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IN MEMORIAM

MELISSA BRITT (FISHER) LEWIS, ESQ.
1968 – 2008

This book of the *Nova Law Review* is dedicated to the issue of Victims' Rights in memory of Melissa Britt (Fisher) Lewis, class of 2000 and former Editor-in-Chief of the *Nova Law Review*. Melissa's life tragically ended on March 7, 2008, when she fell victim to a senseless crime. During her life, Melissa was committed to helping the victims of violent crimes. She will be forever remembered for her tireless contributions to the *Nova Law Review*, as well as her unending dedication to her clients, family and friends.

IN MEMORY OF MELISSA BRITT LEWIS

HEATHER BAXTER

Melissa Britt Lewis may have been the most unlikely candidate ever for *Nova Law Review's* Editor in Chief. A rebellious teenager, Melissa dropped out of high school at the age of 18. She was never one to give up, though, so she quickly obtained her GED and started college classes. Melissa worked full-time through college, so it took her close to ten years to obtain her undergraduate degree. But that didn't mean she was finished. Most people would say, "Enough!" Not Melissa. She wanted to be a lawyer. So, three more years of school awaited her at NSU Shepard Broad Law Center.

This is when I met Melissa. We were both junior staff members on the *Nova Law Review*. I didn't know all about her background yet, but I knew that she was a non-traditional student and quite a bit older than my classmates and me. She quickly became the mother hen of our bunch, cooking for us and providing us with stories from the real world. To say Melissa flourished at NSU would be an understatement. She may have waited a while to get there, but Melissa had found her calling in life and it showed. She excelled academically, and became the Editor in Chief of the *Nova Law Review*. Her leadership skills, coupled with her real life experience, made Melissa an excellent Editor in Chief. I can personally attest to this, as I served as Melissa's second in charge that year.

In addition to her *Law Review* service, Melissa found something else at NSU that would change her life. Melissa signed up for Trial Advocacy under adjunct professor Scott Rothstein. Scott says Melissa impressed him beyond measure from the first assignment, and he quickly hired her as a law clerk in his office (then only two attorneys and a paralegal). Melissa stayed with Scott as his firm grew and she became a preeminent litigator. She was a tireless advocate for her clients, working to right the wrongs they had endured in their employment. Her efforts eventually led her to be named partner at Rothstein, Rosenfeldt and Adler, an achievement of which she and her family were extremely proud.

Though she was a hardworking attorney, Melissa's dedication to her family was unrivaled. Melissa's three nieces were the apples of her eye. I can remember the way she looked when she would tell me of her many trips to Disney World with the girls. Not having children of her own, Melissa felt privileged to be such a big part of her nieces' lives, and they loved their Aunt 'Lissa fiercely.

Mirroring the effort she put in for her clients and her family, Melissa also believed in giving back to her community. She was a member of Leadership Broward and the Broward County Human Rights Board. Because of her

involvement with Leadership Broward, she was working on a memorial dedicated to victims of violent crime when, ironically, she herself was murdered on March 7, 2008. It is this tragedy that prompted the Nova Law Review to dedicate this issue to Victims' Rights, in memory of Melissa.

I feel lucky to have called Melissa a friend. Though it has been a year since her death, I know I speak for countless others when I say we miss her every day. It would make her proud to know that she has inspired this issue of the Nova Law Review, and that, even in death, her memory lives on to give a voice to those who have lost so much.

FOREWORD: THERAPEUTIC JURISPRUDENCE PERSPECTIVES ON DEALING WITH VICTIMS OF CRIME*

BRUCE J. WINICK**

Therapeutic jurisprudence is an interdisciplinary field of legal scholarship that looks at law with the tools of the behavioral sciences.¹ In this respect, it is a descendant of legal realism, which asks us to look at law as it actually impacts people's lives, and to do so using perspectives and approaches drawn from other disciplines.² As Justice Holmes has told us, "The life of the law is not logic. It is experience."³

Accordingly, we need to understand how law actually applies in the real world, how people work with it, deal with it, respond to it. And in order to do that, we have to be interdisciplinary and we need to understand anthropology, psychology, economics, and all of those other disciplines that help us see law and the world in a much more enriched way. Therapeutic jurisprudence uses these tools and examines law through a particular lens, focusing on law's impact on emotional life.⁴ It posits that among the other consequences of law, law is a therapeutic agent. Law is a social force that has inevitable consequences for people's emotional well-being, often negative consequences, sometimes positive ones.

The law and economics movement has taught us that we have to be sensitive to law's economic impact, to conduct the cost benefit analysis of law, and to understand the importance of efficiency.⁵ In a similar way, therapeutic jurisprudence is concerned with law's therapeutic impact. We seek to avoid the mistake that we believe the law and economics approach sometimes has fallen into, which is to assume that if a law is inefficient, it there-

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1. See generally LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996) [hereinafter LAW IN A THERAPEUTIC KEY].

2. Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 186 (1997).

3. OLIVER W. HOLMES, JR., THE COMMON LAW 1 (Gryphon Editions 1982) (1881).

4. See generally LAW IN A THERAPEUTIC KEY, *supra* note 1; Winick, *supra* note 2.

5. Winick, *supra* note 2, at 190.

fore should be changed.⁶ The assumption is that cost-benefit and efficiency are the most important values. Yet, there are other important values at stake—justice, fairness, and equality, among others. Therapeutic jurisprudence suggests that the therapeutic aspect of law is an important understudied dimension. However, a demonstration that a particular law or legal practice is anti-therapeutic does not, in our view, demand that it be changed. Although important, this therapeutic dimension of law is not the highest value served by law. Understanding this therapeutic dimension is crucial to our understanding of law and how it applies to better see how it affects people and to see what we can do to reshape it. When consistent with other important values served by law, this understanding may suggest the value of restructuring law in order to make it more of a healing force. In that sense, it is a revolutionary concept. But, the therapeutic aspect of law does not necessarily trump other values, and sometimes is outweighed by them. When these values coincide with the therapeutic ones, the path to law reform is clear. When they conflict, however, therapeutic jurisprudence does not resolve this conflict. It simply sharpens the issues for further analysis and calls for more empirical research to see whether there may be creative approaches for reshaping law and how it is applied in ways that strike an appropriate balance between these competing values.

Therapeutic jurisprudence is really a fairly simple idea. It calls upon us to examine this therapeutic dimension of law with the tools of the behavioral sciences, in an effort to determine whether we can restructure legal arrangements to minimize unintended anti-therapeutic effects and maximize their potential for healing and rehabilitation. We examine not only legal rules, but legal practices and the way various legal actors—judges, lawyers, police officers, etc.—play their roles. All of these legal actors can properly be seen as therapeutic agents. In the way they act, they typically will impose either positive or negative effects on the emotional life of the people they deal with.

Therapeutic jurisprudence has had a particularly important impact on judging and lawyering. With regard to judging, we have seen in the past fifteen to twenty years the emergence of what we now call problem-solving courts, drug treatment courts, mental health courts, domestic violence courts, and various hybrid models that take the rehabilitation of the offender as a very significant goal.⁷ In these courts, the judge functions as a member of a treatment team helping to provide what often is needed motivation for the offender to opt for treatment and to help with treatment compliance. These

6. *Id.*

7. See generally JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds., 2003).

are voluntary programs. The defendant in criminal court, for example, could plead not guilty to a drug offense and receive the fair trial that our system mandates. Alternatively, he could plead guilty and accept punishment.

The problem-solving court model offers a third alternative. If the offender is prepared to recognize that he has a substance abuse problem and that it is time to deal with it, the drug court can help him to accomplish this goal. If he voluntarily chooses drug court, he enters a behavioral contract with the court, he agrees to accept drug treatment and to participate meaningfully in it, to submit to periodic urine analysis drug testing, and to report to court every ten to fourteen days. The judge will know immediately if the defendant's urine is clean or dirty. If the defendant is doing well, if his urine is clean, the judge says, "Wow, Mr. Jones you're doing great! It's really wonderful to see your progress. Let's everyone in the court room give him a hand." This represents a new role for the judge: the judge as behavioral shaper, motivator, and compliance checker. Many of these defendants have never had an authority figure care about them. The judge's encouragement, therefore, is especially meaningful and helps to build the individual's self-esteem and self-efficacy, both of which are necessary to attainment of the goal. All of a sudden the judge is telling him, "Wow, you can do it Mr. Jones, you're doing great!" And if Mr. Jones has dirty urine that day, the judge is going to scold him or impose a sanction that has been agreed to in the behavioral contract that the individual signs in advance. And at the end of about a year and a half, those who are successful graduate, their charges are dismissed, and the arresting officer comes to court and presents them with a diploma. This represents a sea change in the functioning of the courts.

This approach is not well-suited to every court. It is not appropriate for courts that are designed to decide disputed issues of historic fact. In these instances, the judge should be a neutral umpire. But so much of what the courts are called upon to do these days does not involve this traditional adjudicatory role. Guilt or what transpired in the past is not an issue. The task is to determine disposition, to determine what will happen to the individual and whether the courts can provide help that will prevent a reoccurrence of the problem. In this respect, courts dealing with problems like substance abuse, juvenile delinquency, domestic violence, child abuse and neglect, and untreated mental illness can largely be seen to function as psycho-social agencies.

We would not necessarily think of judges as the best people to play this role. Judges, after all, are law-trained, and may not possess the psychological and social work skills needed to play these roles well. But unfortunately, our society does not put the resources that are needed into prevention and treatment programs in the community that can help people with these problems at an early stage before they get out of hand. As a result, given the lack

of such services, these problems fester and ultimately explode, and the individual is arrested and brought to court. There is always a judge in the back of the room when I give lectures, that says, "But Professor Winick, I'm not a social worker." What I tell them is, "Yes, you are. When you are functioning in one of these courts, you are functioning as a social worker. You're either going to be a good one or a lousy one, so get with the program, learn some of these skills."

Judges who function in these new courts become experts in dealing with these kinds of social problems. They learn some of the basic approaches and techniques of psychology and social work, and apply them in the court room. They learn how to motivate people to understand that they have a problem, to persuade them that they can effectively deal with it, to link them with community treatment resources that otherwise might be unavailable or inaccessible to them as a result of their problem, and to facilitate their treatment through compliance checking and encouragement. In short, they help them to solve the problem that has brought them to court and that otherwise will likely reoccur. This marks a revolutionary change in the way courts function. This new development can be seen as therapeutic jurisprudence at the judicial level.

A leading example in Broward County is Judge Ginger Lerner-Wren, who started the nation's first mental health court.⁸ As the public advocate in Broward County, she learned about therapeutic jurisprudence. When she was elected to county court, she noticed that many of the minor offenders in criminal court were there because they had committed nuisance offenses that were more a product of their untreated mental illness than of criminality. In response, she started the nation's first mental health court about a dozen years ago, explicitly based upon a therapeutic jurisprudence model. There are now more than a hundred mental health courts in the country, probably twenty-four hundred drug treatment courts, several hundred domestic violence courts, and many other such courts throughout the world.

Not only has therapeutic jurisprudence revolutionized the courts, but it has begun to transform the role of the lawyer. Our 2000 book, *Practicing Therapeutic Jurisprudence*, applies the therapeutic jurisprudence model to the practice of law.⁹ Its subtitle, *Law as a Helping Profession*, suggests that

8. See generally Susan Stefan & Bruce J. Winick, *A Dialogue on Mental Health Courts*, 11 PSYCHOL. PUB. POL'Y & L. 507 (2005); GINGER LERNER-WREN, BROWARD'S MENTAL HEALTH COURT: AN INNOVATIVE APPROACH TO THE MENTALLY DISABLED IN THE CRIMINAL JUSTICE SYSTEM (2000), available at http://www.ncsconline.org/WC/Publications/KIS_ProSol_Trends99-00_FlaMentalPub.pdf.

9. PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle, David B. Wexler & Bruce J. Winick, eds., 2000).

therapeutic jurisprudence seeks to reframe the practice of law. That is what lawyers are. They are members of a helping profession. Like doctors, nurses, and others whose task is to help their patients or clients with a life problem. The role of lawyers is to minister to the problems of their clients. Clients come to their offices with the worst problems in the world. They are going through a divorce. They are facing criminal accusation. They are going through a bankruptcy. A business partner has screwed them. Maybe they have been in an accident and they have been horribly injured, perhaps permanently. These are the world's worst problems, and they bring them to the law office.

How should we as lawyers deal with these problems? We, of course, are going to deal with their legal problems. But in the process, let us understand that our clients are people who possess the full range of human emotions that inevitably interrelate with the legal problems they are encountering. Let us look at the client holistically. This is what we teach our doctors these days. It is not a case of colon cancer that has come to the office, it is a person that happens to have colon cancer. We need to understand that the client is a person, a fellow human being. It is our role to understand their emotional problems, as well as their legal ones, and to minister to the whole person. As lawyers, we inevitably are therapeutic agents. If we ignore their problems, we can further exacerbate their psychological difficulties. By contrast, an awareness of the predictable emotional problems that accompany legal difficulties and the possession of a rudimentary understanding of the interpersonal skills needed to deal with them can help the client to solve the legal dilemma in a way that also enhances her emotional well-being.

If we adopt this more comprehensive vision of the role of the lawyer, our clients will be better off both legally and psychologically, and as a result of the relationship, will be much more satisfied with the professional encounter. In addition, we as lawyers will experience a heightened sense of professional satisfaction. Our role as lawyers is to help people, to serve their needs. And there is great joy in using the legal, analytical, and problem solving skills we possess to help people. If we can understand this to be our professional role, we will find the real joy in the practice of law.

Let me turn my attention to the Nova Law Review and the topic of your upcoming issue—victims' rights. I am aware of the story of Melissa Lewis, your dear departed former editor who had a special interest in victims' rights and worked on this topic and yet, ironically, was herself tragically the victim of a very serious crime and was killed.¹⁰ What tragic irony that is, let us meditate upon it. It is entirely appropriate that the law review has dedicated this

10. See Heather Baxter, *In Memory of Melissa Britt Lewis*, 33 NOVA L. REV. 533 (2009).

issue to Melissa Lewis and to the further exploration of the topic of victims' rights that she made such an important part of her short legal life.

What does therapeutic jurisprudence have to contribute to our thinking about victims' rights? Therapeutic jurisprudence focuses our attention on the emotional life of people touched by the law, and of course, victims are very much affected by how they are treated by the legal system. They have been the subject of a crime—sometimes a violent crime. They have suffered predictable emotional responses as a result of that crime: anxiety, fear, depression, humiliation, anger, powerlessness, and betrayal. Some develop the syndrome of post traumatic stress disorder where they relive, periodically, the high anxiety of the crime situation.¹¹ Some develop a form of learned helplessness. They have been victimized and that victimization is something that gives them a sense of powerlessness.

This sense of powerlessness, which they may tend to generalize to other aspects of their lives, could develop into what psychologist Martin Seligman called the syndrome of learned helplessness.¹² They react in an amotivational way to life. They do not set goals, they surrender to their predicament. They feel helpless, hopeless, and function in a way that mirrors the symptoms of clinical depression. They may not be able to get out of bed. They feel that life no longer matters. A lot of people who have experienced serious crimes may react in this way.

Now that we have a bit of an understanding of how the crime might impact at least some victims emotionally, let us think about how the law and legal processes might respond to them. The basic insight of therapeutic jurisprudence is that the legal processes that people encounter will impose consequences for their psychological well-being—either negative or positive. The law reform agenda of therapeutic jurisprudence calls upon us to think creatively about how these legal processes can be reshaped to minimize their anti-therapeutic consequences and maximize the potential for the healing of the victim. We cannot ignore the emotional aspect of their victimization, but must take it into account in deciding how the legal system should react to them. We must be careful not to revictimize them by how we deal with them

11. AM. PSYCHIATRIC ASS'N, DSM IV: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 463–68 (4th ed. 2000); JUDITH HERMAN, *TRAUMA AND RECOVERY* (1997); Anita K. McGruder-Johnson, et al., *Interpersonal Violence and Post-Traumatic Symptomatology: The Effects of Ethnicity, Gender and Exposure to Violent Events*, 15 J. INTERPERSONAL VIOLENCE 205 (2000); J.P. WILSON, *TRAUMA, TRANSFORMATION, AND HEALING: AN INTEGRATIVE APPROACH TO THEORY, RESEARCH, AND POST-TRAUMATIC THERAPY* (1989).

12. MARTIN E.P. SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH* (1975); see Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 PSYCHOL. PUB. POL'Y & L. 6, 42 (1995).

in the criminal justice process. Yet, often we do just that in the way that police officers take their statements, in the way prosecutors interact with them, and in what they experience in the courtroom.

If we view the plight of the victim through the lens of therapeutic jurisprudence, the test becomes how we can better understand the psychological dimensions of their victimization and how we can reshape the legal process to facilitate their healing and human potential. How can the criminal justice system help to turn victims into survivors? A concern for the needs of the victim should, in important respects, be taken into account in redesigning how police, judges, court personnel, prosecutors, and defense lawyers play their roles. They should understand how crime has upset the emotional equilibrium of the victim, and attempt to restore it.

At present, the victim has a subsidiary role in the court process. The prosecutor decides the important issues of what to charge, whether to plea-bargain, what charge to plea-bargain to, how to present the evidence, and whether to call the victim as a witness. The victim frequently has no voice on these questions. They are peripheral players, and once again feel marginalized and disrespected. They feel powerless once again, a feeling that might contribute to depression and learned helplessness. In this way, the criminal justice process contributes to the anti-therapeutic consequences of their victimization. Instead of perpetuating their sense of powerlessness, we need to empower them. And yet, the criminal justice system does not empower them at all.

How can we begin to think about addressing the emotional needs and the interests of the victim? Everyone in the criminal justice system who deals with the victim—judges lawyers, police officers, and court personnel—needs to be sensitized to these issues and to learn about the emotional responses that victims are likely to experience. This calls for education designed to increase their psychological understanding and their ability to respond to the victim with empathy and sensitivity.

How can we deal with the high potential for victims to experience a form of post traumatic stress disorder? One of the leading remedies is to get people to express about it, to talk about it, either to a therapist or to a neighbor, to journal about it, to open up about it rather than holding it inside where it will ultimately come back to haunt them.¹³ We need to provide opportunities in the police station for victims to talk about what happened to them and how they felt about it. It would be desirable to have social workers within

13. See JAMES W. PENNEBAKER, *OPENING UP: THE HEALING POWER OF CONFIDING IN OTHERS* (1990) (describing the psychological and physiological benefits of expression in dealing with post traumatic stress disorder caused by a variety of traumatic events, including crime victimization).

the police and court process who can address the needs of the victim. It would be beneficial to have them complete an intake form in which they are asked to describe what happened to them and how they felt about it as a means of helping them get past it. In the alternative, they could be asked to dictate their feelings into an audio tape. In addition, asking them to prepare a victim impact statement that can be used at sentencing can also accomplish this objective.¹⁴

In our criminal justice process, the prosecutor, not the victim, decides whether and what to charge, whether to offer a plea bargain, and how to present the evidence. This is appropriate, as the prosecutor has the responsibility of seeking the public interest. The victim has his or her own interest in these questions, but it may not truly reflect the public interest. And so we cannot give the victim a veto on these matters. But at the same time, the prosecutor should take her views into account. What the victim needs is a voice, not necessarily a veto, however, the victim's voice is rarely listened to in our criminal justice process. Under Florida law, the prosecutor is supposed to consult with the victim about plea bargaining and sentencing, but this is rarely followed.¹⁵ When the victim learns after the fact that the prosecutor has agreed to a plea bargain, and that the case, in effect therefore, is over, she again will feel disempowered, marginalized, disrespected, and in effect victimized once again.

Prosecutors need to talk with the victim beforehand, giving them a voice, not a veto. Even though the prosecutor ultimately will make the decision, the prosecutor should hear the victim's views, listen to the victim's voice, convey empathy, and in the process treat the victim with dignity and respect. Should the prosecutor decide not to follow the victim's views, he should explain why, on balance, he has reached a different conclusion.

Therapeutic jurisprudence has frequently drawn on insights from the literature on procedural justice.¹⁶ This is an empirical literature that helps us understand how people experience judicial and administrative hearings.¹⁷ This literature shows that the satisfaction of litigants with the procedures

14. *Id.*

15. FLA. CONST. art. I, § 16.

16. See BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 119–38 (2005); Bruce J. Winick & Ginger Lerner-Wren, *Do Juveniles Facing Civil Commitment Have a Right to Counsel?: A Therapeutic Jurisprudence Brief*, 71 U. CIN. L. REV. 115 (2002).

17. E.g. E.A. LIND & T.R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); JOHN W. THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS, (1975); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006); E.A. Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952–59 (1990).

they receive and their ability to accept the outcome are dependent upon several factors. The first is “voice,” the basic need that people have to tell their stories and be listened to. The second is “validation,” the feeling that the judge has taken them seriously. The third is whether the judge has treated them with dignity and respect and has acted fairly and in good faith. Let us adapt these insights to the way the criminal justice process deals with the victim. The prosecutor and the other judicial officials with whom they will deal should give the victim this sense of voice. They should accord them validation, pay attention to them, take them seriously, and take their arguments into account, even if they ultimately reject them. They should listen to them attentively, always treat them with dignity and respect, and provide them with a process that they will feel is in good faith. Even if the prosecutor makes a decision that the victim is unhappy with, the victim will then be more likely to accept it. Treating the victim in this way will nonetheless increase their satisfaction with the process and their ability to accept the outcome. Moreover, treating the victim in this way can avoid much of the re-victimization that the existing process imposes, and thereby assist the victim to heal and move forward.

These are some of the factors that therapeutic jurisprudence suggests we need to take into account in thinking about how to recast our criminal justice system so that it pays more attention to the emotional needs of the victim. These are preliminary perspectives on how therapeutic jurisprudence can improve the plight of the victim in our criminal justice system. We need to value the emotional well-being of the victim, and make greater use of psychological insights and approaches in reshaping our criminal justice process in order to better accomplish this. This symposium and the approach I have outlined can do much to help us reimagine a more humane criminal process that helps to bring about healing for the victim, rather than revictimization.

JUSTICE IN TRANSITION: JURY TRIALS IN POST-SOVIET RUSSIA

HONORABLE JAY B. ROSMAN*

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* Judge Jay Rosman has served as a circuit judge on the Circuit Court Bench in Florida's Twentieth Judicial Circuit since 1992. Prior to the circuit bench, Judge Rosman served as a county judge for Lee County from 1986. He has also served as an Associate Judge for the Second District Court of Appeal on three occasions. Judge Rosman received his B.A. with honors from Hofstra University in 1975, his J.D. from the University of Akron, in 1978, and his M.J.S. from the National Judicial College at the University of Nevada in 1994. He is presently a Doctoral candidate in judicial studies. Judge Rosman has also taught Business Law and Criminal Law since 1982 at the University of South Florida in Ft. Myers and at Florida Gulf Coast University in Ft. Myers, Florida.

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I. INTRODUCTION

In this paper, I will examine jury trials in present day Russia. The main focus of the paper will be on the new Russian Criminal Code of Procedure which became effective in July of 2002.¹ The code is important because it sets forth the standard for jury trials in Russia.

In order to examine jury trials in Russia today, it will be important to look at Russian history. More specifically, it will be important to look at the history of the right to a jury trial in Russia. It would be difficult to analyze the present day Russian jury trial without also considering the historical aspect of the jury trial in Russia in the past.

After looking at the history of the Russian jury trial, I will then examine the present day Russian jury trial. In order to look at the present day Russian jury trial, one must examine the Russian Criminal Code of Procedure. The code itself sets out not only the return of the jury trial, but also sets out the specific standards for the jury trial.

The examination of the Russian jury trial will be informative. Beyond being informative, this paper will address a salient question raised by the

1. Ugolovno-Protseussual'nyi Kodeks [UPK] [Criminal Procedural Code] (Russ.). This article references an English translation of the Russian Criminal Code of Procedure which the Office for Democratic Institutions and Human Rights has available at <http://www.legislationline.org/documents/section/criminal-codes>.

return of the jury trial to Russia. The salient question that this paper will address is whether the jury trial today provides justice to the citizens of post-Soviet Russia. The answer to that question will be addressed throughout the paper and more directly during the paper's conclusion.

II. RUSSIA AND ITS PEOPLE

Before there can be an analysis of the jury trial in Russia, it is first important to have an understanding of the historical context of Russia and its people. It will provide a better view of the current state of the country of Russia—including its judicial system.

Russia is a huge, complex, fascinating place. While it straddles Europe and Asia, Russia is neither European nor Asian in its culture or perspective.² While Russia, as the Soviet Union, attained super-power status with the United States in “the twentieth century, it is very different from America.”³ Russia for centuries has struggled with its own identity among nations.⁴ The struggle for their own sense of identity continues today.⁵ Russia is no longer an imperial power ruled by czars, as it was from the time of Peter the Great in the late 1600s to 1917.⁶ Russia is no longer communist, as it was when ruled by dictatorships from 1918 to 1991.⁷ Since 1991, Russia has been striving to become a true democratic nation.⁸ It continues to struggle with its own identity as a Russian democracy.⁹

Geographically, Russia is the largest country in the world.¹⁰ It occupies approximately 6.6 million square miles, almost twice the size of the United States.¹¹ From east to west, Russia measures over 5,000 miles and has eleven time zones.¹² The population of the Soviet Union was about 290 million.¹³ Today the Russian Federation has a population of approximately 147 million.¹⁴ Russia has the sixth largest population in the world following Chi-

2. CHARLES E. ZIEGLER, *THE HISTORY OF RUSSIA*, 1 (Greenwood Press. 1999).

3. *Id.*

4. *Id.*

5. *Id.*

6. *See id.*

7. ZIEGLER, *supra* note 2, at 1.

8. *See id.* at 1, 6–7.

9. *See id.* at 1.

10. *Id.*

11. *Id.*

12. ZIEGLER, *supra* note 2, at 1.

13. *Id.* at 2.

14. *See id.*

na, India, the United States, Indonesia, and Brazil.¹⁵ Over eighty percent of the population is located in the western part of the country.¹⁶ Only 25 million people “live in the vast expanses of Siberia” and the eastern most part of Russia.¹⁷

As to be expected, most of the roads, railways, and airways are located in the western portion of the country.¹⁸ Interestingly, the eastern part of the country is “rich in natural resources—oil, natural gas, gold, diamonds, furs, and timber.”¹⁹ Due to the remoteness and lack of a transportation system to them, these natural resources remain inaccessible.²⁰

Russia today “is ethnically more homogenous than” the Soviet Union.²¹ “The Russian Federation is [approximately] 82 percent Russian. The next largest group is the Tatars,” who are Moslem Turkic people that comprise about four percent of the population.²² Ukrainians make up 3 percent of the population.²³ The remaining twelve percent is made up of Turkics, Germans, Belorussians, Jews, and Siberian tribes.²⁴

Most of Russia is further north than the United States.²⁵ It is comparable more to Canada in its geographical location than to the United States.²⁶ Although Russia has good agricultural land, its northern location and climate provide for shorter growing seasons.²⁷ Many crops do not do well.²⁸ As a result of climate and Soviet policies, the farming sector to the present day has done poorly.²⁹ In 1998, almost half of all Russian imports were food.³⁰

“Much of Russia is flat, and the absence of natural barriers is often cited [as the basis for the continued] historical Russian preoccupation with secure borders.”³¹ The Ural Mountains, which run north to south, separate European Russia from Siberia and the Far East.³² The Urals are not very high and

15. *Id.*

16. *Id.*

17. ZIEGLER, *supra* note 2, at 2.

18. *Id.*

19. *Id.*

20. *Id.*

21. ZIEGLER, *supra* note 2, at 2.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *See* ZIEGLER, *supra* note 2, at 2.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 3.

31. ZIEGLER, *supra* note 2, at 3.

32. *Id.*

are comparable to the Appalachian Mountains in the United States.³³ Due to its vastness, the climate in Russia varies.³⁴ In some southernmost areas in the summer, it “can be quite hot.”³⁵ In north-central Russia the infamous Russian winters are brutally cold.³⁶ It is not unusual for the temperatures to drop to forty degrees below zero.³⁷ In the Siberian town of Verkhoyansk, temperatures have often fell to ninety degrees below zero.³⁸

“Russia is an urban nation . . . about 70 percent of the population liv[es] in cities. Moscow, the capital, is . . . the largest and [perhaps] most dynamic city” in Russia.³⁹ Its population is about nine million.⁴⁰ Close to seventy-five percent of all “Western investment has been concentrated in [Moscow].”⁴¹ The investments have helped transform the capital to a modern refurbished city.⁴² Most other Russian cities lag behind Moscow “where old Soviet industries [lag behind] and the new market economy has” not as of yet taken off.⁴³

Life in the Russian countryside is “far removed” from the culture of the larger cities.⁴⁴ This has been true historically.⁴⁵ Russian villages are much poorer than the cities.⁴⁶ Many rural homes do not have indoor plumbing.⁴⁷ Horse drawn carts are not an uncommon sight.⁴⁸ Agricultural production was mechanized by the Soviet Union.⁴⁹ However, many peasants were forced into huge collective state farms, which are still operating today.⁵⁰ Productivity on these farms “is low and there are few opportunities for young people in the” countryside areas.⁵¹ As a result, many have left these areas for

33. *Id.*

34. *See id.*

35. *Id.*

36. ZIEGLER, *supra* note 2, at 3.

37. *Id.*

38. *Id.*

39. *Id.*

40. ZIEGLER, *supra* note 2, at 3.

41. *Id.* at 3, 5.

42. *See id.*

43. *Id.* at 5.

44. *Id.*

45. *See* ZIEGLER, *supra* note 2, at 5.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. ZIEGLER, *supra* note 2, at 5.

51. *Id.*

the cities.⁵² While Soviet restrictions prevented migration to the cities, the new “Russian Constitution guarantees freedom of movement.”⁵³

Russians are a well-educated and highly literate people.⁵⁴ Before the Russian revolution in 1917, the illiteracy rate stood at fifty-five percent.⁵⁵ Currently, the literacy is approximately ninety-seven percent.⁵⁶ “Russian students routinely outperform” American students in math and science.⁵⁷ Under Soviet rule, “all schools were operated by the state.”⁵⁸ Today, the Russian education system resembles those in the West including the United States.⁵⁹ Private schools and religious schools now exist along with state run schools.⁶⁰ It is not unusual for the Russian elite to now send their children to Europe or the United States for their education.⁶¹

It is readily apparent that the communist Soviet regime failed to eradicate religion.⁶² Today religion flourishes in Russia.⁶³ Numerous church buildings have been restored or rebuilt.⁶⁴ Services are often packed with religious believers of the respective faith.⁶⁵ About eighty percent are Russian Orthodox which was the state church of the czars.⁶⁶

Approximately nine percent are Moslems as represented by the Tatars, the Chechens, Ingush, and others.⁶⁷ About three percent of the population is Jewish.⁶⁸ There are also a large number of Catholics, Baptists, and Buddhists.⁶⁹ A small number of fringe religions exist also, including the “Hare Krishnas and members of the Japanese Aum Shinrikyo cult.”⁷⁰

“For centuries, Russia’s government was a centralized” monarchy led by the czars and “organized on [the] principles of rank and privilege.”⁷¹ In

52. *Id.*

53. *Id.* at 5; *see also* Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 27.

54. ZIEGLER, *supra* note 2, at 5.

55. *Id.* at 5–6.

56. *Id.* at 6.

57. *Id.*

58. *Id.*

59. *See* ZIEGLER, *supra* note 2, at 6.

60. *Id.*

61. *Id.*

62. *Id.*

63. *See id.*

64. ZIEGLER, *supra* note 2, at 6.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. ZIEGLER, *supra* note 2, at 6.

70. *Id.*

71. *Id.*

the Soviet period, after 1917, a more stringent “dictatorship was organized through the Communist Party.”⁷² Lenin, until his death in 1924,⁷³ “established the Soviet system and laid the foundation[] for a totalitarian dictatorship.”⁷⁴ His successor, Joseph Stalin, took the system and developed it into one of the most “repressive governments known to history.”⁷⁵ After Stalin’s death in 1953, Khrushchev (1953–1964) and Brezhnev (1964–1982) tempered some of the oppressive aspects of the Stalin era.⁷⁶ However, they retained and preserved the basics of the Soviet Party-state system.⁷⁷ Gorbachev—from 1985 to 1991—became “the first Soviet leader to undertake serious reform.”⁷⁸ He “set in motion a series of events,” based in reform, which “brought about the collapse of the USSR, leaving fifteen newly independent states in its place.”⁷⁹ From 1991 to 1999, Boris Yeltsin was president.⁸⁰ From 1999 through 2008, Vladimir Putin was the president of the Russian Federation.⁸¹

“Many factors played a role in the collapse of the Soviet Union.”⁸² The most important may “have been internal, although international pressures . . . deserve[] some credit for the [demise].”⁸³ Domestic factors include the following: “poor economic performance of [a] centrally planned economy, technological backwardness, a . . . repressive political system that discouraged [growth and] creativity, excessive military spending, . . . bureaucratic inefficiency,” polluting the environment, the impact of the Chernobyl nuclear disaster on a wide range of issues, Russian nationalism, and the insensitivity of the Soviet Union to its diverse population, including its minorities.⁸⁴

One should consider not only domestic problems and international pressures in the Soviet collapse, but also the generational shift in Soviet leader-

72. *Id.*; see also David Remnick, *Leaders & Revolutionaries: V.I. Lenin*, TIME.COM, Apr. 13, 1998, <http://www.time.com/time/time100/leaders/profile/lenin.html>.

73. *Id.*

74. ZIEGLER, *supra* note 2, at 6.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. ZIEGLER, *supra* note 2, at 7.

80. *Id.*

81. Andrew E. Kramer, *Putin’s Grasp of Energy Drives Russian Agenda*, N.Y. TIMES, Jan. 28, 2009, <http://www.nytimes.com/2009/01/29/world/europe/29putin.html> (last visited Apr. 5, 2009); see Frances Romero, *Russia President Dmitri Medvedev*, TIME.COM, Apr. 2, 2009, <http://www.time.com/time/world/article/0,8599,1888887,00.html>.

82. ZIEGLER, *supra* note 2, at 170.

83. *Id.*

84. *Id.* at 167, 170.

ship and the generational shift of all citizens.⁸⁵ The new, younger “generation was better educated and more critical of [the] Soviet” record.⁸⁶ “[T]he Soviet people [became] disillusioned and impatient with a corrupt, repressive system that” failed to provide for the needs and desires of the modern Soviet people.⁸⁷ The collapse of the Soviet regime may have begun with party officials, but it was embraced by the public affirmation that democracy would be accepted and dictatorship would be rejected and not restored.⁸⁸

Today Russia is a blend of presidential-parliamentary form of government, patterned upon the French system of government.⁸⁹ “It is federal, with political [power] divided between Moscow and eighty-nine regional [or district] governments.”⁹⁰ Russia has its own constitution, which defines the power of the presidency, its legislature called the Federal Assembly, and its judiciary.⁹¹ The constitution also contains a section, which sets out the rights and freedoms for citizens, that is comparable to the American Bill of Rights.⁹²

The country has experienced difficulty in adjusting to their new economy, shifting from a centrally planned economy to a market economy.⁹³ The transition has not been easy.⁹⁴ In the last ten years, Russia “has experienced hyperinflation, unemployment, . . . capital flight, and . . . income inequality.”⁹⁵ There exists a complex and burdensome tax system.⁹⁶ Many businesses keep two sets of books, which causes the government to run at a deficit.⁹⁷ The Russian mafia has a significant presence in the country.⁹⁸ There are many armed mafia gangs, and a large percentage of businesses pay protection money to the mob.⁹⁹ “Russia now has one of the highest murder rates in the world.”¹⁰⁰ Moreover, robbery, rape, and assault cases have risen substantially in recent years.¹⁰¹

85. *Id.* at 170–171.

86. *Id.* at 171.

87. ZEIGLER, *supra* note 2, at 171.

88. *See id.*

89. *Id.* at 6.

90. *Id.* at 6–7.

91. *See id.*

92. *See* ZEIGLER, *supra* note 2, at 6–9.

93. *Id.* at 8.

94. *Id.*

95. *Id.*

96. *Id.*

97. ZEIGLER, *supra* note 2, at 8.

98. *See id.*

99. *Id.*

100. *Id.*

101. *Id.*

“Winston Churchill once remarked that the Soviet Union was a riddle wrapped in a mystery inside an enigma.”¹⁰² Russia’s present is inextricably tied to its past.¹⁰³ It is a past that has been troubled, violent, and fascinating.¹⁰⁴ It is still emerging from many decades of severe repression.¹⁰⁵ It is still struggling to build “a viable and respected democracy.”¹⁰⁶ The country has tremendous potential as reflected in its people and its vast natural resources.¹⁰⁷ Its people are highly educated and creative.¹⁰⁸ Whether the country is captive to its past and is doomed to authoritarian rule remains an open question.¹⁰⁹ With its new constitution as a foundation and responsible leadership, Russia could become an affluent shining example of democracy. This brief review of Russian history will provide a better understanding of the present day jury trial and the jury trial in the past in Russia.

III. SEEDS OF REFORM IN RUSSIA

The seeds of judicial reform were sown by the Czar Aleksandr II.¹¹⁰ He succeeded to the throne in 1855 as the Crimean War was still being waged.¹¹¹ The war impacted “Russia’s confidence in its military and diplomatic capabilities, and underscored the need for social reform.”¹¹² From 1853 to 1856, war between Russia on the one hand, and the Ottoman Empire, England, France, and Sardinia on the other, was waged.¹¹³ The war was initiated by Czar Nicholas I.¹¹⁴ The war revolved around a religious “dispute between Orthodox Christians and Catholics over access to sites in the Holy Land.”¹¹⁵ Negotiations had failed.¹¹⁶ As a result war was waged.¹¹⁷ Aleksandr II came

102. ZIEGLER, *supra* note 2, at 207.

103. *See id.* at 9.

104. *Id.*

105. *Id.*

106. *Id.*

107. ZIEGLER, *supra* note 2, at 9.

108. *Id.* at 7.

109. *See id.*

110. *See id.* at 58–59.

111. *Id.*

112. ZIEGLER, *supra* note 2, at 58.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. ZIEGLER, *supra* note 2, at 58.

to the throne in the midst of a losing war.¹¹⁸ He immediately sought to end the war and negotiated a peace accord.¹¹⁹

Alexsandr ascended to the throne succeeding his father Nicholas who ruled from 1825–1855.¹²⁰ The thirty year reign of Nicholas has been “generally described as conservative, militaristic, and repressive.”¹²¹ In order to preserve domestic order Nicholas had adopted draconian measures.¹²² His secret police, who were the predecessors of the Soviet KGB, were “notorious for their harsh and intrusive methods.”¹²³ The “police investigated every possible revolutionary plot or subversive act” including the monitoring of literature.¹²⁴ One such subversive was the writer Dostoyevsky who was arrested and sentenced to death.¹²⁵ At the moment of execution, Dostoyevsky and others had their sentences commuted and were instead exiled to Siberia.¹²⁶

Succeeding his father’s reign, Alexsandr understood the need for reform in Russia.¹²⁷ The loss of the Crimean War left no doubt that military reform was needed.¹²⁸ The Russian “army was equipped with antiquated weapons and [was] poorly supplied.”¹²⁹ The army was also composed of peasant recruits who were ineffective fighters.¹³⁰ Alexsandr was no different from many in the country who believed that Russia was technologically backwards.¹³¹ Unless change occurred, Russia would fall further behind.¹³²

At the forefront of positive change was the need for ending the deleterious impact caused by the institution of serfdom.¹³³ The first essential reform by Alexsandr was emancipation of the serfs.¹³⁴ “The emancipation of the serfs was . . . the most important of a series of official acts called the Great Reforms.”¹³⁵ The Emancipation Act of 1861 granted freedom to fifty-

118. *Id.* at 58–59.

119. *See id.* at 59.

120. *Id.* at 56, 58–59.

121. *Id.* at 56.

122. ZIEGLER, *supra* note 2, at 56.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *See* ZIEGLER, *supra* note 2, at 61–62.

128. *Id.* at 61.

129. *Id.*

130. *Id.*

131. *See id.* at 61–62.

132. *See* ZIEGLER, *supra* note 2, at 62–63.

133. *Id.* at 63.

134. *Id.*

135. *Id.*

two million people from a total population at the time of seventy-three million.¹³⁶ Interestingly, Abraham Lincoln would free American slaves two years later.¹³⁷ The American slaves freed totaled four million.¹³⁸ Aleksandr had stated that Russia needed to abolish serfdom from above before it abolished itself from below.¹³⁹

IV. JUDICIAL REFORM IN RUSSIA

Another major reform enacted by Aleksandr II was judicial reform.¹⁴⁰ “Russia’s judicial system in the early nineteenth century was inefficient and corrupt, and based on class privilege.”¹⁴¹ On November 20, 1864, he “signed the main documents of Judicial Reform, known in history as [the] Judicial Statutes.”¹⁴² A speedy, just, and merciful trial system equal for all was presented to Russia.¹⁴³ Reform “introduced a number of institutions shaped after western European models, such as trial by jury, [and] representation by counsel for [an] accused; torture and physical punishments such as flogging were forbidden.”¹⁴⁴ Judicial power was strengthened by providing independence to inspire respect for the law that was necessary for well-being.¹⁴⁵

By introducing trial by jury as part of the 1864 Judicial Reform, Aleksandr and other reformers in Russia intended to transform the practice of their courts.¹⁴⁶ The initiation of juries, which had been developed in “the adversarial tradition of Anglo-American countries, forced Russia to abandon its pure[ly] inquisitorial” system.¹⁴⁷ The Reform replaced the inquisitorial

136. *Id.*

137. ZIEGLER, *supra* note 2, at 63.

138. *Id.*

139. *Id.*

140. *See id.* at 63–64.

141. *Id.* at 64.

142. Moscow Center for Prison Reform, *Jury Trials in Russia* (1998), <http://www.prison.org/english/rpsjur.htm> (last visited Apr. 5, 2009).

143. ZIEGLER, *supra* note 2, at 64.

144. World History at KMLA, *Russian Empire, Russian Domestic Policy, 1855–1881*, <http://www.zum.de/whkmla/region/russia/rus185581dompol.html> (last visited April 5, 2009).

145. *See generally* Sergi M. Kazantsev, *The Judicial Reform of 1864 and the Procuracy in Russia*, in *REFORMING JUST. IN RUSS., 1864–1996: POWER, CULTURE, AND THE LIMITS OF LEGAL ORDER* 44 (Peter H. Solomon, Jr. ed., 1997) [hereinafter Kazantsev, *Judicial Reform*]; ZIEGLER, *supra* note 2, at 65–83.

146. Girish N. Bhat, *The Consensual Dimension of Late Imperial Russian Criminal Procedure: The Example of Trial by Jury*, in *REFORMING JUST. IN RUSS., 1864–1996: POWER, CULTURE, AND THE LIMITS OF LEGAL ORDER* 61 (Peter H. Solomon, Jr. ed., 1997) [hereinafter Bhat, *Consensual Dimension*].

147. *Id.*

procedure with public trials.¹⁴⁸ The trials featured a contest between two attorneys, presented before an audience composed of a judge, jury and spectators.¹⁴⁹

Adversarialism was a “major procedural component of Russian jury trial procedure.”¹⁵⁰ It was intended to address the defects of pre-1864 Russian justice.¹⁵¹ Above all else, the reformers “of the new judicial order sought fairness, [i.e.,] equity and even-handedness in resolving [legal] disputes.”¹⁵² The reformers also sought “a fundamental respect for the individual as a subject of the law.”¹⁵³ Adversarialism presupposes competition between competing “parties, in a formal court setting, with the common [goal] of determining legal truth and obtaining judicial satisfaction.”¹⁵⁴ The state represents society as a whole and the victim more particularly.¹⁵⁵ The state “is opposed, on equal terms, by the legally [competent] defender [for] the accused. Adversarial procedure is also [noted] by the presumption of innocence,” the importance of oral advocacy, and the adherence to an analytical standard of proof in evaluating testimony and the admissibility of evidence.¹⁵⁶ The jury trial, based on “its procedural format and [its] philosophical basis, represent[ed] the best aspects of adversarial justice.”¹⁵⁷ The judge’s role in the adversarial trial in Russia was to be a neutral and “‘impartial settler of disputes’ between [the] prosecution and the defense.”¹⁵⁸

Some historians consider the judicial reform as the most successful and far-reaching of all the great reforms.¹⁵⁹ The legal reform gave Russia, in the opinion of legal experts, one of the best legal systems anywhere in Europe.¹⁶⁰ The courts became independent of administrative interference.¹⁶¹ Judges were sufficiently paid to resist corruption.¹⁶² The accused was guaranteed the right to representation by counsel.¹⁶³ Criminal trials were marked with a

148. *Id.*

149. *Id.*

150. *Id.* at 65.

151. Bhat, *Consensual Dimension*, *supra* note 146, at 65.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. Bhat, *Consensual Dimension*, *supra* note 146, at 65–66 (footnote omitted).

157. *Id.* at 66 (footnote omitted).

158. *Id.* (footnote omitted).

159. See DAVID SAUNDERS, *RUSSIA IN THE AGE OF REACTION AND REFORM: 1801-1881*, 258 (1998).

160. See *id.* at 258–59.

161. See *id.* at 261.

162. *Id.*

163. See *id.*

presumption of innocence standard.¹⁶⁴ Lawyers were part of a professional bar association, which raised competency levels to be advocates for an accused.¹⁶⁵ Importantly, people who were charged with crimes received trials by jury that were in open court with oral testimony from witnesses on the competing sides.¹⁶⁶ The new freedom from administrative interference and the right to competent legal counsel with advocacy representation helped to establish and maintain public confidence in the legal system.¹⁶⁷ In turn, with faith in the justice system, public confidence was gained in the state system itself.¹⁶⁸

Unfortunately, the Bolsheviks abolished jury trials along with other democratic institutions in 1917.¹⁶⁹ Thereafter, courts were transformed from being fair, independent bodies that resolved disputes and protected rights into a component of the repressive system of the new governmental authority.¹⁷⁰

V. RETURN OF JURY TRIALS TO RUSSIA

Since the end of 1993, and the beginning of 1994, jury trials have once again begun to operate in Russia.¹⁷¹ In September of 1992, President Yeltsin issued an order requesting the State Legal Directorate and the Ministry of Justice to develop a program of experiments introducing new provisions of judicial legislation.¹⁷² In 1993, the Russian Federation adopted the Laws on Changes on Court Proceedings in the Russian Federation, the Criminal Procedural Code of the Russian Federation, the Criminal Code of the Russian Federation, and the Code on Administrative Violations of Law.¹⁷³ The Russian Constitution specifically provides the right to a jury trial to Russian citizens.¹⁷⁴ Interestingly, the new reforms are close to the ones established by the Judicial Reform of 1864.¹⁷⁵ The result is that after consulting with a lawyer, a defendant may choose a court consisting either of a judge and two lay

164. SAUNDERS, *supra* note 159, at 259.

165. *See id.* at 261.

166. *See id.*

167. *See id.*

168. *See id.*

169. *See* Stephen C. Thaman, *The Resurrection of Trial by Jury in Russia*, 31 STAN. J. INT'L L. 61, 62 (1995) [hereinafter Thaman, *Resurrection*].

170. *See id.*

171. *Id.*

172. *Id.* at 78.

173. Moscow Center for Prison Reform, *supra* note 142.

174. Konstitutiia Rossiiskoi Federatsii [Knost RF] [Constitution] art. 47, 123.

175. Thaman, *Resurrection*, *supra* note 169.

assessors or a judge and twelve jurors who reach a verdict without the judge's participation.¹⁷⁶

Today in Russia, the procedure of excluding unlawfully obtained evidence is an important component of the jury trial.¹⁷⁷ The procedure in Russian jury trials today is, again, adversarial.¹⁷⁸ Jurors are invited to regional courts, which deal with the most serious crimes.¹⁷⁹ Jurors are chosen by heads of local administrations by lot among active people.¹⁸⁰ Jurors must be twenty-five years or older and must never have been in prison.¹⁸¹

After considering the evidence, jurors listen to the arguments of the prosecution and the defense.¹⁸² The defendant has an opportunity to make his or her last words.¹⁸³ The judge sums up the case to the jury.¹⁸⁴ Jurors then deliberate and fill in a questionnaire.¹⁸⁵ The jurors are asked to determine whether the defendant is guilty or not guilty and whether he deserves leniency.¹⁸⁶ If the answer to the question of leniency is yes the judge gives a milder sentence.¹⁸⁷ The answers to the questionnaire are considered the verdict of the jury.¹⁸⁸

The number of jury trials has risen from the two that were first held in 1993.¹⁸⁹ As part of the experimental nature of the return of the jury trial, only nine regions began conducting jury trials.¹⁹⁰ The goal of the recent reforms in Russia was a bold one. The goal was to destroy the totalitarian mentality of the country. The aim was to end stereotypes of the historical Russian and Soviet justice system and to gain public confidence between courts and the people.¹⁹¹

176. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 30 (Russ.).

177. See Thaman, *Resurrection*, *supra* note 169.

178. *Id.* at 102.

179. *Id.*

180. Thaman, *Resurrection*, *supra* note 169, at 95.

181. See *id.* at 83.

182. See *id.* at 102.

183. *Id.* at 113.

184. Thaman, *Resurrection*, *supra* note 169, at 123.

185. See *id.* at 114.

186. *Id.* at 102.

187. See *id.* at 127.

188. See *id.* at 114; see also Stephen C. Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, in *WORLD JURY SYSTEMS* 339 (Neil Vidmar ed., 2000) [hereinafter Thaman, *Europe's New Jury System*].

189. See Thaman, *Resurrection*, *supra* note 169, at 62.

190. See *id.* at 81–82.

191. See Thaman, *Europe's New Jury System*, *supra* note 188, at 325.

VI. THE CRIMINAL CODE OF THE RUSSIAN FEDERATION

In July of 2002, Russia adopted a new legal code that governs the prosecution of criminal cases and protects the rights of those accused.¹⁹² In a country where the criminal justice system has remained ossified in its Soviet past, the introduction of the code has been called the first step of a judicial revolution.¹⁹³ The following discussion focuses on the new Russian Criminal Code;¹⁹⁴ this discussion is narrowly focused on one portion of the code, which provides clear direction on conducting a jury trial. This portion of the code is Chapter 42 which contains Articles 324 through 353. This chapter and included articles contained therein, set forth the framework from which a jury trial is conducted in Russia. The chapter provides direction to an audience which includes judges, prosecutors, defense attorneys, law enforcement, witnesses, the Russian public, and to the world community.

VII. ORDER OF THE PROCEEDINGS IN A COURT WITH THE PARTICIPATION OF JURORS

Article 324 is a short introductory statement. It simply states that trials “with the participation of jurors,” i.e., jury trials, will be governed by the requirements set out in the articles or provisions contained within, Chapter 42 of the code.¹⁹⁵ Basically, a judge need only look at the code, and more specifically at this chapter, to guide oneself through the procedures of conducting a jury trial.

VIII. SPECIFICS IN CONDUCTING A PRELIMINARY HEARING

Article 325 of the criminal code recognizes that after the accused demands trial by jury at the close of a preliminary investigation, the judge sets a preliminary hearing.¹⁹⁶ At the preliminary hearing, the judge must confirm the defendant’s choice of a trial by jury.¹⁹⁷ If there are multiple defendants in a case, a jury trial will take place if any one defendant requests a jury.¹⁹⁸

192. *See generally* Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] (Russ.).

193. *See* Thaman, *Resurrection*, *supra* note 169, at 138.

194. *See generally* Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] (Russ.).

195. Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 324 (Russ.).

196. *See id.* art. 325(1).

197. *See id.* art. 325(2)–(3).

198. *Id.* art. 325(2).

Article 325 also prescribes the number of initials jurors to be brought into court as the initial venire.¹⁹⁹ The number is not to be less than twenty prospective jurors.²⁰⁰ Interestingly, the court makes a determination at the preliminary hearing whether jury selection will be “open, closed or partially closed.”²⁰¹ No guidance is given as to when this stage of the proceedings should be closed or not. This provides the judge wide latitude in making the determination whether or not to close jury selection to the public.²⁰²

Once the judge confirms that a case will proceed with a jury, the decision is final.²⁰³ It appears that there is no appeal on this issue.²⁰⁴ Once the judge makes the determination that the case will proceed with a jury, a defendant may neither refuse nor change one’s mind.²⁰⁵ It is a critical time, since the decision to proceed with or without a jury is confirmed and finalized at the preliminary hearing.²⁰⁶

IX. COMPILING A PRELIMINARY LIST OF JURORS

Article 326 of the Criminal Procedure Code provides for the initial compilation of a prospective jury.²⁰⁷ This section provides that a secretary of the court or a judge, who is not the presiding judge at trial, select candidates for jurors, or a venire, from annual lists through a random fashion.²⁰⁸

The secretary of the court or the deputy judge then can make a determination whether there exists any circumstances that would prevent the prospective juror in sitting as a fair and impartial juror at trial.²⁰⁹ This initial decision is made without the prospective juror being in a formal court session.²¹⁰ This section anticipates an informal inquiry either through the documentation or contact with the candidate for jury service.²¹¹ It gives the

199. *Id.* art. 325(4).

200. Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 325(4) (Russ.).

201. *Id.*

202. *See id.*

203. *Id.* art. 325(5).

204. *See id.*

205. *See* Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 325(5) (Russ.).

206. *See id.* art. 325(1), (5).

207. *See generally id.* art. 326.

208. *Id.* art. 326(1).

209. *Id.* art. 326(2).

210. *See* Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 326(6) (Russ.).

211. *See id.* art. 326(2).

power to exclude candidates who may not be fair and impartial to someone other than the presiding trial judge.²¹²

Article 326 limits the time in which a person may serve as a juror.²¹³ Specifically, a person may not serve in more than one trial in any one year.²¹⁴ Participation in any trial, irrespective of length, would preclude service in that same year.²¹⁵ Arguably, if a case lasted from the end of one year to another, a juror would not be required to serve again in the same year the case was concluded.²¹⁶

After selecting a preliminary list of jurors, the secretary or deputy judge shall sign off on the list affirming their selection of a venire.²¹⁷ The list is required to include the prospective juror's name as well as his or her father's last name and home address.²¹⁸

Notifications are required to be given to those chosen to make up a venire.²¹⁹ This section requires that citizens be given the place of the court, the date, and time for their appearance.²²⁰ Also, notice must be given a minimum of seven days prior to the case proceeding to trial.²²¹

X. PREPARATORY PART OF A COURT SESSION

Article 327 addresses the procedure in selecting jurors immediately prior to the questioning of prospective jurors.²²² Prior to trial, the presiding judge determines if there is a minimum of twenty jurors in the prospective panel.²²³ If there is not, the judge will order that a minimum of twenty be summoned.²²⁴

The list of the prospective panel is handed to the parties.²²⁵ The list is not allowed to contain the home addresses of the venire members.²²⁶ Prior to

212. *See id.*

213. *See id.* art. 326(3).

214. *Id.*

215. *See* Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 326(3) (Russ.).

216. *See id.*

217. *Id.* art. 326(4).

218. *Id.*

219. *Id.* art. 326(6).

220. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 326(6) (Russ.).

221. *Id.*

222. *Id.* art. 327.

223. *See id.* art. 327(3).

224. *Id.*

225. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 327(4) (Russ.).

beginning the questioning of individuals in the venire, the trial judge is required to tell the parties they are entitled to exercise “a motivated objection to a juror.”²²⁷ A motivated objection is a legal challenge for cause. Furthermore, the presiding judge must explain to the parties that they may exercise their right to a motivated objection only two times.²²⁸ No additional number of challenges is delineated based upon the type of case involved.²²⁹

XI. FORMATION OF A COLLEGE OF JURORS

Article 328 is one of the lengthiest sections in Chapter 42.²³⁰ The chapter deals with procedures involving the selection of a jury.²³¹ It should be noted that a college of jurors means a jury panel.

