NOVA LAW REVIEW
NOVA SOUTHEASTERN UNIVERSITY

THE FLORIDA BOOK

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PERETZ LAINE*

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I. INTRODUCTION

The Jewish law doctrine *dina d'malchuta dina*—the law of the kingdom is the law—provides that when there is an unavoidable conflict between Jewish law and the local government's law about a monetary matter, and the local government's law is designed to benefit the government or the public, one must follow the local government's law on the matter.[1]

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1. *See* Babylonian Talmud, Gitin 10b; Moshe Isserles, *Hagahot Harema*, *in* SHULCHAN ARUCH, CHOSHEN MISHPAT 259:7, 369:11 (Morasha Le'hanchil Friedman ed. 2003).

For example, with the laws on finds, if the local government requires the finder to return the find, and Jewish law would otherwise allow the finder to keep it, a Jew must follow the local government's law and return the find to its owner.[2] Similarly, if the local government's law requires that the finder hand the find to the police, he must do so, even when Jewish law would otherwise require the finder to personally care for the find and seek out its owner.[3] On the other hand, if maintaining strict Jewish law on finds does not conflict with the local government's law, the finder must adhere to Jewish law.[4] Thus, if the local government's law allows the finder to keep the find, but Jewish law requires that he return it, he must return the find to its owner.[5]

This Article will thoroughly examine the Jewish law on finds and compare it with both the common law and Florida's statutory law on finds. Following this introduction, Part II will provide an overview of the structure of Jewish law and describe how it grew and evolved over the many centuries.

Following this, Part III will examine the Jewish law on finds. First, it will discuss the finder's affirmative duty to retrieve lost property and seek out its owner, and will also address exceptions to this duty.[6] Second, it will differentiate between personal property ("property") that has a unique identifying mark and property that does not.[7] It will show that a finder generally cannot keep property that has a unique identifying mark, though he may sometimes keep property that does not.[8] Third, it will discuss the law on property that its owner seems to have intentionally laid down.[9] This discussion will include property that the owner seems to have hidden hoping to collect later;[10] property that the owner seemingly forgot about;[11] and property that the owner seems to have abandoned.[12] Finally, Part III will illustrate some of the finder's duties while in possession of the find.[13]

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2. Isserles, *supra* note 1, at 259:7; 2 YAAKOV YESHAYA BLAU, PITCHEI CHOSHEN: HILCHOT AVEDA U'METZIA 2:22, at 316 (n.s. 2017) (1983). *But see* ARYEH LEIB HAKOHEN HELLER, KETZOT HACHOSHEN: CHOSHEN MISHPAT 259:7 n.3 (Oraysoh 1998) (1796) (explaining that the primary reason for returning an object to its owner after the owner relinquished his rights is because of the doctrine of *lifnim mishurat hadin*—going beyond the letter of the law—and the doctrine of *dina d'malchuta dina* is merely tangential support).

3. *See* Isserles, *supra* note 1, at 259:7.

4. *See id.*

5. *See id.*

6. *See* discussion *infra* Part III.

7. *See* discussion *infra* Section III.A–B.

8. *See* discussion *infra* Section III.A–B.

9. *See* discussion *infra* Section III.C.

10. *See* discussion *infra* Section III.C.1.

11. *See* discussion *infra* Section III.C.1, 3.

12. *See* discussion *infra* Section III.C.4.

13. *See* discussion *infra* Section III.D.

After examining Jewish law on finds, Part IV will examine the American Common Law on finds. First, it will explain that the finder gets relative title to lost property, inferior only to the true owner's title.[14] Second, it will show that the owner of the *locus in quo*'s right to mislaid property supersedes the finder's rights thereto.[15] Third, it will show that a finder's claim to treasure trove supersedes the owner of the *locus in quo*'s claim.[16] Finally, Part IV will explain how the finder can gain full title to abandoned property.[17]

Following this, Part V will discuss criticisms of the common law's intent-based categorization of finds and discuss some of the reasons that the states enacted statutes to govern these laws on finds. Part VI will then examine Florida's statutes on finds. It will show that Florida's statutes: (1) dispense with the common law's distinction between lost and mislaid property; (2) require that all finds, including abandoned property, be reported to the police; and (3) allow the finder to gain full title to the find when the owner is not located within ninety days after the authorities publish notice about the find.[18]

