



# DUQUESNE LAW REVIEW OF THE THOMAS R. KLINE SCHOOL OF LAW

## A TRIBUTE TO CHIEF JUSTICE MAX BAER AND HIS LEGACY

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*Debra Todd*

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# Foreword: A Tribute to Chief Justice Max Baer and His Legacy

*Ken Gormley\**

The Honorable Max Baer—Chief Justice of the Pennsylvania Supreme Court and a proud alumnus of Duquesne University Law School (now the Thomas R. Kline School of Law)—passed away unexpectedly on September 30, 2022, at age 74.<sup>1</sup> It was several months shy of his 75<sup>th</sup> birthday and his planned retirement.

The loss was a profound one for the entire Commonwealth of Pennsylvania, but particularly in Allegheny County and at the law school where he had earned his degree. Here, Chief Justice Baer was a fixture in the community. He was a vibrant participant in activities relating to the bench and the bar where he had cut his teeth and risen in the profession. He was also an enthusiastic participant within the classrooms and moot courtrooms of the law school, where he relished helping to shape new generations of lawyers as they prepared to enter the profession.

For all of us who knew Chief Justice Baer (he preferred to be called “Max”), he was more than just a revered public figure. He was also an avid participant in the life of the courts and the legal profession, a person who injected energy, a sense of humor and kindness into every setting.

Born in Pittsburgh, the future jurist earned a Bachelor of Arts from the University of Pittsburgh in 1971 and a Juris Doctor from Duquesne University in 1975.<sup>2</sup> From 1975 to 1980, he served as Deputy Attorney General of Pennsylvania.<sup>3</sup> He was elected judge of the Allegheny County Court of Common Pleas in 1989<sup>4</sup> and was retained for a second ten-year term in 1999.<sup>5</sup> He was then elected to the Pennsylvania Supreme Court in 2003<sup>6</sup> and

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\* President and Professor of Law, Duquesne University.

1. *In Remembrance of Chief Justice Max Baer*, AOPCONNECTED (Pennsylvania Judicial System, Harrisburg, Pa.), Oct. 2022, at 2.

2. *Id.* at 5.

3. *Id.*

4. *Id.*

5. *Chief Justice Max Baer*, THE UNIFIED JUD. SYS. OF PA., <https://www.pacourts.us/Storage/media/pdfs/20220511/141620-baer.pdf> (last visited Oct. 20, 2023).

6. *In Remembrance of Chief Justice Max Baer*, *supra* note 1, at 2.

retained in the election of 2013 for a second ten-year term.<sup>7</sup> In 2021, he ascended to the position of chief justice upon the retirement of Chief Justice Thomas Saylor,<sup>8</sup> a moment of great pride for him, as well as for his many friends and admirers.

When I was a young attorney in legal practice in the 1980s, Max was already taking the County Courthouse by storm, as a judge on the Allegheny County Court of Common Pleas who revolutionized and modernized Family Division. He possessed a special passion for Juvenile Law and dedicated himself, particularly, to protecting young people who were at risk within the legal system. His efforts earned him national recognition, including honors at a White House ceremony.

I got to know Max on a personal level almost immediately after he earned a seat on the Pennsylvania Supreme Court. From the start, above all else, he was known for his collegiality and respect for his fellow Justices. At that time, as a young law professor developing a specialty in State Constitutional Law, I was working as a special clerk to then-Chief Justice Ralph Cappy, helping to draft early opinions in that area of jurisprudence. Whenever we were trying to noodle through complex issues and understand competing judicial philosophies on the Court, Ralph would say: “Go talk to Max. Everyone respects that guy. He’s like Sandra Bullock. He’s *Mr. Congeniality*.”

In many ways, Max became the heart of the Court. His kindness and caring were on display every day. Yet he was also a brilliant and formidable legal thinker. When I would bring my State Constitutional Law class to the Court’s magnificent courtroom in Pittsburgh to attend oral arguments, they would watch in terrified awe as Max peppered lawyers with questions and tied them up in knots of logic. He was a master inquisitor as an appellate jurist. But he always managed to perform that function with grace, respect, and a touch of good humor. His only purpose in jousting with lawyers, as he scrolled through briefs and grilled them from the bench, was to reach a just result.

Max was the true model of a selfless public servant. When he became Chief Justice, he shied away from the limelight. Yet he took great pleasure in celebrating the accomplishments of others. He brought the Court together to achieve consensus whenever possible. And he presided, with enormous pride, over the 300th anniversary of the Pennsylvania Supreme Court—the nation’s oldest court—in

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7. *Chief Justice Max Baer*, *supra* note 5.

8. *In Remembrance of Chief Justice Max Baer*, *supra* note 1, at 3.

May of 2022, at an impressive event he personally organized at the National Constitution Center in Philadelphia.

Max treated with reverence the unique history of the Pennsylvania Supreme Court—it was the oldest court, he liked to remind people, not only in the nation but in North America.<sup>9</sup> Max was particularly fascinated by the history of the Pennsylvania Constitution that dated back to September of 1776, more than a decade before the ratification of the U.S. Constitution. When he enlisted me to participate in this special spring 2022 event at the National Constitution Center—based upon my scholarly writing in this area—he spoke excitedly about the unique contributions the Pennsylvania Supreme Court had made in this domain. Not only was Max keenly aware that Justices on his Court had been among the leaders, nationally, with respect to the independent interpretation of state constitutional provisions,<sup>10</sup> he recognized the ongoing potential for his Court to help develop national jurisprudence in this area.

Among other cases, Max was proud of his own opinion in *In re J.B.*,<sup>11</sup> a major decision in the area of juvenile rights and state constitutional autonomy. In that case, the Court held that the irrebuttable presumption in the registration requirements of the Sex Offender Registration and Notification Act (“SORNA”), deeming all juvenile sex offenders to “pose a high risk of committing additional sexual offenses,”<sup>12</sup> violated Article I, Section 1 of the Pennsylvania Constitution—the “Inherent Rights of Mankind” provision.<sup>13</sup> He concluded that this statutory provision amounted to an infringement upon the right of procedural due process and the fundamental right to reputation protected by that distinct provision of Pennsylvania’s fundamental charter.<sup>14</sup>

Then-Justice Baer emphasized that SORNA’s irrebuttable presumption would lead the average person of reasonable intelligence to unfairly conclude that every juvenile registrant was “particularly dangerous and more likely to reoffend,” thus impinging upon the juvenile offenders’ fundamental right to reputation under Article I,

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9. See Kenneth G. Gormley, *Introduction: The History of a Time-Honored Court*, in *THE SUPREME COURT OF PENNSYLVANIA: LIFE AND LAW IN THE COMMONWEALTH, 1684–2017* (John J. Hare ed., 2018).

10. See Ken Gormley, *Overview of Pennsylvania Constitutional Law*, in *THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES*, 6 (Ken Gormley & Joy G. McNally, eds., 2nd ed. 2020) [hereinafter TREATISE].

11. 107 A.3d 1 (Pa. 2014).

12. 42 PA. CONS. STAT. § 9799.11(a)(4) (2023).

13. *In re J.B.*, 107 A.3d at 16–17, 16 n.26 (quoting PA. CONST. art. I, § 1).

14. *Id.* at 19–20. See Elizabeth Wachsman & Ken Gormley, *Inherent Rights of Man*, in TREATISE, *supra* note 2, at 105–106.

Section 1.<sup>15</sup> He also underscored that there existed “reasonable alternative means” to ascertain if a juvenile posed a high risk of recidivism; namely, the individualized assessment process that SORNA itself created for the designation of sexually violent predators, in contrast to adopting a sweeping presumption that all juvenile offenders posed an indefinite risk to society.<sup>16</sup> Justice Baer wrote eloquently: “SORNA’s registration requirements improperly brand all juvenile offenders’ reputations with an indelible mark of a dangerous recidivist, even though the irrebuttable presumption . . . is not ‘universally true.’”<sup>17</sup>

In breaking new ground under the Pennsylvania Constitution, in that case, then-Justice Baer emphasized that the “right to reputation” guaranty contained in Article I, Section 1 of the Pennsylvania Constitution was a “fundamental right,” quite distinct from any comparable provision in the U.S. Constitution.<sup>18</sup>

Seated in the front row at that historic celebration on the occasion of the 300<sup>th</sup> anniversary of the Pennsylvania Supreme Court, Max leaned forward and applauded appreciatively as we discussed cases (including his own decision in *In re J.B.*) in which the High Court had blazed new trails under the State Constitution. Max was not just celebrating a 300<sup>th</sup> anniversary on that day; he viewed it (equally) as a celebration of the national prominence his Court had attained in advancing an independent body of state constitutional law, fostering the notion of judicial independence at the state level that he had long championed.

Max was a lifelong student of history. He genuinely revered the role of the State Supreme Court in our system of government. For that reason, above all, he was enormously proud of serving as Chief Justice. He was particularly proud that he was only the second alumnus from Duquesne’s Law School ever to hold that supreme honor. And he was brimming with pride, throughout the spring and summer, that Justice Debra Todd would succeed him and become the first female Chief Justice in the history of Pennsylvania. He spoke with unabashed joy and excitement about that transition, saying that he wanted to make sure that she succeeded in every way. He was certain that she would set a new bar of excellence as Chief, and he viewed that success as a part of his own legacy.

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15. *In re J.B.*, 107 A.3d at 16. See TREATISE at 105–06.

16. *In re J.B.*, 107 A.3d at 19.

17. *Id.* (quoting *Dep’t of Transp. Bureau of Driver Licensing v. Clayton*, 684 A.2d 1060, 1063 (Pa. 1996)).

18. *Id.* at 16–17, 16 n.26 (quoting PA. CONST. art. I, § 1).

Max was seated in the front row of dignitaries at our university ballroom, in September 2022, as we announced the historic naming of the Thomas R. Kline School of Law of Duquesne University in honor of his fellow law alumnus and friend, Tom Kline. Max was one of the few people who received advanced notice of this surprise announcement, and he was one of the first people to claim a good seat in the front row. He was ecstatic to be witnessing this event, in part because he so admired Tom's work to advance the profession; in part because he knew Tom's impressive gift would benefit generations of present and future law students. Later that week, Max wrote me a beautiful handwritten note, saying that participating in this historic occasion that launched an exciting new era for the Law School where he had gotten his start was one of the high-points of his own professional career.

It was barely three weeks later that we gathered again in that same ballroom on campus, to grieve together at a memorial service just days after Max's unexpected death. An outpouring of love and respect for this iconic jurist was on full display. The packed ballroom included Chief Justice Debra Todd and the entire Supreme Court of Pennsylvania; Governor Tom Wolf and First Lady Frances Wolf; over a hundred jurists from every court in the Commonwealth, dressed in their judicial robes; prominent legislators and other public officials; hundreds of lawyers from Allegheny County and across the state; and hundreds more friends, family members and admirers. It was both a somber and uplifting moment.

At that touching ceremony, I shared with Max's family and guests the fact that I'd never seen Max more content and happier than I'd seen him in those most recent months. It was as if he knew that he had accomplished all the most important things that God had tasked him with doing, and he'd done it all in magnificent fashion. He seemed enormously pleased that his work on the Court was nearly done, and that a new era under Chief Justice Debra Todd was about to begin.

Max Baer was a judge's judge; a lawyer's lawyer; a gracious and encouraging colleague; an extremely proud husband to his devoted wife, Beth; a great father to his sons Ben and Andy, of whom he was unabashedly and outspokenly proud; and a doting grandfather to a brood of grandchildren who were the apples of his eye (and with whom he enjoyed frequent mischief-making). He was a warm, caring human being who believed in the solemn responsibility of all lawyers to use the legal profession to do good for others.

In the pages of this special tribute to the legacy of Chief Justice Max Baer that follow, some of those who worked at his side and knew him best share their reflections.

Chief Justice Debra Todd, the 58th Chief Justice of Pennsylvania, begins this special issue of the *Duquesne Kline Law Review* with a thoughtful, personal tribute to her predecessor, who was her colleague and friend on the High Court for over fifteen years. Chief Justice Todd's piece is followed by tributes from the remainder of the Court's distinguished jurists: Justices Christine L. Donohue, Kevin M. Dougherty, David N. Wecht, Sallie Updyke Mundy, P. Kevin Brobson, and Chief Justice Emeritus Thomas G. Saylor. Other contributors include: Betsy Ceraso, Esq. (long-time Chief Law Clerk to Chief Justice Baer); President Judge Kim Berkeley Clark (Court of Common Pleas of Allegheny County); Maureen Lally-Green (retired Superior Court judge and former dean of the Duquesne Kline Law School); Thomas R. Kline, Esq., Charles Becker, Esq. and Andra Laidacker, Esq. (of the Kline & Specter law firm); John J. Hare, Esq. (editor of "The Supreme Court of Pennsylvania: Life and Law in the Commonwealth, 1684–2017"); and Dr. Joel Fishman (retired long-time librarian at Duquesne Kline Law School and a specialist in Pennsylvania legal history). Finally, the Epilogue is written by Dean April Barton, who reflects on Chief Justice Baer's enduring legacy.

Chief Justice Max Baer's death remains a terrible loss for all of us; there's no escaping that fact. Yet, despite that profound sense of loss, it is comforting to know that Chief Justice Baer exited this earth on top of his game, still smiling and expressing abundant pride in others. It is also reassuring to know that he has left behind an indelible imprint that will be part of the Court's legacy—and the legacy of the legal profession that he cared so deeply about—in perpetuity.

As only the second Chief Justice in the history of the Pennsylvania Supreme Court to graduate from Duquesne's Law School (the first was Chief Justice Henry X. O'Brien, Law School class of 1929, who served as Chief from 1980 to 1983)<sup>19</sup>—Chief Justice Max Baer has solidified his place as one of the most towering figures to pass through the halls of this educational institution. It is for that reason that this special issue of the *Duquesne Kline Law Review* is dedicated to his memory. Max Baer was an irreplaceable fixture. Losing this towering jurist leaves a massive void in the entire Pittsburgh

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19. *Chief Justice Henry X. O'Brien*, THE UNIFIED JUD. SYS. OF PA., <https://www.pacourts.us/Storage/media/pdfs/20220510/181332-o'brien.pdf> (last visited Oct. 20, 2023).



legal community, in the national assemblage of jurists, and among the Duquesne family that still mourns his loss. Yet, his work of selfless service to others will assuredly continue.

## A Tribute to Chief Justice Max Baer

*Chief Justice Debra Todd\**

We were all extremely saddened by the loss of our friend and colleague Chief Justice Max Baer. Max unexpectedly passed away at age seventy-four, three months before his scheduled retirement as Chief Justice of Pennsylvania. It was a tremendous loss for the Court and the entire Commonwealth.

As I said at the time, “Pennsylvania has lost a jurist who served the Court and the citizens of the Commonwealth with distinction. Chief Justice Baer was an influential and intellectual jurist whose unwavering focus was on administering fair and balanced justice. He was a tireless champion for children, devoted to protecting and providing for our youngest and most vulnerable citizens.”

Despite his untimely death, we are blessed with Max’s rich legacy, reflected not only in his scholarly opinions and in the family court system he transformed into one of the best in the nation, but also in his steadfast love and devotion to his family and his staff. Although his tenure as Chief was brief, his legacy will be everlasting.

Born in West Virginia, Max spent his formative years in Western Pennsylvania. He and I shared an affinity for the University of Pittsburgh, where Max was an undergraduate, and I attended law school. Max continued his education by earning his law degree at Duquesne University. His deep love of both of these institutions, and for this entire region, continued throughout his life.

After working in private practice, Max was elected judge of the Allegheny County Court of Common Pleas in 1989, beginning his journey as a public servant. In the court’s family division, Max presided over cases near and dear to his heart, and he made them his own. He was nationally recognized as a pioneer in this area of the law: improving the child welfare system, upgrading the dependency court, streamlining the adoption process, and increasing parent involvement in child custody cases. Eventually, he became the Administrative Judge of family court, accumulating invaluable knowledge for his later role as Chief Justice. Anyone familiar with Max in the 1980s and 90s knew that he was a rising legal star, and

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\* Chief Justice, Pennsylvania Supreme Court

that his intellect, range of legal skills, and track record as an advocate, judge, and scholar made him an ideal choice for election to the Pennsylvania Supreme Court. He ran as the “Fighting Judge” with the logo of a Teddy Bear with clenched fists covered by boxing gloves—perhaps an homage to the great heavyweight champion boxer of the 1930s Max Baer, but certainly reflecting his own “can do” attitude in confronting and overcoming any problem that came before him. Not surprisingly in 2003, Max was elected to the High Court.

On our Court, Max was a beloved colleague, not only because of his kindness and caring nature, but also because his work product was unmatched—rigorous in his research, logical in his analyses, and plain speaking in his writing style. Over the years, he earned a well-deserved reputation as a thoughtful, moderate, and prolific jurist. He recognized the power of the constitution to protect individual rights, adhered to tenets of statutory construction with integrity, respected precedent, and crafted persuasive opinions that arrived at just results.

Max’s opinions are a reminder of his abiding sense of goodness. His writing spanned the full gamut of topics and often resulted in ground-breaking decisions.

After eighteen years as a Justice, Max was installed as the fifty-seventh Chief Justice of Pennsylvania in April 2021. So enamored with Pittsburgh, he drew a connection between himself and Heinz 57, the slogan of the H. J. Heinz Company. Max loved being on the Court and had an easy rapport with his colleagues and his staff. I sat next to him on the bench for most of my tenure on the Court. From that position, I observed his probing and peppering of advocates at oral argument with hypothetical upon hypothetical question. He did this not to toy with a lawyer for sport but to fully comprehend an issue and to seek to understand the limits of a particular rule of law.

Max could be beyond candid, telling advocates that he was not in favor of their position, but giving them a chance, by asking the lawyers to explain to him why he was wrong. He was a refreshingly honest jurist. While a textualist at heart, who meticulously applied the rules of statutory construction in his decisions, he also recognized the pragmatic side of the law.

Yet, Max was much more than the sum of his judicial accomplishments. We were judicial colleagues and friends for over fifteen years. Personally, Max was delightful. He loved his Pitt football and Pittsburgh Steelers. With childlike enthusiasm, he expressed his fascination with fine watches, showing you his latest acquisition,

which included a watch forged with a moon rock. Writing instruments, sports cars, and writing instruments with sport car logos, all captured his interest. Perhaps most telling of his optimistic view of the law, and the future, was his often referred to deep love of science fiction, including Star Trek, Star Wars, and Game of Thrones.

Chief Justice Baer's valued staff—whom he considered to be his “family” —was readily absorbed by other Justices' chambers, the Prothonotary's Office, and Central Legal Staff, upon his untimely passing. I had the distinct pleasure of inheriting one of his law clerks, attorney Anna Venturini, who shared with me her unique perspective of Max.

Anna explained that, harkening back to his days as a teenage camp counselor, Chief Justice Baer, whom his staff referred to as “the Judge,” created a mantra for his judicial chambers, “Happy Counselors, Happy Campers, Happy Camp.” His mantra rang true, and his camp was a happy one, with a distinctive character unlike any other. When Anna began clerking for Max more than fifteen years ago, one of the first tasks he asked her to perform was to provide a photograph of her twin daughters, then age nine, to add to a photo collage of the staff's children, which was displayed prominently on the wall in the entry to his chambers. Upon learning the girls' ages, and to her profound dismay, Max advised her that she had only half of the girls' childhood left to enjoy, as they would likely be leaving for college at the age of eighteen; he implored her to make the most of every day with them, cautioning that life had a way of moving quickly.

According to Anna, this exchange led her to appreciate, early on, Max's love for and devotion to his family, his belief that his judicial staff was a part of that family, and his insightful ability to notice and revel in the small wonders of life. To illustrate, as was evident to anyone who knew him, Anna recalled that the concept of time was paradoxical for Max. Minutes had little value, but moments were treasured. Believing that arriving early was unproductive, Max viewed meeting times as merely aspirational. The meetings, however, particularly those conducted to prepare for oral argument, were worth the wait, because it was during those long days that she formed her fondest memories of Max. To describe him as enthusiastic was an understatement, as he became immersed in the intricate factual predicates and thorny legal issues of the day. He took great care to examine thoroughly every aspect of the appeal, as well as the application of a proposed holding to various factual scenarios not at issue in the case. Regardless of the complexity of the matter,

Max's confidence in reaching a just resolution was unbridled, as he often said, "every case is hard, until you figure it out."

During breaks in the meetings, Anna described how he would divert the topic of discussion, musing about adventures with his wife Beth and the many impressive achievements of his sons Ben and Andy and, on a rare occasion, engaging in a Facetime conversation with his young grandchildren, introducing them to his staff. Max also shared myriad stories, such as how, many decades earlier, he obtained the bull horns that hung above the bookcases in his chambers' library; recited verbatim the lyrics of poems, such as "Casey at the Bat" by Ernest Thayer; and played side-splitting video clips on his phone, such as Peter Sellers as Inspector Clouseau. Suffice it to say, Max transported his judicial staff into his world, and what a wonderful world Anna found it to be.

Finally, Anna explained that Max had great respect and admiration for the Pennsylvania Supreme Court as an institution, and for those with whom he served. His legal acumen and tireless efforts to administer justice in this Commonwealth have been celebrated by many, long before his untimely passing. But what she found equally impressive was that the Judge enjoyed every moment, taking the time to find adventure and purpose in the journey, and caring deeply for those he encountered along the way. As one of Max's "happy campers," she found it to be an absolute privilege to experience the ride.

Of course, no tribute to Max would be complete without acknowledging his Chief Administrative Assistant, and longtime friend and confidante, Michele Makray. Michele was essential to Max, and she is deserving of this tribute as much as he. Michele was kind enough to share some thoughts about Max. Like so many others, Michele emphasized that above all else, Max cherished his family—his wife and children, including their spouses and children—and that his staff was simply his work family, including their spouses and children. Michele stressed Max's "work hard, play hard" motto, and, consistent therewith, his love of legal discussions with his staff in chambers—changing the facts and spinning hypothetical questions to thoroughly understand every issue that came before the Court. However, Michele explained that, ultimately, Max strived to better the lives of children and change their world. In this area, failure was never an option, and in that regard, he was extremely successful.

While Max's staff was his extended "family," Max's immediate family was his true mark of success—his wife Beth Baer, the accomplished Baer children, Ben, a Philadelphia attorney, and Andy,

an Air Force Lieutenant Colonel, as well as his five grandchildren. His family was a great source of pride and emotional support to Chief Justice Baer, and they fully embraced the understanding that all of the Chief's staff were part of one large, extended family.

Chief Justice Baer worked tirelessly with wisdom, integrity, and enthusiasm for nearly twenty years on our Court and thirteen years on the Allegheny County Court of Common Pleas. Because of his life in the law, children are safer, and families are stronger, perhaps the highest achievement that can be attained by a judge. As the time for his retirement approached, Max was at peace with turning over the reins, rightfully satisfied with his many accomplishments, and particularly proud of the state in which he left the Court. Indeed, this was an incredible gift to me when I assumed the position of Chief Justice after Max's passing and one reason why the current Court remains so successful. He often told me that he was especially proud of me becoming the first female Chief Justice of Pennsylvania.

Max's contributions to the law were significant and his decisions will continue to be profound far into the future. It is difficult for me to find words that would celebrate his contribution as it deserves to be celebrated, and I am saddened that I do not have his wise counsel going forward. Chief Justice Baer enriched my life in so many ways. I have many fond memories of our shared times as colleagues on the bench, at bar association meetings and panel discussions, as well as many dinners with our spouses, Beth and Steve. I am grateful to have known Max, to have learned from him, and to have counted him as a friend. Max's was a life well lived, an accomplishment to which we can all aspire.

# My Reflections on Former Chief Justice Max Baer

*Justice Christine Donohue\**

Former Chief Justice Max Baer was a relative stranger to me when I joined the Supreme Court of Pennsylvania in January 2016. Although we were both members of the Pittsburgh legal community, our paths never crossed in the practice, and not being a family law lawyer, I never had occasion to appear before him while he served on the bench in Allegheny County. While we engaged with each other on occasion at various bar association and Supreme Court functions, those encounters only gave me the superficial impression that he was approachable and had strong views on matters that were important to him, including but not limited to children, Pitt football, and all matters political. After getting to know Max, these impressions did not change, but nearly seven years of service together on the Supreme Court exposed me to the depth of his admiration for the legal profession, his commitment to applying the law fairly and impartially, and his dedication to advancing social justice.

The former Chief Justice held the legal profession, including lawyers and judges, in high regard and went out of his way to make the point. When critiquing a trial or intermediate appellate court decision in one of his opinions, he always started his rejection of a rationale or holding with the word “respectfully.” Although the qualifier likely didn’t blunt the disappointment in the reversal, it was important to Max to signal his respect for the thought process and judgment of the judges deciding cases in the first instance. Indeed, Justice Baer and I sparred on occasion about the breadth of this deference in his application of the abuse of discretion standard for reviewing certain trial court actions.<sup>1</sup> Our disagreement aside, Max

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\* Justice, Pennsylvania Supreme Court

1. For example, in writing for the majorities in *Commonwealth v. Norton*, 201 A.3d 112, 121 (Pa. 2019) (affirming denial of motion to withdraw a guilty plea after sentencing) and *Commonwealth v. King*, 212 A.3d 507, 513 (Pa. 2019) (affirming denial of motion to preclude Commonwealth from interviewing defendant’s trial counsel in preparation for Post-Conviction Relief Act hearing), Justice Baer relied on the importance of deferring to the discretion of trial judges in assessing credibility, considering the totality of circumstances and reaching a just result. In my responsive postures, I viewed these decisions as granting trial courts discretion unfettered by the substantive legal framework that trial courts are required to apply. *Norton*, 201 A.3d at 124–25 (Donohue, J., dissenting); *King*, 212 A.3d at 515 (Donohue,

was always guided by his instincts as a former trial judge and appropriately distinguished the roles of trial courts and the intermediate appellate courts from the Supreme Court's role.

The Duquesne Kline School of Law was precious to the former Chief Justice. It was his alma mater, and he continued his relationship with it throughout his career. The Primary and the General Election were blocked out on Max's calendar every year and not so that he could vote or to celebrate other citizens' exercise of the franchise. Instead, twice a year on these days, the former Chief Justice would appear in the law school's moot courtroom to administer the oath of office to recent Duquesne Kline graduates who were successful in passing the bar examination. During this special session of the Supreme Court, he would regale the newly admitted lawyers on their accomplishment and remind them of the seriousness of their obligations to the public and the court. Illustrated with his personal and professional experiences, he told them about the importance of seeking the advice of more seasoned attorneys as they embarked on their first representations. He cautioned against gamesmanship in the practice of law and described the lasting scars of crossing an opponent or lacking candor with the courts. In other words, he delivered a delightfully heartfelt lecture on the Rules of Professional Conduct, rules that he believed distinguished our profession from all others.

When I joined the Court, Max invited me to co-administer the oath of office with him at these special sessions since I was also a Duquesne Kline alumnus. This outreach was an example of Max's kindness and generosity. Make no mistake, this event which he initiated was Max's show for over a decade, and he could have kept those moments for himself. Instead, he allowed me to join in the joy and pride of welcoming new Duquesne Kline lawyers to the profession. In November 2022, I administered the oath of office in a special session without my dear friend and colleague. The loss of Max was again palpable to me and the Duquesne Kline community. He was sorely missed.

Chief Justice Baer will undoubtedly be most remembered in the history of the Commonwealth for his groundbreaking work as a tireless champion for children. It is shortsighted to view these accomplishments detached from Max Baer's judicial opinions that otherwise exhibit his innate sense of justice. He was passionate about fairness and the equal protection of the law.

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J., concurring). Justice Baer responded, in so many words, that I was wrong. *Norton*, 201 A.3d at 121; *King*, 212 A.3d at 513.



Our jurisprudence is peppered with concepts that inadvertently create opportunities for jurists to stray from blind justice. One example is the notion of “high crime areas” when used in the determination of the existence of probable cause to arrest an individual under the Fourth Amendment to the United States Constitution.<sup>2</sup> Justice Baer wrote pointedly about his deep concerns for applying the constitution differently based on the neighborhood where a citizen resides. In his concurring and dissenting opinion in *Commonwealth v. Thompson*,<sup>3</sup> Justice Baer distanced himself from the majority’s reliance on the high crime nature of the neighborhood where the arrest took place in determining that probable cause existed for the arrest:

The unfortunate result of today’s decision is that the low socioeconomic character of a neighborhood will now be enough to suffice the rigorous standards of probable cause for any citizen, not just the street-level heroin dealer. While I understand that, in the social norms of today’s world, drug transactions may occur more often in neighborhoods such as the one here, the rights of Pennsylvania residents in both high-crime and low-crime areas remain the same under our Constitution. To be sure, if police can now use evidence of the high-crime nature of the neighborhood to demonstrate probable cause, then the simple action of shaking a friend’s hand upon greeting will subject those friends potentially to being searched and seized, while the same occurrence in a low-crime area will not. Such a conclusion is patently offensive to our longstanding constitutional principles protecting every person in our society from intrusive action by the state, even in the face of an ever-increasing drug problem on our streets. *See e.g. Illinois v. Wardlow*, 528 U.S. 119 (2000) (“An individual’s presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime.”); *Whren v. United States*, 517 U.S. 806, 813 (1996) (recognizing that the Constitution prohibits selective enforcement of the law based upon subjective considerations).

I fully realize that a drug transfer in this case could have occurred, and that probable cause does not require absolute certainty. *See Los Angeles County, California v. Rettele*, 550 U.S. 609, 615 (2007). Nevertheless, the regrettable outcome of this

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2. *Illinois v. Wardlow*, 528 U.S. 119 (2000).

3. 985 A.2d 928 (Pa. 2009).

decision places the deciding factor in a case, not on the perceived action, but rather on the location of that action. Again, while an arresting officer may be proved correct in his hunch, such is not an accepted constitutional norm.<sup>4</sup>

Just as Justice Baer fought for the rights of children, his jurisprudence advanced the overarching principle that all citizens are entitled to a fair chance in life and equal application of the law.

My first impressions of Max were correct. He was approachable and quick to express his views on things that were important to him. Over time I learned that nothing was more important to him than his family. He was engaging and kind and open to new ideas and friendships. Former Chief Justice Max Baer's legacy as a jurist will be marked by his deep respect for lawyers, judges, and the rule of law. I am grateful for the opportunity to have known him and to call him my friend.

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4. *Id.* (Baer, J., concurring and dissenting) (citations omitted).

## Reflections on the Legacy of Chief Justice Max Baer

*Justice Kevin M. Dougherty\**

*“Justice is not to be taken by storm. She is to be wooed by slow advances.”<sup>1</sup>*

The sky carried a light-greenish hue. The thunder let out a gentle growl. Suddenly the lightning slammed, and harsh winds pounded the patio furniture into the pool. The host bellowed for all to seek shelter inside. Paralyzed with uncertainty, I instinctively reached for then-Justice Max Baer’s arm to direct him to safety. He calmly responded in his monotone voice: “It’s only a tornado, Kevin. If you’re frightened, run into the house with the others. I’m drinking my wine. We don’t get enough of them in Pittsburgh, and I would like to see one.”

The year was 2005. I was attending a gathering at the Minneapolis house of then-Minnesota Chief Justice Kathleen A. Blatz along with Justice Baer, Allegheny County Family Division Administrative Judge Kimberly Clark, and a score of other judicial officials from across the country. The Conference of Chief Justices, the Conference of State Court Administrators, the National Center for State Courts, and the National Council of Juvenile and Family Court Judges had convened a groundbreaking judicial summit titled, *Justice for Children: Changing Lives by Changing Systems: National Judicial Leadership Summit on the Protection of Children*.<sup>2</sup> It was prompted by an urgent and dire need to reform the nation’s flailing child welfare system.<sup>3</sup> Our charge from then-Chief Justice Ralph Cappy was straightforward but difficult: figure out how to fix our Commonwealth’s dependency system, which involves at-risk and vulnerable children (and their families) who, far too often, become hopelessly entangled by it. Unsurprisingly, Justice Baer was tapped to lead our delegation and spearhead this challenging endeavor.

This brief story illustrates an irrefutable truth about my friend, the late Chief Justice Baer: he was unwaveringly (perhaps stubbornly) fearless. And the same courage that emboldened him to

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\* Justice, Pennsylvania Supreme Court

1. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 133 (2nd ed. 1924).

2. MARY CAMPBELL, *NAT’L CTR. FOR STATE COURTS, JUSTICE FOR CHILDREN* 2 (2005).

3. *Id.* at 3.

stare down an impending weather disaster is also what enabled him to become such a true pioneer in the profession.

After serving as a deputy Pennsylvania attorney general and doing a stint in private practice, the late Chief Justice Baer began his judicial career as a Common Pleas Judge in Allegheny County. It didn't take long for him to make a lasting impact; he quickly developed a reputation as an innovative, reform-minded jurist. While serving as the Administrative Judge of Allegheny County's Family Court, then-Judge Baer obtained statewide and even national recognition for his relentless efforts to streamline adoptions and overhaul the county's child welfare system.<sup>4</sup> Most admirably, he sought to reduce the number of children in foster care and shorten the length of time children were away from their families. His impressive efforts did not go unnoticed: in 1997, he was named Advocate of the Year by the Pennsylvania Department of Public Welfare;<sup>5</sup> in 1998, he received the Robert S. Steward Award for Distinguished Service to Pennsylvania Families;<sup>6</sup> and, perhaps most impressive of all, in 1997, he was awarded the Adoption Excellence Award for Judicial Innovation by the Federal Department of Health and Human Services.<sup>7</sup> The award was presented to him at the White House by President Clinton and the First Lady.<sup>8</sup> Now, to be clear, Chief Justice Baer was not the type to seek attention or acclaim; he always advocated, not for himself, but for the needs of the impecunious and the struggling. This is why, as a young jurist in Philadelphia at the time, I so admired his unrestrained leadership—especially his quest to convert a balkanized juvenile delinquency/dependency court and child welfare system into a national model. Having been assigned to the Family Division, I became an acolyte.

Walt Disney once stated, “[T]he way to get started [is] to quit talking and begin doing.”<sup>9</sup> The late Chief Justice Baer did exactly that. Resolute from our Minnesota excursion, he established an independent office within the Administrative Office of Pennsylvania Courts (AOPC)—which functions as the state administrative and bureaucratic arm of the Supreme Court—known as the Office of

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4. NAT'L CTR. FOR STATE COURTS, NATIONAL JUDICIAL LEADERSHIP SUMMIT IV ON CHILD WELFARE: SUMMIT SPEAKERS 1 (September 24–25, 2019).

5. *Id.*

6. *In Remembrance of Chief Justice Max Baer*, AOPCONNECTED, (Pennsylvania Judicial System, Harrisburg, Pa.), Oct. 2022, at 5.

7. NAT'L CTR. FOR STATE COURTS, *supra* note 4.

8. *Id.*

9. Hedda Hopper, *Hedda Hopper's Hollywood*, THE LIMA NEWS, July 15, 1957, at 11.

Children and Families in the Courts (OCFC).<sup>10</sup> The goal was simple: “Families for Children,” meaning every child in the Commonwealth grows up in a safe, permanent, and nurturing family.<sup>11</sup>

Then-Justice Baer and OCFC, led by its initial director, Andrea Jelin,<sup>12</sup> quickly realized child welfare and dependency systems were struggling due to siloed thinking. County-level judges, child welfare administrators, and other stakeholders were not sharing best practices for communicating, strategizing, or planning for the same population. As a result, the Children’s Roundtable Initiative was launched.<sup>13</sup> During its infancy, Ms. Sandy Moore replaced Ms. Jelin and helped steer OCFC to national prominence.<sup>14</sup> The Children’s Roundtable Initiative is a three-tiered structure allowing for effective administration and communication between local Children’s Roundtables, Leadership Roundtables, and the Pennsylvania State Roundtable.<sup>15</sup> Since its inception, the goal of the Children’s Roundtable Initiative has been singular but critical: ensure that every child coming through the dependency/child welfare system in Pennsylvania flourishes in a safe, nurturing, and permanent family.<sup>16</sup>

Allow me a moment to further elaborate on this innovative structure. All groups share the same composition but on different tiers or levels. The first tier includes local Children’s Roundtables.<sup>17</sup> These are chaired by a county’s lead dependency judge and child welfare administrator.<sup>18</sup> Other members include county solicitors, guardians ad litem (GAL),<sup>19</sup> juvenile probation, service providers, law enforcement, parent attorneys, hearing officers, and other system leaders varying by county.<sup>20</sup> Local Children’s Roundtables meet as often as local need dictates.<sup>21</sup> At the second tier are seven

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10. *Overview, About OCFC*, OFFICE OF CHILDREN & FAMILIES IN THE COURTS, <https://ocfcpacourts.us/about-ocfc/overview/> (last visited, Oct. 17, 2023).

11. *Id.*

12. Zig Pines, *Planting an Acorn to Protect a Child*, OFFICE OF CHILDREN & FAMILIES IN THE COURTS, [https://ocfcpacourts.us/wp-content/uploads/2020/06/Planting\\_an\\_Acorn\\_to\\_Protect\\_a\\_Child\\_000413.pdf](https://ocfcpacourts.us/wp-content/uploads/2020/06/Planting_an_Acorn_to_Protect_a_Child_000413.pdf) (last visited October 17, 2023).

13. *Id.*

14. *Id.*

15. *Organizational Structure, Children’s Roundtable Initiative*, OFFICE OF CHILDREN & FAMILIES IN THE COURTS, <https://ocfcpacourts.us/childrens-roundtable-initiative/organizational-structure/> (last visited, Oct. 17, 2023).

16. CHILD’S ROUNDTABLE INITIATIVE OFF. OF CHLD. & FAMS. IN THE COURTS, MISSION AND GUIDING PRINCIPLES FOR PENNSYLVANIA’S CHILD DEPENDENCY SYSTEM 8 (2009).

17. *Organizational Structure*, *supra* note 15.

18. *Id.*

19. GALs are appointed by the court to advocate for children who have been removed from their homes because of alleged abuse, abandonment, or neglect.

20. *Organizational Structure*, *supra* note 15.

21. *Id.*

Leadership Roundtables.<sup>22</sup> These are organized by county size, meet twice a year, and include the county's lead judge, child welfare administrator, and one additional member from the local Children's Roundtable.<sup>23</sup> The State Roundtable comprises the final tier.<sup>24</sup> It meets once a year and includes Leadership Roundtable co-chairpersons, workgroup leaders, and content experts.<sup>25</sup> The State Roundtable was co-chaired for seventeen years by Chief Justice Baer and the Deputy Secretary for DHS's Office of Children, Youth, and Families, with support from OCFC Director Moore. It is tasked with setting the priorities for all dependency court improvement activities throughout the Commonwealth.<sup>26</sup>

I am proud to say the Children's Roundtable Initiative has had remarkable success. Its achievements include the safe reduction of children placed in foster care (from 21,000 in 2006 to 13,000 in 2022),<sup>27</sup> the expansion of kinship care (from 20% in 2006 to 44% in 2022),<sup>28</sup> and the safe reduction of group care (from 16% in 2006 to 10% in 2022).<sup>29</sup> In addition, the initiative's structure has provided extensive judicial and attorney education and led to innovative practices including the Permanency Practice Initiative, Family Group Decision Making and, most recently, the still-ongoing Family Engagement Initiative.<sup>30</sup>

Now, as I sit in my chamber on the forty-first floor, I gaze upon the thirty-seven-foot ornate statue of William Penn affixed to the top of Philadelphia City Hall. Every time I see it, I cannot help but

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22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. News Release, Admin. Off. of Pa. Cts., Supreme Court Issues Judicial Guide to Benefit Children, Families (July 28, 2011), [https://www.pacourts.us/Storage/media/pdfs/20210518/130124-supcrtissuesguidetobenefitchildrenfamilies\\_080311-001383.pdf](https://www.pacourts.us/Storage/media/pdfs/20210518/130124-supcrtissuesguidetobenefitchildrenfamilies_080311-001383.pdf); *Trends in Foster Care and Adoption: FY 2013–2022*, ADMINISTRATION FOR CHILDREN & FAMILIES, <https://www.acf.hhs.gov/cb/report/trends-foster-care-adoption> (last visited, Mar. 29, 2024).

28. *Kinship Care Placement with Family or Friends is Focus of Pa. Dependency Court Attorney Educational Session*, THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA (Aug. 15, 2023), <https://www.pacourts.us/news-and-statistics/news/news-detail/1146/kinship-care-placement-with-family-or-friends-is-focus-of-pa-dependency-court-attorney-educational-session>; OFF. OF CHILD. & FAMS. IN THE CTS., 2022 STATE ROUNDTABLE REPORT KINSHIP CARE 4 (2022).

29. *See Common Pleas Case Management, Children's Roundtable Initiative*, OFFICE OF CHILDREN & FAMILIES IN THE COURTS, <https://ocfcpacourts.us/childrens-roundtable-initiative/state-roundtable-workgroupscommittees/common-pleas-case-management/> (last visited, Mar. 30, 2024); *Adoption and Foster Care Analysis and Reporting System (AFCARS)*, ADMINISTRATION FOR CHILDREN & FAMILIES, <https://www.acf.hhs.gov/cb/data-research/adoption-fostercare> (last visited Mar. 30, 2024).

30. *See Children's Roundtable Initiative*, OFFICE OF CHILDREN & FAMILIES IN THE COURTS, <https://ocfcpacourts.us/childrens-roundtable> (last visited, Oct. 17, 2023).

think how incredibly fortunate and blessed I am to have the opportunity to participate in the developed reality fashioned by his Frame of Government. And I am equally humbled that I had the chance to work with the late Chief Justice Baer, whose professional footsteps I aim to tread. Few had a front-row seat to the astounding achievements of these two great men—William Penn and Max Baer. I did, and for that I will be forever grateful.

“Gentle pressure relentlessly applied.” This, the late Chief Justice Baer often said, is the best way to enact real change. Nineteen years have passed since that disagreeable weather in Minneapolis, and in that time, Chief Justice Baer blew in an era of change and betterment for those in the foster care system—and well beyond it. Thank you for your gentle hand relentlessly guiding us in the right direction.

Slán mo chara!

## Wrestling with the Baer

*Justice David Wecht\**

Max Baer was one of a kind. A man of irrepressible energy, of great devotion to family, state, and country, of unstinting dedication to the law and the courts. I met Max not long after I moved back home to Pittsburgh in 1993, after I had practiced law in Washington, D.C., for several years. He was around fifteen years older than me, and he was already a greatly respected jurist, having been elected to the Court of Common Pleas in 1989. Max had been assigned to the family division, as was the general custom for new judges, and he had immediately made his mark there, along with beloved veteran jurists like Larry Kaplan, Tony Wettick, and Gene Strassburger. What a family law bench!

I was intrigued by Max Baer, partly because of his “fighting judge” logo, which alluded to the name he shared with the great heavyweight boxing champion of yesteryear, and partly because we were both Jews. At some point in the mid-1990s, Max reportedly put in a good word for me with the woman who in 1998 would become my wife. At the time, Valerie was serving as an Allegheny County juvenile probation officer, and she often appeared in Max’s courtroom. This was back when juvenile court was housed in Oakland, in an old brick building laced with cramped rooms and claustrophobic hallways. A real rabbit warren. The crowded waiting room itself was enough to dissuade any rational person from returning if return could somehow be avoided. Now, I say “reportedly,” because the tale, in Max’s telling, grew taller and taller as the years went by. Whatever Max said to Valerie about me, it certainly didn’t hurt, because she did go out with me on the blind date that a mutual friend had proposed. Over time, Max’s positive reference developed into a full-blown *shadkhan* (matchmaker) claim, one that he repeated at every public opportunity. Whatever the precise details, Max was pleased that things worked out for Valerie and me. And, all these years, and all these kids, later, so are we.

Now, I mentioned Max’s acclaim as a family court judge, and the Supreme Court eventually asked him to take over as administrative judge of the division. He soared to the greatest of heights, receiving

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\* Justice, Pennsylvania Supreme Court



an award at the White House, spearheading the successful drive for a superb new family court building in the old jail downtown, and helping innumerable children and parents gain happier lives by dint of his hard work and his deep care and empathy. When 2003 came around, Max was serving in the civil division and rumored to be Governor Ed Rendell's favorite for the top of the ticket in the statewide court races that year. The greatest of plans go awry, and no package deal formed, so Max had to run hard and win that primary the old-fashioned way. I was running that spring to keep the common pleas seat to which I had just been appointed in early February, and I got to see first-hand the energy and effort that Max, his wife Beth, and his sons Andy and Ben put into the campaign. The Baer juggernaut proved unstoppable, and Max went on to win the primary and general, taking his seat on the Supreme Court in January 2004.

Back in early 2003, Max had called me after I arrived in family division (where I was a stranger operating in a strange land), and he told me that I'd inherited a long-fought and hotly contested divorce case that he had supervised in the early going. The dispute had begun as an economic-claims-in-divorce case in family division, but as time passed it had accreted a passel of related civil division and orphans court actions as well, along with a federal court securities freeze-out action, to boot. This was not only my first effort to adjudicate a complex dispute involving closely held business entities; it was my first serious divorce trial of any kind at all. Somehow, the thing moved over the finish line. That was a great experience, and I began to see what Max meant when he said how much he'd loved his work in the family division.

Late in 2008, Max summoned me to his Supreme Court chambers and, to my utter surprise, told me I'd been selected as administrative judge of the family division. That was a job where Max had defined the role, and no one could reasonably expect to measure up. I accepted the responsibility nonetheless, and of course proceeded to make many mistakes, mistakes that Max himself would not have made. Frequently, I sought his advice, and even more frequently he offered his thoughts and "suggestions," unsolicited. One key piece of advice he imparted during my two years in that role was "Don't lose your court." In other words, when your colleagues overwhelmingly resist your grand initiative, don't push the matter beyond the breaking point. Maybe they've got insights you lack. Maybe there's something you're failing to appreciate. Listen. Learn. Adjust. Move on.

As the years went by, I had occasion to recall that advice, and to use it, in a variety of contexts. Not every battle is worth fighting. Not all wisdom is yours. Team efforts usually beat individual ones. Buy-in is a good thing.

Well, the clock wound around a few more cycles, and I followed Max's advice that you can't run a statewide judicial race from family division. The hours are too long, the cases too fact-intensive, the opportunities to interact with civil trial lawyers too few. Like Max, I migrated to civil division, and, in 2011, I ran for Superior Court. Four years later, in 2015, I ran for Supreme Court, and one of the greatest things about January 2016 was the opportunity to begin working with Justice Max Baer as a colleague.

We disagreed often. His work was impeccable. Max Baer was a workhorse, a common-sense jurist, impatient with stuffy doctrine. I have some formalist tendencies where the law is concerned, so we were often at odds jurisprudentially speaking. Max won most of those debates. His legacy is truly unparalleled. The work he did for our Court's Tricentennial in 2022 was epic and destined to be remembered by us all. It was horrible that Max left us in October 2022, a deep and bitter shock to his family, his friends, his colleagues. But Max Baer went out at the top of his game. Since Max was the greatest of sports fans, it's not trite for me to say that he left it all on the field.

## Chief Justice Baer – “The Fighting Baer Judge”

*Justice Sallie Updyke Mundy\**

I first met Max Baer and his lovely wife Beth in January 2004 while attending a Pennsylvania Bar Association meeting in Florida. The event was dinner at a car themed restaurant, and the venue included several authentic vintage cars. Then, Max was a newly elected Justice to the Pennsylvania Supreme Court, and I was there as a practicing attorney with my three young sons, ages six, four, and two. I recall Max’s genuine interest in learning who I was and being introduced to my children. Max delighted in interfacing with my young sons, showing them the cars and telling them fascinating facts about the engine of each car. At the end of the evening, Max gave each child a fat handful of left-over “Max Baer for Supreme Court, The Fighting Judge” campaign stickers.

Prior to his bid for that seat, Max had earned a reputation as an excellent jurist heading the Family Law Division of the Court of Common Pleas of Allegheny County where he initiated programs to improve the efficiency and efficacy of adoption and family law matters before the court. It was not unusual for the Superior Court to acknowledge that excellence when reviewing his decisions on appeal. For example:

The well reasoned and highly detailed explanations provided by the Honorable Max Baer correctly dispose of the points raised by appellant wife, and we affirm on that basis.

...

Here, the learned trial judge has crafted a scheme of equitable distribution and alimony which carefully weighs and balances appellant’s reasonable need for assets as well as for current and future income in conjunction with her ability to provide for herself. When the language of the several orders entered by Judge Baer in this case is considered dispassionately, it is clear that the trial court has recognized appellant’s continuing need

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\* Justice, Pennsylvania Supreme Court

for additional income for the foreseeable future in order that economic justice between the parties may be effectuated.<sup>1</sup>

In another case the Superior Court considered an appeal in a dependency case where a panel of the Orphans Court Division, including Judge Baer, dealt with obstreperous litigants, including foster parents who violated numerous court orders. In commending Judge Baer's judicial temperament, the Superior Court Panel noted: "As Judge Baer stated at the conclusion of the January 17, 1996 hearing, 'We need to have a thick skin here. We're not going to use these children to punish these adults.'"<sup>2</sup>

With his ascension to our Supreme Court, the late Chief Justice Max Baer brought these qualities of compassion and judicial acumen and temperament with him. Among the early issues he encountered was a challenge to the limits of the "best interest of the child" standard when it was alleged to be against the competing fundamental rights of the parties. In *Shepp v. Shepp*, a father appealed a Superior Court decision that upheld a family court's restrictions on his proselytizing his fundamental religious views, *i.e.* his fundamentalist Mormon polygamist stance and intention to marry four additional wives, in the presence of the child.<sup>3</sup> The Majority of the Court held the restraint was unwarranted without a sufficient showing of a crime if acted upon, or of harm to the child, and that advocacy of plural marriage in this instance did not show such harm.<sup>4</sup> In a thoughtful dissent, Justice Baer deemed the trial court's findings, based on the testimony, to be supported that "Father had every intention of 'follow[ing] through' on his beliefs and, unchecked, would do whatever he could, in his position of considerable authority as Child's parent, to lead Child into a life of polygamy while still of tender years."<sup>5</sup> Ever the advocate for children, Justice Baer reminded "[t]he state also has an unquestionable *parens patriae* obligation to protect its children and serve their best interests."<sup>6</sup>

Flash forward to January of 2009, I was still peeling or trying to peel his fighting Baer campaign stickers from almost every piece of furniture in the house. I renewed my friendship with Justice Baer

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1. *Nemoto v. Nemoto*, 620 A.2d 1216, 1219, 1220–21, (Pa. Super. Ct. 1993) (affirming the trial court's alimony award, including limitations on future petitions to amend, and termination alimony pendente lite prior to termination of case).

2. *In re Griffin*, 690 A.2d 1192, 1213 (Pa. Super. Ct. 1997) (affirming the lower court's determination that Foster Parents had standing to contest removal of child from their home).

3. 906 A.2d 1165, 1168 (Pa. 2006).

4. *Id.* at 1174.

5. *Id.* at 1177–78 (Baer, J., dissenting).

6. *Id.* at 1177.

as I undertook my campaign as a candidate for Superior Court. Like all candidates in that election cycle, I was asked by Justice Baer to participate in an event at a local comedy club to benefit Allegheny County's children. Max was thrilled that I agreed to participate in the event and even more excited that I chose to include the same three sons to participate with me in the comedy routine. By that time, Max was known affectionately by my sons as the "Fighting Baer Judge."

When I joined the Supreme Court in 2016, I was frequently drawn to view a case through the same judicial lens as my friend and colleague Justice Baer. One such case concerned the question of whether, under the Adoption Act, 23 Pa. C.S. § 2313(a), a child subject to contested termination proceedings should be appointed counsel in addition to the guardian ad litem (GAL) to represent the child's legal interests.<sup>7</sup> The Court presented a splintered decision in the first case, *In re Adoption of L.B.M.*<sup>8</sup> All Justices agreed appointment was necessary under appropriate circumstances but differed on those circumstances and whether they were present in the case. The lead opinion opined that the GAL cannot serve both roles.<sup>9</sup> The concurrence did not foreclose scenarios where a GAL could fulfill both roles absent a conflict but deemed the trial court failed to engage in a conflict analysis.<sup>10</sup> Justice Baer in dissent saw no prohibition in the statutory provision from dual representation and indeed found support in similar provisions in the Juvenile Act.<sup>11</sup> Justice Baer differed from the concurrence in his assessment of the record relative to the consistency between the GAL's view of the child's best interest and the views expressed by the child.<sup>12</sup> However, lest his view of the case be over generalized he noted:

Nevertheless, I am troubled that an affirmance of the trial court's denial of the motion to appoint counsel could be misconstrued as not requiring the appointment of counsel in contested termination proceedings. Indeed, I agree that lack of counsel for the child would result in a structural error in a termination proceeding. As such, it would be a better practice for courts in every contested termination proceeding to place an order on the record formalizing the appointment of counsel to highlight for

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7. *In re Adoption of L.B.M.*, 161 A.3d 172, 174 (Pa. 2017).

8. *Id.* at 183.

9. *Id.* at 181.

10. *Id.* at 184–85 (Saylor, J., concurring).

11. *Id.* at 185–88 (Baer, J., dissenting).

12. *Id.* at 189. I joined this dissenting opinion and authored my own, joined by Justice Baer. *See id.* at 193 (Mundy, J., dissenting).

all parties the responsibility for the representation of the child's legal interests, while simultaneously permitting that attorney to serve as the child's GAL so long as there is no conflict of interest between the child's legal and best interests.<sup>13</sup>

The second case in the series, *In re T.S.*, Chief Justice Saylor in an opinion, garnering support of four other Justices in pertinent part, confirmed the position of the four Justices in *In re Adoption of L.B.M.* that a GAL could serve in a dual role absent a conflict of interest and went on to hold that a non-communicative child incapable of indicating a preferred outcome presumptively cannot present a conflict requiring an appointment of additional counsel.<sup>14</sup>

The third case in the series, *In re Adoption of K.M.G.*, authored by Justice Baer, fully joined by four Justices, explored the parameters for judicial review of the questions posed by the earlier cases, *i.e.* the existence of a conflict and the propriety of a GAL assuming a dual role in a particular case.<sup>15</sup> Justice Baer first noted that courts are generally, as part of judicial restraint, reticent to assume the authority to review an issue *sua sponte*.<sup>16</sup> Given that reticence, balanced by the important rights of the child at stake, the Court held that *sua sponte* review confirming the orphans court engaged in a determination that the child's best interest and legal interests were represented, was appropriate.<sup>17</sup> However, *sua sponte* review of the existence of a conflict, or the performance of a GAL in a dual role would not be appropriate given the orphans court's better position to make such a determination.<sup>18</sup>

Again, I do not mention these cases for their result, but as illustrations of the unique, thoughtful qualities and humanity the late Chief Justice Baer brought to all the weighty decisions brought before the Court. He was equally cognizant of the dispassionate stance jurists must take in addressing disputes, while keenly aware of the real and personal impact those decisions have on the participants and, as precedent, on the people of the Commonwealth at large.

Over the years, as I joined Max as a Justice on the Supreme Court, our friendship continued to flourish. We spoke frequently and enjoyed our time together when our paths would meet. Almost without exception our conversations started with his inquiry of the status of the Mundy children followed by his update on his sons and

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13. *Id.* at 188 (Baer, J., dissenting).

14. 192 A.3d 1080, 1092–93 (Pa. 2018).

15. 240 A.3d 1218, 1224 (Pa. 2020).

16. *Id.* at 1234.

17. *Id.* at 1235–36.

18. *Id.* at 1236–38.

his cherished grandchildren before we would turn the conversation to the issue at hand. The late Chief Justice Max Baer was a tremendous Justice. He cared about the rule of law, the duty of upholding the Constitution, the independence of the judiciary, the administration of justice—all the educational and tangible aspects of serving as a Justice on the Pennsylvania Supreme Court. But, in addition to all those fine and impressive attributes, Max Baer cared about all the children: my children, your children, his children, and always the less fortunate children in this Commonwealth. He was at all times the “Fighting Baer Judge” for children.

# Baer on Election Law

*Justice P. Kevin Brobson<sup>1</sup>*

## I. IN MEMORIAM

When I attended my first appellate judges conference in June 2010 as a newly seated Pennsylvania Commonwealth Court Judge, my wife Lauren and I had the pleasure of dining with then-Justice Max Baer and his wife Beth. Prior to that, Max and I had just one, brief conversation by telephone. We had never previously met in person. Wonderful friendships were formed during that dinner.

In the years that followed, I would look forward to my annual visits with Max and Beth at the conference. Lauren would attend when time permitted, always eager to feel the warmth of our friendship with Max and Beth. I also sat on a few presentation panels with Max. I was never convinced that he prepared all that much for them. When it was his turn, Max would begin by saying—“I can’t wait to speak, because I’ve been looking forward to hearing what I’m going to say.”

Upon my election to the Pennsylvania Supreme Court, then-Chief Justice Max Baer was as kind and as welcoming as anyone who knew him would expect. Although I knew his time on the Court would conclude after only my first year as a Justice, I looked forward to our friendship growing and to availing myself of his insights about the law, the Court, and life as he slid into his well-deserved retirement. His sudden loss left a void that is not likely to be filled. His memory, however, remains a blessing to all of us.

## II. ELECTION LAW

During his installation ceremony as Chief Justice in 2021, Allegheny County President Judge Kim Berkeley Clark referred to Chief Justice Baer as a “living legend,” for his tireless work and innovative approach to custody, juvenile, and dependency matters.<sup>2</sup> Indeed, Chief Justice Baer spent his entire thirteen-year tenure as

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1. Justice, Supreme Court of Pennsylvania. The views expressed in this Article are those of the author and not of the Court. The author recognizes and thanks Maria Allegretto, Esquire, former Law Clerk to Chief Justice Baer and current Deputy Judicial Clerk to Justice Brobson, for her contributions to this Article.

2. Transcript of Installation Ceremony of Chief Justice Max Baer at 7 (Oct. 5, 2021).



an Allegheny County Common Pleas Judge in the trial court's family division. Yet, during his time on the Pennsylvania Supreme Court, Chief Justice Baer played a prominent role in the Court's decisions impacting the way Pennsylvania elects its public officials at the federal, state, and local levels. His impact on election law in Pennsylvania is an additional noteworthy aspect of his jurisprudential legacy.

Throughout then-Justice Baer's first term, election-related decisions by the Court tended to focus on candidate qualification to appear on the ballot. Justice Baer's first majority opinion for the Court was in an election-related case—*In re Nomination Petition of Benninghoff*.<sup>3</sup> At issue in *Benninghoff* was whether a candidate for office who failed to disclose a source of income on his timely filed statement of financial interests, in accordance with the governing statute,<sup>4</sup> should be prevented from running due to that omission.<sup>5</sup> The candidate in that case was an incumbent State Representative who omitted his Commonwealth-paid salary from the portion of the form statement where the candidate was to disclose his sources of income.<sup>6</sup> Writing for a narrow majority, Justice Baer had little difficulty concluding that the State Representative's salary for that elected office constituted "income" that had to be disclosed on the required form,<sup>7</sup> even disagreeing with the State Ethics Commission's contrary conclusion.<sup>8</sup>

While the candidate failed to disclose that particular source of income in the appropriate box on the form, Justice Baer nonetheless concluded that the candidate "substantially complied" with the statute, because the candidate disclosed his existing employment as a State Representative elsewhere on the form and the salaries of state representatives are a matter of public record.<sup>9</sup> "Listing the

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3. 852 A.2d 1182 (Pa. 2004).

4. See 65 PA. CONS. STAT. § 1104(b) (1998) (requiring candidates to file statement of financial interests and append copy thereof to candidate's petition to appear on ballot for election).

5. 852 A.2d at 1183–85.

6. *Id.* at 1183–84.

7. See *id.* at 1183–87; 65 PA. CONS. STAT. § 1105(b)(5) (2007) (providing that statement of financial interests shall disclose "[t]he name and address of any direct or indirect source of income totaling in the aggregate \$1,300 or more").

8. *Benninghoff*, 852 A.2d at 1185–87. The State Ethics Commission is the administrative agency responsible, *inter alia*, for policing compliance with the Public Official and Employee Ethics Act (Ethics Act), 65 PA. CONS. STAT. §§ 1101–1113, of which Section 1104(b) is a part. See 65 PA. CONS. STAT. § 1106 (1998) (establishing State Ethics Commission); *id.* § 1107 (setting forth commission's powers and duties).

9. *Benninghoff*, 852 A.2d at 1187. *But see id.* at 1189–93 (Castille, J., concurring) (distancing himself from majority's "substantial compliance" rule in favor of evaluation that considers whether defect is "fatal" or "amendable"). In 1989, the General Assembly amended the Ethics Act to provide that "[f]ailure to file the statement [of financial interests] in accordance

General Assembly or the Commonwealth as a direct source of income in Box 10,” Justice Baer noted, “would not disclose anything that is not already disclosed . . . in Boxes 4, 5, and 6.”<sup>10</sup> Here, the candidate “substantially complied” with the income-source-disclosure requirement because, while omitted from the appropriate box on the form, the statutorily required information was provided “on the form as a whole.”<sup>11</sup> The rule then-articulated by Justice Baer for the Court was as follows: “[W]here . . . a candidate has substantially complied with the requirements of the Ethics Act and there is a technical defect appearing on the face of a candidate’s [statement of financial interests], such a defect is subject to the candidate’s amendment.”<sup>12</sup>

The Court continued to grapple with defective statements of financial interests in the years that followed, and Justice Baer was in the thick of it. In *In re Littlepage*,<sup>13</sup> the candidate wrote “None” in Block 10 of the statement of financial interests, failing to disclose actual income from a rental property.<sup>14</sup> Justice Baer, writing for the majority, found that the failure to make the disclosure was not amendable, because the candidate’s statement contained no other information that would have informed a reviewer that the candidate was in receipt of rental income.<sup>15</sup> In a nod to *Benninghoff*, Justice Baer concluded for the Court that “there is not sufficient information on the face of [the statement] to constitute substantial compliance with the requirements of the [Ethics] Act.”<sup>16</sup> Accordingly,

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with the provisions of this act shall . . . be a fatal defect to a petition to appear on the ballot.” See Act of June 26, 1989, Pub. L. 26, No. 9, § 4(b)(3) (recodified as amended at 65 PA. CONS. STAT. § 1104(b)(3) (1989)). In his concurring opinion, then-Justice Castille interpreted this statutory fatal-defect rule as applying only to untimely filed statements, not statements that were timely filed but included a defect or omission. *Benninghoff*, 852 A.2d at 1192 (Castille, J., concurring).

10. *Benninghoff*, 852 A.2d at 1187.

11. *Id.*

12. *Id.* at 1189. Of course, the candidate in *In re Benninghoff* would, years later, go on to become Pennsylvania House Majority Leader Kerry Benninghoff. Upon Chief Justice Baer’s untimely death, Leader Benninghoff issued the following statement:

On behalf of the Pennsylvania House Republican Caucus, I offer my deepest condolences and sympathies to the family, friends, colleagues and loved ones of Chief Justice Max Baer.

Of note, his admirable work in the area of foster care, adoption and child advocacy is something that has had a monumental impact on the lives of countless Pennsylvania children and made the dream of becoming a family a reality for many.

I again wish those close to him comfort and peace during this difficult time.

Press Release, Kerry Benninghoff, Majority Leader, Pa. House of Representatives, PA House Majority Leader Offers Condolences Following Death of PA Chief Justice Max Baer (Oct. 1, 2022), <https://www.kerrybenninghoff.com/News/31373/Latest-News/PA-House-Majority-Leader-Offers-Condolences-Following-Death-of-PA-Chief-Justice-Max-Baer>.