The first direction under this article is directed towards the presiding judge.²³² Interestingly, while many judges in Russia are women, throughout the code the pronoun that references judges is masculine.²³³ The judge, prior to jury selection, is required to address the prospective panel.²³⁴ The judge must give an introductory speech to the candidates of a prospective jury.²³⁵ By law, the judge must introduce himself.²³⁶ The judge is also mandated to introduce the parties to the venire.²³⁷ The nature of the criminal case that will be heard by the jury must be explained by the trial judge to the venire.²³⁸ The jury must be told the length of the trial.²³⁹ Also, the venire must be told of their duties as jurors as well as their role in the criminal proceedings.²⁴⁰

Jurors, prior to selection, have the right to point out any reasons why they should not be selected.²⁴¹ If they are unable to perform their duties, they

226. *Id.*

227. *Id.* art. 327(5)1.

228. *Id.* art. 327(5)2.

229. *See id.*

230. *See generally* Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 328 (Russ.).

231. *See generally id.*

232. *Id.* art. 328(2).

233. *See, e.g., id.* art. 328(2)1.

234. *Id.* art. 328(2).

235. Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 328(2) (Russ.).

236. *Id.* art. 328(2)1.

237. *Id.* art. 328(2)2.

238. *See id.* art. 328(2)3.

239. *Id.* art. 328(2)4.

240. Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 328(2)5 (Russ.).

241. *Id.* art. 328(4).

may present this to the trial judge.²⁴² The concept of a juror disclosing that he or she is unable to serve is referred to as self-rejection.²⁴³ The position of a prospective juror's inability to serve will be reviewed by the judge.²⁴⁴ The judge is required to hear from the parties if a jury candidate claims that it would be impossible for him or her to serve.²⁴⁵ If the judge rules in favor of self-rejection, the code requires the judge to remove the prospective juror from the courtroom.²⁴⁶

After the review of claims for self-rejection, the trial judge then informs the parties of their right to make motivated objections towards members of the venire.²⁴⁷ These are challenges for cause. The parties are then required to be allowed to question the venire.²⁴⁸ The questions must have a bearing on their ability to participate in the particular criminal case as a juror.²⁴⁹ This language appears to narrow the focus of questions that may be presented to possible jurors.

After the questioning by the parties, the judge asks whether there are any objections to the prospective panel.²⁵⁰ Any objection to the panel is then addressed by discussing each panel member in order of their sequence on the jury list.²⁵¹ Any motivated objection must be reduced to writing.²⁵² Such an objection may not be announced in open court.²⁵³ The code requires the judge to rule from the bench on these challenges.²⁵⁴ The trial judge must rule on the motivated petitions without departure from the court room to a retiring room for consideration.²⁵⁵

The judge is then required to announce the decision on motivated objections to the parties.²⁵⁶ There is no requirement to inform the particular juror

242. *Id.* art. 328(3).

243. *See id.* art. 328(4)–(7).

244. *Id.* art. 328(5).

245. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 328(5) (Russ.).

246. *Id.* art. 328(6).

247. *Id.* art. 328(7).

248. *Id.* art. 328(8).

249. *Id.*

250. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 328(9) (Russ.).

251. *Id.*

252. *Id.* art. 328(10).

253. *Id.*

254. *See id.*

255. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 328(10) (Russ.).

256. *Id.* art. 328(11).

of the decision.²⁵⁷ The judge may bring the decision on motivated challenges to the juror candidate.²⁵⁸ After consideration of self-rejections and motivated challenges, the trial judge is required to inform the parties of proceeding with unmotivated objections.²⁵⁹ These are preemptory challenges.²⁶⁰

The prosecution must go forward first in exercising unmotivated objections or challenges.²⁶¹ The number of unmotivated objections is dependant up on the number of jurors remaining.²⁶² The trial judge can grant an equal number of unmotivated objections to the parties if there are sufficient prospective jurors remaining from self-rejection and motivated objections.²⁶³ In order to proceed, there must be fourteen remaining members of the venire.²⁶⁴ From these individuals, twelve jurors will proceed along with two alternates.²⁶⁵ These alternates are referred to as reserve jurors.²⁶⁶ While the code requires a minimum of two reserve jurors, more can be ordered.²⁶⁷ The trial judge has the discretion, depending on “the character and complexity of the criminal case,” to select additional alternate jurors.²⁶⁸

Once the jury is selected, including reserve jurors, the presiding judge is required to announce those who have been selected.²⁶⁹ The judge is precluded from explaining why any juror was excluded.²⁷⁰ Interestingly, the code requires the trial judge to thank the juror candidates who have been excused.²⁷¹

The trial judge then assigns the panel their seating arrangement in order of their placement on the jury list.²⁷² The panel is required to be in a jury box that is separated from everyone else in the courtroom.²⁷³ The jury box, as

257. *See id.*

258. *Id.*

259. *Id.* art. 328(12).

260. *See* Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 328(13) (Russ.).

261. *Id.* art. 328(14).

262. *See id.* art. 328(12).

263. *Id.* art. 328(16)–(17).

264. *Id.* art. 328(18).

265. *See* Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 328(21) (Russ.).

266. *See id.* art. 328(18).

267. *Id.*

268. *Id.*

269. *Id.* art. 328(19).

270. Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 328(19) (Russ.).

271. *Id.*

272. *See id.* art. 328(22).

273. *Id.*

prescribed in the code, shall be directly opposite the witness stand.²⁷⁴ The finalization of jury selection shall take place in camera, outside the presence of the venire.²⁷⁵ While questioning and objections take place in the courtroom, the college of jurors is formed in camera.²⁷⁶

If the criminal case will contain evidence of state secrets or any secrets protected by federal law, the jurors are required to sign a written acknowledgement and agree not to divulge such evidence.²⁷⁷ If a juror declines to sign an agreement not to disclose privileged secrets, the trial judge shall reject, i.e., remove, the juror.²⁷⁸ There is no discretion available to the trial judge.²⁷⁹ A juror must be removed and replaced with an alternate upon refusal to protect privileged secrets from public disclosure.²⁸⁰

XII. REPLACEMENT OF A JUROR WITH A RESERVE ONE

Article 329 addresses the replacement of a juror from the original college of jurors, i.e., panel of jurors.²⁸¹ Once the jury has been selected, this section contemplates that one of the jurors may not be able to proceed.²⁸² If one of the jurors is not able to proceed, the judge may replace the original panel member with a reserve juror.²⁸³

A reserve juror is the Russian counterpart to the American alternate juror. The alternate juror is selected in the sequence of selection as an alternate.²⁸⁴ The first alternate must be chosen first to replace a juror who is unable to proceed.²⁸⁵ If there is more than one alternate, the sequence mandates the selection of a replacement.²⁸⁶

The code does not address the specific reason for replacement of the original juror. No mention is set forth as to health reasons or bias. The replacement is based on a broad concept: “[O]ne of the jurors cannot go on

274. *See id.*

275. *See* Ugolovno-Protsessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 328(23) (Russ.).

276. *Id.*

277. *Id.* art. 328(24).

278. *Id.*

279. *See id.*

280. Ugolovno-Protsessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 328(24) (Russ.).

281. *See id.* art. 329.

282. *Id.* art. 329(1).

283. *Id.*

284. *Id.*

285. Ugolovno-Protsessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 329(1) (Russ.).

286. *Id.*

participating in the court session.”²⁸⁷ Arguably, this allows the trial judge broad discretion in deciding to replace a juror with an alternate.²⁸⁸

If there are not enough reserve jurors to hear the case after multiple jurors need replacement, the trial judge is required to find the proceedings to be invalid.²⁸⁹ The presiding judge must then begin jury selection again.²⁹⁰ Jurors who had been previously discharged, as well as the reserve jurors, may be part of the pool to form a new college of jurors.²⁹¹

This section also addresses the inability of a juror to proceed once deliberation begins.²⁹² The judge is again allowed broad discretion to consider the issue.²⁹³ The general language is that during the deliberation there may be an “impossibility for [some] of the jurors to participate.”²⁹⁴ Once the presiding judge learns and determines that such an impossibility exists, the panel must enter the courtroom.²⁹⁵ The judge then has the ability to replace a juror during deliberation and require the new panel to continue deliberations with a reserve juror.²⁹⁶

XIII. DISMISSAL OF THE JURY BECAUSE OF THE BIASED NATURE OF ITS COMPOSITION

Article 330 allows the parties one last opportunity to object to the college of jurors.²⁹⁷ The objection by any of the parties is not based upon an objection to an individual juror.²⁹⁸ The objection is directed to the “college of jurors as a whole.”²⁹⁹

The basis of the objection must be based on the specific facts of the criminal case to be tried.³⁰⁰ Even though the individual jurors have been

287. *Id.*

288. *See id.*

289. *Id.* art. 329(3).

290. Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 329(3) (Russ.).

291. *Id.*

292. *See id.* art. 329(1).

293. *See id.*

294. *Id.* art. 329(4).

295. Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 329(4) (Russ.).

296. *See id.*

297. *See id.* art. 330(1).

298. *See id.*

299. *Id.*

300. Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 330(1) (Russ.).

approved, this section recognizes that the panel, as a whole, may be incapable of fairly deliberating a verdict.³⁰¹

Issues of bias and impartiality should have been addressed with the selection of the college of jurors. However, in theory, the facts of the case may raise questions about the jury as a whole even after the individual questioning of potential jurors.³⁰² Something, such as misconduct, may have occurred between the time of individual questioning and the formation of the college of jurors.

The presiding judge is required to entertain the party's objection, and must rule after proceeding to chambers, which is called a retiring room in Russia.³⁰³ If the presiding judge agrees with the objection, the college of jurors must be disbanded.³⁰⁴ Jury selection must then begin anew.³⁰⁵

XIV. SENIOR JUROR

In the United States, a foreman or foreperson is selected immediately prior to deliberation.³⁰⁶ It is the first order of business for the jury before deliberations will begin.³⁰⁷ The purpose of a foreman is to help direct deliberations to ensure that the law is followed and respect for fellow jurors is maintained.³⁰⁸

In Russia, Article 331 addresses the selection and function of a foreman—the Russian term used in lieu of foreman is senior juror.³⁰⁹ Interestingly, the jury does not wait for deliberations to select the senior juror. Nor is the selection limited to those jurors who will be deliberating.

The Code provides that the jury, by a majority vote, decides the selection of the senior juror.³¹⁰ The selection must then be presented to the attention of the presiding judge.³¹¹ The vote does not take place immediately prior to deliberation.³¹² It takes place immediately after jury selection and

301. *See id.*

302. *See id.*

303. *Id.* art. 330(2).

304. *Id.* art. 330(3).

305. *See* Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 330(3) (Russ.).

306. *See, e.g.,* Florida STANDARD JURY INSTRUCTIONS IN CIVIL CASES § 7.2 (2007).

307. *See, e.g., id.*

308. *See id.*

309. *See* Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 331 (Russ.).

310. *Id.* art. 331(1).

311. *Id.* art. 331(1).

312. *See* Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 332(1) (Russ.).

before the case proceeds.³¹³ The alternate or reserve juror participates in the voting for a senior juror.³¹⁴

The function of the senior juror is not limited to deliberations.³¹⁵ The senior juror, during the course of the trial, takes the role of providing direction to the jury and providing communication to the trial judge.³¹⁶ Any questions or requests from the jury must be communicated only through the senior juror.³¹⁷ The senior juror is also responsible for answering any questions placed before the jury by the judge about the case.³¹⁸ The answers must be in writing.³¹⁹ The senior juror must also summarize the result of the voting of the jury, as well as formalize and announce the verdict in open court.³²⁰

XV. TAKING AN OATH BY THE JURORS

Article 332 provides a detailed oath that must be administered to a selected college of jurors.³²¹ The presiding judge is required to read the oath to the selected panel verbatim after the senior juror is chosen.³²² Unlike an American oath that is general in nature and requires jurors to swear to perform their lawful duty, the Russian oath provides greater detail:

As I begin the discharge of the juror's responsible duties, I hereby solemnly swear to discharge them honestly and without a bias, to take into account all the proof considered in court, both those exposing the defendant and acquitting him, and to resolve the criminal case in accordance with my inner conviction and conscience, not acquitting a guilty person and not condemning an [sic] guilty one, as befits a free citizen and a just man.³²³

After reading the oath to the panel as a whole, the trial judge addresses each member of the college of jurors, including the reserve jurors, indivi-

313. *See id.*

314. *See id.* art. 331(1).

315. *See id.* art. 331(2).

316. *Id.*

317. *See* Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 331(2) (Russ.).

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* art. 332(1).

322. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 332(1) (Russ.).

323. *Id.*

dually.³²⁴ Each individual must respond to the oath with two required words set out in the code: "I swear."³²⁵ The judge is required to make a written note that the oath has been administered and taken.³²⁶ Interestingly, the code requires that everyone in the courtroom, including the jurors, stand while the oath is being administered and accepted by the panel.³²⁷

After the oath is sworn to, the judge is next required to explain to the jurors their rights and duties as set out in the following article.³²⁸

XVI. RIGHTS OF THE JURORS

The rights of each juror are enumerated in detail in Article 333.³²⁹ This portion of the code is divided into two conceptual parts.³³⁰ First, the article addresses the rights that jurors have and then the article addresses the rights that jurors do not have.³³¹

Generally, a Russian juror has the right to be an active participant in a trial.³³² The code recognizes the right of a juror to study all of the circumstances of a criminal case.³³³ Towards that end, a juror has the right to pose questions to all witnesses through the presiding judge.³³⁴ Questions may not be posed directly to witnesses.³³⁵ They must first be presented to the trial judge.³³⁶

The examination of the case is not limited to questioning witnesses. A juror has the right to pose questions during the trial about any evidence, including documents, demonstrative proof, and the investigative action that was taken on the case.³³⁷ It is a proactive position; more involved than most American jurors are allowed.

324. *Id.* art. 332(2)–(3).

325. *Id.* art. 332(2).

326. *Id.* art. 332(4).

327. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 332(5) (Russ.).

328. *Id.* art. 332(6).

329. *Id.* art. 333.

330. *See id.* art. 333(1)–(2).

331. *Id.*

332. *See* Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 333(1)1 (Russ.).

333. *Id.*

334. *Id.*

335. *See id.* art. 333(2)3.

336. *See id.* art. 333(1)1.

337. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 331(1)1 (Russ.).

The Russian juror also has the right to pose questions to the judge during the trial.³³⁸ A juror has the right to ask the judge about the law of the case at any time.³³⁹ If there are documents admitted into evidence, a juror is entitled to inquire about the contents of the documents at any time.³⁴⁰ As a general proposition, a juror has the right to ask the trial judge any question during a trial if one finds any concept or issue to be vague.³⁴¹ This catchall phrase allows the juror to ask the judge any question during the trial if the juror is in the slightest way unclear on any matter.³⁴²

The jurors, by law, are entitled to take written notes; there is no prohibition as to time of taking the notes.³⁴³ This allows a juror to take notes at any time during the course of all the proceedings.³⁴⁴ The jury is also not limited to the use of the written notes.³⁴⁵ The notes taken during the course of a trial may be taken back to the retiring room or room for deliberation for consideration by the jurors.³⁴⁶

Article 333 informs everyone that jurors do not have certain rights.³⁴⁷ The first right or prohibition to jurors pertains to their attendance in court.³⁴⁸ A juror does not have the right to leave the courtroom while the proceedings are taking place.³⁴⁹ This portion of the code is a recognition of the need for the jury to hear and see all the evidence and testimony in the case as well as hear the law from the judge.³⁵⁰

Jurors are not allowed to express their opinions about the criminal case until they begin their deliberations.³⁵¹ This ensures that jurors maintain their impartiality until such time as they have heard all the evidence and the law and are prepared to discuss the case with their fellow jurors. This is comparable to the expectations placed upon jurors in the United States.

338. *Id.* art. 333(1)2.

339. *See id.*

340. *Id.* art. 333(1)1–2.

341. *Id.* art. 333(1)2.

342. *See* Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 333(1)2 (Russ.).

343. *Id.* art. 333(1)3.

344. *See id.*

345. *See id.*

346. *See id.*

347. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 333(2) (Russ.).

348. *Id.* art. 333(2)1.

349. *Id.*

350. *See id.*

351. *Id.* art. 333(2)2.

Jurors are not allowed to communicate with anyone outside the courtroom about the circumstances of the pending case.³⁵² While there is no prohibition to questioning witnesses in the courtroom, this portion of the code precludes jurors from conducting an investigation of the case outside of the courtroom.³⁵³ While inside the courtroom, a Russian juror may actively scrutinize the case.³⁵⁴ Independent investigation of the case and even discussion of the case with anyone outside of the courtroom is prohibited.³⁵⁵ This section is comparable with American jury expectations.

The jurors have no right to discuss their deliberations and verdict after they are excused.³⁵⁶ This section is very broad. The prohibition prevents a Russian juror from discussing their deliberations and verdict with anyone.³⁵⁷ While one would contemplate this as an assurance to keep the media from gaining information about the jury's thought process, the prohibition prevents a juror from divulging their work with anyone. While this maintains the secrecy of the jury deliberation, it also impinges upon a Russian citizen's ability to speak freely after serving as a juror. This portion of the code is not comparable to the American jury requirements. Such a portion would be considered an impingement on a juror's First Amendment rights upon being excused from jury service.

A juror has no right to fail to come to court without "a serious reason."³⁵⁸ The serious reason is not elaborated upon. This provides a trial judge broad discretion to consider whether a serious reason has been provided for missing court. If a juror fails to appear in court and fails to provide an appropriate reason, the presiding judge may impose a monetary fine.³⁵⁹ The contempt power of the Russian trial judge is limited in this circumstance.³⁶⁰ American trial judges have contempt power that allows for the imposition of incarceration and/or a monetary fine. Russian judges are limited to monetary fines.³⁶¹

The last portion of this article requires the presiding judge to inform the jurors of their rights and warn them of the consequence of violating any of

352. Ugolovno-Protssessual'nyi Kodcks [UPK] [Criminal Procedural Code] art. 333(2)3 (Russ.).

353. *Id.* art. 333(2)4.

354. *See id.* art. 333(1)1.

355. *Id.* art. 333(2)3.

356. *Id.* art. 333(2)5.

357. *See* Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 333(2)5 (Russ.).

358. *Id.* art. 333(3).

359. *Id.*

360. *See id.* art. 333(4).

361. *Id.* art. 333(3).

the demands placed on them.³⁶² If they violate any of the demands placed on them, the judge may discharge a particular juror.³⁶³ The removal of the juror is not mandatory.³⁶⁴ The trial judge is given the discretion to consider the violation and consider the appropriate action including removal.³⁶⁵ Once removed, the trial judge may replace the juror with a reserved one.³⁶⁶

XVII. POWERS OF THE JUDGE AND OF THE JURORS

Article 334 generally delineates the function of the judge and the jury.³⁶⁷ The function of a Russian jury is to address three issues or questions that are presented for its consideration.³⁶⁸ These issues or questions are: (1) whether the crime that has been charged was committed or has taken place; (2) whether the crime that was charged was proven to be committed by the defendant; (3) whether the defendant is guilty of the crime; and when there is a conviction, an additional question: (4) whether a defendant found guilty of a crime deserves leniency.³⁶⁹

The first two issues addressed by a Russian jury are similar to the responsibilities of an American jury. In the United States, the prosecution must prove both that a crime has been committed and that the defendant on trial was the person who committed the crime. The third issue is a variance of the American standard. In the United States, if it has been proven that the crime had been committed and the defendant committed the crime, then the jury is bound to convict the defendant.

The third issue or question presented to juries in Russia allows for a jury to vote for an acquittal even when the case has been legally proven.³⁷⁰ It is tantamount to a jury pardon or jury nullification. A number of bases may be presented to a jury to pardon a particular defendant. One's use of alcohol, a mental condition, or even economic strata could be considered to find that a defendant was not guilty.³⁷¹

362. See Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 333(4) (Russ.).

363. *Id.*

364. See *id.* art. 333(4).

365. See *id.*

366. *Id.*

367. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 334 (Russ.).

368. *Id.* art. 334(1).

369. *Id.* art. 339(1)1-3, (4).

370. See *id.* art. 339(1)2-3.

371. See *id.* art. 335(8).

Once a defendant is found guilty, the jury has the power to find that the defendant is entitled to leniency.³⁷² This finding then allows the presiding judge to attenuate the sentence based on the jury finding that leniency is deserved.³⁷³ This is a power that is in most states in the United States not afforded to jurors. In most states and in most cases, the judge alone imposes a sentence without input from the jury. In capital cases, the jury does have that input. Interestingly, the Russian code allows the jury to make a finding of leniency, but no finding that a defendant deserves a severe or tougher sentence.³⁷⁴ Theoretically, based on the language of the code, the presiding judge is the only person who may find that a convicted defendant deserves a severe or tougher sentence based on the facts and circumstances of the case and the particular defendant.³⁷⁵

This article notes that four questions are decided exclusively by the jury.³⁷⁶ The article then in a straightforward manner, declares that all other questions are to be decided by the presiding judge.³⁷⁷ Specifically, the jury is responsible for only those issues and no others.³⁷⁸ The trial judge is on his or her own in deciding a multitude of issues that may arise during the course of a trial.³⁷⁹

XVIII. SPECIFICS OF THE JUDICIAL INVESTIGATION IN A COURT WITH THE PARTICIPATION OF JURORS

Article 335 provides direction to the judge, parties, and jurors as to their role in the court proceeding.³⁸⁰ The Russian code refers to the jury trial proceedings as a judicial investigation.³⁸¹ The investigation involves more than just the judge and parties.³⁸²

372. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 339(4) (Russ.).

373. *See generally id.*

374. *See id.* art. 334.

375. *See id.* art. 334(2).

376. *Id.* art. 339(1)1–3, 4.

377. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 334(2) (Russ.).

378. *See id.* art. 334(1).

379. *See id.* art. 334(2).

380. *Id.* art. 335.

381. *Id.* art. 335(1).

382. *See* Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 335 (Russ.).

The jury trial begins with introductory statements made by the prosecutor and counsel for the defense.³⁸³ This is analogous to the opening statement in American courts.³⁸⁴

The prosecutor is required in the introductory statement to elaborate on the nature of the charges that have been brought.³⁸⁵ The prosecutor is also required to set out the evidence necessary to prove the case and describe the steps that will be taken to present proof of guilt.³⁸⁶ The duty of the Russian prosecutor is similar to the requirements of an American prosecutor.³⁸⁷ The Russian code provides greater detail as to how the prosecutor should proceed.³⁸⁸ It is generally understood in American courts that the prosecutor in an opening statement will set out the facts which will support the charges.³⁸⁹ However, the opening statement in many courts does not allow for legal argument.³⁹⁰ The opening statement is meant to provide the prosecutor an opportunity to let the jury know what the facts of the case will be.³⁹¹ Closing arguments are generally reserved for presenting legal argument to the jury.³⁹²

The defense is also required to present their position to the jury in the introductory statement.³⁹³ The language in the code is mandatory for defense counsel to express their opinion about the charge to the jury.³⁹⁴ The defense, similar to the prosecution, must also present their position as to the evidence and proof anticipated during the trial.³⁹⁵ This requirement is different from American proceedings.³⁹⁶ There is no mandatory requirement for the defense to present an opening statement in American courts.³⁹⁷ Any requirement would impinge on the presumption of innocence, the right to remain silent, and the right against self-incrimination.

383. *Id.* art. 335(1).

384. 75 AM. JUR. 2D *Trial* § 429 (2008).

385. *See* Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 335(2) (Russ.).

386. *Id.*

387. *Compare id.*, with 75 AM. JUR. 2d *Trial* § 429.

388. *See* Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 335(2) (Russ.).

389. 75 AM. JUR. 2d *Trial* § 429.

390. *See* 88 C.J.S. *Trial* § 263 (2007).

391. 75 AM. JUR. 2d *Trial* § 429.

392. 75A AM. JUR. 2d *Trial* § 444 (2007).

393. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 335(3) (Russ.).

394. *See id.*

395. *Id.*

396. *See* 75 AM. JUR. 2d *Trial* § 431 (2007).

397. *See id.*

Article 335 allows jurors to pose questions to the defendant, the victim, witnesses, and experts after they have been questioned by the parties, and the questions must be reduced to writing and “submitted to the presiding [judge] through the senior juror.”³⁹⁸ The jury’s questions shall be posed by the presiding judge who may rephrase the questions.³⁹⁹ The judge may also refuse to pose a proposed jury question if the judge makes the determination that the question bears no relevancy to the case.⁴⁰⁰

This portion of the code authorizes the judge to exclude evidence that is inadmissible in the case.⁴⁰¹ The judge has the power to exclude inadmissible evidence on his own initiative or upon the petition or objection of the parties.⁴⁰² A judge is required to hear any objections or arguments on the admissibility of evidence outside the presence of the jury.⁴⁰³ The code allows for the parties to state their opinions on the issue of admissibility.⁴⁰⁴ After considering the parties’ opinions, the judge alone is required to decide issues of admissibility of evidence.⁴⁰⁵

This section notes that the judicial investigation or trial proceedings is a factual consideration for the jury.⁴⁰⁶ Only the factual circumstances of the case are to be presented to the jury for their consideration.⁴⁰⁷ The facts must relate to the questions the jury is able to address pursuant to Article 334.⁴⁰⁸ Those questions as previously noted are: 1) whether the crime that has been charged was committed or had taken place; 2) whether the crime that was charged was proven to be committed by the defendant; 3) whether the defendant is guilty of the crime; and 4) whether a defendant found guilty of a crime deserves leniency.⁴⁰⁹

This section specifically prohibits any inquiry during the jury trial of the facts of a defendant’s prior criminal record or questions relating to whether the defendant is an alcoholic or a drug addict.⁴¹⁰ Moreover, this section has a

398. Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 335(4) (Russ.).

399. *Id.*

400. *Id.*

401. *Id.* art. 335(5).

402. *Id.*

403. Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 335(6) (Russ.).

404. *See id.*

405. *Id.*

406. *Id.* art. 335(7).

407. *Id.*

408. Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 335(7) (Russ.).

409. *Id.* art. 334, 339.

410. *Id.* art. 335(8).

general edict that no questions may be posed that will give rise to any bias against the defendant to the jurors.⁴¹¹ In the United States, a defendant's prior record generally may not be used as substantive evidence of guilt.⁴¹² The number of convictions of a defendant may be considered as impeachment to attack the credibility of a defendant who testifies.⁴¹³ Similar to the Russian code, reputation evidence of a defendant being addicted to alcohol or drugs would be considered inadmissible.⁴¹⁴ Similar to American courts, the Russian code would allow reputation evidence to be admissible if it was not used to show bad character, but to establish the *modus operandi* or *corpus delicti*.⁴¹⁵ The general reference to bias gives a judge broad discretion compatible with American courts to determine whether any evidence is unduly prejudicial to a defendant.⁴¹⁶

XIX. PARTIES' PRESENTATIONS

Article 336 generally addresses the parties' rights to closing arguments in a criminal jury trial.⁴¹⁷ The closing arguments are called presentations.⁴¹⁸ As this section notes, the presentations are to be carried out in conformity with Article 292 of the Russian code.⁴¹⁹ Article 292, in turn, more particularly describes the requirements of the presentations of the parties.⁴²⁰

Article 292 calls the arguments the speeches of the parties.⁴²¹ The prosecution and defense are entitled to give presentations to the jury.⁴²² The prosecution always goes first.⁴²³ The defense always goes last.⁴²⁴ The victim or victim's representative may also give a presentation to the jury.⁴²⁵ The ability of the victim to be heard at this juncture is within the presiding

411. *Id.*

412. FED. R. EVID. 404(b).

413. *See* FED. R. EVID. 608(b).

414. *Compare* Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 335(8), *with* FED. R. EVID. 404(a), 608(b).

415. *Id.*

416. *See* Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 335(8).

417. *See id.* art. 336.

418. *Id.*

419. *Id.* art. 336(1).

420. *See id.* art. 292.

421. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 292(1).

422. *Id.*

423. *Id.* art. 292(3).

424. *Id.*

425. *Id.* art. 292(2).

judge's discretion.⁴²⁶ After the opening presentation of the prosecution and the defense, each side is entitled to a response, which is referred to as a rebuttal.⁴²⁷ This is analogous to the American rebuttal.

The length of the presentations is unlimited.⁴²⁸ Article 292 specifically forbids a trial judge to limit the time of the presentation.⁴²⁹ The article also prohibits the court from stopping argument that is relevant and based upon the fair discussion of admissible evidence.⁴³⁰

After the initial reference to Article 292, Article 336 generally notes that the presentations shall not touch upon matters considered after the verdict.⁴³¹ Arguably, this can refer to sentencing, as well as issues as to the conduct of a defendant post trial.⁴³² It is a limitation to the parties to discuss matters that pertain to the charge and the jury's duty to focus on the issues of guilt or innocence.⁴³³ If one of the parties attempts to discuss matters that are relevant after a jury verdict, the trial court can stop the presentation and explain or instruct the jury that it must not take these circumstances into consideration during deliberations.⁴³⁴

Finally, Article 336 generally provides that the parties may not refer to inadmissible evidence during their presentations.⁴³⁵ If the parties do so, the court is required to stop the party and explain to the jury that it may not consider the circumstances during jury deliberation.⁴³⁶

The ability of a Russian judge to stop inappropriate comments during presentations is similar to the ability of American judges to prevent inappropriate comments during closing arguments. While oftentimes the attorneys will make an objection, nothing prevents the American trial judge from addressing serious violations that may be fundamental error if left alone. While Article 336 does not prevent an attorney from objecting first during presentations, the code places an affirmative duty on judges to ensure the jury hears only relevant arguments that are based upon the admissible evidence at trial.⁴³⁷

426. See Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 292(2).

427. *Id.* art. 292(6).

428. *Id.* art. 292(5).

429. *Id.*

430. *See id.*

431. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 336(2).

432. *See id.*

433. *See id.*

434. *Id.*

435. *Id.* art. 336(3).

436. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 336(3).

437. *Id.*

XX. RETORTS OF THE PARTIES AND THE LAST PLEA OF THE DEFENDANT

Article 337 is a short provision that recognizes that all parties have the right to one rebuttal or retort to the presentation that was originally presented by the opposing party.⁴³⁸ The last retort belongs to defense counsel and the defendant.⁴³⁹

This article also recognizes the right of a defendant to make a final plea in conformity with Article 293 of the Russian Criminal Procedure Code.⁴⁴⁰ Article 293 makes the final plea mandatory if the defendant so chooses to speak.⁴⁴¹ While phrased as a last plea, in effect it is the last opportunity the defendant has to present one's position alone.⁴⁴² It is one's individual presentation to the jury after all the other presentations, including any retorts or rebuttals, have been made.⁴⁴³

The last plea is the last opportunity for a defendant to speak to the jury about one's case.⁴⁴⁴ The opportunity is made without any examination of the defendant.⁴⁴⁵ Article 293 expressly forbids any questions from anyone being placed before the defendant when the defendant is exercising a final plea to the jury.⁴⁴⁶ Additionally, the defendant may speak as long as one wants.⁴⁴⁷ A court has no right to limit the time that the defendant wishes to use during a last plea.⁴⁴⁸ The only time the court is allowed to interrupt a defendant's last plea is if the defendant starts speaking upon matters that are totally unrelated to the case before the jury.⁴⁴⁹

XXI. RAISING QUESTIONS TO BE RESOLVED BY THE JURORS

Article 338 sets out the Russian equivalent of the American jury charge conference.⁴⁵⁰ This section notes that the judge is responsible for the ques-

438. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 337(1) (Russ.).

439. *Id.*

440. *Id.* art. 337(2).

441. *Id.* art. 293(1).

442. *Id.*

443. *See* Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 293(1) (Russ.).

444. *See id.*

445. *Id.*

446. *Id.*

447. *Id.* art. 293(2).

448. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 293(2) (Russ.).

449. *Id.*

450. *See id.* art. 338.

tions to be placed before the jury in determining the outcome of the criminal trial.⁴⁵¹ Similar to special interrogatories in American cases, the judge submits written questions to the jury to be answered during deliberations.

The judge is required to formulate, or compose, the questions.⁴⁵² Along with the questions, the judge submits an overview of the judicial investigation, or trial proceedings, with a summary of the parties' presentations, or closing arguments.⁴⁵³ All these writings must be submitted to the parties for their review and input.⁴⁵⁴

The parties have a right to provide input to all questions formulated by the judge.⁴⁵⁵ The parties also have the right to provide input as to the overall summary by the judge concerning the judicial investigation, as well as the parties' presentations.⁴⁵⁶ Besides comments, the parties may present to the judge for consideration their own questions and summaries of the proceedings.⁴⁵⁷

This section of the code requires the trial judge to have the jury consider any defenses that have been raised in the case.⁴⁵⁸ Any defense which excludes the defendant's responsibility must be presented to the jury.⁴⁵⁹ Moreover, any questions that may establish a lesser included offense from the main charge must be placed before the jury.⁴⁶⁰

This section also requires that any discussion of the proposed jury questions and formulation of such questions must take place outside the hearing of the jury.⁴⁶¹ Specifically, the jurors are required to depart from the courtroom whenever such discussions take place.⁴⁶²

The judge is required to finalize the jury questions after considering the input of the parties.⁴⁶³ When appropriate, the judge should allow the parties' comments and input to be part of the questions and summaries.⁴⁶⁴ The judge

451. *Id.* art. 338(1).

452. *Id.* art. 338(4).

453. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 338(1) (Russ.).

454. *Id.* art. 338(2).

455. *Id.* art. 338(4).

456. *Id.* art. 338(1).

457. *Id.* art. 338(2).

458. *See* Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 338(2) (Russ.).

459. *Id.*

460. *Id.*

461. *Id.* art. 338(3).

462. *Id.*

463. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 338(4) (Russ.).

464. *Id.* art. 338(2).

is required to sign the list of questions, verifying that the final questions are those to be placed before the jury for their consideration.⁴⁶⁵

Once formalized, the questions shall be read out to the jurors by the judge in open court.⁴⁶⁶ The written questions must be handed to the senior juror.⁴⁶⁷ If the jurors have any confusion from the list of questions, they are entitled to ask the trial judge to resolve any ambiguities before their deliberation begins.⁴⁶⁸ The presiding judge is cautioned that when explaining any confusion or ambiguity, not to provide answers to the jury questions.⁴⁶⁹ The judge may clear up the form of the question without providing the answers to them.⁴⁷⁰ It is the role of the jury to answer the questions after being provided clarity from the judge.⁴⁷¹

XXII. CONTENT OF QUESTIONS PUT TO THE JURORS

Article 339 specifically defines the three basic questions that a jury must consider in every criminal case.⁴⁷² The questions are: “1) whether it is proven that the act has taken place; 2) whether it is proven that the act was committed by the defendant; [and] 3) whether the defendant is guilty of the perpetration of this act.”⁴⁷³ A judge is required to pose these questions at a minimum to a jury.⁴⁷⁴ Whether a defendant is guilty is also considered a basic question.⁴⁷⁵ This straightforward question must also be presented to the jury in every case.⁴⁷⁶ The question of guilt in form is a general question without any additional issues allowed within the question.⁴⁷⁷

After the basic questions are posed, private or special questions may be placed before the jury.⁴⁷⁸ Those questions may require the jury to consider

465. *Id.* art. 338(4).

466. *Id.* art. 338(5).

467. *Id.*

468. Ugolovno-Protssesual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 338(5) (Russ.).

469. *Id.*

470. *Id.*

471. *See id.*

472. *Id.* art. 339(1).

473. Ugolovno-Protssesual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 339(1)1–3 (Russ.).

474. *See id.* art. 339(1).

475. *Id.* art. 339(1)3.

476. *See id.*

477. *See id.* art. 339(1)2.

478. Ugolovno-Protssesual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 339(3) (Russ.).

mitigating or aggravating circumstances of the defendant's guilt.⁴⁷⁹ Also questions may be presented addressing the defenses claimed by the defendant, including the level of responsibility.⁴⁸⁰ Another question the jury may consider is whether criminal intent has been established and to what extent.⁴⁸¹

Also the jury may consider the use of force utilized by the defendant in the particular case in question.⁴⁸² In addition, questions may address the complicity of each of the co-defendants charged in the perpetration of the crimes.⁴⁸³

Questions must be presented allowing the defendant to maintain that a less serious crime was committed.⁴⁸⁴ Such questions may not be posed if the result to any answers would involve a more serious crime for which the defendant would be convicted.⁴⁸⁵

If a defendant is found guilty, the jury must be presented a question on leniency.⁴⁸⁶ The jury may respond in any case that the defendant deserves leniency.⁴⁸⁷ The court has no discretion in denying a question of leniency once a defendant is convicted.⁴⁸⁸ The trial judge must present a question of leniency to the jury.⁴⁸⁹

No question may be presented to the jury that inquires about the defendant's prior criminal record nor criminal history.⁴⁹⁰ No question either directly or in combination with another question may address whether the defendant should be categorized as a dangerous recidivist.⁴⁹¹

Importantly, no question may be presented to the jury that causes a response that finds the defendant guilty of an offense that has not been charged by the prosecutor.⁴⁹² The questions must address the charge that has been

479. *See id.*

480. *See id.* art. 339(3)–(4).

481. *Id.*

482. *See id.*

483. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 339(3) (Russ.).

484. *Id.*

485. *Id.*

486. *Id.* art. 339(4).

487. *See id.*

488. *See* Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 339(4) (Russ.).

489. *See id.*

490. *Id.* art. 339(5).

491. *See id.*

492. *Id.* art. 339(6).

brought by the prosecutor and that is supported by the evidence.⁴⁹³ Theoretically, if a sexual offense is the only charge, no question may be presented that would convict a defendant of a theft charge that has not been brought by the prosecutor.⁴⁹⁴

This article requires that every defendant be entitled to separate questions for their individual case.⁴⁹⁵ Questions cannot be combined for co-defendants.⁴⁹⁶ The questions must be separated for each defendant.⁴⁹⁷ Moreover, any questions that are formulated and put before the jury must be comprehensible.⁴⁹⁸ This is an effort to reduce complex legalistic questions to an understandable fashion to jurors who may be unfamiliar with the law.

XXIII. CHARGING WORD OF THE PRESIDING JUSTICE

Article 340 directs the presiding judge, or justice, to charge the jury before they deliberate.⁴⁹⁹ What the judge must do is contained in this lengthy article.⁵⁰⁰ The code requires that before the jury deliberates the trial judge must “address the jurors with the charging word.”⁵⁰¹ In essence the charging word means charging the jury. In an American court, this is charging, or giving jury instructions to the jury.

The first admonition given to the trial judge is not to express one’s opinion on any of the questions that will be posed to the jury.⁵⁰² A Russian judge, during the charge of the jury, is expressly prohibited in any manner or form to convey his own opinion.⁵⁰³ Arguably, this could be expressed in word or through body language. American jury instructions often contain a charge to jurors to disregard anything the judge may have said or done during the course of the trial to give the impression that the trial judge had one position or another as to the outcome of the case.

493. See Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 339(6) (Russ.).

494. See *id.*

495. *Id.* art. 339(7).

496. See *id.*

497. *Id.*

498. Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 339(8) (Russ.).

499. *Id.* art. 340(1).

500. See generally *id.* art. 340.

501. *Id.* art. 340(1).

502. *Id.* art. 340(2).

503. Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 340(2) (Russ.).

The charge to the jury is required to contain certain things.⁵⁰⁴ The first requirement is to inform the jury of the charge or charges against the defendant that they must decide.⁵⁰⁵ Next, the judge is required to explain the criminal law with respect to the case and the charge.⁵⁰⁶ This entails the elements of the charge necessary to be proven for a conviction.⁵⁰⁷

The judge is also responsible for summarizing the evidence objectively.⁵⁰⁸ This summary must fairly present the evidence that is both inculpatory and exculpatory.⁵⁰⁹ The court is not allowed to draw any conclusions from the evidence nor convey any conclusions to the jury.⁵¹⁰

The trial judge must also present the position of both the prosecutor and the defense.⁵¹¹ The judge is required to explain to the jury the concept of weighing the evidence.⁵¹² This is compatible with American instructions that touch upon weighing the evidence and the credibility of witnesses.

Similar to American instructions, the Russian code contains the requirement that the trial judge must inform the jury of the presumption of innocence.⁵¹³ While this is a hallmark of American justice, this is a departure from Soviet law that placed a defendant in the position of proving one's innocence.⁵¹⁴ Now the Russian code aligns its judicial system with the United States by presuming that a defendant is innocent until such time as the government proves guilt beyond a reasonable doubt.⁵¹⁵ Reasonable doubt or eliminating doubt must be contained in the charge to the jury.⁵¹⁶

Russian jurors are to be advised that they may only consider the evidence that has been introduced during the course of the trial.⁵¹⁷ They are not permitted to speculate on matters that were not part of the evidence.⁵¹⁸ Nor

504. *Id.* art. 340(3)1–7.

505. *Id.* art. 340(3)1.

506. *Id.* art. 340(3)2.

507. *Id.*

508. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 340(3)3 (Russ.).

509. *See id.*

510. *Id.*

511. *Id.* art. 340(3)4.

512. *Id.* art. 340(3)5.

513. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 340(3)5 (Russ.).

514. John Quigley, *The Soviet Conception of the Presumption of Innocence*, 29 SANTA CLARA L. REV., 301, 301 (1989).

515. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 340(3)5 (Russ.).

516. *Id.* art. 340(3)5.

517. *Id.* art. 340(3)5–6.

518. *See id.*

may the jury rely on or speculate or consider evidence that the court ruled was inadmissible.

The court must instruct the jury that the defendant has the right to remain silent and that the refusal to give evidence may not be considered by them as having any legal importance.⁵¹⁹ This is similar to American instructions, which inform the jury that a defendant has the absolute right to remain silent and the exercise of that right may not be considered in the jury's deliberations. The Russian jury is further informed that a defendant's silence cannot be considered as evidence of guilt.⁵²⁰ This aspect of the Russian code is similar to American instructions dealing with the right to remain silent and the jury's requirement to disregard such an exercise and not consider it as evidence of a defendant's guilt.

The judge must explain to the jurors their responsibility in answering the written questions or interrogatories presented to them.⁵²¹ The presiding judge must inform them of their voting procedure on questions and for their procedure to arrive at a verdict.⁵²²

The final charge or instruction to the jury is a reminder of their oath that they had originally taken as jurors to reinforce the importance of considering the admissible evidence and following the law.⁵²³ Then, the judge must also remind the jury that even if they convict a defendant, they may still find that "the defendant deserves leniency" in terms of sentencing.⁵²⁴

After hearing the complete charge or instructions from the judge, the jury may have questions about the instructions.⁵²⁵ If so, they are entitled to further explanations of the charge from the presiding judge prior to their deliberations.⁵²⁶ This is different from juror questions on American instructions. Oftentimes, an American jury begins deliberation and then poses questions about the instructions. Under the Russian code, jurors' questions may be posed to the judge for clarification before the deliberations begin.⁵²⁷

Finally, this section allows the parties to make an objection to the final instructions or charging word of the trial judge.⁵²⁸ The objection may be

519. *Id.* art. 340(3)6.

520. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 340(3)6 (Russ.).

521. *Id.* art. 340(3)7.

522. *Id.*

523. *Id.* art. 340(4).

524. *Id.*

525. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 340(5) (Russ.).

526. *Id.*

527. *Id.*

528. *Id.* art. 340(6).

based upon the concept of the judge “violating the principle of objectivity and impartiality” in the charging word.⁵²⁹ This limitation is problematic. If the judge presents instructions in such a way that there is a question of maintaining objectivity and impartiality, an objection may be preserved. This raises the question whether an objection may be made for an improper or incorrect instruction on the law when made in good faith by the judge. Perhaps this may precipitate an objection or fall under the purview of breaching objectivity and impartiality.

XXIV. SECRET OF THE JURORS’ CONFERENCE

Article 341 generally provides for the conduct of deliberations by the jurors.⁵³⁰ After the charging word or final instructions, the jurors are required to proceed to a retiring room or jury room for their deliberations and consideration of a verdict.⁵³¹ The Russian code refers to the deliberation as a conference.⁵³² This is the same procedure followed by American jurors. Perhaps we take for granted that a jury deliberates within their own room. The Russian code clearly lays out the place where the jury will deliberate.⁵³³

This provision precludes anyone other than a jury member from being in the retiring room or jury room.⁵³⁴ While not set out in American criminal codes, the presence of anyone besides the sworn jury would cause a mistrial in an American court.

This section also allows the jury to stop or choose not to start their conference or deliberations.⁵³⁵ This depends upon the time of day.⁵³⁶ If, according to the code, night time comes and it is after working hours, the jurors have a “right to interrupt their conference for a rest.”⁵³⁷ The right to interrupt the conference by the jurors must be with the permission of the trial judge.⁵³⁸ Theoretically, if it is getting late the jury may be tired or have family or business matters to attend to. They may choose to come back in the morning or next day to complete their deliberations. They may even choose to begin

529. *Id.*

530. Ugolovno-Protseussual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 341 (Russ.).

531. *Id.* art. 341(1).

532. *Id.* art. 341.

533. *Id.* art. 341(1).

534. *Id.* art. 341(2).

535. See Ugolovno-Protseussual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 341(3) (Russ.).

536. *Id.*

537. *Id.*

538. *Id.*

deliberation the next day if the hour is late. While the jury has the right to do so, the code only allows the right to be exercised upon approval of the trial judge.⁵³⁹

Allowing the jury to rest and continue their deliberations is similar to American courts. In some cases the judge or jury can decide that it is best for the jury to either begin or complete their deliberations the next day. Often times this is a discretionary decision. When the jury has been sequestered, and also specifically in capital cases, it will not be allowed to go home and return the next day for deliberations. The Russian code, however, does not provide for the concept of sequestration.

The jury is also admonished not to divulge their discussions during the conference or deliberations.⁵⁴⁰ This is more stringent than the American counterpart. American jurors are not allowed to speak with anyone about the case other than their fellow jurors during deliberations. Once deliberations are ended and their duties have been completed, they are not required to speak with the public, but may do so if they so desire.

Finally, this section specifically allows jurors to take their notes made during the judicial investigation or trial back to the retiring room.⁵⁴¹ The notes may be used during their conference or deliberation.⁵⁴² The notes may be used to assist the jury in the answering of any of the questions that they must answer as part of the special interrogatories placed before them.⁵⁴³

XXV. PROCEDURE FOR HOLDING THE CONFERENCE AND THE VOTING IN THE RETIRING ROOM

Article 342 sets out additional procedures that must be followed by the jury during their conference or deliberations.⁵⁴⁴ The section is a direction to, and recognition of, the power of the senior juror, or foreperson.⁵⁴⁵

The senior juror is given slightly more power and responsibility than the American counterpart.⁵⁴⁶ The senior juror is required to direct the discussion to the questions posed by the court in the order, or sequence, presented.⁵⁴⁷ It

539. *Id.*

540. *See* Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 341(4) (Russ.).

541. *Id.* art. 341(5).

542. *Id.*

543. *Id.*

544. *See id.*

545. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 342 (Russ.).

546. *See id.* art. 331(2).

547. *Id.* art. 342(1).

is also up to the senior juror to hold the voting on any questions and the verdict as a whole and to count the votes.⁵⁴⁸

The code even provides the manner in which jurors are to cast their votes.⁵⁴⁹ Votes are required to be cast by the show of hands.⁵⁵⁰ American deliberations are not as controlled by the senior juror as the Russian code provides.⁵⁵¹ Nor is the manner of the vote of the individual jurors specifically defined. The American jury may cast written votes in secret if they so choose. They may decide as a whole the manner in which to deliberate and cast their votes on questions and the verdict.

No Russian juror member may abstain from a vote.⁵⁵² Each juror is required to vote.⁵⁵³ Theoretically, if an individual juror refuses to vote in violation of the code, the senior juror could bring this to the attention of the trial judge. In turn, the trial judge could admonish the recalcitrant juror or replace the juror with a reserved one or alternate.⁵⁵⁴

While the senior juror is given more power and responsibility than the other jurors, the code requires that the senior juror be the last person to cast their vote.⁵⁵⁵ Arguably this tempers the power of the senior juror to initially influence the other members. By allowing others to vote first there may be a freer uninfluenced vote being made initially.

XXVI. PASSING VERDICT

Article 343 defines the manner and process for reaching a verdict.⁵⁵⁶ The section begins by providing that a jury should try to reach a unanimous verdict.⁵⁵⁷ This is contrary to every American verdict. A unanimous verdict is required in every criminal case in the United States. It is not a question of attempting to reach a unanimous verdict. One must be attained or there is a hung jury and mistrial.

548. *Id.*

549. *Id.* art. 342(2).

550. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 342(2) (Russ.).

551. *See id.* art. 331.

552. *Id.* art. 342(3).

553. *Id.*

554. *See id.* art. 329.

555. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 342(4) (Russ.).

556. *See id.* art. 343.

557. *Id.* art. 343(1).

Interestingly, under the Russian code, a jury has three hours in which to reach a unanimous verdict.⁵⁵⁸ This time imposition is also contrary to the law in American courts. No specific time limitation is imposed on a jury. It is not unusual for some complex cases, such as capital cases, to have jury deliberations extend beyond three hours. Some cases take a day or more to decide.

If the jurors have not reached a unanimous decision in three hours, a verdict is reached by voting.⁵⁵⁹ Simply put, a guilty verdict is reached through a majority vote.⁵⁶⁰ If a majority of the jurors answer in the affirmative to the three paramount questions set forth in Article 339, then a guilty verdict is reached.⁵⁶¹ Those three questions are: “1) whether it is proven that the act has taken place; 2) whether it is proven that the act is committed by the defendant; [and] 3) whether the defendant is guilty of the perpetration of this act.”⁵⁶²

If there is no majority vote on the aforementioned questions, a not guilty verdict is reached.⁵⁶³ It should be noted, as specifically set out in the code, if the jury is split or tied with a vote of six to six, a not guilty verdict is rendered.⁵⁶⁴ A majority for guilt has not been reached and therefore a tie goes to the defendant in the form of a not guilty verdict.⁵⁶⁵

On questions other than the three paramount questions set out in Article 339, an answer is arrived similarly by a majority if a unanimous answer may not be reached.⁵⁶⁶ In addition, if there is a tie on non-paramount questions, the answer that is the most favorable to the defendant is accepted.⁵⁶⁷ An example would be on the question of leniency. If a unanimous decision is not reached on that question, the majority vote shall prevail.⁵⁶⁸ On the other hand, if the jury is equally divided on the question of leniency, the answer to the question on leniency would be in the affirmative since that answer would be more favorable to the defendant under the code.⁵⁶⁹

558. *Id.*

559. *Id.*

560. Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 343(1)–(2) (Russ.).

561. *Id.* art. 343(2).

562. *Id.* art. 339(1)1–3.

563. *Id.* art. 343(3).

564. *See id.*

565. Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 343(3), (5) (Russ.).

566. *Id.* art. 343(4).

567. *Id.* art. 343(5).

568. *Id.* art. 343(4).

569. *See id.* art. 343(5).

Even when a verdict is attained, the jury may consider varying the verdict to reflect a charge that is more favorable to the defendant.⁵⁷⁰ In theory, the jury, within its discretion under the code, could find the defendant guilty of a lesser included offense, even if the main charge has been proven.⁵⁷¹ That is a matter that is within their discretion when passing a verdict.⁵⁷²

The code specifies the manner in which the answers to the three questions under Article 339 must be presented.⁵⁷³ The answers must be in writing.⁵⁷⁴ Furthermore, the answers are limited to a confirmation, i.e., affirmation or negation, i.e., in the negative.⁵⁷⁵ The response must also be followed by an explanatory phrase addressing guilt or innocence.⁵⁷⁶ An example of the form of the answer to those questions would be: “Yes, guilty,” or “No, not guilty.”⁵⁷⁷

The senior juror is required to enter the responses to all the questions based upon the vote of the jury.⁵⁷⁸ If a unanimous verdict is not reached, the senior juror is also responsible for noting the vote count as part of the response to the written interrogatories.⁵⁷⁹ Finally, the senior juror is required to sign the verdict form and list of interrogatories.⁵⁸⁰

XXVII. ADDITIONAL EXPLANATIONS OF THE PRESIDING JUSTICE AND RESUMPTION OF THE JUDICIAL INVESTIGATION

Article 344 sets out the procedure for the jury to raise questions about their deliberations and also to reopen the case to consider additional evidence if they feel the need and the judge concurs with the request.⁵⁸¹

The section begins with the acknowledgement that the jury may have questions about the questions posed to them by way of the interrogatories as part of the verdict.⁵⁸² The code allows the jury to pose questions if they are

570. Ugolovno-Protsessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 343(6) (Russ.).

571. *Id.* art. 338(2).

572. *Id.* art. 343(6).

573. *See id.* art. 343(7)–(10).

574. *See id.* art. 343(8).

575. Ugolovno-Protsessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 343(7) (Russ.).

576. *Id.*

577. *Id.*

578. *Id.* art. 343(8).

579. *Id.* art. 343(9).

580. Ugolovno-Protsessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 343(10) (Russ.).

581. *Id.* art. 344(1)–(6).

582. *Id.* art. 344(1).

confused or need clarification on the questions presented to them by the trial judge.⁵⁸³ The specific procedure for posing questions is set forth in this article. The jury must come back into the courtroom and present their questions to the presiding judge through the senior juror.⁵⁸⁴ This procedure is slightly different from the one exercised in American courts. An American jury will reduce any question they may have to writing.⁵⁸⁵ There is no requirement that the American foreperson be the writer of the question nor specifically be required to convey the question to the judge.⁵⁸⁶

Once presented with the questions, the judge may solicit the opinions of the parties to determine how to respond.⁵⁸⁷ The ultimate burden is on the trial judge to appropriately respond to the questions posed to him or her by the jury.⁵⁸⁸ The code notes that the court may explain the questions or present additional questions based on the juror's need for clarification.⁵⁸⁹

If there is an amendment to the original questions presented by the judge to the jury, an additional charging word, or instructions, must be provided to the jury.⁵⁹⁰ The code refers to the additional charging word as being a brief one at that time.⁵⁹¹ Once the explanations are made, or additional questions are posed to the jury, and after the additional brief charging word, the jury is required to return to the retiring room to continue with their deliberations.⁵⁹²

Interestingly, the jury may make a request to resume the judicial investigation even after they have begun their conference or deliberation.⁵⁹³ The code provides that if the jury has doubts about the factual circumstances of the case which is essential to their answering the questions before them in the verdict, they may request the judge to resume the judicial investigation.⁵⁹⁴ In essence the code provides for the reopening of the case to introduce facts on issues the jury has doubts on.⁵⁹⁵ In theory, the jury could hear additional

583. *Id.*

584. *Id.*

585. See American Bar Association, Principles for Juries and Jury Trials 22 (2005), available at <http://www.abanet.org/juryprojectstandards/principles.pdf>.

586. See *id.*

587. See Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] 344(6) (Russ.).

588. See *id.* art. 344(2).

589. *Id.*

590. *Id.* art. 344(3).

591. *Id.*

592. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 344(4) (Russ.).

593. *Id.* art. 344(5).

594. *Id.*

595. See *id.*

testimony or evidence, or have testimony repeated or clarified. The request for the resumption of the judicial investigation is made to the trial judge through the senior juror in open court.⁵⁹⁶

This procedure is different from the recognized procedures in American courts. Once an American jury begins deliberating, there is no authority to allow for the reopening of the criminal case for additional testimony or evidence.⁵⁹⁷ Under some circumstances, a jury may request to review evidence that has already been admitted.⁵⁹⁸ Also, an American jury may ask for the testimony of one of the parties to be re-read to them.⁵⁹⁹ This may be within the discretion of the court subject to the parties' objections.

Once the request to resume the judicial investigation is made, the presiding judge must consider the parties' opinion.⁶⁰⁰ The judge must make the ultimate decision whether or not to grant the request for the resumption of the judicial investigation.⁶⁰¹

If the court allows for the resumption of the judicial investigation, the parties and the court follow the procedure that takes place at the end of the original judicial investigation.⁶⁰² This means that the court must formulate additional or modified questions with the input of the parties.⁶⁰³ The parties are again allowed to make a presentation or argument to the jury along with retorts or rebuttal, and the defendant is allowed again to speak to the jury if he or she chooses, which is described as one's final plea.⁶⁰⁴ Once again, the judge must provide a charging word to the jury with appropriate summaries of everyone's position on the case.⁶⁰⁵ The jury then, once again, must proceed to their conference or deliberation in order to reach a verdict.⁶⁰⁶

596. *See id.* art. 344.

597. *Cf. Zenith Radio Corp. v. Hazeltine Res., Inc.*, 401 U.S. 321, 332–33 (1971).

