ARTICLES AND SURVEYS

LAW DONE BACKWARDS: THE TIGHTENING OF CIVIL AND LOOSENING OF CRIMINAL PROTECTIONS

Uzair Kayani

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Tricia-Gaye Cotterell

NOTES AND COMMENTS

THE RACE AGAINST THE CLOCK: A NEW BILL PROVIDING HOPE FOR CHILDREN FIGHTING THE ULTIMATE BATTLE

Nicholas M. Fiorello

REINSTATEMENT OF THE GLOBAL GAG RULE IN 2017: PLAYING POLITICS WITH WOMEN’S LIVES AROUND THE WORLD

Andrea Montes

TWEETS THAT BREAK THE LAW: HOW THE PRESIDENT’S @realDonaldTrump TWITTER ACCOUNT IS A PUBLIC FORUM AND HIS USE OF TWITTER VIOLATES THE FIRST AMENDMENT AND THE PRESIDENT RECORDS ACT

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The Nova Law Review is published three times per year by students of the Shepard Broad College of Law. The current annual subscription rate is $35.00. Single issues are available for $12.00. Canadian subscribers should add $5.00 for postage fees. Foreign subscribers should add $20.00 for postage fees. Subscriptions are automatically renewed unless notification to the contrary is received by Nova Law Review.

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LAW DONE BACKWARDS: THE TIGHTENING OF CIVIL AND LOOSENING OF CRIMINAL PROTECTIONS .................................UZAIR KAYANI 179

LESS FATALITIES, MORE CASUALTIES: THE NEED TO PREVENT A CRISIS INSTEAD OF FINDING A CURE..................................TRICIA-GAYE COTTERELL 223

NOTES AND COMMENTS

THE RACE AGAINST THE CLOCK: A NEW BILL PROVIDING HOPE FOR CHILDREN FIGHTING THE ULTIMATE BATTLE.................NICHOLAS M. FIORELLO 255

REINSTATEMENT OF THE GLOBAL GAG RULE IN 2017: PLAYING POLITICS WITH WOMEN’S LIVES AROUND THE WORLD....................ANDREA MONTES 285

TWEETS THAT BREAK THE LAW: HOW THE PRESIDENT’S @REALDONALDTRUMP TWITTER ACCOUNT IS A PUBLIC FORUM AND HIS USE OF TWITTER VIOLATES THE FIRST AMENDMENT AND THE PRESIDENT RECORDS ACT.................BRYAN C. SIDDIQUE 317
LAW DONE BACKWARDS: THE TIGHTENING OF CIVIL AND LOOSENING OF CRIMINAL PROTECTIONS

UZAIR KAYANI*

I. INTRODUCTION: THE CIVIL AND CRIMINAL SYSTEMS............. 179

II. THE ADVANTAGES OF CRIMINAL DEFENDANTS OVER CIVIL ONES ................................................................. 185
A. Private Information and Asymmetric Disclosure ....... 185
B. The Impartial Decision Maker and Public Scrutiny ...... 188
C. Civil Versus Criminal Judgments ......................... 193
D. Expedition and Finality........................................... 197

III. THE ADVANTAGES OF CIVIL DEFENDANTS OVER CRIMINAL ONES ................................................................. 200
A. Case by Case Civil Protections Versus Enumerated Criminal Protections .................................................. 200
B. The Civil Complaint Versus the Criminal Indictment ...... 204
C. Civil Discovery Versus Criminal Search and Seizure ..... 207
D. Adversarial Process and Legal Representation ............. 211

IV. POSSIBLE REASONS FOR THE DIFFERENCES IN CRIMINAL AND CIVIL PROTECTION ........................................ 214

V. CONCLUSION ........................................................................ 219

I. INTRODUCTION: THE CIVIL AND CRIMINAL SYSTEMS

The broad differences between criminal and civil actions are well understood. First, a civil action is typically brought by a plaintiff, whereas a criminal action is brought by the state. Second, the typical civil remedy are

* The author thanks his mentors: Professors Richard Epstein, William Landes, Murray Dry, Russel Leng, Elizabeth M. Penn, and John W. Patty. In addition, the author thanks the faculties of Law and Economics at the Lahore School of Management Sciences. Many thanks also to the editors of the Nova Law Review for their excellent work on editing the piece. For excellent research assistance, the author is grateful to Ms. Fatima Wahla.

1. See DAVID D. FRIEDMAN, LAW’S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS 289 (2000).
2. Id.; ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 458 (6th ed. 2012). “In a civil suit the plaintiff is a private individual—the victim. In a criminal prosecution the plaintiff is society as represented by the public prosecutor or attorney general.” COOTER & ULEN, supra.
damages awarded to the plaintiff, whereas typical criminal remedies are a fine to the state or imprisonment. Third, civil damages are generally compensatory and meant to make the plaintiff whole—that is, indifferent to the wrong done—whereas criminal penalties are neither compensatory, nor equal to the harm caused. Fourth, criminal litigants always have legal expertise, with the state prosecutor on one side and guaranteed defense counsel on the other, whereas civil litigants must pay for legal representation and may forego it. Fifth, criminal defendants have a right to a jury, whereas civil defendants generally do not. Sixth, people accused of crimes have broader rights to withhold unfavorable information and receive favorable information from the prosecutor than civil defendants do. Seventh, crimes—unlike civil wrongs—usually have an intent element. And finally, the civil burden of proof at trial is lower than the criminal one.

There is an impression that the criminal process is more exacting for the claimant and more favorable to the defendant than the civil process.

3. Cooter & Ulen, supra note 2, at 459–60; Friedman, supra note 1, at 289.

4. See Cooter & Ulen, supra note 2, at 460. “Compensation in civil law aims to restore the victim’s welfare at the expense of the injurer. Punishment in criminal law makes the injurer worse off without directly benefiting the victim.” Id.


Criminal trials have several characteristics that render appointed counsel appropriate. First, the government is not only a litigant, but also the employer of many of the witnesses—for example, law enforcement officers—whom it calls at trial. Second, the government supplies the attorney to argue for its position, which inherently means that the advantage in terms of resources, institutional knowledge, and credibility usually lies with the prosecution. Third, the subject of litigation involves immense power disparities between the individual and the government—that is, the individual is simply no match for the government at any stage leading up to a criminal proceeding, ranging from the earliest stages of investigation to the moment of arrest. Fourth, in criminal cases, the government’s position is inherently always represented. Fifth and finally, the evidence of abusive behavior by law enforcement officers throughout our criminal justice system renders counsel particularly appropriate when the circumstances leading to the litigation involve law enforcement.

Leong, supra, at 2476–77 (footnotes omitted). “Another but consistent way to explain the difference between the criminal and civil burdens of proof is by reference to the inherent advantages of the prosecution in a criminal case . . . .” Posner, supra, at 1505.

6. See U.S. Const. art. III, § 2; U.S. Const. amend. VI.


8. Friedman, supra note 1, at 288.

9. Id.

This view is based on constitutional protections provided explicitly to the criminal defendant and not to the civil one.¹¹ The view is apparently confirmed when we observe a defendant prevailing against a criminal claim and failing against a corresponding civil claim.¹² The purpose of this Article is to challenge this wisdom.* It will be argued that the criminal claimant—the state—is not more encumbered than the civil one, and though there are practical reasons for this, the low thresholds for criminal prosecution seem to conflict with the constitutional scheme.*

Civil protections in aggregate may well be greater than criminal protections.¹³ This is reasonable enough, since the prosecutor of a criminal claim typically has weaker incentives to invest in the legal process, and often lower resources, than a private plaintiff does.¹⁴ If the benefits from a criminal case were lower, and the costs higher than in the corresponding civil case, then criminal prosecution could go the way of the dodo.¹⁵ Whether that would be a good or a bad thing is unclear.¹⁶ Briefly, we consider some arguments for the coexistence of the two systems: First, some cases involve positive externalities, where a civil claimant would not find it worthwhile to bring a case, but society as a whole would be better off if the case were pursued;¹⁷ however, this could explain why the state might bring a case, but not why that case would be criminal rather than civil.¹⁸ Second, in some cases, the offender is judgment proof—that is, too resource-constrained to be able to pay large damages—and therefore, unresponsive to the threat of a hefty damages award; however, if this were decisive, then the only difference

L. SCH. REC., Winter 1965, at 24, 26. “We have secured the acquittal of an indigent person—but only to abandon him to eviction notices, wage attachments, repossession of goods and termination of welfare benefits.” Kennedy, supra, at 26.

¹¹ See U.S. CONST. amends. V, VI.

¹² See FRIEDMAN, supra note 1, at 281. A prominent example is the criminal acquittal versus civil liability for O.J. Simpson. Id.

¹³ See NAT'L CTR. FOR VICTIMS OF CRIMES, supra note 10, at 6–7.


¹⁷ See id. at 334, 336. “[H]igh legal expenses of plaintiff, low expenses of defendants, a low level of loss, [and] a large reduction in net expected losses due to liability tend[] to increase the likelihood that there will not be [a private] suit when it would be socially desirable.” Id. at 336.

¹⁸ See id. at 334, 336.
between criminal and civil actions would be the penalties and not the procedural or substantive rules.\textsuperscript{19} Third, the criminal process may exist because, in solving the two previous problems, the law faces the possible collusion of investigators, prosecutors, and judges when all of these roles are played by the government; this possibility could explain both the existence of the criminal system and more exacting rules—such as jury involvement, publicity, guaranteed defense, the defendant’s special rights, and a higher burden of proof.\textsuperscript{20} It is still arguable that collusion, externalities, and judgment proofness problems could be solved by subsidizing a private plaintiff’s case, or by offering the plaintiff some reward, rather than erecting an entire parallel system of justice so that the case for criminal law remains vulnerable.\textsuperscript{21} Indeed, such an alternative system may have supplanted criminal law if criminal prosecution were, in fact, more challenging than a civil suit, as the Constitution seems to demand.\textsuperscript{22} However, assuming that the criminal process is worth preserving for social or political purposes, it will be argued that it is sustained, in part, by the constitutionally problematic relative ease of pursuing criminal prosecution versus a civil suit.\textsuperscript{23} The government’s incentives in pursuing a criminal charge may be weaker than a private plaintiff’s incentives in a corresponding civil suit; the successful private plaintiff will typically receive damages that make her whole, whereas a successful prosecution results in a penal sanction that may be of lesser value to the prosecutor.\textsuperscript{24} There are two reasons for this: First, some portion of a penal sanction often serves to stigmatize or incapacitate the defendant rather than redistribute value; and such a sanction is of limited value to the prosecutor’s office.\textsuperscript{25} Second, even if part of the criminal sanction is monetary, or even granting that stigma, and incapacitation of the defendant does provide utility, that utility is not captured entirely by the prosecutor’s office, but is distributed across society.\textsuperscript{26} While the private plaintiff can expect to internalize most of the benefit of a successful claim, a prosecutor is unlikely to internalize the entire benefit of a successful

\textsuperscript{19} Friedman, supra note 1, at 282–83; Shavell, supra note 16, at 334.


\textsuperscript{21} See Friedman, supra note 1, at 282–83, 291; Shavell, supra note 16, at 334.

\textsuperscript{22} See U.S. Const. amend. VI, VII; Friedman, supra note 1, at 286.

\textsuperscript{23} See Friedman, supra note 1, at 289, 291; Leong, supra note 5, at 2462.

\textsuperscript{24} See Cooter & Ulen, supra note 2, at 460; Shavell, supra note 16, at 334.

\textsuperscript{25} See Cooter & Ulen, supra note 2, at 459–60.

\textsuperscript{26} See id.
prosecution. It follows that a prosecutor’s incentives in pursuing a criminal case will often be weaker than a civil plaintiff’s in pursuing a private claim.

Compounding the effect of weaker incentives is often the prosecutor’s lowest resource. It has been observed that prosecutor workloads in some jurisdictions are so heavy to virtually ensure malpractice. While the civil plaintiff is also resource constrained—and while the mismatch between a well-heeled civil defendant and plaintiff can be starker than that between criminal litigants—the civil plaintiff typically has more control over her caseload, and is unlikely to take on multiple court appearances a day or hundreds of cases in a year.

Admittedly, this incentives story is complicated by the fact that while the prosecutor does not reap the entire benefit of a prosecution, she also does not bear its full cost. Absent a statutory or contractual provision, the successful plaintiff still bears the costs of litigation, whereas the prosecutor’s costs are borne by the government. There are two reasons for the prosecutor’s lower costs: First, the costs of criminal investigations are borne primarily by law enforcement agencies. Second, agency costs—that is, the costs of shirking or monitoring incurred by a principal because of her agent’s divergent incentives—are also lower for the prosecutor than for a private plaintiff, because the prosecutor is effectively acting for her own office under her own budget, rather than for a client. Nevertheless, the heavy caseload and limited budget of the prosecutor’s office may overwhelm these cost advantages.

28. See Cooter & Ulen, supra note 2, at 458–60; Gershowitz & Killinger, supra note 27, at 264; Posner, supra note 5, at 1505.
29. See Gershowitz & Killinger, supra note 27, at 264, 286–87.
30. See id. at 263. “[M]any prosecutors are asked to commit malpractice on a daily basis by handling far more cases than any lawyer can competently manage.” Id.
31. See Posner, supra note 5, at 1505.
32. See id. at 263–64, 287.
34. See Posner, supra note 5, at 1505 n.59.
36. Mann, supra note 35; Gershowitz & Killinger, supra note 27, at 262–63.
The legal system has evolved, in a way, around the lower incentives and resources of the criminal prosecutor. The solution—both counterintuitive and constitutionally delicate—is to lower the costs of prosecution by applying permissive thresholds that counterbalance many of the constitutional protections that appear to hamstring the prosecutor. Concurrently, the legal system has moved to restrict civil cases by imposing higher thresholds for the civil plaintiff in various areas. This Article details how these changes have been accomplished and how they tend to encourage criminal litigation in an already overburdened penal system, while discouraging its sometime viable, and perhaps superior, substitute—the civil case.

The sequel is composed of four parts. Part II explains the advantages of a criminal defendant over a civil one. These include the criminal defendant’s access to favorable evidence procured by the prosecutor; the defendant’s right to withhold inculpating evidence; the requirement that the prosecutor achieve a unanimous jury verdict; the publicity of the trial; the higher burden of proof in the criminal case; and the double jeopardy rule that protects a successful defendant from re-litigation. Part III contrasts this with the peculiar advantages of civil defendants over criminal ones. These include the higher threshold for a civil complaint versus a criminal grand jury indictment; the judicial supervision of civil discovery versus the broad leeway for criminal police investigations; and the

37. See Cooter & Ulen, supra note 2, at 460, 474–76; Gershowitz & Killinger, supra note 27, at 262–63.
41. See infra Part II–V.
42. See infra Part II.
44. See infra Part III.
absence of a civil defendant’s right to legal representation. Part IV considers various reasons that may explain the contrast between these two regimes. Part V considers some implications of this divide.

II. THE ADVANTAGES OF CRIMINAL DEFENDANTS OVER CIVIL ONES

A. Private Information and Asymmetric Disclosure

Both sides in a legal case have private information that is only partially revealed through the trial process. While revelation is roughly symmetric in the civil case, it is asymmetric in the criminal one because the Constitution gives the criminal defendant a right to withhold unfavorable information, while imposing a duty on the prosecutor to reveal exculpatory evidence to the defendant. As explained below, this asymmetric disclosure advantages the criminal defendant over the civil one.

Different actors in the legal process have different private information. In some cases, this private information is protected by law. Divergent information leads to divergent beliefs, which are not easily corrected; essentially, the public information—information that is available to all direct participants—has to overwhelm each actor’s private information in order for their beliefs to converge. The greater the disjunction in protected private information—and therefore in beliefs—the greater the amount of shared information is required to make the actors’ beliefs coincide.

46. See infra Part IV.
47. See infra Part V.
50. See FRIEDMAN, supra note 1, at 282–83.
51. See COOTER & ULEN, supra note 2, at 383, 393.
52. See U.S. CONST. amend. IV; FED. RULE CIV. P. 26(b)(2)(B).
54. See D.S. SIVIA & J. SKILLING, DATA ANALYSIS: A BAYESIAN TUTORIAL 19 (2d ed. 2006). From a Bayesian perspective: “As the empirical evidence grows, we are eventually led to the same conclusions irrespective of our initial beliefs; the posterior [probability distribution function] is then dominated by the likelihood function, and the choice of the prior becomes largely irrelevant.” Id.
Privacy protection promotes the important social goal of limiting the intrusion of the government or other private parties into a person’s life and work. The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Supreme Court has explained that this right applies to both criminal and civil investigations. The language of the Amendment does not limit the right to criminal contexts, and “the individual’s interest in privacy and personal security ‘suffers whether the government’s motivation is to investigate violations of criminal laws or breaches of other . . . standards.’”

In cases in which the sharing of private information may reduce the divergence in beliefs, the social cost of sharing private facts may outweigh the benefits of symmetric information. For example, a person’s beliefs may be influenced by privileged communications with clergy, lawyers, or psychologists. Where privacy concerns do not dominate, information asymmetries between litigants are slowly reduced as the legal process continues. For example, in criminal trials, the accused has a right to “be informed of the nature and cause of the accusation.” Similarly, in civil trials, the defendant is entitled to “a short and plain statement of the claim” against her. Thereafter, investigations and discovery processes can further force the parties to share unprotected private information.

However, in criminal cases, there is an imbalance where the prosecution is required to share evidence that helps the defendant’s case, while the defendant has a right to conceal evidence that would aid the prosecution. The Court has held that Due Process includes “[t]he prosecution’s affirmative duty to disclose evidence favorable to a defendant.” This is the so-called Brady disclosure. In contrast, the

56. U.S. CONST. amend. IV.
57. New Jersey v. T.L.O., 469 U.S. 325, 335 (1985). “[W]e have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities . . . .” Id.
59. COOPER & ULEN, supra note 2, at 393; Summers, supra note 53, at 499–500.
60. See Mueller, supra note 20, at 15.
61. COOPER & ULEN, supra note 2, at 396.
62. U.S. CONST. amend. VI.
64. Fed. R. Civ. P. 26; see also COOPER & ULEN, supra note 2, at 393, 396.
Constitution provides that a criminal defendant cannot “be compelled in any criminal case to be a witness against himself.”68 While the language speaks to criminal cases, this protection is also available in at least some civil proceedings.69 The Court has achieved this result by distinguishing the right against self-incrimination in criminal cases from a privilege against self-incrimination in some civil contexts.70 While the right must be provided in criminal cases, the privilege “can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory . . . [so long as] the witness reasonably believes [that his statements] could be used in a criminal prosecution or could lead to other evidence that might be so used.”71

Thus, asymmetric disclosure is the norm in criminal cases, but the relative exception in civil ones.72 Two points bear mention here: First, the asymmetric disclosure in criminal cases refers primarily to disclosure of facts and not law.73 The concealment of legal information, such as through the attorney work product doctrine, is roughly symmetric in criminal and civil cases.74 Second, coupling asymmetric factual disclosure in the criminal case with the absence of a right to legal representation in the civil case—discussed below—we may make a conjecture that civil litigants are relatively likelier to diverge in their legal beliefs because they may lack experienced legal counsel, whereas criminal litigants are likelier to diverge in their factual beliefs.75

67. Id. at 432–33; Brady, 373 U.S. at 87.
68. U.S. CONST. amend. V.
69. See In re Gault, 387 U.S. 1, 49 (1967).
70. Chavez v. Martinez, 538 U.S. 760, 770 (2003). “Although our cases have permitted the Fifth Amendment’s self-incrimination privilege to be asserted in non-criminal cases . . . that does not alter our conclusion that a violation of the constitutional right against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case.” Id. (citations omitted); see also U.S. CONST. amend. V.
72. See id.; FRIEDMAN, supra note 1, at 282–83.
73. See United States v. Nobles, 422 U.S. 225, 238 (1975); Kastigar, 406 U.S. at 444–45.
74. See Nobles, 422 U.S. at 238, 238 n.12. Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case.
Id. at 238.
75. See U.S. CONST. amend. V–VI; Nobles, 422 U.S. at 238; Summers, supra note 53, at 499.
The criminal defendant’s access to exculpatory evidence procured by the prosecutor is a valuable advantage. 76 However, it is an advantage that is increasingly under attack. 77 The recent trend is to limit the defendant’s access to exculpatory evidence that she could have procured herself, had she exercised reasonable diligence. 78 For example, in a 2015 case, the Third Circuit ruled that “Brady does not oblige the [G]overnment to provide defendants with evidence that [it] could obtain from other sources by exercising reasonable diligence.” 79 The case was appealed to the Supreme Court, and in an amicus brief, former prosecutors argued that “a rule that excuses a prosecutor from fulfilling her obligation if the defendant could have but did not find the favorable evidence himself... is tantamount to saying that a ‘prosecutor may hide, defendant must seek.’” 80 The former prosecutors urged that similar “decisions of several federal circuits, including the Third Circuit, have undermined Brady by shifting focus away from the prosecutor’s affirmative obligation to disclose.” 81 The Supreme Court declined to review the case. 82

B. The Impartial Decision Maker and Public Scrutiny

While the fact finder in both civil and criminal matters is impartial, the criminal prosecutor faces a steeper test in establishing facts. 83 This is because the fact finder in a criminal case is a jury, which must typically reach a unanimous judgment. 84 This unanimity requirement means that even where a supermajority of jurors is convinced by the prosecutor, the prosecutor is still unable to secure a favorable verdict. 85 The civil plaintiff typically only has to convince one person—the judge—whereas the criminal prosecutor has to convince every single juror. 86

79. Georgiou, 777 F.3d at 140 (quoting Perdomo, 929 F.2d at 973).
81. Id. at 3.
83. See Posner, supra note 5, at 1496, 1505; Portman, supra note 43.
85. See Portman, supra note 43.
86. Bench Trials, USLEGAL, http://www.civilprocedure.uslegal.com/trial/bench-trials/ (last visited Apr. 18, 2018);
The impartial decision-maker is meant to ensure fairness, that is, a lack of bias. Decisions in criminal and civil processes involve either legal or factual matters. Aside from the plaintiff and defendant, the legal process depends on the decisions of the judge and—where applicable—the jury. The judge determines legal matters and, in many civil matters, decides factual matters as well. The fact finder in a criminal case is typically a jury of lay persons, whereas the fact finder in a civil case is typically a judge—though some civil cases use juries too.

As the Supreme Court has recently explained, a judge has a constitutional duty to recuse himself in cases where he may have a bias; the test is “whether, as an objective matter, ‘the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.’” This duty is meant to ensure that the judge does not favor one litigant over another. Meanwhile, the practice of de novo review of legal questions seeks to ensure that the judge does not give undue weight to a lower decision maker on questions of law. These two protections against a biased judge are available in both civil and criminal contexts.

Aside from the judge, the main decision-maker in the legal process is the jury. In the criminal case, the constitutional right to a jury is explained as follows: “Trial of all Crimes, except in Cases of Impeachment, shall be by Jury;” “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury;” and “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . .” Meanwhile, in the civil context, the Seventh
Amendment provides that “[i]n [s]uits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” Thus, the right to a jury in civil cases is more limited, applying only to cases in federal courts—“[c]ourt[s] of the United States”—or to violations of federal statutes. As in the case of asymmetric disclosure—the defendant’s right against self-incrimination—the right to a jury is the norm in criminal cases, but the rare exception in civil ones.

There are two kinds of juries in most criminal trials: The trial is conducted in front of a petit jury, whereas the indictment is sought from a grand jury. The baseline belief of juries in both civil and criminal matters is impartiality. An impartial jury “has no opinion about the case at the start of the trial and . . . bases its verdict on competent legal evidence.” Both civil and criminal trials impose a requirement that jurors be impartial.

In the case of criminal trials, this requirement arises from the Sixth Amendment, whereas in civil trials, it derives from the Supreme Court precedent and procedural rules. For example, 28 U.S.C. § 1866(c) notes that a prospective juror may be “excluded by the court on the ground that such person may be unable to render impartial jury service.” Jury selection, which allows lawyers and judges to remove prospective jurors

100. U.S. CONST. amend. VII. “The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.” FED. R. CIV. P. 38(a).
104. See Role of the Jury, supra note 86.
106. Role of the Jury, supra note 86.
107. U.S. CONST. amend. VI. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .” Id.
108. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554 (1984). In this civil case, the Court affirmed that a “touchstone of a fair trial is an impartial trier of fact—a jury capable and willing to decide the case solely on the evidence before it.” Id. (quoting Smith v. Phillips, 455 U.S. 209, 217 (1982)).
110. Id.
either with or without cause, is meant to assist in procuring an impartial petit jury. 111

Since juries are required in most criminal cases—but not in most civil ones—and since juries must generally proffer unanimous verdicts, the effect of requiring criminal juries is to make the establishment of facts more difficult for the criminal prosecutor. 112 A jury that fails to establish facts either way is called a hung jury, 113 which favors the defendant insofar as it maintains the status quo and requires the prosecutor or plaintiff to spend more if she wishes to re-litigate. 114

Criminal defendants are also entitled to a public trial. 115 As mentioned earlier, the right to a public trial can counter the possibility of collusion between different government organs—the police, prosecutor, and judge—that is peculiar to the criminal context. 116 However, publicity is not necessarily an advantage. 117 On the one hand, since the State is not only judging but also prosecuting and investigating a criminal case, the potential for improper collusion among these roles is greater than in civil cases, and the publicity of a trial—like the involvement of a lay jury—can alleviate this

The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.


112. See U.S. Const. amend. VI; Fed. R. Crim. P. 31; Role of the Jury, supra note 86.


115. U.S. Const. amend. VI.


117. See Mueller, supra note 20, at 3, 12–13.
On the other hand, publicity affords external parties the chance to influence trials, for example, by volunteering as witnesses. Thus, it is a right not only of the criminal defendant but also of the public, which may wish to contribute to the investigation. A particular plaintiff may know something about an employer’s discriminatory practices, but may be unaware of other persons who have far greater knowledge of the defendant’s bad behavior. Similarly, a defendant may be unaware of a witness who saw him at another location at the time of the tried crime. A public trial increases the probability that these strangers will contribute to the case.

This apparent disadvantage for the criminal defendant can partly be explained by the theoretically lower probability of detecting crimes versus civil wrongs. Since crimes are intentional, criminals are better at being able to conceal evidence of wrongdoing than accidental tortfeasors are, and publicity can counteract the effects of criminal concealment. The disadvantage may also be overstated, insofar as publicity only applies at the trial stage; a stage that will never materialize if key evidence is not already known pre-trial. Litigants are unlikely to proceed to trial on the bet that some key piece of evidence will emerge from parts unknown.

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119. See Streicker, supra note 116.

120. See Presley v. Georgia, 558 U.S. 209, 212 (2010) (per curiam); Streicker, supra note 116. “The Sixth Amendment right [to a public trial] . . . is the right of the accused. The Court has further held that the public trial right extends beyond the accused and can be invoked under the First Amendment.” Presley, 558 U.S. at 212 (citing Press-Enterprise. Co. v. Superior Court of Cal. for Riverside, 464 U.S. 501, 508 (1984)).


123. See Streicker, supra note 116.

124. See id.


126. See Mueller, supra note 20, at 17; James, supra note 126.
likelihood of biased juries, where unfavorable media coverage poisons the minds of the public against the prosecution or defense.\textsuperscript{128} However, jury bias and the production of new evidence will obviously make a jury lean pro-defendant or anti-defendant, and may, in the absence of skewed selection, cancel out on average.\textsuperscript{129}

Civil litigants can also appeal using First Amendment arguments supporting the access of the public court proceedings.\textsuperscript{130} In spite of this possibility, most jurisdictions do not require public civil trials.\textsuperscript{131} This implies that civil cases are more likely to exclude information from parties that are unknown to the direct participants: Anyone who hears of a criminal case can come forward to volunteer information, but if no one hears of the civil case, then no one will come forward either.\textsuperscript{132}

C. Civil Versus Criminal Judgments

At the judgment stage, most would agree that the criminal prosecutor faces a clearly higher threshold than civil plaintiffs do.\textsuperscript{133} However, even this seemingly obvious contrast appears more illusory than real.\textsuperscript{134} In the sequel, we consider the two civil thresholds—preponderance of the evidence and clear and convincing evidence, followed by the criminal threshold of beyond a reasonable doubt.\textsuperscript{135}

First, the preponderance of the evidence standard is used to establish a defendant’s liability in most civil cases.\textsuperscript{136} It embodies a presumption that the defendant is just as likely to be liable as not, in civil cases.\textsuperscript{137} Some

\begin{thebibliography}{99}
\bibitem{128} See Mueller, supra note 20, at 11–13.
\bibitem{129} See id.
\bibitem{130} See U.S. CONST. amend. I; NBC Subsidiary (KNBC-TV), Inc. v. Superior Court of L.A. Cty., 980 P.2d 337, 368 (Cal. 1999).
\bibitem{132} See NBC Subsidiary (KNBC-TV), Inc., 980 P.2d at 364–65; Mueller, supra note 20, at 12–13; Streicker, supra note 116.
\bibitem{134} See Evidentiary Standards and Burdens of Proof, supra note 43.
\bibitem{135} C.M.A. McCauliff, \textit{Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?}, 35 VAND. L. REV. 1293, 1294 (1982); Nathan, supra note 133.
\bibitem{136} Evidentiary Standards and Burdens of Proof, supra note 43.

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31
writers have expressed it as an objective probabilistic threshold, either in terms of absolute probability—for example, probability of liability greater than 0.5—or in terms of relative odds—for example, odds in favor greater than one to one. Others have suggested a subjective interpretation, based on the cumulative effect of the evidence on the fact finder.

Second, proving liability by clear and convincing evidence requires either at least the same probability of liability as in the preponderance—but with more precision—or a higher probability of liability than preponderance with at least the same precision. By precision, we mean the reciprocal of the variance, or the lack of variance, in an estimate. For example, suppose that Jury A thinks the defendant is liable with a probability uniformly distributed between 0.3 and 0.8, whereas Jury B thinks that she is liable with probability uniformly distributed between 0.5 and 0.6. Both juries expect that the defendant is liable with probability 0.55, the average, but Jury B’s expectation is more precise because its estimate varies over a smaller range. In this case, Jury B’s verdict may meet the clear and convincing standard while Jury A’s verdict may not, even though both expect the same probability of liability. Alternatively, the clear and convincing standard may be interpreted to mean a higher probability than 0.5, or one-to-one odds, as in the case of preponderance, or even a combination of the two.

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139. See id. at 1259, 1268.
140. See id. at 1266–68.
141. See Evidentiary Standards and Burdens of Proof, supra note 43.
143. See id.
144. See id. at 1268.
145. See id.; Evidentiary Standards and Burdens of Proof, supra note 43.
146. See Cheng, supra note 138, at 1259, 1267–68; Evidentiary Standards and Burdens of Proof, supra note 43.
do not seem to recommend one interpretation over the others. See Cheng, supra note 138, at 1258. Nevertheless, this standard is used to overcome a strong presumption—typically when either an important but non-constitutional individual interest or a clear public policy is challenged. Some cases suggest that it is employed to establish, or avoid, civil liability that is penal in nature. For example, courts have used this standard to determine whether rights should be terminated because of an irremediable pattern of domestic abuse. This is an intermediate standard between the default civil and criminal standards considered immediately above and below. Formally, we can say only that this standard is higher than preponderance, but not much beyond that. In applying the clear and convincing evidence standard to actions challenging the validity of a patent, the Supreme Court merely

147. See Cheng, supra note 138, at 1258.
148. See Weiner v. Fleischman, 816 P.2d 892, 898 (Cal. 1991). “Proof by clear and convincing evidence is required ‘where particularly important individual interests or rights are at stake,’ such as the termination of parental rights, involuntary commitment, and deportation.” Id. (quoting Herman v. Huddleston, 459 U.S. 375, 389 (1985)). “However, ‘imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence.’” Id. (quoting Herman, 459 U.S. at 389–90).
149. See Microsoft Corp. v. i4i Limited Partnership, 564 U.S. 91, 95, 112–13 (2011) (requiring an alleged patent infringer to prove an affirmative defense that the controlling patent was invalid by clear and convincing evidence).
150. See 15 U.S.C. § 2087(b)(2)(B)(iv) (2012). “Relief may not be ordered [against an employer taking a personnel action against a whistleblowing employee] if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of [whistleblowing] behavior.” Id.; Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987) (requiring clear and convincing evidence to revoke a teacher’s license).
152. See Addington v. Texas, 441 U.S. 418, 432–33 (1979). In discussing civil commitment proceedings, the Court reasoned:

We have concluded that the reasonable-doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment. Similarly, we conclude that use of the term unequivocal is not constitutionally required, although the states are free to use that standard. To meet due process demands, the standard has to inform the factfinder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases.

We noted earlier that the trial court employed the standard of clear, unequivocal and convincing evidence in appellant’s commitment hearing before a jury. That instruction was constitutionally adequate. However, determination of the precise burden equal to or greater than the clear and convincing standard which we hold is required to meet due process guarantees is a matter of state law. . . .

Id.; Evidentiary Standards and Burden of Proof, supra note 43.
153. See Weiner, 816 P.2d at 896; Evidentiary Standards and Burden of Proof, supra note 43.
noted that this standard was appropriate because “a preponderance standard of proof was too dubious a basis to deem a [presumptively valid] patent invalid.”154

Finally, the beyond a reasonable doubt standard is used to establish a defendant’s guilt in a criminal case.155 The general impression is that this standard is much higher than the civil ones and provides the starkest advantage to the criminal defendant over a civil one.156 Indeed, the Supreme Court has said that “a person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.”157 But this impression may also be wrong.158 The beyond a reasonable doubt standard has caused much confusion and has even been abandoned in some jurisdictions.159 Surveyed judges have generally equated the standard with a probability of guilt higher than 90%.160 Meanwhile, potential jurors, who actually apply the standard, appear to almost equate it with a preponderance of the evidence.161

156. Id. at 367. In a criminal case, the evidence upon which the jury are justified in finding a verdict of guilty must be sufficient to satisfy them of the prisoner’s guilt beyond a reasonable doubt. Id. at 361.
159. Id. at 32.

England, which has the same common law tradition as our own, has recently abandoned its two-hundred-year-old practice of having judges instruct jurors about the nature of reasonable doubt. Instead, jurors there are simply told that conviction requires that they must be sure of the guilt of the accused. England made this change because senior legal theorists concluded that reasonable doubt could be neither defined, nor uniformly understood, nor consistently applied.

Id. “[T]his notion of proof is grievously inadequate, deliberately unclear, wholly subjective, and open to about as many interpretations as there are judges, to whom it falls to explain this notion to hapless jurors.” Id. at 30.

160. Walen, supra note 40, at 374.

In one study of federal judges throughout the United States, nearly three quarters of the 171 who responded to the poll picked a probability that was 90% or higher; and in a second study, this one of Illinois state judges, the mean probability was 89%, with 63% of the judges picking a level of 90% or higher.

Id. (citing Lawrence M. Solan, Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt, 78 TEX. L. REV. 105, 126 (1999)).

161. See Walen, supra note 40, at 374–76 (providing a literature review of tests showing that potential jurors consider the beyond a reasonable doubt standard as a low standard). For example:

In one study, Robert MacCoun and Norbert Kerr constructed a trial transcript that was as equivocal as possible. The authors gave the transcript to mock juries composed of four students. Half of the juries received a reasonable
Perhaps more interesting than the exact thresholds in these cases is the fact that all three are conditional. Even if the criminal threshold was higher than the civil one at the judgment stage, conditional on both procedures being equally protective—and we have shown that it may not be—it may well be a lower threshold unconditionally. Criminal investigators already have advantages at the pre-trial stage, so higher trial thresholds may not reverse the prior pro-prosecutor imbalances.

D. **Expedition and Finality**

Both criminal and civil cases operate under time constraints. These effectively limit the amount of information that the parties can acquire or present. A prosecutor may be unable to persuade witnesses to speak in a limited time frame; however, more time might have allowed her to convince them. Under the Constitution, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial.” This right is elucidated in the Speedy Trial Act of 1974, which now requires that, absent an enumerated exception, criminal trials must commence within seventy days of
the indictment or first information. 171 Civil defendants can appeal instead to statutory rules such as the Federal Rules of Civil Procedure, which require that they be “construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” 172 The requirements of speed and expedition mean that while many non-legal decisions can be deliberated upon almost indefinitely, legal judgments have a limited window for deliberations and the presentation of information. 173 The costs of delayed decisions can overwhelm both the litigants and the judicial system. 174

The speedy trial may be more advantageous to the criminal defendant than the civil one because of the difference in their adversaries’ caseloads. 175 Prosecutors tend to have many more cases to try than civil plaintiffs in a given timeframe, and time constraints can amplify this difference. 176 If the prosecutor is asked to conclude ten cases in the time it takes a civil plaintiff to conclude just one, then the quality of the prosecutor’s work will suffer, and this may inure to the criminal defendant’s benefit. 177 The reason for using the qualifier may instead of will is that a prosecutor under time constraints can also make the defendant’s life difficult by failing to spot weaknesses in her own case or by offering plea deals that she might have, if she had more time to consider her options. 178 Insofar as a hurried prosecutor can err in ways that both help and hurt the defendant, it is difficult to ascertain whether the speedy criminal trial truly leaves the defendant in a better position. 179

Another limitation is on re-trying a case that has been concluded. 180 In a criminal case, the Constitution commands that “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.” 181

171. 18 U.S.C. § 3161(c)(1). Before being amended in 1979, the Speedy Trial Act of 1974 originally called for criminal trials to start “within sixty days from arraignment on the information or indictment.” 88 Stat. at 2077.
172. 18 U.S.C. § 3161(c)(1); Israel, supra note 167, at 765.
173. See Gershowitz & Killinger, supra note 27, at 262–64; Israel, supra note 167, at 761–62.
174. See Gershowitz & Killinger, supra note 27, at 262–63; Israel, supra note 167, at 761–62.
175. See Gershowitz & Killinger, supra note 27, at 262–65; Israel, supra note 167, at 761–62.
176. See Gershowitz & Killinger, supra note 27, at 262–64; Israel, supra note 167, at 761–62.
177. See Gershowitz & Killinger, supra note 27, at 263–64 (emphasis added).
178. See Gershowitz & Killinger, supra note 27, at 263; Israel, supra note 167, at 766.
179. See U.S. CONST. amend. VI; Gershowitz & Killinger, supra note 27, at 263; Israel, supra note 167, at 766.
180. Id.
The rough analogue in civil cases are the doctrines of claim preclusion, or res judicata, and issue preclusion, or collateral estoppel. The Supreme Court explains that under claim preclusion, “a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.” Whereas under issue preclusion, “once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.

Finality operates as a protection for the defendant against an identical claim or issue being relitigated in the future. This protection is arguably stronger in the criminal case than in the civil one for two reasons: (1) The Supreme Court has apparently subsumed the civil res judicata and collateral estoppel protections of civil law into the Fifth Amendment’s Double Jeopardy clause, thereby elevating a common law protection in civil cases into a constitutional protection in criminal cases; and (2) The Supreme Court has suggested that the constitutional Double Jeopardy provision may have application beyond res judicata and collateral estoppel as well.

