorial Attitudes, Perspectives, and Priorities: Insights from the Inside*" as part of its "*Advancing Prosecutorial Effectiveness and Fairness Report Series*."[33] Its findings regarding community engagement are important. As reported by those surveyed, the following themes arose:

> 1. Communities of color do not hold positive views of the State Attorney's office[.]
> 2. Community engagement helps build trust in the criminal justice system, and it may increase reporting and cooperation with law enforcement[.]
> 3. Community engagement increases the public's understanding of what prosecutors do and humanizes the institutional identity of the office[.]
> 4. Though community engagement has become [more of] a priority for [prosecutors], some barriers to engagement remain[.]
> 5. Prosecutors do not associate community engagement with problem solving or crime prevention[.][34]

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32. Jocelyn Simonson, *Kamala Harris Says Her Campaign Is 'For the People,'* THE NATION (Feb. 5, 2019), https://www.thenation.com/article/kamala-harris-prosecutor-for-the-people/.

33. MACARTHUR FOUND. ET AL., PROSECUTORIAL ATTITUDES, PERSPECTIVES, AND PRIORITIES: INSIGHTS FROM THE INSIDE (2018), https://caj.fiu.edu/news/2018/prosecutorial-attitudes-perspectives-and-priorities-insights-from-the-inside/report-1.pdf.

34. *Id.* at 10-11. Further, in a 2009 study by the Pew Research Center, it was reported that, although Latinos had increased interaction with police and prosecutors, their overall confidence that they would be treated fairly by the criminal justice system dropped to under 50%. *See* Mark Hugo Lopez & Gretchen Livingston, *Hispanics and the Criminal Justice System: Low Confidence, High Exposure*, PEW RES. CTR. (Apr. 7, 2009), https://www.pewresearch.org/hispanic/2009/04/07/hispanics-and-the-criminal-justice-system/. Blacks had even less confidence that they would be treated fairly. *Id.*

Thus, while prosecutors believe that they are representing the community, their actual operations tell a different story. As noted by Professor Ronald White and District Attorney Dan Satterberg:

> [e]ngagement with the community does not stop with victims and their families; prosecutors must ask for input from other members of the community. But in doing so, there is also a danger that a prosecutor will hear only the loudest voices or the best-connected groups. The prosecutor must represent the *whole* community: that includes those who are politically engaged and those who are not.[35]

There continues to be calls for new approaches to ensure that prosecutors do a better job of representing the entire community.[36] The current system of periodic elections and even less frequent disciplinary actions has been insufficient to accomplish the task.[37]

III. Putting the Community Back into the Prosecutor's Role

In 2020, it is time to consider how to give the community a meaningful role in ensuring that their representative prosecutor truly represents their interests.[38] There are several models that can be considered.

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35. Dan Satterberg & Ronald Wright, Prosecution That Earns Community Trust 3 (2018), https://thecrimereport.org/wp-content/uploads/2018/12/IIP-Community_Trust-paper.pdf.

36. *See* Leena Kurki, *Restorative and Community Justice in the United States*, 27 Crime & Just. 235 (2000). Much of the push to having more consideration of community interests in the criminal justice system can be credited to the restorative justice and community justice movements. *See generally id.* By including representatives of victim advocates, grassroots advocates, researchers, and others, advocates in the restorative justice movement have sought to demonstrate crucial links between the operations of criminal justice agencies and the health and welfare of related communities. *Id.* at 235. Most importantly, the movement has highlighted how traditional criminal justice interventions actually destroy community. *Id.* at 241. For the last twenty years, advocates of community empowerment have encouraged criminal justice agencies to "change the way they interact with the public, learn to listen to ordinary citizens, and work together with local people to prevent crime and solve crime-related problems." *Id.* at 245.

37. *See* Dennis, *supra* note 27, at 139-40. It should also be added that civil lawsuits have almost no impact on prosecutors because of their absolute immunity. *Id.* at 144-45; *see also* Prentice L. White, *Absolute Immunity: A License to Rape Justice at Will*, 17 Wash. & Lee J. C.R. & Soc. Just. 333 (2011).

38. The genesis and impact of efforts toward participatory democracy are discussed in detail in David Alan Sklansky, *Police and Democracy*, 103 Mich. L. Rev. 1699 (2005). The rise of the community justice movement in the United States can be traced back to the 1990s. *See* Adriaan Lanni, *The Future of Community Justice,* 40 Harv. C.R.-C.L. L. Rev. 359, 365 (2005). It is an important movement that has affected a wide range of issues in the criminal justice system. *See id.* Yet, it has often taken a limited view of how community justice involves prosecutors. Generally, it envisions the community providing input to prosecutors

First, internal changes can be made and are being made to some prosecution offices so that there will be greater representation of all segments of the community and outreach to them. For example, some prosecution offices have created subgroups of prosecutors to interact and represent specific constituencies in the community. For example, prosecution offices are forming "Latino Prosecutors Associations"[39] or "Black Prosecutors Associations." These prosecutors often become a combination of prosecutor and community activist.[40] Their stated goals include to "give a face to the many people in our community who perceive that law enforcement organizations are not fair."[41]

One of the challenges to this approach is that the statistics for prosecutors of color are still painfully low. In California, Latinos recently surpassed whites as the largest demographic group in the state. Yet, only 9% of California's prosecutors are Latino.[42] Thus, it is a challenge for Latino prosecutors to implement an operation where they are the liaisons to the community, as well as act as their voice in the courtroom. American Bar Association (ABA) Criminal Justice Standard for the Prosecution Function § 3-2.2 focuses on "[a]ssuring [e]xcellence and [d]iversity in the [h]iring, [r]etention, and [c]ompensation of [p]rosecutors."[43] It specifically directs that "[i]n selecting personnel, the prosecutor's office should also consider the diverse interests and makeup of the community it serves, and seek to recruit, hire, promote and retain a diverse group of prosecutors and staff that reflect that community."[44]

Prosecution offices may also try to create special units in their offices that take a broader perspective on prosecution and, in particular, review possible wrongful convictions. During the last ten

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and then prosecutors proposing strategies to address those concerns. *Id.* at 369-70. Proposals generally do not include community members actually having oversight over the operation of prosecutors. *Id.*

39. *See* Elena Gaona, *Minority Prosecutors Face Tough Questions*, L.A. TIMES (May 31, 2002, 12:00 AM), https://www.latimes.com/archives/la-xpm-2002-may-31-me-thelaw31-story.html.

40. *Id.*

41. *Id.* For a firsthand account of why a black prosecutor thinks it makes a difference that minorities be represented in the ranks of prosecutors, *see* Melba Pearson, *My Life as a Black Prosecutor*, MARSHALL PROJECT (July 21, 2016, 10:00 PM), https://www.themarshallproject.org/2016/07/21/my-life-as-a-black-prosecutor (quoting Stanley Williams, Los Angeles County Deputy District Attorney).

42. Debbie Mukamal & David Alan Sklansky, *Op-Ed: A Study of California Prosecutors Finds a Lack of Diversity*, L.A. TIMES (July 29, 2015, 4:43 AM), https://www.latimes.com/opinion/op-ed/la-oe-0729-sklanskymukamal-diversity-prosecutors-california-20150729-story.html.

43. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-2.2 (2015).

44. *Id.* § 3-2.2(b).

years, prosecution offices throughout the country have implemented various types of Conviction Integrity Units.[45] While these units play an important role in ensuring that all persons are treated according to the law, they are not generally viewed as "voices of the community" in prosecution offices. There are enormous differences among how these units work in individual prosecution offices. In some offices, there is a concerted effort to ferret out wrongful convictions and to put in place a series of initiatives that will prevent future injustices.[46]

Prosecutors might seek to bring in "outside prosecutors" from other state agencies to ensure that cases are given a fair review. Yet, these outside prosecutorial agencies face the same challenge. They are, by and large, career prosecutors who evaluate the cases from their personal perspective and have little, if any, understanding of how the broader community wants such cases to be handled. Thus far, a few prosecutors have only taken the incremental step of integrating civilian oversight into their work through the formation of Innocence Commissions to engage in post-conviction review.[47] Although the work of such commissions is undoubtedly helpful, they do not go far enough because they focus primarily on whether there have been wrongful convictions and, sometimes, on how to prevent such injustices. They generally do not take a day-to-day role in guiding the work of prosecutors.

Similarly, there have been efforts to adopt state-wide commissions to address prosecutorial misconduct.[48] In August 2018, New York enacted a bill that would create a stand-alone commission to

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45. *See* CONVICTION INTEGRITY UNITS: VANGUARD OF CRIMINAL JUSTICE REFORM, CTR. FOR PROSECUTOR INTEGRITY (2014), http://www.prosecutorintegrity.org/pr/center-for-prosecutor-integrity-surveys-rise-of-conviction-integrity-units/; *see also* Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705 (2017); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 61-65 (2009); JOHN HOLLWAY, CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE (2016), https://scholarship.law.upenn.edu/faculty_scholarship/1614/.

46. *See generally* Barry Scheck, *The Integrity of Our Convictions: Holding Stakeholders Accountable in an Era of Criminal Justice Reform,* 48 GEO. L.J. ANN. REV. CRIM. PROC. iii (2019) (providing insight as to the range of reforms that can help prevent wrongful convictions).

47. *See* David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1046 (2010) (demonstrating that at least six states—California, Connecticut, Illinois, North Carolina, Pennsylvania, and Wisconsin—have convened some form of a commission to study the problem of post-conviction review).

48. *See* H. Mitchell Caldwell, *The Prosecutorial Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 93-101 (2013) (addressing oversight commissions to investigate and sanction acts of prosecutorial misconduct).

systematically and transparently address misconduct by prosecutors.[49] The commission has the power to hold hearings at which it will receive evidence regarding prosecutorial misconduct. The goal is to have the commission provide transparency about what is occurring in prosecution offices and to issue annual reports to the governor, legislature, and courts regarding its findings. While such broad oversight is helpful, it is fundamentally different from an oversight commission for an individual prosecution office that gives real time feedback on the workings of that office.[50]

A different approach has been to create an advisory board to examine the practices of a district attorney's office and to make specific reform recommendations based upon the board's examination. For example, the Brooklyn District Attorney's Office opted to address systemic change through an initiative called "Justice 2020." The goal was to "transform[] the culture of the Office and . . . strengthen community trust while enhancing public safety."[51] Justice 2020 convened a seventy member committee of reformers, formerly incarcerated people, law enforcement members, community advocates, clergy, and academics to do an analysis of the office and to make recommendations.[52] The committee has made recommendations about how to reduce incarceration, engage communities as partners in justice, focus resources on drivers of crime, and invest in prosecution work in a way that will benefit prosecutors and the community they serve.

If these recommendations are heeded, they could have a significant impact upon the prosecutor's office. Instead of reflexively seeking incarceration, prosecutors may be redirected to consider a diversity of community interests and the use of alternative programs, such as drug diversion and second-chance initiatives.[53] The overall goal—and it is an important one—is to change the culture of the prosecution office from being case processors who punish people for doing bad things to being problem solvers. In finding ways to protect the community, prosecutors must hold people accountable in a

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49. *Governor Cuomo Signs Legislation to Establish Nation's First Commission on Prosecutorial Conduct*, N.Y. ST. (Aug. 20, 2018), https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-establish-nations-first-commission-prosecutorial-conduct.

50. The District Attorneys Association of the State of New York has moved to enjoin implementation of the commission and that case is pending before the courts. *See* Dan M. Clark, *NY District Attorneys Formally Move to Strike down Prosecutorial Watchdog Law*, N.Y.L.J. (July 24, 2019, 5:21 PM), https://www.law.com/newyorklawjournal/2019/07/24/ny-district-attorneys-formally-move-to-strike-down-prosecutorial-watchdog-law/?slreturn=20191131175417.

51. *See* Gonzalez, *supra* note 4, at 9-10.

52. *Id.* at 10.

53. *Id.* at 11-13.

way that serves all core community values, including the likely impact on people of color in that community.[54] Having such an advisory committee to make strategic changes is a wonderful first step that can and should be embraced by other prosecution offices. So far, the results have been promising. As the community becomes more trusting, law enforcement becomes more effective in fighting crime.[55]

Others have called for partnerships between prosecutors and community or business groups to facilitate communication between community groups and prosecutors.[56] The goal is to create a bond with community members that will heighten prosecutors' awareness of and responsiveness to community problems.[57] In this model, prosecutors are sent into the community to be "field" prosecutors so that the community can have greater access to them.[58] Similarly, there have been proposals for prosecutors to go out of the courthouse and into the community to serve the proactive role of identifying ongoing criminal justice problems.[59] Yet, a clear limitation of this model is that the prosecutor is still "calling the shots." Community members may have better access and prosecutors might be better situated to see, hear, and understand the concerns of the community, but prosecutors still wield the decision-making authority.

Yet, it may be time to take an even bolder step—to have civilian oversight much in the way that law enforcement agencies are now being subjected to civilian oversight.[60] On-site community representatives who have the authority to question prosecutors' exercise of discretion would more powerfully ensure that the voices of more members of the community are heard. Especially in the area of prosecuting police, the current approach of prosecutors deciding

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54. The range of recommendations is impressive. They include, among others, sealing or expunging old convictions, developing protocols for addressing police misconduct, encouraging appropriate parole recommendations, creating a single point of contact for hate crimes, and implementing a Post-Conviction Justice Bureau. *Id.* at 14.

55. *Id.* For example, there has been a decline in serious crimes, including the homicide rate, in the jurisdiction. *Id.*

56. *See* Devin J. Doolan, Jr., Comment, *Community Prosecution: A Revolution in Crime Fighting*, 51 CATH. U. L. REV. 547, 549 (2002).

57. *Id.* at 564.

58. *Id.* at 565.

59. *See* Bruce A. Green & Alafair S. Burke, *The Community Prosecutor: Questions of Professional Discretion*, 47 WAKE FOREST L. REV. 285, 291-93 (2012); Doolan, *supra* note 56, at 547.

60. In embracing oversight commissions, it is critical to avoid the problems that have occurred in the implementation of civilian oversight commissions of police. *See generally* Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How It Fails*, 43 COLUM. J.L. & SOC. PROBS. 1 (2009).

when fellow law enforcement individuals should be charged has created skepticism and cynicism about prosecutors. This concern has led to calls for independent special prosecutors, outsiders appointed by the state attorney general, or civilian review boards drawn from the community who have direct input into the prosecution's decision to bring or decline such cases.[61]

As we enter 2020, it may be time to have prosecutors actually share their authority with community members or have community members provide oversight over the decision-making of prosecutors with the power to take action if prosecutors are out-of-tune with the community's needs and interests. How would this be done? Civilian boards could work in prosecution offices to give input on the screening of cases and the priorities of prosecution offices. Rather than waiting for the community's reactions, representatives of the community could give daily feedback on prosecutorial decision-making. These individuals would actually have a say in what cases are or are not being brought by prosecutors. While there is still the challenge of deciding who would be on such boards, they would have much faster and direct input into prosecutorial decision-making.[62]

A slightly different model would be to ensure that prosecutors have a kitchen cabinet composed of diverse members of the community who would advise the head prosecutor on a regular basis regarding prosecutorial priorities, concerns of the community, hiring and training decisions, and needed reforms. Thus, while this group might not provide daily oversight of every case, it will have a regular presence in the prosecutor's office.

The benefit of infusing prosecution offices with such "outsiders" is to respond to the natural tendency of prosecutor's offices to become very insular and, at times, adversaries of those seeking reforms. With working groups, it is much more likely that the civilian groups will have a greater appreciation of the prosecutor's work and prosecutors will establish relationships where they will be more open to direction. Of course, there is the risk that the "embedded" community members might shift their allegiance to the prosecutors. However, clear and regular reminders of their roles could combat such movement.

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61. Robertson, *supra* note 1, at 4; Dennis, *supra* note 27, at 145-46, 151-53.

62. There is a range of approaches to designating individuals for such boards—ranging from appointment by political authorities to the creation of civilian advisory councils whose members are elected through preference voting methods designed to ensure proportional representation. *See* Reenah L. Kim, Note, *Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils*, 36 HARV. C.R.-C.L. L. REV. 461 (2001).

There are also valuable benefits to prosecutors in having civilian oversight or internal advisory boards. To the extent that the community is upset or has concerns, the civilian groups can interact with individuals as ombudsmen. They can be a hotline and lifeline for community complaints. Community engagement increases transparency both for prosecutors and the community. It is critical that community members appreciate that their concerns are being heard and considered.[63] It is also important that prosecutors have an effective means to share their decision-making process with the citizenry.[64] As with consent decrees, oversight boards provide a means of reviewing the propriety and effectiveness of prosecutorial policies, providing information to the community and conveying feedback, advising the decision-makers about what factors they may not have considered in their decision-making, and linking decision-making to actual data showing how a prosecutor's decisions are affecting community members.[65]

The sticking point in this proposal will be what actual authority civilians have to stop prosecutors from bringing cases or to direct them to bring difficult cases, such as excessive force cases by police officers.[66] Prosecutors pride themselves on their independence[67] and are not legally required to charge cases even at the request of judges.[68] Alternatively, community members may counsel against bringing charges that prosecutors are inclined to file.

However, this conflict does not pose an insurmountable obstacle to engaging community oversight for a prosecution office. First, prosecutors could voluntarily defer to the community oversight group's recommendations, recognizing that its role is to represent the community in difficult decisions of exercising prosecutorial discretion. At worst, prosecutors may end up not bringing some cases

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63. *See* Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 796 (2016) ("Community engagement permits the parties to acknowledge the importance of community trust . . . .").

64. The community engagement process, and structures to enforce it, "accord with deliberative democracy and legitimacy theory," although there are some that argue that the inherent biases in the police system make it nearly impossible to have sufficient community engagement. *Id.* at 867.

65. *Id.* at 828-29 (noting how consent decrees integrate collaborative problem-solving and bias-free policing and crime prevention).

66. *See* Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843, 856 (2018).

67. *See* Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 861-64 (2004) (noting how overreliance on prosecutorial independence may be counterproductive because it divorces prosecutors from the interests of the community and creates greater distrust about prosecutorial decision making).

68. *See* Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 383 (2d Cir. 1973).

that some of their members might otherwise want to bring.[69] If prosecutors are truly acting as "representatives of the community," and the community is truly represented on such boards, the prosecutor should probably defer to such decisions. Realistically, if the community sentiment is strong enough to counsel against charging the offense, a subsequent trial jury is likely to nullify the prosecution charge that is brought.

But what if community advisors counsel prosecutors to bring a charge that they are reluctant to bring? Prosecutors cannot ethically bring charges when they do not believe they have sufficient proof for their case.[70] Under the ABA Standards for prosecutors: "[a] prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice."[71] Thus, even if a community oversight commission recommends charges, prosecutors will not be obliged to bring those charges if there is insufficient evidence to support them. While the oversight group may have opinions about whether a charge is in the best interest of justice, the prosecutor makes the ultimate assessment of the strength of the evidence. If the community members cannot convince the prosecutor of the merits of a case, one alternative for breaking the deadlock is to engage a special prosecutor who will bring the case directly to a grand jury.[72]

Oversight groups can also play an important role in evaluating what should happen in a case following a conviction. Prosecutors may be particularly reluctant to step back and evaluate whether an

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69. Given that prosecutors exercise their discretion to such an extent that only an estimated 2% of all crimes are actually charged, deferring to a recommendation not to bring a charge will not dramatically change the overall practices of prosecutors. *See* Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 757 (2005).

70. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-4.3(a) (2015). The professional rules of conduct of individual states may also set similar standards for the prosecutor's decision to bring charges.

71. *Id.*

72. *Cf.* Dennis, *supra* note 27, at 155-61 (proposing system of special superseding prosecutors when there has been a showing of prosecutorial misconduct). In order for grand juries to be effective in representing the community there may need to be important changes in how grand jurors are selected. *See generally* Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333 (2008) (advocating for the reconstitution of grand juries to represent the broader community).

injustice occurred when that evaluation requires acknowledging errors by their own office.[73] While a growing number of prosecution offices have created conviction review units,[74] very few have input from persons other than prosecutors about how such cases should be evaluated.[75] Community members may have the perspective to evaluate post-conviction claims of wrongful convictions without being hampered by the concern that they are criticizing their current or past co-workers. The issue of wrongful conviction has become too big for prosecutors to ignore,[76] and community members are growing increasingly concerned about the issue. Accordingly, community representation in the evaluation of these cases is a key opportunity for the public to learn why there have been wrongful convictions and provides an invaluable chance for prosecution offices to develop more trust in their communities as community members can directly evaluate the prosecution's efforts to correct injustices and prevent them in the future. At minimum, prosecutor's offices should create entities like the North Carolina Actual Innocence Commission that, while not an actual review agency, is a body that

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73. *See* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134 (2004). There are many reasons that prosecutors have difficulties in evaluating post-conviction claims of innocence. The major factor is the culture of the prosecutorial office. "[P]rosecutors can find themselves swept up in a team-spirit mentality, pitting the district attorney's office against the defendant, regardless of potential innocence. Studies on prosecutorial offices have revealed that prosecutors tend to adopt a belief that their trials are staged on a good versus evil landscape, where prosecutors attempt to fulfill a mission of protecting the public and fighting crime." Brandon Hamburg, *Legally Guilty, Factually Innocent: An Analysis of Post-Conviction Review Units*, 25 S. CAL. REV. L. & SOC. JUST. 183, 194 (2016). A key benefit of having community members on the post-conviction review team is to allow for decision making that is not affected by the overall culture of a prosecutor's office, including the stigma that it sometimes creates for prosecutors who are in that office. *Id.*

74. For an overview and review of post-conviction units, *see* CONVICTION INTEGRITY UNITS, *supra* note 45; Hamburg, *supra* note 73; Dana C. Boehm, *The New Prosecutor's Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence*, 2014 UTAH L. REV. 613 (2014); Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting it Right the First Time*, 56 N.Y. L. SCH. L. REV. 1033 (2012); Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215 (2010).

75. In general, the Conviction Integrity Unit of Dallas County has been recognized as making the most effort to have a diversity of input in its evaluation of potential wrongful convictions. In creating the Unit, District Attorney Craig Watkins handpicked a team of prosecutors and defense lawyers, from public and private practice, to establish the unit. Hamburg, *supra* note 73, at 191-92 (internal citation omitted).

76. According to one study, the current population of innocent defendants is between 2.3% and 5% of the overall population, which is between 46,000 and 100,000 people in custody. *See Frequently Asked Questions,* INNOCENCE PROJECT, http://www.innocenceproject.org/about-innocence-project/faqs/how-many-innocent-people-are-there-in-prison (last visited Jan. 27, 2020). Earlier studies had estimated the number of wrongfully convicted individuals during a fifteen-year period of 1989 to 2003, to be 29,000 people. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 532 (2005).

studies, discusses, and makes recommendations regarding best practices to avoid wrongful convictions.[77]

In North Carolina, based upon the recommendation of its Innocence Commission, the state created a review agency that works completely independently from any governmental agency.[78] It is considered a "neutral entity with no allegiance to either prosecution or defense teams."[79] While it can boast independence, there have been criticisms of its operations.[80] First, depending on the persons appointed to the Commission, it can itself be viewed as biased. Rather than supplement a prosecutorial agency, it becomes the substitute for it. Thus, political criticisms of the group have a magnified impact on how the Commission's work is evaluated. Second, as a small group, its ability to investigate and resolve cases is more limited. Very few cases reviewed by the Commission have actually led to exoneration.[81] Finally, there may be a mixed message by having a Commission that works apart from the actual prosecutorial agency. To the extent that prosecutorial agencies believe that an outside agency is a back-up for its mistakes, there may be complacency in the prosecutorial agency itself in monitoring its own work and ensuring that wrongful convictions are remedied.

Although the details for any individual oversight committee may depend heavily on the size, past, organization, and other outreach efforts by the individual prosecutorial office, the step of allowing citizens to actually observe and play a role in prosecutorial decision-making represents an important effort toward increasing transparency and accountability by prosecutors. Having prosecutors know that they are subject to regular oversight is likely to have a salutary effect. A citizen group in their midst is a symbolic reminder that prosecutors are not all powerful and must remember their role to serve the interests of their community—not just in election years and not just for those who can influence the prosecutor's election or

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77. David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1047-48 (2010). For an overview of commissions established by states to investigate the causes and remedies of wrongful convictions, *see Criminal Justice Reform Commissions: Case Studies*, INNOCENCE PROJECT (Mar. 1, 2007), https://www.innocenceproject.org/criminal-justice-reform-commissions-case-studies/.

78. Jerome M. Maiatico, *All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission*, 56 DUKE L.J. 1345, 1347-48 (2007). Other states have created state-based innocence commissions as well. *See* Robert Carl Schehr, *The Criminal Cases Review Commission as a State Strategic Selection Mechanism*, 42 AM. CRIM. L. REV. 1289, 1299-1301 (2005).

79. Hamburg, *supra* note 73, at 197-98.

80. *Id.* at 199.

81. One assessment shows that the cost per exoneration is as high as $1 million. *Id.*

appointment.[82] Rather, prosecutors must have a tangible daily reminder that if they are going to represent the People, they must actually have an idea of how the citizenry is viewing their decision-making.

Oversight groups are meant to break down the walls of prosecution offices and make them true partners with the community in seeking justice. In Europe, there are independent officials who review charging decisions by prosecution agencies.[83] The European model also allows more judicial oversight of prosecutors' charging and declination decisions. In America, the democratic framework dictates that in order to ensure that prosecutors are representing the interests of the community, a group of community representatives, rather than judicial officers, should review prosecutors' decisions.

Civilian oversight can be used broadly or narrowly. It has a natural fit for cases involving public corruption or police violence.[84] With a natural skepticism about whether prosecutors represent the police or the citizens, having direct citizen input into their decisions would be helpful. Under-prosecution of these types of cases, as well as other crimes like sexual offenses that affect a community, undermine a community's confidence in the criminal justice system.[85] Alternatively, with growing concerns of mass incarceration and the overuse of certain criminal charges, such as narcotics offenses, civilian oversight can play a vital role by directing prosecutors to use alternative approaches, like drug courts and diversion programs.[86] For those prosecution offices that still pursue death penalty cases, having members of the community involved in the crucial decision to pursue such a penalty may be essential to ensure that the most significant decisions by a prosecutorial office are not arbitrary, capricious, or based upon improper factors, including race.[87] In fact, the one constant that a civilian group can provide is a reminder that cognitive biases may be impacting prosecutors' decisions.[88] This in

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82. *See* Thompson, *supra* note 8, at 353 (noting that "during the prosecutor's term, the voting public has little or no ability to influence [the prosecutor's] policies and practices"); *see also* James N. Johnson, *The Influence of Politics upon the Office of the American Prosecutor*, 2 AM. J. CRIM. LAW 187, 190-91 (1973) (discussing the role of elections of prosecutors).

83. *See* Brown, *supra* note 66, at 874-77.

84. *Id.* at 891-92.

85. *See id.* at 852-57.

86. *See* David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27 (2001).

87. *See* CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE FINAL REPORT 1 (2008), https://digitalcommons.law.scu.edu/ncippubs/1/.

88. *See* Green & Yaroshefsky, *supra* note 11, at 97; Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006).

itself could contribute to prosecutors doing a better job of representing all members of their community.

When first instituted, there was also resistance to the use of civilian oversight boards to monitor law enforcement agencies.[89] Police were viewed as a "breed apart,"[90] experts in their role of safeguarding the community. Moreover, many of the oversight commissions that were instituted were not successful in curbing police excesses.[91] Decades later, law enforcement is touting the benefits of having civilian oversight.[92] These range from generally improving community relations and fostering communication between the community and the police agency to improve department policies and procedures.[93]

Similar benefits may be available to prosecutors. A civilian oversight committee gives prosecutors an opportunity to get direct community input before they institute new programs.

Even when prosecutors claim to be reformers, their efforts may be rejected because they did not anticipate criticism of their efforts.[94] A citizen group can give the prosecutor more direct feedback about likely community reaction and measures that can be used to have the reform best serve the interests of the community. This would be a vast improvement over the current system in which prosecutorial decisions are largely unreviewable; prosecutors are "among the least accountable public officials."[95]

IV. CONCLUSION AND PROPOSAL

For years, we have assumed that the community's most direct involvement in the criminal justice system is in their role as jurors.[96] However, it is time to do more and give the community a

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89. *See* Sklansky, *supra* note 38, at 1771-74. Many of the arguments being made for oversight of prosecutorial agencies were made during the early proposals for civilian oversight of policing. *See* Kim, *supra* note 62.

90. Sklansky, *supra* note 38, at 1797.

91. *See* Clarke, *supra* note 60.

92. *See* Pamela Seyffert, *Can Professional Civilian Oversight Improve Community-Police Relations?*, POLICE CHIEF (Sept. 13, 2017), https://www.policechiefmagazine.org/can-professional-civilian-oversight-improve-community-police-relations.

93. *Id.*

94. *See, e.g.*, Raven Rakia, *L.A. Prosecutor Touts Her Mental Health Reforms, but Critics Say She's Making the Crisis Worse*, THE APPEAL (June 7, 2019), https://theappeal.org/l-a-prosecutor-touts-her-mental-health-reforms-but-critics-say-shes-making-the-crisis-worse/.

95. Green & Zacharias, *supra* note 67, at 902.

96. To reflect this role, we frequently refer to jurors as the "conscience of the community." *See generally* Daniel W. Van Ness, *Preserving a Community Voice: The Case for Half-and-Half Juries in Racially-Charged Criminal Cases*, 28 J. MARSHALL L. REV. 1, 28 (1994); Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. CAL. L. REV. 1533 (1993).

direct role in prosecutorial decision-making.[97] The current model provides very little transparency about how and why prosecutors make their decisions and gives prosecutors nearly unchecked power to decide what is in the "public interest." If prosecutors represent the community, then there should be a move toward increasing community representation in prosecutorial decision-making. The time may be right for oversight commissions, not just of the police[98] but of their partners as well—prosecutors.

This article is designed to prompt a serious discussion about implementing such oversight commissions for prosecutorial offices across the country. For the last twenty years, the focus has been on how to reform the police and, to some extent, how to address prosecutorial misconduct. However, there has been relatively little attention to the idea of making prosecutors more responsible to their constituents by giving the community a seat in the prosecutor's office. While the means of implementation may not be immediately evident, the need is. Reform in the criminal justice system will not occur without prosecutors engaging—voluntarily or through direction—with such reforms. Suggesting that they might be subject to daily oversight can actively prompt an important discussion of what model prosecutorial offices should look like in 2020 and beyond.

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97. One benefit in increasing community involvement is to ensure that individuals need not go through trials if it is clear that the community does not support their case. While this input can also be provided by grand juries, because the Fifth Amendment has not been incorporated to the states, *see* Hurtado v. California, 110 U.S. 516 (1884), only twenty-three states require their use to bring charges. Greg Hurley, *The Modern Grand Jury*, NAT'L CTR. FOR ST. CTS. (2014), https://www.ncsc.org/sitecore/content/microsites/trends/home/Monthly-Trends-Articles/2014/The-Modern-Grand-Jury.aspx.

98. During recent years, over one hundred jurisdictions have adopted Civilian Oversight Commissions to monitor and guide the work of law enforcement. *See, e.g.*, *Police Oversight by Jurisdiction (USA)*, NAT'L ASS'N CIVILIAN OVERSIGHT L. ENFORCEMENT, https://www.nacole.org/police_oversight_by_jurisdiction_usa (last visited Jan. 26, 2020); *About Us*, L.A. COUNTY CIVILIAN OVERSIGHT COMMISSION, https://coc.lacounty.gov/About-Us (last visited Jan. 26, 2020).

Grand Jury Under Fire: The Debate over Reputational Rights and Pennsylvania's Investigating Grand Jury Reports

Christopher Winkler[*]

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I. INTRODUCTION

The fundamental concept of fairness is integral to every aspect of the justice system. It is the basis upon which this system rests, without which the routine functions of courts and grand juries would fracture. But, what if violations of fair procedures are already happening? What if they occur regularly without anyone noticing or fighting to change them? For Pennsylvania grand juries, this is exactly the case.

Pennsylvania grand juries are equipped with a function most state grand juries lack: the ability to issue reports criticizing people without formally charging them with any crime.[1] This power has resulted in pseudo-trials conducted by the public. They neither see the accused tried in court or found guilty of such a charge, but they

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1. *See* 42 PA. CONS. STAT. § 4552(a) (2015).

publicly condemn the individual nonetheless.[2] Pennsylvania's grand juries have operated with this authority for too long. One grand jury's most recent report, featuring vast accusations against members of the Catholic Church,[3] has caused the debate over an accused person's right to reputation and due process to reach its tipping point.

This article will focus on a Pennsylvania grand jury's 2018 investigation into the Catholic Church for sexual abuse of children over several decades. It will first cover England's grand jury system, describe how that system influenced grand jury law in the United States, and discuss how the United States incorporated England's Magna Charta into its Bill of Rights. This article will then highlight our federal grand jury system and the important cases that have interpreted the boundaries of the federal grand jury's powers.

Next, this article will inspect Pennsylvania's grand jury system. It will examine the Pennsylvania Grand Jury Act, enacted in 1980, and the basis for Pennsylvania's current grand jury system. A detailed description of the tasks and powers of the state grand jury based on statutory law will follow, including the difference between a grand jury created to indict suspected criminals and one created to investigate crimes and offer critical reports. Additionally, it will compare Pennsylvania grand juries to those of other states and note the significant grand jury investigations conducted in Pennsylvania over the past several decades.

The focal point of this article involves Pennsylvania's grand jury investigation into the Catholic Church in 2018. This background portion will provide a detailed examination of the ongoing debate over Pennsylvania's grand jury functions. It will also outline the Pennsylvania Supreme Court decision that ultimately decided the issue.

Finally, this article will conclude with a recommendation section presenting an argument for adjusting the Pennsylvania grand jury powers and the rights afforded to those accused of crimes in an investigative report. The argument will offer a compromise for both sides and call for the state legislature to resolve the ongoing debate.

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2. *See* Charles Thompson, *Sexual Abuse Is the Story, but Grand Jury Process Is the Issue Before Pa. Supreme Court*, PENN LIVE (July 23, 2018), https://www.pennlive.com/news/2018/07/sexual_abuse_is_the_story_but.html.

3. *See id.*

II. BACKGROUND

A. England's Grand Jury System

United States grand jury law is derived from England's grand jury process, which operated to provide a fair method for instituting criminal actions against potential defendants.[4] In England, a group of jurors was selected from the body of the people and was not limited by procedural or evidentiary rules.[5] Rather, the group was free to act on the knowledge of its individual jurors, and it was free to make presentments or indictments on the information it considered appropriate.[6] Ultimately, the English grand jury's purpose was to institute fair criminal proceedings against those suspected of crimes.[7] For centuries, it acted as both an accuser of suspected criminals and a protector of arbitrary and oppressive governmental action.[8] Eventually, England's grand jury gained independence, breaking free from the Crown's control because of its growing popularity.[9]

England's broad charter of public right and law, known as the Magna Charta,[10] was heavily incorporated into our Bills of Rights.[11] Its provisions helped establish limitations upon each power of the United States government.[12] Accordingly, our principles of liberty and justice have evolved from those originating in England due to a more comprehensive interpretation.[13] Unlike in England, where they were utilized only to guard against executive usurpation and tyranny, these provisions "have become bulwarks also against arbitrary legislation; . . . they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property."[14]

Included within these provisions is the grand jury system, which in both the United States and England has "convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special

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4. *See* Costello v. United States, 350 U.S. 359, 362 (1956).
5. *Id.*
6. *Id.*
7. *Id.*
8. United States v. Calandra, 414 U.S. 338, 342-43 (1974).
9. *Costello*, 350 U.S. at 362.
10. *See* Hurtado v. California, 110 U.S. 516, 531 (1884).
11. *Id.* at 531-32.
12. *Id.* at 532.
13. *Id.*
14. *Id.*

favor."[15] The founders believed that the grand jury was essential to basic liberties and, therefore, used the English system to shape the Fifth Amendment to our Constitution.[16] The grand jury's historic functions continue to impact our judicial system today through probable cause determinations and protection against baseless prosecutions.[17]

B. The Federal Grand Jury System

The federal grand jury system is rooted in the Fifth Amendment to the United States Constitution.[18] The Fifth Amendment states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[19] Federal grand juries have always enjoyed freedom to investigate various violations of criminal law without judicial oversight.[20] Grand jury members deliberate in secret and may freely compel evidence or testimony they consider appropriate.[21] Additionally, the grand jury is not hindered by procedural and evidentiary rules:

> [i]t is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.[22]

These proceedings feature ex parte investigations to determine whether a crime has been committed and whether prosecutors should initiate criminal charges against a suspect, rather than adversary hearings to determine guilt or innocence.[23] With a broad investigative power,[24] the grand jury plays "a fundamental governmental role of securing the safety of the person and property of the

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15. Costello v. United States, 350 U.S. 359, 362 (1956).
16. *See* United States v. Calandra, 414 U.S. 338, 343 (1974) (citing *Costello*, 350 U.S. at 361-62).
17. *Id.* (citing Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972)).
18. *See* U.S. CONST. amend. V.
19. *Id.*
20. *Calandra*, 414 U.S. at 343.
21. *Id.*
22. *Id.* (quoting Blair v. United States, 250 U.S. 273, 282 (1919)).
23. *Id.* at 343-44.
24. *See id.* at 344.

citizen . . . ."[25] Further, society's best interest is served by an extensive grand jury investigation[26] triggered by tips, rumors, prosecutorial evidence, or general knowledge of the grand jurors.[27] An indictment by a grand jury is presumed valid on its face and is never tainted by the way in which the jurors obtained evidence.[28]

Beyond its power to act outside normal evidentiary standards, federal grand juries may also compel persons to appear and testify before them.[29] While one's testimony may be unduly burdensome or even embarrassing,[30] the grand jury may nevertheless require the individual's appearance and testimony because "the duty to testify has been regarded as 'so necessary to the administration of justice' that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure."[31] Moreover, a witness appearing and testifying before a grand jury may not interfere with the investigation, urge objections, or challenge the authority of the grand jury.[32]

Despite the grand jury's extensive powers, it does not act with unlimited authority. While it may utilize otherwise inadmissible evidence, it may not violate a valid privilege, such as the constitutional guarantees of privilege under the Fifth Amendment.[33] Accordingly, grand juries will often grant a witness the privilege against self-incrimination to speak about otherwise privileged matters without concern of prosecution.[34] Furthermore, the grand jury may not violate one's privacy interest protected by the Fourth Amendment.[35] The court may remove a grand jury's vast subpoena power if the subpoena is "'far too sweeping in its terms to be regarded as reasonable' under the *Fourth Amendment*."[36]

The federal grand jury's current system was shaped over decades through crucial legal decisions. One such decision was *Hurtado v. California*.[37] In *Hurtado*, the defendant challenged the constitutionality of his prosecution, which resulted from neither the filing of an indictment nor a presentment by a grand jury.[38] He claimed

25. *Id.* (quoting Branzburg v. Hayes, 408 U.S. 665, 700 (1972)).
26. *See* Wood v. Georgia, 370 U.S. 375, 392 (1962).
27. *Calandra*, 414 U.S. at 344 (citing Costello v. United States, 350 U.S. 359, 362 (1956)).
28. *Id.* at 344-45.
29. *Id.* at 345.
30. *Id.*
31. *Id.* (quoting Blair v. United States, 250 U.S. 273, 281 (1919)).
32. *Id.*
33. *Id.* at 346.
34. *See id.*
35. *Id.*
36. *Id.* (quoting Hale v. Henkel, 201 U.S. 43, 76 (1906)).
37. 110 U.S. 516 (1884).
38. *Id.* at 519-20.

that "due process of law" was equivalent to "law of the land," referenced in Chapter 29 of the Magna Charta.[39] This Chapter referred to "the very institutions which . . . have been tried by experience and found fit and necessary for the preservation of those principles, and . . . crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the State."[40] The defendant claimed the grand jury was one such institution protected by the "law of the land," which required an indictment or presentment for a felony charge against the accused to fulfill due process of law.[41]

The *Hurtado* Court examined numerous passages by Lord Coke that analyzed the Magna Charta's requirements of "due process of law,"[42] which stated that the Magna Charta required the "indictment of good and lawfull [sic] men" before any man be taken or imprisoned in accordance with the law of the land.[43] Moreover, a presentment before justices was required for lawful due process.[44] However, the Court believed that Lord Coke's statements were given too much weight, because if a grand jury indictment or presentment is necessary in all cases of imprisonment for a crime, "it applies not only to felonies but to misdemeanors and petty offenses, and the conclusion would be inevitable that informations as a substitute for indictments would be illegal in all cases."[45] An analysis of the true meaning of "due process of law" then followed.[46]

The Court supported a statement from Justice Johnson, who said that the Magna Charta's words "were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."[47] Accordingly, a process of law sanctioned and settled both in England and America was understood as due process of law.[48] However, this did not mean that nothing else could qualify as due process of law.[49] Nothing within the Magna Charta limited what qualified as ideas and systems of due process.[50] Instead, "it

39. *Id.* at 521.
40. *Id.*
41. *Id.*
42. *Id.* at 522-24.
43. *Id.* at 524.
44. *Id.*
45. *Id.*
46. *Id.* at 527.
47. *Id.* (quoting Bank of Columbia v. Okely, 17 U.S. 235, 244 (1819)).
48. *Id.* at 528.
49. *Id.*
50. *See id.*

was the characteristic principle of the common law to draw its inspiration from every fountain of justice."[51] The Court finally concluded that "any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."[52] Informations as substitutes for indictments or presentments, therefore, qualified as due process of law.[53]

In *United States v. Calandra*, a grand jury convened to investigate loansharking activities consistent with the evidence discovered during the search of the defendant's place of business.[54] The grand jury subpoenaed the defendant, Calandra, for questioning, who appeared before the grand jury but refused to testify and instead moved to suppress the evidence obtained from the search.[55] The United States District Court for the Northern District of Ohio suppressed the evidence, finding that the search warrant was issued without probable cause and that the defendant did not have to answer any of the grand jury's questions based on the suppression of that evidence.[56] After the United States Court of Appeals for the Sixth Circuit affirmed, the government appealed to the United States Supreme Court.[57]

Originally, the Fourth Amendment limited the grand jury's power to compel a witness to answer questions based on unlawfully obtained evidence.[58] The United States Supreme Court, however, decided that the Sixth Circuit's decision would impede the grand jury's function, as the grand jury is not an adjudicator of guilt or innocence.[59] According to the Court, "[p]ermitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings."[60] Countless preliminary trials would therefore result, and "[a]ny holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the

51. *Id.* at 531.
52. *Id.* at 537.
53. *Id.* at 538.
54. 414 U.S. 338, 341 (1974).
55. *Id.*
56. *Id.* at 341-42.
57. *Id.* at 342.
58. *Id.* at 347.
59. *Id.* at 349.
60. *Id.*

public's interest in the fair and expeditious administration of the criminal laws."[61] Accordingly, grand jury questioning based on the evidence it has obtained features no governmental invasion of privacy, but instead is consistent with the questioning in all grand jury proceedings.[62] Therefore, the Court concluded that questions based on illegally obtained evidence do not spark a new Fourth Amendment violation and that damage from the exclusionary rule's extension to grand jury proceedings would outweigh the rule's deterrent effect.[63]

Finally, another crucial case in cementing the modern grand jury system was *Costello v. United States*.[64] The issue *Costello* addressed was whether it was lawful to prosecute and convict a defendant when only hearsay evidence was presented to the grand jury which indicted him.[65] The United States Supreme Court stated, "[i]f indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed."[66] The Fifth Amendment only requires that an indictment returned by a legally constituted and unbiased grand jury be valid on its face to proceed to a trial on the charge.[67] While defendants are entitled to evidentiary rules during a trial to reach a fair verdict, no rule permitting unnecessary delay in the grand jury proceeding exists.[68] Therefore, a grand jury may indict someone based solely on hearsay evidence.[69]

C. *Pennsylvania's Grand Jury System*

Pennsylvania enacted its current grand jury law, known as the "Investigating Grand Jury Act,"[70] in 1980.[71] Under the Act, an attorney representing the Commonwealth may summon a county investigating grand jury if the attorney believes the grand jury's investigatory resources are necessary due to the existence of criminal

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61. *Id.* at 350 (quoting United States v. Dionisio, 410 U.S. 1, 17 (1973)).
62. *Id.* at 354.
63. *Id.*
64. 350 U.S. 359 (1956).
65. *Id.* at 359.
66. *Id.* at 363.
67. *Id.*
68. *Id.* at 364.
69. *Id.*
70. 42 PA. CONS. STAT. §§ 4541-4553 (2015).
71. *See* Angela Couloumbis & Liz Navratil, *Clergy Abuse Case Reflects Simmering Scrutiny of Pa. Grand Jury System*, PITT. POST-GAZETTE (Aug. 5, 2018, 5:00 AM), www.post-gazette.com/news/politics-state/2018/08/05/Clergy-abuse-scrutiny-Pennsylvania-grand-jury-system-catholic-diocese-Pittsburgh-Philadelphia-Greensburg/stories/201808030172.

activity within that specific county.[72] Additionally, if the presiding judge of the court of common pleas determines that a grand jury's investigative powers are necessary, the judge may empanel a grand jury without the Commonwealth's permission.[73] If, however, the county's district attorney and Pennsylvania's Attorney General both determine that a grand jury is unnecessary, then they may stay the judge's action of summoning one.[74] Furthermore, the Attorney General may apply to the Pennsylvania Supreme Court for a multicounty investigating grand jury if he believes it is necessary because of criminal activity within more than one county of the Commonwealth, and that an adequate investigation by a grand jury limited to one county is impossible.[75]

The Act specifies that each investigating grand jury shall initially contain twenty-three members selected from the public, with a minimum of seven and a maximum of fifteen alternatives.[76] While fifteen members are required to conduct business for the grand jury, a majority of the full grand jury is required to adopt a report or issue a presentment.[77] Each investigating grand jury is required to serve eighteen months,[78] with the exception that the grand jury may request an extension of six months by majority vote because it has not yet completed its duties,[79] or that the court may discharge the grand jury early because it has not fulfilled its investigatory obligations.[80]

The grand jury derives power from its ability to investigate criminal offenses alleged to have been committed within one or multiple counties of the Commonwealth.[81] To properly investigate crimes, the investigating grand jury possesses the power to subpoena, the power to initiate civil and criminal contempt proceedings, and all other powers exercised by the grand juries throughout the Commonwealth.[82] One primary power of the investigating grand jury is its ability to issue a presentment against an individual suspected of committing criminal acts within the Commonwealth.[83] When it believes that a presentment is necessary, it instructs an attorney for the Commonwealth to prepare one that shall be voted on by the

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72. 42 PA. CONS. STAT. § 4543(b).
73. *Id.* § 4543(c).
74. *Id.*
75. *Id.* § 4544(a).
76. *Id.* § 4545(a).
77. *Id.* § 4545(b).
78. *Id.* § 4546(a).
79. *Id.* § 4546(b).
80. *Id.* § 4546(c).
81. *Id.* § 4548(a).
82. *Id.*
83. *Id.* § 4548(b).

grand jury.[84] With a majority vote of approval by the grand jury's members, the presentment is then issued to the supervising judge.[85] If the supervising judge accepts the presentment, an attorney for the Commonwealth may then file a complaint against the defendant.[86] Despite its extensive power to issue presentments, the grand jury has no power to indict suspected criminals.[87]

While grand juries in Pennsylvania often exercise their powers to issue presentments, they also frequently utilize a unique power among state grand juries: their power to issue reports.[88] An investigating grand jury report is defined as "[a] report submitted by the investigating grand jury to the supervising judge regarding conditions relating to organized crime or public corruption or both; or proposing recommendations for legislative, executive, or administrative action in the public interest based upon stated findings."[89] The broad abilities of Pennsylvania grand juries to issue reports contrast the limited nature of federal grand jury reports, which must relate only to organized criminal activity.[90]

The investigating grand jury can submit an investigatory report to its supervisory judge at any time during its term with a majority vote.[91] After examining the report, the judge may file it as public record only if the report is based on facts obtained during the grand jury's investigation and if those facts are supported by a preponderance of the evidence.[92] Moreover, the supervising judge may, in his or her discretion, allow individuals to submit written responses to the allegations within the report if the judge finds that the report criticizes those individuals without indicting them.[93] The judge may then attach those responses to the actual report before the report is released to the public.[94] Unlike Pennsylvania's grand jury system, however, the federal grand jury process affords an individual named within the report a reasonable opportunity to testify and

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84. *Id.* § 4551(a).
85. *Id.*
86. *Id.* § 4551(e).
87. *Id.* § 4548(c).
88. *See id.* § 4552.
89. *Id.* § 4542.
90. *See* Christopher Carusone, *Grand Jury Reports, the Right to Due Process and a Corporation's Reputation*, LEGAL INTELLIGENCER (July 24, 2018, 1:31 PM), https://www.law.com/thelegalintelligencer/2018/07/24/grand-jury-reports-the-right-to-due-process-and-a-corporation's-reputation/.
91. 42 PA. CONS. STAT. § 4552(a).
92. *Id.* § 4552(b).
93. *Id.* § 4552(e).
94. *Id.*

present witnesses on that person's behalf before the report is released.[95] Pennsylvania offers no similar opportunity, and individuals named within reports have little chance to rebut the accusations.[96]

Pennsylvania courts have interpreted the Investigating Grand Jury Act throughout numerous cases post-enactment. In *In re Investigating Grand Jury*, the petitioner was subpoenaed and granted immunity to testify before an investigating grand jury but refused to do so.[97] The grand jury's supervising judge then issued an order of civil contempt against the petitioner.[98] The petitioner's challenge of the order asserted that, under 42 Pa. Cons. Stat. § 4548(a) of the Investigating Grand Jury Act, the grand jurors are the only ones with the authority to initiate contempt proceedings.[99] In rejecting this argument, the Pennsylvania Supreme Court noted that nothing within the statute grants exclusive authority to the grand jury or removes powers from the court.[100] 42 Pa. Cons. Stat. § 4548(a) allows an investigating grand jury "to *request* the court to exercise its contempt power," but it does not transfer that power to the jurors themselves.[101]

In *Robert Hawthorne, Inc. v. County Investigating Grand Jury*, the supervising judge held the defendant, Hawthorne, in civil contempt for refusing to obey a subpoena.[102] He raised numerous arguments on appeal, the first alleging that the grand jury's investigation was illegal due to its lack of trustworthy information that crimes were being committed.[103] Despite the Pennsylvania Supreme Court's recognition that credible evidence from trustworthy sources was previously an essential element of investigations,[104] the Investigating Grand Jury Act now only requires that the Commonwealth submit a notice to the supervising judge alleging that the grand jury's resources are required for an investigation.[105]

Hawthorne also challenged the Act by alleging that it violated the probable cause requirements for seizures under the Fourth Amendment of the United States Constitution and Article 1, Section 8 of

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95. Carusone, *supra* note 90.
96. Thompson, *supra* note 2.
97. 433 A.2d 5, 5-6 (Pa. 1981).
98. *Id.* at 6.
99. *Id.*
100. *Id.* at 6-7.
101. *Id.* at 7 (emphasis added).
102. 412 A.2d 556, 558 (Pa. 1980).
103. *Id.*
104. *Id.* at 559 (citing Commonwealth *ex rel.* Camelot Detective Agency v. Specter, 303 A.2d 203, 205 (Pa. 1973)).
105. *Id.*

the Pennsylvania Constitution.[106] However, the Pennsylvania Supreme Court recognized no federal or Pennsylvania probable cause standard for subpoena-related issues.[107] Moreover, the court rejected Hawthorne's assertion that he was denied due process after it examined federal law standards for conducting grand jury investigations and determined that the Fourteenth Amendment "does not require the states to go beyond federal standards."[108]

Finally, Hawthorne challenged the subpoena itself.[109] The court noted that a supervising judge must follow the *Schofield* procedure[110] before issuing a subpoena, which requires the Government:

> to make some preliminary showing by affidavit that each item is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose. . . . [sic] [U]nless extraordinary circumstances appear, the nature of which we cannot anticipate, the Government's supporting affidavit should be disclosed to the witness in the enforcement proceeding. . . . If after such disclosure the witness makes application . . . for additional discovery in the enforcement proceeding the court must in deciding that request weigh the quite limited scope of an inquiry into abuse of the subpoena process, and the potential for delay, against any need for additional information which might cast doubt upon the accuracy of the Government's representations.[111]

The court adopted this procedure for Pennsylvania grand jury subpoena issues,[112] and determined that the supervising judge in this case followed every step necessary.[113]

The nature of Pennsylvania's grand jury system is unique compared to other state grand juries. New York, for example, guarantees anyone named in a grand jury's investigative report the chance

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106. *Id.*
107. *Id.*
108. *Id.* at 560.
109. *Id.*
110. *See In re* Grand Jury Proceedings, 486 F.2d 85, 93 (3d Cir. 1973) (reversing a district court's action of holding a woman in contempt for refusing to submit handwriting exemplars and to allow her photograph and fingerprints to be taken). Judge Spaeth first implemented the *Schofield* procedure as a requirement under state law in 1976. *See* Salvitti Appeal, 357 A.2d 622, 625 (Pa. Super. Ct. 1976) (finding "no reason why an investigating grand jury should be supervised less strictly if it is a state grand jury rather than a federal one").
111. *Robert Hawthorne, Inc.*, 412 A.2d at 560-61 (quoting *In re Grand Jury Proceedings*, 486 F.2d at 93).
112. *Id.* at 561.
113. *Id.* at 562.

to personally appear before that grand jury to provide his or her own side of the story.[114] Reports that result in policy recommendations or proposed legislative changes are not supposed to be critical of any one, specific person.[115] Furthermore, if the supervising judge determines that a grand jury's report is not supported by the preponderance of the evidence, the judge has the authority to either seal the record or direct the grand jury to take additional testimony.[116]

Nearly thirty years ago, Alaska faced problems similar to those currently ongoing in Pennsylvania regarding the grand jury's operations.[117] Alaska resolved the issue by establishing a process that allowed people to challenge their inclusions in a grand jury report before the report was released publicly.[118] Today, an Alaskan grand jury must remain in session until its supervising judge reviews the report and determines whether the report will hinder an individual's constitutional rights.[119] If the judge's findings confirm that the individual's rights will be violated, the judge must return the report to the grand jury for further proceedings.[120] Gathering evidence in secret and building criminal cases from that evidence is common for grand juries throughout the country, but it is very uncommon to release the reports that identify and criticize people without actually charging them with crimes.[121] At least eighteen other states prohibit their grand juries from naming individuals in a report unless formal charges are brought against the accused.[122]

Before Pennsylvania's grand jury began its investigation into the Catholic Church in 2018, it had conducted numerous other notable investigations over the past several decades.[123] Philadelphia District Attorney Lynne Abraham was the first to use the grand jury system to investigate clergy sex abuse in 2005.[124] A city grand jury in Philadelphia revealed, in a 424-page report,[125] that at least sixty-three priests sexually abused hundreds of minors over several decades.[126] The report identified these individuals and offered harsh

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114. Thompson, *supra* note 2.
115. *Id.*
116. *In re* Fortieth Statewide Investigating Grand Jury, 197 A.3d 712, 718 (Pa. 2018).
117. Couloumbis & Navratil, *supra* note 71.
118. *Id.*
119. *In re Fortieth*, 197 A.3d at 718.
120. *Id.*
121. *See* Couloumbis & Navratil, *supra* note 71.
122. *In re Fortieth*, 197 A.3d at 718.
123. *See generally* Couloumbis & Navratil, *supra* note 71.
124. *Id.*
125. *Id.*
126. Maria Panaritis, *A Huge Clergy Abuse Probe Is About to Go Public. Could Pa.'s Attorney General Be on the Verge of Slaying Goliath?*, PHILA. INQUIRER (Aug. 2, 2018, 5:57 PM),

criticism of the Archdiocese of Philadelphia leaders for ignoring or concealing the problem.[127] No prosecutions ensued, however, because the statute of limitations had already passed.[128] A Philadelphia grand jury released another report in 2011 exposing numerous priests of sexual abuse.[129] In addition to removing those priests from priesthood, the report resulted in the imprisonment of Monsignor William Lynn, the highest ranking Catholic Church official in the United States convicted for sexually abusing children.[130] Moreover, in 2016, a grand jury reported on the sexual abuse of hundreds of children at the hands of over fifty priests and religious leaders in the Altoona-Johnstown Diocese.[131] Once again, the statute of limitations prevented the filing of any formal charges against the priests.[132]

D. Pennsylvania Grand Jury's Investigation into the Catholic Church

The focal point of this article is the most recent grand jury investigation into the reported sexual abuse of children by priests within the Pennsylvania Catholic Dioceses. For over eighteen months, a Pennsylvania grand jury investigated six Pennsylvania Catholic Dioceses: Harrisburg, Pittsburgh, Allentown, Scranton, Erie, and Greensburg.[133] The investigation, which ended in April 2018,[134] identified more than 1,000 child victims and at least 300 clergy members suspected of sexual abuse.[135]

This grand jury exercised its investigatory ability because numerous Pennsylvania dioceses have hidden or concealed reports of

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https://www.inquirer.com/philly/columnists/maria-panaritis/pennsylvania-grand-jury-report-clergy-abuse-catholic-church-attorney-general-josh-shapiro-maria-panaritis-20180801.html.