Finally, after examining each body of law on finds and comparing them with each other, Part VII will explain that in certain close-call cases, it is advisable to seek professional advice on how to maintain the Jewish law on finds without violating Florida's statutory law on finds. Also, it will conclude that adherence to Florida's statutes does not absolve the finder from maintaining the Jewish law on finds when doing so would not violate Florida's statutes on finds.[19]

II. UNDERSTANDING THE STRUCTURE AND THE EVOLUTION OF JEWISH LAW

Before exploring the Jewish law on finds, it will be helpful for the reader to get acquainted with the structure of Jewish law and understand how it evolved over the centuries. Jewish law, commonly called *halacha*, stems from the laws and directives set out by the Torah.[20] The Torah consists of two parts, the written Torah and the oral Torah.[21] The written Torah mostly refers to the Five Books

14. *See* discussion *infra* Section IV.A.
15. *See* discussion *infra* Section IV.B.
16. *See* discussion *infra* Section IV.C.
17. *See* discussion *infra* Section IV.D.
18. *See* discussion *infra* Part VI.
19. *See* discussion *infra* Part VII.
20. 9 ENCYCLOPEDIA TALMUDIT *Halacha* 241 (Shlomo Yosef Zevin et al. eds., Rohr ed. 2009).
21. MOSES MAIMONIDES, MISHNEH TORAH, SEFER HAMADA, at Hakdamat Harambam 5 (Mosad Harav Kuk La'am ed. 12th prtg. 1993).

of Moses,[22] and the oral Torah refers to the explanations, interpretations, and derivations of it.[23] The oral Torah can be divided into four categories:

(1) The oral instruction given by God to Moses at Sinai.[24] This category includes both the basic interpretation of the written Torah and the laws that do not have any clear source in the text.[25] These laws, like the written text itself, have remained static and unaltered since the time of Moses.[26]

(2) New laws that the Sages derived and inferred from the written Torah and from the first category of the oral Torah.[27] This category, as well as the next two categories of oral Torah, allow the Torah to grow and evolve as society changes and new circumstances arise.[28]

(3) New laws and decrees that the Sages instituted as preventive measures to preserve the biblical laws.[29]

(4) Jewish customs and enactments that the Sages instituted for the betterment of society.[30]

At first, the oral Torah was not written down for in-text study.[31] This is because the Torah forbids writing down the oral Torah for this purpose.[32] But because the Jews were being persecuted and dispersed among the other nations—making it difficult to maintain the oral tradition—Rabbi Yehuda Hanasi decided

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22. *See id.*

23. *Id.*

24. MOSES MAIMONIDES, *Hakdama l'Seder Zera'im*, *in* HAKDAMOT L'PEIRUSH HAMISHNA 9, 37 (Mordechai D. Rabinovitz ed., Mosad Harav Kuk 14th prtg. 1994).

25. *See id.* at 35. For example, the requirements that *tefillin* straps be black and that a Torah scroll be written with black ink have no source in the Torah's *text* but are part of the Torah's oral tradition. *Id.*

26. *Id.*

27. *Id.* at 13, 37. The Sages derived these laws via the hermeneutic rules that God taught to Moses at Sinai. MAIMONIDES, *supra* note 24, at 13.

28. *See id.* at 13, 28–29.

29. *Id.* at 40. For example, the biblical law only prohibits eating meat and milk that were cooked together, and the Sages, as a preventive measure, decreed against eating fowl with milk to ensure that people will not transgress the biblical law. *Id.*

30. *Id.* at 41. For example, Jewish law provides that some monetary debts owed to individual creditors be forgiven on the *shemittah* year, which occurs once every seven years. Shemittah *Loan Amnesty:* Pruzbul, CHABAD.ORG, http://www.chabad.org/library/article_cdo/aid/562041/jewish/Loan-Amnesty-Pruzbul.htm (last visited Nov. 17, 2022). The wealthy, concerned that the poor would not pay their loans by the *shemittah* year, did not lend money in the year prior to *shemittah*. *Id.* To protect the poor from this arbitrary result, Hillel instituted the *pruzbul*. *Id.* The *pruzbul*'s function is to allow a creditor to transfer his loan to the court—transforming the loan into a judicial loan—preventing it from being forgiven. *Id.* Aside from the customs and enactments initiated by the Sages, an individual may also initiate a custom to enhance his religious commitment. *See* Babylonian Talmud, Pesachim 50b. These customs are then binding on his family and descendants. *Id.*

31. *See* MAIMONIDES, *supra* note 21, at 5, 8.