However, the greater protection of criminal defendants through the finality of judgments is easily overstated. In particular, the Supreme Court has allowed the prosecutor to relitigate issues that a civil plaintiff would be estopped from revisiting. In Standefer v. United States, the Court reasoned that a prosecutor was not estopped from relitigating an issue against an aider and abettor in a criminal case, even though the principal that the defendant had allegedly aided had been acquitted of the offense. In reaching this conclusion, the Court drew three distinctions between a civil plaintiff and a prosecutor to justify this result: (1) the prosecutor had
procedural limitations that were inapplicable to civil plaintiffs, such as—supposedly—more limited discovery, the unavailability of judgment notwithstanding the verdict, and limited or no appeal from an adverse judgment; (2) the prosecutor’s ability to introduce evidence was more limited than a civil plaintiff’s because of the exclusionary rule and similar devices; and (3) the state had a special interest in the enforcement of criminal laws.192

The most meaningful advantage of finality for the criminal defendant does not lie in Double Jeopardy protection—which is arguably balanced by lower collateral estoppel and res judicata protections—but in an asymmetric right of appeal.193 Both criminal and civil defendants can appeal against defective adverse judgments.194 In most civil cases, other than small claims, the plaintiff has a right to appeal an adverse judgment for good cause; however, in criminal cases, the prosecutor has virtually no right of appeal.195 Thus, errors in favor of the civil defendant are likelier to be rectified than errors in favor of the criminal defendant.196

III. THE ADVANTAGES OF CIVIL DEFENDANTS OVER CRIMINAL ONES

A. Case by Case Civil Protections Versus Enumerated Criminal Protections

Criminal and civil cases differ as to various procedural limitations that control whether, and how, litigants can collect information, present the information they have, or challenge the information of the other side.197 Limitations on the gathering and use of information create two expectations.198 First, we expect prospective litigants—who have access to greater information—to have stronger beliefs about the matters involved.199 Second, we expect the fact finder’s beliefs to be closer to the beliefs of the

192. Id. at 22–25.
195. See id. at 23; William S. McAninch, Unfolding the Law of Double Jeopardy, 44 S.C. L. Rev. 411, 496 (1993). In limited circumstances, the prosecutor can appeal a sentence, though she cannot appeal a verdict. McAninch, supra, at 496. An example of appealing a sentence would be where the court’s sentence was above or below the sentencing limits set by a statute. Fed. R. Crim. P. 32(j)(1)(B); see also McAninch, supra, at 496.
198. See id. at 91–93, 134–36; Summers, supra note 53, at 499–500.
litigant, who has greater information or opportunity to present her case.200 The litigants’ and fact finders’ tendencies are reasonably predictable in the criminal context, but vary case by case in civil litigation.201 Under the Fifth Amendment, a person may “no[t] be deprived of life, liberty, or property, without due process of law.”202 Due process has been bifurcated into substantive due process, which covers certain rights that any party must have in any due process; and procedural due process, which covers the actions adjudicators, litigants, or connected parties must take, or refrain from, in particular cases.203 Due process applies to both civil and criminal matters.204 However, courts have interpreted it differently in these two contexts.205 In civil matters, the court applies the three-part test from Mathews v. Eldridge206 to determine what due process requires in a particular case:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.207

The Mathews test is essentially an adaptation of Judge Learned Hand’s test for negligence208 to the constitutional due process context: If B is the burden to the government of marginally greater procedural protections, P is the probability that the defendant’s interest is erroneously infringed, and L is the magnitude of that interest—net of any countervailing benefit to the state—then the state should provide greater due process protection if \( B < PL \).209 In practice, courts have used the Due Process Clause to extend

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202. U.S. CONST. amend. V.
205. See id.
207. Id. at 335.
208. See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947); Mathews, 424 U.S. at 335.
209. See Mathews, 424 U.S. at 335; Carroll Towing Co., 159 F.2d at 173.
some of the rights that the Constitution only provides for criminal trials to civil trials.\textsuperscript{210}

On the other hand, in the criminal context, the court has held that “[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.”\textsuperscript{211} While important enumerated protections apply to only criminal cases, the \textit{Mathews} test allows for these and potentially further protections for the civil defendant on a case by case basis.\textsuperscript{212} In particular, while civil protections may apply at any stage—trial or pre-trial—most of the criminal protections apply only at the trial or post-trial stage.\textsuperscript{213} A surprising consequence of this distinction is that “criminal defendants constitutionally may be arrested, detained, and suspended from government employment before trial with less meaningful hearing rights than comparable deprivations would require in civil litigation.”\textsuperscript{214} Given that most cases—criminal or civil—never proceed to trial at all, the implication is that in practice, criminal defendants may have fewer protections than civil ones.\textsuperscript{215} In the pre-trial stages of a criminal versus a civil case, the fact finder’s beliefs are likely to be closer to the prosecution’s than the defendant’s, since the criminal defendant’s due process rights are more limited.\textsuperscript{216}

The following sketch depicts the comparison of information gathering in the civil and criminal processes.\textsuperscript{217}

\begin{itemize}
\item \textsuperscript{210} See Goldberg v. Kelly, 397 U.S. 254, 269 (1970). An example is the right to confront adverse witnesses, discussed below. \textit{Id.; see also infra} Section III.D.
\item \textsuperscript{212} Medina, 505 U.S. at 443–44; Mathews, 424 U.S. at 335.
\item \textsuperscript{213} Kuckes, \textit{supra} note 204, at 4–5, 39.
\item \textsuperscript{214} \textit{Id.} at 3–4, 39.
\item \textsuperscript{215} See \textit{id.} at 3–5, 39; Patricia Lee Refo, \textit{Opening Statement: The Vanishing Trial}, A.B.A. SEC. LITIG., Winter 2004, at 1, 2–3.
\item \textsuperscript{216} See Kuckes, \textit{supra} note 204, at 3–4, 22–25, 39.
\item \textsuperscript{217} See \textit{Cooter} & \textit{Ulen}, \textit{supra} note 2, at 393; Kuckes, \textit{supra} note 204, at 4–5, 7; Peter Lewisch, 7700: \textit{Criminal Procedure, in 5} ENCYCLOPEDIA L. & ECON.: ECON. CRIME & LITIG. 241, 253 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).
\end{itemize}
At the early stages of the civil process, the plaintiff must meet relatively high thresholds to continue the investigation, whereas the criminal prosecutor faces lower limits. At the trial stage, the criminal prosecutor faces higher thresholds than the civil plaintiff, notably because of the defendant’s enhanced protections, evidence vetting, a higher burden of proof, and the lopsided opportunity to appeal. The preceding section has shown how many of these protections for criminal defendants have either been whittled down or replicated in the civil case, thus making the civil-criminal contrast weaker. In the sequel, we consider how civil protections at some stages have been increased to levels not seen in the criminal context.

218. See Fed. R. Civ. P. 8; David S. Evans, What You Need to Know About Twombly: The Use and Misuse of Economic and Statistical Evidence in Pleadings, GCP, July 2009, at 1, 2, http://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634ec6c40ad/EVANS-JULY-09_2_.pdf; Evidentiary Standards and Burdens of Proof, supra note 43.

219. See U.S. Const. amends. V, VI; Lewisch, supra note 217, at 253, 255; Nathan, supra note 133.

220. See Kuckes, supra note 204, at 34, 38; supra Part III.

221. See infra Part IV.
B. The Civil Complaint Versus the Criminal Indictment

To commence the formal legal process, the civil plaintiff files a complaint, whereas the criminal prosecutor typically seeks an indictment.\(^{222}\) The standard for the civil complaint is plausible evidence,\(^{223}\) and in the case of securities fraud litigation, strong inference;\(^{224}\) whereas the standard for a criminal indictment is probable cause.\(^{225}\) A comparison of these standards will highlight the difference between civil and criminal thresholds.\(^{226}\)

The *Bell Atlantic Corp. v. Twombly*\(^{227}\) and *Ashcroft v. Iqbal*\(^{228}\) cases established the plausible evidence standard to discourage meritless complaints and avoid wasteful discovery costs in civil cases.\(^{229}\) This standard is notably higher than the notice pleading regime that preceded it.\(^{230}\)

The Third Circuit applies the plausible evidence standard as a three part test:

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\(^{223}\) David S. Evans, *What You Need to Know About Twombly: The Use and Misuse of Economic and Statistical Evidence in Pleadings,* GCP, July 2009, at 1, 3–4, http://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9de2634f6c40d/ EVANS-JULY-09_2_.pdf; *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (Stevens, J., dissenting). The *Twombly* Court instead explained that Rule 8 of the Federal Rules of Civil Procedure requires that a complaint include facts—as distinct from legal labels and conclusions—giving rise to a plausible, rather than merely conceivable, entitlement to relief. *Twombly*, 550 U.S. at 555, 570. Two years later in *Iqbal*, the Court confirmed that *Twombly* applies to all civil suits, not just antitrust cases or complex cases. *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009).

\(^{224}\) *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007). The majority held that plaintiffs must demonstrate a cogent inference of scienter at least as strong as any opposing inference from the defendant. *Id.*

\(^{225}\) *Id.* at 336. Probable cause is a requirement found in the Fourth Amendment that must usually be met before police make an arrest, conduct a search, or receive a warrant. *U.S. Const.* amend. IV. Probable cause exists when there is a fair probability that a search will result in evidence of a crime being discovered. *See* Illinois v. Gates, 462 U.S. 213, 238–39 (1983).


\(^{228}\) 556 U.S. 662 (2009).

\(^{229}\) *See* *Twombly*, 550 U.S. at 559. [T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment]. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence.

\(^{230}\) *See* Conley v. Gibson, 355 U.S. 41, 45–47 (1957). “[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* at 45–46.
(1) check that the plaintiff has pled every element of the claim; (2) check that the plaintiff’s allegations in support of each element are not merely conclusions—for example, this element is met—but statements of fact from which conclusions may be inferred—for example, if these facts are true then this element is likely met; and (3) assuming that non-conclusory allegations are true, decide whether they plausibly entitle the plaintiff to relief. This test does clarify that every element of the claim must be supported by factual allegations from which the element may be inferred. However, it does not tell us how strong that inference needs to be. Judge Posner explained the plausibility standard in Atkins v. City of Chicago as follows: “the complaint taken as a whole must establish a non-negligible probability that the claim is valid, though it need not be so great a probability as such terms as preponderance of the evidence connote.” This probabilistic view is perhaps at odds with Iqbal’s language that “[t]he plausibility standard is not akin to a probability requirement.” However, it is difficult to understand the standard in a non-probabilistic way; moreover, a probabilistic view, even if imperfect, helps us usefully compare thresholds such as plausible evidence and preponderance.

In securities fraud litigation, the higher strong inference standard is used to sift strong complaints from weaker ones. The policy concern is similar to that for the plausible evidence standard: that “[p]rivate securities fraud actions . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct

231. Connelly v. Lane Constr. Corp., 809 F.3d 780, 787 (3d Cir. 2016). Under the pleading regime established by Twombly and Iqbal, a court reviewing the sufficiency of a complaint must take three steps. First, it must “take note of the elements the plaintiff must plead to state a claim.” Second, it should identify allegations that, “because they are no more than conclusions, are not entitled to the assumption of truth.” Finally, “when there are well-pleaded factual allegations, the court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” Id. (quoting Iqbal, 556 U.S. at 675, 679) (footnote omitted) (citations omitted).

232. See id.

233. See id.

234. 631 F.3d 823 (7th Cir. 2011).

235. Id. at 832.

236. Iqbal, 556 U.S. at 678; Atkins, 631 F.3d at 832.

237. Atkins, 631 F.3d at 831.

The Private Securities Litigation Reform Act (“PSLRA”) requires that “the complaint shall . . . state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” However, even though the concerns are similar, the threshold for strong inference is explicitly higher than plausible evidence. As the Supreme Court explained:

An inference of fraudulent intent may be plausible, yet less cogent than other, nonculpable explanations for the defendant’s conduct. To qualify as strong, . . . an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of non-fraudulent intent.

Compare the criminal process, where the grand jury which decides on indictment, can be impaneled on mere suspicion. The Supreme Court has explained that:

“Unlike a court, whose jurisdiction is predicated upon a specific case or controversy, the grand jury ‘can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not.’” It need not identify the offender it suspects, or even “the precise nature of the offense” it is investigating. The grand jury requires no authorization from its constituting court to initiate an investigation, nor does the prosecutor require leave of court to seek a grand jury indictment. And in its day-to-day functioning, the grand jury generally operates without the interference of a presiding judge.

Thus, while the civil complaint at least requires a claim pleaded with particularity—for example, stating the elements of a claim and alleging some evidence for each element—the prosecutor in a criminal case can impanel a grand jury merely on suspicion of some unknown wrongdoing. Suspicion is “[t]he apprehension or imagination of the existence of something wrong based only on inconclusive or slight evidence, or possibly even no

239. Tellabs, Inc., 551 U.S. at 313.
242. Id.
244. Id. (citations omitted) (quoting United States v. R. Enters., Inc., 498 U.S. 292, 297 (1991); Blair v. United States, 250 U.S. 273, 282 (1919)).
245. Telllabs, Inc., 551 U.S. at 314; Williams, 504 U.S. at 48.
This is an explicitly lower threshold than the plausible evidence required for a civil claim, even though it triggers the substantial social cost of impaneling a grand jury.\textsuperscript{247} Next, in order to return an indictment, the grand jury must find probable cause for further process.\textsuperscript{248} This standard was most recently scrutinized when the Supreme Court of the United States held that a finding of probable cause by a lay grand jury was sufficient to justify the forfeiture of a suspect’s property, even when such forfeiture would limit the suspect’s ability to hire a defense attorney.\textsuperscript{249} The Supreme Court characterizes probable cause as a threshold lying between mere suspicion and prima facie evidence: “\textquoteleft\textquoteleft[t]he term \textit{probable cause} . . . imports a seizure made under circumstances which warrant suspicion. . . . [I]t is clear that ‘only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.’”\textsuperscript{250} Similarly, the Sixth Circuit characterizes probable cause “as reasonable grounds for belief, supported by less than prima facie proof, but more than mere suspicion.”\textsuperscript{251} Since suspicion is warranted even without any evidence, arguably any scintilla of evidence at all could potentially suffice for a finding of probable cause, which would secure an indictment and trigger further social costs.\textsuperscript{252}

C. Civil Discovery Versus Criminal Search and Seizure

In the civil context, the scope of discovery is governed by the Federal Rules of Civil Procedure, which state:

\begin{quote}
Unless otherwise limited by court order, the scope of discovery is as follows: [p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this
\end{quote}

\textsuperscript{246} \textit{Suspicion}, BLACK’S LAW DICTIONARY (9th ed. 2009).
\textsuperscript{247} See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); \textit{Williams}, 504 U.S. at 47–48.
\textsuperscript{248} Kaley v. United States, 134 S. Ct. 1090, 1097 (2014).
\textsuperscript{249} See \textit{id.} at 1095–97, 1105.
\textsuperscript{251} United States v. McClain, 444 F.3d 556, 562 (6th Cir. 2005) (quoting United States v. Ferguson, 8 F.3d 385, 392 (6th Cir. 1993)).
\textsuperscript{252} See \textit{id.} at 569.
scope of discovery need not be admissible in evidence to be discoverable.\textsuperscript{253}

In the criminal context, searches and seizures are governed by three successively weaker standards:\textsuperscript{254} Probable cause—familiar from the grand jury indictment discussed above,\textsuperscript{255} reasonable suspicion,\textsuperscript{256} and reasonable belief.\textsuperscript{257}

Probable cause at criminal law is “[a] reasonable ground to suspect that a person has committed or is committing a crime, or that a place contains specific items connected with a crime.”\textsuperscript{258} It is the evidentiary standard that the police must meet to obtain a warrant for an arrest or to execute a search of a person or property.\textsuperscript{259} The Court has explained that this standard requires case-by-case balancing:

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case, it requires a balancing of the need for the particular search

\textsuperscript{253} \textit{Fed. R. Civ. P. 26(b)(1)}.
\textsuperscript{254} See \textit{Tellabs, Inc. v. Makor Issues & Rights, Ltd.}, 551 U.S. 308, 336 (2007) (Stevens, J., dissenting); \textit{Ornelas v. United States}, 517 U.S. 690, 696 (1996); \textit{Terry v. Ohio}, 392 U.S. 1, 28 (1968). “When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer’s significantly diminished privacy interests is reasonable.” \textit{United States v. Knights}, 534 U.S. 112, 121 (2001).
\textsuperscript{255} \textit{Tellabs, Inc.}, 551 U.S. at 336 (Stevens, J., dissenting); see also discussion \textit{supra} Section III.B.

The probable cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. We have stated, however, that ‘[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt,’ and that the belief of guilt must be particularized with respect to the person to be searched or seized.

\textit{Maryland v. Pringle}, 540 U.S. 366, 371 (2003) (alteration in original) (citation omitted). Probable cause “exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.” \textit{Ornelas}, 517 U.S. at 696 (citing \textit{Brinegar v. United States}, 338 U.S. 160, 175–76 (1949)).

\textsuperscript{256} \textit{Ornelas}, 517 U.S. at 696. Reasonable suspicion is a standard, more than a hunch but considerably below preponderance of the evidence, which justifies an officer’s investigative stop of an individual upon the articulable and particularized belief that criminal activity is afoot. \textit{Illinois v. Wardlow}, 528 U.S. 119, 123–24 (2000).

\textsuperscript{257} \textit{Terry}, 392 U.S. at 28. Reasonableness is that point at which the government’s interest advanced by a particular search or seizure outweighs the loss of individual privacy or freedom of movement that attends the government’s action. \textit{Illinois v. Lidster}, 540 U.S. 419, 426–27 (2004).

\textsuperscript{258} \textit{Probable Cause, Black Law’s Dictionary} (9th ed. 2009).

\textsuperscript{259} See id.
against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.\textsuperscript{260}

Both the civil proportionality standard and the probable cause criminal standard are determined case-by-case.\textsuperscript{261} In each context, just as important as the balancing requirement, is the institutional requirement that a judge, rather than a plaintiff or police officer, conduct the balancing inquiry: “[probable cause] protection consists in requiring that [necessary] inferences be drawn by a neutral and detached magistrate, instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.”\textsuperscript{262} These similarities suggest that discovery and criminal search and seizure, face similar thresholds.\textsuperscript{263} However, note that the factors that explicitly require balancing in the civil case are more extensive and explicit than in the criminal one.\textsuperscript{264} In particular, the proportionality language in the civil discovery context can require estimates for costs and benefits of a particular discovery that are absent in the criminal context.\textsuperscript{265} This, and other enumerated factors, suggest that the civil discovery threshold may be harder to meet than criminal probable cause standard.\textsuperscript{266}

The other two search standards in the criminal context are even lower.\textsuperscript{267} The second standard that applies to criminal investigations is “reasonable suspicion, [which is a] particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity.”\textsuperscript{268} It is the standard that a police officer must meet to briefly detain, but not arrest, someone who is suspected of involvement in a crime, or to frisk a person—the so-called Terry stop.\textsuperscript{269} The Supreme Court explained the threshold as follows:

While reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than

\begin{footnotesize}
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\item \textsuperscript{260.} Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1526 (2012) (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).
\item \textsuperscript{261.} See Fed. R. Civ. P. 26(b)(1), (2)(A); Bell, 441 U.S. at 559.
\item \textsuperscript{262.} Johnson v. United States, 333 U.S. 10, 14 (1948).
\item \textsuperscript{263.} See Fed. R. Civ. P. 26(b)(1); Florence, 132 S. Ct. at 1526; Johnson, 333 U.S. at 14.
\item \textsuperscript{264.} See Fed. R. Civ. P. 26(b)(1); Florence, 132 S. Ct. at 1526.
\item \textsuperscript{265.} See Fed. R. Civ. P. 26(b)(1); Florence, 132 S. Ct. at 1526.
\item \textsuperscript{266.} See Fed. R. Civ. P. 26(b)(1); Probable Cause, supra note 258.
\item \textsuperscript{267.} See Evidentiary Standards and Burdens of Proof, supra note 43.
\item \textsuperscript{268.} Reasonable Suspicion, BLACK’S LAW DICTIONARY (9th ed. 2009).
\item \textsuperscript{269.} Terry v. Ohio, 392 U.S. 1, 26–27 (1968); see also Illinois v. Wardlow, 528 U.S. 119, 122 (2000).
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preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop. The officer must be able to articulate more than an “inchoate and unparticularized suspicion or hunch” of criminal activity.\textsuperscript{270}

Thirdly, the reasonable belief standard applies when officers are searching premises that they do not have clear authority—typically given by a warrant pursuant to probable cause—to search.\textsuperscript{271} Police officers are immune from suit so long as they search a location with the \textit{reasonable belief} that a suspect, or inculpating material, will be found there.\textsuperscript{272} The Supreme Court has held that this standard provides qualified immunity to “all but the plainly incompetent or those who knowingly violate the law.”\textsuperscript{273} A year later, the Court held that to overcome qualified immunity for an official who has allegedly violated a right, “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”\textsuperscript{274} At the circuit level, the Second Circuit has held that the reasonable belief standard is lower than probable cause.\textsuperscript{275} The Tenth Circuit has held the same.\textsuperscript{276}

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\item \textsuperscript{270} \textit{Wardlow}, 528 U.S. at 123–24 (citation omitted) (quoting \textit{Terry}, 392 U.S. at 27).
\item \textsuperscript{271} \textit{Griffin v. Wisconsin}, 483 U.S. 868, 870–71, 880 (1987) (upholding warrantless search of probationer’s house by probation officer on basis of \textit{reasonable grounds}).
\item \textsuperscript{272} \textit{United States v. Lauter}, 57 F.3d 212, 214 (2d Cir. 1995); \textit{Griffin}, 483 U.S. at 870–71.
\item \textsuperscript{273} \textit{Malley v. Briggs}, 475 U.S. 335, 341 (1986).
\item \textsuperscript{274} \textit{Anderson v. Creighton}, 483 U.S. 635, 640 (1987).
\item \textsuperscript{275} \textit{See Lauter}, 57 F.3d at 215.
\end{itemize}

Although we agree with the district court’s ultimate conclusion, we note that it applied too stringent a test when it held that “officers may properly determine whether they have \textit{probable cause} to believe that an apartment or house is the arrestee’s residence, and if probable cause exists, they may enter such premises to effect the arrest when they have a reasonable basis to believe that the arrestee will be present.” As noted above, the proper inquiry is whether there is a \textit{reasonable belief} that the suspect resides at the place to be entered to execute an arrest warrant, and whether the officers have reason to believe that the suspect is present. \textit{Id.} (citations omitted).

\textit{Id.} at 1224 (citation omitted) (quoting \textit{United States v. Harper}, 928 F.2d 894, 896 (9th Cir. 1991)).
D. Adversarial Process and Legal Representation

Although both criminal and civil litigants have rights to direct and cross-examination, the government backed prosecutor has certain advantages—in both experience and resources—that a private plaintiff may lack.277 As mentioned earlier, private civil litigants have to pay their own way, and insofar as the plaintiff must make her case before the defendant responds, the plaintiff has to pay first; if the plaintiff does not have the legal expertise to make a prima facie case, then the case is dismissed.278 This pay-to-play dynamic also provides a criminal prosecutor a potential advantage over the civil plaintiff, as explained below.279

When private information is revealed through investigation, discovery, or trial, the adversarial system provides for contentious vetting.280 Through confrontation and cross-examination, each side attempts to minimize the weight of adverse evidence.281 Both civil and criminal litigants have the opportunity to challenge information adduced by the other side.282 A criminal defendant has a constitutional right “to be confronted with the witnesses against him.”283 Although this right is not universal in civil proceedings, the Supreme Court has held that “[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”284

In theory then, civil litigants are at a disadvantage to criminal ones in persuading the judge on legal issues.285 The prosecutor has a budget and a team of experienced attorneys to pursue any case, and the criminal defendant must “have the Assistance of Counsel for his defen[s]e.”286 There is no analogue for this right in civil cases.287 There has been support for extending the right to counsel to at least some civil cases.288 For example, an American Bar Association resolution calls for extending the right to “low income

277. Posner, supra note 5, at 1505; see also U.S. CONST. amend. VI.
279. See Posner, supra note 5, at 1505.
280. See id. at 1490–91.
281. See id. at 1490.
283. U.S. CONST. amend. VI.
287. See U.S. CONST. amend. VI.
288. See HOWARD H. DANA, JR., TASK FORCE ON ACCESS TO CIV. JUST., REPORT TO THE ABA HOUSE OF DELEGATES 1 (2006); Rosen-Zvi & Fisher, supra note 35, at 151–52.
persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody.”

In a comparative context, the European Court of Human Rights has held that the right to counsel exists in cases where absence of counsel would result in cosmetic rights—which are “theoretical or illusory [rather than] practical and effective.” However, even if this right were extended to civil defendants, it would not help the private plaintiff who, unlike the criminal prosecutor, would still have to pay her way or proceed pro se. While wealthy civil litigants can afford good legal representation, those with limited means have to proceed pro se, and are less likely to make legal arguments that would convince a judge. Legal aid organizations and firms can lessen this disparity by offering pro bono representation, and judges can be more permissive in hearing pro se litigants, but these remedial measures are a far cry from the constitutional guarantee to representation in criminal cases or the experienced and publicly funded resources of a prosecutor’s office.

This difference in the guarantee of legal representation has two potential effects. First, it can increase the divergence in the litigants’ private information, noted in the previous part. When both sides are assured legal representation, the legal rules, tests, and practices are familiar to their lawyers, and are therefore common information. Only the factual, as opposed to legal, information is private in the criminal case. However, in the civil case, neither side has a right to legal representation. This may result in a divergence of legal information that compounds the divergence in private factual information. Moreover, where litigants are less versed in the skills of direct and cross-examination, divergences in factual—opposed to legal—beliefs are also likelier to persist. Second, if potential litigants are dissuaded by the cost of litigation, then the absence of a right to

289. DANA, supra note 288, at 1.
291. See COOTER & ULEN, supra note 2, at 62 n.11; FRIEDMAN, supra note 1, at 286; Rosen-Zvi & Fisher, supra note 35, at 92–93.
292. See COOTER & ULEN, supra note 2, at 62 n.11; FRIEDMAN, supra note 1, at 286.
293. See U.S. CONST. amend. VI; COOTER & ULEN, supra note 2, at 62 n.11; Rosen-Zvi & Fisher, supra note 35, at 92.
294. See Kuckes, supra note 204, at 18; Summers, supra note 53, at 498–99.
295. See COOTER & ULEN, supra note 2, at 383, 393.
296. See id. at 62, 393; Summers, supra note 53, at 502, 504, 506.
297. See COOTER & ULEN, supra note 2, at 393.
298. See Kuckes, supra note 204, at 3, 8, 18.
300. See id. at 499.
counsel in civil cases can skew civil litigation to the side of the well-heeled, whether plaintiffs or defendants, and the precedents emanating from the litigation of the rich may not be appropriate for regulating society as a whole.\textsuperscript{301} In particular, many self-help options that are available to rich parties—such as alternative arrangements in case of a contract breach or self-insurance in case of a tort—are sometimes taken for granted in law.\textsuperscript{302} Yet, these options can involve search and transaction costs that only the affluent can afford.\textsuperscript{303}

If the guarantee of legal counsel is an advantage for the criminal defendant, then the nature of her adversary is a countervailing disadvantage.\textsuperscript{304} Criminal defendants are prosecuted by the government, whereas civil defendants are often sued by private parties—though government agencies also bring civil suits, in which case this difference is erased.\textsuperscript{305} Four distinctions follow from this point: first, the prosecutor has resources—particularly her relationships with law enforcement and the judiciary—that a private litigant does not, and this can create a power imbalance in the criminal case that, even if sometimes present, is not as stark in civil litigation.\textsuperscript{306} Second, the criminal prosecutor’s office is more experienced in criminal litigation than the typical civil plaintiff.\textsuperscript{307} Third, the prosecutor does not use her own private resources in litigation, whereas a civil plaintiff typically bears her costs, unless the court redistributes these costs after litigation.\textsuperscript{308} Fourth, the prosecutor is likelier to have political ambitions and pressures that affect her calculus in ways that are inapplicable to the typical civil plaintiff.\textsuperscript{309}

\begin{itemize}
  \item \textsuperscript{301} See Rosen-Zvi & Fisher, supra note 35, at 101–04.
  \item \textsuperscript{302} Id. at 91–92, 103, 120.
  \item \textsuperscript{303} Id. at 90–91.
  \item \textsuperscript{304} See Kuckes, supra note 204, at 18 (citing U.S. CONST. amend. VI).
  \item \textsuperscript{305} See FRIEDMAN, supra note 1, at 288–89; Rosen-Zvi & Fisher, supra note 35, at 92.
  \item \textsuperscript{306} Rosen-Zvi & Fisher, supra note 35, at 91–92.
  \item \textsuperscript{308} COOTER & ULEN, supra note 2, at 400; Posner, supra note 5, at 1505; Rosen-Zvi & Fisher, supra note 35, at 102–105.
\end{itemize}
IV. POSSIBLE REASONS FOR THE DIFFERENCES IN CRIMINAL AND CIVIL PROTECTION

Six possible reasons for this divergence are: (1) frivolous civil litigation may be a greater—costlier—problem than frivolous criminal litigation, since the former is brought by private parties that do not internalize costs, whereas the latter is brought by the government;\(^\text{310}\) (2) courts offer greater leeway for criminal investigators to pursue leads in light of their institutional importance and experience;\(^\text{311}\) (3) *Miranda*,\(^\text{312}\) *Massiah*,\(^\text{313}\) and related constitutional rights may make it difficult for criminal investigators to establish a substantial probability of guilt pre-trial;\(^\text{314}\) (4) the harm from letting a criminal off may be greater than the harm from letting a civil wrongdoer off;\(^\text{315}\) (5) the social value of a spectacle—public trial—may justify the trial even when the probability of guilt is relatively low;\(^\text{316}\) and (6) the prosecutor may have private incentives for good behavior, or fewer incentives for bad behavior, than the civil plaintiff.\(^\text{317}\)

The first potential rationale dominated the Court’s reasoning in raising the standard for civil complaints to plausible evidence.\(^\text{318}\) *Twombly* and *Iqbal* were decided in 2007 and 2009, respectively, and civil “caseloads have declined 21% since reaching an apex of 19.5 million cases in 2009—an average of about -3.5% per year.”\(^\text{319}\) This coincidence does not establish causation since the 2008 recession would have contributed in ways unrelated to the changed pleading standard; nevertheless, some “empirical studies have found that *Twombly* and *Iqbal* have increased the likelihood that motions to dismiss would be granted—at least for particular kinds of cases.”\(^\text{320}\)

\(^{310}\) See Friedman, supra note 1, at 286–87, 289; Evans, supra note 218, at 3.

\(^{311}\) See Kuckes, supra note 204, at 21–22; Gadek, supra note 307.


\(^{315}\) See Cooter & Ulen, supra note 2, at 457–58.

\(^{316}\) See Mueller, supra note 20, at 6–7, 11.

\(^{317}\) See Gershowitz & Killinger, supra note 27, at 287–89; Rosen-Zvi & Fisher, supra note 35, at 99.


Whether this over-litigation problem is real is an enduring point of contention. For present purposes, though, we are interested in whether frivolous civil litigation is likelier than frivolous prosecution. That impression perhaps rests on the assumption that criminal prosecutors internalize social costs and benefit better than civil plaintiffs do. However, this is far from obvious for at least two reasons: first, if frivolous litigation is understood to mean litigation that is unlikely to be successful, or litigation that unduly vexes the defendant, then a great deal of criminal litigation appears frivolous as well. Prosecutorial caseloads that stretch far beyond their abilities are vexatious simply because the cases are unlikely to be tried responsibly. Second, even if caseloads were lower, it is unclear that prosecutors consider any public benefit beyond the benefits to their office of winning the trial or securing a guilty plea. It may be countered that in jurisdictions where prosecutors are elected or otherwise politicized, they consider social costs and benefits in roughly the same way that politicians do. However, the extent to which politicians do so is itself questionable; prosecutors, like politicians, may well lean toward important interest groups, such as law enforcement and wealthy constituents. The cost benefit analyses of these interest groups need not mirror the social calculus.

A second possible rationale is institutional—low pre-trial criminal thresholds may reflect the judiciary’s deference to the expertise and institutional roles of the police and the prosecutor’s office. The police and

Amendments, 66 Emory L.J. 1, 16 (2016) (citing Lonny Hoffman, Twombly and Iqbal’s Measure: An Assessment of the Federal Judicial Center’s Study of Motions to Dismiss, 6 Fed. Cts. L. Rev. 1, 12 (2012); see also Iqbal, 556 U.S. at 666; Twombly, 550 U.S. at 548; Court Statistics Project, supra note 319, at 4.
321. Twombly, 550 U.S. at 558, 587; see also Evans, supra note 218, at 3.
322. See Twombly, 550 U.S. at 557–59; Friedman, supra note 1, at 287.
323. See Friedman, supra note 1, at 287–88; Gershowitz & Killinger, supra note 27, at 262–65.
324. See Gershowitz & Killinger, supra note 27, at 263–64.
325. Id. at 263.
326. Friedman, supra note 1, at 287–88; Gershowitz & Killinger, supra note 27, at 264.
327. See Gershowitz & Killinger, supra note 27, at 277.
328. See id.; DA’s, Prosecutors, Judges Continue to Feed the Police Brutality Beast, supra note 118.
330. See Kuckes, supra note 204, at 22; Leong, supra note 5, at 2476–77, 2477 n.69.
criminal prosecutor have valuable experience in pursuing criminal matters.\footnote{331} Moreover, these two organs of the government have public mandates to act within their domains just as the judiciary does.\footnote{332} These institutional concerns—respect for expertise and political legitimacy—may dissuade courts from imposing demanding thresholds in the criminal case.\footnote{333} The only civil cases where such institutional concerns limit courts are cases where the government is a party, typically as either an executive agency or a legislature.\footnote{334} In these cases, courts are likewise deferential to the state, albeit under different doctrines: Chevron deference\footnote{335} and rational basis review, respectively.\footnote{336}

A third possibility is that some of the enumerated constitutional restrictions on criminal inquiries so hamper the investigators as to make higher pre-trial thresholds fatal to the prosecution.\footnote{337} Civil investigators can obtain evidence from their adversaries through discovery, whereas criminal investigators are hampered by the defendant’s rights to an attorney and against self-incrimination, among others.\footnote{338} Such restrictions would limit the criminal investigator at the trial stage, and the lower pre-trial thresholds may compensate for this disadvantage.\footnote{339} The trouble with this reasoning, however, is the constitutional suggestion that criminal investigations should face higher hurdles than civil ones because of the notoriety and severity of criminal sanctions and the public expense of criminal trials.\footnote{340} If the lower thresholds compensate for higher constitutional protections, then the constitutional safeguards of criminal defendants have essentially been annihilated by other means.\footnote{341}

\footnote{331}{See Amici Curiae Brief of Former Federal Prosecutors et al. in Support of the Petitioner, \textit{supra} note 80, at 16.}

\footnote{332}{See id.; Leong, \textit{supra} note 5, at 2477 n.69.}

\footnote{333}{Amici Curiae Brief of Former Federal Prosecutors et al. in Support of the Petitioner, \textit{supra} note 80, at 16; see also Kuckes, \textit{supra} note 204, at 22–23.}


\footnote{335}{See id. at 866.}

\footnote{336}{\textit{Chevron U.S.A. Inc.}, 467 U.S. at 866; Romer v. Evans, 517 U.S. 620, 631–32 (1996).}

\footnote{337}{See U.S. CONST. amends. IV–VII; Miranda v. Arizona, 384 U.S. 436, 474 (1966).}

\footnote{338}{U.S. CONST. amends. V–VI; \textit{Fed. R. Civ. P.} 26.}

\footnote{339}{See \textit{Miranda}, 384 U.S. at 474.}


\footnote{341}{See \textit{Nat’l Ctr. of Victims of Crime, supra} note 10, 4–5; Rosen-Zvi & Fisher, \textit{supra} note 35, at 82.}

\footnote{342}{See \textit{Nat’l Ctr. of Victims of Crime, supra} note 10, 4–5; Rosen-Zvi & Fisher, \textit{supra} note 35, at 82.}
The fourth rationale is similarly questionable; the stigma associated with criminal behavior is obvious—evidenced by such literary tropes as scarlet letters and such contemporary practices as sex offender registries. The media’s obsession with crime, both real life and fictitious, nurtures this notoriety. The criminal wrong tends to generate more interest and coverage than the civil wrong. In light of these trends, it is arguable that the state is more reluctant to terminate a criminal investigation than a civil one, for fear that it may face special opprobrium for any failure in catching criminals. Tough on crime slogans, law and order candidates are meant to signal commitments to the aggressive prosecution of crimes. Such an aggressive approach may encourage the setting of low thresholds for criminal investigations. The state may wish to thereby err on the side of over-deterrence in crime. However, this argument appears to suffer from the same problem as the last—it appears to disregard, or nullify, the constitutional protections that appear to privilege criminal defendants over civil ones.


347. KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 3 (1997); David Alan Sklansky, *The Problems with Prosecutors*, ANN. REV. CRIMINOLOGY 451, 455 (2018). “[P]ublic opinion polls indicate that members of the public have become more likely to support punitive policies such as the death penalty and three strike sentencing laws.” BECKETT, *supra*, at 3.


350. See U.S. CONST. amend. VI; Kuckes, *supra* note 204, at 14; Gershowitz & Killinger, *supra* note 27, at 263.

The fifth explanation focuses squarely on the political functions of litigation. The public nature of the criminal trial gives it a communicative, perhaps even theatrical, character that the typical civil trial lacks. Therefore, it stands to reason that the main stage, where constitutional restrictions are applied, would be the most public phase of lawmaking—the criminal trial before a jury of peers. Protections at earlier stages are relatively invisible to the public and do not serve the purpose of communicating the government’s constitutional commitments as well as the trial does. Highlighting these protections at the trial stage, rather than at the pre-trial stage, affords the criminal defendant protections at the time that he is most visible to the polity. This explanation, however, is only partial; it may offer an account for why criminal trials have higher thresholds than civil ones, but it does not tell us why pre-trial civil protections should be higher than the corresponding criminal ones.

A sixth rationale for the disjunction between criminal and civil investigations is the distinction, not between the prosecutor’s purportedly public and the civil plaintiff’s private motives, but between the peculiar purely private motives of the two. Winning cases may not be as important to the civil plaintiff as the prosecutor. The civil plaintiff may push for further investigation merely to intimidate the defendant, or potential future defendants, or to hold out for a high settlement. The prosecutor, on the other hand, builds her reputation on successful trials and statistics such as the percentage of cases argued and won. These reputational concerns may

355. See Kuckes, supra note 204, at 17; Mueller, supra note 20, at 5–6; Difference Between Grand Jury and Trial Jury, supra note 103.
356. See Kuckes, supra note 204, at 21.
357. See id. at 21–22.
358. See id. at 24 n.132.
359. Posner, supra note 5, at 1486, 1505.
360. See id. at 1505.
361. FRIEDMAN, supra note 1, at 286; Posner, supra note 5, at 1490.
362. See Posner, supra note 5, at 1505.
give the prosecutor a strong private incentive to quickly drop cases that are unlikely to be won at trial and to focus resources on those cases that would survive the high constitutional thresholds in court.\textsuperscript{363} If this is right, then it would also provide prosecutors an incentive for farsightedness—a strong interest in predicting eventual trial outcomes early in the process and in terminating investigations that are unlikely to bear fruit.\textsuperscript{364} However, an expectation of such foresight seems misplaced in light of the overwhelming caseloads that prosecutors appear to carry.\textsuperscript{365}

V. CONCLUSION

Taken in isolation, neither the clamp down on civil litigation, nor the expansion of criminal litigation seems surprising.\textsuperscript{366} Too many civil cases do impose a great cost on society, as does crime.\textsuperscript{367} However, taken together, they appear to pose a paradox.\textsuperscript{368} The civil system is, in many cases, a cheaper substitute for criminal prosecutions.\textsuperscript{369} We would, therefore, expect that over time, criminal prosecutions would decline and civil litigation would increase, as claims migrate from the former regime to the latter.\textsuperscript{370} Yet, the trend we observe seems to be the exact opposite.\textsuperscript{371}

To hazard a speculation, the reason for this puzzling evolution may be pressure from the powerful stakeholders in the criminal and civil systems: law enforcement, politicians, prosecutors in the former, and powerful private institutions in the latter.\textsuperscript{372} Legal devices evolve under the pressure of interest groups, even when the views of such groups are questionable.\textsuperscript{373} The loosening of protections for criminal defendants likely arose from the steady

\textsuperscript{363.} See id.; Sklansky, supra note 347, 455–56.
\textsuperscript{364.} See Posner, supra note 5, at 1505; Sklansky, supra note 347, at 453, 455–56.
\textsuperscript{365.} See MANN, supra note 35; Sklansky, supra note 347, at 455.
\textsuperscript{367.} See Cooter & Ulen, supra note 2, at 403–04; MANN, supra note 35.
\textsuperscript{368.} See Cooter & Ulen, supra note 2, at 397, 400; MANN, supra note 35.
\textsuperscript{369.} See Cooter & Ulen, supra note 2, at 443; Friedman, supra note 1, at 286; Rosen-Zvi & Fisher, supra note 35, at 92–93.
\textsuperscript{371.} Sklansky, supra note 347, at 453–54, 463; The Role of Pressure Groups, supra note 346.
\textsuperscript{372.} The Role of Pressure Groups, supra note 346.
public and political pressure for a tougher stance on crime, greater support for the police and prosecutors, and more penalties for criminal offenders.373

On the other hand, the extension in protections for civil defendants was likely a response to pressure for lower damage awards, stronger firewalls against vexatious lawsuits, and a lower caseload for courts.374 Ironically, the reasons for increasing protections on the civil side can, with minor changes, be applied to criminal cases as well, while the reasons for decreasing criminal protections can likewise be applied to the civil system.375 If the civil system is bloated, then so too is the criminal one.376 If there is a need to reduce criminal wrongs, there is also a need to reduce civil ones.377 The opposite pressures observed on the civil and criminal systems seem to stem not from a principled distinction between the two, but rather from the contrasting views of the dominant interest groups in play.378

The Constitution also seems to press for the opposite trend; since many protections were created explicitly for the criminal defendant, and not the civil one, absent doctrinal evolution, we would have expected litigation to migrate from the criminal system to the civil one over time.379 The criminal caseload would decline, while the civil caseload would increase.380 Insofar as the criminal system involves greater deadweight losses, by incarcerating wrongdoers, and thereby removing them from the economy than the civil one, which only redistributes wealth—this constitutional result may have been a welcome development.381 However, the evolution of legal doctrine sketched in this Article shows that such a result never materialized.382 Instead, the criminal system continues to grow, while civil litigation is slowing down.383 This state of affairs seems irreversible at this
point, but it appears, both constitutionally and pragmatically, to be a perverse result. 384

384. See COURT STATISTICS PROJECT, supra note 319, at 1, 4; Refo, supra note 215, at 2.
LESS FATALITIES, MORE CASUALTIES: THE NEED TO PREVENT A CRISIS INSTEAD OF FINDING A CURE

TRICIA-GAYE COTTERELL*

I. INTRODUCTION ........................................................................................................... 223
II. THE TURBULENT TIDES OF MORE THAN A DECADE OF WAR ...... 227
III. THE WAVE AND THE RIP CURRENTS................................................................. 229
   A. The Whys and Wherefores of PTSD? ...................................................... 231
   B. TBI and Other Mental Health Conditions ............................................. 235
   C. Navigating the Icy Waters of the Veterans’ Healthcare System ............. 238
IV. CHARTING THE HIGH SEAS .............................................................................. 241
    A. Improved Access to Mental Health Services ........................................ 243
       1. Suicide Prevention ............................................................................. 243
       2. Legislating Mandatory Mental Health Screening ............................. 246
    B. Frontline Treatment ............................................................................... 248
    C. Resiliency Training .............................................................................. 249
V. CONCLUSION .......................................................................................................... 251

I. INTRODUCTION

The resignation of former Secretary General of the Veterans Administration, United States Army General Eric Shinseki, reiterated the need for the development of extensive measures to address undue delays in the delivery of crucial services to veterans. These systemic failures have proven particularly detrimental for those veterans with mental health conditions who rely on the Department of Veterans Affairs (“VA”) for

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healthcare.\(^2\) Delayed access to treatment for post-traumatic stress disorder ("PTSD") and other mental healthcare conditions is one source of the complications that compromise veterans’ successful reintegration into civil society.\(^3\) Consequently, early detection and treatment of these mental health conditions are critical.\(^4\)

In a bid to improve the timely access to treatment, much attention has been placed on modern United States warfare, which is seen as one trigger for the marked increase in the incidence of PTSD among veterans.\(^5\) Combat in the decade-long wars in Iraq and Afghanistan was characterized by frequent deployments of troops with fewer rest periods, and reduced mortality rates of those injured in battle—albeit coupled with higher rates of disability.\(^6\) Experts projected that at least 15% of troops who were deployed to Iraq and Afghanistan would, if some have not already, develop PTSD.\(^7\) Given the large number of troops that were deployed over the past fifteen years, the number of those affected will be taxing for any healthcare system to handle.\(^8\)

Accordingly, the combat veteran’s unique disposition to developing PTSD and other mental health conditions did not escape the attention of the

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2. See id.
4. *Id.* at 186.  