127. Couloumbis & Navratil, *supra* note 71.

128. Panaritis, *supra* note 126.

129. Ivey DeJesus, *Grand Jury Investigation into Six Dioceses, Including Harrisburg, Nears Completion; Findings to Be Worse than Other Reports*, PENN LIVE (Apr. 4, 2018), https://www.pennlive.com/news/2018/04/grand_jury_investigation_into.html.

130. *Id.*

131. Panaritis, *supra* note 126.

132. *Id.*

133. Michelle Boorstein, *Hundreds of Accused Priests Listed in Pennsylvania Report on Catholic Church Sex Abuse*, ST. AUGUSTINE REC. (Aug. 14, 2018, 2:58 PM), www.staugustine.com/news/20180814/hundreds-of-accused-priests-listed-in-pennsylvania-report-on-catholic-church-sex-abuse.

134. Tim Darragh, *Priest Sex Abuse Cases Put Pennsylvania Grand Jury Rules to Test*, MORNING CALL (Aug. 3, 2018, 6:25 PM), https://www.mcall.com/news/pennsylvania/mc-nws-grand-jury-law-catholic-sex-abuse-20180731-story.html.

135. Boorstein, *supra* note 133.

child sexual abuse over many years, while the statutes of limitations for those crimes expired.[136] One Pennsylvania grand jury function is to recommend ways to better address issues that arise during an investigation.[137] Here, the grand jury's concern was that many of the victims of these crimes were too old and could not bring claims against the church or clergy members because of the statute of limitations.[138] Because most of the allegations were too old to permit criminal charges,[139] the grand jury's purpose in investigating these alleged sexual assaults was to recommend statute of limitations changes to Pennsylvania lawmakers.[140]

During the course of its investigation, the grand jury examined internal church documents previously concealed by the church, reviewed written or in-person testimony of bishops from all six dioceses, and spoke with victims of the alleged abuse.[141] The grand jury's final report was nearly 900 pages,[142] and stated that 301 "predator priests" sexually abused over 1,000 children over seven decades.[143] The primary legal issue of the report arose, however, when clergy members named within it challenged the fairness of such a report.[144]

Clergy members named within the report, but not charged with any crime, stated that they had no fair opportunity to rebut the allegations against them.[145] Their lawyers have argued that, because Pennsylvania law protects citizens' reputations, releasing the report to the public would result in those reputations being destroyed without any finding of guilt within a courtroom.[146] Article I of the

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136. Fox43 Newsroom, *Grand Jury: Recommendation for Legal Changes in Response to Child Sex Abuse Investigation*, FOX 43 (Aug. 14, 2018, 2:53 PM), https://fox43.com/2018/08/14/grand-jury-recommendations-for-legal-changes-in-response-to-child-sex-abuse-investigation/.

137. Ed Condon, *Former Pennsylvania Chief Justice Backs Delay of Grand Jury Report*, NAT'L CATH. REG. (Aug. 9, 2018), https://www.ncregister.com/daily-news/former-pennsylvania-chief-justice-backs-delay-of-grand-jury-report.

138. *See* Fox43 Newsroom, *supra* note 136.

139. Darragh, *supra* note 134.

140. Pittsburgh Post-Gazette, *Challenging Grand Jury Rare, but Might Make Sense*, POCONO REC. (July 7, 2018, 8:16 PM), https://www.poconorecord.com/news/20180707/challenging-grand-jury-rare-but-might-make-sense.

141. The LNP Editorial Bd., *Grand Jury Report on Child Sexual Abuse in Pennsylvania Catholic Churches Ought to Be Released Without Redactions*, LANCASTER ONLINE (Sept. 4, 2018), https://lancasteronline.com/opinion/editorials/grand-jury-report-on-child-sexual-abuse-in-pennsylvania-catholic/article_89b9f4f2-ad7e-11e8-9e5b-1730a796bb29.html.

142. Lindsay Lazarski, *Pa. Supreme Court Questions Attorneys About Redactions in Clergy Report*, WHYY (Sept. 26, 2018), https://whyy.org/articles/pa-supreme-court-questions-attorneys-about-redactions-in-clergy-report/.

143. The LNP Editorial Bd., *supra* note 141.

144. Darragh, *supra* note 134.

145. *Id.*

146. *See id.*

Pennsylvania Constitution protects an individual's right to reputation,[147] and many individuals named within the report have objected to being included in its public release because they have neither been able to respond to the allegations nor been afforded appropriate due process rights.[148] The grand jury system in Pennsylvania allows those named within reports to send to the grand jury written responses to the report's allegations before it is released, but those named cannot appear in person, directly answer questions, or question other witnesses.[149] Defense lawyers have repeatedly argued for an opportunity to disprove the accusations against their clients before the report is released by appearing before the grand jury because a written response, they claim, is not sufficient to protect reputational rights.[150]

Conversely, those in favor of releasing the full report to the public argue on behalf of the victims.[151] According to Josh Shapiro, Pennsylvania's Attorney General, "[e]very redaction represents a silenced victim."[152] The grand jurors have argued that the Catholic Church knew of the abuse and had its chance to investigate the issue at the time the allegations were made, but it chose not to.[153] Shapiro has even stated that evidence shows the Vatican knew of the sexual abuse cover-up in Pennsylvania and did nothing about it.[154] Victims of sexual abuse have, themselves, stated that releasing the report would constitute a crucial step in their healing process.[155] Many have noted that their voices can only be heard through courtroom proceedings or through grand jury investigations, and the church's efforts to outrun the statute of limitations have eliminated courtroom proceedings as an option.[156] Furthermore, advocates of releasing the full report have asserted that grand jury reports are too important for acknowledging state policy issues or institutional behavior problems to alter their format.[157] Also, hearing victims' stories could help shed light on why this

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147. PA. CONST. art. I, § 1.
148. Condon, *supra* note 137.
149. *See id.*
150. *See* Thompson, *supra* note 2; *see also* Condon, *supra* note 137.
151. *See generally* The LNP Editorial Bd., *supra* note 141.
152. *Id.*
153. *Id.*
154. *Id.* The Vatican is "the highest echelon of the Catholic Church." *Id.*
155. Darragh, *supra* note 134.
156. *See* Thompson, *supra* note 2.
157. *See id.*

crime occurs within the church and could push Pennsylvania lawmakers to change the statute of limitations on child sexual abuse laws in the state.[158]

The Pennsylvania Supreme Court weighed the arguments of both sides when it decided *In re Fortieth Statewide Investigating Grand Jury*, written by Chief Justice Saylor.[159] After the grand jury's supervising judge opined that the report's findings were supported by a preponderance of the evidence and accepted the report,[160] dozens of clergy members and others named within it challenged its constitutionality.[161] According to the court, "[m]ost of the petitioners alleged that they are named or identified in Report 1 in a way that unconstitutionally infringes on their right to reputation."[162] Further, the petitioners asserted that they were denied due process by not receiving an opportunity to appear before the grand jury or the supervising judge to rebut the claims.[163]

After determining that neither the Constitution nor the laws of Pennsylvania permit the redaction of a grand jury report, the supervising judge held that the petitioners had received appropriate due process under the law.[164] A crucial reasoning behind the supervising judge's decision was that investigating grand juries issue reports as investigative—not adjudicative—bodies.[165] Therefore, limited due process protections are afforded to defendants through the government's investigatory functions.[166] Furthermore, the supervising judge suggested that "any greater procedural protections would be unduly disruptive" of the grand jury's investigative purpose.[167] Accordingly, the supervising judge declined to offer any remedy to the petitioners because doing so would "effectively bring the grand jury process to a halt turning each investigation into a full adjudication."[168]

The Pennsylvania Supreme Court, however, granted the petitioners' request and ordered the grand jury to redact specific names of clergy members from the report before its public release.[169] The

158. *See id.*
159. 190 A.3d 560 (Pa. 2018) [hereinafter Grand Jury I].
160. *Id.* at 564.
161. *Id.* at 565.
162. *Id.* (citing PA. CONST. art. I, § 1).
163. *Id.*
164. *Id.*
165. *Id.* at 566.
166. *Id.*
167. *Id.* at 567.
168. *Id.* (quoting *In re* 40th Statewide Investigating Grand Jury, No. 571 M.D. 2016, slip op. at 6-7 (Pa. C.P. Allegheny June 5, 2018)).
169. *Id.* at 578.

court disagreed with the Commonwealth's position that the report's impact on reputations would not be substantial, noting that the protection of one's reputation is "a fundamental constitutional entitlement."[170] It also recognized the considerable risk that the report would be seen as "carrying the weight of governmental and judicial authority," leading citizens to believe the report's findings and condemn those named as guilty without an actual trial.[171] According to the court, the grand jury blurs the lines between an investigation and an adjudication when it submits condemnatory findings within a report.[172] Finally, the court held that the option to submit a written response to the grand jury was not sufficiently effective for rebutting a 900-page report that named over 300 sexual abusers, and did not afford sufficient due process rights to those accused.[173]

Despite ruling that a redacted report was sufficient for the immediate future, the justices were divided on the necessary remedial measures to permanently satisfy due process for the accused.[174] Therefore, the justices scheduled an oral argument in September 2018 to determine how the final report should be released.[175] Until then, the Pennsylvania Supreme Court held that the redacted version of the grand jury's report must be released to the public no later than 2:00 p.m. on August 14, 2018.[176]

On September 26, 2018, the Pennsylvania Supreme Court heard oral arguments concerning why the full grand jury report should or should not be released.[177] Once again, counsel for the clergy members espoused the position that the report violated their reputational and due process rights because they were not afforded the opportunity to confront their accusers.[178] Additionally, these lawyers argued that proposed legislation to amend the statute of limitations for sexual abuse victims had recently been approved by the Pennsylvania House of Representatives.[179] This amendment would open a two-year window for older sexual abuse victims to sue in

170. *Id.* at 572 (citing PA. CONST. art. I, § 1).
171. *See id.* at 573.
172. *Id.*
173. *See id.* at 574.
174. *Id.* at 576.
175. *Id.*
176. *Id.* at 579.
177. Deb Erdley, *Pennsylvania AG Shapiro: New Information Has Surfaced Since Catholic Sex Abuse Report*, TRIB LIVE (Sept. 27, 2018, 8:27 PM), https://triblive.com/local/westmoreland/14124858-74/pennsylvania-ag-shapiro-new-information-has-surfaced-since-catholic-sex-abuse-report.
178. *Id.*
179. Lazarski, *supra* note 142.

light of the grand jury's investigation into the Catholic Church.[180] Although the Pennsylvania Senate had not yet approved the amended bill,[181] defense lawyers argued that this statutory change by the Pennsylvania House of Representatives was an achievement within the grand jury's powers and no other action was necessary.[182] Essentially, these lawyers claimed, accepting the redacted report as final was the best-case scenario for their clients.[183]

The Attorney General, however, argued that due process is built into the state's grand jury system, and changing its role could open Pennsylvania to further abuse from powerful institutions.[184] One new argument posited by the representatives of the Attorney General's Office suggested reconvening the grand jury that investigated the Catholic Church and allowing those named in the report to testify under oath about the allegations against them.[185] When asked why his office could not accept the redacted report as final, Ronald Eisenberg, senior appellate counsel for the Attorney General, stated that accepting the redacted report could detrimentally impact future grand jury reports.[186]

After the September 26, 2018 oral arguments, the Pennsylvania Supreme Court made its final decision on the matter on December 3, 2018 in *In re Fortieth Statewide Investigating Grand Jury*, written by Justice Todd.[187] The court heard additional arguments on December 3 from both the Commonwealth and the petitioner priests before ultimately deciding to leave redacted the grand jury's report.[188]

Counsel for the accused priests demanded the application of a three-part test derived from the United States Supreme Court in *Mathews v. Eldridge*.[189] The test was created to establish the amount of process due in a particular case by considering: "(1) the private interest affected by the governmental action; (2) the risk of an erroneous deprivation together with the value of additional or

180. WNEP Web Staff & Sarah Buynovsky, *PA Lawmakers Vote to Amend Bill on Statute of Limitations for Sex Abuse Victims*, WNEP (Sept. 24, 2018, 3:08 PM), https://wnep.com/2018/09/24/pa-lawmakers-vote-to-amend-bill-on-statute-of-limitations-for-sex-abuse-victims/.

181. Express-Times Op. Staff, *Pa. Senate Punts on 'Window' for Sexual Abuse Victims*, LEHIGHVALLEYLIVE.COM (Oct. 21, 2018), https://www.lehighvalleylive.com/opinion/2018/10/_editorial_32.html.

182. *See* Lazarski, *supra* note 142.

183. *See id.*

184. *See* Erdley, *supra* note 177.

185. Lazarski, *supra* note 142.

186. *Id.*

187. 197 A.3d 712 (Pa. 2018) [hereinafter *Grand Jury II*].

188. *Id.* at 723.

189. *Id.* at 717 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)).

substitute safeguards; and (3) the state interest involved, including the administrative burden the additional or substitute procedural requirements would impose on the state."[190] Petitioners argued that their interest in defending their own reputations was high and worthy of procedural protection against harm, that the risk of error was essentially certain, that the administrative burden for increasing due process rights was negligible, and that petitioners deserved the chance to present rebuttal evidence to the grand jury and supervising judge.[191] They also asserted that the critical stage for someone accused of crimes but not charged begins when the grand jury receives and reviews evidence.[192] Just as someone formally charged is entitled to due process rights at the critical stages of a criminal trial, the priests demanded the same protections during the grand jury's investigation.[193] This due process, petitioners alleged, involved the right to appear before the supervising judge to challenge evidence and cross-examine witnesses, and to appear before the grand jury to rebut allegations.[194]

In response, the Commonwealth argued for calling back the recently dismissed grand jury or empaneling a new one to hear testimony from the petitioners.[195] However, it maintained that the supervising judge's role should not outweigh that of the grand jurors.[196] Allowing the judge to assume the role of a fact-finder would provide greater authority to that position than the statute permits.[197] Rather, the Commonwealth asserted that the judge should remain as the arbiter of whether the report has satisfied the preponderance of the evidence standard.[198] Only after petitioners presented evidence and the judge determined that the report satisfied its standard would the grand jury publicize the priests' names.[199]

The court's primary reason for leaving the redacted report as final was because the grand jury's duties were statutorily created in the Investigating Grand Jury Act, and challenging those duties would be an improper usurpation of the legislature.[200] The court

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190. *Id.* (quoting Bundy v. Wetzel, 184 A.3d 551, 557 (Pa. 2018)). In *Bundy*, the Pennsylvania Supreme Court utilized the framework set forth in *Mathews v. Eldridge*. *See Bundy*, 184 A.3d at 557.
191. *Grand Jury II*, 197 A.3d at 717.
192. *Id.* at 718.
193. *Id.*
194. *Id.*
195. *Id.* at 719.
196. *See id.* at 719-20.
197. *See id.* at 720.
198. *Id.*
199. *Id.*
200. *Id.* at 721.

stated, "our Court may not usurp the province of the legislature by rewriting the Act to add hearing and evidentiary requirements that grand juries, supervising judges, and parties must follow . . . as that is not our proper role under our constitutionally established tripartite form of governance."[201] Recalling the grand jury, as the Commonwealth suggested, and allowing the supervising judge to make factual findings, as recommended by petitioners, are both outside the scope of statutory authority on grand jury matters.[202] The court concluded that it simply does not possess the authority to order such changes.[203] Therefore, the "only remaining option available" was the redaction of names from the grand jury report.[204]

III. ANALYSIS AND RECOMMENDATIONS

Pennsylvania's grand jury is unique among state grand jury systems throughout the country. Its investigative function allows criticism of people believed to have committed crimes without requiring a formal indictment.[205] Naturally, reputational issues have arisen as a result. This paper's recommendation for the debate over the grand jury's function is aimed at safeguarding reputational due process rights for those accused, while also allowing the grand jury to inform the public of ongoing criminal issues within the state.

Because Pennsylvania courts are unwilling to overstep their bounds and amend grand jury functions,[206] the Pennsylvania legislature must take action by adjusting the statutory language of the Investigating Grand Jury Act. Changing the outcome of the grand jury report condemning Catholic priests is no longer an option. The Pennsylvania Supreme Court made its final decision on the report's status.[207] These recommendations, however, are meant to help avoid additional debate over this topic and to ensure fair procedure for both sides in all future grand jury reports. The primary recommendation offered is that those named in a grand jury report, who will be criticized but not formally indicted, must be given a chance to appear before the grand jury to present a defense. The grand jury must hear the evidence and submit its report to the supervising judge. Then, the judge may decide, by the preponderance of the

201. *Id.*
202. *Id.*
203. *Id.* at 721-22.
204. *Id.* at 723.
205. *See* Thompson, *supra* note 2.
206. *See generally Grand Jury II*, 197 A.3d at 721-24.
207. *See id.* at 723-24.

evidence standard, which names may remain in such a critical report.

The Pennsylvania Supreme Court has already stated that the two current procedures in the Investigating Grand Jury Act for protecting accused individuals' reputational and due process rights are inadequate.[208] The first method, allowing the named individuals the chance to submit a written response,[209] lacks the weight which in-person testimony carries. It is not realistic to think that the public, after reading the name of someone alleged of such reprehensible behavior in the report, would believe the written response of the accused. There is a far greater likelihood that the public will condemn the individual and believe that he or she committed the alleged crime without an actual trial. Offering the chance to remove names from the report before its release by allowing rebuttal testimony before the grand jury is the best procedural safeguard against unconstitutionally damaging reputations.

The second method, requiring the supervising judge to determine by a preponderance of the evidence that the report is based on facts, also lacks due process protection.[210] Because the preponderance of the evidence standard is better suited in adversarial proceedings, where both sides may present evidence, its use here is unjust according to the court because only the Commonwealth offers evidence and witness testimony.[211] Allowing those accused in reports the chance to appear and present their own evidence, however, would amend this issue. The proceeding would become adjudicative in nature and the preponderance of the evidence standard would be appropriate. However, allowing the presentation of rebuttal evidence before grand juries must be limited to those accused in grand jury reports. It is crucial for the legislature to distinguish within the statute that the accused can testify before the grand jury only when a report, and not an indictment or presentment, is offered. Those indicted of crimes are formally charged and will have a chance to appear in court and present their own defenses. People accused in reports, however, have no such opportunity. Extending the chance to testify within all grand jury proceedings would place an improper burden and delay on the grand jury's functions. Therefore, the grand jury must first decide if a report is necessary and then must offer a chance for rebuttal to the accused.

208. *Id.* at 715-16.
209. *Id.* at 715.
210. *Id.* at 715-16.
211. *Id.* at 716.

IV. CONCLUSION

This recommendation is not meant to protect priests who sexually abuse young children. Those truly guilty of such a crime should be punished through formal prosecution or should be publicly reprimanded by grand jury reports if the statute of limitations has expired. However, this article's recommendation is meant to emphasize the goal of overall fairness in these proceedings. Some people accused of crimes could successfully clear their names before a grand jury, if they are given the chance. The Pennsylvania Constitution considers one's right to reputation as important as one's right to speak freely and assuring that no reputational harms ensue without due process is crucial to maintaining the integrity of that right. Setting forth this policy in the future would favor both sides: the Commonwealth could release a full, unredacted report publicizing those guilty of the alleged crimes, and petitioners would have the chance to challenge the evidence and remove the names that are wrongfully accused before the official release. A compromise that both ensures due process protection and punishes reprehensible behavior is the most efficient way for a Pennsylvania investigating grand jury to serve the citizens of its state.

How Long Is Too Long?—Why a Method Proposed by a Panel of the United States Court of Appeals for the Third Circuit for Determining the Constitutionality of De Facto Life Without Parole Imposed upon Juvenile Offenders Was Grounded in Logic but Missed the Mark.

Dominic A. Carrola[*]

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I. INTRODUCTION: COURTS AS CREATURES OF LOGIC

In one of his most vigorous dissents, the late United States Supreme Court Justice Antonin Scalia wrote: "one of the benefits of leaving regulation . . . to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion."[1] This premise takes on special relevance in Eighth

* At the time of writing this article, Carrola was a Juris Doctorate candidate at the Duquesne University School of Law. He graduated in May 2019 and, this article was edited in Spring 2020, at which time Carrola was an Assistant District Attorney with the District Attorney's Office of Washington County, Pennsylvania. Any opinions expressed herein are personal to Carrola and do not reflect those held by the Washington County District Attorney's Office. Carrola thanks Legal Research and Writing Professor Julia M. Glencer for her painstaking assistance in editing this article and for strengthening its theme through exhaustive questioning and testing of its foundational premises.

1. Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting); *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting) ("Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to

Amendment sentencing jurisprudence into which the United States Supreme Court has invited the concept of "proportionality."[2] Proportionality requires some degree of correlation between an offense and a punishment and between an offender and a punishment.[3] The trouble with this approach is the lack of guidelines to aid courts in making this determination. As was once observed by Supreme Court Chief Justice Warren E. Burger:

> [n]or . . . are we endowed with Solomonic wisdom that permits us to draw principled distinctions between sentences of different length for a chronic "repeater" who has demonstrated that he will not abide by the law. The simple truth is that "[n]o neutral principle of adjudication permits a federal court to hold that in a given situation individual crimes are too trivial in relation to the punishment imposed."[4]

Making matters worse, the Supreme Court has essentially adopted its "own judgment" as one of the elements by which it tests the constitutionality of punishments: "[f]or the Constitution contemplates that in the end our *own judgment* will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."[5] In extreme and obvious cases, courts can successfully meet the constitutional requirement of proportionality in sentencing by exercising their own judgment.[6] But in close-call situations, courts are placed in the unhappy position of making bright-line policy decisions that are incapable of being sourced in logic.[7] Such unbridled logic culminates in a bottomless pit: "[n]or does the Court suggest a stopping point for its reasoning. If juries cannot make appropriate determinations in cases involving murderers under eighteen, in what other kinds of cases will the Court find jurors deficient?"[8]

The area of juvenile sentencing jurisprudence has been particularly fraught with logical difficulties as demonstrated by *United*

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resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right.").

2. *See* Coker v. Georgia, 433 U.S. 584, 602 n.1 (1977) (Powell, J., concurring in part, dissenting in part).

3. *See* Ewing v. California, 538 U.S. 11, 20 (2003).

4. Solem v. Helm, 463 U.S. 277, 314 (1983) (Burger, C.J., dissenting) (citation omitted).

5. *Coker*, 433 U.S. at 597 (emphasis added).

6. Robinson v. California, 370 U.S. 660, 667 (1962) (stating that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold").

7. *See* Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting).

8. Roper v. Simmons, 543 U.S. 551, 621 (2005) (Scalia, J., dissenting).

States v. Grant,[9] a recent decision by a panel of the United States Court of Appeals for the Third Circuit. The case evidences what happens when judges substitute logical reasoning for what is properly an exercise of bright-line policy determinations. The case involved Corey Grant, a homicide offender who was convicted in 1992 for various crimes that he committed when he was sixteen years old.[10] The trial court had found that Grant would "never be fit to reenter society"[11] and had sentenced him to life in prison without the possibility of parole (LWOP), on November 10, 1992.[12] The Third Circuit affirmed the conviction on August 23, 1993.[13] It seemed the story was over.

But then, the United States Supreme Court handed down a trilogy of opinions that had the effect of throwing Grant a lifeline: *Graham v. Florida*,[14] *Miller v. Alabama*,[15] and *Montgomery v. Louisiana*.[16] These three cases invalidated life imprisonment without the possibility of parole as a constitutionally valid punishment for certain classes of juvenile offenders.[17] The actual holdings of these three opinions are narrower than—and therefore, do not accomplish—the prophylactic mandate which they evoke. For this reason, courts, as creatures of logic, are sorely tempted to extend the protections granted by these opinions. And, in *Grant*, the Third Circuit decided it was logical to do just that.[18] The impenetrable question before the *Grant* court was, given that a juvenile offender sentenced to imprisonment must be given a "meaningful opportunity to obtain release,"[19] *how many years* of imprisonment is *too many years*? In answering this question, the Third Circuit panel made a bright-line policy determination of its own. Under the panel's holding, a juvenile offender is constitutionally required to be afforded an opportunity for release from prison before the age of sixty-five.[20]

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9. 887 F.3d 131 (3d Cir. 2018).
10. *Id.* at 134.
11. *Id.*
12. Grant v. United States, No. 12-6844 (JLL), 2014 WL 5843847, at *1 (D.N.J. Nov. 12, 2014).
13. United States v. Grant, 6 F.3d 780 (3d Cir. 1993) (table).
14. 560 U.S. 48 (2010).
15. 567 U.S. 460 (2012).
16. 136 S. Ct. 718 (2016).
17. *See Graham*, 560 U.S. at 61-62; *Miller*, 567 U.S. at 479; *Montgomery*, 136 S. Ct. at 736.
18. United States v. Grant, 887 F.3d 131, 138 (3d Cir. 2018).
19. *Graham*, 560 U.S. at 75.
20. *Grant*, 887 F.3d at 151-52.

If this was "Solomonic wisdom" on display, then Solomonic wisdom certainly has a chameleonic quality.[21] Perhaps second-guessing is a natural byproduct that occurs when courts dabble in policy making. Once a court is un-moored from the legislative decision, it is hard to decide between the many untapped and, at times, competing potentials. Tellingly, the Third Circuit did not leave its *Grant* opinion untouched for even a year. The opinion was filed on April 9, 2018.[22] Merely six months later, on October 4, 2018, the Third Circuit vacated the panel's opinion and judgment announced in *Grant* and scheduled rehearing en banc for February 20, 2019.[23] The purpose of this article will be to recommend a course of action to the Third Circuit in view of prior Eighth Amendment doctrine.

This article will begin by covering the history of proportionality in Eighth Amendment sentencing jurisprudence and examine how it blossomed into *Graham*,[24] *Miller*,[25] and *Montgomery*.[26] Then, it will examine *Grant* against the backdrop of these cases and attempt to demonstrate how the Third Circuit's dilemma is a symptom of the uncertainty manufactured by the Supreme Court's own jurisprudence. Finally, it will make the argument that whatever the Third Circuit ultimately holds, it must send a clear message to the Supreme Court that the mandates of *Graham*, *Miller*, and *Montgomery* are unworkable and that unwavering guidance is needed. This article will also suggest two provisional fixes which the Third Circuit might adopt until the Supreme Court or Congress speaks.[27]

II. PROPORTIONALITY AND THE CATEGORICAL PROHIBITION

Proportionality has persistently clung to the Supreme Court's Eighth Amendment sentencing jurisprudence. But perhaps the Court was not always earnest about it. In any case, as early as 1892, at least one Justice contemplated that "[t]he [Eighth Amendment] inhibition is directed, not only against punishments [which inflict torture], but against all punishments which by their excessive length or severity *are greatly disproportioned to the offenses*

21. *See* Solem v. Helm, 463 U.S. 277, 314 (1983) (Burger, C.J., dissenting).
22. *Grant*, 887 F.3d at 131.
23. United States v. Grant, 905 F.3d 285 (3d Cir. 2018) (mem.) (granting rehearing en banc).
24. *Graham*, 560 U.S. at 48.
25. Miller v. Alabama, 567 U.S. 460 (2012).
26. Montgomery v. Louisiana, 136 S. Ct. 718 (2016).
27. How the Supreme Court should ultimately fix the problem (should certiorari be sought and granted) is outside the scope of this article, which seeks to press upon readers the untenable nature of the current state of affairs and proposes some stopgap measures that the Third Circuit could adopt after rehearing.

charged."[28] The Court itself first harnessed the concept of proportionality in its Eighth Amendment jurisprudence by placing categorical prohibitions on capital punishment imposed for certain classes of crimes and on certain classes of offenders.[29]

The first cases instituting categorical prohibitions on the death penalty did so with respect to *certain types of offenses*. In *Coker v. Georgia*,[30] the Supreme Court held that the punishment of death is disproportionate, and therefore categorically prohibited, for the crime of rape.[31] The Supreme Court engaged in a two-part analysis, first seeking "objective evidence of the country's present judgment concerning the acceptability of death as a penalty for rape of an adult woman,"[32] and second, bringing its own judgement to bear on the question.[33] The Court's holding hinged upon the distinction it drew between the finality of murder (for which the death penalty was permissible) and the temporary nature of rape (for which it held the death penalty impermissible).[34] The dissent voiced concern that the Court's holding barred the state "from guaranteeing its citizens that they [would] suffer no further attacks by this habitual rapist."[35] The dissent's concerns were particularly poignant in *Coker*, where the perpetrator had already been serving consecutive life terms for three prior rapes when he managed to escape from prison and commit the crime that was then before the Court.[36] Over the next three decades, the Supreme Court would continue to apply categorical prohibitions on capital punishment for certain crimes.[37]

The first case to institute a categorical prohibition on the death penalty with respect to a *certain class of offenders* was *Thompson v. Oklahoma*.[38] In that case, there was no claim "that the punishment would [have been] excessive if the crime had been committed by an adult."[39] But the crime was perpetrated by a fifteen-year-old boy,[40]

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28. O'Neil v. Vermont, 144 U.S. 323, 340 (1892) (Field, J., dissenting) (emphasis added).

29. Daniel Cardenal, *Applying the Narrow Proportionality Principle to Juvenile Offenders:* Graham v. Florida*, 130 S. Ct. 2011 (2010)*, 22 U. FLA. J.L. & PUB. POL'Y 129, 130 (2011) (examining the use of the proportionality principle in juvenile sentencing).

30. 433 U.S. 584 (1977).

31. *Id.* at 592, 597.

32. *Id.* at 593.

33. *Id.* at 597.

34. *Id.* at 598 ("The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair.").

35. *Id.* at 605-06 (Burger, C.J., dissenting).

36. *Id.* at 605 (Burger, C.J., dissenting).

37. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 421 (2008) (aggravated rape of a child); Enmund v. Florida, 458 U.S. 782, 788 (1982) (robbery without intent to kill).

38. 487 U.S. 815, 838 (1988).

39. *Id.* at 819.

40. *Id.*

and the Court accepted the premise that "some offenders are simply too young to be put to death."[41] The boy, along with three older friends, had mercilessly beaten his brother-in-law before shooting him twice, slashing his throat, chest, and abdomen, and throwing the victim's body into a river.[42] The boy was later heard to brazenly take personal credit for the lethal acts.[43] Each participant was convicted and received a death sentence.[44]

The *Thompson* Court opined that "[i]nexperience, less education, and less intelligence make [teenagers] less able to evaluate the consequences of [their] conduct."[45] "[Y]outh," the Court remarked in a phrase that would become a mainstay of its juvenile sentencing jurisprudence, "*is more than a chronological fact*."[46] In *Thompson*, the Court first coined the phrase "categorical prohibition"[47] and then instituted such a categorical prohibition on capital punishment for offenders under sixteen years of age.[48] The Court relied in part on the "proposition" that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult."[49] In *Thompson*, the Court pointedly refused to extend the prohibition to juveniles between the ages of sixteen and eighteen.[50] That shoe would not drop until nearly seventeen years later.[51]

As these cases demonstrate, by the early 1980s proportionality in the form of categorical prohibitions on capital punishment was well-established.[52] Whether, and how, proportionality would be applied

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41. *Id.* at 828-29.

42. *Id.* at 819.

43. *See id.* at 860-61 (Scalia, J., dissenting). As Justice Scalia's dissenting opinion highlighted, the record provided that Thompson had bragged about the murder to his girlfriend, mother, and others. *Id.* One witness recounted that "she [had] asked Thompson the source of some hair adhering to a pair of boots he was carrying [and he] replied that was where he had kicked Charles Keene in the head." *Id.* at 860. Another witness had "told Thompson that a friend had seen Keene dancing in a local bar, [to which] Thompson remarked that that would be hard to do with a bullet in his head." *Id.* at 861. Finally, "one of Thompson's codefendants admitted that after Keene had been shot twice in the head Thompson had cut Keene 'so the fish could eat his body.'" *Id.*

44. *Id.* at 819 (majority opinion).

45. *Id.* at 835.

46. *Id.* at 834 (quotations omitted) (emphasis added).

47. *Id.* at 821.

48. *Id.* at 838.

49. *Id.* at 835 (footnote omitted) (citing Eddings v. Oklahoma, 455 U.S. 104, 117 (1982), where the Court vacated and remanded a juvenile's death sentence because state courts refused to consider mitigating circumstances).

50. *Id.* at 838.

51. *See* Roper v. Simmons, 543 U.S. 551 (2005).

52. *See, e.g.*, Enmund v. Florida, 458 U.S. 782, 788 (1982) (describing the Eighth Amendment prohibition as being "directed, in part, against all punishments which by their excessive length or severity are greatly *disproportioned* to the offenses charged") (quotations omitted) (emphasis added).

in the context of prison sentences remained uncertain.[53] This was so despite the fact that the Court, nearly seventy years earlier, had referenced proportionality in a case holding unconstitutional a species of imprisonment.[54] Specifically, in *Weems v. United States*, a form of punishment levied against those convicted of defrauding the Government of the Philippine Islands—then under American rule—was challenged.[55] The punishment, called *cadena temporal*, was essentially a term of imprisonment complemented by chains and painful labor.[56] In its analysis, the *Weems* Court contrasted the relative severity of *cadena temporal* against more innocuous punishments prescribed for similar crimes[57] and stated that "it is a precept of justice that punishment for crime should be graduated and *proportioned* to offense."[58] Over a decade later, the Court would once again allude to proportionality while invalidating a punishment, this time with regard to a statute which criminalized drug addiction and imposed a mandatory minimum term of ninety days' imprisonment.[59] As if an after-thought to its analysis, the Court remarked: "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[60]

Despite these early and continued references to proportionality in the context of imprisonment, the Court then had to wrestle with whether proportionality was suited to analyzing the constitutionality of prison sentences. In *Rummel v. Estelle*, the Court reasoned that its "decisions applying the prohibition of cruel and unusual punishments to capital cases [were] of limited assistance" in deciding the constitutionality of a sentence of imprisonment because such a sentence, "no matter how long," differs in kind from a sentence of death.[61] The *Rummel* Court noted that unlike the categor-

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53. *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 272 (1980) (rejecting the applicability of proportionality in the context of a challenge to a sentence of life imprisonment).

54. Weems v. United States, 217 U.S. 349, 382 (1910).

55. *See id.* at 357-58, 360.

56. *Id.* at 364.

57. *Id.* at 380-81.

58. *Id.* at 367 (emphasis added). The Court also quoted the following language contained in *O'Neil* from 1892: "the inhibition was directed not only against punishments which inflict torture, 'but against all punishments which, by their excessive length or severity, are greatly disproportioned to the offenses charged.' . . . 'The whole inhibition is against that which is excessive in the bail required or fine imposed or punishment inflicted.'" *Id.* at 371 (quoting O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892)).

59. Robinson v. California, 370 U.S. 660, 660 n.1, 667 (1962).

60. *Id.* at 667.

61. 445 U.S. 263, 272 (1980). The Court differentiated the result in *Weems* primarily as being dependent upon the "accompaniments" (chains and painful labor) of *cadena temporal*, and not the term of imprisonment itself. *Id.* at 273-74.

ical prohibitions it had placed on death, bright lines would be considerably harder to draw "between one term of years and a shorter or longer term of years."[62]

These difficulties were overcome in *Solem v. Helm* three years later.[63] There, the Court overturned an LWOP sentence as applied to a nonviolent, repeat, non-juvenile offender.[64] In passing sentence, the trial court had found that the offender:

> certainly earned [the] sentence and [had] certainly proven that [he was a] habitual criminal and the record would indicate that [he was] beyond rehabilitation and that the only prudent thing to do [was] to lock [him] up for the rest of [his] natural life, so [he would not] have further victims.[65]

Nonetheless, the Supreme Court cited what it described as its long recognition of proportionality[66] and the lack of historic support for an exception for imprisonment,[67] holding that the proportionality principle applied to *all* criminal sentences.[68] The dissent sarcastically resurrected the line-drawing concerns forecasted in *Rummel*: "[t]oday [the Court] holds that a sentence of life imprisonment, without the possibility of parole, is excessive punishment for a seventh allegedly 'nonviolent' felony. How about the eighth 'nonviolent' felony? The ninth? The twelfth?"[69] But the battle had been won: as a result of *Solem*, as-applied constitutional challenges[70] could be raised against prison sentences.[71] Essentially, this meant that courts could now invalidate individual prison sentences on proportionality grounds, but courts could not yet apply general cate-

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62. *Id.* at 275.
63. 463 U.S. 277, 292 (1983).
64. *Id.* at 280.
65. *Id.* at 282-83 (citation omitted) (quotations omitted).
66. *Id.* at 286-87 (citing Weems v. United States, 217 U.S. 349, 349 (1910)).
67. *Id.* at 288-89.
68. *Id.* at 290.
69. *Id.* at 314 (Burger, C.J., dissenting). Contrary sentiment among the Court's members would survive *Solem*. *See* Harmelin v. Michigan, 501 U.S. 957, 994 (1991) (plurality) (arguing that an alternative perspective of the Court's prior jurisprudence was to view the Court as "treat[ing] [the proportionality] line of authority as an aspect of [its] death penalty jurisprudence").
70. An as-applied challenge is one that challenges a law only "as-applied" to a particular set of facts. *See* Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1337 (2000). In contrast, a facial challenge seeks to invalidate a law altogether and not just in a particular context, "as-applied" to a particular plaintiff. *See id.* (explaining the distinction between as-applied and facial challenges).
71. Graham v. Florida, 560 U.S. 48, 103-04 (2010) (Thomas, J., dissenting).

gorical prohibitions to "shield entire classes of offenses and offenders" from prison sentences as was the practice in the realm of capital punishment.[72]

III. ADVANCING A CONSTITUTIONAL RIGHT FOR JUVENILES

The Supreme Court applied a categorical prohibition to a non-death penalty punishment for the first time in *Graham*,[73] foreclosing LWOP for juvenile, non-homicide offenders.[74] The Court reached this result by applying the two-part test it had historically reserved for capital cases.[75] Under this test, the Court considers:

> [(1)] objective indicia of society's standards, as expressed in legislative enactments and state practice, to determine whether there is a national consensus against the sentencing practice at issue. . . . [And, (2)] guided by the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.[76]

Under the first prong of this analysis, the *Graham* Court concluded that a national consensus existed against LWOP for juvenile non-homicide offenders even though many states had not actually legislated against it.[77] What was significant in the Court's view was that LWOP was *rarely* imposed on juvenile non-homicide offenders.[78] The Court's approximate logic was that even though many states were statutorily authorized to impose LWOP on juvenile non-homicide offenders, it was seldom done, and *that* made it cruel and unusual punishment when it *was* imposed.[79]

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72. *Id.* at 101.

73. *Id.* at 61-62 (majority opinion).

74. *Id.* at 74.

75. *See id.* at 61.

76. *Id.* at 61 (citations omitted) (quotations omitted).

77. *Id.* at 64, 66; *see also id.* at 62 ("Although these statutory schemes contain no explicit prohibition on sentences of [LWOP] for juvenile non[-]homicide offenders, those sentences are most infrequent.").

78. *Id.* at 62-67; *see also id.* at 67 ("Similarly, the many [s]tates that allow [LWOP] for juvenile non[-]homicide offenders but do not impose the punishment should not be treated as if they have expressed the view that the sentence is appropriate. The sentencing practice now under consideration is exceedingly rare.").

79. *Id.* at 66 (concluding that "[LWOP] for juveniles convicted of non[-]homicide crimes is as rare as other sentencing practices found to be cruel and unusual"). The dissent parried: "I cannot agree with the Court that . . . citizens should be constitutionally disabled from using this sentencing practice merely because they have not done so more frequently. If anything,

Under the second prong, the Court dusted off its reasoning from *Roper v. Simmons*, in which the Court had extended a categorical prohibition on capital punishment to all juvenile offenders under the age of eighteen.[80] In *Roper*, the Court expounded on the peculiarity of juvenile offenders, (a subject which it had first broached in *Thompson*[81]):

> [i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others. If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that [s]tates should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty. When a juvenile offender commits a heinous crime, the [s]tate can exact forfeiture of some of the most basic liberties, but the [s]tate cannot extinguish his life and his potential to attain a mature understanding of his own humanity.[82]

the rarity of this penalty's use underscores just how judicious sentencing judges and juries across the country have been invoking it." *Id.* at 112-13 (Thomas, J., dissenting).

80. *Id.* at 68 (majority opinion). The *Roper* Court was presented with a particularly blood-chilling set of facts. Roper v. Simmons, 543 U.S. 556 (2005). The seventeen-year-old defendant had broken into a home without apparent reason, took the lone occupant hostage, bound her hands and feet with electrical wire, wrapped her entire face with duct tape, and threw her into a river where she drowned. *Id.* at 556-67. The prosecutor had used Simmons's youth against him, suggesting that it was an aggravating circumstance rather than a mitigating one. *Id.* at 558 ("'Age . . . . Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary.'") (quoting the prosecutor's rebuttal without providing a direct supporting citation).

81. Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (logicizing that "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult"). The Court had also, on one other occasion prior to *Roper*, refused to extend the prohibition to capital punishment of juvenile murderers who were sixteen or seventeen at the time of their crime. *See* Stanford v. Kentucky, 492 U.S. 361, 380 (1989), *abrogated by Roper*, 543 U.S. at 574-75.

82. *Roper*, 543 U.S. at 573-74 (citations omitted).

The Court further built on this reasoning in *Graham*, noting that "psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence."[83]

But the categorical prohibition in *Graham*, unlike the one in *Roper*, was to be levied against a non-death penalty punishment.[84] Thus, the Court would need extra justification to make the leap. To aid in this endeavor, the Court broke down the distinction it had previously drawn between death and other punishments.[85] It noted that, although a sentence of LWOP does not result in an execution, "the sentence [like death,] alters the offender's life by a forfeiture that is irrevocable."[86] The Court found this result to be particularly severe when applied to juveniles because juveniles are, by definition, younger than non-juveniles and have a longer time to serve.[87] Additionally, the Court distinguished a non-homicide juvenile offender's scienter with a mathematical formula: "a juvenile offender who did not kill . . . has a twice diminished moral culpability [once by the] age of the offender and [once by] the nature of the crime . . . ."[88]

Summarizing all of this logic led the *Graham* Court to reject the penological justification of incapacitation: "[t]o justify [LWOP] on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. . . . [And] incorrigibility is inconsistent with youth."[89] In the Court's view, to impose the sentence of LWOP on a

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83. *Graham*, 560 U.S. at 68.

84. *Id.* at 74.

85. *Id.* at 69.

86. *Id.*

87. *Id.* at 70 (noting that "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender").

88. *Id.* at 69; *see also* Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C. L. REV. 553, 561–62 (2015) (explaining the Court's synthesis of lessened intent and young age as resulting in a twice-diminished moral culpability); James Donald Moorehead, *What Rough Beast Awaits?* Graham*,* Miller*, and the Supreme Court's Seemingly Inevitable Slouch Towards Complete Abolition of Juvenile Life Without Parole*, 46 IND. L. REV. 671, 682 (2013) (describing the Court's asserted distinction between imposing LWOP on juveniles and imposing it on adults as an "equation.").