13. 909 A.2d 1235 (Pa. 2006), *overruled by In re Paulmier*, 937 A.2d 364, 371 (Pa. 2007).

14. 909 A.2d at 1237.

15. *Id.* at 1240.

16. *Id.* (citing *Benninghoff*, 852 A.2d at 1187).

the defect was fatal and the candidate was properly struck from the ballot.<sup>17</sup> But while Justice Baer hoped that his opinion in *Littlepage* might provide clarity to the lower courts on the Supreme Court's precedent in this area,<sup>18</sup> tensions remained as to when and how courts should apply the statutory fatal-defect rule in the Ethics Act,<sup>19</sup> "with which the Court had expressed strong discomfort."<sup>20</sup>

Only one year later, the Court in *Paulmier* jettisoned its prior precedent, including *Littlepage*, in favor of a construction of the statutory fatal-defect rule that promoted both the goal of full candidate financial disclosure in the Ethics Act<sup>21</sup> and the Election Code, which "requires a liberal construction in order to protect a candidate's right to run for office and the voters' rights to elect the candidate of their choice."<sup>22</sup> Under the new construction announced in *Paulmier*, the fatal-defect rule in the Ethics Act only applies where a candidate fails to file a statement of financial interests or files an untimely statement.<sup>23</sup> The Court further explained:

Section 1104 [of the Ethics Act] does not bar any candidate from the ballot if he or she files in a timely manner, even if there are defects on the face of the form, so long as that candidate subsequently amends the form to correct the defect and comes into compliance with the Act in a timely manner. In other words, all defects related to the content of disclosures on a timely filed statement of financial interest are subject to timely amendment.<sup>24</sup>

*Paulmier* remains the law today.

One could imagine a still relatively new Justice Baer put off by the majority's decision in *Paulmier* to overrule *Littlepage*<sup>25</sup> so soon

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17. *Id.* at 1240–41.

18. *Id.* at 1239.

19. *See supra* n.8 and accompanying text.

20. *In re Guzzardi*, 99 A.3d 381, 384 (Pa. 2014).

21. 65 PA. CONS. STAT. § 1101.1(a) (1998).

22. *In re Paulmier*, 937 A.2d 364, 371 (Pa. 2007) (citing Nomination Petition of Ross, 190 A.2d 719, 720 (Pa. 1963)).

23. *Id.* Under Section 1104(b) of the Ethics Act, to be timely, the candidate must file a statement of financial interests with the appropriate authority "on or before the last day for filing a petition to appear on the ballot for election." 65 PA. CONS. STAT. § 1104(b)(1), (2) (1998).

24. *Paulmier*, 937 A.2d at 371.

25. And, as then-Justice Castille noted in his concurring opinion, the majority, while not expressly overruling *Benninghoff*, did not reaffirm the "substantial compliance" rule articulated by Justice Baer for the Court in that opinion. *Id.* at 378 (Castille, J., concurring). As Justice Castille explained: "The fashioning of that rule was made necessary by the effect of the unfortunate *Anastasio* line. The Court having eradicated the *Anastasio* cancer, the half-cure of *Benninghoff* has outlived its usefulness." *Id.*

after its release. Instead, Justice Baer wrote a concurring opinion, embracing the majority's approach in toto.<sup>26</sup> Before addressing his concurring opinion, some additional context is helpful. To be fair to Justice Baer, and as explained by the court in *Guzzardi*,<sup>27</sup> the Court's uneasiness with a rule that compelled candidate disqualification for failure to file a *timely* statement of financial interests preceded Justice Baer's arrival on the Court. It was the Court's unanimous 1982 decision in *Commonwealth, State Ethics Commission v. Baldwin*<sup>28</sup>—wherein the Court refused to impose a *per se* rule of fatality in cases where a candidate fails to file a timely statement of financial interests<sup>29</sup>—that likely prompted the General Assembly to amend the Ethics Act in 1989 to include the fatal-defect rule.<sup>30</sup>

But while the Court would eventually come to accept the General Assembly's legislative judgment in 1989,<sup>31</sup> how Pennsylvania courts interpreted and applied the new statutory fatal-defect rule to *timely filed* statements with errors or omissions became a new flashpoint, starting in 2003, the year that then-Judge Baer was campaigning for the High Court. In *In re Nomination Petition of Anastasio*,<sup>32</sup> the Pennsylvania Commonwealth Court applied the statutory fatal-defect rule and barred a candidate from the ballot who did not disclose certain income in his *timely filed* statement of financial interests.<sup>33</sup> The Pennsylvania Supreme Court affirmed *per curiam* without opinion and with three Justices dissenting.

With this backdrop, then-newly elected Justice Max Baer was tasked with writing his first opinion for the Court in *Benninghoff* for colleagues who unanimously believed, albeit for somewhat different reasons, that the statutory fatal-defect rule should not be applied, as it was in *Anastasio*, to the candidate in *Benninghoff* who committed an identical sin—*i.e.*, he filed a timely statement that

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26. *Id.* at 374 (Baer, J., concurring).

27. *In re Guzzardi*, 99 A.3d 381, 384–85 (Pa. 2014).

28. 445 A.2d 1208 (Pa. 1982), *superseded by statute as recognized in In re Cioppa*, 626 A.2d 146 (Pa. 1993) (plurality opinion).

29. 445 A.2d at 1210–11.

30. *Cioppa*, 626 A.2d at 149 (“Our General Assembly, . . . in apparent response to our *Baldwin* decision, amended and reenacted the Ethics Act in 1989 to include” fatal-defect rule).

31. In *Cioppa*, an opinion announcing the judgment of the Court that followed Court orders allowing candidates who failed to file timely statements of financial interests to remain on the ballot, the Court acknowledged that, in light of the 1989 amendment to the Ethics Code, its orders allowing the candidates to stay on the ballot were “ill-advised” but could not be undone. *Id.* at 148–49. “[T]he rationale expressed in this opinion shall operate prospectively,” the Court explained. *Id.* at 149. “In short, hereafter failure to file the requisite financial interests statement within the prescribed time shall be fatal to a candidacy.” *Id.*

32. 820 A.2d 880 (Pa. Cmmw. Ct. 2003), *aff'd*, 827 A.2d 373 (Pa. 2003) (*per curiam*), *overruled by In re Paulmier*, 937 A.2d 364, 371 (Pa. 2007).

33. *Anastasio*, 820 A.2d at 880–81.

omitted a source of income. Perhaps Justice Baer could have written an opinion that overruled *Anastasio*. If the votes were there at the time, he very well might have.<sup>34</sup> Subsequent decisions by the Court in 2005, however, suggest that at the time Justice Baer wrote *Benninghoff*, there was not yet sufficient discomfort among the Justices with applying the statutory fatal-defect rule to timely filed statements of financial interests that contained errors or omissions.<sup>35</sup>

Justice Baer's decision in *Benninghoff* was, then, perhaps the best he could do at the time to mollify a growing, but not yet ripened, consensus on the Court that the *Anastasio* line of decisions had yielded results that were not only harsh, but, more critically, were inconsistent with the statutory fatal-defect rule itself. The Court's brief experiment with what some might characterize as the *Benninghoff* "substantial compliance" exception to the *Anastasio* rule would add fertilizer to that rising sentiment. Justice Baer's opinion in *Littlepage*, while garnering majority support from his colleagues, revealed the limits of the *Benninghoff* "substantial compliance" exception and, in so doing, laid the groundwork for the Court's majority decision in *Paulmier*.

In this context, Justice Baer's concurrence is humble and generous, if not reflective of where he always wanted to be on the law, and maybe would have been but for *Anastasio*, which he inherited. He explained:

As the author of *Littlepage* and *Benninghoff*, I attempted to draw fine distinctions between the different defects contained in the various financial interest statements filed by candidates because I believed the need for full disclosure in accordance with the goals for the Ethics Act was paramount. Specifically, it was my belief that permitting candidates to amend errors of complete omission would undermine the Ethics Act's goal of full financial disclosure by allowing those who omitted material information the ability to either wait-out the period for challenge in the hope that they would not "get caught", or, if

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34. As reflected in the concurring opinion, only three of the Court's seven Justices deciding *Benninghoff* were prepared to distance themselves from the *Anastasio* line and hold that the statutory fatal-defect rule applied only to untimely filed statements of financial interests. 852 A.2d 1184, 1189–93 (Pa. 2004) (Castille, J., concurring, with Eakin, J., joining); *id.* at 1193 (Nigro, J., concurring).

35. See *In re Braxton*, 874 A.2d 1143, 1144 (Pa. 2005) (*per curiam*) (removing from ballot candidate who filed timely statement of financial interests with omitted income and creditor information), *overruled by Paulmier*, 937 A.2d at 371; *In re Katofsky*, 872 A.2d 1196, 1196 (Pa. 2005) (*per curiam*) (removing from ballot candidate who filed timely statement of financial interests with omitted income).

“caught”, simply supply the information on an amended form, rendering their initial omissions harmless error. Accordingly, I viewed the fatality rule as the legislature’s harsh attempt to avoid this type of scenario. Nevertheless, in focusing primarily on the Ethics Act’s goal of full financial disclosure, and expanding the fatality rule beyond instances of failure to file or untimely filings, I agree with the Majority that the equally important goals of the Election Code, which is to be liberally construed to protect the voting franchise and a candidate’s right to appear on the ballot, have been undermined. Strict interpretation of the fatality rule has resulted in the child’s game of “gotcha” through far too many challenges based upon technical omissions, without regard to whether they were made through oversight, misunderstanding of the instructions or simple inadvertence, as opposed to bad faith. This Court’s upholding of these challenges has resulted in preventing potential candidates from running for office; a result directly in tension with the Election Code’s goals.

Thus, in my view, as eloquently explained by the Majority, because it is clear that the intent of the Legislature is to encourage both full financial disclosure and protect voter choice, when read together, such intents are best served by a rule that permits a good faith timely filer to amend a statement of financial interest in order to come into full compliance “giving the public both the benefit of full financial disclosure and the broadest choice of representatives.”<sup>36</sup>

Those who knew him best might speculate that Justice Baer planned the demise of *Anastasio* all along and that he was intentional in taking incremental approaches in *Benninghoff* and *Littlepage* to reach what he believed to be the right outcome, while also revealing what he perceived to be the flaws in *Anastasio* in order to hasten its demise. What seems beyond conjecture, however, is that then-Justice Baer’s experience authoring his first majority opinion as a Justice of the Pennsylvania Supreme Court helped shape a view of election law and instill a paramount respect for the importance of the elective franchise that would guide his decision-

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36. *Paulmier*, 937 A.2d at 375 (Baer, J., concurring) (footnote omitted) (citations omitted) (quoting *Paulmier*, 937 A.2d at 371).

making throughout his nineteen years of service on Pennsylvania's highest court.<sup>37</sup>

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37. See, e.g., *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 361 (Pa. 2020) (adopting construction of Commonwealth's new mail-in voting law that "favors the fundamental right to vote and enfranchises, rather than disenfranchises, the electorate"), *cert. denied*, 141 S. Ct. 732 (2021); *League of Women Voters of Pa. v. Commonwealth*, 175 A.3d 282, 285–86 (Pa. 2018) (Baer, J., concurring and dissenting) (per curiam) (agreeing with majority that Congressional Redistrict Act of 2011 was unconstitutional gerrymander but breaking with majority on its decision to require new map for 2018 primary), *cert. denied sub nom. Turzai v. Brandt*, 139 S. Ct. 445 (2018); *In re Guzzardi*, 99 A.3d 381, 390–96 (Pa. 2014) (Baer, J., dissenting) (advocating application of *nunc pro tunc* equitable relief where candidate files untimely statement of financial interests); *In re Beyer*, 115 A.3d 835, 843–44 (Pa. 2015) (Baer, J., dissenting) (opining that candidate who had not knowingly misrepresented his occupation on his nomination petitions should not be stricken from ballot).

## Chief Justice Max Baer and the Legitimacy of Policy Courts

*Thomas G. Saylor\**

It was with great pleasure that I watched my friend, Chief Justice Max Baer, orchestrate and preside over the Supreme Court of Pennsylvania’s 300<sup>th</sup> Anniversary Symposium conducted at the Constitution Center in Philadelphia in May 2022. And now, going on a year after his untimely passing, it is a source of comfort to know that Max was able to relish this milestone event in the sunset of his life.

In thinking about crafting a tribute to Max, I reflected on some of his remarks during the symposium. Max was sitting on a panel of chief justices from the high courts of several states. Among the speakers, Chief Justice Donald Beatty of the Supreme Court of South Carolina sparked a lively discussion touching on the role of public policy in judicial decision-making.

Responding to the concern that judges might be result-oriented or outcome-driven in their opinions, Chief Justice Beatty unabashedly embraced the notion that judges “do think about what is right.”<sup>1</sup> And initially, Max dug in deeper, saying: “I think the *only* interpretation that matters is—get it right.”<sup>2</sup> But then Max reminded us that “the rules of statutory interpretation allow [judges] to do this.”<sup>3</sup>

And so, they do. As Max wrote in his final majority opinion:

When the words of [a] statute are not explicit, we may glean the intent of the Legislature by considering . . . the occasion and necessity for the statute; the circumstances under which it was enacted; the mischief to be remedied;

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\* This remembrance is a collaborative effort between retired Chief Justice Thomas Saylor and his former administrative clerk, John Witherow, who had the opportunity to interact with Chief Justice Baer during his tenure on the Court. Both were the beneficiaries of Chief Justice Baer’s kind friendship and wise counsel.

1. PA Courts, *Pennsylvania Supreme Court 300th Anniversary Symposium Day 2*, YOUTUBE (May 20, 2022), <https://www.youtube.com/watch?v=O-KHRscVBfA>.

2. *Id.*

3. *Id.*



. . . the object to be obtained; . . . and the *consequences* of a particular interpretation.<sup>4</sup>

Max thus understood that courts may sometimes evaluate social policy implications in statutory construction as a means of “getting it right.” And he applied this axiom throughout his remarkable career as a judge, as a Justice, and as Chief Justice.

This is, of course, just an entry point into the role of public policy in judicial decision-making. Unfortunately, much of the discourse these days is highly critical, charging judges with wielding ideological biases in highly consequential opinions.<sup>5</sup> But, as explored below, there are numerous indisputably *legitimate* manifestations of policy making in judicial decisions. Thus, the “persistent questions are not the simplistic ones concerning whether judicial actions are legitimate, but rather the more complex ones concerning *which* judicial actions are legitimate.”<sup>6</sup>

To illustrate, we can turn to other of Chief Justice Baer’s numerous contributions to justice to find legitimate—indeed essential—manifestations of the role of policymaking, beyond the realm of statutory construction discussed at the 300<sup>th</sup> Anniversary Symposium. And we can also consider some respectful differences of opinion among Max and his colleagues, including me, about which interventions are most appropriately directed by the judiciary.

Of course, Max would have been the first to recognize that the legislative branch, as the representative arm of

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4. *Commonwealth v. Humphrey*, 283 A.3d 275, 290 (Pa. 2022) (Baer, C.J.) (emphasis added) (citing 1 PA. CONS. STAT. § 1921(c) (2023)).

5. See, e.g., Lynn Adelman, *The Roberts Court’s Assault on Democracy*, 14 HARV. L. & POL’Y REV. 131, 145 (2019); see generally CHRISTOPHER E. SMITH, COURTS AND PUBLIC POLICY 7 (Nelson Hall Publishers 1993) (“Concerns about maintaining the courts’ image as ‘legal’ rather than ‘political’ institutions affect both the public’s perceptions about the nature of the judicial branch and the legal community’s presentations to the public about the court system.”).

6. SMITH, *supra* note 6, at 26.

government, is best suited to the policymaking role.<sup>7</sup> Thus, he wrote in *Weaver v. Harpster*:<sup>8</sup>

In our judicial system, the power of the courts to declare pronouncements of public policy is sharply restricted. Rather, it is for the legislature to formulate the public policies of the Commonwealth.<sup>9</sup>

Nevertheless, some decisions steeped in policymaking reside with the judiciary: by delegation, by default, or by constitutional design.

First, sometimes legislatures specifically undertake to delegate policymaking prerogatives to the courts. For instance, the Pennsylvania General Assembly delegated the task of promulgating support guidelines in the domestic relations arena to the judiciary.<sup>10</sup> It should go without saying that the regulation of the amount of support afforded to spouses and children is deeply substantive, since such regulation affects living standards and quality of life. Thus, the guidelines implicate a host of social policy considerations above and beyond those attending ordinary judicial rulemaking, which is generally procedural in nature.<sup>11</sup>

As a personal anecdote, when I transitioned to the role of Chief Justice in 2015, many administrative functions were transferred to my supervision, including oversight of the Court's procedural rules committees. Due to Max's extensive experience in domestic relations law, I asked him to preview policymaking recommendations in this subject area prior to their circulation to the full Court. His immediate and

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7. See, e.g., *Smith v. Smith*, 938 A.2d 246, 258 (Pa. 2007) (Baer, J.) (“[W]e must defer to the legislature as the policy making body[.]”); see generally *Seebold v. Prison Health Servs., Inc.*, 57 A.3d 1232, 1245 (Pa. 2012) (recognizing the superior tools and resources available to the Legislature in making social policy judgments, including comprehensive investigations and policy hearings).

8. 975 A.2d 555 (Pa. 2009).

9. *Id.* at 563 (citations omitted).

10. See 23 PA. CONS. STAT. § 4322(a) (2023); see also Pa.R.Civ.P. 1910.16-1 Explanatory cmt. 2010.

11. See PA. CONST. art. V, § 10(c) (allocating to the Supreme Court of Pennsylvania the power to “prescribe general rules governing practice, procedure and the conduct of all courts[.]”).

generous response was: “Tom, My great pleasure to assist you in any way, including this! Best, Max.”<sup>12</sup>

An example of the second category of judicial policymaking—policymaking by default—occurred in 2022. That year, the Pennsylvania General Assembly and the Governor were simply unable to satisfy the constitutional requirement to enact the decennial congressional redistricting plan,<sup>13</sup> because they couldn’t reach an agreement. Thus, in *Carter v. Chapman*,<sup>14</sup> the Supreme Court of Pennsylvania undertook the “unwelcome obligation” of selecting a plan from among several constitutionally viable alternatives.<sup>15</sup> In his role as Chief Justice, Max took the opinion-writing assignment to provide the critical explanation presenting the policy rationale for the Court’s choice.

Interestingly, supplementing the traditional, core redistricting criteria,<sup>16</sup> and subordinate historical considerations,<sup>17</sup> Chief Justice Baer deemed it appropriate to consider partisan fairness measures.<sup>18</sup> The majority was concerned with the prospect that the voting power of different groups might be diluted.<sup>19</sup> Thus, the majority looked to expert testimony, demonstrating that the selected plan reflected Pennsylvania’s partisan preferences in a balanced fashion and would be responsive to changes in the voters’ partisan preferences.<sup>20</sup>

In dissent, Justice Mundy suggested that the majority had delved too deeply into policy. Instead, she thought the Court

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12. Other than by way of the above aside, I will leave it to other contributors to elaborate on Max’s vast contributions to the law in the arena of families and children, which will always embody his deeply personal and signature work. For present purposes, I reviewed Max’s greater body of judicial opinions at large to consider how he approached the decisional role of public policy.

13. See U.S. CONST., art. I, § 4.

14. 270 A.3d 444 (Pa. 2022).

15. *Id.* at 450 (quoting *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 823 (Pa. 2018)).

16. These criteria require ensuring that voting districts are compact, contiguous, as nearly equal in population as practicable, and that the district boundaries do not divide political subdivisions except when necessary. See *id.* at 464–68.

17. The subordinate historical considerations include communities of interest, the preservation of prior district lines, and the protection of incumbents. See *id.* at 468–70.

18. See *id.* at 470–71.

19. See *id.* at 470.

20. See *id.*

would be better served by confining the analysis to the traditional, neutral redistricting criteria.<sup>21</sup>

As exemplified by the divergent views voiced in *Carter v. Chapman*, when courts are thrust into the “political thicket,”<sup>22</sup> they are required to make difficult, highly significant, and potentially controversial policy choices. While presenting a unique—almost *sui generis*—example of the courts’ role in social policymaking, the *Carter v. Chapman* decision starkly typifies the difficulty in determining: “how far can [the courts] go in shaping public policy,” when this task is foisted on the judiciary by the failure of the political branches to perform their assigned function.<sup>23</sup>

Common law decision-making reflects another vivid example of the courts’ ongoing role in social policymaking occurring by default. Although, over the years, legislatures have greatly supplanted such substantive lawmaking by the courts,<sup>24</sup> considerable vestiges remain.

For example, in the tort law arena, the Legislature has only partially entered the field of determining the duties persons and entities owe to each other. Thus, in *Dittman v. UPMC*,<sup>25</sup> the Court was confronted with the issue of whether an employer had a legal duty to use reasonable care to safeguard its employees’ sensitive personal information stored on the employer’s computer system.<sup>26</sup> In the opinion authored by then-Justice Baer, the Court carefully distinguished between paradigms involving the imposition of a new duty and those involving application of an existing duty to a novel factual scenario.<sup>27</sup> Ultimately, the Court found that the latter pertained, and the employer had a duty to safeguard employees’ personal information in circumstances in which the employees were required to provide that information to the employer.<sup>28</sup>

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21. See *id.* at 495 (Mundy, J., dissenting).

22. *Evenwel v. Abbott*, 578 U.S. 54, 58 (2016).

23. SMITH, *supra* note 6, at 26.

24. See generally WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 24–38 (3d ed. 2001).

25. 196 A.3d 1036 (Pa. 2018).

26. *Id.* at 1038.

27. See *id.* at 1046.

28. See *id.* at 1047 (“[I]n collecting and storing Employees’ data on its computer systems, UPMC owed Employees a duty to exercise reasonable care to protect them against an unreasonable risk of harm arising out of that act.”).

Significantly, Max also joined the opinion that I authored in *Seibold v. Prison Health Services, Inc.*,<sup>29</sup> expressing circumspection about the judicial imposition of *new* duties—or as Dean William L. Prosser put it, wading through “shifting sands [with] no fit foundation.”<sup>30</sup> There, we agreed that, to the extent the announcement of new duties remains a proper role for the judiciary, the litigants should present a legislative-type record—including experiential evidence—to assist the reviewing courts in addressing the salient policy considerations.<sup>31</sup>

Turning to the third category, courts are also policymakers by constitutional design. In this respect, the judiciary is assigned the weighty responsibility to serve as the ultimate interpreter of the Constitution.<sup>32</sup> Thus, judges must “affect public policy in those instances in which they tell the legislative and executive branches that a particular action cannot be undertaken because that action is unconstitutional.”<sup>33</sup> As then-Justice Baer put it:

[O]ur underlying system of checks and balances requires the courts to serve as a backstop to protect constitutional rights of our citizens even where legislative social policy determinations are involved.<sup>34</sup>

A dramatic example occurred at the height of the pandemic. The Pennsylvania General Assembly had recently implemented no-excuse, mail-in voting via bipartisan legislation.<sup>35</sup> In light of the ensuing national public health emergency and

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29. 57 A.3d 1232 (Pa. 2012).

30. William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 14–15 (1953).

31. *Seibold*, 57 A.3d at 1248 n.24.

32. See, e.g., *Commonwealth v. Stern*, 701 A.2d 568, 570 (Pa. 1997) (explaining that, “[a]s the ultimate interpreter of the Pennsylvania Constitution, this Court bears the responsibility of determining whether a matter has been exclusively committed to one branch of the government.” (citation omitted)).

33. SMITH, *supra* note 6, at 21. In this regard,

Judicial policy-making is not inherently illegitimate when considered in light of the American constitutional system’s conception of democracy: citizen control over policy-making *plus* protection of individuals’ rights. Judges must identify and enforce limitations upon majority policy preferences when the protected constitutional rights of individuals are threatened by those policies.

*Id.* at 25.

34. *Commonwealth v. Torsilieri*, 232 A.3d 567, 583 (Pa. 2020).

35. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 352 (Pa. 2020).

delays in mail delivery as reported by the United States Postmaster General, the Supreme Court of Pennsylvania extended the deadline for receipt of mail-in ballots by three days.<sup>36</sup> Then-Justice Baer authored the opinion, explaining that the remedy was necessary to prevent voter disenfranchisement.<sup>37</sup> Dissenting on this point, Justice Donohue, who I joined alongside Justice Mundy, found this remedy to be too great a departure from the legislative design. Thus, the dissent would have accommodated the exigency by moving the deadline for requesting mail-in ballots from seven to ten days prior to the election.<sup>38</sup>

In any event, the Justices were unanimous in their belief that the Court was constitutionally obliged to implement some sort of a policymaking solution, where the Legislature had failed to act despite a clear warning from the Postmaster General. And I am confident that, despite our differences about the outcome, Max chose the remedy of extension based on his forthright belief in the necessity of the action under the prevailing circumstances.<sup>39</sup>

On another policy matter, Max also felt very strongly that statutory caps on damages payable by the government in tort cases were too low. Thus, from a responsive posture he occasionally took the opportunity to urge the General Assembly to raise the caps. Most recently, he wrote:

I [] respectfully suggest that the Legislature consider the facts of this case, as well as those that have preceded it where its constituents have suffered devastating loss through the negligence of a local government or the Commonwealth and were denied fair compensation because of application of the statutory caps. I urge the General Assembly to take swift action to remedy the situation by increasing the statutory limits. In the event that the Legislature does not so act, this Court may be faced with a developed challenge to the statutory caps as violative of the constitutionally guaranteed right to a jury trial. If a

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36. *See id.* at 371–72.

37. *See id.* at 370.

38. *See id.* at 396–97 (Donohue, J., dissenting).

39. *See Pa. Democratic Party*, 238 A.3d 345.

plaintiff properly constructs a record to establish that the statutory caps place an onerous burden on his or her right to a jury trial, this Court may be compelled to strike the cap, which could leave the Commonwealth or the local governments exposed to full liability if, and until, new legislation is passed.<sup>40</sup>

For institutional reasons, majority opinions can be confining. Thus, jurists may be best able to fully express their policy views through their concurrences and dissents, as exemplified by Max's entreaties to the Legislature.

Surveying Chief Justice Baer's work, we have seen that the judiciary takes the lead role in policymaking, sometimes by delegation, sometimes by default, and sometimes by constitutional design. But Max also taught that observation of structural limitations and self-restraint help to maintain the courts' legitimacy in the eyes of the public. And, from time to time, Max would seize the opportunity to present a clarion call towards policy aims beyond the judiciary's immediate reach.

As one in the long line of jurists striving to do their best to serve the ends of justice, Chief Justice Max Baer offered his own answer to the timeless question of how far judges should go in shaping public policy. And in doing so, he established a most worthy and honorable legacy by forging his own balanced pathway and setting an example for the legion of judges who will follow.

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40. *Grove v. Port Auth. of Allegheny Cty.*, 218 A.3d 877, 892 (Pa. 2019) (Baer, J., concurring) (footnote omitted).

## To Go Boldly

*Betsy Ceraso\**

It was an honor and a privilege working for Chief Justice Max Baer, whom I and most others in our chambers referred to as “the Judge.” As a jurist, the Judge came to the Supreme Court of Pennsylvania from the family court, and he brought with him an immediate and heartfelt sense of how the judicial system affects the vulnerable, particularly children. The Judge was the ever-dedicated public servant who thought it important not only to serve the people, but to give back by engaging with students and young lawyers to help shape the next generation of litigants and judges. More importantly, though, he was a friend and a mentor to me and the many clerks who passed through our chambers. In this article, I hope to share a more intimate insight into his daily practices in our chambers as well as his broader judicial philosophy.

I was hired by the Judge as his Chief Law Clerk immediately after his election to the Pennsylvania Supreme Court in 2003. The Judge wanted to hire someone with Supreme Court experience and knowledge, having come from the trial bench and not having personal experience on an appellate court. At the time, I had clerked for former-Chief Justice Zappala and was working for the Court’s central legal staff under then-Chief Justice Cappy. I was excited to start the position. While I didn’t know the Judge personally, I had heard many positive things about him as a jurist and as a person.

Shortly after being hired, the Judge invited me to join him and Michele Makray, his long-time Chief Administrative Assistant, on a trip to Philadelphia to visit some of the other chambers. Of course, I agreed to go. We planned to set out mid-morning, which would give us the opportunity to visit with each other and to discuss how to set up our chambers after he was sworn in. That day, as our departure time got pushed back further and further, I was first introduced to what would become known affectionately in our chambers as “Max-time.” This was a loose concept of time, which, in essence meant there is no need to be in a hurry.

As will become clear, the Judge was a huge fan of science fiction. One of his beloved figures was Master Yoda from Star Wars, whose

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\* Deputy Prothonotary of the Supreme Court of Pennsylvania



life-size statue watched over the entrance to our chambers. Like Yoda, the Judge had a sense of time that did not always mesh with his younger disciples' sense of urgency. From Yoda, too, he certainly got his maxim: "Don't try: Do! There is no try."

Like many of his science fiction and cultural pursuits, Max-time became a standard in the office, as it was in his personal life, where most of our frequent in-chambers meetings would be scheduled for a particular time and then rescheduled by an hour, two hours, sometimes even a day. Eventually, we all adapted to Max-time and accordingly adjusted our preparations, telling the Judge an earlier "meeting time," which we thought might result in him arriving at the desired later hour. Occasionally, however, the Judge would show up at the scheduled time, unannounced, throwing our calculations out the window and always keeping us on our toes.

This was the way the Judge operated; through a less formal, more personal approach that allowed everyone in the office to feel like they were a member of the team. We often called ourselves "Team-Baer." The corollary of the Judge's idiosyncratic sense of time and sometimes informality was a keen intensity about his work and the responsibility of being a justice of the Supreme Court. From his early days on the Court, he had the greatest respect for and interest in maintaining the integrity of the law and making sure to follow precedent and the law as written. He believed that judges should never allow their rooting interests to win out over application of clear precedent, especially when precedent happened to be contrary to that interest. In this respect, the Judge possessed some of the qualities of a textualist. While he personally cared deeply about certain issues and public matters, he never set aside the requirement that, as a judge, he was tasked with studying the text of a particular law and applying the law as he found it. This, to a large extent, made it difficult for outsiders to predict how he would rule on a particular issue, as he truly felt that the law should be his guidepost in every case.

The Judge would spend endless hours preparing for the Court's oral argument sessions, the one occasion where Max-time never applied. He had a real passion for the cases that came before the Court, and he loved examining all the parameters of a particular issue. He genuinely enjoyed meeting with our entire staff, including our interns, for bench memo and opinion meetings, and he welcomed the insight and input of everyone. In our meetings, he would fully probe each case and spin endless hypothetical questions, seeking to understand thoroughly the nuances of a particular case. He was also known for asking many hypos at oral argument, and it

never failed that he would ask the one question that the clerks counseled against asking. Notwithstanding their counsel, the hypo would be asked, and most often that question would produce the precise answer to a problem the Judge was working through. He approached oral argument as a necessary tool to understand truly a case and all its particulars.

In addition to preparing extensively for oral argument and being committed to following the letter of the law, the Judge also had a great desire to remain consistent with his own prior expressions, which, in another way, evinced the fidelity and respect he had for the law as he found it and not as he wished it to be. He was strongly committed to expressing his opinions in a practical and logical manner, believing that the bench and bar were entitled to clear expressions of the Court's decisions that could be relied upon and easily followed. In this, he remained true to his roots as a trial judge, focusing on litigants and judges rather than academics and legal theorists, always asking how will this decision apply in real life? Many of his personal mantras about opinion-writing were geared toward this goal. He loved the idea of telling a story when setting forth the facts of a case. He was himself a storyteller and an avid reader, and in this way, he wanted the facts of his opinions to be clear and logical. He often said he preferred Hemingway to Faulkner for his clear readability.

The Judge often repeated the refrain that, in setting forth the facts and procedural history of a case, things should go from "a" to "b" to "c," and in chronological order, so that the "story" of the case was understandable and clear. Regardless of complexity, he wanted the reader to be able to grasp quickly the case through clear, logical prose. When he encountered language that he did not feel followed this rule, he would call it "gobbledygook," and direct us to go back and tell the story more clearly.

For him, the facts were critical to how the case would be resolved when applied to the law that was being decided, and he often repeated to us another one of his edicts, "change the facts, change the result." He insisted that every relevant fact of a case be foreshadowed for the reader in the factual and procedural history. He did not like when a new fact was presented at a later stage of the opinion, especially a fact that might be outcome-determinative. Therefore, any fact of relevance in a particular case should be expressed early in the case, not hidden until the end.

This seemed to be a derivative of his often expressed need to know the ending of a story at the outset. He said that when reading a book, he skipped to the end, as he did not want to be surprised with

the loss of a character or an eleventh-hour plot twist. While he often made interesting book and television recommendations to everyone in the office, and he was great at describing the narrative of the story, we would have to stop him short of telling us the ending. Unlike the Judge, most of us wanted to keep the ending a surprise.

When working on our opinion drafts, the Judge was a very heavy editor. He really wanted each opinion to reflect his distinct style and reach his desired goal that the language be plain, clear, and logical. He always crossed out block quotes and discouraged the use of bolding a passage for emphasis. The Judge believed these to be the devices of a lazy writer. He preferred that we read a passage, think it through, and then express it in our own words to assure that we understood the concept and, more importantly, to make it clearer for the reader. While we didn't always love having to edit extensively each draft, and while sometimes we needed multiple staff members to decipher his handwriting, in the end, all of the Judge's rules and devices helped shape his clerks and interns into better, more thoughtful, writers.

From his time in family court, the Judge's office in chambers was full of memorabilia and toys. No young person who visited that office was unimpressed by his collection, and many times, the Judge would take something off the shelf and give it to a visiting child. The Judge's collection included quite a lot of science fiction memorabilia: he was a huge fan of the science fiction of the postwar era, particularly *Star Trek* and *The Day the Earth Stood Still*, a 1951 film that he loved to talk about. He expected everyone to know the film's famous line, "Klaatu barada nikto." His optimism about human potential and the possibility for positive change was likely shaped by these stories that he loved.

This brings me to a time where the Judge's love of science fiction and his particularity as an editor collided over one of his most repeated and known pet peeves when it came to writing: his belief that one must never utilize a split infinitive. We tried to avoid them, but nevertheless, occasionally, he would catch one. Even more rarely, we would catch him using one (he was amused at our joy in pointing out his mistake). Although I often tried to convince him that, while the use of a split infinitive was, at one time, considered inappropriate, grammar rules had changed, and this construction was no longer completely taboo, he wouldn't hear it. His high school English teacher had railed against using split infinitives, and he claimed to have failed a paper for employing the dreaded construction. One day when the Judge was expressing his disfavor of split infinitives, I mentioned to him that my husband, an English

professor, had noticed that there is a split infinitive in the famous introduction to one of the Judge's beloved shows. In the original *Star Trek*, viewers are invited, "to boldly go," not "to go boldly." This seemed to give him pause; I thought maybe I had made progress on our split infinitive debate.

Regardless of this apparent small victory, I have no doubt that the Judge would have sent this line back to the *Star Trek* writers with the prominent correction "to go boldly." Grammar aside, there is no question that the judge went forth boldly, with a great respect for the law and tremendous generosity to those who were fortunate enough to work with him. I think about the Judge every day, and his rules and mantras fortunately continue to shape my thoughts and my writing.

# Remembering Chief Justice Max Baer

*Kim Berkeley Clark\**

When Max Baer was elected to the Allegheny County Court of Common Pleas in 1989, the Family Division was thought of as a place for new judges to be assigned and then leave as soon as possible. Judges and lawyers alike often characterized the work of the Family Division as less important than the work in other divisions because there are no jury trials, because of the high number of self-represented and unrepresented parties struggling to be heard, and due to the mistaken belief that rules were not followed.

Truth be told, the work in the Family Division is grueling. The caseloads are high, and the issues are personal giving rise to things like emotional outbursts. The Family Division is comprised of the Adult or Domestic Relations Section, which includes custody matters, child support, divorce, alimony and equitable distribution, and protection from abuse actions; and the Juvenile Section, which includes juvenile delinquency, dependency, termination of parental rights and adoption, petitions for involuntary drug and alcohol treatment, and special immigrant juvenile status cases.

The issues are serious, and the decisions are often difficult, especially when the judge does not have sufficient information upon which to make an informed decision. Judges assigned to the Family Division have been known to remark that sometimes they feel more like a social worker than a judge.

The Juvenile Section of the Division was especially maligned. In 1990, when Max Baer took the bench, the juvenile court was located in Oakland in an old Health Department Building at 3333 Forbes Avenue, in perhaps the most trauma-inducing court facility that ever existed. It was not uncommon for judges with “issues” to be sent to juvenile court, because it was easy to hide them. The persons appearing in both delinquency and dependency court were overwhelmingly living in poverty or near poverty, and disproportionately were people of color. The design of the building caused persons in conflict to sit together in one large waiting room, sometimes for an entire day.

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\* Former President Judge—5th Judicial District of Pennsylvania

There were only three judges regularly assigned to juvenile court and the caseloads were staggering, which often meant that judges, attorneys, court staff, caseworkers, and parties were in the courthouse until the evening hours in order to resolve cases. The large caseloads also meant that judges were not able to give needed time and attention to the serious issues that impacted vulnerable children and families in Allegheny County.

When Max Baer was elected to the Allegheny County Court of Common Pleas in 1989, like many new judges, he was assigned to the Family Division—but unlike others, he did not jump ship at the first opportunity. Instead, he decided to do something about the problems and deficiencies of the Family Division, which he knew had the most direct impact upon the citizens of Allegheny County. So, in 1993, when the Pennsylvania Supreme Court of Pennsylvania appointed him as the Administrative Judge of the Family Division, Max Baer got busy and never looked back.

The changes that Max Baer initiated have changed the culture not only in Allegheny County, but also across the Commonwealth and the United States. Under the leadership of Max Baer, Allegheny County Family Division extended court hours for working families to address matters during non-traditional hours, he created what is known as the Generations education and mediation program for custody matters—which has resulted in more parents resolving the issue of custody without a court order, and he hired a team of diverse dependency hearing officers that provided more judicial oversight for children in foster care. Perhaps one of his greatest achievements was the acquisition and renovation of the old Allegheny County Jail into the Family Law Center, which enabled both sections of the Division to be in the same courthouse and reduced the chances of conflicting court orders for families that have cases in both sections. Additionally, it has enabled the Division to move to the “one family, one judge” court that is now in place. This was the first step to creating a trauma-informed courthouse.

On a statewide level, the transformation is massive. In October of 2005, Justice Max Baer took a team from Pennsylvania to Minnesota to a national summit on child dependency. The summit was convened, in part, by the Conference of Chief Justices. I was privileged to be part of the Pennsylvania team. During the summit, we created the statewide action plan that would reform and transform dependency courts in Pennsylvania. Our action plan included the following goals: establish a statewide commission on dependent children and hire appropriate staff; institute communication through regular, mandated team meetings; amend the Rules of

Appellate Procedure to achieve more timely permanence for children; expand the use of Family Group Decision-Making; increase the frequency of dependency review hearings; create a statewide website; establish and require performance outcome measures and develop software to capture data uniformly and accurately; secure funding for training and attendance at conferences; expand services for adolescents transitioning into adulthood; hold a statewide summit on child dependency to enable each county to develop its own action plan; and establish and promote best practices.

Miraculously, all of these goals were implemented within four years! Pennsylvania now has a Mission and Guiding Principles for Pennsylvania's Child Dependency System. Pennsylvania also has a Dependency Benchbook (4<sup>th</sup> edition) and a companion Resource Guide. We have Children's Fast Track Rules, which shortens the appeals process in dependency, custody, and termination of parental rights cases. We have the "Children's Roundtable" which is comprised of judges, children welfare administrations and caseworkers, attorneys, and others working in the system to enable them to collaboratively identify issues and needs and implement reform on a county, regional, and state level. We have the Office of Children and Families in the Courts (OCFC), which oversees the collection and analysis of data in Pennsylvania, develops and delivers training to new dependency judges, dependency hearing officers, attorneys, provides ongoing training and assistance to dependency judges and courts with implementing the best practices. Most importantly, we have had a culture change, with the Family Court being recognized as a court that can have a positive impact upon the lives of children and families. It is the place where judges want to be and where judges want to stay. It took someone like Max Baer to make this happen.

When Max Baer became the Chief Justice of Pennsylvania's highest court, he asked me to deliver the welcome at his installation ceremony. I was thrilled. I decided to honor him by writing this poem about his indelible mark upon the Family Division. It was an honor to work so closely with him and watch the magic happen. I will miss my friend.

## LEGEND (Ode to Max)

What is a legend? Larger than life?  
Creating a vision, starting the fight

Boxing gloves on, feet on the floor  
Fighting for children, a righteous war

It takes a legend, someone like Max,  
To improve the system and never look back.

Our children are safer and better with kin,  
Family Division is now a place where judges want in.  
Roundtables, missions, workgroups, and more,  
Safety, well-being and permanency at the core.

It takes a legend, someone like Max,  
To change an entire system and make such an impact.

Family Group and Family Finding are some of our tools,  
And Children's Fast Track is now in the Rules.  
A well-trained judiciary is part of his legacy.  
With a Dependency Benchbook as part of his treasury.

It took someone like Max, a legend, a force,  
With gentle pressure applied to keep us on course.  
As we reflect on the past and look to the future,  
We know that the vision of Max will continue.  
With appreciation and thanks for all you have done,  
Children are safe and families are strong.

It took a legend—someone like you.  
To embrace change and we say thank you.

Kim Clark  
October 5, 2021



# Just Call Me Max

*Maureen Lally-Green\**

Soon after Justice Max Baer was elected to the Supreme Court of Pennsylvania in 2003, he met my husband, Stephen Ross Green, Esq. Ross greeted him with the traditional title lawyers use in professional gatherings: “Justice.” Max would have none of that and collegially said, “With you, I’m not Justice Baer. Just call me Max.” From that day on whenever Ross and I were with him, he was careful to “call” him “Max.”

Mr. Chief Justice Max Baer and I were privileged to attend then-Duquesne Law<sup>1</sup> beginning in 1971.<sup>2</sup> Our legal education was superb and tested in the backdrop of a disrupted society shaken by the Vietnam War, domestic riots, and injustices in many parts of our lives. That probably explains why, at mission-driven Duquesne Law, our skills in legal analysis and advocacy were refined in the context of honesty, professionalism, integrity, and a firm commitment to better the lives of others.

Our professional paths did not intersect until he was elected to the Supreme Court of Pennsylvania in 2003.<sup>3</sup> Yet, his reputation for excellence was already obvious (and his campaign nickname “The Fighting Judge”<sup>4</sup> apt) for the improvements he had made in the Family Division of the Court of Common Pleas of Allegheny County.<sup>5</sup> Those efforts triggered reform across the Commonwealth and the nation. Indeed, he received a Presidential citation in the

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1. In 2022, the law school was renamed the Thomas R. Kline School of Law of Duquesne University.

2. While he was in the “evening” law program, I was in the “day” law program. His matriculated name was David Baer.

3. In June 1998, I was confirmed by the state Senate to fill a vacancy on the Superior Court of Pennsylvania, a statewide appellate court. The year 1999 cascaded me into the political world and a successful statewide campaign for a seat on the Superior Court as a commissioned judge. (I retired in 2009).

4. See Peter Jackson, *Nominees Picked for Courts*, THE YORK DISPATCH, May 21, 2003, at 6; Marylynne Pitz, *Baer Finds Fighting Words Can Win Votes*, PITTSBURGH POST-GAZETTE, May 17, 1989, at 9.

5. As a common pleas court judge, he created programs: requiring parents involved in child custody cases to attend parenting classes and participate in mediation sessions (to avoid litigation); streamlining Pennsylvania’s adoption process; and improving screening and oversight of adoption caseworkers.

early 2000s for excellence in judicial innovation.<sup>6</sup> The “Fighting Judge” nickname was certainly fitting!

Since his election to the Supreme Court, Chief Justice Baer and I worked professionally in significant children and family fast track efforts, presentations on gerrymandering at Carnegie Mellon University and the Chautauqua Institution, reviews of the current term of key U.S. Supreme Court decisions with Waynesburg University’s Stover programs at Cambridge University, England, and with Duquesne’s law students.<sup>7</sup> So many wonderful memories endure, some of which are shared below.

Guardian of children in the legal system. Chief Justice Baer was indefatigable in his belief that children and families needed stable and safe environments. He believed that timely and efficient decision-making about children should occur, especially in cases that involved custody, paternity, dependency, termination of parental rights, and adoption. His immense efforts in establishing the “Children’s Fast Track and Other Family Fast Track” appellate processes are indelible in the appellate arena of Pennsylvania to this day.

In early 2008, Justice Baer asked Frederick Frank, Esq.<sup>8</sup> and me, both members of the Supreme Court’s Appellate Courts Procedural Rules Committee (ACPRC), to co-chair a subcommittee that would suggest new procedures to eliminate unnecessary delay in the appellate process for these five categories of cases on appeal. The subcommittee identified each time-related procedural rule and heard from as many relevant voices as practicable. The ACPRC recommended proposed rules for adoption by the Supreme Court, which the Court did, one year from that first meeting with the Justice.<sup>9</sup>

The essence of these rules endures to this day.<sup>10</sup> The impetus and momentum for this focus on the children and families were all

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6. *See Court, County and City Races*, THE PHILA. INQUIRER, November 2, 2003, at C06.

7. Travel and social time with his wife, Beth, and Ross, were often the added gifts that we shared in connection with many of these presentations!

8. Frederick Frank, Esq. is a highly regarded practitioner of family law (as well as many other aspects of the law) with offices in Allegheny County. His excellence, generosity, and professionalism throughout the entire effort (then and afterwards in other part of our lives) cannot be overstated and is so appreciated.

9. *Supreme Court of Pennsylvania Adopts New Rules to Put Appeals of Children’s Cases on Fast Track*, ADMIN. OFF. OF PA. CTS. (Jan. 13, 2009), <https://www.pacourts.us/Storage/media/pdfs/20210518/130020-prrel09113-001332.pdf>. Chief Justice of Pennsylvania Ronald D. Castille stated that these new procedures would prevent children from “languishing while court procedures take place and will assure a speedier transition to a new and productive life.” *Id.*

10. *See* 210 PA. CODE § 65.14 (2009). Children’s Fast Track and Other Family Fast Track Appeals provides that all children’s fast track cases are identified with the notation “Children’s Fast Track” (CFT) in red ink to ensure that these cases are not overlooked in docketing

“Max”—perceiving a critical problem, discerning what needed to happen, and getting it done.

Collegiality and discipline in decision-making. Mr. Chief Justice Baer had firm beliefs about the role of the judiciary in our Pennsylvania constitutional system. Such was particularly evident in the deft and thoughtful way Justice Baer reasoned in the 2018 case, *League of Women Voters v. Commonwealth*.<sup>11</sup> There, the Court ruled that the state legislature in 2011 adopted a congressional map that was an unconstitutional partisan gerrymander under the “Free and Equal” clause of the Pennsylvania constitution.<sup>12</sup> In its ruling, the Court’s majority identified “neutral criteria” for drawing legislative maps under that clause.<sup>13</sup> It also set a timetable for legislative and executive action before the Court itself would implement its chosen map, which the Court eventually did.<sup>14</sup>

While Justice Baer either agreed or concurred with many of the majority’s conclusions, he dissented from court-imposed “neutral criteria” for legislative districting and the timetable mandates.<sup>15</sup> He argued that the “neutral criteria” requirement may conflict with Article I, Section 4 of the United States Constitution, which empowers state legislatures (and not courts) to address the “time, manner, and places” of holding elections.<sup>16</sup> He objected to the timetable because the state legislature did not have a “fair opportunity” to act and because due process of interested persons was implicated.<sup>17</sup> While he did disagree in his dissent with the “neutral criteria”

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or in the filing process. See 210 PA. CODE § 905(b) (2009). CFT cases have compressed filing deadlines from the first notice that a trial judge’s ruling is to be appealed and at each step of the appeals process. Some time is completely eliminated, the brief scheduling for the parties is abbreviated, and the trial judge’s obligations are simplified. See § 65.14.

11. 178 A.3d 737 (Pa. 2018). The League’s 2017 lawsuit alleged that the 2011 congressional district lines were gerrymandered unconstitutionally to benefit the Republican Party. *Id.* at 741. The trial court held that, although the district boundaries had been drawn to favor Republicans, the district lines did not violate state law. *Id.* at 785–86. The Pennsylvania Supreme Court reviewed the matter on an expedited basis and reversed. *Id.* at 767, 825.

12. *Id.* at 801–02.

13. *Id.* at 816–17.

14. *Id.* at 821. The Court, in its *per curiam* order of January 22, 2018, provided a time frame for the legislative and executive branches to develop new maps. The General Assembly had until February 9, 2018, to propose a map to the Governor and the Governor had until February 15, 2018, to propose it to the Court. The General Assembly failed to submit a plan by the deadline. The Pennsylvania Supreme Court then released its own map. *Id.*

15. *Id.* at 826 (Baer, J., concurring and dissenting).

16. *Id.* at 827.

17. *Id.* at 829. He observed that the Court’s timetable did not give the state legislature a “fair opportunity” to act: it had only 25 days to develop and negotiate a new map (let alone the eight months for the 2011 plan). *Id.* He noted that the majority had created the “possible eventuality” that the state legislature “cannot act in this compressed time frame.” *Id.* Also, he suggested that due process was implicated because the Court’s procedure did not permit an opportunity for parties to respond to a suggested map or to cross-examine witnesses. *Id.* at 830.

determination and about the proper role of the Court vis the legislature, he was not disagreeable—he was credible, disciplined, and cogent. Indeed, he had a well-earned reputation of being a consensus builder.

A love of education. As stated above, the Chief Justice and I had the privilege of co-presenting in various venues on United States (U.S.) Supreme Court decisions. I dare say that we were both educators at heart. Each of us carefully read the relevant opinions, prepared our comments, and met frequently, usually by phone, identifying key points for presentation.<sup>18</sup>

Our styles, evident to anyone who attended these presentations, were quite different. I approached the relevant presentation in light of my background as a law professor, stating the facts and issues, and outlining the essentials of the Court's analyses and dissents. Max would listen respectfully and, when he particularly disagreed with something I had reported on, he would jump into the presentation with a mixture of thoughtful analysis, deep human feeling, and political perspective. My role was to eventually bring things back on topic. Frankly, at times, it did take a few moments to "return to topic" as the audiences often were laughing. Then, onto the next topic and the cycle repeated itself. These presentations were lively, informative, informal, and absolute fun—pure "Max!"

This pattern began with our presentation on gerrymandering with students at Carnegie Mellon University and with patrons and guests at Chautauqua Institution.<sup>19</sup> And, the pattern continued with judges and lawyers of both the federal and state courts in two presentations at the Waynesburg University's Stover program in Cambridge, England.<sup>20</sup> Even with these highly credentialed audiences, each appearance continued in the established format, laced with laughter and goodwill.

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18. I take a moment to recognize the excellent support of Betsy Ceraso, Esq., Chief Clerk to the Chief Justice. Betsy's command of the law and her kind approach to these educational presentations helped in so many ways.

19. The Justice and I were invited to co-present in 2018 on the subject of "gerrymandering" at Carnegie Mellon University in Pittsburgh. Then, through the kind efforts of Mr. Edward Schmidt, Esq. and his wife, Elizabeth Schmidt, Esq., we were invited to present at the Chautauqua Institution in New York in the following summer. Both presentations involved a focused and, at times, quite entertaining "back and forth" probing of what the U.S. Constitution required, what the U.S. Supreme Court precedent permitted, and what might be possible under state constitutions. Indeed, it became the method we used in presentations!

20. I acknowledge with enormous gratitude the great kindness and generosity of the Stover Center for Constitutional Studies and Moral Leadership at Waynesburg University, Waynesburg's President Douglas Lee, Esq., and Center's Director, Lawrence M. Stratton, J.D., Ph.D. Chief Justice Baer and I were privileged to co-present on three occasions (2019 and 2022) at Cambridge University in England.

For many years, Justice Baer honored my last class each semester on Appellate Practice and Procedure as our most distinguished presenter. He faithfully shared with the students his “lessons learned” over a lifetime in the law. His challenge to the students each year was to “live a balanced life,” to “make a difference,” and to “do what you love to do.” Each class, he would share how critical the support and love of his wonderful wife, Beth, his sons, and his entire family, were to his ability to do what he did. All to say that family to him was *the* most important part of his life. “Pure inspiration” does not adequately describe his impact on a generation of lawyers.

Finally, when I became Dean of Duquesne’s School of Law, Max was one of the first to reach out to me, inviting me to his Chambers to talk about the challenges in and to legal education. It was a fascinating two to three hours as we talked about strengths and weaknesses of legal education generally and how to address them in our alma mater. This discussion was instrumental in initiating some of the outreaches our Law School took (with the support of an amazing and committed faculty, a marvelous administration, especially Academic Dean Martha Jordan, and the encouragement of the university).<sup>21</sup> I am so grateful for his inspiration, encouragement, and wisdom during all of my three years as Dean of our alma mater.

A commitment to “live in the moment” and “enjoy life.” Max and Beth were so much fun to share time with and to explore. After presenting in Cambridge, we would return to London. From there, we explored many historical sites of London and its surroundings, and we even traveled to Bath, Stonehenge, and Windsor Castle.<sup>22</sup> Of course, we sampled the food at many a pub along our ways!

Of the many sites in London, we were all fascinated by All Hallows Church at the Tower of London. This is where St. Thomas More was originally buried after his beheading. Our time inside the church reminded us of some of the ugliness of English history. Yet, it also informed us about the birth, in a sense, of the history of Pennsylvania. Why? Well, we discovered that William Penn was baptized in All Hallows Church. And, so was born Max’s fascination with William Penn and his impact in Pennsylvania. This yielded his

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21. This discussion (and many others with Justice Baer) lead to enhanced offerings of law student clinics, a broader focus on the summer law education programs in Ireland, Germany, and China, enhanced course offerings for those interested in work in the corporate world, and a “fellows” program where students could receive an additional credential in a certain segment of the law, such as public service.

22. The Justice’s Chamber’s Administrator, Ms. Michelle Makray and her husband, Doug, joined us on these fascinating excursions.

fabulous presentation to the attendees at the 2022 Stover Program in Cambridge, England.

At Bath, he jumped into very dirty bath waters, contending that his aching back “already felt better” because these waters were miraculous, healing waters! The rest of us dared not to dip a toe in the blackness of that water. I do, however, still have the one-ounce bottle of “Bath” water he purchased for me to have when “you need it!”

Stonehenge brought a meditative quiet to all of us as we absorbed its meaning. Windsor Castle illuminated our appreciation of the breadth and depth of British history.

Max loved exploring unique facets of places we visited. It was not unusual to select a hotel in the middle of everything (the Amba Hotel at Charing Cross), a restaurant with a deep history (a tavern in Cambridge with World War II history), an English tradition (drinking a Pimm’s Cup), or food offerings culturally new (to us). A love of tea led us to the Twinings English tea store on our 2022 Cambridge visit and purchases of unique London Earl Grey tea!

The most cherished evening during the 2022 presentation was time when Beth, Max, and I had dinner at a “fish and chips” pub in Cambridge with a sampling of English-brewed beer. We talked about their children, their spouses, and the grandchildren, the loves of their lives. Their upcoming travel to South Africa was a happy thought, and I promised to (and did) send compression socks for the long journey. More sentimental moments came when we chatted about our lives, as we were both well into our seventies and our lifetime of incredible experiences. I recall how he was most thoughtful about his life after Court retirement, as he considered how best to continue to help children.

In the end, Max’s life was a kaleidoscope of terrific experiences, great dreams, energetic hopes, amazing achievements, and the incredible blessings of a loving family and great friendships. I was so privileged to share but a slice of all of these with him—and wow!—every minute with the man we called “Max” was my blessing!

# The Practical Jurisprudence of Max Baer

*Thomas R. Kline,\* Andra Laidacker,\*\* and Charles Becker\*\*\**

The late Chief Justice Max Baer was a friend. We met through Duquesne Law School. Max graduated in 1975 and I (Tom Kline) graduated three years later. We did not attend law school at the same time, but we became friends through the Duquesne community. We shared the same birthday. We grew up Jewish in small-town Pennsylvania. Following graduation, Max stayed in Pittsburgh and built his career in the Attorney General's Office. I moved to Philadelphia to work for Jim Beasley. We sometimes were on the opposite sides of cases. But every year, we texted or called each other on our birthday.<sup>1</sup>

In 1989, Max was elected as a judge on the Allegheny County Court of Common Pleas. As everyone knows, he took to the work and soon become the family court's administrative judge. There, he found amazing creativity and energy. He pioneered innovative solutions in custody cases. He promoted parenting classes and mediation. He streamlined the adoption process and improved the screening and oversight of social workers. These efforts certainly benefitted the people of Allegheny County; they brought national attention to the family division of the Allegheny Court of Common Pleas. In 1998, Max received the Excellence Award for Judicial

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\*\*\* Partner, Kline & Specter, PC; Adjunct Professor of Law, University of Pennsylvania Carey School of Law; Co-Chair, Historical Commission of the Supreme Court of Pennsylvania; Law Clerk to the Honorable Sandra L. Lynch, United States Court of Appeals for the First Circuit, 1997–98; J.D., Yale University, 1997; B.A., Williams College, 1992.

1. Charles “Chip” warmly remembers the friendship he developed with Max Baer while they and others worked to commemorate the Supreme Court's Tricentennial. For Max, the Tricentennial commemoration was a highlight of his tenure as Chief Justice. For Chip, a highlight of the commemoration was becoming part of Max's extended professional family. Andra also warmly remembers Justice Baer from her years clerking on the Supreme Court. She recalls his decency, collegiality, and generosity to the law clerks and everyone who worked for the Court.

Innovation at a White House ceremony presided over by President Bill Clinton.<sup>2</sup>

Practical solutions to improving child welfare became a lifetime commitment. Even after becoming a Supreme Court justice, Max continued to promote child well-being. He emerged as a key voice in judicial reforms concerning the foster care system. He promoted the overhaul of procedural rules to speed the disposition of family and juvenile cases.

As a judge, Max excelled through his formidable understanding of Pennsylvania law and practical wisdom for how our legal system operates in the real world. As a justice, he added to the mix his deep respect for our constitutional system and the relationship between the coordinate branches of government. To be sure, Max learned a lot about working with different organizations while a family judge. As a justice, he also had to testify repeatedly before the General Assembly on behalf of the Unified Judicial System. I'm sure those hearings gave Max a first-rate education in the importance of respect for the legislature.

Max's pragmatism and respect for the other legislative branches is nicely illustrated by his opinions in *Zauflik v. Pennsbury School District* and *Grove v. Port Auth. of Allegheny County*.<sup>3</sup> In both cases, Max wrote concurrences that show off his best instinct for step-by-step decision making, the ripe development of disputes, and great care when construing the legislature's work.<sup>4</sup>

In *Zauflik*, a high-school student had suffered catastrophic injuries after being run over by a school bus.<sup>5</sup> The case produced a roughly \$14 million jury verdict that was reduced to \$500,000 under the liability cap favoring local agencies set forth at 42 Pa.C.S. § 8553.<sup>6</sup> After the case made its way through the trial court and Commonwealth Court, the Supreme Court addressed and rejected a series of facial challenges to that liability cap. In a majority opinion authored by Chief Justice Castille, the Court explained that Article I, Section 11 of the Pennsylvania Constitution authorizes the General Assembly "to enact laws that direct the way in which a plaintiff might pursue her right to a judicial remedy" against both

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2. See *Philadelphia Bar Association Remembers Pennsylvania Supreme Court Chief Justice Max Baer*, PHILA. BAR ASS'N (Oct. 1, 2022), <https://philadelphia-bar.org/?pg=News&blAction=showEntry&blogEntry=82424>.

3. See *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096 (Pa. 2014); *Grove v. Port Auth. of Allegheny Cnty.*, 218 A.3d 877 (Pa. 2019).

4. See *Zauflik*, 104 A.3d at 1133 (Baer, J., concurring); *Grove*, 218 A.3d at 890 (Baer, J., concurring).

5. See *Zauflik*, 104 A.3d at 1100.

6. *Id.* at 1101.



the Commonwealth and its political subdivisions.<sup>7</sup> Given that constitutional authority, the General Assembly had the power to adopt legislation establishing a general rule of statutory immunity, enumerated exceptions, and limitations on liability.<sup>8</sup> As for the right to jury trial, the Court concluded, “[t]he damages cap does not present a condition or restriction on appellant’s right to have a jury hear her case.”<sup>9</sup> The Court explained instead that “the burden lies in the limited amount of recovery allowed.”<sup>10</sup> Max joined the majority, but also wrote a concurrence joined by Justice Todd and Justice Stevens.<sup>11</sup> In his concurrence, Max agreed that the liability cap did not facially violate the right to jury trial.<sup>12</sup> He also suggested that a governmental liability cap could violate the Constitution in case-specific circumstances based on a factual record showing that the liability cap practically vitiated the plaintiff’s ability to obtain a trial by jury.<sup>13</sup> Max reasoned that a plaintiff’s “ability to present an issue to a jury ‘must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the jury trial right practically unavailable.’”<sup>14</sup>

When reaching this assessment, Max took care to discuss *Application of Smith*.<sup>15</sup> In *Smith*, Mr. Smith filed suit in Lancaster County after being struck by a car.<sup>16</sup> His monetary demand was \$250.<sup>17</sup> A local rule of procedure required Mr. Smith to submit his claim to mandatory arbitration.<sup>18</sup> Under the statute that authorized this local rule, a party had the right to appeal the arbitration panel’s decision to the court of common pleas, on the condition that the appellant paid accrued costs such as arbitrator fees.<sup>19</sup> The statute permitted local courts to set the compensation of each panel.<sup>20</sup> Lancaster County had set a \$25 flat-fee per arbitrator, producing a total of \$75 for Mr. Smith’s case.<sup>21</sup> On these facts, Mr. Smith filed a petition in the Supreme Court seeking a writ of mandamus requiring a trial by jury without the necessity to submit his case to

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7. *Id.* at 1128.

8. *Id.* at 1128–29.

9. *Id.* at 1132.

10. *Id.*

11. *Id.* at 1133 (Baer, J., concurring).

12. *Id.* at 1134.

13. *Id.*

14. *Id.* (quoting *Application of Smith*, 112 A.2d 625, 629 (Pa. 1955)).

15. *Id.*

16. 112 A.2d at 628.

17. *Id.* at 630.

18. *Id.* at 627.

19. *Id.*

20. *Id.* at 627–29.