32. *See* Babylonian Talmud, Temurah 14b.

to compile the laws of the oral Torah into a series known as the Mishna.[33] Rabbi Yehuda Hanasi and his *Beit Din*–Jewish Court–completed the Mishna circa 189 C.E.,[34] almost 1000 years after the Jews received the Torah at Sinai.[35] The Mishna contains the laws from all four of the aforementioned categories of oral Torah from the time of Moses until Rabbi Yehuda Hanasi's time.[36]

The Mishna was then studied, discussed, analyzed, and interpreted for almost three hundred years by the Sages known as the *Amora'im*.[37] Besides interpreting the Mishna's laws, the *Amora'im* continued to develop new laws as new situations inevitably arose.[38] The *Amora'im* ultimately compiled their analyses and interpretations of the Mishna, and their new laws, into a series known as the Talmud.[39]

Because the Talmud is a creature of the dialogue and debate that occurred in various study halls over many years, its format is such that the laws on any topic can be scattered throughout the many volumes of the Talmudic series.[40] Thus, it is often hard to come to a clear law about any particular topic from the Talmud without combing through all of its sixty-three tractates.[41] Also, many arguments in the Talmud were not definitively resolved in the Talmud.[42] Moreover, as the years went on, the rabbis of later generations debated the meaning of the Talmud's rulings.[43] Further, new unforeseen circumstances constantly arise, making it necessary to make new laws about the newly arisen

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33. MAIMONIDES, *supra* note 21, at 8.

34. MATTIS KANTOR, CODEX JUDAICA: CHRONOLOGICAL INDEX OF JEWISH HISTORY 146–47 (2005).

35. *Id.* at 77, 146. Until the compilation of the Mishna, students took notes on their teachers' lectures, but the oral law continued to be taught and learned orally. *See* MAIMONIDES, *supra* note 21, at 8.

36. MAIMONIDES, *supra* note 21, at 8.

37. *See id.* at 11; KANTOR, *supra* note 34, at 37, 345.

38. MAIMONIDES, *supra* note 21, at 11; MAIMONIDES, *supra* note 24, at 63–65.

39. MAIMONIDES, *supra* note 21, at 11; MAIMONIDES, *supra* note 24, at 63–65. During this era, some *Amora'im* lived in Israel, while others lived in Babylonia. *See* KANTOR, *supra* note 34, at 153, 154, 155. Thus, there are two Talmuds: the Jerusalem Talmud and the Babylonian Talmud. *See, e.g.*, MAIMONIDES, *supra* note 21, at 11. But, as the Romans intensified their persecution of the Jews, many *Amora'im* living in Israel fled to Babylonia. KANTOR, *supra* note 34, at 155, 156. This brought the compilation of the Jerusalem Talmud to an abrupt halt while it was still in its rudimentary stages. *Id.* at 156. On the other hand, the compilers of the Babylonian Talmud continued to work on their series for another century. *Id.* at 156–57, 158; MAIMONIDES, *supra* note 21, at 11. The Babylonian Talmud is thus considered more authoritative than the Jerusalem Talmud. *See, e.g.*, 9 ENCYCLOPEDIA TALMUDIT, *supra* note 20, at 250.

40. *See* ADIN STEINSALTZ, THE TALMUD, THE STEINSALTZ EDITION: A REFERENCE GUIDE 7 (Israel V. Berman ed. & trans., 1989).

41. *See* Yosef Caro, *Hakdama l'Sefer Beit Yosef*, *in* TUR ORACH CHAIM (Mosdot Shirat Devorah 1993).

42. *See* 9 ENCYCLOPEDIA TALMUDIT, *supra* note 20, at 248, 251–52.