89. *Graham*, 560 U.S. at 72-73 (quotation omitted); *see also id.* at 79 ("A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual.").

juvenile required a finding that the juvenile's crimes "demonstrate[d] an irretrievably depraved character."[90] The Court described this as a "subjective judgment"[91] which sentencing courts would be unable to make with sufficient accuracy.[92]

Thus, the *Graham* Court's categorical ban prevented sentencing judges from making this determination "at the outset,"[93] such that juveniles would have "a chance to demonstrate maturity and reform."[94] Moreover, the Court agreed with the observation of one *amicus* that "defendants serving [LWOP] are often denied access to vocational training and other rehabilitative services that are available to other inmates[, and juvenile offenders] are most in need of and receptive to rehabilitation."[95] This, in the Court's view, made the punishment of LWOP for juvenile non-homicide offenders "all the more" disproportionate.[96] As the Court opined: "[t]he juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . [LWOP] gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope."[97]

Despite such broad justification, the *Graham* Court included a failsafe, presumably to limit its holding:

> [a] [s]tate is not required to guarantee eventual freedom to a juvenile . . . [non-homicide offender as long as it gives] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation . . . . It bears emphasis, however, that while the Eighth Amendment prohibits a [s]tate from imposing [LWOP] on a juvenile non[-]homicide offender, it does not require the [s]tate to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth

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90. *Id.* at 76 (quotation omitted).

91. *Id.* at 76 ("Nothing in Florida's laws prevents its courts from sentencing a juvenile non[-]homicide offender to life without parole based on a subjective judgment that the defendant's crimes demonstrate an irretrievably depraved character. *This is inconsistent with the Eighth Amendment*.") (citation omitted) (quotation omitted) (emphasis added).

92. *Id.* at 77 ("[I]t does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.").

93. *Id.* at 75.

94. *Id.* at 79.

95. *Id.* at 74 (citing the Brief for the Sentencing Project as Amicus Curiae Supporting Petitioners at 11-13, *Graham*, 560 U.S. 48 (No. 08-7412)).

96. *Id.* at 74.

97. *Id.* at 79.

> Amendment does not foreclose the possibility that persons convicted of non[-]homicide crimes committed before adulthood will remain behind bars for life.[98]

Its broad policy boiled down, all *Graham* really proscribed was a sentencing judge from making the subjective decision at sentencing that a non-homicide juvenile offender's crimes reflect an "irretrievably depraved character" worthy of LWOP.[99]

Roughly two years later the Court took its next step in *Miller,*[100] striking down *mandatory* LWOP sentences for juvenile murderers, relying in part[101] on its reasoning in *Graham*.[102] What bothered the *Miller* Court about mandatory sentencing statutory schemes is that they did not leave the sentencing authority "any discretion to impose a *different* punishment."[103] While the Court acknowledged that *Graham*'s categorical prohibition applied only to juvenile non-homicide offenders,[104] and reiterated that a state "is not required to guarantee eventual freedom,"[105] the Court considered "none of what it said about children . . . [in *Graham* to be] crime specific."[106] Thus, it was imperative that a judge passing sentence on a juvenile homicide offender at least have the *opportunity* to consider mitigating factors, including the offender's youth, before imposing LWOP.[107] A statute that unwaveringly mandated LWOP would not provide any allowance for such an opportunity and was therefore inconsistent with what the Court had expounded in *Roper* and *Graham*.[108] However, the *Miller* Court "[did] not foreclose a sentencer's ability" to *determine* that a murder committed by a juvenile "reflects irreparable corruption" and sentence the juvenile to LWOP.[109] The Court did note, though, that LWOP would likely be uncommonly imposed

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98. *Id.* at 75.

99. *Id.* at 76.

100. Miller v. Alabama, 567 U.S. 460 (2012).

101. The *Miller* Court also relied upon a second line of precedent pertaining to the constitutionality of mandatory sentencing schemes in general. *See id.* at 470, 475-76. That case law is outside the scope of this article.

102. *See id.* at 474, 479.

103. *Id.* at 465 (emphasis added); *id.* at 474 (observing that "these laws prohibit a sentencing authority from assessing whether . . . [LWOP] proportionately punishes a juvenile offender").

104. *Id.* at 473.

105. *Id.* at 479.

106. *Id.* at 473.

107. *Id.* at 480.

108. *Id.* at 479; *see also id.* at 474 ("That contravenes *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a [s]tate's most severe penalties on juvenile offenders cannot proceed as though they were not children.").

109. *Id.* at 479-80 (quotation omitted)*; see also id.* at 480 ("[W]e do not foreclose a sentencer's ability to make that judgment in homicide cases . . . .").

due to "the great difficulty" attendant to distinguishing between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[110] Conversely, the *Miller* Court highlighted the various other "options" discretionary sentencing would allow: "a judge or jury could choose, rather than [LWOP], a lifetime prison term *with* the possibility of parole or a lengthy term of years. It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence . . . while still not thinking [LWOP] appropriate."[111]

In essence, the *Miller* Court only held that a judge or jury passing sentence on a juvenile homicide offender *must* be permitted to give consideration to mitigating factors, including the offender's youth, before imposing LWOP.[112] At the time of its decision, the *Miller* Court did not consider its holding to be implementing any categorical prohibition.[113] As the Court stated, "[o]ur decision does not categorically bar a penalty for a class of offenders or type of crime . . . . Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth . . . ."[114] The Supreme Court would later revise this interpretation in its most recent chapter of its juvenile-sentencing jurisprudence: *Montgomery*.[115]

The issue squarely before the Court in *Montgomery* was tangential to its holdings in *Graham* and *Miller*, *i.e.*, whether *Miller* was "retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided."[116] This issue invoked the procedural/substantive distinction enunciated in *Teague v. Lane*,[117] which controls whether a newly-announced right protects against violations that occurred in proceedings before that right was announced.[118] Violations of *substantive* rights *are* reviewable, even if the violation occurred *before* the right was announced, but violations of *procedural* rights *are not* so reviewable.[119] The *Montgomery* Court recast the right in *Miller* as a *substantive right* so that it did

110. *Id.* at 479-80 (quotation omitted).
111. *Id.* at 489.
112. *Id.* at 479*; see also id.* at 480 ("Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against [LWOP].") (footnote omitted).
113. *See id.* at 479 ("[W]e do not consider [the] alternative argument that the Eighth Amendment requires a categorical bar on [LWOP] . . . .").
114. *Id.* at 483.
115. *See* Montgomery v. Louisiana, 136 S. Ct. 718 (2016).
116. *Id.* at 725.
117. 489 U.S. 288, 307, 312-13 (1989).
118. *Montgomery*, 136 S. Ct. at 728.
119. *Id.*

indeed apply retroactively.[120] While the Court agreed that *Miller* had a procedural component,[121] it rejected the proposition that that procedural component foreclosed the existence of a substantive right.[122] Acknowledging that *Miller* did not "bar a punishment for all juvenile offenders,"[123] as was the case in *Roper* and *Graham*, the Court noted that *Miller* "*did* bar [LWOP] . . . for all but the rarest of juvenile offenders . . . whose crimes reflect permanent incorrigibility."[124] Essentially, the Court was indicating its recognition of "juvenile offenders . . . whose crimes reflect permanent incorrigibility" as its own class.[125] Thus, it was clear that, in the Court's own estimation, *Miller* did indeed announce a categorical prohibition, one that banned LWOP for a certain class.[126] That class included "all but the rarest of juvenile offenders . . . whose crimes reflect[ed] permanent incorrigibility."[127] As the Court explained: "[t]he fact that [LWOP] could be a proportionate sentence for . . . [that] kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right."[128] This dichotomy among what was previously a unified class (juvenile offenders) shed light on exactly *what kind* of juvenile offenders could be constitutionally sentenced to LWOP. *Miller*, the Court noted, "did not foreclose a sentencer's ability to impose [LWOP] on a juvenile [offender] . . . [as long as that juvenile offender's crimes] reflect[ed] irreparable corruption."[129] Indeed, "a lifetime in prison [was] disproportionate . . . for all but the rarest of children."[130] However, the Court left it to the states to determine how exactly to distinguish the incorrigible children from the non-incorrigible ones.[131] The Court suggested that

120. *Id.* at 732, 736.

121. *Id.* at 734 (noting that *Miller*'s procedural component "requires a sentencer to consider a juvenile offender's youth and attendant characteristics" before imposing a proportionate sentence).

122. *Id.* at 735.

123. *Id.* at 734.

124. *Id.* (emphasis added).

125. *Id.*; *see also Eighth Amendment-Retroactivity of New Constitutional Rules—Juvenile Sentencing*—Montgomery v. Louisiana, 130 HARV. L. REV. 377, 384-85 (2016) (suggesting that *Montgomery* is prone to "criticisms of 'sleight of hand'" by its designation of *Miller* as protecting non-incorrigible juveniles) (citation omitted).

126. *Montgomery*, 136 S. Ct. at 734.

127. *Id.*

128. *Id.*

129. *Id.* at 726 (quotation omitted).

130. *Id.*

131. *Id.* at 735 (offering state sovereignty as the reason that the *Miller* Court did not require trial courts to make a finding of fact regarding a child's incorrigibility: "When a new substantive rule of constitutional law is established, this Court is careful to limit the scope

states need not leave the retroactive application of this constitutionally-protected distinction to the courts.[132] If, for instance, parole consideration was extended to these offenders, a resentencing hearing was unnecessary: "[a]llowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment."[133] Contrariwise, "[t]hose prisoners . . . [showing] an inability to reform [would] continue to serve life sentences."[134] This distinction was well-illustrated by the *Montgomery* Court's detailed description of the plight of the petitioner immediately before it:

> [p]etitioner has discussed in his submissions to this Court his evolution from a troubled, misguided youth to a model member of the prison community. Petitioner states that he helped establish an inmate boxing team, of which he later became a trainer and coach. He alleges that he has contributed his time and labor to the prison's silkscreen department and that he strives to offer advice and serve as a role model to other inmates.[135]

The *Montgomery* Court perceived this distinction as honoring what it termed the "central intuition" of *Miller*: "that children who commit even heinous crimes are capable of change."[136]

IV. *GRANT*: THE SEARCH FOR A LIMITING PRINCIPLE

This troubled world of Supreme Court jurisprudence set the stage for the Third Circuit panel's decision in *Grant*.[137] Although *Grant*'s

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of any attendant procedural requirement to avoid intruding more than necessary upon the [s]tates' sovereign administration of their criminal justice systems").

132. *Id.* at 736 (stating that considering the offender for parole could satisfy *Miller* in lieu of resentencing).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*; *see* Carly Loomis-Gustafson, Comment, *Adjusting the Bright-Line Age of Accountability Within the Criminal Justice System: Raising the Age of Majority to Age 21 Based on the Conclusions of Scientific Studies Regarding Neurological Development and Culpability of Young-Adult Offenders*, 55 DUQ. L. REV. 221 (2017) (canvassing modern scientific research of juvenile neurological development and arguing for a higher age than that established by *Roper* and *Graham*).

137. United States v. Grant, 887 F.3d 131 (3d Cir. 2018). The case was before Joseph A. Greenaway, Jr. and Robert E. Cowen, Circuit Judges, and John R. Padova, Senior Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation. *Id.* at 134 n.1.

staying force was short-lived, it built upon prior Supreme Court precedent in a momentous way. *Grant* also portends future steps in the realm of Eighth Amendment juvenile sentencing and, for this reason, it is worthy of attention.

The *Grant* panel began its analysis by noting that "[t]he Supreme Court ha[d] long grappled with the societal bounds of imposing the most severe punishments[,]"[138] and recounted seriatim the holdings and rationales of *Roper*, *Graham*, *Miller*, and *Montgomery*.[139] The panel recognized its task as determining "whether the *logic* of [those] cases . . . foreclos[ed] [what was termed a] de facto LWOP for juvenile offenders whose crimes do not reflect irreparable corruption."[140] Grant was a juvenile homicide offender.[141] His first sentence, under sentencing guidelines effective in 1992, was mandatory LWOP.[142] Mandatory LWOP for juvenile homicide offenders was then held to be unconstitutional in *Miller*, and Grant was awarded a new sentence.[143] At this second sentencing, the new sentencing judge remarked that the "record sufficiently evidenced that [Grant] was not incorrigible."[144] Under *Miller,* as later interpreted by the Court in *Montgomery*, this finding of non-incorrigibility meant that Grant *could not* receive an LWOP sentence.[145] Thus, the sentencing judge sentenced him to a sixty-five year sentence without parole instead.[146]

This result is not proscribed by *Miller*. Nonetheless, Grant challenged it on the ground that it defeated his "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," which the Supreme Court had promised in *Miller*.[147] In short, Grant argued that his prison sentence exceeded his life expectancy (as "diminish[ed]" by the effects of prison),[148] and even if it did not,

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138. *Id.* at 137.

139. *Id.* at 138-42. Unsurprisingly, the panel amplified the policy of protecting non-incorrigible juveniles rather than heeding the Supreme Court's previously imposed bright lines. *Id.*

140. *Id.* at 138 (emphasis added) (quotation omitted).

141. *Id.* at 136.

142. *Id.*; *see also* Grant v. United States, No. 12-6844 (JLL), 2014 WL 5843847, at *1 (D.N.J. Nov. 12, 2014).

143. *Grant*, 887 F.3d at 136.

144. *Id.* at 137 (citation omitted).

145. Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016).

146. *Grant*, 887 F.3d at 137.

147. *Id.* at 134 (quotation omitted).

148. *Id.* at 142. Grant, under the second sentence he received, would not be eligible for release until age seventy-two. *Id.* Grant argued that decades of prison reduce life expectancy and that, factoring the effects of prison into his life expectancy, reduced it to age seventy-two. *Id.* Thus, according to Grant, he had no meaningful opportunity for release. *Id.* The government, for its part, disputed Grant's calculation and argued that Grant's real life ex-

that "a meaningful opportunity for release must afford him an opportunity for 'personal fulfillment.'"[149] He supported these contentions with "various mortality estimates and social scientific studies."[150] The Third Circuit, agreeing with Grant, concluded that a "de facto" life sentence, defined by the panel as "[a] term-of-years sentence without parole that meets or exceeds the life expectancy of a juvenile offender who is still capable of reform,"[151] violates the Eighth Amendment because it deprives juvenile offenders of their "meaningful opportunity" for release,[152] and that "the Supreme Court's concerns about the diminished penological justification for LWOP sentences for juvenile offenders apply with equal strength to de facto LWOP sentences."[153] The panel also made clear that its holding "extend[ed]" to sentences of juvenile non-homicide offenders because, under *Graham*, such offenders are non-incorrigible "by definition."[154] Even the government had agreed in principle that a sentence exceeding a non-incorrigible juvenile offender's life expectancy unconstitutionally deprived that offender of their meaningful opportunity for release.[155]

This conclusion is well-grounded in reason and seems to follow logically from the Supreme Court's precedent. Once the Supreme Court had promised a meaningful opportunity for release, it defies logic to conclude that all that is prohibited is LWOP. A 254-year prison sentence, for instance, defeats a meaningful opportunity for release just as soundly as does LWOP.[156] Or, as the Third Circuit reasoned, "[the] distinctive attributes [of juveniles] are equally relevant regardless of the . . . formal distinction between de facto and de jure LWOP sentences."[157] "[A] de facto LWOP sentence cannot possibly provide a meaningful opportunity for release because it relegates the juvenile offender to spending the rest of his or her life

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pectancy was 76.7. *Id.* at 142 n.8. Release sometime before death, the government contended, is all that *Miller* required. *Id.* "Some years," or in this case, 4.7 years (76.7 minus 72) outside prison walls was enough. *Id.* at 147.

149. *Id.* at 147.

150. *Id.* at 147; *see also id.* at 142.

151. *Id.* at 142.

152. *Id* (quotation omitted).

153. *Id.* A sentence that lasts for the life of the convict by its express terms is a *de jure* life sentence. In contrast, a *de facto* life sentence is a term-of-years sentence that is so long that it is likely to extend beyond the life of the convict. As astute courts have noted, the convict dies in prison either way.

154. *Id.* at 142 n.7.

155. *Id.* at 142 n.8 (recounting that the government argued that Grant's sentence was permissible because it did not exceed his life expectancy); *see also id.* at 147.

156. *See* Moore v. Biter, 725 F.3d 1184, 1191 (9th Cir. 2013) (holding that a 254-year prison sentence precluded a meaningful opportunity for release).

157. *Grant*, 887 F.3d at 144.

behind prison bars and prohibits him or her from ever reentering society."[158] Predictably, the Third Circuit was not the first circuit court of appeals to take a step beyond the Supreme Court. The panel noted in *Grant* that the United States Court of Appeals for the Seventh Circuit had previously concluded: "[t]he 'children are different' passage . . . from [*Miller*] cannot *logically* be limited to *de jure* life sentences as distinct from sentences denominated in numbers of years yet highly likely to result in imprisonment for life."[159]

This decision is an easy one to make where a sentence is so long that it obviously precludes a meaningful opportunity for release. This is so whether it is the United States Court of Appeals for the Tenth Circuit striking down 131.75 years in prison without the possibility of parole,[160] the United States Court of Appeals for the Ninth Circuit striking down 127 years and two-months in prison without the possibility of parole,[161] or the Seventh Circuit striking down two consecutive fifty-year prison terms without opportunity for release.[162] In all of these cases, it was all but certain that the juvenile offenders would die in prison.[163] Yet, however valid and compelling this logic might be, it cuts against the literal rules of *Graham*, *Miller*, and *Montgomery*, which hold only that a meaningful opportunity for release prohibits LWOP.[164] Once circuit courts blaze beyond these narrow confines, they are not only freed (or rather unmoored) from any "semantic classifications" imposed by legislatures,[165] but are also beyond the purview of *Graham*, *Miller*, and *Montgomery*. When the prison sentence under consideration is ex-

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158. *Id.* at 145.

159. *Id.* (emphasis added) (quoting McKinley v. Butler, 809 F.3d 908, 911 (7th Cir. 2016)); *accord Moore*, 725 F.3d at 1194; Budder v. Addison, 851 F.3d 1047, 1056 (10th Cir. 2017).

160. *Budder*, 851 F.3d at 1050; *see also id.* at 1056 ("The Constitution's protections do not depend upon a legislature's *semantic classifications*. Limiting the Court's holding by this linguistic distinction would allow states to subvert the requirements of the Constitution by merely sentencing their offenders to terms of 100 years instead of 'life.'") (emphasis added) (footnote omitted).

161. *See Moore*, 725 F.3d at 1186 ("Because Moore would have to live to be 144 years old to be eligible for parole, his chance for parole is zero.").

162. *McKinley*, 809 F.3d at 909; *see also id.* at 911 ("[I]t is such a long term of years (especially given the unavailability of early release) as to be—unless there is a radical increase, at present unforeseeable, in longevity within the next 100 years—a *de facto* life sentence, and so the *logic* of *Miller* applies.") (emphasis added).

163. *See Budder*, 851 F.3d at 1056; *Moore*, 725 F.3d at 1186; *McKinley*, 809 F.3d at 911.

164. Graham v. Florida, 560 U.S. 48, 74 (2010); Miller v. Alabama, 567 U.S. 460, 479 (2012); Montgomery v. Louisiana, 136 S. Ct. 718, 735 (2016). The Third Circuit also cited to United States v. Jefferson, 816 F.3d 1016, 1018-19 (8th Cir. 2016) as the only case to hold that *Miller* only proscribed mandatory and not discretionary LWOP sentences. *Grant*, 887 F.3d at 146. But, the Third Circuit explained, "*Jefferson* misses the point of *Graham* and *Miller*. . . ." *Id.*

165. *Budder*, 851 F.3d at 1056.

treme, the *Graham*, *Miller*, and *Montgomery* meaningful-opportunity-for-release standard provides adequate guidance by which circuit courts may vacate the sentence.[166] But when the prison sentence under consideration *not so obviously* deprives a juvenile offender of his meaningful opportunity for release, the constitutional question now turns upon semantics. The Tenth Circuit was correct when it observed that these semantics are no longer sourced in statutory boundaries.[167] But a determination that was previously determined by statutory semantics now turns upon a determination which depends upon the efficacy of some studies predicting the life expectancy of the juvenile offender.[168] The semantics of legislative schemes have been exchanged for the semantics of the logic of courts. This is shaky ground on which to rest a constitutional guarantee.

Whether Grant would be released at some point before his death was (and still is) a close call.[169] Thus, the Third Circuit, in dealing with a sentence that did not obviously deprive Grant of his opportunity for release, endeavored to set forth a limiting principle to guide courts' discretion.[170] As a starting point, a meaningful opportunity for release must mean that the sentence is something less than a "de facto" life sentence.[171] The panel referred back to the broad language of *Graham* as:

> the essence of what a "meaningful opportunity for release" is: . . . an opportunity for release at a point of time in [the non-incorrigible juvenile offender's] life that still affords "fulfillment outside prison walls," "reconciliation with society," "hope," and "the opportunity to achieve maturity of judgment and self-recognition of human worth and potential."[172]

This "mandate," the Third Circuit provided, "encompasses more than mere physical release at a point just before . . . life is expected to end."[173] In other words, the Third Circuit recognized that the

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166. *See, e.g.*, *Graham*, 560 U.S. at 75.

167. *Budder*, 851 F.3d at 1056.

168. *See Grant*, 887 F.3d at 147. The court noted that Grant relied on "various" mortality estimates and social scientific studies to establish his life expectancy. *Id.* The government countered that Grant was erroneously measuring his life expectancy from birth and contended that his life expectancy was longer when appropriately measured from his present age (then forty-four). *Id.*

169. *See id.* (noting that according to the various statistics presented, Grant could conceivably live to age 72 or even 76.7).

170. *See id.*

171. *Id.* at 144.

172. *Id.* at 147 (quoting Graham v. Florida, 560 U.S. 48, 79 (2010)).

173. *Id.*

rationale compelling the Supreme Court's prior holdings was broader than those holdings themselves. Thus, the panel discarded the government's proffered hope-for-some-years-outside-prison-walls standard as "*too narrow* in light of the [Supreme] Court's statements."[174] But the hunt for an alternate, workable benchmark by which 'meaningful opportunity for release' might be measured was an elusive one.

To accomplish its objective (*i.e.*, defining 'meaningful opportunity'), the Third Circuit began by instituting what it termed a "legal framework."[175] Under this framework, sentencing judges would first be required to factually determine the juvenile offender's life expectancy to ensure that a juvenile offender would not be sentenced to a term-of-years that exceeded the juvenile offender's life expectancy.[176] Having established a base determination that did not really get it any closer to its principle objective, the Third Circuit engaged in the following soliloquy:

> at what age is one still able to meaningfully reenter society after release from prison? Is there a principled reason for why, say, a juvenile offender can properly reenter society at age fifty but not at age sixty? At age sixty but not at age seventy? We believe not. . . . [W]e are not aware of any widely accepted studies to support such precise line drawing on a principled basis in the prison release context.[177]

This conundrum is not new. In fact, it is a reincarnation of the dilemma presaged by Chief Justice Burger in his dissent to *Solem*, where the Supreme Court first unmistakably applied the concept of proportionality to prison sentences some thirty-five years earlier:

> [t]oday [the Court] holds that a sentence of life imprisonment, without the possibility of parole, is excessive punishment for a seventh allegedly "nonviolent" felony. How about the eighth "nonviolent" felony? The ninth? The twelfth?[178]

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174. *Id.* at 148 (emphasis added) (noting, however, that the Supreme Court has expressly declined to guarantee juvenile offenders release from prison).

175. *Id.*

176. *Id.* at 149. Such a determination in itself, the *Grant* panel noted, was fraught with dilemmas. *Id.* at 149-50 (quoting United States v. Mathurin, 868 F.3d 921, 932 (11th Cir. 2017) (noting the equal protection issues that would arise were sentences tailored to expectancy data because life expectancies vary according to race and sex). To avoid this constitutional quagmire, the panel mandated individualized evidentiary hearings to determine each juvenile offender's life expectancy. *Id.*

177. *Id.* at 150.

178. Solem v. Helm, 463 U.S. 277, 314 (1983) (Burger, C.J., dissenting).

Regardless of whether proportionality is an aid to Eighth Amendment capital punishment jurisprudence, proportionality in the realm of prison sentences presents judges with an amorphous standard that can produce radical results. The Third Circuit's attempt to place a principled limit on a term-of-years sentence bears this out: in *Grant*, the court adopted "a rebuttable presumption that a non-incorrigible juvenile offender should be afforded an opportunity for release before the *national age of retirement*."[179] Three observations are instructive in light of this result.

First, consider how the panel arrived at this place. The panel found it "clear" that "society accepts the age of retirement as a transitional life stage where an individual permanently leaves the work force after having contributed to society over the course of his or her working life."[180] What is not particularly convincing about the panel's pronouncement is that a term in prison can be fruitfully analogized to a lifelong career. Recognizing the difficulty of announcing the "precise national age of retirement" with certainty,[181] the panel declined to "definitively determin[e] [that] issue."[182] Instead, the panel was content to consider sixty-five as an "adequate approximation" and leave the precise determination to sentencing courts.[183] Perhaps, in light of this holding, the panel's assessment that it "goes no further" than prior Supreme Court holdings is not particularly convincing.[184] The Supreme Court, after all, had never contemplated measuring the meaningful-opportunity-for-release standard by a person's age of retirement.

Second, consider what the panel's proffered rule does not mean. Although the panel *defined* the constitutional right—meaningful opportunity for release before the national age of retirement—it seemingly did not extend that right to *all* non-incorrigible offenders.[185] This is because it is *only* a "*rebuttable presumption*."[186] Thus, under *Grant*, a non-homicide offender under *Graham* (non-incorrigible by default[187]) and a non-incorrigible homicide offender under *Miller*, could presumably still be deprived of a meaningful opportunity for release before retirement age. Because this right does

179. *Grant*, 887 F.3d at 152 (emphasis added).
180. *Id.* at 150 (emphasis omitted) (citation omitted).
181. *Id.* at 151.
182. *Id.* at 152.
183. *Id.* at 151-52.
184. *Id.* at 148.
185. *Id.* at 152 ("We do not, however, categorically foreclose the possibility that a district judge may sentence a non-incorrigible juvenile offender beyond the national age of retirement . . . .").
186. *Id.* at 152.
187. *Id.* at 142 n.7.

not necessarily apply evenly to all non-incorrigible offenders, it might very well be understood as inconsistent with both *Graham* and *Miller* which *required* a meaningful opportunity for *all* members of *both* classes of non-incorrigible juvenile offenders.[188] This inconsistency can presumably be resolved by reading *Grant* to still require that meaningful opportunity for release occurs sometime *after* the age of retirement. This contingency would arise where a non-incorrigible juvenile offender, although capable of reform, still warranted a greater sentence under other sentencing factors.[189] Moreover, provided that a sentencing judge determines that a homicide juvenile offender is incorrigible in the first instance, the protection against a term of years past the age of retirement (even up to LWOP) slips away and *Grant*, for all of its own hortatory language, provides no more certain protection than *Miller*.[190] Thus, the holding in *Grant* is somewhat ambiguous. It can be viewed as a gargantuan leap ahead of the Supreme Court's own jurisprudence, or because it is so hemmed in, as a diminutive one. So perhaps the panel was justified in its perception that this holding did not transgress the Supreme Court's prior jurisprudence.[191]

Finally, consider whether the panel's "age of retirement" rule accomplished what the panel intended and whether it is actually consistent with *Graham*, *Miller*, and *Montgomery*. The holdings of those three cases transformed LWOP imposed upon juvenile offenders into a constitutional issue and, by doing so, largely took it "from the realm of democratic decision."[192] Once the Third Circuit panel accepted the premise that the spirit of these three cases abolished not only *de jure* but also *de facto* LWOP sentences,[193] it followed inexorably that courts would have to define what constituted a *de facto* LWOP sentence. Thus, the burden falls on courts, rather than legislatures, to determine how many years of incarceration imposed upon juveniles for specific offenses is *too many years*, such that it deprives the juvenile offenders of their constitutional right to a

188. Graham v. Florida, 560 U.S. 48, 74 (2010) (non-homicide offenders); *see also* Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) (reinterpreting Miller v. Alabama, 567 U.S. 460 (2012) to prohibit LWOP for the class of non-incorrigible homicide offenders).

189. *Grant*, 887 F.3d at 152 (citing to the factors in 18 U.S.C. § 3553 (2012), which include "the nature and circumstances of the offense and the history and characteristics of the defendant," and forecasting that instances where such factors counsel a sentence beyond the national age of retirement "will be rare and unusual").

190. *Id.* at 153.

191. *Id.* at 148.

192. Obergefell v. Hodges, 135 S. Ct. 2584, 2625 (2015).

193. *Grant*, 887 F.3d at 142.

"meaningful opportunity to obtain release."[194] In effect, by following this path, the panel may have extricated juveniles from being subject to a legislature's "semantic classifications,"[195] but the result it reached delivers juveniles to instead be ensnared by a semantic classification of the panel's own invention.

Indeed, the "age of retirement" rule, requiring the meaningful opportunity for release to come before the age of sixty-five, is no less arbitrary than any rule that could be imposed by a legislature.[196] After all, the age-of-retirement rule could, in some circumstances, encourage sentencing judges to pass a longer sentence than they otherwise would by relying on *Graham*, *Miller*, and *Montgomery* alone. Consider that by capping the maximum sentence in this way, a seventeen-year-old offender receiving the maximum possible sentence under *Grant*'s proposed rule would receive a shorter sentence than a fourteen-year-old offender receiving the maximum possible sentence (*e.g.*, compare forty-eight years' imprisonment without the possibility of parole (14 + 48 = 62), with fifty-one years' imprisonment without the possibility of parole (14 + 51 = 65)). Under *Grant* this outcome is constitutionally sound but perhaps a future Third Circuit panel or the court en banc would disagree. Perhaps a future Third Circuit or the court en banc would regard it as logically perverse, a mere stopgap provision levied simply because the earlier holding had to draw the line somewhere (and perhaps the Third Circuit has already decided this by granting rehearing and vacating the panel's opinion). But if this is true, was the panel's sixty-five-year-old bright-line rule simply kicking the can down the road, until a future court has the opportunity to follow logic further into the semantic wormhole, and draw a new constitutional line in a completely new place? If so, the constitutional right to a meaningful opportunity for release is certainly chameleonic in nature, meaning one thing today and a different thing tomorrow. Perhaps the observation that "[l]iberty finds no refuge in a jurisprudence of doubt"[197] is nowhere more apt than in the context of imprisonment, the literal deprivation of a person's physical freedom.

194. Graham v. Florida, 560 U.S. 48, 75 (2010).
195. Budder v. Addison, 851 F.3d 1047, 1056 (10th Cir. 2017).
196. *Grant*, 887 F.3d at 150-51.
197. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).

V. CONCLUSION: WAITING FOR THE SUPREME COURT (OF FOR CONGRESS)

In the interests of clarity and consistency, it is imperative that the Third Circuit en banc resists the invitation to wade into the quagmire of Eighth Amendment juvenile sentencing logic for two main reasons.

First, it is the prerogative of the Supreme Court to advance its own constitutional bright lines. As a plurality of the Supreme Court enunciated in *Hein v. Freedom From Religion Foundation, Inc.*, "a necessary concomitant of the doctrine of *stare decisis* [is] that a precedent is not always expanded to the limit of its logic."[198] For instance, the Supreme Court in *Kennedy v. Louisiana* disapproved of expansively reading a prior case, *Coker v. Georgia*, to "state a broad rule" reaching beyond its specific holding.[199] In *Coker*, the Court held that the Eighth Amendment prohibited capital punishment for the rape of an adult woman.[200] In *Kennedy*, the Court was faced with deciding whether the Eighth Amendment prohibited capital punishment for the rape of a child.[201] Although the Court answered that question in the affirmative, the Court emphatically rejected the argument that *Coker* had *already* answered that question despite noting the seemingly "logical" merit that that argument possessed.[202] The *Kennedy* Court acknowledged that confined to one particular passage, "*Coker*'s analysis . . . [was] susceptible of a reading that would prohibit making child rape a capital offense."[203] However, the Court emphasized that "*Coker*'s holding was narrower than some of its language read in isolation."[204]

The same is true of *Graham*, *Miller*, and *Montgomery*. In each of these three cases where the Supreme Court has invalidated legislative bright lines, the Court has *necessarily* redrawn those lines in accordance with the constitutional mandate. Ultimately, it is the prerogative of the Supreme Court to set the bright lines by which all other courts must abide.[205] Thus, the Third Circuit should adopt the Eighth Circuit's position, and abide by the narrow holdings of those three cases.[206] Under this approach, *Graham* would only pro-

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198. 551 U.S. 587, 615 (2007).
199. *See* Kennedy v. Louisiana, 554 U.S. 407, 428-29 (2008).
200. Coker v. Georgia, 433 U.S. 584, 592 (1977).
201. *Kennedy*, 554 U.S. at 413.
202. *See id.* at 426-27.
203. *Id.* at 428.
204. *Id.*
205. *See, e.g.*, Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 33 (2006).
206. United States v. Jefferson, 816 F.3d 1016, 1018-19 (8th Cir. 2016).

hibit LWOP (and nothing else) for juvenile non-homicide offenders,[207] *Miller* would only prohibit mandatory LWOP (and not discretionary LWOP)[208] for juvenile homicide offenders,[209] and *Montgomery* would only prohibit discretionary LWOP with respect to non-incorrigible homicide offenders.[210] While such a restrictive approach would exclude any of these cases' more expansive language from being operative, it would also neatly comport with the three cases' express holdings.[211] It is these holdings that should be controlling rather than what is simply dicta.[212]

Such a result would also comport with fundamental fairness. Because different federal courts could and do come to different conclusions, juvenile offenders could be subject to differing standards as to what constitutes a meaningful opportunity for release where term-of-year sentences approach, but do not equate to, *de facto* LWOP sentences.[213] Thus, unless and until the Supreme Court weighs in, the Third Circuit should adhere to the express holdings of *Graham*, *Miller*, and *Montgomery* and leave any logical advancement or subsequent line-drawing to the Supreme Court.[214] Indeed, the Third Circuit panel itself recognized this obligation, and the

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207. Graham v. Florida, 560 U.S. 48, 76 (2010).

208. This issue is currently on certiorari before the Supreme Court. *See* Malvo v. Mathena, 893 F.3d 265 (4th Cir. 2018), *cert. granted*, No. 18-217, 2019 WL 1231751, at *1 (U.S. Mar. 18, 2019).

209. Miller v. Alabama, 567 U.S. 460, 479 (2012).

210. Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016).

211. *See, e.g.*, Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 33 (2006) ("[T]he duty of a court of appeals [is] to follow the precedents of the Supreme Court until the Court itself chooses to expressly overrule them."); *see also* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.").

212. *See* Kennedy v. Louisiana, 554 U.S. 407, 428-29 (2008) (responding to the argument that it was "possible" that *Coker* be understood to "state a broad rule" covering child rape: "*Coker*'s holding was narrower than some of its language read in isolation. . . . The opinion does not speak to the constitutionality of the death penalty for child rape, an issue not then before the Court.").

213. "What kind of Equal Justice under Law is it that—without so much as a '[s]orry about that'—gives as the basis for [subjecting] one person [to a sentence] arguments *explicitly rejected* in refusing to [subject] another?" Roper v. Simmons, 543 U.S. 551, 619 (2005) (Scalia, J., dissenting).

214. Although appellate courts defer to Supreme Court dicta as a general matter, *see In re* Pre-Filled Propane Tank Antitrust Litig., 860 F.3d 1059, 1064 (8th Cir. 2017), *cert. denied sub nom.*, Ferrellgas Partners, LP v. Morgan-Larson, LLC, 138 S. Ct. 647 (2018), such deference can go too far. *See id.* (stating that "[a]lthough panels have held that federal courts are 'bound' by Supreme Court dicta, this goes too far"). Where a federal court must decide between either (1) following a clear holding of the Supreme Court, or (2) giving effect to Supreme Court dicta that would have the effect of obliterating the bright line previously set by the clear holding, the federal court should stick with the clear holding. This is especially true where the lives of juvenile offenders hang in the balance.

court en banc should also heed it.[215] Dissimilar to the result in *Coker*, the Supreme Court could very well decide that the holdings in *Graham*, *Miller*, and *Montgomery* are the absolute limit of the constitutional requirement, hortatory language notwithstanding.[216] But for now, the bright lines set forth in those cases are the Court's last word.[217]

Second, it is ultimately Congress, rather than the courts, that has the ability to implement the solution that is needed to satisfy the constitutional requirements of *Graham*, *Miller*, and *Montgomery*. In *Frothingham v. Mellon*, the Supreme Court enunciated the general rule that federal taxpayers lack standing to challenge a federal statute's constitutionality.[218] When the Supreme Court subsequently decided *Flast v. Cohen*, there had been "confusion" as to whether *Frothingham* had announced an absolute constitutional bar to taxpayer standing or "simply impos[ed] a rule of [judicial] self-restraint."[219] The *Flast* Court decided that it was the latter.[220] Expressing concern in his dissent, Mr. Justice John Marshall Harlan II wrote the following:

> [i]t seems to me clear that public actions, whatever the constitutional provisions on which they are premised, may involve important hazards for the continued effectiveness of the federal judiciary. . . . [T]here surely can be little doubt that they strain the judicial function and press to the limit judicial authority. There is every reason to fear that unrestricted public actions might well alter the allocation of authority among the three branches of the Federal Government. It is not, I submit, enough to say that the present members of the Court would not seize these opportunities for abuse, for such actions would, even without conscious abuse, go far toward the final transformation in the Council of Revision which, despite Madison's support, was rejected by the Constitutional Convention. . . . We

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215. United States v. Grant, 887 F.3d 131, 148 (3d Cir. 2018) (stating "we are bound to follow the mandate of the Supreme Court . . . .") (quotation omitted).

216. *See Kennedy*, 554 U.S. at 428.

217. *See id.*

218. 262 U.S. 447 (1923).

219. Flast v. Cohen, 392 U.S. 83, 92 (1968).

220. *Id.* at 93. Interestingly, it was precisely this exception to the general rule of no taxpayer standing that the Supreme Court was unwilling to advance in *Hein*. Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 590 (2007). Confronted with the argument that it was "'arbitrary' to distinguish between money spent pursuant to congressional mandate and expenditures made in the course of executive discretion," *id.* at 609, the plurality responded that "a necessary concomitant of *stare decisis* is that a precedent is not always expanded to the limit of its logic." *Id.* at 615.

> must as judges recall that, as Mr. Justice Holmes wisely observed, the other branches of the Government "are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[221]

The lesson from *Flast* is instructive in the present context. Criminal sentencing laws are at the heart of the legislative function.[222] As multiple Supreme Court justices have observed, the Constitution makes for a clumsy tool when it comes to fine-tuning legislative schemes.[223] To acknowledge this maxim is not to diminish the judiciary's significant role in overseeing the constitutionality of criminal justice.[224] It is merely to state that not every criminal sentencing question should be injected with Eighth Amendment significance. In order to sustain the viability of the system, courts must be willing to rely on coordinate branches of government as co-equal "guardians of the liberties."[225]

The verity of this premise is even stronger when the simplest solution in a given context is a legislative one. Such is the case here: providing parole eligibility for all juvenile offenders would comfortably and easily satisfy the requirements of *Graham*, *Miller*, and *Montgomery*. Of course, for this solution to be viable, Congress would have to re-establish a federal parole system.[226] With such a system, it would be difficult to argue under *Graham*, *Miller*, and *Montgomery* that any term-of-years prison sentence, no matter how long, deprives a juvenile offender of a meaningful opportunity for release as long as that juvenile offender is eligible for parole. The

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221. *Flast*, 392 U.S. at 130-31 (Harlan, J., dissenting) (footnote omitted) (citation omitted).

222. *See* Miller v. Alabama, 567 U.S. 460, 515 (2012) (Thomas, J., dissenting) (stating that "questions of sentencing policy [are] to be determined by Congress and the state legislatures . . . [because] [d]etermining the length of imprisonment that is appropriate for a particular offense and a particular offender inevitably involves a balancing of interests").

223. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting) ("Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right."); *see also* Manson v. Brathwaite, 432 U.S. 98, 118 (1977) (Stevens, J., concurring) (citation omitted) ("I am persuaded that this rulemaking function can be performed more effectively by the legislative process than by a somewhat clumsy judicial fiat, and that the Federal Constitution does not foreclose experimentation by the [s]tates in the development of such rules."); *Miller*, 567 U.S. at 515 (Thomas, J., dissenting) (recognizing that "[t]he Eighth Amendment imposes certain limits on the sentences that may be imposed in criminal cases, but for the most part it leaves questions of sentencing policy to be determined by Congress and the state legislatures . . . .").

224. *See Miller*, 567 U.S. at 514-15 (Thomas, J., dissenting).

225. *Flast*, 392 U.S. at 131 (Harlan, J., dissenting) (quotation omitted).

226. *See* United States v. Analla, 975 F.2d 119, 126-27 (4th Cir. 1992) (noting that the Sentencing Reform Act of 1984 abolished parole for all sentences, including life imprisonment).

Supreme Court has twice now suggested the expediency of this option in this context. The Court first entertained the option in *Miller*[227] and elaborated on its potential in *Montgomery*: "[a]llowing those offenders to be considered for parole ensures that juvenile[] . . . [offenders] will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment."[228] Although the difficulty of how far into a sentence the Constitution requires a juvenile offender be considered for parole would remain, this approach would alleviate the strain on sentencing courts in attempting to ferret out the requirements of *Graham*, *Miller*, and *Montgomery* with respect to each offender.[229] If by its references in *Miller* and *Montgomery*, the Supreme Court is signaling to Congress that congressional action is required, then the federal judiciary should be unified in this resolve.

In summary, the Third Circuit should exercise forbearance and decline to wade through the quagmire of Eighth Amendment logic. Not only will this permit time for congressional action, it will also respect the constitutional bright lines which the Supreme Court has already drawn. For no bright line can be perfectly drawn and somewhere the quixotic pursuit of perfect logic must die.

227. *Miller*, 567 U.S. at 489.
228. Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016).
229. *Id.*; *see also* United States v. Grant, 887 F.3d 131, 149 (3d Cir. 2018) (rejecting the approach of formulating specific sentences tailored to each individual offender's life expectancies as unworkable).

Fear of Change: *Carpenter v. United States* and the Third-Party Doctrine

Tricia A. Martino[*]

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I. INTRODUCTION

Today's society is in an Information Age,[1] which is "immeasurably enriched" and "seriously imperiled" by rapidly advancing technology.[2] While individuals enjoy the benefit of having access to e-mail, global positioning system technology (GPS), social media, the internet, and a plethora of other applications on their phones, this same technology "endanger[s] the liberties at the core of our constitutional system."[3] Unknowingly, individuals are providing the government with ever-easier ways to access and record every action they take.[4] Law enforcement officials need not expend their own resources to do this because the privacy scheme developed through the Fourth Amendment and relevant statutes allows law enforcement to simply ask third parties for the information.[5] Unconsciously, each individual is giving law enforcement information on a grand scale that the government historically lacked the resources to collect.[6] Whether it is the telephone company, the grocery store offering a rewards card, the internet service provider (ISP), Google, or even companies of which the individual is unaware,[7] these companies are creating "digital dossiers" on anyone with a service account.[8] Without due vigilance, this could be disastrous for the fundamental protections and liberties that define American society through the Fourth Amendment.[9]

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1. The Information Age is an era where technology allows individuals to "communicate, transfer and share information, access data, and analyze a profound array of facts and ideas." Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1089 (2002). However, individuals must "plug in" or enter into relationships with entities that then generate records of the individual's personal information. *Id.*
2. James J. Tomkovicz, *Technology and the Threshold of the Fourth Amendment: A Tale of Two Futures*, 72 MISS. L.J. 317, 318 (2002).
3. *Id.* at 321-22.
4. Solove, *supra* note 1, at 1089 ("We are becoming a society of records, and these records are not held by us, but by third parties.").
5. *See id.* at 1148-50.
6. Zachary Gold & Mark Latonero, *Robots Welcome? Ethical and Legal Considerations for Web Crawling and Scraping*, 13 WASH. J.L. TECH. & ARTS 275, 290 (2018). The type of tracking the government has access to now was "either impossible or prohibitively expensive in the past." *Id.*
7. *See* Solove, *supra* note 1, at 1092 (describing companies that buy and aggregate people's data from other entities).
8. *Id.* at 1084. These records are "becoming digital biographies, a horde of aggregated bits of information combined to reveal a portrait of who we are." *Id.* at 1095.
9. Tomkovicz, *supra* note 2, at 322. This trajectory tolerates totalitarian features that allow the government to increase social control over citizens' private lives. Solove, *supra* note 1, at 1102.

The United States Supreme Court's recent decision in *Carpenter v. United States* takes a small step toward reigning in this technological encroachment.[10] While imperfect, the decision began a judicial analysis about the impact of the Information Age on constitutional protections, specifically in the context of historical cell-site location information (CSLI).[11] This article analyzes the *Carpenter* decision and posits whether the third-party doctrine should be reevaluated or overruled in the technology-influenced era. Section II describes the history of the Fourth Amendment, and Section III addresses the facts of *Carpenter*. Sections IV and V discuss the majority and dissenting opinions, respectively. Lastly, Section VI examines the problems attendant to the third-party doctrine and suggests reform to the third-party doctrine.

II. HISTORY OF THE FOURTH AMENDMENT[12]

> In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself.[13]

The Fourth Amendment was a direct reaction to the colonists' abhorrence for British use of the Writs of Assistance.[14] In colonial times, England gave law enforcement officials general and unrestricted powers for the better part of four centuries.[15] The American colonists resented the use of this unlimited power in the Writs of Assistance that enabled British soldiers to invade homes and businesses.[16] These general warrants were random, unannounced, un-

10. 138 S. Ct. 2206, 2217 (2018).

11. *Id.* at 2211.

12. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

13. Solove, *supra* note 1, at 1125 (quoting JAMES MADISON, *The Federalist No. 51*, *in* THE FEDERALIST 347, 349 (Jacob E. Cooke ed., 1961)).

14. Writs of Assistance were general warrants used by the British against the colonists which had no expiration. NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 26, 53-54 (1937). These arbitrary warrants needed no probable cause and were widely abused because they gave officials absolute and unlimited discretion subject only to the limits of (1) no arresting powers and (2) only daytime execution. *Id.*

15. *Id.* at 23.

16. *Id.* at 51.

supervised, and enacted without any suspicion of criminal activity.[17] Eventually, the colonists brought the issue to court.[18] James Otis, Jr.'s 1761 oration at court against the Writs of Assistance "breathed into this nation the breath of life" and "was the first scene of opposition to the arbitrary claims of Great Britain. Then and there the child of Independence was born."[19] Though the original draft of the Bill of Rights made no mention of it, the Founders at the Constitutional Conventions placed high importance on the inclusion of what became the Fourth Amendment.[20]

The Fourth Amendment protects the security of "persons, houses, papers, and effects."[21] The Founders designed the Fourth Amendment to take decision-making out of the executing officer's hands[22] and into the "more trustworthy and sober judgment" of a judicial officer.[23] The Fourth Amendment strikes a balance between liberty and social order—two concepts which stand on opposite sides of an ideological teeter-totter.[24] The objective was "to guarantee the maximum amount of individual freedom that would be possible in a nation that also aspired to be safe, secure, and enduring."[25] Therefore, the Fourth Amendment allows government investigation so long as

17. Stephen Treglia, *Precedent-Shattering* 'Carpenter'?, N.Y.L.J. (July 30, 2018, 2:35 PM), https://www.law.com/newyorklawjournal/2018/07/30/precedent-shattering-carpenter/.

18. LASSON, *supra* note 14, at 57.

19. *Id.* at 59 (internal citations omitted).

20. *Id.* at 79-80.

21. U.S. CONST. amend. IV.

22. Organized police forces did not exist at the Founding; modern police forces began organizing in the nineteenth century and did not achieve modern sophistication until the mid-twentieth century. Solove, *supra* note 1, at 1105. It is inherently difficult for law enforcement officials to balance order and liberty when under social pressure to control and prevent crime and violence. *Id.* at 1106. This leads to the official taking short cuts, excessive force, or unwarranted exercises of discretion and insensitivity or brutality toward constitutionally protected rights of the citizen. *Id.*

23. LASSON, *supra* note 14, at 120.

24. Tomkovicz, *supra* note 2, at 324-25. Full social order is possible only in repressive regimes, while full liberty would result in an unsustainable governmental scheme. *Id.*

25. *Id.* at 325.

searches[26] and seizures[27] are reasonable. Such reasonableness requires a warrant,[28] supported by probable cause,[29] which must particularize[30] "the places to be searched and the persons or things to be seized."[31] In this way, the Fourth Amendment prevented the "fishing expeditions" and "dragnet investigations" that the Founders resented.[32]

Originally, the Court analyzed the Fourth Amendment under a common law trespass doctrine requiring a physical intrusion on a constitutionally-protected area by the government before Fourth Amendment protections were triggered.[33] This property-based or trespass-based analysis dominated Fourth Amendment jurisprudence for centuries[34] until *Katz v. United States* recognized that "the Fourth Amendment protects people, not places."[35] The Court in *Katz* found that the trespass was doctrine no longer controlling[36] and thereafter adopted an analysis focusing on reasonable expectations of privacy.[37] Specifically, the physical trespass doctrine could no longer safeguard the privacy interests that so motivated the Founders, and a new threshold for the Fourth Amendment had to recognize and encompass the substance of that privacy protection.[38] As the Court later explained through the *Katz* test:

> [w]hen an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to

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26. An unreasonable search occurs whenever the intrusiveness of the investigation outweighs the gravity of the crime being investigated. Solove, *supra* note 1, at 1119 n.201.

27. The test for unreasonable seizures examines whether there was "some meaningful interference with an individual's possessory interests in [the] property." United States v. Jacobsen, 466 U.S. 109, 113 (1984).

28. *See* U.S. CONST. amend IV; Solove, *supra* note 1, at 1118 ("Generally, searches and seizures without a warrant are per se unreasonable.").

29. Probable cause exists where the "facts and circumstances within [the police's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." Solove, *supra* note 1, at 1119 (quoting Brinegar v. United States, 338 U.S. 160, 175-76 (1949)).

30. Particularized suspicion is a factual basis to believe a particular person is engaged in illegal conduct. *Id.* at 1109.