598. *See* Sherry M. Purdy, Casenote, *Videotaped Testimony in Child Sexual Abuse Cases: United States v. Binder*, 23 WILLAMETTE L. REV., 193, 196–98 (1987).

599. *See id.* at 196–97.

600. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 344(6) (Russ.).

601. *Id.*

602. *Id.*

603. *See id.*

604. *Id.*

605. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 344(6) (Russ.).

606. *Id.*

XXVIII. PROCLAMATION OF THE VERDICT

Article 345 addresses the protocol to be followed by the jury after reaching a verdict.⁶⁰⁷ The senior juror is required to sign the list of answered questions that were posed to the jury by the presiding judge.⁶⁰⁸ The jury is required to return to the courtroom after completing their conference or deliberation in the retiring room or jury room.⁶⁰⁹

The senior juror in open court is responsible for announcing the verdict.⁶¹⁰ This is done by reading aloud each question put to the jury by the judge followed by announcing the corresponding answers by the jury.⁶¹¹

Interestingly, the code requires that when the verdict is announced, everyone in the courtroom must stand.⁶¹² This is in contrast with American courts where the parties and counsel will stand when receiving the verdict. The audience, however, in American courts is not required to stand when the verdict is read.

The Russian code provides that the proclaimed verdict must be physically presented to the presiding justice.⁶¹³ The justice is then required to make the verdict together with all the questions and answers part of the criminal case or file.⁶¹⁴ This ensures, similar to an American trial, that there is a record for appellate purposes.

XXIX. ACTIONS OF THE PRESIDING JUSTICE AFTER THE PROCLAMATION OF THE VERDICT

Article 346 sets out the protocol to be followed by the presiding justice, or trial judge, after the proclamation, or receiving, of the verdict.⁶¹⁵ If the jury finds the defendant not guilty, the presiding justice shall declare the defendant to be acquitted.⁶¹⁶ If the defendant is in custody, he or she must be immediately released after an acquittal.⁶¹⁷ The code specifies that the release

607. See generally *id.* art. 345.

608. *Id.* art. 343(10).

609. *Id.* art. 345(1).

610. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 345(3) (Russ.).

611. *Id.*

612. *Id.* art. 345(4).

613. *Id.* art. 345(5).

614. *Id.*

615. See generally Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 346 (Russ.).

616. *Id.* art. 346(1).

617. *Id.*

is immediate and directly from the courtroom from which the not guilty verdict was rendered.⁶¹⁸

These first two provisions are comparable with American trials. Upon receiving a not guilty verdict, an American judge must accept the verdict of the jury without any ability to vary the acquittal. On the other hand, while American courts require the release of an acquitted defendant from custody, not all jurisdictions require the release to be directly from the courtroom as the Russian code specifies. An American detainee may be released in some jurisdictions after being processed through the jail the same day within a short period of time.

The Russian code requires the presiding justice to thank the jury for their service.⁶¹⁹ Also after the proclamation of the verdict, the trial judge must inform the jury that their service in the case has ended.⁶²⁰ American judges thank jurors for their service, but it is not a requirement set out in every code. Similar to the Russian courts, American judges also discharge the jury after the verdict has been received. Often they are discharged or excused with the thanks and appreciation of the judge and the parties.

After the verdict is rendered, there may be consequences to the verdict.⁶²¹ An example of a consequence would be the sentencing after a guilty verdict.⁶²² The code recognizes that after any verdict the consequences shall be discussed among the parties and the judge without the participation of the jury.⁶²³ Once the jury has given “the proclamation of the verdict,” their duties cease.⁶²⁴

The jurors still have the right to stay in the courtroom after they have reached a verdict and have been relieved of their duties.⁶²⁵ The Russian code requires, however, that if a juror decides to remain for the discussion of the consequences of the verdict, it must be seated with the rest of the public in the audience.⁶²⁶ In essence after the verdict is reached they no longer are jurors and return to public seating if they decide to observe the remaining proceedings.⁶²⁷

618. *Id.*

619. *Id.* art. 346(2).

620. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 346(2) (Russ.).

621. *Id.* art. 347.

622. *Id.* art. 347(3).

623. *Id.* art. 346(3).

624. *Id.* art. 346(2).

625. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 346(3) (Russ.).

626. *Id.*

627. *See id.* art. 346(2)–(3).

XXX. DISCUSSION OF THE CONSEQUENCES OF THE VERDICT

Article 347 defines the roles of everyone and also the matters to be discussed after the proclamation of the verdict.⁶²⁸ After the verdict is received, the judicial proceedings continue with the participation of the parties and the judge.⁶²⁹

This section first addresses the procedure when a not guilty verdict is rendered.⁶³⁰ If a not guilty verdict is rendered, the parties must address the issue of the civil claims contained within the criminal case.⁶³¹ Under the Russian code, issues of restitution or damages are handled within and not separate from the criminal case.⁶³² An example would be if there was a burglary or aggravated battery case where damages arose from the defendant's conduct.

The issue of damages is addressed through questions placed before the jury in the criminal case.⁶³³ Even when there is a not guilty verdict, damages may be assessed civilly against a defendant if the jury so finds.⁶³⁴ While this may appear inconsistent with a not guilty finding, the Russian code distinguishes innocence from a finding of civil responsibility.

If there is a conviction, the parties are also allowed to be heard on sentencing issues.⁶³⁵ This is done prior to the actual sentencing.⁶³⁶ The defense counsel and the defendant have the right to be heard last.⁶³⁷ Besides discussion of the civil claim, the issue of classification of the criminal conduct and the issue of punishment may also be discussed.⁶³⁸ The parties have the right to be heard prior to the judge pronouncing sentence.⁶³⁹ The argument of the parties must address matters that need resolution, such as the appropriate classification and the appropriate sentence to be imposed.⁶⁴⁰ The parties are prohibited from arguing that the verdict reached by the jury was inappro-

628. *See id.* art. 347.

629. *Id.* art. 347(1).

630. *See* Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 347(2) (Russ.).

631. *Id.*

632. *See id.* art. 347(3).

633. *See id.* art. 347(2).

634. *See id.*

635. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 347(3) (Russ.).

636. *See id.*

637. *Id.* art. 347(5).

638. *See id.* art. 347(4).

639. *See id.* art. 347(5).

640. *See* Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 347(4) (Russ.).

priate.⁶⁴¹ They are precluded from casting doubt on the correctness of the jury's discretionary decision.⁶⁴²

After the parties present their last arguments before the court, prior to sentencing, the defendant has the right to be heard.⁶⁴³ The defendant has another last plea.⁶⁴⁴ Before sentencing, the last plea of the defendant is before the presiding justice.⁶⁴⁵ After hearing the last arguments from everyone, the judge is required to retire and consider his or her decision on the sentence to be imposed in the criminal case.⁶⁴⁶

XXXI. OBLIGATORY CHARACTER OF THE VERDICT

Article 348 deals with the impact of the verdict and how the presiding justice or trial judge is required to address it.⁶⁴⁷ First, the code mandates that a not guilty verdict is a mandatory verdict that the judge must accept.⁶⁴⁸ He or she cannot reject it, ask for further deliberations, nor override it with a finding of guilt.⁶⁴⁹ The judge upon receiving a not guilty verdict must pass or find the defendant not guilty.⁶⁵⁰ A sentence of acquittal shall be entered by the presiding justice.⁶⁵¹

Second, the code notes that a verdict of guilty is also obligatory.⁶⁵² The trial judge must accept it.⁶⁵³ However, the code also notes that the judge has the ability to override a guilty verdict under some circumstances set out in a later portion of Article 348.⁶⁵⁴ This paper will address this exception shortly.

The judge must make certain determinations or findings when the jury renders a guilty verdict.⁶⁵⁵ The judge is required to determine the classifica-

641. *Id.*

642. *Id.*

643. *Id.* art. 347(5).

644. *Id.*

645. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 347(5) (Russ.).

646. *Id.*

647. *See generally id.* art. 348.

648. *Id.* art. 348(1).

649. *See id.*

650. *See* Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 348(1) (Russ.).

651. *Id.*

652. *Id.* art. 348(2).

653. *Id.*

654. *Id.* art. 348(2), (4), (5).

655. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 348(3) (Russ.).

tion or degree of the convicted crime.⁶⁵⁶ The judge must also consider the circumstances of the facts of the case without assistance from the jury before imposing a sentence.⁶⁵⁷

A trial judge has the discretion to pass a sentence of acquittal or override a guilty verdict.⁶⁵⁸ This may occur if the presiding justice finds that the acts committed by the defendant do not give rise to a crime.⁶⁵⁹ This is comparable to an American judge granting a judgment of acquittal. If a legally sufficient case is not proven, i.e., a *prima facie* case, an American judge has the power to grant a dismissal of the case. It is not, however, considered a passing or sentence of acquittal as the Russian code proscribes.⁶⁶⁰

The judge also has the discretion to determine whether the defendant is an innocent person irrespective of a guilty verdict.⁶⁶¹ The basis of this determination is that the defendant's guilt has not been established, or that the defendant's participation in a crime has not been proved.⁶⁶² If a court determines that a convicted defendant is an innocent person, the court can proceed further.⁶⁶³ In American trials, once a jury or a judge makes a determination of legal insufficiency, that trial judge can go no further based on double jeopardy protections.⁶⁶⁴

The Russian courts face no double jeopardy restriction.⁶⁶⁵ The code allows the trial judge to take further steps in the case even when the judge makes a finding that the defendant is innocent.⁶⁶⁶ The court may dismiss the college of jurors but must address a resolution on sending the criminal case for a new consideration.⁶⁶⁷ This is tantamount to the case being reset and retried before another judge and jury.⁶⁶⁸ Procedurally, the case may be initially referred to the beginning stage of a preliminary hearing should a judge grant a resolution sending the criminal case for a new consideration.⁶⁶⁹ This

656. *Id.*

657. *See id.*

658. *Id.* art. 348(4)–(5).

659. *Id.* art. 348(4).

660. *See* Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 348(4) (Russ.).

661. *Id.* art. 348(5).

662. *Id.*

663. *Id.*

664. *See* United States v. Scott, 437 U.S. 82, 91 (1978).

665. *See* Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 348(5) (Russ.).

666. *Id.*

667. *Id.*

668. *See id.*

669. *Id.*

is a significant decision by a Russian trial judge.⁶⁷⁰ The decision is not subject to appeal.⁶⁷¹ This gives the judge tremendous power to continue proceedings against a defendant whom the government has unsuccessfully prosecuted the first time.

This is a troubling portion of the Russian code. It allows the government to continue prosecution even after being unsuccessful the first time. Without the American protection against double jeopardy, a Russian citizen may go through multiple trials after a trial judge grants an acquittal to a convicted defendant. Arguably, a judge could find sufficient facts to warrant additional investigation and continued prosecution after a first or even second trial or more.

XXXII. LEGAL CONSEQUENCES OF RECOGNIZING THE DEFENDANTS AS DESERVING LENIENCY

Article 349 addresses the concept of leniency in sentencing, directing the presiding judge on how to proceed.⁶⁷² The section begins by mandating that the trial judge must accept the finding of the jury that leniency is merited in the case before it.⁶⁷³ The code describes the finding as an obligatory one for the judge.⁶⁷⁴ The court has no discretion to disregard or override the determination by the jury that a defendant deserves leniency.⁶⁷⁵

A jury decides when a defendant deserves leniency and so notes it as part of the verdict.⁶⁷⁶ Once the jury makes this determination, the judge must account for leniency in the sentence.⁶⁷⁷ The code then directs the trial judge to follow Article 64 and Article 65 of the Russian Criminal Code.⁶⁷⁸

Article 64 allows the judge, upon a jury's finding of leniency, to impose the most lenient sentence under the sentencing requirements of the Russian code.⁶⁷⁹ The court may also disregard any additional mandatory sentencing

670. See *Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code]* art. 348(5) (Russ.).

671. *Id.*

672. See *id.* art. 349.

673. *Id.* art. 349(1).

674. *Id.*

675. *Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code]* art. 349(1) (Russ.).

676. See *id.*

677. *Id.*

678. *Id.* art. 349(2). Note that this code is substantive as compared with the procedural law of the Russian Code of Criminal Procedure.

679. *Ugolovnyi Kodeks [UK] [Criminal Code]* art. 64(1) (Russ.).

requirements.⁶⁸⁰ This would be analogous to a court being able to disregard a minimum mandatory sentence in the United States.

Article 65 further provides that irrespective of the lenient sentence imposed, it may not exceed two-thirds of the maximum term for the particular crime charged.⁶⁸¹ An example would be for a robbery case that has a maximum sentence of thirty years. A Russian judge obligated by a jury finding of leniency would under no circumstance be able to exceed a sentence of twenty years. Additionally, if the defendant is convicted of a capital offense or a life felony, Article 65 precludes a judge from imposing either a capital sentence or a respective life sentence if the jury finds the defendant deserves leniency.⁶⁸²

The presiding judge also has the discretion to impose a more lenient sentence, even when the jury makes no finding for leniency, when reaching a guilty verdict.⁶⁸³ Article 349 gives the trial judge this authority.⁶⁸⁴ The trial judge may take into consideration the circumstances of the case and the defendant, along with any mitigating and aggravating circumstances relating to the case.⁶⁸⁵ The court is directed to consider sentencing under the Russian Criminal Code, giving consideration again to Article 64.⁶⁸⁶

Article 64 contains the necessary predicate for the trial judge to consider when solely deciding to impose a lenient sentence.⁶⁸⁷ Generally, the standard is one of exceptional circumstances set out in the aforementioned article.⁶⁸⁸ The exceptional circumstances must relate to the motive or purpose behind the crime.⁶⁸⁹ Was it one of malice or was the defendant committing a crime with the motive to assist his family?

Under Article 64, the court must consider the role played by the defendant in the crime.⁶⁹⁰ Also, the court is required to consider the behavior of a defendant during or after the commission of the crime.⁶⁹¹ The court must consider the societal impact of the crime in terms of danger.⁶⁹² A drug of-

680. *Id.* art. 65(1).

681. *Id.* art. 65(1).

682. *Id.*

683. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 349(2) (Russ.).

684. *Id.* art 349(2).

685. *Id.*

686. *Id.*

687. Ugolovnyi Kodeks [UK] [Criminal Code] art. 64(1) (Russ.).

688. *Id.*

689. *Id.*

690. *Id.*

691. *Id.*

692. Ugolovnyi Kodeks [UK] [Criminal Code] art. 64(1) (Russ.).

fense may be considered less dangerous than a crime of violence such as robbery or sexual battery.

The court may consider particular mitigating circumstances or the totality of mitigating circumstances when considering whether the circumstances rise to the standard of being exceptional to merit a more lenient sentence.⁶⁹³ The actual sentence imposed when the judge makes the finding of leniency without the jury is the same substantively as when the jury determines a defendant deserves leniency.⁶⁹⁴

XXXIII. KINDS OF DECISIONS TAKEN BY THE PRESIDING JUSTICE

The criminal jury trial ends through the conduct of the trial judge.⁶⁹⁵ The procedure is set out in Article 350 which the judge must follow to complete the case.⁶⁹⁶ At the conclusion of the case, a presiding judge has four options or decisions to make.⁶⁹⁷ In order to reach this decision, a judge must not only review Article 350, but also multiple other sections of the code that are referenced in order to properly conclude the case.⁶⁹⁸ This paper will go through the myriad of sections which the judge must consider and follow in order to complete the case.

The first option or decision that the judge must consider is “the termination of the criminal case.”⁶⁹⁹ Article 254 governs the law when considering a termination of the criminal case.⁷⁰⁰ A court must terminate a criminal case under certain circumstances pursuant to Article 24 before the case proceeds before the jury.⁷⁰¹ These circumstances include the expiration of the period of limitation for the criminal case.⁷⁰² This is the Russian version of the American statute of limitations or speedy trial rules.⁷⁰³ Another circumstance would be the death of the suspect or accused.⁷⁰⁴ This would result in termi-

693. *Id.* art. 64(2).

694. *See* Ugolovno-Protsessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 349(2) (Russ.).

695. *See id.* art. 350.

696. *See id.*

697. *Id.*

698. *See id.*

699. *Id.* art. 350(1).

700. Ugolovno-Protsessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 254 (Russ.).

701. *Id.* art. 254(1).

702. *Id.* art. 24(1)3.

703. *See id.*

704. *Id.* art. 24(1)4.

nation of the criminal case.⁷⁰⁵ Additionally, if there is an “absence of the victim’s application” to pursue the case, a judge must terminate the case.⁷⁰⁶ The judge must also terminate the criminal case if the proper charging authority has not been followed.⁷⁰⁷ Under Article 448, different governmental positions, such as judges or prosecutors who face criminal charges, must be prosecuted by those named specifically.⁷⁰⁸ If the procedure is not followed, the trial judge would be required to terminate the case.⁷⁰⁹

The judge is also required to stop or terminate a prosecution pursuant to Article 27.⁷¹⁰ The circumstances set out in this provision include the non-involvement of the suspect.⁷¹¹ If the accused is shown at any point not to be involved with the crime, a judge is required to stop or terminate the case.⁷¹² Also, when there is a resolution to terminate the case made by the body of inquiry, investigator, or prosecutor, the judge must terminate the case.⁷¹³ Additionally, when the Russian Parliament refuses to institute a case against a member of that legislative body, the judge must terminate the case.⁷¹⁴ If the Russian Parliament refuses to bring a Human Rights action, the judge must terminate the case.⁷¹⁵ And if the Russian Parliament refuses to remove the grant of immunity to the President of the Russian Federation during a prosecution, the judge must terminate the case.⁷¹⁶

The prosecutor during a criminal prosecution has a duty to the court pursuant to Article 246.⁷¹⁷ Anytime during the case, a prosecutor may determine that there is a legally insufficient case to move forward with.⁷¹⁸ When that occurs, the code requires the prosecutor to renounce or dismiss the

705. Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 24(1) (Russ.).

706. *Id.* art. 24(1)5.

707. *Id.* art. 24(1)6.

708. *Id.* art. 448(1).

709. *Id.* art. 24(1)6.

710. Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 254(1) (Russ.).

711. *Id.* art. 27(1)1.

712. *See id.*

713. *See id.* art. 27(1)5.

714. *See id.* art. 448(1)(1).

715. *See id.* art. 448(1)(7).

716. Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 27(1)6 (Russ.).

717. *Id.* art. 246.

718. *Id.* art. 246(7).

case and to explain the situation to the court.⁷¹⁹ The court must in turn record and terminate the case.⁷²⁰

The prosecution of a criminal case requires the victim to appear and participate.⁷²¹ Should a victim refuse to appear or participate in the criminal proceeding, this will result in the termination of the case when the appearance is obligatory by law.⁷²² Article 249 addresses this area of termination of cases.⁷²³ It would be the responsibility of the prosecutor to renounce the case and bring the matter to the court's attention.⁷²⁴

The court, in concluding or terminating a case, must also consider three other sections.⁷²⁵ Article 25 deals with the parties' reconciliation.⁷²⁶ An application may be filed by a victim of a crime to terminate the case.⁷²⁷ The victim could be a friend or family member of the defendant, although no relationship is required under the code.⁷²⁸ The crime must be a first offense and be a minor one or one of ordinary gravity.⁷²⁹ The prosecutor must approve the termination along with the parties, the court, and the investigator.⁷³⁰ If there is reconciliation and compensation to the victim for any damages suffered, termination takes place with the approval of all the interested participants.⁷³¹

A case may be terminated based on a change of the situation, pursuant to Article 27.⁷³² This section provides that if the person has changed or the facts of the case have changed to the point where the defendant is no longer socially dangerous, the case may be terminated.⁷³³ Perhaps the defendant has been rehabilitated from a drug or alcohol abuse problem.⁷³⁴ The prosecutor must approve the termination along with the parties, the court, and the inves-

719. *Id.*

720. *Id.*

721. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 249(1) (Russ.).

722. *Id.* art. 249(2).

723. *See id.* art. 249.

724. *See id.* art. 254(2).

725. *See id.* art. 25, 27, 28.

726. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 25 (Russ.).

727. *Id.*

728. *See id.*

729. *See id.*

730. *Id.*

731. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 25 (Russ.).

732. *See id.* art. 27.

733. *Id.*

734. *See id.* art. 134.

tigator.⁷³⁵ The crime must be a first offense and be a minor one or one of ordinary gravity.⁷³⁶

A case may also be terminated if there has been inadmissible evidence, such as a confession obtained without the presence of counsel or one that has not been confirmed by the defendant and is only established through hearsay.⁷³⁷ The prosecutor must approve the termination along with the parties, the court, and the investigator.⁷³⁸ The crime must be a first offense and be “a minor one or [one] of an ordinary gravity.”⁷³⁹ The second option or decision under Article 350 that the judge must consider to complete a case is the sentence of acquittal.⁷⁴⁰ Articles 305 and 306 govern this consideration.⁷⁴¹ The former section requires that three basic questions be placed before every Russian jury.⁷⁴² Those questions are: “1) whether it is proven that the act has taken place; 2) whether it is proven that the act [is] committed by the defendant; [and] 3) whether the defendant is guilty of the perpetration of this act.”⁷⁴³ If any one of those questions is answered by the jury in the negative, the judge must enter a sentence of acquittal.⁷⁴⁴

The third option or decision under Article 350 that the judge must consider to complete a case is the sentence of conviction.⁷⁴⁵ The judgment of conviction may be entered only after considering and reflecting on the legal sufficiency of the case based on all the admissible evidence.⁷⁴⁶ The judgment of conviction is governed by Article 302.⁷⁴⁷ In passing a sentence of conviction, the judge must specify the punishment.⁷⁴⁸ It could be a time certain or a suspended sentence.⁷⁴⁹ A judge is also authorized to impose no punishment.⁷⁵⁰

735. *Id.* art. 25.

736. *See* Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 25 (Russ.).

737. *Id.* art. 28; *see also id.* art. 75(2).

738. *Id.* art. 25.

739. *Id.*

740. *Id.* art. 350(2).

741. Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 305, 306 (Russ.).

742. *Id.* art. 339(1)1–3.

743. *Id.*

744. *Id.* art. 350(2).

745. *Id.* art. 350(3).

746. *See* Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 302(4) (Russ.).

747. *Id.* art. 302(4)–(5), (7).

748. *Id.* art. 302(5)1, (7).

749. *Id.* art. 302(5)1–2.

750. *Id.* art. 302(5)3.

The judge is required to compile or reduce the sentence to its proper form pursuant to Article 303.⁷⁵¹ It also must address all the questions resolved by the jury.⁷⁵² The sentence must also be reduced to either a writing by hand or by the use of a technical device, whether that is a transcript or by computer.⁷⁵³

Under Article 307, the judgment of conviction must contain a descriptive-motivation part.⁷⁵⁴ This means there must be a description of the criminal act supplied by the judge.⁷⁵⁵ Also, the judge must set out the place, time, and method of the crime's perpetration.⁷⁵⁶ The court is responsible for providing the evidence and conclusions that were reached that served as the basis for the defendant's conviction.⁷⁵⁷ The form must also contain a consideration of aggravating and mitigating circumstances that impact the sentence.⁷⁵⁸ The court must explain how it handled the resolution of questions during the trial.⁷⁵⁹ In general, the judge is required in the sentencing form for conviction, to summarize and describe all the factual and legal issues at trial.⁷⁶⁰

The judgment of conviction form must also contain a resolute part setting forth the details of the sentence under Article 308.⁷⁶¹ This part requires the defendant's full name to be set forth.⁷⁶² The judge must record and recognize the defendant to be guilty.⁷⁶³ The criminal code violation must be specified.⁷⁶⁴ The punishment administered must be noted.⁷⁶⁵ The name of the correctional institution must be identified in the resolute part of the judgment of conviction.⁷⁶⁶ Any probationary period and any other type of

751. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 303 (Russ.).

752. *See id.* art. 303(1).

753. *Id.* art. 303(2).

754. *Id.* art. 307.

755. *Id.* art. 307(1).

756. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 307(1) (Russ.).

757. *See id.* art. 307(2).

758. *See id.* art. 307(3).

759. *Id.* art. 307(4).

760. *See id.* art. 307(1).

761. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 308 (Russ.).

762. *Id.* art. 308(1)1.

763. *Id.* art. 308(1)2.

764. *Id.* art. 308(1)3.

765. *Id.* art. 308(1)4.

766. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 308(1)6. (Russ.).

punishment must be detailed in the form.⁷⁶⁷ The judge must also account for any time the defendant served while being detained before trial either while in jail, house arrest, or in a mental hospital.⁷⁶⁸ This time is offset, which means a defendant is entitled to the time that he or she was detained prior to trial including the conviction and sentence. This form also requires the judge to describe the restraint necessary for the defendant prior to the sentence being imposed and served.⁷⁶⁹ The court must detail those charges that the defendant was convicted on and on those where there was an acquittal.⁷⁷⁰ Finally, the court must record that a sentence is suspended or that no punishment at all is being meted out.⁷⁷¹

The fourth and last option or decision under Article 350 that the judge must consider to complete a case is the resolution on the dismissal of the college of jurors and the sending of “the criminal case for a new consideration by another composition of the court.”⁷⁷² The judge has the discretion, pursuant to Article 348, to determine that a defendant is an innocent person irrespective of a guilty verdict.⁷⁷³ The basis of this determination is that the defendant’s guilt has not been established or that the defendant’s participation in a crime has not been proved.⁷⁷⁴ If a court determines that a convicted defendant is an innocent person, the court can proceed further. The court may dismiss the college of jurors, but must address a resolution on sending the criminal case for a new consideration.⁷⁷⁵ This is tantamount to the case being reset and retried before another judge and jury. Procedurally, the case may be initially referred to the beginning stage of a preliminary hearing, should a judge grant a resolution sending the criminal case for a new consideration.

XXXIV. PASSING THE SENTENCE

Article 351 addresses the procedure the judge must follow before imposing a sentence.⁷⁷⁶ Passing a sentence basically means determining, for-

767. *Id.* art. 308(1)7.

768. *Id.* art. 308(1)9.

769. *Id.* art. 308(1)10.

770. *Id.* art. 308(2).

771. *See* Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 308(3) (Russ.).

772. *Id.* art. 350(4).

773. *Id.* art. 348(5).

774. *Id.*

775. *Id.* art. 350(4).

776. *See* Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 351 (Russ.).

mulating, imposing, and recording the sentence. The first requirement for a judge is to proceed with sentencing based on the mandate of Chapter 39 of the code.⁷⁷⁷ Chapter 39 contains articles 296 through 313.⁷⁷⁸ This paper has already addressed several of the provisions contained in those articles.⁷⁷⁹ This paper will generally provide an overview of Chapter 39 to give some sense of the judge's responsibility in passing the sentence.

Chapter 39 requires the judge to address many issues before a sentence may be passed.⁷⁸⁰ The judge must first be convinced of the legality, substantiation, and justness of the sentence.⁷⁸¹ The judge must reflect on these things.⁷⁸² The judge must go to a retiring room or chambers to maintain the secrecy of the judge's conference or deliberation on the passing of a sentence.⁷⁸³

The judge must resolve questions that the code presents.⁷⁸⁴ These questions are similar to the ones answered by the jury. They are questions that deal with the legality of the conviction and the appropriateness of any sentence to be imposed.⁷⁸⁵ The judge is required to consider the defendant's sanity before imposing sentence.⁷⁸⁶ The judge is required to consider the different types of sentences that can be imposed.⁷⁸⁷ The judge is also required to compile or reduce the sentence to written form with details of the case and the court's findings.⁷⁸⁸ These details of the case and sentence provide a record from which the public and the appellate court may review.

Importantly, the judge is required in any sentence to set out the procedure and time frame in which to file an appeal.⁷⁸⁹ The judge is required to return to the courtroom to pronounce or impose the sentence.⁷⁹⁰ Everyone present in the courtroom is required to stand as the judge pronounces the

777. *Id.*

778. *Id.* art. 296–313.

779. *See supra* notes 746–72 and accompanying text.

780. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 296–313 (Russ.).

781. *Id.* art. 297(1).

782. *See id.*

783. *See generally id.* art. 298.

784. *See id.* art. 299.

785. *See* Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 299(1)–17 (Russ.).

786. *Id.* art. 300(1).

787. *Id.* art. 302.

788. *Id.* art. 303(1)–(2).

789. *Id.* art. 309(3).

790. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 310(1) (Russ.).

sentence.⁷⁹¹ The judge must also be mindful when a defendant is in custody.⁷⁹² If there is a sentence of acquittal, the defendant must be released from the courtroom after the judge pronounces the sentence.⁷⁹³

The judge must also adhere to the mandate to provide copies of the written sentencing document to the defendant, to defense counsel, and to the prosecutor.⁷⁹⁴ Copies must be provided to the respective individuals within five days of the pronouncement of the sentence.⁷⁹⁵

While Article 351 is instructive to the trial judge to follow Chapter 39 in passing sentence, Article 351 also is instructive to the trial judge on what not to do.⁷⁹⁶ The judge is prohibited from naming the jurors in the written sentence form.⁷⁹⁷

This section also requires the judge to reference the charge and verdict of the jury when a sentence of an acquittal is rendered.⁷⁹⁸ When there is a sentence of conviction, the judge must describe the criminal act of which the defendant was found guilty.⁷⁹⁹ The court must also provide an explanation for the punishment that the judge imposes.⁸⁰⁰ If there is a civil claim imposed as part of the sentence, the judge must also provide a substantiation and explanation for the claim.⁸⁰¹ Finally, this section underscores that the judge must explain within the sentencing form the cassation procedure or appellate procedure for filing an appeal from the sentence.⁸⁰²

XXXV. TERMINATING AN EXAMINATION OF THE CRIMINAL CASE BECAUSE OF THE ESTABLISHED DEFENDANT'S INSANITY

Article 352 gives guidance to the judge and all parties on the procedure to follow when there is evidence of the defendant's insanity.⁸⁰³ This section

791. *Id.*

792. *See id.* art. 311.

793. *Id.* art. 311(1).

794. *Id.* art. 312.

795. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 312 (Russ.).

796. *See id.* art. 351.

797. *Id.* art. 351(1).

798. *Id.* art. 351(2).

799. *Id.* art. 351(3).

800. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 351(3) (Russ.).

801. *Id.*

802. *Id.* art. 351(4).

803. *See generally id.* art. 352.

is applicable during any stage of a jury trial.⁸⁰⁴ The court must act if there is evidence of insanity.⁸⁰⁵

The insanity of the defendant is at issue whether the insanity was present at the time of committing the act charged or anytime thereafter.⁸⁰⁶ The issue of insanity could arise during the trial or at sentencing.⁸⁰⁷ There must be a showing that the defendant has or is suffering a mental disorder.⁸⁰⁸ There must be some circumstances shown to prove this mental disorder.⁸⁰⁹ This section of the code also requires that an expert, one who has forensic-psychiatric expertise, confirm or support the circumstances or claim of a mental disorder.⁸¹⁰

Once the mental disorder is established with some evidence and confirmed by an expert, the judge is mandated to “pass a resolution on the termination” of the examination of the criminal case.⁸¹¹ This procedure does not terminate or dismiss the case entirely.⁸¹² It simply ends the existing jury trial.⁸¹³ In the United States, the issue of competency and insanity is addressed prior to trial. If an American defendant is not competent to stand trial, the case may not proceed until such time as competency is restored. If a defendant in the United States is competent to stand trial, but was insane at the time of the commission of the offense, the defendant may assert this defense at trial. A jury would then be able to find the defendant not guilty by reason of insanity.

If a Russian judge passes “a resolution on the termination” of the examination of the criminal case based upon the insanity of the defendant, the court is required to move the case to another court for consideration of the issue of insanity as set out in Chapter 51.⁸¹⁴ Chapter 51 requires the new court to consider only the issue of insanity based upon compliance with articles 433 through 446.⁸¹⁵

804. *See id.*

805. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 352(1) (Russ.).

806. *Id.*

807. *See id.*

808. *Id.*

809. *Id.*

810. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 352(1) (Russ.).

811. *Id.*

812. *See id.*

813. *See id.*

814. *Id.*

815. *See* Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 433–36 (Russ.).

The referral of the case to another court is considered a separate proceeding.⁸¹⁶ The focus of the referral is the establishment of the insanity of the defendant conclusively.⁸¹⁷ The issue of the defendant's conclusive mental disorder is heard and decided by the new judge alone, without the assistance of a jury.⁸¹⁸ During this proceeding the defendant is entitled to representation.⁸¹⁹

If the judge hearing the referred case determines the defendant suffers no mental infirmity, then the case may be referred back to the prosecutor to proceed to a jury trial.⁸²⁰ If the judge hearing the referred case determines the defendant is insane, the judge must order the defendant to a stationary state mental hospital.⁸²¹ It should be noted that the terms "insanity," "mental disorder," "mentally deranged," and "mentally ill" are used interchangeably.⁸²² The term stationary precludes outpatient treatment and requires the defendant to be confined for treatment.⁸²³ The decision of the judge on the issue of finding a mental disorder may be appealed by way of cassation, the Russian counterpart to an appellate court.⁸²⁴

Article 352 finally specifies that the decision of the trial judge to terminate the examination of the criminal case with a referral to a judge under Chapter 51 is not subject to appeal.⁸²⁵

XXXVI. SPECIFICS IN KEEPING THE PROTOCOL OF A COURT SESSION

Article 353 requires there to be a record of the criminal proceedings during the course of a jury trial.⁸²⁶ The record of the proceedings is referred to as the protocol.⁸²⁷ The protocol or record "may be written by hand, or typed, or made with the use of a computer."⁸²⁸ The process of reducing the case to a written record is compatible with the recording process of an Amer-

816. *Id.* art. 436.

817. *Id.* art. 154, 436.

818. *See id.* art. 440.

819. *Id.* art. 437-38.

820. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 443(5) (Russ.).

821. *Id.* art. 435(1).

822. *See id.* art. 433, 435, 446.

823. *See id.* art. 203(1)-(2).

824. *Id.* art. 445(8).

825. *See* Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 352 (Russ.).

826. *See generally id.* art. 259, 353.

827. *See id.* art. 259.

828. *Id.* art. 259(2).

ican criminal jury trial. American courts require a written record detailing all the proceedings.

All of the proceedings must be memorialized in order to provide a record that may be reviewed by an appellate court for its correctness.⁸²⁹ The judge is required to compile or verify and confirm the protocol and sign the entire record within three days of the end of the concluding court session.⁸³⁰

Article 353 details what must be contained within the protocol or record.⁸³¹ The record must reflect the composition or members of the jury.⁸³² The protocol is required to show the process as to how the college of jurors or panel has been selected.⁸³³

This section also requires that the charging word or jury instructions from the presiding justice shall be part of the protocol in writing.⁸³⁴

Article 353 ends with the mandate that all of the proceedings should be reflected in the protocol.⁸³⁵ The reason for having a protocol or record is the same reason as American courts have in maintaining a record. The Russian code states that it is important to have a protocol of “the entire course of the judicial proceedings, so that one can [get] convinced of the correctness of its conducting.”⁸³⁶ Simply stated, a record will convince many audiences of the correctness of the conduct of the judge, the prosecutor and all the proceedings during the course of the trial.⁸³⁷ The audience is not limited to an appellate court.⁸³⁸ It includes the public as well.⁸³⁹

XXXVII. CONCLUSION

It is difficult to separate the history of Russia from its people and its judicial system. For centuries the country was ruled by the Czars. A large percentage of Russians lived as serfs tantamount to slavery. The justice system was by grace of the monarchy and not from the will of the people.

829. *See id.* art. 353(4).

830. Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 259(6) (Russ.).

831. *See generally id.* art. 353.

832. *See id.* art. 353(2).

833. *Id.*

834. *Id.* art. 353(3).

835. Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedural Code] art. 353(4) (Russ.).

836. *Id.*

837. *See id.*

838. *See id.* art. 354(4).

839. *See id.*

With the Reforms of 1864, the Russian people were granted freedoms including the right to a jury trial.⁸⁴⁰ However, this historical period of reform lasted a little over fifty years.⁸⁴¹ With the Russian revolution of 1917, a totalitarian rule under communism began.⁸⁴² Jury trials stopped.⁸⁴³ The judicial system was the arm of the totalitarian government with few rights granted to those charged with offenses.⁸⁴⁴ No due process rights were provided nor substantive laws to provide for a fair and just resolution of a case.⁸⁴⁵ Acquittals were unheard of under totalitarian rule.⁸⁴⁶ The Soviet judicial system was perceived as another tool of the government to maintain power and control over the people.⁸⁴⁷

From the darkness of communism to the sunshine of freedom, Russia has moved towards democracy.⁸⁴⁸ In 1993, the first Russian jury trial was held since the October Revolution of 1917.⁸⁴⁹ Since 2003, all provinces provide for a jury trial to those defendants who are charged with serious crimes.⁸⁵⁰ The Russian Constitution now grants rights that we are familiar with in the United States: the presumption of innocence; the right to remain silent; the right to have illegally seized evidence excluded; the right to counsel; and the right to a jury as provided by law.⁸⁵¹

The new Russian Code of Criminal Procedure provides the framework for implementation of those rights to a defendant during the course of a jury trial.⁸⁵² The stages of the Russian jury trial are similar to the American jury trial.⁸⁵³ The demand for the jury trial is made by the defendant.⁸⁵⁴ Jury selection takes place with the right to inquire of prospective jurors and challenge

840. See SAUNDERS, *supra* note 159, at 260–61.

841. See Sharon LaFraniere, *Russian Courts Give Power to the People; Revival of Jury Trials Marks Shift from Soviet-Style Justice System*, WASH. POST, Dec. 22, 2002, at A24.

842. See *id.*

843. See *id.*

844. See *id.*

845. See LaFraniere, *supra* note 841.

846. See *id.*

847. See Ian Traynor, *Shake-Up for Russia's Legal Code*, THE GUARDIAN, July 2, 2002, at 11.

848. See *id.*

849. See James W. Diehm, *The Introduction of Jury Trials and Adversarial Elements into the Former Soviet Union and Other Inquisitional Countries*, 11 J. TRANSNAT'L L. & POL'Y 1, 4 (2001).

850. See LaFraniere, *supra* note 841; see also Diehm, *supra* note 849 at 37 n.220.

851. Diehm, *supra* note 849 at 29–33.

852. See Steven Lee Myers, *Russia Glances to the West for Its New Legal Code*, N.Y. TIMES, July 1, 2002, at A1.

853. See generally Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 325 (Russ.).

854. See *id.* art. 325(3).

the jurors to ensure their impartiality.⁸⁵⁵ Opening statements are permitted as well as the examination of witnesses.⁸⁵⁶ The attorneys are allowed to make closing arguments.⁸⁵⁷ The judge may dismiss the case if it is legally insufficient.⁸⁵⁸ If the case is legally sufficient, the case goes to the jury with instructions from the judge.⁸⁵⁹ The jurors deliberate in private.⁸⁶⁰ The judge reflects on the sentence and imposes it in open court after a conviction.⁸⁶¹

As a whole, the new constitution and new code provides citizens with a fair process.⁸⁶² No longer is the judge aligned with the prosecutor.⁸⁶³ The Russian judge is now a neutral arbiter deciding legal issues before the jury can determine the disposition of the case.⁸⁶⁴ The process is fair because the defendant has an opportunity to be heard before a jury of one's peers.⁸⁶⁵ The case does not rest solely with the government.⁸⁶⁶ The people, as a jury, decide the fate of a Russian citizen.⁸⁶⁷

While the present Russian jury trial, based on the Russian Constitution and code, provides for greater justice to the people, there are areas of concern that should be addressed. One area of concern is double jeopardy. This concept is not recognized under Russian law. In fact, the code provides for the termination of the case by a judge with a referral to another court for further investigation.⁸⁶⁸ This could result in a Kafkaesque situation. A defendant could have a trial where the evidence is insufficient, but face further prosecution. The case should end the first time under a double jeopardy theory to ensure proper original investigation. Respecting double jeopardy protections would also free the people from the belief that the case is never ending whenever the government so chooses.

Another area of concern is the limitation on deliberation and the process thereafter. Russian juries are not permitted to deliberate longer than three

855. *Id.* art. 328(3), (8).

856. *Id.* art. 335(1), (4).

857. *See id.* art. 336(1).

858. *See* Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 348(5) (Russ.).

859. *Id.* art. 338(5).

860. *Id.* art. 341(1).

861. *Id.* art. 347(3).

862. *See* Myers, *supra* note 852.

863. *Id.*

864. *Id.*

865. *Id.*

866. *Id.*

867. Myers, *supra* note 852.

868. Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 350(4) (Russ.).

hours in order to arrive at a unanimous verdict.⁸⁶⁹ The judge has no discretion on this issue.⁸⁷⁰ There are some complex criminal cases, such as a death penalty case, which require more than a three hour time frame to consider. This time period is arbitrary and would raise significant constitutional due process questions if an American Legislature imposed a deliberation restriction on criminal juries.

Along with the time limitation is the process after the three hour period is met. Under the code, the jury must decide the case after three hours with a less than unanimous verdict.⁸⁷¹ In theory, seven people could decide the fate of an individual in a death penalty case even though five other jurors support an acquittal.⁸⁷² This would again raise constitutional questions in an American court. Such a provision would have a difficult time withstanding constitutional scrutiny.⁸⁷³

The type of crimes where a Russian citizen is entitled to a jury trial should be expanded. Presently, only the most serious crimes in Russia entitle a defendant to have a case considered by a jury.⁸⁷⁴ In the United States, a jury trial in many jurisdictions is guaranteed when the crime carries with it any term of incarceration.⁸⁷⁵ This marks the high value we place on freedom. The Russian Parliament should consider expanding the right to a jury trial in any case in which the defendant may be sentenced to incarceration.

Finally, standard jury instructions need to be developed in Russia. In American courts, judges are provided with standard jury instructions to properly charge a jury.⁸⁷⁶ At the present time, no standard jury instructions exist in Russia. This may result in judges applying different law throughout the country and also places a burden on the trial judge to create jury instructions in every case. It would be easier for the judge administratively, and it would be more consistent for all parties in Russia, if jury instructions were standardized and adopted.

It is an exciting time for Russia. The move from totalitarian rule to democracy provides challenges along with the many new freedoms we now see. The judicial system is a fairer and a more just system than before. It

869. *Id.* art. 343(1).

870. *See id.*

871. *Id.*

872. *See id.* art. 343(2).

873. *See, e.g.,* Morgan v. Illinois, 504 U.S. 719, 721 (1992).

874. *See* Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 20, 30 (Russ.).

875. *See* Duncan v. Louisiana, 391 U.S. 145, 148–50 (1968).

876. *See* Molly Armour, Comment, *Dazed and Confused: The Need for a Legislative Solution to the Constitutional Problem of Juror Incomprehension*, 17 TEMP. POL. & CIV. RTS. L. REV. 641, 643–44 (2008).

will provide confidence and a belief by the people that the government does not determine their freedom; it respects it and acknowledges it. The new constitution and code provide a great promise to the Russian people. It is a promise that must be acted upon. The words of the constitution and the code must be given meaning by the people in the justice system by implementing and protecting the rights given to Russian citizens. Only then will those words grant freedom to a people who have long lived under the tyrannical rule of the Czars and communist dictators. Only time will tell whether the Russian people will successfully break from its past and embrace its new found democracy. That success will be assisted by the historic return of the jury trial to Russia, a return not only of the jury trial to Russia, but a return of justice to the Russian people.

GUIDELINE FOR HANDLING CASES INVOLVING SEXUAL ABUSE OF A MINOR BY A PUBLIC SCHOOL TEACHER

DIANA SANTA MARIA*

Laura D. Dolin**

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I. KNOW YOUR CASE

Cases involving sexual abuse of students are extremely sensitive and demanding in several aspects. As the victim’s attorney, these cases require thorough preparation and dedication. It is essential to spend sufficient time interviewing the minor client and appropriate family members in order to obtain all essential details of the abuse so as to be able to properly investigate the case and initiate legal proceedings. You will want to meet and obtain statements from other victims or potential victims and witnesses, as well as obtain all available school documents and meet with parents of other children in order to gather up all necessary data for your case. As the victim’s lawyer, you need to get involved with the State or District Attorney and/or the local investigating agency with jurisdiction over the criminal matter and obtain as much police investigation as is available. Next you want to make sure that your client(s) is/are obtaining appropriate psychological care for his/her/their injuries. You will need to know the appropriate law in your jurisdiction applicable to the facts of your case in order to determine which legal remedies are available for you to proceed on. Because of the potentially high profile nature of these cases, you will need to be available to respond to media attention while, at the same time, protecting your client and his/her family from the media to protect their privacy.

A. *Identify Your Client(s)*

It is important to identify who your clients are in each particular case. The most identifiable client is the student who has been abused. However, it

is also important to identify other family members who may have viable claims, e.g., for intentional or negligent infliction of emotional distress, or for cost of medical or psychological treatment of the minor plaintiff. Because of the extremely sensitive and often embarrassing topic of sexual abuse, some family members will not directly disclose the damages that they have sustained as a result of the injuries caused to their children. It is, however, important to engage in open discussions with the parents and potentially other family members in order to ferret out these claims.

B. *Develop Your Minor Client's Trust in You, Such That There Will Be Open and Complete Disclosure of All Facts*

Early on in the process, it is very important that your minor client feels comfortable in disclosing all the facts with as much detail as possible to assist you in building your case. Because of the very sensitive and potentially embarrassing nature of these claims, it will be very important for the client to feel comfortable enough with you to open up and discuss things that he or she may not even wish for his or her parents to know. You need to caution the parent to allow this process, and you should consider bringing in a psychotherapist or guardian ad litem to assist you with this process early on.

II. BUILD YOUR CASE WITH AS MANY FACTUAL DETAILS AS POSSIBLE IN ORDER TO BE ABLE TO PROVE FORESEEABILITY

A. *Obtain Names of All Teachers and/or Other School Administrators and Employees Who May Have Witnessed Any Unusual Behavior*

Many jurisdictions agree that the mere fact that sexual "abuse occurred on school district property does not make the school district automatically liable for abuse by its employee."¹ Hence, in many jurisdictions it is necessary to establish that the sexual abuse was or should have been foreseeable in order to hold the school district liable for negligence under different theories, for example negligent supervision.²

1. See, e.g., *Godar v. Edwards*, 588 N.W.2d 701, 707 (Iowa 1999).

2. See, e.g., *P.L. v. Aubert*, 545 N.W.2d 666, 668 (Minn. 1996). "A school district cannot be held liable for actions that are not foreseeable when reasonable measures of supervision are employed to insure adequate educational duties are being performed by the teachers, and there is adequate consideration being given for the safety and welfare of all students in the school." *Id.*; see *Godar*, 588 N.W.2d at 707.

Because cases involving sexual abuse by a public school teacher typically contain many hurdles, one such hurdle being foreseeability, it is very important to gather extremely detailed information, including names of all teachers who may have witnessed any circumstances alleged early on while the details are fresh in the victim's memory.³

III. EARLY ON DECIDE IF YOU WILL NEED AN EXPERT IN THE APPROPRIATE FIELD TO HELP EDUCATE AND INFORM THE COURT ON THE ISSUE OF FORESEEABILITY AS IT APPLIES TO THE FACTS OF YOUR CASE

In the preparation of your case, decide early on if you may need an expert to assist you in developing liability. In Minnesota, the state supreme court, in *P.L. v. Aubert*,⁴ determined that the plaintiff student did not prevail because he failed to retain an expert to prove implied foreseeability.⁵

The Supreme Court of Minnesota compared the school board case involving a teacher who had an ongoing sexual relationship with a student to an earlier decision involving a psychologist who made "improper sexual advances to patients during and immediately after therapy sessions."⁶ In the *P.L.* school board case, the court held that despite the fact "that teachers have power and authority over students," there was "no expert testimony or affidavits" that a relationship between a teacher and a student is a well known hazard, and "thus, there can be no implied foreseeability."⁷

3. See, e.g., *P.L.*, 545 N.W.2d at 668.

4. 545 N.W.2d 666 (Minn. 1996).

5. See *id.* at 668.

6. *Id.* at 667-68; *Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd.*, 329 N.W.2d 306, 307 (Minn. 1982).

7. *P.L.*, 545 N.W.2d at 668. Conversely, earlier Minnesota case law held that liability lies with the employer when the source of the attack is related to the "duties of the employee and occur[] within work related limits of time and place." *Marston*, 329 N.W.2d at 310-11 (quoting *Lange v. Nat'l Biscuit Co.*, 211 N.W.2d 783, 786 (Minn. 1973)). The *Marston* case involved an employee, who was a psychologist, who made unwelcomed and improper sexual advances to patients during and immediately after therapy sessions in his office. See *id.* at 308. The court held that there was a fact issue as to whether the acts were "within the scope of [the doctor's] employment." *Id.* at 311. "[I]t should be a question of fact whether the acts of [the defendant] were foreseeable, related to and connected with acts otherwise within the scope of employment." *Id.* (citing *Todd v. Forest City Enter., Inc.*, 219 N.W.2d 639, 640 (Minn. 1974)). The issue of foreseeability was raised because of expert testimony at the trial court that sexual relations between doctors and patients were "a well-known hazard and thus . . . foreseeable." *Id.* It was the foreseeability of the risk that determined the outcome of that case. See *Marston*, 329 N.W.2d at 311.

IV. KNOW THE CURRENT STATE OF THE LAW IN YOUR JURISDICTION AND IN OTHER JURISDICTIONS INVOLVING SEXUAL ABUSE CASES BY PUBLIC SCHOOL TEACHERS

Plaintiff victims of sexual abuse by school officials who proceed with civil state law claims allege the following theories of liability in their complaints: negligent hiring, negligent retention, negligent supervision, negligence and negligence per se, and respondeat superior.⁸ School administrators have been held liable when their officials knew or should have known that school employees or applicants had a history of sexual abuse, the school retained or hired the person despite the person's record, as well as situations where their personnel knew or should have known that an employee sexually abused a student, and the school retained the employee notwithstanding this knowledge.⁹

A. *Immunity of School Officials*

"[M]any states have governmental immunities that block negligent hiring and retention claims against public schools."¹⁰ The reason provided by the courts for granting immunity "is that the hiring and supervision of school

8. See Robin Cheryl Miller, Annotation, *Liability, Under State Law Claims, of Public and Private Schools and Institutions of Higher Learning for Teacher's, Other Employee's, or Student's Sexual Relationship with, or Sexual Harassment or Abuse of, Student*, 86 A.L.R. 5th 1, 22, 36–37 (2001) (providing a comprehensive outline and discussion of various state and federal cases discussing the state tort or statutory liability of entities involved in the operation of public or private schools or institutions of higher learning, when not precluded by sovereign or charitable immunity, for an injury sustained by a student during a sexual relationship with, or sexual harassment or abuse by, a teacher or other school employee, or another student at the school).

9. See *id.* at 22–23.

10. William W. Watkinson, Jr., Note, *Shades of DeShaney: Official Liability Under 42 U.S.C. § 1983 for Sexual Abuse in the Public Schools*, 45 CASE W. RES. L. REV. 1237, 1272 (1995) ("Governmental immunity is a doctrine that absolves government[al] agencies and officials from tort liability when they are acting in their official capacities."). See Bruce Beezer, Commentary, *School District Liability for Negligent Hiring and Retention of Unfit Employees*, 56 EDUC. L. REP. 1117, 1119 (1990) (stating that courts in New Mexico, Michigan, Missouri, Pennsylvania, and Wisconsin have upheld governmental immunity for school officials in negligent hiring and retention actions); see also Scott J. Borth, Comment, *Municipal Tort Liability for Erroneous Issuance of Building Permits: A National Survey*, 58 WASH. L. REV. 537, 540–46 nn.23–48 (1983) (demonstrating that in thirteen states, municipal governments and officials have absolute immunity from tort liability, twenty-four states retain tort immunity but provide for exceptions in certain circumstances, and fifteen states have abolished governmental tort immunity).

personnel is a discretionary governmental function that is necessary to carry out public education.”¹¹

Conversely, other jurisdictions have rejected the immunity argument and have held that school officials may be held liable for negligence in hiring or retaining unfit school personnel.¹² In *Doe v. Durtschi*,¹³ an Idaho case where there was admitted sexual abuse of four female students and allegations of negligent hiring and retention, the Supreme Court of Idaho rejected the school district’s argument of immunity and held that the district may be liable for its own negligence in retaining a teacher where it was informed of the teacher’s dangerous behavior.¹⁴ The court further held that the exemption under the immunity statute for employee acts that arise out of assault and battery did not apply in this situation.¹⁵ Likewise, in the Florida case of *School Board of Orange County v. Coffey*,¹⁶ which involved allegations of a teacher’s sexual abuse of a student, the Fifth District Court of Appeal held that “[t]he retention and supervision of a teacher by a school board are not acts covered [within] sovereign immunity.”¹⁷

In Ohio, sovereign immunity was argued in *Massey v. Akron City Board of Education*.¹⁸ Based upon arguments made by the defense, as to the applicable sovereign immunity statute, the court concluded “that the plaintiff[s] could succeed only if they [could] show [that the school] board acted with malice, in bad faith, or in a wanton or reckless manner.”¹⁹ The court found that on the facts presented, there was “sufficient evidence to raise a genuine issue of material fact” where the school board so acted, and therefore, denied the school board’s motion for summary judgment.²⁰

B. *Respondeat Superior Claims in Sexual Abuse by Public School Teacher Cases*

In California, the state “[s]upreme [c]ourt has held that the conduct of teachers who sexually molest students under their supervision will not be

11. Beezer, *supra* note 10, at 1119.

12. See, e.g., *Doe v. Durtschi*, 716 P.2d 1238, 1245 (Idaho 1986).

13. *Id.* at 1238. “Governmental immunity is a doctrine that absolves government[al] agencies and officials from tort liability when they are acting in their official capacities.” Watkinson, *supra* note 10, at 1272.

14. *Durtschi*, 716 P.2d at 1240–41, 1245.

15. *Id.* at 1243–44.

16. 524 So. 2d 1052 (Fla. 5th Dist. Ct. App. 1988).

17. *Id.* at 1053.

18. 82 F. Supp. 2d 735, 747–48 (N.D. Ohio 2000).

19. *Id.* at 748.

20. *Id.*

imputed to school districts to permit recovery by injured students from the employing districts under the doctrine of respondeat superior.”²¹

Conversely, the doctrine of respondeat superior was held to apply so as to render a school district liable for a teacher’s sexual molestation of a student when applying Nevada law.²²

C. *Negligent Hiring Cases*

In California, although the courts do not recognize a theory for respondeat superior in cases involving sexual molestation of students, the courts do recognize causes of action for negligent hiring.²³

D. *Negligent Supervision Cases*

In Illinois, the appellate court held that “[a] cause of action for negligent supervision exists against the School District if it is alleged and established that the School District had a duty to supervise its employees, that the School

21. *See Virginia G. v. ABC Unified Sch. Dist.*, 19 Cal. Rptr. 2d 671, 675 (Cal. Ct. App. 1993) (citing *John R. v. Oakland Unified Sch. Dist.*, 769 P.2d 948, 953 (Cal. 1989)).

22. *Doe v. Estes*, 926 F. Supp. 979, 989–90 (D. Nev. 1996) (denying the district’s motion for summary judgment on the student’s battery claim). The district was held liable, in that case, to the student under the doctrine of respondeat superior. *Id.* at 989. The court referred to a Nebraska case in which a casino was held vicariously liable for injuries suffered by a patron punched by a blackjack dealer. *Id.* The court held that it “fail[ed] to discern any principled legal distinction between a battery claim against a casino whose blackjack dealer slug[ged] a patron and the same claim against a school district whose teacher fondle[d] a student.” *Id.* In both cases, the court reasoned, “the plaintiff was on the defendant’s premises for the purpose of enjoying the defendant’s services” and in neither case did “the employee’s duties include acts of common-law battery.” *Id.*

23. *Virginia G.*, 19 Cal. Rptr. 2d at 675. In *Virginia G.*, the court held that while the teacher-perpetrator’s conduct in molesting the student

will not be imputed to the District, if individual District employees responsible for hiring and/or supervising teachers knew or should have known of [the teacher’s] prior sexual misconduct toward students, and thus, that he posed a reasonably foreseeable risk of harm to students under his supervision, including [the student at issue], the employees owed a duty to protect the students from such harm.

Id. Thus, the court held that the plaintiff

may be able to amend her pleading[s] to allege a cause of action against the District based on the negligence of its employees who were responsible for the hiring and/or supervision of [the teacher] if such employees knew or should have known of [the teacher’s] history of sexual misconduct with students under his supervision.