43. *See, e.g.*, MAIMONIDES, *supra* note 21, at 13.

issues.[44] For these reasons, the *Rishonim*[45] found it necessary to codify Jewish law.[46] But at this point in history, the Jews were even more dispersed than before.[47] So the halachic authorities of the time did not have a forum in which to reach a consensus.[48] Thus, unlike the Mishna and the Talmud—each a product of a consensus between the halachic authorities of its time—the *Rishonim*'s codifications were only representative of that individual codifier's view, irrespective of his contemporaries' views.[49] So unlike the Mishna and Talmud—the definitive laws of which are binding on all Jews—the *Rishonim*'s codifications were only binding on the Jews in each of the *Rishonim*'s respective regions.[50] As a result, Jewish law started to diversify, bringing about differences in customs and practices among Jews based on the different regions they inhabited.[51] The most notable of these regions were Spain and North Africa on the one hand and Germany and France on the other.[52] The Jews descending from Spain and North Africa are commonly known as Sephardic Jews, and the Jews descending from Germany and France are commonly known as Ashkenazic Jews.[53]

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44. *See, e.g.*, *id.*

45. This term is used to identify Torah scholars that lived between the end of the eleventh century C.E. until the beginning of the sixteenth century C.E. *See, e.g.*, KANTOR, *supra* note 34, at 348.

46. *See, e.g.*, MAIMONIDES, *supra* note 21, at 15.

47. *Id.* at 14.

48. *Id.* at 13. Before the Romans completely disbanded the *Sanhedrin*, the *Sanhedrin* settled halachic disputes by a majority vote. MOSES MAIMONIDES, MISHNEH TORAH, SEFER SHOFTIM: MAMRIM 1:1, 4 (Mosad Harav Kuk La'am ed. 6th prtg. 1985). The *Sanhedrin* was the Jewish Supreme Court, which consisted of seventy-one of the most prominent Sages in each generation. *See id.* at 2:2. The first *Sanhedrin* was led by Moses in around 1313 B.C.E., *see* MAIMONIDES, *supra* note 21, at 5; KANTOR, *supra* note 34, at 77, and the Romans disbanded it completely during the fourth century C.E., KANTOR, *supra* note 34, at 156; ISAAK HALEVY, DOROT HARISHONIM, SEFER DIVREI HAYAMIM LIVNEI YISRAEL: PART II 398 (1923). Because the persecution forced Jews out of their homeland and caused them to be dispersed throughout different regions of the world, there ceased to be a forum where the rabbinical authorities could come to a consensus on matters of Jewish law. *See* MAIMONIDES, *supra* note 21, at 13. Thus, during the fifth century, rabbis that resettled in one region needed to rule on halachic issues without discussing it with rabbis that resettled in other regions. *Id.* Jewish practice therefore slowly began to diversify from region to region. *Id.* These variations in Jewish practice and customs continue to this day. *See, e.g.*, Menachem Posner, *Ashkenazi and Sephardic Jews: The History of Ashkenazim and Sephardim*, CHABAD.ORG, http://www.chabad.org/library/article_cdo/aid/4095674/jewish/Ashkenazi-and-Sephardic-Jews.htm (last visited Nov. 17, 2022).

49. *See* MAIMONIDES, *supra* note 21, at 13.

50. *Id.*

51. *See id.*; Posner, *supra* note 48.

52. *E.g.*, Posner, *supra* note 48.

53. *E.g.*, *id.*

In the sixteenth century, Rabbi Yosef Caro, a Sephardic halachic authority, wrote a code on Jewish law.[54] His goal was to end the diversity in Jewish law, which arose because the generation preceding him lacked a forum to reach a consensus.[55] He decided that he could accomplish this by looking at the decisions of the *Rishonim* and making a consensus among them.[56] He based his code mainly on the decisions of Rabbis Moses Maimonides ("*Rambam*"), Yitzchak Alfasi ("*Rif*"), and Asher Ben Yechiel ("*Rosh*"), whom he considered to be the three most notable *Rishonim*, and whenever he would find a disagreement among them on any given topic, he would settle the matter by ruling according to two out of the three of them.[57] This way, he reasoned, the most prominent *Rishonim* had reached a consensus, which they could not do during their own lifetime.[58] He formatted his code based on the format of the *Arbaah Turim*, which classifies Jewish law into four general categories.[59] He named his work *Shulchan Aruch*, which means a set table, to imply that no one need look any further for a clear ruling on any relevant topic in Jewish law.[60]