21. *Id.* at 630.

arbitration.<sup>22</sup> Mr. Smith argued that the rule and statute violated Article I, Section 6 as applied to him by imposing a financial condition that was onerous given the economic realities of his case and effectively nullified his ability to move forward with the litigation.<sup>23</sup> The Court agreed that a rule imposing arbitration costs on the appellant did not categorically infringe upon the right to a jury trial.<sup>24</sup> However, the local rule could be constitutionally problematic depending on the amount of money at issue. The problem was “one of degree rather than of kind.”<sup>25</sup> “[T]he necessity of paying that amount as a condition for the right to appeal would seemingly operate as a strong deterrent, amounting practically to a denial of that right, if the case should involve only, as in the present instance, as little as \$250.”<sup>26</sup> Any constitutional rule would have to “take cognizance of this fact and should provide for a lower rate of compensation where only a comparatively small claim is involved.”<sup>27</sup>

Building on *Smith*, Max reasoned that the problem with governmental liability caps also was a problem of degree given the “practicalities of litigating a catastrophic injury case against a political subdivision.”<sup>28</sup> He wrote that a victim of governmental negligence “may be able to establish that the costs and fees of litigating the claim precluded counsel from accepting the case, thereby denying the victim the right to present the case to a jury.”<sup>29</sup> He described how a governmental liability cap could render a case uneconomical and constitutionally infirm simply because of the expensive and complex features of modern litigation, including expert retention, the development of expert reports, lengthy depositions, and the necessity for high-quality presentations.<sup>30</sup> As Max explained:

To meet the well-financed and vigorous defenses asserted by insurance companies and their counsel and to comply with basic Pennsylvania law, I conclude, premised on my thirteen years as a trial court judge, that plaintiffs’ counsel in complex litigation are required to retain multiple liability and damages experts who are, in turn, mandated to develop their theories to a reasonable degree of certainty, provide detailed expert

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22. *Id.* at 628.

23. *Id.* at 629.

24. *Id.* at 629–30.

25. *Id.* at 630.

26. *Id.*

27. *Id.*

28. *Zaufflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1134 (Pa. 2014).

29. *Id.* at 1134–35.

30. *Id.* at 1135.

reports, sit for depositions, and often provide live testimony at the cost of tens of thousands of dollars.<sup>31</sup>

He continued:

Distinct from 1978, when the statutory damages cap was enacted, it is now necessary and extraordinarily expensive to produce demonstrative evidence such as complex accident reconstructions, biomechanical and human factor recreations, “day in the life” videos, as well as other types of recreations and animations. These are often used in opening statements and closing arguments, as well as during trial, necessitating complex and careful development to ensure admissibility, and requiring an operator to coordinate the audio-visual display as counsel presents the case. There are also enormous sums expended for discovery and mediations, which each cost thousands or tens of thousands of dollars, as well as the inevitable miscellaneous expenditures for travel, lodging, meals and the like, which aggregate throughout all complex litigation. All of these expenses are without consideration of the contingent fees and general overhead every lawyer must charge and consider before accepting a case.<sup>32</sup>

Max concluded that “plaintiffs’ counsel cannot responsibly agree to enter an appearance in a case where there will be no or *de minimis* return to the client because of the costs and fees necessary to secure a successful result.”<sup>33</sup> He observed that “[c]ounsel also cannot accept a case where required costs are disproportionate to a potential fee.”<sup>34</sup> He suggested that a damages cap may be unconstitutional where the factual record showed that the economic realities of litigation would make pursuing the litigation economically untenable.<sup>35</sup> Against this backdrop, Max also noted that Pennsylvania had not increased its government liability caps since their enactment in 1980. He urged the General Assembly to increase the caps to lessen the constitutional risk.<sup>36</sup>

*Zauflik* was a masterclass in constitutional incrementalism and in respecting the legislative prerogative to act before the Court took matters into its own hands. I was counsel in the case and would

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31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 1135–36.

rather have won it. I had to accept the Court's decision. But I appreciated Max's willingness to write separately to highlight the problem with the cap, warn that the problem only would get worse, and draw out a different path.

In 2019, Max again touched on governmental liability in *Grove v. Port Auth. of Allegheny County*.<sup>37</sup> In *Grove*, the plaintiff had suffered injury as a result of being struck by a bus operated by a Commonwealth agency.<sup>38</sup> Trial resulted in a seven-figure verdict in plaintiff's favor based on the negligence of a Commonwealth agency.<sup>39</sup> The verdict was reduced to \$250,000 under the liability cap favoring the Commonwealth.<sup>40</sup> After the defendant appealed, the Commonwealth Court ordered a new trial on grounds that the trial court wrongly failed to instruct the jury on negligence *per se*.<sup>41</sup> The Supreme Court reversed and reinstated the verdict in plaintiff's favor.<sup>42</sup>

While the majority opinion focused on jury instructions, Max used the occasion to author another concurrence to make practical observations about the liability cap. Joined by Justices Donohue, Dougherty, and Mundy, Max wrote that "a statutory requirement that renders cost-prohibitive the exercise of the jury trial right violates Article I, Section 6."<sup>43</sup> Max noted that nearly forty years had passed since the General Assembly enacted its governmental liability caps.<sup>44</sup> According to Max, this lengthy period justified reassessment of the statute's constitutionality where the caps failed "to account for all realities [of litigating catastrophic injury cases], including simple inflation."<sup>45</sup> Given the legislature's failure to update the caps, Max suggested that, if confronted with a factual record constructed to "establish that the statutory caps place an onerous burden on his or her right to a jury trial," the Supreme Court's obligation would be "to protect . . . citizens' constitutional rights."<sup>46</sup> On such a record, the Court "may be compelled to strike the cap, which could leave the Commonwealth or the local governments exposed to full liability if, and until, new legislation is passed."<sup>47</sup>

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37. 218 A.3d 877 (Pa. 2019).

38. *Id.* at 880.

39. *Id.* at 883.

40. *Id.*

41. *Id.* at 884–85.

42. *Id.* at 890.

43. *Id.* at 891 (Baer, J., concurring).

44. *Id.* at 890.

45. *Id.* at 892.

46. *Id.*

47. *Id.*

Max's concurrences in *Zauflik* and *Grove* reflect his characteristic approach of judicial restraint and respect for the constitutional system. Max felt moved to write about the unfairness of a cap that compensates an injured plaintiff for a diminishing fraction of her losses given inflation over time. Yet he also acknowledged the limitations of the judicial role and hence a preference for the legislature to act in the first instance. While steeped in deference to constitutional structure, these concurrences have kept alive an important conversation on the liability caps protecting the Commonwealth and its political subdivisions. Indeed, prompted directly by Max's concurrences, the General Assembly commissioned a report on the caps issued in June 2022. The report urged significant changes to Pennsylvania's governmental liability caps underscored Max's insights into the unfairness of these liability limitations. Prompted by Max's concurrences, litigation over caps also continues to unfold in the courts through the vehicle of *Freilich v. SEPTA*.<sup>48</sup> A conclusion to that story is yet to be written.

I last saw Max in September 2022, when he sat in the front row of the audience as President Ken Gormley announced the naming of Thomas R. Kline School of Law at Duquesne University. That day, I spoke about our constitutional rights to jury trial, open courts, and a full remedy at law. I spoke about the crucial role that the Supreme Court has played in protecting these rights for all Pennsylvanians. Max was present in his official capacity as Chief Justice of Pennsylvania. As always, Max wore the burden with good spirit, humility, and a keen sense of love for his colleagues, friends, and family. It was a great day for me, all the better for sharing it with my law school friend. We are fortunate for Max's contributions to Pennsylvania law and his presence in our lives. May his memory be for a blessing.

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48. No. 327 C.D. 2022, 2023 WL 4370703 (Pa. Commw. Ct. July 6, 2023).

# Chief Justice Baer and the Supreme Court's Tricentennial Anniversary

*Attorney John Hare\**

The debate about whether great people or great events primarily shape history is as old as the study of history itself. The truth seems to be somewhere in the middle: the right people presented with the right circumstances can achieve exceptional success. Such is the story of Chief Justice Baer's leadership in commemorating the tricentennial anniversary of his beloved Supreme Court. Fortuity made him the Chief Justice when the Court reached its three hundredth year in 2022, but he seized the opportunity and orchestrated a remarkable tribute to the Court's even more remarkable history.

Over the course of two years, he encouraged and guided the project, and his remarks at the commemoration emphasized not only his characteristic humility and kindness but also his adherence to a jurisprudence that valued practicality over ideology. He was, after all, a man who began his long judicial career in family court, where he learned that the law is not merely theoretical and is often the only effective protection for the most vulnerable among us, especially children.

Chief Justice Baer was essential in organizing and guiding the tricentennial commemoration, and his efforts created an enduring chronicle of the Supreme Court's history for the benefit of future generations. His efforts also revealed as much about him as they did the Court.

## THE TRICENTENNIAL PROJECT

As a student of history, the Chief Justice knew that the development of Pennsylvania and its Supreme Court were inextricably linked. Pennsylvania is called "the Keystone State" for good reason—it was the geographical center of the original colonies and was essential to the economic, religious, and political development of the

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\* The author was a member of the Tricentennial Committee. He thanks Chief Justice Emeritus Saylor, Justice Mundy, Teresa Ficken Sachs, John Witherow, and Bob Mongeluzzi for their review.

colonies and later the new nation.<sup>1</sup> It was no accident that the First Continental Congress met in Pennsylvania and that the Declaration of Independence and the United States Constitution were drafted and debated there. But Pennsylvania was essential for a century before those events, and it was Pennsylvania's role in early American history that led to the creation of its Supreme Court.

Almost immediately after his arrival in his namesake colony, William Penn published his famous 1682 Frame of Government, which envisioned a judiciary that was nothing like the unjust system that had persecuted and imprisoned him in England.<sup>2</sup> Only two years later, in 1684, Pennsylvania created its first colony-wide court, called the Provincial Court, which was the ancestor of the modern Supreme Court.<sup>3</sup> For the next 38 years, however, the particular form and powers of the colony's judiciary, and even the existence of the judiciary, were contested by Pennsylvanians and their overseers in England.<sup>4</sup> Finally, on May 22, 1722, the Pennsylvania Assembly passed a comprehensive judiciary act that formally created "the Supreme Court of Pennsylvania."<sup>5</sup>

On January 5, 2016, nearly 294 years after the statutory creation of the Supreme Court, then-Justice Baer attended the installation ceremony for his new colleague, Justice Kevin Dougherty, at the National Constitution Center. One of the speakers at the event was Robert Mongeluzzi, a prominent Philadelphia attorney and close friend of Justice Baer. During his remarks, Mr. Mongeluzzi pointed south to Independence Hall, an early home of the Supreme Court, and reminded the audience that the Court's tricentennial anniversary was only six years away. Over cocktails later that evening, and many times over the next several years, Justice Baer and Mr. Mongeluzzi discussed the approaching anniversary and the need to commemorate it.

Justice Baer raised the subject with then-Chief Justice Thomas Saylor and other members of the Court, and he was placed in charge of organizing a commemoration. He ultimately decided that the centerpiece of the event should be an academic symposium held on May 19 and 20, 2022, the last two business days before the Court's

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1. *State Symbols*, COMMONWEALTH OF PA., <https://www.pa.gov/guides/state-symbols/> (last visited Oct. 21, 2023).

2. *Frame of Government of Pennsylvania May 5, 1683*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR. (2008), [https://avalon.law.yale.edu/17th\\_century/pa04.asp](https://avalon.law.yale.edu/17th_century/pa04.asp).

3. *A Brief History of the Courts of Pennsylvania*, PA. CTS., <https://www.pacourts.us/assets/opinions/Superior/out/aopchistory.pdf> (last visited Oct. 12, 2023).

4. *Id.*

5. See Debra J. Poul & Wendy L. Wallner, *The Pennsylvania Project – The Pennsylvania Supreme Court: Perspectives from Within*, 23 VILL. L. REV. 1041, 1044 (1977).

official tricentennial anniversary on Sunday, May 22, 2022. In August of 2020, Justice Baer appointed a Tricentennial Committee, with fellow Justice Sallie Updyke Mundy and Mr. Mongeluzzi as co-chairs. Characteristic of his humility, Justice Baer did not include himself as a formal committee member. Instead, he remained a constant resource and advisor, collaborating with Justice Mundy, Mr. Mongeluzzi, and the Court's Counsel, Teresa Ficken Sachs, and supporting and encouraging the committee's work. From the outset, Justice Baer made clear that the symposium should not be purely celebratory but must include serious and objective academic consideration of the Court's jurisprudence and role in shaping the law in Pennsylvania and beyond. He wanted noted jurists, scholars, and practitioners to create a balanced and enduring record of the Court's first three centuries.

When organizational efforts began in August of 2020, then-Justice Baer was not scheduled to become Chief Justice until January of 2022, when Chief Justice Saylor would have retired after reaching the mandatory retirement age of 75. Because Justice Baer would reach 75 in 2022 and would be required to retire at the end of 2022, he would have only one year as Chief Justice. In a notable display of collegiality, Chief Justice Saylor decided that one year was not enough time for Justice Baer to lead the Court, so Saylor relinquished his position in April of 2021.<sup>6</sup> This gracious decision allowed Justice Baer to serve an extra eight months as Chief Justice.

With the approaching symposium on his mind, he used the time well. He was instrumental in refining the event and especially in arranging notable speakers, including Pennsylvania Governor Tom Wolf, retired United States Supreme Court Justice Anthony Kennedy, the Chief Justices of three other states, and many others.

#### THE TRICENTENNIAL SYMPOSIUM

With hundreds attending live and virtually, the symposium began on May 19, 2022. Appropriately, the event was held at the National Constitution Center, where the idea for the symposium first emerged. Over the next two days, six panels proceeded generally in chronological order, with noted jurists, law and history professors, and others discussing different eras and aspects of the Court's

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6. Matt Miller, *Chief Justice Thomas G. Saylor to Relinquish Pa. Supreme Court's Top Post Months Before He Retires*, PENN LIVE, <http://www.pennlive.com/news/2021/03/chief-justice-thomas-g-saylor-to-relinquish-pa-supreme-courts-top-post-months-before-he-retires.html> (last visited Oct. 22, 2023).



history. The panels addressed the Court's ideological roots and emergence from Pennsylvania's turbulent colonial politics, important interpretations of Pennsylvania's five constitutions, the role of state courts in our federal system, the many adjudicative and administrative functions of the modern Supreme Court, the process of judicial decision-making in state supreme courts, and reflections from prominent federal and state jurists.

The symposium and associated presentations, which included educational videos and panoramas, produced a comprehensive record of the Supreme Court's history that will serve as an important resource for future study of the Court and the impact of state judiciaries on the development of American law.

#### CHIEF JUSTICE BAER'S REMARKS

Having been the primary impetus behind the commemoration, Chief Justice Baer was both host and panelist, and his remarks in both capacities revealed as much about him as they did the Court.

He introduced the second day's events with his typical humor, humility, and recognition that the Court's importance lay in its institutional role, not in the identities of individual Justices. Referencing former President Calvin "Silent Cal" Coolidge, Justice Baer began his introduction by promising to be "gone quickly" so the "wonderful" speakers could proceed. Calling himself a mere "footnote in history," he credited his former and current colleagues with building the Court, and he stated that he would be successful as Chief Justice if he could "merely continue" the traditions and thoughtfulness of his predecessors, especially Chief Justice Saylor. He also enthusiastically acknowledged Justice Debra Todd, who would succeed him and become Pennsylvania's first female Chief Justice. He paid special tribute to the Tricentennial Committee's co-chairs, Justice Mundy and Mr. Mongeluzzi, who had so capably managed the committee's wide-ranging work. But even as he praised others, he reminded attendees that he and the other Justices were temporary custodians, not the Court itself. "Nobody is actually here for any appreciable amount of time," he said. "We come, we go, but the institution remains strong."

He concluded by talking about the future. He wished he had another ten years to serve on the Court, because the resurgent authority of state courts created exciting opportunities to develop jurisprudence that protects individual rights beyond the parameters of federal law. It is the states, he said, not the federal government, that have been the traditional guardians of rights, and

Pennsylvania is “perfectly positioned” to continue in that capacity because of its Supreme Court’s strong rights-centered jurisprudence. Ultimately, recognizing that his tenure as Chief Justice was nearing its end, he said that he looked forward to “watching rather than participating” as the Court continued to serve the interests of all Pennsylvanians into the distant future.

Later that day, Chief Justice Baer participated in a panel discussion entitled “Decision-Making in State Supreme Courts,” which included the Chief Justices of Ohio, Rhode Island, and South Carolina. In his remarks, he returned to the independence of state courts and encouraged his Court and other state courts to utilize their own constitutions to depart from federal decisions when appropriate, with the goal of protecting and enhancing individual rights. When questioned about competing methods of constitutional and statutory interpretation, including originalism and textualism, he emphasized his belief in a practical jurisprudence that was free of what he saw as overly formal analytical constraints. “These schools of interpretation are folderal,” he said, because “the only interpretation that matters is to get it right.” Judges should apply constitutional and statutory text according to its plain meaning, evaluate the text’s intent, consider the consequences of a particular holding, and endeavor to reach a just result. These principles were captured in what his law clerks called the “Rules of Baer,” which cautioned against using “the tools of a lazy judge,” including reliance on block quotes and unwarranted deference to legislative or lower court determinations. The better approach to adjudication, he explained, is to “think it through, articulate it carefully, and get to the right result.”

Finally, when asked about the controversial subject of political influence on an elected judiciary like Pennsylvania’s, Chief Justice Baer emphasized the importance of courage, which he described as “the principal attribute of any judge.” He said that, so long as a judge has the courage to seek the right outcome even when it is not politically expedient, he or she will retain the respect of those who may disagree with the outcome. As examples, he noted instances in which legislators from the opposing political party told him they disagreed with a particular decision he made but respected the way he made it. “I can’t tell you what high praise that is,” he said, “and how that pleased me.” “Over the arc of history,” he concluded, judges who make courageous decisions have “protected the judicial branch.”

The last panel of the symposium, “Reflections from the Bench,” involved a wide-ranging discussion of the work of judging and

included retired Justice Kennedy, now-Chief Justice Emeritus Saylor, Third Circuit Chief Judge D. Brooks Smith, and Stanford Law School Professor Pamela S. Karlan, who was then on leave from the law school to run the Justice Department's Civil Rights Division.<sup>7</sup> Justice Kennedy was originally scheduled to attend in person, but the ongoing COVID-19 pandemic caused his physicians to advise him to avoid large crowds. As a result, he agreed to participate in a videotaped roundtable with the other panelists only, and the video then would be shown during the symposium. Justice Kennedy agreed to travel to Philadelphia and Chief Justice Baer arranged to have the roundtable recorded in the Supreme Court's chambers in City Hall.

When Justice Kennedy arrived, Chief Justice Baer greeted him warmly and thanked him for traveling to Philadelphia. The Chief Justice had Court staff arrange a lunch and asked Justice Kennedy whether he preferred to eat before or after the roundtable discussion. An extremely affable man, Justice Kennedy responded that he had no preference and would defer to the group. Noting the security personnel who accompanied Justice Kennedy, Chief Justice Baer then asked what time the Justice had to depart for his return to Washington. Justice Kennedy responded, "I'm in no hurry, I have a lifetime appointment." The Chief Justice had met his match in grace and humor, and the two men clearly enjoyed each other's company. At the end of the day, Justice Kennedy invited Chief Justice Baer to Washington to tour the Supreme Court. Justice Kennedy's heartfelt remarks were a highlight of the symposium, and the warm manner in which Chief Justice Baer hosted him clearly left an impression.

#### THE GREAT CONCILIATOR

The humility, kindness, and practicality for which Chief Justice Baer was well-known were apparent throughout the tricentennial events. Rather than placing himself at the head of the planning committee, he appointed trusted and capable co-chairs, let them lead, and encouraged and assisted them rather than dictating decisions. In his remarks at the symposium, he was funny, self-deprecating, and effusive in his praise of past and current colleagues. He also emphasized the importance of the Court's institutional role and

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7. *The Pennsylvania Supreme Court at 300: Past, Present & Future*, PA COURTS, <https://www.pacourts.us/Storage/media/pdfs/20220505/164609-supreme300agenda.pdf> (last visited, Oct. 22, 2023).

the need for judges to be bold and courageous in utilizing the law to solve problems and protect rights rather than to advance a formalistic, doctrinaire, or political ideology. This moderate, deferential, and practical worldview was indicative of his leadership style as Chief Justice as well, where he was known to seek consensus, find common ground, and avoid the factionalism that is unfortunately common in public life.

Mr. Mongeluzzi, a close friend of Chief Justice Baer for many years, has aptly described the Chief Justice as “The Great Conciliator.” In this and other respects, Chief Justice Baer’s thoughtful leadership of the Supreme Court and the tricentennial project left a lasting legacy from which we can all learn.

# The Judicial Opinions of Chief Justice Max Baer of the Supreme Court of Pennsylvania (2004–2022)

*Dr. Joel Fishman*

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Chief Justice David Max Baer (December 24, 1947–October 1, 2022) was born in Pittsburgh, graduated from the University of Pittsburgh, B.A., with honors, 1971, and from Duquesne University School of Law, J.D. with honors, 1975. He was admitted to the Allegheny County Bar and federal courts in 1975. He served as a Deputy Attorney-General (1975–79), practiced law in Sherrard, German and Kelly, PC, (1980–89), and elected a Judge of the Court of Common Pleas of Allegheny County in November 1989 and retained in November 1999, serving then from January 1990 to January 2004. Baer served as a member of the Family Division, where he became Administrative Judge (December 1993–April 1999), before transferring to the Civil Division (January 2000–January 2004). He was elected to the Supreme Court of Pennsylvania in November 2003 and retained in November 2013. Baer served as Associate Justice from January 2004 until April 1, 2021, when Chief Justice Thomas Saylor resigned his position, making Justice Baer Chief Justice of the Supreme Court until his sudden death on October 1, 2022. His induction ceremony as Associate Justice can be found in 579 Pa. [LXXXVII]-CXXVI.

Chief Justice Baer received a number of honors and awards during his career: Shalom Moot Court Competition, Duquesne Law School; Pennsylvania Adoption Advocate of the Year, 1997; Excellence Award for Judicial Innovation, 1998; Robert S. Stewart Award for Outstanding Contribution to Family Law, 1998; Pennsylvania Bar Association Child Advocate of the Year, 2000; Federal Department Health and Human Services Adoption 2002 Excellence Award; Champion of Children Award, Homeless Children’s

Education Fund, 2003; Pennsylvania's Most Valuable Peacemaker Award (mediation advocate), Pennsylvania Mediation Council, 2004; Civic Leadership Award, Three Rivers Adoption Council, 2005.

He also served in a number of organizations: Former Chairman, Domestic Relations Committee, Pennsylvania Supreme Court; Former Chairman, Family Law Section, Pennsylvania State Conference of State Trial Judges; Former member, Education Committee, Pennsylvania Conference of State Trial Judges; Former member, ex-officio, Juvenile Court Judges Committee; Board member, Family Services of Western Pennsylvania; Board Member, Emma Kaufmann Camp; Former Chair, Domestic Relations Procedural Rules Committee; Ex Officio Representative, Juvenile Court Judges Commission; Former Chair, Joint State Government Commission on Adoption Law and Services to Children and Youth.

Chief Justice Baer co-authored *The Judges' Book* (1992) and wrote a few articles: *Custody Wars—The Creation of a New Weapon of Mass Destruction*, 21 Pa. Fam. Law. 121–25 (1999); guest columnist, Pittsburgh Post-Gazette, Forum: *Open, Shut and Complicated, a Critique of the Elian Gonzales Case* (Feb. 2000); *Family Law and Civility: Can They Co-exist?* 24 Pa. Fam. Law. 13–16 (2002).

Chief Justice Baer's achievements and judicial philosophy have been remarked upon by other members of this article. My task was to prepare an index of the Justice's opinions. I have used both Lexis and Westlaw to retrieve all of his opinions, checked every opinion in both databases, and have categorized them into the five major categories: (1) majority opinions, (2) concurring opinions, (3) dissenting opinions, (4) concurring and dissenting opinions, and (5) plurality opinions (wherein a divided court and Justice Cappy either supported an affirmation of the opinion or in support of reversal).

In cases when the opinion citation was different (abbreviated or longer) in both systems, I used the Westlaw version of the case. I have omitted standard legal abbreviations and have written out the full title of the case.

Chief Justice Baer wrote 521 opinions broken down into 264 majority opinions, 120 concurring opinions, 93 dissenting opinions, 38 concurring and dissenting opinions, and six plurality opinions. The list below does not include those opinions that he joined in the majority, dissenting, or concurring opinions that others wrote. In addition, I added a list of his trial opinions given in the Allegheny County Court of Common Pleas that were published in the

*Pittsburgh Legal Journal* (some opinions are full-text, and some are capsule summaries written by members of the Allegheny County Bar Association).

## I. MAJORITY OPINIONS

*A Special Touch v. Department of Labor and Industry*, 658 Pa. 288, 228 A.3d 489 (2020).

*A.S. v. I.S.*, 634 Pa. 629, 130 A.3d 763 (2015).

*Allegheny Inspection Service, Inc. v. North Union Tp.*, 600 Pa. 245, 964 A.2d 878 (2009).

*American and Foreign Insurance Company v. Jerry's Sport Center, Inc.*, 606 Pa. 584, 2 A.3d 526 (2010).

*Arneson v. Wolf*, 633 Pa. 224, 124 A.3d 1225 (2015).

*Babcock & Wilcox Company v. American Nuclear Insurers*, 635 Pa. 1, 131 A.3d 445 (2015).

*Barnish v. KWI Building Company*, 602 Pa. 402, 980 A.2d 535 (2009).

*Bayview Loan Servicing LLC v. Wicker*, 651 Pa. 545, 206 A.3d 474 (2019).

*Berner v. Montour Township Zoning Hearing Board*, 655 Pa. 137, 217 A.3d 238 (2019).

*Brittain v. Beard*, 601 Pa. 409, 974 A.2d 479 (2009).

*Bruckshaw v. Frankford Hospital of City of Philadelphia*, 619 Pa. 135, 58 A.3d 102 (2012).

*Butler v. Charles Powers Estate ex rel. Warren*, 620 Pa. 1, 65 A.3d 885 (2013).

*C.C.H. v. Philadelphia Phillies, Inc.*, 596 Pa. 23, 940 A.2d 336 (2008).

*Carrozza v. Greenbaum*, 591 Pa. 196, 916 A.2d 553 (2007).

*Carter v. Chapman*, 270 A.3d 444 (2022).

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## APPENDIX 1

*Judge Baer's Opinions in the Court of Common Pleas of Allegheny County Published in the Pittsburgh Legal Journal*

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## Epilogue: Chief Justice Max Baer's Enduring Legacy

*Dean April Barton*

The pages of this special issue of our *Duquesne Law Review of the Thomas R. Kline School of Law* have been dedicated to our beloved friend, distinguished alumnus, and prominent jurist, Chief Justice Max Baer. We have assembled this tribute to his life and service to our Commonwealth as an example of the best of our profession.

Throughout the trajectory of his career, Max Baer never stopped his pursuit of justice, and he was committed to doing the right thing—always. In his days as a family court judge, he was fondly dubbed the “fighting judge.” As a Justice of the Supreme Court of Pennsylvania, he was never associated with a school of jurisprudence, rather he was known as a careful and fair Judge; he was not afraid to act but was reluctant to make new law unless necessary.

Max Baer leaves a legacy of extraordinary impact and unmatched greatness. He was a distinguished jurist and a dedicated public servant, but, most importantly, he was also a shining example kindness, joy, and caring. He was always uplifting others and was simply the best of the best. Deep down, he was pure goodness, and those around him knew it and aspired to be like Justice Baer.

Amongst the most loyal and dedicated alumni of the Thomas R. Kline School of Law, he served many years on our Law School Advisory Board, was our 2019 Commencement speaker, presided over our bar admission ceremony each year, and received posthumously our most distinguished alumni award. He was a constant and welcoming presence and an integral part of our life here at Duquesne.

He often gave heartfelt advice. His words of wisdom usually involved one of three sources: (1) his father, who was a successful and hardworking automotive dealership owner; (2) lyrics from folk songs that he found particularly meaningful; or (3) profound metaphors of life he extracted from *Star Trek* or *Star Wars*.

In his 2019 Commencement address at our Law School, Chief Justice Baer reminded our aspiring lawyers to “know what you know, trust what you have learned, and be confident in all your knowledge.” He followed this piece of advice by reminding our graduates to also “know what you *don't* know. The law is voluminous

and complex. Ask for help.” Finally, he told our graduates to “never be anything but candid with everyone about the facts. You take the facts as you find them. You did not create the facts. Be honest, and always maintain your integrity.” Sound guidance for any practicing lawyer, gleaned from his years of experience and unwavering values.

He closed by sharing these words with our graduates: passion leads, happiness sustains, success will follow. Max’s passion was helping children. He said, “When I close my eyes for the last time, no one is going to write about the opinions I wrote. They will write about what I’ve done for kids. And that’s okay, that will make me happy.”

Max was an exceptional person who had an extraordinary career. But far more importantly, he would appreciate being remembered as the kind, loving, devoted family man he was. His beautiful family was the center of his universe. More than anything, he loved being husband to Beth and father to sons Andy and Ben. He beamed with pride when he spoke about Andy, who serves as a Major in the U.S. Air Force, and Ben, who is a successful Philadelphia trial lawyer. We bonded over the fact that I, too, have two sons. He was especially proud to be grandfather to his five grandchildren and delighted in sharing stories about them. He is remembered with deep affection as a loving and devoted husband, father, and grandfather.

We were honored to hold Chief Justice Baer’s memorial service on Duquesne’s campus. The Power Center Ballroom was filled to capacity with distinguished jurists, attorneys, public servants, faculty, alumni, and those who knew and loved him. When driving home from Max’s memorial service that day, I saw the most magnificent rainbow. It was one of those rare rainbows where you can see end to end. It stretched across the entire sky, and it was perfect. I knew instantly that it was Max smiling down on us.

When I think of Max Baer, I remember a sparkle in his eye, a smile on his face, and a kind and encouraging word to say. He brought his light and love into this world and inspires all of us to do the same. At Duquesne University, we are filled with the Holy Spirit in all we do, and I am certain Max’s spirit is now part of that precious source of inspiration, hope, and guidance for us all.

# Antitrust Against the Anti-Hero: Ticketmaster Monopoly Wages Ongoing War on the Concert Industry

Claire J. Neiberg\*

“It’s me, hi, I’m the problem, it’s me” — Taylor Swift<sup>1</sup>

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## I. INTRODUCTION

Taylor Swift is one of the biggest names in the music industry. Following her rise to fame in 2006, Swift made history as the first

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1. TAYLOR SWIFT, *Anti-Hero*, on MIDNIGHTS (Republic Rec. 2022).

female country singer to write an entire U.S. platinum-certified album, and over the next seventeen years, she has curated a discography spanning multiple genres and reaching millions of listeners.<sup>2</sup> When Swift announced ticket sales for her 2023 *The Eras Tour*, fans were met with an obstacle that concertgoers know all too well: Ticketmaster and its monopolistic practices.<sup>3</sup> Founded in 1976, Ticketmaster is the world's largest ticketing sales and distribution company and the global market leader in live event ticketing products and services.<sup>4</sup> In 2010, the company merged with Live Nation, and as of 2023, it represents 70% of all tickets sold in the United States, dominating the industry.<sup>5</sup>

The practices Ticketmaster and Live Nation Entertainment have engaged in over the last decade have plagued the concert industry by implementing controlling measures over artists and their fans. Taylor Swift addressed the situation on November 18, 2022, via Instagram.<sup>6</sup> She expressed that Ticketmaster assured her and her team that it could “handle this kind of demand” and that her “hope is to provide more opportunities for us to all get together and sing these songs.”<sup>7</sup> While fans were left with no answers for weeks following Swift's sentiment, Ticketmaster provided a select group of fans the opportunity to purchase up to two leftover tickets to Swift's tour on December 12, 2022.<sup>8</sup> This sale was at the request of Swift and her team, and Ticketmaster sold the remaining 170,000 seats through another branch of its company, Ticketstoday.<sup>9</sup> However, similar to the presale, this sale did not guarantee tickets but provided fans with a limited “opportunity to request to purchase 2 tickets.”<sup>10</sup> Swift's tour promoter also spoke out and claimed that the

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2. *Taylor Swift: Hal David Starlight Award*, SONGWRITERS HALL OF FAME (2010), [https://www.songhall.org/awards/winner/taylor\\_swift](https://www.songhall.org/awards/winner/taylor_swift).

3. See Spencer Kornhaber, *How Taylor Swift Broke Ticketmaster*, THE ATLANTIC (Nov. 19, 2022, 6:20 PM), <https://www.theatlantic.com/culture/archive/2022/11/taylor-swift-ticketmaster-presale-concert-tickets/672181/>.

4. See Lauren Feiner & Sarah Whitten, *Senators Slam Live Nation Over Ticketmaster's Dominance, Botched Taylor Swift Sale*, CNBC (Jan. 24, 2023, 3:25 PM), <https://www.cnbc.com/2023/01/24/senate-committee-live-nation-ticketmaster-hearing.html>.

5. *Id.*

6. See Samantha Kubota, *Taylor Swift Speaks Out After Ticketmaster Fumbles Tour Ticket Sales*, TODAY (Nov. 18, 2022, 12:23 pm), <https://www.today.com/popculture/taylor-swift-speaks-out-ticketmaster-rcna57812>.

7. *Id.*

8. See Jon Blistein, *Taylor Swift Got Ticketmaster to Release a Few More 'Eras Tour' Tickets*, ROLLING STONE (Dec. 12, 2022), <https://www.rollingstone.com/music/music-news/taylor-swift-fans-second-chance-eras-tour-tickets-1234645918/>.

9. See Brenton Blanchet, *Ticketmaster Will Sell 170,000 Remaining Tickets to Taylor Swift's Eras Tour Over Next Four Weeks*, PEOPLE (Dec. 16, 2022, 3:09 PM), <https://people.com/music/ticketmaster-to-sell-remaining-tickets-to-taylor-swift-tour/>.

10. See Blistein, *supra* note 8.

team was forced to work with Ticketmaster due to the company's "exclusive deals with the vast majority of venues on the Eras Tour."<sup>11</sup> Ticketmaster's exclusive deals with large concert venues and its method of selling tickets give rise to the issues surrounding antitrust and the company's monopoly.

Part II.A of this article summarizes the history of antitrust laws and how they have failed to address the modern the entertainment industry.<sup>12</sup> It compares the current structure of Ticketmaster to that of the Hollywood Studio system, which was broken up by anti-trust legislation in the 1930s. Additionally, this subsection explains the history of Ticketmaster and the company's rise to success.<sup>13</sup> Part II.B introduces the controversy surrounding Swift's 2023 tour and examines how the 2010 merger between Ticketmaster and Live Nation Entertainment is the root of the issues consumers are dealing with today, including technical difficulties and exorbitant prices.<sup>14</sup> Part III.A and Part III.B criticize Ticketmaster's monopoly structure, answering the question of "Who owns what?"<sup>15</sup> and explains the dynamic pricing model that the company uses.<sup>16</sup> Part III.C analyzes potential working solutions, ultimately arguing that government intervention is necessary in order to cease the company's antitrust violations.<sup>17</sup> Finally, Part IV provides concluding remarks harmonious with the sentiment that the enjoyment of live music should be accessible to all at a reasonable expense.<sup>18</sup>

## II. BACKGROUND

Audiences have enjoyed public concerts since the late seventeenth century.<sup>19</sup> Over the next several centuries, concerts gained more traction in the form of symphony orchestras,<sup>20</sup> and in the 1950's, these performances shifted into the modern events that are

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11. See Sarah Whitten, *Taylor Swift's Tour Promoter Says It Had No Choice but to Work with Ticketmaster*, CNBC (Jan. 25, 2023, 3:57 PM), <https://www.cnbc.com/2022/11/22/taylor-swift-tour-promoter-had-to-work-with-ticketmaster.html>.

12. See *infra* Part II.A.

13. *Id.*

14. See *infra* Part II.B.

15. See *infra* Part III.A.

16. See *infra* Part III.B.

17. See *infra* Part III.C.

18. See *infra* Part IV.

19. See Phyllis S. Rueb, *The Public Concert Emerges*, AM. MUSIC TCHR., Feb.–Mar. 1973, at 18, 18. John Banister, an English violinist, held the first public concert at his home in 1672. Following Banister's concerts, Thomas Britton began a series of concerts which his audience members paid for in the form of an annual subscription from 1678–1714. *Id.*

20. *Id.* at 19.

popular today.<sup>21</sup> Following World War II, the rise of “youth culture” had a profound effect on the American music industry,<sup>22</sup> and, as a direct result, concert promoter Bill Graham<sup>23</sup> opened the Fillmore East theater in New York City on March 8, 1968.<sup>24</sup> In its run, the venue showcased some of the greatest legends in rock and roll history.<sup>25</sup> However, despite the opening of the Fillmore East marking the beginning of the “burgeoning live-concert empire,”<sup>26</sup> the venue closed its doors just three years later on June 27, 1971.<sup>27</sup> Due to the large growth of the concert industry and the beginning of computerized ticket sales,<sup>28</sup> the Fillmore East and its small capacity ostensibly could not keep up with the rise of stadium tours. The venue had a capacity of 2,654, and the gross earnings for one show was approximately \$12,575.00.<sup>29</sup> Graham also cited “burnout, his contempt for competing arena shows and an antipathy toward the increasingly corporate nature of the rock scene” as reasons for shutting down his venue.<sup>30</sup>

## A. *From Oil to Entertainment: History of Antitrust Law*

### 1. *The Eras of Antitrust*

An examination of the “corporate nature of the rock scene”<sup>31</sup> must begin with the history of antitrust laws and the effect that these

21. See Cheryl L. Keyes, *The Aesthetic Significance of African American Sound Culture and Its Impact on American Popular Music Style and Industry*, 45 *WORLD OF MUSIC* 105, 105 (2003). In 1954, the Moon Dog Coronation Ball was the first major rock and roll concert, held at an arena in Cleveland that was suited for 10,000 audience members. This concert presented unique challenges, but it established the formula for the rock and roll concerts millions of Americans enjoy today. *Id.* at 119.

22. See Lawrence Grossberg, *The Politics of Youth Culture: Some Observations on Rock and Roll in American Culture*, *SOC. TEXT*, Winter 1983–1984, at 104, 104–106 (relating the emergence of rock and roll to the youth’s “articulated experiences of alienation, powerlessness and boredom” that stemmed from this post-war era). Ticketmaster’s success is influenced by modern day youth culture, as it has gained much of its traction from social media and other news outlets.

23. Steve Appleford, *Bill Graham’s Rock & Roll Life Goes on Display in L.A.*, *ROLLING STONE* (May 12, 2015), <https://www.rollingstone.com/music/music-lists/bill-grahams-rock-roll-life-goes-on-display-in-l-a-21426/carlos-santanas-guitar-211533/>.

24. See Corbin Reiff, *Fillmore East: 15 Great Shows*, *ROLLING STONE* (June 27, 2016), <https://www.rollingstone.com/music/music-news/fillmore-east-15-great-shows-222941/>.

25. *Id.* (featuring artists Jimi Hendrix, Led Zeppelin, the Allman Brothers Band, B.B. King, Eric Clapton, and Sly and the Family Stone).

26. *Id.*

27. See WILLIE PERKINS, *NO SAINTS, NO SAVIORS: MY YEARS WITH THE ALLMAN BROTHERS BAND* 57 (Mercer Univ. Press 2005).

28. See *infra* note 55 and accompanying text.

29. See PERKINS, *supra* note 27, at 56.

30. See DEAN BUDNICK & JOSH BARON, *TICKET MASTERS: THE RISE OF THE CONCERT INDUSTRY AND HOW THE PUBLIC GOT SCALPED* 42 (ECW Press 2011).

31. *Id.*



laws have had on the entertainment industry in the last century. This section will explain that Ticketmaster's control over the market is comparable to that seen in three prominent antitrust cases. When President Theodore Roosevelt took office in 1901,<sup>32</sup> he faced political pressure from the public to dismantle trusts.<sup>33</sup> Roosevelt's policies were supported by the newly passed Sherman Antitrust Act of 1890 (Sherman Act), which outlawed "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."<sup>34</sup> As a leader of the Progressive Era, Roosevelt believed that Wall Street giants were becoming too powerful, and there was no limit to the corporate greed they exhibited.<sup>35</sup> Roosevelt's criticisms stemmed from his fear that continued exploitation of the public could result in a violent uprising that could destroy society as a whole and that the captains of industry could usurp elected governmental officials through their monopolistic practices.<sup>36</sup> Contemporaneous with Roosevelt taking office, Hollywood films were just beginning to take off.<sup>37</sup> But before the Sherman Act had any impact on the entertainment industry, the government first sought to enforce the Act through the control of oil and railroads.<sup>38</sup>

Ultimately, Roosevelt's presidency saw the dissolution of the Northern Securities Company, which set a powerful precedent for limiting vertical control within America's largest companies.<sup>39</sup> Moreover, in *Standard Oil Co. v. United States*, the Supreme Court held that Standard Oil—John D. Rockefeller's oil and gas industry—unreasonably restrained trade and violated the Sherman

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32. *Theodore Roosevelt: The 26th President of the United States*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/presidents/theodore-roosevelt/> (last visited Feb. 7, 2023).

33. See *Roosevelt and the Trusts*, OHIO STATE UNIV. DEP'T OF HIST., <https://ehistory.osu.edu/exhibitions/1912/trusts/roosevel> (last visited Oct. 31, 2022).

34. See 15 U.S.C. § 1; see also 15 U.S.C. § 2 (making it illegal to "monopolize any part of the trade or commerce among the several States, or with foreign nations") (emphasis added).

35. See Jackson Lears, *Teddy Roosevelt, Not-So-Great Reformer*, THE NEW REPUBLIC (March 14, 2014), <https://newrepublic.com/article/116790/bully-pulpit-doris-kearns-goodwin-reviewed-jackson-learns>.

36. See, e.g., Kirsten Swinth, *The Square Deal: Theodore Roosevelt and the Themes of Progressive Reform*, GILDER LEHRMAN, <https://www.gilderlehrman.org/history-resources/essays/square-deal-theodore-roosevelt-and-themes-progressive-reform> (last visited Feb. 7, 2023) [hereinafter "*The Square Deal*"]. Under Roosevelt's presidency, the government became "the steward of public welfare" and business monopolies were challenged. *Id.*

37. See *infra* note 43 and accompanying text.

38. Compare *N. Sec. Co. v. United States*, 193 U.S. 197, 238 (1904) (finding that a holding company formed to create a railroad monopoly violated the Sherman Act), with *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 65 (1911) (holding that business arrangements that unreasonably restrained trade violated the Sherman Act).

39. See Swinth, *supra* note 36.

Act.<sup>40</sup> The Court stated that the company “had obtained a complete mastery over the oil industry, controlling 90 percent of the business.”<sup>41</sup> While the company did not enjoy total control of the market, it retained “substantial power,” serving “to add additional cogency to the presumption of intent to monopolize.”<sup>42</sup>

The enforcement of the Sherman Act in the entertainment industry began in Hollywood, nearly forty years before concerts gained their widespread popularity.<sup>43</sup> The Motion Picture Patents Company (MPPC), owned by Thomas Edison, controlled movie patents from 1908–1915.<sup>44</sup> Through this system, the MPPC charged its exhibitors weekly rates for licensed films which established a monopoly over all aspects of filmmaking.<sup>45</sup> These practices lasted until 1915 when the United States District Court for the Eastern District of Pennsylvania relied on the Sherman Act to strike them down in *United States v. Motion Picture Patents Co.*<sup>46</sup> Following this decision, patents became much harder to enforce and filmmakers began to flourish.<sup>47</sup>

It was not until the 1930s, however, that the film industry really began to take off in an era otherwise known as “The Golden Age.”<sup>48</sup> During this time, five major Hollywood studios controlled the industry: Metro-Goldwyn-Mayer (MGM), Warner Brothers, Paramount Pictures, Fox, and Radio-Keith-Orpheum (RKO).<sup>49</sup> Through vertical integration, each company oversaw every aspect of production in what was known as the “Hollywood Studio System.”<sup>50</sup> At the start of the Hollywood Studio System, the five companies claimed to be merely exercising their copyright privileges, but as time went on, the companies colluded to exercise monopolistic control over the

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40. See *Standard Oil Co.*, 221 U.S. at 65.

41. *Id.* at 54. Thus, Standard Oil effectively controlled all aspects of the oil business, including “producing, shipping, refining and selling petroleum and its products, and thus was able to fix the price of . . . petroleum and to restrain and monopolize all interstate commerce in those products.” *Id.*

41. *Id.* at 77.

43. See Jeanne Thomas, *The Decay of the Motion Picture Patents Company*, 10 CINEMA J. 34, 35 (1971).

44. *Id.*

45. *Id.*

46. See *United States v. Motion Picture Pats. Co.*, 225 F. 800, 811 (E.D. Pa. 1915).

47. See William F. Whitman, *Anti-Trust Cases Affecting the Distribution of Motion Pictures*, 7 FORDHAM L. REV. 189, 191 (1938).

48. See Rafael Abreu, *What is the Studio System – Hollywood’s Studio Era Explained*, STUDIO BINDER (Jan. 1, 2023), <https://www.studiobinder.com/blog/what-is-the-studio-system-in-hollywood/>.

49. *Id.*

50. *Id.*

film industry.<sup>51</sup> The Hollywood Studio System came to an end in *United States v. Paramount Pictures* when the United States brought suit against the five film studios and alleged that their practices violated Sections 1 and 2 of the Sherman Act.<sup>52</sup> The Supreme Court decided the fate of film studios and held that they were no longer permitted to operate their own movie theaters, a decision which gave actors more freedom under their contracts.<sup>53</sup>

## 2. *Ticketmaster's Takeover*

With recorded music continuing to rise in popularity, the concert ticket industry grew rapidly, as companies soon took advantage of the chance to profit from selling tickets to live shows by popular performers. At the beginning of concert popularity, venues sold tickets through their own box offices.<sup>54</sup> However, this all changed with the growth of the internet.<sup>55</sup>

In 1965, Edgar Bronfman, Sr. formed the first computerized ticketing company, Ticket Reservations Systems, Inc. (TRS).<sup>56</sup> TRS launched its “pilot project,” a computerized sale of tickets to an off-Broadway theater production, on July 6, 1967.<sup>57</sup> TRS was based on an early computer operating system,<sup>58</sup> and in July 1969, the company began operating under the name “Ticketron.”<sup>59</sup>

As computerized ticketing became more popular, other companies began mimicking the practices of Ticketron. In 1976, Arizona State University staffers, among other business partners, founded Ticketmaster, which quickly grew into an international company.<sup>60</sup> Fred Rosen was appointed CEO of Ticketmaster in 1982, and consequently, the company began dominating the Ticket industry.<sup>61</sup> Rosen moved the company to Los Angeles, California, where he

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51. *The Sherman Act and the Motion Picture Industry*, 13 UNIV. OF CHI. L. REV. 346, 347 (1946).

52. See *United States v. Paramount Pictures*, 334 U.S. 131, 140 (1948). Under the inquiry set forth in *Paramount Pictures*, Ticketmaster's vertical integration structure has developed into an illegal monopoly. In *Paramount Pictures*, the Court opined that “the power created by size . . . to crush . . . competition” is “potent evidence that the requisite purpose or intent attends the presence of monopoly power.” *Id.* at 174.

53. See *The Sherman Act and the Motion Picture Industry*, *supra* note 51, at 353.

54. See Appleford, *supra* note 23.

55. See BUDNICK & BARON, *supra* note 30, at 233–35.

56. *Id.* at 4.

57. *Id.* at 10.

58. *Id.* Control Data Corporation launched the “1700 computer” system in 1965, which served as a model for TRS. *Id.*

59. *Id.* at 24.

60. See *Our History: 1970s & 1980s*, TICKETMASTER, [https://www.ticketmaster.com/about/our-history.html?tm\\_link=abouttm\\_history](https://www.ticketmaster.com/about/our-history.html?tm_link=abouttm_history) (last visited Feb. 7, 2023).

61. *Id.*

used aggressive tactics to outperform his competitors.<sup>62</sup> Accordingly, Ticketmaster acquired Ticketron in 1991 and became the market leader.<sup>63</sup>

Ticketmaster's growth did not stop with the purchase of Ticketron. As computer technology advanced, so did Ticketmaster sales. By 1993, the company generated \$1.3 billion in revenue from selling sixty-one million tickets annually with sales across forty U.S. states in addition to Canada, Europe, and Australia.<sup>64</sup> That same year, Microsoft co-founder Paul Allen<sup>65</sup> invested \$240 million in Ticketmaster and acquired an 80% stake in the company.<sup>66</sup> However, CEO Rosen showed little respect for Allen and still ran the company as if it were his own.<sup>67</sup> Despite Rosen's dismissiveness, Allen's stake in Ticketmaster, in conjunction with his Microsoft connections, were integral to the company's success over the internet. In 1997, the Home Shopping Network purchased a 47.5% stake from Allen, allowing its then-owner, Barry Diller, to gain control of the company.<sup>68</sup>

Diller's vision, "to create a twenty-first century media company with an integrated portfolio that leveraged the Internet,"<sup>69</sup> came alive in 1998 when he made the decision to merge Ticketmaster with another website: Citysearch.<sup>70</sup> The new company, Ticketmaster Online-Citysearch (TMCS), was created with the goal of raising enough capital for further business growth and advancing the technology behind the budding online ticket business.<sup>71</sup> In just two years, TMCS had sold nineteen million tickets which resulted in a gross revenue of \$864 million, a considerable increase from their pre-merger numbers.<sup>72</sup> The percentage of tickets being sold online also increased from 10% in 1998 to more than 20% in 2001.<sup>73</sup> By 2008, a decade after the merger, online sales went up to a whopping

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62. See Kate Pickert, *A Brief History of Ticketmaster*, TIME (Feb. 11, 2009), <http://content.time.com/time/business/article/0,8599,1878670,00.html>.

63. See *Our History*, *supra* note 60.

64. See BUDNICK & BARON, *supra* note 30, at 227.

65. *Id.* at 226.

66. *Id.* at 227.

67. *Id.* at 232.

68. *Id.*

69. *Id.* at 233–34.

70. *Id.* at 235. "Citysearch," launched in 1996, was another website that served as an online guidebook for buying tickets based on localities across the United States. Citysearch partnered with local newspapers and created comprehensive listings to acclimate users with various cities. This website helped Ticketmaster expand and reach Americans in every state and operates similarly to how the website does today. *Id.* at 236.

69. *Id.* at 244.

72. *Id.* In 1999, TMCS sold ten million tickets which resulted in \$440 million in revenue. *Id.*

73. *Id.* at 250.

75%.<sup>74</sup> Additionally, another subset of the Ticketmaster company, Ticketmaster Corp., was responsible for regulating call centers, outlets, and box office sales.<sup>75</sup> In 2000, TMCS and Ticketmaster Corp. eventually merged into “Ticketmaster.”<sup>76</sup>

## B. *Ticketmaster’s Modern Monopoly*

### 1. *2022 Ticketmaster Controversy (Taylor’s Version)*

On November 1, 2022, Taylor Swift officially announced *The Eras Tour* with tickets to go on sale to the general public on November 18.<sup>77</sup> Additionally, Swift partnered with Ticketmaster’s Verified Fan program,<sup>78</sup> which allowed a select group of fans to register for an exclusive ticket presale scheduled for November 15, 2022.<sup>79</sup> Over 3.5 million fans registered for the presale—the largest registration for such an event in history.<sup>80</sup> Within an hour of commencing the sale, Ticketmaster’s website crashed.<sup>81</sup> As a result of the site’s technical difficulties, fans were left frustrated and upset, and ultimately, they were unable to carry out their intended purchases.<sup>82</sup>

Despite the controversy that arose from the presale, media outlets still admitted that “[t]he breadth and intensity of Swift’s fandom right now is extraordinary.”<sup>83</sup> Throughout the last sixteen years, Swift has consistently topped the charts, and following the release of her latest studio album, *Midnights*, she made history as the first artist to claim every slot in the top ten of the U.S. singles

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74. *Id.*

75. *Id.* at 236. TMSC was responsible solely for online ticket sales. *Id.*

76. *Id.* at 244.

77. See Angeline J. Bernabe & Kelly McCarthy, *Taylor Swift Announces ‘Eras’ Tour: It’s a Journey Through All of My Musical Eras of My Career*, GOOD MORNING AM. (Nov. 1, 2022), <https://www.goodmorningamerica.com/culture/story/taylor-swift-announces-eras-tour-journey-musical-eras-92453666>.

78. See generally *Everything You Need to Know About Ticketmaster Verified Fan*, TICKETMASTER (May 10, 2020), <https://blog.ticketmaster.com/verifiedfan-faq/>.

79. See Bernabe & McCarthy, *supra* note 77.

80. See *Taylor Swift | The Eras Tour Onsale Explained*, TICKETMASTER, <https://business.ticketmaster.com/business-solutions/taylor-swift-the-eras-tour-onsale-explained/> (last visited Oct. 31, 2022). Moreover, the company explained that “Historically, around 40% of invited fans actually show up and buy tickets, and most purchase an average of 3 tickets. Around 1.5 million people were sent codes to join the onsale for all 52 show dates, including the 47 sold by Ticketmaster.” *Id.*

81. See Andrew Limbong, *Taylor Swift’s Fans Caused Ticketmaster to Crash and Lawmakers Are Demanding Answers*, NPR (Nov. 17, 2022, 4:31 PM), <https://www.npr.org/2022/11/17/1137501868/taylor-swifts-fans-caused-ticketmaster-to-crash-and-lawmakers-are-demanding-an-sw>.

82. See Tatum Hunter, *Angry Taylor Swift Fans Rail About Ticketmaster Glitches*, WASH. POST (Nov. 15, 2022, 5:10 PM), <https://www.washingtonpost.com/technology/2022/11/15/taylor-swift-ticketmaster/>.

83. See Kornhaber, *supra* note 3.

chart.<sup>84</sup> Additionally, Swift has released four studio albums since her last tour in 2018, and like all musical artists, was preparing to tour as soon as it was safe to do so within the confines of the COVID-19 pandemic.<sup>85</sup>

Notwithstanding Swift's success and fanbase comprised of millions, Ticketmaster has shouldered much of the blame with regard to the criticism surrounding *The Eras Tour*.<sup>86</sup> However, the disappointment from fans did not end with the presale. On November 17, 2022, Ticketmaster announced via Twitter that the general sale scheduled for the following day would be cancelled.<sup>87</sup> Justifying this announcement, the company cited "extraordinarily high demands on ticketing systems and insufficient remaining ticket inventory to meet that demand" as reasons for the cancellation.<sup>88</sup> Additionally, Ticketmaster explained that to meet the demand for Swift's show, the artist would need to perform over 900 stadium shows.<sup>89</sup> Despite these burdensome numbers, the company's reasoning did not resonate well with fans or commentators.<sup>90</sup> Based on the number of fans registered for the presale, Ticketmaster was aware of the demand for Swift's tour long before the sale commenced.<sup>91</sup> Yet, the company did not seem to take any preventative measures, and forced thousands of fans to wait in a queue with no chance of receiving tickets.

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84. See Mark Savage, *Taylor Swift Makes History as She Takes Over the Entire US Top 10*, BBC NEWS (Nov. 1, 2022), <https://www.bbc.com/news/entertainment-arts-63470176>.

85. See Kornhaber, *supra* note 3. New Zealand singer-songwriter, Lorde, explained the issue stating, "Let's start with three years' worth of shows happening in one . . . On the logistical side there's things like immense crew shortages." *Id.* (quoting *Lorde's Email Archive*, TUMBLR, <https://lordeemailarchive.tumblr.com/> (last visited Sept. 2, 2023)).

86. *Id.*

87. See Zach Sharf & Jem Aswad, *Ticketmaster Cancels Taylor Swift Tour's Public Tickets Sale Due to 'High Demand' and 'Insufficient Inventory'*, VARIETY (Nov. 17, 2022, 12:34 PM), <https://variety.com/2022/music/news/ticketmaster-cancels-taylor-swift-public-ticket-sales-eras-tour-1235435965/>.

88. *Id.*

89. *Id.* Additionally, *The Eras Tour* originally consisted of twenty-seven dates across twenty U.S. Cities, but due to high demand, twenty-five more dates were added, nearly doubling the initial plan. See Chris Willman, *Taylor Swift Adds 17 More Stadium Shows to 'Eras Tour,' Which Will Include a Five-Night Stand in L.A., Making It Her Biggest U.S. Tour to Date*, VARIETY (Nov. 11, 2022, 5:09 AM), <https://variety.com/2022/music/news/taylor-swift-adds-17-shows-eras-tour-five-nights-sofi-stadium-1235430260/>.

90. See Hannah Yasharoff, *Taylor Swift Speaks Out After Ticketmaster Cancels Her Tour's General Ticket Sale: 'It Pisses Me Off'*, USA TODAY (last updated Nov. 18, 2022, 12:47 PM), <https://www.usatoday.com/story/entertainment/music/2022/11/18/taylor-swift-statement-ticketmaster-eras-tour-sale-cancellation/10727486002/>.

91. See Sharf & Aswad, *supra* note 87.

## 2. *Ticketmaster & Live Nation Merger*

Following the disappointment of thousands of “Swifties,”<sup>92</sup> commentators were quick to acknowledge the root of the issue: Ticketmaster’s merger with Live Nation.<sup>93</sup> In 2010, the Department of Justice approved a merger between Ticketmaster and Live Nation, and the two companies formed Live Nation Entertainment.<sup>94</sup> Previously, Live Nation was operating as a concert promoter and served as Ticketmaster’s only genuine competitor in the industry.<sup>95</sup> As of 2007, Ticketmaster controlled more than 82% of the primary ticketing market in the United States, and Live Nation was its largest customer.<sup>96</sup> However, in the same year, Live Nation ended its relationship with Ticketmaster and launched its own service called CTS Eventim, leaving Ticketmaster with a 66.4% share of the market.<sup>97</sup> The merger of the two companies was a turning point for the concert industry, because it enabled Ticketmaster to use Live Nation’s relationships with artists to pressure venues to use its services.<sup>98</sup> The number of artists who have felt coerced by the company evidences the prevalence of Ticketmaster’s engagement in these practices. Over the years, many performers have expressed feeling left with no other options than to partner with Ticketmaster.<sup>99</sup>

## III. ANALYSIS

### A. *The Pearl Jam Problem: Ticketmaster Takes All*

Immediately following Ticketmaster’s website crash, Representative Alexandria Ocasio-Cortez posited via Twitter that the company’s merger with Live Nation is a monopoly that must be broken

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92. See Marisa Dellato, *More Than Half Of U.S. Adults Say They’re Taylor Swift Fans, Survey Finds*, FORBES (Mar. 14, 2023, 11:18 AM), <https://www.forbes.com/sites/marisadelatto/2023/03/14/more-than-half-of-us-adults-say-theyre-taylor-swift-fans-survey-finds/?sh=55cf273d6877> (explaining the term “Swifties” as the name given to members of Taylor Swift’s fanbase).

93. See *infra* note 98 and accompanying text.

94. See BUDNICK & BARON, *supra* note 30, at 328.

95. *Id.* at 321.

96. *Id.*

97. *Id.* at 305.

98. *Id.* at 321.

99. See Whitten, *supra* note 11. In March 2023, Robert Smith, a co-founder of The Cure, spoke out against Ticketmaster’s hidden fees. Smith stated that “the artist has no way to limit them” which indicates that there is a disconnect between the artist and Ticketmaster. See Judy Kurtz, *The Cure’s Robert Smith Says He’s ‘Sickened’ by Ticketmaster Fees: ‘The artist has no way to limit them’*, THE HILL (Mar. 16, 2023, 12:17 PM), <https://thehill.com/blogs/in-the-know/3903490-the-cures-robert-smith-says-hes-sickened-by-ticketmaster-fees-the-artist-has-no-way-to-limit-them/>.

up.<sup>100</sup> Examining possible solutions to such criticism begs the question of “Who owns what?” and the options concertgoers have to retaliate against Ticketmaster.

Ticketmaster is exclusively partnered with hundreds of concert venues and has a demonstrated history of buying out smaller venues.<sup>101</sup> The company owns TicketsNow and Front Line, among many others.<sup>102</sup> Since Ticketmaster owns these companies, they are essentially profiting off of these sales as well, contributing to its monopoly on the industry. The Sherman Act permits challenges of such exclusive agreements.<sup>103</sup> First, under Section 1 of the Act, Ticketmaster’s use of exclusive agreements are contracts in “restraint of trade among the several states” because they prevent competitors from being able to share venue space.<sup>104</sup> Additionally, under the Commerce Clause of the United States Constitution,<sup>105</sup> the way in which Ticketmaster operates has a substantial effect on interstate commerce.<sup>106</sup> However, because Ticketmaster’s conduct “appears unilateral in nature,” its practices have been upheld.<sup>107</sup> Venues were not colluding with Ticketmaster with the purpose to exclude competitors because Ticketmaster was competing with its rival, Ticketron.<sup>108</sup> Section 2 of the Sherman Act outlaws monopoly power which turns to the definition of the “product market.”<sup>109</sup> Ticketmaster’s purported definition of the product market

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100. See Alexandria Ocasio-Cortez, *AOC on Ticketmaster: ‘Fans Are Being Absolutely Fleeced,’* ROLLING STONE (Nov. 22, 2022), <https://www.rollingstone.com/music/music-features/aoc-ticketmaster-live-nation-monopoly-interview-1234634599/>. Ocasio-Cortez stated that she is “supporting unwinding that merger” and does not “believe it should’ve been approved in the first place.” *Id.* Additionally, she notes that if concertgoers wish to see a large-scale performance, “It’s getting to a point where if you want to see one of these large acts, there’s so little protection for everyday people.” *Id.*

101. See BUDNICK & BARON, *supra* note 30, at 318.

102. *Id.*

103. See Matthew K. Finkelstein & Colleen Lagan, “*Not for You*”; *Only for Ticketmaster: Do Ticketmaster’s Exclusive Agreements with Concert Venues Violate Federal Antitrust Law?*, 10 ST. JOHN’S J.L. COMM. 403, 411 (1995). Specifically, “Ticketmaster’s exclusive agreements with venues violate section 1 of the Sherman Act if Ticketmaster colluded with venues to exclude rivals, and qualify as conduct evidencing a violation of section 2 of the Sherman Act if, on balance, their anticompetitive effect outweighs Ticketmaster’s legitimate business reasons for exclusive dealing.” *Id.* at 412.

104. *Id.* at 413. Moreover, they “foreclose competitors from striving for a substantial share of venues.” *Id.*

105. See U.S. CONST. art. 1, § 8, cl. 3 (giving Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes”).

106. See Finkelstein & Lagan, *supra* note 103, at 413.

107. *Id.* at 414. See also *Monsanto Co. v. Spray Rite Serv. Corp.*, 465 U.S. 752, 784 (1984) (articulating the standard required for unilateral conduct).

108. See Finkelstein & Lagan, *supra* note 103, at 414. However, the reality was that Ticketmaster was not competing with Ticketron as Ticketmaster was “offering a more attractive package of services and royalties in exchange for their exclusive patronage.” *Id.*

109. *Id.* at 415–16.



encompasses “all tickets sold for entertainment events in the United States” which means the company’s share is less than 2%.<sup>110</sup> Ticketmaster’s definition, however, severely understates the power the company holds because of the “exclusive contracts” it has with venues.<sup>111</sup> Therefore, popular artists wanting to book an arena tour essentially have no choice but to use Ticketmaster. As a result, Ticketmaster has implemented strategies to protect the venues but continues to neglect protecting the artist and the consumer.