Id. at 676. The court further concluded that the “[d]etermination of the question whether the District is immune from liability to” the student based on the immunity provisions must await the plaintiff’s “further pleading and the requisite factual determinations, if any.” *Id.*

District negligently supervised [the teacher-perpetrator], and that such negligence proximately caused [the] plaintiff's injuries."²⁴

E. *Negligent Retention Cases*

In Indiana, the district court denied summary judgment and held that a negligent retention claim was supportable against a university for retaining a professor who sexually harassed a student, where the professor had previously engaged in similar misconduct, and the university had ignored the conduct.²⁵

V. MAKE A RECORD: BRING OUT THE FACTS WHICH SHOW FORESEEABILITY—DO NOT BASE YOUR CASE ON SIMPLY THE FACT THAT THE BAD ACTS WERE COMMITTED ON SCHOOL PREMISES WITHOUT SHOWING HOW THE SCHOOL DISTRICT KNEW OR SHOULD HAVE KNOWN OF THE PERPETRATOR'S ACTIONS

The way to prevail in state civil court on these cases is by using the facts of your case to show how the school district knew or should have known of the perpetrator's actions or propensities.²⁶ If you simply rely on the egregiousness of the occurrence(s), regardless of whether they occurred on school property, without demonstrating that the actions were foreseeable by school district officials, you may not succeed in getting your case to the jury.²⁷

For example, in a Washington case, a minor and his parents sued a school district and its principal "for negligence in hiring, retaining and supervising a teacher" and librarian.²⁸ On two different occasions, in secluded areas of the auditorium and library, the teacher/librarian engaged in oral sex with the student.²⁹ The trial court's granting of summary judgment for the district and the principal was affirmed by the higher court.³⁰

The Washington court focused on the following question: "Did the district know, or in the exercise of reasonable care should it have known, that

24. *Mueller v. Cmty. Consol. Sch. Dist.* 54, 678 N.E.2d 660, 664 (Ill. App. Ct. 1997).

25. *Chontos v. Rhea*, 29 F. Supp. 2d 931, 937-39 (N.D. Ind. 1998).

26. *See, e.g., Peck v. Siau*, 827 P.2d 1108, 1112-13 (Wash. Ct. App. 1992).

27. *See id.*

28. *Id.* at 1109.

29. *Id.*

30. *Id.* at 1109, 1113.

[the teacher/librarian] was a risk to its students?”³¹ Without evidence “in the record to so indicate,” the appellate court answered this question in the negative.³²

The court explained that:

When a pupil attends a public school, he or she is subject to the rules and discipline of the school, and the protective custody of the teachers is substituted for that of the parent. As a result, a duty is imposed by law on the school district to take certain precautions to protect the pupils in its custody from dangers reasonably to be anticipated. This duty is one of reasonable care, which is to say that the district, as it supervises the pupils within its custody, is required to exercise such care as a reasonably prudent person would exercise under the same or similar circumstances. The basic idea is that a school district has the power to control the conduct of its students while they are in school or engaged in school activities, and with that power [comes] the responsibility of reasonable supervision.³³

“A school district’s duty requires that it exercise reasonable care to protect students from physical hazards in the school building or on school grounds. . . . [I]t also requires that the district exercise reasonable care to protect students from the harmful actions of fellow students.”³⁴ Quoting several cases and the Restatement (Second) of Torts, the Washington court concluded that:

[T]he district is not liable merely because such activities occur. ([The] school district [is] not an insurer of the safety of its pupils). Rather, the district will be liable only if the wrongful activities are foreseeable, and the activities will be foreseeable only if the district knew or in the exercise of reasonable care should have known of the risk that resulted in their occurrence.³⁵

31. *Peck*, 827 P.2d at 1113.

32. *Id.*

33. *Id.* at 1112 (citations omitted).

34. *Id.*

35. *Id.* at 1112–13 (citations omitted).

VI. FEDERAL CAUSES OF ACTION

After you have reviewed the pertinent facts of your case and the case law which governs your jurisdiction, you should decide if it is advantageous to proceed with a state or federal cause of action.

A. *Reasons to Proceed with Federal Causes of Action*

In some jurisdictions, the courts are reluctant to find liability for negligent hiring and retention in school board cases.³⁶ In addition, state tort law generally cannot hold school officials liable for their deliberate indifference toward sexual abuse.³⁷ Another reason to turn to federal law for relief is due to sovereign immunities, which may bar state causes of action in certain jurisdictions.³⁸ Holding school systems liable under 42 U.S.C. § 1983 is necessary because “[c]omplicated state law immunities may protect municipalities and school districts from many state tort claims but will not insulate them from a constitutional tort suit.”³⁹

B. *Criteria to Proceed with a Federal 42 U.S.C. Section 1983 Cause of Action*

Some plaintiffs have proceeded with claims under Federal Statutes. A Nevada federal court has held that a defendant school district could be liable

36. Watkinson, *supra* note 10, at 1272.

37. *See id.*

38. *See id.*

39. *Id.* at 1273 (quoting Steven F. Huefner, Note, *Affirmative Duties in the Public Schools after DeShaney*, 90 COLUM. L. REV. 1940, 1961 (1990)). According to the author of the Note, *Shades of DeShaney*, there is controversy in federal court cases as to whether the schools can be liable for the sexual abuse of their students based on predicated special relationships on custody. *See id.* at 1283. *Doe v. Taylor Independent School District* interpreted custody broadly and held the school liable. *See Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 451 n.3 (5th Cir. 1994). However, *D.R. v. Middle Bucks Area Vocational Technical School*, subscribed to a narrow definition of custody. *See D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1369–72 (3d Cir. 1992). Thus, the court in *Middle Bucks* found that the school district did not have an affirmative duty to protect its students. *Id.* at 1384. The *Shades of DeShaney* article discusses later federal cases which offer an alternative liability theory, removing the custody controversy where a school employee is the perpetrator of the sexual abuse. Watkinson, *supra* note 10, at 1250–57. The later cases hold that school systems and its officials are not liable under section 1983 without a finding of a special relationship between the school and the student. *See discussion infra* Part V.

under 42 U.S.C. § 1983 if some policy or custom it followed can be said to have legally been the cause of the complained constitutional violation.⁴⁰

The school district may be liable under section 1983 for constitutional torts committed by its employees when their choice, from among various alternatives, to follow a particular course of action reflects a “deliberate indifference” to the constitutional rights of the plaintiffs.⁴¹

For officials to be liable under section 1983, they must be deliberately indifferent to the plight of a student.⁴² Mere negligence upon the part of an official will not trigger liability.⁴³ If schools are found to have an affirmative duty of protection, school officials will be liable only in cases like *Doe v. Taylor Independent School District*⁴⁴ and *D.R. v. Middle Bucks Area Vocational Technical School*,⁴⁵ where the officials know that the abuse is occurring but do nothing to stop it.⁴⁶

VII. CONCLUSION

Your emphasis should remain in preparing your case and discovering all pertinent facts to establish foreseeability and liability of the school district. Once the facts are revealed, you can apply them to the laws which govern your jurisdiction. Without obtaining the relevant facts, and ensuring that the laws in your jurisdiction provide you with an adequate remedy, you will be unable to establish what you need to prove to the court: that the egregious violation of your victim/client’s rights and their resulting lifetime damages

40. See *Doe ex rel. Knackert v. Estes*, 926 F. Supp. 979, 986–87 (D. Nev. 1996). In *Doe ex rel. Knackert v. Estes*, the court granted judgment as a matter of law as to the school board. See *id.* at 989–90. The court found that the defendants failed to demonstrate that “the absence of any genuine issue[] of material fact [existed] with respect to the question [as to] whether the defendant school district’s pre-1990 failure to prevent the sexual molestation of its students was a policy for which the district could be liable under [s]ection 1983.” *Id.* at 988. The court concluded that:

[The] [p]laintiffs [presented] evidence that the defendant school district had until the arrest of [the perpetrator] in 1990 no policy [in effect] regarding the reporting of suspected incidents of sexual abuse of students, had never instructed its employees in the techniques of recognizing the warning signs of suspected sexual abuse of students, [and] had never provided its staff with guidelines for dealing with such suspicions.

Id.

41. *Id.*

42. *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 270 (1987) (O’Connor, J., dissenting).

43. See *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388–89 (1989) (explaining the deliberate indifference standard for section 1983 liability by inaction).

44. 15 F.3d 443 (5th Cir. 1994).

45. 972 F.2d 1364 (3d Cir. 1992).

46. *Taylor*, 15 F.3d at 445; *D.R.*, 972 F.2d at 1366.

are issues which should get to the jury to decide the liability of the school district for the acts of its employee, or the liability of the school district for failing to properly supervise or carefully hire its employees.

BLACKWATER AND BEYOND: CAN POTENTIAL PLAINTIFFS SUE PRIVATE SECURITY COMPANIES FOR DUE PROCESS VIOLATIONS VIA EXCEPTIONS TO THE STATE ACTION DOCTRINE, INCLUDING THROUGH SECTION 1983 ACTIONS?

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I. INTRODUCTION

On March 30, 2004, insurgents attacked a United States military convoy in Fallujah, Iraq, killing four of its members.¹ The bodies were mutilated, burned, and hung from a bridge.² This incident quickly became infamous due to its shocking brutality.³

The Fallujah incident was also newsworthy for a second reason. Those killed in the attack were not members of the United States military, but rather employees of Blackwater Worldwide,⁴ a private security company (PSC).⁵ Blackwater was under contract with the U. S. government to provide extra security forces and to perform other duties typically performed by U.S. soldiers.⁶ The Fallujah fallout was the first time many Americans became aware of the existence of such agreements, and for those who were aware of the existence of PSCs, the extent to which the government relies on them.

The existence and use of PSCs is controversial, and much academic discourse is available on the subject.⁷ Much of this is centered on their use in Iraq and other military zones.⁸ It is claimed that these entities are mercenaries who operate lawlessly and with no accountability.⁹ The proposed solutions focus on international law, statutes aimed at military activities, and

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1. See, e.g., *U.S. Expects More Attacks in Iraq*, CNN.COM, May 6, 2004, <http://www.cnn.com/2004/WORLD/meast/03/31/iraq.main/> (last visited Apr. 4, 2009); see also *infra* Part II.C.2.

2. *U.S. Expects More Attacks in Iraq*, CNN.COM, May 6, 2004, <http://www.cnn.com/2004/world/meast/03/31/iraq.main/> (last visited Apr. 4, 2009)

3. See *id.*

4. This company was formerly known as “Blackwater USA”, and has recently again changed names, operating now as “Xe”.

5. See Jonathan Finer, Recent Development, *Holstering the Hired Guns: New Accountability Measures for Private Security Contractors*, 33 YALE J. INT’L L. 259, 259 (2008).

6. See *id.* at 260.

7. See *id.* at 259.

8. See *id.* at 259–60.

9. See *id.*

contract law.¹⁰ The United States Constitution has been essentially ignored as an avenue of recourse.¹¹ This may be reasonable when discussing acts concerning the military or Iraqi citizens. However, PSCs can also affect U.S. citizens, who are entitled to the protections of the Constitution.

This article narrows this focus to the relationship between PSCs and American citizens. Specifically, this article raises the previously unanswered question of whether PSCs, when contracting with federal or state governments, are state actors. If they are determined to be state actors, then they would be liable for violations of the Constitution, especially the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments.¹² The practical application of this determination would be whether a U.S. citizen would have recourse if a PSC, acting under contract with a state or federal government, violated that citizen's federal constitutional rights.

This article argues that PSCs should be considered state actors when carrying out obligations under contract with a state or federal government. Thus, a citizen aggrieved by a PSC in this manner would have the same methods of recourse as he or she would if an actual government actor had caused the claimed injury, including a claim under 42 U.S.C. § 1983. However, this is not necessarily a green light to sue, as the aggrieved must also have a pleadable cause of action and the prospective defendant must be subject to suit.¹³

Part I describes the use of PSCs in the Hurricane Katrina aftermath. It then discusses the controversial events regarding PSCs in Iraq. Part II serves as a refresher on the state action doctrine, discusses its various exceptions, and analyzes the case law dealing with privately contracted security guards. Part III examines the law regarding section 1983 claims and analyzes the case law applying section 1983 to privately run prisons. Part IV offers the analysis of PSCs under the state action doctrine and argues that a PSC is a state actor when performing work under government contract if it violates the federal constitutional rights of a U.S. citizen. Part V provides a brief description on how suits might proceed—or not proceed—under 42 U.S.C. § 1983 after a violation has occurred.

10. See *Finer*, *supra* note 5, at 260–63.

11. See *id.* at 261–65.

12. See, e.g., *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 929–30 (1982).

13. *Id.* at 930 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970)). See *infra* Part V for a discussion of how these requirements affect a suit against a state actor.

II. THE USE OF PRIVATE SECURITY COMPANIES IN THE UNITED STATES

This part will focus on Blackwater's presence in New Orleans after Hurricane Katrina. While this article's thesis remains hypothetical at this point, the fact that PSCs have operated within the United States, makes this thesis more of a prediction of future events than pure conjecture. It will then describe Blackwater's controversial actions in Iraq to help advance the claim that these entities and their employees do participate in actions that would be, at best, questionable if subjected to federal constitutional scrutiny. Finally, it will summarize the current lawsuits pending against Blackwater to show the lack of remedies when a PSC acts abroad. This article attempts to provide a remedy for U.S. citizens when PSCs act domestically under either state or federal contract, as was the case with Blackwater in New Orleans.

A. *The Rise of Private Security Companies*¹⁴

PSCs are nothing new, and the U.S. military has utilized private contractors since the American Revolution.¹⁵ One author notes the use of privately contracted ships outnumbered the U.S. Navy in the War of 1812.¹⁶ The use of PSCs exploded during Vietnam and has risen steadily ever since.¹⁷ One explanation is that the demilitarization after the end of the Cold War helped increase the number of PSCs.¹⁸ The current numbers are staggering. It is estimated that more than 30,000 employees of PSCs are currently in Iraq.¹⁹

14. This section is intended to give a very brief description of how the use of PSCs came about. For a much more in-depth discussion and description of how these entities operate, see generally P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003).

15. Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233, 234 (2000).

16. Finer, *supra* note 5, at 259.

17. *See id.* at 259–60; *See* Davidson, *supra* note 15, at 235.

18. E.L. Gaston, Note, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement*, 49 HARV. INT'L L.J. 221, 224 (2008).

19. JENNIFER K. ELSEA ET AL., *PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES* 3 (Cong. Research Serv., CRS Report for Congress Order Code RL32419, Aug. 25, 2008), available at <http://fas.org/sgp/crs/natsec/RL32419.pdf>.

B. *Involvement in New Orleans After Hurricane Katrina*

While Blackwater is most infamously known for its actions in Iraq, it also contracts to perform operations within the United States.²⁰ Blackwater initially deployed approximately 150 personnel to help with security after Hurricane Katrina in September 2005.²¹ This number would later swell by at least another hundred.²² Blackwater issued a press release stating that it was donating aerial support and that airlift, security, humanitarian support, and logistics and transportation services would be available.²³ However, its presence also included ground personnel, which charged the government \$950 a day per employee.²⁴ It is claimed that Blackwater was paid a total of \$73 million in less than a year in New Orleans.²⁵

However, at least for the purpose of this article, the financial aspects regarding PSCs are not as troubling as their actions. Blackwater employees were heavily armed with automatic weapons in New Orleans.²⁶ They patrolled the streets in khaki uniforms with an armband as their only identification as Blackwater employees.²⁷ They patrolled in SUVs or other vehicles, sometimes marked with the Blackwater logo, sometimes not.²⁸ They operated under contract with the Department of Homeland Security and at least some were deputized by the State of Louisiana.²⁹

While there were no incidents in New Orleans that gained the press that the incidents in Iraq did, questionable conduct still went on, this time involving—assumedly—U.S. citizens.³⁰ Scahill reports of an interview with a PSC employee who was transporting wealthy business owners in New Orleans.³¹

20. See Griff Witte, *Private Security Contractors Head to Gulf*, WASH. POST, Sept. 8, 2005, at A14.

21. See *id.*

22. JEREMY SCAHILL, *BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL MERCENARY ARMY* 325 (2007). "On September 18, Blackwater estimated that it had 250 troops deployed in the region; a number Mathews said would continue to grow." *Id.*

23. Press Release, Blackwater Tactical Weekly, Blackwater Joins Hurricane Katrina Relief Effort! (Sept. 5, 2005), available at <http://www.libertyparkusafd.org/lp/Hale/Special%20Reports%5CBlackwaterUSA%5CBlackwater%20Tactical%20Weekly.htm>.

24. See SCAHILL, *supra* note 22, at 326.

25. *Id.* at 327. So much for Blackwater's claims that "[w]e don't believe we will make a profit here" and "[i]f we break even on the security services, our company will have done a great job." *Id.* at 325.

26. *Id.* at 321–24. "[W]hat poured in fastest were guns. Lots of guns." *Id.* at 323.

27. See SCAHILL, *supra* note 22, at 321.

28. *Id.*

29. *Id.* at 324.

30. See *id.* at 327–28.

31. See *id.* at 328–29.

He claims that the “convoy came under fire,” and the employees “unleashed a barrage of bullets in the general direction of the alleged shooters.”³² While this was likely self-defense, what is more troubling was the lack of investigation by either the Army or state troopers.³³ “[T]hey didn’t even care. They just left. . . . [W]e all coordinate with each other—one family.”³⁴ This suggests that PSCs were seen as equals of state and federal actors in their law enforcement status.³⁵

Despite this, and the continued uproar over Blackwater’s presence in Iraq³⁶, its presence in New Orleans after Hurricane Katrina has been essentially ignored.³⁷ However, as Hurricane Katrina was certainly financially successful for Blackwater, there is no reason to think that domestic activity will not continue in the future.³⁸ This presents troubling state action problems that are discussed *infra*.³⁹

C. *Private Security Companies in Iraq and Controversies*

This article is applicable to all PSCs, but Blackwater Worldwide will operate as the primary example, due to its infamy in the U.S. media and its involvement in New Orleans after Hurricane Katrina. The latter establishes the fact that state governments have used—and presumably will continue to use—PSCs.⁴⁰ It is apparent in the Hurricane Katrina aftermath that PSCs are not utilized solely by the U.S. military.⁴¹ Likewise, one author notes that PSCs realize that there is potential in expanding operations within the United States: “The private security firm Blackwater is seeking to diversify its business by reaching out to U.S. state and local governments that may lack infrastructure or capacity to respond to natural disasters and terrorist attacks.”⁴² This is important for this article, as it avoids the rather complex

32. SCAHILL, *supra* note 22, at 328–29.

33. *See id.*

34. *Id.*

35. *See id.*

36. In January, 2009, the U.S. State Department announced that Blackwater’s contract to operate in Iraq would not be renewed. It is unclear, however, when Blackwater will fully withdraw its employees. *See U.S. Will Not Renew Blackwater Contract in Iraq*, REUTERS.COM, Jan 30, 2009, <http://www.reuters.com/article/GCA-GCA-iraq/idUSTRE50T73520090131>.

37. *See id.* at 330.

38. *See* Brent D. Hessel, *United Nations Update*, 15 HUM. RTS. BRIEF 53, 54 (2007).

39. *See infra* Part V.

40. *See Hessel, supra* note 38, at 54.

41. *See id.*

42. *Id.* Hessel points out that Blackwater’s effectiveness was not questioned, but its cost was. *Id.*

issues of military immunity that would arise if Blackwater was solely contracted to provide soldiers on foreign soil as a military supplement.⁴³

1. Controversial Incidents Involving Blackwater in Iraq

Blackwater's initial foray into Iraq was when it was awarded a no-bid \$27.7 million contract to provide security detail for L. Paul Bremer III, the Coalition Provisional Authority for the invasion.⁴⁴ Even after Bremer's departure, Blackwater stayed in Iraq on various security details.⁴⁵ In March 2007, *Time Magazine* reported that Blackwater had been paid \$320 million for its services in Iraq.⁴⁶ Among Blackwater's current responsibilities is providing security for the U.S. Embassy in Baghdad.⁴⁷

Several controversial incidents have marked Blackwater's tenure in Iraq. The first was the killing of four Blackwater employees in an attack by Iraqi opposition forces on March 31, 2004.⁴⁸ Their bodies were burned and hung from a bridge overlooking the Euphrates River.⁴⁹ The images were broadcast on television.⁵⁰ This has been described as "a turning point in public opinion about the war."⁵¹

The Committee on Oversight and Reform (Committee) launched an investigation into the Fallujah incident as to whether Blackwater properly trained and supplied its employees.⁵² The Committee concluded it had not.⁵³

43. Although the Justice Department's recent indictment of five Blackwater employees on manslaughter charges for their involvement in the Nissor Square massacre suggests that this area of the law is in flux. Despite this "unprecedented use of the law", it is much too early in the proceedings to determine the likelihood of conviction. Ginger Thompson and James Risen, *Plea by Blackwater Guard Helps Indict Others*, NYTIMES.COM, Dec. 8, 2008, <http://www.nytimes.com/2008/12/09/washington/09blackwater.html?ref=us>

44. See SCAHILL, *supra* note 22, at 68–69. Scahill notes that the contract was awarded after the Secret Service had assessed the situation as too dangerous for its men. *Id.* at 69.

45. See *id.* at 164–65.

46. See Brian Bennett, *Victims of an Outsourced War*, TIME.COM, Mar. 15, 2007, <http://www.time.com/time/magazine/article/0,9171,1599682,00.html>.

47. *U.S. Embassy Resumes Use of Blackwater Security*, USATODAY.COM, Sept. 21, 2007, http://www.usatoday.com/news/world/iraq/2007-09-21-iraq-blackwater_N.htm.

48. MAJORITY STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 110TH CONG., PRIVATE MILITARY CONTRACTORS IN IRAQ: AN EXAMINATION OF BLACKWATER'S ACTIONS IN FALLUJAH 4 (Comm. Print 2007), available at <http://oversight.house.gov/documents/20070927104643.pdf> [hereinafter PRIVATE MILITARY CONTRACTORS].

49. *Report: Blackwater 'Impeded' Probe into Contractors Deaths*, CNN.COM, Sept. 27, 2007, <http://www.cnn.com/2007/POLITICS/09/27/iraq.blackwater/index.html>.

50. PRIVATE MILITARY CONTRACTORS, *supra* note 48, at 4.

51. *Id.*

52. See *Id.* at 2.

Due to this finding, the Committee also concluded that “[t]hese actions raise serious questions about the consequences of engaging private, for-profit entities to engage in essentially military operations in a war zone.”⁵⁴ The Fallujah incident sparked questions about whether Blackwater is liable for injuries suffered by its own employees.⁵⁵

A much more controversial incident led to questions about Blackwater’s liability to third parties harmed by its conduct.⁵⁶ On September 16, 2007, a group of Blackwater troops were involved in a gunfire attack on Iraqi citizens in Nisour Square in Baghdad, killing seventeen while wounding twenty-four others.⁵⁷ The fallout from this incident was fierce. The Iraqi government immediately revoked Blackwater’s license to operate in Iraq.⁵⁸ The State Department official in charge of PSCs in Iraq resigned.⁵⁹ Blackwater CEO Erik Prince took a trip to Capitol Hill to face a Congressional committee.⁶⁰ In addition, an American watchdog group filed a lawsuit on behalf of the Iraqi victims’ estates.⁶¹ This incident has fueled the debate regarding Blackwater’s legality and accountability.⁶²

2. Pending Lawsuits

Blackwater currently has two lawsuits pending, both resulting from incidents that occurred in Iraq.⁶³ The first was filed by the estates of the four

53. *Id.* at 17. Among Blackwater’s shortcomings were undertaking a mission before its contract began and one that it had been previously warned about as too dangerous, not providing properly armed vehicles and weapons, and sending out a team two members short. *Id.*

54. PRIVATE MILITARY CONTRACTORS, *supra* note 48, at 17.

55. See *infra* Part II.C.2 for a description of the lawsuit stemming from the Fallujah incident brought by the victims’ estates.

56. See Paul von Zielbauer & James Glanz, *Under Siege, Blackwater Takes on Air of Bunker*, NYTIMES.COM, Oct. 25, 2007, <http://www.nytimes.com/2007/10/25/world/middle-east/25blackwater.html?hp=&pagewanted=all>.

57. *Id.*

58. *Iraq Battle Was Self-Defense, Security Firm Says*, CNN.COM, Sept. 18, 2007, <http://www.cnn.com/2007/WORLD/meast/09/17/iraq.main/index.html> [hereinafter *Iraq Battle Was Self-Defense*].

59. Zielbauer & Glanz, *supra* note 56.

60. See John M. Broder, *Chief of Blackwater Defends His Employees*, N.Y. TIMES, Oct. 3, 2007, at A8.

61. See generally Plaintiffs’ First Amended Complaint, *Abtan v. Blackwater Worldwide*, No. 1:07-cv-01831 (D.D.C. Nov. 26, 2007); see *infra* Part II.C.2 for a discussion of this lawsuit.

62. See generally Plaintiffs’ First Amended Complaint, *supra* note 61.

63. See *Nordan v. Blackwater Sec. Consulting, L.L.C.*, 382 F. Supp. 2d 801, 803 (E.D. N.C. 2005); Plaintiffs’ First Amended Complaint, *supra* note 61, at 3.

Blackwater employees killed in the Fallujah attack in March 2004.⁶⁴ The lawsuit states claims for wrongful death and fraud.⁶⁵ It was originally filed in state court and later removed to federal court.⁶⁶ The federal district court remanded it to state court.⁶⁷ The Fourth Circuit Court of Appeals held the remand unreviewable and refused to issue a writ of mandamus.⁶⁸ The United States Supreme Court denied certiorari.⁶⁹

The second lawsuit was filed by the Center for Constitutional Rights on behalf of victims of the September 2007 attack on Iraqi civilians.⁷⁰ The amended complaint claims, inter alia, violations of the Alien Tort Claims Act, wrongful death, and negligent hiring and supervision.⁷¹ Blackwater is again in a jurisdictional battle, but this time over the proper federal forum.⁷² Blackwater's motion to dismiss or transfer has yet to be ruled on.⁷³

The existence of these lawsuits shows that Blackwater is certainly not immune to suit. However, they address statutory and common law violations. The remaining question is whether Blackwater is answerable for federal constitutional violations. This may seem conjectural at this point, but its actions in Louisiana certainly foreshadow such a situation, especially given its track record in Iraq. Thus, this article will analyze Blackwater—and any other PSC in a similar situation—under the traditional state action doctrine. It will argue that Blackwater is a state actor when it contracts with the federal or state governments and is therefore answerable for any federal constitutional violations that it may inflict on U.S. citizens.⁷⁴

64. *Nordan*, 382 F. Supp. 2d at 803.

65. *Id.*

66. *Id.*

67. *Id.* at 814.

68. *In re Blackwater Sec. Consulting, L.L.C.*, 460 F.3d 576, 595 (4th Cir. 2006).

69. *Blackwater Sec. Consulting, L.L.C. v. Nordan*, 549 U.S. 1260, 1260 (2007).

70. *See Plaintiffs' First Amended Complaint*, *supra* note 61, at 18.

71. *Id.* at 14–15, 17.

72. *See Defendants' Motion to Dismiss the Amended Complaint for Lack of Venue and to Dismiss Non-Legal Entities at 1*, *Abtan v. Blackwater Worldwide*, No. 1:07-cv-01831 (D.D.C. Jan. 22, 2008). The case is currently filed in the United States District Court for the District of Columbia. *Id.* Blackwater suggests the court should dismiss the entire suit for filing in an improper venue, or alternatively, transfer to the Eastern District of Virginia. *Id.*

73. *See Court Docket*, *Abtan v. Blackwater Worldwide*, No. 1:07-cv-01831 (D.D.C. Oct. 11, 2007).

74. This is not to insinuate that PSCs automatically will act in such a way. Therefore, this analysis does remain hypothetical to a certain extent. What is more certain is that governments will continue to utilize PSCs for certain matters and that it is possible that such a claim could arise in the near future. This is especially true if PSCs continue to act outside of military operations, such as Blackwater did during the Hurricane Katrina aftermath.

III. THE DUE PROCESS CLAUSE AND STATE ACTION DOCTRINE

This part provides a description of the state action doctrine and its historical path. It then introduces the major strands of the doctrine and summarizes the seminal cases from which they sprang. It then focuses on two exceptions most pertinent to this article's discussion that PSCs will later be analyzed under:⁷⁵ The exclusive and traditional state function exception and the nexus exception. Finally, this part describes how courts have historically treated private security guards under the state action doctrine.

A. *The Origins of the State Action Doctrine*

The Fourteenth Amendment to the Constitution was passed in 1868.⁷⁶ Among other things, it promulgated that a state may not “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁷⁷ One of the first cases the Supreme Court applied this clause to was the *Civil Rights Cases*⁷⁸ in 1883.⁷⁹ In these consolidated cases, the underlying issue was whether a private entity could still enforce its racially discriminatory policies.⁸⁰ The Court held that the Amendment did not apply to private actors.⁸¹ As opposed to this private discrimination, “[i]t is State action of a particular character

75. See *infra* Part III B.

76. *Lawrence v. Texas*, 539 U.S. 558, 596 (2003) (Scalia, J., dissenting).

77. U.S. CONST. amend. XIV, § 1.

78. 109 U.S. 3 (1883).

79. *Id.* at 9. The Amendment had come up before, but under different circumstances. *United States v. Cruikshank*, 92 U.S. 542, 554 (1876). In *Cruikshank*, the Court held that the Fourteenth Amendment did not incorporate the Bill of Rights and that the Bill of Rights was only applicable to the federal government. *Id.* at 551–52. This holding, of course, has been chipped away over the years through the doctrine of selective incorporation. See *Benton v. Maryland*, 395 U.S. 784 (1969) (incorporating the Fifth Amendment freedom from double jeopardy); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (incorporating the Sixth Amendment right to trial); *Klopper v. North Carolina*, 386 U.S. 213 (1967) (incorporating the Sixth Amendment right to a speedy trial); *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating the Fourth Amendment freedom from unlawful search and seizure); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (incorporating the First Amendment's provision preventing the establishment of a religion); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (incorporating the Eighth Amendment's ban against cruel and unusual punishment); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Near v. Minnesota*, 283 U.S. 697 (1931); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (incorporating the freedoms of the First Amendment); *Gitlow v. New York*, 268 U.S. 652 (1925).

80. See *The Civil Rights Cases*, 109 U.S. at 9–11.

81. *Id.* at 11.

that is prohibited.”⁸² The Court also clarified the power given to Congress in the final section of the Amendment.⁸³ Congress has only the power “[t]o adopt appropriate legislation for correcting the effects of such prohibited state laws and state acts.”⁸⁴ That is, Congress can invalidate state action that violates the Amendment, but it cannot invalidate similar private action.⁸⁵

The debate soon centered on the definition of state action. Some state action is easily discernable, for example, an actual discriminatory state law⁸⁶ or action taken by a state employee.⁸⁷ A somewhat more difficult case is the doctrine’s application to government agencies. For example, in *Lebron v. National Railroad Passenger Corp.*,⁸⁸ the National Railroad Passenger Corporation—more popularly known as Amtrak—was held to be a government agent, thus subject to federal constitutional requirements.⁸⁹ The Court held that when “the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government.”⁹⁰ This has not been interpreted as an automatic finding that all government agencies are state actors; rather, it is a factual finding based on each specific agency’s makeup.⁹¹ For example, the Ninth Circuit held the Federal Home Loan Mortgage Corporation—Freddie Mac—not to be a state actor for due process purposes.⁹² This decision was based on

82. *Id.*

83. *Id.* The text of that section is: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5.

84. *The Civil Rights Cases*, 109 U.S. at 11.

85. *See id.* That is, it cannot invalidate discriminatory private action using the power granted to it by section five of the Fourteenth Amendment. *See id.* However, it can—and has—regulated discriminatory private action with other powers, notably its Commerce Clause power. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (affirming Congress’ power to regulate private hotel from discriminating against blacks under the Interstate Commerce Clause); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (affirming Congress’ power to regulate private restaurants under the Interstate Commerce Clause).

86. *See Palmer v. Thompson*, 403 U.S. 217, 220 (1971).

87. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984).

88. 513 U.S. 374 (1995).

89. *Id.* at 400. Amtrak was created under the Railroad Passenger Service Act of 1970. *Id.* at 383–84; *see also* 45 U.S.C. § 501 (2000), *repealed by* Act of July 5, 1994, Pub. L. No. 103–272, § 7(b), 108 Stat. 1379, 1386. *Lebron* dealt with a First Amendment issue regarding political advertising directed against the Coors family—of Coors Brewing fame. *Lebron*, 513 U.S. at 376–77.

90. *Id.* at 400.

91. *See, e.g., Am. Bankers Mortgage Corp. v. Fed. Home Loan Mortgage Corp.*, 75 F.3d 1401, 1409 (9th Cir. 1996).

92. *Id.*

the level of control the government had on the make-up of the board of directors, holding it was much less than in *Lebron*.⁹³

However, there are exceptions to the state action doctrine in certain circumstances where the private entity's actions could legitimately be attributed to the state.⁹⁴ The literature on the subject varies. One academic counts six distinct categories in which state action could be found.⁹⁵ Another names two main categories, with the second consisting of three subcategories.⁹⁶ Regardless of the nomenclature of the various exceptions, the overarching idea is the same: Under certain circumstances, a private entity will be considered a state actor.

B. *The State Action Doctrine as Applied to Private Entities*

The next section will focus on two commonly litigated exceptions that would most likely be discussed in a case involving a PSC: the exclusive and traditional public function exception and the nexus exception.

1. Traditional and Exclusive Governmental Functions

One area that will subject a private actor to the state action doctrine is when that actor is performing a traditional state function.⁹⁷ This exception has been narrowed to include only those functions which are "traditionally the exclusive prerogative of the State."⁹⁸ This exception has its beginning in the White Primary Cases, a collection of Supreme Court rulings dealing with

93. *Id.* at 1407–09. In an interesting dichotomy, while Freddie Mac is not a government actor for state action purposes, a federal district court has held that it is a government actor for immunity purposes. See *Paslowski v. Standard Mortgage Corp. of Ga.*, 129 F. Supp. 2d 793, 800–01 (W.D. Pa. 2000).

94. See generally G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333 (1997).

95. *Id.* at 344. Professor Buchanan claims the following six situations came about, albeit some of them indirectly, from the *Civil Rights Cases* decision: Public Function, State Nexus, Beyond-State-Authority, Projection-of-State-Authority, State Authorization, and State Inaction. *Id.* at 344–53.

96. See Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302 (1995). Professor Krotoszynski claims the two main categories are whether the actor is a state agency and whether the actor has sufficient contacts with the state. *Id.* at 306, 314. The "contacts" category is further broken down into: exclusive government functions, symbiotic relationships, and the nexus test. *Id.*

97. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).

98. *Id.* at 353.

the denial of black citizens' right to vote in state primary elections.⁹⁹ To synthesize, the Court held that although the Democratic Party of Texas, a private entity, was responsible for the questioned elections, the elections were ultimately regulated by state law.¹⁰⁰ Thus, the Democratic Party was answerable for its violations of the Fourteenth and Fifteenth Amendments when it excluded black citizens on the basis of race.¹⁰¹ This was later extended to a private organization known as the Jaybird Democratic Association, which claimed it was a completely private and voluntary organization, not a state-regulated political party.¹⁰² The Court so held that "[t]he Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county."¹⁰³

The Court added another situation to the public function prong in *Marsh v. Alabama*.¹⁰⁴ In *Marsh*, the plaintiff was a Jehovah's Witness claiming a violation of her First Amendment freedoms of press and religion.¹⁰⁵ The defendant was a corporately owned town which claimed it had no federal constitutional liability.¹⁰⁶ The Court held the city liable, noting that "[o]wnership does not always mean absolute dominion."¹⁰⁷ It further reasoned that the city's actions, by opening up its property for public use and then regulating it, resulted in it being a traditional public function.¹⁰⁸

The public function exception was further discussed in *Flagg Bros. v. Brooks*.¹⁰⁹ In *Flagg Bros.*, the Court held that a firm executing a lien sale pursuant to statute was not an exclusive traditional state function, although it is usually thought to be a sheriff's duty.¹¹⁰ The Court noted that "[c]reditors and debtors have had available to them historically a far wider number of choices than has one who would be an elected public official, or a member of Jehovah's Witnesses who wished to distribute literature in Chickasaw, Ala.,

99. See *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

100. See *Smith*, 321 U.S. at 663–64; *Condon*, 286 U.S. at 89.

101. See *Smith*, 321 U.S. at 666; *Condon*, 286 U.S. at 89.

102. *Terry*, 345 U.S. at 462–63.

103. *Id.* at 469.

104. 326 U.S. 501, 506 (1946).

105. *Id.* at 504.

106. *Id.* at 502.

107. *Id.* at 506.

108. *Id.* The Court likened this to private companies that build and operate bridges, ferries, and roadways. *Marsh*, 326 U.S. at 506. "Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation." *Id.*

109. 436 U.S. 149 (1978).

110. *Id.* at 161–62.

at the time *Marsh* was decided.”¹¹¹ Due to the variety of options, creditors and debtors had to solve their dispute; the Court held that the lien sale was not a function exclusive to the state.¹¹² It also noted that there were several areas that would be better suited to the extension of the exception before creditor rights: “Among these are such functions as education, fire and police protection, and tax collection.”¹¹³ The Court only mentioned these as possibilities and of course, declined to rule on any of them.¹¹⁴

2. Nexus/Entanglement

This section will attempt to synthesize the line of cases that address private action that is not a traditional government function, but yet involves such close activity with the state that the entity’s behavior can be attributed to the state. Nomenclature of this prong varies, with terms such as “joint activity,” “nexus,” “entanglement,” and “symbiotic relationship” being used in cases. However, the underlying premise is that the state and private actor have such a close relationship that the line between them becomes blurred.

a. *Private Action That Is State Action*

In *Burton v. Wilmington Parking Authority*,¹¹⁵ the Court held that the symbiotic relationship between a restaurant and a parking structure operated by the State was sufficiently close to require the restaurant to meet the mandates of the Fourteenth Amendment.¹¹⁶ *Burton* involved a privately-owned restaurant that refused to serve the plaintiff, who was black.¹¹⁷ The restaurant was located on the ground floor of a publicly owned parking lot, and it leased its business space from the operating state agency.¹¹⁸ The State used the proceeds from the lease to help with the financing of and payment for the structure.¹¹⁹ The lease provided that the State would include certain utilities and be responsible for most repairs.¹²⁰ In addition, the restaurant enjoyed a

111. *Id.* at 162.

112. *Id.* at 163. “[E]ven if we were inclined to extend the sovereign-function doctrine outside of its present carefully confined bounds, the field of private commercial transactions would be a particularly inappropriate area into which to expand it.” *Id.*

113. *Flagg Bros.*, 436 U.S. at 163.

114. *Id.* at 163–64.

115. 365 U.S. 715 (1961).

116. *See id.* at 716, 726.

117. *Id.* at 716.

118. *Id.*

119. *See id.* at 719.

120. *See Burton*, 365 U.S. at 720.

public tax exemption for any improvements to the property that would be considered fixtures.¹²¹ Signs hung from the structure stating its public nature and the state and national flags flew above it.¹²²

The Court considered the fact that this set-up was mutually beneficial to both parties; the restaurant's patrons had a convenient place to park, and the State profited from their use of the structure.¹²³ The Court attempted to narrow its holding by recognizing that "a multitude of relationships might appear to some to fall within the Amendment's embrace" and by insisting that this is to be a factual inquiry.¹²⁴ In this case, the Court emphasized that the State went further than mere acquiescence to the discrimination; it instead "elected to place its power, property and prestige behind the admitted discrimination."¹²⁵ Based on the above factors, the Court found that by the mutual benefits conferred between the State and the restaurant, "[t]he State [had] so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity."¹²⁶

In *Reitman v. Mulkey*,¹²⁷ the Court addressed an amendment to the California Constitution banning the State from regulating discrimination in property transactions except in those transactions where the State was the property owner.¹²⁸ Among its effects, the amendment nullified two state civil statutes penalizing discrimination in housing transactions.¹²⁹ California argued that it was simply taking a neutral position to private housing discrimination.¹³⁰ The Court disagreed, stating that the amendment "changed the situation from one in which discrimination was restricted 'to one wherein it is encouraged, within the meaning of the cited decisions.'"¹³¹ Thus, the State was now "'at least a partner in the instant act of discrimination'"¹³² The Court explained that by enacting the amendment, the State went beyond repeal of the civil provisions.¹³³ Instead of relying on mere "personal choice"

121. *Id.* at 719.

122. *Id.* at 720.

123. *Id.* at 724.

124. *Id.* at 726.

125. *Burton*, 365 U.S. at 725. The Court also recognized the irony "that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race." *Id.* at 724.

126. *Id.* at 725.

127. 387 U.S. 369 (1967).

128. *See id.* at 370-71.

129. *See id.* at 372.

130. *See id.* at 376.

131. *Id.* at 375.

132. *Reitman*, 387 U.S. at 375.

133. *See id.* at 377.

to discriminate, one “could now invoke express constitutional authority” to do so.¹³⁴ This led the Court to conclude that the State had “significantly involved itself with invidious discriminations” and that this state action violated the Fourteenth Amendment.¹³⁵

In *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*,¹³⁶ the Court held that a high school athletic association was a state actor when enforcing its rules against member schools.¹³⁷ Although the Association was comprised of both public and private high schools, the Court held that the “pervasive entwinement” between the Association and public high school officials required a finding of state action.¹³⁸ Examples of this entwinement included: the fact that each member-school was represented by a faculty or administration member acting within his or her scope of duty, that meetings were often held during school hours, and that the schools provided a small part of the Association’s funding.¹³⁹ There was a financial relationship between the public schools and the Association as well.¹⁴⁰ In exchange for the services the Association provided in scheduling and regulating athletic events within the state, it received dues from the member-schools and a portion of the sales generated by the events.¹⁴¹ Not only were the public officials involved in the Association, they overwhelmingly performed “all but the purely ministerial acts by which the Association exists and functions in practical terms.”¹⁴²

The Court referred to this presence of public school officials as “bottom up” entwinement.¹⁴³ It also found what it termed “top down” entwinement.¹⁴⁴ The Court noted that State Board of Education members were assigned to

134. *Id.*

135. *Id.* at 376, 380–81.

136. 531 U.S. 288 (2001).

137. *See id.* at 290–91.

138. *Id.* at 291. The Court noted that 84% of the member-schools are public, and that the 16% which are private prevent “this entwinement of the Association and the public school system from being total and their identities totally indistinguishable.” *Id.* at 299–300. The dissent was unimpressed with “entwinement” as the basis of the majority’s holding. *Id.* at 305 (Thomas, J., dissenting) (“We have never found state action based upon mere ‘entwinement.’”).

139. *See Brentwood*, 531 U.S. at 299. “Although the findings and prior opinions in this case include no express conclusion of law that public school officials act within the scope of their duties when they represent their institutions, no other view would be rational . . .” *Id.*

140. *See id.*

141. *See id.*

142. *Id.* at 300.

143. *Brentwood*, 531 U.S. at 300.

144. *Id.*

serve on the board of control and legislative council.¹⁴⁵ It also considered the fact that the Association's ministerial employees were considered state employees for purposes of the state retirement system.¹⁴⁶ The Court found the sum result of these two forms of entwinement "unmistakable" and "overwhelming," and that the evidence presented required the Association to be considered a state actor.¹⁴⁷

b. *Private Action That Is Not State Action*

The Court has drawn boundaries to ensure that a state and a private entity may interact without the private entity automatically becoming a state actor. In *Moose Lodge No. 107 v. Irvis*,¹⁴⁸ the Court held that a private social club did not become a state actor by virtue of its liquor license obtained from the state liquor board.¹⁴⁹ Likewise, the State was not liable for the club's racial discriminatory policies in so licensing them.¹⁵⁰ The Court held that this case presented "nothing approaching the symbiotic relationship between lessor and lessee that was present in *Burton*," noting that "while Eagle was a public restaurant in a public building, Moose Lodge is a private social club in a private building."¹⁵¹ In analyzing the relationship between the licensing board and the club, the Court noted that the board "plays absolutely no part in establishing or enforcing the membership or guest policies of the club."¹⁵² The board's regulatory scheme was to keep track of the number of licenses in a given jurisdiction and to regulate their use, and "cannot be said to in any way foster or encourage racial discrimination."¹⁵³ Thus, the State could not be held in joint activity with the private club and the club's discriminatory policies did not constitute state action.¹⁵⁴

However, the Court did enjoin the enforcement of one provision of the board's regulations that required "[e]very club licensee shall adhere to all of the provisions of its Constitution and By-Laws."¹⁵⁵ It reasoned that this

145. *Id.*

146. *Id.*

147. *Id.* at 302.

148. 407 U.S. 163 (1972).

149. *See id.* at 177, 179.

150. *Id.* at 175-77.

151. *Id.* at 175 (emphasis added).

152. *Id.*

153. *Irvis*, 407 U.S. at 176-77.

154. *See id.* at 177.

155. *Id.*

would be state enforcement of the Lodge's discriminatory policy if it were to discipline the Lodge for violating its own policy of racial discrimination.¹⁵⁶

These standards were again tested in *National Collegiate Athletic Ass'n (NCAA) v. Tarkanian*,¹⁵⁷ with the Court holding that the NCAA is not a state actor.¹⁵⁸ The University of Nevada, Las Vegas (UNLV), had disciplined its basketball coach Jerry Tarkanian after an investigation and recommendation by the NCAA.¹⁵⁹ Tarkanian filed suit against both UNLV and the NCAA alleging due process violations in his termination.¹⁶⁰

The Court held that UNLV, as a public university, is clearly a state actor.¹⁶¹ The remaining question was whether, through UNLV's compliance with NCAA rules and recommendations, the NCAA had transformed into a state actor as well.¹⁶² The Court answered this in the negative.¹⁶³ The Court rejected the argument that the NCAA was involved in state action because UNLV adopted the NCAA's governing rules or because UNLV had a small level of involvement in drafting them.¹⁶⁴ It concluded that "the source of the legislation adopted by the NCAA is not Nevada but the collective membership, speaking through an organization that is independent of any particular State."¹⁶⁵ Lastly, the Court disagreed that UNLV had delegated its power to the NCAA, noting that the entities were really adversaries in this transaction.¹⁶⁶ The Court summed up the relationship by stating "[i]t would be more appropriate to conclude that UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law."¹⁶⁷

156. *See id.* at 178–79.

157. 488 U.S. 179 (1988).

158. *See id.* at 199.

159. *Id.* at 180–81. The Court described the NCAA's findings as "38 violations of NCAA rules by UNLV personnel, including 10 involving Tarkanian." *Id.* at 181. As for discipline by the NCAA, it had placed the program on probation for two years and threatened further sanctions if Tarkanian was not dismissed. *Id.*

160. *Tarkanian*, 488 U.S. at 181.

161. *Id.* at 192.

162. *Id.* at 193.

163. *Id.* at 195.

164. *See id.*

165. *Tarkanian*, 488 U.S. at 193. In a footnote, the Court suggested that it may have required a different analysis if the NCAA were made up of only schools within a single state. *Id.* at 193 n.13.

166. *Id.* at 196. The Court said that in disciplinary investigations, the NCAA is an adversary of the institution being investigated, as it is looking out for the interests of all the other member institutions. *Id.* It likened this to a state-paid public defender representing a client against the state. *Id.*

167. *Tarkanian*, 488 U.S. at 199.

C. *Privately-Contracted Security Guards and the State Action Doctrine*

With this background, this section will show how private security guards have been treated under the exceptions to the state action doctrine. Whether a State's police power is an exclusive and traditional government function remains untested by the United States Supreme Court.¹⁶⁸ This section briefly describes the available case law on the subject. It focuses on the police power delegated to private security guards and the results courts have reached in such scenarios.

The Supreme Court's decision in *Griffin v. Maryland*¹⁶⁹ involved a claim that a private security guard enforced an amusement park's racially discriminatory policy.¹⁷⁰ However, this particular guard was a deputized sheriff by the state and wore a badge stating this.¹⁷¹ He nonetheless remained under control of the park as to his duties.¹⁷² The Court noted that the guard "purported to exercise the authority of a deputy sheriff."¹⁷³ Furthermore, the Court also noted that "[i]f an individual is possessed of state authority and purports to act under that authority, his action is state action."¹⁷⁴ Thus, the guard's actions constituted state action in violation of the Equal Protection Clause.¹⁷⁵

While the Supreme Court has not revisited this particular issue, the *Griffin* holding and the *Flagg* dicta which specifically listed "police protection" as an example of a possible exclusive governmental function have provided guidance for lower courts deciding this issue.¹⁷⁶ The cases turn on the amount of authority delegated to the private security guards by the state.¹⁷⁷ The Seventh Circuit Court of Appeals perhaps described the necessary factors best in *Wade v. Byles*.¹⁷⁸ In *Wade*, a private security guard at a housing project was involved in an altercation that ended in the guard shooting the

168. See *Flagg Bros. v. Brooks*, 436 U.S. 149, 163–64 n.14 (1978).

169. 378 U.S. 130 (1964).

170. See *id.* at 131.

171. *Id.* at 132.

172. *Id.*

173. *Id.* at 135.

174. *Griffin*, 378 U.S. at 135.

175. See *id.* at 137.

176. *Flagg Bros. v. Brooks*, 436 U.S. 149, 163–64 (1978); see also *Griffin*, 378 U.S. at 137. The following cases are not intended to provide a complete overview of the case law by any means, but instead were selected as examples of how the lower courts have decided the issue. See, e.g., *Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629 (6th Cir. 2005); *Payton v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 184 F.3d 623 (7th Cir. 1999); *Wade v. Byles*, 83 F.3d 902 (7th Cir. 1996).

177. *Romanski*, 428 F.3d at 640; *Payton*, 184 F.3d at 627; *Wade*, 83 F.3d at 905.

178. See 83 F.3d at 902, 905.

plaintiff.¹⁷⁹ The court stated that the powers granted to the defendant, including carrying a weapon, arresting trespassers until the police arrived, and shooting in self-defense, while perhaps traditionally reserved to the state, are not exclusively reserved to the state.¹⁸⁰ Based on this, the court held that the defendant “was not a state actor when he [fired the] shot.”¹⁸¹

Three years later, the Seventh Circuit confronted a factually different claim in *Payton v. Rush-Presbyterian-St. Luke’s Medical Center*,¹⁸² and found the security guard to be a state actor.¹⁸³ In *Payton*, the security guard was stationed at a hospital, but he was also a “special police officer” under city ordinance.¹⁸⁴ As such, he was required to wear an issued badge and “conform to and be subject to all rules and regulations governing police officers of the city.”¹⁸⁵ The guard was granted broad authority by the ordinance: “[They] shall possess the powers of the regular police patrol at the places for which they are respectively appointed or in the line of duty for which they are engaged.”¹⁸⁶ The court held that this broad authority included functions traditionally and “exclusively reserved to the state.”¹⁸⁷ It found most distinctive the fact that the guards were not confined to a specific area nor were they limited in their arrest power as was the guard in *Wade*.¹⁸⁸ Finding “no legal difference exists between a privately employed special officer with full police powers and a regular Chicago police officer,” the court held that the guards were participating in state action.¹⁸⁹

In *Romanski v. Detroit Entertainment, L.L.C.*,¹⁹⁰ the Sixth Circuit Court of Appeals held that private casino security guards were state actors, citing heavily to the Seventh Circuit’s decisions.¹⁹¹ *Romanski* involved a casino patron detained by the casino’s security guards for several hours because she

179. *Id.* at 903. The defendant worked for a security company hired by the complex. *Id.* The company was also named as a defendant in this action. *Id.*

180. *Id.* at 906.

181. *Wade*, 83 F.3d at 907. “If Wade’s allegations are true, he may very well have a cognizable tort claim, but it is not one of constitutional dimension.” *Id.*

182. 184 F.3d 623 (7th Cir. 1999).

183. *Id.* at 630.

184. *Id.* at 624–25.

185. *Id.* at 625 (quoting CHI., ILL., CODE OF ORDINANCES § 4-340-100 (2008)).

186. *Id.* (quoting CHI., ILL., CODE OF ORDINANCES § 4-340-100 (2008)).

187. *Payton*, 184 F.3d at 630.

188. Compare *id.*, with *Wade v. Byles*, 83 F.3d 902, 906 (7th Cir. 1996). “[C]itizen’s arrests and the rights to carry handguns and use them in self-defense are available to individuals outside of the law enforcement community.” See *Payton*, 184 F.3d at 629 (citing *Wade*, 83 F.3d at 906).

189. *Id.* at 630.

190. 428 F.3d 629 (6th Cir. 2005).

191. *Id.* at 640.

took a token from an unoccupied slot machine.¹⁹² As in *Payton*, a statute—this time a state statute, not a city ordinance—gave special police authority to the security guards.¹⁹³ This authority included “the authority to arrest a person without a warrant as set forth for public peace officers.”¹⁹⁴ However, the arrest must occur on casino property, thus, the Michigan statute seems narrower than the Chicago ordinance in *Payton*, which had no such limitation.¹⁹⁵ Nonetheless, the court held that “[w]here private security guards are endowed by law with plenary police powers such that they are *de facto* police officers, they may qualify as state actors under the public function test.”¹⁹⁶ Based on the statute and the arrest powers of the guards, the court concluded the police power the guards were given was the exclusive and traditional power of the state, and the guards were therefore state actors.¹⁹⁷

IV. SECTION 1983 AND THE STATE ACTION DOCTRINE

While this article has thus far focused on the state action doctrine and its exceptions, this Part will discuss 42 U.S.C. § 1983. Section 1983 has proven an important tool for plaintiffs seeking remedies for federal constitutional violations and would likely be part of a claim against a PSC, as many of the state action cases discussed *supra* involved section 1983 claims.¹⁹⁸ This Part will examine the history of section 1983 and briefly describe its requirements and limits. It will also describe the availability of a *Bivens* action, a judicially created right that acts as the federal counterpart to a sec-

192. *Id.* at 632–33. It probably did not help the defendants’ case that the patron was a seventy-two year old woman and the token she took from the machine was worth five cents. *Id.* at 632.

193. *See id.* at 633; *see also* MICH. COMP. LAWS § 338.1080 (2008).

194. *Romanski*, 428 F.3d at 633 (quoting MICH. COMP. LAWS § 338.1080).

195. *Compare* MICH. COMP. LAWS § 338.1080, *and Romanski*, 428 F.3d at 633, *with* CHI., ILL., CODE OF ORDINANCES § 4-340-100 (2008), *and Payton v. Rush-Presbyterian-St. Luke’s Med. Ctr.*, 184 F.3d 623, 628 (7th Cir. 1999). The ordinance in *Payton* allowed the guards “to ‘do special duty at any fixed place in the city, or at any place necessary for protection of persons, passengers and property.’” *Payton*, 184 F.3d at 628 (quoting CHI., ILL., CODE OF ORDINANCES § 4-340-030).

196. *Romanski*, 428 F.3d at 637 (citing *Payton*, 184 F.3d at 630; *Henderson v. Fisher*, 631 F.2d 1115, 1117–18 (3d Cir. 1980) (*per curiam*); *Rojas v. Alexander’s Dep’t Store, Inc.*, 654 F. Supp. 856, 857 (E.D.N.Y. 1986)).

197. *Id.* at 640 (citing and quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)).

198. *See, e.g.*, *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 293 (2001); *NCAA v. Tarkanian*, 488 U.S. 179, 181–82 (1988); *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 165 (1972).

tion 1983 action.¹⁹⁹ The relationship between the “state action” requirement of the Due Process Clause and the section 1983 requirement of “acting under color of state law” will then be discussed. Finally, this Part will analyze cases involving section 1983 claims against privately run prisons, which will serve as a basis for comparison to PSCs in Part V.