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Rates of mental health injuries are still increasing, of course, because the conflict[] in . . . Afghanistan [is] ongoing. . . . Rates of mental health injuries are increasing not only because of the time it takes for troops’ psychological injuries to manifest, however. Longer tours and multiple deployments are also contributing to higher rates of mental health injuries.

federal government. Efforts continue to be multiplied across various agencies in order to provide care to those already diagnosed, or at risk for a future diagnosis. However, the record number of veterans waiting to receive care—or suffering high rates of substance abuse, unemployment, divorce, homelessness, penalties for criminal infractions, and suicide—flies in the face of these efforts. More still needs to be done to meet the needs of the veteran population because failure to address this dilemma sooner rather than later has a strong potential to cripple the sustainability of the VAs, as well as of the wider, public healthcare system. This Article supports the view that in order to reduce the number of soldiers who develop combat-related PTSD, the federal government’s long-term goal must be prevention. In fact, the sustainability of the Veteran’s Healthcare System and the efficiency of the VA depends on it. Part II will give a brief synopsis on the nature of the most recent past war efforts and why it will likely increase the incidence of mental health conditions in veterans. Part III will examine combat-related mental health conditions, and focus on PTSD and Traumatic Brain Injury (“TBI”). It will also briefly discuss the VA healthcare claims process and the challenges faced by veterans to access healthcare benefits for mental health conditions. Although, PTSD appears to be an inevitable by-product of combat, in some

9. See U.S. Gov’t Accountability Off., supra note 7, at 1. The report identifies efforts by the Department of Defense to identify service members who are at risk for developing PTSD and the VA’s public education drive to inform veterans of mental health services it provides for their benefit. Id. at 1–2.
10. See id.
12. See Gomes, supra note 6, at 360.
13. See Baker, supra note 8, at 348.
15. See id. § 13,625(1).
16. See id. § 13,625(2).
17. See U.S. Gov’t Accountability Off., supra note 7, at 1–2; Baker, supra note 8, at 348.
18. See U.S. Gov’t Accountability Off., supra note 7, at 1; infra Part II.
19. McGrane, supra note 3, at 189; see also infra Part III.
20. Peter W. Tuerk et al., Combat-Related PTSD: Scope of the Current Problem, Understanding Effective Treatment, and Barriers to Care, Dev. Mental Health L., Jan. 2010, at 49, 51–52; see also infra Part III.
circles persons accept that PTSD can be preempted by effective psychological screening of military recruits and interventions facilitated by military training. For this reason, Part IV will examine the United States Army’s resiliency training program, formerly known as Battlemind (“Battlemind”), and the Executive Order aimed at treatment and prevention of PTSD in veterans. This section will also examine other legislation, which proposed action for addressing mental health issues affecting veterans and service members, to determine their effectiveness for meeting their stated targets.

Part V will conclude by making the point that prevention is the optimal course to pursue for three reasons: First, given the perennial challenges facing the VA healthcare system and preliminary findings on the rate at which persons with PTSD seek medical attention, long term treatment of PTSD will not be sustainable. Second, the toll that PTSD has taken on veterans, their families, and the nation is likely to dissuade the caliber of recruits the armed forces would otherwise attract. Finally, past pronouncements by the former Chairman of the Joint Chiefs of Staff on the desire “to rebalance the use of military power” suggest that frequent deployment could be slowed in the coming years. The use of military strategies, which would see a lull in deployment, could provide the necessary downtime the VA needs to get a handle on the number of veterans that will require specialized care for PTSD and other mental healthcare needs after a decade of war.


23. Medical Evaluation Parity for Servicemembers Act of 2015, H.R. 1465, 114th Cong. § 2(a), (c) (2015); see also infra Part IV.

24. Baker, supra note 8, at 350; Ginzburg & Holm, supra note 11, at 73–74; see also infra Part V.


27. See WILLIAMSON & MULHALL, supra note 5, at 6, 11, 17; Ginzburg & Holm, supra note 11, at 73; Kitfield, supra note 25.
II. THE TURBULENT TIDES OF MORE THAN A DECADE OF WAR

Since 2001, more than two million troops have been deployed in support of Operation Iraqi Freedom (“OIF”) and Operation Enduring Freedom (“OEF”) in Afghanistan missions. Of that number, approximately 800,000 were required to serve on multiple tours. Armed with the Vietnam War veterans’ experience, experts’ preliminarily predicted that approximately 30% of troops would return with some type of mental health condition and that more than half that number would present classic symptoms of PTSD. Given the number of cases we have seen, the withdrawal of troops supporting the OEF mission in late 2014, and the subsequent surge, the projected estimates are expected to increase because certain potential claims are not yet ascertainable. Submission of these claims will likely exacerbate the already unduly long wait times for care and will lengthen the administration and litigation of claims—which are characteristic of the VA claims process.

Several factors about the nature of the OEF and OIF conflicts point to the high probability that the severity of the mental health issues among veterans has not yet reached its peak. “[W]e have yet to see the full extent of troops’ psychological and neurological injuries.”

“What is different [about] these wars is that soldiers have multiple tours, multiple kills, and multiple close calls without a break in between,” said Shad Meshad, president of the National Veterans Foundation and a pioneer in PTSD research. “One

29. Finnemore, supra note 5, at 20.
30. U.S. GOV’T ACCOUNTABILITY OFF., supra note 7, at 1–2; WILLIAMSON & MULHALL, supra note 5, at 6.
31. See WILLIAMSON & MULHALL, supra note 5, at 1; Finnemore, supra note 5, at 20; Kitfield, supra note 25.
32. See WILLIAMSON & MULHALL, supra note 5, at 14; Shear & Oppel, Jr., supra note 1.

The need for mental health services will only increase in the coming years as the Nation deals with the effects of more than a decade of conflict. . . . [W]e have an obligation to evaluate our progress and continue to build an integrated network of support capable of providing effective mental health services for veterans, service members, and their families.

3 C.F.R. § 13,625(1).
34. WILLIAMSON & MULHALL, supra note 5, at 1.
incident can cause . . . [people] to live with PTSD for the rest of their lives, and these people are experiencing multiple traumas.

“This is something we [have not] dealt with before, and [it is] scary because we [do not] know what is going to happen,” adds Meshad, a Vietnam vet[eran]. “Although those of us with forty-plus years of experience with PTSD have a pretty good idea of what will happen. [We are] going to see more homicides, suicides, domestic violence and divorces.”

One feature of the multiplicity Meshad highlighted was the frequency of roadside bombs—commonly using improvised explosive devices (“IEDs”)—which creates an environment where soldiers must be hypervigilant. In effect, soldiers must always be on guard and ready to engage in combat at a moment’s notice. This hypervigilance—which typically lasted for more than ten months—combined with the other stresses of combat have followed many soldiers home, and is also a classic symptom of combat-related PTSD.

Additionally, technological advancements, which facilitated the redesign of the protective gear worn in combat and provided life saving devices in the field, have acted as a double-edged sword. On one hand, IEDs have not produced as many fatalities as would have occurred without the improvements. On the other hand, however, many survivors—the majority of whom are young men—now have to live with significant disabilities. “Following a life-threatening war injury, the [veteran]’s worldview is dramatically altered or shattered.” Yet, there are some—one

35. Finnemore, supra note 5, at 20–21.
36. See Baker, supra note 8, at 349–50; Finnemore, supra note 5, at 21; Walter Reed Army Inst. of Research, supra note 22.
37. See Walter Reed Army Inst. of Research, supra note 22.
38. Our Warriors Today and “Combat Trauma”, Am. Ass’n Christian Couns., http://www.aacc.net/2011/5/17/our-warriors-today-and-combat-trauma/ (last visited Apr. 18, 2018). In comparison, a tour in Vietnam included 240 days of combat per tour on average and most troops served one or two tours, while very rarely, some served three. Id.
39. The OEF and OIF missions have seen redeployment of up to three times. See Williamson & Mulhall, supra note 5, at 6–7.
40. See Baker, supra note 8, at 348–49; Finnemore, supra note 5, at 22.
41. See Baker, supra note 8, at 348–50; Finnemore, supra note 5, at 21–22.
42. See Williamson & Mulhall, supra note 5, at 7; Baker, supra note 8, at 349–50; Finnemore, supra note 5, at 22.
study found, who were able to experience growth as they made adjustments to overcome their significant injuries and altered lifestyles.\(^4^4\) Notwithstanding this, those with no physical injury still have a strong potential for harboring undetected mild to moderate TBIs, which they carry daily as mementos of combat.\(^4^5\)

### III. THE WAVE AND THE RIP CURRENTS

The Department of Defense (“DoD”) and the VA are charged with ensuring that all returning troops get the required support to help them recover from their physical and mental injuries.\(^4^6\) This support is aimed at smooth readjustment to civil society and/or the army base where these troops can once again enjoy the way of life they fought to protect.\(^4^7\) The majority of troops who have returned from the OIF and OEF missions appear to be having a successful transition to life—far from the combat zone.\(^4^8\) Yet, for those who have mental healthcare needs, transition has been difficult and, in some cases, a complete failure ending in suicide.\(^4^9\) What is worse, those with mental health needs do not receive the same degree of attention, nor care, as those with physical injuries.\(^5^0\) This occurs, in part, because the severity of their injuries is not apparent to the naked eye, and, thus, remain veiled.\(^5^1\) If

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44. Id. at 416–17. This is referred to as *posttraumatic growth* (“PTG”). Id. at 412. These veterans who underwent amputations and other significant life-threatening injuries were found to experience PTG in levels commensurate with the degree of emotional support and access to medical and other social support services coupled with the length of time since the event which caused the injury. Id. at 416–17.


46. See Ginzburg & Holm, supra note 11, at 71–72.

47. Id. at 72; Tuerk et al., supra note 20, at 52, 53.

48. See Michael L. Fessinger, Balancing the Reasonable Requirements of Employers and Veterans Living with Traumatic Brain Injury — the Modern U.S. Military’s “Signature Injury” Is a Game Changer, 53 WASHBURN L.J. 327, 329 n.13 (2014); Tuerk et al., supra note 20, at 49.

49. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-12, VA MENTAL HEALTH: NUMBER OF VETERANS RECEIVING CARE, BARRIERS FACED, AND EFFORTS TO INCREASE ACCESS 2 (2011).

50. See Baker, supra note 8, at 352; Tuerk et al., supra note 20, at 52.

51. See Ginzburg & Holm, supra note 11, at 72; Tuerk et al., supra note 20, at 51.
the DoD and VA are going to successfully carry out their mandate, the same priority must be given to those with mental health conditions. This success is critical because the failure to provide timely mental healthcare for those in need has facilitated complications in addition to socioeconomic costs that are not always measurable. Retired United States Navy Rear Admiral and Fellow of the American College of Surgeons, Michael S. Baker, has indicated that:

Another huge impact on society for which there is no metric is the tragic effect of this fiasco on veterans’ families. The family members of those on long deployments, whose family members have been wounded or killed, manifest mental health issues, or develop substance abuse will be forever damaged. These conditions ruin relationships, disrupt marriages, aggravate the difficulties of parenting, lead to child mistreatment, and result in psychological problems in children that may extend the consequences of combat trauma across generations. The DoD and [the VA] do not measure this collateral damage. It may represent the ugliest aspect of all social concerns related here. It is another future cost to society, which will be huge but is neither predictable nor quantifiable.

Left untreated, PTSD has been found to cause a downward spiral into substance abuse, criminal infractions, self-harming, and other violent behaviors. Studies have shown a strong correlation between PTSD and unemployment as well as homelessness; and, concomitantly, to an increase in the utilization of non-mental health services. In fact, it has been found that persons suffering from PTSD “are 200% more likely to be diagnosed with an unrelated medical disease within [five] years of returning from deployment.” Veterans with PTSD were also found to access non-mental healthcare services including:

-P]rimary care, ancillary services, diagnostic tests and procedures, emergency services, and hospitalizations—at a rate 71% to 170% higher than those without PTSD. Studies have [also] shown that TBI, often overlapping with PTSD, places sufferers at higher risk

52. See Ginzburg & Holm, supra note 11, at 71–73.
53. Tuerk et al., supra note 20, at 50.
54. Baker, supra note 8, at 352 (footnotes omitted).
57. See Baker, supra note 8, at 350.
58. Id.
for lifelong health problems such as heart disease, dementia, and other chronic ailments.\textsuperscript{59}

A. The Whys and Wherefores of PTSD?

PTSD is defined in the \textit{Diagnostic and Statistical Handbook of Mental Disorders} ("DSM") as a psychiatric disorder that occurs after an individual’s direct or indirect exposure to a traumatic event "involv[ing] actual or threatened death or serious injury, or other threat to [the person’s] physical integrity."\textsuperscript{60} In making a PTSD diagnosis, the doctor must identify symptoms from three clusters: Intrusive recollection, avoidance or numbing, and hyperarousal.\textsuperscript{61} Intrusive recollection is often marked by the experience of nightmares or vivid flashbacks of the traumatic event.\textsuperscript{62} The individual exhibits symptoms of the avoidant or numbing cluster by avoiding people or activities that are reminiscent of the traumatic event, becoming emotionally detached, and/or self-medicating by abusing substances.\textsuperscript{63} Hypervigilance, insomnia, and exaggerated startle response are symptoms that are typical of the hyperarousal cluster.\textsuperscript{64}

Generally, a diagnosis of PTSD is not made unless the tripartite clustered symptoms last for at least one month.\textsuperscript{65} Persons who develop symptoms immediately, or less than three months after exposure to the traumatic event, are said to have an acute form of the illness.\textsuperscript{66} Alternatively, a person is said to have chronic PTSD when symptoms appear or last for three months or longer after the event.\textsuperscript{67} It should be noted that in some instances, symptoms emerge many months— or even years— later than the trigger event.\textsuperscript{68} Interestingly, military combat is the first in a series of examples listed by the DSM as a traumatic or triggering event for PTSD.\textsuperscript{69}

No amount of training or natural aptitude can make war less . . . horrifying. Indeed, some degree of horror is the only

\begin{itemize}
\item \textsuperscript{59} Id. (footnote omitted).
\item \textsuperscript{60} AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 463 (4th ed. 2000). Direct exposure refers to personal experience of the trauma, whereas indirect means the individual is witnessing the threatened trauma to another person. \textit{See id.} at 463–64.
\item \textsuperscript{61} \textit{See id.} at 464, 468.
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Id.; Finnemore, \textit{supra} note 5, at 20.
\item \textsuperscript{64} AM. PSYCHIATRIC ASS’N, \textit{supra} note 60, at 464–68.
\item \textsuperscript{65} Id.
\item \textsuperscript{66} Id. at 465.
\item \textsuperscript{67} Id.
\item \textsuperscript{68} Id. at 466.
\item \textsuperscript{69} AM. PSYCHIATRIC ASS’N, \textit{supra} note 60, at 463.
\end{itemize}
appropriate reaction, said Dr. Jonathan Shay, a leading veterans psychiatrist. “If you look at the menu of PTSD [symptoms]”—the hair-trigger response to sudden noises, the sudden waking, the swift anger, the suppression of gentler emotions—they all are signs of “the mobilization of the mind and body for danger,” Shay said. “The primary injury from war is simply the persistence into civilian life of those absolutely valid adaptations that let you survive other human beings’ trying to kill you.”

“[M]ental health issues resulting from service in combat have been observed throughout history.” The stigma and suspicion that surrounded those affected in earlier times is still observed today, albeit not to the same degree. In earlier times, the suspicion was that the soldiers were feigning mental illness as a cover for their cowardice, or that they were merely malingering. However, the large numbers of soldiers suffering from psychological issues after World War I prompted further study as to whether the external events in the war could cause psychological injury, which produced changes in the soldiers’ behavior. Some in the psychiatric community held the view that individuals exposed to a sufficient amount of psychological stress could suffer a temporary break. Conversely, where the symptoms were prolonged, the break was attributed to the psychological make-up of that individual and not exposure to the stressful situation. These individuals were said to suffer from war neuroses.

Accordingly, prior to being sent into combat during World War II, soldiers in the British and American armies were screened for predisposition to war neuroses. Those who were found to have such a psychological make-up were excluded from combat. At the end of World War II, however, the number of casualties with psychological injuries far exceeded the numbers projected by then-experts, who had anticipated improvement over the numbers reported for World War I since those predisposed to war

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70. Freedberg Jr., supra note 39, at 28–29 (alteration in original).
72. See McGrane, supra note 3, at 191–92.
74. Id.
76. Id. at 13.
77. Id.
78. Id. at 14.
79. See id.
neuroses had been left behind.\textsuperscript{80} These findings shifted the school of thought from some persons being predisposed to breaking to the consensus that “every[one] has his breaking point.”\textsuperscript{81} Soldiers with psychological injuries were no longer removed from combat, but were instead removed from the front and given brief periods of rest before rejoining the fight.\textsuperscript{82} Today, this is referred to as \textit{frontline treatment}.\textsuperscript{83}

Seen as a kind of psychiatric first aid in the combat zone, \textit{frontline treatment} uses the principles of proximity, immediacy, and expectancy as a preventative measure to stop or abate the development of PTSD.\textsuperscript{84} Treatment is administered in proximity to the front line of battle, immediately after symptoms emerge, and with the expectation that the soldier will resume duties with his unit after the intervention.\textsuperscript{85} The two- to three-day mini-retreat from combat gives the soldier an opportunity to get rest and food in an environment where the traumatic event can be discussed.\textsuperscript{86} Here, the soldier’s response to the trauma is not seen as weakness, but rather a natural response to the stress of battle.\textsuperscript{87}

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Sanders’s recovery from an experience that could have easily caused disabling PTSD underlines the importance of simple things in keeping troops mentally fit to fight. First is that his fellow marines knew him so well, and so understood his anguish, that they gave him time to grieve without guilt or pressure. Second is the value of sleep. In fact, the time-tested first resort of military psychologists is “three hots and a cot”: [T]hree hot meals a day and as much sleep as the combatant requires. “People can look incredibly crazy, completely gone, wildly psychotic,” Dr. Shay said, “but you let them sleep for [twelve] or [fourteen] hours, and they wake up and say, ‘Hey, hey, where’s my unit? I need to get back.’”\textsuperscript{88}
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Early intervention offered by \textit{frontline treatment} helps the potential PTSD casualty to avoid the complications present in the chronic phase.\textsuperscript{89} In effect, it prevents the development of the disorder before the need arises for a

\begin{itemize}
\item \textsuperscript{80} See Smith, \textit{supra} note 75, at 14.
\item \textsuperscript{81} \textit{Id.} (quoting \textsc{Ben Shephard}, \textsc{A War of Nerves: Soldiers and Psychiatrists in the Twentieth Century} 326 (Harvard Univ. Press 2001) (2000)).
\item \textsuperscript{82} \textit{Id.} at 14–15.
\item \textsuperscript{83} Solomon et al., \textit{supra} note 21, at 2309.
\item \textsuperscript{84} \textit{Id.} at 2309–10.
\item \textsuperscript{85} \textit{Id.} at 2309.
\item \textsuperscript{86} \textit{Id.}
\item \textsuperscript{87} \textit{Id.}
\item \textsuperscript{88} Freedberg Jr., \textit{supra} note 39, at 32.
\item \textsuperscript{89} Solomon et al., \textit{supra} note 21, at 2309; see also Williamson & Mulhall, \textit{supra} note 5, at 2–3.
\end{itemize}
When intervention is not early and symptoms are present for a month or more, Cognitive Behavioral Therapy ("CBT") is the preferred psychotherapeutic option, which has been proven to be effective in treating PTSD. Like frontline treatment, Cognitive Restructuring ("CR")—one type of CBT—encourages the soldier to talk about upsetting thoughts surrounding the trauma with the aim of processing the memory of the event. Instead of avoiding it, the ordeal is confronted and the soldier can move past it. Frontline treatment attacks PTSD by preempting symptoms of nightmares or vivid flashbacks from the intrusive recollection cluster, whereas CBT attacks PTSD by preempting symptoms of avoiding people or activities, becoming emotionally detached, or self-medicating by abusing substances in the avoidant or numbing cluster.

Studies have shown that the longer the period of deployment—and the greater the number of deployments—the more likely that the soldier will develop PTSD. In the context of ongoing combat, during a deployment period of twelve to fifteen months, early intervention via frontline treatment is not likely to be successful since the soldier tends to suffer re-exposure after re-exposure to similar traumatic events. The frontline treatment option is meant to be preemptive rather than curative and, therefore, does not have its best results when combat is as protracted as the OEF and OIF wars. Similarly, the CBT option would neither be practical nor preemptive during periods of long deployment or with frequent deployment.

It has also been suggested that “only half [of the veterans of the OEF and OIF missions] who need treatment for major depression or PTSD seek it.” Although much effort has been made in recent times to destigmatize the need for therapy, classic symptoms of PTSD dispose soldiers to avoid admission of mental health difficulties. Much of it, though, may be due to delayed detection by the armed forces, delayed onset of symptoms, or failure

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90. See Solomon et al., supra note 21, at 2309.
93. See id.
95. Williamson & Mulhall, supra note 5, at 6–7.
96. See id. at 6; Solomon et al., supra note 21, at 2309–10.
97. Solomon et al., supra note 21, at 2309–10; see also Williamson & Mulhall, supra note 5, at 6.
98. See Nat’l Council for Behavioral Health, supra note 28, at 7; Williamson & Mulhall, supra note 5, at 6.
99. Baker, supra note 8, at 350; see also Dubyak, supra note 71, at 662.
on the part of the individual to self-recognize the problem coupled with the choice in many instances to “self-medicate with drugs or alcohol.”

If the government is serious about minimizing the development of PTSD in our troops, then policy should dictate that—even where there are resource constraints—deployment periods must not exceed six months. Long deployment periods provide an incubator for PTSD development. This is especially true when the battle is intense and service members’ exposure puts them at risk for bomb blasts from IEDs and mortar fire.

B. TBI and Other Mental Health Conditions

TBI has been labeled the signature injury of the OEF and OIF missions. It typically arises from a “blow or jolt to the head or a penetrating head injury that disrupts brain function” or produces neurological damage resulting in mood changes and other cognitive problems.

[TBI] can be caused by bullets or shrapnel hitting the head or neck, but also by the blast from mortar attacks or roadside bombs. Closed head wounds from blasts, which can damage the brain without leaving an external mark, [were] especially prevalent in Iraq. [Most of those] wounded in action experienced blast-related injuries.

There are three forms of injury: Mild, moderate, and severe. Mild TBI is commonly known as a concussion and can produce symptoms such as: Brief loss of consciousness, nausea, dizziness, headache, anxiety disorder, fatigue, depressed mood, and confusion. Typically, persons who suffer a mild TBI recover within a few weeks or months. However, without a diagnosis—and if untreated—mild TBI can result in death.

102. See Williamson & Mulhall, supra note 5, at 6.
103. Id. at 3, 6–7.
104. See Williamson & Mulhall, supra note 5, at 3, 7; Baker, supra note 8, at 349–50; Fessinger, supra note 48, at 327, 328–29.
107. Williamson & Mulhall, supra note 5, at 3.
108. Fessinger, supra note 48, at 331, 333.
109. Id. at 331, 334.
110. Id. at 331.
111. Id.
Approximately one-third of the persons diagnosed with the moderate form of the injury have resulting permanent mental disabilities.\textsuperscript{112} The rates for combat-related TBI more than doubled between 2000 and 2011.\textsuperscript{113} “This marked increase is due to the inherent nature of OEF/OIF, where United States service members are exposed to [IEDs] and other non-fatal combat trauma on a daily basis.”\textsuperscript{114} During the same period, “approximately 230,000 cases of TBI were reported”—77\% of which were classified as being mild and 20\% of them as being moderate.\textsuperscript{115} By November 2017, the number rose to 375,230—with approximately 82\% classified as mild and 9\% as moderate.\textsuperscript{116} Many persons within the armed forces with mild or moderate forms of TBI remain undiagnosed.\textsuperscript{117} Both forms are difficult to diagnose for several reasons including the fact that symptoms of mild and moderate TBI overlap with symptoms of PTSD and major depressive disorder.\textsuperscript{118}

As a result, it is often unclear [whether] a service member is suffering primarily from biological damage to the brain or a psychological injury. TBI and PTSD may, in fact, compound one another’s effects. At least one study suggests that combat stress can have a visible, physical effect on the brain, and veterans with PTSD who were exposed to blasts are “more likely to have lingering attention deficits.” Soldiers who reported an injury that caused them to lose consciousness are nearly three times [more]
likely to develop PTSD. Depression is also commonly associated with TBI.\textsuperscript{119}

Much of what is known about TBI is learned from medical treatment of injuries sustained from motor vehicle accidents and athletic or other injuries.\textsuperscript{120} No guaranteed benefits are known to derive from applying findings from TBIs sustained in civil society to the treatment of TBIs sustained at war.\textsuperscript{121} Consequently, more research needs to be carried out on the impact that pressure waves have in producing brain damage during exposure to roadside bombs and other IEDs in combat zones.\textsuperscript{122} There is currently no diagnostic test that is able to detect mild or moderate forms of the injury via brain imaging.\textsuperscript{123} These research findings will inform the development of a diagnostic test which can rule out TBI in soldiers exposed to roadside bombs and other blasts.\textsuperscript{124}

An accurate diagnosis is fundamental to receiving the appropriate treatment for TBI.\textsuperscript{125} The development of the required diagnostic test is the necessary first step for determining what proportion of those who have served in the OEF and OIF missions are walking around with undetected, mild, or moderate TBIs unknown to them.\textsuperscript{126} This is particularly crucial because both mild and moderate TBIs have the potential to result in permanent mental disability through correlation to later development of brain disorders, such as Parkinson’s or Alzheimer’s.\textsuperscript{127} Prevention or preemption

\begin{thebibliography}{9}
\bibitem{120} Id. at 3. “There is nothing novel about the returning veterans’ struggle to find their place and mission in civilian society,” Ginzburg \& Holm, supra note 11, at 72.
\bibitem{121} See WILLIAMSON \& MULHALL, supra note 5, at 3.
\bibitem{122} See id. at 3, 5.
\bibitem{123} Id.; see also Fessinger, supra note 48, at 331. However, neuroimaging is commonly used to detect bleeding inside the skull in persons with TBI because post-traumatic bleeding is associated with worse prognosis and can be life-threatening. See Benjamin J. Hayempour et al., The Role of Neuroimaging in Assessing Neuropsychological Deficits Following Traumatic Brain Injury, 39 J. PSYCHIATRY \& L. 537, 538–39. On occasion, such evidence of TBI is discovered on neuroimaging in persons in which the clinical suspicion of TBI was low. See id. at 538–40. Although not all neuroimaging modalities are able to identify all TBIs, some techniques, for example MRI, are better able to identify patients with some potentially critical injuries. See id. at 539–40, 547.
\bibitem{124} See WILLIAMSON \& MULHALL, supra note 5, at 3; Fessinger, supra note 48, at 334.
\bibitem{125} Fessinger, supra note 48, at 332–33; see also WILLIAMSON \& MULHALL, supra note 5, at 3, 5.
\bibitem{126} Fessinger, supra note 48, at 328, 332–33; WILLIAMSON \& MULHALL, supra note 5, at 5.
\bibitem{127} WILLIAMSON \& MULHALL, supra note 5, at 3; Fessinger, supra note 48, at 333.
\end{thebibliography}
of these complications requires that the necessary research and development occur without delay. Prevention also requires access to medical care that will facilitate prompt diagnosis and treatment of TBIs and other mental health conditions.

C. Navigating the Icy Waters of the Veterans’ Healthcare System

The veterans’ struggle to obtain mental health benefits has been an ongoing one for decades. These benefits are, in many ways, crucial to providing financial and other support required for veterans’ readjustment to civilian life. No group knows this better than the Vietnam War cohort, who—after fighting an unpopular war—came home to find that benefits earmarked for them were inaccessible because there was no formal diagnosis for their mental health conditions or for which they could state a claim. The group collaborated with noted psychoanalysts at that time to lobby the VA and the American Psychiatric Association to include a formal diagnosis for which veterans could claim their mental injuries arising from combat. Without this diagnosis, veterans were unable to receive “compensation for their [significant and] persistent psychiatric difficulties” from the VA. The collaborative effort bore fruit in 1980, when the editors of the DSM were persuaded to include the PTSD diagnosis in the third edition.

Having cleared the absence-of-a-diagnosis iceberg, the submission of a disability claim on the basis of a PTSD diagnosis proved to be another blockade for veterans on the high seas of acquiring benefits to aid their successful transition to civilian life. Submission required documentation to substantiate the claim that the traumatic event that caused the veteran’s psychological injury was connected to, or occurred during, service in the

128. See Fessinger, supra note 48, at 332–34.
129. William & Mulhall, supra note 5, at 17; see also Fessinger, supra note 48, at 332–34; Ginzburg & Holm, supra note 11, at 72.
130. See Ginzburg & Holm, supra note 11, at 72; Gomes, supra note 6, at 327, 344.
131. Insurance coverage in the form of military benefits from the government has become the main source of financial, psychological, and medical support for soldiers and veterans. . . . Thousands of soldiers have been unable to secure assistance for their mental health and today, thousands of veterans are still fighting for health care.
132. Ginzburg & Holm, supra note 11, at 72; Gomes, supra note 6, at 347.
133. Smith, supra note 75, at 3.
134. Id. at 23–24.
135. Id. at 21, 25; see also AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 236–38 (3d ed. 1980).
136. See Dubyak, supra note 71, at 668–70.
military—and, specifically, on the field of combat. Additionally, submission required proof of veteran status, disability, degree of disability, and effective date of disability. The requirement for proof of service connection was a difficult one to overcome because the combat zone did not provide logistics for veterans to keep a log of daily occurrences and documentation that took place long after the traumatic event was not likely to be an entirely accurate account.

Moreover, veterans who were deployed to the combat zone to support troops in combat, were automatically excluded from submitting a claim because their duties did not involve combat. Even though they were susceptible to the same hostilities—and therefore, the same physical, mental, and neurological injuries—to which service members participating in combat were exposed, these veterans were left out in the cold. Legislative action has improved the plight of those who were unable to access disability benefits and services from the VA on the basis of a mental health need. Today, several groups of persons are presumed eligible for mental health services related to readjustment under 38 U.S.C. § 1712A. These groups include those who were on active duty in a combat zone or area where there were hostilities; those “who provided . . . emergency medical or mental [healthcare], or mortuary services” but were not themselves present in the “combat [zone] or area of hostilities;” and those “who engaged in combat . . . by remotely controlling an unmanned aerial vehicle, notwithstanding” not being physically located in the area of combat.

Despite the way being cleared for veterans to access the benefits earmarked for them—or, as explained in some circles, because of the progress made—the vast number of veterans seeking care has overwhelmed the operational structure of the VA in such that veterans are still being denied access to crucial services. The systemic failings of the VA have been cited as an ever-present blockade to providing the care that veterans need in order to transition to life outside of the armed forces. The VA’s current state of

137. Id. at 667–69.
138. Id. at 667–68.
139. Id. at 672.
140. Gomes, supra note 6, at 346–47; see also Dubyak, supra note 71, at 675–76.
141. See Dubyak, supra note 71, at 675–76; Gomes, supra note 6, at 347.
142. Gomes, supra note 6, at 358.
143. 38 U.S.C. § 1712A(a)(1)(C) (2012). This piece of legislation makes it mandatory for the VA to provide counselling and other mental health support to veterans.
144. Id. § 1712A(a)(1)(C)(i)–(iii).
145. See U.S. Gov’t ACCOUNTABILITY OFF., supra note 7, at 1–3.
unpreparedness for the influx of veterans requiring healthcare, disability, and other benefits is difficult to excuse because as early as 2004, the Government Accountability Office had conducted a study to evaluate the VA’s capacity to handle the increase of persons who would require mental healthcare services arising from the OEF and OIF operations.\footnote{Id. at 3.} At that time, the writing was on the wall that certain administrative failings needed to be corrected.\footnote{Id. note 7, at 11; Richard A. Oppel, Jr. & Abby Goodnough, Doctor Shortage Is Cited in Delays at V.A. Hospitals, N.Y. Times, May 30, 2014, at A1; Shear & Oppel, Jr., supra note 1.} The jury is still out on the ability of the VA to remedy the long wait times and cumbersome bureaucracy that veterans must navigate in order to access services.\footnote{Id.; Freedberg Jr., supra note 39, at 31–32. “But most care still comes as it has since ancient times: ‘[C]omrade to comrade. ‘They had combat stress teams, and it was}

The nationwide shortage of primary healthcare physicians and the availability of mental healthcare specialists are not within the VA’s control.\footnote{Id. (footnote omitted) (quoting Dep’t Veteran Affairs, The Independent Budget: Fiscal Year 2008, 35 (2008)).} The VA remains the provider of choice for mental health services for veterans because the healthcare and mental health support services are of a high quality.\footnote{Id. (citing Michael Serota & Michelle Singer, Veterans’ Benefits and Due Process, 90 Neb. L. Rev. 388, 390 (2011)); David Gottfredson, Vets on VA Claims: “Delay, Deny, Wait Till I Die.,” CBS News 8 (Apr. 26, 2013, 4:03 AM), http://www.cbs8.com/story/22082924/veterans-on-the-va-claim-process-delay-deny-wait-til-i-die; See id. at 3.} Additionally, veterans are likely to prefer speaking to counselors at the VA who are, in most cases, themselves veterans and, therefore, more readily understand the field of combat and their experiences.\footnote{[T]he VA healthcare system . . . is considered by experts to be ‘equivalent to, or better than, care in any private or public healthcare system’ in the United States.” Id. (footnote omitted) (quoting Dep’t Veteran Affairs, The Independent Budget: Fiscal Year 2008, 35 (2008)).}

reputation of inefficiency and ineffectiveness, has been bluntly described as a failure and a national embarrassment, and the infamous disability claims backlog has recently garnered outrage.” Id. (citing Michael Serota & Michelle Singer, Veterans’ Benefits and Due Process, 90 Neb. L. Rev. 388, 390 (2011)); David Gottfredson, Vets on VA Claims: “Delay, Deny, Wait Till I Die.”; CBS News 8 (Apr. 26, 2013, 4:03 AM), http://www.cbs8.com/story/22082924/veterans-on-the-va-claim-process-delay-deny-wait-til-i-die; See Williamson & Mulhall, supra note 5, at 11–12; Shear & Oppel, Jr., supra note 1. The [VA] . . . has intensified its efforts to inform new veterans from the Iraq and Afghanistan conflicts about the health care services — including treatment for PTSD — it offers to eligible veterans. These efforts, along with expanded availability of VA health care services for Reserve and National Guard members, could result in an increased percentage of veterans from Iraq and Afghanistan seeking PTSD services through VA. Concerns have been raised about whether VA can provide PTSD services for a new influx of veterans, while at the same time continuing these services for veterans that [the] VA currently treats for PTSD.
IV. CHARTING THE HIGH SEAS

During his administration, President Obama reiterated his commitment to improving the lives of veterans by “evaluat[ing] [the] progress [made] and continu[ing] to build an integrated . . . support capable of providing effective mental health services for veterans.”153 The Executive Order was issued on August 31, 2012.154 It outlined an action plan for preventing and treating mental health illness and substance abuse, which have been plaguing veterans, service members, and their families in increasing numbers.155 Preventative objectives included but were not limited to: The expansion of the suicide prevention strategies of the Departments of Defense, Education, Health and Human Services, Homeland Security, and the VA; the establishment of an Interagency Task Force responsible for reviewing current legislation and proposing programs for the achievement of the objectives of the Executive Order; and the establishment of the joint National Research Action Plan.156

The Executive Order also outlined the following treatment measures to: Extend the hours of service and operation of the Veterans Crisis Line, expand the mental healthcare staff by employing 800 peer-to-peer counselors and 1600 mental healthcare professionals, and “develop a plan for a rural mental health recruitment initiative to promote opportunities for the [VA] and rural communities to share mental health providers when demand is insufficient.”157 The increased number of mental health professionals, peer counselors, and expanded suicide prevention programs have all been realized; yet, the plight of veterans is the same and suicide rates have not decreased.158

The state of affairs is not lost on the current administration.159 Five years later, the new administration still finds itself dealing with the...
challenges that have been overwhelming the VA healthcare system.\textsuperscript{160} In August 2017, the VA Choice and Quality Employment Act (“Act”) was signed into law.\textsuperscript{161} The law is aimed at providing veterans with access to private healthcare—in realization that the VA is not capable of meeting the needs of the vast number of veterans who still find themselves on long waiting lists.\textsuperscript{162} The Act also makes funding available for additional VA medical facilities.\textsuperscript{163} However, despite these improvements, pronouncements by former VA Secretary, David Shulkin, point to the need for Congress to approve funding for employment surges to clear the current backlogs.\textsuperscript{164}

The seemingly insurmountable task of treating PTSD and other mental health conditions points to the need for a more comprehensive preemptive approach to stem the tide of complications arising from mental health conditions.\textsuperscript{165} Generally, three levels of intervention are used to reduce the impact or incidence of psychological injury associated with war.\textsuperscript{166} At the primary level, prevention is focused on selecting those individuals who will be adaptable to training in preparation for likely exposure to combat.\textsuperscript{167} This occurs at the time of initial screening of the new recruits during their medical assessment.\textsuperscript{168} The recruit must then be exposed to realistic training, which will provide stress inoculation for building resiliency.\textsuperscript{169} Stress Inoculation Training—a component of CBT—teaches anxiety reduction techniques and coping skills to reduce PTSD symptoms related to the trauma.\textsuperscript{170} Secondary intervention also involves a training component whereby the individual is taught what should be done following exposure to combat.\textsuperscript{171} This includes techniques for relaxation and

\begin{itemize}
\item \url{http://www.journaltimes.com/news/national/fact-check-trump-on-veterans-health-care-economy/article_97ba111d-9dcd-51ea-9504-beadb72e03ab.html}.
\item Id.
\item § 1, 131 Stat. at 968–69; Gehrke, supra note 162.
\item See Woodward & Yen, supra note 159.
\item See Solomon et al., supra note 21, at 2309.
\item See id.
\item See id. at 2309–10.
\item See id. at 2310.
\item Treatment of PTSD, supra note 169.
\item See Solomon et al., supra note 21, at 2309–10.
\end{itemize}
typically involves some type of psychological debriefing. Tertiary level intervention is made after symptoms of the psychological injury develop. Success at this stage will be driven by individual characteristics, such that a person’s predisposition will be a measure of whether the goal of prevention is achieved.

A. Improved Access to Mental Health Services

1. Suicide Prevention

Historically, suicide rates in the Army have been lower than rates in civil society. However, rates have climbed steadily since 2001, despite suicide intervention strategies and the withdrawal of troops from Iraq and most of Afghanistan. Many have attributed the rise in the incidence of suicide to untreated PTSD, other mental health conditions, and to difficulties with the transition to civilian life after combat. Undoubtedly, “[d]eployment and exposure to combat can act as catalysts that worsen existing problems in a service member’s life, like drug abuse, or cause new ones, like post-traumatic . . . brain injuries, which may contribute to suicidal behavior.” However, since 2001, more than half of the victims’ deaths took place in the United States and some victims had never been deployed. The DoD’s report on suicide rates for 2013 revealed that the number of suicides across all branches of the armed forces was 479, a marked improvement over the 522 reported in 2012. However, improved rates were not achieved over all branches. The annual suicide rate for those who were Active Duty across all branches was 18.7, a four point improvement over the previous year. The rate for the Reserves across all

172. See id.; Treatment of PTSD, supra note 169.
173. See Treatment of PTSD, supra note 169.
174. Solomon et al., supra note 21, at 2311, 2313.
177. See U.S. GOV’T ACCOUNTABILITY OFF., supra note 7, at 1; McGrane, supra note 3, at 191; Dao & Lehren, supra note 176.
178. Dao & Lehren, supra note 176.
181. See id.
182. Id.
branches showed a slight increase up to 23.4 from 19.3 in 2012; while the National Guard registered at 28.9 up from 28.1 the previous year. 183 Suicide rates, reported per every 100,000 service members, 184 reveal that among veterans the number had risen to an average of twenty-two per day. 185

Of the four branches, the Navy—both Active Duty and Reserve—reported tremendous improvement in its suicide rates for the year. 186 While not willing to claim that they had turned the corner on the rising number of suicides, the Navy reported that it has changed the manner of support provided to the group within its service, among which the highest suicide rates had been found. 187 It was also felt that some success had been achieved in changing the culture to one where no stigma surrounds the request for help. 188

Although no verifiable link has been found between serving in combat and the likelihood of committing suicide, at least half of the National Reserve victims reportedly served in Iraq or Afghanistan. 189 Remarkably, members of the National Reserve comprised approximately 40% of the troops deployed to Iraq and Afghanistan over the period commencing in 2001. 190 “Troops facing financial or family troubles while deployed have higher rates of PTSD”—financial and family troubles members of the Army Reserve disproportionately “because they lack the social safety net of active duty military life.” 191 It is also suggested that based on the nature of their schedules, members of the Army Reserve may not have had access to the initiatives and suicide prevention strategies offered to those residing on army bases. 192 It seems, then, that members of the National Guard and other

183. Id.
184. Id.
186. See GARRICK, supra note 180, at 2.
187. See Baldor, supra note 158.
188. Id.
189. Id.
191. WILLIAMSON & MULHALL, supra note 5, at 7 (footnotes omitted).