But because both *Rambam* and *Rif* were Sephardic authorities and only *Rosh* was an Ashkenazic authority, Ashkenazic Jews felt that the *Shulchan Aruch*'s decisions were skewed toward the Sephardic tradition and therefore did not apply to them.[61] Thus, Rabbi Moshe Isserles ("*Rema*"), made a similar consensus between the *Rishonim*.[62] His consensus, however, incorporated more Ashkenazic authorities like *Mordechai*, *Or Zarua*, and others.[63] Upon completing his work, *Rema* placed his findings as insertions to the *Shulchan*

54. *See, e.g.*, KANTOR, *supra* note 34, at 223.
55. Caro, *supra* note 41.
56. *Id.*
57. *Id.*
58. *See id.*
59. *Id.* The *Arbaah Turim*, translated literally as *four columns*, was written by Rabbi Yaakov Ben Asher (the son of *Rosh*). *See, e.g.*, Caro, *supra* note 41. He was a *Rishon*, but unlike the other *Rishonim*, whose codifications included laws that were pertinent only in Temple times, his code only included laws that apply in post-Temple times. *See* KANTOR, *supra* note 34, at 202; Arba'ah Turim, WIKIPEDIA, http://en.wikipedia.org/wiki/Arba%27ah_Turim (last visited Nov. 17, 2022). His work is also unique in that it divides Jewish law into four sections: (1) *Orach Chaim*—Jewish ritual laws that are connected with specific times of the day, week, month, or year; (2) *Yoreh Deah*—Jewish ritual laws that are not connected with specific times; (3) *Even Ha'ezer*—laws pertaining to family matters, and (4) *Choshen Mishpat*—laws pertaining to torts, property, legal procedure, and finance. TUR CHOSHEN MISHPAT, at Hakdamat Rabeinu Yaakov Baal Haturim (Mosdot Shirat Devorah 2000); Arba'ah Turim, *supra*.
60. SHULCHAN ARUCH, CHOSHEN MISHPAT, at Hakdamat Hamechaber (Tal-Man 1977).
61. Moshe Isserles, *Hakdamat Harema*, *in* SHULCHAN ARUCH, CHOSHEN MISHPAT, *supra* note 60.
62. *See id.*
63. *Id.*

Aruch—indicating where Ashkenazic practice would differ from Sephardic practice.[64] Thus, the *Shulchan Aruch*, with *Rema*'s insertions in it, became the one-stop-shop for Jewish law.[65] Over the years, many rabbinic authorities continued to discuss and interpret Rabbi Yosef Caro and *Rema*'s rulings in the *Shulchan Aruch*.[66] The opinions of some of the most notable of these rabbis were inserted as footnotes to the *Shulchan Aruch*.[67] This helped solidify the *Shulchan Aruch*'s acceptance by most *halacha*-practicing Jews.[68]

But as the years went on and the commentaries to the *Shulchan Aruch* continued to accumulate, Jewish law once again became riddled with disputes.[69] Therefore, toward the end of the eighteenth century, Rabbi Dovber, the *Magid* of Mezeritch, tasked his disciple, Rabbi Shneur Zalman of Liadi, with writing a new edition of *Shulchan Aruch*.[70] Its purpose was to make a consensus and settle disputes among the commentators on *Shulchan Aruch*, and to decide on the new halachic issues that had since arisen.[71] This work is an independent series of books known as *Shulchan Aruch Harav*.[72] His work originally included the relevant laws from all four categories of Jewish law as originally categorized in the *Arbaah Turim*.[73] But many of Rabbi Shneur Zalman of Liadi's original manuscripts on Jewish law were, unfortunately, lost in a fire.[74] His rulings that did survive, however, are considered most authoritative among Hassidic Jews.[75]

Also, toward the end of the nineteenth century, Rabbi Yechiel Michel Epstein authored the *Aruch Hashulchan*.[76] Like Rabbi Shneur Zalman of Liadi, Rabbi Epstein composed his series as a stand-alone composition with the same purpose in mind.[77] The *Aruch Hashulchan* covers the laws from all four areas