A. *A Brief Background of Section 1983 and Its Relationship to the State Action Doctrine*

Section 1983 of title 42 of the *United States Code* was originally passed as part of the Civil Rights Act of 1871 and later codified to its present state.²⁰⁰ The statute states that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .²⁰¹

The statute’s main purpose is to provide redress for violations of the Fourteenth Amendment.²⁰² In order to plead a cognizable claim under § 1983, a plaintiff must show two elements: that he or she was deprived of a right guaranteed “by the ‘Constitution and laws,’” and that the defendant was acting “‘under color of law.’”²⁰³ Among other relief, a successful § 1983 claim provides for reasonable attorney’s fees to the plaintiff.²⁰⁴

Section 1983 and the state action doctrine are related, but are doctrinally different when considering private parties.²⁰⁵ In order to be liable under § 1983, a private party must be acting “under color of state law.”²⁰⁶ To fall within the confines of the Fourteenth Amendment, a private party must meet

199. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 407–08 (1971) (Harlan, J., concurring).

200. See, e.g., *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

201. 42 U.S.C. § 1983 (2000).

202. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 934 (1982) (quoting *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 545 (1972)).

203. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970).

204. 42 U.S.C. § 1988(b) (2006).

205. See *Lugar*, 457 U.S. at 928 n.8.

206. *Id.* at 935.

one of the exceptions to the state action doctrine.²⁰⁷ In *Lugar v. Edmondson Oil Co.*,²⁰⁸ the Court analyzed the relationship between the two standards.²⁰⁹ The *Lugar* Court held that if state action was found to be present, then the “acting under color of state law” requirement of § 1983 would be satisfied as well.²¹⁰ It is important to note that the converse of this rule is not necessarily true; that is, not all valid § 1983 “acting under color of law” claims automatically equate state action for the purposes of the Fourteenth Amendment.²¹¹

One more facet of § 1983 must be mentioned. Section 1983 applies to those only under color of *state* law.²¹² It is silent to federal actors.²¹³ In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,²¹⁴ the Court found an implied cause of action for damages for certain constitutional violations by federal actors.²¹⁵ While the initial *Bivens* decision was limited to a violation of the Fourth Amendment,²¹⁶ it has been extended to violations of the Fifth and Eighth Amendments.²¹⁷ However, the Court has stressed the extraordinariness of *Bivens* as a remedy, noting that the only circumstances in which it has been used are when individual actors violated one’s constitutional rights and there was no alternative remedy for the violation.²¹⁸ The

207. *See id.* at 926.

208. 457 U.S. 922 (1982).

209. *See id.*

210. *Lugar*, 457 U.S. at 942. “[P]etitioner was deprived of his property through state action; respondents were, therefore, acting under color of state law in participating in that deprivation.” *Id.* The Court also commented on the inequity that would result if “state action” was not held to equate to “color of law” for § 1983 purposes:

To read the “under color of any statute” language [sic] of the Act in such a way as to impose a limit on those Fourteenth Amendment violations that may be redressed by the § 1983 cause of action would be wholly inconsistent with the purpose of § 1 of the Civil Rights Act of 1871, 17 Stat. 13, from which § 1983 is derived.

Id. at 934.

211. *Id.* at 935 n.18; *see also* *Pino v. Higgs*, 75 F.3d 1461, 1464 (10th Cir. 1996); 15 AM. JUR. 2D CIVIL RIGHTS § 73 (2000 & Supp. 2008).

212. 42 U.S.C. § 1983 (2006) (emphasis added).

213. *See id.*

214. 403 U.S. 388 (1971).

215. *See id.* at 396–97.

216. *See id.* at 397.

217. *See, e.g.,* *Carlson v. Green*, 446 U.S. 14, 17–18 (1980) (finding a *Bivens* action for a violation by federal actors of the Cruel and Unusual Punishment Clause of the Eighth Amendment); *Davis v. Passman*, 442 U.S. 228, 229–30 (1979) (finding a *Bivens* action for a violation by federal actors of the Due Process Clause of the Fifth Amendment). *But see* *Bush v. Lucas*, 462 U.S. 367, 390 (1983) (declining to extend *Bivens* to a First Amendment violation).

218. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001).

two extensions mentioned above are the only two times the Court has found both factors met.²¹⁹

B. *Privately-Run Prisons and § 1983*

This section will analyze the treatment of privately-run prisons under § 1983. The phenomenon of privatizing state and federal prisons provides a workable analogy to that of privatizing the military in the form of PSCs.²²⁰ In both cases, private actors are delegated a certain amount of authority to control others. One such private actor is Corrections Corporation of America (CCA).²²¹ CCA, now a publicly traded company, claims it is the nation's largest provider of jail, detention and corrections services to governmental agencies with 75,000 total inmates²²² in nineteen states and the District of Columbia.²²³ It also contends that these figures make it the fourth largest correctional system in the United States, behind the federal prison system and those of two states.²²⁴

Privately-run prisons are not a new invention; rather, they have been in use since the nation's founding.²²⁵ Both federal and state governments currently utilize these facilities.²²⁶ However, private prisons under contract with the federal government have been treated slightly different than private prisons under contract with a state government for state action and § 1983 liability purposes.

219. *Id.* "In 30 years of *Bivens* jurisprudence we have extended its holding only twice" *Id.*

220. See Corrections Corporation of America, <http://www.correctionscorp.com/about> (last visited Apr. 4, 2009) [hereinafter CCA].

221. *Id.*

222. *Id.*

223. Corrections Corporation of America, CCA Facility Locations, <http://www.correctionscorp.com/facilities/> (last visited Apr. 4, 2009).

224. CCA, *supra* note 220.

225. Rachel Christine Bailie Antonuccio, Note, *Prisons for Profit: Do the Social and Political Problems Have a Legal Solution?*, 33 J. CORP. L. 577, 582–83 (2008).

226. *Id.* One author argues that while the use of private prisons by individual states has begun to decrease, the federal government's use of these entities has significantly increased over the past decade. Matthew T. Tikonoff, Note, *A Final Frontier in Prison Litigation: Does Bivens Extend to Employees of Private Prisons Who Violate the Constitution?*, 40 SUFFOLK U. L. REV. 981, 985–87 (2007). This is attributed to the crackdown on federal drug crimes as well as the increase in detainees after 9/11. *Id.* at 986–87.

1. Section 1983 Claims Against Private Prisons Housing State Prisoners

In *Richardson v. McKnight*,²²⁷ the State of Tennessee had contracted with a private corporation to house inmates.²²⁸ Two private guards claimed immunity from alleged § 1983 violations.²²⁹ The Court held that qualified immunity did not extend to employees of private prisons.²³⁰ It did not expressly rule on whether the guards' actions were considered those of a state actor, but ordered the lower court to decide this on standard state action precedent.²³¹ Justice Rehnquist's dicta in another case suggested that the claim would be valid: "[T]he private facility in question housed *state* prisoners—prisoners who already enjoy a right of action against private correctional providers under 42 U.S.C. § 1983."²³²

Several courts have agreed with Justice Rehnquist and have not only held that § 1983 is available, but also that privately-run prisons under state contract have satisfied the "under color of law" requirement.²³³ In fact, the Sixth Circuit held this as early as 1991, well before the quoted dicta in *Correctional Services Corp. v. Malesko*²³⁴ appeared.²³⁵ In so holding, the court appeared to consider both the public function and the nexus exceptions to the state action doctrine.²³⁶ The Fifth Circuit later agreed after *Richardson*: "[c]learly, confinement of wrongdoers—though sometimes delegated to pri-

227. 521 U.S. 399 (1997).

228. *Id.* at 402.

229. *Id.* at 401–02; *see also* Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982) (holding that qualified immunity under § 1983 "is available only to [state] officials performing discretionary functions").

230. *Richardson*, 521 U.S. at 412. The dissent vigorously disagreed, noting:

Today's decision says that two sets of prison guards who are indistinguishable in the ultimate source of their authority over prisoners, indistinguishable in the powers that they possess over prisoners, and indistinguishable in the duties that they owe toward prisoners, are to be treated quite differently in the matter of their financial liability.

Id. at 422 (Scalia, J., dissenting).

231. *Id.* at 413–14.

232. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72 n.5 (2001). *But see* Holly v. Scott, 434 F.3d 287, 292 n.3 (4th Cir. 2006) ("It is an open question in this circuit whether § 1983 imposes liability upon employees of a private prison facility under contract with a state. We need not decide that issue here.").

233. *See, e.g.,* Skelton v. Pri-Cor, Inc., 963 F.2d 100, 102 (6th Cir. 1991) (per curiam).

234. 534 U.S. at 61.

235. *Skelton*, 963 F.2d at 102.

236. *See id.* "As a detention center, Pri-Cor is no doubt performing a public function traditionally reserved to the state." *Id.* "'There is a sufficiently close nexus between the State and the challenged action of [Pri-Cor] so that the action of the latter may be fairly treated as that of the State itself.'" *Id.* (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974)).

vate entities—is a fundamentally governmental function.”²³⁷ The Tenth Circuit has at least suggested the same in dicta.²³⁸

2. *Bivens* Claims Against Private Prisons Housing Federal Prisoners

The Court was more restrictive of a federal prisoner’s rights against a privately-run prison.²³⁹ In *Malesko*, the Court held that *Bivens* actions were unavailable to a federal prisoner against a private corporation.²⁴⁰ This was due, in part, to the fact that the prisoner would not have been able to file an action against anyone but the individual if it were a federally-run prison.²⁴¹ The Tenth Circuit held that *Malesko* barred a *Bivens* action against an employee as well as a privately-run prison itself.²⁴² In *Holly v. Scott*,²⁴³ the Fourth Circuit agreed, noting that the plaintiff had other options under state law.²⁴⁴ On the other hand, some federal district courts have read *Malesko* more broadly and allowed *Bivens* actions against the individual employees.²⁴⁵ No circuit has joined this view to date.

V. PRIVATE SECURITY COMPANIES AND THE STATE ACTION DOCTRINE

The state action doctrine has remained untested against PSCs under contract with the federal or state governments. In *Gantt v. Security, USA, Inc.*,²⁴⁶ the plaintiff claimed that Security, USA, a PSC, violated her Fifth Amendment rights after informing the company of a protective order against her ex-boyfriend.²⁴⁷ She claimed that she needed to remain indoors and se-

237. *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003) (*per curiam*).

238. *See Peoples v. CCA Det. Ctrs.*, 422 F.3d 1090, 1111 (10th Cir. 2005) (Ebel, J., concurring in part, dissenting in part), *vacated en banc*, 449 F.3d 1097 (10th Cir. 2006). While this appears only in a concurrence in part, Judge Ebel was using this as an example of the asymmetry between § 1983 and *Bivens* in private prison settings. *See id.* He does not suggest that there is any question that the § 1983 claim is available. *See id.*

239. *See Malesko*, 534 U.S. at 71–72.

240. *Id.*

241. *Id.* at 72. “The prisoner may not bring a *Bivens* claim against the officer’s employer, the United States, or the BOP. With respect to the alleged constitutional deprivation, his only remedy lies against the individual . . .” *Id.*

242. *Peoples*, 422 F.3d at 1108.

243. 434 F.3d 287 (4th Cir. 2006).

244. *Id.* at 296–97.

245. *See Jama v. INS*, 343 F. Supp. 2d 338, 362–63 (D.N.J. 2004); *Purkey v. CCA Det. Ctr.*, 339 F. Supp. 2d 1145, 1149–51 (D. Kan. 2004); *Sarro v. Cornell Corr., Inc.*, 248 F. Supp. 2d 52, 63 (D.R.I. 2003).

246. 356 F.3d 547 (4th Cir. 2004).

247. *Id.* at 549.

cure, but the company forced her to work outdoors, where she was kidnapped at gunpoint and raped.²⁴⁸ The court noted that there was no evidence to show that Security, USA was anything but a private company.²⁴⁹

Under this article's analysis, the PSCs will be operating under contract with either the federal or a state government; a factor not present in *Gantt*. While *Gantt* may stand for the principle that a PSC standing alone is not a state actor/PSCsr, when it operates under governmental contract for the purpose for governmental security or related objectives, the analysis changes dramatically.²⁵⁰ This part will analyze whether a PSC meets one of the exceptions to the state action doctrine and is therefore liable for constitutional violations. It argues that a court could find that a PSC is a state actor under either the "public function" or the "symbiotic relationship" exception to the state action doctrine.

A. *PSCs Under the Public Function Test*

The first argument that a potential plaintiff could make is that providing security for United States citizens is an exclusive and traditional government function. If this is an exclusive and traditional government function, then the PSC would be liable as a state actor if it violates one's federal constitutional rights when contracting with a state or federal government to provide services.

The best way for a potential plaintiff to frame an argument is to compare PSCs, such as Blackwater, to private security guards that have been held as state actors. The plaintiff could also point to the dicta from *Flagg Bros.*, which specifically listed "police protection" as an example of a possible exclusive governmental function.²⁵¹ However, the *Flagg Bros.* Court specifically pointed out that it was not ruling on the matter, and it never had ruled on whether police protection was a traditional and exclusive governmental function.²⁵² Thus, the plaintiff would be left to distinguish PSCs based substantially on the case law from the lower courts.

In *Griffin*, the Supreme Court held that a deputized security guard, who used the appearance of police authority at a private amusement park, was a state actor.²⁵³ *Wade* held that a private security guard, who only had the power to carry a gun and arrest trespassers until the police came inside the

248. *Id.* at 550–51.

249. *Id.* at 552.

250. *See generally id.*

251. *Flagg Bros. v. Brooks*, 436 U.S. 149, 163 (1978).

252. *Id.* at 163–64 n.14.

253. *Griffin v. Maryland*, 378 U.S. 130, 135 (1964).

apartment complex, was not a state actor.²⁵⁴ The courts in *Payton* and *Romanski* found state action by private security guards, but only in the presence of a broad statutory grant of authority.²⁵⁵

The Blackwater employees in New Orleans were deputized by the State of Louisiana, which carried with it the power to make arrests and use force.²⁵⁶ They wore Louisiana law enforcement badges around their necks and were allowed to carry loaded weapons.²⁵⁷ This deputization by the state governor would likely prove analogous to the delegation of police power by ordinance in *Payton* and by state statute in *Romanski*.²⁵⁸ The authority goes beyond what was given to the guard in *Wade*.²⁵⁹ There were no similar limitations on location or arrest power.²⁶⁰ A court would most likely find that a PSC was a state actor in a Katrina-like scenario.

In addition, by a state or federal government contracting for a PSC's services, another element could be added to the analysis. This is the fact that the security company is directly contracted with the government, rather than working directly for another private actor.²⁶¹ A plaintiff might consider claiming that this in itself establishes state action and no exceptions are needed to prove that the PSC is a state actor.²⁶² However, this would be a difficult argument to make. In *Lebron*, the Court held that Amtrak, a government-sponsored corporation, was a state actor.²⁶³ However, a key to that holding was that the government reserved the power to appoint members of the board of directors.²⁶⁴ There is no evidence suggesting that any government has any amount of control over Blackwater's board of directors or over any other PSC.²⁶⁵ Thus, this argument would be difficult for a plaintiff to make, and would most likely fail.

In sum, the factors discussed above would likely result in a finding of state action under the exclusive and traditional public function exception to

254. *Wade v. Byles*, 83 F.3d 902, 906 (7th Cir. 1996).

255. *See Payton v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 184 F.3d 623, 630 (7th Cir. 1999); *Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629, 637 (6th Cir. 2005).

256. *See SCAHILL, supra* note 22, at 324. "'He was even deputized by the governor of the [S]tate of Louisiana. We can make arrests and use lethal force if we deem it necessary.' . . . Blackwater spokesperson Anne Duke also said the company had a letter from Louisiana officials authorizing its forces to carry loaded weapons." *Id.*

257. *Id.*

258. *See Payton*, 184 F.3d at 624–25; *Romanski*, 428 F.3d at 633.

259. *See Wade*, 83 F.3d at 906.

260. *Compare id.*, with *SCAHILL, supra* note 22, at 324.

261. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378–79 (1995).

262. *See id.* at 381.

263. *Id.* at 400.

264. *See id.*

265. *See generally SCAHILL, supra* note 22.

the state action doctrine. While Blackwater, or any other PSC, would not likely be considered an actual part of a government by contracting with it, a plaintiff could prove that the authority delegated to PSCs was that of an exclusive and traditional state function.²⁶⁶ With this finding, a PSC would be liable for federal constitutional violations when acting under such a grant of authority.²⁶⁷

B. PSCs Under the Nexus Test

If the prior analysis is flawed, or simply unsuccessful in court, a plaintiff could also attempt to show that the nexus between the state and the PSC was so close that the private conduct rose to the level of state action.²⁶⁸

The best argument for a plaintiff would be that the government and the PSC enjoy a symbiotic relationship, as did the restaurant and the state in *Burton*.²⁶⁹ She could claim that the PSC gets a lucrative contract. The state gets security detail without having to train, house, and supervise the private guards. The state also benefits from the hopeful decrease in crime and increase in public order by having the additional security.

However, to meet the *Burton* standard, a plaintiff would have to show a high level of interdependence.²⁷⁰ To revisit an earlier quotation, “we all coordinate with each other—one family.”²⁷¹ To add to this, the descriptions of the dress and armor PSC employees possess do not seem to differentiate them from a state police force or militia.²⁷² To the uninformed, it would likely be difficult to tell whether an individual employee worked for a PSC or the state.²⁷³ A court could consider this evidence of interdependence and that the state “elected to place its power, property and prestige behind the” PSC just as it would its own police force.²⁷⁴

A court could also consider the *Tarkanian* holding when making its decision. In *Tarkanian*, one problem the Court had was that no state controlled the NCAA.²⁷⁵ Here, the PSC would have a contract with a specific governmental entity, whether an individual state or the federal government. This

266. See *Lebron*, 513 U.S. at 394–95.

267. See *id.* at 400.

268. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 716, 726 (1961).

269. See *id.* at 726.

270. See *id.* at 725.

271. SCAHILL, *supra* note 22, at 329.

272. See *id.* at 321–22.

273. See *id.*

274. See *Burton*, 365 U.S. at 725.

275. See *NCAA v. Tarkanian*, 488 U.S. 179, 193 (1988).

would show a higher level of control by the state than was present in *Tarkanian* as a PSC would have a specific authority to abide by.²⁷⁶

The plaintiff might try to invoke the *Brentwood* “entwinement” exception as well.²⁷⁷ However, this would prove less successful. There does not appear to be the pervasive entwinement between the state and the PSC that was found in *Brentwood*.²⁷⁸ In *Brentwood*, the Court found entwinement both “bottom up” and “top down.”²⁷⁹ There is no evidence to suggest that Blackwater’s CEO serves on any governmental board due to the relationship. Likewise, there is no evidence that a governmental actor is involved in the business of the corporation. The necessary “overlapping identity” between the PSC and the government is not present.²⁸⁰ Even though the *Brentwood* test is sometimes seen as less rigid, and more of a balancing test, than the other state action tests,²⁸¹ this scenario lacks the structural entwinement present in *Brentwood*.²⁸² Thus, *Brentwood*, standing alone, would more likely point to a holding that a PSC is not a state actor.

A PSC might point to *Moose Lodge* to try to differentiate its actions from the arguments made above. It could argue that the state is simply licensing and regulating its ability to provide security. It would analogize this to the situation in *Moose Lodge* where a private club was held not to be a state actor despite regulation from the state liquor board.²⁸³ The PSC would attempt to distinguish the relationship with the state from *Burton* and show that it was more like the one found in *Moose Lodge*. However, the level of interdependence might be too much for the PSC to overcome. As previously discussed, the outward appearance of the PSC’s employees is nearly indistinguishable from other soldiers or state officers. The PSC would not remain a private entity on private property, as the *Moose Lodge* was,²⁸⁴ it would be highly visible and possibly on public lands during its missions. The relation-

276. *See id.*

277. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 297 (2001).

278. *See id.* at 302.

279. *Id.* at 300.

280. *See, e.g.*, Megan M. Cooper, Case Note, *Dusting off the Old Play Book: How the Supreme Court Disregarded the Blum Trilogy, Returned to Theories of the Past, and Found State Action Through Entwinement in Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*, 35 CREIGHTON L. REV. 913, 923 (2002). However, the author argues that the extension in *Brentwood* was unnecessary and state action could have been found through other exceptions. *Id.* at 990–91.

281. *See* James Potter, Comment, *The NCAA as State Actor: Tarkanian, Brentwood, and Due Process*, 155 U. PA L. REV. 1269, 1290–91 (2007).

282. *See id.*

283. *See* *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175–77 (1972).

284. *See id.* at 175.

ship between the government and the PSC would be much closer to that in *Burton* than in *Moose Lodge*.

For the reasons stated, a court should hold that a PSC, when providing security under contract with a state or federal government contract, is a state actor under the nexus exception. The strongest argument for this finding would be that they enjoy a symbiotic and interdependent relationship.

VI. POSSIBLE CAUSES OF ACTION UNDER SECTION 1983

The previous part attempted to answer the question of whether a PSC would be considered a state actor when accused of a federal constitutional violation by a U.S. citizen. Now, consider a situation in which overzealous PSCs employees violate the federal constitutional rights of an individual. Perhaps the employees fire their weapons at an innocent person, as is currently alleged by Blackwater's actions in Iraq, and deprive that person of life without due process. A less violent example would be that the PSC decides to conduct its hiring decisions based on discrimination that would violate the Equal Protection Clause. In either scenario, a state actor would be liable for these federal constitutional violations. Relief would most likely be sought in the form of a section 1983 action against the actors.²⁸⁵ This part recognizes this "real-world" solution and attempts to illustrate how a lawsuit might proceed under the precedent guiding section 1983 claims and *Bivens* actions as applied to private prisons.

A. *Violation of Constitution by PSC with State Government Contract*

This part envisions a Katrina-like scenario. A PSC acts under state government authority to provide security and maintain order in an emergency situation.

The wronged individual might consider filing a section 1983 action against the individuals that searched him and against the PSC itself. As part of his or her claim, it would have to be alleged that the PSC, and its agents, were acting under color of state law during the illegal activity.²⁸⁶ As discussed *supra*, the plaintiff should be successful in meeting this burden.²⁸⁷ The requirements of a state actor would automatically result in a finding that the PSC or its agents were acting under color of law.²⁸⁸ Furthermore, there

285. See discussion *supra* Part III.

286. See *supra* Part IV.

287. See *id.* for the argument that a PSC is a state actor under these circumstances.

288. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982); discussion *supra* Part III.A.

are situations where a finding of state action is not required for the actor to be “under-color-of-state-law.”²⁸⁹

Having decided that section 1983 can be used, it must be decided against whom. States are immune from suit.²⁹⁰ Thus, the “stripping doctrine,” a judicially created legal fiction, is used to answer claims against a state.²⁹¹ So the plaintiff here must sue the director of the PSC in his personal capacity in order to recover damages.²⁹² The employee may also be sued under section 1983.²⁹³ It could be argued that *Richardson* could be applied to this context as well. If it was, then the employees would not have the defense of qualified immunity available.

B. *Violation of Constitution by PSC with Federal Government Contract*

This section assumes a similar scenario as discussed above, but now the PSC’s contract is with the federal government. The difference from the above analysis will occur when deciding who can be liable to suit. The plaintiff would not have a statutory cause of action under section 1983 available against a federal actor, but instead, the implied *Bivens* action. The question would be who the plaintiff could file that suit against. If the prison analogy holds, the answer may very well be no one. Under *Malesko*, the PSC could not be sued, as the Court held that *Bivens* actions do not extend to private corporations.²⁹⁴ Whether it could be extended to the individual employees of the PSC is an open question for now, but the majority opinion seems to suggest not.²⁹⁵

Thus, while a PSC may engage in the same conduct as a state actor while contracting with a state or the federal government, following the private prison analogy, the availability of suit may depend on the relationship.

289. See *Lugar*, 457 U.S. at 935 n.18.

290. See U.S. CONST. amend. XI.

291. See generally *Ex Parte Young*, 209 U.S. 123 (1908).

292. See *id.* at 159–60.

293. See 42 U.S.C. § 1983 (2006).

294. See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001).

295. See generally *id.* At least one author has recognized this limitation of *Malesko* and suggests that *Bivens* actions should be available to foreign citizens who have suffered at the hands of civilian contractors. See Scott J. Borrowman, Comment, *Sosa v. Alvarez-Machain and Abu Ghraib—Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors*, 2005 B.Y.U. L. REV. 371, 416–17 (2005). The author suggests that the same action would give rise to a *Bivens* claim “if committed against a U.S. citizen.” *Id.* at 417. However, the case he cites involves a public prison, not a private one. See *id.* at 417–18. It has never been decided by the Court if *Bivens* extends to employees of private prisons.

While a PSC may engage in state action while under contract with the federal government, the plaintiff may be left with the same remedies as it would have been without a PSC held to be a state actor.

VII. CONCLUSION

This article poses a hypothetical that may be tested in the near future. It offers a hypothetical violation of the federal Constitution by a PSC and then asks whether that entity could be held to be a state actor if it was operating under a government contract. This article argues that the answer to that question is relatively straightforward. A PSC would most likely be held to be a state actor in that situation. A court could use either the “exclusive and traditional public function” or the “nexus” exception to the state action test to so hold. However, a more difficult question is how a potential plaintiff would be able to seek redress upon this finding. Section 1983 may provide an avenue for relief for when a PSC is under contract with a state government. However, the issue is less clear when a PSC is under contract with the federal government. The Court has thus far refused to extend *Bivens* actions to private corporations. Thus, federal constitutional violations by a PSC under contract with the federal government may still not have a proper remedy, and PSCs may still be able to operate in a way inconsistent with what a federal agent would be allowed under the Constitution.

THE REFUGEE EXPERIENCE: A LEGAL EXAMINATION OF THE IMMIGRANT EXPERIENCES OF THE SUDANESE POPULATION

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*Not like the brazen giant of Greek fame,
With conquering limbs astride from land to land;
Here at our sea-washed, sunset gates shall stand
A mighty woman with a torch, whose flame
Is the imprisoned lightning, and her name
Mother of Exiles. From her beacon-hand
Glow world-wide welcome; her mild eyes command
The air-bridged harbor that twin cities frame.
"Keep, ancient lands, your storied pomp!" cries she
With silent lips. "Give me your tired, your poor,
Your huddled masses yearning to be free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!"*

– *Inscription on the Statue of Liberty*¹

I. INTRODUCTION

A. *Overview*

Sudan is a diverse country with a rich and complex history. Since its independence from Great Britain in 1956, the people of Sudan have struggled with civil war, environmental issues, medical problems, and poverty.² Due to decades of instability and high health risks, the people of Sudan have sought assistance from and refuge in the international community.³ Primarily, this paper will review the facts about the country of Sudan, including the country's geographical properties, demographics about the Sudanese population, health concerns, major historical events, and its current political environment. Second, this paper will assess the impact that civil war has had on Sudan and its people. Finally, this paper will look at the Sudanese refugees who have settled in Omaha, Nebraska, including their struggles and experiences in this Midwestern community.

B. *Terms*

In order to properly discuss this topic, it is necessary to examine several definitions including: assimilation, asylum, immigrant, refugee, and resettlement.⁴ Assimilation is defined as conforming with the customs and traditions of a dominant culture, in this case, the culture of the United States.⁵ The definition of asylum is a place of refuge or sanctuary; protection granted

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1. EMMA LAZARUS, 1 THE POEMS OF EMMA LAZARUS 198 (BiblioBazaar, LLC 2008). This poem is entitled "The New Colossus." *See id.*

2. *See generally* Central Intelligence Agency, The World Factbook: Sudan, <https://www.cia.gov/library/publications/the-world-factbook/geos/su.html> (last visited Apr. 5, 2009) [hereinafter World Factbook: Sudan].

3. *See id.*

4. All definitions used in this paper come from the fourth edition of the Modern Dictionary for the Legal Profession, the eleventh edition of the Merriam-Webster's Collegiate Dictionary, Blacks Law Dictionary, and online dictionaries.

5. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 74 (11th ed. 2006).

by a government to individuals being persecuted.⁶ An immigrant is a person who comes to a country of which they are not a native, usually for permanent residency.⁷ A refugee is a specific type of immigrant; a person who flees from danger or trouble, oftentimes as a result of political upheaval or war.⁸ Resettlement is the act of the reestablishment of a person or group of people in a new country.⁹ These definitions are by no means an exhaustive list of all the terms used when examining this topic in depth; however, these terms do provide a frame of reference to begin evaluating the many aspects of this complex issue.

II. SUDAN: THE COUNTRY THEY LEFT

A. *Climate and Geography*

Located in North Africa, Sudan is the largest country on the continent and the tenth largest country in the world.¹⁰ Sudan is located north of the equator and east of the prime meridian.¹¹ The highest point in Sudan is the mountain of Kinyeti, which is located near the Ugandan border in the south; the lowest point in Sudan is the Red Sea, which borders Sudan on its east side.¹² Sudan is bordered by Egypt in the north; Kenya, Uganda, and the Democratic Republic of Congo in the south; the Red Sea, Ethiopia, and Eritrea on its east; and Libya, Chad, and the Central African Republic to its west.¹³ Khartoum is the capital of Sudan and is its largest city.¹⁴

While much of Sudan is dominated by the Nile and its tributaries, there is often an inadequate supply of potable water.¹⁵ In addition, excessive hunting threatens the country's wildlife.¹⁶ Furthermore, the country's various regions suffer from soil erosion, desertification, and periodic drought.¹⁷

6. See MODERN DICTIONARY FOR THE LEGAL PROFESSION 70 (4th ed. 2008).

7. See *id.* at 498.

8. See *id.* at 788.

9. See BLACK'S LAW DICTIONARY 1334 (8th ed. 2004).

10. World Factbook: Sudan, *supra* note 2; Financial Standards Foundation, Country Brief: Sudan (June 30, 2008), http://www.estandardsforum.org/secure_content/country_profiles/cp_165.pdf [hereinafter Country Brief: Sudan].

11. See World Factbook: Sudan, *supra* note 2.

12. 28 THE NEW ENCYCLOPEDIA BRITANNICA: THE SUDAN 251–53 (15th ed. 2005); World Factbook: Sudan, *supra* note 2.

13. 28 THE NEW ENCYCLOPEDIA BRITANNICA: THE SUDAN 251–52 (15th ed. 2005).

14. Country Brief: Sudan, *supra* note 10.

15. 28 THE NEW ENCYCLOPEDIA BRITANNICA: THE SUDAN 251–53 (15th ed. 2005); World Factbook: Sudan, *supra* note 2.

16. 2 WORLDMARK ENCYCLOPEDIA OF THE NATIONS: AFRICA 652 (12th ed. 2007).

17. 28 THE NEW ENCYCLOPEDIA BRITANNICA: THE SUDAN 257 (15th ed. 2005).

Most of Sudan's terrain consists of flat plains, but there are mountainous regions in the eastern and western parts of the country.¹⁸ Sudan has arid deserts in the north, a tropical climate in the south, and a rainy season that lasts from April to November.¹⁹

B. *Population*

According to the Central Intelligence Agency, the current population of Sudan is roughly forty million.²⁰ Although the Sudanese population increases by 2.143% every year, more individuals are leaving Sudan than moving there.²¹ The population statistics of Sudan are comparable to other countries in Africa where many of the citizens live at or below the poverty line.²² The median age in Sudan is approximately nineteen, with approximately 40.7% of its citizens being under the age of fourteen.²³ In Sudan, the average life expectancy is 51.42, with only 2.5% of the current Sudanese population over the age of sixty-five.²⁴ Roughly 61% of the Sudanese population is literate.²⁵

Sudan is a country inhabited by a diverse range of people with many different religions, social customs, and religious beliefs.²⁶ In Sudan, there are two predominate cultures and a variety of minority groups.²⁷ Approximately 52% of the country is black, 39% is Arab, and 6% is Beja; the remaining 3% of the population encompasses a variety of other ethnic groups.²⁸ The religious groups are very regionally and ethnically divided; 70% of the population is Sunni Muslim, mostly located in the north, 5% of Sudanese people are Christian, mostly located in the capital city of Khartoum, and the remaining 25% of the population, who retain their traditional indigenous beliefs,²⁹ live primarily in the south—although missionaries have converted some of these people to Christianity.³⁰ Among the black Sudanese

18. *See id.* at 251.

19. *See id.* at 251, 254; World Factbook: Sudan, *supra* note 2.

20. World Factbook: Sudan, *supra* note 2.

21. *See id.*

22. *See id.*

23. *Id.*

24. *Id.*

25. World Factbook: Sudan, *supra* note 2.

26. *See* CBC News, In Depth Sudan, The Republic of Sudan, <http://www.cbc.ca/news/background/sudan/> (last visited Apr. 5, 2009).

27. *See id.*

28. *Id.*

29. *Id.*; World Factbook: Sudan, *supra* note 2.

30. 28 THE NEW ENCYCLOPEDIA BRITANNICA: THE SUDAN 256 (15th ed. 2005). The country's religious divergence is aggravated by the perception among southerners and non-Arab Muslims that they are second-class citizens. *See* Ahmed T. el-Gaili, Note, *Federalism*

population, there is a major divide between those who have gone through the process of “Arabization”³¹ and those who have not.³² Sudanese blacks that have not been “Arabized” have hundreds of ethnic, tribal, and language differences.³³ Sudanese living in the north are Arabic-speaking, but are also fluent in a traditional mother tongue as well.³⁴ In the south, the region contains numerous tribal groups and many more languages than the north.³⁵

C. Culture

Sudanese culture, like many other African cultures, expects that the genders have very defined, traditional roles.³⁶ In the home, “[l]abor and living quarters are divided by gender” either in accordance with the room’s usual purpose or the individual’s intended job responsibilities.³⁷ The man is considered the head of his household and it is his job to protect his family, build the home, and provide food and a source of income.³⁸ Sudanese women are responsible for taking care of “all things inside” the home.³⁹ Women have a duty to prepare meals and care for the couple’s children.⁴⁰ The milking is also done twice daily by the women and children.⁴¹ When disciplining children, mothers will first verbally warn their children, but if they do not

and the Tyranny of Religious Majorities: Challenges to Islamic Federalism in Sudan, 45 HARV. INT’L L.J. 503, 524 (2004).

31. See 28 THE NEW ENCYCLOPEDIA BRITANNICA: THE SUDAN 255–56 (15th ed. 2005). Arabization is the process of transforming countries and territories into regions that speak Arabic and are a part of the Arab culture, which includes the practice of Islam. See OXFORD ENGLISH DICTIONARY 598 (2d ed. 1989). Countries and territories that have gone through or are in the process of being Arabized include: Algeria, Egypt, Iraq, Jordan, Lebanon, Libya, Morocco, Palestine, Sudan, and Syria. See Susan M. Akram & Terry Rempel, *Temporary Protection As an Instrument for Implementing the Right of Return for Palestinian Refugees*, 22 B.U. INT’L L.J. 1, 17 (2004).

32. See 28 THE NEW ENCYCLOPEDIA BRITANNICA: THE SUDAN 270 (15th ed. 2005).

33. See Lino J. Lauro & Peter A. Samuelson, *Toward Pluralism in Sudan: A Traditionalist Approach*, 37 HARV. INT’L L.J. 65, 93 (1996). Sudan is one of the most ethnically and linguistically diverse countries in the world; it is composed of 600 tribes and ethnic groups who communicate in approximately 400 languages and dialects. *Id.*

34. 28 THE NEW ENCYCLOPEDIA BRITANNICA: THE SUDAN 256 (15th ed. 2005).

35. *Id.*

36. See Southern Sudan Community Association, Traditional, <http://sscainternational.org/content.asp?DISPLAY2> (last visited Apr. 5, 2009) [hereinafter SSCA, Traditional].

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. SSCA, Traditional, *supra* note 36.

listen, it is likely children will be physically struck.⁴² Children also have specific roles and responsibilities in Sudanese culture.⁴³ Daughters are expected to learn from their mothers how to properly run a household in preparation for marriage.⁴⁴ When boys are around eight, they go to live with a male relative and tend cattle.⁴⁵ Young men also eat, sleep, and spend leisure time in the barn with other men.⁴⁶

When boys reach their early teens, they often go through a process called scarification.⁴⁷ Scarification is the act of permanently modifying the body by using scar tissue to create designs, pictures, or words in the skin.⁴⁸ In Sudan, scarification has been used as a rite of passage in adolescence, the transformation of a child to a man.⁴⁹ Once the scarification ritual has been performed, the man will leave the dried blood as a symbol of his rite of passage.⁵⁰ Generally, the longer it takes the wounds to heal, the more pronounced they will be, so the individual tries to keep the wounds open and healing for as long as possible.⁵¹ The ultimate goal of the scarification process is to develop keloids, or raised scars.⁵² Keloids are desired for their visual, 3-D effects and because of the way they feel to the touch.⁵³ In addition, scarifications—and the resulting keloids—are usually more visible on darker skinned people than tattoos.⁵⁴

The entire household is responsible for the upbringing of children.⁵⁵ In the Sudanese culture, babies are typically nursed for two years and any of the lactating women may nurse the children.⁵⁶ The first born child of a Sudanese

42. *Id.*

43. *See id.*

44. *Id.*

45. *Id.*

46. SSCA, Traditional, *supra* note 36.

47. *See* Richard Sosis, *The Adaptive Value of Religious Ritual*, 92 AM. SCIENTIST 166, 166 (2004).

48. Body Alterations, University of Iowa Hospitals & Clinics, <http://www.uihealthcare.com/depts/medmuseum/wallexhibits/body/bodyalterations/bodyalterations.html> (last visited Apr. 5, 2009) [hereinafter *Body Alterations*].

49. *See* Sosis, *supra* note 47, at 166.

50. *See* SHARON E. HUTCHINSON, *NUER DILEMMAS: COPING WITH MONEY, WAR, AND THE STATE* 185 (1996).

51. *See* *Body Alterations*, *supra* note 48.

52. *See id.*

53. *See id.*

54. Olubimpe Ayeni, *Observations on the Medical and Social Aspects of Scarification in Sub-Saharan Africa*, <http://www.med.uottawa.ca/medweb/hetenyi/ayeni.htm> (last visited Apr. 5, 2009).

55. SSCA, Traditional, *supra* note 36.

56. *Id.*

family is treated as “extremely special,” particularly if it is male.⁵⁷ Children are traditionally born in their grandmother’s home.⁵⁸ Sudanese fathers are not allowed to be present for the birth of their first child, but are usually present for any subsequent births to assist the midwife.⁵⁹ Naming of children is an important process in Sudan.⁶⁰ The first name of the child is always selected by the father, the child’s middle name is always the father’s first name, and the child’s last name is always the paternal grandfather’s first name.⁶¹ If the child is born to a Christian family, eight days after the birth the baby is taken to church and also given a biblical name.⁶²

The main food staples in the Sudanese diet are milk and meat.⁶³ The Sudanese view raising cattle with great pride, while horticulture is considered “degrading” and only done when poverty demands it.⁶⁴ Cattle are a symbol of great importance, as the more cattle a man has, the wealthier he is considered; cattle are also an important part of the bridal dowry.⁶⁵ The two crops the Sudanese people regularly grow are maize and millet, also known as sorghum.⁶⁶ Millet is boiled into porridge and brewed into alcohol.⁶⁷ Milk is an important staple and has many uses in the Sudanese kitchen: It is drunk fresh, boiled into porridge, soured to use in a relish dish, and churned into cheese.⁶⁸ Particularly, in Southern Sudan, food production consumes all of the population’s time, thus the economy is subsistence driven.⁶⁹

Due to the environment and living habits of Sudan, the only art form practiced by the Sudanese—who refer to themselves as the Nuer—is music, specifically singing.⁷⁰ In Sudan, the year is viewed as the cycling through the dry and rainy seasons.⁷¹ “The most common time marker” in Sudanese culture is the age-sets, although the Sudanese have a very short perception of time and are in many ways a “timeless people.”⁷² Mostly, time is marked by

57. *Id.*

58. *Id.*

59. *Id.*

60. See SSCA, Traditional, *supra* note 36.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. SSCA, Traditional, *supra* note 36.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. SSCA, Traditional, *supra* note 36.

71. *Id.*

72. *Id.*

remembering notable events, although some months are marked by the lunar cycle of the moon.⁷³

D. *Health*

Unfortunately, the people of Sudan live in a world where disease is prevalent, and because there is insufficient medical care, a wide range of illnesses and conditions result in death.⁷⁴ For every 1000 births that occur in Sudan, 82.43 will result in death⁷⁵ due to poverty, common childhood illnesses, and the few opportunities to access advancements in medical technology.⁷⁶ Like the rest of Africa, Sudan is also battling the AIDS epidemic.⁷⁷ Recent studies indicate that there are approximately 320,000 people in Sudan living with HIV/AIDS, and the virus causes an estimated 25,000 deaths annually.⁷⁸ The risk of contracting infectious diseases in Sudan is very high; food and waterborne illnesses are very common.⁷⁹ Typhoid fever, diarrhea, hepatitis A, malaria, dengue fever, meningococcal meningitis, and African trypanosomiasis are all prevalent in Sudan as well.⁸⁰

E. *Current Political Environment*

Since gaining its political independence, Sudan has been ruled by military regimes that have governed the country under strict adherence to Islamic law—called the Shari'ah.⁸¹ Shari'ah is the Arabic word for law, and it governs all public and private activities of individuals living in the state.⁸² Specifically, it is a body of rules based on Islam, regulating everything from politics, economics, and banking, to business law, and contract law.⁸³ Sha-

73. *Id.*

74. See 2 WORLDMARK ENCYCLOPEDIA OF THE NATIONS: AFRICA 663 (12th ed. 2007).

75. See World Factbook: Sudan, *supra* note 2.

76. See Dan Kaseje, Professor of Public Health & Vice Chancellor at Grand Lakes University of Kisumu (Nov. 2, 2006) 3–5, 7, available at <http://www.wilsoncenter.org/topics/docs/Kaseje2.pdf>.

77. See World Factbook: Sudan, *supra* note 2.

78. *Id.*

79. *Id.*

80. *Id.*

81. See 2 WORLDMARK ENCYCLOPEDIA OF THE NATIONS: AFRICA 658 (12th ed. 2007); World Factbook: Sudan, *supra* note 2.

82. 22 THE NEW ENCYCLOPEDIA BRITANNICA 31 (15th ed. 2005).

83. Mohammed Ralf Kroessin, *Concepts of Development in 'Islam': A Review of Contemporary Literature and Practice* 18–19 (Univ. of Birmingham: Int'l Dev. Dep't, Working Paper No. 20-2008), available at http://www.rad.bham.ac.uk/files/resourcesmodule/@random454f80f60b3f4/1229939956_working_paper_20__web_file.pdf.

ri'ah also governs social and moral issue such as: the role of women, dietary laws, dress codes, circumcisions, illegal sexual acts, and freedom of speech, among other things.⁸⁴ Currently, Sudan is ruled by a power-sharing government—a coalition of two parties, which is led by the National Congress Party that came to power by military coup in 1989.⁸⁵ Since October of 1993, Umar Hassan Ahmad al-Bashir has ruled as Sudan's president.⁸⁶

F. *Major Historical Events*

In many ways, Sudan's history has culminated in resulting poverty, civil war, and related issues. During the Age of Imperialism, Sudan was a colony of the British Empire.⁸⁷ When the British ruled Sudan, "it was illegal for people living above the 10th parallel [latitude line] to go further south, and people below the 8th parallel to go further north."⁸⁸ This law was intended to prevent the further spread of tropical diseases—particularly malaria—to British Royal troops.⁸⁹ Sudan finally gained its independence from the United Kingdom in 1956.⁹⁰ Attracted to the Sudanese government's claims that it operated a purely Islamic state, Osama Bin Laden moved to Sudan in 1991.⁹¹ He used his money, power, and expertise in construction to make improvements in Sudan, including building a road from the capital, Khartoum, to the northern town of Shendi.⁹² Bin Laden scholars assert he lost as much as the equivalent of 100 million U.S. dollars on business ventures in Sudan.⁹³ At the request of the U.S. government, Bin Laden was expelled from Sudan; he then relocated to Afghanistan.⁹⁴

In December of 2005, Chad declared war on Sudan, calling for its citizens to mobilize against their common enemy.⁹⁵ According to the Chadian Government, this act was a formal response to militants—allegedly backed by the Sudanese Government—who attacked communities in eastern Chad,

84. *Id.* at 19, 56–57.

85. World Factbook: Sudan, *supra* note 2.

86. *Id.*

87. See 28 THE NEW ENCYCLOPEDIA BRITANNICA: THE SUDAN 267 (15th ed. 2005).

88. Project: Darfur, At a Glance, <http://projectdarfurhoboken.org/article.php?id=18> (last visited Apr. 5, 2009) [hereinafter Project: Darfur].

89. *Id.*

90. See World Factbook: Sudan, *supra* note 2.

91. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 161, 166 (1999).

92. General Answers: Sudan, <http://sudan.generalanswers.org> (last visited Apr. 5, 2009).

93. *Id.*

94. *Id.*

95. Stephanie Hancock, *Chad in 'State of War' with Sudan*, BBC NEWS, Dec. 23, 2005, <http://news.bbc.co.uk/2/hi/africa/4556576.stm>.

murdering people, burning houses, and stealing cattle.⁹⁶ This fighting is ongoing and complicated by regional tensions and the Sudanese civil war.⁹⁷ The people of Sudan have been consumed by civil war since the middle of the twentieth century.⁹⁸ Civil war first began in 1955 and lasted until 1972; it was reignited in 1983 and is still occurring—this topic will be discussed in detail below.⁹⁹

III. THE CIVIL WAR

A. Background

Sudan has been “embroiled in two prolonged civil wars” for the second half of the twentieth century up to the present date.¹⁰⁰ In 1955, a year prior to gaining independence from the United Kingdom, civil war ensued in Sudan.¹⁰¹ This internal fighting is a result of numerous contributing factors.¹⁰² Primarily, the separation of the northern and southern Sudanese during British colonialism resulted in the outbreak of civil war because it further polarized these two already contentious groups.¹⁰³ Fighting lasted for seventeen years until the signing of the Addis Ababa Agreement in 1972, resulting in a ten-year hiatus from civil war.¹⁰⁴

Fighting broke out again in 1983.¹⁰⁵ This time, a combination of issues led to the current violence.¹⁰⁶ Primarily, the government began enforcing Shari’ah law and dissolved three federal states in the south.¹⁰⁷ These actions were directed at non-Muslim, non-Arab Sudanese and fed their resentment of the government’s oppression.¹⁰⁸ Also, fuel and bread shortages, drought, and famine contributed to the growing insurgency in the south of Sudan.¹⁰⁹

96. *Id.*

97. *See* Project: Darfur, *supra* note 88.

98. *See id.*

99. *Id.*

100. World Factbook: Sudan, *supra* note 2.

101. *See* Project: Darfur, *supra* note 88.

102. *See* World Factbook: Sudan, *supra* note 2.

103. Project: Darfur, *supra* note 88.

104. *Id.*

105. *Id.*

106. *See id.*

107. *See id.*

108. *See* Project: Darfur, *supra* note 88

109. *See id.*; World Factbook: Sudan, *supra* note 2.

B. *Darfur Region*

The conflict in the Darfur region of Sudan began in February of 2003 and has led to the deaths of hundreds of thousands and the displacement of millions.¹¹⁰ The United States media has characterized the Darfur conflict as a battle between Arabs and Africans, but in reality, nearly everyone inhabiting Darfur is both Muslim and black.¹¹¹ In actuality, the fighting in this region is between ethnic groups, who have divided themselves based on what languages they speak and whether they are farmers or nomadic herders.¹¹² These groups are fighting over the use of the region's limited resources.¹¹³ The confusion in the West has come from the fact that these tribal factions have labeled themselves "African" and "Arab" based on the aforementioned distinctions, and not on racial or religious differences.¹¹⁴

In the Western world, this conflict has been described as "genocide" and "ethnic cleansing;" although the use of these terms is disputed by many as inaccurate, including the Sudanese government, it has caused over 200,000 to 400,000 deaths.¹¹⁵ As a result of this unrest, almost two million individuals have been displaced from their homes, with two hundred thousand refugees fleeing from Darfur to the neighboring country of Chad.¹¹⁶ The World Health Organization (WHO) stated that about 71,000 deaths had occurred in the region between March and October 2004.¹¹⁷ According to the WHO, these deaths were a result of starvation and disease.¹¹⁸

In February of 2006, the United Nations Security Council agreed to send peacekeeping forces to Darfur.¹¹⁹ Specifically, the resolution called for a troop presence ranging from 12,000 to 20,000, and in addition, the resolution allocated new weaponry for the 7,000 African Union troops already present in the region.¹²⁰ However, President Omar al-Bashir is opposed to a

110. World Factbook: Sudan, *supra* note 2. See Stop Sudan Genocide, The Darfur Crisis, <http://stopsudangenocide.org/default.aspx> (last visited Apr. 5, 2009) [hereinafter The Darfur Crisis].

111. See Emily Wax, *5 Truths About Darfur*, WASH. POST., Apr. 23, 2006, at B3.

112. *Id.*

113. The Darfur Crisis, *supra* note 110.

114. See Wax, *supra* note 111.

115. See The Darfur Crisis, *supra* note 110; Wax, *supra* note 111.

116. See The Darfur Crisis, *supra* note 110.

117. *Id.*

118. *Id.*

119. Joel Brinkley, *Security Council Agrees to Send Troops to Darfur*, N.Y. TIMES, Feb. 4, 2006, at A6.

120. *Id.*

U.N. peacekeeping presence in Sudan and is suspected of supporting the militias in Darfur.¹²¹

C. *Refugees*

More refugees come from Sudan than any other country in Africa.¹²² As explained above, the reason for Sudanese refugees is twofold: either they are seeking asylum from the Arabization policies of the military regime ruling Sudan or they are fleeing the ethnic battles of the Darfur region.

D. *International Assistance*

Scholars have labeled this century “the century of the refugee” because “war, famine, and political oppression” have caused the most unprecedented migration of people in human history.¹²³ Individuals are leaving their countries due to various forms of oppression, seeking the stability and prosperity that industrialized countries—like the United States—promise to provide refugees.¹²⁴ Sudan is considered one of the world’s leading exporters of refugees.¹²⁵ The majority of Sudanese refugees still remain on the African continent, located primarily in Chad, Ethiopia, Kenya, Uganda and Zaire.¹²⁶ However, because the United States is one of seventeen countries that have a refugee acceptance quota; there are Sudanese refugees in the United States as well.¹²⁷

In 1980, the United States Congress passed the Refugee Act which reformed federal immigration law to systematically admit refugees into the

121. See Dafna Linzer, *Sudan May Allow U.N. Force in Darfur, Military Experts Examining Overture from Khartoum*, WASH. POST, Dec. 27, 2006, at A8.

122. See Clara Fischer, *Migration and Displacement in Sub-Saharan Africa—The Security–Migration Nexus II*, RELIEFWEB, Feb. 26, 2009, <http://www.reliefweb.int/rw/RWB.NSF/db900SID/CJAL-7PMQ7T?OpenDocument>.

123. JON D. HOLTZMAN, *NUER JOURNEYS, NUER LIVES: SUDANESE REFUGEES IN MINNESOTA 14* (Nancy Foner ed., Allyn & Bacon) (2000) [hereinafter HOLTZMAN].

124. See *id.* at 14–15.

125. *Id.* at 15.

126. See *id.*

127. See U.N. REFUGEE AGENCY, *SHAPING OUR FUTURE: A PRACTICAL GUIDE TO THE SELECTION, RECEPTION AND INTEGRATION OF RESETTLED REFUGEES*, at 21 (2005), available at <http://www.unhcr.org/refworld/pdfid/437475fec.pdf>. The other sixteen countries that have refugee acceptance quotas are: Argentina, Australia, Benin, Brazil, Burkina Faso, Canada, Chile, Denmark, Finland, Iceland, Ireland, the Netherlands, New Zealand, Norway, Sweden and the United Kingdom. *Id.*

United States for humanitarian reasons.¹²⁸ This Act provided that the United States would accept up to 70,000 refugees annually and as many as 20,000 from a single region.¹²⁹ Through the Federal Refugee Resettlement Program, the United States government allows a pre-determined number of refugees each year to come from different regions around the world to move into the United States and rebuild their lives.¹³⁰ To obtain refugee status in the United States, the Department of Homeland Security requires individuals to pass a screening interview and a medical exam.¹³¹ A Sudanese refugee can only gain admittance into the United States if they are seeking asylum to escape warfare and/or religious persecution.¹³² Even if an individual passes the screening test, they can still be denied admission if the medical exam reveals a serious disease, such as AIDS.¹³³ The United States attempts to settle refugees from the same country together, in hopes that they will develop a community and make their transition to an American way of life easier.¹³⁴

IV. THE SUDANESE POPULATION OF OMAHA, NEBRASKA

A. *Background*

Omaha currently has the largest Sudanese refugee population in the country.¹³⁵ It is estimated that 6,000 Sudanese refugees have come to live in Omaha since 1995.¹³⁶ While some have come directly from Sudan or refugee camps in bordering countries, the remainder of the Sudanese population has relocated to Omaha after first arriving in another part of the United States.¹³⁷ These individuals decided to move to Omaha, not only because of its large Sudanese community, but because the city and surrounding area is perceived

128. Refugee Act of 1980, Pub. L. No. 96-212, § 101, 94 Stat. 102 (codified as amended in scattered sections of 26 U.S.C.).

129. Kelly Jefferys, U.S. Dep't of Homeland Security, Office of Immigration Statistics, Annual Flow Report, Refugees and Asylees: 2006, at 1 tbl.1 (2007), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/Refugee_AsyleeSec508Compliant.pdf.

130. See *id.* at 3; Refugee Act of 1980 § 411.

131. See Jefferys, *supra* note 129, at 3.

132. See HOLTZMAN, *supra* note 123, at 14–15.

133. See Jefferys, *supra* note 129, at 3.

134. See Audrey Singer & Jill H. Wilson, *Refugee Resettlement in Metropolitan America*, MIGRATION INFO. SOURCE, Mar. 2007, <http://www.migrationinformation.org/feature/display.cfm?id=585>.

135. GREATER OMAHA CHAMBER OF COMMERCE, MULTI-ETHNIC GUIDE 18 (2006), available at <http://www.omahachamber.org/pdf/multiethnicguide.pdf>.

136. *Id.*

137. See *id.*

as being safe, a good place to raise a family, and full of economic prosperity with clean, well-kept neighborhoods.¹³⁸

B. *The Lost Boys*

The Lost Boys is a specific group of approximately 3,800 Sudanese boys who were brought to the United States after escaping from war-torn Sudan.¹³⁹ Medical examiners have stated that these children “are the most badly war-traumatized children ever examined.”¹⁴⁰ These boys lost their families and began their long journey to America when they were around ten years old; none of them knew if any of their family members were dead or alive.¹⁴¹ These boys were orphaned or separated from their families when government troops attacked the villages in Southern Sudan where they lived.¹⁴² The reason these boys survived while other members of the community were systematically raped and slaughtered was because they were away from the village, tending herds when the attacks occurred and were able to escape into the jungle.¹⁴³ These boys gathered in the countryside, traveling by night to hide from soldiers and walking hundreds of miles to refugee camps in Ethiopia, but when a civil war broke out there, they were forced to flee again.¹⁴⁴ Running from soldiers, the boys jumped into the Gilo River, where thousands more died, either because they were unable to swim or because “non-swimmers tried to climb on their backs.”¹⁴⁵ The few that were left finally found their way to refugee camps in Kenya and were eventually relocated to the United States.¹⁴⁶ These boys, now in their late teens and early twenties, arrived in this country with only the clothes on their backs.¹⁴⁷

In Omaha, the Southern Sudan Community Association (SSCA) and the Heartland Refugee Resettlement Organization coordinate sponsorship efforts

138. See *id.* at 7.

139. Stephen Buttry, *Churches Helping to Keep Pace with Refugees' Arrivals, a Bellevue Congregation is Among Those Sponsoring the Lost Boys of Sudan*, OMAHA WORLD-HERALD, Sept. 9, 2001, at 1B.

140. Theresa Fambro Hooks, *Chicago Football Classic Starts with Today's Golf Event and Coaches Lunch*, CHI. DEFENDER, Sept. 7-9, 2007, at 14.