Some troops are at higher risk for psychological and neurological injuries, including the combat-wounded, younger troops, National Guardsmen and Reservists . . . . Troops facing financial or family troubles while deployed have higher rates of PTSD. Because these problems are common among troops in the reserve component, and perhaps because they lack the social safety net of active duty . . . . life, National Guardsmen . . . are reporting higher rates of PTSD.

Id.

192. Baldor, supra note 158.

Scattered across the United States, often in small or remote rural communities, many members of the Army National Guard and Reserve report for
Reservists were predisposed to higher than usual rates of stress and trauma and, therefore, at higher risk for suicide.\textsuperscript{193}

As suggested by the Executive Order, by the end of the 2014, Reservists were specially targeted for suicide prevention strategies.\textsuperscript{194} The success enjoyed by the Navy, even in the Reservist quotient, points to the fact that despite the unique familial and financial challenges faced by Reservists, suicide rates can be improved.\textsuperscript{195} Based on their unique circumstances, the recent positive outcomes of the pilot Buddy-to-Buddy program should be explored and expanded for application to Reservists.\textsuperscript{196}

Buddy-to-Buddy ensures contact with every returning [Michigan Army National Guard] soldier by using soldier peers. Trained peers regularly contact their assigned panel of soldiers to check in, help identify those with clinical needs, encourage registration and entry into Veterans Administration Hospital . . . or military programs, and develop strategies to enhance enrollment in community treatment programs that are perceived as safe and acceptable should other alternatives be unworkable or unacceptable.\textsuperscript{197}

The DoD Suicide Event Report for Calendar Year 2015 was released in June 2016.\textsuperscript{198} The latest reported figures on the suicide rate among veterans reveal a slight decrease in the daily rate to twenty.\textsuperscript{199} Whereas, the average yearly suicide rate has not improved since 2013, it has increased among women and persons situated in the western rural areas in the training about one weekend a month and two weeks in the summer. And they often [do not] have quick access to military medical or mental health services that may be on bases far from their homes. That means the outreach effort by the armed services to address the increase in suicides may not always get to reservists in need—particularly those who [do not] actively seek help.

\textit{Id.}
The figures reported for the rural western region coincides with the shortage of services for veterans in that region.\(^\text{201}\) This highlights the distance which veterans must travel in order to access mental health services acts as a barrier to care.\(^\text{202}\)

2. Legislating Mandatory Mental Health Screening

A study of mental health risk and resilience was conducted by the United States Army as part of its initiative to combat the high rates of suicide, which began increasing at the start of the OEF and OIF missions.\(^\text{203}\) Although combat-related PTSD has been attributed as a leading cause for veteran and soldier suicides, the study carried out in conjunction with the National Institute of Mental Health (“NIMH”) revealed that the “[t]he existence of . . . suicide risk among never-deployed soldiers argues . . . against the view that exposure to combat . . . is the [sole] cause of the increase in Army suicides.”\(^\text{204}\)

In light of the fact that Army suicide rates have now exceeded that of the civilian population, one strategy employed by the study was to compare “the prevalence of mental disorders among [Army and] . . . civilian[] [populations].”\(^\text{205}\) Research findings revealed that, “[t]he rate of major depression was five times as high among soldiers as civilians; intermittent explosive disorder was six times as high; and PTSD nearly [fifteen] times as high.”\(^\text{206}\) More importantly, “[n]early 60% of soldier suicide attempts can be


\(^{201}\) See Brown, supra note 200.

\(^{202}\) See id.

\(^{203}\) See Tuerk et al., supra note 20, at 49; Ursano et al., supra note 175, at 108. This study found that 20% of Army recruits had entered the armed forces with pre-existing mental health issues and indicates that the mental health questionnaire completed by recruits at enlistment was insufficient in assessing an individual’s fitness for military service. Ursano et al., supra note 175, at 110, 114; Zarembo, supra note 25.

\(^{204}\) Michael Schoenbaum et al., Predictors of Suicide and Accident Death in the Army Study to Assess Risk and Resilience in Servicemembers (Army STARRS), 71 JAMA PSYCHIATRY 493, 493; see also McGrane, supra note 3, at 189–90.


\(^{206}\) Ursano et al., supra note 175, at 114.
traced to pre-enlistment mental disorders which [were] much more common among non-deployed United States Army soldiers.”

The research findings point to the fact that mental health screening during recruitment and enlistment was not thorough enough because the assessment tool relied on recruits to self-report mental health history. The findings also preliminarily support the view that most of those who committed suicide in recent years, or have developed PTSD in recent years, may have been predisposed to those mental health conditions because of pre-enlistment mental health problems.

Congress contemplated legislative action based on the findings of the study. The Medical Evaluation Parity Act for Servicemembers Act of 2015 was a bill aimed to bring mental health to parity with physical health by mandating a mental health assessment before enlisting in the Army. Assessments prior to enlistment would give the Army baseline data, which could then be used for comparative analysis with other mandatory mental health assessments given prior and subsequent to deployments. The bill proposed that the assessment tool be designed by the NIMH, in conjunction with the DoD and other experts. Congress, however, did not enact the bill.

The study also provided the type of findings that can be used to prevent the development of PTSD from exposure to combat. Thorough mental health assessment at enlistment will determine whether, based on a recruit’s mental health history, that individual is suitable for the rigorous training for combat. It is reminiscent of abandoned post-World War I findings by psychiatrists at the turn of the twentieth century that persons who developed war neuroses were predisposed to that condition, given that not all soldiers received psychological injuries during or after the war.
Congress also mandated mental health screenings for airmen in the National Defense Authorization Act for Fiscal Year 2015. Mandatory mental health screenings went into effect on July 31, 2017. The assessment has similar components to the evaluation for Army recruits and is aimed at helping airmen evaluate and discuss their mental health as part of their medical readiness to take on deployment.

B. Frontline Treatment

Frontline treatment is a secondary level of prevention. It appears to be an important intervention tool for two reasons. First, although a soldier is suffering from symptoms of PTSD, removal from front line duty altogether could have a worse effect because of the stigma which soldiers suffering from mental illness perceive—that they have not lived up to their training and what was expected by their superiors or other unit members. Second, the ability to find, in the combat zone, acceptance that the condition is not a sign of weakness and the opportunity to decompress and resume duties increases the likelihood that a complete recovery can be made.

The United States has sent mental health professionals into combat zones to support troops since World War II as a means of identifying and treating mental health conditions before they became debilitating. No information has been found to indicate whether frontline treatment within the United States military experience has been effective. That is, whether without frontline treatment, the number of service members suffering from mental health illnesses would have been greater. Research efforts should be trained on evaluating the successes of the frontline team. It is known, for example, that the rates of suicides committed at home are greater than

220. Id.
222. Id.
223. McGrane, supra note 3, at 191; Solomon et al., supra note 21, at 2309–10.
224. See McGrane, supra note 3, at 191–92; Pols & Oak, supra note 221, at 2138.
225. Pols & Oak, supra note 221, at 2133.
226. Solomon et al., supra note 21, at 2310.
227. Id.
228. See id.
those committed abroad.229 While this is not indicative of the value of the frontline treatment team, it does raise questions as to whether frontline treatment can have the sort of impact it is meant to have in contemporary combat operations.230

C. Resiliency Training

The events of war produce symptoms of trauma.231 Although PTSD appears to be an inevitable by-product of combat, it is accepted in some circles that its debilitating effects can be preempted by interventions facilitated by military training.232 Resiliency training is part of the DoD’s response to the increase in soldier suicides and other mental health conditions associated with the OEF and OIF missions.233 The program teaches that combat stress is normal but controllable, and teaches soldiers to use virtues such as self-discipline and comradeship as a platform for readjusting to life with their families at the end of deployment.234 One perspective sees the first line of psychological defense to be that of soldier supporting soldier.235 This is due to the fact that the only person who can truly understand what the soldier has gone through is one who witnessed—in the same time and space—the trauma the soldier experienced.236

As a primary prevention strategy, the program uses a “strength-based psychoeducation [curriculum] to encourage positive coping strategies.”237 Service members are taught core resiliency skills that can make them successful in combat.238 The program has a pre-deployment and post-

229. Dao & Lehren, supra note 176.
230. See Solomon et al., supra note 21, at 2310, 2314.
231. AM. PSYCHIATRIC ASS’N, supra note 60, at 463–64; Tuerk et al., supra note 20, at 49–50.
232. See Tuerk et al., supra note 20, at 50–51.
234. See DEP’T OF THE ARMY, supra note 233, at 8, 15; WALTER REED ARMY INST. OF RESEARCH, supra note 22.
235. WALTER REED ARMY INST. OF RESEARCH, supra note 22; see also Carl Andrew Castro et al., Walter Reed Army Inst. of Research, Battlemind Training: Building Soldier Resiliency, in NATO: RESEARCH & TECH. ORG., HUMAN DIMENSIONS IN MILITARY OPERATIONS — MILITARY LEADERS’ STRATEGIES FOR ADDRESSING STRESS AND PSYCHOLOGICAL SUPPORT 42-1, 42-6 (2006).
236. See WALTER REED ARMY INST. OF RESEARCH, supra note 22; see also Castro et al., supra note 235, at 42-6.
237. Tuerk et al., supra note 20, at 53.
238. Id.; see also Castro et al., supra note 235, at 42-5; WALTER REED ARMY INST. OF RESEARCH, supra note 22.
deployment component.\footnote{239} The pre-deployment component offers stress inoculation by giving a realistic picture of combat.\footnote{240} Service members are told, for example that: members of their unit will get injured or killed; no matter how well they perform during training, no one knows how they will perform during combat until the moment arrives; fear is common; and innocent women and children are sometimes killed.\footnote{241}

The post-deployment phase of the program is conducted three to six months after servicemembers return to the United States.\footnote{242} During this component, members are given the opportunity to evaluate their transition to date.\footnote{243} As part of the evaluation, a set of scenarios are produced, and servicemembers are encouraged to see whether their natural responses are Battlemind responses.\footnote{244} Battlemind refers to the core resiliency skillset, which is suitable for combat, but inappropriate for family life and other social contexts.\footnote{245} Servicemembers are taught how to recognize if they are using their Battleminds and how to adjust their approach.\footnote{246} They are encouraged to be patient with themselves and to be deliberate about spending time with their families;\footnote{247} although, the natural inclination is to spend time with their troopmates.\footnote{248} The program also gives servicemembers certain behaviors to look out for in themselves, and also in their friends, as cues for getting a mental check-up.\footnote{249}
The resiliency program appears to be successful in assisting service members to make the transition to combat, and then from combat to home, with their families.\(^{250}\) Canadian Forces adapted the framework as part of their Third-Location Decompression exercise, which is carried out immediately after returning from deployment and held in a third location, away from combat and away from home.\(^{251}\) As part of its evaluation of DoD programs, the Inter-Agency Task Force should be evaluating the success of these programs—not only locally, but where they are implemented internationally—so that any best practices which are developed may be instructive for our armed forces.\(^{252}\) For example, the Canadian Force found that staging the program immediately after combat—before returning home—was more useful than three to six months after returning from their tour of duty.\(^{253}\)

V. CONCLUSION

The triple threat of PTSD, TBI, and major depressive disorder in veterans is on the verge of becoming a pandemic in the United States; having far greater socio-economic costs than have been so far quantified.\(^{254}\) The nature of these mental health conditions leave them undiagnosed, for one reason or the other.\(^{255}\) In the case of PTSD, one symptom cluster disposes the individual to avoid seeking treatment.\(^{256}\) Moreover, mild and moderate TBI share overlapping symptoms with PTSD and major depressive disorder which, while not impossible, makes an accurate diagnosis difficult.\(^{257}\) This is compounded by the fact that there is no available diagnostic test for confirming mild to moderate TBI,\(^{258}\) and findings that other neuroimaging techniques have been found to miss the presence of mild to moderate TBI in patients.\(^{259}\)


\(^{251}\) See *id.* at 1245.

\(^{252}\) See *id.* at 1245, 1247–49.


\(^{254}\) WILLIAMSON & MULHALL, *supra* note 5, at 5; Tuerk et al., *supra* note 20, at 49–50; Finnemore, *supra* note 5, at 20.


\(^{256}\) Tuerk et al., *supra* note 20, at 50.

\(^{257}\) WILLIAMSON & MULHALL, *supra* note 5, at 5–6.

\(^{258}\) *Id.* at 3.

\(^{259}\) *Id.*
The VA healthcare system is already stretched thin.\textsuperscript{260} The influx of veterans needing care, and the nationwide shortage of primary care doctors and mental healthcare specialists—coupled with an absence of facilities in rural areas of the country—add to the picture of tens of thousands of veterans who have left the service and have been languishing on doctor waiting lists for months.\textsuperscript{261} Studies have found that persons with untreated PTSD are at risk for developing other major illnesses.\textsuperscript{262}

The DoD has taken many steps to implement programs aimed at early detection of PTSD among troops.\textsuperscript{263} Early detection and treatment are essential to overcoming the trauma of war and a successful reintegration to life after combat.\textsuperscript{264} However, more can be done where only new recruits and airmen are required to go through mandatory mental health screening.\textsuperscript{265} Every soldier who has the potential to be deployed should undergo mental health assessments as a means of determining baseline behavioral responses.\textsuperscript{266} Knowledge of one’s baseline responses will help the individual to seek help when exposed to triggers in combat.\textsuperscript{267} PTSD, however, can have late onset, so thorough post-deployment screening is equally required.\textsuperscript{268}

At this point, when the OIF and OEF wars have ended or wound down, more will have to be done by way of treatment for those troops and veterans who have already been exposed to trauma.\textsuperscript{269} With due regard to the fact that the United States is still expected to play a leadership role in global conflicts, a plan for prevention must be created now to avoid the toll that war and other military operations take on the mental health of troops and the social fabric of the nation.\textsuperscript{270} Given the challenges still facing the VA healthcare system, and preliminary findings on the rate at which persons with PTSD seek medical attention, prevention is the optimal course to pursue.\textsuperscript{271}

Prevention is also optimal because the toll PTSD takes on veterans, their families, and the nation can dissipate the caliber of recruits the armed

\begin{thebibliography}{99}
\bibitem{260} Ginzburg & Holm, \textit{supra} note 11, at 73.
\bibitem{261} U.S. \textsc{Gov’t Accountability Off.}, \textit{supra} note 49, at 6, 12; McGrane, \textit{supra} note 3, at 192–93.
\bibitem{262} Baker, \textit{supra} note 8, at 350.
\bibitem{263} \textit{See} U.S. \textsc{Gov’t Accountability Off.}, \textit{supra} note 49, at 3–4.
\bibitem{264} McGrane, \textit{supra} note 3, at 191 n.67.
\bibitem{266} \textit{See id.}
\bibitem{267} U.S. \textsc{Gov’t Accountability Off.}, \textit{supra} note 7, at 7.
\bibitem{268} \textit{Id.} at 6–7; Ginzburg & Holm, \textit{supra} note 11, at 76.
\bibitem{269} Baker, \textit{supra} note 8, at 348; Ginzburg & Holm, \textit{supra} note 11, at 75–76.
\bibitem{270} \textit{See} Baker, \textit{supra} note 8, at 352–53; Kitfield, \textit{supra} note 25.
\bibitem{271} Baker, \textit{supra} note 8, at 350, 353.
\end{thebibliography}
forces could otherwise attract. Under President Obama’s leadership, United States foreign policy, as echoed in pronouncements by the former Chairman of the Joint Chiefs of Staff, focused on rebalancing the use of military power and suggested that frequent deployment would be slowed in the coming years. This was crucial because direct military action costs the American population more than any other use of power. However, the current administration appears to have a different foreign policy focus and military strategy, which could see the deployment of troops. “The problem is... whenever a crisis comes up—whether it is a humanitarian crisis, disaster relief, or particularly a security threat—we tend to just deal with them” without due regard to the suffering, mental and otherwise, which both our active duty personnel and veterans will endure.

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272. See Kitfield, supra note 25; Zarembo, supra note 25. “The kind of people who join the Army are not typical people... They have a lot more acting-out kind of mental disorders. They get into fights more. They are more aggressive.” Zarembo, supra note 25.

Over the past [ten] years we [have] done most of our heavy-lifting on the direct action side. Increasingly, we are doing more, however, to build partners so that they can counter threats in their own regions. We are also enabling other nations to act. A good example is the way we [are] partnering with the French in Mali [to counter al-Qaeda-linked terrorists] in West Africa.

As I look forward and think about the need to rebalance the use of military power, I think we will need less direct action because it is the most costly, disruptive, and controversial use of American power. By contrast, we need to do more in terms of building partners. I [am] a huge advocate of doubling or even tripling our effort to build credible partners around the globe. And I [am] also a huge advocate of enabling others who have the will, but perhaps not the capability to act.

Id.

274. Id.
276. Kitfield, supra note 25; see also Baker, supra note 8, at 348.
THE RACE AGAINST THE CLOCK: A NEW BILL PROVIDING HOPE FOR CHILDREN FIGHTING THE ULTIMATE BATTLE

NICHOLAS M. FIORELLO*

I. INTRODUCTION ........................................................................................................... 256
II. CHILDREN IN MEDICAL RESEARCH: UNREGULATED RESEARCH TO PARANOIA TO MODERN DAY .................................................................................. 260
   A. The Negative Connotation Attached to Pediatric Studies: The Result of Historical Abuses .............................................................. 261
   B. Responses to Medical Abuse of Children ................................................................................................................... 262
   C. Pediatric Involvement in Clinical Studies for Childhood Cancer ............................................................................................ 266
III. THE CARROT AND STICK APPROACH: THE FDA’S TANDEM SYSTEM DESIGNED TO CHANGE THE LANDSCAPE OF PEDIATRIC MEDICINE ........................................................................................................ 269
   A. The Incentive-Based “Carrot”: The Best Pharmaceuticals for Children Act ................................................................................. 270
   B. The Pediatric Research Equity Act: The “Stick” to the BPCA’s “Carrot” .......................................................................................... 272
   C. Results Following BPCA 2002 and PREA 2003: The Reenactment of the Carrot and Stick Approach .............................. 273
      1. Revival: The Reenactment of the “Carrot and Stick” ........................................................................................................ 276
         a. The BPCA of 2007 .................................................................................................................. 277
         b. The PREA of 2007 ................................................................. 277
IV. RACE: THE RESEARCH TO ACCELERATE CURES AND EQUITY FOR CHILDREN ACT ........................................................................................................ 278
   A. The Issues RACE Aims to Resolve ................................................................. 279
   B. RACE to the Finish: The Impact of this Proposed Legislation ............ 281
V. CONCLUSION ................................................................................................................. 282

et al.: Nova Law Review

Published by NSUWorks, 2018
I. INTRODUCTION

Roughly forty-three children are diagnosed with cancer daily.\(^1\) Approximately 1190 children are expected to die from pediatric cancer this year in the United States alone—as the disease is the leading cause of death in children and adolescents, ages 1–14, in the country.\(^2\) More than 40,000 children suffer through cancer treatment every year and, to add insult to injury, roughly 15,700 more children will be diagnosed with pediatric cancer this year alone.\(^3\) A child of any age, ethnicity, gender, or socio-economic group can fall victim to a pediatric cancer diagnosis.\(^4\)

Despite leading to the most disease-related deaths among children, along with encouraging advances in the entire cancer research field, children usually are not the recipients of the new and promising drugs and treatments resulting from those advancements.\(^5\) This stems from the rarity of pediatric cancers, which represents less than one percent of newly diagnosed cancers each year in the United States.\(^6\) In turn, with comparatively fewer patients, the pediatric cancer market does not offer enough return for pharmaceutical companies to invest in developing and testing drugs specifically designed to target pediatric cancers.\(^7\) Peter C. Adamson, M.D., who is the Chair of the

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* First and foremost, Nicholas M. Fiorello dedicates this Comment in loving memory of his brother, Adam Fiorello, who unfortunately lost his battle to Alveolar Rhabdomyosarcoma, a rare pediatric cancer. Nicholas earned his Bachelor’s in Environmental Science at Florida State University. He is currently a Juris Doctor Candidate for May 2019 at Nova Southeastern University, Shepard Broad College of Law. Nicholas would like to thank his parents, Heidi and Michael Fiorello, for their unconditional love, support, and instilling the importance of hard work and the necessity of passion at an early age. He would also like to thank his friends and professors for constantly pushing him beyond his limits and positively influencing his legal education. Lastly, Nicholas would like to graciously thank his fellow colleagues of Nova Law Review, Volume 42, for the hard work, dedication, and time spent refining and perfecting this Comment.

3. Duncan, supra note 1. Twelve percent of the children diagnosed with cancer this year will not survive. Id.
4. Id.
Children’s Oncology Group ("COG"), has inferred potential negligence by the pharmaceutical companies which continue to brush off the need of pediatric cancer research.  

The lack of internal incentives within the pharmaceutical industry entice companies to spend valuable money and time on pediatric research which has left children to be treated as **miniature adults**, when, in reality, they differ immensely. The vast differences from adults have led to an individualized medical specialty solely dedicated to children called pediatrics. "Pediatric oncology is a medical specialty focused on the care of children with cancer," and has evolved in less than sixty years into its own medical sub-speciality. The pharmaceutical industry has disregarded the differences between children and adults, leaving children to be treated with medication either only approved for or only tested on adults. Pediatric doctors are forced to prescribe children off-label medications that have only been approved for use in adults. These physicians must estimate appropriate, weaker doses for their child patients based on dosages found to be safe in adults, usually using the child’s weight as the barometer for comparison. Although this practice is custom within the field, off-label use

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*Placebo-Controlled Trials Under the Best Pharmaceuticals for Children Act, 16 ANNALS HEALTH L. 79, 79 (2007).*


In the [United States], approximately 60% of funding for biomedical research stems from the private biopharmaceutical sector. The next largest funder is the [National Institute of Health ("NIH")], which supports approximately 25% of research. For childhood cancers, however, which represent a constellation of more than 100 rare and ultra-rare diseases, the biopharmaceutical sector has an almost negligible investment, resulting in virtually all research funding emanating from the National Cancer Institute ("NCI"), private foundations, and philanthropic sources. This limitation of funding and investment from industry impacts all key areas of drug development, spanning target discovery through clinical development.

*[Id. at 732 (footnote omitted).*

9. Fernandez Lynch, *supra* note 7, at 79. “Despite their similar appearance, children are not just miniature adults. They experience different thought processes, are given different legal rights, and responsibilities . . . .” *Id.* (footnote omitted).

10. *Id.*

11. *Id.*


of medications can be dangerous, or at the very least ineffective on pediatric patients, due to the uncertainty of particular estimates.\textsuperscript{16} This uncertainty may lead physicians to potentially withhold certain medicines that could have provided potential benefits to that child, leading to a possible catastrophic result.\textsuperscript{17}

Adults diagnosed with cancer may be comforted by the idea that several different treatments may be available to them.\textsuperscript{18} On the other hand, children—as well as their families—may not feel the same, as both clinical trials and drugs are not a priority among companies that want to quickly launch effective drugs into the market.\textsuperscript{19} Current drug development focuses mainly on cancers that are close to, if not non-existent, in children such as adult carcinomas.\textsuperscript{20}

Since the early 1970s, the federal government has made a more concerted effort to regulate the pediatric field and has attempted to improve the efficacy and safety, as well as increase the number of pharmaceutical drugs available specifically for children.\textsuperscript{21} Within the last ten to fifteen years, the federal government has attempted to improve the market and make more drugs available to treat children, especially through the 2002 Best Pharmaceuticals for Children Act (“BPCA”) and the Pediatric Research Equity Act (“PREA”) of 2003.\textsuperscript{22} These laws have been incrementally successful, albeit with a \textit{limited positive impact}, “leading to hundreds of drug


\textsuperscript{17} Lynch, \textit{supra} note 7, at 83.


\textsuperscript{19} \textit{Id.}

\textsuperscript{20} Id.


labels being updated with information for use in children.\footnote{23} But despite the \textit{limited positive impact} in terms of the entire pediatric pharmaceutical field, there are still not enough drugs being evaluated in children battling cancer and, due to legal loopholes, children fighting cancer have been prevented from access to promising new drugs.\footnote{24} In response to the modest success of these prior laws, legislation is now attempting to eliminate those exemptions and loopholes to increase opportunities for drug development and change the pediatric cancer landscape for the better.\footnote{25}

The PREA and the BPCA both were enacted roughly fifteen years ago during a time when drugs were developed to fight specific types of cancers in certain parts of the body.\footnote{26} One barrier to drug development breakthroughs, specifically for pediatric cancer, stands out plain and simple—“adults do not develop pediatric cancers.”\footnote{27} Additionally, methods for drug development have changed in oncology.\footnote{28} Instead of targeting specific types of cancers, advances in cancer research have led to drugs being developed through \textit{molecular targeting}.\footnote{29} Using the exceptions in PREA, companies can get a waiver from the Food and Drug Administration (“FDA”), which does not require conducting pediatric studies for their drugs, thus preventing children with cancer from accessing new drugs.\footnote{30} New legislation originally proposed to Congress in 2016—and was reintroduced February 27, 2017—will end those exceptions, thus not awarding more waivers to pharmaceutical companies.\footnote{31} This legislation is called the

\footnote{23} Adamson et al., \textit{supra} note 7, at 737; \textit{Cures for All: US Lawmakers Should Give Drug Firms the Confidence to Test Cancer Therapies in Children, supra} note 18, at 466.

\footnote{24} Adamson et al., \textit{supra} note 7, at 737; \textit{Cures for All: US Lawmakers Should Give Drug Firms the Confidence to Test Cancer Therapies in Children, supra} note 18, at 466.

\footnote{25} \textit{Cures for All: US Lawmakers Should Give Drug Firms the Confidence to Test Cancer Therapies in Children, supra} note 18, at 466; \textit{A RACE to the Finish!, CHILDREN’S CAUSE FOR CANCER ADVOC.} (July 10, 2017), http://www.childrenscause.org/blog/2017/2/27/a-bill-to-generate-more-treatments-for-childhood-cancer.

\footnote{26} Rick Allen, Opinion, \textit{Race Is Now on to Pass the RACE for Children Act to Beat Childhood Cancer, AUGUSTA CHRON.} (Ga.), July 16, 2017, at E3; \textit{see also} § 1, 115 Stat. at 1408; § 1, 117 Stat. at 1936.

\footnote{27} Allen, \textit{supra} note 26.

\footnote{28} \textit{Id.}

\footnote{29} \textit{Id.} The law has not changed or been updated to reflect scientific advances and has thus stifled childhood cancer research and treatment. \textit{Id.}

\footnote{30} \textit{Cures for All: US Lawmakers Should Give Drug Firms the Confidence to Test Cancer Therapies in Children, supra} note 18, at 466; § 2(a), 117 Stat. at 1936–37.

\footnote{31} \textit{Id.}; \textit{Research to Accelerate Cures and Equity for Children Act, S. 456, 115th Cong. §§ 1–2} (as introduced in Senate, Feb. 27, 2017).
Research to Accelerate Cures and Equity for Children Act (“RACE”). RACE updates the 2003 PREA law to better correlate to advances in medicine. This Comment will explain the current landscape of pediatric drug development and how scientific advances have caused the need for legislation throughout the past. Part II will discuss the history of children in pediatric research and examine how history has influenced the current landscape of pediatrics, especially within pediatric oncology. Part III will discuss prior law, the influence of historical actions on the creation of these laws, and how these laws have evolved and adapted since enactment. Part IV will discuss the proposed new legislation and how it updates outdated prior law to better reflect advances in modern medicine. Lastly, Part V will offer a conclusion.

II. CHILDREN IN MEDICAL RESEARCH: UNREGULATED RESEARCH TO PARANOIA TO MODERN DAY

There is a long, dark history of abuses when it comes to pediatric research, which have attached a negative connotation to the practice. Those abuses of children in medical experimentation caused concern in the latter portion of the twentieth century, creating a protective attitude, which has incidentally led to children being virtually excluded from research. But the progress resulting from clinical research in pediatrics from the 1950s to the late 1990s has contributed to a policy shift favoring participation of children in medical studies. Additionally, the halted—or at best, slowed

32. S. 456 § 1. Also presented to the House of Representatives on the same date as H.R. 1231. Id.
34. See infra Parts I–IV.
35. See infra Part II.
36. See infra Part III.
37. See infra Part IV.
38. See infra Part V.
40. Fernandez Lynch, supra note 7, at 86; Michelle Oberman & Joel Frader, Dying Children and Medical Research: Access to Clinical Trials as Benefit and Burden, 29 AM. J.L. & MED. 301, 301 (2003).

By the mid-1980s, the absence of effective treatment, much less cures, for Acquired Immune Disorder Syndrome (“AIDS”) led advocates to demand access to clinical trials arguing, “A Drug Trial is Health Care Too.” This campaign helped to transform the public perception of medical experimentation from a risky, exploitative venture into the best response to an incurable disease.
progress—of potentially valuable biomedical advances due to the many regulations put in place to protect children, had led to many federal policy changes towards the end of the 1990s.\textsuperscript{42} For example, in 1998, the FDA mandated that the NHI supported Phase III clinical trials, which were to be performed to include children, unless there was proper justification for an exclusion.\textsuperscript{43} The general shift in American thinking in terms of including children in medical research tends to get hazy regarding “participation of children in Phase I clinical trials, which are intended to establish, ‘toxicity, metabolism, absorption, elimination, and other pharmacological action.’”\textsuperscript{44} Although conducting Phase I studies is necessary to benefit sick children in the future, it does not have the necessary weight to solely justify medical experimentation on children.\textsuperscript{45} But the evidence suggests that enrollment in trials produces better outcomes compared to non-enrollment, as well as the increased success in later phase trials have led to continued enrollment in Phase I trials, despite the lasting moral dilemma.\textsuperscript{46}

A. The Negative Connotation Attached to Pediatric Studies: The Result of Historical Abuses

Due to an extensive list of historical abuses in research, children have been protected from participation in medical research, thus limiting medical advances in the field.\textsuperscript{47} With little advances in modern day pediatric medicine, in comparison to the advances in adult medicine, this “protective attitude went too far.”\textsuperscript{48} Throughout history, children have been used in medical testing because they were convenient and cheap subjects, as they could not safeguard their own rights and interests.\textsuperscript{49} Before the twentieth century, the legal status of a child was not the same as it is today.\textsuperscript{50} Children

\textit{Id.} at 304 (footnote omitted).
\textsuperscript{42} \textit{Id.} at 303.
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} \textit{Id.} at 304–05 (quoting George J. Annas, \textit{Questing for Grails: Duplicity, Betrayal and Self-Deception in Postmodern Medical Research}, 12 J. CONTEMP. HEALTH L. & POL’Y 297, 310 (1996)). “The design of a Phase I study generally involves placing participants on escalating doses of a study drug and observing them to determine the maximum dose at which the drug can safely be tolerated.” Oberman & Frader, \textit{supra} note 40, at 305.
\textsuperscript{45} \textit{Id.} at 305.
\textsuperscript{46} See \textit{id.} at 307–08.
\textsuperscript{47} Fernandez Lynch, \textit{supra} note 7, at 86 & n.30.
\textsuperscript{48} \textit{Id.} at 86; see \textit{also} Read, \textit{supra} note 15.
\textsuperscript{50} See Breslow, \textit{supra} note 21, at 136.
were considered “chattel, property, and extensions of their parents.”\textsuperscript{51} Due to the little recourse the law provided, children were legally unable to protect their own interests, resulting in children being vulnerable to many cases of what would currently be classified as abuse or abandonment.\textsuperscript{52}

Many developments from medical testing were results of research performed on orphans, institutionalized children, or even the physician’s own children.\textsuperscript{53} Physicians used the types of children mentioned previously to develop vaccines for diseases, such as: Small pox, measles, tuberculosis, scurvy, and rickets.\textsuperscript{54} These medical tests involved exposing children to strands of these diseases after inoculation with a potential vaccine.\textsuperscript{55} To determine the efficacy of surgical procedures and medical technology, such as X-rays, physicians used children as experimental test subjects.\textsuperscript{56} Although there was some minor backlash throughout history regarding the use of medical experimentation on children, it was not until after World War II—when the horrific experiments conducted by the Nazis had been publicized—that there was a true focus on protections of research subjects in medical experimentation.\textsuperscript{57} While the subsequent advances in the pediatric field stemmed from medical experimentation and drug testing on children, their vulnerability was exploited until regulations were put into place.\textsuperscript{58}

B. Responses to Medical Abuse of Children

Public outrage, dated as far back as the 1870s, was a driving factor in the creation of organizations to protect children.\textsuperscript{59} This led the medical community to realize that the needs of children are different from those of adults.\textsuperscript{60} In 1873, a separate division was created by the American Medical Association (“AMA”) to focus solely on women and children.\textsuperscript{61} Despite the growing outcry supporting children’s rights and protections, there was not an entity created that would promote children’s welfare until 1930 when the independent American Academy of Pediatrics was founded.\textsuperscript{62} In addition to children, other classes of people, including African Americans and the
elderly, were subjected to medical experimentation due to their vulnerability. In response to the Holocaust and the Nazi’s medical practices, after World War II, the first international code establishing rights for human research subjects was created and titled the Nuremberg Code (“Code”).

The Code did not allow research on non-consenting persons, employing the doctrine of informed consent, a principle still practiced today. Although by this time it was established that children could not consent themselves, the Code highlighted informed consent of competent individuals and not incompetent subjects. It was not addressed until 1964, when the World Medical Association published the Declaration of Helsinki, which included guidelines for surrogate consent for those who could not consent themselves. Although these international guidelines were established, they were simply guidelines—lacking any legitimate legal authority to bind the science community.

Until the 1970s, the government did not take many steps towards regulating pediatric testing, including not codifying any of the earlier international guidelines published in years prior. In 1973, the federal government finally responded to children’s need for clinical protections in medical research when “the Department of Health, Education, and Welfare—now the Department of Health and Human Services (“HHS”)”—issued new rules on experimentation with human subjects. Children did not benefit from these rules as a majority of the focus was placed on adult subjects. Responding to this lack of focus on children and to create legal standards for testing in children, “Congress enacted the National Research Act, which [generated] the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research (“National Commission”). But

63. Breslow, supra note 21, at 138.
64. Id.
66. 45 C.F.R. § 46.116 (2016); Fernandez Lynch, supra note 7, at 98; Roman, supra note 65, at 445, 448–49.
67. Fernandez Lynch, supra note 7, at 98.
68. Id.
69. Id.
70. See Breslow, supra note 21, at 138; Fernandez Lynch, supra note 7, at 98–99.
71. Breslow, supra note 21, at 138; Fernandez Lynch, supra note 7, at 99.
72. Breslow, supra note 21, at 138.
73. Id.
the National Commission did not submit any “recommendations for pediatric clinical standards” for roughly four years.\footnote{Id. at 139.} The rules were finally published in 1983 and created strict guidelines protecting child clinical subjects tested in HHS funded research.\footnote{Id.} The rules only applied to HHS funded research—limiting the reach of legal authority.\footnote{See id. at 139–40.} There was no change to the application of these rules until 2000, through the Children’s Health Act of 2000, that Congress mandated the HHS to create rules for the general testing of children, both in public and privately funded clinical studies.\footnote{Breslow, \textit{supra} note 21, at 139–40; see also 42 U.S.C. § 284 (2000).}

Following the history of abuse, federal regulations that were put into place to safeguard children from similar harm have led to the current landscape where pediatric testing and drugs developed solely for children are \textit{virtually non-existent}.\footnote{Fernandez Lynch, \textit{supra} note 7, at 86; Oberman & Frader, \textit{supra} note 40, at 301–02.} In less than fifty years, clinical research in pediatric oncology has made substantial progress against many forms of childhood cancer.\footnote{Oberman & Frader, \textit{supra} note 40, at 302. “The most common form of childhood leukemia went from being a nearly always fatal disease to one cured more than \textit{75\%} of the time.”} But due to several factors, such as the strict regulations protecting children, the pediatric field is much more complicated than working with adults—and pharmaceutical companies could avoid the challenges of working with pediatric patients by choosing not to perform pediatric studies.\footnote{Breslow, \textit{supra} note 21, at 144; Lynch, \textit{supra} note 7, at 86.} Actions like these by pharmaceutical companies exemplify children’s need for legislative action to be included in mainstream pharmaceutical research.\footnote{Breslow, \textit{supra} note 21, at 144.}

Due to pharmaceutical companies’ exclusion of marketing or labeling drugs for pediatric populations—leading to a lack of pediatric drugs on the market—children have been labeled as \textit{therapeutic orphans}, as they are forced to use treatment designed for adults instead of treatments designed for themselves.\footnote{Id. at 145.} Pediatricians have been forced to treat children through

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74. \textit{Id.} at 139.
75. \textit{Id.}
76. \textit{See id.} at 139–40.
78. Fernandez Lynch, \textit{supra} note 7, at 86; Oberman & Frader, \textit{supra} note 40, at 301–02.
79. Oberman & Frader, \textit{supra} note 40, at 302. “The most common form of childhood leukemia went from being a nearly always fatal disease to one cured more than \textit{75\%} of the time.” \textit{Id.}
80. \textit{Id.} “Beginning in the mid-1980s, in response to scientific progress achieved through clinical research in cancer and AIDS, Americans began to demand access to clinical trials.” \textit{Id.}
81. Breslow, \textit{supra} note 21, at 144; Lynch, \textit{supra} note 7, at 86.
82. Breslow, \textit{supra} note 21, at 144.
83. \textit{Id.} at 145.
The race against the clock

In an effort to improve drug labeling for pediatric use, the FDA published a final rule in 1994, which did not require any new testing, but required pharmaceutical companies to examine available drug data on pediatric use. In order to satisfy the pediatric labeling requirement, this rule allowed “pharmaceutical companies [to] use adequate and well-controlled adult studies in addition to pharmacokinetic, safety, and pharmacodynamic[s] data” as support. Despite an attempt to change the landscape of pediatric medicine, this FDA initiative failed to encourage pharmaceutical companies to conduct any pediatric research or improve pediatric labeling.

The failure of the 1994 voluntary rule led the FDA to publish a much more stringent regulation in 1998, the Pediatric Rule (“Pediatric Rule”). This rule awarded the FDA with the authority to require pharmaceutical companies to conduct pediatric studies on new and existing marketed drugs. However, the Pediatric Rule was invalidated by a United States district court in Association of American, Physicians & Surgeons v. FDA. The court granted the plaintiff’s motion for summary judgment and held that the “Pediatric Rule exceed[ed] the FDA’s statutory authority.”

84. Id.
85. Breslow, supra note 21, at 151–52; see also Specific Requirements on Content and Format of Labeling for Human Prescription Drugs; Revision of “Pediatric Use” Subsection in the Labeling, 59 Fed. Reg. 64,240, 64,240 (1994) (codified as amended in 21 C.F.R. § 201 (2016)).
86. Specific Requirements on Content and Format of Labeling for Human Prescription Drugs; Breslow, supra note 21, at 152; Revision of “Pediatric Use” Subsection in the Labeling, 59 Fed. Reg. at 64, 240.
87. Specific Requirements on Content and Format of Labeling for Human Prescription Drugs; Revision of “Pediatric Use” Subsection in the Labeling, 59 Fed. Reg. at 64,240.
88. Breslow, supra note 21, at 152–53; Fernandez Lynch, supra note 7, at 92–93.
90. Regulations Requiring Manufacturers to Assess the Safety and Effectiveness of New Drugs and Biological Products in Pediatric Patients, 63 Fed. Reg. at 66,632.
91. 226 F. Supp. 2d 204, 222 (D.C. Cir. 2002).
92. Id.
Before the Pediatric Rule was finalized, the failures of the FDA to improve the pediatric landscape prompted Congress to intervene with the Food and Drug Administration Modernization Act of 1997 (“FDAMA”), which provides drug manufacturers economic incentives for performing pediatric drug studies.\(^{93}\) One of the most influential economic incentives was contained in section 111 of the FDAMA, the BPCA, which was codified as the pediatric exclusivity provision.\(^{94}\) The BPCA exclusivity provision was targeted to improve pediatric labeling by dangling an economic incentive in the form of a six-month extension to a drug manufacturer’s patent or exclusivity period in exchange for the manufacturer testing the drug in a pediatric study.\(^{95}\) Although the provision did not require pediatric testing, it was considered a success despite being riddled with limitations.\(^{96}\) These limitations included: The voluntary participation by companies—the provision only affected companies which had drugs on patent or were in an exclusivity term at that particular point in time—and the provision was only established to last for five years.\(^{97}\) Despite these limitations, the exclusivity provision helped incentivize pediatric research leading to the BPCA’s re-enactment in 2002.\(^{98}\) The BPCA became even more important to the FDA after the Pediatric Rule was struck, as it was the FDA’s only remaining means of directing a change in the pediatric landscape.\(^{99}\)

C. Pediatric Involvement in Clinical Studies for Childhood Cancer

Prior to the 1990s, the regulations put into place to protect children led to a small number of enrollees into pediatric oncology clinical trials.\(^{100}\) Since the early 2000s, this has not been the case as a large majority of children fighting cancer in the United States enroll in Phase III clinical trials,
which are experimental treatments. A majority of children with cancer become an experimental subject compared to a small minority of adults, signifying a lack of concrete medical options for children battling cancer. Until the 1960s, there was no effective treatment that children suffering from this life-threatening disease could look towards for help. Around that time, it had become apparent that in order to save children’s lives, clinical studies were required, but at the same time, regulations to safeguard children were being put in place.