Ticketmaster’s practices also make it difficult for concertgoers to seek relief from the company. The primary reason that most lawsuits filed against Ticketmaster fail is because of the mandatory arbitration clauses embedded in the company’s terms of service.<sup>112</sup> Whether fans are aware of the provisions in the terms of service or not, they must agree to these terms in order to purchase a ticket from Ticketmaster and are, thus, contracting with the company. Additionally, the Eighth Circuit found that concertgoers lacked standing to sue Ticketmaster because they were “indirect purchasers.”<sup>113</sup> In *Campos v. Ticketmaster Corp.*, the plaintiffs alleged that Ticketmaster’s price fixing and excessive fees violated the Sherman Act.<sup>114</sup> However, the court ruled that because the concert promoters agreed to contract with Ticketmaster, they would have to be the ones to bring suit against the company.<sup>115</sup> As a consequence, the company’s policies are in place to benefit the venues.<sup>116</sup>

*The Eras Tour* is not the first time Ticketmaster has been scrutinized regarding their practices. One of the earliest and most notable lawsuits brought against Ticketmaster illustrates the reason why bands have no option other than to contract with the company. In 1994, Pearl Jam, an American rock band, filed a complaint with the

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110. *Id.* at 417.

111. *Id.*

112. *See Terms of Use*, TICKETMASTER, [https://help.ticketmaster.com/s/article/Terms-of-Use?language=en\\_US](https://help.ticketmaster.com/s/article/Terms-of-Use?language=en_US), (last updated July 2, 2021). Specifically, Ticketmaster’s notice provides that “you and we agree that any dispute or claim relating in any way to the Terms . . . will be resolved by binding, individual arbitration, rather than in court. By agreeing to individual arbitration, you and we each waive any right to participate in a class action lawsuit or class-wide arbitration.” *Id.* Although this is typical in large entities that impose contracts on consumers, these clauses make it almost impossible for the average person to make any claim against a company like Ticketmaster.

113. *See Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998); *see also* Jordan Kaufman, “Home Free” – *A New Normal: Mandatory Arbitration Clauses with Class Action Waivers and the Future of the Indirect Purchaser Rule*, 23 U. PA. J. BUS. L. 575, 597 (2021).

114. 140 F.3d at 1168.

115. *Id.* at 1171.

116. In fact, “[g]iven that venues, many of which have exclusive contracts with Ticketmaster, would certainly be hesitant to engage in a legal battle with a ticketing giant such as Ticketmaster, it is unlikely that concertgoers will ever receive a remedy.” Kaufman, *supra* note 113, at 598.

Antitrust Division of the Justice Department alleging that the company engages in anticompetitive practices.<sup>117</sup> Pearl Jam lost this suit, and after severing its relationship with Ticketmaster, it became clear that the band would essentially have to take on every role the company had served if it wanted to attract fans to shows of the same quality. Given the decline in Pearl Jam's success, this proved to be an impossible undertaking for a single band.<sup>118</sup>

While this dispute helped to expose the extent to which Ticketmaster controlled the most popular venues, the Department of Justice sided with Ticketmaster because of the exclusive contracts.<sup>119</sup> Pearl Jam's battle with Ticketmaster shed light on the idea that just because an artist may dislike the company's practices, it is difficult to avoid working with them, as the artist would be sacrificing the many benefits the company exclusively provides. Behind its ticketing platform, Ticketmaster has a massive infrastructure supported by dedicated customer service teams, back and front-end developers, marketing and promotion teams, and the amenities the venues provide, such as security and food sales.<sup>120</sup> Further, in the last several decades, the company has only grown, giving the majority of Americans quick and easy access to its platform.

### *B. Blinded by the Price: Dismantling the Dynamic Pricing Model*

Just several months before Taylor Swift announced her tour, Bruce Springsteen and the E Street Band put tickets on sale for their 2023 tour after nearly six years off the road.<sup>121</sup> As fans of The Boss flocked to Ticketmaster's website to purchase tickets for the upcoming tour, they were met with sticker shock.<sup>122</sup> Ticketmaster's website displayed exorbitant prices, with some tickets retailing for as much as \$5,000.<sup>123</sup> While these prices sparked confusion among

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117. See Finkelstein & Lagan, *supra* note 103, at 408–09.

118. *How Pearl Jam Took on the Music Industry and Lost – But Predicted the Future*, THE INDEP. (July 6, 2019, 12:20 PM), <https://www.independent.co.uk/arts-entertainment/music/features/pearl-jam-ticketmaster-1995-boycott-booking-fees-gigs-ticket-prices-a8989516.html>. Pearl Jam “predicted the future” by writing a cautionary tale for bands considering taking a stance against Ticketmaster. *Id.* In an effort to lower ticket prices for their fans, unfortunately, Pearl Jam ended up losing revenue and traction in the industry. *Id.*

119. See Jon Pareles, *Pearl Jam Bows to Ticketmaster*, N.Y. TIMES (June 15, 1995), <https://www.nytimes.com/1995/06/15/arts/pearl-jam-bows-to-ticketmaster.html>.

120. *Id.*

121. See Corey Irwin, *Bruce Springsteen Announces 2023 US Tour with the E Street Band*, ULTIMATE CLASSIC ROCK (July 12, 2022), <https://ultimateclassicrock.com/bruce-springsteen-e-street-band-2023-us-tour/>.

122. See Allison Stewart, *Bruce Springsteen Fans Face \$5,000 Tickets — and a ‘Crisis of Faith’*, WASH. POST (Aug. 3, 2022, 6:00 AM), <https://www.washingtonpost.com/music/2022/08/03/bruce-springsteen-tickets-dynamic-pricing/>.

123. *Id.*

fans,<sup>124</sup> the explanation for the steep price is fairly simple and raises another legal issue: dynamic ticket pricing.<sup>125</sup>

In 2011, Ticketmaster introduced a dynamic ticket pricing model.<sup>126</sup> Originally employed as a means to sell tickets based on consumer demand, this dynamic pricing model has helped Ticketmaster monopolize the industry.<sup>127</sup> Ever since Springsteen and his band announced their tour on July 12, 2022,<sup>128</sup> there have been questions raised with regard to the algorithmic adjustments to the prices of the concert tickets, including criticism from New Jersey Representative, Bill Pascrell Jr.<sup>129</sup>

On August 31, 2022, Representative Pascrell, the Chairman of the House Ways and the Means Subcommittee on Oversight, demanded justification from Ticketmaster for its “secretive dynamic pricing scheme.”<sup>130</sup> Representative Pascrell expressed doubts about the sincerity of Ticketmaster’s past explanations in his letter to the head of Live Nation Entertainment.<sup>131</sup> Ticketmaster responded to the criticism by explaining that the tickets that sell for as much as \$5,000 were “platinum seats.”<sup>132</sup> The company further noted that its “Official Platinum Seats” are subject to additional amounts and fees on top of the extreme current price.<sup>133</sup> According to Ticketmaster, these “[p]rices and formats are consistent with industry standards for top performers[.]”<sup>134</sup> However, the company has failed to

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124. See Andy Greene & Ethan Millman, *Springsteen Fans Raged Over Ticket Prices. Experts Say There’s No Easy Fix*, ROLLING STONE (Aug. 2, 2022), <https://www.rollingstone.com/music/music-features/bruce-springsteen-ticket-controversy-1391011/>.

125. See Stewart, *supra* note 122 (comparing ticket prices to airline and hotel pricing).

126. See Alex Pham, *Ticketmaster to Roll Out ‘Dynamic Pricing’*, USA TODAY (April 19, 2011, 3:03 PM), <https://www.usatoday.com/story/entertainment/local/2011/04/19/ticketmaster-roll-out-dynamic-pricing/15906803007/>.

127. *Id.*

128. See Gil Kaufman, *Bruce Springsteen and E Street Band Announce 2023 U.S. Tour Dates*, BILLBOARD (July 12, 2022), <https://www.billboard.com/music/rock/bruce-springsteen-e-street-band-2023-u-s-tour-dates-1235113122/>.

129. Press Release, Pascrell Demands Answers from Ticketmaster on Springsteen Tour Fiasco (Aug. 31, 2022) (on file with author) [hereinafter “*Press Release*”]. Representative Pascrell’s committee issued this press release following the outcry over Bruce Springsteen’s tour. *Id.*

130. *Id.*

131. *Id.*

132. See Chris Willman, *Ticketmaster Says Most Bruce Springsteen Tickets Are Under \$200, Only 11% Are Part of Controversial ‘Dynamic Pricing’ Program*, VARIETY (July 24, 2022, 2:09 PM), <https://variety.com/2022/music/news/ticketmaster-bruce-springsteen-dynamic-pricing-defends-1235324318/>.

133. See *What are Official Platinum Seats?*, TICKETMASTER, [https://help.ticketmaster.com/s/article/What-are-Official-Platinum-Seats?language=en\\_US](https://help.ticketmaster.com/s/article/What-are-Official-Platinum-Seats?language=en_US) (last visited Oct. 31, 2022).

134. See Willman, *supra* note 132.

provide fans with specific data and details that support this statement.<sup>135</sup>

The dynamic pricing model also violates the Sherman Act because the Act has outlawed certain types of horizontal control.<sup>136</sup> In *United States v. Socony-Vacuum Oil Co.*, the United States Supreme Court held that horizontal price-fixing agreements are *per se* violations of the Sherman Act.<sup>137</sup> In *Socony-Vacuum*, several mid-western oil companies entered a price-fixing agreement, resulting in the price of gas stabilizing.<sup>138</sup> Once the price of gas stabilized, oil companies were able to charge a higher retail price.<sup>139</sup> Dynamic pricing and price fixing are similar because they both involve the use of a particular method to set prices.<sup>140</sup> Thus, if antitrust laws continue to ban price fixing, then banning dynamic pricing is logical, because this practice also creates unexpected surges in demand.<sup>141</sup> When applying the holding of *Socony-Vacuum Oil Co.*, there are very few differences between Ticketmaster's dynamic pricing model and price-fixing. The strategy Ticketmaster employs charges consumers different prices for the same product based on algorithmic factors that are hidden from the consumer.<sup>142</sup>

Representative Pascrell also reintroduced the Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act (BOSS Act) to better protect consumers from unfair business practices.<sup>143</sup> The BOSS Act would also require primary ticket vendors, such as Ticketmaster, to disclose the number of tickets available to the general public versus the amount reserved for third-party sellers.<sup>144</sup> Artists have faced criticism for large reservations in the

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135. See *Press Release*, *supra* note 129.

136. Price fixing agreements are made by competing businesses with the purpose to "lower, maintain, or stabilize" prices. These agreements have become a major concern in antitrust law because they have revealed to customers that prices are determined by written and verbal agreements between competitors and not by "supply and demand." See *Price Fixing*, FED. TRADE COMM'N (2023), <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing>.

137. 310 U.S. 150, 218 (1940).

138. *Id.* at 166–67.

139. *Id.*

140. See Ramsi A. Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, 105 IOWA L. REV. 1759, 1764–65 (2020).

141. *Id.* at 1765.

142. See Stewart, *supra* note 122.

143. See Sammi Elefant, *Beyond the Bots: Ticked-Off Over Ticket Prices or the Eternal Scamnation?*, 25 UCLA ENT. L. REV. 1, 25 (2018). With regard to ticket scalpers, the BOSS Act "radically limits the timeframe for purchases by scalpers to the forty-eight hours immediately following the primary on-sale, when tickets are first released to the general consuming public." *Id.* at 26. The Act takes a unique approach: instead of attempting to ban scalping, it makes it significantly harder for large scalping companies to obtain tickets in the first place. *Id.*

144. *Id.* at 25.

latter category, which this act would aim to prevent.<sup>145</sup> The BOSS Act also would require ticket vendors to disclose the face value price of all tickets.<sup>146</sup> Fifteen states have either passed or proposed legislation to regulate the use of ticket-bot software and to penalize companies that take advantage of the public.<sup>147</sup> If a bill like the BOSS Act passed, it would require Ticketmaster to be transparent regarding available tickets and would give consumers a better idea of what the face value ticket prices are. As of 2023, this bill has not passed, but it serves as a model of how state legislatures could influence ticket sales in the future.<sup>148</sup>

Ultimately, Ticketmaster has used the dynamic pricing model in reaction to an increase in demand.<sup>149</sup> Using a dynamic pricing model to address surges in demand will never lead to fair outcomes for consumers.<sup>150</sup> Raising prices is also unnecessary to cover fixed costs because surges in demand do not affect these costs, which have already been factored into the original decision the company made to set the price in the first place.<sup>151</sup>

### C. *Dressing for Revenge: Solutions to the Current Controversy*

*The Eras Tour* controversy has prompted the inception of several journalistic investigations to help provide fans with answers. *Slate* magazine released a critical discourse analysis on December 8, 2022, and concluded that Verified Fans were not prioritized as promised.<sup>152</sup> Several days later, *The Wall Street Journal* released data that supported the notion that “[i]nstead of the expected 1.5 million people with presale codes, 12 million unique visitors tried to buy tickets on Ticketmaster during the sale, causing its website to crash in some markets. That number includes automated bots.”<sup>153</sup> Following the presale, fans reported that an abundance of tickets were being sold on resale sites for exorbitant prices.<sup>154</sup>

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145. *Id.* at 25–26.

146. *Id.* at 26.

147. *Id.* at 5.

148. *Id.* at 26.

149. See Stewart, *supra* note 122.

150. See Woodcock, *supra* note 140, at 1770.

151. *Id.* at 1771.

152. See Shannon Palus & Kaiser Fung, *I Knew You Were Trouble When I Logged In*, SLATE (Dec. 8, 2022, 3:47 PM), <https://slate.com/business/2022/12/taylor-swift-eras-tour-tickets-fiasco-data-analysis.html>.

153. See Anne Steele, *Taylor Swift Tickets: How Many Might Be Left?*, WALL ST. J. (Dec. 10, 2022, 10:00 AM), <https://www.wsj.com/articles/taylor-swift-tickets-how-many-might-be-left-11670624940>.

154. See Juliana Kaplan, *Meet a Taylor Swift Fan Who Regrets Paying \$5,500 for Resale Tickets: ‘I’m embarrassed I did it, I regret it, and I kind of just wish I had a nosebleed ticket’*,

Hence, this investigation also addressed the obvious concern about ticket scalpers.

Beginning in October of 2022, the Biden administration has taken a strong stance against monopoly power.<sup>155</sup> This provides hope for the future as legislative action at the federal level is the only action that could break up Ticketmaster's monopoly. As it currently stands, Ticketmaster owns the venues and the bands. If the venues do not use Ticketmaster, they will not get the bands. If the bands do not use Ticketmaster, they will not get into the venues. Ticketmaster has relationships with the biggest names in the music industry because of Live Nation Entertainment. Further, if Ticketmaster and Live Nation had never merged, it is unlikely that Ticketmaster would have had the opportunity to contract with these venues. For substantial change to come into effect, the federal government must undo the merger.

In an effort to hold Ticketmaster accountable, a group of fans filed a class-action lawsuit against Ticketmaster and Live Nation in the Los Angeles County Superior Court on December 2, 2022.<sup>156</sup> The complaint alleges "that the ticketing platform has a monopoly on primary and secondary markets," and further asserts that the company engages in "fraudulent practices and various antitrust violations, including price discrimination and price fixing."<sup>157</sup> The case was assigned a trial judge in Los Angeles on January 5, 2023.<sup>158</sup>

Most recently, the United States Senate Judiciary Committee held a hearing on January 24, 2023, to discuss the 2010 merger of Ticketmaster and Live Nation.<sup>159</sup> The controversy has become "an

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BUS. INSIDER (Nov. 20, 2022, 9:42 AM), <https://www.businessinsider.com/how-much-taylor-swift-tickets-regret-spending-eras-ticketmaster-stubhub-2022-11>.

155. See, e.g., Megan McCluskey, *What to Know About Biden's Crackdown on 'Junk' Fees*, TIME (Oct. 31, 2022, 4:59 PM), <https://time.com/6225677/biden-junk-fees/>. On October 26, 2022, President Joe Biden announced his administration's latest goal: banning hidden fees in the hotel, concert, ticket, and banking industries. He described these fees as "junk fees," alleging that they unfairly disadvantage the average American family. *Id.* These additional fees serve to benefit large corporations while hurting the general public. *See id.* While this goal aims to ban the hidden fees associated with concert tickets, it does not address the exorbitant prices of the actual ticket, but there is a possibility that additional information will surface in the future.

156. See Rachel Treisman, *Dozens of Taylor Swift Fans Sue Ticketmaster in the Wake of Its Ticket Sale Fiasco*, NPR (Dec. 6, 2022, 2:24 PM), <https://www.npr.org/2022/12/06/1140968805/taylor-swift-fans-ticketmaster-lawsuit>.

157. *Id.*

158. See Elizabeth Ireland, *Taylor Swift Fans' Case Against Ticketmaster Assigned Trial Judge in Los Angeles*, TIMES OF SAN DIEGO (Jan. 5, 2023), <https://timesofsandiego.com/arts/2023/01/05/taylor-swift-fans-case-against-ticketmaster-assigned-trial-judge-in-los-angeles/>. Judge Lawrence P. Riff will eventually hear the case, which is "complex in nature." *Id.*

159. See Diane Bartz & Moira Warburton, *Taylor Swift Concert Fiasco Leads to U.S. Senate Grilling for Ticketmaster*, REUTERS (Jan. 24, 2023, 7:36 PM),

easy target for rare bipartisan political action propelled by incredible public support.”<sup>160</sup> Democratic and Republican senators alike criticized Ticketmaster’s monopolistic practices, the company’s lack of transparency, and inability to block bot purchasers.<sup>161</sup> In his opening statement, Republican Senator Mike Lee emphasized that “new legislation or perhaps just better enforcement of existing laws might be needed to protect the American people.”<sup>162</sup> Further, Democratic Senator Amy Klobuchar criticized the company’s lack of transparency explaining that “[t]here isn’t transparency when no one knows who sets the fees.”<sup>163</sup> In response, Live Nation’s president and chief financial officer Joe Berchtold admitted that “there are several things we could have done better—including staggering the sales over a longer period of time and doing a better job setting fan expectations for getting tickets.”<sup>164</sup> Additionally, he stated that “[w]e apologize to the fans, we apologize to Ms. Swift, we need to do better and we will do better.”<sup>165</sup> Regardless of Berchtold’s sentiment, fans were not optimistic because the solution still depends on government action.

#### IV. CONCLUSION

While the discography and sound of Taylor Swift and Bruce Springsteen differ, both artists continue to advance the same message to listeners through their lyrics: Music is for everyone. Springsteen built his career on writing music that connects to the working class, and as country singer Zach Bryan recently stated, “working class people can’t even go to shows anymore.”<sup>166</sup> Despite Springsteen’s manager Jon Landau defending the “\$5,000 freeze-out,”<sup>167</sup>

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<https://www.reuters.com/world/us/ticketmaster-parent-exec-blame-industrial-scale-ticket-scalping-testimony-2023-01-24/>.

160. See Dave Brooks, *Taylor Swift Is the Least of Ticketmaster’s Worries After Senate Hearing*, BILLBOARD (Jan. 25, 2023), <https://www.billboard.com/pro/taylor-swift-ticketmaster-senate-hearing-whats-next/#:~:text=Taylor%20Swift%20is%20the%20least,of%20a%20new%20DOJ%20probe>.

161. See Bartz & Warburton, *supra* note 159.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. See Jon Freeman, *Zach Bryan Wants to Burn Ticketmaster to the Ground*, ROLLING STONE (Jan. 4, 2023), <https://www.rollingstone.com/music/music-country/zach-bryan-concert-tour-tickets-ticketmaster-1234654016/>.

167. See Steve Appleford, *\$5,000 Freeze-Out: Bruce Springsteen Fans Feel Betrayed by ‘Crazed’ Concert Ticket Prices*, L.A. TIMES (July 29, 2022, 6:00 AM), <https://www.latimes.com/entertainment-arts/music/story/2022-07-29/bruce-springsteen-concert-ticket-price-ticketmaster>.

these tickets prices are unfair to the ordinary consumer.<sup>168</sup> But as controversies continue to break out, the overarching question remains: If they are causing so much harm to consumers, why has the government not yet broken up Ticketmaster and Live Nation Entertainment? The response to Swift's tour, while unprecedented in part, has also highlighted a problem that has wrongly impacted concertgoers for decades. The massive amount of power vested in a singular company has made it so that venues, artists, and concertgoers alike have few options when it comes to facilitating the sale of tickets. Unless the government more effectively enforces current anti-trust legislation or passes new legislation, Ticketmaster will remain the concert industry's anti-hero.

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168. See Ron Lieber, *The Case of the \$5,000 Springsteen Tickets*, N.Y. TIMES (last updated Aug. 3, 2022), <https://www.nytimes.com/2022/07/26/your-money/bruce-springsteen-tickets.html>. Landau explained that he believes “that in today’s environment, that is a fair price to see someone universally regarded as among the very greatest artists of his generation.” *Id.*



# Got To Give It Up: Why United States Courts Should Stop Hearing Music Copyright Infringement Cases and Allow Experts to Determine “Substantial Similarity”

*Alexander J. Loverich Bernard\**

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## I. INTRODUCTION

Mark Twain wrote in 1903, “[w]henever a copyright law is to be made or altered, then the idiots assemble.”<sup>1</sup> The expansion of copyright protection has made copyright law the most important legal regulation in the field of entertainment law.<sup>2</sup> As a result of stricter regulation through judicial verdicts, music copyright disputes have left inequitable resolutions for artists of all backgrounds.<sup>3</sup> This Article suggests a twofold, alternative approach to litigation in resolving music copyright infringement disputes: (1) the use of Expert Determination (ED) through the World Intellectual Property Organization (WIPO) to evaluate “substantial similarity” at the trial level, and (2) appellate review of these disputes by the Court of Appeals for the Federal Circuit (the Federal Circuit).<sup>4</sup> WIPO’s use of ED and the Federal Circuit are desirable alternatives to resolving music copyright disputes.<sup>5</sup>

While two separate types of copyright exist with respect to musical recordings—the composition copyright and the sound recording copyright—this Article only explores the copyright of *musical compositions* and disputes related to works that allegedly infringe on them.<sup>6</sup> In each of the cases discussed within this Article, the alleged infringer was sued on the basis of infringing on the copyright owner’s composition copyright, rather than the owner’s sound

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1. MARK TWAIN, MARK TWAIN’S NOTEBOOK, 382 (Albert B. Paine ed., 2nd ed. Harper & Brothers Publishers, 1971) (1933).

2. Jon M. Garon, *Towards a Conceptual Framework of Entertainment Law for the Twenty-First Century*, 102 J. PAT. & TRADEMARK OFFICE SOC’Y 203, 214 (2022).

3. See Matthew H. Ormsbee, *Music to Everyone’s Ears: Binding Mediation in Music Rights Disputes*, 13 CARDOZO J. CONFLICT RESOL. 225, 234 (2011) (“[H]istorically, courts [have] viewed music with a curled lip and a suspicious eye.’ When confronted with musical plagiarism, the courts typically mistreat and disregard music’s inherently unique qualities.” (quoting Michael Der Manuelian, *The Role of the Expert Witness in Music Copyright Infringement Cases*, 57 FORDHAM L. REV. 127, 127 (1988))).

4. See discussion *infra* Part III(C).

5. See discussion *infra* Part III(C).

6. See DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS, 364 (Simon & Schuster, 9th ed. 2015) (explaining that the Copyright Act prohibited “the unauthorized duplication or dubbing of a sound recording . . . by creating a copyright in the actual recording.”).

recording copyright.<sup>7</sup> A composition copyright is broader than a sound recording copyright, meaning it is easier for a writer to infringe on another writer's composition copyright unless the infringing writer "sampled" or actually lifted a segment of the other composer's song.<sup>8</sup>

The music industry faced a precipitous loss in revenue in the early 2000s, creating a rise in music copyright litigation initiated by rightsholders trying to make their careers sustainable again.<sup>9</sup> The Court of Appeals for the Ninth Circuit's controversial 2018 decision in *Williams v. Gaye* resulted in a further proliferation of music copyright suits.<sup>10</sup> At the core of copyright infringement determinations is "substantial similarity"—a concept embraced by the Ninth Circuit.<sup>11</sup> Three recent cases resolved in the Ninth Circuit are illustrative of how the court has created confusing and conflicting standards for judges and juries to follow in determining "substantial similarity" between musical compositions: *Williams v. Gaye*, *Skidmore v. Led Zeppelin*, and *Gray v. Hudson*.<sup>12</sup>

In *Gaye*, the Ninth Circuit affirmed a jury verdict based on irrelevant jury instructions and non-protectable musical elements.<sup>13</sup> *Gaye* has had the adverse effect of chilling creativity in songwriters who fear being sued for even slight similarities between their songs and another writer's.<sup>14</sup> Though the Ninth Circuit took concrete steps in *Skidmore* to clarify confusing standards, it still allowed the jury to arrive at its finding without employing a critical analysis of the overall musical elements of the songs.<sup>15</sup> *Gray* showed that the Ninth Circuit further narrowed its willingness to grant copyright protection, but not before the jury delivered a monumental verdict against songwriters based on unprotectable elements, including

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7. See discussion *infra* Part III(A).

8. See Michael Zaken, *Fragmented Literal Similarity in the Ninth Circuit: Dealing with Fragmented Takings of Jazz and Experimental Music*, 37 COLUM. J.L. & ARTS 283, 297 (2014).

9. See Donald P. Harris, *Time to Reboot?: DMCA 2.0*, 47 ARIZ. ST. L. J. 801, 815 (2015) ("Over the last decade, in an effort to combat rampant music piracy, the recording industry sued tens of thousands of individual infringers.").

10. Christina R. Dimeo, *Rethinking Music Copyright Infringement in the Digital World: Proposing a Streamlined Test After the Demise of the Inverse Ratio Rule*, 55 U. RICH. L. REV. 1077, 1091 (2021).

11. See Grant Beiner, *Copyright in Music in U.S. Interpretation: The Case for Moving Away from Easy and Nonsensical Findings of Copyright Infringement*, 60 S. TEX. L. REV. 459, 470–71 (2019) ("To establish actionable copying under the Copyright Act, a plaintiff must prove: (i) the defendant engaged in factually copying the protected material . . . and (ii) that there is a 'substantial similarity' between the two works" and that "the Ninth Circuit uses a two-pronged 'extrinsic' and 'intrinsic' analysis[]" in evaluating "substantial similarity.").

12. See discussion *infra* Part (III)(A).

13. See discussion *infra* Part (III)(A)(i).

14. See Dimeo, *supra* note 10, at 1090; see also Beiner, *supra* note 11, at 488.

15. See Beiner, *supra* note 11, at 488.

similar pitch sequences and ostinatos.<sup>16</sup> ED, a type of alternative dispute resolution offered by WIPO, has a potential for greater accuracy and resource preservation than the courts in adjudicating whether “substantial similarity” exists between musical compositions in a copyright infringement action.<sup>17</sup> At the appellate level, the Federal Circuit is a better alternative to hear music copyright infringement appeals than the Ninth Circuit.<sup>18</sup> This new framework faces procedural, jurisdictional, and constitutional hurdles, but the need for a new system of copyright infringement dispute resolution outweighs the obstacles facing it.<sup>19</sup>

Part II(A) of this Article differentiates protectable from non-protectable musical elements.<sup>20</sup> Part II(B) is a brief review of the rise of copyright infringement allegations in the music industry since the turn of the millennium.<sup>21</sup> Part II(C) distinguishes the Ninth Circuit’s method for analyzing “substantial similarity” from Court of Appeals for the Second Circuit’s, and describes in detail the Ninth Circuit’s approach.<sup>22</sup> Part III(A) surveys three music copyright infringement cases brought and resolved in the Ninth Circuit in the past ten years.<sup>23</sup> Part III(B) describes the negative effect the three cases have had on songwriters’ creativity.<sup>24</sup> Part III(C) proposes a new method for resolving music copyright disputes that employs the WIPO ED, combined with the Federal Circuit’s appellate review.<sup>25</sup> Part III(D) explores drawbacks of the proposed solution.<sup>26</sup> Part III(E) resolves those drawbacks.<sup>27</sup>

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16. See *Gray v. Hudson*, 28 F.4th 87, 100–01 (9th Cir. 2022) (stating, “no individual musical component of the . . . ostinato is copyrightable.”). An “ostinato” is a “fairly short melodic, rhythmic, or chordal phrase repeated continuously throughout a piece or section.” THE OXFORD COMPANION TO MUSIC 916 (Alison Latham ed., Oxford University Press 2002). See also Kevin Evers, *Stairway to Certainty: The Need for Special Masters in Music Copyright Litigation*, 90 UMKC L. REV. 173, 185 (2021) (“[Gray] is an example of this phenomenon in which both parties employed expert musicologists with completely divergent opinions. Initially, Perry was ordered to pay the small-time rapper millions of dollars.”); see also *id.* at 181 (opining that “[Gray] further illustrates how lay juries struggle with comprehending musical concepts.”).

17. See discussion *infra* Part (III)(C)(i).

18. See discussion *infra* Part (III)(C)(ii).

19. See discussions *infra* Parts (III)(D)–(E).

20. See discussion *infra* Part (II)(A).

21. See discussion *infra* Part (II)(B).

22. See discussion *infra* Part (II)(C).

23. See discussion *infra* Part (III)(A).

24. See discussion *infra* Part (III)(B).

25. See discussion *infra* Part (III)(C).

26. See discussion *infra* Part (III)(D).

27. See discussion *infra* Part (III)(E).

## II. BACKGROUND

A. *Protectable and Non-Protectable Musical Elements*

Before understanding the history of copyright in the music industry, an understanding of basic music theory is critical.<sup>28</sup> The fundamental elements of a musical composition are its rhythm, melody, and harmony.<sup>29</sup> Of these elements, the only element protectable under United States copyright law is melody.<sup>30</sup> Rhythms, chord progressions, tempos, and many other ubiquitous musical elements are not protectable elements of any composition.<sup>31</sup> Melody is the sounding of certain musical pitches in a specific order over time.<sup>32</sup> Melody is both temporal and frequential, and it can be understood as the way music moves vertically (as in pitch) and horizontally (as in rhythm).<sup>33</sup> It is important to note that while rhythm is not copyrightable on its own, it is inherently part of musical melodies, and a melody's rhythm may make it so similar to another melody that infringement can be found.<sup>34</sup>

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28. *Compare* *Martinez v. McGraw*, No. 3-08-0738, 2013 U.S. Dist. LEXIS 16621, at \*8 (M.D. Tenn. Feb 7, 2013) (excluding an expert report in a music copyright infringement action where the expert never took “any classes in music theory or studied any music theory textbooks[ ]” and was generally unknowledgeable about music), *with* *Velez v. Sony Discos*, No. 05 Civ. 0615 (PKC), 2007 U.S. Dist. LEXIS 5495, at \*13 (S.D.N.Y. Jan. 16, 2007) (admitting an expert's testimony in a music copyright infringement action where the expert had “a B.A. in music, a M.M. in Piano/Music History, and a Ph.D. in Music Theory/Piano[ ]” and “authored several books and articles on music and music theory, and presented articles, delivered addresses, and been a panelist member at many conferences in his field.”).

29. *See* *Northern Music Corp. v. King Rec. Distrib. Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952) (stating that “[t]echnically analyzed, a musical composition is made up of rhythm, harmony and melody.”).

30. *See id.* (“Being in the public domain for so long neither rhythm nor harmony can in itself be the subject of copyright. It is in the melody of the composition- or the arrangement of notes or tones that originality must be found.”).

31. *Gray v. Perry*, No. 2:15-CV-05642-CAS-JCx, 2020 U.S. Dist. LEXIS 46313, at \*15 (C.D. Cal. Mar. 16, 2020); *see also* *Williams v. Gaye*, 895 F.3d 1106, 1144–45 (9th Cir. 2018) (Nguyen, J., dissenting) (asserting that “[a] bare rhythmic pattern, particularly one so short and common, isn't protectable.”).

32. *See* *Repp v. Webber*, 132 F.3d 882, 886 (2d Cir. 1997) (relating an expert witness's definition of melody as being comprised of the “constituent elements” of “pitch and rhythm”).

33. *See* *Northern Music Corp.*, 105 F. Supp. at 399 (discussing melodic elements of a song in vertical terms in stating, “the song *When You're In Love* has the same tonal effect of downward scale progression as plaintiff's song . . .”). “Rhythm in music is normally felt to embrace everything to do with both time and motion—with the organization of musical events in time[.]” *THE OXFORD COMPANION TO MUSIC* 1055 (Alison Latham ed., Oxford University Press 2002).

34. One of the most easily perceivable examples of two songs with melodies that are identical because their rhythms are identical are Tom Petty's “*I Won't Back Down*” and Sam Smith's “*Stay With Me*.” *See* Terrence Wright, *Sam Smith's “Stay with Me” vs. Tom Petty's “I Won't Back Down”*, VISTA CHARTER MIDDLE SCH. (Mar. 25, 2015), <https://www.vistacharterms.org/apps/video/watch.jsp?v=76581>.

B. *The Rise in Copyright Infringement Allegations in the Music Industry*

Copyright falls under Article I, Section 8 of the Constitution, which grants Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]”<sup>35</sup> Musical compositions fall within the broad language of copyrightable subject matter that is protected under copyright law.<sup>36</sup> The main goal of the United States copyright system is to foster creative expression.<sup>37</sup>

With respect to recordings of musical compositions, a *musical composition itself* and a *sound recording of the composition* are individually protected by copyright law.<sup>38</sup> The elements of a music copyright infringement claim are: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”<sup>39</sup> In music copyright infringement suits, the Court of Appeals for the Ninth Circuit (the Ninth Circuit) has analyzed the “copying element” by inquiring (a) whether the alleged infringer had access to the source material, and (b) whether substantial similarity exists in the expression of the idea.<sup>40</sup> Furthermore, there is a significant difference between how the Ninth Circuit and Court of Appeals for the Second Circuit (the Second Circuit) have analyzed “substantial similarity.”<sup>41</sup>

The digital renaissance of the late 1990s through the early 2000s gave music consumers significant power by allowing them to access music for free.<sup>42</sup> The inception of Napster, the release of the iPod, and Google’s acquisition of YouTube forever changed the way consumers experience entertainment.<sup>43</sup> Napster, which empowered consumers to share music files rapidly, had a detrimental effect on

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35. U.S. CONST. art. I, § 8.

36. See 17 U.S.C. § 102(a)(2).

37. Mark Bartholomew, *Copyright and the Creative Process*, 97 NOTRE DAME L. REV. 357, 358 (2021).

38. *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1248–49 (C.D. Cal. 2002). See also RON SOBEL & DICK WEISSMAN, *MUSIC PUBLISHING: THE ROADMAP TO ROYALTIES*, 13 (2008) (explaining that the “U.S. Copyright Form SR (Sound Recording) is used to register the ‘sound recording’ itself, but not the underlying musical or dramatic work.”).

39. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

40. *Williams v. Gaye*, 895 F.3d 1106, 1119 (9th Cir. 2018) (quoting *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996)).

41. *Beiner*, *supra* note 11, at 471.

42. Peter S. Menell, *Reflections on Music Copyright Justice*, 49 PEPP. L. REV. 533, 541 (2022).

43. *Garon*, *supra* note 2, at 243–44.

the market for recorded music.<sup>44</sup> Napster's release caused the music industry to lose "almost two thirds of its business during the decade following Napster before shifting most of its revenue generation to streaming."<sup>45</sup>

As fans became accustomed to considering music to be a free good, members and supporters of the music industry unsuccessfully scrambled to stop the economic bleeding.<sup>46</sup> Congress raised statutory damages for copyright infringement by 50% by enacting the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999.<sup>47</sup> The Recording Industry Association of America sued tens of thousands of individual infringers, mostly high school and college students, who were involved in file-sharing.<sup>48</sup> Even the famous metal band, Metallica, participated in a satirical, anti-Napster campaign advertisement that aired during the 2000 Video Music Awards.<sup>49</sup> File sharing and the dissemination of free music largely raised issues of infringement in the holders' *sound recording copyright*, since the infringement arose from the actual copying of audio recordings.<sup>50</sup> Nonetheless, one explanation for the rise in aggressive copyright infringement policing in the 2010s, with respect to both sound recording and *compositions*, is that music copyright holders are trying to recover from the damage done in the early 2000s by the shift in power brought about by Napster.<sup>51</sup>

As the music industry regained its footing about a decade later, the financial incentives in music infringement litigation rose significantly.<sup>52</sup> Music copyright litigation became a source of revenue for

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44. Menell, *supra* note 42, at 541.

45. Garon, *supra* note 2, at 246.

46. Harris, *supra* note 9, at 815.

47. Menell, *supra* note 42, at 547; compare 17 U.S.C. § 504(c)(1) ("[T]he copyright owner may elect . . . to recover . . . an award of statutory damages for all infringements involved in the action . . . in a sum of not less than \$500 or more than \$20,000 as the court considers just.") (amended 1999), with 17 U.S.C. § 504(c)(1) ("[T]he copyright owner may elect . . . to recover . . . an award of statutory damages for all infringements involved in the action . . . in a sum of not less than \$750 or more than \$30,000 as the court considers just."); see also Menell, *supra* note 42, at 550 (He opined that "[r]ecalibrating the statutory damages regime for the Internet Age is critical to restoring support for copyright protection. Such amendments should be done in conjunction with reforms to improve the clarity of copyright liability.").

48. Menell, *supra* note 42, at 548.

49. See Merlin Alderslade, *Lars Ulrich's Anti-Napster Video Remains One of Metal's Weirdest Moments Ever*, METAL HAMMER (Sept. 29, 2022), <https://www.loudersound.com/features/lars-ulrichs-anti-napster-video-remains-one-of-metals-weirdest-moments-ever>.

50. See Zaken, *supra* note 8, at 298 (A sound recording "will include the instruments in question, the exact timbre and manner of playing, and all the particulars of the single performance. This is the scope of the sound recording copyright.").

51. Menell, *supra* note 42, at 559.

52. Ormsbee, *supra* note 3, at 229.

rightsholders trying to preserve their earning ability.<sup>53</sup> The 2010s saw a rise in high-profile musical recording artists being sued for alleged copyright infringement in the United States.<sup>54</sup> The Ninth Circuit's 2018 decision in *Williams v. Gaye* led to an even greater increase in music copyright infringement suits.<sup>55</sup>

### C. *Circuit Split and the Ninth Circuit's Analysis of Substantial Similarity*

The Second Circuit has relied on the opinion of the “lay listener” to determine whether elements of two works are substantially similar.<sup>56</sup> In contrast, the Ninth Circuit has relied on the same test, but divides the analysis into a two-pronged, “extrinsic and intrinsic” test that considers (i) whether the specific expressive elements in the two works are objectively similar (extrinsic), and (ii) whether the expressions are similar from the standpoint of the ordinary reasonable observer (intrinsic).<sup>57</sup> The “extrinsic” piece of the two-pronged test for “substantial similarity” requires expert testimony.<sup>58</sup> From the 1990s to 2020, the Ninth Circuit applied the “inverse ratio rule.”<sup>59</sup> The “inverse ratio rule” is the principle that, in making a finding of infringement, “a lower standard of proof of substantial similarity” is required “when a high degree of access is shown.”<sup>60</sup> The fact that many recent and notable copyright infringement cases have been brought in the Second and Ninth Circuits is unsurprising because of their jurisdictions, covering New York and

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53. Harris, *supra* note 9, at 815.

54. See, e.g., P. Sean Morris, *To What Extent Do Intellectual Property Rights Drive the Nature of Private International Law in the Era of Globalism?*, 28 *TRANSNAT'L L. & CONTEMP. PROBS.* 455, 469–70 (2019) (“At the domestic level, the amount of litigation concerning intellectual property infringements from copyrights . . . has skyrocketed.”); Dimeo, *supra* note 10, at 1091.

55. Dimeo, *supra* note 10, at 1091. In 2016, while Gaye was pending, the median cost of copyright litigation was between \$250,000 & \$1.2 million. Daniel Doft, *Facebook, Twitter, and the Wild West of IP Enforcement on Social Media: Weighing the Merits of a Uniform Dispute Resolution Policy*, 49 *J. MARSHALL L. REV.* 959, 999 (2016).

56. Beiner, *supra* note 11, at 488 (citing *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946) (enshrining the “lay listener” test still used by the Second Circuit)). Over 75 years later, *Arnstein* is still good law. See *OMG Accessories LLC v. Mystic Apparel LLC*, No. 19 CV 11589 (ALC) (RWL), 2021 U.S. Dist. LEXIS 57273, at \*6 (S.D.N.Y. Mar. 25, 2021) (denying a department store’s motion to dismiss a complaint against it by an accessory company alleging copyright infringement in a visual pattern).

57. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020).

58. *Williams v. Gaye*, 895 F.3d 1106, 1119 (9th Cir. 2018) (citing *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004)).

59. *Skidmore*, 952 F.3d at 1066.

60. *Id.* at 1065–66 (quoting *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000)).



California, respectively.<sup>61</sup> Both states have cities that are major hubs of entertainment, but one reason why more plaintiffs sue in California is that California courts are less likely to dismiss a copyright infringement claim before discovery than courts in New York.<sup>62</sup> Because California is a state in which many high profile music copyright infringement cases have been brought, this Article focuses primarily on three recent cases resolved in the Ninth Circuit.<sup>63</sup>

### III. DISCUSSION

Efforts by music copyright holders to maximize revenue through lawsuits may be a reasonable attempt to mitigate their lost earning ability.<sup>64</sup> Regardless, however, of whether such efforts are reasonable, the way musical copyright disputes have been resolved in the past decade is inherently inequitable.<sup>65</sup> Today, music copyright infringement disputes are initiated and resolved in and out of court at an increasing rate, indicating a shift in power to plaintiffs based on questionable applications of copyright law.<sup>66</sup> The rise of these disputes highlights the tension between copyright law's interest in protecting existing works and promoting freedom of creativity.<sup>67</sup>

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61. See *Federal Judicial Circuits: Ninth Circuit*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/administration/federal-judicial-circuits-ninth-circuit-0> (last visited Jan. 2, 2024) (showing California has been part of the Ninth Circuit since 1866); *Federal Judicial Circuits: Second Circuit*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/administration/federal-judicial-circuits-second-circuit-0> (last visited Jan. 2, 2024) (showing New York has been part of the Second Circuit since 1801).

62. *Substantial Similarity in Copyright: It Matters Where You Sue*, DLA PIPER INTELL. PROP. AND TECH. NEWS (N. AM.), ISSUE 48, Q4 2020, Dec. 22, 2020, <https://www.dlapiper.com/en/insights/publications/intellectual-property-and-technology-news/2022/ipt-news-q4-2020/substantial-similarity-in-copyright>.

63. See discussions *infra* Parts (III)(A)(i)–(iii).

64. See Menell, *supra* note 42, at 575–76 (positing that, when “Blurred Lines” was produced, “[r]ecord sales had been in steady decline for more than a decade, and streaming services were still struggling to work out licensing deals with copyright owners, attract subscription customers, and compete with piracy outlets. Record labels were desperate to build audiences for new releases.”).

65. Ormsbee, *supra* note 3, at 234.

66. Johannes Hoffman, *Breaking Up Melodic Monopolies: A New Approach to Originality, Substantial Similarity, and Fair Use for Melodies in Pop Music*, 28 J.L. & POL’Y 762, 774 (2020).

67. See Menell, *supra* note 42, at 565 (“Copyright law must not unduly restrain new artists’ freedom to build on the works of others while ensuring that those forebearers’ works are not infringed.”).

A. *Unclear Formulations of “Substantial Similarity” by Judges and Juries in the Ninth Circuit*

A tripartite of cases that commenced and resolved between 2013 and 2022 in the Ninth Circuit illustrate how the Ninth Circuit has created confusing and conflicting standards for judges and juries alike to follow in determining “substantial similarity” between musical compositions. These cases are *Williams v. Gaye*, *Skidmore v. Led Zeppelin*, and *Gray v. Hudson*.<sup>68</sup>

i. *Williams v. Gaye*

In 2013, the family of Marvin Gaye (the Gayes), who inherited the copyrights in his music, made an infringement demand on Pharrell Williams and Robin Thicke (hereinafter, collectively, “Williams”), alleging Williams’s 2013 hit song, “Blurred Lines,” infringed on Marvin Gaye’s 1977 hit, “Got To Give It Up.”<sup>69</sup> Williams filed suit in the District Court for the Central District of California (the District Court), the Gayes counterclaimed for copyright infringement, and the District Court limited the Gayes’ admissible evidence to the sheet music for “Got To Give It Up” filed with the United States Copyright Office.<sup>70</sup> There was a stipulation as to the Gayes’ possession of the valid copyright and Williams’s access to it.<sup>71</sup> The Gayes relied on musicologist, Judith Finell (Finell), to testify on their behalf, and Williams relied on the expert testimony of Sandy Wilbur (Wilbur).<sup>72</sup> Finell opined that there are eight similarities between the songs: “the signature phrase, hooks, hooks with backup vocals, ‘Theme X,’ backup hooks, bass melodies, keyboard parts, and unusual percussion choices.”<sup>73</sup> The court determined that the Gayes passed the “extrinsic test,” and at trial the jury found that “Blurred Lines” was substantially similar to “Got To Give It Up” and that the latter infringed on the former, which Williams appealed.<sup>74</sup>

On appeal, Williams argued the District Court’s instruction to the jury, “[i]n order to find that [Williams] copied . . . the Gaye Parties’

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68. See discussions *infra* Parts (III)(A)(i)–(iii).

69. *Williams v. Gaye*, 895 F.3d 1106, 1116 (9th Cir. 2018). “Blurred Lines” became the world’s best-selling single in 2013. *Id.*

70. *Id.*

71. *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2014 U.S. Dist. LEXIS 182240, at \*14 (C.D. Cal. Oct. 30, 2014). “Got To Give It Up” reached number one on Billboard’s Hot 100 Chart in 1977, the year it was released. *Gaye*, 895 F.3d at 1116.

72. *Gaye*, 895 F.3d at 1117.

73. *Id.* The “signature phrase” is a ten-note melodic sequence. *Id.* at 1143.

74. See *id.* at 1115.

song[ ], it . . . is sufficient if you find that [Williams] subconsciously copied . . . the Gaye Parties' song[ ]” misled the jury in its determination of substantial similarity because the purpose of the instruction was to guide the jury as to whether Williams had *access* to “Got To Give It Up.”<sup>75</sup> The Ninth Circuit disagreed, holding that “[l]ooking to the jury instructions as a whole, . . . it is clear that the district court properly instructed the jury to find both access and substantial similarity.”<sup>76</sup> Because Williams conceded access to Marvin Gaye’s song, the jury was not required to make any such finding, but was nonetheless given an access instruction that was irrelevant to finding *substantial similarity*.<sup>77</sup>

Williams also argued on appeal that the District Court’s verdict was against the clear weight of the evidence, but the Ninth Circuit disagreed again, reasoning that Finell’s testimony that “areas of extrinsic similarity, including the songs’ signature phrases, hooks, bass melodies, word painting, the placement of the rap and ‘parlando’ sections, and structural similarities on a sectional and phrasing level” overcame Williams’s assertion.<sup>78</sup> The Ninth Circuit’s finding here raises an issue: word “painting,” *placement* of rap and parlendo sections, and *structural* similarities are in no conceivable way lyrics or melodies.<sup>79</sup> As a result, none of those aspects of the songs are protectable.<sup>80</sup>

The District Court found five of the eight features Finell identified in her report to be non-protectable.<sup>81</sup> Because the District Court determined that genuine issues of material fact existed regarding the similarity between the three remaining elements (the “Signature phrase,” “Hook,” and select “Keyboard parts”), it allowed the case to proceed to trial for the jury to determine whether substantial similarity existed between the songs.<sup>82</sup>

75. *Id.* at 1123.

76. *Id.* at 1124.

77. *See* Dimeo, *supra* note 10, at 1108 (stating that Williams claimed the jury “instruction was prejudicial based on the improper admission of evidence that Thicke and Williams were influenced by the ‘groove’ and ‘feel’ of [Got to Give It Up]” and that “the ‘copying’ prong does nothing but bog down the infringement test.”) (Brackets in original).

78. *Gaye*, 895 F.3d at 1127. In the context of singing, a “parlando” is “a speech-like style, with one syllable for each note, often used in dialogues in certain kinds of comic opera.” THE OXFORD COMPANION TO MUSIC 927 (Alison Latham ed., Oxford University Press 2002).

79. *See* discussion *supra* Part (II)(A).

80. *See supra* text accompanying note 30.

81. *See* Williams v. Bridgeport Music, Inc., No. LA CV13-06004 JAK (AGRx), 2014 U.S. Dist. LEXIS 182240, at \*40 (C.D. Cal. Oct. 30, 2014) (holding that “the backup vocals to the hooks . . . and . . . ‘Theme X’ [are] deemed unprotected.”); *id.* at \*40–41 (finding that “backup vocals” are unprotected); *id.* at \*43–44 (finding a “bass melody” is unprotected); *id.* at \*46 (holding that “the percussion choices are deemed unprotected”).

82. *See id.* at \*60–62.

Regarding the “Signature phrase,” Judge Nguyen stated in her dissent in *Gaye* that it “begins in ‘Got to [sic] Give It Up’ with a note repeated four times. In ‘Blurred Lines,’ it begins with a note repeated twice, followed by a different note, followed by the first note.”<sup>83</sup> Finell identified only one protectable element indicative of similarity in the “Signature Phrase”: “Both contain the identical scale degree sequence of 5-6-1 followed by 1-5.”<sup>84</sup> The “1-5” portion of the melody is a “melisma” which Finell defined as “a vocal melody in which one syllable or lyric is held while sung with several successive pitches, rather than a single pitch for each syllable[.]”<sup>85</sup> Wilbur opined that there are differences in pitch between the pitch resolution of the melismas in “Blurred Lines” and “Got To Give It Up.”<sup>86</sup> Specifically, the combined pitch sequence in “Got To Give It Up” is 5-6-1-1-5 as Finell states, but in “Blurred Lines” it is actually 5-6-1-1-1, meaning the pitch sequences only have four notes in common: 5-6-1-1.<sup>87</sup> The Ninth Circuit held as early as 1976 that a sequence of four consecutive pitches common between two compositions is not protectable under copyright law.<sup>88</sup> Therefore, the *Gaye* majority’s finding that these four notes were copyrightable ignored precedent.<sup>89</sup>

As to the “hooks,” Finell contended that “three of the four notes of the songs’ hooks are identical in scale degree[.]”<sup>90</sup> Again, as the Ninth Circuit had already held that four notes are not copyrightable, the *Gaye* majority went even further in ignoring applicable precedent in finding three notes to be copyrightable.<sup>91</sup> The third and final issue is that the “keyboard parts” were not written in the

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83. *Gaye*, 895 F.3d at 1143 (9th Cir. 2018) (Nguyen, J., dissenting).

84. *Bridgeport Music, Inc.*, 2014 U.S. Dist. LEXIS 182240, at \*34–35 (emphasis added).

85. *Id.* at 35. The melisma in “Got To Give It Up” appears throughout the song and is reflected in the pitches “1-5” as stated by Finell (“1” being the scale degree “do” in musical solfège, which falls downward to scale degree “5,” or “sol” with “ti” & “la” being between them) but the melisma in “Blurred Lines” descends further down & resolves an octave lower, making it “1-1” (the first “1” being “do,” then sliding all the way down (passing through “ti,” “la,” “sol,” “fa,” “mi,” “re”) to the next “1,” or “do”) and therefore different in pitch resolution. Compare MGL Studio Berlin, *Got to Give It Up – Marvin Gaye*, YOUTUBE (May 22, 2012), <https://www.youtube.com/watch?v=Ayyy-03ITDg> (the words “be free” at 0:39), with Robin Thicke, *Robin Thicke - Blurred Lines ft. T.I., Pharrell (Official Music Video)*, YOUTUBE, (March 20, 2013), <https://www.youtube.com/watch?v=yyDUC1LUXSU> (the words “blurred lines” at 1:07).

86. See *Bridgeport Music, Inc.*, 2014 U.S. Dist. LEXIS 182240, at \*37.

87. See *supra* note 85 and accompanying text.

88. See *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1071 (9th Cir. 2020) (citing *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 721 (9th Cir. 1976)).

89. See generally *Granite Music Corp.*, 532 F.2d 718.

90. *Bridgeport Music, Inc.*, 2014 U.S. Dist. LEXIS 182240, at \*38.

91. See generally *Granite Music Corp.*, 532 F.2d 718.

deposit copy of the sheet music for “Got To Give It Up.”<sup>92</sup> Because the analysis of substantial similarity was limited to elements of the songs reflected in the sheet music, the *Gaye* majority erroneously allowed Finell’s testimony as to the alleged similarities in the keyboard parts between the songs.<sup>93</sup>

Considering the expert testimony, the Ninth Circuit held that similarities between a handful of non-protectable elements of *Gaye*’s composition, “Got To Give It Up,” were infringed by *Williams*’s composition, “Blurred Lines.”<sup>94</sup>

*ii. Skidmore v. Led Zeppelin*

In 2014, a co-trustee of Randy Wolfe’s trust named Michael Skidmore (Skidmore) sued Led Zeppelin and its individual members (Zeppelin), alleging that the rock band’s classic song, “Stairway to Heaven,” infringed on the copyright in the late Wolfe’s song, “Taurus.”<sup>95</sup> The District Court found that Skidmore demonstrated enough similar, protectable expression that the matter should proceed to a jury to determine whether the songs were “substantially similar.”<sup>96</sup> The jury returned a verdict for Zeppelin, finding that Zeppelin had access to “Taurus,” but that the two songs were not substantially similar under the extrinsic test.<sup>97</sup>

On appeal, Skidmore alleged that the District Court erred with respect to three jury instructions: (1) the court’s failure to instruct the jury about the “inverse ratio rule”; (2) the sufficiency of the originality instructions; and (3) the failure to give an instruction about musical selection and arrangement.<sup>98</sup> The Ninth Circuit agreed with Skidmore on all counts, vacating the District Court’s decision and remanding for a new trial.<sup>99</sup> After vacating that decision and rehearing the case, the Ninth Circuit delivered a new opinion, reversing its positions on all counts of Skidmore’s appeal.<sup>100</sup> In doing so, it abrogated the “inverse ratio rule,” admitting it had “applied it

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92. See *Williams v. Gaye*, 895 F.3d 1106, 1125 (9th Cir. 2018).

93. *Id.* at 1148 (Nguyen, J., dissenting) (“Finell testified that the keyboard parts in ‘Got [T]o Give It Up’ . . . had ‘many important similarities’ to those in ‘Blurred Lines.’ However, there are no keyboard parts in the deposit copy.”).

94. *Id.* at 1138 (Nguyen, J., dissenting).

95. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1057 (9th Cir. 2020).

96. *Skidmore v. Led Zeppelin*, No. CV 15-3462 RGK (AGRx), 2016 U.S. Dist. LEXIS 51006, at \*51 (C.D. Cal. Apr. 8, 2016).

97. *Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1124 (9th Cir. 2018), *vacated on other grounds*, 925 F.3d 999, 1000 (9th Cir. 2019).

98. *Skidmore*, 952 F.3d at 1065.

99. *Skidmore*, 905 F.3d at 1137.

100. See *Skidmore*, 925 F.3d at 1000; see also *Skidmore*, 952 F.3d at 1079.

in confusing ways.”<sup>101</sup> The Ninth Circuit’s unclear application of review with respect to copyright infringement led to its application of copyright law in *Gaye* and *Skidmore*.<sup>102</sup>

Regarding the “selection and arrangement” instruction, the Ninth Circuit initially found that the District Court should have instructed the jury that “the selection and arrangement of unprotectable musical elements are protectable[.]”<sup>103</sup> The court found the error prejudicial to *Skidmore*, reasoning that while “individual elements of a song, such as notes or a scale, may not be protectable, ‘music is comprised of a large array of elements, some combination of which is protectable by copyright.’”<sup>104</sup> In its amended opinion, the Court constructed its precedent around “selection and arrangement” much more narrowly and clarified that it had “extended copyright protection to ‘a combination of unprotectable elements . . . only if those elements are *numerous enough and their selection and arrangement original enough* that their combination constitutes an original work of authorship.”<sup>105</sup>

Regarding the District Court’s instruction to the jury that “common musical elements, such as descending chromatic scales, arpeggios or short sequences of three notes’ are not protected by copyright[.]” the Ninth Circuit initially held the instruction was incongruous with its caselaw demonstrating that a limited number of notes can be protectable under copyright law.<sup>106</sup> Then, in its amended decision, the court relied on Judge Nguyen’s dissenting opinion in *Gaye* in clarifying that copyright does not extend to “commonplace elements that are firmly rooted in the genre’s tradition[.]”<sup>107</sup> The court declared that to “conduct a copyright infringement analysis, the factfinders [must] ask ‘whether “the *protectible elements, standing alone*, are substantially similar”’ and ‘disregard the non-protectible elements.’”<sup>108</sup> In finding that the songs were dissimilar, the Ninth Circuit reasoned, “[w]e have never extended copyright protection to just a few notes.”<sup>109</sup> But the Ninth Circuit had

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101. *Skidmore*, 952 F.3d at 1067.

102. Menell, *supra* note 42, at 568.

103. *Skidmore*, 905 F.3d at 1126.

104. *Id.* (quoting *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004)).

105. *Skidmore*, 952 F.3d at 1074 (emphasis added) (quoting *Satava v. Lowry*, 323 F.3d 805, at 811 (9th Cir. 2003)).

106. *Skidmore*, 905 F.3d at 1128–29.

107. *Skidmore*, 952 F.3d at 1069; (quoting *Williams v. Gaye*, 895 F.3d 1106, 1140–41 (9th Cir. 2018) (Nguyen, J., dissenting)).

108. *Id.* at 1070 (quoting *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002)).

109. *Id.* at 1071.

done exactly that just two years prior in *Gaye*.<sup>110</sup> Though the court took concrete steps in *Skidmore* to clarify confusing standards, it still allowed the jury to arrive at its finding without employing a critical analysis of the overall musical elements of the songs.<sup>111</sup>

The Ninth Circuit narrowed its interpretation of substantial similarity and abrogated the needless inverse ratio rule, while affirming a jury verdict clearly supported by the evidence.<sup>112</sup> But the court's complete reversal of its opinion on all counts, combined with its assertion that it has never held "just a few notes" to be copyrightable shows the difficulties in determining musical aspects in music copyright infringement disputes.<sup>113</sup> Fortunately, the court took steps to clearly define its jurisprudence just two years later, in *Gray v. Hudson*.<sup>114</sup>

### iii. *Gray v. Hudson*

Christian rap and hip-hop artists, Marcus Gray, Chike Ojukwu, Emanuel Lambert, and Lecrae Moore (the Joyful Noise Writers) wrote and recorded the song "Joyful Noise" between 2007 and 2008 and released it in 2008.<sup>115</sup> In 2013, Katy Perry, Henry Russell Walter, Lukasz Gottwald, Karl Martin Sandberg, Sarah Theresa Hudson, and Jordan Houston (the Dark Horse Writers) wrote and recorded the song "Dark Horse."<sup>116</sup> The song was released later that year.<sup>117</sup> In July 2014, the Joyful Noise Writers sued the Dark Horse Writers in the District Court, alleging "Dark Horse" infringed on "Joyful Noise."<sup>118</sup> Pursuant to a jury trial, the "jury entered verdicts finding defendants liable to plaintiffs for copyright infringement, and award[ed] plaintiffs \$2.8 million in damages."<sup>119</sup>

The Dark Horse Writers moved for renewed motions for judgment as a matter of law, or a new trial in the alternative.<sup>120</sup> The District Court granted the Dark Horse Writers' motion for judgment as a matter of law and vacated the jury's award of damages, finding that the Joyful Noise Writers failed to satisfy the extrinsic test of the

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110. See discussion *supra* Part III(A)(i).

111. Beiner, *supra* note 11, at 488.

112. See generally *Skidmore*, 952 F.3d 1051.

113. Menell, *supra* note 42, at 597–98.

114. See discussion *infra* Part (III)(A)(iii).

115. *Gray v. Perry*, No. 2:15-cv-05642-CAS (JCx), 2018 U.S. Dist. LEXIS 138263, at \*3 (C.D. Cal. Aug. 13, 2018).

116. *Id.* at \*5.

117. *Id.*

118. *Id.* at \*1.

119. *Gray v. Perry*, No. 2:15-CV-05642-CAS-JCx, 2020 U.S. Dist. LEXIS 46313, at \*3–4 (C.D. Cal. Mar. 16, 2020).

120. *Id.* at \*4.

substantial similarity analysis.<sup>121</sup> The Joyful Noise Writers' expert witness argued at trial that six elements demonstrated substantial similarity between the songs as such:

[1] [t]he length of the ostinato . . . [2] rhythm of the ostinato . . . [3] melodic content, the scale degrees present . . . [4] melodic shape . . . [5] timbre or the quality and color of the sound . . . and [6] the use of the . . . ostinato, in the musical space of the recording in the mix[.]<sup>122</sup>

The District Court agreed with the Dark Horse Writers' analysis, and the amici briefs submitted by several musicologists supported finding that none of the individual elements cited by the Joyful Noise Writers' expert are protectable.<sup>123</sup> The District Court then found that the musical notes in "Dark Horse" that allegedly infringe on "Joyful Noise" were not numerous enough or arranged in a sufficiently original manner to warrant protection under current precedent.<sup>124</sup> Because of these findings, the District Court found that the Dark Horse Writers were entitled to a new trial because the jury's verdict was against the clear weight of the evidence.<sup>125</sup> On appeal, the Ninth Circuit affirmed the District Court's ruling, vacating the jury award and granting judgment as a matter of law to defendants.<sup>126</sup>

Following in the immediate wake of *Skidmore*, *Gray* was another step towards clarification of jurisprudence by the Ninth Circuit.<sup>127</sup> The District Court judge found that the jury still did not reach a reasonable conclusion in finding infringement, showing that the "battle of the experts" approach is not ideal in explaining musical concepts to laypersons.<sup>128</sup>

121. *Id.* at \*54–55.

122. *Id.* at \*16 (numbering added). The Joyful Noise Writers' expert defined "ostinato" as "a fairly short melodic, rhythmic, or chordal pattern repeated continuously throughout a piece or section." *Gray*, 2018 U.S. Dist. LEXIS 138263, at \*16 n.8.

123. *Gray*, 2020 U.S. Dist. LEXIS 46313, at \*17.

124. *Id.* at \*31–32.

125. *Id.* at \*35–36.

126. *Gray v. Hudson*, 28 F.4th 87, 103 (9th Cir. 2022).

127. See Robert W. Clarida & Thomas Kjellberg, 'Gray v. Hudson' *Rules on Copyrightability of Musical Elements*, NEW YORK L.J. (2022) (describing *Gray* as "a useful statement of current law about copyrightability and substantial similarity in music cases," that "will no doubt provide a road map for other courts addressing such issues in the future.").

128. See Edward Lee, *Do Experts Matter? A Study of the Effect of Musicologist Testimony in Music Cases*, 22 U. ILL. L. REV. 707, 715 (2022).