31. U.S. CONST. amend. IV.

32. Solove, *supra* note 1, at 1125, 1151.

33. Carpenter v. United States, 138 S. Ct. 2206, 2213 (2018).

34. Andrew MacKie-Mason, *The Private Search Doctrine After* Jones, 126 YALE L.J.F. 326, 327 (2017).

35. 389 U.S. 347, 351 (1967).

36. Christopher Totten & James Purdon, *A Content Analysis of Post-*Jones *Federal Appellate Cases: Implications of* Jones *for Fourth Amendment Search Law*, 20 NEW. CRIM. L. REV. 233, 238-39 (2017).

37. The reasonable expectation of privacy test comes from Justice Harlan's concurrence in *Katz*. *See* 389 U.S. at 361 (Harlan, J., concurring).

38. Tomkovicz, *supra* note 2, at 339.

> recognize as reasonable, we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause.[39]

Judicial interpretation post-*Katz* demonstrated privacy as a concept of total secrecy.[40] Total secrecy is a theory wherein the Fourth Amendment protects only the information that an individual specifically acts to keep hidden.[41] The total secrecy conception is detailed best in the third-party doctrine developed by the Court in *Miller v. United States*[42] and *Smith v. Maryland*.[43] The third-party doctrine, as its name implies, governs the collection of information about one individual from a third party.[44] Simply put, "[b]y disclosing to a third party, the subject gives up all of his Fourth Amendment rights in the information revealed."[45] The *Katz* test, together with the third-party doctrine, became the sole analysis for almost five decades.[46] In 2012, however, the Court strongly reminded that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test."[47] The Court in *United States v. Jones* declared that a Fourth Amendment search occurs when the government trespasses on a constitutionally protected area conjoined with an attempt to find something or obtain information.[48] In *Jones's* aftermath, appellate courts have analyzed searches under either a *Katz* privacy test or a *Jones* property test, or both.[49]

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39. Carpenter v. United States, 138 S. Ct. 2206, 2213 (2018) (internal quotations omitted).

40. Solove, *supra* note 1, at 1131.

41. *Id.* Professor Solove contends this conception is not adaptable to advances in technology; thus, it limits Fourth Amendment protection. *Id.*; *see also* Tomkovicz, *supra* note 2, at 341.

42. 425 U.S. 435, 437 (1976) (ruling that the government obtainment of bank records was not a Fourth Amendment search).

43. 442 U.S. 735, 745-46 (1979) (ruling that the government's use of a pen register at a telephone company was not a Fourth Amendment search).

44. Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 563 (2009).

45. *Id.*

46. MacKie-Mason, *supra* note 34, at 328 n.14; *see also* United States v. Jones, 565 U.S. 400, 405 (2012).

47. *Jones*, 565 U.S. at 409.

48. MacKie-Mason, *supra* note 34, at 329. Thus, a GPS monitoring system applied without a valid search warrant to a suspect's car was an unreasonable search in violation of the Fourth Amendment. *Jones*, 565 U.S. at 404.

49. Totten & Purdon, *supra* note 36, at 234.

The Court now stands at a precipice where the third-party doctrine and total secrecy face the challenges of technological advancements of the Information Age.[50] Most personal information now exists in records kept by a variety of third parties.[51] Furthermore, advancements in technology allow increasingly intrusive means of investigating target individuals.[52] Justice Sotomayor explained her concern with the sole reliance on either a trespass or third-party doctrine regime in the Information Age where surveillance need not physically trespass into the records of the target individual.[53] As *Jones* described, GPS monitoring precision continues to improve.[54] While *Jones* was decided on a trespass theory, various Justices hinted that a longer duration of government tracking could implicate other Fourth Amendment concerns.[55] Similarly, in *Riley v. California*, the Court recognized that cell phones are such a "pervasive and insistent part of daily life" that they seem to be a "feature of human anatomy."[56] Thus, a warrant is required to search the information stored in a cell phone, even during a search incident to arrest[57] because "[t]he fact that technology now allows an individual to carry [private information] in his hand does not make the information any less worthy" of Fourth Amendment protection.[58]

The Court has been trending toward a Fourth Amendment threshold based on the amount of information collected: when the government collects a certain amount of data, regardless if it is public or not, the nature of the inquiry changes and the collection becomes a search possibly subject to the Fourth Amendment.[59] A similar inquiry presented itself in *Carpenter v. United States*, where the Court was asked to address Fourth Amendment protection implications of the historical location information stored by cell phone providers.[60]

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50. *See* Solove, *supra* note 1, at 1084.
51. *Id.* at 1087.
52. For example, CSLI can now locate a person within fifty meters. Carpenter v. United States, 138 S. Ct. 2206, 2219 (2018).
53. *Jones*, 565 U.S. at 413-18; Gold & Latonero, *supra* note 6, at 288-90.
54. *Jones*, 565 U.S. at 428 (Alito, J., concurring).
55. *See id.* at 415 (Sotomayor, J., concurring); *id.* at 430 (Alito, J., concurring).
56. 573 U.S. 373, 385 (2014). Interestingly, Chief Justice Roberts authored both *Riley* and *Carpenter*, which suggests he is "the architect of these new privacy principles." Davis Wright Tremaine LLP, *Cracking Open a Can of Worms: Why* Carpenter v. United States *May Not Be the Privacy Decision that Was Needed or Wanted*, JD SUPRA (July 11, 2018), https://www.jdsupra.com/legalnews/insight-cracking-open-a-can-of-worms-20667/.
57. *Riley*, 573 U.S. at 403.
58. *Id.*
59. Gold & Latonero, *supra* note 6, at 291 (analyzing *Jones* and *Riley*).
60. 138 S. Ct. 2206, 2211 (2018).

III. FACTS AND PROCEDURAL HISTORY OF *CARPENTER*

In 2011, police arrested several suspects in connection with multiple armed robberies.[61] One of the suspects confessed, identified fifteen accomplices in nine robberies, and gave the FBI several phone numbers of these accomplices, including that of Timothy Carpenter.[62] Pursuant to the Stored Communications Act (SCA),[63] the government obtained court orders[64] for two cell phone providers, MetroPCS and Sprint, in order to obtain Carpenter's CSLI.[65] CSLI is the time-stamped and location-recorded data collected and stored when cell phones connect to cell sites to perform ordinary functions, often several times per minute.[66] The government requested 159 days of CSLI records from the two providers.[67] Collectively, the providers produced 12,898 location points spanning 129 days.[68]

Subsequently, Carpenter was charged with six counts of robbery and six firearms counts.[69] Carpenter filed a pretrial motion to suppress the CSLI data alleging that the warrantless seizure violated the Fourth Amendment.[70] The United States District Court for the Eastern District of Michigan denied the motion.[71] Carpenter was convicted on all but one firearm count and sentenced to over one hundred years in prison.[72] The United States Court of Appeals for the Sixth Circuit affirmed the conviction by adhering to the third-

61. *Id.* at 2212.
62. *Id.*
63. Stored Communications Act, 18 U.S.C. § 2703(d) (2012).
64. According to the SCA, the government needs a search warrant for records that are less than 180-days old but only requires a court order for records that are older than 180 days. Gold & Latonero, *supra* note 6, at 288. This distinction is significant where court orders do not require particularized suspicion and, in some instances, judges merely act as a rubber stamp due to statutory requirements mandating their approval if certain steps are followed. Solove, *supra* note 1, at 1150.
65. *Carpenter*, 138 S. Ct. at 2211-12.
66. *Id.* For example, imagine a girl, Jane, waking in the morning to her friend calling. The friend asks her what time Jane would be picking her up for work. Jane hangs up and texts this friend that she is going to leave the house after she takes a shower. In the shower, Jane listens to music using her cell phone. As she brushes her teeth, Jane checks her emails on her phone. Her mom calls while she is making breakfast. During this conversation, Jane's phone pings some notifications about deals through store applications. Then, Jane texts her friend when she leaves her house. On the way, she uses Google Maps for directions. Upon arrival, Jane texts the friend. While waiting for the friend to come to the car, Jane has a text exchange with her husband about dinner that night. Jane also receives multiple notifications while on her way to work. In this simple example, Jane's phone collected dozens of CSLI data points.
67. *Id.* at 2212.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 2213.

party doctrine.[73] Because Carpenter shared the location information with his wireless carriers, the third-party doctrine dictated he did not have a reasonable expectation of privacy in that information; thus, there were no Fourth Amendment implications.[74] The United States Supreme Court granted certiorari.[75]

IV. THE MAJORITY OPINION

Chief Justice Roberts wrote the majority opinion, concluding that the government's use of CSLI against Carpenter was a search under the Fourth Amendment.[76] The Court determined that the government invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements when it accessed CSLI from wireless carriers for long durations of time.[77] Historically, it was only practical for the government to pursue suspects for limited durations; therefore, society did not expect the government's ability to "monitor and catalogue every single movement . . . for a very long period [of time]."[78] Using GPS tracking as a touchstone,[79] the Court compared CSLI to GPS location information, stating that time-stamped data "provides an intimate window into a person's life"[80] because cell phone users have their phones on them almost constantly, giving the government "near perfect surveillance" of the targeted user.[81] Furthermore, historical CSLI allows the government to go back in time and effectively tail any individual, subject only to the retention policies of wireless carriers.[82] The Court described the case as a "detailed chronicle of a person's physical presence compiled every day, every moment, over several years."[83] For this reason, "an individual maintains a legitimate expectation of

73. *Id.*

74. United States v. Carpenter, 819 F.3d 880, 889-90 (6th Cir. 2016). Notably, Judge Stranch's concurrence explained there were Fourth Amendment concerns but that a good faith exception applied. *Id.* at 893-94 (Stranch, J., concurring).

75. *Carpenter*, 138 S. Ct. at 2213.

76. *Id.* at 2220.

77. *Id.* at 2219. Notably, the Court refused to set time parameters for this decision, stating "[i]t is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search." *Id.* at 2217 n.3.

78. *Id.* at 2217 (quoting United States v. Jones, 565 U.S. 400, 430 (2012)). The majority opinion placed great weight on Justice Sotomayor's *Jones* concurrence. *Id.*

79. *See, e.g.*, *id.* at 2216 ("[T]racking partakes of many of the qualities of the GPS monitoring . . . ."); *Id.* at 2217-18 (like GPS monitoring, CSLI tracking is easy, cheap, and efficient); *Id.* at 2218 (historical cell-site records present "even greater privacy concerns than GPS monitoring").

80. *Id.* at 2217 (citing *Jones*, 565 U.S. at 415).

81. *Id.* at 2218.

82. *Id.* Currently, cell phone providers retain records for five years. *Id.*

83. *Id.* at 2220.

privacy in the record of his physical movements as captured through CSLI."[84]

The Court declined to apply the third-party doctrine, created through *Miller*[85] and *Smith*,[86] declaring that it would be a "significant extension" of the doctrine.[87] It found that CSLI was categorically different information than telephone numbers and bank records.[88] The Court opined, "the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection,"[89]—a determination which stands at odds with the original conception of the third-party doctrine.[90] Distinguishing *Miller* and *Smith*, wherein the individuals assumed the risk of disclosure to the government by revealing information to a third party,[91] the Court determined that CSLI is not "shared" as normally conceptualized; rather, it is logged automatically without any affirmative action by the user "beyond powering up."[92]

Justice Roberts further determined the government's search of Carpenter's cell phone was unreasonable because it failed the probable cause standard.[93] The government acquired a court order for the CSLI records pursuant to Section 2703(d) of the Stored Communications Act,[94] which requires a standard of proof "well short" of probable cause.[95] Therefore, Section 2703(d) utilized an unconstitutional mechanism for accessing historical CSLI due to its failure to meet the probable cause standard for a warrant.[96] In rejecting

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84. *Id.* at 2217.
85. United States v. Miller, 425 U.S. 435 (1976).
86. Smith v. Maryland, 442 U.S. 735 (1979).
87. *Carpenter*, 138 S. Ct. at 2219.
88. *Id.* at 2216-17.
89. *Id.* at 2217.
90. *See id.* at 2262 (Gorsuch, J., dissenting) (the doctrine created a "categorical rule" whereby individuals surrender privacy expectations when disclosing information to third parties).
91. *Id.* at 2216 (majority opinion) (analyzing United States v. Miller, 425 U.S. 435, 443 (1976) and *Smith*, 442 U.S. at 745).
92. *Id.* at 2220 (noting "there is no way to avoid leaving behind a trail of location data" unless the user turned it off, an action that renders the device unusable for its normal functions).
93. *Id.* at 2221*; see also* Solove, *supra* note 1, at 1119 (explaining probable cause and what it requires).
94. Stored Communications Act, 18 U.S.C. § 2703(d) (2012) (requiring the government to provide "specific and articulable facts" showing "reasonable grounds" that the records are "relevant and material to an ongoing criminal investigation").
95. *Carpenter*, 138 S. Ct. at 2221. Court orders, issued under a relevance standard, lie somewhere between subpoenas limited only by the burden placed on the producing party and warrants requiring probable cause and particularization. Solove, *supra* note 1, at 1149-50.
96. *Carpenter*, 138 S. Ct. at 2221.

Justice Alito's dissenting argument,[97] the majority noted that subpoenas are subject to more relaxed scrutiny without regard to expectations of privacy in the records because: (1) the Court has never held the government could subpoena third-party records where the individual had a reasonable expectation of privacy in the information, (2) if subpoenas had no regard for Fourth Amendment implications, no record would be protected, and (3) there is an open argument whether warrant requirements apply to "modern-day equivalents" of people's papers or effects, regardless of whether they are held by third parties.[98] The Court emphasized its duty to step in to ensure Fourth Amendment protections are not swallowed by scientific progress and innovation.[99]

In sum, *Carpenter v. United States* declared that, regardless of whether information may be held by a third party, a person has a reasonable expectation of privacy in location information via CSLI. Therefore, the government must obtain a warrant supported by probable cause to acquire this information.[100] According to Justice Roberts:

> [w]e decline to grant the state unrestricted access to a wireless carrier's database of physical location information. In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection.[101]

Though a "narrow" decision, *Carpenter* provides greater protection to individuals in their technology and information given to third-party cell phone providers.[102]

V. THE DISSENTERS

Four Justices dissented, taking completely different views on the CSLI issue. Justice Kennedy focused on the third-party doctrine and argued the Court should have adhered to precedent and legislative judgment.[103] Justice Thomas criticized the *Katz* doctrine completely, arguing it removes most of the Fourth Amendment

97. *See generally id.* at 2246-61 (Alito, J., dissenting).
98. *Id.* at 2221-22 (majority opinion).
99. *Id.* at 2223.
100. *Id.*
101. *Id.*
102. *Id.* at 2220.
103. *See generally id.* at 2223-35 (Kennedy, J., dissenting).

text.[104] Justice Alito focused on the differences between subpoenas and warrants.[105] And, Justice Gorsuch called for an entire re-evaluation of Fourth Amendment jurisprudence.[106]

A. *Justice Kennedy's Dissent*

Justice Kennedy's dissent characterized the new rule established by the majority as a needless departure from established precedent; he claimed it unhinged the property-based concepts of the Fourth Amendment.[107] The third-party doctrine dictated the "commonsense principle" that property law analogues are dispositive in analysis of privacy expectations,[108] and a defendant has no attenuated interest in property owned by another.[109] Cell-site records are similar to the records involved in *Smith* and *Miller* because they are created, kept, classified, owned, controlled, and sold by the third party; thus, the new ruling creates an "unprincipled and unworkable" third-party doctrine[110] for which the Court failed to establish guidelines.[111] The majority, as Justice Kennedy pointed out, misread *Miller* and *Smith* as a balancing test rather than a dispositive threshold question; furthermore, even if it was a balancing test, the majority incorrectly protected location information more than bank records and phone calls.[112]

Justice Kennedy ultimately cautioned the Court to defer to the legislature instead of imposing constitutional barriers that restrain further legislative debate.[113] Here, the government received the information through a congressionally-authorized process which, Justice Kennedy highlighted, protected information more than a normal subpoena.[114] By determining that CSLI was subject to the Fourth Amendment, the Court essentially reined in investigative tools and rendered the cell phone a "protected medium that dangerous persons will use to commit serious crimes."[115] Justice Kennedy

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104. *See generally id.* at 2235-46 (Thomas, J., dissenting).
105. *See generally id.* at 2246-61 (Alito, J., dissenting).
106. *See generally id.* at 2261-72 (Gorsuch, J., dissenting).
107. *Id.* at 2224 (Kennedy, J., dissenting).
108. *Id.* at 2228. Justice Kennedy argued that *Katz v. United States*, 389 U.S. 347 (1967) provided property-based analogies in expectations of privacy rather than abandoning the doctrine completely. *Id.*
109. *Id.* at 2227.
110. *Id.* at 2224, 2230.
111. *Id.* at 2234.
112. *Id.* at 2231-32.
113. *Id.* at 2233.
114. *Id.* at 2224, 2235.
115. *Id.* at 2230.

also criticized the majority's failure to address threshold questions for applying this new inquiry.[116]

B. *Justice Thomas's Dissent*

Justice Thomas's dissent called for the dissolution of the *Katz* reasonable expectation of privacy test.[117] He declared that the test "has no basis in the text or history of the Fourth Amendment" and leads courts to make policy decisions rather than law.[118] He also contended that it removed many words from the Amendment itself[119] by defining a search under the *Katz* test in ways that defy common understanding[120] and by focusing on privacy in ways contrary to the text of the Fourth Amendment.[121] He explained the Founders enacted the Fourth Amendment as a protection from the Writs of Assistance that allowed broad searches of one's *home*.[122] In Justice Thomas's view, there is a hierarchy to Fourth Amendment protections, namely property and privacy protections.[123] The ancillary protection accorded privacy should not be the "*sine qua non* of the Amendment" according to Justice Thomas.[124] Justice Thomas advocated overruling the *Katz* test, stating the case should involve *whose* property was searched, an analysis which returns to the text of the Fourth Amendment.[125]

C. *Justice Alito's Dissent*

Justice Alito's dissent expounded the distinction between subpoenas *duces tecum* and actual searches.[126] Where actual searches allow law enforcement officers to enter homes and root through private papers and effects, subpoenas require parties to search

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116. *Id.* at 2234. Justice Kennedy questioned what makes records a distinct category of information, how much information can be requested without a warrant, whether a time limitation depends on the type of information at issue, the scope of Congress's power to authorize the government's collection of information, and how to apply the Fourth Amendment's reasonableness to compulsory processes. *Id.*

117. *See generally id.* at 2236 (Thomas, J., dissenting).

118. *Id.*

119. *Id.* at 2241. Justice Thomas argued that *Katz* rendered the phrase "persons, houses, papers, and effects" "entirely 'superfluous'" and read out the word "their." *Id.* (quoting United States v. Jones, 565 U.S. 400, 405 (2012)).

120. *Id.* at 2238.

121. *Id.* at 2239.

122. *Id.* at 2240.

123. *Id.*

124. *Id.*

125. *Id.* at 2235.

126. *Id.* at 2247 (Alito, J., dissenting). Subpoenas *duces tecum* are tools used to compel the production of tangible evidence like books, papers, and other physical evidence. *Id.* at 2248.

through and produce their own records.[127] The Founders, in creating the Fourth Amendment, revolted against the means of acquiring information, not the acquisition itself.[128] Justice Alito critically stated the Founders knew of subpoenas *duces tecum*, yet chose not to include them in the Fourth Amendment text.[129] Notwithstanding, Justice Alito admitted Fourth Amendment jurisprudence evolved to include subpoenas *duces tecum* under a less strict standard.[130] Justice Alito conceded that the government satisfied this burden in *Carpenter*.[131]

Justice Alito also condemned the departure in *Katz* from property-based rights, stating it led people to claim privacy rights in others' items.[132] He qualified this by stating that the majority misunderstood *Miller* and *Smith* as a new doctrine rather than a rejection of "an argument that would have disregarded the clear text of the Fourth Amendment."[133] Reminding the Court that Fourth Amendment rights are personal, Justice Alito admonished the majority for creating a new line of Fourth Amendment doctrine by allowing individuals to object to the search of another individual or entity.[134] Additionally, Justice Alito questioned why the Court now afforded an individual greater Fourth Amendment protection than a party actually subject to the subpoena.[135]

D. Justice Gorsuch's Dissent

Justice Gorsuch agreed with the majority's judgment but departed from its reasoning.[136] He began his dissent with two powerful questions: "[w]hat's left of the Fourth Amendment" and "[w]hat to do [about it]?"[137] Justice Gorsuch explained that everything today is on the internet and held by third-party servers, including documents that were historically kept locked away.[138] According to

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127. *Id.* at 2247.
128. *Id.* at 2251.
129. *Id.* at 2252. Justice Alito points out subpoenas were not even discussed during the writing of the Fourth Amendment. *Id.*
130. *Id.* at 2254 (citing Okla. Press Publ'g Co. v. Walling, 327 U.S. 186 (1946)). The standard foregoes probable cause and instead requires the material production to be particularly described, authorized by law, and relevant. *Id.*
131. *Id.* at 2255 (describing the standard for a court order to be "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome") (citations omitted).
132. *Id.* at 2259-60. Justice Alito hailed *Miller* for rejecting this notion. *Id.* at 2260.
133. *Id.*
134. *Id.* at 2257.
135. *Id.* at 2256.
136. *See generally id.* at 2261-72 (Gorsuch, J., dissenting).
137. *Id.* at 2262.
138. *Id.*

Miller and *Smith*, the police could review all of it because individuals have no reasonable expectation of privacy in material held by third parties.[139] This presents a problem to which Justice Gorsuch found three possible responses: (1) ignore the problem and continue application of *Smith* and *Miller*, (2) set aside the third-party doctrine and go back to *Katz* analysis, or (3) look elsewhere.[140]

1. Maintain Smith and Miller

Unlike the majority's use of a balancing test, Justice Gorsuch said *Miller* and *Smith* create a categorical rule where individuals who disclose information to third parties forfeit their Fourth Amendment reasonable expectation of privacy.[141] From Justice Gorsuch's standpoint, the doctrine is unworkable in today's technological society precisely because people will inevitably relinquish personal information while wanting to maintain privacy.[142] Justice Gorsuch noted the Court has never given persuasive justification for the third-party doctrine.[143]

2. Set Aside Miller and Smith and Retreat to Katz

Returning to a *Katz* regime would inevitably end in the same analytical problems confronted today, according to Justice Gorsuch.[144] He found that history did not support *Katz* because existing jurisprudence did not resemble it.[145] Furthermore, Fourth Amendment protections historically depended neither on expectations of privacy nor on what a judge believed to be reasonable, but rather protected the person, house, papers, and effects whenever they were unreasonably searched or seized.[146] Justice Gorsuch explained multiple ways that the *Katz* test conflated Fourth Amendment jurisprudence into an unpredictable and unbelievable mess guided by no single rubric.[147] The question of whether the reasonable expectation of

139. *Id.*
140. *Id.*
141. *Id.*
142. *See id.* (providing examples including emails from Google and DNA from 23andMe).
143. *Id.* at 2263; *see also* Kerr, *supra* note 44, at 564. In ruling out justifications, Justice Gorsuch described (1) the Restatement's definition of assumption of the risk—expressly agreeing to or manifesting willingness to accept risks—has no context in the Fourth Amendment, (2) that voluntary consent to disclose information is the same as assumption of the risk, and (3) that clarity is no excuse where it would be just as easy to categorically say Fourth Amendment protections are not per se diminished in information shared with third parties. *Carpenter*, 138 S. Ct. at 2263 (Gorsuch, J., dissenting).
144. *Id.* at 2264 (noting it was *Katz* that produced *Miller* and *Smith*).
145. *Id.*
146. *Id.*
147. *See id.* at 2266-67.

privacy test is empirical or normative remains unsettled; nevertheless, this question should be resolved by the legislative, rather than the judicial, branch.[148]

Justice Gorsuch believed the majority needlessly complicated Fourth Amendment analysis.[149] He described two principles that the majority melded into the *Katz* test, namely arbitrary power and permeating police surveillance.[150] The Court, however, refused to provide guidelines on these principles.[151] The Court directed lower courts to first perform a *Katz* analysis and then evaluate whether disclosure to a third party outweighed privacy interests in the category of information.[152] This pyramid of balancing inquiries, in Justice Gorsuch's opinion, puts lower courts on a path "where *Katz* inevitably leads."[153]

3. Looking Elsewhere for Answers

Justice Gorsuch believed the answer to the problem lay elsewhere.[154] The two prevalent ideas he suggested were resorting to traditional property-based approaches or relying on positive law.[155] First, Justice Gorsuch advocated returning to a property-based approach to the Fourth Amendment, albeit with a slightly different focus.[156] By applying a property-based analysis, Fourth Amendment protections and privacy interests would not automatically dissipate when information is shared with third parties.[157] Rather, third parties obtaining information such as CSLI was similar to a bailment in which the original owner retains interests in the property that is possessed by the third party; this approach is counterintuitive to *Miller* and *Smith* because it provides greater Fourth Amendment protection.[158] In this way, complete or exclusive control over property was not required for Fourth Amendment rights.[159]

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148. *Id.* at 2265.
149. *Id.* at 2267.
150. *Id.* at 2266.
151. *Id.*
152. *Id.* at 2267.
153. *Id.*
154. *Id.*
155. *Id.* at 2268.
156. *Id.* at 2268-69.
157. *Id.* (providing examples where giving one's car keys to a valet or asking a neighbor to watch one's dog does not eliminate the owner's interest in the car or dog).
158. *Id.*
159. *Id.* at 2269-70 (for example, individuals have a Fourth Amendment interest in their houses without holding fee simple title).

Second, Justice Gorsuch balanced positive law and constitutional protections.[160] He explained that positive law guides evolving technologies while constitutional evaluation establishes a floor which no legislation may subvert.[161] Finally, Justice Gorsuch admonished the majority for "keep[ing] *Smith* and *Miller* on life support" and Carpenter for not invoking any property right which would have been "his most promising line of argument."[162]

VI. THE PROBLEM WITH THE THIRD-PARTY DOCTRINE

Rather than side-step the third-party doctrine, the doctrine should be overruled as a per se categorical limitation on Fourth Amendment protection. The majority alluded to but refrained from doing so.[163] Justice Gorsuch called for reevaluation.[164] The doctrine continues to have value in situations involving informants and traditional tracking practices.[165] Especially in today's ever-growing technological world, the antiquated third-party doctrine stands for principles no longer applicable to the enormity of stored and shared data.[166] As technological advancements unfold, its implications on the Fourth Amendment grow.[167] Increasingly, a constitutionally appropriate distinction must be struck as to which technological "enhancements of human capabilities" should be regulated by the Fourth Amendment and which should "be able to promote societal safety unfettered by Fourth Amendment demands."[168] Not surprisingly, half of law enforcement agencies have no formal policies or processes in using technology or the internet in investigations.[169]

Indeed, algorithms and artificial intelligence have allowed computers and computer programs to collect, analyze, and store vast amounts of information beyond that of human capability.[170] Computers now store what used to be kept within the home—documents, photographs, records, and other private matters.[171] Moreover, facial recognition technology infringes upon intimate privacy interests. Such technology identifies persons, not only through

160. *Id.* at 2270.
161. *Id.* at 2270-71.
162. *Id.* at 2272.
163. *See generally id.* at 2211-23 (majority opinion).
164. *Id.* at 2272 (Gorsuch, J., dissenting).
165. Solove, *supra* note 1, at 1136.
166. *Id.* at 1087.
167. *See supra* Introduction.
168. Tomkovicz, *supra* note 2, at 323.
169. Gold & Latonero, *supra* note 6, at 285. This lack of oversight and thus self-regulating nature resembles that of the Writs of Assistance abhorred by the Founders. *Id.*
170. *Id.* at 277.
171. *Id.* at 290.

their own pictures, but also in images posted by strangers.[172] Consequently, the current scheme does not account for the increasing invasiveness of technology.

A. Third-Party Support

Professor Orin Kerr may fairly be described as the chief proponent of the third-party doctrine.[173] He defends that use of the third-party doctrine outweigh its criticism for various reasons, not the least of which is a dearth of any reasonable alternatives.[174] He asserted that the doctrine: (1) creates reasonable divides between less invasive investigatory procedures and more intrusive procedures requiring probable cause,[175] (2) maintains technological neutrality of the Fourth Amendment by prohibiting a substitution of public for private transactions,[176] and (3) provides *ex ante* clarity by eliminating the need to track information's history.[177] Kerr explained that the third-party doctrine is best understood as a "consent doctrine" rather than an application of the reasonable expectation of privacy approach.[178] Further, it is a shared-space doctrine where the individual consents to a third party having control over the information.[179] Lastly, he criticizes opposing arguments for treating the Fourth Amendment as a be-all-end-all, rather than one of many

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172. *Id.* at 284. Besides this recognition, metadata is also collected from these photos, including the times and locations, as well as the people at the same location or in the same picture. *Id.*

173. *See generally Orin Kerr*, BERKELEY LAW, https://www.law.berkeley.edu/our-faculty/faculty-profiles/orin-kerr/ (last visited Mar. 15, 2020). Professor Kerr has written over sixty articles, the majority of which have been cited by judicial opinions. *Id.*

174. Kerr, *supra* note 44, at 581.

175. *Id.* at 574.

176. Historically, crimes had a public and a private element. *Id.* at 573. The public component was critical to police investigation; however, the use of technology and third parties have substituted "a hidden transaction for the previously open event." *Id.* at 575. The third-party doctrine, then, maintains the status quo. *Id.* at 581.

177. *Id.* at 565. This analysis posits that the history of an individual's information is unknowable at the time law enforcement officials seek it; therefore, it is easier to determine the information's privacy interests based on its location. The third-party doctrine guarantees that all information at a particular location is treated the same. *Id.* at 582. Difficulty lies in creating a doctrine to replace the third-party doctrine's clarity in the face of the possible exclusion of evidence if improperly judged. *Id.*

178. *Id.* at 588-89. Professor Kerr explained that the United States Supreme Court's applications of the third-party doctrine have been "awkward and unconvincing" because in his opinion, the Court incorrectly focused on the application of *Katz's* privacy test rather than consent principles. *Id.* at 588. Professor Kerr contends that as long as it is a knowing disclosure, a person's choice to give the information to law enforcement is a valid and voluntary consent that extinguishes Fourth Amendment protection. *Id.*

179. *Id.* at 589.

tools to prevent governmental abuses.[180] All of these justifications are short-sighted and only rationalize the use of third parties in obtaining information in real time. The justifications do not hold up in the analysis of third-party records such as CSLI.[181]

B. Why the Third-Party Doctrine Should Be Curtailed or Overruled

In this Information Age, Americans have no choice but to establish relationships with numerous third parties to fully enjoy what society has to offer.[182] With every connection, third parties collect records that are increasingly useful to law enforcement officials.[183] Rather than a rigid view of privacy, modern society requires sharing of information with others.[184] Instead, privacy should be seen as contextual and built through relationships with other individuals and entities.[185] For example, it seems intuitive that medical information may be shared from patient to doctor, and the doctor in turn may share that relevant information with pharmacists or medical insurance companies.[186] It would be appalling, however, to think that doctors would be able to share sensitive medical information to newscasters or marketers.[187] In a similar sense, individuals share location information in applications like Uber or Google Maps.[188] They also share personal and intimate information in dating applications like Tinder specifically to be matched with a compatible partner.[189] While it is expected that this information be shared with that partner, individuals do not expect the stored information to then be supplied to other entities such as the government or employers.[190] Privacy is an enduring right in American life and the Fourth Amendment protections need to embrace the changing attitudes toward those interests to fully embrace the Amendment's original purpose. Therefore, the third-party doctrine is an

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180. *Id.* at 591 (explaining that other amendments, statutes, privileges, the entrapment doctrine, the *Massiah* doctrine, and internal agency regulations all similarly regulate government uses of third parties).
181. *See generally* Carpenter v. United States, 138 S. Ct. 2206, 2211-23 (2018).
182. *See* Solove, *supra* note 1, at 1084.
183. *Id.*
184. Gold & Latonero, *supra* note 6, at 288-89.
185. *Id.* at 289.
186. *Id.*
187. *Id.*
188. Davis Wright Tremaine LLP, *supra* note 56.
189. *Id.*
190. *Id.* Furthermore, there are some technological developments that, by necessity, are relayed to the government such as autonomous driving technology systems that utilize private government networks for navigation and analysis of public roads. *Id.*

antiquated doctrine unsuited for the Information Age.[191] It gives the government too much power.[192] This is so, especially when considering the retainability dynamic between fallible human memory and infallible technological recording of information.[193] The third-party doctrine, therefore, is "not responsive to life in the modern Informational Age."[194]

Statutory attempts to bridge the gap between privacy interests and technological advancements left in the wake of the third-party doctrine are weak and "uneven, overly complex, filled with gaps and loopholes, and containing numerous weak spots."[195] Another problem with the current privacy scheme is whether the threshold should relate to actual societal expectations or to the original values underlying the Fourth Amendment.[196] For example, what place should actual public use hold in the evaluation of governmental exploitation of technology?[197] Therefore, the third-party doctrine must be re-evaluated, if not completely overruled.

Additionally, multiple state supreme courts have rejected the third-party doctrine as applied to their jurisprudence.[198] The Indiana Supreme Court declared "the third-party doctrine plays no part in our State's search-and-seizure jurisprudence" before applying its state constitutional analysis instead.[199] The Indiana Supreme Court also noted that the highest courts in California, Colorado, Florida, Hawaii, Idaho, Illinois, New Jersey, Utah, and Washington have rejected the third-party doctrine.[200]

Individuals may become targets of investigations based on third-party disclosures for information that may not be related to them at all.[201] Even where individuals attempt to remain anonymous on

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191. Solove, *supra* note 1, at 1087.
192. Kerr, *supra* note 44, at 572 (explaining the third-party doctrine "gives the government more power than is consistent with a free and open society").
193. *Id.*
194. Solove, *supra* note 1, at 1087.
195. *Id.* at 1088.
196. Tomkovicz, *supra* note 2, at 415 ("The protection afforded by a living Constitution might expand or contract due to changes in the fabric of the society for which it was designed.").
197. Professor Tomkovicz suggests that public use requires more than the possibility that the public could use the technology; it also considers whether society has accepted and actually made use of such technology. *Id.* at 417.
198. Kerr, *supra* note 44, at 564.
199. Zanders v. State, 73 N.E.3d 178, 186 (Ind. 2017), *summarily vacated and remanded by* Zanders v. Indiana, 138 S. Ct. 2702 (2018).
200. *Id.*
201. All individuals who log onto an unsecured network, such as free Wi-Fi at Starbucks, receive the same internet protocol (IP) address. Erin Larson, *Tracking Criminals with Internet Protocol Addresses: Is Law Enforcement Correctly Identifying Perpetrators?*, 18 N.C.

the internet, the law recognizes only that the user "must still initially 'disclos[e] his identifying information to complete strangers.'"[202] Therefore, the third-party doctrine excepts the activity from constitutional protection.[203] While the *Carpenter* Court did not address tower dumps, the magnitude of information about innocent people received through tower dumps cautions against the continuation of the third-party doctrine in the Information Age.[204] Government surveillance in this way is subject only to self-regulation by the specific law enforcement department.[205]

C. Considerations for Change

While supporters of the third-party doctrine cite to the clarity created by the doctrine,[206] this is not enough to justify the privacy interests breached. The idea of the third-party doctrine's clarity is that "[b]ecause the history of information is erased when it arrives, the law can impose rules as to what the police can or cannot do based on the known location of the search instead of the unknown history of the information obtained."[207] This line of reasoning does not hold up when compared to other constitutional and statutory tests. For example, just like the bona fide occupational qualification defense in employment discrimination law, Fourth Amendment privacy in third parties can be an inquiry into whether the information is "reasonably necessary to the normal operation of that particular business or enterprise."[208] Consider, for example, a

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J.L. & TECH.316, 327 (2017). Internet activity and IP addresses, as understood currently, are not protected information under the Fourth Amendment. *Id.* at 323.

202. *Id.* at 326 (quoting United States v. Farrell, No. CR15-029RAJ, 2016 WL 705197, at *2 (W.D. Wa. Feb. 23, 2016).

203. *Id.*

204. For example, North Carolina law enforcement officials are obtaining "reverse searches" to gather all information from Google accounts within a seventeen-acre area including homes, businesses, bars, restaurants, and apartments to find suspects in crimes. Tyler Dukes, *To Find Suspects, Police Quietly Turn to Google*, WRAL NEWS (Mar. 15, 2018, 5:05 AM), https://www.wral.com/Raleigh-police-search-google-location-history/17377435/. The police obtain time, location, names, dates of birth, email, phone number, and types of devices for each account chosen. Amanda Lamb, *Scene of a Crime? Raleigh Police Searched Google Accounts as Part of Downtown Fire Probe*, WRAL NEWS (Feb. 14, 2018), https://wral.com/scene-of-a-crime-raleigh-police-search-google-accounts-as-part-of-downtown-fire-probe/17340984/.

205. *See* Dukes, *supra* note 204 (tactics are "used in extraordinary circumstances because the department is aware of the privacy issues [raised]") (internal quotations omitted).

206. Kerr, *supra* note 44, at 582.

207. *Id.*

208. James O. Pearson, Jr., Annotation, *What Constitutes "Business Necessity" Justifying Employment Practice Prima Facie Discriminatory Under Title VII of Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e et seq.)*, 36 A.L.R. Fed. 9 (1978).

telephone provider's financial statements or even the numbers dialed from particular phone numbers. They are reasonably necessary to normal business operations; however, the location logging of where those numbers were dialed is not related to the purpose or operations of the business. Thus, government information gathering of this data should be subject to Fourth Amendment warrant requirements.

In formulating a new Fourth Amendment analysis, a modified property-based analysis could quickly distinguish Fourth Amendment protections.[209] An emerging consensus among reported cases finds that a warrant is required for constitutionally-protected areas.[210] In short, if a police officer walks into an individual's house in search of evidence, he must have a warrant. This is the most basic type of situation requiring a warrant.

Additionally, Fourth Amendment analysis must focus on *whose* information is sought by the search and *how* the information was obtained by the original third party.[211] Specifically, the evaluation must question whether the information was voluntarily, knowingly, and affirmatively conveyed.[212] First, there is a distinct difference in situations where an individual freely explains criminal plans to a person who is an informant and where an individual who, just by owning a cell phone, is tracked every minute of the day without any affirmative actions on that individual's behalf.[213] While the third-party doctrine still benefits analysis in an informant context, it should be reconsidered in other areas of surveillance and investigation. Second, there even can be a difference seen in an individual voluntarily and knowingly dialing phone numbers into the cell phone to connect a call, and again, the individual being tracked

209. *See* Carpenter v. United States, 138 S. Ct. 2206, 2267-68 (2018) (Gorsuch, J., dissenting) (explaining that under a property-based analysis, Fourth Amendment protections do not automatically vanish when papers and effects are shared with third parties).

210. United States v. Jones, 565 U.S. 400, 406 n.3 (2012).

211. *See* Kerr, *supra* note 44, at 589. Professor Kerr describes the third-party doctrine as a "shared space doctrine," whereby an individual who discloses information to a third party consents to its control over that information. *Id.* While this is correct, this analysis points to an opposite outcome than that of the third-party doctrine: both parties have an interest in the information with the individual having a reasonable expectation of privacy in it.

212. The Court began demarking this categorically by stating CSLI is not "shared" as normally conceptualized. *Carpenter*, 138 S. Ct. at 2220.

213. *Compare* Hoffa v. United States, 385 U.S. 293, 297 n.3 (1966) (individual confided in a confidential informant), *with Carpenter*, 138 S. Ct. at 2220 (cell phone provider automatically tracked individual "by dint of its operation").

every minute of the day without the individual performing any affirmative actions to trigger recording.[214] On one hand, the individual's location, including aggregated data of movement inside his home, is information personal to the individual who has not knowingly or affirmatively conveyed such information nor has the ability to contest the collection thereof.[215] On the other hand, an individual specifically contracts with a telephone provider to make telephone calls, and therefore the act of dialing telephone numbers is knowingly and affirmatively conveyed to the provider. The difference in these records is clear and distinguishes the records in which an individual would have an expectation of privacy from those in which he does not.

VII. CONCLUSION

Today's Information Age both benefits and imperils society. Rapidly advancing technology enriches citizens' lives, but it does so at the cost of relinquishing private information to third parties. The tension between privacy interests and society's increasing use of technology creates problems when the government uses this information in criminal investigations. In *Carpenter v. United States*, the United States Supreme Court addressed this usage in the context of CSLI and Fourth Amendment protections.

Fourth Amendment interpretation has developed throughout history to include property protections as well as privacy protections. It began as a limitation against general warrants used by the British and is now a major right enjoyed by all citizens. The United States Supreme Court reminded lower courts that both interpretations, property and privacy, are valid analyses in *United States v. Jones*. The Court then analyzed Timothy Carpenter's conviction using CSLI records.

The majority emphatically declared that the third-party doctrine does not extend to the historical CSLI stored by cell phone service providers. They declared CSLI is categorically different information and, if applied, it would significantly extend the third-party doctrine. This is so because CSLI is not shared as originally posited. Moving forward, the government must utilize warrants to obtain such information. The dissenters, however, criticized the deci-

214. *Compare* Smith v. Maryland, 442 U.S. 735, 744 (1979) (Smith's affirmative action of dialing telephone numbers was recorded by a pen register), *with Carpenter*, 138 S. Ct. at 2220 (Carpenter made no affirmative steps other than having his cell phone turned on).

215. *See, e.g.*, *Carpenter*, 138 S. Ct. at 2218 (cautioning that the government "achieves near perfect surveillance" in this manner).

sion and admonished it for departing from the established precedents and textual reading of the Fourth Amendment. They focused on the differences between subpoenas and warrants. Justice Gorsuch even called for a reevaluation of the Fourth Amendment jurisprudence.

Professor Kerr defends the third-party doctrine in saying it creates divides, maintains Fourth Amendment neutrality, and provides clarity. However, the doctrine leaves citizens susceptible to intrusion on the private information that, by necessity, individuals must share with third parties. Statutory attempts to address the issue are weak and state supreme courts have declined to adopt the third-party doctrine. Furthermore, individuals become targets of investigations unrelated to their conduct.

Moving forward, the third-party doctrine must be reevaluated and tailored to the technological Information Age. A modified property-based analysis conjoined with an analysis of whose information is at issue and how that information was obtained could distinguish where the doctrine would be relevant and where it should not apply to Fourth Amendment analysis.

Carpenter has paved the way for finally allowing Fourth Amendment analysis to concern itself with the technological advancements of the Information Age. While some attempt to support the continuation of the third-party doctrine, this antiquated regime cannot answer to the privacy interests implicated with the utilization of the internet and other technology in government searches and seizures. The doctrine must be replaced with a more workable privacy scheme.

Let Them Eat Cake: A Comparative Analysis of Recent British and American Law on Religious Liberty

Gerard A. Hornby[*]

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"[F]or everyone is orthodox to himself . . . ."[1]

I. INTRODUCTION

In recent years, the debate over the idea of an organic, or popular, constitution has taken on new meaning, particularly pertaining to

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1. John Locke, *A Letter Concerning Toleration*, *in* THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE 125, 126 (Paul E. Sigmund ed., Norton 2005).

the role of religion in public life.[2] The most illustrative example of recent times for the country's direction regarding constitutional interpretation is the 2016 election of Donald J. Trump. The evangelical support of the candidacy and presidency of Trump[3]—an unabashedly irreligious figure[4]—confirms what, for some, the 2004 "moral values"[5] election heralded: the cementing of an American religious democracy and the end of secular politics.[6] This proposition, and the rest of this article, is not an argument for religious democracy, a certain political persuasion or party, or even a certain theological advancement, but a recognition of the role of religion in American democracy and constitutional understanding.[7] That so many devout Christians would support a figure so antithetical to their creed ultimately illustrates a deep-seated yearning for socio-religious redemption among the evangelical bloc—primarily in light of the increasing liberalization of American society.[8] In short, this

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2. *See, e.g.*, BRUCE LEDEWITZ, AMERICAN RELIGIOUS DEMOCRACY 85 (2007). By way of example of the relationship between religious voters and constitutional interpretation, consider the shockwaves (and electoral repercussions) felt in the religious community after the oral arguments of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), when Solicitor General Donald Verrilli, Jr. was asked whether constitutional recognition for same-sex marriage would lead to stripping federal tax exemptions from religious colleges that oppose gay marriage, in the same way that federal law strips tax exemptions from colleges that oppose interracial marriage: Mr. Verrilli said that "It's certainly going to be an issue." *See* David French, *Yes, Religious Liberty Is in Peril*, WALL STREET J. (July 26, 2019, 10:54 AM), https://www.wsj.com/articles/yes-american-religious-liberty-is-in-peril-11564152873.

3. Robert P. Jones, *White Evangelical Support for Donald Trump at All-Time High*, PRRI (Apr. 18, 2018), https://www.prri.org/spotlight/white-evangelical-support-for-donald-trump-at-all-time-high/.

4. Michele F. Margolis, *Who Wants to Make America Great Again? Understanding Evangelical Support for Donald Trump*, CAMBRIDGE U. PRESS (July 11, 2019), https://www.cambridge.org/core/journals/politics-and-religion/article/who-wants-to-make-america-great-again-understanding-evangelical-support-for-donald-trump/C3D6FC81996221BD9E789C0289B49E1A (describing candidate Trump as a "thrice-married, casino-owning candidate who frequently uses foul language, had a series of religious gaffes while campaigning, and was caught on tape denigrating women").

5. David W. Moore, *Moral Values Important in the 2004 Exit Polls*, GALLUP (Dec. 7, 2004), https://news.gallup.com/poll/14275/moral-values-important-2004-exit-polls.aspx.

6. *See* LEDEWITZ, *supra* note 2, at 83.

7. *Id.* at 97 ("So, to say that the democratic will of the people is moving the Court toward a greater acceptance of religion in the public square, is not to assert that this path is better in any sense than the constitutional commitment of the secular consensus. It is simply to say that the people have gone in a different direction and that their opinion must, and will, ultimately control constitutional interpretation.").

8. In "the American culture wars . . . . [s]ecuring important ground more often leads to new and escalated demands and to more aggressive efforts against remaining pockets of resistance . . . . [This] gives credence to the sense of existential threat among moral traditionalists, and thus it stiffens their resistance." Douglas Laycock, *Afterword*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY 189, 193-194 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson, eds., 2008); *see also* Michelle Goldberg, *Donald Trump, the Religious Right's Trojan Horse*, N.Y. TIMES (Jan. 27, 2017), https://www.nytimes.com/2017/01/27/opinion/sunday/donald-trump-the-religious-rights-trojan-horse.html.

is a revival.[9] This revival will continue to exhibit itself in part through a series of judicial decisions concerning the place of religious exemptions and the freedom of conscience in American society.[10]

In the midst of this constitutional restructuring is Justice Anthony Kennedy's opinion in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.[11] The opinion left many questions unanswered—answers that will be provided over the coming years through the United States Supreme Court's redemptive decisions—but provided a key principle of calm in a storm of cultural divisiveness.[12] On the other side of the spectrum, and the Atlantic, lies *Lee v. Ashers Baking Company*.[13] This 2018 decision handed down by the United Kingdom Supreme Court presents a strikingly similar fact-pattern to *Masterpiece*: a Christian bakery's refusal to cater for a gay customer.[14] Together, the cases illustrate a new approach to the problems posed by the breakdown in public discourse over religious exemptions from generally-applicable laws.

Religious believers, and those acting upon the dictates of their conscience, manifest their beliefs in a variety of different ways across commercial, private, and social spheres, with practices and beliefs universally shared presenting little-to-no legal challenge to society.[15] But some religious practices impose both a cultural and financial burden upon others and the state.[16] Thus, the extent to

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9. *See* JACQUES BERLINERBLAU, HOW TO BE SECULAR: A CALL TO ARMS FOR RELIGIOUS FREEDOM xix (2012).

10. *See* Sean R. Janda, Essay, *Judge Gorsuch and Free Exercise*, 69 STAN. L. REV. ONLINE 118, 120 (2017) (finding that, in decisions from the United States Court of Appeals for the Tenth Circuit, then-Judge Gorsuch gave "broad latitude to religious claimants to define the scope of their religious beliefs and determine what acts (or omissions) infringe those beliefs" and believed that the Free Exercise Clause "repudiates liberal neutrality and enshrines religion as a favored good in the United States"); *see also* Priests for Life v. U.S. Dep't of Health & Human Servs., 808 F.3d 1, 14 (D.C. Cir. 2015) (Kavanaugh, J., dissenting) (concerning religious exemptions under the Affordable Care Act).

11. 138 S. Ct. 1719 (2018).

12. *See id.* at 1729. Secularists—both believers and non-believers—would and should balk at the manifestly unneutral comments made by the Colorado Civil Rights Commission, linking religious freedom with the atrocities of the Holocaust. *See id.*

13. [2018] UKSC 49 (appeal taken from N. Ir.).

14. *See id*. at [1].

15. *See generally* Peter Cumper, *The Accommodation of 'Uncontroversial' Religious Practices*, *in* RELIGIOUS PLURALISM AND HUMAN RIGHTS IN EUROPE: WHERE TO DRAW THE LINE? 195, 195 (M.L.P Loenen & J.E. Goldschmidt eds., 2007).

16. *See* Brief in Opposition at 25, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) ("Landlords could refuse to rent to interracial couples, employers could refuse to hire women or pay them less than men, and a bus line could refuse to drive women to work . . . . All civil rights laws would be vulnerable to such claims where the discrimination was motivated by religion.").

which legislative exceptions should be made to avoid putting religious actors in the undesirable state of choosing between fidelity to their beliefs and obeying the law is unsettled.[17] Whether particular religious practices can be accommodated within secular liberal democracies is a challenging and contentious issue. The increased polarization of American and European society has sparked a new chapter in the so-called "culture wars."[18] The tension between religious liberty and social cohesion appear in numerous examples, sometimes dealt with differently on both sides of the Atlantic. This article outlines those trends and details how their cause is an increasing refusal of both sides of the cultural debate to accept and appreciate what is at stake here. The article offers some proposed solutions going forward derived from the principles of both *Masterpiece* and *Ashers* that allow sufficient protection for both the lesbian, gay, bisexual, transgender, and questioning (LGBTQ) community and those acting upon the dictates of their faith.