“In less than half of a century,” clinical studies and pediatric cancer research combined to make great strides in the pediatric oncology field. The success of these studies helped turn the tide in American thinking to allowing children to partake in medical studies. Progress in treatment development for Human Immunodeficiency Virus (“HIV”) and cancer have particularly led the way in transforming the perception of children partaking in medical studies. But despite the medical progress, there have been some societal conflicts regarding children partaking in clinical trials, especially Phase I trials. Phase I clinical trials are used to determine, “toxicity, metabolism, absorption, elimination, and other pharmacological action.” The purpose behind a Phase I study is not for therapeutic benefit; all benefits are incidental, or indeed coincidental, because its essential use is to “determine the maximum dose at which the drug can safely be tolerated.”

An issue present in treating children is the fact that introducing new treatments for children requires pediatric subjects be put through clinical trials—Phase I, II, and III—as rigorous as those for adults. “Children differ physiologically from adults,” so the data learned through an adult trial can be useless and even dangerous for pediatric use. In order to benefit

101. Id.
102. Id. at 302.
103. Id.
104. Id.
105. Oberman & Frader, supra note 40, at 302.
106. Id.
107. Id. at 304.
108. Id. at 304–05.
110. Oberman & Frader, supra note 40, at 305.
111. Id.
112. Id.
future patients and continue to make progress, these studies are necessary, but even this future benefit cannot be the sole justification for subjecting these children to clinical experimentation. 113 But, children in Phase I studies are extremely ill, and have not responded to standard treatment, so these patients volunteer for these trials because the patient and/or their family “naturally view research as their best chance [for] survival.” 114 This is called therapeutic misconception. 115 The desperation to find a cure drives a sick patient to believe that Phase I clinical trials constitute a treatment more than a non-therapeutic medical experimentation. 116

Tension in conducting Phase I clinical trials challenges every party attempting to protect the child’s best interest. 117 As a minor, a child is not legally autonomous and cannot consent to their own healthcare, especially to enroll themselves into clinical trials. 118 The child’s guardian(s), usually parents, must authorize enrollment into these trials. 119 Another issue present in a child’s enrollment into a Phase I trial involves the parent’s decision to enroll a terminally ill child into a clinical study. 120 A parent may not have the best interests of the child in mind when faced with such a decision. 121 Parents of a terminally ill child may have an unrealistic hope that the child will improve despite the disease or “may consent to research in an effort to obtain a sense of control over” the death of their child. 122 With our interest in safeguarding a child’s best interest, it might never be possible to have a rational justification for Phase I research with children, but these studies must always continue with the best interest of the child in mind. 123

113. Id.
114. Id. at 306, 308–09. “One survey of clinical researchers found that [ninety-four percent] agreed that adult patients enroll in Phase I studies ‘mostly for the possible medical benefit.’” Oberman & Frader, supra note 40, at 309 (quoting Eric Kodish et al., Ethical Issues in Phase I Oncology Research: A Comparison of Investigators and Institutional Review Board Chairpersons, 10 J. CLINICAL ONCOLOGY 1810, 1812 (1992)).
115. Id. at 308.
116. Id.
117. See id.
118. Id. at 314.
119. Oberman & Frader, supra note 40, at 314. “The absence of a substituted judgment model for parental decision-making suggests that we view the parent-child relationship as unique and regard children and their parents, in some sense, as a single unit.” Id. at 315.
120. See id. at 314–15.
121. See id. at 315.
122. Id. at 315.
123. Oberman & Frader, supra note 40, at 317.
III. THE CARROT AND STICK APPROACH: THE FDA’S TANDEM SYSTEM DESIGNED TO CHANGE THE LANDSCAPE OF PEDIATRIC MEDICINE

Costs of clinical trials, especially those in pediatrics, continue to rise and without legislation in place to act as an incentivizing device, pharmaceutical companies would have little economic interest in pursuing pediatric trials.124 Currently, many companies will typically pursue pediatric use in a developing adult drug, which if it has shown promise in children, is because of the carrot or [the] stick.125 The Pediatric Rule and FDAMA were the original stick and carrot meant to ensure drugs would be tested in children.126 But statutory issues leading to the suspension of the Pediatric Rule and limitations embedded in the FDAMA’s exclusivity provision led to legislative changes in the early 2000s.127

The BPCA of 2002—reauthorized in 2007—provides drug companies with “an additional six months of marketing exclusivity [for their] patented drug” in exchange for conducting an FDA-requested pediatric study.128 The reward-based arrangement provided an incentive for pharmaceutical companies to test their drugs on pediatric populations, thus the carrot of the modern day regulatory system for pediatric research.129

The PREA of 2003—also reauthorized in 2007—authorizes the FDA with the ability to force testing of new drugs in a pediatric population by the drug manufacturer.130 This law awarded the FDA with the power to require pediatric testing of drugs already in the market stream, as well as drugs not yet approved by the FDA.131 The BPCA was created to increase information available about the use of drugs in children through economic incentives, and

127. See Breslow, supra note 21, at 162; Ross & Walsh, supra note 49, at 322–23.
129. Fernandez Lynch, supra note 7, at 94.
131. Fernandez Lynch, supra note 7, at 95; Jerles, supra note 13, at 521.
the PREA’s mandate for pediatric testing supports that vision, providing “the stick to the BPCA’s carrot.”\footnote{132}

A. *The Incentive-Based “Carrot”: The Best Pharmaceuticals for Children Act*

The expiration of the FDAMA in 2001 led to the enactment of the BPCA in 2002.\footnote{133} A lack of prescriptions being tested and approved for use in children, as well as dosing adult medication to children based solely on weight, led Congress to intervene.\footnote{134} Additionally, because drugs were designed with adults in mind, the absence of *age-appropriate formulations* and devices for use were causing difficulties among pediatric patients.\footnote{135} Congress enacted the BPCA upon a finding that the exclusivity provision of the FDAMA had positively impacted the pediatric population unlike any legislation prior.\footnote{136}

BPCA of 2002 continued the goal of the FDAMA but made some alterations, such as eliminating the Pediatric List which did not meet its intended goal of effectively prioritizing the certain drugs that should have been tested in children.\footnote{137} Although pediatric testing is not required and remains voluntary, the 2002 BPCA set a two-level system in place where the FDA researches current drugs to determine if it may produce a benefit to pediatric populations.\footnote{138} If the FDA were to find a drug that shows potential to produce benefits to pediatric populations, the FDA will send a written request to the patent holder to perform a pediatric clinical study with its drug.\footnote{139} If the patent holding company decides to perform the requested pediatric clinical trials centered around its own drug, it would earn an additional six-month term of market exclusivity.\footnote{140} This additional six months of market exclusivity acts as an incentive for these companies to perform pediatric studies.\footnote{141} But due to the voluntary nature of the statute, a patent holder can choose not to perform the requested pediatric clinical

\footnotetext[132]{132}{Fernandez Lynch, *supra* note 7, at 95.}

\footnotetext[133]{133}{§ 1, 115 Stat. at 1408; Jerles, *supra* note 13, at 517.}

\footnotetext[134]{134}{Id. at 517, 527.}

\footnotetext[135]{135}{Id. at 517. “The BPCA increases the capacity of the FDA, enabling it to handle its new role as the initiator and arbitrator of pediatric studies—something that the original bill had failed to do.” Breslow, *supra* note 21, at 178.}

\footnotetext[136]{136}{Id. note 13, at 518.}

\footnotetext[137]{137}{Breslow, *supra* note 21, at 134.}

\footnotetext[138]{138}{Jerles, *supra* note 13, at 518.}

\footnotetext[139]{139}{Jerles, *supra* note 13, at 518.}

\footnotetext[140]{140}{Breslow, *supra* note 21, at 134; Jerles, *supra* note 13, at 518.}

\footnotetext[141]{141}{Jerles, *supra* note 13, at 518.}
If the patent holder opts not to perform the requested study, the statute allows the FDA to contract out of the drug testing, with entities that have pediatric clinical trial expertise, such as universities and hospitals. Additionally, a significant addition to the BPCA of 2002 was the creation of a program to test off-patent drugs, which the FDAMA lacked prior. This reform was called the Program for Pediatric Studies of Drugs Lacking Exclusivity (“Program”). This Program called for the FDA and NIH to work together to develop a list of off-patent or off-exclusivity drugs that show potential to produce a benefit to the pediatric populations. Under the BPCA, the FDA may issue written requests to the application holders of a drug that is deemed to require more research. If the application holders do not respond within thirty days of the request, or choose not to conduct the requested pediatric trials with the drug, the FDA can then publish requests for proposals from entities with pediatric clinical trial expertise.

The BPCA of 2002 also requires that any pediatric report, conducted pursuant to a written request for a clinical trial, must be published in the Federal Register within 180 days after it has been submitted to the FDA. Additionally, in response to lack of pediatric labeling, the BPCA awards the FDA the power to deem a drug mislabeled. When the drug manufacturer refuses to accept the FDA’s decision for a labeling change, the BPCA allows the FDA to bring an enforcement action under the Federal Food, Drug, and Cosmetic Act. Lastly, due to the unease from the pediatric oncologist community, the BPCA attempts to increase research performed in their field which despite the exclusivity provision, was markedly absent. This attempt culminated in the creation of a Pediatric Subcommittee of the Oncologic Drugs Advisory Committee to evaluate cancer drugs and prioritize which would be of the most use for children. Though the

142. Breslow, supra note 21, at 134.
143. Id.; Jerles, supra note 13, at 518.
144. Breslow, supra note 21, at 174–76.
145. Id. at 174; see also 42 U.S.C. § 284 (2012).
146. 42 U.S.C. § 284(a) (2012); Breslow, supra note 21, at 174.
147. 42 U.S.C. § 284(c) (2012); Breslow, supra note 21, at 174.
148. 42 U.S.C. § 284(c)(3) (2012). Once a drug application holder has declined to conduct a test or misses the thirty-day deadline, it is not eligible to respond to a written request for a contract from the FDA. Id. § 284(c)(4).
150. § 3, 115 Stat. at 1408; Breslow, supra note 21, at 175.
151. 42 U.S.C. § 284(c)(10)–(11) (2012); Breslow, supra note 21, at 175.
152. Breslow, supra note 21, at 178.
153. Id.
participation under BPCA is voluntary and in the control of the pharmaceutical companies, the BPCA attempts to compensate for the voluntary nature by including programs, such as the Pediatric Studies Program or the Pediatric Subcommittee of the Oncologic Drugs Advisory Committee, which will help facilitate and begin research drugs that are not researched by the pharmaceutical companies.\footnote{154}{Id. at 181–82.}

B. The Pediatric Research Equity Act: The “Stick” to the BPCA’s “Carrot”

The purpose of the BPCA of 2002 was to increase the amount of research on drugs that children were using due to the lack of labeling and dosages.\footnote{155}{See § 3, 115 Stat. at 1408–09; Breslow, supra note 21, at 146; Jerles, supra note 13, at 520–21.} Despite the success of the earlier exclusivity provision, Congress believed that the voluntary testing established under the BPCA was not adequate and thought the FDA needed the requisite authority to mandate pediatric testing.\footnote{156}{Jerles, supra note 13, at 520.} Additionally, the Pediatric Rule had just been invalidated by a United States District Court in 2002, which held that the Rule exceeded the FDA’s statutory authority.\footnote{157}{Ass’n of Am., Physicians & Surgeons v. FDA, 226 F. Supp. 2d 204, 222 (D.C. Cir. 2002).} Due to the importance of proper labeling of pediatric drugs and Congress’ belief that the FDA needed the authority to mandate pediatric testing, Congress enacted the Pediatric Research Equity Act of 2003.\footnote{158}{Pediatric Research Equity Act of 2003, Pub. L. No. 108-155, § 1, 117 Stat. 1936, 1936 (codified as amended in scattered sections of 21 U.S.C.); Jerles, supra note 13, at 521.}

The PREA of 2003 gave the FDA the authority to require pediatric testing of drugs already present in the market as well as mandating pediatric testing and labeling on all drugs that have not been approved by the FDA.\footnote{159}{§ 2, 117 Stat. at 1936–39; Fernandez Lynch, supra note 7, at 95; Jerles, supra note 13, at 521.} This enactment was meant to be non-voluntary support for the voluntary exclusivity provision within its sister statute, the BPCA of 2002.\footnote{160}{Fernandez Lynch, supra note 7, at 94–95.} The PREA of 2003 mandates that pharmaceutical companies must, when submitting a new drug application, submit sufficient information regarding the clinical indication of the drug in relevant pediatric subpopulations, even if the drug was not intended for pediatric use.\footnote{161}{§ 2, 117 Stat. at 1936; Fernandez Lynch, supra note 7, at 95–96.} Additionally, this statute
mandates drug manufacturers to submit data supporting use in “pediatric subpopulations in which the drug is found to be safe and effective.”

Furthermore, the PREA allows the FDA to require the drug manufacturers to produce sufficient data supporting use in pediatric subpopulations for drugs already approved and actively on the open market. Because these drugs are already approved, they do not fall under the same classification as a new drug application. Despite receiving authority to require data for existing drugs, the FDA could only mandate the drug manufacturer to conduct pediatric testing after requesting the manufacturer to voluntarily conduct the research. The FDA has the authority to require pediatric data for existing drugs if the drug is used substantially among pediatric populations for the designated use on the label, or if there is the possibility the drug could provide an upgraded therapeutic benefit over the drugs being used for pediatric patients at that time. Additionally, the FDA must show that the absence of proper labeling could create substantial risks for the pediatric population. Similar to the procedure for new drugs yet to be approved, if the drug manufacturer agreed to conduct the research voluntarily, the manufacturer was awarded the additional six months of market or patent exclusivity pursuant to BPCA of 2002. If the manufacturer refused to conduct the pediatric research regarding the drug, the FDA would then refer the study to the Foundation for the National Institute of Health and proceed to contract the study out to an entity with pediatric clinical trial expertise.

C. Results Following BPCA 2002 and PREA 2003: The Reenactment of the Carrot and Stick Approach

The complexity of conducting childhood studies places barriers around the field, discouraging drug manufacturers from aiming their products at a pediatric audience. Economically speaking, the manufacturer sees no reason to change the current system, which allows pediatricians to prescribe drugs off-label. In economic terms, a drug manufacturer can save money without expending additional effort by continuing to target adult

163. Id. at 95–96; see also § 2, 117 Stat. at 1936–37.
164. Fernandez Lynch, supra note 7, at 95–96, 96 n.102.
165. Jerles, supra note 13, at 522.
166. Fernandez Lynch, supra note 7, at 96.
169. Id. at 518.
170. Id. at 526.
171. Id.
use, choosing not to conduct voluntary pediatric clinical studies, and allowing the doctors to keep prescribing drugs off-label.\textsuperscript{172} Additionally, due to some problems in BPCA 2002 and PREA 2003, pharmaceutical companies did not have very much difficulty avoiding these regulations.\textsuperscript{173} While these laws pursued improvement and increased availability of drugs to children, both had some negative results in the areas that were designated for upgrades.\textsuperscript{174}

Companies would manipulate BPCA 2002 and PREA 2003 to their advantage, using several loopholes—riddling these laws.\textsuperscript{175} Clinical trial testing takes a very long time to complete; therefore, results do not occur quickly.\textsuperscript{176} Both of these laws were enacted for such a short time, thus drug manufacturers would take advantage of the length needed for a clinical trial and delay testing with the hopes of the legislation expiring.\textsuperscript{177} Furthermore, shortly before the expiration of their patent—sometimes days—a drug manufacturer could submit data from pediatric testing.\textsuperscript{178} In addition to filing a last second application, the FDA was required to review the results within ninety days, giving drug companies a \textit{de facto} three month exclusivity period, even if inadequate testing was performed.\textsuperscript{179} Even if the FDA rejects an inadequate study, the drug company is awarded an additional three months of exclusivity for their drug, making a profit at the expense of pediatric studies.\textsuperscript{180}

Pediatric care requires a completely different mindset than adult care, ranging from the devices used for application of the drug to the way children metabolize drugs.\textsuperscript{181} Although it is looked at as the cheap alternative by pediatricians, it is practical to prescribe off-label drugs to children, but for many drugs to work properly, they must be re-sized to suit application in children and not adults.\textsuperscript{182} Even though these laws were perforated with problems, since enactment, they have helped change the

\begin{footnotes}
\item[172] Id.
\item[173] Jerles, \textit{supra} note 13, at 526–27.
\item[174] Id. at 527.
\item[175] Id.
\item[176] Id. at 526.
\item[177] Id. Drug manufacturers who had begun clinical trials also took advantage of the length needed to complete a trial. Jerles, \textit{supra} note 13, at 526. Clinical trials likely require longer than four years to complete, but the laws only mandated testing for four years. Id.
\item[178] Id. at 527.
\item[179] Id.
\item[180] Id.
\item[181] Jerles, \textit{supra} note 13, at 516–17, 527.
\item[182] Id. at 527.
\end{footnotes}
perception of children in the medical field in a much more positive light. \footnote{183}{Id. at 527–28.} Despite many pharmaceutical companies taking advantage of the many loopholes within these laws, the motivation of patent extensions to seek approval for pediatric use was a step in the right direction. \footnote{184}{Id. at 528.}

Although there were steps taken in the right direction, as well as an increased availability of clinical studies for children, there was very little advancement regarding the development of drugs specifically for use in children. \footnote{185}{Id. at 531.} Drug companies test already developed drugs on pediatric subjects, typically recruiting pediatric patients for general tests conducted on everyone afflicted by a certain condition and not just on children. \footnote{186}{Id. at 530–31.} By testing the effects of drugs already approved for adults, pharmaceutical companies still receive the benefit of an additional six months of market exclusivity—giving them “little incentive to develop [new] drugs specifically for” use in pediatric populations. \footnote{187}{Id. at 531.} Although the legislation was made in an effort to update labeling of existing drugs and to develop an increased number of new drugs for pediatric patients, these laws “incentivize[] [drug] manufacturers to test drugs already approved for adults, rather than develop new drugs for children,” because it is much less profitable. \footnote{188}{Id. at 532.} This has led to a large increase in therapies available to children, but with little increase in drugs developed specifically for use in children. \footnote{189}{Id. at 532.} Additionally, when testing drugs on children, drug manufacturers have typically used more cost-cutting methods. \footnote{190}{Id. at 542.} When conducting a clinical trial on adult drugs, a company’s first step is usually to study the absorption of a particular drug and how it is metabolized before effectiveness is tested. \footnote{191}{Id. at 543.} But in order to cut costs of pediatric clinical trials, these drug manufacturers combine both testing for absorption and effectiveness, leading to trials that drag on causing pediatric patients to deny enrollment.

Another issue present within these laws deals with the lack of negative data disclosure from clinical trials. \footnote{192}{Id. at 539.} Different journals of medicine created either voluntary databases to input results, or started to require trials registered with the public clinical trial registry to be published
in that journal.\textsuperscript{194} The Fair Access to Clinical Trials Act ("FACT Act") was introduced in 2005 for the FDA to expand the existing database to make clinical results more readily available to the public.\textsuperscript{195} Under the FACT Act, results of both publicly and privately funded clinical trials would be published, despite the results.\textsuperscript{196} In 2006, a modified version of the FACT Act was introduced, the Enhancing Drug Safety and Innovation Act.\textsuperscript{197} This limited what was published, and no longer required devices or procedures to be published—only detailed information regarding the drug and its approval status.\textsuperscript{198} Neither of these bills passed, and were deferred to the Senate Committee on Health, Education, Labor, and Pensions.\textsuperscript{199}

1. **Revival: The Reenactment of the “Carrot and Stick”**

Despite having several problems, both acts were reauthorized upon their expiration in 2007.\textsuperscript{200} Both were reenacted for another five years as part of larger legislation, the Food and Drug Administration Amendments Act of 2007 ("FDAAA").\textsuperscript{201} The FDAAA helped close some of the existing loopholes and fix other issues which were taken advantage of by pharmaceutical companies.\textsuperscript{202} Also, an important addition to this act helped pave the way for age-appropriate devices for application of adult drugs in children, with the Medical Device Safety and Improvement Act of 2007.\textsuperscript{203} This Act curtails off of the incentive driven attitude of the BPCA, and provides incentives in exchange for the creation of products that children can use for treatments.\textsuperscript{204} Along with providing incentives for creating products for children, the Act requires that companies pursuing approval for a device have to include description[s] of . . . pediatric subpopulations which are afflicted by the issue the device is aimed to fix.\textsuperscript{205} Further, the Act inspired pediatric device research because within 180 days of enactment, the FDA

\textsuperscript{194} Id.  
\textsuperscript{195} Id. at 539–40; see also Fair Access to Clinical Trials Act of 2005, S. 470, 109th Cong. § 2(1)–(4)(2005).  
\textsuperscript{196} Jerles, supra note 13, at 540.  
\textsuperscript{197} Id. at 541; see also Enhancing Drug Safety and Innovation Act of 2006, S. 3807, 109th Cong. § 1 (2006).  
\textsuperscript{198} Id.  
\textsuperscript{199} Id. at 542.  
\textsuperscript{200} Id. at 516.  
\textsuperscript{202} See Jerles, supra note 13, at 544.  
\textsuperscript{203} See § 301-07, 121 Stat. at 859–66; Jerles, supra note 13, at 516.  
\textsuperscript{204} See § 301-07, 121 Stat. at 859–66; Jerles, supra note 13, at 516.  
\textsuperscript{205} § 302, 121 Stat. at 859.
was required to publish a pediatric device research agenda which was to be followed in the development stage.\textsuperscript{206}

\begin{itemize}
  \item[a.] \textit{The BPCA of 2007}

  The FDAAA of 2007 enacted the BPCA of 2007, a reenactment of the BPCA 2002, with some adjustments.\textsuperscript{207} One major issue BPCA of 2007 was targeted to fix was the situation where pharmaceutical companies could submit pediatric test results, immediately before the patent expired, to attempt to receive patent exclusivity for a maximum of nine months or minimum of three months.\textsuperscript{208} BPCA 2007, with the intentions of improving the pediatric landscape, aimed to close this loophole by not only removing the period of exclusivity during the FDA’s review, but also doubling the time of review from ninety days to 180 days, awarding the FDA much more time to analyze the results provided.\textsuperscript{209} This effectively removed the ability of pharmaceutical companies to provide inadequate pediatric testing yet reap the benefits of up to nine extra months of exclusivity, three for those companies who provided extremely inadequate pediatric testing.\textsuperscript{210}

  \item[b.] \textit{The PREA of 2007}

  Like the BPCA of 2007, the FDAAA of 2007 enacted the PREA of 2007, which reenacted the PREA of 2003.\textsuperscript{211} The PREA of 2007 was designed to make some changes to the prior law.\textsuperscript{212} The law removed the requirement that the FDA request a pharmaceutical company to conduct pediatric tests voluntarily before having the authority to mandate testing.\textsuperscript{213} Without that nuance, the FDA was granted the authority to mandate pediatric testing by pharmaceutical companies, thus avoiding the unnecessary steps

\end{itemize}

\footnotesize
\begin{itemize}
  \item[206.] § 304, 121 Stat. at 863.
  \item[209.] Jerles, \textit{supra} note 13, at 519; \textit{see also} § 505, 121 Stat. at 879.
  \item[210.] Jerles, \textit{supra} note 13, at 519–20.
  \item[212.] Jerles, \textit{supra} note 13, at 522; \textit{see also} § 402, 121 Stat. at 869.
  \item[213.] Jerles, \textit{supra} note 13, at 522; \textit{see also} § 402, 121 Stat. at 869.
\end{itemize}
which delayed progress. Two major requirements added to the PREA of 2007 helped to improve the landscape of pediatric medicine and increased the FDA’s power to mandate testing. First, the PREA of 2007 required pharmaceutical companies to provide more detailed data in support of a waiver requesting permission for pediatric testing of their drug. Second, the law requires the FDA to assess the effectiveness of the law through conducting studies with the Institute of Medicine and the Government Accountability Office years after the law, which will help the FDA formulate a plan of attack for the future.

IV. RACE: THE RESEARCH TO ACCELERATE CURES AND EQUITY FOR CHILDREN ACT

As previously mentioned, pediatric cancer is the number one killer among children. Very little is known about childhood cancers, as the types of cancers and biology of childhood cancers are much different from adult cancers. PREA and BPCA were enacted first in 2003 and then reenacted in 2007 to increase pediatric research to develop drugs specifically for use in children. The “BPCA ha[d] worked reasonably well for drugs with [a] large market” for use, but still remains voluntary, and does not support drugs for smaller markets, such as cancer. Almost every single instance under PREA, cancer drugs that have already been developed for adults receive waivers eliminating the requirement to conduct pediatric cancer studies. Children with cancer have been victims of pharmaceutical companies abusing loopholes within the law. Exemptions in PREA “have been broadly applied to cancer.” Legislation originally introduced in 2016 and reintroduced February of 2017 has aimed to end this abuse. The

214. See Jerles, supra note 13, at 522.
215. Id.; see also § 402, 121 Stat. at 866.
216. Jerles, supra note 13, at 522; see also § 402, 121 Stat. at 868–69.
217. Jerles, supra note 13, at 522; see also § 402, 121 Stat. at 874–75.
218. Childhood Cancers, supra note 2.
221. Adamson et al., supra note 7, at 737.
222. Id.
223. Cures for All: US Lawmakers Should Give Drug Firms the Confidence to Test Cancer Therapies in Children, supra note 18, at 466.
224. Id.
225. Id.; see also Research to Accelerate Cures and Equity for Children Act, H.R. 1231, 115th Cong. § 2 (as introduced in House, Feb. 27, 2017); Research to Accelerate
Research to Accelerate Cures and Equity for Children Act (“RACE”) was introduced to improve children’s access to new, promising drugs—thus improving current cancer treatments considerably.226 “RACE updates the 2003 PREA law,” which requires pediatric testing during development of adult drugs.227 RACE updates PREA to more adequately reflect current advances in oncology drug development by removing the exemptions, which have halted the development of new pediatric cancer drugs.228

A. The Issues RACE Aims to Resolve

BPCA and PREA have generated major safety and labeling data for several children’s diseases.229 Despite producing hundreds of successful cases which provide incredible data on drug use in children, “[PREA] has never been applied to a pediatric cancer drug.”230 The current PREA law was written with some significant loopholes, which are in the form of broad exemptions in pediatric cancer drug development, thus awarding drug manufacturers a waiver from completing pediatric studies.231 PREA requires pharmaceutical companies to conduct pediatric testing while developing a drug for use in adults.232 These loopholes have prevented children with cancer from accessing the newest and most promising drugs.233 As drug development in oncology has advanced over the past fifteen years, these issues have arose out of the language of PREA not growing simultaneous with those advances.234 Currently, instead of targeting specific types of cancers, drugs are developed by targeting genes and proteins that are shared in children and adults.235 This method is called molecular targeting.236

Cures and Equity for Children Act, S. 456, 115th Cong. § 2 (as introduced in Senate, Feb. 27, 2017).

226. KIDS V CANCER, supra note 5; see also H.R. 1231 § 2; S. 456 § 2.
227. McCaul et al., supra note 33.
228. See id.; KIDS V CANCER, supra note 5.
229. A RACE to the Finish!, supra note 25.
230. McCaul et al., supra note 33.
231. Id.
232. A RACE to the Finish!, supra note 25.
233. Id.
234. See Allen, supra note 26; McCaul et al., supra note 33.
236. Id.

The current approach to licensing drugs is based on their pathological indication rather than their mechanism of action, even though the drug target for a common adult cancer, such as ALK in non-small-cell lung cancer, can be present and therapeutically relevant in a pathologically distinct childhood cancer, such as neuroblastoma.

Adamson et al., supra note 7, at 737.
PREA has not benefitted children because children’s cancer initiates in different parts of the body than adult cancers.\textsuperscript{237} Due to the current PREA law, drug manufacturers receive waivers for drugs that target adult cancers because the common adult cancers these drugs are being developed for, do not occur in children.\textsuperscript{238} However, some pediatric cancers share the same molecular targets as adult cancers, despite originating in different organs.\textsuperscript{239} Due to the language of the legislation, PREA only applies when the diseases are the same in both the child and the adult, meaning the cancer has to originate in the same part of the body.\textsuperscript{240} This results in the first exemption that has constrained PREA’s impact on children with cancer.\textsuperscript{241} Under PREA, treatments developed for conditions in adults that do not effect children are exempt from the requirements of pediatric testing.\textsuperscript{242} Thus, pediatric studies during drug development can only be required where the drug is being studied for the same disease or indication in both adults and children.\textsuperscript{243} Because children do not develop many of the identical adult cancers, pediatric studies are not performed.\textsuperscript{244}

Another exemption to PREA’s required pediatric testing applies when the drug “ha[s] received [an] orphan designation,” given when a drug is being developed for a rare disease.\textsuperscript{245} A drug receives an orphan designation when it affects 200,000 people or fewer in the United States.\textsuperscript{246} Due to scientific advances, the “ability to define the molecular basis of an individual’s cancer means that diagnoses have become increasingly subdivided, and the majority of approved cancer drugs now carry this orphan designation.”\textsuperscript{247} Recently, with this improved ability, has come a drastic increase in the number of orphan designations.\textsuperscript{248} With no changes in the last

\begin{footnotes}
\item[237] \textit{KIDS v CANCER}, supra note 5.
\item[238] \textit{Cures for All: US Lawmakers Should Give Drug Firms the Confidence to Test Cancer Therapies in Children}, supra note 18, at 466.
\item[239] \textit{KIDS v CANCER}, supra note 5. As an example, children with neuroblastoma have been successfully treated by an ALK inhibitor that treats adults with lung cancer. \textit{Id.}
\item[240] See Allen, supra note 26; McCaul et al., supra note 33.
\item[241] \textit{A RACE to the Finish!}, supra note 25.
\item[242] \textit{Id.}; see also \textit{Cures for All: US Lawmakers Should Give Drug Firms the Confidence to Test Cancer Therapies in Children}, supra note 18, at 466.
\item[243] \textit{A RACE to the Finish!}, supra note 25.
\item[244] See \textit{id.}
\item[245] McCaul et al., supra note 33; see also \textit{Cures for All: US Lawmakers Should Give Drug Firms the Confidence to Test Cancer Therapies in Children}, supra note 18, at 466.
\item[246] \textit{Cures for All: US Lawmakers Should Give Drug Firms the Confidence to Test Cancer Therapies in Children}, supra note 18, at 466.
\item[247] \textit{Id.}
\item[248] See \textit{id.}
\end{footnotes}
fifteen years, the law has not been able to keep pace with medicine, thus leaving children with a lack of updated treatment options.\textsuperscript{249}

B. \textit{RACE to the Finish: The Impact of this Proposed Legislation}

\textit{RACE} is designed to fix the problems that riddle PREA and further increase the opportunities for pediatric studies involving children with cancer.\textsuperscript{250} \textit{RACE} gives the FDA the necessary authority to require pediatric investigation when drugs are being developed using molecular targeting and the target identified in the adult cancer is \textit{substantively relevant} to a form of pediatric cancer.\textsuperscript{251} PREA requirements would apply to any therapy with a molecular target that is relevant in both adult and childhood cancers; it does not matter what part of the body the cancer existed or if it is the same type of disease.\textsuperscript{252} This will help provide accurate labeling on drugs for pediatric use, “allow[ing] doctors to [establish correct] dosage[s], safety, and efficacy in children.”\textsuperscript{253} As new treatments emerge and proper dosages are studied, doctors will no longer have to prescribe children \textit{off-label} adult drugs and can eventually prescribe drugs developed specifically for use in children.\textsuperscript{254}

Additionally, \textit{RACE} will end PREA’s pediatric study exemption of orphan designated drug development.\textsuperscript{255} \textit{RACE} requires \textit{pediatric investigation} during development of adult orphan drugs—no matter how many people are afflicted by the disease and no matter where the cancer originates in the body.\textsuperscript{256} Lastly, \textit{RACE} includes an incentive to companies that submit \textit{pediatric study plans} early, which includes earlier FDA’s input on those plans.\textsuperscript{257} The bill even attends to the most \textit{serious} and \textit{life-threatening diseases} in children, as it directs the FDA to work with pharmaceutical companies to speed up development of drugs in these situations.\textsuperscript{258} Currently, treatment is limited for children suffering from some
of the most challenging forms of cancer, but “[t]he RACE for Children Act could be the game-changer that finally offers children and their families the best standard of care possible.”

V. CONCLUSION

Children’s involvement in medicine has always been a conundrum of sorts.260 History has revealed that children have been on a proverbial rollercoaster when it comes to their involvement in medicinal practices.261 At first, children lacked rights and were even considered as chattel—belonging to their parents.262 Once the public was aware of the abuse children were subjected to through clinical trials and studies, progress was slowly made.263 As time passed, in the eyes of the public and the government, children became a vulnerable class as they could not protect themselves due to their lack of rights.264 Due to public outcry, the government felt the need to safeguard children from the types of abuses they had endured in the past.265

As medicine progressed over the course of the late twentieth century, regulations were placed to further protect children from clinical trials and studies.266 Though the intentions were sincere, these regulations slowed down and even halted the development of new pediatric drugs and treatments.267 While drugs had been developed for well-known and common diseases, childhood cancer patients were often overlooked.268 Despite general medical advances, the regulations in place provided little reason for pharmaceutical companies to develop drugs for pediatric use, especially for childhood cancer.269

259. McCaul et al., supra note 33.
260. See Breslow, supra note 21, at 135–136; Ross & Walsh, supra note 49, at 320.
261. See Breslow, supra note 21, at 135–136; Ross & Walsh, supra note 49, at 320.
262. Breslow, supra note 21, at 136.
263. See Fernandez Lynch, supra note 7, at 98; Ross & Walsh, supra note 49, at 320.
264. See Fernandez Lynch, supra note 7, at 98; Oberman & Frader, supra note 40, at 301.
265. See Breslow, supra note 21, at 138–39; Oberman & Frader, supra note 40, at 301.
266. See Breslow, supra note 21, at 138–39; Oberman & Frader, supra note 40, at 301.
267. See Fernandez Lynch, supra note 7, at 85–86; Oberman & Frader, supra note 40, at 301.
268. See Lynch, supra note 7, at 86.
269. Id.
In the late 1990s, with momentum carrying into the 2000s, Congress tried to take a stand to improve the availability of drugs for children. Programs were enacted to provide incentives for pharmaceutical companies to test drugs in children to provide adequate labeling and other programs were enacted to require testing in pediatric populations to hopefully result in new treatments. As with many laws, these had to be reenacted upon expiration to continue the progress but also to patch some holes within the writing of the laws.

Despite having overall success in many pediatric fields, these laws did little to positively impact childhood cancer and the children suffering from it. The laws in place were focused mainly on adult drugs, with little development in drugs specifically for use in children, which incentivized companies to test on adult drugs already on the market rather than formulate drugs specifically for children. Loopholes in the most current laws providing waivers to required pediatric testing have allowed companies to avoid testing in childhood cancer all together, leaving children without treatment designed for their specific illness.

A new bill has been introduced to Congress that would end the waiver exemptions. RACE updates the existing law to properly correlate with the medical progress made over the last fifteen years. “RACE . . . catches . . . the law [up] with the science . . .”. Rick Allen, who represents the Twelfth Congressional District of Georgia, has called this commonsense legislation, and if there was ever a time to classify it as such, the time is now. As of July 2017, the House of Representatives included RACE in a larger piece of legislation, the FDA Reauthorization Act of 2017, which unanimously passed in the House. The passage of this legislation is crucial in the fight to save children’s lives, as expressed by U.S. Senator Chris Van Hollen when he professed:

270. Id. at 93.
271. See Breslow, supra note 21, at 133–34.
272. See Jerles, supra note 13, at 519, 528.
273. Adamson et al., supra note 7, at 737.
274. Jerles, supra note 13, at 531–32.
275. See Fernandez Lynch, supra note 7, at 96–97; Jerles, supra note 13, at 521–22.
276. Cures for All: US Lawmakers Should Give Drug Firms the Confidence to Test Cancer Therapies in Children, supra note 18, at 466.
277. Allen, supra note 26; Cures for All: US Lawmakers Should Give Drug Firms the Confidence to Test Cancer Therapies in Children, supra note 18, at 466.
278. KIDS v CANCER, supra note 5.
280. Id.
No childhood should be interrupted by a struggle for survival, but cancer tragically puts far too many kids in Maryland and across the country in a battle for their lives. Researchers at institutions like the National Institutes of Health have made important progress on cancer research, and our laws need to reflect this. House passage of this legislation brings us an important step closer to updating statutes around drug development to reflect recent advancements to research, which will help save children and their families from the misery of this horrific disease.281

The passage of RACE would provide many new treatments for pediatric cancer patients, leading to many more birthdays all while giving families hope for a successful RACE to a cure.282


282. KIDS v CANCER, supra note 5. The author would like to add that since the writing of this Comment, the RACE for Children Act has been signed into law as Title V of the FDA Reauthorization Act, amending the Pediatric Research Equity Act, otherwise known as PREA. Hopefully this leads to waiving the checkered flag, successfully completing the RACE to a cure.