B. *The “Chilling Effect” Gaye, Skidmore, and Gray Have Had on Popular Music*

Since the Ninth Circuit found in favor of the Gayes in *Gaye*, members of both the legal and creative communities correctly predicted that the decision would result in a “chilling effect” on composers of music.<sup>129</sup> *Skidmore* stood for an improvement in judicial standards, but it did not go far enough in clarifying how the court handles music copyright infringement disputes.<sup>130</sup> As Matthew Ormsbee stated in his 2011 article, *Music To Everyone’s Ears: Binding Mediation in Music Rights Disputes*, “[a] poorly educated judiciary is a threat to just resolution of music rights disputes, since it will likely base its conclusions on the most easily demonstrable harmonic elements.”<sup>131</sup> Judges are not expected to be experts in the fields concerned in the matters before them at trial in any area of the law, but their lack of musical training can particularly hinder the just resolution of music copyright infringement cases.<sup>132</sup> *Gray* showed the Ninth Circuit’s growing awareness of the importance of deciding music copyright infringement cases accurately and clearly, but it left open the question of how a jury can deliver a verdict unsupported by musical evidence.<sup>133</sup> One explanation is that “[j]uries are more inclined to overestimate the degree of substantial similarity when material similarities are not clear.”<sup>134</sup>

The ramifications of the Ninth Circuit’s decisions in these three cases are apparent from the direction popular artists have gone

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129. Dimeo, *supra* note 10, at 1090; Lee, *supra* note 128, at 723; *see also* Jason Palmer, Note, “*Blurred Lines*” Means Changing Focus: Juries Composed of Musical Artists Should Decide Music Copyright Infringement Cases, Not Lay Juries, 18 VAND. J. ENT. & TECH. L. 907, 910 (2016) (opining that *Gaye* raised issues as to the accuracy of trial verdicts in music copyright infringement cases, and that such inaccurate verdicts “may create a chilling effect that discourages artists from making music.”).

130. *See* Lee, *supra* note 128, at 723 (“The firestorm [resulting from *Gaye*] may have been short-lived as the en banc Ninth Circuit in *Skidmore* recognized a greater role for courts in scrutinizing the testimony related to the extrinsic test or dissection[ ]”); *but see* Menell, *supra* note 42, at 594 (stating the Ninth Circuit “failed on all counts” to, *inter alia*, “correct some of its confusing copyright infringement jurisprudence[.]” to “demystif[y] its inscrutable ‘extrinsic’/‘intrinsic’ infringement analysis framework[.]”).

131. Ormsbee, *supra* note 3, at 234.

132. *See* Bartholomew, *supra* note 37, at 358–59 (opining that “the creative process is wholly and necessarily subjective, impervious to description or measurement by objective criteria . . . . Because there are no objective benchmarks available to keep them honest, judges and juries will lend an undesirable bias to any attempt to rigorously evaluate artistic creativity[.]”).

133. *See* discussion *supra* Part (III)(A)(iii).

134. Asher Mitchell, Note, *Cause We Don’t Give a Darn: The Fundamental Tension Between Modern Copyright Law and American Folks Music*, 67 WASH. U. J.L. & POL’Y 443, 463 (2022).

recently in their creative choices.<sup>135</sup> For example, without even receiving a cease-and-desist letter, Olivia Rodrigo retroactively gave up half of her publishing royalty income on a song to members of the band, Paramore, because of similarities between Rodrigo's song, "Good 4 U," and Paramore's song, "Misery Business."<sup>136</sup> In 2022, pop musician, Kelis, took to social media to express her disapproval with Beyoncé's interpolation of Kelis's song, "SONG," on Beyoncé's 2022 single, "Energy."<sup>137</sup> Without public comment, Beyoncé simply re-released "Energy" without including Kelis's song materials.<sup>138</sup> These situations are concerning because just as "a random social media post . . . does not bestow ownership or control to the commercial choreographer[,] it does not automatically give the aggrieved copyright holder a legitimate basis to make infringement claims."<sup>139</sup>

While the aforementioned artists conceded their royalty income or original creation, other artists took a different approach to potential adverse claimants: reusing older songs.<sup>140</sup> For example, Nicki Minaj released a chart-topping single, "Super Freaky Girl," that prominently features a sample of Rick James's 1981 hit, "Super Freak."<sup>141</sup> Minaj's song is a bass-boosted instrumental version of "Super Freak" with Minaj's vocals overlaid.<sup>142</sup> Similarly, Britney Spears and Sir Elton John released a collaborative tune titled "Hold Me Closer"—essentially a modernized version of John's 1971 song, "Tiny Dancer."<sup>143</sup> "Super Freaky Girl" and "Hold Me Closer" prompted no copyright disputes, because Minaj was given permission to use James's sample, and the latter song is a collaborative effort between a modern and veteran artist.<sup>144</sup>

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135. See Kristin Robinson, *Split Decisions: Olivia Rodrigo Has Given Up Millions in Publishing Royalties*, BILLBOARD (Sep. 1, 2021), <https://www.billboard.com/pro/olivia-rodrigo-royalties-song-credits-sour/>; see also Rania Aniftos, *Beyoncé Removes Kelis Interpolation From 'Energy' After Getting Called Out for 'Theft'*, BILLBOARD (Aug. 2, 2022), <https://www.billboard.com/music/music-news/beyonce-removes-kelis-interpolation-energy-1235121669/>.

136. See Robinson, *supra* note 135.

137. See Aniftos, *supra* note 135.

138. *Id.*

139. See William Frank Weber, Student Article, *From Beyoncé to Bohemia: Reforming Joint Copyright Ownership*, 60 DUQ. L. REV. 372, 373 (2022).

140. See Rania Aniftos, *Nicki Minaj Unleashes the 'Super Freaky Girl' Inside with New Single: Listen*, BILLBOARD (Aug. 12, 2022), <https://www.billboard.com/music/rb-hip-hop/nicki-minaj-super-freaky-girl-listen-1235125895/>; see also Mitchell Peters, *Fans Choose Elton John & Britney Spears' 'Hold Me Closer' as This Week's Favorite New Music*, BILLBOARD (Aug. 28, 2022), <https://www.billboard.com/music/music-news/elton-john-britney-spear-hold-me-closer-best-new-music-1235131906/>.

141. See Aniftos, *supra* note 140.

142. See *id.*

143. See Peters, *supra* note 140.

144. See articles cited *supra* in note 140.

Artists giving up their royalty income, changing their already-released compositions, and resurrecting older songs rather than writing new songs, are likely symptoms of aggressive copyright infringement policing.<sup>145</sup>

C. *A New Framework for Determining Substantial Similarity: WIPO Expert Determination and the Federal Circuit*

The Ninth Circuit's jurisprudence regarding music copyright infringement has, ironically, done quite the opposite of "foster[ing] creative expression."<sup>146</sup> However, a desirable alternative form of resolution for such disputes is the use of Expert Determination (ED) through the World Intellectual Property Organization (WIPO) at the trial level, combined with the Court of Appeals for the Federal Circuit (the Federal Circuit) hearing all subsequent appeals.<sup>147</sup> This approach would allow for fairer and more accurate resolutions, preventing a further "chilling effect" in the music industry.<sup>148</sup>

i. *The Case for WIPO Expert Determination*

WIPO is a "public international legal institution that purely administers *private rights*["]<sup>149</sup> The United States has been a party to WIPO since 1970.<sup>150</sup> Congress implemented the WIPO copyright treaties in 1998, in the passing of the Digital Millennium Copyright Act (DMCA).<sup>151</sup> WIPO is significant in that it governs not only legal relationships between nations with respect to intellectual property (IP) rights, but also provides a forum for private actors to arbitrate their disputes.<sup>152</sup> The WIPO Arbitration and Mediation Center (AMC) is a non-profit organization that acts as a neutral provider of services for the resolution of international IP disputes, maintaining a list of "neutrals" (mediators, arbitrators, & experts) to resolve disputes.<sup>153</sup> Nevertheless, the AMC offers more than just mediation

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145. See Hoffman, *supra* note 66, at 766–67 ("Granting too much protection over melodies in pop music, then, shrinks an already-thin musical arsenal and stifles creativity by making artists fearful of liability for copyright infringement.").

146. See Bartholomew, *supra* note 37, at 358.

147. See discussions *infra* Parts (III)(C)(i)–(ii).

148. See discussions *infra* Parts (III)(C)(i)–(ii).

149. Morris, *supra* note 54, at 521.

150. *Information by Country: United States of America*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, [https://www.wipo.int/directory/en/details.jsp?country\\_code=US](https://www.wipo.int/directory/en/details.jsp?country_code=US) (last visited Feb. 10, 2023).

151. Menell, *supra* note 42, at 547 n.51.

152. Morris, *supra* note 54, at 529.

153. Alexandra George, *Transcending Territoriality: International Cooperation and Harmonization in Intellectual Property Enforcement and Dispute Resolution*, 10 *TSINGHUA CHINA L. REV.* 225, 255 (2018).

& arbitration in terms of methods of alternative dispute resolution (ADR), including ED.<sup>154</sup>

ED is a “procedure in which a dispute or a difference between the parties is submitted, by agreement of the parties, to one [or more] experts who make a determination on the matter referred to it [sic] [them]. The determination is binding, unless the parties agreed otherwise.”<sup>155</sup> Parties using ED may choose their expert or experts, and if they do not agree on who will be the determining expert(s), they may have one (or more) chosen by the AMC with the parties’ consent.<sup>156</sup> Additionally, ED proceedings and outcomes are confidential.<sup>157</sup>

Generally, the process of an ED proceeding consists of the following steps: (1) a party submits a Request for ED; (2) the other party submits an Answer to Request for ED (unless the Request was filed jointly); (3) the expert is appointed; (4) an expert prepares a description of the matter referred to ED; (5) submissions are made and conferences and meetings are held (as needed); and (6) the determination is made.<sup>158</sup> WIPO currently boasts a list of over 2,000 neutrals, including arbitrators, mediators, and experts, and it includes practitioners & experts in copyrights.<sup>159</sup> Disputes resolved under ED are not required to be international: indeed, domestic IP disputes may be resolved through it.<sup>160</sup> WIPO’s “eADR” system (electronic alternative dispute resolution) allows for electronic filing of ED-related documents, and flexible options for parties who wish to hold meetings or hearings online.<sup>161</sup>

WIPO ED is a desirable alternative to having courts decide whether “substantial similarity” exists between musical compositions in a copyright infringement action.<sup>162</sup> Understanding these

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154. *Id.*; *WIPO | ADR*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <https://www.wipo.int/amc/en/center/index.html#contact> (last visited Jan. 2, 2024).

155. *What Is Expert Determination?*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <https://www.wipo.int/amc/en/expert-determination/what-is-exp.html> (last visited Jan. 2, 2024).

156. *Id.*

157. *Id.*

158. *Principal Steps in WIPO Expert Determination*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <https://www.wipo.int/amc/en/expert-determination/principal-steps.html> (last visited Jan. 2, 2024).

159. *WIPO Neutrals*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <https://www.wipo.int/amc/en/neutrals/index.html> (last visited Jan. 2, 2024).

160. *WIPO | ADR*, *supra* note 154.

161. *WIPO Online Case Administration Tools*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <https://www.wipo.int/amc/en/eadr/index.html> (last visited Jan. 2, 2024).

162. See Dev Gangjee, *Faculty Members Co-author Report on Use of Alternative Dispute Resolution (ADR) Mechanisms in B2B Digital Copyright Disputes*, UNIVERSITY OF OXFORD (Sept. 13, 2021), <https://www.law.ox.ac.uk/news/2021-09-13-faculty-members-co-author-report-use-alternative-dispute-resolution-adr-mechanisms> (“[C]opyright disputes tend to arise

copyright disputes requires an understanding of basic music theory, but the factual issues presented in cases like *Gaye*, *Skidmore*, and *Gray* reveal that these disputes must be analyzed in significant detail with the input of expert musicologists.<sup>163</sup> Legal disputes requiring the arbiter to understand complicated factual issues are good candidates for ED because analysis of such complex and technical disputes can sap judicial resources.<sup>164</sup> As a result, ED is a beneficial alternative to litigation for musicians in copyright infringement disputes, because it does not require the parties to spend considerable time and money explaining their argument to a judge who may not understand the inner workings of music theory.<sup>165</sup>

As *Gaye*, *Skidmore*, and *Gray* illustrated, “[m]usic infringement litigation has suffered from habitually poor legal and musical analysis. Music is a highly technical, yet often imprecise field.”<sup>166</sup> Judges are generally not likely to understand standard musical notation, relying on the input of conflicting expert testimony.<sup>167</sup> While a judge’s lack of expertise may not be detrimental to their decision in a securities fraud case involving complex business transactions, their legitimacy in deciding matters featuring aesthetic judgments is more questionable due to music’s artistic nature.<sup>168</sup>

Juries face similar challenges to judges in music copyright infringement litigation, as they are not typically skilled in determining the similarity of protectable musical elements, and are susceptible to being misled about what compositional material is infringing on another work.<sup>169</sup> *Gray* is a fitting example of a jury delivering a verdict against the weight of the evidence where both the trial and appellate courts agreed in vacating its finding of “substantial similarity.”<sup>170</sup> Jurors inevitably have difficulty understanding an expert witness’s opinion relating to highly technical fields, and even

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across a wide range of sectors, including . . . musical works and sound recording[s]. . . . There is a growing interest in ADR mechanisms, such as mediation, arbitration or expert determination, for resolving such copyright disputes.”)

163. See Menell, *supra* note 42, at 568 (“Jurors might well need the assistance of musicalologists to understand whether musical elements are unprotectable or unoriginal.”); Lee, *supra* note 128, at 710 (“Following the controversial jury verdict finding that Pharrell Williams and Robin Thicke’s smash hit ‘Blurred Lines’ infringed the copyright to Marvin Gaye’s ‘Got To Give It Up,’ forensic musicologists have gained in both importance and notoriety.”).

164. See Ormsbee, *supra* note 3, at 229 (“Arguments involving complicated factual issues are good candidates for neutral fact finding in ADR, since technical or complex disputes may waste limited judicial resources and vex the judiciary.”).

165. See *id.* at 229–30.

166. *Id.* at 256.

167. Zaken, *supra* note 8, at 294.

168. See *supra* text accompanying note 132.

169. Mitchell, *supra* note 134, at 463.

170. See *Gray v. Perry*, No. 2:15-CV-05642-CAS-JCx, 2020 U.S. Dist. LEXIS 46313, at \*35–36 (C.D. Cal. Mar. 16, 2020).

the accuracy and genuineness of those experts' opinions will likely be colored by the legal argument they are supporting.<sup>171</sup> It is the forensic musicologists who appear in these cases as expert witnesses who are the most qualified to determine whether protectable musical elements of respective compositions are "substantially similar."<sup>172</sup> Juries face similar challenges to judges in deciding music copyright infringement cases because they are tasked with evaluating a subjective artform through an objective legal lens.<sup>173</sup> Music is a technical specialization that requires years of study, and only a small portion of the public has the ability to accurately analyze it, while an even smaller portion can reliably discern infringement.<sup>174</sup>

In his 2011 article, *Music To Everyone's Ears: Binding Mediation in Music Rights Disputes*, Matthew Ormsbee suggests eschewing the current legal framework of determining "substantial similarity" in music copyright infringement suits in favor of binding mediation.<sup>175</sup> He argues that "binding mediation is to date the most appropriate process for resolving disputes involving music rights."<sup>176</sup> Regarding the issue of what happens when mediation does not resolve the parties' dispute, Ormsbee clarifies that "[i]f mediation attempts do not lead to a mutual agreement, or if particular issues remain unresolved, parties to binding mediation [may] then commence arbitration, selecting one private arbiter or a panel of three private arbiters, who possess expertise in the field of music."<sup>177</sup> While a viable alternative to the current framework, mediation does not offer the same efficiency as ED in resolving "substantial similarity" determinations.<sup>178</sup> According to a survey the WIPO AMC conducted in 2013, "mediation took on average approximately 8 months[ ]" and "generally did not exceed USD 100,000 [in costs]" while "expert determination typically took less than 6 months" and its costs "would not typically exceed USD 50,000."<sup>179</sup>

ED allows the parties to decide from the beginning of their dispute how many experts to use, who to select as the experts, and if

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171. Lee, *supra* note 128, at 726.

172. See *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 880 (9th Cir. 2016) (holding that where "a highly qualified and trained musician listened to . . . recordings with the express aim of discerning which parts of the song had been copied, and . . . could not do so accurately[,] . . . [an] average audience would not do a better job.").

173. See *supra* text accompanying note 132.

174. Ormsbee, *supra* note 3, at 233–34.

175. See generally Ormsbee, *supra* note 3.

176. *Id.* at 257.

177. *Id.* at 240.

178. *Results of the WIPO Arbitration and Mediation Center International Survey on Dispute Resolution in Technology Transactions*, WIPO ARBITRATION AND MEDIATION CENTER, 1, 32 (2013), <https://www.wipo.int/export/sites/www/amc/en/docs/surveyresults.pdf>.

179. *Id.*

they cannot agree as to a third, neutral arbiter, WIPO offers many qualified experts that it can appoint to ensure fairness.<sup>180</sup> This consolidates the procedure into one, rather than establishing a procedure for mediation with potential to fail, and a contingency plan of arbitration in case of that failure.<sup>181</sup> Because WIPO ED is available to domestic litigants in private actions, already has an established procedure, allows for remote participation by all parties, and offers experts where parties are unable to fully agree as to who the experts should be, it is the best alternative to litigation for resolving music copyright infringement disputes at the trial level.<sup>182</sup>

Regarding analysis of these disputes on the appellate level, courts have been reluctant to apply the same formal, black-and-white logic than in patent suits.<sup>183</sup> Those courts that have attempted to do so, such as the Ninth Circuit, have done so with questionable accuracy and awareness.<sup>184</sup> As discussed below, as the arbiter of patent infringement disputes on the appellate level, the Federal Circuit is uniquely positioned to be the best appellate court to hear music copyright infringement appeals.<sup>185</sup>

*ii. The Case for the Federal Circuit Hearing Copyright Infringement Appeals*

The Federal Circuit is an intermediate appellate court.<sup>186</sup> The Federal Circuit has exclusive, nationwide appellate jurisdiction in patent cases, appellate jurisdiction in certain trademark proceedings before the United States Patent and Trademark Office, and various types of jurisdiction over other matters not related to IP.<sup>187</sup> Approximately half of the Federal Circuit's cases are related to IP, with an overwhelming majority being patent cases.<sup>188</sup> While claims involving copyrights or trademarks *and patents* are reviewed by the Federal Circuit, the court does not presently review decisions of district courts in cases where *only* a copyright or trademark matter is

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180. See *supra* Part III(c)(i).

181. Compare *What Is Expert Determination?*, *supra* note 155, with Ormsbee, *supra* note 3, at 240.

182. See generally *WIPO | ADR*, *supra* note 154; *WIPO Online Case Administration Tools*, *supra* note 161; *What is Expert Determination?*, *supra* note 155.

183. Ormsbee, *supra* note 3, at 234.

184. See discussions *supra* Parts III(A)–(B).

185. See discussion *infra* Part (III)(C)(ii).

186. See J. Jonas Anderson et al., *Extraordinary Writ or Ordinary Remedy? Mandamus at the Federal Circuit*, 100 WASH. U. L. REV. 327, 333 (2022).

187. *Court Jurisdiction*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (Feb. 10, 2023), <https://cafc.uscourts.gov/home/the-court/about-the-court/court-jurisdiction/>; see generally 28 U.S.C. § 1295.

188. See Anderson et al., *supra* note 186, at 338.

raised.<sup>189</sup> But an exception to this rule exists if any one of those issues triable by the Federal Circuit was raised in *at least one point* in the suit.<sup>190</sup>

The Federal Circuit applies the law of the regional circuit in analyzing copyright infringement disputes.<sup>191</sup> In *Amini Innovation Corp. v. Anthony Cal., Inc.*, the Federal Circuit's most recent application of Ninth Circuit law in a copyright infringement dispute, it reversed the District Court's grant of summary judgment of non-infringement of a copyright and design patent with respect to bedroom furniture designs.<sup>192</sup> The Federal Circuit reasoned that the District Court "mistakenly expanded the extrinsic elements of the infringement test to encompass the intrinsic elements[.]" therefore "perform[ing] the intrinsic test" and reaching its finding "based primarily on its own visual inspection."<sup>193</sup>

More recently, in 2020, the Federal Circuit applied Second Circuit law in a copyright infringement case in *LEGO v. ZURU Inc.*, which was a dispute related to toys resembling Lego products.<sup>194</sup> The Federal Circuit first determined Lego's expert properly relied on evidence introduced at trial in conducting her analysis of "substantial similarity."<sup>195</sup> Regarding whether the parties' respective products were substantially similar, the Federal Circuit agreed with the lower court's finding that appellant failed to demonstrate that the toys' "total concept and feel" were different.<sup>196</sup> By affirming the lower court's finding rather than undergoing its own "total concept and feel" test, the Federal Circuit showed appropriate deference to the expert's fact-finding abilities and limited its review to errors of law.<sup>197</sup>

*Amini* and *LEGO* demonstrate that the Federal Circuit is (1) capable of analyzing substantial similarity in copyright infringement disputes, (2) with an awareness of the judiciary's role in finding substantial similarity, (3) with an attention to the validity of expert testimony, (4) without being reversed by a higher court.<sup>198</sup> One

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189. *Just the Facts: Intellectual Property Cases—Patent, Copyright, and Trademark*, UNITED STATES COURTS (Feb. 13, 2020), <https://www.uscourts.gov/news/2020/02/13/just-facts-intellectual-property-cases-patent-copyright-and-trademark#footnote14>.

190. *See Amini Innovation Corp. v. Anthony Cal., Inc.*, 439 F.3d 1365, 1368 (Fed. Cir. 2006).

191. *Id.*

192. *Id.* at 1367.

193. *Id.* at 1370.

194. *See generally* *LEGO v. ZURU Inc.*, 799 F. App'x 823 (Fed. Cir. 2020).

195. *Id.* at 829.

196. *Id.* at 831.

197. *See generally* *LEGO*, 799 F. App'x 823.

198. *See* discussion *supra* Part (III)(C)(i).



explanation for why the Federal Circuit avoided analyzing “total concept and feel” in *LEGO* is that some judges tend to believe creativity is “incapable of measurement[ ]” based on “an assumption that the creative process is necessarily subjective, preventing efforts to measure expressive attempts against some kind of external benchmark.”<sup>199</sup> The Federal Circuit’s laissez-faire approach to “substantial similarity” analysis here stands in contrast to the Ninth Circuit’s approach to fact-finding in music copyright infringement cases.<sup>200</sup>

#### D. Drawbacks of the New Framework

##### i. WIPO Expert Determination: Implementation Hurdles and Seventh Amendment Issues

One concern about using WIPO ED to have musical experts decide music copyright infringement disputes is that the federal courts have jurisdiction to hear such cases under the Constitution.<sup>201</sup> As such, having federal courts abdicate their jurisdiction may require an act of Congress: the formulation and approval of which can be a time-consuming and inefficient process.<sup>202</sup> WIPO ED could replace the fact-finding function of federal trial courts if legislation is enacted, requiring copyright disputes to first be adjudicated by experts before they are reviewable by federal appellate courts for errors of law.<sup>203</sup>

Another issue regarding the use of WIPO ED instead of federal court fact-finding in copyright infringement disputes is that such a system would take power away from the American jury.<sup>204</sup> Under the Seventh Amendment to the Constitution, the jury has the

199. See Bartholomew, *supra* note 37, at 363.

200. See generally *LEGO*, 799 F. App’x 823; *Amini Innovation Corp. v. Anthony Cal., Inc.*, 439 F.3d 1365 (Fed. Cir. 2006); *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018); *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020); *Gray v. Hudson*, 28 F.4th 87 (9th Cir. 2022).

201. U.S. CONST. art. III, § 2, cl. 1.

202. See Samuel Krislov & Paul Kramer, *20/20 Vision: The Future of the California Civil Courts*, 66 S. CAL. L. REV. 1915, 1962 (1993) (discussing “[t]he inefficiencies of court and legislative processes”).

203. See Douglas E. Edlin, *A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States*, 57 AM. J. COMP. L. 67, 70 (2009) (“Ouster clauses[ ] . . . are legislative articles that purport to deprive the courts of their jurisdiction to review governmental action. In the United States, ouster clauses challenge judicial autonomy and the courts’ position as a coequal branch of government[.]”).

204. Replacing trials with WIPO ED would perhaps be even more offensive to the Second Circuit, which relies on the ears of the lay listener, reasoning that the proper question “is whether defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed[.]” *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946).

constitutional authority to decide civil matters.<sup>205</sup> From a creative standpoint, “[o]ne commonly cited drawback in choosing ADR over litigation is that courts often consider the tastes of the public, by means of a jury--a factor absent in ADR.”<sup>206</sup> From a political standpoint, reallocating power from the public—the jury—to elite professionals—expert musicologists—widens an already-increasing gap between America’s social classes at a time when our country is more divided than ever.<sup>207</sup>

*ii. The Federal Circuit: Lack of Relevant Precedent and Jurisdictional Limits*

Another consideration is the lack of relevant precedent on the Federal Circuit’s capability of finding “substantial similarity.”<sup>208</sup> The fact that only a handful of copyright infringement disputes have been resolved in the Federal Circuit since the year 2000 demonstrates the court’s lack of experience with hearing copyright infringement disputes.<sup>209</sup> Given the court’s limited record, it seems to have the necessary skills to resolve these disputes.<sup>210</sup> But its lack of guiding precedent may make it an undesirable forum for appellate review of copyright infringement cases.<sup>211</sup>

As is the case with WIPO ED, the method for implementing the Federal Circuit is unclear.<sup>212</sup> The Ninth Circuit’s jurisdiction extends to copyright infringement cases brought in federal trial courts in California, where most high-profile disputes are brought.<sup>213</sup> Having the Nation’s appellate courts abdicate their jurisdiction and giving the Federal Circuit that exclusive jurisdiction may require legislative action.<sup>214</sup>

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205. U.S. CONST. amend. VII.

206. Ormsbee, *supra* note 3, at 243.

207. Joel Kotkin, *Feudal Future Podcast — Episode 19, The Clash: The Power Divide Between the Working Class & the Managerial Elite, with Michael Lind* (Jan. 18, 2021), <http://joelkotkin.com/power-divide-between-working-class-managerial-elite/> (starting at 5:54, Mr. Lind stated “the void . . . created . . . in the realms of political power, of economic power, and of culture has been filled by institutions controlled by member of the college-educated over-class.”).

208. See discussion *supra* Part III(C)(ii).

209. See discussion *supra* Part III(C)(ii).

210. See discussion *supra* Part III(C)(ii).

211. See discussion *supra* Part III(C)(ii).

212. See discussion *supra* Part III(D)(i).

213. See *Federal Judicial Circuits: Ninth Circuit*, *supra* note 61.

214. See Edlin, *supra* note 203, at 70.

*E. Resolution of Issues*

Switching to a new framework of resolving copyright infringement disputes faces significant challenges, primarily procedural ones.<sup>215</sup> Nevertheless, the costs of keeping the current system likely outweigh the benefits.<sup>216</sup> For instance, juries having great power over songwriters' originality jeopardizes societal benefits of creative expression in music.<sup>217</sup> Juries are not always capable of discerning significant differences between compositions.<sup>218</sup> In fact, an expert study suggests that "the current use of duelling experts in music cases is suboptimal, especially when the jury is composed of individuals who lack music knowledge."<sup>219</sup> Finally, despite its benefits of transparency, consistency, and fairness, litigation is frequently costly, time-consuming, and unpredictable.<sup>220</sup> The ramifications of allowing the Ninth Circuit to flip-flop on issues is evidenced by the creative "chilling effect" predicted by early critics of *Gaye*.<sup>221</sup> The certainty that exists in patent law jurisprudence lies in stark contrast to copyright law's uncertain applications.<sup>222</sup> A legislative act may be the only method of implementing the new framework, and an added benefit of that method is that the political issue of socio-cultural divisiveness would then be resolved by a political branch of the American government: Congress.<sup>223</sup>

A change is worth considering at this juncture, especially because scholars have posited that the current "battle of the experts" method of resolving copyright disputes "disproportionately impacts musicians who lack resources, meaning less established or unknown musicians . . . might not be able to afford a reputable musicologist to vindicate themselves[.]"<sup>224</sup> Proponents of IP ADR have pointed out that WIPO AMC provides needed confidentiality in IP disputes that courts across the world cannot offer.<sup>225</sup> WIPO offers a suitable forum for resolving copyright infringement cases on the trial level because it gives the parties autonomy over the proceedings and expert(s) involved and it can be quicker than litigation.<sup>226</sup>

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215. See discussions *supra* Parts III(D)(i)–(ii).

216. See discussions *supra* Parts III(D)(i)–(ii).

217. Bartholomew, *supra* note 37, at 401.

218. Menell, *supra* note 42, at 601.

219. Lee, *supra* note 128, at 775.

220. Doft, *supra* note 55, at 1002.

221. See discussion *supra* Part (III)(B).

222. See discussion *supra* Part (III)(C)(ii).

223. See Edlin, *supra* note 203, at 70.

224. Lee, *supra* note 128, at 715–16.

225. Morris, *supra* note 54, at 522.

226. George, *supra* note 153, at 253.

The current system is flawed, but shifting to this new framework can ameliorate these flaws and ensure that “[t]he protection of a musical composition” is tied to “whether it meets the requirements of the law.”<sup>227</sup>

#### IV. CONCLUSION

The World Intellectual Property Organization’s (WIPO) alternative dispute resolution (ADR) method, Expert Determination (ED), and the United States Court of Appeals for the Federal Circuit (the Federal Circuit) are desirable alternatives to resolving music copyright disputes.<sup>228</sup> The way musical copyright disputes have been resolved in the past decade has disserved songwriters.<sup>229</sup> *Williams v. Gaye*, *Skidmore v. Led Zeppelin*, and *Gray v. Hudson* illustrate how there are confusing and conflicting standards for judges and juries to follow in determining “substantial similarity” between musical compositions.<sup>230</sup> WIPO and its use of ED has a potential for greater accuracy and resource preservation than courts do in adjudicating whether “substantial similarity” exists between musical compositions in a copyright infringement action<sup>231</sup> Further, at the appellate level, the Federal Circuit is a better alternative to hear music copyright infringement appeals due to its substantial experience in deciding patent cases.<sup>232</sup> This new framework faces procedural, jurisdictional, and constitutional hurdles, but the need for a new system of copyright infringement dispute resolution outweighs the obstacles facing it, as it will allow for composers of all kinds to seek proper resolutions.<sup>233</sup>

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227. Zaken, *supra* note 8, at 324.

228. See discussions *supra* Parts (III)(C)(i)–(ii).

229. See Ormsbee, *supra* note 3, at 229–30 (“While courts must necessarily be at the disposal of any meriting lawsuit within their jurisdiction, the judiciary is not always competent in specialized fields, such as mathematics or music[.]”).

230. See discussion *supra* Part (III)(A).

231. See discussion *supra* Part (III)(C)(i).

232. See discussion *supra* Part (III)(C)(ii).

233. See discussions *supra* Parts (III)(D)–(E).

# The Phillie Phanatic Hits Free Agency: An Analysis of *Phillies v. Harrison* and the Application of Copyright Law to Mascots as Characters

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## I. INTRODUCTION

Wacky, chaotic, lovable. These are just a few words used to describe mascots of all types, especially the Phillie Phanatic. The Phanatic is arguably one of the most well-known and recognizable mascots in sports. Its taunting of opposing teams and goofy yet aggressive personality have shifted the mascot landscape; as the way mascots are perceived continues to change, so does the number of

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teams hoping to use them.<sup>1</sup> The Phanatic's antics at games have led to trouble more than a few times, gaining it the title of the most-sued mascot in sports.<sup>2</sup> Nonetheless, the Phanatic is a cherished part of Philadelphia sports and is indispensable to the Philadelphia Phillies's brand. Therefore, when the creators of the Phanatic threatened to make it a "free agent," the Phillies were rightfully concerned and took to the courts to try to save their beloved mascot.<sup>3</sup>

The dictionary definition of a *mascot* is "a person, animal, or object that is believed to bring good luck, or one that represents an organization."<sup>4</sup> Mascots represent high schools, colleges, and other organizations like radio stations, often becoming symbols of good luck and enthusiasm for the brand they represent. They have a rich history<sup>5</sup> and can make a meaningful impact on how people experience events and the communities themselves.<sup>6</sup> Mascots even reflect the communities that they represent more broadly.<sup>7</sup>

Mascots are frequently a central part of the game day experience for fans and athletes alike.<sup>8</sup> From getting a crowd invested in a

1. 99% Invisible, *How a French Opera and Sesame Street Inspired the Birth of the Philly Phanatic*, SLATE (Feb. 4, 2015, 11:58 AM), [http://www.slate.com/blogs/the\\_eye/2015/02/04/a\\_short\\_history\\_of\\_the\\_mascot\\_from\\_99\\_invisible\\_and\\_roman\\_mars.html](http://www.slate.com/blogs/the_eye/2015/02/04/a_short_history_of_the_mascot_from_99_invisible_and_roman_mars.html); Jeff Marzick, *Mascots*, THE CULTURE CRUSH, <https://www.theculturecrush.com/feature/mascots> (last visited Feb. 24, 2023).

2. Robert M. Jarvis & Phyllis Coleman, *Symposium: Batter Up!: From the Baseball Field to the Courthouse: Contemporary Issues Facing Baseball Practitioners: Hi-Jinks at the Ballpark: Costumed Mascots in the Major Leagues*, 23 CARDOZO L. REV. 1635, 1661 (2002); Amber Lee, *The Top 25 Pro Sports Mascot Power Rankings*, BLEACHER REPORT (Feb. 12, 2015), <https://bleacherreport.com/articles/2359754-the-top-25-pro-sports-mascot-power-rankings>.

3. See *Phillies v. Harrison*, No. 19-CV-7239 (VM) (SN), 2021 U.S. Dist. LEXIS 243554 (S.D.N.Y. Aug. 10, 2021).

4. *Mascot*, CAMBRIDGE ENGLISH DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/mascot> (last visited Jan. 8, 2023).

5. The term "mascot" evolved from the French word "mascotte," which meant "lucky charm" and was often used in gambling. Marzick, *supra* note 1. The French Opera *La Mascotte* brought the word to the mainstream. *Id.* In this opera, a farmer's struggle to grow crops is remedied when he is visited by a farm girl, Bettina. *Id.* The farm girl functioned as a good luck charm, a mascotte, as long as she remained a virgin. *Id.*

6. One such impact is demonstrated by the Phillie Phanatic. The Phanatic is part of a program called "Phanatic About Reading," which encourages students to read more often to improve their literacy skills. *Phanatic About Reading*, MLB, <https://www.mlb.com/phillies/community/educational-programs/phanatic-about-reading> (last visited Feb. 24, 2023). As incentives, schools and students may receive tickets to games, visits from the Phanatic, and recognition at a themed night at a Phillies's game. *Id.*

7. For example, the University of Nebraska sports teams are called the Cornhuskers, and the school's mascot is Herbie Husker. Marzick, *supra* note 1. Herbie represents the state's agricultural roots. *Id.* Herbie wears a red cowboy hat, jeans, a red work shirt, and work boots, which reflect the common attire of agricultural workers and the general public in that location. *Id.*

8. In one instance, the Chicago Bulls's mascot tossed a drink on a man and carried the woman he was with away after the man yelled at the woman for trying to participate in the

game and tossing hot dogs, to appearances at local events, they have become a recognizable aspect of the sports industry. Because mascots play an integral role in this forum, teams seek to protect their mascots from outside use. One such legal protection is through copyright law.<sup>9</sup> The Philadelphia Phillies, a Major League Baseball team, and the creators of the Phillie Phanatic, the Phillies's mascot, chose this route.<sup>10</sup>

*Phillies v. Harrison*<sup>11</sup> illustrates the issue of the copyrightability of mascots as characters. The originality of a costume in conjunction with the performance may impute intellectual property rights. However, no single test clearly defines when a character, especially a mascot, is entitled to copyright protection.

This Article argues that the court in *Phillies v. Harrison* was incorrect in holding that the Phanatic did not qualify for character protection. It will address why the Phanatic should be considered “sufficiently delineated”<sup>12</sup> and what the Phillies and other teams could do to produce a tangible work of authorship that the mascot is fixed in.<sup>13</sup> More broadly, this Article argues that the standard for character protection should encompass mascots more easily. There needs to be a clear standard across circuits regarding the protection of characters. This Article will propose a test that allows for mascots to be copyrighted as characters while protecting the fundamental goals of copyright law.<sup>14</sup>

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kiss cam at the game. Andrew Maggio, *Top 15 Ridiculous Mascot Moments*, THESPORTSTER (Jan. 18, 2015), <https://www.thesportster.com/entertainment/top-15-ridiculous-mascot-moments/#13-jazz-bear-s-surfboard-tumble>.

9. The Phillies also protected the Phanatic with several trademarks. The trademarks are for products that include, but are not limited to, headwear, shirts, infant ware, footwear, various types of toys, puppets, Christmas tree ornaments, baseball bats, stickers, temporary tattoos, pens, pencils, art prints, and foam novelty items. Michael McCann, *Will Phillies Have to Ditch Phillie Phanatic Mascot?*, SPORTS ILLUSTRATED (Aug. 6, 2019), <https://www.si.com/mlb/2019/08/06/philadelphia-phillies-mascot-lawsuit-phanatic>.

10. Professional sports teams, and Major League Baseball teams in particular, commonly trademark mascots, names and designs. Christian H. Brill & Howard W. Brill, *Baseball Mascots & the Law*, 65 KAN. L. REV. 105, 122 (2016). Copyright law has also been used to protect mascot plans and designs. *Id.* at 123 (discussing copyright infringement suits involving mascot plans and designs with the Colorado Rockies and Kansas City Royals).

11. No. 19-CV-7239 (VM) (SN), 2021 U.S. Dist. LEXIS 243554 (S.D.N.Y. Aug. 10, 2021).

12. *See infra* Section IV.A.

13. *See infra* Section IV.B.

14. *See infra* Section IV.C.

## II. BACKGROUND

A. *The Rise of the Phillie Phanatic*

The Phillies franchise was founded in 1883 and is the oldest, continuously-run team in all of American professional sports, because it only ever had a single name and remained in one city.<sup>15</sup> For 84 years, the team operated with no mascot representing them. Nevertheless, in 1971, when opening Veterans Stadium, the Phillies introduced Phil and Phillis.<sup>16</sup> The two mascots were a pair of siblings wearing colonial dress. Fans were indifferent to them, so rather than remaining as the team's live mascots, they became a part of a "home run spectacular."<sup>17</sup>

So, in February 1978, Bill Giles, the then-Executive Vice President of the Phillies, decided to create a new mascot for the team. Giles reached out to Jim Henson, an inventor and puppeteer,<sup>18</sup> who recommended artist Bonnie Erickson.<sup>19</sup> Erickson worked with her husband, Wayne Harrison, and the two of them founded the design partnership Harrison/Erickson (H/E).<sup>20</sup> This firm entered into an agreement with the Phillies outlining the Phanatic's creation on March 17, 1978 (March 1978 Agreement).<sup>21</sup> Pursuant to that agreement,<sup>22</sup> H/E claimed copyright in the Phanatic, and the Phillies paid H/E a \$3,900 fee.<sup>23</sup> H/E provided the Phillies with the Phanatic

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15. Adam Augustyn, *Philadelphia Phillies*, BRITANNICA, <https://www.britannica.com/topic/Philadelphia-Phillies> (last updated Nov. 6, 2022); *Timeline – 1800s*, MLB, <https://www.mlb.com/phillies/history/timeline-1800s> (last visited Dec. 20, 2022).

16. *Philadelphia Phil & Philadelphia Phillis (Philadelphia Phillies)*, SPORTS MASCOTS WIKI, [https://sportsmascots.fandom.com/wiki/Philadelphia\\_Phil\\_%26\\_Philadelphia\\_Phillis\\_\(Philadelphia\\_Phillies\)](https://sportsmascots.fandom.com/wiki/Philadelphia_Phil_%26_Philadelphia_Phillis_(Philadelphia_Phillies)) (last visited Jan. 2, 2023).

17. *Id.*

18. Henson was a pioneer in various fields, including television, puppetry, the visual arts, and technology. *Our Founders – Jim Henson*, JIM HENSON: THE JIM HENSON CO., <https://www.henson.com/our-founders/> (last visited Jan. 7, 2023). His performances brought to life some of the most well-known characters, the most notable being Kermit the Frog from the Muppets. *Id.* In addition to "The Muppet Show," he worked on "Sesame Street," various movies, and multiple television series. *Id.*

19. *Phillies v. Harrison*, No. 19-CV-7239 (VM) (SN), 2021 U.S. Dist. LEXIS 243554, at \*3 (S.D.N.Y. Aug. 10, 2021).

20. *Id.* at \*4.

21. *Id.*

22. The March 1978 Agreement was "for the 'design and construction of a character to be known as The Phillie Fanatic for use as an entertainer during home baseball games.'" *Id.* H/E would supply: "(1) a design for The Phillie Fanatic [ . . . ], (2) a costume built from the design to measurements provided by the Phillies, and (3) delivery on or before April 30, 1978." *Id.* The Phillies would supply: "(1) measurements for the wearer of the costume as required by forms sent March 14, 1978, (2) five yards of material used in the uniform shirt, an extra large shirt, a pair of extra large baseball stockings and a large Phillie logo 'P.'" *Id.*

23. *Id.* at \*4–5. The March 1978 Agreement stated that "[t]he character will be copywritten by Harrison/Erickson who reserve all rights of its use for purposes other than expressly specified in writing," with the acknowledgment that "[t]his costume will be used on Phillies



costume in April 1978, and the Phanatic debuted as the Phillies's new mascot later that month.<sup>24</sup> Dave Raymond wore the costume,<sup>25</sup> and other Phanatic performers following Raymond copied his style<sup>26</sup> so that the crowd would not know who was in the costume at any given time.<sup>27</sup>

The Phanatic was wildly popular with fans, so the Phillies began using it in various products and advertisements. On July 15, 1978, the Phillies and H/E entered into another agreement (July 1978 Agreement), which detailed when and how reproductions of the Phanatic could be made.<sup>28</sup> The July 1978 Agreement stated in relevant part:

1. We [H/E] hereby grant to you the exclusive rights through all of the territories of the world for the term of this agreement only, to make reproductions of our copyrighted character presently known as "Phillie Phanatic" the subject of the agreement between us dated March 17, 1978, in and as part of various souvenir items such as keychains, decals, tee-shirts and dolls. [(Licensed Articles)]

2. As an express condition precedent to your right to make reproductions, each proposed Licensed Article shall be submitted to us in the form in which you intend to manufacture it. For a period of ten working days following receipt by us of each proposed Licensed Article, we shall have the right in our sole discretion to determine whether the proposed reproduction satisfies our personal quality standards. . . . Our approval of any proposed reproduction or modification shall not be unreasonably withheld.

3. Copies of all Licensed Articles . . . shall bear copyright notice in our name in the proper location as follows: "©1978 Harrison Erickson."

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TV, Phillies commercials and personal appearances to promote the Phillies Baseball Team." *Id.*

24. *Id.* at \*5.

25. Raymond was an intern for the Phillies when he began his role as the Phanatic. He remained the performer behind the Phanatic for 16 years and has now built a career around designing and creating mascots, focusing on the power of fun. *The Power of Fun – Dave Raymond, the Original Phillie Phanatic*, A GREAT NO. OF THINGS, <https://agreatnumberofthings.com/dave-raymond-phillie-phanatic/> (last visited Jan. 7, 2023).

26. *Phillies*, 2021 U.S. Dist. LEXIS 243554, at \*5–6.

27. *Id.* at \*6.

28. *Id.*

[ . . . ]

6. Except as previously authorized herein, and in our agreement dated March 17, 1978, you shall have no right to make any use of the Phillie Phanatic character.<sup>29</sup>

H/E also solidified their copyright by filing a registration application with the United States Copyright Office, wherein they described the work as an “artistic sculpture.”<sup>30</sup> The Copyright Office granted the registration on May 4, 1979, with Bonnie Erickson and Wayne Harrison listed as the only co-authors.<sup>31</sup>

By 1980, H/E earned more than \$200,000 in royalties from the use of the Phanatic.<sup>32</sup> However, they were still unhappy.<sup>33</sup> Despite the success of the Phanatic and the earnings it produced for them, H/E filed a lawsuit against the Phillies in 1979 for copyright infringement, breach of the 1978 agreements, and violation of the Lanham Act.<sup>34</sup> This lawsuit quickly settled and led to a new licensing agreement (1979 Agreement). The settlement and the 1979 Agreement allowed the Phillies to pay H/E a lump sum of \$115,000 for the exclusive right to use the Phanatic.<sup>35</sup>

Following the years of litigation and changing agreements, on October 31, 1984, the Phillies and H/E entered into a new agreement (1984 Agreement) regarding the rights to use the Phanatic.<sup>36</sup> In this new agreement, H/E assigned all of their rights in the Phanatic copyright to the Phillies, who paid \$215,000 in consideration, for a term of “forever.”<sup>37</sup> The 1984 Agreement specifically stated:

Subject to the terms of this agreement only, H/[/E hereby sells, transfers and assigns to the PHILLIES all of H/[/E’s rights, title and interest in and to the MASCOT and in and to all

29. *Id.* at \*6–7.

30. *Id.* at \*7–8.

31. *Id.* at \*8.

32. McCann, *supra* note 9.

33. *Id.*

34. *Phillies*, 2021 U.S. Dist. LEXIS 243554, at \*8; *see also* McCann, *supra* note 9 (detailing the 1979 lawsuit); Michael Horvath, *A Big Green Mess: Analyzing the Legal Implications Surrounding the Phillie Phanatic*, THE JEFFREY S. MOORAD CTR. FOR THE STUDY OF SPORTS L., [https://www1.villanova.edu/villanova/law/academics/sportslaw/commentary/mslj\\_blog/2019/1015.html](https://www1.villanova.edu/villanova/law/academics/sportslaw/commentary/mslj_blog/2019/1015.html) (last visited Jan. 2, 2023). The Lanham Act is the federal statute that established modern U.S. trademark law. *Lanham Act 75th Anniversary Celebration*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/about-us/events/lanham-act-75th-anniversary-celebration> (last visited Jan. 7, 2023).

35. *Phillies*, 2021 U.S. Dist. LEXIS 243554, at \*8–9 (detailing the 1979 Agreement’s language that acknowledged that, although H/E owned the copyright of the artistic sculpture, the Phillies had valuable rights in the costume of the Phanatic); McCann, *supra* note 9.

36. *Phillies*, 2021 U.S. Dist. LEXIS 243554, at \*10.

37. *Id.* at \*11–12.

reproductions and portrayals of all or part of the MASCOT in any medium whatsoever, everywhere and forever, including all copyrights therein throughout the world, free and clear of any adverse claims and interests.<sup>38</sup>

The Phillies also continued to commission H/E to create new artwork and designs, update older artwork, and repair costumes related to the Phanatic.<sup>39</sup> The Phanatic was an investment and, over the years, has become an integral part of the team's identity. Further, the Phillies have registered trademarks for various products associated with the Phanatic ranging from clothing to toys to decorations.<sup>40</sup> In total, the Phillies have paid H/E over \$780,000 following the 1984 Agreement, because the team continued to commission H/E for work relating to the Phanatic.<sup>41</sup>

### *B. The Phanatic is at Risk of Becoming a Free Agent*

In June 2018, however, H/E issued the Phillies with a notice of termination of the 1984 Agreement, threatening the Phillies's use of the Phanatic and potentially making the Phanatic a "free agent."<sup>42</sup> The notice seemed to be H/E's attempt to start a renegotiation of the 1984 Agreement and demand more money. It asserted that H/E was the legal author of the Phanatic and could terminate the Phillies's rights to use the Phanatic beginning June 15, 2020, as termination provisions of copyright law allow authors to reclaim rights after thirty-five years.<sup>43</sup> The termination provisions specifically state that "termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant."<sup>44</sup> Prior to the addition of these rights to the Copyright Act in 1976, authors were not entitled to terminate any grants.<sup>45</sup> However, this addition was critical as lawmakers realized that, compared to corporations, authors

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38. *Id.* at \*10–11.

39. *Id.* at \*13.

40. McCann, *supra* note 9 (listing items in which the Phillies have registered trademarks related to the Phanatic).

41. *Phillies*, 2021 U.S. Dist. LEXIS 243554, at \*13.

42. *Id.* at \*13–14, \*17.

43. *Id.* at \*14; 17 U.S.C. § 203(a)(3); McCann, *supra* note 9; *Phillies File Suit to Keep Ownership of Phillie Phanatic*, NBC SPORTS PHILADELPHIA (Aug. 2, 2019), <https://www.nbcsports.com/philadelphia/phillies/phillies-file-suit-keep-ownership-phillie-phanatic>.

44. 17 U.S.C. § 203(a)(3).

45. Jeanne Hamburg & David H. Siegel, *Terminate Copyright Grants Correctly or Risk Losing Your Rights*, THE NAT'L L. REV. (Jul. 30, 2021), <https://www.natlawreview.com/article/terminate-copyright-grants-correctly-or-risk-losing-your-rights>.

often ended up in disadvantaged bargaining positions.<sup>46</sup> Thus, by allowing authors to terminate a grant of rights within a specified time after thirty-five years, authors are able to regain a revenue stream, because, as the law acknowledges, some works will greatly increase in value over the years in ways not originally predicted.<sup>47</sup>

In response to the termination notice, the Phillies hired illustrator and graphic designer Tom Sapp “to make alterations and modifications to H/E’s Phanatic design, with the express intent of creating a derivative work[.]”<sup>48</sup> The Phillies filed suit against H/E in 2019,<sup>49</sup> hoping the new work would allow them to continue using the Phanatic if the 1984 Agreement was successfully terminated. In total, the Phillies raised seven claims in the lawsuit.<sup>50</sup> However, this Article will focus on the fourth, in which the Phillies asserted that it is the author of the Phanatic character.<sup>51</sup> The team claimed this authorship because it “brought to life” the Phanatic costume.<sup>52</sup> If this assertion had been confirmed, it would have potentially barred H/E’s termination of the Phillies’s rights to the Phanatic, allowing the Phanatic to remain the beloved Philadelphia mascot. It could have also changed the standard for how mascots are viewed and protected in the realm of copyright law.

### III. COPYRIGHT LAW

Copyright law is rooted in the United States Constitution, which states that Congress has the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]”<sup>53</sup> The Copyright Act of 1976 (Act) is Congress’s latest attempt at codifying these constitutional powers. The Act states that “[c]opyright protection subsists . . . [of] original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a

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46. *Id.*

47. *Id.*

48. *Phillies*, 2021 U.S. Dist. LEXIS 243554, at \*14.

49. *Id.* at \*16. This lawsuit was settled in 2021, allowing the Phillies to continue using the original Phanatic. Todd Zolecki, *Phillies Welcome Back Original Phanatic*, MLB (Nov. 17, 2021), <https://www.mlb.com/news/phillies-settle-phanatic-lawsuit>. Although the settlement is confidential, Harrison and Erickson, who sought millions in the suit, will be paid an undisclosed amount of money by the Phillies. *Id.*

50. *Id.*

51. *Phillies*, 2021 U.S. Dist. LEXIS 243554, at \*17.

52. *Id.*

53. U.S. CONST. art. I, § 8, cl. 8.

machine or device.”<sup>54</sup> In general, for a work created on or after January 1, 1978, the copyright lasts for the life of the author plus seventy years following the author’s death.<sup>55</sup> However, this term varies in length following the death of an author if it is a joint work or a work made for hire.<sup>56</sup>

The Act does not define the term “original.” This omission was made because “[t]he phrase ‘original works of authorship’ . . . is intended to incorporate without change the standard of originality established by the courts under the present [1909] copyright statute.”<sup>57</sup> There is no novelty requirement as there is with patents.<sup>58</sup> Instead, only originality is needed, and a work is original if the work originates from an author and is independently created, not copied.<sup>59</sup> This requirement allows for flexibility in what may be copyrighted. A work that is almost identical to another can receive protection as long as the author put in independent efforts to create the work.<sup>60</sup>

The phrase “works of authorship” was also left undefined in the Act to allow for flexibility.<sup>61</sup> The Act enumerates eight broad categories of works entitled to copyright protection. These categories are listed in Section 102(a) of the Act and include “(1) literary works; (2) musical works, . . . ; (3) dramatic works, . . . ; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”<sup>62</sup> Nevertheless, House Report 94-1476, which details the revisions to copyright law, makes it clear that other types of works may be entitled to

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54. 17 U.S.C. § 102(a).

55. 17 U.S.C. § 302(a).

56. *Duration of Copyright*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/circs/circ15a.pdf> (last revised Feb. 2023) (explaining that “[f]or a ‘joint work prepared by two or more authors who did not work for hire,’ the term lasts for 70 years after the last surviving author’s death[, and f]or works made for hire . . . , the duration of copyright is 95 years from first publication or 120 years from creation, whichever is shorter . . .”).

57. 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 2.01[A] (2022) (quoting H.R. REP. No. 94-1476, at 51 (1976)).

58. Under patent law, a process, machine, manufacture, or composition of matter is generally patentable if the invention is new, useful, and non-obvious. 35 U.S.C. § 101; 35 U.S.C. § 103. The novelty requirement is a key condition to patentability and precludes an individual from obtaining a patent if the claimed invention was “patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention[.]” 35 U.S.C. § 102(a)(1).

59. NIMMER & NIMMER, *supra* note 57, § 2.01[A][1].

60. *Id.*; see also *Mag Jewelry Co. v. Cherokee, Inc.*, 496 F.3d 108, 119 (1st Cir. 2007) (explaining how a work that is seemingly a copy of another is actually an original work entitled to copyright protection).

61. H.R. REP. No. 94-1476, at 51.

62. 17 U.S.C. § 102(a).

protection, because “[a]uthors are continually finding new ways of expressing themselves[.]”<sup>63</sup> “[I]t is impossible to foresee the forms that these new expressive methods will take.”<sup>64</sup> This scope is not unlimited but is not so restrictive that copyright protection can never expand,<sup>65</sup> which protects the promotion of creativity, a goal established in the Constitution. It is necessary to note, however, that copyright protection does not extend to ideas, processes, methods of operation, procedures, systems, principles, concepts, or discoveries.<sup>66</sup>

Next, the Act states the work must be fixed in a “tangible medium of expression” using broad language.<sup>67</sup> The medium may be “now known or later developed,”<sup>68</sup> and “the fixation is sufficient if the work ‘can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.’”<sup>69</sup> Under the Act, the copyrightability of a work does not depend on the medium in which the work is fixed.<sup>70</sup> Like the standards set for originality and the forms a work of authorship may take, the standard for what mediums may be used is flexible to allow for changes in technology.<sup>71</sup> The greater focus is on the fixation rather than the medium.<sup>72</sup>

#### A. *Copyright Protection for Characters*

Copyright law has expanded, and across circuits, the prevailing view is that characters are entitled to copyright protection.<sup>73</sup> However, there is a circuit split in the tests used for determining whether a specific character is granted this protection, and it is an unsettled area of the law.<sup>74</sup> The split is demonstrated by the federal

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63. H.R. REP. No. 94-1476, at 51.

64. *Id.*

65. Music, dramatic works, and works of art were not originally protected by copyright law; only maps, charts, and books were protected by the first copyright statute enacted in the 1790s. H.R. REP. No. 94-1476, at 51–52. Those major forms of expression were added in subsequent versions of the copyright statute. *Id.* at 52.

66. 17 U.S.C. § 102(b).

67. 17 U.S.C. § 102(a).

68. *Id.*

69. H.R. REP. No. 94-1476, at 52.

70. *Id.*; see *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1, 17 (1908) (setting artificial distinctions in mediums that the current Act worked on abandoning when the court held that musical compositions are not susceptible to being copied until they have been put in a form that others can see and read).

71. H.R. REP. No. 94-1476, at 52.

72. *Id.*

73. NIMMER & NIMMER, *supra* note 57, § 2.12[A][2]; *Phillies v. Harrison*, No. 19-CV-7239 (VM) (SN), 2021 U.S. Dist. LEXIS 243554, at \*61–62 (S.D.N.Y. Aug. 10, 2021).

74. Haley Zenenberg, *Obtaining Copyright Protection in Character Cases? A Monstrous Hurdle Indeed*, BROOKLYN SPORTS & ENT. L. BLOG (Feb. 23, 2022), <https://sports->

appellate courts from the Ninth Circuit and Second Circuit, the two circuits that established the two prevailing tests: the distinct delineation test and the story being told test, which was reworked into the *Towle* test.<sup>75</sup>

### B. *The Distinct Delineation Test*

In the Second Circuit, there are two requirements characters must meet in order to satisfy the distinct delineation test and be protected under copyright law. This test was established in 1930 in the copyright infringement case *Nichols v. Universal Pictures Corp.*<sup>76</sup> In that case, Anne Nichols was the author of the play *Abie's Irish Rose* and alleged that the defendant's motion picture, *The Cohens and The Kellys*, was taken from it.<sup>77</sup> *Abie's Irish Rose* tells the story of a Jewish boy and an Irish Catholic girl who secretly marry despite their families wishing they would marry someone within their respective faiths.<sup>78</sup> The families disapprove when they learn of the marriage and try to find a way to dissolve the union.<sup>79</sup> The play concludes with the families reconciling when they learn that the couple had twins and that each would bear the name of a grandparent.<sup>80</sup> Ultimately, the court found that the characters from *Abie's Irish Rose*, like the theme, were "too generalized an abstraction."<sup>81</sup> If these characters were afforded copyright protection, it would have broadened the copyright too much so that what was not original to the author would also be protected.<sup>82</sup>

Through the court's comparison of the works, the court laid out the foundation of the distinct delineation test, which looks at how developed a character is.<sup>83</sup> The first requirement is that characters are entitled to this protection when original works of authorship that are protected by copyright law themselves embody the characters.<sup>84</sup> This requirement emphasizes the fundamental point of copyright protection: it protects the expression of ideas rather than the ideas themselves. Second, for protection, a character must be

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entertainment.brooklaw.edu/film-tv/obtaining-copyright-protection-in-character-cases-a-monstrous-hurdle-indeed/.

75. *Id.*

76. 45 F.2d 119 (2d Cir. 1930).

77. *Id.* at 120.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 122.

82. *Id.*

83. *Id.* at 121.

84. *See id.*

“sufficiently delineated.”<sup>85</sup> The test turns on whether the author fixed the abstract concept of a character in a tangible medium. Part of this analysis for sufficient delineation requires the court to consider whether the author sufficiently described a character’s conceptual and physical qualities through texts, graphics, or both. Overall, the distinct delineation test is summed up as “the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.”<sup>86</sup>

### C. *From the Story Being Told Test to the Towle Test*

On the other hand, the Ninth Circuit developed its test in two prominent cases: *Warner Bros. Pictures v. Columbia Broadcasting System, Inc.*<sup>87</sup> and *DC Comics v. Towle*.<sup>88</sup> First, in *Warner Bros. Pictures*, Dashiell Hammett entered into a contract with Alfred A. Knopf, Inc. to publish and copyright his story, *The Maltese Falcon*.<sup>89</sup> Following the publication of the book, Knopf and Hammett granted Warner Bros. certain rights.<sup>90</sup> Hammett claimed that the rights acquired by Warner Bros. did not include the exclusive right to use the characters from *The Maltese Falcon*.<sup>91</sup> With this belief, Hammett used characters from *The Maltese Falcon*, including the leading character Sam Spade, in radio, television, and motion pictures.<sup>92</sup> Warner Bros. alleged copyright infringement and unfair use and competition because of Hammett’s reuse of Sam Spade and other characters.<sup>93</sup> The court concluded that while the characters were unable to be copyrighted themselves, they could be used in other stories, because “[t]he characters were vehicles for the story told, and the vehicles did not go with the sale of the story.”<sup>94</sup>

In coming to its conclusion in *Warner Bros. Pictures*, the court created its first attempt at clarifying the law surrounding the copyrightability of characters, the story being told test.<sup>95</sup> The test states that characters may be afforded copyright protection if “the character really constitutes the story being told, but if the character

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85. *See id.*

86. *Williams v. Crichton*, 84 F.3d 581, 589 (2d Cir. 1996) (quoting *Nichols*, 45 F.2d at 121).

87. 216 F.2d 945 (9th Cir. 1954).

88. 802 F.3d 1012 (9th Cir. 2015).

89. *Warner Bros. Pictures*, 216 F.2d at 946.

90. *Id.*

91. *Id.* at 948.

92. *Id.*

93. *Id.* at 948–49.

94. *Id.* at 950.

95. *See id.*



is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright.”<sup>96</sup> This test indicates that while the line is indefinite, a character must take on a significant role or personality aside from the original portrayal.

After several other attempts at clarifying the standard,<sup>97</sup> the Ninth Circuit further defined the story being told test in its adjudication of *Towle*, especially concerning the scope of protection for movie, television, and comic book characters.<sup>98</sup> In 2015, the court in *Towle* had to decide whether Mark Towle infringed on DC Comics’s copyright when he built and sold replicas of the Batmobile as it appeared in the television show *Batman* and the movie *BATMAN*.<sup>99</sup> The court found that DC Comics owns a copyright interest in the Batmobile character<sup>100</sup> and, in doing so, held that for determining whether a character is entitled to copyright protection: “First, the character must generally have ‘physical as well as conceptual qualities.’ Second, the character must be ‘sufficiently delineated’ to be recognizable as the same character whenever it appears. . . . Third, the character must be ‘especially distinctive’ and ‘contain some unique elements of expression.’”<sup>101</sup>

When applying this new test to the Batmobile, the court explained that the Batmobile met all three prongs and qualified for copyright protection as a character.<sup>102</sup> First, because the Batmobile appeared in comic books, a television series, and a movie, it had “physical as well as conceptual qualities.”<sup>103</sup> Applying the second prong, the court decided that the Batmobile was consistent and recognizable whenever it was pictured because it kept the same physical and conceptual qualities throughout its various appearances.<sup>104</sup> For example, the Batmobile typically has a bat-like appearance and is a “crime-fighting car with sleek and powerful characteristics that allow Batman to maneuver quickly while he fights villains.”<sup>105</sup>

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96. *Id.*

97. *Walt Disney Prods. v. Air Pirates* was the most notable of these attempts, distinguishing between graphic and literary characters. 581 F. 2d 751 (9th Cir. 1978). In this case, the court held that Disney’s characters were not precluded from copyright protection, because comic book characters with physical and conceptual qualities are more likely to have unique elements of expression, distinguishing them from purely literary characters. *Id.* at 755.

98. *Zenenberg*, *supra* note 74.

99. *DC Comics v. Towle*, 802 F.3d 1012, 1015 (9th Cir. 2015).

100. *Id.* at 1024.

101. *Id.* at 1021 (first quoting *Air Pirates*, 581 F.2d at 755; then citing *Rice v. Fox Broad. Co.*, 330 F. 3d 1170, 1175 (9th Cir. 2003); and then quoting *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008)).

102. *Towle*, 802 F.3d at 1022.

103. *Id.* at 1021.

104. *Id.*

105. *Id.*

Finally, the court held that the Batmobile was especially distinctive and was more than a stock character.<sup>106</sup> The Batmobile has a unique name in addition to the various characteristics as Batman's sidekick that the court described.<sup>107</sup>

The *Towle* test sets a much higher bar for authors to meet to obtain protection for their characters.<sup>108</sup> The second prong of the test requires consideration of whether the character displays consistent, identifiable character traits and attributes throughout different productions.<sup>109</sup> The character, however, does not need to have a consistent appearance.<sup>110</sup> When applying the third prong, the character cannot be a stock character, but the character may be protected even if it does not obtain any sentient attributes and does not speak.<sup>111</sup>

#### D. *The Seventh Circuit Weighs In*

Another variation of the tests for protecting characters under copyright law came from the Seventh Circuit in 2004 in *Gaiman v. McFarlane*.<sup>112</sup> Although less widely known and referenced, this decision implicates a stock character test, which draws from principles of the *scènes à faire* doctrine.<sup>113</sup> This case considered whether the characters Medieval Spawn and Count Nicholas Cogliostro from the comic book *Spawn* were copyrightable.<sup>114</sup> McFarlane began publishing *Spawn* in 1992 after forming his own publishing house.<sup>115</sup> He invited Gaiman, along with three other writers, to create a script for one issue of the comic.<sup>116</sup> Gaiman accepted and wrote the script for issue No. 9.<sup>117</sup> In this script, Gaiman introduced Medieval

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106. *Id.* at 1022.