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64. *Id.*
65. KANTOR, *supra* note 34, at 223, 224.
66. *See, e.g.*, *id.* at 229.
67. *Id.*
68. *Id.*
69. Dovber Shneuri et al., *Introduction* to 1 SHNEUR ZALMAN OF LIADI, SHULCHAN ARUCH HARAV, ORACH CHAIM 8 (Kehot Publ'n Soc'y rev. ed. 6th prtg. 2006); *see also* YECHIEL MICHEL EPSTEIN, ARUCH HASHULCHAN, ORACH CHAIM, at Hakdama 4 (Oz Vehadar Friedman ed. 2006).
70. Shneuri et al., *supra* note 69, at 8–9, 8 n.13; KANTOR, *supra* note 34, at 253–54.
71. Shneuri et al., *supra* note 69, at 8; KANTOR, *supra* note 34, at 253–54.
72. *See* KANTOR, *supra* note 34, at 253–54.
73. Shneuri et al., *supra* note 69, at 10.
74. *See id.* at 12.
75. *See* Yaakov Goldstein, *The History of the* Shulchan Aruch Harav, SHULCHANARUCHHARAV.COM: DAILY HALACHA (Jan. 21, 2020), http://shulchanaruchharav.com/the-history-of-the-shulchan-aruch-harav/.
76. EPSTEIN, *supra* note 69, at Hakdama 5.
77. *Id.*; *see also* Menachem Mendel Pomerantz, *Preface to* EPSTEIN, *supra* note 69.

originally categorized in the *Arbaah Turim*.[78] The series still survives in its entirety and is considered most authoritative by many Ashkenazic Jews.[79]

Finally, in the twentieth century, Rabbi Yitzchak Yosef, the current chief Rabbi of Israel, compiled the rulings of his father—Rabbi Ovadia Yosef—into a series of books known as *Yalkut Yosef*.[80] Many Sephardic communities consider these rulings to be most authoritative.[81]

III. JEWISH LAW ON FINDS

After getting acquainted with the structure of Jewish law, this Article now turns to the Jewish law on finds. In determining whether the finder may keep the find, the law first considers how the owner first parted with it.[82] For instance, Jewish law distinguishes between property that its owner seems to have inadvertently dropped;[83] property that its owner seems to have intentionally hid and still expects to retrieve;[84] property that its owner seems to have forgotten its whereabouts;[85] and property that its owner seems to have abandoned.[86]

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78. Pomerantz, *supra* note 77. Unlike most authorities of his time, Rabbi Epstein's work includes laws that are only pertinent in Temple times. EPSTEIN, *supra* note 69, at Hakdama 5.

79. Pomerantz, *supra* note 77; *Toldos*, *in* EPSTEIN, *supra* note 69, at 22; Mishna Berurah, WIKIPEDIA, http://he.wikipedia.org/wiki/%D7%9E%D7%A9%D7%A0%D7%94_%D7%91%D7%A8%D7%95%D7%A8%D7%94 (last visited Nov. 17, 2022). In addition, toward the end of the nineteenth century, Rabbi Yisrael Meir Kagan of Radin wrote the *Mishna Berurah* with the same purpose in mind. YISRAEL MEIR HAKOHEN OF RADIN, MISHNA BERURAH, at Hakdama (Vagshal 1996); Mishna Berurah, *supra*. But unlike the *Shulchan Aruch Harav* and the *Aruch Hashulchan*, the *Mishna Berurah* only discusses the laws of *Orach Chaim*—the laws most pertinent to day-to-day activities of a Torah observant Jew. RADIN, *supra*. Thus, the *Mishna Berurah* does not contain laws on lost property. *See id.* Many Ashkenazic Jews consider the *Mishna Berurah* as the most authoritative contemporary code of Jewish law. Mishna Berurah, *supra*.

80. Yalkut Yosef, WIKIPEDIA, http://he.wikipedia.org/wiki/%D7%99%D7%9C%D7%A7%D7%95%D7%98_%D7%99%D7%95%D7%A1%D7%A3 (last visited Nov. 17, 2022).

81. *Id.*

82. *See* 1 MICROPEDIA TALMUDIT *Aveda* 12, 13 (Avraham Shteinberg et al. eds., 2013).

83. *Id.* at 13; *see also* discussion *infra* Section III.A, B.

84. *See* 1 MICROPEDIA TALMUDIT, *supra* note 82, at 13; discussion *infra* Section III.C.

85. *See* 1 MICROPEDIA TALMUDIT, *supra* note 82, at 13; discussion *infra* Section III.C.1, 3.