141. See Buttry, *supra* note 139.

142. *Id.*

143. See *id.*

144. *Id.*

145. *Id.*

146. Buttry, *supra* note 139.

147. See *id.*

for the Lost Boys.¹⁴⁸ In addition to collecting donations of furniture and supplies, these non-profit organizations seek out churches and other groups to help individual refugees.¹⁴⁹ Individual mentors teach the boys to drive, take them to doctors' appointments, help them register with the Social Security Administration and apply for jobs.¹⁵⁰ As an example, the six Lost Boys sponsored by the Thanksgiving Lutheran Church in Bellevue all have jobs, working up to 60 hours per week.¹⁵¹ Also, because these Lost Boys all speak English and are attended high school in the Kenyan refugee camps, they are currently studying for their high school equivalency exams.¹⁵²

C. *The Southern Sudan Community Association*

In 1997, the SSCA was started by Tor Kuet—now the SSCA Executive Director—a Sudanese refugee.¹⁵³ The SSCA is located at 4819 Dodge Street¹⁵⁴ and is incorporated as a 501(c)(3) non-profit organization under the laws of the State of Nebraska.¹⁵⁵ The SSCA became an official refugee resettlement agency in December of 2000.¹⁵⁶ The objective of SSCA is to aid and assist refugees who have escaped Southern Sudan's civil war and religious persecutions.¹⁵⁷ Specifically, the mission of SSCA is to facilitate refugees in transitioning from Sudanese culture to an American lifestyle.¹⁵⁸ It is the goal of the SSCA to help Sudanese refugees become self-sufficient, "to live and work productively," to contribute positively to the Omaha community, to obtain an education, and to pursue "a better life" for themselves and their families.¹⁵⁹

The SSCA provides numerous services to assist refugees, helping them acclimate to an unfamiliar culture.¹⁶⁰ Specifically, the agency provides a

148. *Id.*

149. *Id.*

150. *Id.*

151. Buttry, *supra* note 139.

152. *Id.*

153. See Southern Sudan Community Association, Home, <http://www.sscainternational.org/main.asp> (last visited Apr. 5, 2009) [hereinafter SSCA, Home]; Southern Sudan Community Association, About Us, <http://www.sscainternational.org/content.asp?DISPLAY13> (last visited Apr. 5, 2009) [hereinafter SSCA, About Us].

154. SSCA, Home, *supra* note 153.

155. SSCA, About Us, *supra* note 153.

156. Southern Sudan Community Association, Resettlement, <http://www.sscainternational.org/content.asp?DISPLAY9> (last visited Apr. 5, 2009).

157. SSCA, About Us, *supra* note 153.

158. *Id.*

159. *Id.*

160. See *id.*

variety of courses, including: driving lessons,¹⁶¹ parenting classes,¹⁶² GED tutoring, and English as a Second Language Classes—also known as ESL classes.¹⁶³ The SSCA also provides immigration assistance through mentors and cultural support.¹⁶⁴ The agency also has an after school tutoring program for children and provides transportation and translation services.¹⁶⁵ In addition, the agency has a no interest housing loan program, lending up to 1,000 dollars to Sudanese refugees to use for their first month's rent, as a deposit or for utility bills.¹⁶⁶ The SSCA's work is carried out through volunteers who function in a variety of capacities.¹⁶⁷ Primarily, the agency asks its volunteers to assist in running major events, teaching classes, mentoring, providing transportation, and acting as sponsors to individual families.¹⁶⁸ In addition, the SSCA coordinates a volunteer program with the Nebraska Bar Association to provide free legal services at the SSCA office on the first and third Tuesday of every month between the hours 1:00 P.M. and 4:00 P.M.¹⁶⁹

V. CONCLUSION

Like many individuals who have immigrated to the United States, the Sudanese have come to this country from a place of violence and disease in hopes of creating a better life for their families. Their collective experience is a testament to the strength and perseverance of their people and their individual stories, while heartbreaking, demonstrate a determination of spirit. Like so many immigrants before them, the people of Sudan have come to the shores of America with only the clothes on their backs and dreams of peace and prosperity. Settling in Omaha, these people not only have to adjust to a new climate—none of them have seen snow before—but also to a modern, industrialized culture, very different from the traditional rural communities they left. These new citizens of Omaha show a sense of pride and love for

161. Southern Sudan Community Association, Drivers training, <http://www.sscainternational.org/content.asp?DISPLAY3> (last visited Apr. 5, 2009).

162. *Id.*

163. See Southern Sudan Community Association, Volunteer, <http://www.sscainternational.org/content.asp?DISPLAY3> (last visited Apr. 5, 2009) [hereinafter SSCA, Volunteer].

164. *Id.*

165. *Id.*

166. Southern Sudan Community Association, Housing Loan Program, <http://www.sscainternational.org/content.asp?DISPLAY11> (last visited Apr. 5, 2009).

167. See SSCA, Volunteer, *supra* note 163.

168. *Id.*

169. Southern Sudan Community Association, Legal, <http://www.sscainternational.org/content.asp?DISPLAY14> (last visited Apr. 5, 2009).

their new community and, despite all they have been through, feel truly blessed to have found home in a place they did not even know existed.

KNOWING EVIL WHEN WE SEE IT: AN ATTEMPT TO STANDARDIZE HEINOUS, ATROCIOUS, AND CRUEL

VALERIE L. BARTON*

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I. INTRODUCTION

In 1972, the United States Supreme Court made a ruling that required Florida to revise its death penalty statute in order to eliminate the possibility of arbitrary application and to bring it within constitutional limits.¹ In revising Florida's death penalty statute, the Florida Legislature devised a trifur-

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1. See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

cated, or “hybrid,” type of sentencing scheme.² Florida’s present sentencing scheme charges the judge to weigh the aggravating and mitigating circumstances present and to reach a determination on which sentence is appropriate, life imprisonment without parole, or death.³ One of the aggravating circumstances enumerated in Florida law is whether “[t]he capital felony was especially heinous, atrocious, or cruel.”⁴

This article will examine and discuss the evolution of Florida’s current capital sentencing scheme. Particular focus will be given to the statutory aggravating circumstance of a crime being heinous, atrocious, or cruel, which, if present, may allow for a possible death sentence.⁵ This article will also address the lack of a clear, objective standard to guide both a judge and a jury in determining when a crime is, or is not, heinous, atrocious or cruel. It will also explore a combined scientific research initiative called the Depravity Scale and its efforts to resolve the absence of a meaningful, objective standard.

Part II of this article will trace the development of Florida’s capital sentencing scheme following the decision in *Furman v. Georgia*,⁶ and the ability of Florida’s capital sentencing statute, after *Furman*, to continually pass constitutional muster. Part III will examine and discuss various Florida capital cases, where death sentences have been both affirmed and vacated, to highlight the varying conceptions of what has been considered heinous, atrocious, and cruel in Florida courts.

Finally, Part IV will discuss the inception, ideology, and research of the Depravity Scale, a collaborative scientific effort that aims to provide judges and juries nationwide with an objective method of defining those crimes that are heinous, atrocious, and cruel.

II. FLORIDA: BEFORE AND AFTER *FURMAN*

When the decision in *Furman v. Georgia* was handed down, the statutes that were in effect in Florida automatically imposed a death sentence on any defendant convicted of a capital felony.⁷ The only defendants who were spared the punishment of death were those who received a recommendation

2. See FLA. STAT. § 921.141 (2008).

3. See *id.*

4. *Id.* § 921.141(5)(h).

5. *Id.*

6. 408 U.S. 238 (1972) (per curiam).

7. LaTour Rey Lafferty, *Florida’s Capital Sentencing Jury Override: Whom Should We Trust to Make the Ultimate Ethical Judgment?*, 23 FLA. ST. U. L. REV. 463, 468 (1995).

of mercy from the jury upon return of the verdict.⁸ In these “recommendation of mercy” cases, the defendant then received a mandatory sentence of life imprisonment.⁹ Thus, the fate of a defendant rested solely with the jury.¹⁰

In 1972, the United States Supreme Court, in *Furman*, struck down the capital punishment statutes of Georgia and Texas.¹¹ The Court declared the statutes unconstitutional because their arbitrary application violated the Eighth Amendment’s ban on cruel and unusual punishment.¹² The majority¹³ reasoned that the statutes were applied absent any type of limitation or guidance.¹⁴ The core of the *Furman* decision required that the class of defendants eligible for the death penalty be narrowed, and that a state’s capital punishment statute not be administered in a capricious fashion.¹⁵ It also required that a state’s capital punishment statute achieve this purpose in a manner that is not arbitrary or discriminatory.¹⁶ To align itself with the *Furman* decision, the Florida Legislature passed a new death penalty statute which would come under attack a few years later in *Proffitt v. Florida*.¹⁷

A. Proffitt v. Florida

Following the *Furman* decision, the United States Supreme Court heard cases regarding the revised capital sentencing statutes of five states, one of

8. Charles W. Ehrhardt & L. Harold Levinson, *Florida’s Legislative Response to Furman: An Exercise in Futility?*, 64 J. CRIM. L. & CRIMINOLOGY 10 (1973); Lafferty, *supra* note 7, at 468. Moreover, although defendants were automatically allowed appeal to the Supreme Court of Florida, the issue of sentencing was not permissible for review. *Id.*

9. Ehrhardt & Levinson, *supra* note 8, at 10.

10. *See id.*

11. *See Furman*, 408 U.S. at 238. There were three petitioners in the *Furman* case, each of whom received the death penalty. *Id.* at 239. One petitioner received the death penalty for murder, and the other two for rape. *Id.*

12. Lafferty, *supra* note 7, at 467–68.

13. *Furman*, 408 U.S. at 240. The five Justices included in the majority were Justices Douglas, Brennan, Stewart, White, and Marshall. *Id.* Each of the five Justices in the majority filed a concurring opinion. *Id.* Additionally, the dissenting Justices also each wrote a separate opinion. *Id.*

14. *See generally id.*

15. *See Furman*, 408 U.S. at 249 (Douglas, J., concurring).

16. *Id.* at 249. Addressing the discriminatory aspect of the statutes, Justice Douglas said “[w]hat the legislature may not do for all classes uniformly and systematically, a judge or jury may not do for a class that prejudice sets apart from the community.” *Id.*

17. 428 U.S. 242, 247 (1976).

which was Florida.¹⁸ In *Proffitt*, Florida became one of three states whose death penalty statute gained approval from the United States Supreme Court in the wake of *Furman*.¹⁹

Florida's current trifurcated capital punishment statute provides that after a conviction of a capital offense, a separate trial must be conducted to determine sentencing.²⁰ During the sentencing trial, the jury is present and "the trial judge must permit the introduction of any relevant evidence regarding the nature of the crime and the defendant's character."²¹ The jury, after considering any aggravating and mitigating circumstances, must then provide an advisory sentencing opinion of either life imprisonment or death to the trial judge.²² In Florida, the jury's advisory sentence is not required to be unanimous.²³

Following the receipt of the jury's advisory sentence, the trial judge must then weigh both the "aggravating and mitigating circumstances," if any, against each other and make the ultimate decision of whether to impose a sentence of life imprisonment or death.²⁴ This final sentencing carried out by the judge, notwithstanding the jury's advisory sentence, is known as the "jury override."²⁵ Under *Tedder v. State*,²⁶ the judge is required to give great

18. Gary Scott Turner, Note, *Ring v. Arizona: How Did This Happen, and Where Do We Go?*, 27 NOVA L. REV. 501, 508 (2003). The other four states were North Carolina, Louisiana, Georgia, and Texas. *Id.*

19. *Id.*

20. FLA. STAT. § 921.141(1) (2008). Florida law provides that "[u]pon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment." *Id.*

21. Lafferty, *supra* note 7, at 468.

22. *Id.*; see also FLA. STAT. § 921.141(2).

23. *Bottoson v. Moore*, 833 So. 2d 693, 716 (Fla. 2002) (per curiam) (Shaw, J., concurring). "In these proceedings it is not necessary that the advisory sentence of the jury be unanimous." *Id.*

24. FLA. STAT. § 921.141(3). The Supreme Court of Florida has said that:

It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973).

25. *Id.* at 15.

26. 322 So. 2d 908 (Fla. 1975) (per curiam). In *Tedder*, the defendant, Mack Reed Tedder, was convicted of first-degree murder. *Id.* at 909. At the sentencing hearing, the judge found three aggravating, and no mitigating, circumstances present. *Id.* at 910. One of the three aggravators found was "that the crime was especially heinous, atrocious, or cruel." *Id.*

weight to the advisory opinion of the jury.²⁷ However, if a jury does advise a sentence of life imprisonment and the trial judge imposes a death sentence, the judge is then required to provide, in writing, specific findings of fact relevant to the aggravating and mitigating circumstances.²⁸ If a death sentence is imposed, under Florida law, it is automatically reviewed by the Supreme Court of Florida.²⁹ Additionally, the Supreme Court of Florida will also conduct a “proportionality review,” even if the issue of proportionality is not raised on appeal.³⁰

In *Proffitt*, the defendant, Charles William Proffitt, was convicted of first-degree murder.³¹ Following his conviction, as required by Florida statute, a separate sentencing “hearing was held to determine whether [Proffitt] should be sentenced to death or to life imprisonment.”³² Under Florida’s newly enacted sentencing scheme, whether Proffitt was sentenced to life imprisonment or death hinged on whether the aggravating circumstances present outweighed the mitigating circumstances present.³³ Following the sentencing hearing, the jury rendered its advisory opinion recommending that Proffitt receive the death penalty.³⁴ Then, as provided for in the Florida statute, the judge independently weighed the aggravating and mitigating circumstances present.³⁵ The judge found four aggravating circumstances, and no mitigating circumstances were present.³⁶ The judge then sentenced Proffitt to death.³⁷ On appeal to the Supreme Court of Florida, Proffitt’s sentence was affirmed.³⁸

27. *Id.* (holding “[a] jury recommendation under [Florida’s] trifurcated death penalty statute should be given great weight”). This is commonly referred to as the “*Tedder* standard.” Lafferty, *supra* note 7, at 470.

28. See FLA. STAT. § 921.141(3) (2007). An important ruling on the issue of jury override presented itself in *Tedder*. See *Tedder*, 322 So. 2d at 909–11. Here, the Supreme Court of Florida held that in order for a death sentence to be upheld “following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.” *Id.* at 910.

29. FLA. STAT. § 921.141(4). The “sentence of death shall be subject to automatic review by the Supreme Court of Florida . . . within 2 years after the filing of a notice of appeal. Such review . . . shall have priority over all other cases.” *Id.*

30. *England v. State*, 940 So. 2d 389, 407 (Fla. 2006) (citing *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990) (per curiam)).

31. *Proffitt v. Florida*, 428 U.S. 242, 244–45 (1976).

32. *Id.* at 245–46.

33. *Id.* at 246.

34. *Id.*

35. *Id.* at 246–27.

36. *Proffitt*, 428 U.S. at 246–47. One of four aggravating circumstances found by the judge was that “the murder was especially heinous, atrocious, and cruel.” *Id.* at 246.

37. *Id.*

38. *Id.* at 247.

The United States Supreme Court granted certiorari to determine whether Florida's recently enacted sentencing scheme was in violation of Proffitt's rights under the Eighth and Fourteenth Amendments.³⁹ The Court upheld Florida's statute as constitutional.⁴⁰ The Court reasoned that sentencing determined by a judge and not a jury was an adequate measure to insure that the death penalty was not applied "in an arbitrary or capricious manner."⁴¹ This was because "a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."⁴² As another constitutional challenge, Proffitt argued that the aggravating circumstance of a crime being especially heinous, atrocious, or cruel was overly vague.⁴³ The Court denied Proffitt's argument, holding that this aggravating circumstance was sufficiently narrow, as defined by the Supreme Court of Florida.⁴⁴

B. Walton v. Arizona

Another significant decision of the United States Supreme Court, regarding a capital sentencing statute similar to that of Florida's, came in *Walton v. Arizona*.⁴⁵ In *Walton*, the defendant, Jeffrey Walton, along with two others, robbed the victim, Thomas Powell, at gunpoint.⁴⁶ Then, Walton and his two accomplices drove Powell out to the desert.⁴⁷ Walton exited the vehicle with Powell, walked him out into the desert, forced him to lie on the ground, and with his foot on Powell's neck, shot Powell in the head.⁴⁸

Walton was tried and convicted of first-degree murder.⁴⁹ Following the trial, and without the jury in attendance, the judge then conducted a separate hearing on the issue of sentencing.⁵⁰ During sentencing, the judge found that

39. *Id.*

40. *Proffitt*, 428 U.S. at 259–60.

41. *Id.* at 252–53.

42. *Id.* at 252.

43. *Id.* at 255.

44. *Id.* at 255–56. This "definition," provided by the Supreme Court of Florida, consisted of statements that "the Legislature intended something "especially" heinous, atrocious or cruel when it authorized the death penalty for first degree murder" and that the aggravator of heinous, atrocious, or cruel only applied to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Proffitt*, 428 U.S. at 255 (quoting *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973)); see also *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

45. 497 U.S. 639 (1990).

46. *Id.* at 644.

47. *Id.*

48. *Id.*

49. *Id.* at 645.

50. *Walton*, 497 U.S. at 645.

there were two aggravating circumstances present.⁵¹ One of the two aggravating circumstances found was that the crime was “especially heinous, cruel or depraved.”⁵² The judge, finding no mitigating circumstances, then imposed the death penalty as Walton’s sentence.⁵³ On appeal to the Supreme Court of Arizona, Walton’s sentence of death was affirmed.⁵⁴

Following receiving his sentence of death, Walton was granted certiorari by the United States Supreme Court and argued that the aggravating circumstances being decided by a judge and not a jury directly violated his Sixth Amendment right to a trial by jury.⁵⁵ In rejecting Walton’s constitutional argument and upholding the Arizona statute, the United States Supreme Court relied heavily on its decisions in previous challenges to Florida’s death penalty statute.⁵⁶ The Court reiterated that “the Sixth Amendment does not require [a jury to make] specific findings authorizing the imposition of the sentence of death.”⁵⁷

In its opinion, the Court reasoned that because aggravating circumstances are “not elements of the crime,” but merely considerations for sentencing, Arizona’s statute was not unconstitutional for allowing only the judge to decide the aggravating circumstances.⁵⁸ The Court decided that these aggravating circumstances were considerations, rather than elements, because “the judge’s findings did not result in a conviction or acquittal.”⁵⁹ Thus, the Arizona capital sentencing statute was upheld.⁶⁰

51. *Id.*

52. *Id.* This aggravating circumstance was partially attributable to the testimony given by a medical examiner “that Powell had been blinded and rendered unconscious by the shot but was not immediately killed. Instead, Powell regained consciousness, apparently floundered about in the desert, and ultimately died from dehydration, starvation, and pneumonia approximately a day before his body was found.” *See id.* at 644–45.

53. *Id.* at 645.

54. *Walton*, 497 U.S. at 645. The Supreme Court of Arizona also upheld the finding of the “heinous, cruel, or depraved” aggravating factor. *Id.* at 646. It relied on its previous decisions stating that an aggravating circumstance is present when a victim experiences “mental anguish or physical abuse” before his or her death. *Id.* The Supreme Court of Arizona found as evidence of Thomas Powell’s anguish the fact that he was walked out into the desert by Walton at gunpoint, and, as a result of his anguish, urinated on himself. *Id.* at 646 n.3.

55. *Id.* at 647.

56. *See Walton*, 497 U.S. at 647–48; *see also Hildwin v. Florida*, 490 U.S. 638, 640–41 (1989) (per curiam) (upholding *Spaziano v. Florida*, 468 U.S. 447 (1984), ruling that Florida’s capital punishment statute was constitutional because under the Sixth Amendment, a jury is not required to make the findings necessary to impose the death sentence).

57. *Walton*, 497 U.S. at 648 (quoting *Hildwin*, 490 U.S. at 640–41).

58. Turner, *supra* note 18, at 514–15.

59. *Id.* at 515.

60. *Walton*, 497 U.S. at 649.

C. Ring v. Arizona

However, in 2002, the role that aggravating factors played in the imposition of the death penalty again came before the United States Supreme Court in *Ring v. Arizona*.⁶¹ In *Ring*, the defendant, Timothy Stuart Ring, was convicted of felony murder in the first degree.⁶² Following the trial, but prior to the sentencing hearing, testimony of one of the defendant's accomplices to the crime was heard by the judge.⁶³ Based on this testimony, the judge drew the conclusion that the defendant was the one, of all involved, who actually shot the victim.⁶⁴ The judge then found two aggravating factors, one of which was that the crime was carried out "in an especially heinous, cruel or depraved manner."⁶⁵ Under the jury's verdict, Ring was only subject to a sentence of life imprisonment.⁶⁶ However, the finding of the two aggravating factors by the judge provided for a sentence of death.⁶⁷ Ring was sentenced to death, and his sentence was affirmed following his appeal to the Supreme Court of Arizona.⁶⁸

On appeal to the United States Supreme Court, Ring challenged Arizona's death penalty statute, arguing that allowing a judge, and not a jury, to make the finding of an aggravating factor was in violation of his rights under the Sixth Amendment.⁶⁹ The Court agreed, and reversed Ring's sentence of death.⁷⁰ The Court reasoned that if a state could enhance a defendant's sentence based on a finding of fact in order to satisfy the Sixth Amendment, that finding of fact must be made by a jury, and not a judge.⁷¹

On numerous occasions, the Supreme Court of Florida has been presented with claims that Florida's death penalty statute is unconstitutional under the *Ring* decision.⁷² Two particularly noteworthy cases where the Su-

61. 536 U.S. 584 (2002).

62. Turner, *supra* note 18, at 519.

63. *Id.* at 519–20. The accomplice's testimony implicated Ring as the one, of all involved, that shot the victim. *Id.* at 520.

64. *Id.*

65. *Id.* (quoting *Ring*, 536 U.S. at 594–95).

66. Turner, *supra* note 18, at 521.

67. *Id.*

68. Benjamin F. Diamond, Note, *The Sixth Amendment: Where Did the Jury Go? Florida's Flawed Sentencing in Death Penalty Cases*, 55 FLA. L. REV. 905, 917 (2003). When *Ring* was decided, in addition to Arizona, it also made the death penalty statutes of Colorado, Idaho, Montana, and Nebraska unconstitutional. Turner, *supra* note 18, at 523.

69. *Id.* at 521.

70. Diamond, *supra* note 68, at 917–18.

71. *Id.* at 918.

72. See, e.g., *Robinson v. State*, 865 So. 2d 1259 (Fla. 2004) (per curiam); *Smith v. State*, 866 So. 2d 51 (Fla. 2004) (per curiam); *Parker v. State*, 873 So. 2d 270 (Fla. 2004) (per cu-

preme Court of Florida addressed this issue were *Bottoson v. Moore*⁷³ and *King v. Moore*.⁷⁴ Both Bottoson and King, in different cases, were convicted of murder and received the death penalty.⁷⁵ Following their sentencing, both Bottoson and King received a stay of execution from the United States Supreme Court.⁷⁶ After each was granted a stay of execution, the Supreme Court of Florida decided *Ring*.⁷⁷ After the *Ring* decision was made, both Bottoson and King had their certiorari denied by the Court.⁷⁸

In Florida, the jury is responsible for considering aggravating circumstances in rendering its advisory opinion and the judge is charged with determining which, if any, aggravating circumstances are present in imposing a sentence.⁷⁹ Only aggravating circumstances enumerated in the statute may be considered.⁸⁰ One aggravating circumstance under Florida law is whether

riam); *Guzman v. State*, 868 So. 2d 498 (Fla. 2003) (per curiam); *Davis v. State*, 875 So. 2d 359 (Fla. 2003) (per curiam); *Henry v. State*, 862 So. 2d 679 (Fla. 2003) (per curiam); *Zakrzewski v. State*, 866 So. 2d 688 (Fla. 2003) (per curiam); *Owen v. State*, 862 So. 2d 687 (Fla. 2003) (per curiam); *Cummings-El v. State*, 863 So. 2d 246 (Fla. 2003) (per curiam); *Jones v. State*, 855 So. 2d 611 (Fla. 2003) (per curiam); *Davis v. State*, 859 So. 2d 465 (Fla. 2003) (per curiam); *Rivera v. State*, 859 So. 2d 495 (Fla. 2003) (per curiam); *Stewart v. State*, 872 So. 2d 226 (Fla. 2003) (per curiam); *McCoy v. State*, 853 So. 2d 396 (Fla. 2003) (per curiam); *Owen v. Crosby*, 854 So. 2d 182 (Fla. 2003) (per curiam); *Allen v. State*, 854 So. 2d 1255 (Fla. 2003) (per curiam); *Belcher v. State*, 851 So. 2d 678 (Fla. 2003) (per curiam); *Caballero v. State*, 851 So. 2d 655 (Fla. 2003) (per curiam); *Blackwelder v. State*, 851 So. 2d 650 (Fla. 2003) (per curiam); *Butler v. State*, 842 So. 2d 817 (Fla. 2003) (per curiam); *Harris v. State*, 843 So. 2d 856 (Fla. 2003) (per curiam); *Banks v. State*, 842 So. 2d 788 (Fla. 2003) (per curiam); *Grim v. State*, 841 So. 2d 455 (Fla. 2003) (per curiam); *Lawrence v. State*, 846 So. 2d 440 (Fla. 2003) (per curiam); *Lugo v. State*, 845 So. 2d 74 (Fla. 2003) (per curiam); *Jones v. State*, 845 So. 2d 55 (Fla. 2003) (per curiam); *Kormondy v. State*, 845 So. 2d 41 (Fla. 2003) (per curiam); *Doorbal v. State*, 837 So. 2d 940 (Fla. 2003) (per curiam); *Anderson v. State*, 841 So. 2d 390 (Fla. 2003) (per curiam); *Cole v. State*, 841 So. 2d 409 (Fla. 2003) (per curiam); *Conahan v. State*, 844 So. 2d 629 (Fla. 2003) (per curiam); *Spencer v. State*, 842 So. 2d 52 (Fla. 2003) (per curiam); *Porter v. Crosby*, 840 So. 2d 981 (Fla. 2003) (per curiam); *Lynch v. State*, 841 So. 2d 362 (Fla. 2003) (per curiam); *Lucas v. State*, 841 So. 2d 380 (Fla. 2003) (per curiam); *Fotopoulos v. State*, 838 So. 2d 1122 (Fla. 2002) (per curiam); *Israel v. State*, 837 So. 2d 381 (Fla. 2002) (per curiam); *Bruno v. Moore*, 838 So. 2d 485 (Fla. 2002) (per curiam); *Marquard v. State*, 850 So. 2d 417 (Fla. 2002) (per curiam); *Chavez v. State*, 832 So. 2d 730 (Fla. 2002) (per curiam); *Washington v. State*, 835 So. 2d 1083 (Fla. 2002) (per curiam); *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) (per curiam); *King v. Moore*, 831 So. 2d 143 (Fla. 2002) (per curiam).

73. 833 So. 2d 693 (Fla. 2002) (per curiam).

74. 831 So. 2d 143 (Fla. 2002) (per curiam).

75. *Bottoson*, 833 So. 2d at 694; *King*, 831 So. 2d at 144.

76. *Bottoson*, 833 So. 2d at 697 (Wells, J., concurring).

77. *Id.* at 695 (majority opinion).

78. *Id.* at 697 (Wells, J., concurring).

79. FLA. STAT. § 921.141(2)–(3) (2008).

80. *Id.* § 921.141(5). Florida's statutory aggravating circumstances are as follows:

“[t]he capital felony was especially heinous, atrocious, or cruel.”⁸¹ However, no standardized definition of what heinous, atrocious, or cruel actually

(a) The capital felony was committed by a person under sentence of imprisonment or placed on community control or on probation.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim’s official capacity.

(l) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal street gang member

(o) The capital felony was committed by a person designated as a sexual predator . . . or a person previously designated as a sexual predator who had the sexual predator designation removed.

Id. § 921.141(5)(a)–(o).

81. *Id.* § 921.141(5)(h).

means for sentencing purposes is currently in existence.⁸² This creates a conundrum because Florida is one of thirty-nine states that allow for either the death penalty or a more severe sentencing when a crime is heinous, atrocious, or cruel.⁸³

Florida began implementing the use of aggravating circumstances to “narrow the class of persons eligible for the death penalty.”⁸⁴ However, the United States Supreme Court also requires that these aggravating circumstances provide “clear and objective standards’ that [afford] ‘specific and detailed guidance.’”⁸⁵

Evidence of the vagueness that surrounds determining if a crime is heinous, atrocious, or cruel can be found in the Supreme Court of Florida opinion, *State v. Dixon*.⁸⁶ Directly addressing the heinous, atrocious, and cruel factor, Justice Adkins, writing for the majority, said:

The aggravating circumstance which has been most frequently attacked is the provision that commission of an especially heinous, atrocious or cruel capital felony constitutes an aggravated capital felony. Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.⁸⁷

Again, if a judge determines that the aggravating circumstances outweigh the mitigating circumstances, the judge can override the jury’s advisory sen-

82. See Michael Welner, *Response to Simon: Legal Relevance Demands That Evil Be Defined and Standardized*, 31 J. AM. ACAD. PSYCHIATRY L. 417, 417 (2003) [hereinafter Welner, *Response to Simon*].

83. *Id.*

84. *Lowenfield v. Phelps*, 484 U.S. 231, 232 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)).

85. *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)).

86. 283 So. 2d 1, 18 (Fla. 1973), *superseded by statute*, FLA. STAT. § 782.04(3), *as recognized in State v. Dane*, 533 So. 2d 265, 268–69 (Fla. 1988).

87. *Id.* at 9 (citation omitted).

tence.⁸⁸ The constitutionality of Florida's statutory provision allowing the trial judge, and not the jury, to make the final sentencing determination was challenged in *Spaziano v. Florida*.⁸⁹ In 1976, Spaziano was convicted of first degree murder.⁹⁰ The majority vote of the jury was for a sentence of life imprisonment.⁹¹ Notwithstanding the jury's recommendation of life imprisonment, the trial court judge found there were sufficient aggravating circumstances present to warrant a death sentence.⁹² Two aggravating factors were found, one of which was that the crime "was especially heinous and atrocious."⁹³ On appeal to the Supreme Court of Florida, Spaziano's sentence of death was reversed due to an error in sentencing.⁹⁴ On remand, the trial judge once again found the murder was heinous, atrocious, and cruel and, for the second time, sentenced Spaziano to death.⁹⁵ Once again, Spaziano appealed to the Supreme Court of Florida, and this time, Spaziano's sentence was affirmed.⁹⁶

On appeal to the United States Supreme Court, Spaziano argued that Florida's override provision violated the Fifth, Sixth, Eighth, and Fourteenth Amendments.⁹⁷ The issue presented to the Court was, "whether, given a jury verdict of life," a trial judge may override the jury and impose a sentence of death.⁹⁸ The United States Supreme Court decided a judge could in fact

88. FLA. STAT. § 921.141(3) (2007).

89. 468 U.S. 447, 449 (1984).

90. *Id.* at 451.

91. *Id.*

92. *Id.* at 451–52.

93. *Id.* at 452.

94. *Spaziano*, 468 U.S. at 452. The sentencing error was caused when the trial judge did not allow Spaziano an opportunity to respond after the judge received a presentence report containing confidential information, and relied on it. *See Spaziano v. State*, 393 So. 2d 1119, 1122 (Fla. 1981) (per curiam).

95. *Spaziano*, 468 U.S. at 453. For a similar scenario, see generally *Orme v. State*, 677 So. 2d 258 (Fla. 1996) (per curiam). In *Orme*, the defendant, Roderick Michael Orme, after freebasing cocaine, called the victim, a nurse he had known for some time, for assistance during a "bad high." *Id.* at 260. Upon her arrival to the hotel where Orme was staying, Orme raped, beat, and strangled her. *Id.* Orme was ultimately convicted and sentenced to death. *Id.* at 261. The judge found that three aggravating factors were present. *Id.* One of the three aggravating factors found was that the crime was heinous, atrocious, and cruel. *Orme*, 677 So. 2d at 261.

96. *Spaziano*, 468 U.S. at 453; *see also Spaziano v. State*, 433 So. 2d 508, 511 (Fla. 1983) (holding as constitutional the Florida provision allowing a judge to override the advisory opinion of a jury).

97. *Spaziano*, 468 U.S. at 457–58.

98. *Id.* at 458. When *Spaziano* was decided, the only other states which allowed a jury override were Alabama and Indiana. Lafferty, *supra* note 7, at 472.

override a jury's advisory opinion.⁹⁹ The Court held that the Florida requirements in place allowing for a judge to override the advisory opinion of a jury for sentencing were not so broad or vague as to make them unconstitutional.¹⁰⁰ Additionally, the Court rejected Spaziano's Sixth Amendment argument, holding that the Sixth Amendment does not "guarantee a right to a jury determination" on the issue of punishment.¹⁰¹

III. CASE STUDIES: RECONCILING HEINOUS, ATROCIOUS, AND CRUEL IN FLORIDA

Various Florida cases can be examined to show the varying conceptions of what has been considered heinous, atrocious, and cruel. This is of importance because, as stated by the Supreme Court of Florida, the heinous, atrocious, and cruel aggravator is one "of the most weighty in Florida's sentencing calculus."¹⁰² However, Florida currently has no method in place to precisely define these terms.¹⁰³ The confusion that surrounds what crimes qualify as heinous, atrocious, or cruel was summed up succinctly by Judge Barkett when she stated that:

[M]any death-penalty states require consideration of whether a murder was committed in an "especially heinous, atrocious, or cruel" manner. But what does this mean? Must the perpetrator have intended to torture his victim? Must the victim have suffered even though suffering was not intended by the perpetrator? This factor has been applied so broadly that it has led to anomalous results.¹⁰⁴

99. *Spaziano*, 468 U.S. at 454.

100. *Id.* at 449. However, Justice Stevens opined that Florida's capital sentencing statute was "unusual" because "[i]t consists of a determination of guilt or innocence by the jury, an advisory sentence by the jury, and an actual sentence imposed by the trial judge." *Id.* at 470 (Stevens, J., concurring in part and dissenting in part).

101. *Id.* at 459.

102. *Sireci v. Moore*, 825 So. 2d 882, 887 (Fla. 2002).

103. See Welner, *Response to Simon*, *supra* note 82, at 417. The United States Supreme Court has said that "[a] State's definitions of its aggravating circumstances—those circumstances that make a criminal defendant 'eligible' for the death penalty—therefore play a significant role in channeling the sentencer's discretion." *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990).

104. Rosemary Barkett, *Judicial Discretion and Judicious Deliberation*, 59 FLA. L. REV. 905, 927–28 (2007).

The numerous cases below will attempt to illuminate the lack of uniformity in Florida courts in defining exactly what constitutes a crime being heinous, atrocious, and cruel.

A. *We Know Evil: Upholding the Presence of Heinous, Atrocious, and Cruel*

1. *Johnson v. State*

In *Johnson v. State*,¹⁰⁵ the defendant, Richard Allen Johnson, was convicted of murder and sentenced to death.¹⁰⁶ In 2001, Johnson met his victim at a bar.¹⁰⁷ Johnson and his victim then spent the night together, and the following day, the two had an argument.¹⁰⁸ Johnson then killed his victim by strangling her both manually with his hands, and also with a ligature.¹⁰⁹

In determination of his death sentence, one of the aggravating circumstances found by the judge was that the murder was carried out in a heinous, atrocious, or cruel manner.¹¹⁰ On appeal, the Supreme Court of Florida upheld the finding of the heinous, atrocious, or cruel aggravator and affirmed Johnson's sentence.¹¹¹

2. *Butler v. State*

Another example of a crime being deemed heinous, atrocious, or cruel is found in *Butler v. State*.¹¹² Here, the defendant, Harry Butler, entered the home of his ex-girlfriend, Leslie Fleming, the victim.¹¹³ Butler and Fleming had a daughter together who was in the bedroom with Fleming at the time Butler entered the home.¹¹⁴ Butler then picked his daughter up and took her into a separate bedroom.¹¹⁵

105. 969 So. 2d 938 (Fla. 2007) (per curiam).

106. *Id.* at 943.

107. *Id.*

108. *Id.*

109. *Id.* at 944. Additionally, testimony was given at trial that Johnson stated it took longer to break the victim's neck than he thought it would. *Johnson*, 969 So. 2d at 944.

110. *Id.* at 945.

111. *Id.* at 962.

112. 842 So. 2d 817, 833 (Fla. 2003) (per curiam).

113. *Id.* at 821.

114. *Id.*

115. *Id.*

After putting his daughter in another room, Butler then went back into the room where Fleming was.¹¹⁶ Butler then both stabbed Fleming multiple times and then strangled her.¹¹⁷ Butler was convicted of first-degree murder.¹¹⁸ The jury rendered an advisory sentence by a vote of eleven to one that Butler receive the death penalty.¹¹⁹ During the sentencing trial, the trial judge found only one aggravating circumstance present, that the murder was heinous, atrocious, or cruel.¹²⁰ Several mitigating circumstances were also found.¹²¹ Butler was sentenced to death.¹²²

On appeal to the Supreme Court of Florida, Butler's death sentence, and the finding of the aggravator, was upheld.¹²³ The court held that a sentence of death, even when the only aggravating circumstance found is that the murder is heinous, atrocious, or cruel, is not disproportionate, even if there are several mitigating circumstances present.¹²⁴

3. *Coday v. State*

Once again, in *Coday v. State*,¹²⁵ the aggravator of heinous, atrocious, and cruel was found.¹²⁶ In this case, the defendant, William Coday, was convicted for the murder of his former girlfriend, Gloria Gomez, and sentenced to death.¹²⁷ Coday and Gomez had an on again, off again relationship.¹²⁸ After breaking up, Coday lured Gomez to his apartment by lying and telling Gomez he had cancer.¹²⁹ When Gomez arrived, Coday attempted to reconcile their relationship.¹³⁰ When Gomez refused his advances, Coday "flew into a rage and punched" Gomez.¹³¹

Coday then began to strike Gomez with a hammer.¹³² During the commission of the attack, Coday struck Gomez with a hammer a total of fifty-

116. *Id.*

117. *Butler*, 842 So. 2d at 821.

118. *Id.* at 820–21.

119. *Id.* at 822.

120. *Id.* at 833.

121. *Id.*

122. *Butler*, 842 So. 2d at 833.

123. *Id.* at 834.

124. *Id.* at 833.

125. 946 So. 2d 988 (Fla. 2006) (per curiam).

126. *Id.* at 1006.

127. *Id.* at 992.

128. *Id.*

129. *Id.*

130. *Coday*, 946 So. 2d at 992.

131. *Id.*

132. *Id.*

seven times.¹³³ Following the strikes of the hammer, Coday then stabbed Gomez with a knife eighty-seven times.¹³⁴ Then, while Gomez was likely still conscious, Coday stabbed Gomez in the throat, and held the knife there until she died.¹³⁵ At trial, expert medical testimony was presented that the victim was likely alive the entire time.¹³⁶ Due to the nature of the attack, the trial court gave great weight to the aggravating circumstance of the crime being heinous, atrocious, or cruel.¹³⁷

On appeal to the Supreme Court of Florida, Coday argued that the finding of the heinous, atrocious, or cruel aggravator was improper because “he did not have an intentional design to torture or inflict pain.”¹³⁸ The court rejected this argument, and upheld Coday’s conviction and vacated the sentence, affirming the finding of the heinous, atrocious, or cruel aggravator because Coday’s action represented “utter indifference to the suffering of” the victim.¹³⁹

B. *Mistaking Evil: Some Crimes Do Not Rise to the Level of Heinous*

I. *Robertson v. State*

Conversely, cases can be found where the aggravator of heinous, atrocious, and cruel was found, and death sentences imposed, only to have them later vacated on appeal to the Supreme Court of Florida.¹⁴⁰ In *Robertson v. State*,¹⁴¹ the defendant, Lavarity Robertson, was convicted of two counts of

133. *Id.* at 1006.

134. *Id.*

135. *Coday*, 946 So. 2d at 1006.

136. *Id.* In addition to the medical testimony that the victim, Gloria Gomez, was likely still alive, Coday signed a written confession to the effect that “Gomez was alive until the fatal stab wound when he thrust the knife into her neck and held it there until she expired.” *Id.*

137. *Id.*

138. *Id.*

139. *See Coday*, 946 So. 2d at 1006. In upholding the finding of the heinous, atrocious, or cruel aggravator, the court said:

In this case, Coday brutally beat Gloria Gomez with two hammers a total of fifty-seven times. He then stabbed her eighty-seven times. The medical examiner testified that Gomez was alive for 143 of the 144 wounds, that she was conscious for all of her defensive wounds, and that she may have been conscious for 143 of the wounds. In Coday’s signed, written confession, he wrote that Gomez was alive until the fatal stab wound when he thrust the knife into her neck and held it there until she expired. The facts demonstrate at the very least an utter indifference to the suffering of Gloria Gomez.

Id.

140. *See, e.g., Robertson v. State*, 611 So. 2d 1228 (Fla. 1993) (per curiam); *Bonifay v. State*, 626 So. 2d 1310 (Fla. 1993) (per curiam); *McKinney v. State*, 579 So. 2d 80 (Fla. 1991).

141. 611 So. 2d at 1228.

murder and sentenced to death.¹⁴² In 1988, Robertson came upon a couple sitting in a parked car.¹⁴³ Deciding to rob the couple, Robertson approached the driver's side of the vehicle.¹⁴⁴ After demanding money, he shot the first victim.¹⁴⁵ The second victim then exited the vehicle screaming, and Robertson shot her as well.¹⁴⁶

On appeal, the Supreme Court of Florida reversed Robertson's death sentence, finding the aggravator of heinous, atrocious, or cruel was not present because the murder was not committed with the intent of torturing the victim or "the desire to inflict a high degree of pain or with the enjoyment of" the victim's suffering.¹⁴⁷ The court went on to say that the heinous, atrocious, or cruel aggravator is only found in murders that include torture or murders where depravity, shown by the desire to cause a high degree of suffering, is present.¹⁴⁸ Because the murders committed by Robertson were ordinary shootings, they were not outside the "norm" and as such, not heinous, atrocious, or cruel.¹⁴⁹

2. *Bonifay v. State*

In *Bonifay v. State*,¹⁵⁰ the defendant, James Patrick Bonifay, killed a clerk who worked at a parts store where his cousin was previously fired from.¹⁵¹ Bonifay and an accomplice each shot the victim once.¹⁵² After shooting the victim, Bonifay and his accomplice then broke open cash boxes located in the store.¹⁵³ In the midst of Bonifay and his accomplice emptying the cash boxes, the victim, who was still conscious, begged for his life.¹⁵⁴ The victim also told Bonifay that he had a wife and children.¹⁵⁵ Bonifay told the victim to "shut up" and then proceeded to fire two bullets into the vic-

142. *Id.* at 1231–32.

143. *Id.* at 1230.

144. *Id.*

145. *Id.*

146. *Robertson*, 611 So. 2d at 1230.

147. *Id.* at 1233.

148. *Id.*

149. *Id.*

150. 626 So. 2d 1310 (Fla. 1993) (per curiam).

151. *Id.* at 1311. The apparent motive for the killing was the belief of Bonifay's cousin that the clerk was the cause of him being released from his employment. *Id.* However, the record shows that the intended victim was not working on the night of the murder, and another clerk was killed. *Id.*

152. *Id.*

153. *Bonifay*, 626 So. 2d at 1311.

154. *Id.*

155. *Id.*

tim's head.¹⁵⁶ Bonifay was subsequently convicted of murder, and during the sentencing phase, the judge found four aggravators present, and sentenced Bonifay to death.¹⁵⁷ One of the aggravators found was that the murder was heinous, atrocious, or cruel.¹⁵⁸

On appeal, the Supreme Court of Florida found that there was no evidence to support the aggravator of heinous, atrocious, or cruel.¹⁵⁹ Although the victim begged for his life, the court held that there was no intent "to inflict a high degree of pain or to otherwise torture the victim."¹⁶⁰ The court went on to explain that a victim begging for his or her life, or the presence of multiple gunshots, was not an adequate basis to find the aggravator of heinous, atrocious, or cruel, unless "Bonifay intended to cause the victim unnecessary and prolonged suffering."¹⁶¹ Following this finding, Bonifay's death sentence was vacated and his case remanded for a new sentencing process.¹⁶²

3. *McKinney v. State*

In *McKinney v. State*,¹⁶³ the defendant, Boris McKinney, was convicted of murder and other charges.¹⁶⁴ In 1987, McKinney robbed the victim and then drove him to an overpass where he then shot the victim.¹⁶⁵ McKinney then brought the victim to an alley, where he eventually disposed of the body, and shot the victim two more times.¹⁶⁶ Following the trial, the court found that there were three aggravators present.¹⁶⁷ One of the three aggravators was that the murder was "unnecessarily heinous, atrocious, or cruel."¹⁶⁸ At sentencing, McKinney received the death penalty.¹⁶⁹

156. *Id.*

157. *Id.* at 1311-12.

158. *Bonifay*, 626 So. 2d at 1312.

159. *Id.* at 1313.

160. *Id.*

161. *Id.* However, even if a victim is interrogated before being shot execution style, this still will not satisfy the requirement of being heinous, atrocious, or cruel. *See Maharaj v. State*, 597 So. 2d 786, 791 (Fla. 1992) (per curiam).

162. *Bonifay*, 626 So. 2d at 1311-12.

163. 579 So. 2d 80 (Fla. 1991).

164. *Id.* at 81. The other charges McKinney was convicted of included "unlawful display of a firearm during the commission of a felony, armed robbery, armed kidnapping, armed burglary of a conveyance, and grand theft of an automobile." *Id.* at 82.

165. *Id.* at 84.

166. *Id.*

167. *McKinney*, 579 So. 2d at 82.

168. *Id.*

169. *Id.*

On appeal to the Supreme Court of Florida, McKinney argued that the aggravator of heinous, atrocious, or cruel did not apply to his case.¹⁷⁰ The Supreme Court of Florida agreed.¹⁷¹ The court held that the aggravator of heinous, atrocious, or cruel was not proven beyond a reasonable doubt.¹⁷² The court expressed that “[w]hile it is true that the victim was shot multiple times, a murder is not heinous, atrocious, or cruel without additional facts to raise the shooting to the shocking level required by this factor.”¹⁷³ Because there were no additional facts, aside from the victim being shot multiple times, the court held that the aggravator of heinous, atrocious, or cruel was not proven beyond a reasonable doubt.¹⁷⁴ Thus, the Supreme Court of Florida subsequently vacated McKinney’s death sentence.¹⁷⁵

IV. THE DEPRAVITY SCALE: A SCIENTIFIC APPROACH TO DEFINING EVIL

The Depravity Scale is being developed by the Forensic Panel,¹⁷⁶ which is “the only peer-reviewed forensic consultation practice [located] in the United States.”¹⁷⁷ In the United States, many states allow for harsher sentencing and in some cases the death penalty for crimes that are found to be “depraved,” “heinous,” or “evil.”¹⁷⁸ However, these terms are ambiguous, and as such, “these aggravating factors have offered judges and juries little in terms of guidance.”¹⁷⁹ As previously mentioned, in Florida, one of the enumerated aggravating factors of a crime is especially heinous, atrocious, or

170. *Id.* at 84.

171. *Id.*

172. *McKinney*, 579 So. 2d at 84.

173. *Id.*

174. *Id.*

175. *Id.* at 85.

176. The Forensic Panel is a peer reviewed forensic practice, founded by Michael Welner, M.D., whose members specialize in the fields of psychiatry, psychology, toxicology and neuropsychology, and provide consultation services on court cases. Michael Welner, The Depravity Scale, Forensic Panel, About Us, <http://www.forensicpanel.com/aboutus/index.htm> (last visited Apr. 5, 2009) [hereinafter Welner, About Us]. All research conducted for the Depravity Scale is solely funded by the Forensic Panel. Michael Welner, The Depravity Scale, Forensic Panel, FAQ, <https://depravityscale.org/depscale/faq.php> (last visited Apr. 5, 2009) [hereinafter Welner, FAQ].

177. Michael Welner, *Symposium: Hidden Diagnosis and Misleading Testimony: How Courts Get Shortchanged*, 24 PACE L. REV. 193, 193 (2003). Michael Welner is the Chairman of The Forensic Panel, a Clinical Associate Professor of Psychiatry at New York University School of Medicine and also serves as an Adjunct Professor of Law at Duquesne University School of Law. *Id.*

178. Welner, FAQ, *supra* note 176.

179. Barkett, *supra* note 104, at 927.

cruel.¹⁸⁰ Although there is no statutory definition of what these terms mean, the Supreme Court of Florida has said:

It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.¹⁸¹

Again, no objective method exists that assesses whether a crime meets these criteria, or defines just what these words mean. By creating the Depravity Scale, the Forensic Panel seeks to undertake the task of scientifically guiding jurors and judges in determining whether a crime qualifies as heinous or depraved, in an effort to eliminate leaving these determinations up to subjective personal opinion.¹⁸² “In a system sensitive, at sentencing, to prejudice influenced by race, orientation, and socioeconomic factors, mingling the ‘what’ of a crime with other factors that had nothing to do with the perpetrator’s intent, actions, and attitudes undercuts an unbiased, equal justice.”¹⁸³

“Is it fair for one person to characterize anyone [as] evil without an objective standardized appraisal of his intent, actions, and attitudes?”¹⁸⁴ Although many people can recognize certain crimes are worse than others, the Depravity Scale seeks out how to objectively and fairly determine the worst of the worst.¹⁸⁵ “Standardized definitions must integrate the diversity of our social, psychological, and cultural influences on our perception of what distinguishes certain acts for additional accountability—for all criminal cases, not merely murder.”¹⁸⁶ Without clear guidelines, it is not far-reaching to assume that both judges and juries can have their judgment colored by emotion when deciding whether a particular crime is heinous or depraved.¹⁸⁷ This is why the Depravity Scale enlists input given by the public to allow the

180. FLA. STAT. § 921.141(5)(h) (2007).

181. *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973).

182. Welner, *Response to Simon*, *supra* note 82, at 418–19.

183. *Id.* at 417–18.

184. *Id.* at 420.

185. Welner, FAQ, *supra* note 176.

186. Welner, *Response to Simon*, *supra* note 82, at 418.

187. See Paul H.B. Shin, *Depravity Scale: Weighing the Evil That Men Do*, N.Y. DAILY NEWS, May 14, 2006, at 20.

public “to affect criminal sentencing standards.”¹⁸⁸ An individual, regardless of his or her familiarity or experience in the legal or forensic science fields, can participate in Phases B and C of the Scale’s research initiative.¹⁸⁹

The Depravity Scale focuses on the “what” of the crime, and not the “who.”¹⁹⁰ The founder of the Forensic Panel, Michael Welner, feels it necessary for jurors, when deciding whether the aggravating circumstance of heinousness or depravity is present, to be provided with an objective guide to shield them from deciding based on trial tactics and possible bias.¹⁹¹ The Depravity Scale seeks to distinguish between the worst of crimes in a standardized and consistent manner.¹⁹² It also aims to change the way the law enforcement community investigates crimes.¹⁹³ The Depravity Scale is a chart comprised of objective categories of an offender’s traits and crime, such as intent, the act itself, and behavior.¹⁹⁴ The goal of the Depravity Scale is to “yield a standardized instrument that focuses inexperienced juries on evidence.”¹⁹⁵ This is necessary because in order to justify a harsher sentence, such as death, the fact pattern of a heinous, atrocious, or cruel crime must be distinguishable from a crime that is not.¹⁹⁶

A. *Researching the Evil Side of Crime*

The research of the Depravity Scale is broken in to three separate phases: A, B, and C.¹⁹⁷ The research that sparked the Depravity Scale began in 1998.¹⁹⁸ In Phase A, the Depravity Scale’s founder, Michael Welner, studied over one-hundred appellate court decisions, randomly selected, “where jury

188. Welner, FAQ, *supra* note 176.

189. *Id.*

190. *Id.*

191. *Id.*

192. Amanda Phillips, *Psychology 101: The Mind of a Shooter*, 34 L. ENFORCE. TECH. 38, 45 (2007).

193. *Id.* at 46.

194. Neely Tucker, *Giving Evil the Eye; Juries Don’t Always Know Heinous Crimes When They See Them, but This Might Help*, WASH. POST, July 23, 2007, at C1.

195. Welner, *Response to Simon*, *supra* note 82, at 420.

196. Welner, FAQ, *supra* note 176.

197. *Id.*

198. *Id.* The research conducted by the Depravity Scale is overseen by an advisory board. *Id.* The advisory board consists of professionals and experts in fields such as psychology, criminology, forensic nursing, law, computer science, law enforcement, pathology, entomology, history, and engineering. *Id.*

findings of ‘heinous’ or ‘depraved’ were challenged and upheld.”¹⁹⁹ The details of the crime in each case were then organized by common features.²⁰⁰

Next, these features were organized and termed in accordance with psychiatric diagnostic constructs typically associated with exceptionally notorious behavior: specifically, antisocial personality, psychopathy, malignant narcissism, antisocial-by-proxy, sadism, and necrophilia. Fifteen items emerged from this exercise of ascertaining “depraved” intents, actions, and attitudes as had been signified by American courts, establishing content validity.²⁰¹

The Depravity Scale is currently in Phase B of its research effort which consists of releasing a survey to the public.²⁰² Participants are given scenarios and asked to rate whether a crime is “‘especially,’ ‘somewhat,’ or ‘not’ deprived.”²⁰³ The participant is provided with twenty-six categories of crimes.²⁰⁴ The high percentage of people in agreement, approximately 25,000 people who have taken the survey, is surprising.²⁰⁵ Results of the survey show that ninety-nine percent of all those responding “agree that ‘actions that cause grotesque suffering,’ ‘intent to emotionally traumatize’ and ‘actions that prolong suffering,’ are depraved.”²⁰⁶ Furthermore, the research effort of the Depravity Scale recognizes that a number of variables may influence one’s opinion of what is heinous or depraved.²⁰⁷ To combat responses being too heavily influenced by a respondent’s demographics, the

199. Welner, *Response to Simon*, *supra* note 82, at 419.

200. Welner, FAQ, *supra* note 176.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* Some of the categories include: emotionally traumatizing someone, maximizing damage and destruction, causing disfigurement, targeting victims who are vulnerable, reacting to a trivial irritant, prolonging the suffering of a victim and inflicting exceptional harm physically. Posting of Marie Price to Depravity Scale Blog, <https://depravityscale.org/blog/?m=200612> (Dec. 20, 2006, 16:37 EST). Additionally, the crime scenarios are given range from non-violent, such as property crimes, to violent. Welner, FAQ, *supra* note 176. This is so all criminal acts, not just murder alone, are included because “[s]tandardized definitions must distinguish certain acts for greater accountability.” *Id.*

205. Tucker, *supra* note 194. Those who completed the survey are representative of more than fifty countries, with the highest number of respondents being located within the United States. *Id.*

206. *Id.*

207. Welner, *Response to Simon*, *supra* note 82, at 419.

Depravity Scale has implemented control factors in its conduction of research.²⁰⁸

Following Phase B, Phase C shall “establish how the items on the final [scale] should be ‘weighted’ upon measuring the factors present in a given crime.”²⁰⁹ Phase C evaluates the items under research to compare them to one another.²¹⁰ In order to partially determine an item’s “weight,” survey “[p]articipants are asked to rank the items from ‘least depraved’ . . . to ‘most depraved’ . . . when presented together in randomly ordered subgroups.”²¹¹ Each survey participant is provided with a random set of unique questions, to determine “whether participants consistently regard certain items as more depraved than other items, regardless of presentation order or reference frame.”²¹²

V. CONCLUSION

Florida’s trifurcated capital sentencing scheme requires the jury to consider aggravating factors when rendering its advisory sentence of life imprisonment or death.²¹³ The sentencing scheme also charges the judge to weigh the aggravating and mitigating circumstances present in a crime in reaching a conclusion on which sentence is appropriate, life imprisonment without parole or death.²¹⁴ One of the fifteen enumerated aggravating circumstances in Florida is whether “[t]he capital felony was especially heinous, atrocious, or cruel.”²¹⁵ Although the Supreme Court of Florida has said “we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended,”²¹⁶ currently no objective method exists to define these “common knowledge” terms.²¹⁷

208. *Id.* The variables for which controls are in place include age, gender, ethnicity, history of victimization, state of residence, profession, attitude toward the death penalty, level of spirituality, education level, location, degree of religious tradition and others. *Id.* at tbl.1. No one has “distinguished the social, political, religious, and cultural influences on peoples’ perceptions of depravity. Therefore . . . to establish intents, actions, and attitudes [the] research must take into account all potentially confounding variables.” Welner, FAQ, *supra* note 176.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* Additionally, each participant is only able to partake in the surveys that comprise Phase B and Phase C one time each. Welner, FAQ, *supra* note 176.