107. *Id.*

108. Zenenberg, *supra* note 74.

109. *Towle*, 802 F.3d at 1021.

110. *Id.*

111. *Id.*

112. 360 F.3d 644 (7th Cir. 2004).

113. Kathleen Hanley, Comment, *Character Copyrightability in Chaos: How Unclear Character Copyrightability Tests Lead to Improper Results*, 71 AM. U.L. REV. 1145, 1161 (2022). The *scènes à faire* doctrine is a fundamental aspect of copyright law, and it limits what may qualify as copyrightable material. Elements of works that are common to certain genres or mediums are too ordinary to be copyrighted. *Scènes à faire* often include stock characters, settings, and events that are not original and lack creativity. NIMMER & NIMMER, *supra* note 57, § 313.4(I).

114. *Gaiman*, 360 F.3d at 657.

115. *Id.* at 649.

116. *Id.*

117. *Id.*

Spawn and Count Nicholas Cogliostro.<sup>118</sup> He “described, named, and wrote the dialogue for them, but McFarlane drew them.”<sup>119</sup>

The court held that copyright protection should be afforded to both characters, Cogliostro and Medieval Spawn, and that Gaiman and McFarlane were co-owners of the copyrights to the characters.<sup>120</sup> Regarding Cogliostro, the court pointed out his “age, obviously phony title (“Count”), what he knows and says, his name, and his faintly Mosaic facial features.”<sup>121</sup> These characteristics combined to create a character that is distinct due to its specific name and appearance.<sup>122</sup> Regarding Medieval Spawn, the court noted that he was similar to other Hellspawn in *Spawn* No. 9.<sup>123</sup> Additionally, “Medieval Spawn” was not his official name, just a description he came to be known by.<sup>124</sup> The only expressive content that made him stand out was his costume and manner of speech, but that was enough for the court, because “Spawn itself (the original Spawn, . . . Al Simmons) is not a stock character.”<sup>125</sup>

It follows from this decision that the stock character test allows for copyright protection to be afforded to characters when they exhibit something more than the standard features used in a stock character.<sup>126</sup> This test, while drawing on the *scènes à faire* doctrine, is reminiscent of the distinct delineation test, which sought to separate stock characters from those that were originally conceived and sufficiently developed.<sup>127</sup> In contrast to the distinct delineation test, the stock character test may be a lower bar with no clear standard on how much more must be added to a character for it to no longer be just a stock character.

#### IV. ANALYSIS

The Second Circuit’s distinct delineation test was applied in *Phillies v. Harrison*. The court, in this case, recommended that summary judgment be granted in H/E’s favor on the character claim, holding that the Phanatic did not meet the criteria to qualify for

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118. *Id.* at 650.

119. *Id.*

120. *Id.* at 648.

121. *Id.* at 659.

122. *Id.*

123. *Id.* at 661.

124. *Id.*

125. *Id.*

126. See Hanley, *supra* note 113, at 1161.

127. NIMMER & NIMMER, *supra* note 57, § 2.12[A][2]

character protection under copyright law.<sup>128</sup> The court determined, regarding the first requirement that the character must be embodied in an original work of authorship that is itself protected by copyright law, that the Phillies did not meet this element.<sup>129</sup> The Phillies could not claim ownership of a copyrightable character because they could not produce a work of authorship of their own creation that depicts the Phanatic character.<sup>130</sup>

Regarding the second requirement that the character must be sufficiently delineated, the court held that even if the Phillies were able to produce a work of authorship, the Phanatic is not developed enough.<sup>131</sup> Specifically, the court stated that the Phanatic's personality traits along with its name, conduct, and actions, "do not delineate a character of sufficient unique expression to warrant copyright protectability."<sup>132</sup>

As described previously, there are several tests that the circuits use to determine whether a character will be protected under copyright law. Although the distinct delineation test from the Second Circuit is the controlling principle,<sup>133</sup> there are significant differences among the options. While the distinct delineation test states that "the less developed the characters, the less they can be copyrighted[.]"<sup>134</sup> the *Towle* test lays out several requirements that make achieving copyright protection more challenging. With the confusion surrounding the law, leaving authors to guess whether or not they have done enough to have their efforts protected, there needs to be a clearer and more-defined test. This confusion is particularly prevalent when it comes to mascots, and *Phillies v. Harrison* is an example of how an iconic and well-known character may not be afforded protection, arguably because of the lack of clarity in the standard. Therefore, this Article argues that the Judge should have found that the Phanatic qualified for character protection. A clearer standard regarding copyright protection of characters is needed. This new standard should encompass mascots more easily.

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128. *Phillies v. Harrison*, No. 19-CV-7239 (VM) (SN), 2021 U.S. Dist. LEXIS 243554, at \*61 (S.D.N.Y. Aug. 10, 2021).

129. *Id.* at \*66.

130. *Id.*

131. *Id.* Although the court recommended that the Phanatic could not be copyrighted as a character, the Phanatic is validly registered with the U.S. Copyright Office as an "artistic sculpture." *Id.* at \*33–34. Bonnie Erickson and Wayne Harrison obtained this registration on May 4, 1979. *Id.* at \*26.

132. *Id.* at \*67.

133. NIMMER & NIMMER, *supra* note 57, § 2.12[A][2].

134. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

A. *The Phillie Phanatic is “Sufficiently Delineated”*

In using the Second Circuit’s distinct delineation test in *Phillies v. Harrison*, the judge essentially states that, even if the Phillies could provide a copyrightable work, the Phanatic is not “sufficiently delineated” as it is not of sufficient unique expression.<sup>135</sup> The Phanatic, however, should have been found to be “sufficiently delineated.” The controlling principle states that the less developed the character, the less it can be copyrighted.<sup>136</sup> Following this principle, many mascots are given their own unique personas to expand upon the basic concept of a mascot. Dave Raymond used this formula to create the personality of the Phanatic. For example, in an interview, Dave Raymond stated, “The first night I fell over a railing by accident, and people laughed. So I was thinking, I have to fall down more.”<sup>137</sup> He used a mascot’s common traits to begin building the entire character, giving the Phanatic an individual identity. The unique personality in conjunction with the striking look of the Phanatic allows it to be “sufficiently delineated.”

Further, derivative rights come from the form in which an author puts their work. The Phanatic’s character can be compared to characters that have received copyright protection with the necessary delineations. Superman has set the baseline for a copyrightable character. In *Detective Comics, Inc. v. Bruns Publications, Inc.*,<sup>138</sup> the court stated that the defendants “used more than general types and ideas and have appropriated the pictorial and literary details embodied in the complainant’s copyrights.”<sup>139</sup> This decision was one of the first to indicate that Superman was copyrightable, and the court specifically noted that his representations were not just a delineation of Hercules.<sup>140</sup> Superman, along with other characters like James Bond and the Batmobile, are copyrightable because they are “apparent and recognizable whenever they appear[.]”<sup>141</sup> They have character traits that are consistent and identifiable, even though

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135. *Phillies*, 2021 U.S. Dist. LEXIS 243554, at \*66–67.

136. *Nichols*, 45 F.2d at 121 (establishing the distinct delineation test).

137. *The Power of Fun – Dave Raymond, the Original Phillie Phanatic*, *supra* note 25.

138. 111 F.2d 432 (2d Cir. 1940).

139. *Id.* at 433; *see Warner Bros. v. ABC*, 654 F.2d 204, 209 (2d Cir. 1981).

140. *Bruns Publications, Inc.*, 111 F.2d at 433.

141. Gene Markin, *Copyrightability of Fictional Characters – the Difference Between Superman and Chessmen*, STARK & STARK NEWSROOM (Feb. 1, 2021), <https://www.stark-stark.com/blog/copyrightability-of-fictional-characters-the-difference-between-superman-and-chessmen/>; *see Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995) (pointing to Bond’s overt sexuality, sophistication, cold-bloodedness, and love of martinis “shaken, not stirred” as some of the character traits that were specific to Bond and developed throughout sixteen films allowing him to be copyrighted).

their physical characteristics change over various adaptations.<sup>142</sup> Like Superman's reminiscence of Hercules, the Phanatic reminds people of a typical mascot. However, the specific look and actions take the Phanatic past the mark of a general mascot.

Additionally, the Phanatic, like these literary characters, has taken on a persona that has remained consistent throughout its performances and appearances since its introduction in 1978. This consistency is further supported by the fact that other performers adapted how they acted when in the Phanatic costume to what Raymond did as the initial performer.<sup>143</sup> The origin story, displayed by the biography, along with energetic performances have developed the Phanatic's character sufficiently to be afforded copyright protection. To a greater extent, the Batmobile is afforded copyright protection as a character because it is so distinctive and consistently remains so. The Batmobile, as a car with no inherent personality, is considered a character for copyright purposes. Therefore, the Phanatic, which has a significant amount of personality, should also be viewed as a protectable character.

However, even with origin stories and unique looks, highly detailed mascots, such as the Phanatic, may not warrant protection due to the *scènes à faire* doctrine. The *scènes à faire* doctrine holds that particular creative works in a genre are not copyrightable as certain patterns are so recurring and ingrained in a particular genre that they cannot be copyrighted; they are mandatory to the genre and lack the originality needed to be protected by copyright.<sup>144</sup> This doctrine may be construed to apply to mascots as some may view mascots as needing to act a certain way, such as with great charisma and in a childlike manner, to be effective. Some of the Phanatic's traits include being a passionate sports fan, dancing, and taunting, which are those of many other mascots as well. As these are characteristics seen frequently with mascots, those traits may be customary to a mascot's role, thus barring character protection.

In addition to a potential bar by the *scènes à faire* doctrine, there are several cases dissuading judges from holding mascots copyrightable as characters.<sup>145</sup> The most notable of these cases is *KGB*,

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142. Markin, *supra* note 141.

143. *Phillies v. Harrison*, No. 19-CV-7239 (VM) (SN), 2021 U.S. Dist. LEXIS 243554, at \*5-6 (S.D.N.Y. Aug. 10, 2021) (discussing how the subsequent performers followed Raymond's style as the Phanatic to avoid the crowd knowing who the performer was at any point).

144. NIMMER & NIMMER, *supra* note 57, § 313.4(I).

145. See *Lesley v. Spike TV*, 241 F. App'x 357, 358 (9th Cir. 2007); *KGB, Inc. v. Giannoulas*, 104 Cal. App. 3d 844, 857 (Cal. Ct. App. 1980); *Alexander v. Haley*, 460 F. Supp. 40, 45-46 (S.D.N.Y. 1978); *SOFA Ent., Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273, 1279 (9th Cir.

*Inc. v. Giannoulas*.<sup>146</sup> Although a trademark case, the court discusses Ted Giannoulas's appearances as the KGB Chicken,<sup>147</sup> he is also known as the San Diego Chicken due to his appearances at San Diego Padres's games.<sup>148</sup> The court held that the concept of parading as a mascot in an animal costume may be within the public domain.<sup>149</sup> It further commented that: "Certainly it is commonplace and a number of similar fictional animal characters coexist in the media; for example, note Yogi Bear, Smokey the Bear, Winnie the Pooh, and the California Bear acting as mascot for the University of California."<sup>150</sup>

While to this court, it was just a chicken, Giannoulas's San Diego Chicken became "an innovative and enduring figure in sports entertainment."<sup>151</sup> The court referenced *Lugosi v. Universal Pictures*,<sup>152</sup> which discussed "the inheritability of the rights to the 'uniquely individual likeness and appearance of Bela Lugosi in the role of Count Dracula.'"<sup>153</sup> In referencing this case, the court pointed out that Lugosi and Giannoulas made their respective roles their own through a combination of body language, mannerisms, gestures, and other behavior amassing to a unique character.<sup>154</sup> For example, once Giannoulas left KGB, one skit involved the Chicken slapping and tackling "Duffy the Dragon."<sup>155</sup> The court also saw "no reason why the concept of unique individual likeness should not apply to the role of antic chicken whose turns, kicks, tumbles and gyrations have become uniquely those of Giannoulas."<sup>156</sup> The court's discussion implies that there is value to a mascot's work and that an individual's behavior in the costume can create a separate character. Thus, the combination of the performances created by Giannoulas and the look of the costume gave the Chicken its value.

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2013); *Alexander v. Murdoch*, No. 10 Civ. 5613 (PAC) (JCF), 2011 U.S. Dist. LEXIS 79543, at \*24–25 (S.D.N.Y. May 27, 2011); *Fun With Phonics, LLC v. LeapFrog Enters., Inc.*, No. CV 09-916-GHK (VBX), 2010 U.S. Dist. LEXIS 146641, at \*18–19 (C.D. Cal. Sept. 10, 2010); *but cf. Metro-Goldwyn-Mayer, Inc.*, 900 F. Supp. at 1296.

146. 104 Cal. App. 3d 844.

147. *Id.* at 846.

148. Fred Rogers, *Ted Giannoulas (San Diego Chicken)*, SOC'Y FOR AM. BASEBALL RSCH., <https://sabr.org/bioproj/person/ted-giannoulas-san-diego-chicken/> (last visited Feb. 5, 2023).

149. *KGB, Inc.*, 104 Cal. App. 3d at 857.

150. *Id.*

151. John Racanelli, *Profiles in Plumage: The San Diego Chicken*, SOC'Y FOR AM. BASEBALL RSCH., [https://sabr.org/journal/article/profiles-in-plumage-the-san-diego-chicken/#\\_ednref52](https://sabr.org/journal/article/profiles-in-plumage-the-san-diego-chicken/#_ednref52) (last visited Feb. 27, 2023).

152. 25 Cal. 3d 813 (1979).

153. *KGB, Inc.*, 104 Cal. App. 3d at 854.

154. *Id.* at 855.

155. Racanelli, *supra* note 151.

156. *KGB, Inc.*, 104 Cal. App. 3d at 855.

*B. How to Overcome the Requirement of Fixation in a Tangible Work of Authorship*

Regardless of whether a mascot is sufficiently delineated, the character and its traits must be shown in a tangible work of authorship that delineates them, which was the downfall of the Phillies and the Phanatic.<sup>157</sup> The Phillies could not satisfy this initial requirement of the distinct delineation test. The Phillies submitted four videos of Dave Raymond's performances as the Phanatic for the requirement.<sup>158</sup> The videos, however, could not be authenticated, so they could not be used.<sup>159</sup> Nevertheless, the requirement of fixation in a tangible work of authorship is fundamental to copyright law.<sup>160</sup> Without this requirement, ideas, which are specifically excluded from copyright law, could obtain protection.

The lack of tangible works of authorship is a hurdle that could be common to mascots in general, because their personalities and how they act are typically displayed throughout live performances at games and other appearances. Performances are only copyrightable when they give way to an established copyrightable work, such as a motion picture or sound recording.<sup>161</sup> Thus, when creating a mascot, the creators should ensure that they have a plan to address this requirement.

Several actions have demonstrated ways for creators to incorporate a tangible work of authorship into the creation of a mascot. Currently, the Phillies have a biography for the Phanatic on their website.<sup>162</sup> As a website is copyrightable,<sup>163</sup> a page of this nature could serve as one tangible work of authorship to support the delineation of a character. The Boston Red Sox, despite having a

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157. *Phillies v. Harrison*, No. 19-CV-7239 (VM) (SN), 2021 U.S. Dist. LEXIS 243554, at \*66 (S.D.N.Y. Aug. 10, 2021).

158. *Id.* at \*65.

159. *Id.* at \*65–66. The videos could not be authenticated and were therefore unusable because who made the videos and when they were made could not be certified—it did not matter that Raymond declared that he was in the videos without this other information. *Id.* at \*65.

160. The Act itself states that works must be fixed in a tangible medium for copyright rights to attach. 17 U.S.C. § 102(a).

161. NIMMER & NIMMER, *supra* note 57, § 2.12[B][1].

162. The Phanatic's biography includes information such as size, physical attributes, birthplace, favorites, and hobbies. *Phillie Phanatic*, MLB, <https://www.mlb.com/phillies/fans/phillie-phanatic> (last visited Jan. 8, 2023).

163. *Copyright Registration of Websites and Website Content*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/circs/circ66.pdf> (last revised Mar. 2021) (explaining that a website may be registered if it satisfies the statutory requirements for collective works or compilations).



biography on their website,<sup>164</sup> initially chose a different route and released a children's book entitled *The Legend of Wally the Green Monster* when debuting their mascot, Wally.<sup>165</sup> The book describes Wally's origins and, like a website, is in a copyrightable form.

C. *The Test for Copyright Protection of Characters Should Be a Mixed Standard*

The Phanatic and mascots from other teams are often unique and should be treated as such. Likely, a mascot that is simply an animal, like a tiger, or that has only a t-shirt with a team's logo to differentiate from another would not qualify for protection when compared with mascots that are more specific or unique.<sup>166</sup> Frequently, the mascots that are specific or unique, such as the Phanatic, become a recognizable part of that brand's image and should be entitled to greater protections than the general mascots. However, with no hard and fast rules that distinctly lay out how developed a character must be, the decision is left up to the courts on a case-by-case basis.

In *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*,<sup>167</sup> the Ninth Circuit case that is part of the circuit split, the court attempted to draw such a line with the story being told test. The greatest benefit to the story being told test is that it is a clearer standard than the distinct delineation and stock character tests. The story being told test requires a court to consider the development of the character along with the development of the entire story.<sup>168</sup> Thus, protection of a character apart from the work is granted "when a character's role in a particular literary work is so dominant that it embodies the development of the story."<sup>169</sup> However, this test is criticized for being too restrictive, supporting a move for broader copyright protection of characters.<sup>170</sup> The restrictiveness likely narrows the opportunity for character protection too much and outweighs any clarity the test provides. More specifically,

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164. *About Wally the Green Monster*, MLB, <https://www.mlb.com/redsox/fans/mascots/about-wally> (last visited Feb. 5, 2023).

165. MAXWELL M. CAREY, *THE LEGEND OF WALLY THE GREEN MONSTER* (1997); Jarvis & Coleman, *supra* note 2, at 1640–41.

166. *KGB, Inc. v. Giannoulas*, 104 Cal. App. 3d 844, 857 (Cal. Ct. App. 1980) (using fictional bears to explain that the concept of parading as a mascot may be in the public domain because multiple bear characters exist with no one creator having a monopoly over them all).

167. 216 F.2d 945 (9th Cir. 1954).

168. Samuel J. Coe, *The Story of a Character: Establishing the Limits of Independent Copyright Protection for Literary Characters*, 86 CHI.-KENT L. REV. 1305, 1322 (2011).

169. *Id.*

170. *Id.* at 1306; NIMMER & NIMMER, *supra* note 57, § 2.12[A][3][a].

the story being told test may envision “a ‘story’ devoid of plot, wherein character study constitutes all, or substantially all, of the work,”<sup>171</sup> and would “for most practical purposes, . . . effectively exclude characters from the orbit of copyright protection.”<sup>172</sup> The same criticism has also been applied to the *Towle* test, because “unless plaintiffs can prove that their character falls into one of two categories, iconic or wholly novel, it is unlikely that the court will extend the character copyright protection.”<sup>173</sup> These tests may go too far and interrupt the balancing of an author’s rights with the promotion of creativity, a fundamental goal of copyright law established in the U.S. Constitution. In addition, originality is a crucial component of analyzing whether a work is copyrightable, and the term was left undefined in the Act. If originality allows a work almost identical to another to receive protection as long as the author put in independent efforts to create the work,<sup>174</sup> then a broader test, unlike the story being told test or *Towle* test, would be favored to balance the constitutional considerations.

The distinct delineation test and the stock character test are broader standards that likely better balance the constitutional goals of copyright law. However, these tests seem too broad. Regarding the distinct delineation test, there has been no clarification on what “sufficiently delineated” means. As demonstrated with the *Phanatic*, this test leaves it up to the judge to decide whether a character is developed enough to be afforded protection. Therefore, as applied to the character of mascots, and potentially more generally to characters as an entire class, a test that combines the standards set throughout the circuits would likely provide a more precise standard for judges to assess cases while not opening the floodgates to protection for every mascot.

Several proposals and arguments have previously been made regarding the tests for copyrighting characters. Some believe that one of the existing tests is the best way to protect characters,<sup>175</sup> while some have argued for amending copyright law and creating a

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171. NIMMER & NIMMER, *supra* note 57, § 2.12[A][3][a].

172. *Id.*

173. Zenenberg, *supra* note 74.

174. NIMMER & NIMMER, *supra* note 57, § 2.01[A][1].

175. Coe, *supra* note 168, at 1322 (arguing that “[t]he ‘story being told’ test provides a reliable model that courts can apply in both the determination of whether a character should be protected and the subsequent substantial similarity analysis for infringement claims.”); Hanley, *supra* note 113, at 1175 (discussing how “[t]he ‘stock character’ test most appropriately provides authors the ability to copyright truly unique characters without having to meet a myriad of various interrelated, yet undefined, elements of different tests.”).

separate category for characters.<sup>176</sup> Still, others have suggested new tests all together. For instance, a predictability test has been proposed that would protect characters when they are able to be placed in a new plot or situation and act in a predictable way that is still unique to the character's style.<sup>177</sup> This proposed test would have the court look at the physicality, story of origin, and behavior of the character.<sup>178</sup> When each of these categories evidence "something distinctive enough to make the character predictable[,]” the character should be copyrightable.<sup>179</sup>

However, a combination of the distinct delineation test and the *Towle* test is likely the most effective way to offer copyright protection to mascots as characters. This proposed test distinguishes between mascots with little development and mascots with a unique look that have become an integral part of the brand they represent. The first element of this test would be to provide a tangible work of authorship that displays the character and its persona.<sup>180</sup> In the case of mascots, one way to satisfy this requirement would be to follow the lead of the Boston Red Sox and release a book or other form of media that gives the mascot an origin story.

The second requirement is the combination of the distinct delineation test and the *Towle* test. As mascots, and other characters, may be continuously developed over time, this combination would allow that development to be fully taken into account. Thus, the second requirement would be that a mascot's character is sufficiently delineated when it is developed enough with consistent traits and unique elements of expression to be recognizable whenever it appears. It does not need to be especially distinctive but must have a level of creativity that takes it beyond a stock character. For mascots, the development of a truly distinctive character may take time, but several factors, such as persona, backstory, look, and significance to the brand, should be considered. When the factors weigh past the point of a stock character, and there is a consistent appearance, there is sufficient delineation. Thus, this element may be satisfied by mascots, such as the Phanatic, with a unique look,

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176. David B. Feldman, Comment, *Finding a Home for Fictional Characters: A Proposal for Change in Copyright Protection*, 78 Calif. L. Rev. 687, 712 (1990).

177. Mark Bartholomew, Article, *Protecting the Performers: Setting a New Standard for Character Copyrightability*, 41 SANTA CLARA L. REV. 341, 370 (2001) (analyzing how character copyrightability may be applied to human performance characters with a predictability test).

178. *Id.* at 371.

179. *Id.*

180. A tangible work of authorship will always be needed to afford a character copyright protection as it is a clear statutory requirement. 17 U.S.C. § 102(a).

background, and personality consistently shown at games and appearances.<sup>181</sup>

The distinct delineation test left the decision of what was sufficient to judges leading to a potential for overprotection of characters. When Judge Learned Hand articulated the distinct delineation test, no guidance was given to know when a character was sufficiently delineated. The lack of guidance led courts “to us[e] ‘I know it when I see it’ logic when determining if a character is copyrightable.”<sup>182</sup> In contrast, the *Towle* test gave an idea of what must be considered for a character to be sufficiently delineated but went too far. The first prong stated that the character must have physical and conceptual qualities, which may limit the protection to characters with a visual aspect to them.<sup>183</sup> Further, the second prong that a character must be ‘sufficiently delineated’ so that it is recognizable whenever it appears still does not give much guidance as to when ‘sufficient delineation’ by a character is met.

The proposed test sets the appropriate bar of copyrightability for characters, because it balances the criticisms of the distinct delineation test and the *Towle* test. It seeks to give guidance to the courts for when a character warrants copyright protection, what the distinct delineation test lacked, through the influence of the *Towle* test’s second and third prongs. By setting up guideposts for the court to follow, the proposed test will allow courts to exercise their discretion in a consistent manner. Additionally, the test will not be as restrictive as the *Towle* test, because, although it is proposed in a manner relevant to mascots, it could be applied to other literary or visual characters as well. A character can develop through time without the need to be “iconic or wholly novel.”<sup>184</sup>

## V. CONCLUSION

In conclusion, one test should be adopted to analyze whether a character is copyrightable. The confusion surrounding this area of copyright law makes it difficult for teams and authors to know if they can protect these valuable assets. The Second Circuit and the Ninth Circuit created the most widely-used tests. The Second Circuit’s distinct delineation test states that the less developed the

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181. For example, the Phanatic is not a recognizable animal. The Phanatic is covered in bright green fur and has an extra-long beak with a long, curled up tongue with pink eyelashes and powder blue eyebrows.

182. Hanley, *supra* note 113, at 1165.

183. This application to visual characters is in contrast to the traditional prior application of the story being told test to literary characters. *Id.* at 1169.

184. Zenenberg, *supra* note 74.

character is, the less it is able to be copyrighted. This test sets a low bar and leaves it up to the judges, whether they are experienced in copyright law or not, to decide if a character has been “sufficiently delineated.” The Ninth Circuit has made several attempts at creating a test to evaluate characters appropriately. Starting with the story being told test, the Ninth Circuit expanded upon that iteration to establish the *Towle* test. However, the court may have gone too far with this test, making it especially difficult for characters, and even more so mascots, to be copyrighted. The Seventh Circuit recently attempted to set a standard and created the stock character test, which is reminiscent of the distinct delineation test. This version, though, is an even lower bar than the standard set by the Second Circuit and incorporates the *scènes à faire* doctrine.

A more compelling test for copyrighting mascots as characters would involve a combination of the distinct delineation and *Towle* tests. A test of this nature would promote creativity yet prevent mascots that are just stock characters or have little development from gaining too much protection. In addition, it would adhere to the fundamental principles of copyright law by still requiring the fixation of the mascot or character in a tangible work of authorship.

When revealing a new mascot, a team may need to produce a video or story that details the mascot’s origins to ensure that there is a tangible work of authorship and a baseline to develop the character further during performances. The Phillies have started to do this with the Phanatic’s biography on their website, while the Boston Red Sox released a children’s book about Wally the Green Monster.

All in all, one of the overarching goals of copyright law is to promote creativity, and there is no better example of creativity than the Phanatic. *Phillies v. Harrison* serves as an example of the importance of ensuring that mascots and characters are properly created and protected. If the Phillies could produce a tangible work of authorship, the Phanatic should be entitled to copyright protection as a character because it is sufficiently delineated. Nevertheless, the new test proposed would also allow the Phanatic to be copyrighted under the current circumstances. The new test would also make character protection for mascots more easily accessible for teams. As mascots, like the Phanatic, become significant components of their team’s brands, the law must recognize their value with character protection to ensure their antics will be enjoyed by generations to come.

# State of Confusion: Underinsured Motorist Coverage in Pennsylvania and the Opportunity to Get it Right

*Logan Bennett\**

“[W]e acknowledge that this area of the law is not particularly clear and straightforward.”<sup>1</sup>

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## I. INTRODUCTION

Automobiles play a critical role in modern society. While many opt for alternative modes of transportation—for example public transportation, walking, and biking—the automobile remains the

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1. *Erie Ins. Exch. v. Mione*, 253 A.3d 754, 760 (Pa. Super. Ct. 2021).

most popular method in America.<sup>2</sup> Despite the obvious convenience of a personal vehicle, car accidents are a foreseeable but unfortunate consequence of driving. There are an average of six million car accidents in the United States each year.<sup>3</sup> In Pennsylvania alone, there were over 115,000 car accidents reported in 2022, with the most common vehicle type involved being passenger cars.<sup>4</sup>

Fortunately, Pennsylvania is a state that requires certain types of automobile insurance, one of which is bodily injury liability coverage; the liability coverage insuring the person responsible for the collision is, generally, the first level of compensation for those who are injured as a result of those accidents.<sup>5</sup> Mandating coverage eases the financial difficulties associated with car accidents, but liability coverage amounts may be insufficient to cover the extent of injuries in the event of truly serious car accidents, where operators are significantly injured. Underinsured motorist (UIM) coverage fills the gap when a tortfeasor's insurance coverage is insufficient and plays an important role at the intersection of car insurance and litigation.

UIM coverage protects operators involved in an accident with at-fault drivers who do not have sufficient bodily injury liability coverage to compensate for the losses resulting from the accident.<sup>6</sup> UIM coverage is an optional coverage that individuals can purchase to establish additional protection from situations where the tortfeasor's liability coverage is insufficient.<sup>7</sup> The primary distinction between mandated liability coverage and UIM coverage, however, is that one makes a claim under their own insurance policies, rather than the tortfeasor's for UIM recovery.<sup>8</sup>

Trouble arises, however, in states like Pennsylvania where UIM coverage is not required.<sup>9</sup> This article analyzes the current state of underinsured motorist coverage in Pennsylvania and proceeds with three sections. The first section examines the background of UIM coverage in Pennsylvania, including the relevant statutory code,

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2. Felix Richter, *Cars Still Dominate the American Commute*, STATISTA, (May 12, 2022), <https://www.statista.com/chart/18208/means-of-transportation-used-by-us-commuters/>.

3. *30+ Car Accident Statistics in the U.S. & Worldwide in 2022*, VEHICLE FREAK, (May 25, 2022), <https://vehiclefreak.com/car-accident-statistics/>.

4. PA. DEP'T OF TRANSP., PA. CRASH FACTS AND STATISTICS 6 (2022).

5. *Automobile Insurance Guide*, PA. INS. DEP'T, <https://www.insurance.pa.gov/Coverage/Auto/Pages/Auto-Insurance-Guide.aspx> (last visited Nov. 5, 2023).

6. Mary Phelan D'Isa, *How Does Underinsured Motorist Coverage Work?*, LAWYERS.COM (July 13, 2022), <https://www.lawyers.com/legal-info/personal-injury/types-of-personal-injury-claims/how-does-underinsured-motorist-coverage-work.html>.

7. *Id.*

8. *Id.*

9. *Automobile Insurance Guide*, *supra* note 5.

important case law, policy exclusions, and previously proposed legislation.<sup>10</sup> The second section analyzes the positive and negative effects of recent and forthcoming case law and prospective changes in legislation.<sup>11</sup> The third and final section argues that (1) legislative intervention will alleviate the primary issues currently associated with UIM coverage in Pennsylvania and (2) legislative intervention will operate favorably for all parties involved in insurance disputes.<sup>12</sup>

## II. BACKGROUND

### A. *The Pennsylvania Motor Vehicle Financial Responsibility Law*

The Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL) provides the statutory framework for legal disputes regarding car insurance.<sup>13</sup> Since its enactment in 1984, Pennsylvania judges have used the MVFRL to make determinations in legal disputes involving car insurance.<sup>14</sup> But recent case law and legislative intervention in this area could have a tremendous impact on fundamental legal principles in automobile insurance law prospectively.

To fully grasp the scale of the issues surrounding automobile insurance law in Pennsylvania, it is first important to understand the structure of the MVFRL and all that it covers. The MVFRL “defines an individual’s rights when injured in a car accident.”<sup>15</sup> Under the MVFRL, an insured includes: the individual named as an insured on the policy for motor vehicle liability insurance; spouses or relatives of the named insured who reside with the named insured; and minors in the custody of the named insured who reside with the named insured.<sup>16</sup> The Pennsylvania Supreme Court has explained that one of the principal legislative concerns in enacting the MVFRL was to combat rising costs for car insurance.<sup>17</sup> It has also

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10. See *infra* Section II.

11. See *infra* Section III.

12. See *infra* Section IV.

13. 75 PA. STAT. AND CONS. STAT. § 1701 et seq. (West, Westlaw Edge through 2023 Reg. Sess.).

14. John R. Riddell, *What Constitutes a Purchase Under the Pennsylvania MVFRL?*, MARSHALL DENNEHEY (Apr. 1, 2022), <https://marshalldennehey.com/articles/what-constitutes-purchase-under-pennsylvania-mvfrl/>.

15. *Pennsylvania Motor Vehicle Financial Responsibility Law*, LUPETIN & UNATIN, LLC, <https://www.pamedmal.com/blog/pa-motor-vehicle-financial-responsibility-law/> (last visited Oct. 25, 2022).

16. 75 PA. STAT. AND CONS. STAT. § 1702 (West, Westlaw Edge through 2023 Reg. Sess.).

17. See, e.g., *Rump v. Aetna Cas. & Sur. Co.*, 710 A.2d 1093, 1096 (Pa. 1998) (stating “[the] legislative concern over the increasing costs of automobile insurance is the public policy which is advanced when interpreting the statutory provisions of the MVFRL.”); *Paylor v. Hartford Ins. Co.*, 640 A.2d 1234, 1235 (Pa. 1994) (stating “the enactment of the MVFRL



stated, however, that remediation is equally important and, therefore, must be balanced against the cost containment rationale.<sup>18</sup>

In Pennsylvania, one of the mandatory forms of coverage for motor vehicle policies is bodily injury liability coverage.<sup>19</sup> The minimum amount of liability coverage allowed under the MVFRL is “\$15,000 because of an injury to any one person in any one accident, in the amount of \$30,000 because of injury to two or more persons in any one accident and in the amount of \$5,000 because of damage to property of others in any one accident.”<sup>20</sup> Issues arise, however, when the injuries one suffers exceed the \$15,000 minimum policy requirement for liability coverage carried by the driver responsible for the accident. Underinsured motorist coverage is the legislative solution to this problem.

Section 1702 of the MVFRL defines an underinsured motor vehicle as “[a] motor vehicle for which the limits of available liability insurance and self-insurance are insufficient to pay losses and damages.”<sup>21</sup> For every automobile insurance policy issued in Pennsylvania, UIM coverage must be offered to an insured.<sup>22</sup> Such coverage “shall provide protection for persons who suffer injury arising out of the maintenance or use of a motor vehicle and are legally entitled to recover damages therefore from owners or operators of underinsured motor vehicles.”<sup>23</sup> Although UIM coverage is optional, the only means by which an insurance carrier can circumvent providing UIM coverage to an insured is through the insured executing a statutorily compliant rejection.<sup>24</sup> When an insurance carrier fails to meet the statutory requirements for a valid rejection form, UIM

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reflected a legislative concern for the spiraling consumer cost of automobile insurance and the resultant increase in the number of uninsured motorists driving on public highways.”).

18. See, e.g., *Safe Auto Ins. Co. v. Oriental-Guillermo*, 214 A.3d 1257, 1266 (Pa. 2019) (“While we have repeatedly recognized the goal of cost containment, we have consistently observed that there is a balance to be struck between that goal and the remedial purpose of the MVFRL.”); *Williams v. Geico Emps. Ins. Co.*, 32 A.3d 1195, 1210 (Pa. 2011) (Saylor, J., concurring) (noting that he would abandon cost containment as “the overarching policy concern” of the MVFRL because the legislation retains remedial objectives from prior legislative schemes).

19. *Insurance Overview*, PA. DEPT OF MOTOR VEHICLES, <https://www.dmv.pa.gov/VEHICLE-SERVICES/Insurance/Insurance%20Overview/Pages/default.aspx> (last visited Aug. 16, 2023).

20. 75 PA. STAT. AND CONS. STAT. § 1702 (West, Westlaw Edge through 2023 Reg. Sess.). Importantly, § 1711 of the MVFRL states that “[a]ll insurers subject to this chapter shall make available for purchase a motor vehicle policy which contains only the minimum requirements of financial responsibility and medical benefits as provided for in this chapter.” *Id.* at § 1711(b)

21. *Id.* § 1702.

22. *Id.* § 1731(a).

23. *Id.* § 1731(c).

24. *Id.* § 1731(c.1).

coverage under the policy must be equal to the bodily injury coverage, absent a request for lower limits of coverage.<sup>25</sup>

It is important to note that UIM coverage functions as a contract claim, whereby a carrier, in exchange for payment of a UIM policy premium, promises to pay for injuries sustained in an accident caused by someone whose bodily injury coverage is insufficient to compensate for the injuries.<sup>26</sup> Thus, where an insurer refuses or fails to pay UIM benefits, the insured typically brings a breach of contract cause of action.<sup>27</sup>

Another critical aspect to understand is “stacking” of UIM coverage. Stacking is the ability to increase the amount of UIM coverage available to you by either the number of vehicles insured on your policy (intra-policy stacking) or the number of policies under which you are considered an insured (inter-policy stacking).<sup>28</sup> The MVFRL maintains that the limits of coverage for each vehicle owned by an insured “shall be the sum of the limits for each motor vehicle as to which the injured person is an insured.”<sup>29</sup> Stacking applies “[w]hen more than one vehicle is insured under one or more policies” which provide for UIM coverage.<sup>30</sup> For example, if an insured has two vehicles insured for UIM coverage under a single policy with \$100,000 in UIM coverage, if the insured elects for stacking under the policy, \$200,000 in UIM benefits could hypothetically be available to them. Similar to UIM coverage, stacking is the default option and must be waived using specific language in order to be valid.<sup>31</sup> This waiver must also be signed by the first named insured.<sup>32</sup>

### *B. The Household Vehicle Exclusion*

The confusion surrounding UIM coverage is due in part to insurance companies refusing to compensate for claims—for which the

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25. *Id.* §§ 1731(c.1), 1734.

26. *See* *Gallagher v. GEICO Indem. Co.*, 201 A.3d 131, 137 (Pa. 2019) (stating that the Court “must apply general principles of contract interpretation, as, at base, an insurance policy is nothing more than a contract between an insurer and insured.”); *see also* Paul Bucci, *Bodily Injury Car Accident Insurance Coverage in Pennsylvania*, LAFFEY, BUCCI, & KENT, LLP, (Mar. 28, 2013), <https://www.laffeybuccikent.com/bodily-injury-car-accident-insurance-coverage-in-pennsylvania>.

27. *E.g.*, *Gunn v. Auto. Ins. Co. of Hartford*, 971 A.2d 505 (Pa. Super. Ct. 2009).

28. *What Does Stacking Mean on My Pennsylvania Auto Insurance Policy?*, CORDISCO & SAILE LLC, <https://www.cordiscosaille.com/faqs/what-does-stacking-mean-on-my-pennsylvania-auto-insurance-policy> (last visited Aug. 18, 2023).

29. 75 PA. STAT. AND CONS. STAT. § 1738(a) (West, Westlaw Edge through 2023 Reg. Sess.).

30. *Id.*

31. *Id.* § 1738(d). The requirements for a valid stacking waiver are that the waiver must be knowingly and voluntarily made. *Id.* § 1738(d)(2).

32. *Id.* § 1738(e).

insured has been paying premiums—in two significant situations where exclusions are at play. Insurance providers include what is commonly referred to as a Household Vehicle Exclusion in automobile insurance policies. The Household Vehicle Exclusion bars coverage for injuries sustained in an accident involving a vehicle owned by the insured or someone within their household but not listed under the policy from which recovery is sought.<sup>33</sup> Typical language for a Household Vehicle Exclusion is as follows: “This coverage does not apply to bodily injury while occupying or being struck by a vehicle owned or leased by you or a relative that is not insured for Underinsured Motorists Coverage under this policy.”<sup>34</sup>

Historically, the Household Vehicle Exclusion has been upheld by the Pennsylvania Supreme Court.<sup>35</sup> Issues involving the Household Vehicle Exclusion have arisen recently, however, concerning whether the exclusion can be used to prevent an insured from stacking UIM benefits for an accident involving a vehicle owned by the insured, but not insured under the policy at issue, when the insured did not sign a valid stacking waiver.<sup>36</sup>

This issue was addressed in 2019 in the landmark case of *Gallagher v. GEICO Indemnification Company*.<sup>37</sup> In *Gallagher*, the plaintiff was operating a motorcycle when another motorist ran a stop sign and struck him, resulting in serious injuries.<sup>38</sup> The plaintiff had two GEICO insurance policies: the first included \$50,000 of UIM coverage and insured only his motorcycle; the second insured

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33. See *Legal Update Regarding Issues of Stacking of UM and UIM Benefits Under Pennsylvania Law*, ROBB LEONARD MULVIHILL, <http://www.rlmlawfirm.com/Legal-Update-Regarding-Issues-Stacking-of-UM-and-UIM-Benefits-Under-Pennsylvania-Law-1> (last visited Oct. 10, 2022).

34. *Gallagher v. GEICO Indem. Co.*, 201 A.3d 131, 138 (Pa. 2019).

35. See, e.g., *Craley v. State Farm Fire and Cas. Co.*, 895 A.2d 530, 541–42 (Pa. 2006) (upholding the validity of the Household Vehicle Exclusion where the insured knowingly waived inter-policy stacking in exchange for reduced premiums); *Eichelman v. Nationwide Ins. Co.*, 711 A.2d 1006, 1010 (Pa. 1998) (stating that “[a]llowing the ‘household exclusion’ to stand in this case is further bolstered by the intent behind the MVFRL, to stop the spiraling costs of automobile insurance in the Commonwealth.”); *Hart v. Nationwide Ins. Co.*, 663 A.2d 682 (Pa. 1995) (reversing the order of the Pennsylvania Superior Court and implicitly holding that the household exclusion did not violate public policy where plaintiff was driving a vehicle insured under a separate policy from that which he sought to obtain underinsured benefits); *Windrim v. Nationwide Ins. Co.*, 641 A.2d 1154, 1158 (Pa. 1994) (holding that the exclusion was valid as applied on the basis that relatives living with the named insured did not decide to purchase insurance for their own vehicles and instead attempted to rely on uninsured motorist coverage under the named insured’s policy); *Paylor v. Hartford Ins. Co.*, 640 A.2d 1234 (Pa. 1994) (concluding that allowing the insureds to recover UIM in the face of a household vehicle exclusion would allow them to effectively convert the UIM coverage into additional liability coverage).

36. See *Legal Update*, *supra* note 33.

37. 201 A.3d 131 (Pa. 2019).

38. *Id.* at 132.

his two automobiles and provided for \$100,000 of UIM coverage for each vehicle.<sup>39</sup> Importantly, the plaintiff opted for stacked coverage for each policy.<sup>40</sup> As is typical in these cases, the tortfeasor's insurance was insufficient to compensate the plaintiff for the injuries he suffered, thus he sought stacked UIM coverage under both of his GEICO policies.<sup>41</sup> GEICO paid Gallagher \$50,000 under his motorcycle policy, but they denied his claim for stacked UIM coverage under his automobile policy on the basis that he was operating a motorcycle at the time of the accident, which was not covered under the automobile policy.<sup>42</sup>

The plaintiff filed suit to recover the UIM benefits under the automobile policy.<sup>43</sup> The case made its way to the Pennsylvania Supreme Court where two issues were addressed: (1) whether the Household Vehicle Exclusion violates Section 1738 of the MVFRL where GEICO issued all household policies and unilaterally decided to issue two separate policies, when the insured desired stacking, elected stacking, paid additional premiums for stacking, and never knowingly waived stacking of UIM benefits; and (2) whether the Household Vehicle Exclusion impermissibly narrows or conflicts with the statutory mandates of the MVFRL and the evidence of the record is that GEICO is fully aware of the risks of insuring a motorcycle in the same household as other family vehicles but unilaterally decided to write a separate motorcycle policy.<sup>44</sup>

There, the court began its analysis by noting that the plaintiff had not signed a statutorily prescribed waiver for either GEICO policy and that he would have received the UIM coverage for which he had paid under the MVFRL absent the Household Vehicle Exclusion in the policy.<sup>45</sup> The court went on to hold:

This policy provision, buried in an amendment, is inconsistent with the unambiguous requirements of Section 1738 of the MVFRL under the facts of this case insomuch as it acts as a *de facto waiver* of stacked UIM coverage provided for in the MVFRL, despite the indisputable reality that Gallagher did not sign the statutorily-prescribed UIM coverage waiver form.<sup>46</sup>

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39. *Id.* at 132–33.

40. *Id.* at 133.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 135–36.

45. *Id.* at 137.

46. *Id.* at 138 (emphasis added).

Consequently, the court maintained that GEICO's Household Vehicle Exclusion practice "runs contrary to the MVFRL and renders the household vehicle exclusion *invalid and unenforceable*."<sup>47</sup>

The decision in *Gallagher* has led to tremendous disorder in the area of Pennsylvania car insurance law.<sup>48</sup> As a result of the decision, and more specifically the language that the court used in invalidating the Household Vehicle Exclusion, plaintiffs now argue that the exclusion has been uniformly invalidated, whereas defendants maintain it has only been invalidated in circumstances such as those present in *Gallagher*.<sup>49</sup> Additionally, disputes arose regarding whether the *Gallagher* decision overruled *Eichelman v. Nationwide Insurance Company*, a Pennsylvania Supreme Court case that formerly upheld the Household Vehicle Exclusion on public policy grounds.<sup>50</sup> Interestingly enough, however, the court in *Gallagher* never addressed *Eichelman* in invalidating the Household Vehicle Exclusion at issue.

In early 2023, the Pennsylvania Supreme Court decided *Erie Insurance Exchange v. Mione*, which clarifies situations in which the Household Vehicle Exclusion remains valid.<sup>51</sup> In *Mione*, the plaintiff was involved in an accident with a third-party while operating a motorcycle, and he recovered the maximum limit from the third-party's tort liability insurer.<sup>52</sup> Mione then sought to recover benefits under a single-vehicle policy issued by Erie to him and his wife that included UM/UIM coverage with stacking, as well as under an Erie single-vehicle policy issued to his daughter.<sup>53</sup> Neither of the Erie policies listed the motorcycle as an insured vehicle, which was insured under its own policy with Progressive.<sup>54</sup> Both Erie policies included a Household Vehicle Exclusion provision that barred recovery of UIM benefits for "injuries arising out of the operation of a non-listed miscellaneous vehicle."<sup>55</sup> Additionally, Mione had executed a valid rejection of UIM coverage on his Progressive motorcycle policy.<sup>56</sup>

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47. *Id.* (emphasis added).

48. *See Legal Update, supra* note 33.

49. *See id.*

50. 711 A.2d 1006, 1010 (Pa. 1998) (upholding application of the Household Vehicle Exclusion on public policy grounds where the plaintiff voluntarily chose not to purchase UIM coverage in return for reduced insurance premiums).

51. 253 A.3d 754 (Pa. Super. Ct. 2021), *aff'd*, 289 A.3d 524 (Pa. 2023).

52. *Id.* at 756.

53. *Id.*

54. *Id.*

55. *Id.* at 757.

56. *Id.*

The trial court granted a motion for judgment on the pleadings in favor of Erie, holding that Mione was precluded from recovering UIM benefits under either of the Erie policies.<sup>57</sup> The trial court reasoned that because Mione rejected UIM benefits under his Progressive motorcycle policy, there was no underlying policy upon which to stack UIM benefits.<sup>58</sup> On appeal, the Pennsylvania Superior Court conducted an extensive review of the relevant case law and began by looking to *Eichelman v. Nationwide Insurance Co.*,<sup>59</sup> where the Pennsylvania Supreme Court held:

[A] person who has voluntarily elected not to carry UIM coverage on his own vehicle is not entitled to recover UIM benefits from separate insurance policies issued to family members with whom he resides where clear and unambiguous ‘household’ exclusion language precludes UIM coverage for bodily injury suffered while occupying a motor vehicle not insured for UIM coverage.<sup>60</sup>

The court next addressed *Gallagher*, noting that the Pennsylvania Supreme Court held the respective Household Vehicle Exclusion provision contained in the policy violated the MVFRL, “because the exclusion impermissibly acts as a *de facto waiver* of stacked UM and UIM coverages.”<sup>61</sup> Lastly, the court looked to *Erie Insurance Exchange v. Petrie*,<sup>62</sup> where the Pennsylvania Superior Court “issued a broad holding that the household exclusion cannot be used to skirt the express requirement under Section 1738 that an insurer must receive an insured’s written acknowledgment that he knowingly decided to waive stacked UM/UIM coverage.”<sup>63</sup> Importantly, in *Petrie*, the court stated that “just because the decedent did not purchase stacking or the policies are from two different companies is irrelevant because Section 1738 requires a knowing waiver of stacking from whom the insurance is being obtained . . . .”<sup>64</sup>

Based on the holdings of the aforementioned cases, the Pennsylvania Superior Court suggested that *Gallagher* had not directly invalidated Household Vehicle Exclusions in all situations, but rather only that such exclusions cannot be used to “evade Section 1738’s

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57. *Id.* at 758.

58. *Id.*

59. *Id.* at 760 (citing *Eichelman v. Nationwide Ins. Co.*, 711 A.2d 1006, 1007 (Pa. 1998)).

60. *Id.* at 760 (quoting *Eichelman*, 711 A.2d at 1010).

61. *Id.* (quoting *Gallagher v. GEICO Indem. Co.*, 201 A.3d 131, 132 (Pa. 2019)) (emphasis added).

62. 242 A.3d 915 (Pa. Super. Ct. 2020).

63. *Mione*, 253 A.3d at 764.

64. *Id.* (quoting *Petrie*, 242 A.3d at 922).

explicit requirements for waiving stacking.”<sup>65</sup> Because, the court explained, Mione had fully and validly waived UIM coverage on the Progressive motorcycle policy, there was nothing upon which to stack the UIM benefits available under the Erie policies.<sup>66</sup> The court concluded that Mione was attempting to use the Erie policies to “procure UIM coverage in the first place,” unlike *Gallagher* where the insured had not waived coverage, and the carrier was manipulating the exclusion as a workaround to Pennsylvania law.<sup>67</sup>

Consequently, the Pennsylvania Superior Court applied the *Eichelman* principle that “a clear and unambiguous household exclusion is enforceable where the insured was operating a vehicle at the time of the accident that was covered by a separate policy not providing the insured with UM/UIM coverage because the insured had voluntarily, and validly, waived such coverage.”<sup>68</sup> Therefore, the Household Vehicle Exclusions in the Erie policies were enforceable and precluded Mione from recovering UIM benefits.<sup>69</sup>

In February of 2023, the Pennsylvania Supreme Court affirmed the Superior Court’s holding in *Mione* that the Household Vehicle Exclusion may be applied to deny UIM coverage for claims arising out of an insured’s use or occupancy of a household vehicle that was covered by a separate policy, issued by a separate insurer, which does not provide UIM coverage.<sup>70</sup> The court observed that Mione could not have reasonably expected UIM coverage when he rejected UIM in his Progressive motorcycle policy, and his Erie automobile policy explicitly excluded UIM coverage where the vehicle in which the accident occurred did not itself have UIM coverage.<sup>71</sup>

Regarding *Gallagher*, the Pennsylvania Supreme Court similarly rejected the argument that the Household Vehicle Exclusion had been uniformly invalidated and further noted that the exclusion at issue was not “operating as the sort of disguised waiver of *stacking* that was disapproved in *Gallagher*.”<sup>72</sup> Instead, the court noted that in circumstances such as those present in *Mione*, the Household Vehicle Exclusion “serves as an unambiguous preclusion of all UM/UIM coverage (even unstacked coverage) for damages sustained while operating an unlisted household vehicle.”<sup>73</sup> Moving

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65. *Id.* at 766.

66. *Id.* at 768.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Erie Ins. Exch. v. Mione*, 289 A.3d 524, 531 (Pa. 2023).

71. *Id.* at 530.

72. *Id.*

73. *Id.*

forward, for a Household Vehicle Exclusion to constitute an impermissible *de facto* waiver, the insured must have received UM/UIM coverage under some other policy in the first place.<sup>74</sup>

The Household Vehicle Exclusion only remains valid in two unique circumstances: when there is a stacking waiver on a single-vehicle policy or when the insured affirmatively rejected UIM coverage on the vehicle they were operating at the time of the accident.<sup>75</sup>

### C. *The Regular Use Exclusion*

The exclusion presently receiving the attention of Pennsylvania lawyers, judges, and insurance carriers is the Regular Use Exclusion.<sup>76</sup> The Regular Use Exclusion precludes coverage for injuries sustained in or by a vehicle that was not explicitly covered by the policy but was regularly available for the injured individual's use.<sup>77</sup> When faced with cases involving the Regular Use Exclusion, Pennsylvania courts have historically upheld its validity.<sup>78</sup> However, despite the ostensible security that accompanied the Regular Use Exclusion for nearly a decade, the exclusion is now on its way back to the Pennsylvania Supreme Court in the recent case of *Rush v. Erie Insurance Exchange*.<sup>79</sup>

In *Rush*, the plaintiff sustained serious injuries when two other drivers crashed into his police car, which was insured by the City of Easton through a policy that provided \$35,000 in UIM coverage.<sup>80</sup> Rush sought to recover additional UIM under two Erie insurance

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74. *Id.* at 531.

75. *See, e.g.*, *Donovan v. State Farm Mut. Auto. Ins. Co.*, 256 A.3d 1145, 1160 (Pa. 2021) (holding that the Household Vehicle Exclusion did not comply with the requirements for waiver of stacking on a single-vehicle policy and was therefore unenforceable); *Craley v. State Farm Fire & Cas. Co.*, 895 A.2d 530, 541–42 (Pa. 2006) (upholding the validity of the Household Vehicle Exclusion where the insured knowingly waived inter-policy stacking in exchange for reduced premiums).

76. *See* Jason G. Bates, *Is the Regular Use Exclusion in Vehicle Coverage Becoming a Relic of the Past?*, CONNOR WEBER, & OBERLIES (June 20, 2022), <https://cwolaw.com/legal-articles/regular-use-exclusion-vehicle-coverage-relic/>.

77. *Id.* Bates explains that the rationale for the Regular Use Exclusion is to prevent insurance carriers from providing coverage to injured parties where, unbeknownst to the carrier, the injured party regularly used another vehicle which was not covered under the carrier's policy. *Id.*

78. *See, e.g.*, *Burstein v. Prudential Prop. & Cas. Ins. Co.*, 809 A.2d 204, 208 (Pa. 2002) (holding that voiding the regular use exclusion would frustrate public policy, as insurance companies would be “underwrit[ing] unknown risks that it has not been compensated to insure.”); *Rawl v. GEICO Indem. Co.*, 237 A.3d 1042 (Pa. Super. Ct. 2020) (affirming the trial court's grant of summary judgment against an insured who contested a Regular Use Exclusion).

79. 265 A.3d 794 (Pa. Super. Ct. 2021), *appeal granted*, 281 A.3d 298 (Pa. 2022).

80. *Id.* at 795.



policies, which covered his three family vehicles and included stacked UIM coverage up to \$750,000.<sup>81</sup> Despite paying for stacked UIM coverage, both of the Rush's Erie policies contained identical Regular Use Exclusion clauses that limited the scope of the UIM coverage for which Rush paid.<sup>82</sup> Specifically, the language of the exclusions precluded Erie from providing UIM coverage when a person suffered injuries arising from the use of a motor vehicle that he (1) regularly uses, (2) does not own, and (3) does not insure under the Erie policies.<sup>83</sup> As is typical in situations involving Regular Use Exclusions, Erie denied coverage on the basis of the exclusion, and Rush filed suit seeking a judicial determination as to whether the MVFRL permits an insurance company to limit the scope of its UIM policies through the use of the Regular Use Exclusion.<sup>84</sup> Interestingly, the trial court granted summary judgment in favor of Rush, holding that the exclusion violated the requirements of the MVFRL.<sup>85</sup>

On appeal, the Pennsylvania Superior Court looked to section 1731 of the MVFRL, which governs the scope of UIM coverage and provides that, absent a rejection of coverage, insurers shall provide UIM coverage that "protect[s] persons who suffer injury arising out of the maintenance and use of a motor vehicle and are legally entitled to recover damages therefor from owners or operators of underinsured motor vehicles."<sup>86</sup> Furthermore, "[i]nsurers are relieved of the obligation of providing UIM coverage only when an insured waives such coverage by executing a statutorily prescribed rejection form."<sup>87</sup> Considering these requirements, the court agreed with the trial court and held that the Regular Use Exclusion impermissibly limited the scope of UIM coverage required by section 1731 of the MVFRL by precluding coverage if an insured is injured while operating a motor vehicle that he regularly uses but does not own.<sup>88</sup> Consequently, the court determined that the Regular Use Exclusion was unenforceable.<sup>89</sup>

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81. *Id.* Rush and his family had three personal vehicles insured through Erie that contained stacked UIM coverage on two policies: the first policy provided \$250,000 of UIM coverage on one vehicle and the second policy provided \$250,000 stacked UIM coverage on two vehicles. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 796 (quoting 75 PA. STAT. AND CONS. STAT. § 1731(c) (West, Westlaw Edge through 2023 Reg. Sess.).

87. *Id.* (citing 75 PA. STAT. AND CONS. STAT. §§ 1731 (c), (c.1)).

88. *Id.* at 797.

89. *Id.*

The Superior Court's decision in *Rush* has placed the Regular Use Exclusion in jeopardy. Two Federal District Courts in Pennsylvania have also interpreted Pennsylvania law and found the Regular Use Exclusion to be invalid.<sup>90</sup> Consequently, the Pennsylvania Supreme Court, in addressing the Regular Use Exclusion for the first time in nearly a decade, will now have a variety of judicial decisions to consider in determining whether to invalidate the Regular Use Exclusion altogether.<sup>91</sup> Case law is not, however, the only means available to clarify the uncertainty that presently riddles automobile insurance law in Pennsylvania, for the Pennsylvania legislature has previously attempted to take steps of its own to lend clarity to this area of the law.

#### *D. Pennsylvania Senate Bill No. 676*

While this once stable area of the law has become riddled with uncertainty and exceptions, there remains the prospect of clarification in the not-so-distant future. Recently proposed legislation, Pennsylvania Senate Bill 676, would have made significant changes to the above-referenced aspects of insurance law that are currently a source of confusion.<sup>92</sup> Senate Bill 676 would have had significant effects on minimum coverage amounts, required UIM coverage, stacking, and policy exclusions that insurance carriers have traditionally relied upon to deny coverage.<sup>93</sup> While the legislation was not passed in the last session of the General Assembly and has since expired,<sup>94</sup> it contained a number of provisions that would have lent clarity to this area of the law.

With respect to minimum coverage amounts, as noted previously, the current coverage minimum amounts for bodily injury liability coverage are \$15,000 for single accidents involving one person and \$30,000 for single accidents involving multiple persons.<sup>95</sup> These limits have not increased since the 1970s. Pennsylvania Senate Bill 676 would have increased these minimum coverage requirements

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90. See *Johnson v. Progressive Advanced Ins.*, 587 F. Supp. 3d 277, 285–86 (W.D. Pa. 2022) (holding that a Regular Use Exclusion provision in an insurance contract which contravenes the MVFRL “must be struck down as violative of the law.”); *Evanina v. The First Liberty Ins. Corp.*, 587 F. Supp. 3d 202, 209 (M.D. Pa. 2022) (denying the defendant’s motion for summary judgment on the basis of a prediction that the Pennsylvania Supreme Court will find the Regular Use Exclusion to operate “contrary to the unambiguous provisions of the MVFRL . . .”).

91. See *Bates*, *supra* note 76.

92. S.B. 676, 206th Gen. Assemb., Reg. Sess. (Pa. 2021).

93. *Id.*

94. *Pennsylvania Senate Bill 676*, LEGISCAN, <https://legiscan.com/PA/bill/-SB676/2021> (last visited Aug. 27, 2023).

95. 75 PA. STAT. AND CONS. STAT. § 1702 (West, Westlaw Edge through 2023 Reg. Sess.).

to \$30,000 because of injury to any one person in any one accident and \$60,000 because of injury to two or more persons in any one accident.<sup>96</sup>

Pennsylvania Senate Bill 676 further appeared, at least in its final form, to mandate UIM coverage. In the proposed Bill it stated, “[n]o motor vehicle liability insurance policy shall be delivered or issued for delivery in this Commonwealth, with respect to any motor vehicle registered or principally garaged in this Commonwealth, unless uninsured motorist and underinsured motorist coverages are . . . *provided therein* . . .”<sup>97</sup> The current language of section 1731 includes “*offered therein*.”<sup>98</sup> The amounts of minimum UIM coverage would have remained the same as the minimum for bodily injury liability coverage and would therefore be set at \$30,000 because of injury caused to any one person in any one accident, and \$60,000 because of injury to two or more persons in any one accident.<sup>99</sup>

It appeared, however, that Senate Bill 676 would have expressly eliminated stacking in Pennsylvania.<sup>100</sup> Specifically, the Bill stated, “[t]he limit of liability for uninsured and underinsured motorist coverage applicable to two or more motor vehicles delivered or issued for delivery in this Commonwealth *shall not be added together* to determine the limit of the coverage available to an insured for injuries sustained in an accident.”<sup>101</sup>

Lastly, Pennsylvania Senate Bill 676 would have made tremendous changes to the aforementioned policy contained exclusions, which, as noted, are a source of confusion in this area of the law. The final iteration of the Bill stated:

[A]n insurer may not exclude uninsured and underinsured motorist coverage solely because an insured is injured in a vehicle operated by the insured but not covered by the insured’s policy, provided the insured’s use of the vehicle is with the permission of the owner of the vehicle and the vehicle is furnished for the regular use of the insured.<sup>102</sup>

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96. S.B. 676, 206th Gen. Assemb., Reg. Sess. (Pa. 2021) (proposing changes to § 1702).

97. *Id.* (proposing changes to 75 PA. STAT. AND CONS. STAT. § 1731) (emphasis added).

98. 75 PA. STAT. AND CONS. STAT. § 1731 (emphasis added).

99. S.B. 676, 206th Gen. Assemb., Reg. Sess. (Pa. 2021) (proposing changes to 75 PA. STAT. AND CONS. STAT. § 1731(b)).

100. *Id.* (proposing changes to 75 PA. STAT. AND CONS. STAT. § 1738).

101. *Id.* (emphasis added).

102. *Id.* (emphasis added).

This language would have been broad enough to encompass a uniform invalidation of both the Regular Use and Household Vehicle Exclusions.

### III. ANALYSIS

#### A. *Recent and Forthcoming Case Law*

The Pennsylvania Supreme Court's decision in *Mione* clarifies when the Household Vehicle Exclusion remains valid. The forthcoming decision in *Rush* should, theoretically, also add clarity to the ambiguity currently associated with the Regular Use Exclusion. Because insurance policies are simply contracts—whereby an insurer agrees to compensate policyholders for unknown risks in exchange for the payment of premiums—the solution to these issues should be grounded in balancing the expectations of each party while advancing the policies supporting the MVFRL. And while it is true that insurance companies should not be required to “underwrite unknown risks that it has not been compensated to insure,”<sup>103</sup> it is also true that cost containment “cannot be mechanically invoked as a justification for every contractual provision that restricts coverage and purportedly lessens the cost of insurance.”<sup>104</sup>

A consideration of the fundamental purposes of the MVFRL demonstrates that the main concern moving forward should be the provision of adequate protection for each party. While the respective courts in *Rush*, *Gallagher*, and *Mione* were required to focus only on the facts before it,<sup>105</sup> balancing cost containment with the remedial purpose of the MVFRL is critical. Similar to past decisions from both the Pennsylvania Supreme Court and Superior Court, the determination of UIM recovery should rest on the particular coverage purchased.