**Andrea Montes**

## Table of Contents

I. **Introduction** ................................................................. 286

II. **History of the Mexico City Policy—Global Gag Rule** ................................................................. 290
   A. Legislation Leading to the Global Gag Rule ................................................................. 290
   B. Consequences of the Global Gag Rule ................................................................. 293

III. **The Global Gag Rule in 2017** ................................................................. 295
   A. The Policy Terms ................................................................. 295
   B. Potential Implications in 2017 ................................................................. 295
   C. The Importance of Comprehensive Reproductive Healthcare in 2017 ................................................................. 297
   D. Organizations Forgoing Funding ................................................................. 299

IV. **Challenging the Global Gag Rule** ................................................................. 300
   A. *PPFA v. USAID* ................................................................. 300
   B. *CRLP v. USAID* ................................................................. 301
   C. *Rust v. Sullivan* ................................................................. 303
      1. Constitutional Conditions Post-Rust ................................................................. 305
         a. *Eighth Circuit* ................................................................. 305
         b. *Tenth Circuit* ................................................................. 305
         c. *Seventh Circuit* ................................................................. 306
   D. *Alliance v. USAID* ................................................................. 307
      1. Unconstitutional Conditions Post-Alliance ................................................................. 309
         a. *Eleventh Circuit* ................................................................. 309
         b. *Sixth Circuit* ................................................................. 311

V. **Applicability of the Unconstitutional Conditions Doctrine** ................................................................. 312

VI. **Conclusion** ................................................................. 313
I. INTRODUCTION

Forty-four years after Roe v. Wade, anti-abortionists continue to attack women’s reproductive rights, including a woman’s constitutional right to obtain an abortion. The most palpable efforts to restrict abortion rights have been in the form of legislative measures aimed at limiting access to abortion services and imposing economical burdens on low-income women seeking the procedure. The last few years alone account for more than one-quarter of all abortion restrictions enacted since Roe. Between 2011 and 2015, state legislatures enacted close to three hundred restrictions on abortion—27% of a total of 1074 restrictions enacted since Roe was decided in 1973. The dramatic rise in restrictions in the last six years is partly due to the 2010 congressional midterm elections, when a majority of abortion opponents were elected into office. Since then, state legislatures have incessantly burdened abortion providers and low-income women with unnecessary medical and economic requirements. By enacting restrictive laws under the guise of protecting women’s health, state legislatures have...
effectively restricted women from accessing abortion services and comprehensive reproductive healthcare.\(^8\)

Unsurprisingly, abortion was a highly-contested issue during the 2016 presidential race.\(^9\) On the right, Republican presidential nominee, Donald Trump, promised to defund Planned Parenthood and appoint pro-life Supreme Court Justices who would overturn Roe.\(^10\) On the left, Democratic nominee, Hillary Rodham Clinton, promised the opposite: She would defend Roe and protect a woman’s right to choose.\(^11\) Mrs. Clinton further asserted that “women’s rights are human rights.”\(^12\)

The 2016 presidential race—one of the most divisive ones in recent times—resulted in Mr. Trump’s election, and since his inauguration in January 2017, he has swiftly reversed many of his predecessor’s policies and programs.\(^13\) True to his word, President Trump promptly took action to restrict women’s reproductive rights at all levels of government.\(^14\) On his first full day in office, President Trump reinstated and expanded the Mexico City Policy (“the Policy”)—a Reagan-era policy that prohibits foreign non-profit organizations or programs receiving federal funding to provide, promote, or make referrals of abortion services.\(^15\) To receive funding, a non-governmental organization (“NGO”) must “certify that they will not ‘perform or actively promote abortion as a method of family planning’” with any type of funds, including non-U.S. funds.\(^16\) The Mexico City Policy, also

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8. \(^{See id.}\)
10. \(^{Letter from Donald J. Trump, Trump for President, Inc., to Pro-Life Leader (Sept. 2016) (on file with author); Sherman, supra note 9; see also Roe, 410 U.S. at 113.}\)
11. \(^{LaFrance, supra note 9; see also Roe, 410 U.S. at 113.}\)
12. \(^{LaFrance, supra note 9.}\)
14. \(^{Sherman, supra note 9.}\)
known as the *Global Gag Rule* by its critics, was introduced in 1984 by President Ronald Reagan at the United Nations Population Conference in Mexico City—hence its name.\(^{17}\) Since then, “it has been rescinded and reinstated by subsequent administrations along party lines.”\(^{18}\)

In the past, the Global Gag Rule has only applied to family planning assistance with an estimated $600 million for the 2017 fiscal year—but the expanded version applies to the majority of United States assistance, including Human Immunodeficiency Virus (“HIV”), Acquired Immune Deficiency Syndrome (“AIDS”), U.S. President’s Emergency Plan for AIDS Relief (“PEPFAR”), malaria, tuberculosis, nutrition, global health security, and other program areas.\(^{19}\) This means that the Policy will impact over $8 billion allocated to *global health assistance* for the fiscal year in 2017.\(^{20}\) The Policy’s unprecedented expansion has raised widespread concern among global health organizations and foreign governments, given its disruptive and potentially devastating effect[s].\(^{21}\) A couple of days after the Policy was reinstated, the Dutch government pledged to set up a fund, called *She Decides*, to support abortion services affected by the Policy.\(^{22}\) In the United States, President Trump’s supporters lauded his decision to reinstate and expand the Policy, but the Policy’s reinstatement was met with strong opposition as well.\(^{23}\) Pro-choice advocates have warned that the Policy seriously jeopardizes women’s health and interferes with family planning efforts in the developing world.\(^{24}\) Moreover, the Policy is inconsistent with American constitutional rights and democratic principles.\(^{25}\)

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Immediately after President Trump gave the order, United States Senator Jeanne Shaheen and a bipartisan group of senators introduced legislation “to permanently repeal the [Global Gag Rule].”\textsuperscript{26} “However, [the proposed legislation] faces an uphill battle” with conservative Republicans controlling both chambers of Congress.\textsuperscript{27} Additionally, in a recent Senate Appropriations Subcommittee hearing, Senator Shaheen questioned Secretary of State Rex Tillerson on the potentially devastating impact the Global Gag Rule might have on the multiple programs the Policy encompasses.\textsuperscript{28} Secretary Tillerson assured the Appropriations Subcommittee that the State Department would closely observe the Policy’s impact on foreign aid programs, but a comprehensive report is pending.\textsuperscript{29}

Still, opponents of the Global Gag Rule could attempt to seek legal recourse and challenge the restrictions constitutionality.\textsuperscript{30} In 2013, the Supreme Court of the United States held in \textit{Agency for International Development v. Alliance for Open Society International, Inc.},\textsuperscript{31} that the United States Agency for International Development’s (“USAID”) rule mandating NGOs “to adopt a policy that explicitly opposed prostitution and sex trafficking” or forego federal funding, violated the First Amendment and was therefore unsustainable.\textsuperscript{32} Opponents of the Global Gag Rule could argue that similar to the restrictions challenged under \textit{Alliance}, the Global Gag Rule is a restriction on speech or a mandate to adopt the government’s pro-life stance, in violation of the First Amendment.\textsuperscript{33} Given that First Amendment rights only protect American citizens, foreign NGOs might not have standing to challenge the Gag Rule—however, domestic NGOs have challenged the rule in the past; and despite losing on the merits, they have

\begin{thebibliography}{100}


\bibitem{id} \textit{Id.}


\bibitem{id2} \textit{Id.} at 6:00–7:45; \textit{see also} Press Release, U.S. Dep’t of State, Protecting Life in Global Health Assistance (May 15, 2017) (on file with author).


\bibitem{133} 133 S. Ct. 2321 (2013).

\bibitem{id3} \textit{Id.} at 2326, 2332; Brown, \textit{supra} note 30.

\bibitem{id4} Brown, \textit{supra} note 30; \textit{see also} U.S. CONST. amend. I; \textit{Agency for Int’l Dev.}, 133 S. Ct. at 2331–32.

\end{thebibliography}
been found to have standing under the Equal Protection Clause. In view of recent developments concerning unconstitutional conditions on government funding, opponents of the Global Gag Rule might successfully demonstrate that the restrictive policy impermissibly targets abortion providers based on ideological grounds.

This Comment will explore the implications of the Global Gag Rule’s reinstatement and expansion in 2017. Additionally, it will emphasize policy concerns surrounding the Global Gag Rule, and the significance of reproductive healthcare and family planning in the developing world. This Comment will also discuss the doctrine of unconstitutional conditions on public funding that infringe First Amendment rights of speech and association. Subsequently, this Comment will explore the applicability of the unconstitutional conditions doctrine in the context of funding restrictions, which aim to suppress speech on abortion, like the Global Gag Rule.

II. HISTORY OF THE MEXICO CITY POLICY—GLOBAL GAG RULE

A. Legislation Leading to the Global Gag Rule

Before Ronald Reagan introduced the Mexico City Policy, President John F. Kennedy had signed into law the Foreign Assistance Act (“FAA”) in 1961, which authorized the President “to furnish assistance, on such terms and conditions as he may determine, for voluntary population planning.” Congress was able to confer “such broad discrentional power to the [P]resident” based on “[t]he President’s constitutional authority to conduct

34. Ctr. for Reprod. Law & Policy v. Bush, 304 F.3d 183, 186, 197–98 (2d Cir. 2002); see also U.S. CONST. amend. XIV, § 1; Brown, supra note 30. The United States Court of Appeals for the Second Circuit held in Center for Reproductive Law & Policy v. Bush that the domestic NGO had standing to challenge the Mexico City Policy under a theory of competitive advocate standing. 304 F.3d 183 (2d Cir. 2002).
35. See infra Part IV.B; Brown, supra note 30.
36. See Memorandum on the Mexico City Policy, supra note 15.
40. 22 U.S.C. § 2151b(b) (2012); Jones, supra note 17, at 192.
foreign affairs.\textsuperscript{41} The FAA’s enactment separated military and humanitarian assistance for the first time, and established USAID.\textsuperscript{42}

In 1973, the same year in which the Supreme Court of the United States decided Roe, Congress enacted the Helms Amendment to the FAA.\textsuperscript{43} The Amendment prohibits the use of United States foreign assistance funds for abortion services.\textsuperscript{44} Pro-choice advocates denounced the Helms Amendment and similar restrictions as part of a wave of anti-abortion backlash to Roe.\textsuperscript{45} In the years following Roe, anti-abortionists focused on imposing economic restrictions that would limit access to abortion.\textsuperscript{46} Aware that they had failed to convince women and the rest of the pro-choice community that abortion was wrong, anti-abortionists began to devise new laws that targeted abortion providers and services.\textsuperscript{47} Among these economic restrictions was the 1981 Biden Amendment to the FAA, which prohibited the use of foreign aid funding “for biomedical research related to [the] methods . . . or . . . performance of abortion[s].”\textsuperscript{48}

Despite their gains in Congress, anti-abortionists were dismayed when President Reagan nominated Sandra Day O’Connor to the Supreme Court of the United States in 1981.\textsuperscript{49} O’Connor, who was known as a moderate conservative, had once voted for a preliminary bill to decriminalize abortion during her time in the state senate.\textsuperscript{50} As a result, President Reagan became the target of his pro-life supporters—an unwelcomed situation for the President since he planned to run for re-election in 1984.\textsuperscript{51} “Jennifer Donnally, a historian who studies abortion rights,” explained that President Reagan introduced the Mexico City Policy in 1984, in part, to appease his

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41. Jones, supra note 17, at 192–93.
44. 22 U.S.C. § 2151b(f); Jones, supra note 17, at 194.
46. Dunlap, supra note 7; see also Roe, 410 U.S. 113.
47. Dunlap, supra note 7.
50. Diamond, supra note 15; see also Weisman, supra note 49.
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pro-life supporters.\textsuperscript{52} Alan Keyes, one of President Reagan’s advisors, helped drafting the Policy and presented it at the International Conference on Population in Mexico City.\textsuperscript{53}

After its introduction in 1984, the Mexico City Policy remained in effect until 1993, when President Bill Clinton rescinded it during his first term in office.\textsuperscript{54} The Policy was legislatively reinstated between 2000 and 2001, during President Clinton’s second term.\textsuperscript{55} Congress was able to institute “a modified version of the [P]olicy . . . as part of a broader arrangement to pay the U.S. debt to the United Nations” during President Clinton’s last year in office.\textsuperscript{56} “The [P]olicy was reinstated [through executive order] by President George W. Bush in 2001,” and it remained in place during his two terms in office.\textsuperscript{57} In 2009, President Obama rescinded the Policy.\textsuperscript{58} On January 23, 2017, President Trump reinstated the Policy via presidential memorandum, ordering the Secretary of State to restate the 2001 Presidential Memorandum on the Mexico City Policy.\textsuperscript{59} President Trump further directed the State Department and the Department of Health to extend the Policy’s requirements to all “global health assistance furnished by all departments or agencies.”\textsuperscript{60}

On May 15, 2017, the Department of State issued a press release statement, announcing that President Trump’s Secretary of State, Rex Tillerson, had approved a plan called “Protecting Life in Global Health Assistance” as a guideline for the Mexico City Policy implementation.\textsuperscript{61} Like in the past, the Policy restricts foreign aid recipients from using any funds, including non-U.S. funds.\textsuperscript{62} The Policy guidelines apply to foreign NGOs, recipients of foreign aid funding, “including those to which a U.S. NGO makes a sub-award with such assistance funds.”\textsuperscript{63} The implementation plan further indicates that, “global health assistance includes funding for

\textsuperscript{52} Id.
\textsuperscript{53} Id.; AlanKeyesTv, \textit{Alan Keyes Values Voter Debate 9/17/07 Mexico City Policy} at 1:33, \textsc{YouTube} (Nov. 18, 2010), http://www.youtube.com/watch?v=Yoq2VmR8n78.
\textsuperscript{54} Kaiser Family Found., \textit{supra} note 16, at 2.
\textsuperscript{55} See id.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Memorandum on the Mexico City Policy, \textit{supra} note 15.
\textsuperscript{60} Id.
\textsuperscript{61} Press Release, U.S. Dep’t of State, \textit{supra} note 29.
\textsuperscript{62} Id.; Kaiser Family Found., \textit{supra} note 16, at 1. Before the Policy’s introduction, “NGOs [were allowed to] use non-U.S. funds to engage in [abortion services and advocacy, but were required to] maintain[] segregated accounts.” Kaiser Family Found., \textit{supra} note 16, at 2.
\textsuperscript{63} Press Release, U.S. Dep’t of State, \textit{supra} note 29.
international health programs, such as those for HIV/AIDS, maternal and child health, malaria, global health security, and family planning and reproductive health.”

The State Department addressed the Policy’s expansive nature in the same press release, indicating that “the [d]epartment will undertake a thorough and comprehensive review of the effectiveness and impact of the [P]olicy’s application over the next six months,” adding that “[n]ewly covered programs [like] PEPFAR . . . [would] be given special attention under [the] review.” However, critics point out that there are no indications that the Trump Administration has studied the impact of the Policy’s expansion—both on women’s health and the prevention of infectious diseases, such as HIV or Zika.

At this stage, it is hard to predict the exact implications of the Mexico City Policy, but estimates and analysis presented by global health organizations reveal troublesome information on the possible effects of the expanded Policy. Moreover, comparative data obtained between 2001 and 2008 suggests that the Policy’s implementation is not only harmful, but is counterproductive in reducing abortion and preventing maternal deaths.

B. Consequences of the Global Gag Rule

Proponents of the Mexico City Policy claimed that, when in force, the rule reduced the number of abortions performed around the world. But a 2011 study conducted by Stanford University’s Department of Medicine indicated that the Mexico City Policy is associated with increased rates of abortions in Sub-Saharan Africa. The study showed that, “in high exposure

64. Id.
65. Id.
66. Redden, supra note 23.
70. Bendavid et al., supra note 68, at 877.
countries, abortion rates began to rise noticeably only after the Mexico City Policy was reinstated in 2001 [by President Bush] and the increase became more pronounced from 2002 onward.” 71 Reduced access to contraception in highly exposed countries might explain the study’s paradoxical findings. 72 Many women in Sub-Saharan Africa entirely depend on NGOs for contraception and reproductive healthcare. 73 After the Policy’s reinstatement in 2001, NGOs that refused to follow the Policy were forced to reduce personnel or shut down entirely, resulting in limited access to contraception, which in turn increased the number of unintended pregnancies and abortions. 74 Stanford University researchers concluded that, despite the fact that abortion is associated with multiple factors, their findings suggested that the Mexico City Policy could have “unrecognized—and unintended—health consequences.” 75

In addition to quantitative data presented by Stanford University, there is anecdotal evidence on the rule’s impact on services provided by NGOs that have foregone funding in the past. 76 In a 2007 congressional hearing before the Committee on Foreign Affairs, the former director for Planned Parenthood Association of Ghana, Joana Nerquaye-Tetteh, Ph.D., testified that by refusing to sign the Mexico City Policy, the organization had lost $600,000—almost a third of its budget. 77 The Ghanaian International Planned Parental Federation (“IPPF”) branch was forced to lay off more than half of their 192 staff members and over a thousand community-based agents. 78 Community agents, she explained, were the “backbone of [their] family planning outreach [program] for rural Ghanaians.” 79 In addition to human resources, the branch lost U.S.-donated contraceptive[s], and in less

71. Id.
72. See id. at 878.
73. See id. at 877; Perry & Morlin-Yron, supra note 23 (explaining that “[w]omen will walk for miles” to find contraceptive services).
74. See The Mexico City Policy/Global Gag Rule: Its Impact on Family Planning and Reproductive Health: Hearing Before the H.R. Comm. on Foreign Affairs, supra note 68, at 1, 32–33.
75. Bendavid et al., supra note 68, at 878.
76. KAISER FAMILY FOUND., supra note 16, at 5–6.
79. Id. at 32.
than one year, “condom distribution fell by [forty] percent.” By 2004, 38,000 Ghanaian women had lost access to modern contraception.

III. THE GLOBAL GAG RULE IN 2017

A. The Policy Terms

President Trump’s Executive Order will apply to funds appropriated directly to USAID, the Department of State, and, for the first time, the Department of Defense. The restrictions apply to three types of funding agreements: “[G]rants, cooperative agreements, and [for the first time], contracts.” In addition to being restricted from promoting or providing abortion services, recipient NGOs are restricted from “[l]obbying a foreign government to legalize . . . abortion as a method of family planning,” or from “[c]onducting a public information campaign in foreign countries regarding the benefits . . . of abortion.”

However, the Policy makes several exceptions. NGOs can provide information or make a referral on abortion when the mother’s life is in danger, or the pregnancy is the result of incest or rape. Under the Policy, NGOs may also “passively respond[] to . . . question[s] regarding where a safe, legal abortion may be obtained” once the mother clearly states she has decided to have a legal abortion. Finally, NGOs are not restricted from providing post-abortion care to women who have suffered injury or illness due to a legal or illegal abortion.

B. Potential Implications in 2017

In a recent study on the scope of the Mexico City Policy, the Kaiser Family Foundation concluded that from sixty-four countries “that received U.S. bilateral global health assistance in . . . 2016, [thirty-seven of those countries] allow for legal abortion in at least one case not permissible by the

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80. Id.
81. Id.
82. See Press Release, U.S. Dep’t of State, supra note 29.
83. Id.
85. Id.
86. Id.
87. Id.
88. Id.
[Mexico City Policy]. In other words, NGOs providing assistance in those thirty-seven countries will be restricted from providing abortion related services in cases that are still permissible under the country’s laws. “These [thirty-seven] countries account[] for 53% of bilateral global health assistance,” with the majority of countries located in Africa and the second largest group in South and Central Asia. The remaining twenty-seven countries receiving bilateral assistance are not expected to be as heavily impacted given that abortion is illegal beyond the exceptions listed under the Mexico City Policy—i.e. rape, incest, or when the mother’s life is in danger. Altogether, the sixty-four countries accounted for $6.1 billion in foreign assistance funding for the fiscal year of 2016.

NGOs operating in countries where abortion is not legal, beyond the exceptions listed under the Policy, will not be forced to choose between restricting permissible abortion services or foregoing United States funding. Nonetheless, all NGOs receiving federal funding are banned from lobbying for the decriminalization of abortion or from conducting public campaigns on the benefits of abortion as a method of family planning. Opponents of the Global Gag Rule fear that banning NGOs from participating in advocacy activities will thwart democratic processes in countries where abortion is strictly restricted and undermine efforts to repeal draconian abortion laws that harm girls and women. Countries with extreme poverty and violence, like El Salvador and Honduras, criminalize abortion in all circumstances, including cases of child rape and when the mother’s life is in danger. Activists working in Latin America fear that the

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89. KATES & MOSS, supra note 67, at 1.
90. Id.
91. Id. at 1, 3.
92. Id. at 1–3.
93. Id. at 3.
94. See KATES & MOSS, supra note 67, at 3–4.
95. Id. at 2, 4.
97. See Sherman, supra note 96; Watts, supra note 96. Violence against women is so rampant in Honduras that, “[b]etween 2005 and 2013, . . . violent female deaths rose by . . . 260[%];” and in 2013, “[a] report of sexual assault was filed an average of every three hours.” Sherman, supra note 96.
Global Gag Rule “will have a chilling impact on . . . work done by [NGOs and Latin American groups] that advocate [for] safe abortion.”

C. **The Importance of Comprehensive Reproductive Healthcare in 2017**

The Bill and Melinda Gates Foundation reported, in early 2017, that “[f]or the first time in history, more than 300 million women in developing countries are using modern methods of contraception.” Additionally, data provided by the Guttmacher Institute indicated a gradual decline in abortion rates between 2010 and 2014. However, the lowest abortion rates were observed in developed nations. In contrast, abortion rates “increased in developing regions from [thirty-nine] million to [fifty] million as the reproductive age population grew at a similar pace.”

According to the World Health Organization (“WHO”), “[t]he unmet need for contraception remains too high, [and] [t]his inequity is fueled by both a growing population, and a shortage of family planning services.” “By 2020, there will be more women of reproductive age than ever before” and “there are still more than 225 million women in the developing world who [do not wish] to get pregnant but [do not] have access to contracepti[on].” The WHO has further indicated that “[i]n Africa, 24.2% of women of reproductive age have an unmet need for . . . contraception.”

In South Asia, “contraceptives are used by only a third of . . . women,” and according to a “recent youth survey [conducted] in the Indian state of Uttarakhand . . . 64% of married teenage girls wanted to postpone their first pregnancy, but only 9% practiced a modern method of contraception.” Critics of the Global Gag Rule condemn the administration’s disregard for these troubling statistics, and fear the Global Gag Rule will disrupt current practices.

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98. Watts, supra note 96.
101. Id.
102. Id.
103. **Family Planning/Contraception, supra** note 37.
105. **Family Planning/Contraception, supra** note 37.
and future efforts to provide better access to contraception in the developing world.  

Additionally, the Global Gag Rule could negatively impact efforts to reduce maternal mortality by restricting access to safe abortion in developing countries. The Kaiser Family Foundation reported that “[e]ach year, an estimated 303,000 women die from complications during pregnancy and childbirth,” most of them in the developing world. As of January 2018, the leading cause of death for fifteen to nineteen-year-old girls are complications during pregnancy and childbirth—and babies born to adolescent mothers have higher rates of infant mortality. Besides complications during pregnancy and childbirth, thousands of women—most of them in the developing world—die from unsafe abortion practices each year. According to the WHO, every year, 21.6 million women have unsafe abortions, and 47,000 women die from complications. Restrictive laws on abortion will not stop women from obtaining an abortion; in their desperation, women will turn to unsafe and clandestine procedures to end their pregnancies.

Protecting women’s access to reproductive healthcare is also vital to human development. A 2016 study published by the United Nations Population Fund revealed that today, most ten-year-old girls live in a developing nation. Of ten-year-old girls, almost nine out of ten of them, or 89%, live in the developing world—half of them in Asia and the Pacific alone. Girls living in developing countries are at a statistical disadvantage in relation to their brothers; they “are less likely to stay in school, more likely to be engaged in child [labor], more likely to be married before they turn [eighteen, and] more likely to experience intimate partner violence.”

107. See Starrs, supra note 19, at 486.
112. Id.
113. GUTTMACHER INST., supra note 100.
115. Id. at 16.
116. Id.
117. Id. at 26.
Gender inequality extends far beyond pay gaps; it has life-long effects on girls’ lives and negatively impacts communities.\textsuperscript{118} In short, poverty is sexist.\textsuperscript{119} It is not a secret that societies that empower women reap the socio-economic benefits.\textsuperscript{120} Studies show a correlation between gender equality and economic growth.\textsuperscript{121} Some of the world’s wealthiest nations, such as Denmark, Sweden, and Norway rank high under gender equality indexes; whereas, poor countries such as Niger, Somalia, and Mali rank last when it comes to gender equality and human development.\textsuperscript{122}

D. Organizations Foregoing Funding

Global organizations like IPPF and Marie Stopes International (“MSI”) confirmed they would forego United States funding.\textsuperscript{123} Both organizations support abortion rights and believe the rule goes against their core principles.\textsuperscript{124} IPPF further added that the Policy undermines human rights by restricting, or taking away, people’s right to choose.\textsuperscript{125} MSI expressed that it is not possible to remove safe abortion from its services, as it would only expose women to other dangers.\textsuperscript{126}

Given that USAID is one of the largest donors, IPPF and MSI face large budget cuts.\textsuperscript{127} IPPF reported that the group stands to lose $100 million in annual funding for refusing to sign the Policy.\textsuperscript{128} From those $100 million, $42 million would have been used for HIV programs to provide treatment to 275,000 women living with the virus.\textsuperscript{129} IPPF provides 300

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\textsuperscript{118} See id. at 26–27.
\textsuperscript{119} GATES & GATES, supra note 99, at 10.
\textsuperscript{120} Id. at 10–12.
\textsuperscript{122} JAHAN, supra note 121, at 214, 216–17; see also GATES & GATES, supra note 99, at 10.
\textsuperscript{125} Why We Will Not Sign the Global Gag Rule, supra note 124.
\textsuperscript{126} Perry & Morlin-Yron, supra note 23.
\textsuperscript{127} See Sifferlin, supra note 123.
\textsuperscript{128} Why We Will Not Sign the Global Gag Rule, supra note 124.
\end{flushleft}
services per minute every day, “including [seventy] million contraceptive services every year.”\(^{130}\) Additionally, IPPF estimates that U.S. “funding could have prevented 20,000 maternal deaths, 4.8 million unintended pregnancies, [and] 1.7 million unsafe abortions.”\(^{131}\) MSI, which provides family planning services in thirty-seven countries, stands to lose $30 million in funding.\(^{132}\) The organization has estimated that, without their United States funding, 1.6 million women will lose access to contraception—which could lead to “6.5 million unintended pregnancies, . . . 2.1 million unsafe abortions, and 21,700 maternal deaths.”\(^{133}\) The Dutch government launched the *She Decides* project with the objective of raising funds for organizations like MSI and IPPF.\(^{134}\) As of February 2017, the project had raised thirty million euros from the $600 million needed each year to make up for lost funding.\(^{135}\)

IV. CHALLENGING THE GLOBAL GAG RULE

A. **PPFA v. USAID**

Domestic NGOs have not failed to challenge the Global Gag Rule in court since its introduction.\(^{136}\) One of the first decisions concerning the constitutionality of the Mexico City Policy was *Planned Parenthood Federation of America, Inc. v. Agency for International Development*,\(^{137}\) decided by the United States Courts of Appeals for the Second Circuit in 1990.\(^{138}\) According to Planned Parenthood Federation of America (“PPFA”), the Gag Rule “impose[d] unconstitutional conditions on a[] . . . government benefit by requiring it to enforce restrictions on speech in order to participate as a conduit for . . . funds to . . . NGOs.”\(^{139}\) Furthermore, PPFA argued that the Policy interfered with its constitutional right to association by granting a financial incentive to foreign NGOs to not associate with it.\(^{140}\) The Second


130. *Why We Will Not Sign the Global Gag Rule, supra* note 124.
133. Sifferlin, *supra* note 123.
135. *Id.*
137. 915 F.2d 59 (2d Cir. 1990).
138. *Id.* at 59.
139. *Id.* at 62.
140. *Id.*
Circuit dismissed PPFA’s claim and affirmed the district court’s decision, in that the Mexico City Policy conditions on funding foreign NGOs constituted “the least restrictive means of implementing a nonjusticiable foreign policy decision.” Furthermore, the Policy “advanced a substantial governmental foreign policy interest” in preventing abortions, and “incidental intrusion on the rights of domestic NGOs [were] ‘no greater than is essential to the furtherance of’” that Policy. The Second Circuit reasoned that foreign NGOs’ refusal to associate with Planned Parenthood was “the result of choices made by . . . NGOs to take [USAID’s] money rather than engage in [non-USAID] . . . efforts with” Planned Parenthood and was, therefore, incidental to the Policy. The court noted that the government’s refusal to subsidize abortions did not constitute an unconstitutional penalty imposed on women who chose to have an abortion and was, therefore, permissible—as established by the Supreme Court of the United States in Harris v. McRae, which had upheld the constitutionality of the Hyde Amendment.

B. CRLP v. USAID

The Policy was challenged once more in 2002 by the Center for Reproductive Law and Policy (“CRLP”) on grounds that foreign NGOs, which had agreed to follow the Policy, were chilled from interacting and communicating with domestic abortion rights groups, therefore depriving CRLP from its constitutional rights to speech and association. CRLP argued that the Policy’s “restrictions violate[d] the Equal Protection Clause . . . by preventing [it] from competing on equal footing with domestic anti-abortion groups.” According to CRLP, the Policy conditions infringed the Due Process Clause by failing to clearly instruct which activities were restricted, therefore allowing arbitrary enforcement of the Policy.

“CRLP [further] argued . . . that the district court [had] wrongly [interpreted] the issues of injury in fact and causation” by relying on Planned Parenthood Federation of America, Inc.—a case that, according to CRLP,

141. Id. at 60–61.
143. Id. at 64.
144. 448 U.S. 297 (1980).
145. Planned Parenthood Fed’n of Am., Inc., 915 F.2d at 65; see also Harris, 448 U.S. at 317.
147. Id. at 188.
148. Id. at 196.
did not resemble the facts at hand. Moreover, in between the time Planned Parenthood Federation of America, Inc. was decided and CRLP’s action, the Supreme Court of the United States had criticized some courts’ practice to “proceed[] directly to the merits of a case . . . assuming arguendo that the plaintiff’s ha[d] constitutional standing” to sue. However, the Court explained an exception would be allowed when the merits were foreordained by another case to the extent that answering the jurisdictional question on standing would not affect the outcome. Following this line of reasoning, the Second Circuit refused to answer whether CRLP had constitutional standing in relation to its First Amendment claims. The circuit court explained that its decision in Planned Parenthood Federation of America, Inc. foreordained CRLP’s First Amendment claims on the merits, and answering the question of Article III standing would make no difference.

Additionally, the Second Circuit dismissed CRLP’s due process claim, arguing that CRLP lacked standing “[p]ursuant to the doctrine of prudential standing.” The doctrine prohibits a litigant from raising another person’s legal rights and “require[s] that a plaintiff’s complaint fall within the zone of interests protected by the [legal provision] invoked.” CRLP’s claim that the Policy’s lack of clarity encouraged NGOs to arbitrarily enforce the rule against CRLP was derivative of the NGOs “due process-type harm, and . . . albeit an unactionable one—concern[ed] First Amendment interests.” CRLP’s derivative harm did not fall within the zone of interests

149. Smith et al., supra note 136, at 14; see also Ctr. for Reprod. Law & Policy, 304 F.3d at 190–91.
150. Ctr. for Reprod. Law & Policy, 304 F.3d at 186, 190, 192. When this opinion was written, Justice Sonia Sotomayor was on the Second Circuit; since she is on the Supreme Court when this Comment was written, she will be distinguished throughout as Justice Sonia Sotomayor. See id.
152. Ctr. for Reprod. Law & Policy, 304 F.3d at 194 (quoting Steel Co., 523 U.S. at 98).
153. Id. at 195; see also U.S. CONST. amend. I.
154. Ctr. for Reprod. Law & Policy, 304 F.3d at 194 (quoting Steel Co., 523 U.S. at 98); see also U.S. CONST. art. III § 1; U.S. CONST. amend. I.
155. Ctr. for Reprod. Law & Policy, 304 F.3d at 196.
156. Id. (quoting Crist v. Comm’n on Presidential Debates, 262 F.3d 193, 195 (2d Cir. 2001) (per curiam)).
157. Id.; see also U.S. CONST. amend. I.
protected by the Due Process Clause—thus, lacking prudential standing.\textsuperscript{158} Justice Sotomayor further wrote, “[p]laintiffs cannot make their First Amendment claims actionable merely by attaching them to a third party’s due process interests.”\textsuperscript{159}

The Second Circuit conceded, however, that CRLP had constitutional standing in relation to its \textit{Equal Protection} claim, based on a theory the court referred to as \textit{competitive advocate standing}.\textsuperscript{160} By choosing to only fund anti-abortion groups, the government had “create[d] an uneven playing field” for competing advocates participating in the same arena.\textsuperscript{161} The government’s conditions on foreign funding were viewpoint-discriminatory and denied CRLP equal protection of the law.\textsuperscript{162} Notwithstanding CRLP’s standing on the issue, the Second Circuit held the \textit{Equal Protection} claim meritless, asserting that the Policy’s discriminatory regulations were permissible because the government was \textit{free to favor} an anti-abortion position as established under \textit{Rust v. Sullivan}.\textsuperscript{163} In \textit{Rust}, the Supreme Court of the United States held that prohibiting Title X fund-recipients from engaging in abortion counseling or referral did not violate recipients’ constitutional rights by favoring one position over another—the government had simply made a \textit{funding decision} when allocating funds to one group at the exclusion of another.\textsuperscript{164}

C. \textit{Rust v. Sullivan}

In the 1991 decision of \textit{Rust}, the Supreme Court of the United States emphasized that “a basic difference [exists] between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.”\textsuperscript{165} According to the Court, the distinction was between conditions that impermissibly regulated activity outside the project’s scope, and conditions that were “designed to ensure . . . the limits

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\bibitem{158} Ctr. for Reprod. Law & Policy, 304 F.3d at 196; see also U.S. CONST. amend. XIV, § 1.
\bibitem{159} Ctr. for Reprod. Law & Policy, 304 F.3d at 196; see also U.S. CONST. amend. I.
\bibitem{160} Ctr. for Reprod. Law & Policy, 304 F.3d at 197; (quoting U.S. Catholic Conference v. Baker, 885 F.2d 1020, 1028–29 (2d Cir. 1984)).
\bibitem{161} Id. (quoting Baker, 885 F.2d at 1029).
\bibitem{163} 500 U.S. 173 (1991); Ctr. for Reprod. Law & Policy, 304 F.3d at 197–98.
\bibitem{164} Rust, 500 U.S. at 198, 210–11; see also Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, sec. 6(c), § 1008.84 Stat. 1506, 1508 (codified as amended at 42 U.S.C. §§ 300 to 300a-6 (2012)).
\bibitem{165} Rust, 500 U.S. at 193 (quoting Maher v. Roe, 432 U.S. 464, 475 (1977)).
\end{thebibliography}
of the federal program [were] observed.”166 Based on this distinction, the government could prohibit the use of family planning funds for pre-natal services because such services fell outside the program’s scope.167 Accordingly, the government could prohibit the appropriation of funds to programs “where abortion [was] a method of family planning.”168 The Court emphasized that the regulations governed the Title X project, and not the Title X grantee.169 Grantees could still exercise their constitutional rights of free speech and association through programs “separate and independent from [Title X] project[s].”170

However, “[s]cholars have criticized [this] penalty/nonsubsidy dichotomy” due to its arbitrary nature.171 Redefining a viewpoint-discriminatory policy as a funding decision does not change the fact that protected rights have been encroached upon.172 Furthermore, “constitutional rights can [still] be impermissibly burdened even if” the funding restriction does not constitute a penalty of coercive nature.173 Justice Blackmun strongly disagreed with the majority’s opinion in Rust, arguing that “[t]he regulations [were] clearly viewpoint based,” and “[w]hile suppressing speech favorable to abortion with one hand, the [government] compels anti-abortion speech with the other.”174 The government had plainly targeted a particular viewpoint “[b]y refusing to fund those family planning projects that advocate abortion because they advocate abortion.”175 Moreover, disguising a viewpoint-discriminatory policy as a funding decision allowed the government to attach an unconstitutional condition to the award of public funds.176 The restrictions on Title X funds implicated core constitutional rights—primarily rights of speech and a woman’s right to choose whether to

166. Rust, 500 U.S. at 193.
167. Id. at 193–94.
168. Id. at 193.
169. Id. at 196; see also sec. 6(c), § 1008, 84 Stat. at 1508.
170. Rust, 500 U.S. at 196.
171. Ruffin, supra note 162, at 1136–37.
172. See Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc., 133 S. Ct. 2321, 2328 (2013); Ruffin, supra note 162, at 1151. “If the Court continues to recast viewpoint-discriminatory regulations . . . as permissible selective funding decisions subject to only minimal scrutiny, the government’s viewpoint will have a stronger presence in the marketplace in contravention of the goals of the First Amendment.” Ruffin, supra note 162, at 1151; see also Agency for Int’l Dev., 133 S. Ct. at 2328.
173. Agency for Int’l Dev., 133 S. Ct. at 2328; Ruffin, supra note 162, at 1137.
174. Rust, 500 U.S. at 209 (Blackmun, J., dissenting).
175. Id. at 210 (Blackmun, J., dissenting).
176. Id. at 205 (Blackmun, J., dissenting).
terminate her pregnancy. According to Justice Blackmun, in its haste to further restrict women’s reproductive rights, the majority had disregarded established principals of law and contorted previous decisions by the Court to arrive at its preordained result.\footnote{177}{Id. at 205–06 (Blackmun, J., dissenting); see also Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, sec. 6(c), § 1008, 84 Stat. 1504, 1508 (codified as amended at 42 U.S.C. §§ 300 to 300a-6 (1970)).}\footnote{178}{Rust, 500 U.S. at 219 (Blackmun, J., dissenting).}\footnote{179}{Deborah F. Buckman, Annotation, Validity, Construction, and Application of State Statutes Limiting or Conditioning Receipt of Government Funds by Abortion Providers, 26 A.L.R. Fed. 7th Art. 9, §§ 1–2 (2017); see also Rust, 500 U.S. at 196.}\footnote{180}{Planned Parenthood of Mid-Missouri & E. Kan., Inc. v. Dempsey, 167 F.3d 458, 463–64 (8th Cir. 1999) (citing Rust, 500 U.S. at 198).}\footnote{181}{Id. at 463.}\footnote{182}{Id.}\footnote{183}{Id. at 462 (citing Rust, 500 U.S. at 196).}\footnote{184}{645 F. Supp. 2d 992 (N.D. Okla. 2009).}

1. Constitutional Conditions Post-Rust

a. Eighth Circuit

Since Rust, several federal courts have upheld funding conditions that target abortion providers by recasting the restrictions as permissible funding decisions. In 1999, the United States Courts of Appeals for the Eighth Circuit held that a Missouri statute preventing abortion service providers from receiving family planning funds did not impose an unconstitutional condition if the statute was construed as to allow grantees to “establish an independent affiliate to provide abortion services outside the government program.”\footnote{180}{According to the circuit court, the Missouri statute was facially ambiguous by failing to expressly prohibit grantees from affiliating with an independent abortion provider. Under this construction . . . grantees [could] exercise their constitutionally protected rights through [separate] affiliates.} Relying on the Supreme Court’s language in Rust, the circuit court explained that, “[l]egislation that simply dictates the proper scope of government-funded programs is constitutional, while legislation that restricts protected grantee activities outside government programs is unconstitutional.”\footnote{183}{Id. at 462 (citing Rust, 500 U.S. at 196).}

b. Tenth Circuit

In 2009, the United States District Court for the Northern District of Oklahoma held in Hill v. Kemp\footnote{184}{645 F. Supp. 2d 992 (N.D. Okla. 2009).} that an Oklahoma statute that offered...
motorists specialty license plates featuring pro-life statements—and excluded organizations that provided abortion services from obtaining any of the funds collected—was constitutional based on the government’s authority to favor one position over another, as established under *Rust*.

Additionally, the statute allowed the affected NGOs to create a separate affiliate that did not engage in abortion services to apply for the collected funding. According to the court, this arrangement provided an adequate alternative to protect the NGOs’ constitutionally protected rights of speech and association.

**c. Seventh Circuit**

In 2011, Planned Parenthood of Indiana challenged the constitutionality of an Indiana law that prohibited state agencies from contracting or making grants with abortion providers. Planned Parenthood argued that the statute placed an unconstitutional condition on government funding by forcing the organization to “choose between providing abortion services and receiving public [funds].” The Seventh Circuit reiterated the Supreme Court’s language in *Rust* that “[t]he Government ha[d] no constitutional duty to subsidize an activity merely because the activity [was] constitutionally protected and may validly choose to fund childbirth over abortion.”

Thus, the Government was not required to remain “neutral between abortion providers and other medical providers,” particularly in matters of state funding. The Seventh Circuit Court further concluded that Planned Parenthood’s claim was entirely derivative of a woman’s constitutional right to obtain an abortion and added that, “[i]t is settled law that the government’s refusal to subsidize [an] abortion does not impermissibly burden a woman’s right to obtain an abortion.”

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185. *Id.* at 995–96, 1006 (citing *Rust*, 500 U.S. at 194); Buckman, *supra* note 179, at § 12; see also OKLA. STAT. tit. 47, § 1104.6 (2002). The Oklahoma statutory scheme offered license plates with statements like Choose Life and Adoption Creates Families. *Hill*, 645 F. Supp. 2d at 995; see also OKLA. STAT. tit. 47, § 1104.6; Special Interest Plates, OKLA. TAX COMM’N, http://www.ok.gov/tax/Individuals/Motor_Vehicle/Forms & Publications/Specialty_Plate_Forms/Special_Interest_Plates.html (last modified Jan. 18, 2018). In addition to providing abortion services, plaintiff NGO provided adoption services. *Hill*, 645 F. Supp. 2d at 996–97.


187. *Id.*

188. Planned Parenthood of Ind., Inc. v. Comm’r of Ind. State Dep’t of Health, 699 F.3d 962, 967 (7th Cir. 2012).

189. *Id.* at 968.


191. *Id.* at 988.

192. *Id.* at 969.
the Indiana law did not constitute an unconstitutional condition on funding because it did not directly violate a woman’s right to obtain an abortion.193

D.  