II. CAKES AND CONSCIENCES

A. Masterpiece Cakeshop

Masterpiece Cakeshop, a bakery in Denver, Colorado, is owned and operated by Jack Phillips (Phillips), a "devout Christian" whose "main goal in life is to be obedient to Jesus Christ and Christ's teachings in all aspects of his life," while seeking to "honor God through his work at Masterpiece Cakeshop."[19] Indeed, one of Phillips's religious beliefs is that "God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman," and that, therefore, "creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs."[20]

In 2012, Charlie Craig (Craig) and Dave Mullins (Mullins), a same-sex couple, visited Masterpiece Cakeshop to inquire about ordering a wedding reception cake.[21] Craig and Mullins visited the

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17. *See* Cumper, *supra* note 15, at 195.
18. *See generally* Laycock, *supra* note 8, at 193-94*; see also* Byron York, *Evangelical Leader Shows How GOP Can Finesse Gay Marriage*, WASH. EXAMINER (Mar. 27, 2014, 12:00 AM), http://washingtonexaminer.com/evangelical-leader-shows-how-gop-can-finesse-gay-marriage/article/2546413 (quoting Russell Moore, President, Ethics & Religious Liberty Commission, Southern Baptist Convention as stating that "I don't think the culture wars are over . . . but are moving into a new phase").
19. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1724 (2018).
20. *Id.*
21. *Id.*

shop and told Phillips they were interested in a cake for "our wedding."[22] Importantly, "[t]hey did not mention the design of the cake they envisioned."[23] Phillips "informed the couple that he does not 'create' wedding cakes for same-sex weddings," and explained that he would make them "birthday cakes, shower cakes, [and] cookies and brownies," but simply not same-sex wedding cakes.[24] Craig and Mullins thereafter left.[25] The next day, Craig's mother, who had accompanied the couple, called Phillips and inquired into his declination.[26] Phillips explained his "religious opposition" to same-sex marriage.[27]

Craig and Mullins soon filed a complaint against Phillips and Masterpiece Cakeshop, alleging discrimination on the basis of their sexual orientation.[28] The case was referred to the Colorado Civil Rights Commission (Commission), and a state Administrative Law Judge (ALJ) oversaw the case.[29] A subsequent investigation by the Colorado Civil Rights Division found that Phillips had "turned away potential customers on the basis of their sexual orientation" on "multiple occasions," and had openly declared to have "a policy of not selling baked goods to same-sex couples for this type of event"—including selling "cupcakes to a lesbian couple for their commitment celebration."[30] In a subsequent hearing, the ALJ ruled in Craig and Mullins's favor, and found that Phillips had violated the state public accommodation law.[31] The ALJ rejected Phillips's arguments that requiring him to bake the cake would violate his First Amendment right to free speech and right to free exercise of religion.[32] Phillips appeared at two hearings before the Commission, which affirmed the ALJ's findings.[33] The Colorado Court of Appeals affirmed, and, after the Colorado Supreme Court denied review, Phillips petitioned the United States Supreme Court, renewing his Free Speech and Free Exercise claims, but, this time, against the Commission.[34]

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22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 1725.
29. *Id.* at 1725-26.
30. *Id.*
31. *Id.* at 1726.
32. *Id.*
33. *Id.* at 1729.
34. *Id.* at 1726-27.

The Court, made up of Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas, Stephen Breyer, Samuel Alito, Elena Kagan, and Neil Gorsuch, found for Phillips.[35] Justice Ruth Bader Ginsburg, joined by Justice Sonia Sotomayor, dissented.[36] Writing for the majority, Justice Kennedy recognized that religious and philosophical objections "do not allow business owners . . . to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[37] Nevertheless, the Court found that the "Commission's treatment of [Phillips's] case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection."[38] The Court drew attention to comments made by members of the Commission "implying that religious beliefs and persons are less than fully welcome in Colorado's business community."[39] Namely, one of the commissioners stated that "religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust . . . . it is one of the most despicable pieces of rhetoric that people can use . . . to hurt others."[40] For the Court, this "disparag[ing]" treatment was "inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation."[41] The Court avoided the question of where to draw the line between "where the customers' rights to goods and services became a demand for [Phillips] to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs."[42] Instead, the Court focused on the Commission's treatment of Phillips and found that its "hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion."[43] Further, the Court distinguished the Commission's treatment of Phillips's case with the Commission's treatment of three other bakers who had refused to design cakes

35. *Id.* at 1722.
36. *Id.*
37. *Id.* at 1727.
38. *Id.* at 1729.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 1728.
43. *Id.* at 1732.

with a requested message that the Commission had deemed "offensive."[44] William Jack (Jack) had requested custom-designed cakes in the shape of a Bible decorated with messages that included "Homosexuality is a detestable sin. Leviticus 18:2."[45] Each baker offered to make the cake in the Bible shape but had refused to decorate the message.[46] The Commission found these refusals lawful.[47] Jack played an important role throughout all opinions for the Court, and his presence shows an important conceptual point. For the majority, the disparity in treatment between Jack and Phillips by the Commission was telling, as "the Commission's consideration of Phillips' religious objection did not accord with its treatment of [the other bakers'] objections."[48]

But for Justice Ruth Bader Ginsburg's dissent, the difference in treatment between Phillips and Jack forms a critical distinction as "the bakers would have refused to make a cake with Jack's requested message for any customer, regardless of his or her religion[, and] would have sold him any baked goods they would have sold anyone else."[49] Conversely, "Phillips would *not* sell to Craig and Mullins, for no reason other than their sexual orientation, a cake of the kind he regularly sold to others."[50] For Justice Ginsburg, simply change Craig and Mullins's sexual orientation or sex, and Phillips would have provided a cake; whereas changing Jack's religion would not have changed the three bakeries' refusal.[51] Clearly then, for Justice Ginsburg, the solemnity of the marriage ceremony, and the part that the cake plays in it, bears little significance. By that reasoning, this is not an issue of speech because the expression involved is not distinguishable. Further still, the Commission's comments are rendered null by the "several layers of independent decisionmaking" that brought Phillips's case before the Court, and in particular, that the Colorado Court of Appeals heard the case de novo.[52] Instead of this being the crux of the matter for Justice Kennedy, what mattered to Justice Ginsburg is that "Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple."[53]

44. *Id.* at 1728.
45. *Id.* at 1749 (Ginsburg, J., dissenting).
46. *Id.*
47. *Id.*
48. *Id.* at 1730 (majority opinion).
49. *Id.* at 1750 (Ginsburg, J., dissenting).
50. *Id.*
51. *Id.*
52. *Id.* at 1751.
53. *Id.*

But Justice Kennedy's opinion was circumscribed, concluding that the resolution of cases arising from similar circumstances "must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[54] Justice Kennedy thus left the door open for further interpretation and limited *Masterpiece*'s ruling to the facts of this case.

When *Masterpiece* was handed down, the reaction was unsurprisingly divided, and it came to be an interesting point of semblance in a time of political extremes.[55] Its illustrative value for the times was only strengthened by the existence of a factually similar case across the Atlantic.

B. Ashers Baking Company

In 2014, Gareth Lee, a gay man living in Northern Ireland, was planning to attend a private event to support legislation for same-sex marriage.[56] Lee is associated with an organization called QueerSpace, a volunteer-led organization for the lesbian, gay, bisexual, and transgendered community in Northern Ireland.[57] Lee ordered a cake for the event from Ashers Baking Company, a business he had used before, and submitted his own graphic design for the cake—a service provided by the bakery.[58] Lee's requested design was a picture of the Sesame Street characters "'Bert and Ernie,' the QueerSpace logo, and the headline 'Support Gay Marriage.'"[59]

Ashers Baking Company is a private company whose owners, the McArthurs, are Christians who "have sought to run Ashers in accordance with their beliefs."[60] One of the McArthurs' beliefs is that "the only form of full sexual expression which is consistent with Biblical teaching (and therefore acceptable to God) is that between a man and a woman within marriage."[61] When ordering his cake,

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54. *Id.* at 1732 (majority opinion).
55. *See* James Esseks, *In Masterpiece, the Bakery Wins the Battle but Loses the War*, ACLU (June 4, 2018, 4:15 PM), https://www.aclu.org/blog/lgbt-rights/lgbt-nondiscrimination-protections/masterpiece-bakery-wins-battle-loses-war.
56. Lee v. Ashers Baking Co. Ltd. [2018] UKSC 49, [10] (appeal taken from N. Ir.).
57. *Id.*
58. *Id.* at [11]-[12].
59. *Id.* at [12].
60. *Id.* at [9].
61. *Id.*

Lee did not know anything about the McArthurs' religious beliefs, nor did they know anything about his sexuality.[62]

When Ashers received Lee's order, the McArthurs "decided that they could not in conscience produce a cake with that slogan and so should not fulfil the order."[63] Lee subsequently filed suit in the District Court for Northern Ireland, which found Ashers' refusal to be direct discrimination and fined the bakery £500 (approximately $650).[64] The Northern Ireland Court of Appeal affirmed the judgement as a case of direct discrimination by association, or by proxy.[65]

In 2018, the case came before the United Kingdom Supreme Court on the question of "whether it is unlawful discrimination . . . for a bakery to refuse to supply a cake iced with the message 'support gay marriage' because of the sincere religious belief of its owners that gay marriage is inconsistent with Biblical teaching and therefore unacceptable to God."[66] In a per curium opinion authored by President Justice, Lady Marjorie Hale, the United Kingdom Supreme Court found for the Christian bakers, determining that their "objection was to the message, not the messenger."[67] For Lady Hale, this was not a case of direct discrimination; that is, "on grounds of sexual orientation, A treats B less favorably than he treats or would treat other persons."[68] Underpinning this reasoning was that "[a]nyone who wanted that message would have been treated in the same way."[69] Simply put: "[b]y definition, direct discrimination is treating people differently."[70] An individual's objection to expression that they fundamentally disagreed with is simply "objection . . . to the message and not to any particular person or persons."[71] Neither courts nor governments are in the business of "impos[ing] civil liability for the refusal to express a political opinion or express a view on a matter of public policy contrary to the religious belief of the person refusing to express that view."[72]

Lady Hale, sympathetic to the dignitary harm suffered by individuals on the basis of their sexual orientation,[73] nonetheless dismissed the conclusion of the Northern Ireland Court of Appeal that

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62. *Id.* at [11].
63. *Id.* at [12].
64. *Id.* at [14]-[15].
65. *Id.* at [16].
66. *Id.* at [1].
67. *Id.* at [22].
68. *Id.* at [20].
69. *Id.* at [23].
70. *Id.*
71. *Id.* at [34].
72. *Id.* at [36].
73. *Id.* at [35].

this was discrimination by association[74] for two reasons: (1) because "people of all sexual orientations . . . can and do support gay marriage[, s]upport for gay marriage is not a proxy for any particular sexual orientation,"[75] and (2) there was no evidence "that the [McArthurs'] reason for refusing to supply the cake was that Mr. Lee was likely to associate with the gay community . . . . the reason was their religious objection to gay marriage."[76] Thus, the McArthurs were objecting to an idea, not a person.

C. *The Devil Is in the Detail: Religion and the Refusal to Accommodate*

As is apparent, a prominent area in which the tensions between religion and the rights of others is seen is the marketplace and public service; most commonly, religious business owners refusing service to others on the basis of sexuality and that the lifestyle of the customer is considered sinful and violative of the business owner's conscience.[77] These instances and appearances before the bench fit into the larger debate about religious freedom in public life, a debate that "continues to divide and trouble the legal system"[78] and society on the issue of "collective responsibility in a democratic society."[79]

A prominent example was Kim Davis, a Kentucky county clerk.[80] After the United States Supreme Court legalized gay marriage in *Obergefell*,[81] Davis refused to issue marriage licenses to same-sex couples, claiming to act "under God's authority," and declaring that "I can't put my name on a license that doesn't represent what God ordained marriage to be."[82] Despite her relative ineffectiveness, the case of Davis came to symbolize the increasing cultural polarity, but more so, our increasing inability to coexist peacefully as a pluralistic society.[83] Some argued that *Obergefell* "redefined Kim Davis's

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74. *Id.* at [25] (the court of appeal held that "support for same sex marriage was indissociable from sexual orientation").

75. *Id.*

76. *Id.* at [28].

77. *See generally* JOHN CORVINO ET AL., DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION 3 (2017).

78. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1411 (1990).

79. Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 376 (2011).

80. CORVINO ET AL., *supra* note 77, at 21.

81. Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015).

82. CORVINO ET AL., *supra* note 77, at 21.

83. *See* CHRIS STEDMAN, FAITHEIST: HOW AN ATHEIST FOUND COMMON GROUND WITH THE RELIGIOUS 163 (2012).

job."[84] Davis became a symbol in the so-called "War on Christians;" then-presidential candidate Mike Huckabee described her imprisonment as a "criminalization of Christianity."[85] Yet, while this misconstrues her position as a public servant in ensuring that administrative process is carried out properly rather than her religion's sacramental requirements are met, this could have been made even simpler by accommodation: could Davis not simply have her name removed from the licenses or have another clerk issue the licenses? The public hunger for a vehicle to lambast hatred upon the other side of the aisle forces us to lose reason, avoid compromise, and depart from the inclusive purpose of secularism.[86]

Davis is not the only example. Amid the liturgical politicism has been the media-drenched litigation, such as *Masterpiece*, and the perception that the courtroom is now the battleground for the supposed moral rights of one party and the inherent dignity of another.[87] Why is it important to consider these events and their reporting and eventual litigation? Simply put: "[d]iscourse transmits and produces power."[88] The idea of a public discourse producing power, in the form of constitutional interpretation, is at the heart of what can be termed a popular, or organic, constitutionalism.[89] The people and the national conversation—whatever its form—have a role in constitutional interpretation: "[l]awyers, including judges, like to pretend that they control constitutional interpretation. But constitutional interpretation changes along with changes in public opinion, especially deep changes in that opinion."[90] Thus, our national conversations are a reflection of that interpretation. Consider the United Kingdom, a country without a codified constitution but a very robust constitutional tradition and commitment

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84. CORVINO ET AL., *supra* note 77, at 45.

85. *Id.* at 21.

86. *See* BERLINERBLAU, s*upra* note 9, at 196.

87. *See* Wallace v. Jaffree, 472 U.S. 38, 52 (1985) (describing the interpretation of the Free Exercise Clause as being "examined in the crucible of litigation").

88. MICHEL FOUCAULT, HISTORY OF SEXUALITY 101 (Robert Hurley trans., 1990) (1978); *see also* Stephen M. Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 IOWA L. REV. 833, 851 (1996) (reviewing STEVEN SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995) and NAOMI W. COHEN, JEWS IN CHRISTIAN AMERICA: THE PURSUIT OF RELIGIOUS EQUALITY (1992) (noting that "language appears as a technique of power because it helps to produce and reproduce meaning and, thus, social reality")).

89. *See* LEDEWITZ, *supra* note 2, at 90 (describing the jurisprudence of United States Supreme Court Justice John Marshall Harlan II, who "seem[ed] to have in mind something more organic" in interpreting the Constitution).

90. *Id.* at 83.

to a specific method of function.[91] The past few years have seen that tradition and method tested in a way that no other Western country has endured, following the 2016 referendum to depart from the European Union—the so-called "Brexit."[92] The reason that, three years after the vote to leave, the United Kingdom still could not depart the European bloc, is not a failure of the parliamentary system in coping with the departure, but it is the failure of the public and those elected to agree on what a Brexit, and resultant constitutional shakeup, looks like.[93] The push and pull of legal and political participation are symptoms, however uncomfortable, of what can be termed an organic constitutionalism.[94] Similarly, after *Masterpiece* failed to offer any conclusive ruling on whether religious vendors could refuse service for certain individuals, various other cases have slowly made their way through the court annals presenting a similar query, some with more success than others.

In *Klein v. Oregon Bureau of Labor and Industries*, the Oregon Court of Appeals affirmed a ruling by an administrative judge that a Christian-owned bakery, Sweetcakes by Melissa, was required by law to provide a wedding cake for a same-sex couple.[95] The bakery argued that its refusal to do so was protected by the First Amendment's freedom of religion and free speech provisions.[96] The administrative judge found that the Christian bakers violated Oregon's public accommodation laws by refusing to provide the same-sex couple a wedding cake and by communicating their intent to discriminate based on sexual orientation.[97] In June 2019, the United States Supreme Court granted writ of certiorari and vacated the standing

91. *Professor Explains Britain's Unwritten Constitution*, NPR (Sept. 5, 2019, 4:12 PM), https://www.npr.org/2019/09/05/758043757/professor-explains-britains-unwritten-constitution (interviewing Lord Philip Norton, who explained that "we go along with quite a number of conventions as well that constrain, that people comply with. They have no legal force, but they are complied with because they're morally correct. They're necessary in order to make the system work.").

92. The vote, and the resulting years, have led Britain's leading constitutional expert to declare that "the age of pure representative democracy is coming to an end." Vernon Bogdanor, *Brexit Has Shone a Light on Our Constitution. Now It's Time for Real Self-Government*, LEFT FOOT FORWARD (Apr. 30, 2019), https://leftfootforward.org/2019/04/vernon-bogdanor-brexit-has-shone-a-light-on-our-constitution-now-its-time-for-real-self-government/.

93. *See generally* Helen Lewis, *How Britain Came to Accept a 'No-Deal Brexit,'* ATLANTIC (Aug. 22, 2019), https://www.theatlantic.com/international/archive/2019/08/how-no-deal-brexit-became-new-normal/596524/ (explaining the difficulty of applying the referendum result and determining what a Brexit actually looks like regarding the extent of the United Kingdom's departure).

94. *See* LEDEWITZ, *supra* note 2, at 90.

95. 410 P.3d 1051, 1057 (Or. Ct. App. 2017), *review denied*, 434 P.3d 25 (Or. 2018), *vacated*, 139 S. Ct. 2713 (2019).

96. *Id.* at 1056-57.

97. *Id.* at 1056.

ruling by the Oregon Court of Appeals, requiring that court to rehear the case in light of *Masterpiece*.[98] The court has yet to rehear the case.

In *Elane Photography, LLC v. Willock*, the New Mexico Supreme Court held that a Christian wedding photography company's refusal to photograph a same-sex couple's commitment ceremony constituted discrimination based on sexual orientation in violation of the New Mexico Human Rights Act and that application of the statute did not violate the First Amendment.[99] The company made similar arguments to that of Sweetcakes by Melissa, but the court failed to take into consideration the logical implications of its ruling posed by the parties and amicus.[100] The court oddly and dismissively found that it "cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws."[101] The court instead relied upon a compelling analogy to a Ku Klux Klan member refusing to photograph an African American wedding.[102] By doing so, however, the court failed to address the individual nuances of First Amendment jurisprudence and consider that an objection to gay marriage is a doctrinal objection to a form of marriage posed by religious teaching, whereas an objection to the wedding of two African Americans is an objection to the people involved.

And in *State v. Arlene's Flowers, Inc.*, a familiar situation was presented: the Christian florist refused to provide flowers for a friend's gay wedding, prompting the friend to sue.[103] The Washington Supreme Court found that the Christian florist's flower arrangements were an example of conduct and not speech, holding that the arrangements, however unique, were not "inherently expressive."[104] The United States Supreme Court thereafter granted certiorari, and merely remanded, similarly to *Klein*, for reconsideration in light of *Masterpiece*.[105] The Washington Supreme Court affirmed its original holding after considering *Masterpiece*.[106] Such a ruling further delineates the reasoning of *Ashers* that is implicit in *Masterpiece*—that the speech on the cake is protected, rather

98. Klein v. Or. Bureau of Lab. & Indus., 139 S. Ct. 2713, 2713 (2019).
99. 309 P.3d 53, 58-59 (N.M. 2013).
100. *Id.* at 71.
101. *Id.*
102. *Id.* at 72.
103. 389 P.3d 543, 549 (Wash. 2017), *vacated*, 138 S. Ct. 2671 (2018).
104. *Id.* at 557 (citing Rumsfeld v. Forum for Acad. & Inst. Rights, Inc., 547 U.S. 47, 64 (2006)).
105. Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671, 2671 (2018).
106. State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1210 (Wash. 2019).

than just the cake. Clearly, there will never be a general consensus on what business ventures qualify as expressive conduct for the purpose of the First Amendment, but *Elaine*'s ruling and *Ashers*' reasoning, as well the Colorado Civil Rights Commission's reasoning in allowing bakers to refuse Jack's anti-gay message, clearly point in the direction that speech on a designed product is protected. Perhaps a flower arrangement such as a bouquet for a gay wedding does not qualify, but under the above reasoning, it is not difficult to conceive that an arrangement spelling out words (perhaps even the words of the marital parties) would be considered protected.

What the constitution, and anti-discrimination laws, allow is in a precarious balance. Some have called the refusal to serve on the basis of religious belief a "license to discriminate."[107] Others have vigorously defended religious believers' ability to act upon the dictates of their conscience.[108] Clearly, neither side can dominate the other without causing further bitterness and strife. Balance, compromise, and accommodation can be achieved, as a further understanding of *Masterpiece* and *Ashers* will show.

III. WHAT WE CAN LEARN FROM *MASTERPIECE* AND *ASHERS*

A. A Sensible Synthesis?

While some differences do exist between *Masterpiece* and *Ashers*, these decisions can work together to offer some key similarities that, when synthesized, provide a fruitful path going forward in dealing with these issues. The importance of studying these two cases together goes to a much broader cultural implication of their judicial interpretations and debate over the form and function of religion in society.[109]

1. Compelled Speech

The issue in *Ashers* was the refusal of a baker to print the words "Support Gay Marriage" onto a product of his own creation.[110] Lady

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107. Emily London & Maggie Siddiqi, *Religious Liberty Should Do No Harm*, CTR. FOR AM. PROGRESS (Apr. 11, 2019, 9:03 AM), https://www.americanprogress.org/issues/religion/reports/2019/04/11/468041/religious-liberty-no-harm/.
108. Emilie Kao, *The Supreme Court's "Gay Cake" Case Matters to All Americans*, HERITAGE FOUND. (Feb. 5, 2018), https://www.heritage.org/courts/commentary/the-supreme-courts-gay-cake-case-matters-all-americans.
109. Lady Hale's reliance upon Justice Kennedy's reasoning indicates that this may be the case. *See* Lee v. Ashers Baking Co. Ltd. [2018] UKSC 49, [62] (appeal taken from N. Ir.).
110. *Id.* at [1].

Hale found this simply to be a question of compelled speech.[111] The decision is a reasonable one: the state has an interest in preventing discrimination against persons, but no state is in the business of forcing owners to print ideas that violate the individual's conscience.[112] Lady Hale drew on Lord Dyson's statement in *RT (Zimbabwe) v. Secretary of State for the Home Department* that "[n]obody should be forced to have or express a political opinion in which he does not believe,"[113] as well as in Lord Roskill's decision *Wheeler v. Leicester City Council*, where a local council's attempt to force a rugby club to express condemnation of a team's tour of apartheid-era South Africa was found to be unlawful.[114] Lady Hale also drew on decisions of the European Court of Human Rights such as *Buscarini v. San Marino* on the right not to hold religious beliefs.[115] *Ashers* conforms with the principle behind the Colorado Civil Rights Commission's decision to allow secular bakers to refuse cakes with hateful messages.[116] Interestingly, many prominent members of the gay rights community celebrated and welcomed the ruling in *Ashers*—despite the gay claimant losing—for its affirmation of fundamental freedoms and tolerance that apply to all.[117] Surely, then, this suggests that some values are shared.

But reading Lady Hale's reasoning in light of *Masterpiece* raises an underlying issue that separates the concurring opinion of Justices Gorsuch and Thomas from the rest of the opinions: is a generic wedding cake classifiable as speech on the same level as the words "Support Gay Marriage"?[118] For Justice Gorsuch, it is more than equivalent to mere words as he refused to subscribe to the idea that the cake is just a cake.[119] Of course, "[a]t its most general level, the cake at issue in Mr. Phillips's case was just a mixture of flour and

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111. *Id.* at [53].

112. *See An Act for Establishing Religious Freedom*, ENCYCLOPEDIA VA., https://www.encyclopediavirginia.org/An_Act_for_establishing_religious_Freedom_1786 (last visited Jan. 18, 2019) ("[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . . nor shall otherwise suffer on account of his religious opinions or belief.").

113. [2012] UKSC 38, [42] (appeal taken from Eng.).

114. [1985] UKHL 6, 6 (appeal taken from Eng.).

115. 30 Eur. Ct. H.R. 208 (2000).

116. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1733 (2018) (Kagan, J., concurring).

117. *See Ashers 'Gay Cake' Verdict Is Victory for Freedom of Expression,* PETER TATCHELL FOUND. (Oct. 10, 2018), http://www.petertatchellfoundation.org/ashers-gay-cake-verdict-is-victory-for-freedom-of-expression/; *see also* Stephen Fry (@stephenfry), TWITTER (Oct. 10, 2018, 3:27 AM), https://twitter.com/stephenfry/status/1049969777509306369?lang=en (Fry, himself a gay and prominent gay rights activist, tweeted "Agreed!" in response to Tatchell's post. Tatchell is also a prominent gay activist.).

118. *Masterpiece*, 138 S. Ct. at 1738 (2018) (Gorsuch, J., concurring).

119. *Id.*

eggs; at its most specific level, it was a cake celebrating the same-sex wedding" of Craig and Mullins.[120] In contrast with the "secular" convictions afforded by the Commission over Jack's case, Justice Gorsuch stresses the "religious significance" attached to the wedding cake by Phillips and neglected by the Commission—it is equivocal to "sacramental bread" or a "kippah."[121] It is the very creation of the cake that is an exercise of religion, as important as the Eucharist or Abrahamic reverence.[122] For Justice Gorsuch, there is no legal distinction between a religious belief and a religious manifestation.[123]

Is this tenable or does Justice Gorsuch's reasoning afford too much creative stature to Phillips's fondant and flour? Importantly, the anti-discrimination laws of Colorado regulate conduct, not speech.[124] Even if the baker is considered to be an artist, any artist selling to the public is bound by laws that forbid refusal of service on certain grounds by anti-discrimination statutes.[125] As one amicus framed the debate, if Rembrandt puts "The Descent from the Cross" in his shop window, the First Amendment would not condemn a law barring his refusal, on grounds of ethnicity or religion, of the business of a man who wished to hang the painting in a Roman Catholic Church.[126] But perhaps there is more than just creative stature: a wedding is a distinctly religious ceremony to some believers, and its sincerity is unlikely to be questioned.[127] Such an understanding echoes the emphatic stresses of Justice Anthony Kennedy in *Obergefell* that the ruling would not threaten the "utmost, sincere conviction[s]" of those who, for religious reason, believe that same-sex marriage should not be condoned.[128] A wedding cake's place as the centerpiece of a wedding celebration is arguably undisputed.[129] But this still does not answer the question of the

120. *Id.*
121. *Id.* at 1739-40.
122. *Id.*
123. *Id.* at 1739.
124. *Id.* at 1740 (Thomas, J., concurring).
125. *Id.* at 1733 (Kagan, J., concurring).
126. Brief for Floyd Abrams as Amicus Curiae Supporting Respondents at 1, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111). Abrams also analogized that "[i]f a vendor sells 'Black Lives Matter' signs from her stall, she may not refuse on the basis of race to sell her creations to a white customer who she fears will alter that message." *Id.*
127. "Asking someone to participate in or celebrate a wedding ceremony is no small matter. And given the millennia-old connection between religion and weddings, it is no surprise that there are wedding vendors who object to participating in one form of wedding or another based on their religious beliefs." Brief for the Becket Fund for Religious Liberty as Amicus Curiae Supporting Petitioners at 3-4, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).
128. Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).
129. *See* Becket Fund, *supra* note 127, at 22.

hairstylist or the florist. For Justice Gorsuch, because of the centrality of the cake to the faith, the public accommodation of gay couples with a wedding cake is too heavy a burden upon a Christian.[130] Yet, does this set dangerous precedent over whether Phillips could lawfully refuse service to gay couples?[131] As important as the cake is, is it a sacred creation that manifests a religious practice? While courts are not in the position to question the faith, the absolute weight afforded to Phillips would bar equal consideration of the equality interests at stake for his customers.[132]

In determining whether Lady Hale would agree with Justice Gorsuch's reasoning, the answer turns upon how a generic wedding cake sold to a same-sex couple that would be sold to an opposite-sex couple is defined. A clue may lie in Lady Hale's reasoning that the baker's objection "is not comparable to people being refused jobs, accommodation or business simply because of their religious faith. It is more akin to a Christian printing business being required to print leaflets promoting an atheist message."[133] While, indeed, a cake tiered with rainbow-dyed sponge, decorated with fondant indicative of a same-sex wedding, or topped off with two male figurines may pass muster as a legally-objectionable message within Lady Hale's contours, the decision to flatly refuse to participate in a same-sex wedding in any confectionary manner strikes a wholly different tone.

2. *Guilt by Expressive Association*

Perhaps the issues of Phillips and Ashers are better understood through their argument that they would be condoning or associating with a lifestyle that they consider sinful and violative of their conscience.[134] Finding the line between reluctance to associate with another lifestyle and participating in that lifestyle was illustrated by *Masterpiece*'s oral arguments: is the hairstylist allowed to refuse service to a lesbian wedding, or is a florist allowed to refuse service to a gay wedding?[135] Or, as Justice Sotomayor asked, is a business allowed to discriminate against a disabled customer because in the

130. *Masterpiece*, 138 S. Ct. at 1738 (Gorsuch, J., concurring) ("[I]f the wedding cake is made for a same-sex couple it celebrates a same-sex wedding.").

131. Angela C. Carmella, *When Businesses Refuse to Serve for Religious Reasons: Drawing Lines Between "Participation" and "Endorsement" in Claims of Moral Complicity*, 69 RUTGERS U. L. REV. 1593, 1612 (2017).

132. *See generally* CORVINO ET AL., *supra* note 77.

133. Lee v. Ashers Baking Co. Ltd. [2018] UKSC 49, [47] (appeal taken from N. Ir.).

134. *Id.* at [28]; *Masterpiece*, 138 S. Ct. at 1742-43.

135. Transcript of Oral Argument at 12, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

proprietor's eyes, God made only perfect individuals?[136] Or, as Justice Breyer harkened to an earlier landmark Court decision, "maybe Ollie thought he had special barbecue" and merited the protection of an artisan?[137] These examples illustrate the fine line that these cases tread. But a fear of association with a lifestyle that violates one's conscience arguably does not amount to compelled participation in that lifestyle via speech.[138] If Ollie's refusal to sell barbeque chicken to African Americans stemmed from his fear of association, the issue would obviously be a discrimination of the person's lifestyle—not an objection to the speech being compelled.[139] Expression, then, is the key. But, where to draw the line in terms of what services constitute expression is not settled, and *Masterpiece* does not answer that question.[140]

But compare this with *Pichon and Sajous v. France*, where a pharmacist refused to provide contraception to three women holding a valid prescription.[141] In a short and unambiguous ruling, the European Court of Human Rights found no interference with the pharmacist's religious belief.[142] Significantly, the court held that "[e]thical or religious principles are not legitimate grounds to refuse to sell a contraceptive. . . . [because] as long as the pharmacist is not expected to play an active part in manufacturing the product, moral grounds cannot absolve anyone from the obligation to sell . . ."[143] The pharmacist was just a cog.[144]

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136. *Id.* at 23.

137. *Id.* at 18 (citing Katzenbach v. McClung, 379 U.S. 294, 295 (1964) (holding against a barbecue vendor refusing to serve African Americans that Congress could enforce racial antidiscrimination laws under the Commerce Clause)).

138. *See* Carmella, *supra* note 131, at 1616.

139. *Id.*

140. *Masterpiece Cakeshop*, 138 S. Ct. at 1723-24 ("The Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here.").

141. 898 Eur. Ct. H.R. (2001).

142. *Id.*

143. *Id.*

144. *Id.* The court noted that "Article 9 of the [European Convention on Human Rights] does not always guarantee the right to behave in public in a manner governed by that belief. . . . [A]s long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere." *Id.*

Does this compare to *Masterpiece*? The wedding cake is central to the religious ceremony; designing one that violates the conscience of the baker is clearly a violation of a fundamental right.[145] Marriage—in all of its forms—is an inherently spiritual ceremony and it cannot be compared to the refusal of service at a restaurant; most individuals arguably seek only one marriage in their lifetime.[146] There is no doubt regarding the sincerity of a belief over the participation in such a ceremony.[147] The cakes ordered by Jack were central to his religious belief; designing them violated the conscience of the individual bakers.[148] Neither baker could refuse serving the individual or refuse serving a generic cake in the shop window—only direct participation in the ceremony is protected.[149] Otherwise, compelling such would amount to an unconstitutional violation of conscience.[150] An African American graphic artist would not be expected to print a leaflet advertising a Klan meeting, but an African American barista would arguably be (legally) expected to serve a Klan member ordering a coffee. However abhorrent the Klan member's views certainly are, they should not subject him to economic discrimination in a venue open to the general public.[151] This reasoning is seen in Justice Ginsburg's dissenting opinion of *Masterpiece*: what is offered to all cannot be denied to one.[152]

B. The Failure of Religious Liberty and Inclusive Pluralism

Arguably, the problems of expressive association stem from a failure of tolerance.[153] The reason could be a failure of public discourse

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145. "Just a quick reminder: religious liberty *is* a civil right." Douglas Laycock, *The Wedding-Vendor Cases*, 41 HARV. J.L. & PUB. POL'Y 49, 50 (2018).

146. Perry Dane, *A Holy Secular Institution*, 58 EMORY L.J. 1123, 1174 (2009) ("The church has relied on the state to give juridical form to marriage, but the state has relied on the religious valence of marriage to give the institution meaning and depth.").

147. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1724 (2018).

148. *See id.* at 1733 (Kagan, J., concurring).

149. State v. Arlene's Flowers, Inc., No. 13-2-00871-5 (Wash. Super. Ct. Feb. 18, 2015) (concerning a florist that refused to design the floral design for a lesbian wedding; the florist had served the lesbian couple for a number of years. Her refusal to sell flowers to the wedding was not an objection to the person but a refusal to participate in a religious ceremony she disagreed with).

150. To compel a baker's participation against their conscience would, "in effect [require] participation in a religious exercise." Lee v. Weisman, 505 U.S. 577, 594 (1992).

151. Brief for Respondent at 19, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) ("But when a business opens its doors to the public, a State may require that it serve customers on equal terms, regardless of their race, sex, faith, or sexual orientation.").

152. *See Masterpiece*, 138 S. Ct. at 1750 (Ginsburg, J., dissenting).

153. *See* AUSTIN DACEY, THE SECULAR CONSCIENCE: WHY BELIEF BELONGS IN PUBLIC LIFE 14-15 (2008).

to engage openly in matters of conscience and value.[154] The effects of entrenchment and lack of openness are not positive, often resulting in hyper partisanship and politicization of issues that are otherwise personal.[155] The dominance of one singular interpretation of one Abrahamic religion in political life also contradicts the American commitment to religious freedom and thereby severely weakens the possibility for inclusive pluralism.[156] Despite the increasing secularization of Americans—so-called "nones"[157]—religion is here to stay for some time to come.[158] Moreover, the emergence of nihilist political and social tendencies over recent years indicates that the Western world needs a form of religious participation to form democratic consensus and trust.[159] Therefore, there needs to be some way to end evangelical politics and partisan-morality.[160] If morality should not be politicized or furthered for political gain at another's expense, all interests must be fully met so that a mutual dialogue on the purpose and meaning of faith, morality, and values can take place in the public sphere without backlash.[161] The celebration of

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154. *See id.* at 209-10.

155. *See, e.g.*, Trisha Tucker, *Some Schools Still Ban 'Harry Potter.' Here's How They Justify It*, GOOD (June 26, 2017), https://education.good.is/articles/harry-potter-censorship-schools. Consider, for example, the attempts to ban certain books from school districts on the basis of morality. Such pervasive attempts to control pedagogy arguably go well beyond foundational creed or religious manifestation. *Id.*

156. *See* Larson v. Valente, 456 U.S. 228, 245 (1982) (explaining that "Madison's vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference. Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations.").

157. Becka A. Alper, *Why America's 'Nones' Don't Identify with a Religion*, PEW RES. CTR. (Aug. 8, 2018), http://www.pewresearch.org/fact-tank/2018/08/08/why-americas-nones-dont-identify-with-a-religion/.

158. Peter Harrison, *Sorry, Scientists. Religion Is Here to Stay*, WEEK (Sept. 12, 2017), https://theweek.com/articles/723456/sorry-scientists-religion-here-stay.

159. Bruce Ledewitz, *Is Religion a Non-Negotiable Aspect of Liberal Constitutionalism?*, 2017 MICH. ST. L. REV. 209, 230 (2017) (arguing that "[r]eligion is currently a necessary aspect of liberal constitutionalism in America because there are still enough religious voters, sufficiently motivated, to so insist. In the future, however, religion will be a necessary aspect of liberal constitutionalism for a different reason—because secularism will not have, on its own, the necessary sources of meaning to build a sustainable public life.") (citation omitted).

160. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 878-79 (2014) ("The first step for the religious side would be to focus on protecting its own liberty, and to give up on regulating other people's liberty. That is, the religious side would have to stop seeking legal restrictions on other people's sex lives and other people's relationships. . . . On the other side, the advocates of sexual liberty and marriage equality would have to agree to the same basic proposition: that it is far more important to protect their own liberty than to restrict the liberty of religious conservatives.").

161. *Id.* at 877 ("Even on the hot-button culture-war issues, religious liberty provides a model for resolving or ameliorating social conflict. We could still create a society in which

diversity in American life should account for religious diversity.[162] To do so, a healthier, more inclusive pluralism needs to take seriously the question of how to deal with religious differences equitably in a way that retains a commitment to fundamental values such as free speech and non-discrimination.[163] Undoubtedly, there are some religious groups whose tenets fundamentally oppose any idea of pluralistic society and create irreconcilable conflict.[164] But the vast majority of the religiously affiliated are molded by a democratic heritage that promotes social harmony.[165] Neither secularists nor the religious have a place for the other in their ideal vision of society.[166] All that exists is attrition, culture wars, and identity-based politicking.[167] None have a vision of the religious and the secular sharing a public sphere, and our inclusive pluralism is failing as a result.[168]

This is an endemic failure of tolerance and the inclusivity of secularism.[169] A destructive evangelism committed to games of identity politics and anti-science,[170] coupled with a nihilistic secularism

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both sides can live their own values, if we care enough about liberty to protect it for both sides.").

162. *See* BERLINERBLAU, *supra* note 9, at xviii (noting that "secularism, far from being the enemy of religious pluralism, is its *guarantor*").

163. *See id.*; *see also* Lee v. Ashers Baking Co. Ltd. [2018] UKSC 49, [49] (appeal taken from N. Ir.).

164. Consider, for example, the practices of the Westboro Baptist Church. Despite their practices being protected speech, *see* Snyder v. Phelps, 562 U.S. 443, 460-61 (2011), it is difficult to imagine a conducive and reconcilable dialogue is possible with them.

165. *See generally* Eric C. Miller, *How Protestants Made the Modern World*, RELIGION & POL. (Feb. 20, 2018), https://religionandpolitics.org/2018/02/20/how-protestants-made-the-modern-world/.

166. *See* Laycock, *supra* note 8, at 192.

167. *Compare* David French, *The Secular Left's Religious Ignorance Harms Our National Security and Divides Our Nation*, NAT'L REV. (Dec. 1, 2015, 9:20 PM), https://www.nationalreview.com/2015/12/left-religious-ignorance/) (claiming that "[t]he Left won't stop looking for non-religious reasons for jihad"), *with* Tim Rymel, *The Fundamentalist Christian Chokehold on America*, HUFFINGTON POST (Aug. 8, 2017, 7:21 PM), https://www.huffingtonpost.com/entry/the-fundamentalist-christian-chokehold-onamerica_us_598109dae4b02be325be0206 (arguing that most of the 2016 Republican presidential candidates shared a belief in a "form of Christian Sharia law").

168. "A Pew Forum survey found the country evenly split on religious exemptions in the wedding-vendor cases, but the scariest thing about that survey is that only eighteen percent could muster at least some sympathy for both sides." Laycock, *supra* note 145, at 58.

169. *Id.* ("More than eighty percent expressed none or not much sympathy for the people they disagreed with. These are not Americans committed to liberty and justice for all; these are two sides looking to crush each other. They're evenly balanced nationwide, but in blue states, one side gets crushed, and in red states, the other side gets crushed.").

170. *See* Mahita Gajanan, *Republican Congressman Says God Will 'Take Care of' Climate Change*, TIME (May 31, 2017), http://time.com/4800000/tim-walberg-god-climate-change/.

unwilling to engage in any conversation on the benefits of a multicultural dialect, are pervasive.[171] The purpose of secularism has been mistakenly conflated with and lost in the pugnacity of New Atheism and anti-theism.[172] And further, anti-Muslim, anti-Christian, anti-Semitic, and anti-secularist rhetoric is widespread and nationalized.[173] Within a week, the same Court that found abhorrent and inappropriate the Colorado Civil Rights Commission's comments on the use of religious belief to discriminate, found President and then-candidate Trump's comments about Islam not sufficient indicia of anti-Muslim prejudice.[174] Similarly, within a few months, the same Court found constitutional a prison's refusal to provide an Islamic death-row inmate with the presence of an imam instead of the prison's Christian chaplain.[175] The problem encountered with religious differences is a failure to recognize the liberty interests of others.[176]

1. Evangelical Politics

The so-called gay cake row, or gay wedding cake case, was seen as a measuring stick or temperature gauge for a society stricken by

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171. *See, e.g.*, CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING 13 (2007) ("[P]eople of faith are in their different ways planning your and my destruction, and the destruction of all the hard-won human attainments that I have touched upon. *Religion poisons everything*."). *See generally* Bruce Ledewitz, *The Five Days in June When Values Died in American Law*, 49 AKRON L. REV. 115 (2016).

172. BERLINERBLAU, *supra* note 9, at 82.

173. George Yancey, *Has Society Grown More Hostile Towards Conservative Christians? Evidence from ANES Surveys*, 60 REV. RELIGIOUS RES. 71, 71 (2018); *Anti-Muslim Activities in the United States*, NEW AM., https://www.newamerica.org/in-depth/anti-muslim-activity/ (last visited Oct. 7, 2019); James Hamblin, *Bullied for Not Believing in God*, ATLANTIC (Sept. 13, 2013), https://www.theatlantic.com/health/archive/2013/09/bullied-for-not-believing-in-god/279095/; Harriet Sherwood, *Rising Antisemitism Worldwide Boils over at Pittsburgh Synagogue*, GUARDIAN (Oct. 28, 2018, 12:28 PM), https://www.theguardian.com/us-news/2018/oct/28/rising-antisemitism-worldwide-boils-over-at-pittsburgh-synagogue.

174. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (finding no violation of religious freedom or government impartiality in President Trump's so-called "travel ban"). Justice Sonia Sotomayor dissented and wrote that "[u]nlike in *Masterpiece*, where the majority considered the state commissioners' statements about religion to be persuasive evidence of unconstitutional government action, the majority here completely sets aside the President's charged statements about Muslims as irrelevant." *Id.* at 2447 (Sotomayor, J., dissenting) (citation omitted). These charged statements include "an apocryphal story about United States General John J. Pershing killing a large group of Muslim insurgents in the Philippines with bullets dipped in pigs' blood in the early 1900's," a statement demanding the "total and complete shutdown of Muslims entering the United States," the claim that "there is great hatred towards Americans by large segments of the Muslim population," and the claim that "[w]e're having problems with the Muslims, and we're having problems with Muslims coming into the country." *Id.* at 2435-36.

175. Dunn v. Ray, 139 S. Ct. 661, 661 (2019).

176. *See* Laycock, *supra* note 160, at 878-79.

division.[177] Although its history can be traced far back, the so-called "culture wars" and battle over supposed "identity politics" have taken on new weight in recent years.[178] The gay cake cases occur in the middle of this divide, in which the evangelical bloc has seen itself sidelined by a perceived animus, or least apathy, toward religion in society.[179] But that begs the question: is America really becoming less religious, or are the politically religious simply getting louder?

To answer that question, consider the following recent development in religious politics. Within its first year, the Trump Administration embarked upon a robust expansion of religious freedom-centered policies,[180] promising, among other things, to end the so-called "War on Christmas"[181] and do away with the Johnson Amendment—which prohibits tax-exempt religious institutions from engaging in politics.[182] Some secular policies have even been defended by the Trump Administration on Christian grounds.[183] In addition, then-Attorney General Jeff Sessions established a Religious Freedom Task Force within the Department of Justice to target the "dangerous movement, undetected by many, [that] is now challenging and eroding our great tradition of religious freedom"—and cited "the ordeal faced so bravely by Jack Phillips" as one reason for doing so.[184] Similarly, the Department of Health and Human Services has established a civil rights division to protect medical personnel who, on the basis of conscience, refuse to treat certain patients.[185] And

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177. *'Gay Cake' Row in Northern Ireland: Q&A*, BBC NEWS (Oct. 10, 2018), https://www.bbc.com/news/uk-northern-ireland-32065233; Vanita Gupta, *Gay Wedding Cake Ruling Reaffirms that Businesses Can't Discriminate*, CNN (June 5, 2018, 11:00 PM), https://www.cnn.com/2018/06/05/opinions/masterpiece-cakeshop-supreme-court-opinion-gupta/index.html.

178. *See* Laycock, *supra* note 8, at 192-93.

179. *See* BERLINERBLAU, *supra* note 9, at xxi.

180. *See* Promoting Free Speech and Religious Liberty, 82 Fed. Reg. 21675 (May 4, 2017).

181. Ben Kamisar, *Trump: 'We're Saying Merry Christmas Again,'* HILL (Oct. 13, 2017, 11:04 AM), https://thehill.com/homenews/administration/355303-trump-were-saying-merry-christmas-again.

182. Tom Gjelten, *Another Effort to Get Rid of the 'Johnson Amendment' Fails*, NPR (Mar. 22, 2018, 5:21 PM), https://www.npr.org/2018/03/22/596158332/another-effort-to-get-rid-of-the-johnson-amendment-fails.

183. Julia Jacobs, *Sessions's Use of Bible Passage to Defend Immigration Policy Draws Fire*, N.Y. TIMES (June 15, 2018), https://www.nytimes.com/2018/06/15/us/sessions-bible-verse-romans.html (detailing Attorney General Sessions's decision to quote Romans 13 in defense of the Trump Administration's immigration policy at the US-Mexican border).

184. Jeff Sessions, U.S. Attorney General, Attorney General Sessions Delivers Remarks at the Department of Justice's Religious Liberty Summit, (July 30, 2018), *in* UNITED STATES DEPARTMENT OF JUSTICE, https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-department-justice-s-religious-liberty-summit.

185. Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. 3880 (Jan. 26, 2018) (clarifying the right of those health care professionals who

central to President Trump's nominations to the United States Supreme Court have been the nominee's views on *Roe v. Wade* and a woman's abortion rights.[186]

But were these protections or this political dialogue necessary? The centrality of these reforms to the Trump Administration, and the importance of the evangelical vote to President Trump, suggests a much wider problem over the perceived status of the religious in society, or rather, of a certain politicized sect of the religious in society. To show the political manipulation behind the current dominant narrative of the supposed War on Christians, consider that a number of faith leaders responded with trepidation to then-Attorney General Sessions' task force, concerned that it would be predominantly focused on pet issues for conservative Christians.[187] Clearly, then, this is not simply a problem between the secular and the religious.

The perceived necessity of the task force, and the resultant disagreement, raises the question of whether religion has been exploited as a political vehicle. The idea that religion has been left behind or that the traditional concerns of religious people have been sidelined is a debatable point. For example, consider that in 2017, a majority of American Buddhists, Hindus, Jews, Protestants, Orthodox Christians, Catholics, and Muslims supported same-sex marriage according to the Public Religion Research Institute's American Values Atlas.[188] And in a 2016 poll from the Pew Research Center, less than eight percent of Catholics, white evangelicals, black Protestants, and white mainline Christians responded

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have expressed objections to the provision of or participation in insurance coverage for certain procedures or services, such as abortion, sterilization, and assisted suicide).

186. *See* Matt Ford, *Gorsuch:* Roe v. Wade *Is the 'Law of the Land,'* ATLANTIC (Mar. 22, 2017), https://www.theatlantic.com/politics/archive/2017/03/neil-gorsuch-confirmation-hearing/520425/; Tessa Stuart, *Here's What Brett Kavanaugh Has Said About* Roe v. Wade, ROLLING STONE (July 13, 2018, 8:00 AM), https://www.rollingstone.com/politics/politics-features/brett-kavanaugh-roe-v-wade-697634/.

187. Caroline Matas, *Civil Rights Groups Question New Religious Liberty*, HARV. DIVINITY SCH. (Aug. 4, 2018), https://rlp.hds.harvard.edu/news/civil-rights-groups-question-new-religious-liberty-task-force ("Connie Ryan, executive director of the Interfaith Alliance of Iowa, argued that the task force was part of an ongoing attempt by the federal government to 're-define religious freedom [as] a means to provide privilege to one particular sect of Christianity and to force the government to sanction discrimination on their behalf' [and posited that] '[f]ollowers have been manipulated into believing their religious freedom trumps all others and they are the victim when barred from fulfilling their God-given rights.'").

188. Press Release, PPRI, PRRI's American Values Atlas Finds Emerging Public Consensus in Support of LGBT Rights (May 1, 2018), https://www.prri.org/press-release/ava-emerging-consensus-lgbt-rights/.

that using contraceptives is morally wrong.[189] Why the need then for such a task force and why such political zeal from the evangelical base for President Trump?[190] The zeal is a backlash against, symptom of, and part cause of, the lack of common ground needed today in society.[191]

2. Secular Problems

Secular institutions and the public sphere serve the common good by uniting those with differing views and beliefs around a common identity.[192] The tone of public discourse in society today illustrates the current sad state of this goal.[193] Some have argued that this failure can be accounted for by the common failure to believe in common transcendent values; in short, nihilism.[194] The reason could be traced to the push back or hesitation to engage in the dialogue of religiosity or transcendency.[195] America has a tradition of engaging in rhetoric that transcends the material;[196] the inflammatory media treatment of religious exemption cases and the toxic political dialogue denigrates our ability to co-exist.[197] Just as the

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189. *Very Few Americans See Contraception as Morally Wrong*, PEW RES. CTR. (Sept. 28, 2016), http://www.pewforum.org/2016/09/28/4-very-few-americans-see-contraception-as-morally-wrong/.