86. *See* 1 MICROPEDIA TALMUDIT, *supra* note 82, at 12; discussion *infra* Section III.C.4. The laws of salvage are beyond the scope of this Article.

Under Jewish law, when someone comes across[87] property that its owner seems to have inadvertently dropped, he has an affirmative duty to retrieve it and seek out its owner.[88] There are, however, exceptions in which the finder need not retrieve the property at all.[89] Also, in some cases the finder is allowed to keep the find.[90] For example, if the property is worth less than a *perutah*,[91] the finder need not retrieve it,[92] and if he does, he may keep it.[93] Further, when the owner loses hope of finding his lost property, termed in Jewish law as *yeiush*, he effectively relinquishes his rights to it.[94] Consequently, any person who later finds it may keep it.[95]

But how is the finder to know whether the owner already relinquished his rights to the property via *yeiush*? To answer this, this Article will first distinguish between property that has a legally recognized identifying mark and property that does not.[96]

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87. This occurs when someone is within about 429 feet of the object. *See* Babylonian Talmud, Bava Metzia 33a (explaining that the finder only has an obligation if he is within a *ris* of the item); Yoel Sirkis, *Bayit Chadash*, *in* TUR CHOSHEN MISHPAT, *supra* note 59, at 259:1 n.1 (explaining that a *ris* is 266.66 *amot* [cubits]); CHAIM NOEH, SHIUREI TORAH 3:25, at 249–50 (1947) (determining that an *amah* [cubit] is forty-eight centimeters, but one should be stringent in Torah matters and treat an *amah* either as forty-nine or forty-seven centimeters depending on the circumstance (in this case it is more stringent to calculate an *amah* as forty-nine centimeters because it would obligate the finder to retrieve the item from a farther distance)).

88. Deuteronomy 22, 1–3; MOSES MAIMONIDES, MISHNEH TORAH, SEFER NEZIKIN: HILCHOT GEZELA VAAVEDA 11:1 (Mosad Harav Kuk La'am ed. 5th prtg. 1985); TUR CHOSHEN MISHPAT, *supra* note 59, at 259:1; SHULCHAN ARUCH, CHOSHEN MISHPAT, *supra* note 1, at 259:1. But this affirmative duty applies only when the finder comes across lost property laying in an area where most of the passersby subscribe to the Jewish law on finds. *See* 12 SHNEUR ZALMAN OF LIADI, SHULCHAN ARUCH HARAV, CHOSHEN MISHPAT: HILCHOT METZIA U'FIKADON ¶ 17 (Eliyahu Touger & Sholom Ber Wineberg trans., Kehot Publ'n Soc'y Bicentennial ed. 2016); discussion *infra* Part VII.

89. *See* sources cited *supra* note 87. For example, if the finder is farther than 429 feet from the object. *See* sources cited *supra* note 87. Also, a finder need not retrieve property that he perceives to have been abandoned by its owner. LIADI, *supra* note 88, ¶ 16. Also, a person need not retrieve property if, by doing so, he will transgress other Jewish law commandments like desecrating the Sabbath. *Id.* ¶ 40. Also, a person need not expend money or give up business to retrieve lost property. *Id.* ¶ 33.

90. *See* Babylonian Talmud, Bava Metzia 26b; discussion *infra* Section III.B.

91. A *perutah* is a coin that was in circulation during the Mishnaic and Talmudic eras. *See* Babylonian Talmud, Bava Metzia 27a. It is worth 2.5% of a gram of pure silver (about ¢1.5 on today's market). *See* Dovid Yosef, Dinei Neta Revaii, KOVETZ OHR HAHAR, Jan. 29, 1993, *reprinted in* HALACHA U'MAASEH 151 (Yisroel Chaim Druk ed., 1994).

92. MAIMONIDES, *supra* note 88, at 11:12.

93. *Id.*; *see also* Babylonian Talmud, Bava Metzia 27a.

94. *See* Babylonian Talmud, Bava Metzia 26b.

95. *Id.*

96. *See* discussion *infra* Section III.A, B; *e.g.*, TUR CHOSHEN MISHPAT, *supra* note 59, at 262:3.