A simple solution exists that would resolve some of the ambiguity presently associated with UIM coverage and advance the balancing necessary to clarify this area of the law. Where an insured elects for stacked UIM coverage, any exclusions should not apply, as they

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103. *Burstein v. Prudential Prop. & Cas. Ins. Co.*, 809 A.2d 204, 208 (Pa. 2002).

104. *See Heller v. Pa. League of Cities and Muns.*, 32 A.3d 1213, 1222 (Pa. 2011).

105. *See, e.g., Erie Ins. Exch. v. Mione*, 289 A.3d 524, 530 (Pa. 2023) (holding that an insured who voluntarily and validly waived UIM coverage could not recover UIM benefits under another policy); *Gallagher v. GEICO Indem. Co.*, 201 A.3d 131, 138 (Pa. 2019) (holding that a household exclusion ran contrary to the requirements of the MVFRL where the insured selected stacked UIM coverage and the exclusion provision was buried in an amendment); *Rush v. Erie Ins. Exch.*, 265 A.3d 794, 797 (Pa. Super. Ct. 2021) (holding that a regular use provision impermissibly limited the scope of UIM recovery where the insured elected for UIM benefits).

would impermissibly narrow the scope of UIM recovery and operate contrary to the MVFRL.<sup>106</sup> Such a scenario furthers the remedial purpose supporting the MVFRL and ensures recovery beyond a tortfeasor's bodily injury liability limits for severely injured parties. Contrastingly, where the insured has rejected stacked UIM benefits through a statutorily compliant waiver form, the insured should not be entitled to recovery of additional UIM benefits under policies covering vehicles not involved in the respective accident.<sup>107</sup> This furthers the cost containment policy supporting the MVFRL because it reduces the risk of exposure to stacked UIM claims where an insurer has not been paid premiums.

Uniformly invalidating the Regular Use and Household Vehicle Exclusions would require insurance companies to compensate for risks without commensurate consideration, while simultaneously removing a means for reducing insurance premiums. This would undermine the policies supporting the MVFRL and would present a fundamental unfairness to both parties in a system that requires stability and clarity in order to operate as it is intended. Consequently, a uniform invalidation of the Regular Use and Household Vehicle Exclusions by the Pennsylvania Supreme Court, without the provision of additional protection in some form, would replace the current ambiguity with a system of inequity for all parties. While such an invalidation would certainly lend clarity to an area of the law riddled with uncertainty, it is not the proper path forward.

A consideration of the fundamental purposes of the MVFRL suggests that uniformly invalidating these exclusions would lead to additional conflict. The MVFRL—at least in its most basic sense—has been framed as having the primary intention of reducing the costs of automobile insurance in Pennsylvania.<sup>108</sup> But justices on the Pennsylvania Supreme Court have suggested abandoning a purely cost containment rationale and instead emphasizing a remediation

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106. *Gallagher*, 201 A.3d at 138.

107. *Erie Ins. Exch. v. Mione*, 253 A.3d 754, 768 (Pa. Super. Ct. 2021).

108. *See, e.g., Eichelman v. Nationwide Ins. Co.*, 711 A.2d 1006, 1010 (Pa. 1998) (stating that “[a]llowing the ‘household exclusion’ language to stand in this case is further bolstered by the intent behind the MVFRL, to stop the spiraling costs of automobile insurance in the Commonwealth.”); *Rump v. Aetna Cas. & Sur. Co.*, 710 A.2d 1093, 1096 (Pa. 1998) (stating “[the] legislative concern over the increasing costs of automobile insurance is the public policy which is advanced when interpreting the statutory provisions of the MVFRL.”); *Paylor v. Hartford Ins. Co.*, 640 A.2d 1234, 1235 (Pa. 1994) (stating “the enactment of the MVFRL reflected a legislative concern for the spiraling consumer cost of automobile insurance and the resultant increase in the number of uninsured motorists driving on public highways.”).

purpose, too.<sup>109</sup> It is true that the Regular Use and the Household Vehicle Exclusions provide a means through which insurance providers can curb the escalating costs associated with providing coverage for unknown risks, but exclusions also contribute to a reduction in premiums.<sup>110</sup> Because a uniform invalidation, without the granting of additional protection in some form, would presumably lead to an increase in insurance costs for both insurers and policyholders, such action would operate contrary to the MVFRL.

Rather, by leaving the Regular Use and Household Vehicle Exclusions in place, and instead simply directing the inquiry to whether or not an insured has elected to carry or rejected stacked UIM coverage, the Pennsylvania Supreme Court can remove the uncertainty associated with this area of the law while simultaneously reinforcing the intentions of the MVFRL. The main concern must be balancing the interests of insurance providers and policyholders, and the best way to do so is through allowing adequate protection for each party.

### *B. Proposed Legislation*

Beyond the prospect of the Pennsylvania Supreme Court lending clarity to the uncertainty associated with UIM coverage, the Pennsylvania legislature has the ability to revise the MVFRL with clear language that would significantly change the current state of the law, as it has previously done.<sup>111</sup> The intended changes would signal a new era in Pennsylvania automobile insurance law—one with clearly defined provisions and mandates—and would ease the uncertainty that currently confronts the Pennsylvania courts. As with all things, however, the potential benefits present inherent disadvantages.

#### *1. Proposed Increase in Minimum Liability Coverage*

Senate Bill 676 began with an increase in the minimum amounts of bodily injury liability coverage one must carry under their own

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109. See *Williams v. GEICO Gov't Emps. Ins. Co.*, 32 A.3d 1195, 1210 (Pa. 2011) (Saylor, J., concurring) (“I would once and for all abandon the rubric that cost containment was the overarching policy concern . . . since the act clearly retained the core remedial objectives of the prior regulatory scheme); *id.* at 1210 (Baer, J., concurring) (agreeing that the court should abandon cost containment as the “overarching policy concern” of the MVFRL).

110. Candance Edgar, *A Rush to Judgment? PA Superior Court Invalidates “Regular Use” Exclusion*, MARGOLIS EDELSTEIN, (Nov. 4, 2021), <https://electrolyzed.org/motion-in-a-rush-to-judgment>.

111. S.B. 676, 206th Gen. Assemb., Reg. Sess. (Pa. 2021).

policy.<sup>112</sup> Increasing the minimum amount of bodily injury liability coverage presents a number of advantages for recovery. First and foremost, with a minimum of \$30,000 available for recovery by any one person injured in any single accident and \$60,000 available to two or more persons injured in any single accident, recovery would be doubled from the present minimum.<sup>113</sup> As such, those injured would have greater recovery available to them prior to looking to their own insurance policies for UIM coverage, which would contribute to a reduction in insurance-related disputes and the preservation of judicial resources via reductions in insurance-related litigation. An increase in the minimum liability coverage would, therefore, present a number of advantages for this area of the law.

The primary disadvantage resulting from an increase in the minimum bodily injury liability coverage amounts—and the primary disadvantage associated with most of the previously proposed revisions to the MVFRL—is a resultant increase in insurance premiums. This should come as no surprise; greater protection and recovery amounts must coincide with higher premiums.<sup>114</sup> Such an increase in premiums, however, would be an involuntary consequence of higher mandated bodily injury liability coverage amounts. It could therefore be argued that the cost containment rationale supporting the MVFRL would operate contrary to such an involuntary increase in premiums.<sup>115</sup>

However, balancing an increase in insurance premiums with the advantages of an increase in the minimum coverage amounts—namely higher recovery amounts, which would contribute to a reduction in disputes and a conservation of judicial resources—presents a situation where the benefits significantly outweigh the disadvantages. Moreover, the Pennsylvania Supreme Court has signaled its departure from a purely cost containment rubric, and a remedial purpose for those who are severely injured is now a

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112. *Id.*

113. 75 PA. STAT. AND CONS. STAT. § 1702 (West, Westlaw Edge through 2023 Reg. Sess.). With a present minimum of \$15,000 in recovery available for any single person involved in any single accident and \$30,000 available to two or more persons injured in any single accident, an increase to minimums of \$30,000/\$60,000 could contribute to a preservation of judicial resources and fewer insurance disputes ending up in litigation.

114. *What Is a Car Insurance Premium?*, PROGRESSIVE, <https://www.progressive.com/answers/car-insurance-premium/> (last visited Dec. 25, 2022). An insured's car insurance premiums are higher where their coverage limits are higher. *Id.*

115. *See, e.g.,* Rump v. Aetna Cas. & Sur. Co., 710 A.2d 1093, 1096 (Pa. 1998) (stating “[the] legislative concern over the increasing costs of automobile insurance is the public policy which is advanced when interpreting the statutory provisions of the MVFRL.”); Paylor v. Hartford Ins. Co., 640 A.2d 1234, 1235 (Pa. 1994) (stating “the enactment of the MVFRL reflected a legislative concern for the spiraling consumer cost of automobile insurance and the resultant increase in the number of uninsured motorists driving on public highways.”).

principal consideration.<sup>116</sup> As Justice Todd has noted, there “is a balance to be struck between [the cost containment] goal and the remedial purpose of the MVFRL.”<sup>117</sup> The Pennsylvania legislature would thus be wise to consider reintroducing and adopting revisions that increase the minimum amount of bodily liability coverage for any one person injured in any single accident and for two or more persons injured in any single accident.<sup>118</sup>

## 2. *Imposition of Mandatory UIM Coverage*

The next significant proposed revision came in the form of mandated UIM coverage.<sup>119</sup> Requiring all insureds to carry UIM coverage poses a number of advantages and one principal disadvantage. The primary advantage is that it would negate the prospective risk associated with being involved in a car accident where the available insurance recovery from the tortfeasor is insufficient to compensate for the extent of injuries and resultant damages. All insureds could thus look to their own insurance policies for additional recovery, which would assist in easing the tremendous financial burden resulting from extensive injuries and losses due to being involved in serious car accidents. With all policyholders carrying UIM coverage, the prospective legislative changes would provide a level of assuredness that this area of the law—due to the ability of insureds to elect for or reject UIM benefits—does not presently have. A mandated layer of additional protection would certainly be advantageous for all Pennsylvania drivers, and it would advance the remedial intention of the MVFRL.

The primary disadvantage of mandated UIM coverage is simple: higher premiums.<sup>120</sup> Mandated UIM coverage must be balanced against the policies of decreasing consumer costs of automobile insurance,<sup>121</sup> as well as the remediation purpose of the MVFRL.<sup>122</sup>

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116. See, e.g., *Safe Auto Ins. Co. v. Oriental-Guillermo*, 214 A.3d 1257, 1266 (Pa. 2019) (“While we have repeatedly recognized the goal of cost containment, we have consistently observed that there is a balance to be struck between that goal and the remedial purpose of the MVFRL.”); *Williams v. Geico Emps. Ins. Co.*, 32 A.3d 1195, 1210 (Pa. 2011) (Saylor, J., concurring) (noting that he would abandon cost containment as “the overarching policy concern” of the MVFRL because the legislation retains remedial objectives).

117. *Oriental-Guillermo*, 214 A.3d at 1266.

118. S.B. 676, 206th Gen. Assemb., Reg. Sess. (Pa. 2021) (proposing changes to 75 PA. STAT. AND CONS. STAT. § 1702).

119. *Id.* (proposing changes to 75 PA. STAT. AND CONS. STAT. § 1731).

120. *What Is a Car Insurance Premium?*, *supra* note 114. An insured who carries multiple types of coverage under a single policy will have higher car insurance premiums. *Id.*

121. See *Paylor v. Hartford Ins. Co.*, 640 A.2d 1234, 1235 (Pa. 1994).

122. See, e.g., *Oriental-Guillermo*, 214 A.3d at 1266; *Williams v. Geico Employees Ins. Co.*, 32 A.3d 1195, 1210 (Pa. 2011) (Saylor, J., concurring).



Mandated UIM coverage, however, is hardly a gratuitous increase in insurance premiums. Because mandated UIM coverage functions as an additional layer of recovery, it is fair that insureds pay higher premiums. As such, it could be argued that higher premiums in this area are not truly a disadvantage; the benefits are shared equally since insureds would receive additional protection in exchange for increased premiums, and insurance providers would not be asked to “underwrite unknown risks that it has not been compensated to insure.”<sup>123</sup> The fundamental goals of the MVFRL thus remain in view.

### 3. *Elimination of Inter-Policy Stacking*

The next significant proposed change came in the form of the elimination of stacking.<sup>124</sup> Pennsylvania drivers currently have the option to elect for stacking or deny it through the execution of a statutorily prescribed waiver form.<sup>125</sup> Stacking plays an incredibly important role for injured drivers who elect to carry it, as it allows for the combining of UIM policies to increase a severely injured party’s available recovery amount.<sup>126</sup> While the elimination of stacking would decrease recovery in cases, the Pennsylvania legislature should take steps to eliminate it.

It is somewhat illogical that an insured can combine coverage from separate and distinct policies, including ones for vehicles not involved in the respective accident, to increase the amount of recovery available to them. While insureds pay premiums on all policies and the additional cost for stacking, the legislative concern for reducing costs would be supported through an elimination of stacking. And significantly, the Pennsylvania legislature would be advancing a policy focused on common sense and fairness with the elimination of stacking. Such would lend greater clarity to auto insurance law in Pennsylvania, which, as noted, is “not particularly clear and straightforward.”<sup>127</sup>

The primary disadvantage in removing stacking from the MVFRL is that it would abolish an additional means of recovery for injured insureds. This method of increasing recovery amounts,

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123. *Burstein v. Prudential Prop. & Cas. Ins. Co.*, 809 A.2d 204, 208 (Pa. 2002).

124. S.B. 676, 206th Gen. Assemb., Reg. Sess. (Pa. 2021) (proposing changes to 75 PA. STAT. AND CONS. STAT. § 1738).

125. 75 PA. STAT. AND CONS. STAT. § 1738(d) (West, Westlaw Edge through 2023 Reg. Sess.).

126. *What Does Stacking Mean on My Pennsylvania Auto Insurance Policy?*, *supra* note 28.

127. *Erie Ins. Exch. v. Mione*, 253 A.3d 754, 760 (Pa. Super. Ct. 2021).

however, is ill-suited to a system that compensates injured parties for injuries resulting from a particular accident, while operating a designated vehicle, covered under a specific insurance policy. Allowing insureds to combine policies, including policies covering vehicles not involved in the particular accident, effectively eliminates the carriers' ability to evaluate their risks and presents a system that favors insureds over providers.

Even considering the remediation purpose against which cost containment must be balanced, the scale weighs in favor of eliminating stacking. While providers receive premiums for each policy, they should not be required to compensate under policies for vehicles not involved in an accident. And with the prospect of increased minimum liability coverage and mandated UIM furthering the remedial purpose of the MVFRL in favor of insureds, the elimination of stacking furthers the cost containment rationale and the interests of providers. Consequently, the Pennsylvania legislature would be advancing its interests in reducing the costs of insurance, prioritizing a system of fairness, and lending greater clarity to this area of the law by eliminating stacking.

#### 4. *Invalidation of Policy Exclusions*

The final significant proposed revision to the MVFRL was a comprehensive invalidation of exclusions presently used by insurance providers to deny claims.<sup>128</sup> As noted in the above analysis of recent and forthcoming case law, a uniform invalidation of the Regular Use and Household Vehicle Exclusions by the Pennsylvania Supreme Court, without more, is unlikely to be the proper path forward. That conclusion, however, is predicated upon the fact that stacked UIM coverage is presently optional. Thus, the courts can focus on whether or not an insured has elected to carry stacked UIM in resolving disputes involving exclusions.

Because the Pennsylvania legislature proposed mandated UIM coverage and the elimination of stacking in Senate Bill 676,<sup>129</sup> an inquiry into whether an insured has elected or waived stacked UIM coverage would no longer be necessary to resolve such disputes. As the Pennsylvania Supreme Court has previously stated, exclusions function to ensure that providers are not being required to "underwrite unknown risks that it has not been compensated to insure."<sup>130</sup>

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128. S.B. 676, 206th Gen. Assemb., Reg. Sess. (Pa. 2021) (proposing changes to 75 PA. STAT. AND CONS. STAT. § 1738).

129. *Id.* (proposing changes to 75 PA. STAT. AND CONS. STAT. § 1731).

130. *Burstein v. Prudential Prop. & Cas. Ins. Co.*, 809 A.2d 204, 208 (Pa. 2002).

This principle makes sense; it would be fundamentally unfair to require insurance providers to compensate for insureds who are injured in extraordinary events for which they have not paid premiums. However, with mandated UIM coverage, the Pennsylvania legislature could provide the safeguard necessary to secure a system free of unknown risks and insufficient compensation.

Moreover, the Pennsylvania legislature would be removing the possibility of exclusions operating as a “*de facto waiver* of stacked UM and UIM coverages,”<sup>131</sup> because stacking of coverage would be eliminated in the proposed legislation.<sup>132</sup> Consequently, the two principal concerns associated with the Regular Use and Household Vehicle Exclusions would be rendered moot. Instead, the use of exclusions would merely become a method for insurance providers to frivolously deny claims. Eliminating all exclusions through revisions to the MVFRL would not only help to clarify this area of the law, but it would also prioritize a system of equity. Legitimate claims brought by insureds would receive the compensation to which they are entitled, while insurance providers receive premiums to provide such coverage. Mandating UIM coverage, as well as eliminating stacking, would render the exclusions unnecessary and, therefore, could resolve any fundamental confusion.

The Pennsylvania legislature is better suited to add the clarity necessary for this area of the law to function as it is intended. What is now required is explicitness and clear-cut solutions. While the Pennsylvania courts are well-equipped to resolve the disputes that come before them, they are limited to the facts of each case. And what is more, there are competing public policies at play in these cases. When there are contrasting policy concerns at issue, the legislature is in an ideal position to intervene.<sup>133</sup> The Pennsylvania legislature is better suited to establish clear, well-written, and comprehensive solutions to the problems that presently complicate this area of the law. Both policyholders and providers would benefit from clear legislation. As such, the Pennsylvania legislature should introduce and pass new legislation that balances the interests of each party and provides adequate protection.

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131. *Gallagher v. GEICO Indem. Co.*, 201 A.3d 131, 138 (Pa. 2019).

132. S.B. 676, 206th Gen. Assemb., Reg. Sess. (Pa. 2021) (proposing changes to 75 PA. STAT. AND CONS. STAT. § 1738).

133. *Williams v. GEICO Gov't Emps. Ins. Co.*, 32 A.3d 1195, 1211 (Pa. 2011) (Todd, J., concurring) (“When faced with the tension between or among important, yet divergent, policy concerns, I am compelled to conclude that it is the General Assembly who must act and not this Court.”).

## IV. CONCLUSION

The MVFRL is unnecessarily confusing. Because automobiles play a critical role in everyday life, it would be wise to take the steps necessary to lend certainty to this area of the law. Pennsylvania has the ability to do so, as it is currently confronted with the opportunity to clarify the uncertainty and exceptions that have befuddled its courts for the past few years. Of the two paths forward, one through the Pennsylvania Supreme Court and the other through the Pennsylvania legislature, the better path would be through the Pennsylvania legislature.

The Pennsylvania Supreme Court is in a noticeably worse position to resolve the confusion associated with UIM disputes. While the recent *Mione* decision and the forthcoming *Rush* decision should clarify the validity of the Household Vehicle and Regular Use Exclusions, the court's decisions are limited to the unique factual circumstances present. Exclusions undoubtedly require the court's attention and are in dire need of clarification; however, they function as one small piece in a larger insurance puzzle. Comprehensive revisions of the MVFRL are necessary to truly establish the security and clarity that insurance law merits and requires.

That security will be best served through the adoption of carefully considered and clearly drafted legislation. It is imperative that the areas of auto insurance law that presently complicate matters—namely UIM coverage, stacking, and exclusions—are unambiguous and straightforward. Until the Pennsylvania legislature passes comprehensive and clear legislation, the decisions of the Pennsylvania Supreme Court remain the law. But ultimately, adding clarity to and revising the MVFRL is in the best interests of policyholders, insurance providers, and the Pennsylvania legislature. It will remove uncertainty in favor of a straightforward system that prioritizes the interests of each party, while simultaneously lending clear-cut solutions to present problems.

# Punitive Damages as a Deterrent to Distracted Driving: Where the Statutory Penalties Fall Short, the Supreme Court of Pennsylvania Must Fill the Gap

*Abigail Hudock\**

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## I. INTRODUCTION

Punitive damages have always been one of the more controversial remedies available for tort harms.<sup>1</sup> While a minority of states prohibit punitive damages altogether,<sup>2</sup> the majority of jurisdictions embrace them not only as a means of punishment on those tortfeasors who commit especially heinous, callous, or irresponsible acts, but

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1. See James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1118 (1984).

2. See, e.g., *Miller v. Kingsley*, 230 N.W.2d 472, 474 (Neb. 1975); *Bryant v. Wyeth*, 879 F. Supp. 2d 1214, 1221 (W.D. Wash. 2012).

also as a deterrent to others from committing such conduct.<sup>3</sup> They function, therefore, as a societal protection against behavior that poses a great risk to the public that criminal penalties and compensatory damage awards might not be able to prevent or attenuate on their own.

Reflecting the fact that punitive damages are one of the more imprecise aspects of tort law, the Supreme Court of Pennsylvania has addressed the standard for evaluating punitive damages claims numerous times throughout the 20th century.<sup>4</sup> In its effort to clarify what types of behavior can support a claim of punitive damages, the court has often used terms such as outrageous, oppressive, malicious, wanton, reckless, or willful.<sup>5</sup> Eventually, the court whittled its punitive damages analysis down to two basic considerations: whether the defendant acted with an evil motive or whether the defendant acted recklessly.<sup>6</sup> The court further clarified that only certain types of reckless behavior could sustain a claim of punitive damages,<sup>7</sup> offering a clear, concise standard that has been upheld ever since.<sup>8</sup>

One of the issues that predated the court's clarification of the recklessness standard, and was central to the analysis in *Martin*, was the question of whether intoxicated driving as a proximate cause of harm could trigger a jury question of punitive damages.<sup>9</sup> In 1970, while the Supreme Court was still debating issues surrounding the general punitive damages doctrine in Pennsylvania, the Superior Court held that in certain circumstances, intoxicated driving was sufficiently reckless as to establish a claim for punitive damages.<sup>10</sup> This holding has been consistently relied upon by Pennsylvania courts.<sup>11</sup>

Following the invention of the cell phone in the early 1970s and its proliferation a decade later,<sup>12</sup> the Superior Court's decision

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3. RESTATEMENT (SECOND) OF TORTS § 908 (AM. L. INST. 1979).

4. See, e.g., *Feld v. Merriam*, 485 A.2d 742, 747 (Pa. 1984); *Chambers v. Montgomery*, 192 A.2d 355, 358 (Pa. 1963); *Hughes v. Babcock*, 37 A.2d 551, 554 (Pa. 1944); *Thompson v. Swank*, 176 A. 211, 211 (Pa. 1934).

5. *Hughes*, 37 A.2d at 554; *Thompson*, 176 A. at 211.

6. *Feld*, 485 A.2d at 748.

7. *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1097 (Pa. 1985) (plurality opinion).

8. Although *Martin* was only a plurality decision, its rationale has been reapproved several times over the following decades. See, e.g., *Hutchison v. Luddy*, 870 A.2d 766, 771 (Pa. 2005); *SHV Coal, Inc. v. Cont'l Grain Co.*, 587 A.2d 702, 704 (Pa. 1991).

9. *Focht v. Rabada*, 268 A.2d 157, 158 (Pa. Super. Ct. 1970).

10. *Id.* at 160.

11. See *Ceresko v. Keystone Container Serv.*, No. 18 CV 3361, 2021 Pa. Dist. & Cnty. Dec. LEXIS 4171, at \*17 (Ct. Com. Pl. Lackawanna Cnty. Nov. 19, 2021).

12. Ivana Križanović, *Cell Phone History: From the First Phone to Today's Smartphone Wonders*, VERSUS (Jan. 12, 2023), <https://versus.com/en/news/cell-phone-history>.

became increasingly relevant in the arena of punitive damages claims. Even as the rate of intoxicated driving has decreased, the rate of distracted driving has continued to increase steadily.<sup>13</sup> As more scientific research is conducted and the parallels between the dangers of distracted and intoxicated driving become increasingly apparent,<sup>14</sup> the lower courts have been faced with determining whether or not to allow punitive damages claims against distracted drivers.<sup>15</sup> However, there are currently no recorded Pennsylvania appellate court decisions that provide a definitive answer to this question.<sup>16</sup>

In the absence of a judicial avenue to punish and deter distracted drivers, the State Legislature has stepped in and attempted to provide clear statutory penalties for distracted drivers.<sup>17</sup> The Pennsylvania statute currently in effect, Section 3316 of the Motor Vehicle Code, penalizes texting while driving, but that is where the statute ends.<sup>18</sup> The statute's scope is too narrow, and its penalties are too mild to serve as an effective deterrent to distracted drivers.<sup>19</sup> While a bill has been introduced in the Pennsylvania House seeking to expand the statute's scope,<sup>20</sup> the proposed penalties remain too weak to act as deterrents.<sup>21</sup>

Although it does not seem likely that a satisfactory legislative deterrent will exist in the foreseeable future, it is possible that the judiciary could provide one. As the potential for harm from distracted driving and intoxicated driving is the same,<sup>22</sup> both should be subject to the same civil penalties. This article will offer a solution to the current inconsistencies in Pennsylvania law revolving around the availability of punitive damages in motor vehicle suits that result from distracted driving. Part II examines the basis of the punitive damages doctrine as well as the situations in which an

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13. PA. DEP'T OF TRANSP., PENNSYLVANIA CRASH FACTS & STATISTICS 23 (2021) (hereinafter "2021 CRASH FACTS"); PA. DEP'T OF TRANSP., PENNSYLVANIA CRASH FACTS & STATISTICS 23 (1996) (hereinafter "1996 CRASH FACTS").

14. *Id.*

15. *See, e.g.*, *Xander v. Kiss*, No. 18 CV-2010-11945, 2012 Pa. Dist. & Cnty. Dec. LEXIS 1 (Ct. Com. Pl. Northampton Cnty. Jan. 11, 2012); *Rockwell v. Knott*, No. 12 CV 1114, 2013 Pa. Dist. & Cnty. Dec. LEXIS 406 (Ct. Com. Pl. Lackawanna Cnty. Aug. 13, 2013).

16. Wendy R.S. O'Connor, *Cell Phone Usage and Motor Vehicle Accident Litigation*, 91 PA. BAR ASS'N. Q. 55, 55 (2020).

17. 75 PA. STAT. AND CONS. STAT. § 3316(a) (West, Westlaw Edge through 2023 Reg. Sess. Act 7).

18. *Id.*

19. *Id.* § 3316(d) (West, Westlaw Edge through 2023 Reg. Sess. Act 7).

20. S.B. 37, 207th Gen. Assemb., Reg. Sess. (Pa. 2023).

21. *Id.*

22. Tara M. Franklin, *Done with Distracted Driving: Implications of Pennsylvania's Ban on Text-Based Communication While Driving Under the State Constitution*, 117 PENN ST. L. REV. 171, 174 (2012).

award of punitive damages is appropriate.<sup>23</sup> Additionally, this section explores the history and current status of punitive damages law in Pennsylvania, with an emphasis on the doctrine's applicability to actions in which harm results from intoxicated driving. Part III defines distracted driving and discusses the legal responses to its increasing prevalence in the first part of the twenty-first century.<sup>24</sup> Part IV analyzes inconsistencies in Pennsylvania's lower courts' application of punitive damages precedent to contemporary cases and rebuts arguments against allowing punitive damages claims in these instances.<sup>25</sup> The article concludes with an entreaty to the Supreme Court of Pennsylvania to expand the availability of punitive damages to cases in which distracted driving was the cause of the harm.<sup>26</sup>

## II. PUNITIVE DAMAGES

### A. *An Overview of Damages*

#### 1. *Nominal and Compensatory Damages vs. Punitive Damages*

The Restatement (Second) of Torts summarizes the different types of possible damages available in tort actions.<sup>27</sup> Nominal damages are trivial sums of money that are awarded in cases in which the plaintiff has established a cause of action but has not established that they are entitled to compensatory damages.<sup>28</sup> Nominal damages may be awarded in the absence of actual harm to the plaintiff, or for the defendant's bad state of mind.<sup>29</sup> Compensatory damages, on the other hand, are awarded as "compensation, indemnity, or restitution" to persons for harms suffered against them.<sup>30</sup> As damages flow from an injury,<sup>31</sup> it follows logically that the function of compensatory damages is to put an injured person "in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed."<sup>32</sup>

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23. See *infra* pp. 5–17.

24. See *infra* pp. 18–23.

25. See *infra* pp. 24–33.

26. See *infra* pp. 34.

27. RESTATEMENT (SECOND) OF TORTS § 902 cmt. a (AM. L. INST. 1979); *Id.* § 903 (AM. L. INST. 1979).

28. *Id.* § 907 (AM. L. INST. 1979).

29. *Id.* § 907 cmt. a.

30. *Id.* § 903.

31. *Id.* § 902 cmt. a.

32. *Id.* § 903 cmt. a.



Punitive damages exist between nominal and compensatory damages and beyond them. Like nominal damages, but unlike compensatory damages, punitive damages may be awarded in cases where a defendant has caused no harm to a person or to property.<sup>33</sup> Punitive damages are awarded when “the defendant act[s] with recklessness, malice, or deceit” and are assessed as a means of “penalizing the wrongdoer or making an example to others.”<sup>34</sup> By their nature, punitive damages straddle the line between civil and criminal penalties.<sup>35</sup> Although they are awarded in civil lawsuits, their dual functions are not to make a person whole or provide relief where no other exists, but rather to punish and to deter.<sup>36</sup> As such, the bar for such an award is much higher than those of nominal or compensatory damages.<sup>37</sup>

## 2. Punitive Damages—Then and Now

Punitive damages, also sometimes referred to as exemplary damages, are rooted in eighteenth-century English jurisprudence<sup>38</sup> and were recognized in the American colonies soon after their formation.<sup>39</sup> By 1850, they were a well-established aspect of civil law in this country.<sup>40</sup> Only a small number of states, such as Washington and Nebraska, have historically maintained prohibitions on the award of punitive or exemplary damages.<sup>41</sup>

In order for an award of punitive damages to be deemed appropriate, the conduct in question must be so outrageous as to render an award of nominal or compensatory damages alone insufficient.<sup>42</sup> Punitive damages may be awarded for conduct that is “outrageous, either because the defendant’s acts are done with an evil motive or because they are done with reckless indifference to the rights of others.”<sup>43</sup> Inadvertence, mistake, errors of judgement, and other causes, which might constitute ordinary negligence, are inadequate

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33. *Id.* § 908 cmt. b (AM. L. INST. 1979).

34. *Damages*, BLACK’S LAW DICTIONARY (11th ed. 2019).

35. *See* RESTATEMENT (SECOND) OF TORTS § 901 cmt. c (AM. L. INST. 1979).

36. *Id.* § 908(1).

37. *Id.* § 908 cmt. b.

38. Sales & Cole, *supra* note 1, at 1119–20.

39. *Punitive Damages*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/law/encyclopedias-almanacs-transcripts-and-maps/punitive-damages> (last visited Feb. 8, 2023).

40. *Id.*

41. *See, e.g.*, *Bryant v. Wyeth*, 879 F. Supp. 2d 1214, 1221 (W.D. Wash. 2012) (noting that Washington does not allow punitive damages unless expressly authorized by the state legislature); *Miller v. Kingsley*, 230 N.W.2d 472, 474 (Neb. 1975) (finding that punitive damages are unconstitutional and therefore unavailable in Nebraska).

42. RESTATEMENT (SECOND) OF TORTS § 908 cmt. b.

43. *Id.*

grounds to justify an award of punitive damages.<sup>44</sup> When assessing punitive damages, there are several factors that the trier of fact may consider that may not ordinarily be available when assessing nominal or compensatory damages claims, including the character of the defendant's act and the defendant's wealth.<sup>45</sup>

An example of sufficient grounds for an award of punitive damages can be found in a class action lawsuit brought against Janssen Pharmaceuticals over the company's antipsychotic drug, Risperdal.<sup>46</sup> The plaintiff alleged that he took Risperdal from 2003 to 2008 and subsequently grew breast tissue, a condition known as gynecomastia.<sup>47</sup> The suit accused the company of not only failing to warn doctors of the drug's risks but also of improperly marketing the drug to children with mental health disorders.<sup>48</sup> The case ended with a jury award of eight billion dollars in punitive damages in 2019.<sup>49</sup>

But while a defendant may be vulnerable to punitive damages if they acted with either an evil motive or recklessly,<sup>50</sup> the language used in assessing the defendant's actions can be contradictory.<sup>51</sup> Both statutes and judicial opinions have referred to reckless indifference as "willful or wanton misconduct," a phrase which courts have also used to refer to conduct intended to cause harm to another.<sup>52</sup>

The legal definitions of these terms can be inconsistent as well. Willful is defined as "voluntary and intentional, but not necessarily malicious. A voluntary act becomes willful, in law, only when it involves conscious wrong or *evil purpose* [or] inexcusable *carelessness* . . ." <sup>53</sup> Willfulness itself does not necessarily imply malice, but it must involve more than just knowledge. It is "the voluntary, intentional violation or disregard of a known legal duty."<sup>54</sup>

Wanton, meanwhile, is defined as "[u]nreasonably or maliciously risking harm while being utterly indifferent to the consequences."<sup>55</sup>

44. *Id.*

45. *Id.* § 908 cmt. e.

46. *Murray v. Janssen Pharms., Inc.*, 180 A.3d 1235, 1238 (Pa. Super. Ct. 2018).

47. *Id.*

48. *Id.*

49. Katie Thomas & Mihir Zaveri, *Johnson & Johnson Hit With \$8 Billion Jury Verdict in Risperdal Suit*, N.Y. TIMES (Oct. 8, 2019), <https://www.ny-times.com/2019/10/08/health/johnson-and-johnson-risperdal-verdict.html>.

50. RESTATEMENT (SECOND) OF TORTS § 908 cmt. b.

51. *Id.* § 500 special note (AM. L. INST. 1979).

52. *Id.*

53. *Willful*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added).

54. *Willfulness*, BLACK'S LAW DICTIONARY (11th ed. 2019).

55. *Wanton*, BLACK'S LAW DICTIONARY (11th ed. 2019).

It is differentiated from mere recklessness in regard to both the actual state of mind and the degree of culpability:

One who is acting recklessly is fully aware of the unreasonable risk he is creating, but may be trying and hoping to avoid any harm. One acting wantonly may be creating no greater risk of harm, but he is not trying to avoid it and is indifferent to whether harm results or not. . . . The two are not mutually exclusive. Wanton conduct is reckless plus, so to speak.<sup>56</sup>

Section 908(2) of the Restatement (Second) of Torts deliberately avoids using the words “willful” or “wanton,” instead dividing outrageous behavior into two simple categories: those done with an evil motive and those done with reckless indifference.<sup>57</sup> Therefore, a clear understanding of what constitutes “reckless indifference” is required. Section 500 of the Restatement (Second) defines an actor’s conduct as reckless if

he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.<sup>58</sup>

Under this definition, there are two distinct types of reckless conduct.<sup>59</sup> The first requires that the actor knows, or has reason to know, “of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or fail to act, in conscious disregard of, or indifference to, that risk.”<sup>60</sup> The second only requires that the actor has or should have such knowledge, “but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so.”<sup>61</sup> It is up to the court to decide if both types of recklessness constitute outrageous behavior.<sup>62</sup>

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56. *Id.*

57. RESTATEMENT (SECOND) OF TORTS § 908(2) (AM. L. INST. 1979).

58. *Id.* § 500 (AM. L. INST. 1965).

59. *Id.* § 500 cmt. a.

60. *Id.*

61. *Id.*

62. *See infra* pp. 12–14.

## B. *Pennsylvania Precedents on Punitive Damages*

### 1. *Early Precedent*

In some of its earliest discussions on the applicability of punitive damages, the Pennsylvania Supreme Court used terms such as “willful,” “wanton,” “malicious,” “reckless,” and “oppressive” in analyzing punitive damages claims, sometimes interchangeably.<sup>63</sup> In 1963, the court adopted Section 908 of the Restatement of Torts and, relying on its own prior rulings, held that “[i]n determining whether punitive damages should be awarded, the act itself together with all the circumstances including the motive of the wrongdoer” should be considered.<sup>64</sup> Although the court held that punitive damages were available where the conduct was outrageous or “done with a bad motive or with a reckless indifference to the interests of others,”<sup>65</sup> the court did not provide any further insight on what constituted reckless within the scope of a punitive damages analysis.<sup>66</sup>

Two decades later, the court revisited the issue in the case *Feld v. Merriam* and adopted Section 908(2) of the Restatement (Second) of Torts.<sup>67</sup> In addition to reiterating that punitive damages may be awarded when the defendant’s behavior is outrageous, the court stated, “[t]he act, or the failure to act, must be intentional, reckless or malicious.”<sup>68</sup> Although this remains the controlling authority for punitive damages claims in general,<sup>69</sup> there was still the matter of the two types of recklessness defined in Section 500 of the Restatement (Second).<sup>70</sup>

The Pennsylvania Supreme Court addressed this issue in the case *Martin v. Johns-Manville Corporation*,<sup>71</sup> in which the court noted, as it had previously, that punitive damages are only appropriate to punish and deter extreme behavior.<sup>72</sup> “Punitive damages may be awarded for conduct that is outrageous because of the defendant’s evil motive or his reckless indifference to the rights of

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63. See, e.g., *Hughes v. Babcock*, 37 A.2d 551, 554 (Pa. 1944); *Thompson v. Swank*, 176 A. 211, 211 (Pa. 1934).

64. *Chambers v. Montgomery*, 192 A.2d 355, 358 (Pa. 1963) (quoting RESTATEMENT OF TORTS § 908 cmt. e (AM. L. INST. 1939)).

65. *Id.*

66. *Id.*

67. 485 A.2d 742, 747–48 (Pa. 1984).

68. *Id.* at 748.

69. *Hutchison v. Luddy*, 870 A.2d 766, 770 (Pa. 2005).

70. RESTATEMENT (SECOND) OF TORTS § 500 cmt. a (AM. L. INST. 1965).

71. 494 A.2d 1088, 1097 (Pa. 1985).

72. *Id.* at 1096.

others.”<sup>73</sup> But the court went further than it had in the past and contrasted the language of Section 908(2) with the language of Section 500.<sup>74</sup> Although recklessness as it is described in Section 908(2) may be sufficient foundation for a claim of punitive damages, it is not equivalent to both types of recklessness contained in Section 500.<sup>75</sup> The court held that the recklessness outlined in Section 500 actually represented two distinct mental states, only one of which was sufficiently outrageous to support a claim of punitive damages.<sup>76</sup>

The first type of recklessness requires that “[the] actor knows, or has reason to know, . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk.”<sup>77</sup> The second type of recklessness requires only that “the actor [had] such knowledge, or reason to know, of the facts, but [did] not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so.”<sup>78</sup> The court noted that because an indifference to a known risk is closer to an intentional act than a simple failure to appreciate a risk, the first type of recklessness demonstrates a higher degree of culpability than the second.<sup>79</sup> Therefore, only the first type of recklessness can be sufficient to trigger a question of punitive damages.<sup>80</sup> This standard precludes cases in which the conduct is found to be merely negligent or even grossly negligent from qualifying for punitive damages.<sup>81</sup>

Wanton misconduct, as defined and clarified by *Evans*<sup>82</sup> and *Fugagli v. Camasi*,<sup>83</sup> respectively, was also excluded as sufficient to establish punitive damages, a finding that was not without objection.<sup>84</sup> In a concurring opinion, Justice McDermott disagreed that punitive damages were inappropriate ““where the actor has such

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73. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 908(2) (AM. L. INST. 1979)).

74. *Id.* at 1097.

75. *Id.*

76. *Compare Evans v. Phila. Transp. Co.*, 212 A.2d 440, 443 (Pa. 1965) (defining wanton misconduct as conduct done in disregard of a known risk or a risk so obvious that it must be known and so great as to make it highly probable that harm would follow), *with* *McSparron v. Pa. R.R. Co.*, 258 F. Supp. 130, 134 (E.D. Pa. 1966) (finding that wanton misconduct as defined in *Evans* and Section 500 of the Restatement (Second) of Torts is not the same as outrageous conduct done with reckless indifference to the rights of others).

77. *Martin*, 494 A.2d at 1097.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 1098.

82. *Evans v. Phila. Transp. Co.*, 212 A.2d 440, 444 (Pa. 1965).

83. *Fugagli v. Camasi*, 229 A.2d 735, 736 (Pa. 1967).

84. *Martin*, 494 A.2d at 1101 (McDermott, J., concurring) (quoting *Focht v. Rabada*, 268 A.2d 157, 170–71 (Pa. Super. Ct. 1970)).

knowledge, or reason to know of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man would do so.”<sup>85</sup> He opined that such a holding contradicted the court’s prior ruling in *Feld* that punitive damages must be based on malicious, reckless, willful, or wanton misconduct.<sup>86</sup> But the court’s adoption of the language from Section 500 was not a contradiction of the *Feld* standard but rather a clarification of it. By adopting a clear and coherent standard with which to evaluate reckless conduct within the context of Section 908(2), the court merely reconciled past inconsistencies in language and rationale.<sup>87</sup>

In the decades since the *Martin* decision, the court has consistently upheld its rationale, most notably in *Hutchison v. Luddy*.<sup>88</sup> In *Hutchison*, the mother of a child sexually abused by a Catholic priest brought an action against not only the priest, but the parish to which he had been assigned, the Bishop, and the entire Diocese.<sup>89</sup> Taking the opportunity to refine its analysis from *Martin*, the court distilled it into a two-part test:

Thus, in Pennsylvania, a punitive damages claim must be supported by evidence sufficient to establish that (1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted, or failed to act, as the case may be, in conscious disregard of that risk.<sup>90</sup>

Therefore, an actor’s *appreciation of the risk of harm* becomes a necessary element in establishing the requisite mental state to support the imposition of punitive damages.<sup>91</sup>

## 2. Clarification on Intoxicated Driving

When considering the issues presented by *Martin*, the Pennsylvania Supreme Court relied on a unique case which had come before the Pennsylvania Superior Court fifteen years earlier.<sup>92</sup> At that time, *Focht v. Rabada* posed an important question: does intoxicated driving constitute outrageous conduct sufficient to trigger a jury question of punitive damages?<sup>93</sup>

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85. *Id.*

86. *Id.*

87. See *Martin*, 494 A.2d at 1097.

88. 870 A.2d 766, 771 (Pa. 2005).

89. *Id.* at 767.

90. *Id.* at 772.

91. *Id.* at 771 (emphasis added).

92. *Martin*, 494 A.2d at 1097.

93. 268 A.2d 157, 158 (Pa. Super. Ct. 1970).

*Focht* was a negligence case in which the defendant injured the plaintiff while attempting to drive under the influence of alcohol.<sup>94</sup> Before the accident, the defendant had been parked more than one hundred feet away from the plaintiff in front of a club across the street.<sup>95</sup> The plaintiff was standing in front of his own car when the defendant's car rear-ended him, the force of the impact so great that the plaintiff was sent flying thirty feet down the street.<sup>96</sup> Despite this, the defendant failed to stop and continued driving down the road until he struck a second vehicle.<sup>97</sup> The plaintiff, in order to support a request for punitive damages, made four offers of proof.<sup>98</sup> The plaintiff sought to establish:

- (a) that defendant was so intoxicated that he did not know whether his motor was running; (b) that, in fact, defendant released the brake and permitted his automobile to drift, without lights or motor running, down and across the street and into plaintiff's automobile; (c) that defendant was incoherent; and (d) that defendant was uncooperative, refused to give his name and attempted to run away from the scene of the accident.<sup>99</sup>

The trial court refused to allow evidence of intoxication to be admitted, holding that it could not support a claim of punitive damages.<sup>100</sup> Because the defendant had already admitted liability, the trial court issued a directed verdict in favor of the plaintiff but only awarded compensatory damages.<sup>101</sup> The plaintiff moved for a new trial solely on the question of punitive damages, but the trial court dismissed the motion, prompting an appeal.<sup>102</sup>

*Focht* was a case of first impression before the Pennsylvania appellate courts. As the Superior Court noted, there was a jurisdictional split on the question of whether punitive damages were available for harm caused by intoxicated driving.<sup>103</sup> At the time, a minority of states, including Virginia, Texas, Oklahoma, and Maryland, had held that while evidence of intoxicated driving could

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94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

support ordinary negligence, it was insufficient to establish a claim for punitive damages.<sup>104</sup>

The majority of states, however, had found that evidence of intoxicated driving could support a claim for punitive damages.<sup>105</sup> The Arkansas Supreme Court, for example, held that punitive damages could be awarded without proof of intentional misconduct, as there was an inherent disregard for the safety of others in a defendant's guilty plea to reckless driving.<sup>106</sup> The Arkansas Supreme Court observed that "the jury was amply authorized in saying by their verdict that [the defendant] was exhibiting a 'wanton disregard for the rights and safety of others.'"<sup>107</sup>

At the time *Focht* was decided, Pennsylvania had already adopted Section 908 of the Restatement (First) of Torts, finding that punitive damages could be awarded for bad motive or reckless indifference.<sup>108</sup> Therefore, in order to determine whether intoxicated driving constituted a reckless indifference to the interests of others, the Pennsylvania Superior Court turned to the commentary of Section 500 of the Restatement (First),<sup>109</sup> which states:

If the actor's conduct is such as to involve a high degree of chance that serious harm will result from it to anyone who is within range of its effect, the fact that he knows or *has reason to know that others are within such range* is conclusive of the recklessness of his conduct toward them.<sup>110</sup>

The court concluded that driving while intoxicated demonstrated a reckless indifference to the interests of others and, under certain

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104. See, e.g., *Baker v. Marcus*, 114 S.E.2d 617, 621 (Va. 1960) (holding that punitive damages may not be awarded without proof of purposeful carelessness, deliberate inattention to known danger, or intended violation or disregard of the rights of others on the highway); *Sears, Roebuck & Co. v. Jones*, 303 S.W.2d 432, 437 (Tex. Civ. App. 1957) (reversing an award of punitive damages as although the driver was intoxicated, there was no evidence he acted wantonly or maliciously to the extent that would substantiate a conscious indifference to the risk); *Ruther v. Tyra*, 247 P.2d 964, 968 (Okla. 1952) (holding that punitive damages are not available in an ordinary motor vehicle action absent a showing of malice or evil intent); *Davis v. Gordon*, 36 A.2d 699, 701 (Md. 1944) (holding that the test for punitive damages requires an element of fraud or malice forming part of the wrongful act).

105. See *Focht*, 268 A.2d at 159.

106. *Miller v. Blanton*, 210 S.W.2d 293, 295 (Ark. 1948).

107. *Id.* See also *Sebastian v. Wood*, 66 N.W.2d 841, 849 (Iowa 1954) (rejecting the defendant's argument that malice was a necessary element and finding that a drunken man attempting to operate a motor vehicle on a public highway in violation of a statute intended to protect others is reckless and grossly negligent).

108. *Focht*, 268 A.2d at 159.

109. *Id.*

110. *Id.* (quoting RESTATEMENT OF TORTS 908 cmt. d (AM. L. INST. 1939)) (emphasis added).



circumstances, amounted to outrageous conduct such as to allow an award of punitive damages to be imposed.<sup>111</sup>

Automobiles represent the most lethal and deadly weapons today entrusted to our citizens. When automobiles are driven by intoxicated drivers, the possibility of death and serious injury increases substantially. *Every licensed driver is aware that driving while under the influence of intoxicating liquor presents a significant and very real danger to others in the area.*<sup>112</sup>

### III. DISTRACTED DRIVING

#### A. Definition and National Trends

Intoxicated driving is not the only danger Pennsylvania drivers face while behind the wheel. In the United States, the CDC estimates that nine people are killed every day in crashes that involve distracted driving.<sup>113</sup> In 2019, an estimated 400,000 people were injured as a result of distracted driving crashes.<sup>114</sup> In 2020, 3,142 people were killed in crashes involving distracted driving, accounting for over 8% of all road deaths.<sup>115</sup> At any given moment in the day, more than 350,000 distracted drivers are estimated to be behind the wheel of a vehicle.<sup>116</sup>

Distracted driving can be defined as a driver diverting attention away from activities critical to the safe operation of a vehicle and toward any competing activity.<sup>117</sup> Activities that drivers perform while driving can be separated into three categories: 1) primary tasks; 2) secondary tasks; and 3) tertiary tasks.<sup>118</sup> Primary tasks are those that are critical for the safe control and operation of the vehicle, such as steering, accelerating, and braking.<sup>119</sup> Secondary tasks are those that are related to operating the vehicle but are not actually essential, such as using turn signals, using rear- and side-

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111. *Id.* at 160.

112. *Id.* at 161 (emphasis added).

113. *Distracted Driving*, CTRS. FOR DISEASE CONTROL AND PREVENTION, [https://www.cdc.gov/transportationsafety/distracted\\_driving/index.html](https://www.cdc.gov/transportationsafety/distracted_driving/index.html) (last visited Jan. 3, 2023) (hereinafter “CDC”).

114. *The Dangers of Distracted Driving*, FCC, <https://www.fcc.gov/consumers/guides/dangers-texting-while-driving> (last visited Jan. 4, 2023).

115. *Distracted Driving*, GOVERNORS HIGHWAY SAFETY ASS’N, <https://www.ghsa.org/issues/distracted-driving> (last visited Jan. 6, 2023) (hereinafter “GHSA”).

116. *Id.*

117. Nicholas A. Ashford et al., *Distracted Driving: Testing the Contours of the Law and Public Policy*, 7 U. PA. J. L. & PUB. AFF. 113, 118 (2021).

118. *Id.*

119. *Id.*

view mirrors, or operating navigation systems.<sup>120</sup> Finally, tertiary tasks are those not related to operating a vehicle at all.<sup>121</sup> Tertiary tasks can include adjusting the radio, speaking to a passenger, eating, or using a cell phone to text or make a call.<sup>122</sup> If a tertiary task prevents a driver from adequately focusing on primary or secondary tasks, it is classified as a distracting behavior.<sup>123</sup> These distracting behaviors are of three main types: 1) visual (taking one's eyes off the road); 2) manual (taking your hands off the wheel); and 3) cognitive (taking your mind off of driving).<sup>124</sup>

Although there are various activities and behaviors that may constitute distracted driving, technology-based activities and behaviors, such as texting, could be considered the most alarming due to the proven addictive nature of these devices.<sup>125</sup> These technological distractions induce a type of cognitive distortion in which a driver can find it difficult to accurately assess his or her own level of impairment.<sup>126</sup> Several studies have shown that, despite recognizing the dangers of texting while driving, many people continue to do so.<sup>127</sup>

Even though there is increased public awareness of the risks of distracted driving, many people persist in using their cell phones while driving.<sup>128</sup> Both empirical data and self-reported surveys demonstrate that the problem of distracted driving is pervasive.<sup>129</sup> In a thirty-day period, 35% of drivers sent or read a text-based communication while driving.<sup>130</sup> During that same thirty-day period, 67% of drivers reported regularly talking on a handheld cell phone while driving.<sup>131</sup> These statistics present an alarming reality. Sending a single text doubles a driver's reaction time,<sup>132</sup> and simply reading a text requires a driver to take their eyes off the road for an average of five seconds.<sup>133</sup> At fifty-five miles per hour, that is the equivalent of driving the length of an entire football field blindfolded.<sup>134</sup>

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120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 118–19.

124. CDC, *supra* note 113.

125. Ashford, *supra* note 117, at 122.

126. *Id.*

127. *Id.*

128. Franklin, *supra* note 22, at 174.

129. *Id.*

130. *Id.*

131. *Id.* at 174–75.

132. *Id.* at 174.

133. GHSA, *supra* note 115.

134. *Id.*

Pennsylvania is no exception to the national trend of distracted driving. Since the proliferation of cell phones in the mid-1990s,<sup>135</sup> rates of distracted driving crashes in Pennsylvania have been steadily increasing.<sup>136</sup> Although intoxicated driving still causes more deaths than distracted driving every year in Pennsylvania,<sup>137</sup> the number of car crashes in which distracted driving was the primary contributing factor has increased substantially in the last quarter-century.<sup>138</sup> In 1996, there were 6,425 car crashes caused primarily by distracted driving.<sup>139</sup> By 2021, that number had grown to 12,703, an increase of over 97%.<sup>140</sup> Conversely, the number of car crashes caused by intoxicated driving during the same time period has actually decreased by 27%.<sup>141</sup> The statistics for fatal car crashes are even grimmer. From 1996 to 2021, fatal car crashes caused by distracted driving increased by 114%. During that same time period, fatal car crashes caused by intoxicated driving decreased by 68%. Interestingly, during that same time period, the Pennsylvania lower courts were consistently relying on *Focht* and finding that punitive damages may be properly awarded for claims arising from intoxicated driving.<sup>142</sup>

### B. Legislative Responses to Distracted Driving

The Pennsylvania General Assembly did not attempt to address the dangers of distracted driving until more than a decade into the twenty-first century.<sup>143</sup> Currently, thirty states have passed laws that ban the use of all handheld cell phones and devices while driving, but Pennsylvania is not one of them.<sup>144</sup> Pennsylvania is also absent from the group of thirty-six states that ban cell phone use by novice drivers and from the select group of twenty-three states that

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135. Križanović, *supra* note 12.

136. 2021 CRASH FACTS, *supra* note 13, at 23; 1996 CRASH FACTS, *supra* note 13, at 23.

137. 2021 CRASH FACTS, *supra* note 13, at 23; 1996 CRASH FACTS, *supra* note 13, at 23.

138. Note: 1996 was the first year the Pennsylvania Department of Transportation (PennDOT) began tracking distracted driving as a primary contributing factor in car accidents on Pennsylvania highways. See 1996 CRASH FACTS, *supra* note 13.

139. *Id.* at 23.

140. 2021 CRASH FACTS, *supra* note 13, at 23.

141. See *id.*; 1996 CRASH FACTS, *supra* note 13, at 23.

142. See, e.g., *W.P. v. Hebbard*, No. 2018-10235, 2019 Pa. Dist. & Cnty. Dec. LEXIS 6233, at \*4–5 (Ct. Com. Pl. Cumberland Cnty. Feb. 21, 2019); *Rossi v. Fuchs*, No. A.D. 00-10659, 2002 Pa. Dist. & Cnty. Dec. LEXIS 108, at \*3–5 (Ct. Com. Pl. Butler Cnty. Mar. 7, 2002); *Kairamanov v. LaFalce*, No.1587, 1997 Pa. Dist. & Cnty. Dec. LEXIS 106, at \*3–4 (Ct. Com. Pl. Monroe Cnty. Dec. 12, 1997).

143. 75 PA. STAT. AND CONS. STAT. § 3316(a) (West, Westlaw Edge through 2023 Reg. Sess. Act 7).

144. GHSA, *supra* note 115.

ban cell phone use by school bus drivers.<sup>145</sup> In fact, it was not until 2012 that the first state statute went into effect penalizing distracted drivers in Pennsylvania at all.<sup>146</sup> But that statute, Section 3316 of the Motor Vehicle Code, only prohibits drivers from using a cell phone or similar device to send text-based communications.<sup>147</sup> It ignores all other forms of distraction cell phones can provide while driving.<sup>148</sup>

The statute states that “no driver shall operate a motor vehicle on a highway . . . while using an interactive wireless communications device to send, read or write a text-based communication while the vehicle is in motion . . . .”<sup>149</sup> The Pennsylvania legislature defines an interactive wireless communications device as a wireless telephone, smartphone, or similar device that can be used for “voice communication, texting, e-mailing, browsing the internet or instant messaging.”<sup>150</sup> Additionally, Section 3316 also has preemptive effects, which prohibits local jurisdictions from enacting their own forms of distracted driving bans<sup>151</sup> that may restrict distracted driving to more than simply text-based communications. The penalty for violating this statute, a fifty-dollar fine, is at best a slap on the wrist.<sup>152</sup>

By the time Section 3316 went into effect in 2012, technology had already outpaced it.<sup>153</sup> The cellphones of the 1990s and 2000s, whose primary function was that of a simple telephone, had been largely replaced by smartphones with a greater and more diverse array of capabilities.<sup>154</sup> Those capabilities include watching videos, taking photographs, and playing video games, none of which are expressly prohibited by the text of Section 3316.<sup>155</sup> In response to advances in technology, legislation has been introduced to strengthen the language of Section 3316.<sup>156</sup> Senate Bill 37 would add to the definition of wireless communication devices under Section 102 to include devices that can play games, take or transmit images, record or broadcast videos, and create or share social media

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145. *Id.*

146. 75 PA. STAT. AND CONS. STAT. § 3316.

147. *Id.* § 3316(a).

148. *Id.*

149. *Id.*

150. *Id.* § 102 (West, Westlaw Edge through 2023 Reg. Sess. Act 7).

151. Franklin, *supra* note 22, at 177–78.

152. *See* 75 PA. STAT. AND CONS. STAT. § 3316(d).

153. Križanović, *supra* note 12.

154. *Id.*

155. 75 PA. STAT. AND CONS. STAT. § 3316(a).

156. S.B. 37, 207th Gen. Assemb., Reg. Sess. (Pa. 2023).

posts.<sup>157</sup> Additionally, Senate Bill 37 would also create Section 3316.1 of the Motor Vehicle Code, which would prohibit drivers from using an interactive mobile device at all while driving a motor vehicle.<sup>158</sup> Although this amendment would certainly address current gaps in Pennsylvania distracted driving law, the proposed penalties, fines ranging from \$150 to \$500,<sup>159</sup> are inadequate when contrasted with the danger of distracted driving.

#### IV.     INCONSISTENCIES IN APPLYING PUNITIVE DAMAGES           CRITERIA

##### A.    *Recent Lower Court Rulings*

Although distracted driving and intoxicated driving hold equal potential to cause harm to the general public, only one can be punished civilly in proportion to the harm. While *Martin* specified a clear standard for evaluating reckless conduct for its potential to support a claim of punitive damages,<sup>160</sup> and *Focht* provided a springboard for such claims in cases where the harm arises from an intoxicated driver,<sup>161</sup> Pennsylvania's appellate courts still have not ruled definitively on the use of cell phones in relation to motor vehicle lawsuits.<sup>162</sup> As a result of the appellate courts' silence on this subject, the rulings of the lower courts are a tangle of ambiguities, inconsistencies, and, at times, outright contradiction of prior Pennsylvania Supreme and Superior Court holdings.<sup>163</sup>

For instance, the Northampton County Court of Common Pleas considered the issue of distracted driving in *Xander v. Kiss*.<sup>164</sup> In *Xander*, the plaintiff alleged that the defendant was talking on his cell phone while driving and lost control of his car.<sup>165</sup> The defendant then crossed into the plaintiff's lane and struck her vehicle, harming her physically.<sup>166</sup> Factually, the resemblance of *Xander* to *Focht* is striking.<sup>167</sup> Substitute distracted driving for intoxicated driving, and all of the major elements are the same: a driver loses control of

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157. *Id.*

158. *Id.*

159. *Id.*

160. *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1097 (Pa. 1985).

161. *Focht v. Rabada*, 268 A.2d 157, 161 (Pa. Super. Ct. 1970).

162. O'Connor, *supra* note 16, at 55.

163. *See infra* note 172 and accompanying text.

164. *Xander v. Kiss*, No. 18 CV-2010-11945, 2012 Pa. Dist. & Cnty. Dec. LEXIS 1, at \*1 (Ct. Com. Pl. Northampton Cnty. Jan. 11, 2012).

165. *Id.*

166. *Id.*

167. *Compare Focht v. Rabada*, 268 A.2d 157, 158 (Pa. Super. Ct. 1970) *with Xander*, 2012 Pa. Dist. & Cnty. Dec. LEXIS 1, at \*1-3.

their vehicle while engaging in reckless behavior and strikes an innocent bystander, resulting in harm.<sup>168</sup> The plaintiff in *Xander* entered a demand for punitive damages, alleging that the defendant's conduct was egregious enough to justify a claim for punitive damages.<sup>169</sup> In response, the defendant filed a motion to strike the claim of punitive damages, which the trial court sustained.<sup>170</sup>

To determine whether the defendant's conduct rose to the level of outrageousness necessary to support a claim of punitive damages, the trial court relied on the case *McClellan v. Health Maintenance Organization of Pennsylvania*.<sup>171</sup> Although *McClellan* appropriately defined outrageous conduct as conduct done with "a bad motive or reckless indifference to the interests of others,"<sup>172</sup> it went on to equate reckless indifference with the definition of wanton misconduct from *Evans*, ignoring the fact that the Pennsylvania Supreme Court had previously rejected this rationale in favor of adopting the language from Section 500 of the Restatement (Second).<sup>173</sup> By failing to take into account Section 500, the trial court missed one of its critical considerations: the range of danger.<sup>174</sup> "[T]he fact that [an actor] knows or has reason to know that others are within such range is conclusive of the recklessness of his conduct toward them."<sup>175</sup>

The trial court applied very little analysis to the facts of the case when determining if the defendant's conduct was outrageous.<sup>176</sup> The court stated that "the Defendant simply lost control of his vehicle while speaking on his cellular telephone" and found that this alone did not support a claim of punitive damages.<sup>177</sup>

A year and a half after *Xander*, the Lackawanna County Court of Common Pleas considered the question of whether distracted driving may serve as sufficient grounds for an award of punitive damages.<sup>178</sup> In *Rockwell v. Knott*,<sup>179</sup> the plaintiff alleged that the defendant stopped at an intersection and began looking at his GPS unit, taking his eyes off the road and diverting his attention "from

168. *Xander*, 2012 Pa. Dist. & Cnty. Dec. LEXIS 1, at \*1.

169. *Id.*

170. *Id.*

171. 604 A.2d 1053, 1061 (Pa. Super. Ct. 1992).

172. *Id.*

173. See *supra* note 74 and accompanying text.

174. RESTATEMENT (SECOND) OF TORTS § 500 cmt. d (AM. L. INST. 1965).

175. *Id.* (emphasis added).

176. See *Xander v. Kiss*, No. 18 CV-2010-11945, 2012 Pa. Dist. & Cnty. Dec. LEXIS 1 (Ct. Com. Pl. Northampton Cnty. Jan. 11, 2012).

177. *Id.* at \*3.

178. *Rockwell v. Knott*, No. 12 CV 1114, 2013 Pa. Dist. & Cnty. Dec. LEXIS 406, at \*1 (Ct. Com. Pl. Lackawanna Cnty. Aug. 13, 2013).

179. *Id.* at \*3.

oncoming traffic for a substantial and significant amount of time.”<sup>180</sup> At this point, the plaintiff entered the intersection and was abruptly struck by the defendant’s vehicle.<sup>181</sup>

The plaintiff’s principal allegations were that the defendant “knew that it was dangerous to operate his GPS at the same time that he was operating a vehicle,”<sup>182</sup> and that he “knowingly and intentionally chose to be distracted by his GPS system while he was operating a motor vehicle.”<sup>183</sup> The court found that the record lacked proof of the plaintiff’s allegation that the defendant was distracted for a substantial and significant amount of time<sup>184</sup> and that the plaintiff’s evidence was insufficient to support a claim of punitive damages as a matter of law.<sup>185</sup> However, the court did acknowledge *Focht’s* holding that punitive damages claims may be permitted against drivers under certain circumstances.<sup>186</sup> Finding that, although a motorist’s “split-second glimpse at [a] screen is akin to a momentary glance at a speedometer or [side]view mirror” and does not constitute reckless misconduct, a driver who “completely diverts his or her attention away from the roadway to view a [device]” and continues to travel without any view of the road or traffic may be deemed reckless.<sup>187</sup> Additionally, the *Rockwell* court recognized that “[t]exting while driving significantly increases the degree of driver distraction since it requires the motorist to completely divert his or her attention from the roadway as [he or she] focuses upon the mobile device. As such, texting poses a much greater risk to pedestrians and other motorists than speaking on a cell phone.”<sup>188</sup>

The Cumberland County Court of Common Pleas relied on both *Xander* and *Rockwell* when faced with the same question in *Manning v. Barber*.<sup>189</sup> In *Manning*, the plaintiffs were stopped at a red light with another vehicle behind them. The defendant rear-ended the second car with such force that it crashed into the back of the

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180. *Id.*

181. *Id.*

182. *Id.* at \*4.