190. Conversely, Douglas Laycock raises the question of why the ACLU has chosen to bring more cases against Catholic hospitals for not providing abortion services. *See* Laycock, *supra* note 160, at 848.

191. *Id.* at 879.

192. *See* BERLINERBLAU, *supra* note 9, at xviii.

193. *See* CORNEL WEST, DEMOCRACY MATTERS: WINNING THE FIGHT AGAINST IMPERIALISM 161 (2004) ("Ought we not be concerned with the forms of dogmatism and authoritarianism in secular garb that trump dialogue and foreclose debate? Democratic practices—dialogue and debate in public discourse—are always messy and impure. And secular policing can be as arrogant and coercive as religious policing.").

194. *See* Ledewitz, *supra* note 171, at 116-17.

195. HAROLD J. BERMAN, THE INTERACTION OF LAW AND RELIGION 31 (1974) ("The secular-rational model neglects the importance of certain elements of law which transcend rationality, and especially those elements which law shares with religion."); *see also* Ledewitz, *supra* note 159, at 246 (arguing that "secularism is a function of a worn out hostility to religion and of a materialist ontology").

196. *See, e.g.*, Lyndon Baines Johnson, U.S. President, President Johnson's Special Message to the Congress: The American Promise (Mar. 15, 1965), *in* LBJ PRESIDENTIAL LIBRARY, http://www.lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise ("There is no moral issue. It is wrong—deadly wrong—to deny any of your fellow Americans the right to vote in this country."); George W. Bush, U.S. President, President Bush Salutes Heroes in New York (Sept. 14, 2001), *in* WHITE HOUSE ARCHIVES, https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010914-9.html ("America today is on bended knee in prayer for the people whose lives were lost here."); Martin Luther King, Jr., Sermon at Temple Israel of Hollywood (Feb. 26, 1965), *in* AMERICAN RHETORIC, https://www.americanrhetoric.com/speeches/mlktempleisraelhollywood.htm ("[T]he arc of the moral universe is long, but it bends toward justice.").

197. *See* BERLINERBLAU, *supra* note 9, at 81-82.

evangelical right fails to account for the different religious or non-religious views of others, secularists fails to account for religious differences with others.[198]

Justice Kennedy's *Masterpiece* opinion is a testamentary push back against the anti-religious rhetoric pervasive in the public sphere.[199] This is surprising, both procedurally and politically, for the discussion over the Colorado Civil Rights Commission's comments was never raised by the petitioner at oral arguments.[200] Similarly, Lady Hale's *Ashers* opinion reaffirms the commitment to certain secular values.[201] Why is this important? Because both the secular and the religious must undergo efforts to find and prioritize common ground as well as ensuring pluralism.[202] In short: an inclusive pluralism is needed.[203] Taken together, these decisions affirm a commitment to inclusive pluralism that is sorely lacking in both American and European public spheres.[204]

Western European countries have had to deal with a change in pluralistic makeup on a much larger and more rapid scale than American states have.[205] The early First French Republic and American Republic shared common understandings over the protection of religious liberty.[206] But that common understanding extended no further and both countries share very little in terms of what the free exercise of religion means.[207] Thus, the symptoms of

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198. *See* Laycock, *supra* note 8, at 189. Consider also the emergence of a new trend in senate confirmation hearings for federal judges: questioning the appointee's membership in religious, typically Catholic, organizations. *See* Patrick L. Gregory, *Senators Spar on Religion Questions at Trump Judge Pick Hearing*, BLOOMBERG L. (June 5, 2019, 12:58 PM), https://news.bloomberglaw.com/us-law-week/senators-spar-on-religion-questions-at-trump-judge-pick-hearing.

199. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1729 (2018).

200. Transcript of Oral Argument, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

201. Lee v. Ashers Baking Co. Ltd. [2018] UKSC 49, [53] (appeal taken from N. Ir.).

202. Laycock, *supra* note 160, at 878-79.

203. *See id.*

204. *See id.* at 865.

205. Muslims now make up roughly 5% of the European population, with countries such as France, Germany, and Sweden holding a Muslim population of 8.8%, 6% and 8% respectively. *See* Conrad Hackett, *5 Facts About the Muslim Population in Europe*, PEW RES. CTR. (Nov. 29, 2017), http://www.pewresearch.org/fact-tank/2017/11/29/5-facts-about-the-muslim-population-in-europe/. Contrast this with the 1.1% of the U.S. population who identify as Muslim, or even the 2.2% who identify as Jewish. *See* Besheer Mohamed, *New Estimates Show U.S. Muslim Population Continues to Grow*, PEW RES. CTR. (Jan. 3, 2018), http://www.pewresearch.org/fact-tank/2018/01/03/new-estimates-show-u-s-muslim-population-continues-to-grow/; *A Portrait of Jewish Americans*, PEW RES. CTR. (Oct. 1, 2013), http://www.pewforum.org/2013/10/01/chapter-1-population-estimates/.

206. Laycock, *supra* note 160, at 863.

207. *Id.* at 864-65 ("France can, and sometimes does, single out religion for discriminatory regulation. . . . Religious organizations in France must obtain licenses from the state, and,

a breakdown in public discourse have exhibited themselves in different ways in Western European countries than in America: "ostensibly" religious insignia are banned in French public schools—including Islamic head scarves, Christian crosses, and kippahs[208] and major European countries have illegalized full-facial coverings in public—so-called "Burka Bans."[209] But many of these efforts—particularly in banishing religion from the public sphere—have had counter-availing effects.[210] As well as banishing some women to the home for fear of leaving the house, the ban subjugates the religious expression of individuals.[211] One woman described the niqab as "a huge part of my identity. It's a very spiritual choice—and now it has also become a sign of protest."[212] Such legislation is undoubtedly contradictory to the central underpinnings of a free society.[213]

Similar efforts have been made in France to nationalize differing religions to ensure social cohesion: President Emmanuel Macron's recent efforts to "lay the groundwork for the entire organization of the Islam of France" are just the latest in a series of efforts by French presidents to remake the Islamic religion in the spirit of the Republic.[214] Social cohesion bound by a national norm is a recurring issue for many European countries coming to grips with growing unfamiliar minority cultures: workplace exemptions for activities such as prayer,[215] social mannerisms such as handshaking,[216] and

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on occasion, these licenses are denied. There are restrictions on religious speech, and especially on evangelism. The state owns most of the churches, and pays for their maintenance, and it pays for religious schools.") (citations omitted).

208. In 2004, an overwhelming majority of the French National Assembly (494-to-36) voted for this change. *See* Elaine Sciolino, *French Assembly Votes to Ban Religious Symbols in Schools*, N.Y. TIMES (Feb. 11, 2004), https://www.nytimes.com/2004/02/11/world/french-assembly-votes-to-ban-religious-symbols-in-schools.html.

209. Sigal Samuel, *Banning Muslim Veils Tends to Backfire—Why Do Countries Keep Doing It?*, ATLANTIC (Aug. 3, 2018), https://www.theatlantic.com/international/archive /2018/08/ denmark-burqa-veil-ban/566630/ ("Limitations on wearing face veils in public have already been enacted in France, Belgium, the Netherlands, Bulgaria, and Austria.").

210. *Id.*

211. *Id.*

212. *Id.*

213. U.S. CONST. amend. I; DECLARATION ON THE RIGHTS OF MAN AND THE CITIZEN, Aug. 26, 1789, art. 10.

214. David Revault d'Allonnes, *Macron Wants to "Lay the Groundwork for the Entire Organization of the Islam of France,"* LA J. DU DIMANCHE (Feb. 10, 2018, 11:42 PM), https:// www.lejdd.fr/Politique/macron-veut-poser-les-jalons-de-toute-lorganisation-de-lislam-de-france-3570797.

215. *See* CUMPER, *supra* note 15, at 197.

216. Dan Bilefsky, *Muslim Boys at a Swiss School Must Shake Teachers' Hands, Even Female Ones*, N.Y. TIMES (May 26, 2016), https://www.nytimes.com/2016/05/27/world/europe/ switzerland-school-migrants-shake-hands.html.

the ritual slaughtering of animals.[217] The question raised by all of this is whether this is an effort to unify differing races, religions, and beliefs around certain unwavering values, or whether it is a sacrifice of pluralism. Inclusive pluralism accounts for differences in belief and opinion as a fundamental norm in the social fabric—even those that some might find abhorrent. But how to deal with those differences is often as problematic as the differences themselves.

3. *A Cultural Bargain?*

Is it the case, then, that liberal secularists should just give a "free pass" to those with views found to be socially abhorrent? Framing the debate as such is too crude. Instead, the purpose and value of religious liberty must be remembered,[218] and not hijacked by political evangelism or by a dominant norm that eliminates differences in pursuit of supposed social cohesion.[219] *Ashers* and *Masterpiece* show a pathway that includes both a commitment to certain unwavering values (the commitment to free speech) as well as reasoned and respectful dialogue (the commitment to an independent recognition of different beliefs on the part of the state). This echoes Lady Hale's decision in *Bull v. Hall*, where a Christian couple failed in their appeal of an anti-discrimination penalty for refusing to allow a gay couple to stay at their bed and breakfast.[220] Illustrated here is the push and pull between liberal secularism and religious liberty. Both an ardent secularist and a supporter of religious liberty must welcome a decision like *Bull* because no one can endorse that kind of discrimination nor defend the supposed sincerity of the opinion as a religious belief—neither the Catholic Church nor any other major ecclesiastical authority has spoken on the moral justification to economically discriminate like this.[221]

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217. Milan Schreuer, *Belgium Bans Religious Slaughtering Practices, Drawing Praise and Protest*, N.Y. TIMES (Jan. 5, 2019), https://www.nytimes.com/2019/01/05/world/europe/belgium-ban-jewish-muslim-animal-slaughter.html.

218. Letter from James Madison to Jacob de la Motta (Aug. 1820), *in* JAMES MADISON ON RELIGIOUS LIBERTY 81 (Robert S. Alley, ed., 1985) (only with "mutual respect [and] good will among Citizens of every religious denomination" can we attain "social harmony" and the "advancement of truth").

219. *See* Douglas Laycock, *The Right of Religious Academic Communities*, *in* RELIGIOUS LIBERTY, VOLUME TWO: THE FREE EXERCISE CLAUSE 473, 493 (2001) ("To decide what innovations a religious tradition can and cannot tolerate is to decide the future content of the faith. It is of the essence of religious liberty that such decisions be made by the religious community, and never by secular authority.").

220. [2013] UKSC 73 [1] (appeal taken from Eng.).

221. *See, e.g.*, *"Male and Female He Created Them . . . ,"* VATICAN, http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a6.htm (last visited Oct. 7, 2019) (Gay individuals

But there are some areas, such as marriage, that religious authorities have sincerely spoken upon and beliefs are entrenched; therefore, accommodation and compromise must be achieved.[222] For the civil libertarian, religious minorities and sexual minorities share much in common in their resistance to "legal and social pressures to conform to majoritarian norms."[223] But in reality, this is not the case.[224] There is a common unity missing in public discourse, and until society learns to accommodate and realize that demanding others to violate beliefs and norms contrary to their identity and conscience is untenable in a liberal democracy, this fight will only intensify.[225] Phillips of Masterpiece Cakeshop, as well as the McArthurs of Ashers Baking Company, were not asking for a general right to discriminate against gay people.[226] But instead, these cases became embroiled in a cultural war of words and identities that left the legal nuances of the particular cases behind.[227]

A bargain can be struck, and a cultural compromise is possible.[228] *Obergefell* cannot be overturned, nor can society change the religious views of individuals—either by forcing them to bake a cake or banning their religious garb. Society must be able to consider the individual beliefs and differences of others with respect and deliberation.[229] This means that certain practical exemptions are necessary: a wedding cake is directly connected to a religious celebration, and while a baker cannot refuse to serve a cake that is sold to all to

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"must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided").

222. Laycock, *supra* note 160, at 878-79.

223. Laycock, *supra* note 8, at 189.

224. *Id.*

225. "There is no apparent prospect of either side agreeing to live and let live. Each side respects the liberties of the other only when it lacks the votes to impose its own views. Each side is intolerant of the other; each side wants a total win. This mutual insistence on total wins is very bad for religious liberty." Laycock, *supra* note 160, at 879 (emphasis omitted).

226. In his opinion, Justice Kennedy made repeated references that no such right could exist in American law. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018). Lady Hale was equally considerate of the sincere dignity at risk. Lee v. Ashers Baking Co. [2018] UKSC 49, [35] (appeal taken from N. Ir.).

227. Andrew Koppelman, *Masterpiece Cakeshop and How "Religious Liberty" Became So Toxic*, VOX (Dec. 6, 2017, 12 PM), https://www.vox.com/the-big-idea/2017/12/6/16741840/religious-liberty-history-law-masterpiece-cakeshop.

228. *See* Bruce Ledewitz, *Religion and Gay Rights Need Not Be at Loggerheads*, PITT. POST-GAZETTE (July 23, 2017, 12 AM), https://www.post-gazette.com/opinion/Op-Ed/2017/07/23/Religion-and-gay-rights-need-not-be-at-loggerheads/stories/201707230035.

229. "Naturally, the religiously devout will see many things differently from the way their fellow citizens do. Taking an independent path . . . is part of what the religions are for." Stephen L. Carter, *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118, 137 (1993) (emphasis omitted).

a gay couple, small business owners[230] should not have to violate their moral integrity—no matter how retroactive or unpopular those moral norms are—in the marketplace.[231] This protection cannot be afforded to indirect connections to a wedding, but for those personally involved in ensuring that the wedding is the best it can be through their own creative efforts and artistry, protection must be afforded for that person's conscience.[232] In return, same-sex marriage and the rights of gay participants can surely be left alone.[233] Any refusal of accommodation in the marketplace will be limited to a very few instances—such as a custom-designed wedding cake from a small businessowner—but any discrimination against the gay people themselves will be prohibited, i.e., a refusal to sell a cake featured in the window.[234] This protection is limited but significant; its protection for small artisans is undeniably different to that wrongly afforded to Hobby Lobby Stores in allowing an imposition of a specific religious lifestyle upon more than 30,000 employees.[235] Democratic society must compromise some of its demands on others for the purposes of a more inclusive society.[236] If democratic society is to remain committed to the fundamental freedom of conscience,

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230. *See* Laycock, *supra* note 145, at 63 (arguing that exemptions should not be granted "for refusing to serve gays and lesbians in contexts not directly related to the wedding or the marriage or the sexual relationship[,] [i.e.,] large and impersonal businesses even in the wedding context. But for very small businesses where the owner will be personally involved in providing any services, we should exempt vendors from doing weddings and commitment ceremonies.").

231. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) ("We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies.").

232. *See* Laycock, *supra* note 145, at 63 ("The job of the wedding planner, the photographer, and the caterer is to make each wedding the best and most memorable it can be. They are promoting it, and the conscientious objectors say they cannot do that. This creative and promotional role is narrower for bakers and florists, but I think it's sufficiently clear for them as well. Their piece of the wedding is also to be the best and most memorable that it can be.").

233. "Same-sex civil marriage is a great advance for human liberty, but the gain for human liberty will be severely compromised if same-sex couples now force religious dissenters to violate their conscience in the same way that those dissenters, when they had the power to do so, forced same-sex couples to hide in the closet. . . . We could protect both religious minorities and sexual minorities if we were serious about civil liberties." *Id.* at 60-61.

234. Brief for Floyd Abrams, *supra* note 126, at 1-2.

235. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 736 (2014). Central to this understanding is the difference between Phillips and other bakers refusing to create cakes featuring words and symbols that they disagree with and a national store opposed to contraceptives that describes itself as Christian but buys billions of dollars' worth of stock from China, where as a result of the state's one-child policy, in place in 2014, 35,000 infants are terminated every day. *See* Jonathan Merritt, *Stop Calling Hobby Lobby a Christian Business*, WEEK (June 17, 2014), https://theweek.com/articles/446097/stop-calling-hobby-lobby-christian-business.

236. DACEY, *supra* note 153, at 209-10.

some conflict is unavoidable—but unmanageable chaos is not.[237] That is the very purpose of exemptions, without which, "religious groups will likely be crushed by the weight of majoritarian law and culture."[238] Moral integrity and sexual identity will thus be left alone, and the fundamental goals of the Free Exercise Clause—peace, equality, and cohesion—will be achieved.[239]

IV. CONCLUSION

Democratic consensus in constitutional society requires a commitment to compromise and mutual effort, in order to ensure an organic constitution for everyone. What guiding principles come from this discussion? That what is offered to all cannot be denied to one—no matter how abhorrent that person's lifestyle or beliefs may be.[240] However, this is subject to the caveat that, even if a service is offered to all, if that service requires expression amounting to speech on the part of the offeror, it cannot be compelled by another when that person objects to the speech on the basis of religion or conscience. The push and pull of religion and the public sphere is more than just another chapter in the breakdown of the sociopolitical dialogue,[241] it is a reform of popular constitutionalism. But an inclusive pluralism will take time; its envisioning will arguably take many forms. Socially, a more productive dialogue is necessary; politically, a more embracing collective is needed; legally, a commitment in the vein of Justice Kennedy and Lady Hale to ensuring that fundamental values are not sacrificed must be continued.[242] Courts cannot change beliefs, no matter how discriminatory, intolerant, or unpopular. But they can—and, indeed, must—retain the principles of tolerance necessary for a free society to ensure that all interests are equally considered.

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237. Frederick Mark Gedicks, Essay, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 690 (1992).

238. *Id.* ("[M]ajoritarian dominance could radicalize some believers into destabilizing, antisocial activity, including violence.").

239. "Unless the Court and the society it serves broaden their vision of what it means for religion to be exercised freely, we will very likely end up in a society in which the mainline religions flourish, protecting themselves through political clout, and the sparkling diversity of religious life at the margins is snuffed out." Carter, *supra* note 229, at 142.

240. *See* Floyd Abrams, *supra* note 126, at 1-2.

241. DACEY, s*upra* note 153, at 72-73.

242. "Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 636 (1943).

Shield, Sword, or Trojan Horse? Free Speech as the Court's Modern Weapon of Choice.

Zachary M. Mazzarella[*]

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I. INTRODUCTION

In late November 2018, President Trump criticized District Judge Jon S. Tigar of the United States Court of Appeals for the Ninth Circuit,[1] over the Obama-appointed judge's ruling that fed-

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1. Robert Barnes, *Rebuking Trump's Criticism of 'Obama Judge,' Chief Justice Roberts Defends Judiciary as 'Independent'*, WASH. POST (Nov. 21, 2018, 6:21 PM), https://www.wash-

eral law clearly mandates that migrants may seek asylum anywhere on United States soil.[2] This ruling was in direct opposition to the Trump Administration's attempt to deny asylum to migrants who illegally crossed the border.[3] However, the President's statements were not left unanswered. In a rare rebuke, Chief Justice John Roberts of the United States Supreme Court, appointed by President George W. Bush, departed from the stoic tradition of the Court, and responded to the President's statements.[4] The Chief Justice defended Tigar and the judiciary as a whole, stating:

> We do not have Obama judges or Trump judges, Bush judges or Clinton judges. . . . What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. . . . That independent judiciary is something we should all be thankful for.[5]

The President quickly responded via Twitter: "Sorry Chief Justice Roberts, but you do indeed have 'Obama judges,' and they have a much different point of view than the people who are charged with the safety of our country."[6] Regardless of which side of the aisle one stands on, there seems to be some truth behind both opinions.[7] The women and men who don the black robes in front of hundreds of court rooms across the United States every day are extraordinary individuals out to do their very best to interpret and apply the law how each see fit. Nonetheless, most still agree with the President's criticism that, truly, there are "Obama judges," that is, judges who

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ingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-edb7-11e8-96d4-0d23f2aaad09_story.html?noredirect=on&utm_term=.7ddba56a041d.

2. *Id.*

3. *Id.* The district court judge wrote that, "[w]hatever the scope of the President's authority, he may not rewrite the immigration laws to impose a condition that Congress has expressly forbidden." *Id.*

4. *Id.*

5. *Id.*

6. *Id.* The President continued:

> It would be great if the 9th Circuit was indeed an "independent judiciary," but if it is why . . . are so many opposing view (on Border and Safety) cases filed there, and why are a vast number of those cases overturned. Please study the numbers, they are shocking. We need protection and security—these rulings are making our country unsafe! Very dangerous and unwise!

Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018, 12:51 PM), https://twitter.com/realDonaldTrump/status/1065346909362143232; Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018, 1:09 PM), https://twitter.com/realDonaldTrump/status/1065351478347530241.

7. *See generally* Jake J. Smith, *Supreme Court Justices Become Less Impartial and More Ideological When Casting the Swing Vote*, KELLOGGINSIGHT (Sept. 13, 2018), https://insight.kellogg.northwestern.edu/article/supreme-court-justices-become-less-impartial-and-more-ideological-when-casting-the-swing-vote.

are partisan and aligned with the ideological principles of the President who appointed them.[8] Recently, this seemingly obvious criticism has intensified in the First Amendment realm.

The liberal-conservative divide has a long history in First Amendment jurisprudence. Initially, the Left[9] "embraced a 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"[10] This view aimed to broaden the First Amendment's protections in order to promote the right of dissenting speech for everyone.[11] On the other hand, the Right sought to apply free speech protections narrowly, believing it should only protect speech that is explicitly political.[12] This view changed over time as "conservatives recognized the importance from their perspective of affording strong free speech rights to business interests."[13]

This changing understanding of free speech has manifested in the decisions of the judiciary. In fact, the conservative majority on the Court "has narrowed [First Amendment] liberties except when it

8. *See id.*

9. This article's reference to the "Left" refers to the left-wing ideologies centered around individuals with liberal beliefs, favoring an expanded role in government. Conversely, the "Right" refers to the right-wing ideologies centered around individuals with conservative beliefs, favoring individual rights and civil liberties.

10. STEVEN H. SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT? 5 (2016) (citation omitted).

11. *See, e.g.*, Cohen v. California, 403 U.S. 15, 24 (1971) ("The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . ."); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.").

12. Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html; *see, e.g.*, Renton v. Playtime Theatres, 475 U.S. 41, 54 (1986) ("[W]e have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." (citing Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 78 (1976) (Powell, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact . . . ."))); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 783-84 (1975) (Rehnquist, J., dissenting) ("The Court speaks of the importance in a 'predominantly free enterprise economy' of intelligent and well-informed decisions as to allocation of resources. While there is again much to be said for the Court's observation as a matter of desirable public policy, there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession.") (citations omitted).

13. SHIFFRIN, *supra* note 10, at 6.

serves the conservative ideological agenda to do otherwise."[14] Ultimately, over the past decade the conservative majority has used the First Amendment as a weapon—an outcome-oriented tool—used to achieve certain ideological agendas.[15]

The United States Supreme Court's recent decision of *Janus v. AFSCME, Council 31*,[16] for example, has emphasized this issue. In *Janus*, the Court overruled *Abood v. Detroit Board of Education*, an over forty-year-old precedent, holding, in a five to four decision, that union "fair-share" fees are unconstitutional on First Amendment grounds.[17] This decision comes at the end of a lengthy campaign—backed by wealthy conservative legal foundations[18]—to reverse *Abood*,[19] and has been widely criticized as an ideological attack on labor unions.[20] The four-member dissent, authored by Justice Elena Kagan and joined by the Court's three remaining liberal members, criticized the five-member majority opinion, authored by Justice Samuel Alito and joined by the Court's four remaining conservative members, stating that the conservative majority effectively "weaponize[ed] the First Amendment."[21]

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14. ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION 194 (2010); *see, e.g.*, Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2491 (2018) (Kagan, J., dissenting) ("Indeed, [the majority's] reversal today creates a significant anomaly—an exception, applying to union fees alone, from the usual rules governing public employees' speech."); Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2383 (2018) (Breyer, J., dissenting) ("[R]ather than set forth broad, new, First Amendment principles, [as the majority does,] I believe that we should focus more directly upon precedent more closely related to the case at hand."); Citizens United v. FEC, 558 U.S. 310 (2010) (expanding the free speech rights of corporations); Garcetti v. Ceballos, 547 U.S. 410 (2006) (denying free speech rights to public sector employees).

15. This article takes a more expansive view than what has been termed "First Amendment Lochnerism," i.e., "using the First Amendment as a workaround to bring back *Lochner*'s economic deregulation," focusing on the broader argument that the First Amendment has become a political tool. Boyd Garriott, Janus *and the Problem with Alleging Lochnerism*, ONLABOR (May 4, 2018), https://onlabor.org/janus-and-the-problem-with-alleging-lochnerism/; *see also* Kenneth D. Katkin, *First Amendment Lochnerism? Emerging Constitutional Limitations on Government Regulation of Non- Speech Economic Activity*, 33 N. KY. L. REV. 365 (2006) (explaining briefly First Amendment Lochnerism).

16. 138 S. Ct. 2448 (2018).

17. *Id.* at 2486.

18. Celine McNicholas et al., Janus *and Fair Share Fees: The Organizations Financing the Attack on Unions' Ability to Represent Workers*, ECON. POL'Y INST. (Feb. 21, 2018), https://www.epi.org/publication/janus-and-fair-share-fees-the-organizations-financing-the-attack-on-unions-ability-to-represent-workers/.

19. *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting) (citing Friedrichs v. Cal. Teachers Ass'n, 135 S. Ct. 2933 (2015); Harris v. Quinn, 134 S. Ct. 2618 (2014); Knox v. SEIU, Local 1000, 567 U.S. 298 (2012)).

20. *See generally* Fran Spielman et al., *Chicago Teachers Union Uses* Janus *Case to Blast* Rauner*,* Emanuel, CHI. SUN TIMES (June 7, 2018, 10:36 AM), https://chicago.suntimes.com/news/chicago-teachers-union-uses-janus-case-to-blast-rauner-emanuel/.

21. *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting).

This article analyzes the conservative majority's recent trend to exploit free speech as an outcome-oriented tool to promote certain ideologies. It utilizes the Court's decision in *Janus* to evidence this "weaponization" of the First Amendment and shed light on exactly what Justice Kagan condemns in her dissenting opinion. Finally, the article concludes by analyzing the potential implication of the conservative majority's weaponization of free speech, discussing potential challenges to state minimum wage laws.

II. BACKGROUND

A. *Historical Background of the Conservative Free Speech Movement*

1. *Early Years of Conservative Free Speech Ideology*

Since *Roe v. Wade*,[22] "the Supreme Court has rarely recognized new constitutional rights or extended existing rights; in fact, it often has significantly cut back on important civil liberties."[23] The Burger,[24] Rehnquist,[25] and Roberts[26] Courts generally have recognized new rights only when such rights advance conservative ideology.[27] This general trend persists in the context of the First Amendment.[28] Case law throughout the years since Chief Justice Warren[29]

22. 410 U.S. 113 (1973).

23. CHEMERINSKY, *supra* note 14, at 169.

24. In 1969, President Richard Nixon appointed Warren E. Burger as the Chief Justice of the United States Supreme Court due to his "starkly conservative stance" on Fifth Amendment Rights of the accused and his connections to the Republican party. *Warren E. Burger*, OYEZ, www.oyez.org/justices/warren_e_burger (last visited Feb. 3, 2019). President Nixon hoped that Chief Justice Burger's "deference to 'law and order' would reign in what many conservatives saw as liberal judicial activism." *Id.*

25. In 1969, President Nixon appointed William H. Rehnquist to the United States Supreme Court as an associate justice, in which he served for seventeen years, "stay[ing] true to his conservative values." *William H. Rehnquist*, OYEZ, www.oyez.org/justices/william_h_rehnquist (last visited Feb. 4, 2019). Then in 1986, President Ronald Reagan appointed Rehnquist to the position of Chief Justice of the United States Supreme Court upon former Chief Justice Burger's retirement. *Id.*

26. In 2005, President George W. Bush Nominated John G. Roberts as an associate justice to fill Justice Sandra Day O'Connor's vacancy. *John G. Roberts*, OYEZ, www.oyez.org/justices/john_g_roberts_jr (last visited Feb. 3, 2019). However, after the death of Justice Rehnquist, President Bush withdrew his initial nomination to instead nominate Roberts to Chief Justice of the United States Supreme Court. *Id.* Chief Justice Roberts, known for being a political pragmatist on the bench, is an avid supporter of the Court's role as an independent judiciary: to interpret the law, rather than create it. *Id.*

27. CHEMERINSKY, *supra* note 14, at 129.

28. *Id.* at 194.

29. In 1953, President Dwight D. Eisenhower nominated Earl Warren to be the Chief Justice of the United States Supreme Court. *Earl Warren*, OYEZ, www.oyez.org/justices/earl_warren (last visited Feb. 3, 2019). Chief Justice Warren "joined the Court in the midst of some of its most important issues—racial segregation in public schools and the expansion

left the bench in 1969 helps illustrate the Court's conservative approach to free speech.[30]

Beginning in 1971, Robert H. Bork, a future United States Supreme Court nominee and prominent conservative law professor at the time, wrote that "[c]onstitutional protection should be accorded only to speech that is explicitly political," and that "[t]here is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic."[31] Bork's view is a clear rejection of the free speech claims presented to the Warren Court in the 1950s and 1960s, which involved anti-obscenity, civil rights, and public protests claims.[32] At this time, it was the Left who led the conversation on supporting broad First Amendment protections for all, such as "fighting to protect sexually explicit materials from government censorship"[33] and even supporting "the right of the American Nazi Party to march among Holocaust survivors."[34] This is quite the opposite of what is seen today on both the Left and Right.[35]

This change is first noticeable five years after the publication of Bork's conservative stance on free speech. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[36] the Court considered "a challenge to a state law that banned advertising the prices of prescription drugs."[37] The claim, filed by Public Citizen, a consumer rights group founded by Ralph Nader,[38] attacked the state law as violating the First and Fourteenth Amendments.[39] Persuaded by the consumer advocates' argument that the law hurt consumers, the Court held that "[t]he First Amendment protects

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of civil liberties." *Id.* "Growing liberal with age, much of Warren's decisions were still rooted in Progressive beliefs supported by the rule of common law." *Id.*

30. *See, e.g.*, Renton v. Playtime Theatres, 475 U.S. 41, 54 (1986); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 783-84 (1975).

31. Liptak, *supra* note 12.

32. *Id. See generally* Street v. New York, 394 U.S. 576 (1969); Pickering v. Bd. of Educ., 391 U.S. 563 (1968); United States v. O'Brien, 391 U.S. 367 (1968); Yates v. United States, 354 U.S. 298 (1957).

33. Liptak, *supra* note 12; *see also* Stanley v. Georgia, 394 U.S. 557 (1969).

34. Liptak, *supra* note 12; *see also* Nat'l Socialist Party v. Skokie, 432 U.S. 43 (1977).

35. Liptak, *supra* note 12 (quoting Floyd Abrams, a lawyer specializing in the First Amendment) ("Now the progressive community is at least skeptical and sometimes distraught at the level of First Amendment protection which is being afforded in cases brought by litigants on the right.").

36. 425 U.S. 748 (1976).

37. Liptak, *supra* note 12.

38. Ralph Nader is a well-known consumer activist and environmentalist. Beth Rowen, *Ralph Nader: Consumer Advocate and Presidential Hopeful*, INFOPLEASE, https://www.infoplease.com/ralph-nader (last updated Feb. 28, 2017). Nader, along with his followers, advocate for "protections for workers, taxpayers, and the environment and [fight] to stem the power of large corporations." *Id.*

39. *Va. Citizens Consumer Council*, 425 U.S. at 749-50.

the advertisement because of the 'information of potential interest and value' conveyed, rather than because of any direct contribution to the interchange of ideas."[40] While this decision seemed to be a win for consumers, it soon became one of "the biggest boomerangs in judicial cases ever."[41]

Subsequent rulings made clear the true beneficiary of *Virginia Citizens*: corporate speakers.[42] The Court was soon flooded with corporate speech cases claiming First Amendment challenges to the inclusion of alcohol content on beer can labels, the limitation of outdoor tobacco advertising near schools, rules governing how compounded drugs may be advertised, gun control laws, securities regulations, country-of-origin labels, graphic cigarette warnings, and limits on off-label drug marketing.[43] Indeed, corporate speakers effectively used the First Amendment to achieve their own agendas.[44] This trend continues today and, in fact, is even more pronounced under the Roberts Court.[45]

2. *Conservative Free Speech Intensifies Under the Roberts Court*

According to a study prepared for the New York Times,[46] the United States Supreme Court, under Chief Justice Roberts, has heard a larger share of First Amendment cases concerning conservative speech than its predecessors, ruling in favor of conservative speech at a considerably higher rate than liberal speech.[47] Indeed, "'[t]he Roberts Court—more than any modern court—has trained its sights on speech promoting conservative values,' the study found."[48] A few noteworthy cases illustrate these findings.

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40. *Id.* at 780 (citing Bigelow v. Virginia, 421 U.S. 809, 820 (1975)). Notably, the sole dissent in the decision came from the Court's most conservative member at the time— future Chief Justice William H. Rehnquist. *Id.* at 790 (Rehnquist, J., dissenting) ("I do not believe that the First Amendment mandates the Court's 'open door policy' toward such commercial advertising.").

41. Liptak, *supra* note 12.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* ("[T]he study . . . was conducted by Lee Epstein, a law professor and political scientist at Washington University in St. Louis; Andrew D. Martin, a political scientist at the University of Michigan and the dean of its College of Literature, Science and the Arts; and Kevin Quinn, a political scientist at the University of Michigan.").

47. *Id.*

48. *Id.* Contrast these results with those of the Warren, Burger, and Rehnquist Courts. The Warren Court, from 1953 to 1969, "was almost exclusively concerned with cases concerning liberal speech. Of its 60 free-expression cases, only five, or about 8 percent, challenged the suppression of conservative speech." *Id.* The Burger Court, from 1969 to 1986, saw a rise in the proportion of challenges to restrictions on conservative speech to 22%, with a win

On May 30, 2006, the Court decided "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties[,]" in *Garcetti v. Ceballos*.[49] Ultimately, the Court rejected "the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties."[50] However, the true implications of the case encompassed far more than ordinary speech made pursuant to the employee's official duties. Rather, the Court was protecting the Government's retaliatory conduct against Ceballos.[51]

The case involved Richard Ceballos, a long-time deputy district attorney for the Los Angeles County District Attorney's Office,[52] who challenged the veracity of a deputy sheriff in regard to an affidavit he signed to obtain a search warrant.[53] Ceballos contacted the officer to discuss inaccuracies he found.[54] Unsatisfied with the officer's answers, Ceballos filed a memo with his superiors expressing his concerns and recommending dismissal of the case.[55] His superiors decided to continue with the case pending the disposition of the defendant's motion to traverse the evidence, in which Ceballos himself was called as a witness for the defense.[56] Ultimately, Ceballos faced retaliation for his conduct[57]—conduct which is arguably seen as being a whistleblower.[58]

Ceballos sued, alleging that the "petitioners violated the First . . . Amendment[] by retaliating against him based on his memo" because the memo constituted protected speech.[59] "Although the Supreme Court long has held that there is constitutional protection for the speech of government employees, it ruled against Ceballos and concluded that he could not bring a claim for the violation of

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rate of 70% for conservative speech and 47% for liberal speech. *Id.* Additionally, the Rehnquist Court, from 1986 to 2005, saw a rise in the proportion of challenges to restrictions on conservative speech to 42%, with a win rate of 63% for conservative speech and 48% for liberal speech. *Id.*

49. 547 U.S. 410, 413 (2006).
50. *Id.* at 426.
51. CHEMERINSKY, *supra* note 14, at 196.
52. *Garcetti*, 547 U.S. at 413.
53. *Id.* at 413-14.
54. *Id.* at 414.
55. *Id.*
56. *Id.* at 414-15.
57. *Id.* at 415.
58. *See id.* at 428-29 (Souter, J., dissenting); CHEMERINSKY, *supra* note 14, at 196.
59. *Garcetti*, 547 U.S. at 415 (majority opinion).

his First Amendment rights."[60] The majority chose to narrowly tailor First Amendment principles, drawing a distinction between speech made "as a citizen" and speech made "as a public employee."[61] Under the Court's view, "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."[62] Accordingly, speech is largely unprotected when it is made pursuant to a public employee's employment duties.[63] Because this unprecedented distinction only protected speech made as a private citizen, Ceballos's claims were nullified.[64]

Similarly, on January 21, 2010, the Court overruled precedent it had recently decided to instead favor corporate speech in *Citizens United v. Federal Election Commission*.[65] In *Citizens United*, the Court was asked to reconsider *Austin v. Michigan Chamber of Commerce*,[66] a 1990 decision, and, in effect, *McConnell v. Federal Election Commission*,[67] a 2003 decision.[68] Ultimately, the Court overruled *Austin* and *McConnell*, holding that "corporations have the First Amendment right to spend money in election campaigns."[69]

The case concerned Citizens United, a nonprofit corporation that released a film depicting then presidential candidate Hillary Clinton.[70] While the film *Hillary: The Movie*[71] was released in theaters and on DVD, Citizens United sought to increase distribution and make the film available through video-on-demand.[72] Citizens United wanted to advertise the free offering through broadcast and cable television.[73] However, "federal law prohibited . . . corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any

60. CHEMERINSKY, *supra* note 14, at 195. Justice Kennedy delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. *Garcetti*, 547 U.S. at 413.
61. CHEMERINSKY, *supra* note 14, at 195.
62. *Garcetti*, 547 U.S. at 421-22.
63. *Id.*
64. CHEMERINSKY, *supra* note 14, at 195.
65. 558 U.S. 310 (2010).
66. 494 U.S. 652 (1990).
67. 540 U.S. 93 (2003).
68. *Citizens United*, 558 U.S. at 319.
69. CHEMERINSKY, *supra* note 14, at 197.
70. *Citizens United*, 558 U.S. at 319.
71. HILARY: THE MOVIE (Citizens United 2008).
72. *Citizens United*, 558 U.S. at 320.
73. *Id.*

form of media, in connection with certain qualified federal elections."[74] Fearing the film and its advertisements would be barred by the federal ban, Citizens United filed for injunctive relief, claiming the law was unconstitutional under the First Amendment.[75]

The question to overrule *Austin* and *McConnell* sparked a multitude of opinions among the Justices,[76] but ultimately, the majority expanded free speech rights, striking down the regulatory restrictions.[77] The Court rationalized that more speech is better for the public good in response to the arguments proffered for upholding the restrictions by Citizens United's opponents, such as the prevention of corporate corruption.[78] Thus, the Court chose to protect corporate speech and a corporation's ability to spend money in election campaigns.[79]

Lastly, on June 26, 2018, the day prior to its ruling in *Janus*, the Court decided *National Institute of Family and Life Advocates v. Becerra*.[80] In *Becerra*, the Court determined whether a California law requiring licensed and unlicensed perinatal care clinics to notify pregnant mothers of "free or low-cost services, including abortions," and to provide contact information for such services, violated the First Amendment.[81] The FACT Act's stated purpose sought to promote California residents' knowledge of their personal reproductive health care and address the issue of licensed and unlicensed crisis pregnancy centers run by organizations opposed to abortion.[82] The petitioners, one such organization, filed suit after the Governor of California signed the FACT Act into law.[83]

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74. *Id.*

75. *Id.* at 321.

76. *See id.* at 317 ("Kennedy, J., delivered the opinion of the Court, in which Roberts, C.J., and Scalia and Alito, JJ., joined, in which Thomas, J., joined as to all but Part IV, and in which Stevens, Ginsburg, Breyer, and Sotomayor, JJ., joined as to Part IV. Roberts, C.J., filed a concurring opinion, in which Alito, J., joined; Scalia, J., filed a concurring opinion, in which Alito, J., joined, and in which Thomas, J., joined in part. Stevens, J., filed an opinion concurring in part and dissenting in part, in which Ginsburg, Breyer, and Sotomayor, JJ., joined. Thomas, J., filed an opinion concurring in part and dissenting in part.").

77. *Id.* at 365.

78. Steven Andre, *Government Election Advocacy: Implications of Recent Supreme Court Analysis*, 64 ADMIN. L. REV. 835, 842 (2012).

79. CHEMERINSKY, *supra* note 14, at 197.

80. 138 S. Ct. 2361 (2018).

81. *Id.* at 2368 (citing CAL. HEALTH & SAFETY CODE § 123470 (West, Westlaw through 2019 Reg. Sess.)) ("The California State Legislature enacted the FACT Act to regulate crisis pregnancy centers. Crisis pregnancy centers . . . are 'pro-life . . . organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center.'").

82. *Id.* at 2369-70.

83. *Id.* at 2370.

The majority,[84] authored by Justice Clarence Thomas,[85] struck down the law's notice requirements, holding that the law violated the First Amendment.[86] In regard to the licensed facilities, the majority refused to recognize a new category for "professional speech," because doing so would "exempt [it] from ordinary First Amendment principles."[87] While the majority recognized that the Court had granted this type of speech lesser protections in two situations,[88] it did not view the California law to fit within those situations.[89] Further, the majority did not view the law to achieve its stated purpose of promoting health care knowledge; thus, it concluded the law could not even meet the lesser standard of intermediate scrutiny.[90]

In regard to the unlicensed facilities, the majority cited precedent which required "disclosures to remedy a harm that is 'potentially real not purely hypothetical' and to extend 'no broader than reasonably necessary.'"[91] However, the majority opined that California had not "demonstrated any justification . . . that [was] more than 'purely hypothetical.'"[92] Even if it had, the majority concluded that the law nonetheless burdened speech because the "disclosure requirement [was] wholly disconnected from California's informational interest."[93]

For all of these reasons, the majority believed that the petitioners were likely to succeed on the merits and reversed and remanded the case back to the lower court.[94] In dissent, Justice Stephen Breyer[95]

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84. *Id.* at 2367 (joining the majority opinion were Roberts, C.J., and Kennedy, Alito, and Gorsuch, JJ.).

85. In 1991, Clarence Thomas, "known for his quiet, stoic demeanor during oral arguments and his conservative viewpoint that challenges, if not surpasses, even Scalia's originalism," was appointed by Republican President George H. W. Bush. *Clarence Thomas*, Oyez, https://www.oyez.org/justices/clarence_thomas (last visited Feb. 6, 2019).

86. *Becerra*, 138 S. Ct. at 2378.

87. *Id.* at 2375.

88. First, the Court's precedent has "applied more deferential review to some laws that require professionals to disclose *factual, noncontroversial information* in their 'commercial speech.'" *Id.* (internal citations omitted) (emphasis added). Second, the Court's precedents have permitted states to "regulate professional conduct, even though that conduct incidentally involves speech." *Id.* (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.)).

89. *Id.* at 2372.

90. *Id.* at 2375.

91. *Id.* at 2377 (citations omitted).

92. *Id.* (citations omitted).

93. *Id.*

94. *Id.* at 2378.

95. In 1994, Democratic President Bill Clinton appointed Stephen G. Breyer to the United States Supreme Court, who since "has cultivated a reputation for pragmatism, optimism, and cooperation with both political parties." *Stephen G. Breyer*, OYEZ, https://www.oyez.org/justices/stephen_g_breyer (last visited Feb. 6, 2019).

viewed the majority's analysis as "a misuse of First Amendment principles."[96] Specifically, Justice Breyer stated that "[u]sing the First Amendment to strike down economic and social laws that legislatures long would have thought themselves free to enact will, for the American public, obscure, not clarify, the true value of protecting freedom of speech."[97] Indeed, Justice Breyer's concern for this misuse of First Amendment principles directly relates to Justice Kagan's future remarks of weaponizing the First Amendment.[98]

B. The Janus *Decision*

On June 27, 2018, this increasingly conservative trend culminated in the Court's decision of *Janus v. AFSCME, Council 31*.[99] From the very start, the case was viewed as an effort to thwart Illinois labor unions' abilities in the collective bargaining process.[100] Using the First Amendment as an outcome-oriented tool, the conservative majority validated the six-year attack on public employee unions and fair-share fee agreements.[101]

1. Background

Over forty years ago, the Court first considered the constitutional question of fair-share agreements[102] in *Abood v. Detroit Board of Education*.[103] The constitutional challenge to fair-share fees presented in *Abood* was whether "[r]equiring the payment of [fair-share] fees by nonmember objectors is a violation of the objectors' First Amendment rights."[104] The *Abood* Court agreed that fair-share fees were a violation to a certain extent.

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96. Liptak, *supra* note 12.
97. *Becerra*, 138 S. Ct. at 2383 (Breyer, J., dissenting).
98. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (citing *Becerra*, 138 S. Ct. at 2361).
99. *Id.*
100. Catherine L. Fisk, Janus*: Weaponized First Amendment Shoots at Democracy*, AM. CONST. SOC'Y (July 2, 2018), https://www.acslaw.org/acsblog/janus-weaponized-first-amendment-shoots-at-democracy/.
101. *Id.*
102. Fair-share agreements require non-union members of a collective bargaining agreement to pay their "fair share" of dues to the union in compensation for the benefits they receive through the collective bargaining process. David Kreutzer & Rachel Greszler, *The* Janus *Decision Scored a Major Win for Workers' Rights. Here's What Should Come Next.*, DAILY SIGNAL (July 16, 2018), https://www.dailysignal.com/2018/07/16/the-janus-decision-scored-a-major-win-for-workers-rights-heres-what-should-come-next/.
103. 431 U.S. 209 (1977).
104. McNicholas et al., *supra* note 18.

The unanimous Court affirmed that fair-share fees "could be collected from public-sector workers . . . [because] any minor infringement . . . posed by [fair-share] fees was justified by the state's legitimate interest in preventing free riders from undermining a union's ability to represent the bargaining unit."[105] However, the Court also recognized that the "government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment."[106] Accordingly, the Court struck a balance between the competing interests.[107] The Court required unions to separate out the portion of fair-share fees used "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative."[108]

The vast majority of caselaw following *Abood* primarily focused on the application of the Court's compromise, adjudicating whether union expenditures were proper and consistent with *Abood's* holding,[109] rather than continuing to dispute the constitutionality of the fees overall.[110] However, that is not to say the case was without criticism. Anti-union organizations, which disapproved of the Court's decision, continued to litigate and challenge fair-share fees in an effort to weaken union efforts.[111] Such challenges intensified over the past decade,[112] ultimately leading to the final challenge in *Janus*. This final challenge came in light of clear signals from the Court that it was ready to reconsider *Abood*.[113]

The first such signal was found in the Court's decision of *Knox v. SEIU*.[114] The issue in *Knox* centered around the type of notice a

105. *Id.*
106. *Id.*
107. *Id.*
108. *Abood*, 431 U.S. at 235.
109. *See, e.g.*, Davenport v. Wash. Educ. Ass'n, 551 U.S. 177 (2007); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991); Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986); Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 447 (1984).
110. Joe E. Ling, Note, *Transgression of a Timid Judiciary: Our Highest Court's Refusal to Overturn* Abood v. Board of Education—Harris v. Quinn, 42 WM. MITCHELL L. REV. 1237, 1245 (2016).
111. McNicholas et al., *supra* note 18.
112. Knox v. Serv. Emp. Int'l Union, Local 1000, 567 U.S. 298 (2012); Harris v. Quinn, 134 S. Ct. 2618 (2014); Friedrichs v. Cal. Teachers Ass'n, 135 S. Ct. 2933 (2015).
113. McNicholas et al., *supra* note 18.
114. 567 U.S. 298 (2012).

union is required to give nonmembers after it levied a special assessment or dues increase.[115] While Justice Samuel Alito,[116] writing for the majority, outlined the controlling precedent regarding fair-share fees and analyzed the merits of the case, he also added in his own criticism of the Court's free speech case law.[117] Specifically, Justice Alito commented on the free-rider justification first proffered in *Abood*—the risk of non-union members enjoying a "free ride" justifies the use of fair-share fees.[118] Regarding this argument, he stated in dicta that it "represents something of an anomaly."[119] It is this statement that "[m]any observers considered . . . [as] an invitation to argue for overturning *Abood*[,]" as it evinced the Court's, or at least Justice Alito's, willingness to reconsider the long-standing precedent's merits.[120]

Two years later, in *Harris v. Quinn*,[121] the first corporate-backed plaintiffs took up Justice Alito's invitation by filing a challenge against fair-share fees.[122] The case involved Illinois home-care workers who were nonmember parties to a collective bargaining unit which contained a fair-share fee agreement.[123] The petitioners, represented by the National Right to Work Legal Defense Foundation,[124] argued that such agreements violated the employees' First Amendment rights because the agreements compelled them to pay a fee into a union in which they did not wish to support.[125]

Again, Justice Alito wrote the majority opinion for the Court, joined by the Court's remaining conservative members.[126] The majority began by noting the lower court's reliance on *Abood*, in which the Seventh Circuit concluded that the home-care workers were

115. *Id.* at 305-06.

116. Justice Alito was appointed by President George W. Bush in 2005 and is "known for his right wing leanings that sometimes encompass libertarian ideals." *Samuel A. Alito*, OYEZ, www.oyez.org/justices/samuel_a_alito_jr (last visited Feb. 2, 2019).

117. *Knox*, 567 U.S. at 300.

118. The free-rider argument justifies fair-share fees on the premise that such fees "counteract[] the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977). The same justification was affirmed in subsequent rulings. *See, e.g.*, Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986).

119. *Knox*, 567 U.S. at 311.

120. McNicholas et al., *supra* note 18.

121. 134 S. Ct. 2618 (2014).

122. McNicholas et al., *supra* note 18.

123. *Id.*

124. *Id.*

125. *Harris*, 134 S. Ct. at 2626.

126. *Id.* at 2623.

public employees that fit within the precedent's confines.[127] However, the majority distinguished the home health-care workers from "full-fledged" public employees because they were only recognized as public employees for the purposes of collective bargaining.[128] Under the majority's view, this slight distinction removed the case from analysis under the controlling precedent of *Abood*.[129] Indeed, Justice Alito viewed any application of *Abood* to be a "substantial expansion" of the precedent's reach.[130]

Accordingly, the Court considered whether fair-share fees serve "a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms[,]" in regard to this special class of employees.[131] Ultimately, the Court held that it did not; thus, such arrangements violated the First Amendment rights of these employees.[132]

However, this holding was limited to the special class of employees at issue, those employees deemed to not be "full-fledged" public employees.[133] Thus, rather than overruling *Abood*, the Court merely held that *Abood* did not apply in this context.[134] Notably, Justice Alito again commented on *Abood's* justifications in dicta, noting his prior statement in *Knox* that "*Abood* is 'something of an anomaly.'"[135]

On June 30, 2015, the Court granted certiorari on what seemed to be the final domino in the chain of cases pushing for the overturning of *Abood*: *Friedrichs v. California Teachers Association*.[136] The plaintiff, Rebecca Friedrichs, alongside nine other public school teachers, directly challenged *Abood*.[137] The teachers argued that

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127. *Id.* at 2627-28.