213. FLA. STAT. § 921.141(2)(a) (2008).

214. *Id.* § 921.141(3).

215. *Id.* § 921.141(5)(h).

216. *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973).

217. Welner, FAQ, *supra* note 176.

Because the presence of the heinous, atrocious, or cruel aggravator can mean life or death, judges and juries should have some standard of deciding objectively which crimes are the worst of the worst.²¹⁸ To truly bring this aggravating circumstance into the category of “clear and objective” required by the United States Supreme Court,²¹⁹ courts need some method of defining just what these terms are to mean.

This is exactly what the Depravity Scale seeks to do by scientifically guiding jurors and judges in determining whether a crime qualifies as heinous or depraved in an effort to eliminate leaving these determinations up to subjective personal opinion. “Without standardized direction, jury decisions on whether a crime is depraved are all too often contaminated by details about the ‘who’ of a crime . . . as opposed to focusing on ‘what’ the defendant actually did.”²²⁰ The founder of the Forensic Panel, Michael Welner, M.D., feels it is necessary for jurors and judges, when deciding whether the aggravating circumstance of heinousness or depravity is present, be provided with an objective tool to make these decisions, so they are not influenced on trial tactics and possible bias.²²¹ This is because “[s]tandardizing the already used terminology of ‘heinous,’ ‘depraved,’ and ‘evil,’ is a matter of fairness and justice.”²²²

218. *Id.*

219. *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)).

220. Welner, *Response to Simon*, *supra* note 82, at 417.

221. Welner, FAQ, *supra* note 176.

222. Welner, *Response to Simon*, *supra* note 82, at 418.

ARE PRISONERS' RIGHTS TO LEGAL MAIL LOST WITHIN THE PRISON GATES?

*AARON C. LAPIN

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I. INTRODUCTION

“Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.”¹ Although prisoners lose aspects of their rights to liberty and privacy, incarceration does not eliminate all constitutional rights.² The Supreme Court has recognized that when a prison regulation or practice infringes upon a fundamental right, courts will protect prisoners’ constitutional rights.³ “[C]ourts have learned from repeated investigation and bitter experience that judicial intervention is *indispensable* if constitutional dictates—not to mention considerations of basic humanity—are to be observed in the prisons.”⁴

“The basic prisoner interest is in uninhibited communication with attorneys, courts, prosecuting attorneys, and probation or parole officers.”⁵ Since a prisoner’s means of communication with these parties is “restricted sharply by the fact of incarceration, the essential role of postal communications cannot be ignored.”⁶ The Supreme Court has determined that prisoners have a right to receive and send mail.⁷ Particularly, a prisoner has a right not to have his legal mail read.⁸ “[T]he denial of free and unfettered communication between inmates and courts and attorneys may constitute a denial of federal constitutional rights.”⁹ Such a denial would cause the prisoner to

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1. *Turner v. Safley*, 482 U.S. 78, 84 (1987). “Prisoners are still ‘persons’ entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all of the requirements of due process.” *Procunier v. Martinez*, 416 U.S. 396, 428 (1974) (Douglas, J., concurring).

2. *Bierregu v. Reno*, 59 F.3d 1445, 1449 (3d Cir. 1995); see *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974) (“There is no iron curtain drawn between the Constitution and the prisons of this country.”).

3. *Procunier*, 416 U.S. at 405–06 (citing *Johnson v. Avery*, 393 U.S. 483, 486 (1969)).

4. *Peterkin v. Jeffes*, 855 F.2d 1021, 1033 (3d Cir. 1988) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 354 (1981) (Brennan, J., concurring)). However, the judicial system is reluctant to interfere with prison administration because “courts are ill equipped to deal with” its complex nature. *Turner*, 482 U.S. at 84–85 (quoting *Procunier*, 416 U.S. at 405–06).

5. *Taylor v. Sterrett*, 532 F.2d 462, 475 (Former 5th Cir. 1976).

6. *Id.*

7. See *Thornburgh v. Abbot*, 490 U.S. 401, 403–04 (1989); *Procunier*, 416 U.S. at 413–14.

8. See *Wolff v. McDonnell*, 418 U.S. 539, 575 (1974).

9. *Barlow v. Amiss*, 477 F.2d 896, 898 (Former 5th Cir. 1973).

become a victim of the prison's unconstitutional regulations.¹⁰ However, there is a split among jurisdictions regarding whether the mere opening, but not reading, of legal mail outside the presence of an inmate violates a prisoner's constitutional rights.¹¹

Part II of this paper will provide an overview of prisoners' rights to legal mail. Part III will describe the sources of prisoners' particular rights associated with legal mail and the scope of those rights. Part IV will describe the split among United States Circuit Courts of Appeals regarding prisoners' rights to receive unopened and unread legal mail. Finally, Part V of this paper will conclude that prisoners have a constitutionally protected right to have their legal mail opened in their presence.

II. HISTORICAL VIEW ON THE DEVELOPMENT OF PRISONERS' LEGAL MAIL CLAIMS

A. *Wolff v. McDonnell*

The Court in *Wolff v. McDonnell*¹² addressed whether prison officials could open a prisoner's legal mail in a prisoner's presence or whether the legal mail had to "be delivered unopened if normal detection techniques fail to indicate contraband."¹³ Prisoners filed a class action suit challenging the constitutionality of the prison regulations to inspect all incoming and outgoing mail.¹⁴ Prisoners claimed that their rights under the First, Sixth, and Fourteenth Amendments would be violated if prison regulations permitted the opening of their legal mail.¹⁵ The prison officials retreated from the prison policy of opening and reading all of the prisoners' legal mail.¹⁶ The prison officials determined that prisoners have a right not to have their legal mail opened and read.¹⁷ They contended that prisoners' legal mail may be opened

10. *Al-Amin v. Smith*, 511 F.3d 1317, 1331 (11th Cir. 2008).

11. *See id.* at 1328–30. Some jurisdictions have held that opening legal mail outside of a prisoner's presence is a constitutional violation. *Id.* at 1329. Others claim that prisoners do not have a constitutional right to have legal mail opened in their presence. *Id.* at 1328–29.

12. 418 U.S. 539 (1974).

13. *Id.* at 575.

14. *Id.* at 553, 574. There was no exception for prisoners' legal mail. *Id.* at 574.

15. *Id.* at 575. However, the Court did not address the Sixth Amendment claim because the Sixth Amendment only protects "the attorney-client relationship from intrusion in the criminal setting, while the claim here would insulate all mail from inspection, whether related to civil or criminal matters." *Wolff*, 418 U.S. at 576 (citations omitted).

16. *Id.* at 575.

17. *Id.*

“as long as it is done in the presence of the prisoners.”¹⁸ The Court added that the legal mail should be properly marked as such, so that the prisons do not have to inspect and sort out those letters that are legal mail.¹⁹

The Court determined that opening legal mail in the presence of prisoners does not constitute censorship, since it insures that legal mail will not be read.²⁰ “Neither could it chill such communications, since the inmate’s presence insures that prison officials will not read the mail.”²¹ Additionally, the opening of legal mail insures that contraband will not enter the prison.²² Thus, the Court determined that “by acceding to a rule whereby the inmate is present when mail from attorneys is inspected, [the prisons] have done all, and perhaps even more, than the Constitution requires.”²³

B. Taylor v. Sterrett

After *Wolff*, the Fifth Circuit clarified in *Taylor v. Sterrett*²⁴ the “constitutional bases for the restrictions placed on opening, inspecting, and reading of an inmate’s correspondence with attorneys, various public officials, and the press.”²⁵ In *Taylor*, prison officials challenged the district court’s restriction, forbidding opening a prisoner’s legal mail, except in that prisoner’s presence.²⁶ The court in *Taylor* concluded that opening legal mail in the prisoner’s presence supports the prisoner’s constitutional “right of access to

18. *Id.* The prison officials conceded that they could not open and read prisoners’ legal mail. *Id.*

19. *Wolff*, 418 U.S. at 576. Requiring attorneys to identify themselves as attorneys will allow the prisons to determine that they are members of the bar and would further security and efficiency. *Id.* at 576–77.

20. *Id.* at 577. The Court emphasized that “freedom from censorship is not equivalent to freedom from inspection or perusal.” *Id.* at 576.

21. *Id.* at 577.

22. *Wolff*, 418 U.S. at 577. Contraband may be placed inside legal mail and would compromise prison safety. *See id.* The Court also determined that a “flexible test” permitting opening legal mail only “in ‘appropriate circumstances’” is unworkable. *Id.*

23. *Id.* The Court did not classify the constitutional basis for opening prisoners’ legal mail in their presence. *See id.* at 575–76. The Court broadly stated that none of their rights were violated by opening legal mail in their presence. *Wolff*, 418 U.S. at 576. The Court did not reach the issue whether such a process was constitutionally required. *See id.* at 575–76.

24. 532 F.2d 462 (Former 5th Cir. 1976).

25. *Id.* at 465.

26. *Id.* at 464.

The sheriff is directed not to open mail transmitted between inmates of the jail and the following persons: courts, prosecuting attorney, probation and parole officers, governmental agencies, lawyers and the press. If, however, there is a reasonable [probability] that contraband is included in the mail, it may be opened, but only in the presence of the inmates.
Id. However, the reasonable probability restriction was removed. *Id.* at 469, 475.

the courts.”²⁷ In reaching this result, the court in *Taylor* “weigh[ed] the burden on the prisoner’s access to the courts against the legitimate governmental interest of prison security.”²⁸ Before a prisoner can succeed with a right to access claim, “it must be clear that the state’s substantial interests cannot be protected by less restrictive means.”²⁹ The government interest was “jail security as affected by the introduction of contraband into the jail and by the communication of escape plans or other” criminal activities.³⁰ “The basic prisoner interest is in uninhibited communication with attorneys.”³¹

Inspection of legal mail is limited to locating contraband and the contents of the mail are not to be read.³² Prohibiting reading of legal mail promotes the prisoner’s interests in “uninhibited communication” between attorneys and prisoners and ensuring that “judicial proceedings” involving prisoners are “conducted fairly.”³³ Given these interests, simply prohibiting prison officials from reading legal mail still inhibits a prisoner’s attorney-client relationship.³⁴ “[T]he fact that prison officials are entirely trustworthy is irrelevant. The controlling factor is that attorneys or prisoners may fear that prison employees who read inmate correspondence will abuse the sensitive information to which they have access.”³⁵

The court in *Taylor* determined that by opening prisoners’ legal mail in their presence, a compromise is established between the interests of both the

27. *Taylor*, 532 F.2d at 475.

28. *Id.* at 472.

29. *Id.* “Jail security alone is unquestionably a substantial or compelling governmental interest. Whenever a jail practice or procedure furthers the interest of jail security in a manner that is necessary or essential to that interest, there is no constitutional violation.” *Id.* at 472 n.14. The court in *Taylor* “[took] the terms ‘necessary’ or ‘essential’ to mean that there [was] no alternative means of protecting jail security that [was] reasonably available to prison officials. This is the least that should be required when a fundamental interest such as access to the courts is at stake.” *Id.*

30. *Taylor*, 532 F.2d at 473.

31. *Id.* at 475.

32. *Id.*

33. *Id.*

The basic prisoner interest is in uninhibited communication with attorneys, courts, prosecuting attorneys, and probation or parole officers. Both pre-trial detainees and convicted prisoners have a vital need to communicate effectively with these correspondents. This is to insure ultimately that the judicial proceedings brought against or initiated by prisoners are conducted fairly. Since the prisoner’s means of communicati[on] with these parties are restricted sharply by the fact of incarceration, the essential role of postal communications cannot be ignored.

Id.

34. *Taylor*, 532 F.2d at 475–76. “The inhibitory effect remains because the medium through which sensitive legal communications are to be transmitted is unshielded.” *Id.* at 476.

35. *Id.* (citing *Smith v. Robbins*, 454 F.2d 696, 697 (1st Cir. 1972)). The prisoners may fear that their sensitive information will be “exposed to third party interception.” *Id.*

prison administration and the prisoners.³⁶ “Prisoners are not inhibited in using this traditional communication medium to pursue their defense or to present their legal grievance. And jail officials are not denied the use of any mail procedure shown to be essential to jail security.”³⁷ Thus, the prisoner’s presence ensures that legal mail will be unread and prison officials are assured that no contraband enters the prison.³⁸ In *Taylor*, the prison officials failed to satisfy their burden that reading legal mail is essential in order to prevent a security breach.³⁹ Therefore, consistent with the regulations in *Wolff*, the court in *Taylor* recognized a prisoner’s right not to have his or her legal mail read, and therefore implemented prison regulations requiring that opening legal mail must be done in the prisoner’s presence.⁴⁰

C. Turner v. Safley

The Court in *Turner v. Safley*⁴¹ drastically changed a prisoner’s ability to persevere in his or her constitutional claims.⁴² *Turner* established that a prison regulation restricting prisoners’ constitutional rights is valid if the regulation “is reasonably related to legitimate penological interests.”⁴³ The *Turner* Court established four factors to determine the reasonableness of a prison regulation:

[1]) a “valid, rational connection”⁴⁴ between the prison regulation and the legitimate governmental interest;

...

36. *Id.* at 477.

37. *Taylor*, 532 F.2d at 477.

38. *Id.* The head of the jail, Chief Rowland, believes that censorship of mail minimally affects jail security. *Id.* (quoting *Taylor v. Sterrett*, 344 F. Supp. 411, 414 (N.D. Tex. 1972)).

39. *Id.* The court in *Taylor* determined that prison officials have not made a persuasive showing that abuses of incoming mail pose a realistic threat to jail security or any other legitimate governmental interest that is cured by reading this mail or having the ability to do so. The actual abuses cited in the appellants’ briefs involve contraband, not information contained in letters that can be discovered only by reading them. Thus, the abuses allegedly cured by the reading, perhaps selectively, of inmate mail are hypothetical.

Id.

40. *Taylor*, 532 F.2d at 475; *Wolff v. McDonnell*, 418 U.S. 539, 575 (1974); see also *Guajardo v. Estelle*, 580 F.2d 748, 758 (Former 5th Cir. 1978) (following *Taylor*’s holding that “incoming [legal] mail could be opened only to inspect for contraband and in the presence of the inmate recipient”).

41. 482 U.S. 78 (1987).

42. See *id.* at 89.

43. *Id.*

44. *Id.* (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

[2]) whether there are alternative means of exercising the right that remain open to prison inmates;

...

[3]) the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally;

...

[4]) the absence of ready alternatives . . . [to the] prison regulation.⁴⁵

Two years later, in *Thornburgh v. Abbott*,⁴⁶ the Court held that incoming prisoner mail regulations shall be analyzed under *Turner's* "reasonably related" test.⁴⁷

III. RIGHTS INVOLVED IN PRISONERS' LEGAL MAIL CLAIMS

A. *Right of Access to the Courts*

The United States Supreme Court has held "that prisoners have a constitutional right of access to the courts."⁴⁸ An inmate's right to "unfettered access to the courts is as fundamental a right as any other he may hold. . . . All other rights of an inmate are illusory without it"⁴⁹ Prison regulations may not interfere with prisoners' access to the courts.⁵⁰ A prisoner's interests in access to the courts are "to challenge their convictions, advance the timing and terms of their release from confinement, reform prison conditions, or conduct or assist in the preparation of their defense."⁵¹

45. *Id.* at 89–90.

46. 490 U.S. 401 (1989).

47. *Id.* at 404 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). In *Thornburgh*, the Court applied *Turner's* reasonably related test to a prison regulation of incoming publications. *Id.* at 403–04.

48. *Bounds v. Smith*, 430 U.S. 817, 821 (1977); see *Wolff v. McDonnell*, 418 U.S. 539, 578 (1974) (citing *Johnson v. Avery*, 393 U.S. 483, 485 (1969)); see also *Johnson*, 393 U.S. at 489; *Ex parte Hull*, 312 U.S. 546, 549 (1941).

49. *McCray v. Sullivan*, 509 F.2d 1332, 1337 (Former 5th Cir. 1975) (quoting *Adams v. Carlson*, 488 F.2d 619, 630 (7th Cir. 1973)).

50. *Taylor v. Sterrett*, 532 F.2d 462, 471 (Former 5th Cir. 1976); see also *McCray*, 509 F.2d at 1337.

51. *Taylor*, 532 F.2d at 470.

1. Source of the Right

Notions of prisoners possessing a right to access the courts began in 1941.⁵² In *Ex parte Hull*,⁵³ prison officials read prisoners' legal mail that was addressed to the courts.⁵⁴ Prison officials would only mail the contents to the courts, if in their opinion, it was worthy of being sent.⁵⁵ As a result, prisoners' legal mail was intercepted thereby interfering with their ability to communicate with the courts and their right of access to the courts was hindered.⁵⁶ The Court determined that the regulation was invalid stating that prison officials may not interfere with a prisoner's right of access to the courts for a writ of habeas corpus.⁵⁷

In *Bounds v. Smith*,⁵⁸ the Court established "that prisoners have a constitutional[ly] [protected] right of access to the courts."⁵⁹ *Bounds* never purported to explain the exact constitutional source.⁶⁰ Recently, courts have determined that the right of access arises under the Sixth Amendment,⁶¹ First Amendment, Equal Protection Clause, Due Process Clause of the Fourteenth Amendment, Article IV Privileges and Immunities Clause, and Fifth Amendment.⁶²

a. Right to Petition

In the colonial era, citizens primarily used their right to petition by petitioning their legislatures.⁶³ In modern times, the United States Supreme Court determined that the Petition Clause includes the right to access the

52. See *Hull*, 312 U.S. at 549. The Supreme Court recognized that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." *Id.*

53. *Id.* at 546.

54. *Id.* at 548.

55. *Id.* at 548-49.

56. See *Hull*, 312 U.S. at 549.

57. *Id.*

58. 430 U.S. 817 (1977).

59. *Id.* at 821; see also *Wolff v. McDonnell*, 418 U.S. 539, 577-78 (1974); *Johnson v. Avery*, 393 U.S. 483, 489 (1969); *Hull*, 312 U.S. at 549.

60. *Bounds*, 430 U.S. at 833-34 (Burger, C.J., dissenting). The only reference to the constitutional source was the prisoners' complaint, which stated that their inability to have meaningful access violated the Fourteenth Amendment. *Id.* at 818 (majority opinion).

61. See *Wolff*, 418 U.S. at 576.

62. *Chappell v. Rich*, 340 F.3d 1279, 1282 (11th Cir. 2003) (per curiam) (citing *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002)).

63. *Bieregu v. Reno*, 59 F.3d 1445, 1453 (3d Cir. 1995), *abrogated in part by Lewis v. Casey*, 518 U.S. 343, 349 (1996).

courts.⁶⁴ The United States Supreme Court has dealt with the right to petition as encompassed within the First Amendment.⁶⁵ Thus, the First Amendment right to petition is where the right of access to the courts originated.⁶⁶

b. *Right to Counsel*

The attorney-client privilege cannot be restricted in a manner that hinders a prisoner's ability to access the courts.⁶⁷ The Sixth Amendment guarantees individuals, in criminal proceedings, effective assistance of counsel.⁶⁸ A prison regulation that infringes upon a prisoner's First and Sixth Amendment rights does not need to be considered independently.⁶⁹ Therefore, any intrusion upon a prisoner's right to effective counsel by reading his or her legal mail is integrated within a parallel abridgement of the right to access the courts.⁷⁰

c. *Due Process*

The Due Process Clause of the Fourteenth Amendment includes the right of access to the courts.⁷¹ "The constitutional guarantee of due process

64. *Id.* at 1453. Right of access encompasses both the legislative branch and the courts. *Id.*

65. *Id.*; see also *McDonald v. Smith*, 472 U.S. 479, 482 (1985) (stating that the right to petition guarantees freedom of expression). "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

66. *Bieregu*, 59 F.3d at 1453.

67. *Taylor v. Sterrett*, 532 F.2d 462, 473 (Former 5th Cir. 1976).

68. See *Bieregu*, 59 F.3d at 1453-54 n.4; see also *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974) ("As to the Sixth Amendment, its reach is only to protect the attorney-client relationship from intrusion in the criminal setting.").

In all criminal prosecutions, the 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

69. *Taylor*, 532 F.2d at 472.

70. *Id.*

71. *Bieregu*, 59 F.3d at 1454.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights.⁷² Prisoners are required to be given reasonable opportunity to search and obtain attorney assistance.⁷³ Prisoners' interest in having their legal mail unread is a "liberty" interest under the Fourteenth Amendment.⁷⁴ Thus, prisoners' right to their legal mail is protected from arbitrary prison regulation.⁷⁵ Prison regulations that interfere with the availability of attorney representation or obstruct other aspects of a prisoner's ability to access the courts are unconstitutional.⁷⁶

2. Scope of the Right

A prisoner's access to the courts must be "adequate, effective, and meaningful" to be constitutionally valid.⁷⁷ The degree to which each of these elements must be met remains obscure.⁷⁸ The Supreme Court extended the right of access to encompass only the preparation and transmission of legal documents to the courts.⁷⁹ The prison regulation must reasonably provide prisoners with an "adequate opportunity" to present violations of their constitutional right of access to the courts.⁸⁰ All prisoners must be given the opportunity to adequately present their legal claims fairly.⁸¹ This is achieved by "meaningful access" to the courts.⁸²

A prisoner must be "actually denied" access to the courts in order for his or her claim to succeed.⁸³ Specifically, the prisoner must show proof of actual injury.⁸⁴ Initially, courts followed a demarcation between ancillary

U.S. CONST. amend. XIV, § 1.

72. *Procunier v. Martinez*, 416 U.S. 396, 419 (1974).

73. *Id.*

74. *Id.* at 418.

75. *Id.*

76. *Id.* at 419.

77. *Bounds v. Smith*, 430 U.S. 817, 822 (1977).

78. *Brewer v. Wilkinson*, 3 F.3d 816, 821 (5th Cir. 1993).

79. *Id.*; see *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974).

80. *Bounds*, 430 U.S. at 825.

81. *Id.* at 823 (quoting *Ross v. Moffitt*, 417 U.S. 600, 616 (1974)).

82. *Id.* (citing *Ross*, 417 U.S. at 612).

83. *Bieregu v. Reno*, 59 F.3d 1445, 1454–55 (3d Cir. 1995) (quoting *Hudson v. Robinson*, 678 F.2d 462, 466 (3d Cir. 1982), *superseded by* *Lewis v. Casey*, 518 U.S. 343, 349 (1996)).

84. *Lewis*, 518 U.S. at 349. The actual injury requirement is derived from the constitutional principle of standing. *Id.* The doctrine of standing ensures that the courts do not interfere with coordinate branches of the government. *Id.*

It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the polit-

aspects of access to the courts, which merely impact convenience or comfort without depriving access to the courts, from prison regulations that are central to a prisoner's right of access to the courts.⁸⁵ Regulations that are central to a prisoner's access to the courts do not require actual injury, but ancillary claims do require proof of actual injury.⁸⁶ Repeatedly violating the confidentiality of a prisoner's legal mail is central to the right of access to the courts, and thus it is unnecessary to show actual injury for the prisoner to establish an infringement of that right.⁸⁷

Therefore, "the only way to ensure that mail is not read when opened, and thus to vindicate the right to access, is to require that it be done in the presence of the inmate to whom it is addressed."⁸⁸ Interfering with a prisoner's legal mail threatens the principle, often exclusive, means that a prisoner can implement his or her constitutional right.⁸⁹ Prisoners must be assured that their legal mail is kept confidential and secure in order for access to the courts to "be effective, adequate, and meaningful."⁹⁰

However, the demarcations between ancillary and central affects to the right of court access were dismissed.⁹¹ In *Lewis v. Casey*,⁹² the Supreme Court held that all prisoners' claims based on a denial of the right to court access must show proof of actual injury.⁹³ Thus, both ancillary and central effects require proof of actual injury.⁹⁴ Actions by prison officials that hinder a prisoner's pursuit of a non-frivolous claim satisfy the requirement of proof of actual injury.⁹⁵ Therefore, the prisoner must exhibit that his or her

ical branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.

Id.

85. *Bieregu*, 59 F.3d at 1455 (citing *Peterkin v. Jeffes*, 855 F.2d 1021, 1041 (3d Cir. 1988)).

86. *Id.* (citing *Peterkin*, 855 F.2d at 1041–42).

87. *Id.*

88. *Id.* at 1456 (citing *Wolff v. McDonnell*, 418 U.S. 539, 576–77 (1974)).

89. *Id.*

90. *Bieregu*, 59 F.3d at 1455.

91. *Oliver v. Fauver*, 118 F.3d 175, 177–78 (3d Cir. 1997).

92. 518 U.S. 343 (1996).

93. *Id.* at 349. *Lewis* superseded the *Bieregu* ruling. See generally *id.*; *Bieregu*, 59 F.3d 1445. However, it only superseded the holding regarding access to the courts and not the First Amendment free speech claim. *Jones v. Brown*, 461 F.3d 353, 358–59, n.6 (3d Cir. 2006). Actual injury need not be shown in First Amendment free speech claims. *Id.* at n.6. However, proof of actual injury must be shown for access to the courts claims. *Oliver*, 118 F.3d at 177–78.

94. *Oliver*, 118 F.3d at 177. Due to the decision in *Lewis*, "even claims involving so-called central aspects of the right to court access require a showing of actual injury." *Id.* at 177–78.

95. *Jones*, 461 F.3d at 359 (citing *Lewis*, 518 U.S. at 349–53).

ability “to secure judicial relief” through access to the courts has been infringed or frustrated “in some consequential way.”⁹⁶

B. Right to Free Speech

1. Source of the Right

“The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues.”⁹⁷ The First Amendment prohibits the states from “abridging the freedom of speech.”⁹⁸ The mail provides a medium for the exercise of free speech, and the sending and receiving of mail is a First Amendment right.⁹⁹ A prisoner’s First Amendment rights are not lost when he or she enters the prison.¹⁰⁰ The Supreme Court has determined that interference with prisoners’ legal mail implicates the First Amendment right to free speech.¹⁰¹

2. Scope of the Right

The Supreme Court has held that censorship of prisoner mail is justified if the following criterion is met: “First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. . . . Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.”¹⁰²

96. *Id.*

97. *Bieregu*, 59 F.3d at 1451 (quoting *United States ex rel. Milwaukee Soc. Democratic Publ’g Co. v. Burluson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting)), *abrogated by Lewis*, 518 U.S. at 349.

98. U.S. CONST. amend. I.

99. *Al-Amin v. Smith*, 511 F.3d 1317, 1333 (11th Cir. 2008).

100. *Turner v. Safley*, 482 U.S. 78, 95 (1987) (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)). For example, prisoners’ First Amendment rights are violated when prison officials decline to deliver prisoners’ incoming mail because it is in a foreign language. *Bieregu*, 59 F.3d at 1452 (citing *Ramos v. Lamm*, 639 F.2d 559, 581 (10th Cir. 1980)).

101. *See Pell*, 417 U.S. at 822.

102. *Procunier v. Martinez*, 416 U.S. 396, 413 (1974). “[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.” *Pell*, 417 U.S. at 822. Prison officials “must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation.” *Procunier*, 416 U.S. at 413.

Repeatedly opening prisoners' incoming legal mail outside their presence infringes upon communication with the courts—a free speech right protected by the First Amendment.¹⁰³ The confidentiality of prisoners' legal mail is breached when opened outside of their presence.¹⁰⁴ “Such a practice chills protected expression and may inhibit the inmate’s ability to speak, protest, and complain openly, directly, and without reservation with the court.”¹⁰⁵ Regardless of the prison official’s assurances that prisoners’ legal mail will not be read, prisoners’ freedom of expression is still ultimately sacrificed.¹⁰⁶ Thus, the single way to guarantee that a prisoner’s legal mail will remain unread when opened requires that their mail be opened in the presence of the prisoner to whom the mail is addressed.¹⁰⁷

Unlike access to court claims, the actual injury requirement does not pertain to First Amendment freedom of speech claims.¹⁰⁸ In *Lewis*, the Supreme Court stated that to succeed in a claim for interfering with access to the courts, the prisoners must show they were actually injured.¹⁰⁹ However, nothing was stated in *Lewis* that would indicate that a prisoner claiming that their legal mail was opened outside of his or her “presence and thereby violat[ing] his First Amendment rights need allege any consequential injury stemming from that violation, aside from the violation itself.”¹¹⁰ Thus, “protection of an inmate’s freedom to engage in protected communications is a constitutional end in itself.”¹¹¹

C. *Right to Privacy*

Reading prisoners’ legal mail outside their presence may infringe upon prisoners’ rights to privacy.¹¹² An individual’s right to privacy is not lost due to incarceration.¹¹³ If prisoners lose their right to private communication,

103. *Bieregu*, 59 F.3d at 1451. In *Bieregu*, the prisoner complained that his legal mail was opened fifteen times outside his presence. *Id.* at 1452.

104. *Jones v. Brown*, 461 F.3d 353, 359 (3d Cir. 2006).

105. *Bieregu*, 59 F.3d at 1452.

106. *Jones*, 461 F.3d at 359.

107. *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974).

108. *See Jones*, 461 F.3d at 359.

109. *Lewis v. Casey*, 518 U.S. 343, 349 (1996).

110. *Jones*, 461 F.3d at 359.

111. *Id.* at 360.

112. *Bieregu v. Reno*, 59 F.3d 1445, 1456 n.5 (3d Cir. 1995), *abrogated by Lewis*, 518 U.S. at 349; *Stevenson v. Koskey*, 877 F.2d 1435, 1443 n.2 (9th Cir. 1989) (Reinhardt, J., dissenting).

113. *Bieregu*, 59 F.3d at 1456 n.5 (citing *Turner v. Safley*, 482 U.S. 78, 95–99 (1987)). In *Turner*, a prisoner’s right to marry was not lost due to incarceration. *See Turner*, 482 U.S. at 98.

then recidivism is fostered rather than rehabilitation.¹¹⁴ “[P]ersonal information in the hands of prison officials may result in ridicule, harassment, and [even] retaliation.”¹¹⁵

IV. SPLIT OF AUTHORITY IN THE CIRCUIT COURTS

The United States Circuit Courts of Appeals are split regarding the issue of whether prisoners have a constitutionally protected right to receive their legal mail unread and opened only in their presence.¹¹⁶ There is not an absolute determination of whether a prisoner automatically deserves such rights.¹¹⁷ Instead, the Supreme Court in *Turner* initiated a reasonableness test to determine whether a prison regulation infringes upon a prisoner’s constitutional rights.¹¹⁸ A prison regulation that impinges upon a prisoner’s constitutional rights will be valid if it is determined to be reasonably related to a legitimate penological interest.¹¹⁹ Post-*Turner*, there has been a split among the United States Circuit Courts of Appeals regarding whether the mere opening, but not reading, of legal mail outside the presence of an inmate violates a prisoner’s constitutional rights.¹²⁰

114. *Bieregu*, 59 F.3d at 1456 n.5.

115. *Id.*

116. *Al-Amin v. Smith*, 511 F.3d 1317, 1328–29 (11th Cir. 2008).

117. *See id.* at 1327.

118. *Turner*, 482 U.S. at 89.

119. *Id.* The *Turner* Court established four factors to determine the reasonableness of a prison regulation:

[1]) a “valid, rational connection” between the prison regulation and the legitimate governmental interest;

...

[2]) whether there are alternative means of exercising the right that remain open to prison inmates;

...

[3]) the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally;

...

[4]) the absence of ready alternatives . . . [to the] prison regulation.

Id. at 89–90 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

120. *Al-Amin*, 511 F.3d at 1328–29.

A. *Circuits That Recognize Prisoners' Constitutional Rights to Receive Legal Mail Unread and Opened in Their Presence*

1. Eleventh Circuit

In 2008, the Eleventh Circuit Court of Appeals in *Al-Amin v. Smith*,¹²¹ discussed a prisoner's constitutional rights to legal mail.¹²² Thirteen envelopes that were all specifically marked as "legal mail" from an attorney were repeatedly opened before they reached the prisoner.¹²³ The prisoner alleged that "his constitutional rights to access . . . the courts and free speech" were violated by the repeated opening of his legal mail outside of his presence by prison officials.¹²⁴ The prison policy regarding prisoner mail was that correspondence between prisoners and their attorneys was privileged mail.¹²⁵ Specifically, the prison policy forbade prison officials from opening a prisoner's legal mail, and its contents could only be opened in the prisoner's presence.¹²⁶ The prison regulations authorized only external inspection of the legal mail, and even if the mail was opened in the prisoner's presence, prison officials still could not read the mail.¹²⁷

The court in *Al-Amin* relied on *Taylor and Guajardo v. Estelle*¹²⁸ as binding precedent in assessing prisoners' constitutional rights to legal mail.¹²⁹ The Supreme Court in *Wolff* established that a prisoner has a consti-

121. *Id.* at 1317.

122. *Id.* at 1325.

123. *Id.* at 1322. The prisoner filed grievances because his mail was opened outside of his presence. *Id.* at 1321. In response to the grievances, the warden was notified to treat the prisoner's legal mail as privileged and that the mail must be opened in his presence. *Al-Amin*, 511 F.3d at 1321. Despite the grievance ruling, prison officials continued to open the prisoner's legal mail even though he filed multiple grievances regarding the unauthorized opening of his legal mail. *Id.* at 1322.

124. *Id.* at 1320.

125. *Id.* A prisoner's "attorney includes 'any attorney with whom the inmate has had, or is attempting to establish, an attorney client relationship' and who is licensed to practice in state or federal courts." *Id.*

The district court noted that for mail to be treated as privileged legal mail, the state may require: (1) that legal mail be specially marked as originating from an attorney with the attorney's name and address; and (2) that an attorney desiring to communicate with a prisoner first identify herself and her client to prison officials to assure that letters marked privileged are actually from members of the bar.

Al-Amin, 511 F.3d at 1324 n.15; see also *Wolff v. McDonnell*, 418 U.S. 539, 576–77 (1974).

126. *Al-Amin*, 511 F.3d at 1320.

127. *Id.* The external inspection is done by using a fluoroscope, manually inspecting the mail for contraband, or by using a metal detecting device. *Id.*

128. 580 F.2d 748 (Former 5th Cir. 1978).

129. *Al-Amin*, 511 F.3d at 1325–27. The United States Court of Appeals for the Eleventh Circuit "adopted as binding precedent all decisions of the former Fifth Circuit handed down

tutional right to receive unopened and unread legal mail.¹³⁰ The court in *Taylor* relied on the Supreme Court's decision in *Wolff*, that opening legal mail in the presence of prisoners ensures that their legal mail will remain unread.¹³¹ The court in *Al-Amin*, followed the rulings in *Taylor* and *Guajardo*, holding that "a prisoner's constitutional right of access to the courts requires that incoming legal mail from his attorneys, properly marked as such, may be opened only in the inmate's presence and only to inspect for contraband."¹³²

However, the prison officials claimed that the holdings of *Taylor* and *Guajardo* were no longer viable because of the intervening decision by the Supreme Court in *Turner*.¹³³ The court in *Al-Amin* applied *Turner's* reasonableness factors to determine whether the prison official's regulations were reasonably related to a legitimate prison interest.¹³⁴ As to *Turner's* first factor, the court in *Al-Amin* recognized that the government has an interest in keeping prisons secure.¹³⁵ Though, it is unlikely that attorneys pose a security risk of sending contraband.¹³⁶

Additionally, the prison officials never stated "a legitimate security interest" for opening a prisoner's properly marked legal mail outside of the prisoner's presence.¹³⁷ Prison officials can inspect for contraband if legal mail is opened in the prisoner's presence, and the prison's own policy requires a prisoner's legal mail to be opened in the prisoner's presence.¹³⁸ "Assuring the inmate of the confidentiality of inmate-attorney mail by opening such mail only in the inmate's presence actually advances the state's interest in promoting institutional order and security."¹³⁹ Thus, *Turner's* first factor failed because there was no rational connection between the practice in the prison and a legitimate prison interest.¹⁴⁰

prior to close of business on September 30, 1981." *Id.* at 1326 n.18 (citing *Bonner v. City of Prichard*, 661 F.2d 1206, 1207, 1209 (11th Cir. 1981) (en banc)).

130. *See Wolff*, 418 U.S. at 577.

131. *See Taylor v. Sterrett*, 532 F.2d 462, 475 (Former 5th Cir. 1976); *Al-Amin*, 511 F.3d at 1327 n.20.

132. *Al-Amin*, 511 F.3d at 1325; *see Guajardo v. Estelle*, 580 F.2d 748, 758 (Former 5th Cir. 1978); *Taylor*, 532 F.2d at 475.

133. *Al-Amin*, 511 F.3d at 1326.

134. *Id.* at 1327-28 (citing *Turner v. Safley*, 482 U.S. 78, 89-90 (1987)).

135. *Id.* at 1331.

136. *Id.*

137. *Id.*

138. *Al-Amin*, 511 F.3d at 1331.

139. *Id.* (citing *Bieregu v. Reno*, 59 F.3d 1445, 1457 (3d Cir. 1995)).

140. *Id.*

As to *Turner's* second factor, Al-Amin did not have another means of exercising his right of access to the courts.¹⁴¹ Al-Amin's ability to access the courts required that his communications with his attorneys remain confidential.¹⁴² Regardless, if prison officials promise "to open but not read" legal mail, courts have observed that prisoners lack trust in that promise and are fearful that their legal mail will be read.¹⁴³ "Opening attorney mail only in the inmate's presence ensures that the inmate's correspondence with his attorney is not inhibited or chilled by his fear that this correspondence may be read by prison officials."¹⁴⁴

As to *Turner's* third factor, the court found that there was no proof that opening legal mail in a prisoner's presence burdens guards, inmates, or the distribution of prison resources.¹⁴⁵ The prison policy instituted had already required that all legal mail be opened in the prisoner's presence.¹⁴⁶ "While opening all prison mail in an inmate's presence would pose an impermissible burden, [the court in *Al-Amin* concluded that] properly marked attorney mail does not."¹⁴⁷ Thus, opening a prisoner's legal mail in the prisoner's presence does not impose an impermissibly large burden on the prison.¹⁴⁸ As to *Turner's* "fourth factor, opening an inmate's attorney mail in his presence itself is the easy alternative; it 'fully accommodates the prisoner's right at *de minimis* cost to valid penological interests.'"¹⁴⁹ Thus, the court in *Al-Amin* determined that *Taylor* and *Guajardo* are not undermined by *Turner* and remain "valid, well-established law."¹⁵⁰ As such, in the Eleventh Circuit Court of Appeals, prisoners "have a constitutionally protected right to have their properly marked attorney mail opened in their presence."¹⁵¹

Al-Amin would have succeeded in his right to access the courts claim but for the actual injury requirement instituted by the United States Supreme Court in *Lewis*.¹⁵² Al-Amin only made conclusory allegations that the

141. *Id.* *Turner's* second factor "is whether there are alternative means of exercising the right that remain open to prison inmates." *Turner v. Safley*, 482 U.S. 78, 90 (1987).

142. *Al-Amin*, 511 F.3d at 1331.

143. *Id.*

144. *Id.* (citing *Taylor v. Sterrett*, 532 F.2d 462, 476 (Former 5th Cir. 1976)).

145. *Id.*

146. *Id.*

147. *Al-Amin*, 511 F.3d at 1331.

148. *Id.*

149. *Id.* (quoting *Turner v. Safley*, 482 U.S. 78, 91 (1987)).

150. *Id.*

151. *Id.*; see *Lemon v. Dugger*, 931 F.2d 1465, 1467-68 (11th Cir. 1991); *Guajardo v. Estelle*, 580 F.2d 748, 758 (Former 5th Cir. 1978); *Taylor v. Sterrett*, 532 F.2d 462, 475 (Former 5th Cir. 1976).

152. *Al-Amin*, 511 F.3d at 1332; *Lewis v. Casey*, 518 U.S. 343, 349 (1996).

opening of his legal mail compromised his case.¹⁵³ Furthermore, Al-Amin did not specifically demonstrate how any of his legal matters were damaged.¹⁵⁴ As such, the court concluded that Al-Amin did not successfully show the indispensable actual injury requirement to succeed in his access to the courts claim.¹⁵⁵

However, the court in *Al-Amin* determined that his First Amendment right to free speech was violated by the prison officials' continued practice of opening his legal mail outside his presence.¹⁵⁶ The court in *Al-Amin* determined that the right to access claims and the right to free speech claims are independent of one another.¹⁵⁷ A prisoner's presence in a prison does not strip that prisoner of his First Amendment right to free speech.¹⁵⁸ Al-Amin's ability to use the mail is a medium for him to express his right to free speech.¹⁵⁹ "[G]iven their incarceration and often distance from their attorneys, prisoners' use of the mail to communicate with their attorneys about their criminal cases may frequently be a more important free speech right than the use of their tongues."¹⁶⁰

Furthermore, the court in *Al-Amin* relied on the Third Circuit Court of Appeals' holding in *Jones v. Brown*,¹⁶¹ which determined "that a state prison's 'pattern and practice' of opening attorney mail outside the inmate's presence 'interferes with protected communications, strips those protected communications of their confidentiality, and accordingly impinges upon the inmate's right to freedom of speech.'"¹⁶² The court in *Al-Amin* determined that to maintain a constitutional claim for violation of a prisoner's free speech rights, a separate showing of actual injury is not required beyond the violation itself.¹⁶³ Specifically, the court in *Al-Amin* agreed with the Third Circuit's conclusion that a separate showing of actual injury is not required for claims of free speech violations.¹⁶⁴ Thus, "Al-Amin has a First

153. *Al-Amin*, 511 F.3d at 1333.

154. *Id.* There was nothing provided by Al-Amin that showed "specific cases or claims being pursued, nor any deadlines missed, nor any effect on Al-Amin's legal claims." *Id.*

155. *Id.*

156. *Id.*

157. *See Al-Amin*, 511 F.3d at 1334.

158. *See id.* at 1333. "[I]t is well established that a prison inmate 'retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'" *Id.* (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)).

159. *Id.*

160. *Id.* at 1333–34.

161. 461 F.3d 353 (3d Cir. 2006).

162. *Al-Amin*, 511 F.3d at 1334 (quoting *Jones*, 461 F.3d at 359).

163. *Id.* at 1333.

164. *Id.* at 1334.

Amendment free speech right to communicate with his attorneys by mail, separate and apart from his constitutional right to access to the courts.”¹⁶⁵ Additionally, the court in *Al-Amin* relied on *Lemon v. Dugger*,¹⁶⁶ which stressed that a prisoner’s basic interest is unconstrained and effective communication with his or her attorney.¹⁶⁷

2. Third Circuit Court of Appeals

“Of all communications, attorney mail is the most sacrosanct.”¹⁶⁸ The main decisions in the Third Circuit Court of Appeals that discuss prisoners’ rights to legal mail are *Bieregu v. Reno*¹⁶⁹ and *Jones*.¹⁷⁰ The earlier decision, *Bieregu*, involved a prisoner’s claim that prison officials violated his rights by repetitively opening his properly marked legal mail outside his presence.¹⁷¹ The court in *Bieregu* reviewed numerous courts of appeals decisions that determined that opening legal mail outside of a prisoner’s presence violates the Constitution.¹⁷² The Third Circuit determined that the source of a prisoner’s right to receive his or her legal mail unread and opened in his or her presence derived from both the First Amendment right to freedom of speech and the right to access the courts.¹⁷³ The Third Circuit noted a potential source in the right to privacy.¹⁷⁴

In *Bieregu*, the court stated that the right of court access is included within the Due Process Clause of the Fourteenth Amendment and under the First Amendment right to petition clause.¹⁷⁵ The court in *Bieregu* failed to recognize the decision in *Hudson v. Robinson*,¹⁷⁶ which required that a prisoner be “‘actually denied’ access to the courts” to claim his right to access the courts had been violated.¹⁷⁷ Alternatively, *Bieregu* followed the Third Circuit’s later decision in *Peterkin v. Jeffes*,¹⁷⁸ which imposed a demarcation between ancillary aspects of access to the courts, which merely

165. *Id.*

166. 931 F.2d 1465 (11th Cir. 1991).

167. *See Al-Amin*, 511 F.3d at 1331–32 (quoting *Lemon*, 931 F.2d at 1467).

168. *Bieregu v. Reno*, 59 F.3d 1445, 1456 (3d Cir. 1995), *abrogated in part by Lewis v. Casey*, 518 U.S. 343, 349 (1996).

169. *Id.* at 1445.

170. *Jones v. Brown*, 461 F.3d 353, 355–56 (3d Cir. 2006).

171. *Bieregu*, 59 F.3d at 1448.

172. *Id.* at 1450.

173. *Id.* at 1456–58.

174. *See id.* at 1456 n.5.

175. *See id.* at 1453–54.

176. 678 F.2d 462 (3d Cir. 1982).

177. *Bieregu*, 59 F.3d at 1454–55 (quoting *Hudson*, 678 F.2d at 466).

178. 855 F.2d 1021 (3d Cir. 1988).

impact convenience or comfort without depriving access to the courts, from prison regulations that are central to a prisoner's right of access to the courts.¹⁷⁹ Regulations that are central to a prisoner's access to the courts do not require actual injury, but ancillary claims require proof of actual injury.¹⁸⁰

The court in *Bieregu* determined that repeatedly violating the confidentiality of a prisoner's legal mail are central to the right of access to the courts.¹⁸¹ Therefore, *Bieregu* concluded that prison officials repetitive reading of a prisoner's legal mail does not require the prisoner to show proof of actual injury in order for the prisoner to establish an infringement of that right.¹⁸² Similar to the former Fifth Circuit's *Taylor* decision, the court in *Bieregu* determined that "the only way to ensure that mail is not read when opened, and thus to vindicate the right of access, is to require that it be done in the presence of the inmate to whom it is addressed."¹⁸³

The recent 2006 decision in *Jones* assessed the constitutional validity of a new prison policy requiring the opening of prisoners' legal mail outside their presence.¹⁸⁴ The state enacted this new policy to safely secure its prisons from the threat of anthrax attacks fueled by the September 11, 2001 terrorist attacks.¹⁸⁵ Prior to this change in policy, all legal mail was required to be opened in the prisoner's presence.¹⁸⁶ The court in *Jones* analyzed the vitality of *Bieregu* in relation to *Lewis*.¹⁸⁷ *Jones* determined that *Lewis* had no effect on *Bieregu*'s First Amendment free speech claims.¹⁸⁸ *Bieregu*'s

179. *Bieregu*, 59 F.3d at 1455 (quoting *Peterkin*, 855 F.2d at 1041).

180. *Id.* (citing *Peterkin*, 855 F.2d at 1041–42).

181. *Id.*

182. *Id.*

183. *Id.* at 1456 (citing *Wolff v. McDonnell*, 418 U.S. 539, 576–77 (1974)); see *Guajardo v. Estelle*, 580 F.2d 748, 758 (Former 5th Cir. 1978); *Taylor v. Sterrett*, 532 F.2d 462, 475 (Former 5th Cir. 1976). Reading prisoners' legal mail would likely violate the right of court access "even more than simply opening and inspecting it." *Bieregu*, 59 F.3d at 1456. "[I]nterference with attorney mail probably infringes the right of court access even more than interference with court mail, whether the correspondence relates to a criminal conviction, a subsequent collateral proceeding, or a civil suit to protect an inmate's constitutional rights." *Id.*

184. See *Jones v. Brown*, 461 F.3d 353, 355–56 (3d Cir. 2006).

185. See *id.* at 356.

186. *Id.*

187. See *id.* at 359.

188. *Id.* *Jones* reaffirmed *Bieregu*'s holding that

[a] state pattern and practice, or, as is the case here, explicit policy, of opening legal mail outside the presence of the addressee inmate interferes with protected communications, strips those protected communications of their confidentiality, and accordingly impinges upon the inmate's right to freedom of speech. The practice deprives the expression of confidentiality and chills the inmates' protected expression, regardless of the state's good-faith protestations that it does not, and will not, read the content of the communications. This is so because "the

ruling that no proof of actual injury needs to be shown for First Amendment free speech claims remains well established law.¹⁸⁹

Following *Lewis*, the Third Circuit in *Oliver v. Fauver*¹⁹⁰ ruled that in order to sustain a claim for denial of access to the courts the prisoner must show evidence of actual injury.¹⁹¹ Thus, in doing so, it is clear that *Bieregu* was “effectively overruled.”¹⁹² The particular evidence necessary to satisfy the actual injury requirement was not elaborated on in *Jones* beyond the broad statement that the prisoner must have been “hindered in an effort to pursue a nonfrivolous legal claim.”¹⁹³

The court in *Jones* determined that “while the health and safety of inmates and staff are legitimate penological interests, if there is no information suggesting a significant risk of an anthrax attack, there is no reasonable connection between those interests and the policy of opening legal mail in the absence of the inmate addressee.”¹⁹⁴ Therefore, the prison officials failed to meet their burden under *Turner’s* first step.¹⁹⁵ Thus, in *Bieregu* and *Jones*, the Third Circuit Court of Appeals held that a prisoner has a constitutional right to receive his or her legal mail unread and opened in his or her presence.¹⁹⁶ Such prisoners’ rights are grounded in both the right to access the courts and the right to free speech.¹⁹⁷

3. Sixth Circuit Court of Appeals

Recently, the Sixth Circuit Court of Appeals in *Sallier v. Brooks*¹⁹⁸ determined that a prisoner’s interest in communicating confidentially with an

only way to ensure that mail is not read when opened . . . is to require that it be done in the presence of the inmate to whom it is addressed.”

Jones, 461 F.3d at 359 (quoting *Bieregu*, 59 F.3d at 1456).

189. *Id.*

190. 118 F.3d 175 (3d Cir. 1997).

191. *Jones*, 461 F.3d at 359 (citing *Oliver*, 118 F.3d at 177–78).

192. *Id.* at 359 (quoting *Oliver*, 118 F.3d at 178). However, *Bieregu’s* First Amendment free speech ruling is still good law. *Id.*

193. *Id.* “[T]he inmate must show that his or her exercise of the right at issue, the right of accessing the courts to secure judicial relief, has been infringed in some consequential way.” *Id.* (citing *Lewis v. Casey* 518 U.S. 343, 349 (1996)).

194. *Jones*, 461 F.3d at 364.

195. *Id.* The regulations were not “‘reasonably related to legitimate penological interests.’” *Id.* at 360 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

196. *See id.* at 359; *Bieregu v. Reno*, 59 F.3d 1445, 1456 (3d Cir. 1995), *abrogated in part* by *Lewis v. Casey*, 518 U.S. 343, 349 (1996).

197. *Jones*, 461 F.3d at 359; *Bieregu*, 59 F.3d at 1456.

198. 343 F.3d 868 (6th Cir. 2003).

attorney is a primary element of the judicial process.¹⁹⁹ Therefore, legal mail, as a matter of law, implicates a prisoner's constitutionally protected right to receive mail from an attorney.²⁰⁰ "There is no penological interest or security concern that justifies opening such mail outside of the prisoner's presence when the prisoner has specifically requested otherwise."²⁰¹ As such, it is widely held throughout the Sixth Circuit Court of Appeals that prisoners have a constitutionally protected right to receive legal mail unread and opened in their presence.²⁰²

4. Other United States Circuit Courts of Appeals

Numerous other United States Circuit Courts of Appeals, including the First, Second, Seventh, Eighth, Ninth, and Tenth, have all held that a prisoner has a constitutional right to receive his or her legal mail opened in his or her presence.²⁰³ In *Smith v. Robbins*,²⁰⁴ the First Circuit determined that legal mail from attorneys may not be opened outside the prisoner's presence because the prisoner's presence ensures that the legal mail will remain unread.²⁰⁵ The First Circuit further noted that otherwise, prisoners will fear that their legal mail will be read.²⁰⁶ The Second Circuit determined in *Davis v. Goord*²⁰⁷ that interfering with a prisoner's legal mail implicates a prisoner's right to access the courts.²⁰⁸

199. *Id.* at 877; see *Knop v. Johnson*, 977 F.2d 996, 1012 (6th Cir. 1992) (stating that "[a] prisoner's right to receive mail is protected by the First Amendment").

200. *Sallier*, 343 F.3d at 877; see *Kensu v. Haigh*, 87 F.3d 172, 175 (6th Cir. 1996) (holding that "prison officials should have treated the legal materials delivered to [the prisoner] as 'legal mail' and, therefore, should not have examined the contents outside [the prisoner's] presence").

201. *Sallier*, 343 F.3d at 877-88; see *Muhammad v. Pitcher*, 35 F.3d 1081, 1085-86 (6th Cir. 1994) (holding that the prison policy of opening mail from the state attorney outside of a prisoner's presence is unconstitutional because the practice "is not reasonably related to [a] penological interest"); *Knop*, 977 F.2d at 1011 ("[T]he court ordered implementation of a system-wide policy insuring that legal mail will be opened only in the presence of the addressee if that is the addressee's wish.").

202. *Sallier*, 343 F.3d at 877-78; *Kensu*, 87 F.3d at 175; *Muhammad*, 35 F.3d at 1085-86; *Knop*, 977 F.2d at 1011.

203. See *Al-Amin v. Smith*, 511 F.3d 1317, 1329 (11th Cir. 2008); *Bieregu v. Reno*, 59 F.3d 1445, 1456 (3d Cir. 1995), *abrogated in part by Lewis v. Casey*, 518 U.S. 343, 349 (1996).

204. 454 F.2d 696 (1st Cir. 1972).

205. See *id.* at 697.

206. See *id.*

207. 320 F.3d 346 (2d Cir. 2003).

208. *Id.* at 351. However, the Second Circuit also concluded that only two incidents of prison officials interfering with legal mail "are insufficient to state a claim for denial of access

Additionally, the Seventh Circuit, in *Kaufman v. McCaughtry*,²⁰⁹ determined that when prison officials open a prisoner's properly marked legal mail outside his or her presence, it potentially violates the prisoner's rights.²¹⁰ The Seventh Circuit further determined in *Castillo v. Cook County Mail Room Department*²¹¹ that opening the prisoner's legal mail on three occasions outside the prisoner's presence implicates a "colorable claim" violation of the prisoner's constitutional rights.²¹² Furthermore, the Eighth Circuit in *Powells v. Minnehaha County Sheriff Department*²¹³ concluded that there is a cause of action for a constitutional violation when prison officials open prisoners' legal mail outside their presence.²¹⁴ The Eighth Circuit in *Jensen v. Klecker*²¹⁵ determined that prison officials' repeated opening of a prisoner's legal mail outside the prisoner's presence violated the prisoner's rights.²¹⁶ In addition, the Tenth Circuit, in *Ramos v. Lamm*,²¹⁷ determined that opening prisoners' legal mail outside their presence violates their First and Fourteenth Amendment rights.²¹⁸ Lastly, the Ninth Circuit in *Stevenson v. Koskey*²¹⁹ stated in its dissenting opinion that reading prisoners' legal mail may infringe upon prisoners' rights to privacy.²²⁰

B. *A Circuit That Fails to Recognize Prisoners' Constitutional Rights to Receive Legal Mail Unread and Opened in Their Presence*

1. Fifth Circuit Court of Appeals' *Brewer v. Wilkinson* Ruling

Post-*Turner*, the Fifth Circuit, in *Brewer v. Wilkinson*,²²¹ reassessed the *Taylor* and *Guajardo* holdings.²²² In *Brewer*, the prisoners claimed that the prison officials' practice of opening prisoners' legal mail violated their con-

to the courts because [the prisoner] has not alleged that the interference with his mail either constituted an ongoing practice of unjustified censorship or caused him to miss court deadlines or in any way prejudiced his legal actions." *Id.* at 352.

209. 419 F.3d 678 (7th Cir. 2005).

210. *Id.* at 686.

211. 990 F.2d 304 (7th Cir. 1993) (per curiam).

212. *See id.* at 305, 307.

213. 198 F.3d 711 (8th Cir. 1999) (per curiam).

214. *Id.* at 712.

215. 648 F.2d 1179 (8th Cir. 1981) (per curiam).

216. *Id.* at 1182-83.

217. 639 F.2d 559 (10th Cir. 1980).

218. *Id.* at 582.

219. 877 F.2d 1435 (9th Cir. 1989).

220. *Id.* at 1443 n.2 (Reinhardt, J., dissenting).

221. 3 F.3d 816 (5th Cir. 1993).