183. *Id.*

184. *Id.* at \*23.

185. *Id.* at \*24–25.

186. *Rockwell v. Knott*, No. 12 CV 1114, 2013 Pa. Dist. & Cnty. Dec. LEXIS 406, at \*11 (Ct. Com. Pl. Lackawanna Cnty. Aug. 13, 2013) (quoting *Focht v. Rabada*, 268 A.2d 157, 161 (Pa. Super. Ct. 1970)) (“Punitive damages claims have been permitted against motorists in narrow sets of circumstances indicating unreasonable actions by defendants in conscious disregard of known or obvious risks which pose a high probability of harm to others.”).

187. *Id.* at \*23.

188. *Id.* at \*20–21.

189. *Manning v. Barber*, 17-7915 Civ. Term, 2018 Pa. Dist. & Cnty. Dec. LEXIS 8394, at \*4 (Ct. Com. Pl. Cumberland Cnty. June 21, 2018).

plaintiffs' car.<sup>190</sup> The plaintiffs sought punitive damages, averring that the defendant was distracted at the time of the collision and repeatedly took her eyes off of the road to "read, view, and/or text" on her cell phone.<sup>191</sup> The defendant made no attempt to apply the brakes or take any evasive action before striking the second vehicle.<sup>192</sup> The defendant objected to the claim of punitive damages on the grounds that cell phone use alone was insufficient to sustain such a claim.<sup>193</sup>

When comparing *Xander*, *Rockwell*, and *Manning*, the defendant's actions in *Manning* are the most egregious, rising above simply speaking on a cell phone or viewing a GPS unit while driving. The defendant in *Manning* completely diverted her attention from the road to text while driving, resulting in a three-car pile-up.<sup>194</sup> Despite the *Manning* court's reliance on *Rockwell*, however, which noted that such behavior could constitute recklessness,<sup>195</sup> the court still held that there were insufficient additional indicia of recklessness to permit the plaintiffs' claim of punitive damages.<sup>196</sup> The conflict between these three opinions—*Xander*, *Rockwell*, and *Manning*—indicates an area of ambiguity in Pennsylvania law that the appellate courts have yet to address or clarify.<sup>197</sup>

### B. *The Need for Clarification*

Disturbingly, even as the number of car crash fatalities caused by intoxicated driving has plummeted,<sup>198</sup> and those caused by distracted driving continue to increase year after year,<sup>199</sup> trial court decisions on distracted driving in Pennsylvania remain woefully inconsistent and outright contradictory.<sup>200</sup> As the Pennsylvania

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190. *Id.* at \*2.

191. *Id.* at \*5.

192. *Id.*

193. *Id.* at \*2.

194. *Id.* at \*4–5.

195. *Rockwell*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 406, at \*23.

196. *Manning*, 2018 Pa. Dist. & Cnty. Dec. LEXIS 8394, at \*7.

197. O'Connor, *supra* note 16, at 55.

198. *See* 2021 CRASH FACTS, *supra* note 13, at 23; 1996 CRASH FACTS, *supra* note 13, at 23.

199. *Id.*

200. *Compare* Pietrulewicz v. Gil, No. 2014-C-0826, 2014 Pa. Dist. & Cnty. Dec. LEXIS 966, at \*1 (Ct. Com. Pl. Lehigh Cnty. June 6, 2014) (refusing to allow a claim of punitive damages against a distracted driver absent evil intent or conscious indifference to the rights of others, despite acknowledging that the driver's cell phone use was the undisputed cause of the car accident) *with* Schwab v. Bates, No. 2446, 1991 Pa. Dist. & Cnty. Dec. LEXIS 133, at \*8 (Ct. Com. Pl. Westmoreland Cnty. Aug. 5, 1991) (allowing a claim of punitive damages against the estate of an intoxicated driver "to deter conduct that, if deterred, will without question save many innocent lives").



Superior Court noted, as long ago as 1970, “[a]utomobiles represent the most lethal and deadly weapons today entrusted to our citizens.”<sup>201</sup> If the courts are justified in utilizing punitive damages to punish and deter those who drive while intoxicated,<sup>202</sup> it follows that the courts must also be justified in utilizing them to deter those who drive while distracted.

Not only do the paradoxical rulings of Pennsylvania’s trial courts conflict directly with the Supreme Court of Pennsylvania’s rationale in *Martin*,<sup>203</sup> the failure of the trial courts to allow such claims deprives the judiciary of an effective method of protecting society.<sup>204</sup> Deterrence is one of the main functions of punitive damages; to deter others from engaging in the same behavior that poses a substantial threat to the societal safety. By excluding distracted driving from claims for punitive damages, that function is being disregarded.<sup>205</sup>

There is an equitable need for the Supreme Court of Pennsylvania to set clear and unambiguous standards for the lower courts to apply consistently when assessing the availability of punitive damages in cases where harm arises from distracted driving. The court can do so by properly applying the principles and reasoning from previous Pennsylvania appellate court decisions.

Look again at *Manning*,<sup>206</sup> but this time through the lens of *Martin*<sup>207</sup> and *Focht*.<sup>208</sup> At first glance, it would seem, as the trial court pointed out, that merely using a cell phone while driving a car is not reckless enough to constitute outrageous conduct.<sup>209</sup> But consider that the perception of risk is a key factor in determining whether reckless conduct rises to the level of outrageousness. In order for a plaintiff to establish a claim of punitive damages, they must show evidence that the defendant had a “subjective appreciation of the risk of harm to which the plaintiff was exposed [and] acted, or failed to act . . . in conscious disregard of that risk.”<sup>210</sup>

Now apply the rationale from *Focht*.<sup>211</sup> The Pennsylvania Superior Court, in allowing a claim for punitive damages for intoxicated

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201. *Focht v. Rabada*, 268 A.2d 157, 161 (Pa. Super. Ct. 1970).

202. *Id.*

203. *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1097–98 (Pa. 1985).

204. RESTATEMENT (SECOND) OF TORTS § 908(1) (AM. L. INST. 1979).

205. *See supra* note 169 and accompanying discussion.

206. *Manning v. Barber*, 17-7915 Civ. Term, 2018 Pa. Dist. & Cnty. Dec. LEXIS 8394, at \*1 (Ct. Com. Pl. Cumberland Cnty. June 21, 2018).

207. *Martin*, 494 A.2d at 1097–98.

208. *Focht v. Rabada*, 268 A.2d 157, 161 (Pa. Super. Ct. 1970).

209. *Manning*, 2018 Pa. Dist. & Cnty. Dec. LEXIS 8394, at \*4.

210. *Hutchison v. Luddy*, 870 A.2d 766, 772 (Pa. 2005).

211. *Focht*, 268 A.2d at 161.

driving, recognized that “[a]utomobiles represent the most lethal and deadly weapons today entrusted to our citizenry. . . . *Every licensed driver is aware* that driving while under the influence of intoxicating liquor presents a significant and very real danger to others in the area.”<sup>212</sup> If every licensed driver is aware of the risks of driving while intoxicated, then it follows logically that every licensed driver is aware of the risks of driving while distracted. Therefore, in choosing to drive while distracted, the defendant in *Manning* had a clear perception of the risk of physical harm to others.<sup>213</sup> The defendant knew or should have known that using her cellphone while driving created a high degree of risk of physical harm to everyone within range of her vehicle.<sup>214</sup> Despite this, she made the conscious choice to use her phone while driving.<sup>215</sup>

Not only does using a phone while driving put everyone within range of the vehicle at risk of serious physical harm, but evidence shows that people continue to do so despite recognizing that risk.<sup>216</sup> The defendant in *Manning* chose to text while driving.<sup>217</sup> Regardless of the actual extent of harm, there was a significant, appreciable risk of physical harm to others. A solid foundation for punitive damages claims in cases such as these emerges. If one of the primary functions of punitive damages is to serve as a deterrent against outrageous behavior,<sup>218</sup> then it is only logical for punitive damages to be available to deter distracted driving.<sup>219</sup>

Of course, punitive damages are not without their criticism. General criticisms include that excessively high punitive damage awards have the potential to force defendants into bankruptcy, rendering successive plaintiffs without the opportunity to obtain full compensation for any injuries or harms they have suffered.<sup>220</sup> Another concern is that punitive damage awards can vary significantly depending on jurisdiction.<sup>221</sup> A study in 1996 found that there was a large difference between the mean and median punitive damage awards.<sup>222</sup> While the median punitive damage award was \$50,000,

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212. *Id.* (emphasis added).

213. *Manning*, 2018 Pa. Dist. & Cnty. Dec. LEXIS 8394, at \*4–5.

214. *Id.*

215. *Id.*

216. Ashford, *supra* note 117, at 122.

217. *Manning*, 2018 Pa. Dist. & Cnty. Dec. LEXIS 8394, at \*4–5.

218. RESTATEMENT (SECOND) OF TORTS § 908(1) (AM. L. INST. 1979).

219. Schwab v. Bates, No. 2446, 1991 Pa. Dist. & Cnty. Dec. LEXIS 133, at \*8 (Ct. Com. Pl. Westmoreland Cnty. Aug. 5, 1991) (finding that punitive damages should be available to deter conduct that poses a danger to innocent lives).

220. Jeremy C. Baron, *The “Monstrous Heresy” of Punitive Damages: A Comparison to the Death Penalty and Suggestions for Reform*, 159 U. PA. L. REV. 853, 860 (2011).

221. *Id.* at 861.

222. *Id.*

the mean award was \$859,000, which demonstrates a large discrepancy.<sup>223</sup> Additionally, there are concerns regarding whether juries are able to determine the correct amount of punitive damages, with some research suggesting that juries do not remember jury instructions well enough and, therefore, may not be accurately following the judges' orders.<sup>224</sup>

The need to deter dangerous behavior in order to protect the public must be weighed against a party's right to seek compensation for the harm they have suffered.<sup>225</sup> Even if a punitive damages award is so high that it completely bankrupts a defendant and prevents successive plaintiffs from receiving relief, it has still fulfilled one of the primary functions of punitive damages: deterring dangerous behavior.<sup>226</sup> Although a potential plaintiff seeking relief in the moment might be dismayed to learn that there is no possibility of relief, the long-term benefits to society outweigh that potential lost compensation.<sup>227</sup> If a defendant acts with reckless disregard to the safety of others and subsequently loses their home or their business as a result of a punitive damages award, other parties engaging in the same behavior may rethink their own courses of action and refrain in the future from that reckless or outrageous behavior. While successive plaintiffs may not be able to secure relief themselves, that loss is outweighed by the potential lives saved and future harm avoided.<sup>228</sup>

## V. CONCLUSION

As the number of distracted driving fatalities increases every year,<sup>229</sup> it has become more pressing for the Supreme Court of Pennsylvania to act. Despite its best effort, the actions undertaken by the Pennsylvania legislature have fallen short in addressing the growing epidemic of distracted drivers.<sup>230</sup> Neither the current

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223. *Id.*

224. *Id.* at 863.

225. *See Schwab v. Bates*, No. 2446, 1991 Pa. Dist. & Cnty. Dec. LEXIS 133, at \*8 (Ct. Com. Pl. Westmoreland Cnty. Aug. 5, 1991) (noting that “[i]f the court would engage in a balancing test, the court should weigh the possible harm that may be suffered by the [tortfeasors] against the harm that could be prevented to many innocent families if the conduct . . . is deterred.”).

226. RESTATEMENT (SECOND) OF TORTS § 908(1) (AM. L. INST. 1979).

227. *See Schwab*, 1991 Pa. Dist. & Cnty. Dec., at \*8.

228. *Id.*

229. 2021 CRASH FACTS, *supra* note 13, at 23; 1996 CRASH FACTS, *supra* note 13, at 23.

230. 75 PA. STAT. AND CONS. STAT. § 3316(a) (West, Westlaw Edge through 2023 Reg. Sess. Act 7).

version of Section 3316,<sup>231</sup> nor its proposed amendment,<sup>232</sup> contain penalties for distracted driving that are strong enough to serve as effective deterrents. While punitive damages are often subject to criticism,<sup>233</sup> their purpose as a deterrent to extremely outrageous behavior functions as an effective judicial tool to protect society.<sup>234</sup>

The Supreme Court of Pennsylvania already has the foundation to craft a solid, understandable standard by which to assess punitive damages claims against distracted drivers. The court's own rationale from *Martin* has served as the settled standard for evaluating recklessness within the realm of punitive damages claims for almost forty years.<sup>235</sup> And for over fifty years, the Pennsylvania Superior Court's decision in *Focht* has proven that the courts can expand on the applicability of punitive damages to keep up with changing technology.<sup>236</sup> When punitive damages first entered Pennsylvania jurisprudence, cars had not been invented, and there was no danger to society from intoxicated driving. But as the prevalence of intoxicated driving injuries and deaths increased,<sup>237</sup> the Pennsylvania Superior Court was not afraid to expand the scope of punitive damages in order to better protect society.<sup>238</sup> The Pennsylvania Supreme Court must do the same for distracted driving.

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231. *Id.*

232. S.B. 37, 207th Gen. Assemb., Reg. Sess. (Pa. 2023).

233. Baron, *supra* note 220, at 854–55.

234. RESTATEMENT (SECOND) OF TORTS § 908(1) (AM. L. INST. 1979).

235. *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1097–98 (Pa. 1985).

236. *Focht v. Rabada*, 268 A.2d 161 (Pa. Super. Ct. 1970).

237. 2021 CRASH FACTS, *supra* note 13, at 23; 1996 CRASH FACTS, *supra* note 13, at 23.

238. *Focht*, 268 A.2d at 161.

# Anonymity Preserves Integrity: Expanding the Use of Anonymous Juries in High-Profile Criminal Cases

Caitlin McDonough\*

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## I. INTRODUCTION

While serving on a jury for a high-profile case, there is always a possibility that a juror develops “juror stress,” an emotional or physical reaction to their jury service.<sup>1</sup> Stress can accumulate over the course of jury service, with an estimated 70% of all jurors reporting some level of stress from partaking in the duty.<sup>2</sup> Jury duty asks a lot of a person, especially when a juror is called to serve on a high-profile trial that could continue for weeks or months on end and amass intense media scrutiny. Certain high-profile trials require

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1. Paula Hannaford-Agor, *Jury News*, 26 THE CT. MANAGER 50, 50 (2011).

2. *Id.*

the court to establish greater protections for jurors than others.<sup>3</sup> One such trial that necessitated heightened standards for juror safety was the murder trial of Derek Chauvin.<sup>4</sup>

On April 20, 2021, former Minneapolis Police officer Derek Chauvin was convicted of second-degree murder, third-degree murder, and second-degree manslaughter for the death of George Floyd in May 2020.<sup>5</sup> This trial garnered immense publicity across the United States, as the death of George Floyd sparked a renewed effort in the Black Lives Matter organization, which was founded in 2013.<sup>6</sup> Over the course of the summer of 2020, upwards of twenty-six million Americans participated in protests for police reform and racial equality across the nation, which generated massive media attention.<sup>7</sup>

As these protests dominated the news cycle in 2020, when the trial of Derek Chauvin began, the nation tuned in for that as well. In response to the “blazing spotlight” on the trial, presiding Judge Peter Cahill made the decision to empanel an anonymous jury.<sup>8</sup> Judge Cahill stated that “[s]trong reasons exist to believe that threats to jurors’ safety and impartiality exist,” as millions of Americans felt invested in the trial following the previous year of social unrest.<sup>9</sup> Although the jurors’ names were not released, Judge Cahill released the race and age by decade of the twelve jurors and three alternates.<sup>10</sup> The jury was kept anonymous through most of 2021, including during the trial of the other three officers present at the time Floyd was killed.<sup>11</sup> In November 2021, the names of all jurors were released publicly for the first time.<sup>12</sup>

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3. Marco della Cava, *Anonymous Jury in Derek Chauvin Trial Part of a Growing Trend that has Some Legal Experts Worried*, USA TODAY (Apr. 26, 2021, 7:47 AM), <https://www.usatoday.com/story/news/nation/2021/04/25/chauvin-trial-jury-anonymous-concerning-trend-us-justice/7342909002/>.

4. *Id.*

5. Eric Levenson & Aaron Cooper, *Derek Chauvin Found Guilty of All Three Charges for Killing George Floyd*, CNN (Apr. 21, 2021, 12:13 PM), <https://www.cnn.com/2021/04/20/us/derek-chauvin-trial-george-floyd-deliberations/index.html>.

6. Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

7. *Id.*

8. della Cava, *supra* note 3.

9. *Id.*

10. *Id.*

11. *Id.*

12. Nicholas Bogel-Burroughs, *Jurors Who Convicted Derek Chauvin Are Identified for First Time*, N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2021/11/01/us/derek-chauvin-trial-jury.html>.

The empaneling of anonymous juries is a relatively recent phenomenon in American jurisprudence, dating back only to the 1970s.<sup>13</sup> The murder trial of Derek Chauvin is the most recent example of a trial court empaneling an anonymous jury in a high-profile criminal case. This Article analyzes the use of anonymous juries in high-profile criminal trials and advocates for expanding their use in the future. Section II provides background on the history of anonymous jury empanelment and how circuit courts employ them today. Additionally, this section addresses how courts must combat First and Sixth Amendment concerns, specifically the threat of prejudice against a defendant's presumption of innocence. Section III describes how technological advancements have changed courtroom procedures and the need for anonymous juries. Section IV argues that the widely-used factor test to determine anonymous jury empanelment should be updated to include the likelihood of social media presence creating risks to juror safety and judicial integrity.

## II. ANONYMOUS JURIES IN CRIMINAL PROCEEDINGS

The Sixth Amendment to the United States Constitution provides criminal defendants “the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.”<sup>14</sup> The right to be tried by a jury of one's peers is fundamental and deeply rooted in American jurisprudence.<sup>15</sup> Since the Sixth Amendment was ratified in 1791, the process by which a jury is empaneled has been fairly streamlined in both state and federal court.

The jury selection process, known as voir dire, allows the court and the parties' attorneys the opportunity to vet jurors to ensure a fair trial.<sup>16</sup> During voir dire, potential jurors undergo a series of questions presented by either the judge or the parties' attorneys to determine their qualifications as a juror.<sup>17</sup> Questions include inquiries into a juror's personal life and professional expertise, as well as their views on issues related to the case and their ability to follow applicable legal principles.<sup>18</sup> Regardless of who is leading the questioning, the court has discretion to direct the voir dire, especially by

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13. *United States v. Barnes*, 604 F.2d 121, 143 (2d Cir. 1979).

14. U.S. CONST. amend. VI.

15. See Christopher Keleher, *The Repercussions of Anonymous Juries*, 44 U. S.F. L. REV. 531, 553 (2010).

16. *Voir Dire*, BLACK'S LAW DICTIONARY (11th ed. 2019).

17. Phylis Skloot Bamberger, *Jury Voir Dire in Criminal Cases*, 78 N.Y. STATE BAR ASS'N J. 24, 24 (2006).

18. *Id.* at 26.

limiting the scope of attorneys' inquiries.<sup>19</sup> Both the prosecution and the defense retain peremptory challenges, which they can use to exclude a potential juror from the venire without the need for a reason or explanation.<sup>20</sup> No matter how voir dire is conducted, attorneys on both sides normally receive information via questioning that relates to each juror's identity. In the past forty years or so, in some criminal prosecutions, the government has argued for the identities of empaneled jury members to remain anonymous for the safety of the jury and the integrity of the judicial process.<sup>21</sup>

### A. *Introduction of the Anonymous Jury*

In 1979, the first anonymous jury was empaneled in *United States v. Barnes*.<sup>22</sup> Fifteen defendants were convicted of conspiracy to violate federal narcotics laws, and defendant Barnes was additionally convicted of engaging in a continuing criminal enterprise involving narcotics.<sup>23</sup> The case was tried in the United States District Court for the Southern District of New York, which had a "sordid history" with multi-defendant narcotics cases being tried there.<sup>24</sup> This put the trial court on notice that enhanced safety measures should be taken for the protection of prospective jurors.<sup>25</sup>

In its sequestration papers prior to the trial,<sup>26</sup> the government directed the judge's attention to three recent cases in the Southern District where evidence of influence over jurors affected the outcome of the trial.<sup>27</sup> In the first case, six weeks into the trial of twenty-two narcotics defendants, a co-defendant suggested the possibility of bribing a juror who later approached a defendant's sister.<sup>28</sup> The juror in question was excused, and a subsequent investigation into jury tampering was commenced by the government.<sup>29</sup> Another case in the Southern District involved a juror who suffered "chest pains" in the second trial of a narcotics matter, which

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19. *Id.*

20. A peremptory challenge may not be used if the opposing party presents a prima facie argument that the challenge was used to discriminate on the basis of race, ethnicity, or sex. *Id.* at 24.

21. See *United States v. Barnes*, 604 F.2d 121, 133 (2d Cir. 1979); *United States v. Ross*, 33 F.3d 1507, 1519 (11th Cir. 1979).

22. *Barnes*, 604 F.2d at 143.

23. *Id.* at 130.

24. *Id.*

25. *Id.* at 134–35.

26. In the context of a trial, sequestration refers to the isolation of a jury to prevent juror tampering or prejudice by media coverage. *Sequestration*, WESTLAW (2023). Sequestration is rare and typically reserved for high-profile criminal cases. *Id.*

27. *Barnes*, 604 F.2d at 134 n.3.

28. *United States v. Moten*, 582 F.2d 654, 656 (2d Cir. 1978).

29. *Id.* at 657–58.



resulted in a mistrial due to suspicious circumstances.<sup>30</sup> The government lastly presented a narcotics case in which all defendants were acquitted, but a grand jury investigation ensued following information concerning improper contacts between jurors and defendants.<sup>31</sup>

The *Barnes* case also generated pretrial publicity within the Harlem and South Bronx neighborhoods that dramatized the alleged acts of violence committed by the defendants.<sup>32</sup> With this in mind, District Judge Werker determined that the trial court would conduct voir dire and refused to disclose the jurors' identities, residence locales, or ethnic backgrounds to the parties' attorneys.<sup>33</sup>

The defendants appealed their convictions, asserting, in part, that the judge's refusal to disclose the ethnic backgrounds of jurors deprived them of a fair trial.<sup>34</sup> The Second Circuit found that the voir dire conducted by the trial court adequately addressed any potential prejudices that could arise, citing specific examples in the trial transcript where potential jurors were dismissed for admitting prejudice.<sup>35</sup> Further, both the prosecution and defense were equally uninformed as to names, addresses, and ethnic backgrounds of prospective panelists, but each side received information on questions concerning their lives and attitudes toward issues that would arise in the case.<sup>36</sup> The court concluded that there was neither statutory nor constitutional law that required disclosure of information about jurors unrelated to any issue as to which prejudices may prevent an impartial verdict.<sup>37</sup> Thus, the defendants were not deprived of any fundamental right.<sup>38</sup>

The anonymous jury was empaneled in *Barnes* to protect both the potential jurors and the integrity of the judicial system.<sup>39</sup> In the Southern District of New York, specifically, the presence of organized crime families and smuggling operations presented challenges to the jury process.<sup>40</sup> Throughout the 1970s and 1980s, many instances of jury intimidation and tampering led to acquittals or

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30. *United States v. Stanzone*, 391 F. Supp. 1201, 1201 (S.D.N.Y. 1975). The judge felt as though the circumstances were suspicious and stated on the record that the juror might have been "reached." *Id.*

31. *United States v. Tutino et al.*, 419 F. Supp. 246, 247 (S.D.N.Y. 1976).

32. *Barnes*, 604 F.2d at 141.

33. *Id.* at 133.

34. *Id.* at 137.

35. *Id.* at 143.

36. *Id.* at 142.

37. *Id.* at 143.

38. *Id.*

39. *Id.*

40. *Id.* at 134.

mistrials where defendants with mafia connections or violent crimes were involved.<sup>41</sup> Citizens did not want to serve on a jury in fear of retaliation against well-connected defendants.<sup>42</sup> The Court in *Barnes* stated, “If a juror feels that he and his family may be subjected to violence or death at the hands of a defendant or his friends, how can his judgment be as free and impartial as the Constitution requires?”<sup>43</sup>

Ensuring the safety of jurors and the integrity of the judicial system are not separate endeavors but instead are necessarily linked. Defendants often protest the empaneling of an anonymous jury as a violation of their fundamental rights.<sup>44</sup> Those in opposition to anonymous juries believe that a defendant’s presumption of innocence is harmed if a jury needs to conceal their identities to ensure their protection.<sup>45</sup> But the threat of outside influence, whether it is in connection to a violent defendant, the media, or the community at large, can work to hinder the impartiality of the jury.

### B. *Circuit Court Analysis*

The United States Supreme Court has not yet ruled on the validity or constitutionality of an anonymous jury. A number of federal circuit courts have, however, upheld the use of anonymous juries in criminal proceedings.<sup>46</sup> Tests for upholding the empanelment of an anonymous jury vary across jurisdictions; but a number of circuits employ the use of a factor test.<sup>47</sup> Notably, a trial court holds a considerable amount of discretion in making its determination to order the empanelment of an anonymous jury.<sup>48</sup>

In 1991, the Second Circuit created a factor test to determine whether empanelment was appropriate, depending on the circumstances.<sup>49</sup> An anonymous jury is properly empaneled where there is “strong reason to believe that the jury needs protection” and the court takes “reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights

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41. See Abraham Abramovsky & Jonathan I. Edelstein, *Anonymous Juries in Exigent Circumstances Only*, 13 ST. JOHN’S J. LEGAL COMMENT. 457, 464 (1999).

42. *Barnes*, 604 F.2d at 141.

43. *Id.* at 140–41.

44. See Keleher, *supra* note 15, at 553.

45. See *id.* at 553–54.

46. See, e.g., *United States v. Ross*, 33 F.3d 1507, 1520 (11th Cir. 1979).

47. See, e.g., *United States v. Dinkins*, 691 F.3d 358, 373 (4th Cir. 2012).

48. See, e.g., *United States v. Castillo-Rubio*, 34 F.4th 404, 408 (5th Cir. 2022).

49. *United States v. Paccione*, 949 F.2d 1183, 1192 (2d Cir. 1991).

are protected.”<sup>50</sup> To make this decision, the court considers four principal factors:

- (1) the dangerousness of the defendants, demonstrated by the seriousness of the crimes charged and whether defendants are charged with participating in a large-scale criminal enterprise;
- (2) whether the defendants or their associates have engaged in past attempts to interfere with the judicial process;
- (3) whether the defendants have the ability to interfere with or intimidate the jury; and
- (4) whether the trial is likely to attract media attention and publicity.<sup>51</sup>

This factor test speaks to the reasons anonymous juries were first empaneled in the Southern District of New York in particular—to protect jurors in the face of threats from well-connected and dangerous criminals.<sup>52</sup> The court is more likely to empanel an anonymous jury in the face of prior attempts at interference or threats to jurors, with the added likelihood of media interest.<sup>53</sup>

In 1994, the Eleventh Circuit proceeded to adopt the Second Circuit’s reasoning in part in *United States v. Ross*, stating that the court should not order an anonymous jury without a strong basis for ensuring juror protection and taking reasonable precautions to minimize prejudicial effects on the defendant.<sup>54</sup> The court went on to list five factors, a combination of which would show sufficient cause for empaneling an anonymous jury:

- (1) the defendant’s involvement in organized crime;
- (2) the defendant’s participation in a group with the capacity to harm jurors;
- (3) the defendant’s past attempts to interfere with the judicial process;
- (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties; and
- (5) extensive publicity that could enhance the possibility that jurors’ names would become public and expose them to intimidation or harassment.<sup>55</sup>

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50. See *United States v. Kelly*, No. 19–CR–286, 2020 WL 8482693, at \*1 (E.D.N.Y. Oct. 8, 2020). The defendant in this case was charged with heading an enterprise to recruit women and girls to engage in illicit sexual activity and to produce child pornography. *Id.* In a previous case against the defendant, his alleged personal involvement in attempts to influence the jury resulted in an acquittal. *Id.* The government alleged he again attempted to interfere with the judicial process in their case against him. *Id.*

51. *Id.*

52. *United States v. Barnes*, 604 F.2d 121, 140–41 (2d Cir. 1979).

53. *Id.* at 141.

54. *United States v. Ross*, 33 F.3d 1507, 1520 (11th Cir. 1994).

55. *Id.*

In *Ross*, the appellant was the active leader of a large-scale organized crime body that had both the means to harm jurors and had committed prior acts of violence.<sup>56</sup> Additionally, the appellant had previously attempted to interfere with the judicial process by ordering the death of a government witness due to testify against him.<sup>57</sup> The Eleventh Circuit found the trial court had sufficiently minimized prejudice against the defendant through careful instruction to the jury.<sup>58</sup> But because a defendant's fundamental rights are at issue in these inquiries, courts do not take the government's requests to empanel an anonymous jury lightly.<sup>59</sup>

The tests employed by the Second and Eleventh Circuits display a high standard that the government must clearly meet in order to empanel an anonymous jury. Both circuits take the defendants' connection to possible criminal enterprises and their heightened abilities to threaten the judicial process seriously.<sup>60</sup> Additionally, both circuits consider whether the trial is likely to garner media publicity that could potentially expose jurors to intimidation outside of the courtroom.<sup>61</sup> The traceable criminal connections and media interest factors, in particular, give great weight to the empaneling of an anonymous jury because the court must often approach usual processes, like voir dire, differently to ensure that the rights of all parties are adequately met.<sup>62</sup>

The factors defined by the Eleventh Circuit in *Ross* have been adopted by other circuits in their determinations to empanel anonymous juries.<sup>63</sup> In 2012, the Fourth Circuit first employed its test to determine anonymous jury empanelment.<sup>64</sup> In *United States v. Gutierrez*, the court concluded that an anonymous jury is warranted with the presence of two conditions: if "there is a strong reason to conclude that the jury needs protection from interference or harm, or that the integrity of the jury's function will be compromised absent anonymity; and reasonable safeguards have been adopted to minimize the risk that the rights of the accused will be infringed."<sup>65</sup>

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56. *Id.*

57. *Id.*

58. *Id.* at 1521.

59. *Id.* at 1522.

60. *See, e.g.*, *United States v. Paccione*, 949 F.2d 1183, 1192–1193 (2d Cir. 1991); *Ross*, 33 F.3d at 1520.

61. *Paccione*, 949 F.2d at 1192–93; *Ross*, 33 F.3d at 1520.

62. *Paccione*, 949 F.2d at 1192.

63. *See, e.g.*, *United States v. Gutierrez*, 963 F.3d 320, 329 (4th Cir. 2012); *United States v. Castillo-Rubio*, 34 F.4th 404, 408 (5th Cir. 2022); *United States v. Shryock*, 342 F.3d 948, 971 (9th Cir. 2003).

64. *United States v. Dinkins*, 691 F.3d 358, 373 (4th Cir. 2012).

65. *Gutierrez*, 963 F.3d at 329.

Trial courts may then assess whether “strong reasons” for an anonymous jury exist by considering the five *Ross* factors mentioned above.<sup>66</sup> The court engages in a fact-specific inquiry that “must rest on something more than speculation or inferences of potential risk.”<sup>67</sup>

In *Gutierrez*, the appellants were leaders of an east coast gang named United Blood Nation (UBN), and all of them were found guilty of a Racketeer Influenced and Corrupt Organizations (RICO) conspiracy.<sup>68</sup> As leaders of UBN, the appellants were connected with members who were not incarcerated and capable of harassing or intimidating jurors on their behalf.<sup>69</sup> Additionally, there was evidence of one appellant attempting to interfere with the judicial process by directing a UBN member to make false statements to law enforcement.<sup>70</sup> Because the district court was found to have properly adopted appropriate safeguards by issuing neutral instructions to the jury, the empanelment of an anonymous jury was upheld.<sup>71</sup>

The Fifth Circuit also uses the *Ross* factors in its determination.<sup>72</sup> In *United States v. Castillo-Rubio*, the court determined that anonymous juries are “constitutional when needed to ensure against a serious threat to juror safety, if the courts also protect the defendants’ interest in conducting effective voir dire and maintaining the presumption of innocence.”<sup>73</sup> The court would not uphold the empanelment of an anonymous jury without adequately ensuring that defendants’ rights were not infringed upon.<sup>74</sup> Along with issuing proper jury instructions, it is the court’s responsibility to conduct effective voir dire in order to maintain defendants’ rights.<sup>75</sup>

In the Ninth Circuit, a combination of factors similar to the *Ross* factors are employed in determining whether the jury needs protection.<sup>76</sup> An anonymous jury may be empaneled where:

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66. *Id.* (quoting *Ross*, 33. F.3d at 1520).

67. *Id.*

68. *Id.* at 327–28.

69. *Id.* at 330.

70. *Id.*

71. *Id.* at 331.

72. *See* *United States v. Castillo-Rubio*, 34 F.4th 404, 408 (5th Cir. 2022).

73. *Id.* The appellant was a high-ranking member of an organized criminal cartel. *Id.* at 407. Trial testimony established that the cartel trafficked drugs from Mexico, bribed law enforcement, military, and political officials, and employed assassins to kidnap, torture, and murder those in their way. *Id.* at 408–09.

74. *Id.* at 408.

75. *Id.*

76. *See* *United States v. Shryock*, 342 F.3d 948, 971 (9th Cir. 2003). The appellants were involved with the highly-connected Mexican mafia and had attempted to interfere with the judicial process. *Id.* at 972.

(1) there is a strong reason for concluding that it is necessary to enable the jury to perform its factfinding [sic] function, or to ensure juror protection; and (2) reasonable safeguards are adopted by the trial court to minimize any risk of infringement upon the fundamental rights of the accused.<sup>77</sup>

The Ninth Circuit's test, in particular, speaks to the possible interference with judicial functions. It may be the case that something both prevents a jury from performing the tasks it was chosen to carry out and also threatens their personal safety. But only one or the other is necessary for the government to make its case.

Although courts do not engage in the exact same analysis across circuits, the reasons for empaneling anonymous juries and the high standard to uphold defendants' fundamental rights stand firm.<sup>78</sup> Whether the government's motion is granted depends on a fact-specific inquiry, where the court considers the "totality of the circumstances" that would account for upholding the integrity of the judicial system in a way that benefits both jurors and defendants.<sup>79</sup>

### C. *Opposition Concerns in Empaneling Anonymous Juries*

Opponents of anonymous juries believe that empanelments are more likely to violate a defendant's fundamental rights. Critics point to the negative implications against a defendant's right to an impartial jury and the presumption of innocence.<sup>80</sup> They feel that withholding anything in regard to a potential juror's identity taints a defendant's right to a fair and impartial jury as guaranteed by the Sixth Amendment.<sup>81</sup> Defendants similarly feel that empaneling an anonymous jury unfairly taints the understanding that they are presumed innocent until proven guilty.<sup>82</sup> While this is not a

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77. *Id.* at 971.

78. *Castillo-Rubio*, 34 F.4th at 408 ("Anonymous juries are 'constitutional when needed to ensure against a serious threat to juror safety, if the courts also protect the defendants' interest in conducting effective voir dire and maintaining the presumption of innocence.") (quoting *United States v. Krout*, 66 F.3d 1420, 1426 (5th Cir. 1995)); *United States v. Gutierrez*, 963 F.3d 320, 329 (4th Cir. 2020) ("[A] federal district court may empanel an anonymous jury in any non-capital case in which the interests of justice so require.") (quoting *United States v. Dinkins*, 691 F.3d 358, 372 (4th Cir. 2012)); *United States v. Ross*, 33 F.3d 1507, 1519 (11th Cir. 1994) ("Every court that has considered the issue has held that, when genuinely needed and when properly used, anonymous juries do not infringe a defendant's constitutional rights.").

79. *Castillo-Rubio*, 34 F.4th at 408.

80. Keleher, *supra* note 15, at 553–54.

81. *Id.*

82. *Id.*

fundamental right afforded to defendants, it has become deeply engrained in the American judicial system.<sup>83</sup>

The appellants in *Barnes* argued that “jurors must publicly disclose their identities and publicly take responsibility for the decisions they are to make,”<sup>84</sup> and because the court withheld the names and addresses of the jurors, they could not do so. Not only is this not the law,<sup>85</sup> but this idea that jurors should take public responsibility for their decisions as members of a jury extends the role of the jury unnecessarily. The duty of a juror is to render an impartial verdict in accord with the evidence and applicable law provided, in a fair and unbiased way.<sup>86</sup>

Defendants also believe that anonymity hinders the effectiveness of voir dire, as potential biases may be more difficult to uncover without the availability of certain information.<sup>87</sup> The safeguards utilized by the court during the voir dire process, however, work to counteract any undue implication about the defendant’s innocence in anonymous jury panels.<sup>88</sup> While the court engages in a review of the circumstances presented in a motion for empaneling an anonymous jury, it has discretion in the instructions it gives to the jury as to why they will remain anonymous.<sup>89</sup> In cases where an anonymous juror may feel less pressure as a result of their anonymity, their impartiality may be enhanced.<sup>90</sup> Nevertheless, there have been instances in which a trial court abused its discretion when empaneling an anonymous jury.

In 1996, the Fifth Circuit, in *United States v. Sanchez*, reversed the sentence of a police officer who was convicted of civil rights violations by an anonymous jury.<sup>91</sup> Officer Belarmino Sanchez was patrolling an area of Galveston, Texas where he allegedly used the threat of arrest to coerce five suspected prostitutes to engage with him in various sexual acts against their will.<sup>92</sup> During jury selection, the district court redacted the jurors’ names, along with their

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83. *Id.* at 553.

84. *United States v. Barnes*, 604 F.2d 121, 140 (2d Cir. 1979).

85. *Id.* at 143 (“There is neither statutory nor constitutional law that requires disclosure of information about jurors unrelated to any issue as to which prejudices may prevent an impartial verdict.”); *see also* U.S. CONST. amend. VI. (“[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”).

86. Bamberger, *supra* note 17, at 26.

87. Keleher, *supra* note 15, at 555.

88. *See United States v. Paccione*, 949 F.2d 1183, 1192 (2d Cir. 1991).

89. *See United States v. Gutierrez*, 963 F.3d 320, 329 (4th Cir. 2012).

90. *See United States v. Barnes*, 604 F.2d 121, 141 (2d Cir. 1979).

91. 74 F.3d 562, 563 (5th Cir. 1996).

92. *Id.*

spouses' names, their addresses, and their places of employment.<sup>93</sup> The court concluded that redacting the identities of the jury was necessary due to a delay following jury selection, as well as potential fears of jurors adjudicating a police officer.<sup>94</sup> The judge speculated, "I don't think there's anything more frightening to the populous [than] having a rogue cop on their hands."<sup>95</sup> The Fifth Circuit ruled that the empaneling of the anonymous jury was not warranted because neither the safety of the jury nor the judicial process was implicated.<sup>96</sup> The district court's decision rested erroneously on "mere allegations or inferences of potential risk," unduly prejudicing the defendant's presumption of innocence and violating his Sixth Amendment rights.<sup>97</sup>

In 2011, in *State v. Sundberg*, the Supreme Court of Oregon ruled that a trial court erred in its empanelment of an anonymous jury without determining that withholding the names of jurors was justified and without taking further steps to mitigate possible prejudice against the defendant.<sup>98</sup> The defendant was indicted for various sex abuse crimes and convicted of attempted sexual penetration and sexual abuse.<sup>99</sup> Adopting the Second Circuit factor test, the court determined that the trial court erred in empaneling an anonymous jury because none of the usual factors were met.<sup>100</sup> Judges county-wide agreed to withhold names and identifying information of prospective jurors because past jurors had objected to the disclosure of their identities to litigants.<sup>101</sup> The trial court gave no further explanation to the defendant or the jury as to why an anonymous jury was to be empaneled.<sup>102</sup> Additionally, there was no effort taken by the trial court to mitigate the risk of prejudice against the defendant, as the lack of instruction to the jury heightened the belief that the defendant was unusually dangerous.<sup>103</sup>

Both cases demonstrate instances in which trial courts have not adequately set forth pertinent reasons justifying the empanelment of an anonymous jury, nor taken steps to mitigate the prejudice towards the defendant. In each case, the defendants did not exhibit many of the typical factors that would normally suggest the need

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93. *Id.* at 564.

94. *Id.*

95. *Id.* at 565.

96. *Id.*

97. *Id.*

98. 247 P.3d 1213, 1214 (Or. 2011).

99. *Id.* at 1215.

100. *Id.* at 1222.

101. *Id.*

102. *Id.*

103. *Id.*



for stricter juror safety measures. In *Sundberg*, the government could not make the argument that the trial court's error in empanelling an anonymous jury was harmless, because there was no explanation given to the jury as to why their identities were hidden, leading to the possibility that jurors could perceive the defendant as particularly dangerous.<sup>104</sup> If the trial court had given an instruction or explanation to the jury as to why their identities would be hidden, the anonymous jury may have been upheld.

Aside from participating defendants, media outlets also largely object to the use of anonymous juries, as the practice is believed to violate journalists' First Amendment right to access to trial proceedings.<sup>105</sup> In 1980, the Supreme Court held that "the right to attend criminal trials is implicit in the guarantees of the First Amendment."<sup>106</sup> Four years later, the Court held that the right of access to criminal trials includes a right to gather information through voir dire as well.<sup>107</sup> If the jury is considered part of the story that journalists are reporting on, the perspective of the jurors is thought to add valuable information to the journalists' take on that case.<sup>108</sup> Nevertheless, like all constitutional rights, the right of access is not absolute. Criminal defendants are entitled to a public trial, but the media is not entitled to all-inclusive access to pertinent documents or information available to the court.<sup>109</sup> If an overriding interest is found to be essential to preserve higher values and is narrowly tailored to serve that interest, the presumption of openness for media access may be overcome.<sup>110</sup>

Juror safety is likely to be an overriding interest in comparison to the media's right to access. If the parties are not subject to personal information regarding the jurors, it is unlikely that the media will be entitled to that information. In particularly high-profile cases that the media follows closely, it is not unheard of for members of a press corporation to attempt to interact with the jurors either during or after the course of the trial. In the trial of John Zachary DeLorean, which involved a large-scale cocaine transaction, media members used license plates and reverse dictionaries to ascertain the telephone numbers of jurors during deliberation in an

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104. *Id.* at 1223.

105. See Keleher, *supra* note 15, at 556.

106. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

107. *Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501, 508 (1984) ("Press-Enterprise I").

108. Emily Palmer, *Home Visits. Handwritten Notes. How Reporters Contact a Jury.*, N.Y. TIMES (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/reader-center/contacting-weinstein-jury.html>.

109. *Press-Enterprise I*, 464 U.S. at 510.

110. *Id.*

attempt to get a comment from them.<sup>111</sup> Each juror declined to comment, so the trial court merely gave the media a “strict lecture” in lieu of punishment.<sup>112</sup> Nevertheless, this was a clear infringement by the media on jurors’ privacy, as well as the integrity of the judicial process.

Media members seeking comments from jurors as to why they decided a certain way—both during and after a trial—constitutes an invasion of privacy that implicates juror safety. Therefore, it is likely to be considered an overriding interest when compared to the media’s right of access.

### III. DEVELOPING TECHNOLOGY’S INFLUENCE ON THE JUDICIAL PROCESS

The twenty-first century has seen the greatest technological advancements in human history. One of these advancements is the creation of social media, which is defined as “a computer-based technology that facilitates the sharing of ideas, thoughts, and information through virtual networks and communities.”<sup>113</sup> As of October 2021, more than 4.5 billion people around the world use some form of social media.<sup>114</sup> In the United States alone, 72% of the public indicate that they use at least one type of social media platform.<sup>115</sup> Of these social media networks, Facebook, Instagram, Twitter, YouTube, and TikTok are some of the largest.<sup>116</sup> 81% of American adults indicate that they frequently use YouTube, a platform that provides users with new alternative means to receive information.<sup>117</sup>

The ability to quickly connect with both like and unlike-minded people on the internet has served to alter the flow of information and discourse. The result of having a wealth of information at one’s fingertips frequently accounts for the appearance of social media “mobs” in which a person or group of people can be attacked because of their difference in opinion. Instead of news reporters broadcasting at the end of a day spent in a courtroom, any person with a

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111. Robert M. Takasugi, *Jury Selection in a High-Profile Case*: United States v. DeLorean, 40 AM. U. L. REV. 837, 840 (1991).

112. *Id.*

113. Maya Dollarhide, *Social Media: Definition, Importance, Top Websites & Apps*, INVESTOPEDIA (Aug. 31, 2021), <https://www.investopedia.com/terms/s/social-media.asp>.

114. *Id.*

115. *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/>.

116. Dollarhide, *supra* note 113.

117. *Social Media Fact Sheet*, *supra* note 115.

smartphone can give or receive potentially false information that millions of people engaging with it could be led to believe.

The practice of empaneling an anonymous jury is both constitutional and necessary. Anonymous juries began largely in response to dangerous organized crime enterprises continuously intimidating and tampering with jurors in order to avoid the charges brought against them.<sup>118</sup> In response, courts developed factor tests that focused on potentially dangerous defendants and whether they had connections with criminal enterprises.<sup>119</sup> These “high-profile” cases also attracted media attention early on in the proceedings.<sup>120</sup> Media interest stirs public interest, which creates additional difficulties within the voir dire process for the court to ascertain prejudices of potential jurors while ensuring the impartiality of the jury.

In the current technological age, retaliation from organized crime groups is not the only threat to juror safety and judicial integrity.<sup>121</sup> With that in mind, instances in which empaneling an anonymous jury facilitates the integrity of the judicial process have arguably expanded. The rise of social media, and most recently, the social media “mob,” have created challenges that warrant the use of anonymous juries in high-profile criminal cases.<sup>122</sup> Because of the speed at which both information and misinformation spread in a technologically-connected world, potential jurors have to anticipate threats from both defendants and connected affiliates, as well as media outlets and citizens with internet access.

The empaneling of anonymous juries where the jurors’ private information would be held only by the court will benefit not only the jurors but also the defendants. A jury that is not constantly worried about what harm will come to them or their families is more likely to be truly impartial<sup>123</sup> and, thus, will ultimately safeguard defendants’ fundamental rights. The expanded use of anonymous juries in high-profile situations is the best way to ensure the integrity of the judicial system while protecting everyone involved.

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118. Abramovsky & Edelstein, *supra* note 41.

119. *See, e.g.*, United States v. Ross, 33 F.3d 1507, 1520 (11th Cir. 1994).

120. *See* United States v. Barnes, 604 F.2d 121, 141 (2d Cir. 1979).

121. Carrie Johnson, *Why Courts Use Anonymous Juries, Like in Freddie Gray Case*, NPR (Nov. 30, 2015, 4:46 PM), <https://www.npr.org/sections/thetwo-way/2015/11/30/457905697/why-courts-use-anonymous-juries-like-in-freddie-gray-case>.

122. *See* della Cava, *supra* note 3.

123. *See Barnes*, 604 F.2d at 140–41.

A. *The Effect of Technological Advances on Courtroom Procedure*

The popular adoption of social media in people's daily lives has changed how both the media and courts approach and respond to certain situations. In the 1980s, journalists wanted access to courtroom proceedings that stirred up interest within the community.<sup>124</sup> The media held a specific right of access in which journalists could be present in the courtroom, take notes, and later publish their article informing the public of the latest happenings in that trial.<sup>125</sup> A sort of "telephone line" existed to pass along information from the court to the press to the public.

Just a decade later, one of the most infamous criminal trials in American history, the murder trial of O.J. Simpson, was televised directly from the courtroom.<sup>126</sup> In 1994, Judge Lance A. Ito ruled that a single television camera could remain in the courtroom for the extent of the trial.<sup>127</sup> Due to the extremely publicized nature of the preceding investigation, the subsequent trial was of great interest to many Americans. The prosecution and defense both argued for the trial to be televised in an effort to avoid irresponsible reporting and help legitimize the eventual verdict.<sup>128</sup> On October 3, 1995, 57% of the country, over 150 million viewers, watched the verdict live on broadcast television.<sup>129</sup> This was a never-before-seen insight into a high-profile trial that exposed the American public to courtroom testimony from start to finish. For sixteen months, Court TV and CNN covered every aspect of the trial, all of which the public had access to.<sup>130</sup> And with the verdict came strong opinions from all viewers, many of whom still hold those same opinions today.

In April of 2022, the civil defamation case brought by Johnny Depp against his ex-wife Amber Heard received a tremendous amount of media attention.<sup>131</sup> Law & Crime, a network that covers high-profile court cases, streamed the entirety of the trial on its

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124. *See* Press-Enter. Co. v. Superior Ct., 464 U.S. 501, 508 (1984) ("Press-Enterprise I").

125. *Id.* at 509–10.

126. Julia Zorthian, *How the O.J. Simpson Verdict Changed the Way We All Watch TV*, TIME (Oct. 2, 2015, 5:27 PM), <https://time.com/4059067/oj-simpson-verdict/>.

127. David Margolick, *Judge in Simpson Trial Allows TV Camera in Courtroom*, N.Y. TIMES (Nov. 8, 1994), <https://www.nytimes.com/1994/11/08/us/judge-in-simpson-trial-allows-tv-camera-in-courtroom.html>.

128. *Id.*

129. Zorthian, *supra* note 126.

130. *Id.*

131. Kalhan Rosenblatt, *Johnny Depp and Amber Heard Defamation Trial: Summary and Timeline*, NBC NEWS (Dec. 19, 2022, 10:55 AM), <https://www.nbcnews.com/pop-culture/pop-culture-news/johnny-depp-amber-heard-defamation-trial-summary-timeline-rcna26136>.

YouTube channel.<sup>132</sup> The channel increased its subscribers by 50% over the course of the three month trial, and it tracked more than 3.5 million viewers watching live during the verdict in June of 2022.<sup>133</sup> Daily footage of the testimony attracted viewers across multiple platforms, as clips and headlines popped up on other social media sites like Instagram and TikTok.<sup>134</sup> While this was a civil trial, the celebrity status of both Johnny Depp and Amber Heard, along with the wall-to-wall livestream of the case, piqued the interest of many Americans. As with the O.J. Simpson case, the Depp-Heard verdict also induced strong opinions among those who either watched the livestream or saw “reports” of it across social media platforms. Where the attorneys in the O.J. Simpson trial advocated for the courtroom camera to dispose of any false reporting, advocates for the Depp-Heard livestream were mixed.<sup>135</sup> Ultimately, the presiding judge has discretion to assess the right of public access against the nature of the case and how it could potentially affect proceedings.<sup>136</sup> For the extent of this trial, content creators across major social media networks were often the ones to provide “breaking news” on the happenings in the courtroom to millions of their followers.<sup>137</sup> While this celebrity defamation case attracted enough publicity for the presence of cameras, its presence across various social media sites was unprecedented. It is not difficult to imagine this kind of wide-spread social media coverage becoming the new norm in relaying information to the public, especially, about high-profile criminal cases.

### B. Threats Against Jurors by Disinterested Parties

As circuit courts developed tests regarding when to empanel an anonymous jury, many of the threats to juror safety came from defendants known to be involved with dangerous organized crime affiliates.<sup>138</sup> However, threats to juror safety are not restricted to dangerous defendants or their connections. Following the high-profile

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132. Jacob Shamsian, *The Internet Rallied to Johnny Depp's Side in His Trial Against Amber Heard. He Can Thank The Judge's Decision to Livestream It.*, INSIDER (June 8, 2022, 10:01 AM), <https://www.insider.com/johnny-depp-v-amber-heard-livestream-has-little-precident-2022-6>.

133. *Id.*

134. Taylor Lorenz, *Who Won the Depp-Heard Trial? Content Creators That Went All-In.*, WASH. POST (June 2, 2022, 9:17 PM), <https://www.washingtonpost.com/technology/2022/06/02/johnny-depp-trial-creators-influencers/>.

135. Shamsian, *supra* note 132.

136. *Id.*

137. Lorenz, *supra* note 134.

138. Abramovsky & Edelstein, *supra* note 41.

trial of Casey Anthony for the murder of her two-year-old daughter Caylee in 2011, the jury that acquitted her was subject to harassment and threats by the public.<sup>139</sup> The judge delayed the release of the jurors' names for several months in an attempt to create a "cooling-off period" due to the heightened publicity and vocal displeasure over the verdict.<sup>140</sup> However, this tactic did not seem to work as the judge intended. In Orlando, Florida, where the trial took place, once the court released the names of the jurors, members of the community expressed their harsh feelings. Vendors put signs in their windows stating, "Casey Anthony jurors not welcome here,"<sup>141</sup> and the woman known as "Juror 12" left her job and fled town after receiving death threats.<sup>142</sup>

There are clear differences between threats against jurors from known violent criminals and regular citizens who feel passionately about the outcome in a particular trial. But any type of threat to cause harm, especially death threats, must be taken seriously. As many circuit courts have attested to,<sup>143</sup> defendants on trial for serious felonies with connections to organized crime mafias often have the network to follow through with threats made to jurors or against the judicial process. Preventing any ill-will towards jurors, while simultaneously protecting the integrity of the system, was the original goal in empanelling an anonymous jury.<sup>144</sup> With that goal still in mind, viable threats to juror safety are no longer limited to organized crime affiliates. The rapid advancement of social media has opened up a new avenue for abuse and violence online. Approximately 41% of Americans have experienced some form of online harassment, with 25% of those Americans reporting experiencing more severe forms of harassment that include physical threats, sexual harassment, stalking, and sustained harassment.<sup>145</sup> 75% of the targets of online abuse experienced this abuse while active on social media.<sup>146</sup>

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139. Daily Mail Reporter, *Casey Anthony Juror, 60, Quits Work and Flees Town in Fear of Her Life*, DAILY MAIL (July 12, 2011, 8:35 EDT), <https://www.dailymail.co.uk/news/article-2013371/Casey-Anthony-juror-60-quits-work-flees-town-fear-life.html>.

140. Rene Lynch, *Casey Anthony Case Casts Harsh Light on Jurors' Lack of Privacy*, L.A. TIMES (Oct. 26, 2011, 12:33 PM), <https://www.latimes.com/archives/blogs/nation-now/story/2011-10-26/casey-anthony-case-casts-harsh-light-on-jurors-lack-of-privacy>.

141. Johnson, *supra* note 121.

142. Daily Mail Reporter, *supra* note 139.

143. See *United States v. Barnes*, 604 F.2d 121, 140–41 (2d Cir. 1979).

144. See *id.* at 134 n.3.

145. Emily A. Vogels, *The State of Online Harassment*, PEW RSCH CTR. (Jan. 13, 2021), [https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2021/01/PI\\_2021.01.13\\_Online-Harassment\\_FINAL.pdf](https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2021/01/PI_2021.01.13_Online-Harassment_FINAL.pdf).

146. *Id.*

As technology continues to progress, along with so much information being shared on the internet or social media, what constitutes “high-profile” continues to develop. The Casey Anthony trial took place in Florida, and while the response in Orlando towards the jurors presented a greater threat, it accumulated national attention.<sup>147</sup> And though the Johnny Depp defamation trial took place in Virginia, it was livestreamed to all Law & Crime subscribers on YouTube, whether they resided in the United States or around the world.<sup>148</sup>

The O.J. Simpson and Casey Anthony verdicts stirred up so much commotion because most of the public thought the defendants were guilty and the juries were wrong to acquit them.<sup>149</sup> At the end of the day, however, a jury of one’s peers sitting across from the defendant are the only ones who can make that decision. Threats of any kind, especially death threats, cannot be tolerated against jurors during or after a trial takes place. It is likely the case that the jurors in the Derek Chauvin trial were not attacked because most of the public agreed with the jurors that he should have been convicted of the murder charges brought against him.<sup>150</sup> It is not difficult to imagine what could have happened if the jury came back from deliberation with a different verdict. With millions of Americans following the trial closely after nearly a year of protests and violence following the death of George Floyd, protestors would have likely emerged with a vengeance. And with the difference in technology, even in the decade separating 2011 from 2021, it would not be difficult to unearth information about who the jurors were or where they lived.

#### IV. A REVISED FACTOR TEST IS NECESSARY TO ACCOUNT FOR THE THREATS OF SOCIAL MEDIA INTERFERENCE AGAINST THE JUDICIAL PROCESS

A social media “mob” has the potential to grow to be as dangerous as a criminally organized mob. With the increase in the dissemination of information, and the charged partisan atmosphere in the United States, Americans have become very passionate and particular about their opinions across the board.<sup>151</sup> If a jury reaches a

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147. Lynch, *supra* note 140.

148. Shamsian, *supra* note 132.

149. Daily Mail Reporter, *supra* note 139.

150. John Eligon et al., *Derek Chauvin Verdict Brings a Rare Rebuke of Police Misconduct*, NY. TIMES (June 25, 2021), <https://www.nytimes.com/2021/04/20/us/george-floyd-chauvin-verdict.html>.

151. *Partisan Antipathy: More Intense, More Personal*, PEW RSCH. CTR. (Oct. 10, 2019), <https://www.pewresearch.org/politics/2019/10/10/partisan-antipathy-more-intense-more-personal/>.

verdict that the public personally disagrees with, many will take it upon themselves to express their disgust or anger at the outcome on social media. This creates a real potential for violence against jurors from outside influences that have no connection to the trial. While the viability of such threats may be lesser than those brought by known criminals, it would be a mistake to completely ignore instances of death threats against jurors for a unanimous decision they came to during the course of a trial.

In order to account for the potential viability of threats imposed on jurors by a heightened social media presence in high-profile criminal cases, circuit courts must develop and employ a modified factor test.

The Ninth Circuit states that where “there is a strong reason for concluding that it is necessary to enable the jury to perform its fact-finding [sic] function, or to ensure juror protection; and reasonable safeguards are adopted by the trial court to minimize any risk of infringement upon the fundamental rights of the accused,”<sup>152</sup> an anonymous jury may be empaneled. This particular approach takes into account both implications of juror safety and possible infringements against the jury accurately performing their duties.<sup>153</sup> As social media has fostered immense reliability and availability of information between people online, it is not difficult to imagine potential jurors having to deal with undue outside influence. Defendants often argue that withholding personal information about jurors hinders their ability to detect any biases they may hold.<sup>154</sup> However, releasing the jurors’ names in high-profile criminal cases opens them up to intense scrutiny and possible bias from outside individuals. It is increasingly easy to find someone you are looking for via the Internet, so even if jurors themselves make an effort to keep off of social media networks, individuals who are dedicated enough could still potentially track them down. For a trial court to determine most accurately whether an anonymous jury should be empaneled, circuit courts should uniformly employ the approach that takes into account both the jury’s ability to perform its fact-finding function safely, while minimizing infringements against the rights of the accused.

In determining whether there is a strong reason for concluding that an anonymous jury is necessary, courts should continue to

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152. *United States v. Shryock*, 342 F.3d 948, 971 (9th Cir. 2003).

153. A juror’s duties include attending court at the prescribed hours, listening to the evidence, and evaluating the evidence fairly in accordance with the circumstances and issues of a particular case. *Bamberger*, *supra* note 17, at 26.

154. *See Keleher*, *supra* note 15, at 555.



employ a factor analysis. Because of the implications against defendants' fundamental rights, the decision to empanel an anonymous jury is necessarily a fact-dependent analysis.<sup>155</sup> That being said, the widely-used factor tests across circuits must be expanded to take modern challenges into account.

The Second Circuit considers four main factors in its analysis. The first factor is “the dangerousness of the defendants, demonstrated by the seriousness of the crimes charged and whether defendants are charged with participating in a large-scale criminal enterprise,”<sup>156</sup> which speaks to any organized crime connections. Because of the seriousness of these threats against juror safety, it is important to keep this factor. Additionally, defendants' past attempts to interfere with the judicial process and their ability to tamper with or intimidate the jury are important factors to account for as well.<sup>157</sup>

While the *Ross* test, in particular, accounts for “extensive publicity,”<sup>158</sup> this factor should be revised to account for social media interference specifically. A showing of public interest across social media platforms for an extended period of time would implicate this factor. Furthermore, this could easily impact juror safety or integrity. In the Derek Chauvin case, there was immense media scrutiny through each step in the judicial process, including *voir dire*.<sup>159</sup> With such intense media scrutiny before *voir dire* even began, it is not difficult to see why Judge Cahill decided to implement anonymity into the process.<sup>160</sup> If the government submits a motion to empanel an anonymous jury on the grounds that intense social media scrutiny will interfere with the jury's fact-finding function or juror safety, a showing of possible media interference should be enough to show that an anonymous jury could be empaneled. Threats, regardless of their potential credibility, cannot be underestimated, especially against jurors merely performing their civic duties.

If the government does present a valid reason to empanel an anonymous jury, the second step in the court's determination is to take appropriate actions to mitigate any prejudices against the defendant. In instances where this does not occur, the empanelment of an anonymous jury will be found unconstitutional as a violation

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155. See *United States v. Castillo-Rubio*, 34 F.4th, 404, 408 (5th Cir. 2022).

156. See *United States v. Kelly*, No. 19-CR-286, 2020 WL 8482693, at \*1, (E.D.N.Y. Oct. 8, 2020).

157. *Id.*

158. *United States v. Ross*, 33 F.3d 1507, 1520 (11th Cir. 1994).

159. *della Cava*, *supra* note 3.

160. *Id.*

of a defendant's fundamental rights.<sup>161</sup> So long as the fundamental rights of defendants are guaranteed, the trial court, in its discretion, should account for the effects of increased social media influence in its determination for allowing the empanelment of an anonymous jury. To limit empaneling anonymous juries to only cases with organized crime connections would be a mistake. The effects of evolving technology on courtroom procedure necessitates the expansion of the use of the anonymous jury.

## V. CONCLUSION

Over the past forty years, many courts across the nation have empaneled anonymous juries in an effort to protect both prospective jurors and the judicial process.<sup>162</sup> The first anonymous jury was empaneled to protect jurors from intimidation and influence by defendants involved with organized crime enterprises.<sup>163</sup> In order to preserve the integrity of the judicial process, however, threats from the public at large must also be taken into account.

The presence of a social media "mob" has the potential to capitalize on the momentum of strong opinions by people who believe there is a "correct" verdict in a high-profile trial. While there are more instances of recorded threats against jurors by organized crime affiliates, threats against jurors by uninterested parties solely on the result of the verdict have occurred.<sup>164</sup> The ever-increasing use of social media in all aspects of life necessitates a revision in how courts anticipate whether the empanelment of an anonymous jury is justified. Courts must take into account changing technology and threats to the judicial process stemming from these changes, as they create a real opportunity for harm.

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161. See *State v. Sundberg*, 247 P.3d 1213, 1222 (Or. 2011).

162. See Circuit Court Analysis discussion in Section II, *supra*.

163. See *United States v. Barnes*, 604 F.2d 121, 130 (2d Cir. 1979).

164. See Daily Mail Reporter, *supra* note 138.



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