128. *Id.* at 2634 ("*Abood* involved full-fledged public employees, but in this case, the status of the personal assistants is much different. The Illinois Legislature has taken pains to specify that personal assistants are public employees for one purpose only: collective bargaining. For all other purposes, Illinois regards the personal assistants as private-sector employees.").

129. *Id.*

130. *Id.*

131. McNicholas et al., *supra* note 18 (quoting *Harris*, 134 S. Ct. at 2639).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Harris*, 134 S. Ct. at 2627 (quoting Knox v. SEIU, 567 U.S. 298, 311 (2012)).

136. 135 S. Ct. 2933 (2015).

137. The plaintiffs in the case were represented by the Center for Individual Rights (CIR). Knowing their First Amendment argument had already been answered by the long-standing precedent of *Abood*, CIR rushed the case through the lower courts. CIR filed a motion for judgment on the pleadings, which the union opposed asking for the opportunity to introduce information on the necessity of fair-share fees, which would be the corner stone of the union's position to uphold *Abood*. However, the trial court ruled on the pleadings alone, as *Abood* clearly controlled, skipping any opportunity to call witnesses, take testimony, and conduct discovery. The plaintiffs then appealed to the Ninth Circuit Court of Appeals, which affirmed

being required to make any financial contribution to their unions through fair-share fee agreements was a violation of their First Amendment rights.[138] Oral arguments were held on January 11, 2016, and predictions did not fare well for upholding *Abood* after their closing.[139] However, due to the unfortunate death of Justice Scalia on February 13, 2016, the Court was unable to issue a determinative decision, ending the dispute in a 4-4 tie.[140] This "left the door open [for Governor Bruce Rauner and Mark Janus] to continue the attack on [fair-share] fees."[141]

On September 28, 2017, the United States Supreme Court granted Petitioner, Mark Janus's (hereinafter "Janus") writ of certiorari,[142] which explicitly asked the Court to overrule *Abood* and hold public-sector fair-share fee agreements unconstitutional.[143] In a seven-part opinion, Justice Alito again delivered the majority opinion of the Court and again was joined by the Court's remaining conservative members.[144] Justice Elena Kagan, joined by the remaining liberal members of the Court, filed a dissenting opinion.[145]

2. Factual Background

At first blush, *Janus*, like much of the Court's recent First Amendment altering decisions, appeared to be an issue of labor law

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the lower decision, again relying on the controlling case of *Abood*. This allowed the plaintiffs to petition the United States Supreme Court for review. McNicholas et al., *supra* note 18.

138. Friedrichs v. Cal. Teachers Ass'n, No. SACV 13-676-JLS (CWx), 2013 WL 9825479, at *2 (C.D. Cal. Dec. 5, 2013); McNicholas et al., *supra* note 18.

139. McNicholas et al., *supra* note 18.

140. *Id.*

141. *Id.*

142. Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018). The initial case against Respondent, American Federation of State, County, and Municipal Employees, Council 31, was filed by newly elected Illinois State Governor, Bruce Rauner. Lynn Sweet & Jon Seidel, *In a Blow to Unions, Government Workers No Longer Have to Pay 'Fair Share' Fees*, CHI. SUN TIMES (July 7, 2018, 10:38 AM), https://chicago.suntimes.com/columnists/ruling-mark-janus-afscme-council-31-supreme-court-unions-fair-share-fees-collective-bargaining-bruce-rauner/. Janus, along with Brian Trygg, who was later precluded from bringing his claim because of his involvement in a prior suit, *Janus v. AFSCME, Council 31*, 851 F.3d 746, 748 (7th Cir. 2017), intervened in the Governor's lawsuit after the District Court ruled that Rauner did not have standing to bring the case. Sweet & Seidel, *supra* note 142. Janus filed an amended complaint, claiming that "all 'nonmember fee deductions are coerced political speech' and that 'the First Amendment forbids coercing any money from the nonmembers.'" *Janus*, 138 S. Ct. at 2462. In response, Respondent filed a motion to dismiss on the basis that Petitioner's claims were foreclosed by the Court's decision in *Abood v. Detroit Board of Education*, which the District Court granted, and the Court of Appeals affirmed. *Id.*

143. Both Petitioner Janus and intervenor Trygg acknowledged they would not prevail at the lower courts; however, the process was a necessary step in reaching their ultimate goal of having agency fee agreements found unconstitutional, which could only be accomplished at the United States Supreme Court. *Janus*, 851 F.3d at 747-48.

144. *Janus*, 138 S. Ct. at 2459, 2486.

145. *Id.* at 2487.

and fair-share fees. But underneath the decision laid the same conservative outcome-oriented application of the First Amendment seen in *Citizens United*, *Garcetti*, and *Becerra*. The present case, arising out of Illinois, focused on fair-share fee agreements in the public sector. At its base, Illinois permits public-sector employees to unionize under the Illinois Public Labor Relations Act (IPLRA).[146] Under the IPLRA, a union may be designated as the exclusive representative over all employees by a majority vote.[147] Although employees remain free to refuse union membership, the union is still charged with the responsibility to represent the interest of all members and nonmembers in the collective bargaining unit alike.[148] Indeed, regardless of actual membership, a union works for and provides services to all employees. As decided by *Abood*, and contingent on a fair-share fee agreement, nonmembers were required to pay a reduced fee, excluding any portion of union dues used for political or ideological projects.[149]

The petitioner, Mark Janus, a child support specialist at the Illinois Department of Healthcare and Family Services, was represented by Respondent American Federation of State, County, and Municipal Employees, Council 31 (hereinafter "Union"), alongside 35,000 other public employees.[150] Because Janus opposed many of the public policy positions that the Union advocated for, he refused to join; accordingly, Janus was considered a nonmember party to his respective bargaining agreement.[151] Indeed, Janus's dissatisfaction was so severe that he opposed having to pay any sum to the Union for the services he did receive.[152] However, under his unit's collective bargaining agreement, Janus was nonetheless "required to pay [a fair-share] fee of $44.58 per month," or $535 per year, pursuant to his union-negotiated contract.[153] In his complaint, Janus claimed that all nonmember fee deductions, including the $535 he was required to pay each year, "'are coerced political speech' and that 'the First Amendment forbids coercing any money from . . . nonmembers.'"[154]

146. 5 ILL. COMP. STAT. ANN. 315/6(a) (2019) (LEXIS through 2019 Reg. Sess.).
147. *Janus*, 138 S. Ct. at 2460.
148. *Id.*
149. *Id.* at 2460-61. Ultimately, agency fees represent a nonmember's "proportionate share," a reduced percentage of the full dues which accounts for and excludes the proportionate percentage of nonchargeable expenditures. *Id.* at 2461.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 2462.

3. The Majority's Analysis

The majority opinion, again authored by Justice Alito, and again joined by the Court's remaining conservative members, started its analysis by turning to the main issue presented before the Court: the constitutionality of *Abood v. Detroit Board of Education*.[155] To address this issue, the majority subdivided its analysis of *Abood* into three different sections.[156] First, it considered whether *Abood's* holding was consistent with First Amendment principles, determining that fair-share fee agreements do raise First Amendment concerns.[157] Accordingly, in the remaining two subsections, it applied exacting scrutiny to *Abood's* two justifications for fair-share fees—the state's interest in labor peace and the risk of free riders, respectively.[158]

Before doing so, the majority briefly recapped First Amendment protections, noting that the First Amendment forbids abridgement of the freedom of speech and that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all."[159] The majority concerned itself with the negative right of the First Amendment to be free of compelled speech.[160] When speech is compelled, the majority continued, additional damage is done to the essential functions that the First Amendment serves because forcing free and independent individuals to endorse ideas they find objectionable effectively coerces such individuals into betraying their convictions, a more urgent concern than simply forcing silence.[161]

While Janus's situation is not exactly compelled speech, the majority noted that forcing a person "to subsidize the speech of other private speakers raises similar First Amendment concerns."[162] From this distinction, the majority "recognized that a 'significant impingement on First Amendment rights' occurs when public employees are required to provide financial support for a union that 'takes many positions during collective bargaining [which] have powerful political and civic consequences.'"[163] "Because the compelled subsidization of private speech seriously impinges on First

155. *Id.* at 2463.
156. *Id.* at 2463-69.
157. *Id.* at 2463-64.
158. *Id.* at 2465-69.
159. *Id.* at 2463 (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1977)).
160. *Id.* at 2464.
161. *Id.*
162. *Id.* (citing Knox v. SEIU, Local 1000, 567 U.S. 298, 309 (2012); United States v. United Foods, Inc., 533 U.S. 405, 410 (2001); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977)) (emphasis omitted).
163. *Id.* (quoting *Knox*, 567 U.S. at 310-11).

Amendment rights," the majority opined that "it cannot be casually allowed."[164]

Accordingly, the majority turned to the different "levels of scrutiny" to be applied, which it highlighted through recent free speech cases.[165] Ultimately, it applied intermediate scrutiny, rather than the more stringent strict scrutiny standard, to evidence that the alleged constitutional infringement at issue could not even pass a lesser standard of review.[166]

Accordingly, the majority turned to the two justifications for fair-share fee agreements accepted in *Abood*—the state's interest in labor peace and the risk of free riders.[167] However, it did not find either of these justifications compelling.[168] Specifically, it believed "labor peace" could be achieved through significantly less restrictive means than fair-share fee agreements.[169] It supported this contention by recognizing that federal law, the postal service, and twenty-eight states all prohibit fair-share fees while sustaining the collective bargaining process.[170] Additionally, the majority opined that the risk of free riders is never a compelling argument to overcome a First Amendment challenge.[171] It believed that simply because an advocacy group's efforts may benefit nonmembers who are in no way affiliated with the group itself, with nothing further, does not mean the advocacy group's speech is to be automatically subsidized by those who receive some benefit but are otherwise unaffiliated

164. *Id.*

165. *Id.* at 2464 (citing *Knox*, 567 U.S. 298; Harris v. Quinn, 134 S. Ct. 2618 (2014); Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016) (per curiam)). The hierarchical schema of judicial analysis that the Court uses in First Amendment cases ranges from "strict scrutiny," the most stringent standard, to "intermediate" or "exacting scrutiny," and, finally, to "minimum scrutiny" or "rational-basis review," the most deferential standard. "Under strict scrutiny, the state must establish that is has a compelling interest that justifies and necessitates the law in question." *Strict Scrutiny*, BLACK'S LAW DICTIONARY (10th ed. 2014). "Under 'exacting' scrutiny . . . a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms,'" that applies outside of the commercial sphere. *Janus*, 138 S. Ct. at 2465 (internal citations omitted). Finally, under minimum scrutiny, "the [C]ourt will uphold a law if it bears a reasonable relationship to the attainment of a legitimate governmental objective." *Rational-Basis Test*, BLACK'S LAW DICTIONARY (10th ed. 2014).

166. *Janus*, 138 S. Ct. at 2465. The majority quickly dismissed the dissent's argument that the justifications for *Abood* should be considered under the minimum scrutiny standard, stating that it was "foreign to . . . free speech jurisprudence." *Id.*

167. *Id.*

168. *Id.* at 2465-69.

169. The *Abood* Court defined "labor peace" as, the "avoidance of the conflict and disruption that . . . would occur if the employees in a [bargaining] unit were represented by more than one union." *Id.* at 2465 (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 220-21 (1977)).

170. *Id.* at 2466.

171. *Id.*

with such group.[172] Accordingly, the majority dismissed both arguments.[173]

The majority then considered two main alternative justifications presented by the Union and its *amici curiae*. First it considered an originalist argument—whether *Abood* was correctly decided because the "First Amendment was not originally understood to provide *any* protection for the free speech rights of public employees."[174] Next, it considered whether other precedent controlled—specifically, whether *Abood* is based on *Pickering v. Board of Education*.[175]

The majority dispensed with the originalist argument with little consideration, noting that it ultimately would result in no free speech rights of public employees, a consequence the Union could not have intended.[176] Further, it recognized and considered that this would render countless precedents meaningless, in direct opposition to the principles of *stare decisis*.[177] Therefore, the majority found the originalist argument unpersuasive.[178]

Next, the majority turned to the justification that *Abood* was based on *Pickering*. However, it quickly responded that it was not.[179] The majority pointed out that *Abood's* slight reference of *Pickering*—an acknowledgement in a footnote—did not have any bearing on the issue.[180] For this reason, the majority viewed this justification as an unwarranted attempt to fit *Abood* into the *Pickering* framework.[181] Nonetheless, assuming arguendo that *Abood* did fit within *Pickering's* framework, the majority analyzed it as such.[182] Indeed, it determined that *Abood* would still not survive.[183]

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172. *Id.* (citing Knox v. SEIU, Local 1000, 567 U.S. 298, 311 (2012)). Justice Alito supported this conclusion with a hypothetical. The Justice compared a union's situation to that of a lobbyist group advocating for senior citizens, veterans, or another group of the like. In his view, although these types of groups advocate for the benefit of individuals in no way affiliated with their organization, their advocacy does not grant them a right to compel those who may directly or indirectly benefit to pay for such speech. *Id.* at 2466-67.

173. *Id.* at 2469.

174. *Id.*

175. *Id.* at 2471 (citing Pickering v. Bd. of Educ., 391 U.S. 563 (1968)).

176. *Id.* at 2469-71.

177. *Id.* at 2469-70.

178. *Id.* at 2470-71.

179. *Id.* at 2471-72.

180. *Id.* at 2472.

181. *Id.*

182. *Id.*

183. *Id.* Under the *Pickering* framework, the majority first considered (1) whether the present speech should be treated as speech "pursuant to [an employee's] official duties," (2) "whether the speech is on a matter of public or only private concern," and (3) "whether the State's proffered interests justify the heavy burden that agency fees inflict on nonmembers' First Amendment interests." *Id.* at 2474-77.

Notably, within its *Pickering* analysis, the majority believed that fair-share fee agreements did not constitute speech pursuant to an employee's official duties—which was the case in *Garcetti*, discussed *supra*—because a contrary holding would distort the reality of collective bargaining.[184] In differentiating *Garcetti*, it noted that a union member or a nonmember's speech in his or her capacity as a member or nonmember of the union is substantially different from that of regular employees, because when a member or nonmember speaks in his or her regular capacity they speak for the employees, rather than for the employer.[185] In the majority's view, this distinction removed the current speech from consideration under *Garcetti's* standard, meaning that the present speech should not be treated as "pursuant to [an employee's] official duties."[186]

Additionally, the majority opined that union speech in collective bargaining addresses many other important matters of public concern—such as education, child welfare, healthcare, and minority rights—because the topics of collective bargaining inherently seek to answer policy questions about such.[187] Therefore, the majority determined that speech made pursuant to collective bargaining "overwhelmingly" consists of "substantial" matters of public concern, warranting First Amendment protection.[188]

With all of this considered, the majority concluded that *Abood* was improperly decided. Yet it did not simply end its analysis. Rather, it went on to consider whether the principles of *stare decisis* counseled against overruling the longstanding precedent.[189] At the outset of this analysis, the majority noted that the doctrine is at its weakest in the context of constitutional rights.[190] Specifically, it opined that *stare decisis* should apply with perhaps the least amount of force to decisions which wrongly denied First Amendment rights, stating that: "This Court has not hesitated to overrule

184. *Id.* at 2474.
185. *Id.*
186. *Id.* (quoting Garcetti v. Ceballos, 547 U.S. 410, 421 (2006)).
187. *Id.* at 2475-76 ("Take the example of education . . . [t]he public importance of subsidized union speech is especially apparent in this field, since educators make up by far the largest category of state and local government employees, and education is typically the largest component of state and local government expenditures. Speech in this area also touches on fundamental questions of education policy. Should teacher pay be based on seniority, the better to retain experienced teachers? Or should schools adopt merit-pay systems to encourage teachers to get the best results out of their students?").
188. *Id.* at 2477.
189. *Id.* at 2478.
190. *Id.* (citing Agostini v. Felton, 521 U.S. 203, 235 (1997)).

decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)."[191] Ultimately, after considering the different factors to be taken into account under the doctrine, the majority held that *stare decisis* did not counsel against overruling *Abood*.[192]

Justice Alito concluded the roughly twenty-six-page majority opinion by succinctly stating that *Abood* was poorly decided and, therefore, overruled.[193] Accordingly, the majority held that "[s]tates and public-sector unions may no longer extract [fair-share] fees from nonconsenting employees."[194] Thus, neither a fair-share fee "nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay."[195]

4. *Dissenting Opinion*

Authoring the dissent,[196] Justice Elena Kagan's displeasure with the majority's ruling is immediately apparent.[197] In her opening, Justice Kagan comments that "the Court succeed[ed] in its 6-year campaign to reverse *Abood*," noting Justice Alito's prior "anomaly" comments in *Knox* and *Harris*.[198] In a rare and animated dissent, Justice Kagan continued to outline every way the majority went wrong.

At the forefront, the dissent saw nothing "questionable" about *Abood's* analysis. It viewed the free-rider justification to be a substantial concern, quoting the late Justice Scalia, who himself recognized that prohibiting unions from collecting fair-share fees effectively requires it to carry—"to *go out of its way* to benefit [them],

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191. *Id.* at 2478 (quoting Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in judgment) (internal quotation marks omitted)) (omitting case examples).

192. *Id.* at 2486 ("All these reasons—that *Abood's* proponents have abandoned its reasoning, that the precedent has proved unworkable, that it conflicts with other First Amendment decisions, and that subsequent developments have eroded its underpinnings—provide the 'special justification[s]' for overruling *Abood*." (citing *id.* at 2497 (Kagan, J., dissenting) (quoting Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2409 (2015)))).

193. *Id.* (reversing the judgment of the Court of Appeals for the Seventh Circuit and remanding the case for further proceedings consistent with its opinion).

194. *Id.*

195. *Id.*

196. Justice Ginsburg, Justice Breyer, and Justice Sotomayor joined in Justice Kagan's dissent. *Id.* at 2487 (Kagan, J., dissenting). All four justices joining the minority were elected by Democratic presidents. Sweet & Seidel, *supra* note 142.

197. *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting).

198. *Id.* (citing Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016) (per curiam); Harris v. Quinn, 134 S. Ct. 2618 (2014); Knox v. SEIU, Local 1000, 567 U.S. 298 (2012)).

even at the expense of its other interests"—nonmember free-riders.[199] In the dissent's view, the state had a compelling interest to avoid this problem, justifying any slight infringement that fair-share fees may have imposed.[200]

Additionally, the dissent severely disapproved of the majority's disregard for the principles of *stare decisis*.[201] In the dissent's view, even if *Abood* was wrong, the principles of *stare decisis* "demand[ed] a 'special justification—over and above the belief that the precedent was wrongly decided.'"[202] The dissent found no such special justification in the present case. Ultimately, the dissent seemingly categorized the majority's attempt to curtail the principles of *stare decisis* to fit its reasoning as laughable, stating it "barely limps to the finish line."[203]

The dissent concluded by continuing this severe criticism, more than implying that the majority's analysis was a partisan decision, made to pick the "winning side in . . . an energetic policy debate."[204] However, what was "most alarming" in the dissent's view, was how the majority chose the case's "winners" by effectively "turning the First Amendment into a sword, and using it against workaday economic and regulatory policy."[205] The dissent further warned that this was not the first time, nor would it likely be the last that the conservative majority had done so.[206] Effectively, Justice Kagan viewed the majority's decision as "weaponizing the First Amendment in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."[207]

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199. *Id.* at 2490 (quoting Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 556 (1991)).

200. *Id.* at 2490-91.

201. *Id.* at 2497 ("But the worse [sic] part of today's opinion is where the majority subverts all known principles of *stare decisis*.").

202. *Id.* (quoting Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2409 (2015)).

203. *Id.* at 2501 ("The standard factors this Court considers when deciding to overrule a decision all cut one way. *Abood's* legal underpinnings have not eroded over time: *Abood* is now, as it was when issued, consistent with this Court's First Amendment law. *Abood* provided a workable standard for courts to apply. And *Abood* has generated enormous reliance interests. The majority has overruled *Abood* for no exceptional or special reason, but because it never liked the decision. It has overruled *Abood* because it wanted to.").

204. *Id.* ("Americans have debated the pros and cons for many decades—in large part, by deciding whether to use fair-share arrangements. Yesterday, 22 States were on one side, 28 on the other (ignoring a couple of in-betweenness). Today, that healthy—that democratic—debate ends. The majority has adjudged who should prevail.").

205. *Id.*

206. *Id.* at 2501-02 ("Today is not the first time the Court has wielded the First Amendment in such an aggressive way. *See, e.g.*, Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) (invalidating a law requiring medical and counseling facilities to provide relevant information to users); Sorrell v. IMS Health Inc., 564 U.S. 552 (2011) (striking down a law that restricted pharmacies from selling various data).").

207. *Id.* at 2501.

III. ANALYSIS

A. Defining the "Weaponization of the First Amendment"

The Court sparked much debate following its decision in *Janus*. While the Left criticized the Court's analysis and reasoning, the Right justified the Court's decision, viewing it as a long-time coming.[208] However, both sides agree that *Janus's* ruling is a "blow to [labor] unions."[209]

Much of the criticism understandably comes from the Left, which views "*Janus* [as] an ideological attack on workplace and political democracy."[210] But this criticism amounts to more than just a policy debate decided under a certain ideological view; rather, it rises to the view of an all-out political attack by wealthy corporate interests on the labor movement.[211] A majority of such criticism considers the United States Supreme Court, specifically the conservative majority, as a vital part in such assault, implying that the Court no longer plays the role of an independent judiciary but rather that of an active participant.[212] This is evidenced in a few different ways.

To start, the Court has had a higher tendency to take and decide conservative free speech cases.[213] Statistically, the Roberts Court has heard far more conservative free speech cases than that of its predecessors.[214] Additionally, the Roberts Court has also decided in favor of conservative free speech in those cases more often than it has decided in favor of liberal free speech in such cases.[215] These statistics seemingly speak for themselves; the Court has been more willing to decide in favor of its majority's political ideology.

This trend undoubtedly substantiates the Court's natural willingness to hear *Janus* in the first place, as it concerned conservative speech—animus towards the labor movement. However, Justice Alito's "anomaly" statements likely played a significant role in light

208. *See generally* Jordan Muller, *Here's Why the Supreme Court's "Right-to-Work" Ruling Is a Win for Conservatives*, OPENSECRETS.ORG (June 27, 2018, 10:03 AM), https://www.opensecrets.org/news/2018/06/janus-vs-afscme-ruling-impact-conservatives/; Fisk, *supra* note 100.

209. Sweet & Seidel, *supra* note 142.

210. Fisk, *supra* note 100.

211. Spielman et al., *supra* note 20.

212. Fisk, *supra* note 100.

213. Specifically, it has taken a 65% share of free speech cases concerning conservative speech, which is a 23% increase from the Rehnquist Court and a 57% increase from the Warren Court. Liptak, *supra* note 12.

214. *Id.*

215. The Roberts Court has ruled in favor of conservative free speech in 69% of such cases it has taken, while only ruling in favor of liberal speech in 21% of such cases. *Id.*

of this trend.[216] Anti-union organizations certainly embraced this message with open arms, as they had "picked at the seams of *Abood* for decades in an attempt to weaken the ability of unions to collect fair-share fees."[217] Indeed, such challenges gained a new momentum in light of the increasingly corporate-friendly United States Supreme Court,[218] prompting the eventual challenges to *Abood's* constitutionality by the corporate-backed plaintiffs of both *Friedrichs* and *Janus*.[219] Thus, the corporate-friendly feel of the United States Supreme Court, supplemented by the deep pockets of corporate interests, created the perfect storm for *Janus* to be brought, heard, and overruled. Yet these statistics alone are not necessarily proof that the conservative majority on the Court has used the First Amendment to its advantage. Nonetheless, other recent trends, or the lack thereof, regarding the Court's stance on free speech seemingly offer additional proof.

First, the Court has not only broadened free speech rights when necessary to serve conservative speech but has also narrowed free speech rights when necessary to do so.[220] Indeed, the Court has lacked a sense of consistency in applying free speech principles. This lack of consistency evinces an intent to favor conservative free speech, rather than merely a specific ideological stance.[221] Two cases previously discussed—*Garcetti* and *Citizens United*—begin to illustrate this point.[222]

In *Garcetti*, the Court made an unprecedented distinction between the speech of citizens and that of public employees.[223] This distinction effectively narrowed free speech rights and resulted in an enormous loss of rights for millions of public employees.[224] However, in *Citizens United*, the Court overruled long-standing precedent to grant corporations the First Amendment right to spend money in election campaigns.[225] Indeed, this decision expanded free speech protections to favor corporate speech. [226] The stark contrast

216. McNicholas, *supra* note 18.
217. *Id.*
218. Liptak, *supra* note 12.
219. "The plaintiffs in *Harris*, *Friedrichs*, and *Janus* have all been represented by wealthy legal foundations, providing pro bono representation in each of these cases." McNicholas et al., *supra* note 18.
220. CHEMERINSKY, *supra* note 14, at 169.
221. *Id.*
222. *Id.* at 194-98.
223. *Id.* at 195.
224. *Id.* at 194.
225. *Id.* at 197.
226. *Id.* The decision was a drastic change from the Court's view seven years previously under Rehnquist. One easily identifiable change was Court personnel. Justice Alito replaced Justice O'Connor, previously in the majority against *Citizens United's* view of free speech,

between the application of free speech principles in these two cases, made roughly four years apart by the same conservative members on the Court, evince the Court's willingness to construe free speech principles in favor of conservative speech. While these two cases implicated different areas of free speech methodology, this inconsistent application can be seen in other comparable decisions, including *Janus*.

For example, in *Harris*, the Court's application of *Abood* narrowly tailored free speech principles to find fair-share fees unconstitutional against a select group of individuals.[227] Again, *Harris* dealt with what the majority in that case considered a partial-public employee, or employees that were only considered public employees for the sake of collective bargaining.[228] Thus, while these employees were indeed covered under the collective bargaining contract and declared public employees by Illinois law, the majority distinguished them nonetheless, removing them from consideration under the controlling precedent of *Abood*.[229] This distinction was enough for the majority to refrain from, as it considered, substantially expanding *Abood's* holding to govern the present case.[230] However, such distinction truly should not have made a difference in *Abood's* application.[231] Ultimately, the conservative majority again narrowed free speech principles, limiting *Abood*'s application in pursuit of finding fair-share fees unconstitutional.[232]

Further, the majority's decision in *Janus* seemingly narrows free speech as well; however, it does so through the use of its holdings in *Pickering* and *Garcetti*.[233] First, the majority quickly dismisses any application of the *Pickering* framework to *Abood*,[234] choosing to strictly apply its analysis without regard to the general principles that may be derived and applied in the case at bar.[235] Specifically, in the public employment context, the government has a much freer hand in regulating its employees' speech, as opposed to the general public.[236] In the employment realm, the government's managerial

and effectively tipped the balance of the Court in favor of overturning the prior precedent. *Id.*

227. Harris v. Quinn, 134 S. Ct. 2618, 2634 (2014).

228. *Id.* at 2625, 2634.

229. *Id.* at 2634.

230. *Id.*

231. *Id.* at 2646 (Kagan, J., dissenting).

232. *See generally id.* at 2645-58 (explaining how the conservative majority distinguished the factual circumstances to remove the case from the controlling precedent of *Abood*, while remaining reluctant to overrule the precedent).

233. *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2471-78 (2018).

234. *Id.* at 2472.

235. *Id.* at 2494 (Kagan, J., dissenting).

236. *Id.* at 2492.

interest—the need to run the government as effectively and efficiently as possible—necessitates its need to manage its workforce as it sees fit. Thus, public employees submit to certain limitations on their speech by the very nature of their employment.[237] A proper balance must, therefore, be achieved when public employees' expressive rights are at issue, between employee speech rights and the government's managerial prerogative.[238] The Court has long utilized *Pickering* in striking such balance.[239] Nonetheless, the majority takes a strict and narrow view of *Pickering's* application, ignoring that both *Pickering* and *Abood* utilize this underlying principle.[240]

Further, although the majority argued that *Garcetti's* principles did not apply,[241] *Garcetti* held that if an employee's speech is made pursuant to his or her employment duties, it is largely unprotected.[242] Accordingly, under *Garcetti*, if an employee speaks on a workplace matter, he or she has no opportunity to bring a First Amendment claim.[243] While the dissent recognized this underlying principle of *Garcetti*—that speech in the scope of employment is unprotected until it extends into the public realm[244]—the majority further narrowed its application in *Janus*, restricting it to only when an employee speaks pursuant to his or her official duties or otherwise speaks as his or her employer.[245] Thus, the majority's reasoning in *Janus* must be looked at in one of two different ways in regard to *Garcetti*: (1) the majority narrowed *Garcetti's* holding further, removing its application from the current case, or (2) the majority narrowly decided *Janus*, carving out a "unions only" exception.[246] Otherwise, the two opinions contradict.

To express this contradiction, take the underlying complaint in *Garcetti*. Ceballos's speech claim stemmed from a memorandum written to his supervisors expressing his concerns regarding an employment matter.[247] In determining whether Ceballos's speech was protected, the dispositive factor was not that his speech was made

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237. *Id.* at 2492.
238. *Id.* at 2493.
239. *Id.*
240. *Id.* ("Like *Pickering*, *Abood* drew the constitutional line by analyzing the connection between the government's managerial interests and different kinds of expression.").
241. *Id.* at 2474 (majority opinion).
242. *Id.* at 2471 (citing Garcetti v. Ceballos, 547 U.S. 410, 421-22 (2006)).
243. *Id.* at 2492 (Kagan, J., dissenting).
244. *Garcetti*, 547 U.S. at 436 (Stevens, J., dissenting).
245. *Janus*, 138 S. Ct. at 2474.
246. *Id.* at 2496 (Kagan, J., dissenting).
247. *Garcetti*, 547 U.S. at 414.

at work or about his employment—although those factors are significant—but rather that his speech was made *pursuant to* his duties as a public employee.[248] The speech was about and directed to the workplace, rather than the broader public square.[249] This is the critical question. Accordingly, had Ceballos directed his memorandum to the local news outlet, rather than his supervisor, his speech would be protected.[250] Consider a similar situation in which a public employee is subpoenaed to testify in court as to the criminal acts of his supervisor. In that situation, the employee speaks not as a public employee—although his speech undoubtedly arises out of his employment relationship—but rather as a private citizen because the speech is not made within the ordinary scope of an employee's duties, regardless of whether the speech concerns such duties.[251]

Accordingly, when it comes to the type of speech at issue in *Abood* and *Janus*, it should be seen as speech made within the ordinary scope of an employee's duties. As the dissent points out, the "essential stuff" of collective bargaining should be given the same treatment.[252] While individualized cases are easily distinguished, speech that owes itself to the collective bargaining process should be treated in the same manner because such speech is truly of the workplace or occurs because of the employment relationship. It is speech addressed to the workplace, made in the workplace, and (most of all) about the workplace.[253] This is the important question.

Nonetheless, the majority equated such speech as being directed to the public sphere because of potential budgetary consequences in one portion of its analysis.[254] It further qualified the union's speech on behalf of employees as speech made for the employees, not the employer, in another. Both views take the speech at issue out of *Garcetti's* control, causing the speech to fail at either the first or second step of the *Pickering* analysis. Thus, *Janus* can be viewed as narrowing *Garcetti's* reach by requiring speech made pursuant to one's employment duties to be speech made on behalf of his or her employer, or as a limited decision, expressing a union's only exception in which the very nature of collective bargaining justifies excluding this speech from protection. The contrast between *Janus*

248. *Id.* at 421.
249. *Janus*, 138 S. Ct. at 2471.
250. *See Garcetti*, 547 U.S. at 423-24.
251. *See* Lane v. Franks, 573 U.S. 228, 239-40 (2014).
252. *Janus*, 138 S. Ct. at 2494-96 (Kagan, J., dissenting).
253. *Id.* at 2495.
254. *Id.* at 2495-96.

and *Garcetti*—and consequently *Pickering*—again evinces the conservative majority's willingness to limit free speech principles when it serves their agenda to do so.[255]

Finally, the conservative majority on the Court again broadened free speech protections in *Becerra*.[256] The dissent in *Becerra* makes clear that the case's majority extended sound First Amendment principles far beyond the limits it should have.[257] Indeed, the majority applied such goals as "the need to protect the Nation from laws that 'suppress unpopular ideas or information' or inhibit the 'marketplace of ideas in which truth will ultimately prevail[,]'" beyond its own careful examination of how such goals should be fulfilled.[258] Ultimately, the dissent condemned the majority's broad use of the First Amendment to "strike down economic and social laws that legislatures long would have thought themselves free to enact."[259] In short, each of these cases discussed evidences that the conservative Court has curtailed First Amendment principles to produce a specific outcome in line with the ideologies of the Right.[260]

Notable in Justice Kagan's dissent were both the majority's decision of First Amendment principles and its utter disregard for all known principles of *stare decisis*. "Stare decisis has a long pedigree in the American legal tradition."[261] Often emphasized by the Court, *stare decisis* plays a critical role in ensuring that legal rules remain consistent and stable under the constant pressures of changing times and circumstances.[262] Indeed, Justice Kagan herself stresses that "[d]epartures from *stare decisis* are supposed to be 'exceptional action[s]' demanding 'special justification.'"[263] "Tellingly, in a substantial majority of cases over the past 50 years in which a constitutional precedent has been overturned, the [C]ourt has been unanimous or nearly unanimous, with two or fewer justices in dissent."[264] It follows that unanimity is seen as a reflection of the Court's decision being "founded in law rather than the proclivities of individuals" and its integrity as the independent judiciary.[265]

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255. CHEMERINSKY, *supra* note 14, at 197.
256. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).
257. *Id.* at 2382 (Breyer, J., dissenting).
258. *Id.*
259. *Id.* at 2383.
260. CHEMERINSKY, *supra* note 14, at 194.
261. Michael Kimberly, *Symposium: The Importance of Respecting Precedent*, SCOTUSBLOG (Dec. 20, 2017, 2:57 PM), http://www.scotusblog.com/2017/12/symposium-importance-respecting-precedent/.
262. *Id.*
263. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).
264. Kimberly, *supra* note 261.
265. *Id.* (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986)).

Accordingly, overruling long-standing constitutional precedent, as the majority does in *Janus*, by a strongly divided Court "raises doubts . . . about whether it is principles or politics that underlie the [C]ourt's decisions."[266] Justice Kagan implied the latter when she stated that the conservative majority accomplished such ideological goals "by weaponizing the First Amendment," in *Janus*.[267] She further warned that *Janus* had not been the first of such improper action, nor will it be the last.[268]

Such a warning seemingly stems not only from the trend of caselaw Justice Kagan refers to, but also from a potentially overlooked statement from the majority.[269] One justification for the majority's departure from *stare decisis* is that the doctrine is "at its weakest" in interpreting constitutional provisions, implying that constitutional rights themselves warrant the special justification Justice Kagan's dissent considers lacking.[270] The Court goes on to clarify that "*stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights."[271] On its face, this statement seems warranted to an extent. However, its potential use is exactly what the dissent warns of.

One of the dissent's many criticisms of the Court helps to illustrate this statement's potential. Justice Kagan criticized the majority, stating: "[d]on't like a decision? Just throw some gratuitous criticisms into a couple of opinions and a few years later point to them as 'special justifications.'"[272] She was, of course, referring to Justice Alito's comments in *Knox* and *Harris*, stating that *Janus* was somewhat of an anomaly.[273] The majority, written by Justice Alito, relied on such comments, also written by Justice Alito, in justifying its decision to overturn *Abood*.[274] The conflict with this situation is blatantly obvious.

In fact, the majority's analysis of *Abood's* constitutionality begins with a recap of the Justice's past criticism.[275] Justice Alito opens by saying:

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266. *Id.*
267. *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting).
268. *Id.*
269. *Id.* at 2501-02.
270. *Id.* at 2478 (majority opinion) (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997)).
271. *Id.*
272. *Id.* at 2498 (Kagan, J., dissenting).
273. Knox v. SEIU, Local 1000, 132 S. Ct. 2277, 2290 (2012); Harris v. Quinn, 134 S. Ct. 2618, 2627 (2014).
274. *Janus*, 138 S. Ct. at 2463.
275. *Id.* at 2463.

> In *Abood*, the Court upheld the constitutionality of an agency-shop arrangement like the one now before us, but in more recent cases we have recognized that this holding is "something of an anomaly," and that *Abood*'s "analysis is questionable on several grounds." We have therefore refused to extend *Abood* to situations where it does not squarely control, while leaving for another day the question whether *Abood* should be overruled.[276]

He sets the stage for *Abood's* reversal as if he is referring to longstanding precedent, rather than his own dicta. Thus, there seems to be an inherent bias in the Justice's reasoning as he ends the campaign to overrule *Abood*, a campaign his words started a few years ago.[277]

If the conservative majority used its own dicta to initiate the assault on *Abood*, what should stop it from using such a statement to overrule precedent in favor of conservative speech in the future? While this may be speculation, the recent trend of the Court certainly does not foreclose the argument, just as the dissent suggests.

B. Potential Implications of Janus *and the First Amendment*

Along with her issued warning at the end of her nearly fifteen-page dissent, Justice Kagan references that speech is everywhere, a part of every human activity, such as employment, health care, and securities trading, among other things.[278] As such, the conservative majority's use of the First Amendment seemingly has no end because all economic or regulatory policies that touch such speech are seemingly put in the cross hairs after the *Janus's* ruling.[279]

Consider the minimum wage for example. The federal minimum wage rests at $7.25 per hour as set by the Fair Labor Standards Act.[280] As the "fight for $15," currently continues across America, successful First Amendment challenges, backed by similarly-sponsored corporate-backed organizations, to a state's minimum wage laws may be forthcoming.[281] Indeed, such claims have already

276. *Id.* (internal citations omitted).
277. *Id.* at 2498 (Kagan, J., dissenting) ("Dicta in those recent decisions indeed began the assault on *Abood* that has culminated today.").
278. *Id.* at 2501-02.
279. *Id.*
280. 29 U.S.C. § 206 (2012, Supp. I, Supp. II, Supp. III, Supp. IV & Supp. V).
281. *See generally* Braden Campbell, *Wages up $61.5B for 19M Through Fight for $15, Report Says*, LAW360 (Nov. 30, 2016), https://www.law360.com/articles/867320/wages-up-61-

made their way to the courtroom but to no avail at this point.[282] The laws were viewed as purely economic regulations with the only impingement upon one's First Amendment rights being insufficient to trigger scrutiny.[283]

However, the minimum wage is another energetic policy debate.[284] While federal law sets the baseline, each state is free to enact a higher rate. Further, cities may enact local ordinances raising the minimum wage above the federal limit.[285] Nonetheless, employers are ultimately able to set the hourly wages for their employees greater than or equal to this set minimum wage. Generally, employers set these wages according to an employee's value, or what that employee's labor is "worth." However, what exactly one's labor is worth or how that worth is to be determined is one issue at the core of the minimum wage debate.[286] Thus, where a state or local ordinance has enacted a drastic increase to the minimum wage, most employers will be required by law to pay their employees more than they generally view their work to be worth.

Accordingly, in line with the *Janus* majority, such a drastic increase may be argued as compelling employers to overvalue the work of their employee's labor. This is especially true in light of the heated policy debate. If a similar argument is accepted, it may be enough to thrust a minimum wage law from being generally seen as a purely economic regulation, to being seen as implicating one's First Amendment rights to the point of triggering some level of scrutiny. As Justice Kagan's dissent makes clear, such a challenge is not out of the purview of the conservative majority.[287]

5b-for-19m-through-fight-for-15-report-says (describing the worker advocacy campaign, comprised of a majority of fast-food restaurant chain employees, to increase the minimum wage for workers).

282. *See* Int'l Franchise Ass'n, Inc. v. City of Seattle, 97 F. Supp. 3d 1256 (W.D. Wash. 2015), *aff'd in relevant part*, 803 F.3d 389 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1838 (2016).

283. *See Int'l Franchise Ass'n, Inc.*, 803 F.3d at 408.

284. *See generally* Alison Doyle, *Pros and Cons of Raising the Minimum Wage*, BALANCE CAREERS, https://www.thebalancecareers.com/pros-and-cons-of-raising-the-minimum-wage-2062521 (last updated July 15, 2019).

285. Erica Bergmann, Note, *Three out of Four Economists Recommend Raising the Minimum Wage! A Closer Look at the Debate Surrounding Seattle's Minimum Wage Ordinance*, 39 SEATTLE U. L. REV. 593, 594.

286. *See generally* Jenn Brown, *Trying to Understand the Value of Work: Why Do We Pay So Little for Labor that We Depend on So Much?*, NOTEWORTHY—THE J. BLOG (May 30, 2019), https://blog.usejournal.com/trying-to-understand-the-value-of-work-why-do-we-pay-so-little-for-labor-that-we-depend-on-so-9b760a53d33d.

287. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2501-02 (2018) (Kagan, J., dissenting).

IV. CONCLUSION

In short, it is no secret that the liberal-conservative divide over free speech has intensified over the past few decades. This divide is significantly present on the conservative side of the Court, as recent case law evidences the conservative majority's use of the First Amendment as an outcome-oriented tool to achieve a certain agenda. It is this use of free speech principles that makes Justice Kagan's dissenting remarks correct, that truly today's Court has gone further than its predecessors and effectively weaponized the First Amendment. While its fate is still fairly unknown, there is certainly some truth behind Justice Kagan's warning that the conservative majority's road runs long. Indeed, the First Amendment was meant for better things.

Justice Hasted Is Justice Wasted: *League of Women Voters v. Commonwealth*

Carrie R. Garrison[*]

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I. INTRODUCTION

"[T]he way of progress is neither swift nor easy . . . ."[1] The Pennsylvania Supreme Court's near groundbreaking decision in *League of Women Voters of Pennsylvania v. Commonwealth*[2] marked another case where the Pennsylvania Constitution gave its citizens vastly broader rights than that of the United States Constitution.[3] Indeed, the Court correctly decided that a perfectly gerrymandered congressional districting map was a clear, plain, and palpable violation of the state constitution.[4] However, the haste underlying the entirety of the decision limited the impact of the case.[5]

Almost every aspect of the decision was the product of impatience.[6] First, the Pennsylvania Supreme Court exercised extraordinary jurisdiction[7] over the case, refusing to wait for the United States Supreme Court's guidance in *Gill v. Whitford*.[8] Then, the Court ordered the Pennsylvania Commonwealth Court[9] to complete fact-finding in a mere fifty-three days.[10] Lastly, in issuing its remedy, the Court anticipated the legislative and executive branches' unwillingness to redraw the state congressional districts[11] and dictated that, in such circumstances, the Court itself "would fashion a

1. Marie Curie, *Secret Studies in Warsaw*, AM. INST. PHYSICS, https://history.aip.org/exhibits/curie/brief/06_quotes/quotes_03.html (last visited Jan. 20, 2019).

2. 178 A.3d 737, 740 (Pa. 2018).

3. *See, e.g.*, Commonwealth v. Matos, 672 A.2d 769, 776 (Pa. 1996) (finding rights afforded by the United States Constitution to be inconsistent with the constitutional protections under the Pennsylvania Constitution); Commonwealth v. Edmunds, 586 A.2d 887, 888 (Pa. 1991) (reversing a conviction because under the Pennsylvania Constitution there is no "good faith" exception to the exclusionary rule).

4. *League of Women Voters of Pa.*, 178 A.3d at 824-25.

5. *See* Bruce Ledewitz, *A Lost Opportunity to Reach a Consensus on Gerrymandering*, JURIST (Feb. 13, 2018, 1:26 PM), https://www.jurist.org/commentary/2018/02/pennsylvania-gerrymandering-bruce-ledewitz/ (noting Chief Justice Saylor's vote on the majority would have instigated a "candid national conversation about gerrymandering").

6. *Id.* (explaining the Court's exigency played a role in the chief justice's decision to dissent).

7. 42 PA. CONS. STAT. § 726 (2015) (noting the Pennsylvania "Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or magisterial district judge of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done").

8. 138 S. Ct. 1916, 1923 (2018) (considering a Wisconsin state legislative redistricting plan favoring Republican voters).

9. *Pennsylvania Court Structure*, PENNSYLVANIANS FOR MOD. CTS., https://www.pmconline.org/resources/pennsylvania-court-structure (last visited Jan. 22, 2020) (explaining the Pennsylvania Supreme Court exercises authority over "all other courts").

10. League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 767 (Pa. 2018).

11. *Id.* at 821.

judicial remedial plan."[12] Justifying its actions by use of the "imminent[ly] approaching primary elections,"[13] and distinguishable precedent from 1966, where the Court gave the legislature *nearly a year to redraw the map*,[14] the Court ordered the legislature to do an impossible task: redraw the congressional district map in *only three weeks*.[15] As the Court expected, the legislature could not meet this deadline and the Court redrew the map itself.[16]

The haste of this decision sets dangerous precedent as it endorses blatant separation of powers violations[17] and manifests the state judiciary's charge into the political thicket.[18] Moreover, the case sets ambiguous precedent as the Court provided only a "floor" of neutral criteria that must be met for such a map to pass constitutional muster.[19] This "floor" provided no "ceiling" to the state legislature which it could use as guidance in redrawing the map.[20]

This article will first lay out the background of important foundational concepts. Then, it will go on to explain the majority and dissenting opinions of the Pennsylvania Supreme Court's decision in *League of Women Voters of Pennsylvania*.[21] Finally, it will explain why the haste of the Court was apparent in almost every aspect of this case. From the grant of extraordinary jurisdiction and accelerated fact-finding to the ultimate decision to redraw the map, it is clear that judicial restraint in this inherently political area would have averted most of the controversial aspects of this decision.[22]

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12. *Id.*

13. *Id.* at 822; *see also id.* at 791 (noting the primary elections were scheduled for May 15, 2018).

14. Butcher v. Bloom, 216 A.2d 457, 458-59 (Pa. 1966) [Butcher Order].

15. League of Women Voters of Pa. v. Commonwealth, 175 A.3d 282, 284 (Pa. 2018) [League of Women Voters Order].

16. *League of Women Voters of Pa.*, 178 A.3d at 823.

17. Brooke Erin Moore, Comment, *Opening the Door to Single Government: The 2002 Maryland Redistricting Decision Gives the Courts Too Much Power in an Historically Political Arena*, 33 U. BALT. L. REV. 123, 124 (2003).

18. *League of Women Voters of Pa.*, 178 A.3d at 831 (Saylor, J., dissenting) (noting the inherently political nature of redistricting).

19. *Id.* at 817 (majority opinion).

20. *Id.* (noting these neutral criteria are "not the exclusive means by which a violation of Article I, Section 5 may be established"); *see also Who Draws the Maps? Legislative and Congressional Redistricting*, BRENNAN CTR. FOR JUST. (Jan. 30, 2019), https://www.brennancenter.org/our-work/research-reports/who-draws-maps-legislative-and-congressional-redistricting (noting this information is current as of December 2018).

21. *League of Women Voters of Pa.*, 178 A.3d at 740.

22. *Id.* at 834 (Saylor, J., dissenting) (noting that had the "process [been] an ordinary deliberative one," he would have been more inclined to agree with the majority opinion).