**Alliance v. USAID**

The Supreme Court of the United States recently issued an important decision on unconstitutional conditions on federal funding in *Agency for International Development v. Alliance for Open Society International, Inc.* Domestic organizations that received federal funding under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act (“Leadership Act”), sought a declaratory judgment asserting that the Leadership Act’s policy requirement violated their First Amendment rights by requiring them to affirmatively oppose prostitution to receive funding.194 The organizations wished to remain neutral on the issue, and “fear[ed] that adopting a policy explicitly opposing prostitution” would diminish the program’s effectiveness by making it harder to work with prostitutes in efforts to eradicate HIV/AIDS.195 Furthermore, NGOs were concerned that the Policy restrictions would require them to censor privately-funded publication and research content concerning the prevention of HIV/AIDS among prostitutes.196

The Supreme Court agreed that the Policy requirement infringed First Amendment rights by requiring recipients to pledge allegiance to a Policy they did not accept as their own.197 Although the recipient could simply choose to forego government funding, the Government could not deny a benefit on the basis of infringing on the constitutional right to free speech.198 A condition on federal funding needs to be coercive in order to be categorized as impermissible.199 Moreover, the Court warned, “Congress

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193.  *Planned Parenthood of Ind., Inc.*, 699 F.3d at 969.
194.  *Agency for Int’l Dev.*, 133 S. Ct. at 2326, 2331; *see also U.S. CONST.* amend. I.
196.  *Id.*
197.  *Id.* at 2332; *see also U.S. CONST.* amend. I.
198.  *Agency for Int’l Dev.*, 133 S. Ct. at 2328. USAID argued that the Leadership Act conditions did not infringe constitutional rights because grantees had the option to work with independent affiliates that did not adopt the Policy, or grantees could reject funding themselves and create an affiliate that would abide by the terms, but whose sole purpose would be to receive the funds. *Id.* at 2331. The Supreme Court rejected these alternatives, explaining that affiliates could not serve that purpose when the recipient was forced to adopt a belief as its own. *Id.* On one hand, if the affiliate was clearly distinct from the recipient, the arrangement would still prevent the recipient from expressing its beliefs. *Id.* On the other hand, if an affiliate was identified with the recipient, the recipient could express those beliefs “only at the price of evident hypocrisy.” *Id.*
[could not] recast a [discriminatory] condition” as a permissible funding decision in each case, “lest the First Amendment be reduced to a simple semantic exercise.”\textsuperscript{200}

According to the majority, to distinguish between impermissible and permissible restrictions, “the relevant distinction [lays] . . . between conditions that define the limits of” a funding program Congress has agreed to subsidize, “and conditions that [attempted] to leverage funding to regulate speech outside” the program’s scope.\textsuperscript{201} The Court recognized the difficulty in drawing the distinction between both types of conditions, in part, because a program’s scope could \textit{always be manipulated to encompass the restricted activity}.\textsuperscript{202} Albeit this complication, the Court unequivocally held the Leadership Act restriction as unconstitutional, reasoning that “[b]y requiring recipients to profess a specific belief, the Policy Requirement [went] beyond defining the limits of the federally funded program to defining the recipient.”\textsuperscript{203}

Perhaps foreseeing the potential implications the \textit{Agency for International Development} decision could have, the Court distinguished the Leadership Act’s restrictions from those in \textit{Rust}, explaining that conditions on Title X funds targeting abortion providers were constitutional because they only regulated activities that fell within the scope of Title X projects.\textsuperscript{204} In \textit{Rust}, the majority explained that the government’s conditions did not restrict grantees from \textit{engag[ing] in abortion advocacy on their own time and dime}; as long as those activities were kept separate from Title X projects, grantees were free to speak in favor of abortion.\textsuperscript{205} Based on this separation of activities, the majority in \textit{Agency for International Development} concluded that Title X regulations in \textit{Rust} “did not run afoul of the First Amendment.”\textsuperscript{206}

Justice Scalia dissented from the majority’s opinion in \textit{Agency for International Development}, arguing that the Leadership Act’s restrictions on funding were well within the program’s scope, precisely because eliminating prostitution was “an objective of the HIV/AIDS program.”\textsuperscript{207} Moreover, he

\begin{itemize}
  \item [200] \textit{Agency for Int’l Dev.}, 133 S. Ct. at 2328 (quoting Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 547 (2001)); see also U.S. CONST. amend. I.
  \item [201] \textit{Agency for Int’l Dev.}, 133 S. Ct. at 2328.
  \item [202] Id.
  \item [203] Id. at 2330, 2332.
  \item [204] Id. at 2329–30 (citing Rust v. Sullivan, 500 U.S. 173, 196 (1991)); see also Paul M. Smith et al., \textit{Supreme Court Issues Significant Decision on Unconstitutional Conditions Doctrine}, COMM. LAW., Nov. 2013, at 26, 26.
  \item [205] \textit{Agency for Int’l Dev.}, 133 S. Ct. at 2330 (quoting \textit{Rust}, 500 U.S. at 196–97).
  \item [206] \textit{Agency for Int’l Dev.}, 133 S. Ct. at 2330 (citing \textit{Rust}, 500 U.S. at 197).
  \item [207] \textit{Agency for Int’l Dev.}, 133 S. Ct. at 2333.
\end{itemize}
argued [m]oney [was] fungible, “and any promotion of prostitution” undermined the program’s objective.\textsuperscript{208} More troubling to Justice Scalia, however, was that the majority opinion opened the door to more suits challenging the constitutionality of government funding restrictions that discriminated between relevant ideological positions.\textsuperscript{209} Justice Scalia’s rationale was that “it is quite impossible to distinguish between the rare requirement that an organization make an ideological commitment as a condition of funding—as here—and the more common situation where the government must choose between applicants on relevant ideological grounds.”\textsuperscript{210}

1. Unconstitutional Conditions Post-Alliance

a. \textit{Eleventh Circuit}

Since the Supreme Court of the United States issued its decision in \textit{Agency for International Development}, at least two federal courts have ruled viewpoint-discriminatory conditions targeting abortion providers as unconstitutional conditions on funding.\textsuperscript{211} In 2016, Planned Parenthood of Southwest and Central Florida challenged a Florida statutory amendment that defunded abortion providers regardless of their separation of abortion and non-abortion related services.\textsuperscript{212} Relying on the unconstitutional condition test delineated by the Supreme Court in \textit{Agency for International Development}, the United States District Court for the Northern District of Florida found the defunding provision unconstitutional.\textsuperscript{213} Under the \textit{relevant distinction} analysis provided by Chief Justice John Roberts in \textit{Agency for International Development}, “[t]he defunding provision [had] nothing to do with the state and local spending programs . . . which address[ed] [issues] like . . . sexually transmitted diseases [(“STDs”)] and

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\item \textsuperscript{208} \textit{Id.} at 2333–34.
\item \textsuperscript{209} \textit{Id.} at 2335.
\item \textsuperscript{210} Smith et al., \textit{supra} note 205, at 27 (quoting \textit{Agency for Int’l Dev.}, 133 S. Ct. at 2335).
\item \textsuperscript{211} Buckman, \textit{supra} note 179, at § 9; \textit{see also Agency for Int’l Dev.}, 133 S. Ct. at 2332, 2335; Planned Parenthood of Greater Ohio v. Hodges, 201 F. Supp. 3d 898, 906, 908 (S.D. Ohio 2016); Planned Parenthood of Sw. & Cent. Fla. v. Philip, 194 F. Supp. 3d 1213, 1217–18, 1220 (N.D. Fla. 2016).
\item \textsuperscript{212} \textit{Planned Parenthood of Sw. & Cent. Fla.}, 194 F. Supp. 3d at 1215; \textit{see also} Act Effective March 25, 2016, ch. 2016-150, § 390.011, 2016 Fla. Laws 2.
\item \textsuperscript{213} \textit{Planned Parenthood of Sw. & Cent. Fla.}, 194 F. Supp. 3d at 1217; \textit{see also Agency for Int’l Dev.}, 133 S. Ct. at 2328.
\end{itemize}
\end{flushleft}
dropout prevention.”

Therefore, the State could not label the defunding provision as a condition that defined the limits of the spending program—here, the defunding provision was “an effort to leverage the funding of those programs to reach abortion services.”

The defunding provision went beyond existing Florida law that already prohibited the use of state or local funds to provide, or support, provisions by prohibiting recipients of state funds from separately providing abortion services on their own time and dime. Reverberating Justice Blackmun’s dissent in Rust, the district court explained that the Florida Legislature refused to fund non-abortion related services offered by Planned Parenthood because the organization chose to provide abortions with private funds. Put simply, “[t]he [S]tate’s only beef [was] that the plaintiffs provide[d] abortions.”

The district court further explained that the State’s contention that appropriating funding to non-abortion related services could indirectly support the provision of abortions given the fungible nature of money failed on both the facts and the law. It failed as a matter of fact because Planned Parenthood had submitted proof that, under the statutory amendments, their non-abortion related programs were the net losers and “[a] program that cost[] more than [what] it [brought] in [could not] indirectly support an unrelated program.” The contention failed as a matter of law because the Supreme Court had made clear in Agency for International Development that “the cross-funding argument does not prevent application of the unconstitutional-conditions doctrine.” The State, similar to USAID in Agency for International Development, had failed to offer any support that cross-funding would occur.

Finally, the district court rejected the State’s argument that a funding condition could only be held unconstitutional if such condition placed an undue burden on a woman’s right to obtain an abortion. The undue

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215. Id. at 1217–18.
216. Id. at 1216 (quoting Agency for Int’l Dev., 133 S. Ct. at 2330).
219. Id. at 1219.
220. Id.
221. Id.; Agency for Int’l Dev., 133 S. Ct. at 2331.
222. Planned Parenthood of Sw. & Cent. Fla., 194 F. Supp. 3d at 1219; Agency for Int’l Dev., 133 S. Ct. at 2331.
burden test described in seminal cases like *Whole Woman’s Health v. Hellerstedt* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* were unrelated to the unconstitutional conditions doctrine and applying it in this context—public funding decisions—was simply illogical. The district court ultimately held that Planned Parenthood had demonstrated a likelihood of success on the merits of their claim that the statutory amendment was unconstitutional—thus, enjoining the State from enforcing the statutory provision.

### b. Sixth Circuit

Later in 2016, the District Court for the Southern District of Ohio held that an Ohio statutory provision prohibiting the State from granting funds to abortion providers for non-abortion related services constituted an unconstitutional condition on government funding. According to the district court, the statute placed a speech-based condition on recipients in violation of their First Amendment rights. The court turned to the Supreme Court’s analysis in *Rust*, explaining that by regulating the recipients’ activities outside the publicly funded programs, the condition did not “leave the grantee unfettered in its other activities.” The statutory conditions “[sought] to leverage funding to regulate speech outside the contours of the [publicly funded] program[s].” Those programs included: “[T]ests and treatment for STDS, cancer screenings for women, HIV testing, . . . prevention of sexual violence,” and other related activities. Nothing within those programs—the district court said—was related to performing abortions.

The Ohio Department of Health (“ODH”) contended that the provision was constitutional because it did not compel any speech. The

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226. *Planned Parenthood of Sw. & Cent. Fla.*, 194 F. Supp. 3d at 1220; see also *Whole Woman’s Health*, 136 S. Ct. at 2309; *Planned Parenthood of Se. Pa.*, 505 U.S. at 878.
229. *Id.* at 906, 908; see also U.S. CONST. amend. I.
231. *Id.* at 906 (quoting Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc., 133 S. Ct. 2321, 2328 (2013)).
232. *Id.*
233. *Id.* at 906.
234. *Id.* at 905–06.
district court rejected the government’s distinction, arguing that in *Agency for International Development*, “[t]he Supreme Court ha[d] explained that an unconstitutional condition [was] not limited to [a] situation . . . ‘when the condition is actually coercive.’”235 Instead, the relevant distinction was whether the condition defined the limits of government spending or attempted “to regulate speech outside the contours of the program.”236 ODH further argued that a condition was only unconstitutional if it placed an undue burden on a woman’s right, based on the seventh circuit’s decision in *Planned Parenthood of Indiana*.237 The court reiterated that the undue burden test was irrelevant in that context, stating that, “[t]his Court has serious doubts as to whether it is proper to import the undue burden analysis . . . here, which Defendant has acknowledged is a case about money.”238 Based on these reasons, the District Court for the Southern District of Ohio permanently enjoined the State from enforcing the statute.239

V. APPLICABILITY OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

The terms of the Global Gag Rule are comparable to the statutory provisions declared unconstitutional by the district courts of the Northern District of Florida and the Southern District of Ohio.240 For one, the administration’s expanded version of the Gag Rule applies to health assistance programs, such as HIV/AIDS (PEPFAR), malaria, nutrition, hygiene, global health security, etc.—programs that have little or nothing to do with abortion.241 The Department of State and USAID cannot claim that the Mexico City Policy allows the government to define the scope of each of these programs given that they are completely unrelated to abortion services.242 Second, the Global Gag Rule regulates the grantees’ activities beyond the contours of all health assistance programs—even those related to family planning and reproductive healthcare—by prohibiting NGOs from

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236. *Id.* at 906 (quoting *Agency for Int’l Dev.*, 133 S. Ct. at 2328).
237. *Id.* at 910; see also *Planned Parenthood of Ind.*, Inc. v. Comm’r of Ind. State Dep’t of Health, 699 F.3d 962, 988 (7th Cir. 2012).
239. *Id.* at 912.
providing or promoting abortion on their own time and dime.243 Third, the Helms Amendment already prohibits the use of public funds to pay for abortion services overseas.244 Similar to what the district court for the Northern District of Florida and Justice Blackmun expressed, the government is targeting abortion providers precisely because they provide abortions with private funds.245 The current administration’s only beef is that NGOs, like IPPF and MSI, provide and promote abortion as a method of family planning.246 Fourth, by restricting NGOs from discussing abortion at any time, the government is attempting to impose its pro-life policy on domestic NGOs.247 Like Chief Justice Roberts explained in Agency for International Development, a condition need not be coercive to impermissibly infringe on constitutional rights.248 Fifth, the argument made by proponents of the Global Gag Rule—that tax monies could still be used to pay for abortion services both directly and indirectly—should fail as a matter of law based on the Supreme Court’s stance in Agency for International Development that “the cross-funding argument does not prevent application of the unconstitutional conditions doctrine.”249 Finally, the undue burden test or the least restrictive means approach should not be applied in the context of unconstitutional conditions targeting abortion providers.250 Although the undue burden test is relevant to abortion rights, it is not necessarily relevant to First Amendment issues and funding decisions.251

VI. CONCLUSION

After several developments in caselaw regarding unconstitutional conditions in funding, opponents of the Global Gag Rule might be able to

244. 22 U.S.C. § 2151b(f) (2012); Helms Amendment Hurts Women Worldwide, supra note 45.
246. Planned Parenthood of Sw. & Cent. Fla., 194 F. Supp. 3d at 1217–18; Sifferlin, supra note 123; Why We Will Not Sign the Global Gag Rule, supra note 124.
247. See Agency for Int’l Dev., 133 S. Ct. at 2330–32; Sifferlin, supra note 123.
251. See id.
successfully challenge its constitutionality. In Center for Reproductive Law and Policy v. George W. Bush, the Second Circuit found that CRLP had standing in relation to its Equal Protection claim based on a theory of competitive advocate standing—thus, recognizing that the government chose to favor anti-abortion organizations. Nonetheless, CRLP’s claim failed on the merits based on the government’s authority to favor one viewpoint over another, as the Supreme Court held in Rust. Since then, the Supreme Court issued its decision in Agency for International Development, and emphasized that conditions that restrict beyond the contours of a program are impermissible conditions on constitutionally protected rights. Based on this relevant distinction, domestic NGOs, like IPPF and CRLP, might be able to demonstrate that, despite the government’s authority to favor one position over another, restrictions on funding cannot regulate NGOs’ activities beyond the federally funded program.

In general, restrictions targeting abortion providers—at all levels of government—should be carefully examined. Decisions like Rust and Harris v. McRae were premised on the assumptions that the government has a valid interest in discouraging abortion . . . and creating an incentive in favor of childbirth. But none of “these assumptions [are] consistent with the view that abortion is a private moral judgment.” Supreme Court Justice Anthony Kennedy explained in his dissent in Hill v. Colorado, that their decision in Planned Parenthood of Southeastern Pennsylvania had established that a woman’s decision whether to abort her child “was [at] its essence a moral one, a choice the State could not dictate,” and added that, “[f]oreclosed from using the machinery of government to ban abortions in early term, those who oppose it are remitted to debate the issue in its moral dimensions.” By denying funding to recipients that provide or promote abortions—claiming that it is free to favor a pro-life position—the

252. See id.; Planned Parenthood of Sw. & Cent. Fla., 194 F. Supp. 3d at 1224.
253. 304 F.3d 183 (2d Cir. 2002).
254. Id. at 196–98.
257. See id. at 2328, 2330; The Mexico City Policy/Global Gag Rule: Its Impact on Family Planning and Reproductive Health: Hearing Before the H.R. Comm. on Foreign Affairs, supra note 68, at 36.
258. See Chemerinsky & Goodwin, supra note 2, at 1247.
260. Chemerinsky & Goodwin, supra note 2, at 1241; see also Rust, 500 U.S. at 192–93; Harris, 448 U.S. at 324–26.
261. Chemerinsky & Goodwin, supra note 2, at 1241.
262. 530 U.S. 703 (2000).
263. Id. at 791.
government uses its enormous power to interfere with a woman’s private decision.\textsuperscript{264}

Finally, there are important policy considerations regarding the Global Gag Rule.\textsuperscript{265} WHO reported in November 2016, that “approximately 830 women die from preventable causes related to pregnancy and childbirth” per day and, “[ninety-nine percent] of all maternal deaths occur in developing countries.”\textsuperscript{266} Restricting access to safe and legal abortions literally endangers women’s lives around the globe.\textsuperscript{267} Incoming administrations should not be allowed to “play politics with the lives of women and girls.”\textsuperscript{268} Moreover, implementing policies abroad that would be unconstitutional at home is hypocritical and undermines democratic values.\textsuperscript{269} With officials like Senator Shaheen attempting to pass legislation that permanently bans the Global Gag Rule, there is hope for the future that a more representative Congress will work toward eliminating this undemocratic and dangerous Policy for good.\textsuperscript{270}

\begin{thebibliography}{99}
\bibitem{264} See Harris, 448 U.S. at 330.
\bibitem{265} BLOOM ET AL., supra note 114, at 8–9; Why We Will Not Sign the Global Gag Rule, supra note 124; see also Watts, supra note 96.
\bibitem{267} Why We Will Not Sign the Global Gag Rule, supra note 124.
\bibitem{269} See Cohen, supra note 25, at 1–2.
\bibitem{270} See Jeanne Shaheen: U.S. Senator N.H., supra note 28, at 8:50.
\end{thebibliography}
Tweets That Break the Law: How the President’s @realDonaldTrump Twitter Account Is a Public Forum and His Use of Twitter Violates the First Amendment and the President Records Act

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I. INTRODUCTION ........................................................................................................... 318
II. THE DOCTRINES ........................................................................................................ 322
   A. Public Forum ........................................................................................................... 322
   B. Traditional Public Forum ....................................................................................... 323
   C. Designated Public Forum ....................................................................................... 324
   D. Limited Public Forum ............................................................................................ 325
   E. Nonpublic Forum .................................................................................................... 327
   F. Government Speech .............................................................................................. 328
   G. Mixed Speech ........................................................................................................ 329
III. APPLICATION OF THE PUBLIC FORUM DOCTRINES, GOVERNMENT SPEECH DOCTRINE, AND MIXED SPEECH ANALYSIS TO @realDonaldTrump ........................................................................................................... 331
   A. Threshold Issues ..................................................................................................... 331
      1. Metaphysical ......................................................................................................... 331
      2. The Government Does Not Own Twitter ............................................................ 332
      3. @realDonaldTrump Is Not a Personal Account .................................................... 332
   B. Application of the Doctrines .................................................................................... 334
      1. Traditional Public Forum ....................................................................................... 334
      2. Designated and Limited Forum Analysis ............................................................. 335
         a. Designated Public Forum .................................................................................... 335
         b. Limited Public Forum ......................................................................................... 337
      3. Nonpublic Forum .................................................................................................. 338
      5. Mixed Speech ....................................................................................................... 340
         a. Central Purpose of @realDonaldTrump ................................................................. 341
         b. President’s Degree of Control over @realDonaldTrump ......................................... 342
         c. “The Identity of the Person to Whom a Reasonable Social Media User Would Attribute the Speech” ............................................................... 343
         d. Mixed Speech Conclusion ................................................................................. 344
IV. HOW COURTS SHOULD FIND @REALDONALDTRUMP IS A DESIGNATED PUBLIC FORUM ........................................................................................................... 344
Imagine one day, you send out a tweet about your opinion on a recent government policy and someone replies to that tweet criticizing you and your views in an abusive way.* You decide to block this person because you do not agree with their views and abusive comments.* You post another tweet, but after posting it you realize that there is a spelling error in it so you delete the tweet.* This normally happens on Twitter with zero consequences for normal every day users, which is nothing to write home about. But what if you are one of the most powerful individuals in the world?* For example, the President of the United States. That leaves the question: Are these acts, which are done by Twitter users on a frequent basis, constitutional when done by the President of the United States?*

On May 28, 2017, President Trump tweeted that the British Prime Minister was upset that some of the information Britain gave the United States concerning the Manchester attack was leaked. Holly O’Reilly responded to the tweet, telling the President that he was the leaker and posted a graphic interchange format (“GIF”) claiming that the video in the GIF was how the world viewed the President. Almost immediately, Ms. O’Reilly was blocked from viewing the President’s Twitter account. A week later, Joe Papp had a similar experience when he tweeted a question to President

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2. Id.


5. Id.
Trump. He asked why the President did not attend his #PittsburghNotParis rally, adding to the tweet #fakeleader. Like Ms. O’Reilly, Mr. Papp was immediately blocked. Ms. O’Reilly and Mr. Papp are just two of many people who have been blocked by the President from @realDonaldTrump. In fact, there are internet sites that keep a running list of individuals that come forward and show evidence that they have been blocked from the President’s @realDonaldTrump account. The blocked individuals cannot view the President’s statements or opinions on policy through conventional means. Additionally, the blocked viewers are prohibited from contributing to the threads themselves and adding their opinions or views on a tweet from the President that addresses policy. The Knight First Amendment Institute of Columbia (“Knight”), which represents Ms. O’Reilly and Mr. Papp, believes the President has violated the First Amendment by blocking these individuals based on their views towards the President and his policies. Knight claims that the President’s @realDonaldTrump Twitter account is a “forum[,] in which [he] share[s] [his] thoughts and decisions as President . . . [where] millions . . . respond, ask questions, and sometimes have those questions answered.” Specifically, Knight claims that the Twitter account @realDonaldTrump “operates as a designated public forum” for purposes of the First Amendment and “viewpoint-based blocking of [their] clients is unconstitutional.” On July 11, 2017, Knight filed a lawsuit against President Trump seeking an injunction, naming Sean Spicer and Dan Scavino as co-defendants.

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6. Id.
7. Id.
8. Id.
9. Andrews, supra note 1. Dozen[s] have reached out to Knight First Amendment Institute of Columbia. Id.
11. Andrews, supra note 1; Savage, supra note 3.
13. Letter from Jameel Jaffer et al. to President Donald Trump, Knight First Amendment Inst., Columbia Univ., to Donald J. Trump, President 1–2 (June 6, 2017) (on file with the Knight First Amendment Institute).
14. Id. at 1.
15. Id.
Within twenty-four hours of his presidency, President Trump’s use of his Twitter account already sparked questions about legality.17 The President tweeted that he was “honored [sic] to serve as president.”18 Shortly after this tweet was deleted, “a second tweet was posted that corrected the [u]spelling” of the previous tweet.19 These deleted tweets come in conflict with the President Records Act of 1978 (“PRA”).20 “The PRA set[] [out] strict rules for [any] presidential record[] [that is] created during a president’s [tenure].”21 “Under the law, the [F]ederal [G]overnment must maintain ownership and control of all presidential records” created by the President or the President’s staff.22 The PRA prohibits the President from getting rid of “any presidential records without the written permission of the archivist, [a]nd presidential records that have ‘administrative, historical, informational, or evidentiary value’ [may not] be destroyed at all.”23

An issue that arises when it comes to Trump’s presidential tweeting is that he currently uses two Twitter accounts, @realDonaldTrump and @POTUS—the official Twitter account of the President of the United States.24 @realDonaldTrump has been the President’s Twitter account since before the election in 2016, which currently has more than 50 million followers.25 The @POTUS Twitter account was turned over to him after the end of the previous administration’s presidency and has over 25 million followers less than @realDonaldTrump.26 However, the President continued to use his previous account along with @POTUS after taking office.27 Further, the President uses his personal account to give his opinions on public policy.28 The President has stated that “he will continue to use . . . @realDonaldTrump . . . to speak directly to the people about issues of

18. Id.
19. Id.
20. See id.
21. Id.
22. Johnson, supra note 17.
23. Id.
25. Donald J. Trump (@realDonaldTrump), TWITTER, http://www.twitter.com/realDonaldTrump?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor (last visited Apr. 18, 2018). As of April 18, 2018, there are 50.9 million followers of @realDonaldTrump.
26. See Andrews, supra note 1; Johnson, supra note 17; President Trump (@POTUS), TWITTER, http://www.twitter.com/POTUS (last visited Apr. 18, 2018). As of April 18, 2018, there are 22.9 million followers of @POTUS.
27. Johnson, supra note 17.
28. See Savage, supra note 3.
national and international importance.\textsuperscript{29} In addition, on Tuesday, June 6, 2017, former Press Secretary Sean Spicer stated that the tweets from @realDonaldTrump are “official statements [of] the President of the United States,” which leads to support claims that individuals’ tweets to the President—replying to his official statements—deserve First Amendment protection.\textsuperscript{30} The President also uses @POTUS to retweet many of his tweets from @realDonaldTrump, showing that both accounts are interchangeable when it comes to the President of the United States.\textsuperscript{31} Less than a week later, after former Press Secretary Sean Spicer stated that the tweets were official statements, the Ninth Circuit Court of Appeals cited to a tweet from @realDonaldTrump in a decision as evidence to block the travel ban.\textsuperscript{32} In the decision, the Court cited to a CNN report that stated Spicer’s comment about the President’s tweets from @realDonaldTrump being official statements.\textsuperscript{33} Also, @POTUS states that all tweets are archived, assumingly because of the PRA.\textsuperscript{34} However, @realDonaldTrump does not have any disclaimer on it that its tweets are archived.\textsuperscript{35}

Whether or not replies by individuals to the President’s tweets deserve First Amendment protection has not been addressed by the Supreme Court.\textsuperscript{36} This Comment will discuss the public forum doctrines, the government speech doctrine, and the proposed mixed speech analysis by law review articles and a few courts;\textsuperscript{37} it will apply the framework of each doctrine to the President’s Twitter account to determine if the @realDonaldTrump account qualifies as a public forum or government speech and if the responses to his tweets from @realDonaldTrump deserve First Amendment protection.\textsuperscript{38} Additionally, this Comment will propose the best analysis for the courts to use and classify the President’s Twitter account.\textsuperscript{39} Further, this Comment will discuss the PRA and its amendment in 2014, to determine if the President’s tweets from @realDonaldTrump are

\begin{thebibliography}{99}
\bibitem{29} Johnson, supra note 17.
\bibitem{30} See Andrews, supra note 1.
\bibitem{31} See Johnson, supra note 17.
\bibitem{32} Andrews, supra note 1; Ana Campoy, \textit{A US Federal Court Just Used Donald Trump’s Own Tweets to Block His Travel Ban}, \textit{QUARTZ: OFFICIAL STATEMENTS} (June 12, 2017), http://www.qz.com/1004043/the-us-9th-circuit-court-just-used-donald-trump-s-own-tweets-to-block-his-travel-ban/.
\bibitem{33} Campoy, supra note 32.
\bibitem{34} See Johnson, supra note 17; @POTUS, supra note 26.
\bibitem{35} See @realDonaldTrump, supra note 25.
\bibitem{37} See discussion \textit{infra} Part II.
\bibitem{38} See discussion \textit{infra} Part III.
\bibitem{39} See discussion \textit{infra} Part IV.
\end{thebibliography}
presidential records that must be archived, and if the President is violating the Act.\textsuperscript{40}

II. THE DOCTRINES

A. Public Forum

In 1972, the Supreme Court recognized a public forum as a legal category, even though the right to speak on public property was recognized long before.\textsuperscript{41} That decision laid out a complex maze of categories that the Supreme Court has used to determine whether the “government[’s] restriction on expressive use of a government place” requires it to adhere to strict scrutiny or a lesser scrutiny.\textsuperscript{42} Perry Education Ass’n v. Perry Local Educators’ Ass’n\textsuperscript{43} set a standardized test which considers intent and historical use.\textsuperscript{44} In regards to intent, the Court requires a showing that the government “take affirmative steps to open a forum for private speech.”\textsuperscript{45} In addition, courts will often view government intent narrowly, giving the government permission to define specific boundaries or limitations for acceptable expression.\textsuperscript{46} Which constitutional category the type of speech fits in often becomes “the crucial question . . . in deciding . . . speech cases.”\textsuperscript{47}

In defining the forum, courts will identify the government property in question and focus on “the access sought by the speaker.”\textsuperscript{48} A forum will encompass an entire property if a speaker simply seeks general access to the whole property.\textsuperscript{49} But a more tailored approach is used to determine the boundaries of a forum when a speaker seeks limited access.\textsuperscript{50} “[P]ublic comments—private speech—on blogs on agency websites, classified as social media for their interactive quality, have the strongest argument for

\textsuperscript{40} See discussion \textit{infra} Part V.
\textsuperscript{42} \textit{Id.} at 1980.
\textsuperscript{43} 460 U.S. 37 (1983).
\textsuperscript{44} Ardito, \textit{supra} note 36, at 359.
\textsuperscript{45} \textit{Id.} (quoting Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983)).
\textsuperscript{46} \textit{Id.}
\textsuperscript{49} \textit{Id.}; Air Line Pilots Ass’n v. Dep’t of Aviation, 45 F.3d 1144, 1151 (7th Cir. 1995). “A potential speaker’s rights depend . . . upon the type of government property that the speaker seeks to access.” \textit{Id.}
\textsuperscript{50} Cornelius, 473 U.S. at 801.
applying the public forum doctrine.”

“In a public forum, by definition, all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject.”

B. Traditional Public Forum

The first category is the traditional public forum. It is a piece of physical property owned or controlled by the government “which, by long tradition or by government fiat, [has] been devoted to assembly and debate.”

In Perry, the Supreme Court held that streets and parks “have immemorially been held in trust for the use of the public and, . . . used for [the] purposes of assembly, communicating thoughts between citizens, and discussing public questions.” Where these quintessential public fora are found, “the government may not [restrict] all communicative activity.”

“For the [government] to enforce a content-based exclusion, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end,” otherwise known as strict scrutiny. This standard also applies to restrictions of time, place, and manner. Further, regulations must be content-neutral and narrowly tailored.

Traditional public fora are “defined by the objective characteristics of the property,” making it “the easiest [of the] public forum categories to [identify and] apply, but only because the Supreme Court has [narrowly] defined” the parameters with no room for the forum to expand to newer areas similar to those created in cyberspace. These quintessential fora only

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51. Ardito, supra note 36, at 360.
52. Perry Educ. Ass'n, 460 U.S. at 55.
53. Id. at 45.
54. Id.
56. Id.
58. Id.
59. Id.
“arise ‘by long tradition or by government fiat.’”\textsuperscript{61} Since no forum in cyberspace can be attributed to being immemorially held in public trust, it cannot “possibly be a product of long tradition.”\textsuperscript{62} It has been clearly indicated by the Supreme Court that historical use of [the] government property in question determines the placement into the category.\textsuperscript{63} Which leads to the conclusion the category of the traditional public forum “is closed to new places.”\textsuperscript{64}

C. Designated Public Forum

Even if a forum is not historically used as the traditional public forum category requires, governments may create or designate government property or places as a public forum for expressive activity.\textsuperscript{65} “Determining whether government property has become a designated public forum requires [courts to examine] the government’s intent in establishing and maintaining the property.”\textsuperscript{66} “The Supreme Court has repeatedly held that the government must have an affirmative intent to create a public forum” for expressive private speech in order for the forum to qualify as one that is designated.\textsuperscript{67} Courts “will not find that a public forum has been created in the face of clear evidence of a contrary intent.”\textsuperscript{68} Further, courts will not find that the government created “a public forum by inaction or by permitting limited discourse, but only [if the government] intentionally open[s] a nontraditional forum for public discourse.”\textsuperscript{69} To determine the intent required for the creation of a designated forum, “courts must consider both explicit expressions about intent and ‘the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.’”\textsuperscript{70} Further, courts must also “examine[] the nature of the property and its compatibility with expressive activity.”\textsuperscript{71}

\begin{itemize}
\item \textsuperscript{61} Lidsky, supra note 41, at 1983 (quoting Perry Educ. Ass’n, 460 U.S. at 45).
\item \textsuperscript{62} Id. at 1982–83.
\item \textsuperscript{63} Id. at 1983; see also Ark. Educ. Television Comm’n, 523 U.S. at 678.
\item \textsuperscript{64} Lidsky, supra note 41, at 1983.
\item \textsuperscript{65} Perry Educ. Ass’n, 460 U.S. at 45.
\item \textsuperscript{66} Air Line Pilots Ass’n v. Dep’t of Aviation, 45 F.3d 1144, 1152 (7th Cir. 1995) (citing Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985)).
\item \textsuperscript{67} Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 76 (1st Cir. 2004).
\item \textsuperscript{68} Cornelius, 473 U.S. at 803.
\item \textsuperscript{69} Ridley, 390 F.3d at 76 (quoting Cornelius, 473 U.S. at 802).
\item \textsuperscript{70} Id. (quoting Cornelius, 473 U.S. at 802).
\item \textsuperscript{71} Id. (alteration in original) (citation omitted).
\end{itemize}
The same First Amendment protections that are afforded in a traditional public forum apply to a forum that is designated.\textsuperscript{72} For example, “[r]easonable time, place, and manner regulations are [allowed],” and in order to enforce a content-based regulation, the forum must adhere to the test of strict scrutiny.\textsuperscript{73} “Examples of designated public forums include municipal theaters and meeting rooms at state universities.”\textsuperscript{74} The difference between traditional fora and designated fora appear “in the operation of the forum itself” because when it comes to a designated forum, the government “is not required to indefinitely” keep the forum open, but if it chooses to keep the “open character of the facility,” then the government must adhere to the same constitutional “standards [that] apply in a traditional public forum.”\textsuperscript{75} In other words, the government faces strict scrutiny when it attempts to “make content-based restriction on speech” as long as the designated forum remains open, but the government “may completely close the forum [or limit the forum to speakers and topics] if it wishes.”\textsuperscript{76} The government may open a designated public forum to the public as a whole, in which it operates the very same way a traditional public forum does, or it may choose to establish a designated but limited public forum.\textsuperscript{77}

D. Limited Public Forum

The Court in Perry laid out the standards for a limited forum in an ambiguous footnote, which states that the government may designate or create a forum “for a limited purpose such as [for] use by certain groups, . . . or for the discussion of certain subjects.”\textsuperscript{78} In a limited public forum, the government may implement some content-based restrictions to define or

\textsuperscript{72} Alysha L. Bohanon, Note, Tweeting the Police: Balancing Free Speech and Decency on Government-Sponsored Social Media Pages, 101 MINN. L. REV. 341, 348–49 (2016); see also U.S. CONST. amend I.

\textsuperscript{73} Bohanon, supra note 72, at 348–49 (quoting Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 (1983)).

\textsuperscript{74} Id. at 348; see also Widmar v. Vincent, 454 U.S. 263, 267–69 (1981) (finding no doubt that the public university facility qualified as a public forum); Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975) (finding a municipal auditorium and a city leased theater were “designed for and dedicated to expressive activities” qualified as public forum).

\textsuperscript{75} Bohanon, supra note 72, at 349 (quoting Perry Educ. Ass’n, 460 U.S. at 46).

\textsuperscript{76} Id.; see also Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 801 (1985). The government is free to change the nature of any nontraditional forum as it wishes. Cornelius, 473 U.S. at 801–02.

\textsuperscript{77} Perry Educ. Ass’n, 460 U.S. at 45–46; Bohanon, supra note 72, at 349.

\textsuperscript{78} Lidsky, supra note 41, at 1984 (quoting Perry Educ. Ass’n, 460 U.S. at 46 n.7).
limit the boundaries of topics “to be discussed in the forum and . . . preserve those limits once [founded].” A few examples of limited public fora are when “a university . . . limit[s] a public forum it establish[ed] for use by student groups . . . [or when] a school district . . . limit[s] a public forum to the discussion of a particular topic.” However, strict scrutiny will still apply to any restrictions based on a speaker’s opinions or viewpoint. Government restrictions on speech in these limited fora “must be viewpoint neutral and reasonable in light of the purpose served by the forum.” The Supreme Court set forth the constitutional standards that govern establishing content limitations for the limited public forum in Christian Legal Society Chapter of the University of California v. Martinez. The limited forum at issue “was a student organization program established by Hastings College of the Law,” and the limitation the college of law set was “to include only student organizations that complied with [the] nondiscrimination policy.” The law school interpreted the policy as requiring student organizations to “allow any [Hastings] student to participate, become a member, or seek leadership positions in the organization[s], regardless of” their views. The Christian Legal Society decided not to adopt the all-comers policy, and instead decided to create an access barrier, where memberships would only be given “to students who agreed that they believed in Jesus Christ and would eschew homosexual conduct” and premarital sex. Hastings decided to deny the Christian Legal Society’s “funding and other privileges normally accorded to registered student organizations” because of the society’s barring of students based on religion and sexual orientation, which then caused the legal society to sue, “claiming violation of its rights to freedom of association and expression.”

On appeal, the Supreme Court treated the “all-comers policy as a [limitation] on forum parameters.” The Court stated that the constitutional standards

79. Id.
80. Id. at 1984–85 (footnote omitted) (quoting Perry Educ. Ass’n, 460 U.S. at 46 n.7).
81. Ardito, supra note 36, at 366.
82. Id. (quoting Good News Club v. Milford Cent. Sch., 533 U.S. 98, 99 (2001)).
83. 561 U.S. 661, 663 (2010); Lidsky, supra note 41, at 1985.
84. Lidsky, supra note 41, at 1985.
85. Christian Legal Soc’y Chapter of the Univ. of Cal., 561 U.S. at 671.
86. Id. at 672; Lidsky, supra note 41, at 1985 (emphasis added).
87. Christian Legal Soc’y Chapter of the Univ. of Cal., 561 U.S. at 672–74; see also Lidsky, supra note 41, at 1985 (quoting Christian Legal Soc’y Chapter of the Univ. of Cal., 561 U.S. at 673–74).
88. Lidsky, supra note 41, at 1985–86; accord Christian Legal Soc’y Chapter of the Univ. of Cal., 561 U.S. at 678.
standard for access barriers to limited fora “must be reasonable and viewpoint neutral.” The Court found the all-comers policy to be constitutional. When the government applies the criteria of the forum and excludes a speaker on the basis of his speech, “the exclusion need only be ‘reasonable in light of the purposes served by the forum’ and viewpoint neutral.” However, if the government “opens a public forum but excludes a speaker whose speech [clearly] falls within the subject matter [restriction] of the forum, the exclusion is subject to strict scrutiny” as with traditional public forums and designated forums.

E. Nonpublic Forum

The Court has described the last category—the nonpublic forum—“as property owned or controlled by the government, ‘which is not by tradition or designation a forum for public communication.’” The nonpublic forum is the default category for everything owned by the government that is not identified in the other categories. The government’s ability to control speech in nonpublic forums is broad. States may implement time, place, and manner restrictions as well as “exclude a speaker from a forum, even if [the speaker’s] purpose is communicative, as long as [the] exclusion is ‘reasonable and not an [attempt] to suppress expression merely because public officials oppose the speaker’s view[s].’” The Court stated that the government’s power over nonpublic fora was similar to those of private property owners—it has the “power to preserve the property under its control for [its] lawfully dedicated [use].” However, in practice there is very little difference between limited fora and nonpublic fora—commentators suggest the difference is just semantic[s]. Both categories require viewpoint neutrality, and state imposed exclusions are judged according to a reasonableness standard. Examples of nonpublic fora

89. Christian Legal Soc’y Chapter of the Univ. of Cal., 561 U.S. at 679.
90. See id. at 690.
91. Lidsky, supra note 41, at 1989 (quoting Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).
93. Id. at 1989 (quoting Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 (1983)).
94. Id. (emphasis added).
95. Id.
99. Id. at 1991.
include “the sidewalk in front of a post office, . . . airport terminal[s], charity campaigns in federal government offices, and residential mailboxes.”

Perhaps the key difference between a public forum and a nonpublic forum is that “when [the former] is found, a citizen is entitled to access as a matter of constitutional law.”

F. Government Speech

Another category where the President’s Twitter account could fall under is the government speech doctrine. The bedrock of the government speech doctrine is that the “government[] must speak in order to govern.” While the government has permission to use social media to communicate its views or opinions to citizens, when it decides to do so it does not need to include opposing views. First Amendment protections that are afforded by the public fora doctrines do not apply to expression that is labeled as government speech. Pleasant Grove City v. Summum provides a clear example of government speech for purposes of examining the President’s Twitter account. In Summum, a Utah municipality—a government entity—accepted placing a Ten Commandments monument in a public park, but refused to erect a monument containing the Seven Aphorisms of the Summum religion in a public park. The Supreme Court of the United States concluded that “[p]ermanent monuments displayed on public property typically represent government speech,” even though “the Summum religious organization [was claiming] that the park was a public forum.” The Court stated that because a municipality is “[a] government entity, [it] has the right to speak for itself, . . . to say what it wishes, and to select the views it wants to express.” The proposition that is derived from Summum is that when the government decides to convey a message to its citizens, it does not “need [to] consider [opposing] views or accommodate other

100. Ardito, supra note 36, at 339.
101. Id.
103. Id. (citation omitted).
104. Id.
105. Id. at 1992–93.
107. See id. at 466; Lidsky, supra note 41, at 1993.
108. Summum, 555 U.S. at 466; Lidsky, supra note 41, at 1993.
109. Lidsky, supra note 41, at 1993 (alteration in original) (quoting Summum, 555 U.S. at 470).
110. Id. (alteration in original) (citation omitted) (quoting Summum, 555 U.S. at 467–68).
speakers.”

The Court insists that any constraint on government speech comes from the political process. The Court assumes that the marketplace of ideas will cause competing viewpoints to emerge, allowing voters to choose which government speech they agree or disagree with. Thus, the Court grants “government actors a powerful tool for excluding [viewpoints and] speakers from its property—physical or otherwise.”

G. Mixed Speech

The President’s Twitter account, as well as government-sponsored Facebook pages, are situations where it is difficult to determine if the President or the “government entity is speaking on its own behalf or is providing a forum for private speech.” Under the current standards, the first step is to classify the speech as public, private, or government. If private, the “courts apply the public forum” analysis; if government, the “courts apply the government speech doctrine.” Commentators have criticized this approach because there has been no standardization for speech that contains both private and government speech. These critics claim that the public forum analysis “consists of four categories . . . with ill-defined boundaries.” While traditional fora have been defined and set “to parks, roads, and sidewalks,” the other categories remain undefined. In regards to limited forums, “it is unclear what amounts of access—or content—limitations are [required] to change the forum from a designated” forum to one that qualifies as a limited forum. Further, while examining government intent is the distinguishing factor between public and nonpublic forums, this inquiry into intent has not been standardized. The Supreme Court of the United States has stated that when examining government intent, what must be examined is “the policy and practice of the government regarding the forum, the nature and characteristics of the forum, and the

111. Id. at 1994.
112. Id.
113. Id.
115. Ardito, supra note 36, at 344.
116. Id.
117. Id.
119. Id.
120. Id. (footnote omitted).
121. Id.
122. Id.
compatibility of the forum with expressive activity, but [the Court] has not provided a uniform test.”