222. *Id.* at 822-23, 825.

stitutional rights.²²³ Specifically, the prisoners claimed that the prison officials' practice infringed upon their access to the courts and their First Amendment rights.²²⁴ The Fifth Circuit acknowledged that prisoners' rights of access to the courts are constitutionally protected rights.²²⁵ However, *Brewer* "acknowledge[d] that what we once recognized in [*Taylor*] as being 'compelled' by prisoners' constitutional rights—i.e., that a prisoner's incoming legal mail be opened and inspected only in the prisoner's presence—is no longer the case in light of *Turner*."²²⁶ Accordingly, *Brewer* held "that the violation of the prison regulation requiring that a prisoner be present when his incoming legal mail is opened and inspected is not a violation of a prisoner's constitutional rights."²²⁷

Brewer affirmed the district court's decision that summary judgment was proper because appellants had failed to make out "a cognizable constitutional claim."²²⁸ Therefore, the Fifth Circuit failed to recognize the distinction between free speech and access to courts claims.²²⁹ Specifically, the Fifth Circuit failed to recognize the actual injury requirement differences between free speech and access to the courts claims.²³⁰ The court in *Brewer* noted that the prisoners' pleadings were deficient for numerous reasons.²³¹ *Brewer* mentioned that the prisoners alleged that their legal mail was opened and inspected.²³² But, they did not allege that the mail was read.²³³ Additionally, they did not allege "that their ability to prepare or transmit a necessary legal document ha[d] been affected by this opening and inspection."²³⁴ Furthermore, they did not allege that their legal mail had been censored.²³⁵ Lastly, the prisoners acknowledged the prison's "'legitimate penological objective' of prison security."²³⁶

Despite *Brewer*'s acknowledgment of the prisoners' deficient pleadings, the Fifth Circuit, nevertheless, overruled *Taylor*.²³⁷ *Brewer* held that the prisoners "have not stated a cognizable constitutional claim either for a deni-

223. *Id.* at 817–18.

224. *Id.* at 818.

225. *Id.* at 820.

226. *Brewer*, 3 F.3d at 825.

227. *Id.*

228. *Id.*

229. *See id.*

230. *Id.* at 825.

231. *See Brewer*, 3 F.3d at 825.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Brewer*, F.3d at 825.

237. *Id.*

al of access to the courts or for a denial of their right to free speech by alleging that their incoming legal mail was opened and inspected for contraband outside their presence."²³⁸ The Fifth Circuit's decision in *Brewer* is an anomaly.²³⁹ *Bieregu* acknowledged that its holding was different than *Brewer*'s.²⁴⁰ Most importantly, *Bieregu* stated that its holding "comports with the results reached by the majority of courts of appeals to consider these precise or similar issues, not to mention the results reached by our own district courts."²⁴¹ The majority of circuit courts have held that prisoners have a constitutionally protected right to have their legal mail opened in their presence.²⁴² Therefore, *Brewer* is inconsistent with the majority of courts.²⁴³

V. CONCLUSION

Legal mail is sacred.²⁴⁴ Prisoners may lose certain legal rights upon entrance into prison; however, prisoners still retain many constitutional rights that "free citizens" receive and enjoy.²⁴⁵ Mail is a prisoner's primary form of communication.²⁴⁶ Interfering with a prisoner's legal mail threatens the main avenue, often the only avenue, that a prisoner has to implement his or her constitutional rights.²⁴⁷ Prisoners' constitutional rights to access the courts and free speech are violated by prison officials opening their legal mail outside their presence.²⁴⁸ So, to assuage such fears that his or her mail will be read, circuit courts have required that legal mail be opened in a prisoner's presence.²⁴⁹ This practice balances both the need for prison security and the prisoner's need for uninhibited communication with attorneys.²⁵⁰ Most importantly, requiring legal mail to be opened in the prisoner's presence ensures that prisoners will not fall victim to unconstitutional prison regula-

238. *Id.*

239. *See Bieregu v. Reno*, 59 F.3d 1445, 1458 (3d Cir. 1995); *see also Al-Amin v. Smith*, 511 F.3d 1317, 1328–30 (11th Cir. 2008).

240. *Bieregu*, 59 F.3d at 1458.

241. *Id.*

242. *Id.*; *see also Al-Amin*, 511 F.3d at 1329.

243. *Bieregu*, 59 F.3d at 1458.

244. *See id.* at 1456.

245. *See id.* at 1449.

246. *See id.* at 1455.

247. *Id.*

248. *Al-Amin v. Smith*, 511 F.3d 1317, 1325–34 (11th Cir. 2008).

249. *See id.* at 1331.

250. *Taylor v. Sterrett*, 532 F.2d 462, 477 (Former 5th Cir. 1976).

tions.²⁵¹ This process is neither burdensome nor interferes with prison security.²⁵²

The majority of United States Circuit Courts of Appeals have determined that prisoners have a right to receive their legal mail unread.²⁵³ Courts have further elaborated that such a right requires the mail to be opened in the prisoner's presence to ensure that its contents remain untainted.²⁵⁴ Only one of the United States Circuit Courts of Appeals found it constitutional to censor a prisoner's legal mail and even managed to overturn a binding precedent in its circuit.²⁵⁵ However, its holding remains an anomaly among United States Circuit Courts of Appeals.²⁵⁶ The majority of United States Circuit Courts of Appeals have determined that there is no "rational connection" between the prison practice of opening a prisoner's legal mail outside his or her presence and a legitimate government interest.²⁵⁷ Such a practice hinders their constitutional rights of access to the courts and free speech.²⁵⁸ As such, prisoners have a constitutionally protected right to have their legal mail opened in their presence.²⁵⁹ Therefore, a prisoner's right to legal mail is not shed upon entrance into the prison gates.²⁶⁰

251. *Bieregu*, 59 F.3d at 1455.

252. *Taylor*, 532 F.2d at 477.

253. *See Bieregu*, 59 F.3d at 1458.

254. *See Al-Amin*, 511 F.3d at 1331.

255. *See Brewer v. Wilkinson*, 3 F.3d 816, 825 (5th Cir. 1993).

256. *Bieregu*, 59 F.3d at 1458; *see also Al-Amin*, 511 F.3d at 1328–30.

257. *Al-Amin*, 511 F.3d at 1331.

258. *Id.* at 1325–34.

259. *Id.*

260. *See Bieregu*, 59 F.3d at 1449.

FLORIDA’S REGULATION OF CHILD EXPLOITATION: SENATE BILL 1442

Laura R. Salpeter*

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I. INTRODUCTION

Child pornography has “a devastating and lasting effect on children” emotionally and physically.¹ Under Florida law, child pornography is defined as “any image depicting a minor engaged in sexual conduct.”² Sexual conduct is, in part, conduct such as: “deviate sexual intercourse, sexual bestiality, masturbation, . . . sadomasochistic abuse, [sexual battery], actual lewd

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1. Nat’l Ctr. for Missing & Exploited Children, Child Pornography, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1504 (last visited Apr. 4, 2009) [hereinafter Missing Kids].

2. FLA. STAT. § 847.001(3) (2007).

exhibition of the genitals, [and] actual physical contact with . . . clothed or unclothed genitals.”³ With the increasing use of technology, the Internet has provided our society with great knowledge and opportunity to learn.⁴ However, it has also greatly increased the sexual exploitation of children, more specifically, the continuance of viewing and distribution of sexually exploited children.⁵ Prior research exhibits that more than seventy-seven million children are connected to the Internet, and one in seven of those children have been solicited by a sexual predator online.⁶ Further, recent statistics indicate that child pornographic material on the Internet has grown to reach estimates of as much as twenty percent.⁷

Both Congress and the states have enacted laws in an attempt to control the issue of sexual exploitation of children.⁸ However, few laws have survived the First Amendment and the United States Commerce Clause arguments raised by civil rights groups.⁹ Due to the invalidation of much child exploitation legislation, Congress and the states struggle to narrowly construct provisions of new bills in order to protect children.¹⁰ Despite the constitutional issues raised by civil rights groups, the 2008 Florida Legislature, having a strong governmental interest in protecting children, passed Senate Bill 1442 (SB 1442) to provide additional protection to victims of child pornography both in civil and criminal proceedings.¹¹

This article discusses the history and issues surrounding child exploitation laws and the changes SB 1442 intends to make. This article will first present an overview of the child exploitation problem and discuss the development and progression of legislation both federally and in the State of Florida. Next, this article will analyze the constitutionality of SB 1442. In order to determine the constitutionality of SB 1442, this article will discuss both the First Amendment and the Commerce Clause of the United States Consti-

3. *Id.* § 847.001(16).

4. Missing Kids, *supra* note 1.

5. *Id.*

6. Office of Att’y Gen. of Fla., Child Predator CyberCrime Unit, <http://myfloridalegal.com/pages.nsf/Main/DF75DF6F54BDA68E8525727B00645478> (last visited Apr. 4, 2009) [hereinafter CyberCrime Unit].

7. Missing Kids, *supra* note 1.

8. See Richard H. Martin, Comment, *State Regulation of Pornographic Internet Transmissions: The Constitutional Questions Raised by Senate Bill 144*, 29 FLA. ST. U. L. REV. 1109, 1109 (2002).

9. See *id.* at 1109–10.

10. See generally *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

11. See Fla. S. Comms. on Crim. and Civil Just. Appropriations, Judiciary, Crim. Just., and Senators Dockery and Baker, CS for SB 1442 (2008) Bill Analysis and Fiscal Impact Statement 1 (Apr. 15, 2008) (on file with comms.) [hereinafter SB 1442 Bill Analysis and Impact Statement].

tution. This article will additionally evaluate the impact of SB 1442 on the victims and the State of Florida. Finally, this article will conclude with recommendations toward any present or potential concerns surrounding SB 1442.

II. HISTORY AND PRESENT SITUATION OF CHILD PORNOGRAPHY LAW

Until the mid-1800s, “children were viewed primarily as chattel” and not people.¹² Children were seen as expendable, replaceable, and exchangeable and therefore, children’s rights were non-existent.¹³ Parents or guardians, “under most Western legal systems,” were entitled to sell, beat, and exploit their children.¹⁴ The shift from negative societal attitudes of children began in the nineteenth century and was based upon the concern of care and protection for the child.¹⁵ This new ideology was emphasized by philosophers who proposed that children were malleable and needed to be surrounded by positive experiences.¹⁶ Nationally, this concern grew from the establishments of orphanages and schools to the protection of sexually exploited children.¹⁷

The various rights of children need to be respected and upheld by legislation and the practices of society.¹⁸ In order for these rights to be respected, both Congress and the states have enacted legislation in an attempt to monitor and control society.¹⁹ However, technology and the growing use of the Internet for means of communication have led to abundant grounds for child pornographers and the need for new legislation.²⁰

A. *The Use of the Internet*

The Internet has provided our society with a new medium of communication which has led to a vast amount of knowledge and opportunity.²¹ However, the Internet has also dramatically impacted the growing problem

12. Cynthia Price Cohen, *The Developing Jurisprudence of the Rights of the Child*, 6 ST. THOMAS L. REV. 1, 9 (1993).

13. *See id.*

14. *Id.*

15. *Id.*

16. *See id.*

17. *See Cohen, supra* note 12, at 9.

18. *See Martin, supra* note 8, at 1109–11.

19. *See id.*

20. *Id.* at 1109–10.

21. *Missing Kids, supra* note 1.

of the sexual exploitation of children.²² The eruption of the Internet has significantly complicated law enforcement abilities to control the exchange of pornographic material.²³ According to the National Center for Missing and Exploited Children (NCMEC):

A greater number of child molesters are now using computer technology to organize and maintain their collections of these illegal images. In addition they are also using the Internet to increase the size of these collections. . . . When these images reach cyberspace, they are irretrievable and can continue to circulate forever. Thus the child is revictimized as the images are viewed again and again.²⁴

According to the Online Victimization Report, which surveyed over fifteen hundred children, one in five children are solicited while online.²⁵ Further, the survey indicated that one in thirty-three children are aggressively solicited with attempts to contact the child offline through mail, telephone, or meeting with the child in person.²⁶ However, very few incidents were ever reported to a parent or the authorities.²⁷ One theory is that molesters will gradually introduce sexual images or “content into their online conversations” in an attempt to “lower the child’s inhibitions.”²⁸ Once the child believes that his or her peers have engaged in these sexual activities, he or she begins to see the behavior as acceptable and is more willing to participate.²⁹ Now that the sexual exploitation has taken place, the molester has the ammunition to blackmail the child for expansion of his or her collection.³⁰ The Internet has become a valuable tool for molesters to reach a level of respect from other molesters.³¹ For example, once a personally manufactured image has been placed on the Internet, the respect status is achieved and other molesters will begin trading their own illegal images among fellow exploiters.³²

22. *Id.*

23. Mehagen Doyle, *Bad Apples in Cyberspace: The Sexual Exploitation and Abuse of Children over the Internet*, 21 WHITTIER L. REV. 119, 120 (1999).

24. Missing Kids, *supra* note 1.

25. DAVID FINKELHOR ET AL., ONLINE VICTIMIZATION: A REPORT ON THE NATION’S YOUTH ix (2000), available at http://www.missingkids.com/en_US/publications/NC62.pdf.

26. *Id.*

27. *See id.*

28. Missing Kids, *supra* note 1.

29. *Id.*

30. *See id.*

31. *Id.*

32. *Id.*

A number of children found an encounter with a molester distressing, whether sexual exploitation occurred or not.³³ In order to reduce these encounters, our society needs to better protect the children, increase the number of incidences reported to authorities, and educate both parents and children on the problem of sexual exploitation and the Internet.³⁴

B. *Federal Law and the Exploitation of Children*

Congress, in recent years, has passed numerous amounts of legislation in an attempt to protect children from sexual exploitation.³⁵ The first of Congress's attempts occurred in 1996 when the Communications Decency Act of 1996 (CDA) was passed.³⁶ The CDA was passed as part of the Telecommunications Act of 1996 and prohibited knowingly transmitting pornography to children.³⁷ Specifically, the CDA regulated access to sexually explicit "obscene or indecent" material on the Internet by criminalizing the sending or displaying in an accessible area of such material to anyone under the age of eighteen.³⁸ However, in 2000, in *United States v. Playboy Entertainment Group, Inc.*,³⁹ the United States Supreme Court found the CDA unconstitutional because it violated First Amendment rights.⁴⁰ More specifically, the Court agreed that the CDA was overly broad and vague because while there is a "governmental interest in protecting children from harmful materials, . . . that interest does not justify an unnecessarily broad suppression of speech addressed to adults."⁴¹

Congress additionally enacted the Child Pornography Prevention Act of 1996 (CPPA) to expand child pornography laws to prohibit virtual child pornography.⁴² This Act was overruled in *Ashcroft v. Free Speech Coalition*⁴³ because the Court found that the CPPA "abridges the freedom to engage in a substantial amount of lawful speech [and] is overbroad and unconstitutional"

33. See FINKELHOR ET AL., *supra* note 25, at ix, 1.

34. *Id.* at ix.

35. Martin, *supra* note 8, at 1111.

36. *Id.*

37. *Id.* at 1111-12 (citing 47 U.S.C. § 223(a) (1994)).

38. *Id.* at 1112 (citing 47 U.S.C. § 223(a) (1994)).

39. 529 U.S. 803 (2000).

40. *Id.* at 827.

41. Reno v. ACLU, 521 U.S. 844, 875 (1997).

42. See Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-26 (codified as amended in scattered sections of 18 U.S.C.).

43. 535 U.S. 234 (2002).

under the First Amendment.⁴⁴ Therefore, the Court held that virtual child pornography was not grounds to find actual child pornography.⁴⁵

Due to the unconstitutionality of the CDA, Congress passed the Child Online Protection Act (COPA).⁴⁶ COPA was intended to limit the scope of material “harmful to minors.”⁴⁷ In particular, COPA required commercial websites to inquire about the user’s age before allowing him or her to enter the Internet site, thereby prohibiting any entity or individual in knowingly making available any sexually explicit material that would be considered “harmful to minors.”⁴⁸ Similar to the CDA and the CPPA, COPA was examined on the basis of vagueness and unconstitutionality.⁴⁹ The United States Court of Appeals for the Third Circuit determined COPA was overly broad and unconstitutional and the United States Supreme Court upheld the lower court’s decision.⁵⁰

During the litigation of COPA, Congress passed the Children’s Internet Protection Act (CIPA), which required school libraries receiving any federal technology funds to install software on their computers that blocked pornography.⁵¹ The American Library Association argued that the Act was unconstitutional on its face and the United States District Court for the Eastern District of Pennsylvania agreed.⁵² However, the United States Supreme Court held that CIPA was constitutional because school libraries are required to make determinations regarding the material viewable on the Internet and CIPA only supported the libraries’ duty to make content based decisions viewed by patrons.⁵³

Congress has further enacted legislation for the protection of children against predators in an attempt to prevent the sexual exploitation altogether.⁵⁴ For example, Congress passed the Prosecutorial Remedies and Other Tools

44. *Id.* at 256.

45. *See id.* at 258.

46. *See* Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681-736 (1998) (codified at 47 U.S.C. §§ 230-31).

47. *See id.* § 231(e)(6) (“The term ‘material that is harmful to minors’ means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene . . .”).

48. *Id.* § 231(a).

49. *ACLU v. Ashcroft (ACLU II)*, 542 U.S. 656, 670-673 (2004).

50. *ACLU v. Ashcroft (ACLU I)*, 322 F.3d 240, 271 (2003), *aff’d* 542 U.S. 656 (2004).

51. Children’s Internet Protection Act, 47 U.S.C. § 254(h)(1)(B) (2000).

52. *Am. Library Ass’n v. United States (Library I)*, 201 F. Supp. 2d 401, 407, 495 (E.D. Pa. 2002).

53. *United States v. Am. Library Ass’n (Library II)*, 539 U.S. 194, 208 (2003).

54. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 1, 117 Stat. 650, 650 (codified as amended in scattered sections of 18 U.S.C.).

to End the Exploitation of Children Today Act (PROTECT) in 2003, which expanded law enforcement wiretapping authority.⁵⁵ PROTECT was intended to prevent child abduction and sexual exploitation, instead of punishing the violators.⁵⁶

Additionally, Congress, in their attempts for prevention, enacted the Children's Online Privacy Protection Act of 1998 (COPPA).⁵⁷ COPPA prevented any commercial website from accessing any personal information from a child under the age of thirteen.⁵⁸ Although COPPA does limit online material to children, it fails to limit a child's ability to claim an age of legality without verification.⁵⁹

Furthermore, Congress passed the Adam Walsh Child Protection and Safety Act of 2006 (AWCPS) in response to violent crimes related to sexual exploitation of children.⁶⁰ This Act aims to prevent child abuse and child pornography and to encourage and promote Internet safety.⁶¹ Masha's Law is a provision within the AWCPS, which provides a civil remedy for victims of child pornography, both minors and adults, from those offenders who have downloaded the victim's images and raises the minimum penalty from fifty thousand dollars to one hundred fifty thousand dollars.⁶²

Moreover, Congress has taken additional steps in order to protect children of other countries.⁶³ In 2006, Congress enacted 18 U.S.C. § 2423, which forbids any United States citizen from traveling abroad to engage in sexual activity with a minor.⁶⁴ Further, that same day, Congress enacted 18 U.S.C. § 2422, which bans the use of the mail, Internet, or other means to persuade, coerce, or entice any person under the age of eighteen in unlawful sexual behavior.⁶⁵

In addition to Acts passed by Congress, many states have attempted to enact legislation to address child exploitation issues. There still remains a

55. *See id.* § 201.

56. *See generally id.* §§ 101–108.

57. Children's Online Privacy Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-728 (codified at 15 U.S.C. §§ 6501–6506).

58. *Id.* §§ 1302–1303.

59. *See id.*

60. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, §1, 120 Stat. 587, 587 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.).

61. *Id.*

62. 18 U.S.C. § 2255 (2006).

63. *See* 18 U.S.C. § 2423(b) (2006).

64. *Id.*

65. 18 U.S.C. § 2422(b) (2006).

need for a state legislation that can withstand the constitutional challenges of either the First Amendment or the Commerce Clause in federal court.⁶⁶

C. *Florida Law and the Exploitation of Children*

According to the Federal Internet Crimes Against Children Task Force, “Florida ranks fourth in the nation in volume of child pornography.”⁶⁷ In response, Attorney General Bill McCollum (McCollum) began the Child Predator CyberCrime Unit in 2005.⁶⁸ The purpose of this unit is to increase the safeguard precautions taken to ensure the prevention of child pornography, Internet-based sexual exploitation, and the prosecution of sexual predators.⁶⁹ The success of this unit has led to the arrests of more than fifty child predators or facilitators of child pornography.⁷⁰

The Child Predator CyberCrime Unit has opened the doors for Florida to enact legislation to guarantee the unit’s success.⁷¹ For example, the CyberCrimes Against Children Act of 2007 was enacted through the efforts of McCollum and made the State of Florida a leader in the fight to end the sexual exploitation of children.⁷² This Act increases the penalties for the possession or distribution of Internet child pornography and creates a penalty for those predators who actually travel to meet a child with “the specific purpose” of exploiting them.⁷³ The Act also increases the penalties for “grooming”⁷⁴ themselves to seduce a child.⁷⁵ The success of this Act has led to the expansion of the CyberCrime Unit, with locations throughout the State of Florida.⁷⁶

In 1990, the Florida Legislature enacted the Conditional Release Program Act which provides that certain re-offenders, including sexual exploitation offenders, are subject to terms and conditions established by the commission after their release from the correctional institution.⁷⁷ Further, in

66. See generally *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999).

67. CyberCrime Unit, *supra* note 6.

68. *Id.*

69. *Id.*

70. *Id.*

71. See generally *id.*

72. CyberCrime Unit, *supra* note 6.

73. *Id.*

74. See *id.* (stating that “‘grooming’ is intended to make a child believe the offender is closer in age to the child, therefore encouraging the child to feel more comfortable conversing with the offender”).

75. *Id.*

76. See *id.*

77. FLA. STAT. § 947.1405(1)–(2)(c) (2007).

1997, the Conditional Release Program Act was amended to include stricter restrictions for sex offenders.⁷⁸ These conditions included: prohibitions from operating a motor vehicle, using a post box office, taking an annual polygraph test, a submission to an HIV test, and the use of an electric monitor if the commission deemed it necessary.⁷⁹

Furthermore, after the kidnap, rape, and murder of nine-year-old Jimmy Ryce, the Florida Legislature passed the Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators Act (Jimmy Ryce Act).⁸⁰ This Act is intended to deem certain sex offenders as “sexually violent predators” in which they are involuntary and indefinitely committed to a mental health facility after they have served time in the correctional facility.⁸¹ This Act only applies to offenders “who have been convicted of a sexually violent” crime prior to the new offense.⁸²

The State of Florida recognized that when innocent people suffer any personal injury or death in an effort to prevent criminal activity, they may incur negative impacts such as: disabilities, financial hardships, or the need of public assistance.⁸³ Therefore, Florida enacted the Florida Crimes Compensation Act in 2007.⁸⁴ This Act is intended to aid, care, and support victims of crime.⁸⁵ It also provides a way for innocent children who are subjected to exploitation to receive assistance from the Florida Attorney General’s Division of Victim Services.⁸⁶

Further, the State of Florida enacted the Computer Pornography and Child Exploitation Prevention Act which criminalizes knowingly: transmitting, viewing, enticing, luring, seducing, or soliciting any child or parent of a child by computer to obtain obscene material pertaining to the sexual exploitation of children.⁸⁷ Additionally, this Act punishes any person who travels or attempts to travel to meet a child with the intention to engage in unlawful sexual conduct with the child.⁸⁸

Florida, having “the nation’s third highest population of sex offenders,” became the first State to enact statewide residence restrictions against sexual

78. *See id.* § 947.1405(7)(b).

79. *Id.*

80. FLA. STAT. §§ 394.910–.932 (2007).

81. *Id.* § 394.910.

82. *Id.* § 394.925.

83. *See* FLA. STAT. § 960.002 (2007).

84. *Id.* § 960.01.

85. *Id.* § 960.0021(2)(a).

86. SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 4–5.

87. *See* FLA. STAT. § 847.0135(1), (3) (2007).

88. *Id.* § 847.0135(4).

predators whose victims were children.⁸⁹ While a majority of states have enacted one statute for sex offenders, Florida maintains two different statutes: one for general sexual offenders and a “more stringent set of restrictions” for sexual predators.⁹⁰ The restrictions against general sex offenders prohibit certain sex offenders “in which the victim of the offense was less than [sixteen] years of age, to reside within 1000 feet of any school, day care center, park, or playground.”⁹¹ However, these restrictions apply only to those sex offenders convicted for the offense on or after October 1, 2004.⁹² The restrictions against sexual predators are more severe and apply to a smaller category of sex offenders than general sex offenders.⁹³ Sexual predators are classified as those “who present an extreme threat to . . . public safety.”⁹⁴ Those labeled sexual predators and whose victims were under the age of eighteen at the time of the crime are prohibited from “living within 1000 feet of a school, daycare center, park, playground, [public school bus stops], or other place[s] where children regularly congregate” if the convicted crime was committed on or after October 1, 1995.⁹⁵

Moreover, Florida has enacted many state statutes in an attempt to control the sexual exploitation of children. For example, *Florida Statutes* section 92.56 provides that the confidentiality of the victim of child exploitation is protected from civil and criminal proceedings and the State may use a pseudonym⁹⁶ for the victim in a sexual exploitation case.⁹⁷ Additionally, *Florida Statutes* section 775.082 provides minimum penalties for criminals, including sexual exploitation, who reoffend by punishing them to life in prison or death.⁹⁸ Further, *Florida Statutes* section 948.31 requires an evaluation to determine whether certain sex offenders are in need of a probationer or outpatient counseling program.⁹⁹ If deemed necessary, the court will pro-

89. See Steven J. Wernick, Note, *In Accordance with a Public Outcry: Zoning Out Sex Offenders Through Residence Restrictions in Florida*, 58 FLA. L. REV. 1147, 1188 (2006).

90. *Id.* at 1160–61.

91. FLA. STAT. § 794.065(1) (2007).

92. *Id.* § 794.065(2).

93. Wernick, *supra* note 89, at 1162.

94. FLA. STAT. § 775.21(3)(a) (2007). “Repeat sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety.” *Id.*

95. Wernick, *supra* note 89, at 1162.

96. FLA. STAT. § 92.56 (2007). Keeping confidential “[a]ll court records, including testimony from witnesses, that reveal the photograph, name, or address of the victim.” *Id.* § 92.56(1).

97. *Id.*

98. FLA. STAT. § 775.082(1) (2007).

99. FLA. STAT. § 948.31 (2007).

vide an outpatient counseling requirement for a term or indefinite condition.¹⁰⁰

Florida has become “one of the leading states” in the nation fighting child exploitation and enacting legislation to prevent and protect children.¹⁰¹ However, although Florida has taken a stand, the fight against child exploitation has only begun. Both federal and state legislation must continue to grow with the quickly changing times and revolutionized technology.

III. SENATE BILL 1442

In the 2008 session, the Florida Legislature enacted Senate Bill 1442 (SB 1442), which provides additional protections to victims of child exploitation “in civil and criminal proceedings, as well as a civil remedy for victims of child pornography.”¹⁰² Specifically, SB 1442: 1) allows the victim to protect his or her confidentiality by allowing “the use of a pseudonym in court records and proceedings;” 2) removes stricter requirements for conviction of the offender and lessens the proof for conviction to “the person selling or transferring the custody of a minor knew that the minor being sold would engage in prostitution, perform naked for compensation, or otherwise participate in the trade of sex trafficking;” 3) relocates a provision in *Florida Statutes* section 800.04(7)(b) to the computer pornography statute in *Florida Statutes* section 847.0135(5); 4) requires law enforcement officers to provide material found during investigation to the Child Victim Identification Program (CVIP) within the National Center for Missing and Exploited Children (NCMEC); 5) “[r]equires prosecutors to enter certain information into the Victims in Child Pornography Tracking Repeat Exploitation database;” 6) creates a civil remedy for victims of child pornography and guarantees these victims minimum damages of one hundred and fifty thousand dollars; 7) permits “the Office of the Attorney General to pursue cases on behalf” of victims; 8) amends the Florida Crimes Compensation Act to expand the definition of “crime;” and 9) allows victims to file a victim’s compensation claim.¹⁰³

SB 1442 is patterned after “Masha’s Law” found in the federal Adam Walsh Child Protection and Safety Act of 2006, which gives a civil remedy against offenders who download the victim’s child pornography images.¹⁰⁴ Masha’s Law was named after Masha Allen whose abuse was distributed

100. *See id.*

101. CyberCrime Unit, *supra* note 6.

102. SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 1.

103. *Id.* at 1–2, 5.

104. *See* 18 U.S.C. § 2255 (2006).

worldwide on the Internet when she was sexually abused by her adoptive father Matthew Mancuso.¹⁰⁵ Prior to Masha's Law, civil penalties for sexual exploitation of a child were less than the penalty for downloading music illegally.¹⁰⁶ Masha's Law successfully increased the monetary damages from a minimum of fifty thousand dollars to one hundred fifty thousand dollars and allowed minors to recover damages while they were still under the age of eighteen.¹⁰⁷ With the passage of SB 1442, Florida has become the first state to allow victims of child pornography to recover civil damages in a Florida-based court from offenders who download images of their sexual exploitation.¹⁰⁸

IV. CONSTITUTIONAL ISSUES SURROUNDING SENATE BILL 1442

While many states have attempted to control the growing issue of child exploitation, few have succeeded. With the increasing use of technology and the ability to communicate via the Internet, state enacted legislation of child pornography has come under constitutional attack for violations of freedom of speech and interfering with interstate commerce.¹⁰⁹ Freedom of speech is a constitutionally protected right under the First Amendment.¹¹⁰ Legislation may deprive a person from freely expressing himself or herself if it prohibits against a "clear and present danger", child pornography, or obscenity.¹¹¹ Further, Article I, Section 8 of the United States Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹¹² A state law will be held unconstitutional if it places an undue burden on interstate commerce, is discriminatory, or is preempted by federal law.¹¹³

105. Office of Att'y Gen. of Fla., *McCollum, Legislators: Victims of Child Pornography Deserve Voice in Court, Civil Damages*, Feb. 19, 2008, <http://myfloridalegal.com/newsrel.nsf/newsreleases/224531D54E6EB873852573F400567E2B> [hereinafter *McCollum*].

106. *Id.*

107. 18 U.S.C. § 2255.

108. *McCollum*, *supra* note 105.

109. *See generally* ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999).

110. U.S. CONST. amend. I.

111. *See* New York v. Ferber, 458 U.S. 747, 763–64 (1982); *see also* Brandenburg v. Ohio, 395 U.S. 444, 449–50 (1969).

112. U.S. CONST. art. I, § 8.

113. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 623–24 (1978).

A. *The First Amendment Implications*

To guarantee freedom of speech, the First Amendment of the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech;” however, this right is not absolute.¹¹⁴ Content-based regulations of speech¹¹⁵ are typically held unconstitutional and are subjected to strict scrutiny.¹¹⁶ Nevertheless, the regulation of speech will be sustained under the First Amendment if: the government has a compelling interest to regulate the speech; it is narrowly tailored to meet a compelling state interest; and the regulation is the least restrictive alternative.¹¹⁷ Further, any regulation encroaching on speech that imposes a criminal penalty must be “adequately defined” by state law and requires scienter.¹¹⁸ SB 1442 regulates the images of child pornography and therefore, is a content-based regulation and will be subjected to strict scrutiny.¹¹⁹

1. The State’s Interest in Regulation

The United States Supreme Court has consistently held obscene material to be outside the scope of the protections of the First Amendment.¹²⁰ The Court recognized that the original states prosecuted for “libel, blasphemy, and profanity.”¹²¹ Further, throughout history the Court has “remained firm in the position that ‘the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.’”¹²² In *New York v. Ferber*,¹²³ the Supreme Court identified five rationales to why “the States are entitled to greater leeway in the regulation of pornographic depictions of children.”¹²⁴ First, the state has a compelling interest in “safeguarding the physical and

114. U.S. CONST. amend I.

115. See *Ferber*, 458 U.S. at 763–64 (explaining that content-based regulations of speech are accepted if “the evil to be restricted so overwhelmingly outweighs the expressive interests”).

116. See, e.g., *People v. Foley*, 731 N.E.2d 123, 131 (N.Y. 2000).

117. *Id.* (citing *Sable Comm’n of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

118. See *Ferber*, 458 U.S. at 764–65.

119. See SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 1–2.

120. E.g., *Ferber*, 458 U.S. at 764.

121. *Id.* at 754.

122. *Id.* at 754–55 (quoting *Miller v. California*, 413 U.S. 15, 18–19 (1973)).

123. *Id.* at 747.

124. *Id.* at 756.

psychological well-being of a minor.”¹²⁵ Second, research indicates that child pornography is directly linked to the abuse of children.¹²⁶ Third, the marketing and promotion of child pornography provide an economic motive that is essential to the production of such illegal material and it is unlikely that freedom of speech extends to a violation of a criminal statute.¹²⁷ Fourth, child pornography and children engaged in lewd acts do not constitute an important literary, educational, or scientific purpose. “[T]he value of permitting live performances and photographic reproductions of children engaged in lewd exhibitions is exceedingly modest, if not *de minimis*.”¹²⁸ Lastly, classifying child pornography outside the scope of what is protected by the First Amendment freedom of speech is not inconsistent with precedent.¹²⁹

Research indicates the use of children for pornographic material is harmful to the physical, psychological, and emotional health of the child.¹³⁰ The child victim may experience: genital bruising, lacerations, depression, anger, withdrawal, nightmares, pelvic and back pains, feelings of guilt and responsibility, betrayal, and low self esteem.¹³¹ Legislative judgment has repeatedly found relevancy in combating child pornography and has sustained legislation to protect the physical, psychological, and emotional health of children, even where freedom of speech is questioned.¹³² SB 1442 is intended to provide additional protections to victims of child pornography in both criminal and civil proceedings to further the prevention of sexual exploitation and abuse, and therefore, violators of SB 1442 fall outside the scope of the First Amendment protections.¹³³

Child pornography is directly linked to child abuse in such that it supplies a permanent record of the initial occurrence and the harm is intensified by the distribution of the material.¹³⁴ This distribution of material must be eliminated in order to control the sexual exploitation of children.¹³⁵ Therefore, the most practical approach to eliminate the production of child pornography is to impose criminal penalties and prosecute those who advertise, sell, promote, encourage, and support the product. SB 1442 creates a new

125. *Ferber*, 458 U.S. at 756–757 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

126. *Id.* at 759.

127. *Id.* at 761–62.

128. *Id.* at 762.

129. *Id.* at 763.

130. *See Ferber*, 458 U.S. at 758 & n.9.

131. *Missing Kids*, *supra* note 1.

132. *E.g.*, *Ferber*, 458 U.S. at 758.

133. *See* SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 1–2.

134. *Ferber*, 458 U.S. at 759.

135. *Id.*

civil remedy that allows the recovery of damages from those who produce, promote, or possess illegal images concerning the victim.¹³⁶ The First Amendment does not limit a state in prosecuting those who promote, possess, or encourage the exploitation of children;¹³⁷ therefore, SB 1442 falls within the permissible scope aimed at protecting children.

Title 18, section 2251 of the United States Code makes it a federal offense for “[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct.”¹³⁸ Additionally, the interest of the First Amendment to support the distribution of commercial material, which would normally outweigh a governmental interest in regulation, does not apply when the commercial activity is illegal.¹³⁹ Therefore, the restrictions SB 1442 places on the marketing and promotion of child pornography are imperative to the valid limitation it places on the production of child pornography.

The First Amendment extends to material that provides an important and necessary scientific, educational, or literary purpose.¹⁴⁰ The Court in *Ferber* indicated that it is unlikely child pornography and the sexual depictions of children exhibiting lewd conduct would provide any important and necessary scientific, educational, or literary purpose; and the First Amendment interest is narrowly limited to those works portraying children that are important and necessary.¹⁴¹ SB 1442 proscribes lewd or lascivious exhibition of children over the Internet to the computer pornography statute in section 847.0135 of the *Florida Statutes*, computer pornography,¹⁴² which legislative judgment has previously deemed to have “exceedingly modest, if not *de minimis*” value.¹⁴³

The determination of what classification of speech is “protected by the First Amendment . . . depends on the content of the speech” that is being regulated.¹⁴⁴ Any legislation that impinges on speech must be adequately defined by state law or authoritatively construed.¹⁴⁵ However, a content-based classification of speech may fall outside the protection of the First Amendment because the restriction significantly “outweighs the expressive

136. SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 7.

137. See *Ferber*, 458 U.S. at 764-65.

138. 18 U.S.C. § 2251 (2006).

139. *Ferber*, 458 U.S. at 761-62.

140. *Id.* at 762-63.

141. *Id.*

142. See FLA. STAT. § 847.0135 (2007).

143. See *Ferber*, 458 U.S. at 762.

144. *Id.* at 763 (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976)).

145. *Id.* at 764.

interests.”¹⁴⁶ Child pornography has been recognized by precedent as a category outside the scope protected by the First Amendment.¹⁴⁷ SB 1442 stands for the position to safeguard the welfare of children by specifically providing for civil and criminal protections,¹⁴⁸ and it is permissible to consider the material SB 1442 aims to secure without the protection of the First Amendment.

2. Means and Ends

The regulation of speech will be sustained under a First Amendment challenge if the statute is narrowly tailored to meet a compelling state interest.¹⁴⁹ In other words, the statute must not be overbroad or vague.¹⁵⁰ Any regulation of speech must be adequately defined in such a manner that a person of common intelligence can decipher between whether his or her “contemplated conduct is lawful” or criminal in nature.¹⁵¹ A statute that is vague fails to warn a person that a conduct is criminal and is subject to First Amendment challenges.¹⁵² Further, a statute which regulates more speech than regulation allows under the Constitution is said to be overbroad and will be subjected to the overbreadth doctrine.¹⁵³

There are two ways in which a statute may be challenged for vagueness: on its face and as applied.¹⁵⁴ If the legislation prohibits a constitutionally protected right, then the facially vague challenge applies.¹⁵⁵ If the law does not have sufficient clarity to the conduct prohibited or fails to warn a person that the conduct is criminal, then the legislation is challenged as applied.¹⁵⁶

In order to determine vagueness, the statute must be examined in a contextual background, analyzing the full law and understanding the intention of the law.¹⁵⁷ If the legislation “fails to draw reasonably clear lines”¹⁵⁸ to the conduct being prohibited and does not provide a “fair and non-discriminatory

146. *Id.* at 763–64.

147. *Id.* at 756.

148. SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 1.

149. *People v. Foley*, 731 N.E.2d 123, 131 (N.Y. 2000) (citing *Sable Comm’n of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

150. *Id.* at 128–30.

151. *State v. Maxwell*, 825 A.2d 1224, 1230 (N.J. Super. Ct. Law Div. 2001) (quoting *State v. Cameron* 498 A.2d 1217, 1219 (N.J. 1985)).

152. *See id.*

153. *See People v. Arndt*, 814 N.E.2d 980, 994 (Ill. App. Ct. 2004).

154. *Maxwell*, 825 A.2d at 1230.

155. *See id.*

156. *See id.* at 1230–31.

157. *Id.* at 1230.

158. *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

application of the laws,"¹⁵⁹ then the legislation will be void for vagueness. SB 1442 specifies provisions it intends to broaden, amend, replace, and create. Further, SB 1442 identifies specific purposes of each provision, the conduct considered illegal, and the remedies available to the victims.¹⁶⁰ Moreover, SB 1442 leaves no hypothetical application of the law and explicitly states the minimum amount a victim will receive with a successful claim.¹⁶¹

The overbreadth doctrine prohibits the government from banning constitutionally unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.¹⁶² In order for legislation to be considered overbroad, it must "significantly compromise" a fundamental right.¹⁶³ The overbreadth doctrine should only be used as a last resort and has been depicted as a "strong medicine."¹⁶⁴ Further, commercial activity, such as advertising and promoting, rarely will be susceptible to the overbreadth doctrine.¹⁶⁵ SB 1442 provides protections to victims of child pornography and punishes those who promote, produce, or possess images involving victims of child pornography.¹⁶⁶ The conduct of promoting, advertising, or producing images that exploit children is an unlawful conduct and, therefore, does not have any constitutional protections.¹⁶⁷ Further, because SB 1442 regulates a commercial activity, it is unlikely that the overbreadth doctrine is enforceable.¹⁶⁸

3. Least Restrictive Alternative

Even if a state has a compelling interest in the regulation it seeks to enforce, it must still be the least restrictive method to achieve the state's purpose.¹⁶⁹ If there is a less restrictive method of regulation that is equally as effective and accomplishes the same purpose as the state's legislation, then

159. *Kreimer v. Bureau of Police for the Town of Morrison*, 958 F.2d 1242, 1266 (3d Cir. 1992).

160. SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 6.

161. *Id.* at 9–10.

162. *New York v. Ferber*, 458 U.S. 747, 772 (1982).

163. *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

164. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

165. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 766 (1976).

166. SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 2.

167. *People v. Arndt*, 814 N.E.2d 980, 994 (Ill. App. Ct. 2004).

168. *See generally* SB 1442 Bill Analysis and Impacts, *supra* note 11.

169. Pamela J. Stevens, Note, *Community Standards and Federal Obscenity Prosecutions*, 55 S. CAL. L. REV. 693, 697–98 (1982).

the legislation is unconstitutional under the First Amendment.¹⁷⁰ Debatably, the only effective means of regulating child exploitation is a ban of pornography in totality.¹⁷¹ However, courts are unlikely to ban an entire industry of sales when the use of an alternative might be equally as effective, and therefore, state legislation is aimed at protecting children by regulating the production, possession, and distribution of child exploitation.¹⁷²

The distribution of child pornography has long been seen as a victimless crime, and thus, victims did not receive rights under civil or criminal law.¹⁷³ Specifically, defendants argue that “minors depicted [in child pornography] were not ‘directly and most seriously affected’ by [the] transmission of the pictures.”¹⁷⁴ Contrary to this argument, courts have identified three ways in which the distribution of child pornography is directly harmful to the victim.¹⁷⁵ First, “[t]he materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation.”¹⁷⁶ Therefore, the continuance of sexual exploitation of the child is directly linked to the distributor and possessor of child pornography.¹⁷⁷ “Second, the mere existence of child pornography represents an invasion of the privacy of the child depicted.”¹⁷⁸ The distribution and possession of child pornography invades the privacy interest and continues the “disclosure of personal matters.”¹⁷⁹ Lastly, “the consumer of child pornography instigates the original production of child pornography by providing an economic motive for creating and distributing the materials.”¹⁸⁰ In other words, the production of child pornography could not exist without the promotion and distribution of child pornography and vice versa.¹⁸¹ Therefore, the possession, promotion, or distribution of child pornography is directly correlated to the victimization of the child.¹⁸²

The regulation of child pornography seeks “to prevent the abuse and misuse of children.”¹⁸³ Evidence illustrates that “the ‘victimization’ of the

170. *Id.*

171. *Id.* at 698.

172. *Id.*

173. *See* United States v. Tillmon, 195 F.3d 640, 644 (11th Cir. 1999).

174. *Id.*

175. United States v. Norris, 159 F.3d 926, 929–30 (5th Cir. 1998).

176. *Id.* at 929 (quoting New York v. Ferber, 458 U.S. 747, 759 (1982)).

177. *Id.* at 930.

178. *Id.*

179. Whalen v. Roe, 429 U.S. 589, 599 (1977).

180. Norris, 159 F.3d at 930; *see also* Osborne v. Ohio, 495 U.S. 103, 110 (1990).

181. *See* Norris, 159 F.3d at 930.

182. *See id.*

183. Stevens, *supra* note 169, at 698.

children involved does not end when the pornographer's camera is put away, . . . "[t]he pornography's continued existence causes the child victims continuing harm by haunting those children" in future years.¹⁸⁴ The states have a compelling interest to prevent the production of child pornography and the most effective means to stop production is to stop the market that has "led to the creation of the images in the first place."¹⁸⁵ Therefore, by punishing those who have a direct link to the production of child pornography, SB 1442 is taking the least restrictive way of lessening the harm suffered by exploited children.

B. *The Commerce Clause Implications*

Article I, Section 8 of the United States Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹⁸⁶ The Commerce Clause is an enabling power given to Congress to regulate nearly any activity, as long as it involves interstate commerce.¹⁸⁷ Conversely, the Dormant Commerce Clause is a judge-made doctrine which recognizes a state's interest in safeguarding the health and safety of its citizens, but prevents states from discriminating against interstate commerce.¹⁸⁸ The Dormant Commerce Clause is a blocking power which limits a state's ability to regulate interstate commerce.¹⁸⁹ Precisely, "the [D]ormant Commerce Clause's fundamental objective [is to] preserve[] a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors."¹⁹⁰

There have been numerous courts which invoke the Dormant Commerce Clause to overrule legislation which prohibited the transmission of pornographic material.¹⁹¹ The rationale being that a state regulation of the Internet must fall within the broad enabling powers of regulating interstate commerce.¹⁹² However, the Court in *People v. Foley*¹⁹³ found that while the Internet was a part of interstate commerce, the regulation of communication

184. *Norris*, 159 F.3d at 929–30.

185. *United States v. Tillmon*, 195 F.3d 640, 644 (11th Cir. 1999).

186. U.S. CONST. art. I, § 8.

187. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978).

188. *See id.* at 623.

189. *See id.*

190. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997).

191. *See, e.g., Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 167 (S.D.N.Y. 1997).

192. Julie Sorenson Stanger, Comment, *Salvaging States' Rights to Protect Children from Internet Predation: State Power to Regulate Internet Activity Under the Dormant Commerce Clause*, 2005 BYU L. REV. 191, 220 (2005).

193. 731 N.E.2d 123 (N.Y. 2000).

over the Internet does not necessarily burden interstate commerce.¹⁹⁴ Further, the United States Supreme Court uses the “Pike balancing test” to determine if the regulation burdens interstate commerce.¹⁹⁵ This test requires a state to illustrate that there is a legitimate local public interest in the regulation of the activity and there is not an excessive burden on interstate commerce.¹⁹⁶

In *New York v. Ferber*,¹⁹⁷ the United States Supreme Court held that “[i]t is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’”¹⁹⁸ SB 1442 allows for compensation for victims who suffer psychological and physical injury as a result of online sexual exploitation which satisfies the first prong of the “Pike balancing test.”

In *Pike v. Bruce Church, Inc.*,¹⁹⁹ the Court held the criteria for determining whether legislation burdens interstate commerce is as follows:

If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.²⁰⁰

SB 1442 has an interest in providing “protections in civil and criminal proceedings” to the victims of child exploitation.²⁰¹ The state has a local interest to lessen the harm suffered by exploited children, and by punishing the direct source of exploitation without banning pornography altogether, it allows SB 1442 to have a minimal impact on interstate activity.

V. THE IMPACT OF SENATE BILL 1442

According to the Office of the Attorney General (OAG), because of SB 1442, there are over thirty children who will be able to seek OAG representa-

194. *Id.* at 132–33.

195. *See generally* *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)

196. *Id.* at 142. The “Pike balancing test” emerges as a general rule that “[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Id.*

197. 458 U.S. 747 (1982).

198. *Id.* at 756–57 (quoting *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596, 607 (1982)).

199. 397 U.S. 137 (1970).

200. *Id.* at 142.

201. SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 1.

tion, qualify for victim compensation, and seek damages against the producers, promoters, or possessors of child pornography.²⁰² SB 1442 will make the State of Florida the first to enact legislation protecting victims from the distribution and possession of child pornography.²⁰³ Further, SB 1442 impacts victims and the State of Florida in three respects: socially, economically, and physically.²⁰⁴

A. *Victim Relief*

Presently, child pornography is seen as a victimless crime in which victims do not receive financial, emotional, and physical support.²⁰⁵ Further, these victims are not provided with information regarding criminal and civil cases surrounding their exploitation or with the opportunity to be heard at trial.²⁰⁶ However, a “victim” is “anyone who suffers either as a result of ruthless design or incidentally or accidentally.”²⁰⁷ SB 1442 identifies the children of sexual exploitation as the victims and provides criminal and civil relief.²⁰⁸

First, SB 1442 will have an immense social impact on victims and their families.²⁰⁹ SB 1442 will compel officers to provide information and images to the NCMEC and CVIP, and to request any information from the NCMEC in order to identify and contact any victims.²¹⁰ Further, such information is to be entered into the Victims in Child Pornography Tracking Repeat Exploitation database which will expand registry information to prevent and protect children and their families.²¹¹ Moreover, SB 1442 allows victims the use of a pseudonym in both court proceedings and records which allows them to maintain their privacy while still having a voice at trial.²¹² Additionally, SB 1442 increases provisions relating to exploitation of children using a computer.²¹³ These changes will increase the protections for victims, make it harder for children to be reached and exploited, improve law enforcement’s

202. *Id.* at 2.

203. *McCullum*, *supra* note 105.

204. *See generally* SB 1442 Bill Analysis and Impact Statement, *supra* note 11.

205. *McCullum*, *supra* note 105.

206. *Id.*

207. *United States v. Norris*, 159 F.3d 926, 929 (5th Cir. 1998).

208. SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 1.

209. *See generally id.*

210. *Id.* at 2.

211. *Id.* at 6.

212. *Id.*

213. SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 6.

ability to investigate child exploitation cases, and ensure that victims maintain a sense of privacy.

Next, SB 1442 will have a positive economic impact on victims and their families. Specifically, SB 1442 creates legislation that allows victims of child pornography to sue a promoter, possessor, distributor, or producer of such images and recover monetary damages of no less than one hundred and fifty thousand dollars, including attorneys' fees.²¹⁴ Additionally, victims will receive compensation for counseling or any mental health treatment as a result of the sexual exploitation.²¹⁵ Further, SB 1442 allows the OAG to pursue cases of child exploitation for the victim, and defendants are prohibited from using the defense that they "did not commit the abuse depicted in the images" in the recovery of damages.²¹⁶ These changes will provide victims with a civil remedy for the possession and distribution of illegal material and will allow them to recover actual damages per incident.²¹⁷

Finally, SB 1442 will have a supportive physical impact on victims.²¹⁸ Particularly, SB 1442 expands the definition of "crime" relating to sexual exploitation over the Internet, amends the definition of "victim" from individuals under the age of sixteen to under the age of eighteen, and adds a definition for "identified victim of child pornography" to mean any person "[w]ho, while under the age of [eighteen], was depicted in any child pornographic image; [w]ho has been identified by law enforcement; and [w]hose image has been provided to the National Center for Missing and Exploited Children's Child Victim Identification Program."²¹⁹ These changes will provide a greater number of individuals to seek redress for personal, physical, or psychological injury from sexual exploitation.²²⁰

B. *The State of Florida*

Currently, there is no state which entitles victims of a state-based child exploitation case to seek remedies in state courts.²²¹ Florida has become one of the leading states in the nation in fighting child exploitation and enacting legislation to prevent and protect children.²²² With the enactment of SB 1442, Florida is "again taking the lead and standing up for these children

214. *Id.* at 7.

215. *Id.* at 8.

216. *Id.* at 7.

217. *See id.*

218. *See* SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 7–8.

219. *Id.*

220. *See id.*

221. *See McCollum, supra* note 105.

222. *Id.*

who so desperately need us on their side.”²²³ SB 1442 will have a minimal economic impact and a positive social impact for the State of Florida.²²⁴

SB 1442 will have a minimal economic impact for the State of Florida.²²⁵ According to the OAG, the maintenance of the new database will be managed by existing staff and developed by existing technology, which is cost-effective.²²⁶ Further, the additional casework brought by the new remedies in SB 1442 will be handled by the Civil Litigation and Child Predator Cybercrime units, which will diminish the need for new employees.²²⁷ Lastly, to help compensate costs for continuing litigation, the OAG may “seek reasonable attorney’s fees and costs.”²²⁸ The changes and costs that the State of Florida expects to endure because of SB 1442 will only be an insignificant impact.

Further, SB 1442 will have a positive social impact for the State of Florida. Florida is already one of the leading states to combat child exploitation and child abuse.²²⁹ The enactment of SB 1442 will make Florida the first state to treat children as victims in a state court.²³⁰ Florida, being the leader against cybercriminals,²³¹ will provide a model for the nation which will allow the positive social impact to grow from the State of Florida to the nation as a whole.²³²

VI. RECOMMENDATIONS

Although Florida has taken a stand by enacting SB 1442, the fight against child exploitation has only begun. Both federal and state legislation must continue to grow with the quickly changing times and revolutionized technology. Further, child exploitation is not a state issue nor is it an issue that is only dealt with by the United States. Child pornography is a global issue and requires a global solution.

One of the easiest and most effective ways to prevent child exploitation is to educate children and parents. Knowledge will provide children and parents the ability to recognize a dangerous situation and prevent a potential

223. *Id.*

224. *See* SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 2.

225. *See id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *McCollum*, *supra* note 105.

230. *Id.*

231. *Id.*

232. *See id.*

situation.²³³ Although parents should bear the responsibility for teaching their children safety information, much of the prevention efforts have become school-centered.²³⁴ Research has indicated that school-related programs set to reduce victimization of children have the best effect when the child is in elementary school or younger.²³⁵ Moreover, parents need to know the law surrounding the people who work with children and promote personal safety by asking for background checks and further risk assessment of individuals.²³⁶ Additionally, parents need to know the simplicity for an offender to seduce a child and need to educate their children on the amount of personal information they publicize on the Internet.²³⁷ Parents should also look into installing monitoring devices or restrictions if a child is on the Internet unsupervised.²³⁸

Another easy, yet overlooked, way to prevent child exploitation is through Internet Service Providers (ISPs).²³⁹ ISPs provide the means for which child pornography is accessed and distributed over the Internet; therefore, they should help to find a solution.²⁴⁰ ISPs could begin by removing any obvious illegal material from their server and providing law enforcement with personal information from the contract about who is uploading the material.²⁴¹ Further, ISPs could place a clause in the contractual agreement to forbid the production, possession, or distribution of any obscene material with penalties for any illegal use.²⁴² Moreover, law enforcement agents are having trouble retaining records through ISPs because they are only keeping their records for no more than two days.²⁴³ If ISPs would retain their records or keep track of all contact information from one subscriber, the investigation could continue and prosecution would flow more smoothly.²⁴⁴

Lastly, child exploitation needs a global solution. “[I]n at least twenty-six nations, including Ireland, Hungary, South Africa, and France,” the pos-

233. Nat’l Ctr. for Missing & Exploited Child, Guidelines for Programs to Reduce Child Victimization: A Resource for Communities When Choosing a Program to Teach Personal Safety to Children 4 (1999), available at http://www.missingkids.com/en_US/publications/NC24.pdf.

234. *Id.*

235. *Id.* at 5.

236. *Id.* at 7.

237. Doyle, *supra* note 23, at 139.

238. *Id.*

239. *See id.* at 143.

240. *Id.*

241. *Id.*

242. Doyle, *supra* note 23, at 143.

243. *Id.* at 144.

244. *Id.*

session of images of child exploitation is not a criminal offense.²⁴⁵ Although the United States has taken a stand and enacted legislation to prevent citizens from traveling abroad to engage in child exploitation,²⁴⁶ the possession of such explicit material should be criminalized globally and every nation should join to arrest, convict, and punish those who produce, possess, and distribute child exploitation.

VII. CONCLUSION

Child exploitation laws have come a far way since the 1800s when children were seen as chattels and not people.²⁴⁷ The various rights of children need to be respected and upheld by legislation and the practices of society. Child pornography has become the fastest growing business—estimated to make billions of dollars a year. Florida has repeatedly taken a stand to fight against the exploitation of children, and the enactment of SB 1442 is another way in which Florida is attempting to fix oversights in child exploitation legislation. The NCMEC has identified more than thirty children who will receive additional protections²⁴⁸ because of SB 1442, and hopefully this is a model for the other states to enact similar legislation in the near future. Although SB 1442 is likely to be challenged on constitutional rights, it will more than likely prevail. SB 1442 provides victims and the State of Florida with a positive social and physical impact and a minimal amount of economic impact. There is rarely a simple solution to such a global problem; however, the enactment of SB 1442 is an effective way to combat the growing use of the Internet and technology and to provide a safer place for children.

245. *Id.* at 142.

246. *See* 18 U.S.C. § 2423 (2006).

247. Cohen, *supra* note 12, at 9.

248. SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 2.