II. BACKGROUND INFORMATION

A. *What Is Gerrymandering and Why Is It Political?*

The word "gerrymander" is both a noun and a verb and is derived from the name "Elbridge Gerry," a former governor of Massachusetts, and the word "salamander," which describes the shape of an election district formed during Gerry's time in office.[23] The word carries with it a distinct political meaning: "to divide or arrange (an area) into *political units* to give *special advantages* to one group."[24] In theory, one would expect that districts would be drawn to reflect the distributions of populations, but in practice this process reflects the ideals of the party in charge, thus making it an inherently political process.[25] Indeed, "[b]y its definition, gerrymandering is manipulating district boundaries for political gain of one political party or another."[26] Parties use techniques such as "cracking" and "packing," which ultimately dilute an opposing party's vote by spreading out their supporters among various districts, which they will narrowly lose, or concentrating them into districts, which they will overwhelmingly win, thereby "wasting" the opposing party's votes.[27] In fact, many scholars describe the process of redistricting as a "bloodsport of politics,"[28] or an opportunity for "political players [to] game the system."[29]

B. *The Difference Between Reapportionment and Redistricting*

The terms reapportionment and redistricting are often confused. "Reapportionment is the process of deciding how many seats a state will have in the U.S. House of Representatives when its population

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23. *Gerrymander*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/gerrymander (last visited Jan. 18, 2019).
24. *Id.* (emphasis added).
25. *League of Women Voters of Pa.*, 178 A.3d at 831 (Saylor, J. dissenting) (finding redistricting to have an inherently political character).
26. C.E. Clark, *Gerrymandering and Reapportionment: An Explanation of Both and How They Work*, OWLCATION, https://owlcation.com/social-sciences/Gerrymandering-and-Reapportionment-An-Explanation-of-Both-and-How-They-Work (last updated Aug. 21, 2019).
27. *'Cracking and Packing': Tame the Gerrymander*, BALT. SUN (Oct. 3, 2017, 12:45 PM), https://www.baltimoresun.com/news/opinion/editorial/bs-ed-1004-wisconsin-gerrmander-20171003-story.html.
28. T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 588 (1993).
29. Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1833 (2012).

changes."[30] The act of reapportionment determines how many of the 435 seats each state receives.[31] After this is done, redistricting takes place, which is the subject of this article.[32] Redistricting involves "drawing maps that divide each jurisdiction into sections (districts) of voters."[33] This is the process by which new congressional and state legislative districts are drawn.[34]

C. Congressional v. State Redistricting

There are two distinct types of redistricting: congressional and state legislative.[35] The former is the subject of this article. In thirty-seven states, including Pennsylvania,[36] congressional redistricting is the duty of state legislatures.[37] In four states, independent commissions create the congressional districts.[38] In two states, political commissions draw these lines, and in the remaining seven states, congressional redistricting is unnecessary because these states contain only one congressional district each.[39]

State legislative districts are also drawn by differing actors depending on the state.[40] In thirty-seven states, the state legislature draws these districts.[41] In six states, independent commissions draw the lines.[42] In the remaining seven states, including Pennsylvania, political commissions are in charge of creating the state legislative districts.[43] Political commissions vary from state to state but are often comprised of elected officials or incumbent law makers.[44]

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30. PUB. AFFAIRS RESEARCH COUNCIL OF LA., REAPPORTIONMENT & REDISTRICTING: UNDERSTANDING THEIR IMPACT IN LOUISIANA 1-2 (2011), https://www.nfoic.org/sites/default/files/Redistricting-Fact-Sheet.pdf.
31. Clark, *supra* note 26.
32. *See* League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 742 (Pa. 2018).
33. PUB. AFFAIRS RESEARCH COUNCIL OF LA., *supra* note 30, at 2.
34. *League of Women Voters of Pa.*, 178 A.3d at 741.
35. PUB. AFFAIRS RESEARCH COUNCIL OF LA., *supra* note 30, at 1.
36. *Who Draws the Maps? Legislative and Congressional Redistricting*, *supra* note 20.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*

D. *Federal Redistricting Criteria*

When redistricting congressional or state legislative districts, the designated redistricting party must comply with the federal constitutional requirements.[45] These include restraints on population and anti-discrimination.[46] For instance, the "Apportionment Clause of Article 1, Section 2, . . . requires that all districts be as nearly equal in population as practicable."[47] The Voting Rights Act also "prohibits plans that intentionally or inadvertently discriminate on the basis of race, which could dilute the minority vote."[48]

In Pennsylvania, the traditional districting criteria include "population equality; contiguity; compactness; absence of splits within municipalities, unless necessary; and absence of splits within counties, unless necessary."[49] The Pennsylvania Supreme Court used these criteria as an analogy to state legislative districting requirements because the Pennsylvania Constitution was originally interpreted as not providing heightened voter protection.[50] In theory, when drawing the redistricting map, these criteria should be prioritized; however, in practice, the party in charge tries to give itself "a numeric advantage over their opponents" within the bounds of these criteria.[51] This is called partisan gerrymandering.[52]

III. *LEAGUE OF WOMEN VOTERS V. COMMONWEALTH*

The Pennsylvania Supreme Court was divided when it decided that a gerrymandered congressional map, the 2011 Plan,[53] which favored the Republican Party, was a violation of the Pennsylvania Constitution.[54] The majority held that the 2011 Plan violated the

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45. *Redistricting Criteria*, NAT'L CONF. ST. LEGISLATURES (Apr. 23, 2019), http://www.ncsl.org/research/redistricting/redistricting-criteria.aspx.

46. *Id.*

47. *Id.*

48. *Id.*

49. League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 770 (Pa. 2018); *see also* PA. CONST. art. II, § 16.

50. *See* Erfer v. Commonwealth, 794 A.2d 325, 332 (Pa. 2002).

51. Christopher Ingraham, *This Is Actually What America Would Look Like Without Gerrymandering*, WASH. POST (Jan. 13, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/01/13/this-is-actually-what-america-would-look-like-without-gerrymandering/.

52. *Id.*

53. Congressional Redistricting Act of 2011, 25 PA. STAT. AND CONS. STAT. Ann. § 3596.101 (Supp. 2019), *invalidated by* League of Women Voters Order, 175 A.3d 282, 284 (Pa. 2018).

54. League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 825 (Pa. 2018) (showing Justices Donohue, Dougherty, and Wecht joined the majority opinion written by Justice Todd while Justice Baer wrote a concurring and dissenting opinion, Chief Justice Saylor wrote a dissenting opinion, in which Justice Mundy joined, and Justice Mundy wrote a dissenting opinion).

Free and Equal Elections clause of the Pennsylvania Constitution and agreed that, in the legislative and executive branches' failure to act, the Court should redraw the congressional map itself.[55] Two justices, including the chief justice, dissented,[56] primarily noting the rush to overturn the map in time for the "imminent approaching primary elections."[57]

A. The 2011 Plan

The subject of this case, the 2011 Plan, was enacted on December 22, 2011, following the 2010 federal census which reduced Pennsylvania's seats in the House of Representatives from nineteen to eighteen.[58] This triggered the creation of new congressional districts, which were tasked to the Republican General Assembly,[59] members of which were elected in the November 2010 general election.[60] Pennsylvania's congressional districts are drawn by the state legislature and are subject to gubernatorial veto.[61] Thus, the results of the 2010 general election placed the responsibility of drawing the congressional district map in the hands of the Republican majority in the legislature and subject to a Republican governor's veto, that of Tom Corbett.[62] The map began as a bill, originally receiving some Democratic support,[63] and was eventually passed by the Senate and signed into law as Act 131 of 2011.[64]

B. The Claims

In response to the 2011 Plan, Petitioners filed a complaint on June 15, 2017 in the Pennsylvania Commonwealth Court alleging

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55. *See* PA. CONST. art. I, § 5; *see also* Ledewitz, *supra* note 5 (noting the majority's four votes "were cast by . . . Christine Donahue, Kevin Dougherty and David Wecht-joined by holdover Democratic Justice Debra Todd. . . . Max Baer[] concurred in the judgment, dissenting from the timetable set out in the order and on other grounds.").

56. Ledewitz, *supra* note 5 (noting "[t]he Republicans on the Court, Chief Justice Thomas Saylor and Sallie Mundy, both dissented").

57. *League of Women Voters of Pa.*, 178 A.3d at 822.

58. *Id.* at 742 (noting a census is taken every ten years, per U.S. CONST. art. I, § 2, and the census reduced the number of people in the House of Representatives, resulting in a need for the congressional district map to be redrawn).

59. *Id.* at 743.

60. *Id.*

61. *Id.* at 742.

62. *Id.* at 743.

63. *See* Jonathan Lai & Holly Otterbein, *Pa. Gerrymandering's Surprise Co-Conspirators: Democrats,* PHILA. INQUIRER (Apr. 30, 2018), https://www.inquirer.com/philly/news/politics/pennsylvania-congressional-map-republican-gerrymander-democrats-vote-2011-20180430.html.

64. *League of Women Voters of Pa.*, 178 A.3d at 744.

two counts of state constitutional violations.[65] Foreshadowing the haste of the Pennsylvania Supreme Court, the Petitioners brought this challenge right before the 2018 primary elections and after six years of being subject to the map.[66] The Petitioners, the League of Women Voters of Pennsylvania[67] and eighteen registered Democrat voters from each of the congressional districts,[68] brought two counts against respondents: Governor Thomas W. Wolf; Lieutenant Governor Michael J. Stack, III; Secretary Robert Torres; Commissioner Jonathan M. Marks and the General Assembly; Senate President Pro Tempore Joseph B. Scarnati, III; and House Speaker Michael C. Turzai, arguing that the 2011 Plan[69] infringed on their right to vote.[70]

In count one, Petitioners argued the 2011 Plan violated their rights under article I, sections 7 and 20 of the Pennsylvania Constitution, the rights to free expression and association.[71] More specifically, Petitioners alleged the General Assembly created the 2011 Plan by "'expressly and deliberately consider[ing] the political views, voting histories, and party affiliations of Petitioners and other Democratic voters' with the intent to burden and disfavor Petitioners' and other Democratic voters' rights to free expression and association."[72] In count two, the Petitioners alleged the 2011 Plan was an unconstitutional partisan gerrymander, violating equal protection under article I, sections 1, 5, and 26 of the Pennsylvania Constitution.[73] Petitioners alleged the Plan intentionally discriminated against Petitioners and other Democratic voters by using "redistricting to maximize Republican seats in Congress and entrench [those] Republican members in power."[74]

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65. *Id.* at 766.
66. *Id.* at 791 (noting the primary elections were scheduled for May 15, 2018).
67. *See About Us*, LEAGUE OF WOMEN VOTERS, https://www.lwv.org/about-us (last visited Oct. 23, 2018) (noting the national group is a nonpartisan citizens' organization).
68. *League of Women Voters of Pa.*, 178 A.3d at 737, 741 (stating the eighteen registered Democrats were from each state congressional district).
69. Congressional Redistricting Act of 2011, 25 PA. STAT. AND CONS. STAT. ANN. § 3596.101 (Supp. 2019).
70. *League of Women Voters of Pa.*, 178 A.3d at 741-42.
71. *League of Women Voters of Pa.*, 178 A.3d at 765.
72. *Id.* (quoting Petition for Review at ¶ 105, *League of Women Voters of Pa.*, 178 A.3d 737 (No. 159 MM 2017)).
73. *Id.* at 766.
74. *Id.* (quoting Petition for Review at ¶ 116, *League of Women Voters of Pa.*, 178 A.3d 737 (No. 159 MM 2017)).

C. *The Rush of Discovery*

This case involved congressional redistricting, and thus, federal law dictated its base constitutional requirements.[75] The Pennsylvania Supreme Court found, for the first time, that the Pennsylvania Constitution provides heightened requirements for congressional redistricting maps.[76] Before this ruling, the Pennsylvania Supreme Court rejected heightened protection, holding the Pennsylvania Constitution was consistent with federal law in this area.[77] With this precedent in mind, Judge Dan Pellegrini of the Pennsylvania Commonwealth Court granted a stay of proceedings pending the United States Supreme Court's decision in *Gill v. Whitford*,[78] which asked the Court for federal criteria by which to judge congressional districting maps.[79] These criteria were particularly important as, before this time, the United States Supreme Court had stated that partisan gerrymandering claims were justiciable but failed to agree on a clear standard for judicial review.[80]

During this stay, the Petitioners filed an application for extraordinary relief[81] with the Pennsylvania Supreme Court, asking for an exercise of extraordinary jurisdiction over the matter.[82] The Court, in its urgency, granted this petition on November 9, 2017 and assumed plenary jurisdiction over the matter while remanding it to the commonwealth court for discovery.[83] This, however, was done without a formal overruling of *Erfer*, which stated the Pennsylvania Constitution does not provide heightened protection to voters.[84] Moreover, the commonwealth court was given a mere *fifty-three days* to submit findings of fact and conclusions of law to the Pennsylvania Supreme Court.[85] However, it completed this task in *fifty-*

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75. *See* Erfer v. Commonwealth, 794 A.2d 325, 331 (Pa. 2002) (stating that the Pennsylvania Supreme Court's "new view on the justiciability of political gerrymandering claims was predicated on the U.S. Supreme Court's decision in *Davis v. Bandemer*, 478 U.S. 109, 126 (1986)").

76. *League of Women Voters of Pa.*, 178 A.3d at 792-93 (conducting a *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991) analysis, which determines if the Pennsylvania Constitution provides greater protections than the Federal Constitution).

77. *Erfer*, 794 A.2d at 331.

78. Gill v. Whitford, 138 S. Ct. 1916, 1934 (U.S. argued Oct. 3, 2017).

79. *Id.* (remanding Petitioners' claims of partisan gerrymandering to gather evidence of individualized injuries that would demonstrate burden on particular votes).

80. *Bandemer*, 478 U.S. at 127.

81. *Petition for Extraordinary Relief Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/p/petition-for-extraordinary-relief/ (last visited Feb. 7, 2019) (noting a "Petition for Extraordinary Relief can be filed when there is no other plain, speedy and adequate remedy available to a person").

82. *League of Women Voters of Pa.*, 178 A.3d at 766.

83. *Id.*

84. Erfer v. Commonwealth, 794 A.2d 325, 332 (Pa. 2002).

85. *League of Women Voters of Pa.*, 178 A.3d at 766 (emphasis added).

one days after a four-day nonjury trial.[86] This haste showed in the opinion; the Pennsylvania Commonwealth Court's fact-finding lacked depth by which to judge the constitutional violation.[87]

The Pennsylvania Supreme Court then reviewed the sparse findings of the commonwealth court and began to analyze the state constitution, hastily accepting the commonwealth court's conclusion that *Erfer* should be abrogated.[88] Thus, the Court found for the first time that the Pennsylvania Constitution provides heightened protection to state voters.[89] The Court began its analysis by noting that the Pennsylvania Constitution "was adopted over a full decade before the United States Constitution [and] served as the foundation—the template—for the federal charter."[90] Additionally, the Pennsylvania Constitution "stands as a self-contained and self-governing body of constitutional law, and acts as a wholly independent protector of the rights of the citizens of [the] Commonwealth."[91] The Court also foreshadowed the majority's usurpation of legislative power, stating, "the General Assembly's police power is not absolute, as legislative power is subject to restrictions enumerated in the Constitution and to limitations inherent in the form of government chosen by the people of [the] Commonwealth."[92]

Turning next to the language of the Pennsylvania Constitution, the Court found the United States Constitution does not provide this level of protection, stating, "the United States Constitution . . . does not contain, nor has it ever contained, an analogous provision."[93] The Court found the words of article I, section 5 to be a clear and unambiguous mandate "that *all* elections conducted in this Commonwealth must be 'free and equal.'"[94] The Court interpreted this broadly, finding it included *all aspects* of the electoral process, including "a voter's right to equal participation in the electoral process for the selection of his or her representatives in government."[95] This was bolstered by history which indicated that the clause was incorporated into the constitution as part of a framework

86. *Id.* at 769 (emphasis added) (explaining that Democratic voters testified at the trial as to their belief that the 2011 plan compromised their ability to elect a candidate who was representative of their interests).

87. *Id.* at 771 (noting the Pennsylvania Supreme Court did not adopt the fact finding of the commonwealth court, it merely recounted it; this indicates that the fact-finding lacked depth).

88. *Id.* at 785.

89. *Id.* at 809.

90. *Id.* at 802.

91. *Id.*

92. *Id.* at 803.

93. *Id.* at 804.

94. *Id.*

95. *Id.* (emphasis added).

to "secure access to the election process by all people with an interest in the communities in which they lived."[96]

This interpretation was not groundbreaking as the Court first interpreted this clause nearly 150 years ago in *Patterson v. Barlow*. In *Patterson*, the Court held constitutional a legislative act that established eligibility qualifications for electors to vote in all elections held in Philadelphia.[97] Building off this interpretation, the Court found the Pennsylvania Constitution to provide broad protection to the Commonwealth's voters, noting, "[the Pennsylvania] Constitution gives to the General Assembly the power to promulgate laws governing elections, [but] those enactments are nonetheless subject to the requirements of the Free and Equal Elections Clause of [the Pennsylvania] Constitution."[98] The Court then paved the way for its ruling, stating, "any legislative scheme which has the effect of impermissibly diluting the potency of an individual's vote for candidates for elective office relative to that of other voters will violate the guarantee of 'free and equal' elections afforded by Article I, Section 5."[99] Therefore, any congressional district map which dilutes an individual's vote is a violation of the Pennsylvania Constitution.[100]

D. The Majority Decision: The Neutral Criteria

Based on its interpretation of the Pennsylvania Constitution, the Court found that the 2011 Plan "clear[ly], plain[ly], and palpab[ly] . . . subordinat[ed] the traditional redistricting criteria in the service of partisan advantage, and thereby deprive[d] Petitioners of their state constitutional right to free and equal elections."[101] The Court reached this decision by developing "neutral criteria" from which to judge the constitutional violation, derived from the Framers' intent and knowledge of the 1873 Constitutional Convention.[102] These criteria were used both to judge the 2011 Plan's violation of the Pennsylvania Constitution and to provide guidance to the legislature for future congressional maps.[103]

Relying on tradition, the Court first explained, by analogy, that certain neutral criteria have been utilized to judge state legislative

96. *Id.* at 807.
97. Patterson v. Barlow, 60 Pa. 54, 75 (1869).
98. *League of Women Voters of Pa.*, 178 A.3d at 809 (interpreting *Patterson*, 60 Pa. at 75).
99. *Id.*
100. *Id.*
101. *Id.* at 818.
102. *Id.* at 815.
103. *Id.* at 817.

districts.[104] These criteria "place the greatest emphasis on creating representational districts that both maintain the geographical and social cohesion of the communities."[105] The Court then applied this to congressional districts, finding that the authors of the Free and Equal Elections Clause, the Framers of the 1790 Constitution, included a contiguous and compact requirement, stating, "[the Framers] included a mandatory requirement therein for the legislature's formation of state senatorial districts covering multiple counties, namely that the counties must adjoin one another."[106] This was further confirmed by the 1873 Constitutional Convention where delegates explicitly adopted certain requirements for the purpose of preventing vote dilution through gerrymandering.[107] Relying on this, the Court announced these neutral criteria dictate the "floor" of Pennsylvania constitutional standards, stating:

> (1) the population of such districts must be equal, to the extent possible; (2) the district that is created must be comprised of compact and contiguous geographical territory; and (3) the district respects the boundaries of existing political subdivisions contained therein, such that the district divides as few of those subdivisions as possible.[108]

However, the majority conceded that these neutral criteria are "*not the exclusive means* by which a violation of Article I, Section 5 may be established."[109] This became a point of contention among the dissenting justices as this holding seemed to omit *hidden criteria* from which to judge a congressional map and implied that the Court intended to redraw this map, as a remedy, all along.[110]

The Court explained that these neutral criteria prohibit "the use of compactness, contiguity, and the maintenance of the integrity of the boundaries of political subdivisions . . . [to dilute] the strength of an individual's vote in electing a congressional representative."[111] Emphasizing the fairness of these criteria, the Court found that this interpretation of the constitution "simply achieves the constitutional goal of fair and equal elections for all our Commonwealth's voters."[112] Additionally, this criteria comports with the minimum

104. *Id.* at 814.
105. *Id.*
106. *Id.* at 815.
107. *Id.*
108. *Id.* (citing PA. CONST. of 1874, art. 2, § 16).
109. *Id.* at 817 (emphasis added).
110. *Id.* at 827 (Baer, J., concurring and dissenting).
111. *Id.* at 816 (majority opinion).
112. *Id.*

standards guaranteed by the United States Constitution.[113] Thus, the Court adopted the "neutral criteria of compactness, contiguity, minimization of the division of political subdivisions, and maintenance of population equality among congressional districts."[114] The endorsement of these criteria was a decision made by the majority in lieu of waiting for the United States Supreme Court's guidance in *Gill v. Whitford*,[115] which would have dictated the federal requirements. The Pennsylvania Supreme Court could have supplemented these federal requirements with state constitutional requirements. Thus, this is another indicator of the impatience underlying this entire opinion.[116]

In applying these neutral criteria, the Court relied on the arguments of Petitioners.[117] The Court found most persuasive the expert testimony of Dr. Jowei Chen,[118] a scholar in the field of redistricting and political geography.[119] This testimony detailed two sets of 500 computer-simulated Pennsylvania redistricting plans, which more closely adhered to the neutral redistricting criteria than the 2011 Plan.[120] This was supported by Dr. Christopher Warshaw's testimony, an expert in the field of American politics, which found that the districts in the 2011 Plan increased the Republican "advantage to between 15 to 24% relative to statewide vote share."[121] This, and other expert evidence,[122] led the Court to conclude that the 2011 Plan could not, "as a statistical matter, be a plan directed at complying with traditional redistricting requirements."[123] Thus, the Court concluded that the 2011 Plan undermined voters' ability to exercise their right to vote and violated the Free and Equal Elections Clause of the Pennsylvania Constitution.[124]

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113. *Id.* (citing Wesberry v. Sanders, 376 U.S. 1, 18 (1964)).
114. *Id.* at 817.
115. Gill v. Whitford, 138 S. Ct. 1916, 1934 (2018).
116. Ledewitz, *supra* note 5 (finding that the majority's rush was a result of their decision to apply the map to the 2018 primaries).
117. *League of Women Voters of Pa.*, 178 A.3d at 768, 818.
118. *Id.* at 768.
119. *Id.* at 770.
120. *Id.* (relying on expert testimony that compared the 2011 Plan to computer simulated maps that utilized traditional Pennsylvania districting criteria).
121. *Id.* at 820.
122. *Id.* at 820-21 (finding the expert testimony of Dr. Chen and Dr. Kennedy to be the most persuasive).
123. *Id.* at 820.
124. *Id.* at 821.

E. The Remedy

As previously stated, the Court paved the way for its remedy throughout the entire opinion as it dictated a "floor" of constitutional requirements, the neutral criteria, and conceded that these criteria were "not the exclusive means by which a violation of Article I, Section 5 may be established."[125] This statement indicated to the state legislature that there was no "right" way to redraw the map, as part of the criteria by which it would be judged was hidden.[126] In this vein, Justice Baer's proposed standard, a map that demonstrates partisan advantage as the predominant factor is unconstitutional, is clearly better as it lays out exactly what standard should be used to judge a congressional districting map.[127]

Anticipating the legislature's inability to redraw the map, the Court issued an order on January 22, 2018 to remedy the unconstitutional map.[128] This order invited the legislative and executive branches "to take action, through the enactment of a remedial congressional districting plan."[129] However, *in that same order*, the Court prematurely indicated that, should the legislature and executive be "unwilling or unable to act," the Court would draw the map itself.[130] This action impliedly said to the legislature that they did not have to agree to a remedial map as the Court was willing to redraw it.[131] This also took away power and incentive from the governor, who possesses the power of veto in such instance, because he no longer had the encouragement to cooperate.[132] While the Court correctly claimed that legislative and executive action is the "preferred path,"[133] the Court found that the "imminent approaching primary elections for 2018" dictated the allowance "for the prospect of a judicially-imposed remedial plan."[134]

125. *Id.* at 817.
126. *Id.* at 828-29 (Baer, J., concurring and dissenting).
127. *Id.* at 826 (finding "that extreme partisan gerrymandering occurs when, in the creation of a districting plan, partisan considerations predominate over all other valid districting criteria relevant to the voting community and result in the dilution of a particular group's vote").
128. League of Women Voters Order, 175 A.3d 282, 284 (Pa. 2018).
129. *League of Women Voters of Pa.*, 178 A.3d at 821.
130. *Id.* (emphasis added).
131. *Id.* (noting the "possibility that the legislature and executive would be unwilling or unable to act" in the compressed time frame).
132. *League of Women Voters Order*, 175 A.3d at 284 (noting the plan has to be approved by the Governor and submitted within twenty-five days of the order).
133. *League of Women Voters of Pa.*, 178 A.3d at 821.
134. *Id.* at 822.

The Court cited precedent that was distinguishable, primarily *Butcher v. Bloom*,[135] where it "made clear that a failure to act by the General Assembly by a date certain would result in judicial action 'to ensure that the individual voters of this Commonwealth are afforded their constitutional right to cast an equally weighted vote.'"[136] However, in that case, the judiciary gave the legislature ample time, nearly a year, to redraw the map[137] and exercised judicial restraint, stating:

> [t]he task of reapportionment is not only the responsibility of the Legislature, it is also a function which can be best accomplished by that elected branch of government. *The composition of the Legislature, the knowledge which its members from every part of the state bring to its deliberations, its techniques for gathering information*, and other factors inherent in the legislative process, *make it the most appropriate body for the drawing of lines dividing the state into senatorial and representative districts*.[138]

Moreover, in the *Butcher Order*,[139] the Court did not prematurely dictate that it would redraw the map if the legislature failed to do so.[140]

Additionally, the *League of Women Voters of Pennsylvania* majority found support for its remedy in *Baker v. Carr*,[141] *Growe v. Emison*,[142] *Scott v. Germano*,[143] and *Wise v. Lipscomb*,[144] stating, "[t]he power of the judiciary of a State to require valid reapportionment *or to formulate a valid redistricting plan* has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged."[145] However, the Court correctly noted the "unwelcome obligation" of the judiciary into the political thicket, stating:

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135. Butcher v. Bloom, 203 A.2d 556, 568 (Pa. 1964).
136. *League of Women Voters of Pa.*, 178 A.3d at 822 (quoting Butcher Order, 216 A.2d 457, 458-59 (Pa. 1966)).
137. *Id.* at 830 (Baer, J., concurring and dissenting).
138. *Butcher Order*, 216 A.2d at 467 (Musmanno, J., dissenting) (quoting *Butcher*, 203 A.2d at 569).
139. *Id.* at 458-59 (majority opinion).
140. *Id.* (noting the absence of this premature language in this order).
141. 369 U.S. 186, 237 (1962).
142. 507 U.S. 25, 34 (1993).
143. 381 U.S. 407, 409-10 (1965).
144. 437 U.S. 535, 539 (1978).
145. League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 823 (Pa. 2018) (quoting *Growe*, 507 U.S. at 33).

> [l]egislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the "unwelcome obligation" of the federal court to devise and impose a reapportionment plan pending later legislative action.[146]

Finally, the Court relied on persuasive authority as support for its ruling, noting, "virtually every other state that has considered the issue looked, when necessary, to the state judiciary to . . . formulate a valid reapportionment plan."[147]

IV. THE COMPETING POSITIONS

A. *Justice Baer's Concurring and Dissenting Opinion*

Justice Baer joined several of the majority's conclusions.[148] He agreed that the 2011 Plan violated the Pennsylvania Constitution and concurred in the majority's explanation of the Free and Equal Elections Clause.[149] However, the justice dissented from the majority's decision to "impose court-designated districting criteria on the Legislature."[150] Further, he disagreed with the majority's remedy to redraw the redistricting map in the legislature's failure to do so.[151]

For Justice Baer, the court-imposed "neutral criteria"[152] was incorrect and, when applied, violated Article I, Section 4[153] of the United States Constitution.[154] Instead, the justice stated he would have held "that extreme partisan gerrymandering occurs when, in the creation of a districting plan, *partisan considerations predominate over all other valid districting criteria* relevant to the voting community and result in the dilution of a particular group's vote."[155] Further, he claimed these neutral criteria, when applied, violated

146. *Id.* (quoting Connor v. Finch, 431 U.S. 407, 415 (1977); *Wise*, 437 U.S. at 540).
147. *Id.*
148. *Id.* at 825 (Baer, J., concurring and dissenting).
149. *Id.*
150. *Id.* at 826.
151. *Id.*
152. *Id.* at 817 (majority opinion).
153. U.S. CONST. art. I, § 4, cl. 1.
154. *League of Women Voters of Pa.*, 178 A.3d at 826 (Baer, J., concurring and dissenting) (noting the neutral criteria is in conflict with Article I, Section 4 of the United States Constitution, which concerns the time, matter, and places of elections and does not address the size of shape of districts; thus, the Pennsylvania Constitution criteria created by the majority is in conflict with the United States Constitution as it instructs the legislature as to the "manner of holding elections" (quoting U.S. CONST. art. I, § 4, cl. 1)).
155. *Id.* (emphasis added).

Article I, Section 4, explaining, "courts lack the authority to prescribe the 'times, places, and manner of holding' congressional elections."[156] The justice also stated that the Pennsylvania Constitution "does not address the size or shape of districts,"[157] and, therefore, the "criteria for the drawing of congressional districts [is not appropriate] when the framers chose not to include such provisions despite unquestionably being aware of both the General Assembly's responsibility for congressional redistricting and the dangers of gerrymandering."[158] However, the justice did agree with the majority's position that the Free and Equal Elections Clause protects against the dilution of votes and was therefore violated by the 2011 Plan.[159]

As to the remedy, Justice Baer noted that redrawing the map was unnecessary, stating:

> I continue to suggest respectfully that the Court reconsider its decision given the substantial uncertainty, if not outright chaos, currently unfolding in this Commonwealth regarding the impending elections, in addition to the likely further delays that will result from the continuing litigation before this Court and, potentially, the United States Supreme Court, as well as from the map-drawing process and the litigation that process will inevitably engender.[160]

The justice further noted that the legislature does not have a fair opportunity to act as, in this case, it had only *twenty-five days* to develop a new plan and respond to the majority's argument.[161] He noted that the 2011 Plan itself took a long time to develop, stating, "[w]hile it is true that the Legislature technically enacted the 2011 Plan in two weeks, it is naïve to think that the legislators created the map in that short period of time, as opposed to developing and negotiating details of the map over prior months."[162] In fact, the majority observed correctly that the development of the *map took at least eight months* as hearings for it began in May of 2011.[163]

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156. *League of Women Voters of Pa.*, 178 A.3d at 827.
157. *League of Women Voters of Pa.*, 178 A.3d at 827 (Baer, J., concurring and dissenting) (quoting U.S. CONST. art. I, § 4, cl. 1).
158. *Id.*
159. *League of Women Voters of Pa.*, 178 A.3d at 827 (Baer, J., concurring and dissenting).
160. *Id.* at 829.
161. Ledewitz, *supra* note 5 (emphasis added) (noting that the holding was announced on January 22, 2018 which "directed that if the General Assembly and the Governor could not agree on a new plan by February 15, 2018, the Court would itself draft a congressional redistricting plan").
162. *League of Women Voters of Pa.*, 178 A.3d at 829 (Baer, J., concurring and dissenting).
163. *Id.* (citing *id.* at 743 (majority opinion)).

Further, the justice observed that the majority overstepped by preparing for the "'possible eventuality' that the Legislature cannot act in this compressed time frame."[164] He bolstered this claim by explaining that *judicial restraint* needed to be exercised in this case as it was not necessary for the Court to formulate a redistricting plan.[165] Further, he noted the time frame given to the legislature was inadequate, stating, "judicial restraint [was needed] to allow [the] legislature a reasonable period of time, which *should be measured in months rather than weeks*."[166] The justice also pointed out that the majority's reliance on *Butcher v. Bloom*[167] was unfounded as in that case the Court gave the legislature nearly a year to redraw the map, whereas here the legislature was given only twenty-five days.[168] This, he stated, may result in "[s]erious disruption of orderly state election processes and basic governmental functions"[169] and there was potential that even political candidates would be harmed by this rush.[170]

Justice Baer also raised concerns about due process, finding that the Court's procedure for drawing the map would allow parties to submit a map without the "ability to respond to alternative plans, potentially by submitting additional evidence or cross-examining witnesses."[171] He noted that this remedy did not contain any provision that would allow the parties to respond to the Court's map, which did not allow for advising of "potential oversights or infirmities in the map itself."[172] Thus, Justice Baer found that the Court's rush to redraw the map raised constitutional concerns.[173]

B. *Chief Justice Saylor's Dissent*

Chief Justice Saylor, joined by Justice Mundy,[174] dissented from the majority's decision, specifically noting the decision was the product of haste.[175] In this dissent, most notably, Chief Justice Saylor explained he would have joined the majority opinion if it had not been the product of rashness, stating:

164. *Id.*
165. *Id.*
166. *Id.* (emphasis added).
167. Butcher Order, 216 A.2d 457, 459 (Pa. 1966).
168. *League of Women Voters of Pa.*, 178 A.3d at 830 (Baer, J., concurring and dissenting).
169. *Id.* at 831 (quoting Butcher v. Bloom, 203 A.2d 556, 568 (Pa. 1964)).
170. *Id.*
171. *Id.* at 830.
172. *Id.*
173. *Id.*
174. *Id.* at 834 (Saylor, J., dissenting).
175. *Id.* (noting the Court's acceptance of Petitioners' "entreaty to proceed with extreme exigency").

> [w]ere the present process an ordinary deliberative one, I would proceed to sift through the array of potential standards to determine if there was one which I could conclude would be judicially manageable.[176]

Thus, the chief justice found the majority's haste to be the main source of contention in this near groundbreaking decision.[177] Additionally, Chief Justice Saylor found the court-imposed neutral criteria "overprotective"[178] and noted the task of redistricting should have been left to the legislature.[179]

As to the neutral criteria, the chief justice found these were an overstep, stating, "[it] amount[ed] to a non-textual, judicial imposition of a prophylactic rule."[180] Explaining that prophylactic rules may be "legitimate in certain contexts,"[181] the chief justice found this to not be such a situation, stating, "[t]he consideration of whether this sort of rule should be imposed by the judiciary upon a process committed by the federal Constitution to another branch of government seems to me to require particular caution and restraint."[182] Further, the justice noted, these criteria were "overprotective, in that [they] guard[] not only against intentional discrimination, but also against legislative prioritization of any factor or factors other than those delineated in Article II, Section 16, including legitimate ones."[183]

Further, the chief justice pointed out that the task of redistricting should traditionally be left to the legislature, noting, "the appropriate litmus for judicial review of redistricting should take into account the inherently political character of the work of the General Assembly, to which the task of redistricting has been assigned by the United States Constitution."[184] The justice found this judicial overstep was a result of the majority who "fail[ed] to sufficiently account for the fundamental character of redistricting, its allocation under the United States Constitution to the political branch, and the many drawbacks of constitutionalizing a non-textual judicial

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176. *Id.*

177. *Id.* (noting he would have agreed with the majority if the legislature "ha[d] been adequately apprised of what [was] being required of it and afforded sufficient time to comply").

178. *Id.* at 832.

179. *Id.* at 834.

180. *Id.* at 832.

181. *Id.* at 833; *see also* Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged, Prophylactic Rule*, 59 N.Y.U. ANN. SURV. AM. L. 283, 284 (2003).

182. *League of Women Voters of Pa.*, 178 A.3d at 833 (Saylor, J., dissenting).

183. *Id.* at 832.

184. *Id.* at 831.

rule."[185] In this same vein, the majority's reliance on *Erfer v. Commonwealth*[186] incorrectly led the Court to "focus on a limited range of traditional districting factors [which allocated] *too much discretion to the judiciary* to discern violations in the absence of proof of intentional discrimination."[187] This point acknowledged that the Pennsylvania Commonwealth Court did not have enough time to entirely conduct fact finding regarding the issue of intent.[188] Thus, the issue of intentional discrimination could not be fully evaluated as a result of the Court's haste.[189]

Chief Justice Saylor claimed the majority's haste was the main error in the decision, stating, "the acceptance of Petitioners' entreaty to proceed with extreme exigency present[ed] too great of an impingement on the deliberative process to allow for a considered judgement on my part in this complex and politically-charged area of the law."[190] However, the justice found that judicial intervention may sometimes be justified "where a constitutional violation is established based on the application of clear standards pertaining to intentional discrimination and dilution of voting power."[191] He dissented from the majority because he found that situation "is simply not what has happened here."[192]

C. Justice Mundy's Dissenting Opinion

In addition to joining the concerns of Chief Justice Saylor, Justice Mundy wrote her own dissenting opinion.[193] Justice Mundy disagreed with the majority's abrogation of *Erfer v. Commonwealth*[194] and found the majority's adoption of the neutral criteria undermined its holding.[195] If the Court had followed *Erfer*, the state con-

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185. *Id.* at 834.
186. 794 A.2d 325, 332 (Pa. 2002).
187. *League of Women Voters of Pa.*, 178 A.3d at 834 (Saylor, J., dissenting) (emphasis added).
188. *Id.* at 767, 773 (majority opinion) (noting that the Pennsylvania Supreme Court ordered the Pennsylvania Commonwealth Court to fact-find on an expedited basis and its findings included that partisan intent predominated the district lines; however, this finding was recounted, not adopted, by the Pennsylvania Supreme Court).
189. *Id.* at 767.
190. *Id.* at 834 (Saylor, J., dissenting).
191. *Id.*
192. *Id.*
193. *Id.* at 834 (Mundy, J., dissenting).
194. 794 A.2d 325 (Pa. 2002).
195. *League of Women Voters of Pa.*, 178 A.3d at 835 (Mundy, J., dissenting) (noting it is possible to comply with the majority's neutral criteria and yet still dilute an individual's vote).

stitution would have been interpreted as providing the same protection to voters as the federal constitution, not more.[196] Further, Justice Mundy disagreed with the majority's remedy, joining the concerns of Chief Justice Saylor and the dissent of Justice Baer.[197] Justice Mundy particularly disagreed with the majority's decision to strike down the 2011 Plan on the eve of the 2018 midterm election, because it overlooked precedent.[198] The justice also found the remedy to be unsupported.[199] Indeed, the justice found that the *Butcher* decision allowed the General Assembly eleven months to redraw the map, which is distinguishable from the twenty-five days given in this case.[200] Additionally, the justice agreed with Justice Baer's conclusion that the majority's remedy was inconsistent when applied to federal law.[201]

First, as to *Erfer*, the justice opined that "*stare decisis* principles require us to give *Erfer* full effect."[202] *Erfer* held that the Free and Equal Elections Clause did not provide any heightened protections to Pennsylvania voters.[203] Second, the justice noted that the neutral criteria, proposed by the Court, undermined the majority's conclusion that the 2011 Plan violates the Pennsylvania Constitution.[204] This is because, as the majority conceded, "it is possible for the General Assembly to draw a map that fully complies with the Majority's 'neutral criteria' but still 'operate[s] to unfairly dilute the power of a particular group's vote for a congressional representative.'"[205] Moreover, the majority noted these criteria were *not the entire basis by which to judge a congressional district map*.[206] Third, the justice disagreed with the remedy imposed by the majority.[207] While she agreed that the Court had the authority to impose that the legislature redraw the map, she disagreed with the majority's haste to redraw the map before the upcoming elections.[208] Noting that precedent dictated waiting to redraw the map, Justice Mundy joined in the concerns of Chief Justice Saylor and Justice Baer.[209]

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196. *Erfer*, 794 A.2d at 332.
197. *League of Women Voters of Pa.*, 178 A.3d at 835 (Mundy, J., dissenting).
198. *Id.* (citing Butcher v. Bloom, 203 A.2d 556, 568 (Pa. 1964)).
199. *Id.* at 835-36.
200. *Id.* at 836.
201. *Id.*
202. *League of Women Voters of Pa.*, 178 A.3d at 835 (Mundy, J., dissenting).
203. *Erfer*, 794 A.2d at 332.
204. *League of Women Voters of Pa.*, 178 A.3d at 835 (Mundy, J., dissenting).
205. *Id.* (emphasis added) (citing *id.* at 817 (majority opinion)).
206. *Id.* at 817 (majority opinion).
207. *Id.* at 835 (Mundy, J., dissenting).
208. *Id.* at 835-36.
209. *Id.* at 835.

Last, the justice agreed with Justice Baer in noting that the majority's remedy was inconsistent with the Elections Clause of the Federal Constitution, noting, "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking."[210] Further, the justice found that none of the United States Supreme Court cases cited by the majority supported this remedy.[211] In *Scott v. Germano*[212] and *Growe v. Emison*[213] the Elections Clause was not even contemplated.[214] Further, the justice stated the majority's reliance on *Wise v. Lipscomb*[215] was misplaced because that case involved Texas local districting which is outside the purview of the Elections Clause.[216]

V. WHO IS RIGHT? THE MAJORITY'S PREMATURITY GOVERNED BY HASTE

As almost every aspect of the majority's opinion reflects, this decision was the result of haste.[217] This was especially clear, as the dissenting justices correctly noted, in the *procedural* ruling of the majority.[218] This was marked by the Court's premature order dictating that, in the legislature's failure to act, the Court would redraw the map itself.[219] This instruction was a blatant separation of powers violation as it took away power and incentive from the governor and the legislature.[220] By reviewing the separation of powers, as defined by the Pennsylvania Constitution, the political nature of redistricting, and specific aspects of the majority's opinion, it is clear that judicial restraint in this inherently political area would have averted most of the controversial aspects of this decision.[221]

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210. *Id.* at 837 (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2668 (2015)).
211. *Id.* at 837-38.
212. 381 U.S. 407 (1965).
213. 507 U.S. 25 (1993).
214. *League of Women Voters of Pa., 178 A.3d* at 837 (Mundy, J., dissenting).
215. 437 U.S. 535 (1978).
216. *League of Women Voters of Pa.*, 178 A.3d at 838 (Mundy, J., dissenting).
217. *See* Ledewitz, *supra* note 5 (finding the rush by the majority was apparent early in the litigation).
218. *League of Women Voters of Pa.*, 178 A.3d at 830 (Baer, J., concurring and dissenting); *id.* at 834 (Saylor, J., dissenting); *id.* at 835 (Mundy, J., dissenting).
219. *See id.* at 830 (Baer, J., concurring and dissenting).
220. League of Women Voters Order, 175 A.3d 282, 284 (Pa. 2018) (noting the plan has to be approved by the Governor and submitted within twenty-five days of the order).
221. *League of Women Voters of Pa.*, 178 A.3d at 834 (Saylor, J., dissenting) (noting had the "process [been] an ordinary deliberative one," he would have been more inclined to agree with the majority opinion).

A. Separation of Powers

The separation of powers in Pennsylvania dictate that judicial power is broad, stating:

> The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace.[222]

The Pennsylvania Supreme Court has often confronted issues involving the separation of powers and has articulated the particular powers of each branch, noting, "under the separation of powers doctrine, the legislature's function [is] to enact laws; the judiciary's role [is] to interpret the laws; and the executive [is] entrusted to execute the laws."[223] Using this framework, the Court itself has admitted that redrawing a district map "is intended to be a legislative power."[224]

B. The Inherently Political Process

It is a long-standing principle that "state and federal courts consistently recognize that redistricting is an inherently political process and therefore allow state legislative bodies significant latitude in rendering political decisions with respect to the redrawing of district lines."[225] The Pennsylvania Supreme Court recognized this principle in *Costello v. Rice*, stating, "the courts are not authorized to reapportion legislative districts."[226] Further, in the Pennsylvania Supreme Court's own words, "the role of the Court in reviewing a reapportionment plan is not to substitute a more 'preferable' plan for that of the Commission, but only to assure that constitutional requirements have been met."[227] Additionally, the Pennsylvania State Constitution emphasizes that these districts are to be drawn

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222. PA. CONST. art. V, § 1.
223. John M. Mulcahey, Comment, *Separation of Powers in Pennsylvania: The Judiciary's Prevention of Legislative Encroachment*, 32 DUQ. L. REV. 539, 540-41 (1994).
224. Kristina Betts, Note, *Redistricting: Who Should Draw the Lines? The Arizona Independent Redistricting Commission as a Model for Change*, 48 ARIZ. L. REV. 171, 176 (2006).
225. Jonathan Snare, *The Scope of the Powers and Responsibilities of the Texas Legislature in Redistricting and the Exploration of Alternatives to the Legislative Role: A Basic Primer*, 6 TEX. HISP. J.L. & POL'Y. 83, 86 (2001).
226. Costello v. Rice, 153 A.2d 888, 891 (Pa. 1959).
227. *In re* Reapportionment Plan for Pa. Gen. Assembly, 442 A.2d 661, 667 (Pa. 1981).

by the legislature by placing the criteria for districts in article II, section 16 entitled "*Legislative* Districts."[228]

The judiciary lacks certain political powers delegated to state legislatures.[229] It is essential to democracy that elected officials conduct these representative processes.[230] As the United States Supreme Court emphasized, redistricting is "committed to the political branch and is inherently political."[231] Relying on United States Supreme Court precedent, Chief Justice Saylor noted in his dissenting opinion that "redistricting, and concomitant separation-of-powers concerns, warrant special caution on the part of the judiciary in considering regulation and intervention."[232] The chief justice then cited *Colorado General Assembly v. Salazar*[233] and *Vieth v. Jubelirer*,[234] noting that court intervention into the drawing of state lines would "commit federal and state courts to unprecedented intervention in the American political process."[235]

C. Judicial Restraint

While it was not inherently incorrect for the Pennsylvania Supreme Court to redraw the congressional districting map, the Court's haste in doing so limited the holding of the case.[236] Indeed, the Pennsylvania Supreme Court's review of the state's legislative districting scheme was a valid exercise of judicial review.[237] This is something that should be done as the judiciary should be the check on the other branches of government.[238] However, the Court's premature order dictating that it would be the final creator of the map was an overstep, as the state constitution manifestly committed this to another branch and the precedent relied upon did not support this confined timeline.[239]

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228. PA. CONST. art. II, § 16 (emphasis added).

229. Sara N. Nordstrand, Note, *The "Unwelcome Obligation": Why Neither State nor Federal Courts Should Draw District Lines*, 86 FORDHAM L. REV. 1997, 2011 (2018).

230. *Id.*

231. League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 831 (Pa. 2018) (Saylor, J., dissenting).

232. *Id.* at 833.

233. *Id.* (citing Colo. Gen. Assembly v. Salazar, 541 U.S. 1093, 1095 (2004)).

234. *Id.* (citing Vieth v. Jubelirer, 541 U.S. 267, 292 (2004) (plurality)).

235. *Id.* (quoting *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring)).

236. *See* Ledewitz, *supra* note 5.

237. *See* Nat Stern, *Don't Answer That: Revisiting the Political Question Doctrine in State Courts*, 21 U. PA. J. CONST. L. 153, 154 (2018) (noting the Pennsylvania Supreme Court "briskly dismissed" the concern of whether partisan-gerrymandering claims are justiciable).

238. *League of Women Voters of Pa.*, 178 A.3d at 796 (finding that the Court provides a "check on extreme partisan gerrymandering").

239. Stern, *supra* note 242, at 166.

D. The Majority's Lack of Judicial Restraint

1. The Neutral Criteria

The majority's neutral criteria[240] states that each legislative district should be as compact as possible, however, the standard that the criteria impose would not necessarily be satisfied by compactness as the majority conceded this was not the exclusive means by which to judge a constitutional violation.[241] The Court stated the "neutral criteria of compactness, contiguity, minimization of the division of political subdivisions . . . provide a 'floor' of protection for an individual against the dilution of his or her vote in the creation of such districts."[242] These criteria would not necessarily be satisfied by a compact district: for example, a district that is compact and contiguous with minimization of division between the political subdivisions would still not necessarily pass constitutional muster.[243] This indicates that the neutral criteria are necessary but not sufficient to protect the right to vote in Pennsylvania.[244]

Thus, it seems that the majority intended to adopt Justice Baer's proposed standards, which are consistent with the Pennsylvania Constitution.[245] Baer's standards require more fact-finding than was allowed in this case, as the Pennsylvania Commonwealth Court was given a mere fifty-three days to fact-find.[246] Justice Baer's criteria would be violated when "partisan considerations predominate over all other valid districting criteria relevant to the voting community and result in the dilution of a particular group's vote."[247] He noted that these criteria are consistent with the Pennsylvania Constitution, which does not address the size or shapes of districts.[248] Thus, these criteria would still allow for the protection of the Free

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240. *League of Women Voters of Pa.*, 178 A.3d at 815 (citing PA. CONST. of 1874, art. 2, § 16).

241. *Id.* (stating "(1) the population of such districts must be equal, to the extent possible; (2) the district that is created must be comprised of compact and contiguous geographical territory; and (3) the district respects the boundaries of existing political subdivisions contained therein, such that the district divides as few of those subdivisions as possible").

242. *Id.* at 817.

243. *Id.* (noting these neutral criteria are "not the exclusive means by which a violation of Article I, Section 5 may be established").

244. *See generally* PA. CONST. art. II, § 16 (noting districts "shall be composed of compact and contiguous territory as nearly equal in population as practicable").

245. *League of Women Voters of Pa.*, 178 A.3d at 826 (Baer, J., concurring and dissenting).

246. *Id.* at 767 (majority opinion).

247. *Id.* at 826 (Baer, J., concurring and dissenting).

248. *Id.* at 828-29.

and Equal Elections Clause,[249] which protects against the dilution of votes.[250]

2. *Abrogation of Erfer*

The Court's abrogation of *Erfer*[251] was another indication of its haste.[252] The majority recounted the conclusions of law and fact submitted by the Pennsylvania Commonwealth Court and among these was the abrogation of *Erfer*.[253] The commonwealth court, in its hurry to submit conclusions to the Pennsylvania Supreme Court, found that the tests from *Davis v. Bandemer*[254] and *Erfer v. Commonwealth*[255] were abrogated by *Vieth v. Jubelirer*[256] as a matter of federal law.[257] While this was a finding of the lower court, the ultimate blame for this brisk abrogation rests on the Pennsylvania Supreme Court, which ordered the commonwealth court to fact-find on an "expedited basis."[258] This abrogation was done without any hearing, consideration, or oral argument; it was merely a result of these conclusory findings submitted by the rushed commonwealth court.[259]

3. *The Legislature's Impossible Task*

The majority's order, a premature indication of their eventual decision to redraw the map, was also a result of haste.[260] The Court gave the majority a mere *twenty-five days* to complete the impossible task of redrawing a legislative district map.[261] Moreover, in the same order, the Court antagonistically indicated it intended to redraw the map itself.[262] This not only represented a blatant usurpation of the separation of powers principle, but also took away power and incentive from the governor and political parties who realized

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249. PA. CONST. art. I, § 5.
250. *League of Women Voters of Pa.*, 178 A.3d at 827 (Baer, J., concurring and dissenting).
251. Erfer v. Commonwealth, 794 A.2d 325 (Pa. 2002).
252. *League of Women Voters of Pa.*, 178 A.3d at 813 (noting the Pennsylvania Supreme Court accepted this finding without oral argument or any other formal process).
253. *Id.* at 785 (stating that the Free and Equal Elections Clause did not provide any heightened protections to Pennsylvania voters).
254. 478 U.S. 109, 127 (1986).
255. 794 A.2d at 332.
256. 541 U.S. 267, 290-91 (2004).
257. *League of Women Voters of Pa.*, 178 A.3d at 785.
258. *Id.* at 767.
259. *See id.*
260. League of Women Voters Order, 175 A.3d 282, 284 (Pa. 2018) (noting the Court anticipated the legislature's unwillingness or inability to act).
261. *Id.*
262. *Id.*

they did not have to agree on a map because the Court already had decided to redraw it.[263]

VI. CONCLUSION

This fragmented decision had the power to set powerful precedent in an area of contention: partisan gerrymandering.[264] However, the Court failed to do so because of its collective haste.[265] This impatience limited the holding of this case and represented the Pennsylvania judiciary's charge into the political thicket.[266] While the decision was ultimately correct, it is clear that judicial restraint is needed in this inherently political area of the law.[267] Moreover, the Court would have benefitted from judicial restraint, as it would have strengthened the majority opinion and averted the decision's controversial nature.[268]

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263. *Id.* (finding that if the legislature and executive were unable or unwilling to act, the Court would redraw the map itself).

264. *See* Ledewitz, *supra* note 5 (noting Chief Justice Saylor's vote on the majority would have instigated a "candid national conversation about gerrymandering").

265. *Id.*

266. Moore, *supra* note 17, at 124.

267. *See* League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 834 (Pa. 2018) (Saylor, J., dissenting) (noting had the "process [been] an ordinary deliberative one" he would have been more inclined to agree with the majority opinion).

268. *Id.*

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