In addition, the public forum doctrine and government speech coexist rather uncomfortably together. Summum illustrates a dangerous path because the Court relied on the government speech doctrine “to label speech that contain[ed]... both private and governmental expression as government speech.” This resulted in the Court expanding the government speech doctrine without stating why the public forum analysis did not apply to the expression in question, which contained a mixture of government and private speech.

The Fourth and the Ninth Circuit courts have provided a four-factor test in recent cases to address whether speech qualifies as government or private, which resulted in scholars taking and proposing a three-question test to help examine and place speech into a proper category. Before applying the factors, the first step in the approach is to determine whether the speech in question or “the forum...is characterized as governmental, private, or mixed speech.” If the speech or forum in question falls solely into one of those categories, then the developed tests are to be used. This analysis understands that—more often than not—speech in social media will contain both government and private speech.

Thus, to determine whether the government’s social media site is characteristic of governmental, private, or mixed speech, courts should weigh the following factors: (1) the central purpose of the social media site; (2) the government’s degree of control over its social media presence; and (3) the identity of the person to whom a reasonable or average social media user would attribute the speech involved.

123. Rinehart, supra note 118, at 813 (footnotes omitted).
124. Id. at 814.
125. Id.; see also Pleasant Grove City v. Summum, 555 U.S. 460, 464 (2009).
126. Rinehart, supra note 118, at 814.
127. See id. at 823–24, 834–35.
128. Id. at 834.
129. Id. at 834–35.
130. Id. at 835.
131. Rinehart, supra note 118, at 835.
III. APPLICATION OF THE PUBLIC FORUM DOCTRINES, GOVERNMENT SPEECH DOCTRINE, AND MIXED SPEECH ANALYSIS TO @REALDONALDTRUMP

A. Threshold Issues

Before applying the speech doctrines discussed above to @realDonaldTrump, it is necessary to discuss three important issues. A majority of the Supreme Court of the United States cases have “involve[d] either physical places or resources owned or . . . controlled by the government.” Despite the fact that a Twitter account page is *metaphysical*, the government *does not own* Twitter, and the fact that some consider @realDonaldTrump a personal account does not prevent @realDonaldTrump from qualifying as a public forum.

1. Metaphysical

First, the mere fact that @realDonaldTrump is not a physical location with “spatial nor geographical existence [does] not [prevent] it from becoming a public forum” because precedent set by the Supreme Court clearly indicates that public forum doctrines may be applied to locations that are *metaphysical*. For example, the Supreme Court has applied public forum doctrines to cases that involved “pools of funds to subsidize speech or access to email lists on campus servers,” or a school’s internal mailing system. “It is hardly a stretch” that the @realDonaldTrump—which is itself an interactive social media site—qualifies as a public forum when it clearly provides a meeting place for *discussion and debate*. In addition, the Supreme Court has explained that the internet “include[s] vast democratic fora” and has [likened] the use of internet distribution mechanisms to pamphleteering . . . . From a functional standpoint, there [is no] reason [not] to treat” Twitter account pages the same as *meeting rooms* or a *digital town hall*.

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134. Id. at 1994–95; Andrews, supra note 1.
136. Id.; see also Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 (1983).
137. See Lidsky, supra note 41, at 1995; Ardito, supra note 36, at 360.
139. Savage, supra note 16.
2. The Government Does Not Own Twitter

Second, government control is not a necessity for a forum to be qualified with public forum status. A Twitter account page is “neither owned nor exclusively controlled by the government actor who establishes it.” President Trump “does not own . . . the underlying software” to Twitter, nor was Twitter created by the government; most likely, President Trump “receives a license from [Twitter] to use its proprietary software” by accepting the terms and conditions. In fact, these terms and conditions that the President must accept to use Twitter limit his editorial control of his account. Even so, the fact that the President lacks ownership or . . . control over @realDonaldTrump does “not preclude a finding of public forum status.”

Because, if “the government can rent a building, [auditorium, or theater] to use as a forum for public debate and discussion, so, too, can [the President of the United States] rent a [Twitter account] for the promotion of public discussion.”

3. @realDonaldTrump Is Not a Personal Account

Third, the final issue left to address is that the President has two accounts that he chooses to tweet from. @POTUS is “the official Twitter account of the [President of the United States],” which was used during the Obama administration. @realDonaldTrump is his personal Twitter account, which he has “used well before the [2016] election,” and which is more followed and closely watched, evidenced by the fact that it has . . . million[s] more followers than @POTUS. Further, @realDonaldTrump is not a private account; it is open to whoever has a Twitter account to follow him, without needing to be approved, to anyone with internet access.
Also, Spicer’s statement that the tweets from the @realDonaldTrump account are “official statements [of] the [P]resident” seems to negate the fact that the account is a personal one for the man, Donald Trump, but also one that belongs to the forty-fifth President of the United States. 150 Additionally, the President’s bio account line on @realDonaldTrump identifies himself in identically the same way @POTUS does. 151 Even his social media director promotes that the President communicates to the public via @realDonaldTrump. 152 Further, judges have used and cited to @realDonaldTrump as evidence in decisions because of the opinions he states on policy. 153 In addition, @POTUS is now mainly used by the President to simply retweet tweets from @realDonaldTrump, 154 which further supports the argument that, “for all intents and purposes, @realDonaldTrump is the account of the President, like @POTUS, because it is a means for the President to communicate and convey messages to citizens, just as the White House’s Facebook page uses its site to convey messages to citizens. 155 Many commentators have taken to state that this account is a personal one for the man Donald J. Trump and not the President’s, but this argument is flawed and does not take into account how the President uses his account. 156 Many times the President tweets “major official announcements—sometimes for the first time or only time—on the account. 157 A few examples are first, when the President told the public that the courts could call the ban whatever they want but it is flat out a travel


150. See Andrews, supra note 1.

151. Abdo, supra note 149; compare @POTUS, supra note 26 (“[forty-fifth] President of the United States of America”), with @realDonaldTrump, supra note 25 (“[forty-fifth] President of the United States of America”).


153. Campoy, supra note 32. President Trump recently posted his opinion on transgender individuals serving in the military on @realDonaldTrump declaring that “[t]ransgender individuals would not be allowed to participate in the U.S. military in any capacity. Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2017, 6:04 AM), http://www.twitter.com/realDonaldTrump/status/890196164313833472.

154. Johnson, supra note 17; see also @POTUS, supra note 26.

155. Andrews, supra note 1; Lidsky, supra note 41, at 1996; @Scavino45, supra note 152.

156. Andrews, supra note 1; Abdo, supra note 149. This kind of “formalistic approach . . . makes little sense.” Abdo, supra note 149. The test should be functional, which examines how the President uses his account asking if it would be “better understood as personal or as official.” Id. Additionally, “a federal district court allowed a public-forum claim to proceed after noting that a county board member had used her private Facebook page in a manner seemingly official in nature.” Id.

157. Id.
ban—does not need a politically correct term. The second, was when the President decided to “issue statements about upcoming policy changes,”—such as when he tweeted he would announce his decision on the Paris Accord—then the notice to the citizens of the announcement came from @realDonaldTrump. The third was when the President announced that he was going to nominate Christopher Wray as the FBI director, which he announced on @realDonaldTrump “before he . . . announced it through any other channel.” Furthermore, @POTUS never shared the information about the FBI director hiring. The President also announces on @realDonaldTrump when he is meeting or speaking with leaders of other countries. A quick glance at the account’s page clearly shows that the majority of the posts are either upcoming changes, success about his decisions while in office, his views on media, and upcoming meetings or dealings that the President of the United States is doing—not what Donald Trump, the man, is doing. It is hardly a stretch that @realDonaldTrump is the voice of the President of the United States; and the account is for the President to have another platform, which he uses more frequently than any other platform available to him to address the American citizens and the public at large.

B. Application of the Doctrines

1. Traditional Public Forum

The traditional public forum doctrine is perhaps the easiest to apply to the President’s Twitter account because the forum historically has been applied to fora that arise from “long tradition or . . . government fiat,” neither which apply to the President’s Twitter account. @realDonaldTrump cannot possibly be a product that arises from long tradition, however, some commentators have raised the point that

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158. Campoy, supra note 32.
159. Andrews, supra note 1; @realDonaldTrump, supra note 25.
161. Abdo, supra note 149; @POTUS, supra note 26.
163. Andrews, supra note 1; see also Abdo, supra note 149; @realDonaldTrump, supra note 25.
164. Abdo, supra note 149.
165. Lidsky, supra note 41, at 1982–83 (quoting Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983)).
166. See id. at 1983.
government fiat could turn a Twitter page into a traditional public forum. If government fiat could turn the President’s Twitter account into a traditional public forum, it likely applies to the @POTUS account since it has been passed between administrations to the sitting President and not @realDonaldTrump because the account was his since before the election. Therefore, it is likely that the narrow boundaries the Supreme Court has placed on this category of public fora will continue to solely apply to physical areas that have been historically treated as loci of public discourse and will not translate to the online realm. Essentially, the forum is closed to new places or spaces including the internet unless a future Supreme Court case indicates otherwise.

2. Designated and Limited Forum Analysis

a. Designated Public Forum

@realDonaldTrump qualifying as a designated public forum is what has garnered the most support. Knight certainly believes so. The argument for the designated public forum begins that @realDonaldTrump is open to the general public. Anyone that has access to the internet can find @realDonaldTrump and view his tweets but cannot respond to them unless they set up an account. In order for @realDonaldTrump to qualify as a designated public forum, the first step is to examine the intent of the forum. Inaction by the government is not enough to find intent; an affirmative intent to create the forum must “intentionally open[] a nontraditional forum for public discourse.” Not just any intent will do; an affirmative intent to create the forum must be found and that can be found by examining the three factors

167. See id.
169. Rinehart, supra note 118, at 794–95 (citing Perry Educ. Ass’n, 460 U.S. at 44). But perhaps someday in the far future where the internet has been a common commodity to all the generations present, certain areas of the internet may be recognized as having long traditions of public discourse. See Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997).
170. Lidsky, supra note 41, at 1983.
171. See Andrews, supra note 1.
172. Letter from Jameel Jaffer et al. to President Donald Trump, supra note 13, at 1.
173. Bohanon, supra note 72, at 348; see also @realDonaldTrump, supra note 25.
174. Twitter Privacy Policy, supra note 143; @realDonaldTrump, supra note 25; Abdo, supra note 149.
176. Id.
that are laid out in *Ridley v. Massachusetts Bay Transport Authority*:177 The “explicit expressions about intent, . . . ‘the policy and practice of the government,’” and “the nature of the property [in question] and its compatibility with expressive activity.”178

The government did not open @realDonaldTrump; however, the government did open @POTUS and @Whitehouse, all in an attempt to create an openness between government and the public.179 But, the explicit expression of the government is that the President’s tweets from @realDonaldTrump are “official statements [of] the [P]resident.”180 Further, the White House’s official Twitter page states that the latest news about the President and his administration can be found at @realDonaldTrump.181 This statement, in addition to the President’s own statement that he would continue to use @realDonaldTrump to inform the public at large about his policy, are explicit expressions about the policy and the intent of the government to open @realDonaldTrump as a forum for public discourse.182 If the government had never made any explicit expression that tweets from the account are official statements of the President, it could be that it was simply the government’s inaction that created a forum and that it would not qualify as a designated forum.183

When examining Twitter’s compatibility with expressive activity, Twitter’s own mission statement is to “give everyone the power to create and share ideas and information instantly, without barriers.”184 Twitter is considered “as dynamic and multidirectional because . . . [it allows] users the ability to reach multitudes of other users in real time, and allows those users to respond, comment, co-opt, and otherwise interact with the speech produced through [Twitter].”185 Twitter provides each user with a profile that “displays the user’s tweets and other activity . . . in real-time.”186 Twitter posts tweets in real-time, “result[ing] in Twitter breaking news stories before [any other] media outlets” are able.187 Further, Twitter allows

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177. 390 F.3d 65 (1st Cir. 2004).
178. Id. at 76 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985)).
179. See Ardito, supra note 36, at 308–10.
182. Johnson, supra note 17; see also @WhiteHouse, supra note 181.
183. See Ridley, 390 F.3d at 76; Andrews, supra note 1.
185. Rinehart, supra note 118, at 789.
186. Id. at 788.
187. Id.
large public figures to spread messages *unmediated* to users.\(^{188}\) Twitter grants users the ability to be able to select their followers—all through an option on the users’ accounts that sets the users’ accounts to private—letting only who the users wish view their tweets.\(^{189}\) With respect to a designated forum and its expressive activity, Twitter is at the very core of today’s expressive activity, allowing the public at large to view expressive speech *in real time* and giving users the ability to respond to the tweets.\(^{190}\) Therefore, a court could easily find that @realDonaldTrump is a designated public forum because of the explicit expressions of policy by the former Press Secretary, the White House’s Twitter page, the President’s own statements, and the expressive nature of Twitter.\(^{191}\)

b. **Limited Public Forum**

“[While] a designated open forum . . . would best protect private speech interests, there are [a few] uncertainties with this classification.”\(^{192}\) Even if the court is strictly relying on the public forum doctrine, the factors that have been identified in *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*\(^{193}\) and later stated in *Ridley*, could lead a court to determine that @realDonaldTrump “fall[s] into a category with less protection for private speech [interests]—[that being] the limited public forum.”\(^{194}\) The creation of a limited public forum is virtually the same as the creation of a designated open forum.\(^{195}\) It requires the court to examine the President’s intent—rather than historical use—“to open such a forum to expressive activity.”\(^{196}\) If the President opens a forum, but then decides to limit the forum to a certain topic or to certain speakers, then the President creates a limited forum.\(^{197}\) The limitation to certain speakers or certain topics, at the moment of creation, is perhaps the most significant difference between the creation of a designated and limited forum.\(^{198}\) However, the

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188. Id.
189. Id. at 788–89.
190. See Rinehart, supra note 118, at 788–89.
191. See id.
192. Bohanon, supra note 72, at 364; see also Ardito, supra note 36, at 337–38 n.158 (explaining that the Supreme Court has never found a designated forum but lower courts have).
195. Rinehart, supra note 118, at 798.
196. Id. [I]ntent . . . carries the day. Ardito, supra note 36, at 364.
197. Rinehart, supra note 118, at 798.
198. See Ardito, supra note 36, at 364.
limitations must be reasonable—which is a lesser standard—but viewpoint-based exclusions remain subject to strict scrutiny as in any public fora.\textsuperscript{199} Further, strict scrutiny would also apply if the President chooses to "exclude[] a speaker who falls within the class of speakers to whom the forum [has been] available or whose speech concerns a subject . . . [to] which the forum is dedicated."\textsuperscript{200}

It would be reasonable to conclude that @realDonaldTrump—or any government run Twitter account—is a limited public forum.\textsuperscript{201} While virtually any person can access Twitter to view public Twitter profile’s tweets, a person must be registered to Twitter to respond to a tweet, retweet, or otherwise interact with a tweet.\textsuperscript{202} This could evidence the President’s intent to open the forum and constrain the forum to a limited group of speakers, the limited group of speakers who are registered Twitter users, or it could be the President’s intent to constrain the topics to those he raises only on @realDonaldTrump.\textsuperscript{203}

3. Nonpublic Forum

As the analysis of the public forum begins to stray further from the traditional public forum, the boundaries of each begin to blur similar to how a court could find either a designated or limited public forum; so, too, can a court find a limited public forum—but at the same time—a nonpublic forum.\textsuperscript{204} Commentators go as far as to state that the boundary is non-existent and maddeningly slippery.\textsuperscript{205}

The analysis for a nonpublic forum begins with identifying the forum, because the particular channel of communication constitutes the forum.\textsuperscript{206} The forum in question is not access to Twitter in general, but the access sought is to @realDonaldTrump.\textsuperscript{207} The courts will not find that a public forum lacks a clear and evidentiary intent to create one.\textsuperscript{208} As in the designated and limited, the court will examine the policy and practice of the government to ascertain intent, as well as the compatibility of the property

\begin{itemize}
\item \textsuperscript{199} Rinehart, \textit{supra} note 118, at 798.
\item \textsuperscript{200} \textit{Id.} at 798–99.
\item \textsuperscript{201} Ardito, \textit{supra} note 36, at 364; see also @realDonaldTrump, \textit{supra} note 25.
\item \textsuperscript{202} See Rinehart, \textit{supra} note 118, at 788–89; Andrews, \textit{supra} note 1.
\item \textsuperscript{203} See Ardito, \textit{supra} note 36, at 364.
\item \textsuperscript{204} See Lidsky, \textit{supra} note 41, at 1990.
\item \textsuperscript{205} \textit{Id.}
\item \textsuperscript{207} See \textit{id.} at 800–01.
\item \textsuperscript{208} \textit{Id.} at 803.
\end{itemize}
with expressive activity. A court would be hard-pressed to find that @realDonaldTrump is a nonpublic forum because of the statements by the former Press Secretary, along with the President’s own statements, and Twitter’s expressive nature as a foundation of the social media site.

4. Government Speech Doctrine

As stated above, when the government speaks in order to govern on social media, it need not consider opposing viewpoints. Further, the government “speaks through agents whom they hire, pay, select, [elect,] facilitate, or subsidize.” When the government speaks, First Amendment limits imposed do not apply to government speech labeled as expression. Information found on a government’s website is government expression labeled as government speech.

It is difficult to argue that, when the President tweets, there is no other form of expression that can be more labeled as government speech. The President, as an elected official, need not consider opposing views; he must speak to govern and the limits on his speech must come from the political process. When it comes to the President’s tweets, a court would be hard-pressed to label it as anything other than government speech because it is arguably more apparent than what qualified as government speech in Walker v. Texas Division, Sons of Confederate Veterans, Inc. However, “whether . . . the government is speaking is not [the] issue.” At first glance, the President’s Twitter account—where he tweets his opinions on policy—seems like a “textbook case [for] government speech, and the

209. Id. at 802.

210. See Andrews, supra note 1; Johnson, supra note 17; Company, supra note 184; supra Sections III.B.2.a., III.B.2.b. (furthering an in-depth analysis of the intent and compatibility of expressive nature analysis).


212. Id.

213. Id. at 1992–93.

214. Bohanon, supra note 72, at 367.

215. Id. at 368.

216. Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009); Lidsky, supra note 41, at 1994. Public officials’ advocacy involvement can be limited by “law, regulation, or practice [and . . . a government entity is ultimately ‘accountable to the electorate and the political process for its advocacy.’” Summum, 555 U.S. at 468 (quoting Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000)).

217. 135 S. Ct. 2239 (2015). The Supreme Court found that the license plates that were submitted by citizens qualified as government speech because it contained the government’s approval. Id. at 2252; see also Bohanon, supra note 72, at 367–68.

218. Bohanon, supra note 72, at 368.
[President] need not worry about violating private commenters’ free speech rights under the First Amendment.”

@realDonaldTrump differs from the cases that have found government speech in several important ways. First, in Walker and Summum, there was a “belief that the public [would] wrongly attribute messages from private parties to the government.” Rather, where the speech is clearly the President’s, especially on his own account page where his tweets are larger, more prominent, and fully displayed on his account page as his own, “risk of . . . mistaken attribution is not an issue.” Further, unlike the President, many other government official page owners attach disclaimers that “private comments [on their threads] do not reflect the government’s views.” Also, the President does not play a role in accepting or approving followers, considering that his profile is public and there is no barrier to being accepted as one of his followers, nor does the President block every person that criticizes him on his page. For the speech to be considered government speech, there would need to be some kind of affirmative action by the President towards private speech. Unlike Walker, where the court found that state approved and produced license plates qualified as government speech, the President passively allowing comments to remain in a tweet thread—which is debatably different—will likely not be labeled as government speech by a court.

5. Mixed Speech

While mixed speech has not been a recognized doctrine, the test is taken from the Fourth and Ninth Circuit Court decisions in recent cases. The issue rears its head when it comes to the President’s Twitter account because while the @realDonaldTrump’s tweets, retweets of his @POTUS account, and his responses—if he chooses to do so—qualify as government speech, the responses by citizens on his tweets in a thread or forum are

219. Id.; @realDonaldTrump, supra note 25.
220. Bohanon, supra note 72, at 368; @realDonaldTrump, supra note 25.
221. Bohanon, supra note 72, at 368.
222. Id.; @realDonaldTrump, supra note 25.
223. Bohanon, supra note 72, at 368.
224. See Abdo, supra note 149; @realDonaldTrump, supra note 25; Twitter Privacy Policy, supra note 143.
225. Bohanon, supra note 72, at 369.
227. See Rinehart, supra note 118, at 822, 834–35.
When viewing a tweet from President Trump’s Twitter account, his tweet looms over the top showing his government speech; while just under, it in smaller text, shows the number of responses from a multitude of users and their private speech. While the President’s tweet is regarded as government speech, the comment section that a tweet provides users can be viewed as creating a designated or limited forum. But the intent to create a forum as required by the Court must be demonstrably clear, creating “a presumption against a finding of public forum status.”

It would be difficult to argue that the President’s Twitter account did not consist of all government speech if there was a clear and concrete statement that he did not intend to create a public forum, and that he retained “the right to eliminate comments entirely or edit them;” but, as of yet, there is no such statement on @realDonaldTrump or on any of the White House administration’s Twitter accounts. Therefore, on its face, @realDonaldTrump contains elements of both government speech—President’s tweets—and private speech—citizen responses. However, to determine if the public forum doctrines or the government analysis should be applied to @realDonaldTrump—which consists of mixed speech—courts should apply the following test derived from the Fourth and Ninth Circuit, which require courts to determine: “(1) [T]he central purpose of [@realDonaldTrump]; (2) the [President’s] degree of control over [@realDonaldTrump]; and (3) the identity of the person to whom a reasonable [person] or average social media user would attribute the speech involved.”

a. Central Purpose of @realDonaldTrump

The first factor requires a view at @realDonaldTrump as a whole in order to determine if the purpose of the site was to promote “government speech, private speech, or both.” If the account severely limited . . . opportunities for anyone other than government employees to comment and only broadcasted the President’s messages, his account’s purpose would

228. See Lidsky, supra note 41, at 1997–98.
229. @realDonaldTrump, supra note 25.
231. Id. at 1998 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270 (1988)).
232. Id. But see, e.g., @POTUS, supra note 26; @realDonaldTrump, supra note 25; @WhiteHouse, supra note 181.
233. See Lidsky, supra note 41, at 1997–98.
234. Rinehart, supra note 118, at 835.
235. Id.
likely be considered to be the promotion of government speech. However, the President’s account does not severely limit opportunities at all; after all, 40.6 million followers can comment, and he retweets comedians or news networks’ tweets that tend to agree with him, showing that non-government employees can comment without limitation. On the other end of the spectrum, if the President’s account simply tried to elicit feedback from private citizens by asking for opinions and provided no messages of his own, it would likely be suggestive of private speech. Yet, the President’s account does not do this; he posts his opinions, and while he does not actively seek feedback from individuals, it is clearly an attempt to inform the public at large, to illicit responses, and to engage foreign leaders. The central purpose of @realDonaldTrump is to facilitate the interaction of government speech by the President and permit private speech, showing the speech involved is a mix of both private and government, similar to how a government official’s Facebook page that allows comments from other users.

b. President’s Degree of Control over @realDonaldTrump

The second factor addresses how the President maintains @realDonaldTrump. This requires an examination of the access controls the President has used to limit access to @realDonaldTrump and whether there is an existing policy stating that the President maintains the ability “to regulate, block, or remove certain forms of speech,” topics, or class of speakers. If the President established @realDonaldTrump with severe access controls, this would suggest the presence of government speech. If the President only publicized his tweets to followers that he had approved—requiring him to make use of Twitter’s private function—and maintained a strict policy of regulating the speech that occurred on @realDonaldTrump, such as, “blocking any [and every] . . . offensive, slanderous, or irrelevant comment[ator] from commenting thereafter,” it would make a strong argument for government speech. Anything less than this strict regulation would fall into either mixed or private speech categories with First
Amendment implications. The President’s blocking seems rather sporadic—he does not block every irrelevant, slanderous, or otherwise offensive commentator, and he does not provide any access controls for @realDonaldTrump—because it is open for any person with a Twitter account to follow and comment on his account. Further, his account is viewable by any person who may have access to the internet. This leads to the conclusion that the President “cannot constitutionally exclude a speaker who falls within the class of speakers to whom the forum is made available, without satisfying strict scrutiny”—the class of speakers being the 50.9 million followers on @realDonaldTrump and anyone who has a Twitter account. By opening @realDonaldTrump to private comments and responses, the President must accept that even if he limits the scope of the account to certain topics, he must surrender a significant amount of editorial control.

c. “The Identity of the Person to Whom a Reasonable Social Media User Would Attribute the Speech”

The third factor requires an examination of exactly “to whom a reasonable or average social media user would attribute the comment that the [President] regulated.” The content of the comment must fall into either of three categories: Government speech, private speech, or a mixture of the two. If a fellow Twitter user simply retweeted the President’s tweet without any additional commentary, this would likely be considered government speech. If the speech is a response to the President’s tweet, it would likely be considered private speech. It would be considered a combination of the two, if a fellow Twitter follower retweeted the President’s tweet and then decided to add commentary to it. In addition, the court should take into consideration contextual clues that would help define the origins of the speech. One example would be if the President tweeted an opinion on policy and one user retweeted it, adding his or her

245. Id.
246. See Rinehart, supra note 118, at 836; Feinberg, supra note 10.
247. See @realDonaldTrump, supra note 25.
248. See Rinehart, supra note 118, at 836; @realDonaldTrump, supra note 25.
As of April 18, 2018, there are 50.9 million followers of @realDonaldTrump.
249. Rinehart, supra note 118, at 836.
250. Id. at 836.
251. Id. at 837.
252. See id.
253. See id.
254. See Rinehart, supra note 118, at 837.
255. Id.
opinions criticizing the President’s policy—a reasonable social media user would not attribute this speech to the President, but to the private citizen.\textsuperscript{256}

d. \textit{Mixed Speech Conclusion}

The President has stated that he will continue to use the @realDonaldTrump to communicate with American citizens, showing the purpose of @realDonaldTrump is to establish communication with the citizens.\textsuperscript{257} He has maintained the forum since he took office with minimal access controls, and no stated policy of regulation.\textsuperscript{258} Further, any social media user could easily attribute the comments from Mrs. O’Reilly and Mr. Papp towards the individual speakers and not the President, because Mrs. O’Reilly’s comments were responses to President Trump’s tweets and not a retweet of a tweet from President Trump.\textsuperscript{259} Further, Mr. Papp’s tweet, that he tweeted himself to the President—containing nothing from the President’s Twitter account other than the fact that the tweet was directed towards him—cannot be considered anything other than private speech.\textsuperscript{260} Therefore, using the mixed speech analysis can help a court navigate the slippery road of the speech doctrines and apply the proper doctrine to @realDonaldTrump, the public forum doctrine.\textsuperscript{261}

IV. \textbf{HOW COURTS SHOULD FIND @REALDONALDTRUMP IS A DESIGNATED PUBLIC FORUM}

With the help of the mixed speech analysis, a court can properly find that the public forum doctrines apply and government speech does not.\textsuperscript{262} However, this does not end the analysis; the court will still need to decide which forum was created.\textsuperscript{263} The mixed speech analysis is still instructive, even at this point in the analysis.\textsuperscript{264} Since the President created

\textsuperscript{256} See id.
\textsuperscript{257} Johnson, supra note 17; see also Rinehart, supra note 118, at 837.
\textsuperscript{258} See Abdo, supra note 149; Rinehart, supra note 118, at 837; @realDonaldTrump, supra note 25.
\textsuperscript{260} See Rinehart, supra note 118, at 822, 836; Andrews, supra note 1; @joepabike, supra note 259.
\textsuperscript{261} See Lidsky, supra note 41, at 190; Rinehart, supra note 118, at 837, 839.
\textsuperscript{262} Rinehart, supra note 118, at 837–38.
\textsuperscript{263} Id. at 838.
\textsuperscript{264} See id. at 837, 839.
Tweets That Break the Law

2018

TWEETS THAT BREAK THE LAW

@realDonaldTrump and enacted zero access controls, the forum does not qualify as government speech, and the courts should presume that the President created a “designated public forum, open generally to all speakers and all topics.”

“The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”

By taking the steps to establish his Twitter presence on @realDonaldTrump as the President of the United States, by the White House claiming that his tweets from the account are official statements of the President, and by not limiting access to his account or constraining the topics of his account once he took office, a court can reasonably assume that the President “intentionally opened a nontraditional forum for public discourse.”

Additionally, considering the open nature of Twitter, it further supports the conclusion that the President created a designated public forum for general expressive activity when he established his presence as the President of the United States without having any notice that he retained the right to limit private speech.

Therefore, when the President attempts to regulate speech in the designated forum that he created, he is bound to the same constitutional standards that apply in a traditional forum. Any regulation by the President is to be assessed under strict scrutiny, where regulations must be “necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”

Any attempt by the President to limit speech for relevance would likely fail just as any restriction that is not reasonable and viewpoint-based.

Thus, the banning of Mrs. O’Reilly, Mr. Papp, Dr. Stephen King, Marina Sirtis, Aj Joshi, Bess Kalb, and many others, immediately after they announced views that are contrary to President Trump—by tweeting or responding to @realDonaldTrump’s tweets—are subject to strict scrutiny

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265. Id. at 839; Abdo, supra note 149; @realDonaldTrump, supra note 25.
267. Rinehart, supra note 118, at 839; Abdo, supra note 149; Andrews, supra note 1; @realDonaldTrump, supra note 25.
268. Rinehart, supra note 118, at 839–40; Twitter Privacy Policy, supra note 143; @realDonaldTrump, supra note 25.
269. Rinehart, supra note 118, at 840.
270. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 (1983); Rinehart, supra note 118, at 840.
271. Rinehart, supra note 118, at 840.
272. Id.
and are violations of the First Amendment in a designated public forum.273 Even if it is found that the President created a limited or a nonpublic forum, all the individuals that he banned were not a reasonable limitation—but was “an effort to suppress . . . the speakers’ view” simply because the President opposed the speaker’s view—which is evidenced by the fact that each individual was immediately banned after speaking out against President Trump or had a history of holding an opposing viewpoint to the President.274 The fact that the President has only banned those that spoke out against him, and not other speakers, destroys viewpoint neutrality’s bedrock principle.275 The users being blocked are a clear example of a viewpoint discrimination claim because President Trump prefers the messages of those that agree with him than those who do not.276 There is not a subject of speech more protected by the First Amendment than those that concern political issues.277 Therefore, by banning the individuals based on their viewpoints from

273. See id.; Feinberg, supra note 10. Marina Sirtis was blocked six minutes after tweeting at the President “[w]illing to let our boys die to save his sorry ass.” Feinberg, supra note 10. Aj Joshi was blocked for responding to a tweet by the President saying, “[m]aking America [g]reat [a]gain means destroying the world.” Id. Dr. Stephen King was blocked twenty-four hours after writing, “[i]f Ivanka Trump had grown up in farm country, like some of us, [she would] know her father is reaping . . . what he sowed.” Id. One user tweeted “Trump is the funniest example of why you should always be nice to the makeup lady,” which resulted in her being blocked the same day. Bess Kalb (@bessbell), TWITTER (May 28, 2017, 10:01 AM), http://www.twitter.com/bessbell/status/868874858414972928. Christine Teigen was blocked shortly after tweeting to the President “lol no one likes you.” Christine Teigen (@chrissyteigen), TWITTER (July 25, 2017, 6:01 AM), http://www.twitter.com/chrissyteigen/status/889832887041871873.

274. See Rinehart, supra note 118, at 840 (quoting Perry Educ. Ass’n, 460 U.S. at 46); Feinberg, supra note 10. Even in a limited and nonpublic forum the “regulations are still unconstitutional under the First Amendment if the distinctions drawn are viewpoint-based.” Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 82 (1st Cir. 2004).

275. Id. at 82; accord Feinberg, supra note 10. “The bedrock principle of viewpoint neutrality demands that the state not suppress speech where the real rationale for the restriction is disagreement with the underlying ideology or perspective that the speech expresses.” Ridley, 390 F.3d at 82.

276. See id. at 82; Feinberg, supra note 10. The essence of viewpoint discrimination is not that the government incidentally prevents certain viewpoints from being heard in the course of suppressing certain general topics of speech, rather, it is a governmental intent to intervene in a way that prefers one particular viewpoint in speech over other perspectives on the same topic.

Ridley, 390 F.3d at 82.

@realDonaldTrump, the President of the United States violated the First Amendment rights of many individuals. 278

V. THE PRESIDENT RECORDS ACT OF 1978

The PRA was created because Congress feared that President “Nixon would destroy . . . tapes—[evidence]—that [eventually] led to his resignation.” 279 The PRA sets strict standards that the Office of the President needs to adhere to for records created during the president’s term—establishing that the president’s records are property of the United States. 280 The term president’s records, applies to any “documentary material[, or any reasonably segregable portion thereof, [that are] created or received by the President . . . in the course of conducting activities which relate . . . or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.” 281 These documents can “include[] any documentary material[] [that] relat[es] to the political activities of the President . . . only if [the] activities relate” or directly affect the President carrying out his duties. 282 However, it does not include any personal records of the President, such as a personal diary. 283 Further, the PRA takes into account any electronic messaging account, which would include social media accounts such as Twitter and Facebook, because of the broad definition the act uses for non-official electronic messaging accounts. 284 The term electronic messages is defined as any “electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals.” 285 The definition of electronic messages came by an amendment included within the Presidential and Federal Records Act Amendments of 2014. 286 Although the Act does not

278. See Ridley, 390 F.3d at 82; Weber, supra note 277, at 96.
279. Johnson, supra note 17.
280. Id.
282. Id. at § 2201(2)(A).
283. Id. at § 2201(3)(A). Personal records consist of anything that is considered purely of private character that have no relation to carrying out the duties of the President, such as “diaries, journals, or other personal notes.” Id.
286. Id.
contain any language of social media, it caused past presidents to set up auto-archiving so that deleted tweets were also saved.\textsuperscript{287}

A. President Trump’s Violations of the PRA

For the purposes of the PRA, any tweet that President Trump creates needs to be archived.\textsuperscript{288} While the PRA does not list that Twitter is an account that needs to be archived, Twitter perfectly fits within the definition of a messaging account that the PRA lays out.\textsuperscript{289} When President Trump sends out a tweet, he sends out an electronic message[] from an electronic messaging account for the purpose of communication between himself and his followers.\textsuperscript{290} Additionally, the United States National Archivist spokesperson has stated that “tweets are considered presidential records.”\textsuperscript{291} Some commentators have argued that the President’s tweets should be considered personal records.\textsuperscript{292} This may come from reasoning that the @POTUS is the official Twitter account of the President, while @realDonaldTrump is not.\textsuperscript{293} Both the @POTUS account and the official Whitehouse account have clear statements that the tweets are archived.\textsuperscript{294} Showing that the administration does recognize that the tweets must be archived, however @realDonaldTrump’s are not, evidencing a slight intent that @realDonaldTrump is a personal account.\textsuperscript{295} But this argument is flawed for a number reasons.\textsuperscript{296} The President’s account is not private.\textsuperscript{297} Also, if the President decides to retweet a @realDonaldTrump tweet from the @POTUS account—which he does frequently—he is showing to the world that his tweets from @realDonaldTrump are from the President of the United States and not, the man, Donald Trump.\textsuperscript{298} Further, his tweets from @realDonaldTrump—labeled official statements—contain information that

\begin{itemize}
\item \textsuperscript{287} Johnson, supra note 17.
\item \textsuperscript{288} See id.
\item \textsuperscript{289} See Presidential and Federal Records Act Amendments of 2014 § 2209(c)(3); Ardito, supra note 36, at 310; Johnson, supra note 17.
\item \textsuperscript{290} See Presidential and Federal Records Act Amendments of 2014 § 2209(c)(2)–(3); Abdo, supra note 149.
\item \textsuperscript{291} Johnson, supra note 17.
\item \textsuperscript{292} Id.; see also Entralgo, supra note 284.
\item \textsuperscript{293} See Abdo, supra note 149; Johnson, supra note 17.
\item \textsuperscript{294} See @POTUS, supra note 26; @WhiteHouse, supra note 181.
\item \textsuperscript{295} See @realDonaldTrump, supra note 25. At least the administration has not come out and stated that tweets from @realDonaldTrump are archived. Johnson, supra note 17.
\item \textsuperscript{296} See Abdo, supra note 149; Andrews, supra note 1; Johnson, supra note 17.
\item \textsuperscript{297} See @realDonaldTrump, supra note 25.
\item \textsuperscript{298} Andrews, supra note 1; see also @POTUS, supra note 26.
\end{itemize}
relate to the President conducting official duties of the President.\textsuperscript{299} For example, the President has tweeted what is he going to get other countries to do for the United States.\textsuperscript{300} A few of the deleted tweets contain claims the President makes against other countries.\textsuperscript{301} If a tweet is going to be the spark for a lost ally, a provocation for an attack on the United States, or a showing of intent to create new policy, it cannot be more related to the President’s official activities and “American history deserves to have a record of it.”\textsuperscript{302}

These issues will come to the forefront as both Citizens for Responsibility and Ethics in Washington (“CREW”) and the National Security Archive filed suit claiming that White House staffers used encrypted messaging apps—such as Signal and Confide—for internal communication, which violates another provision of the PRA.\textsuperscript{303} The lawsuit draws attention to the President’s use of Twitter and alleges his deleted tweets violate the PRA.\textsuperscript{304} However, an issue arises when it comes to the possible consequences the President would face if violations of the PRA are found.\textsuperscript{305} A court can review whether a document or a piece of information “should be categorized as a presidential record or not.”\textsuperscript{306} But after the initial categorization, the President maintains “control over creation, management, and disposal decisions,” assuming permission by the archivist has been given without court review.\textsuperscript{307} With no veto power given to Congress or the archivist over the president’s record-keeping decision, the PRA creates “a system that cannot be checked.”\textsuperscript{308} There does not seem to be a federal law to prohibit the President from disposing his tweets without taking steps to properly archive them.\textsuperscript{309}

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\item \textsuperscript{299} Andrews, supra note 1; see also 44 U.S.C. § 2201(2)(A) (2012).
\item \textsuperscript{300} See Johnson, supra note 17.
\item \textsuperscript{301} See id. “Mexico will reimburse Americans for the Great Wall”—that was deleted after fifty-one seconds. \textit{Id.} “China had stolen a United States Navy research drone—deleted after one hour.” \textit{Id.} One tweet asked if North Korea’s supreme leader Kim Jong-un had “anything better to do with his life” after North Korea had launched another missile. Donald J. Trump (@realDonaldTrump), TWITTER (July 3, 2017, 7:19 PM), http://www.twitter.com/realDonaldTrump/status/882061157900718081.
\item \textsuperscript{302} Johnson, supra note 17.
\item \textsuperscript{303} Entralgo, supra note 284.
\item \textsuperscript{304} \textit{Id.}
\item \textsuperscript{305} Johnson, supra note 17.
\item \textsuperscript{306} \textit{Id.}
\item \textsuperscript{307} \textit{Id.}
\item \textsuperscript{308} \textit{Id.}
\item \textsuperscript{309} \textit{Id.}
\end{itemize}
VI. CONCLUSION

One possible counterargument to @realDonaldTrump qualifying as a designated forum that will occur is that if the corporate owner can remove abusive comments—Twitter—what is the difference if President Trump then does it himself? Is not relying on Twitter to regulate the President’s account simply outsourcing the same censorship? The crucial difference is that the President is bound by the First Amendment, not Twitter the private corporation. So while Twitter can block abusive comments, it must be reported to them by a third party, and reviewed to determine if it violates Twitter’s standard, which is “an arguably more objective process than [the President] removing speech [he] considers abusive from [his] own page, especially if that speech happens to be critical of [him].” @realDonaldTrump being labeled a designated forum is the best case scenario for American citizens because the category provides the same protection as does a traditional forum and continues to safeguard the heart of “what the First Amendment [was] designed to protect”—expression of social and political concern.

This Comment attempted to address what is an unprecedented occurrence in the United States, a President—a world leader, who consistently without filter—uses Twitter to communicate with his followers about his policy, his carrying out of official duties, and his opinions on other world leaders. But then, he decides to ban certain individuals based on their views about him and his administration. While the public forum doctrines and government speech are settled, there needs to be an addition for when it comes to social media accounts, such as the President’s Twitter account, which clearly includes both private speech and government speech. Therefore, this is why this Comment used mixed speech proposed by different courts and articles to properly place the speech into a category to use a proper doctrine, and come to the conclusion that the President did violate the First Amendment for banning users based on their different viewpoints. In addition, this Comment attempted to address the President Records Act and its application to the President’s Twitter account to show

310. Bohanon, supra note 72, at 378.
311. Id.
312. Id.
313. Id. at 379.
314. Id. at 364; Weber, supra note 277, at 96 (quoting Virginia v. Black, 538 U.S. 243, 365 (2003)).
315. See Abdo, supra note 149; Johnson, supra note 17.
317. See Bohanon, supra note 72, at 344–45; Johnson, supra note 17.
318. See discussion supra Sections III.B.5, IV.
that while the President’s deleted or altered tweets are violations, it does not seem like there is much that can be done about stopping them.\textsuperscript{319}

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\textsuperscript{319} Johnson, supra note 17; see also discussion supra Sections V, V.A.