A. *Lost Property with an Identifying Mark*

When someone loses property that has a distinct identifying mark, termed in Jewish law as a *siman* (*simanim* plural),[97] the law presumes that the owner does not lose hope of being reunited with his property because he has a method by which he can track it down and prove his ownership.[98] The owner thus does not relinquish his rights to the property.[99] So unless the finder hears

97. An irregularity on an item is considered a valid *siman*. Babylonian Talmud, Bava Metzia 23a; *see also* MAIMONIDES, *supra* note 88, at 15:11, 18:6. For example, a hole near a specific letter on a document or a foreign object embedded in a lost item is considered a valid *siman*. MAIMONIDES, *supra* note 88, at 15:11, 18:6. Exact dimensions, exact volume, exact weight, and exact amount are also considered valid *simanim*. *Id.* at 13:5; TUR CHOSHEN MISHPAT, *supra* note 59, at 262:3; SHULCHAN ARUCH, CHOSHEN MISHPAT, *supra* note 1, at 262:3. A unique knot is also considered a valid *siman*. MAIMONIDES, *supra* note 88, at 15:6; TUR CHOSHEN MISHPAT, *supra* note 59, at 262:3; SHULCHAN ARUCH, CHOSHEN MISHPAT, *supra* note 1, at 262:3. Finally, an owner specifying the exact location where he mislaid his property is a valid *siman*. MAIMONIDES, *supra* note 88, at 13:5, 15:6; TUR CHOSHEN MISHPAT, *supra* note 59, at 262:3; SHULCHAN ARUCH, CHOSHEN MISHPAT, *supra* note 1, at 262:3. A generic description, however, like stating the item's color, is not considered a valid *siman* because many people can own the same item in the same color. *Rashi*, *in* Babylonian Talmud, Bava Metzia 27b, s.v. *chiyuri o sumki*.

98. *Tosfot*, *in* Babylonian Talmud, Bava Metzia 27a, s.v. *mah simlah meyuchedet*; MAIMONIDES, *supra* note 88, at 14:3; TUR CHOSHEN MISHPAT, *supra* note 59, at 262:3.

99. Deuteronomy 22, 1–3. The Babylonian Talmud derives this rule from the Torah's text as follows: The Torah states that when someone discovers a lost ox or sheep, he should not ignore it; rather, he must return it to its rightful owner. Babylonian Talmud, Bava Metzia 27a; Deuteronomy 22, 1. In the following verse, the Torah explains that until the finder locates the owner, he must bring the lost property home (and take care of it). Deuteronomy 22, 2. Next, the Torah explains that the finder has an obligation to do the same for a lost donkey, a lost garment, and all lost property. *Id.* at 22, 3. As explained by the Talmud, the reason the Torah singles out and specifies a garment—although it is technically included in "all lost property"—is to specify the type of items that the Torah wishes to include in "*all* lost property." Babylonian Talmud, Bava Metzia 27a; *Tosfot*, *supra* note 98, at 27a, s.v. *mah simlah meyuchedet*; MAIMONIDES, *supra* note 88, at 14:1. Namely, only property that has a *siman*. Babylonian Talmud, Bava Metzia 27a; *Tosfot*, *supra* note 98, at 27a, s.v. *mah simlah meyuchedet*; MAIMONIDES, *supra* note 88, at 14:1. The reason that only property with a *siman* must be retrieved and returned to its owner is because the *siman* provides the owner a means to prove his ownership over the property and he consequently does not lose hope of being reunited with it. *Tosfot*, *supra* note 98, at 27a, s.v. *mah simlah meyuchedet*. So someone who finds property with a *siman* cannot keep it and must seek out its rightful owner. Babylonian Talmud, Bava Metzia 27a; MAIMONIDES, *supra* note 88, at 14:3; SHULCHAN ARUCH, CHOSHEN MISHPAT, *supra* note 1, at 260:9.

the owner expressing *yeiush*[100] before he picks up the property,[101] he cannot gain ownership to it.[102] Instead, he will need to seek out its owner.[103]

B. *Lost Property without an Identifying Mark*

On the other hand, when a property owner loses property that does not have a *siman*, the law presumes that he loses hope of finding it and thereby relinquishes his title to it.[104] This is because he has no way to track it down and prove that he is the rightful owner of the property.[105] But one cannot lose hope of finding what he is unaware is lost at all, and thus cannot relinquish his title to it via *yeiush*.[106] Thus, when the finder retrieves property before the owner is even aware of its absence, he cannot gain title to it even if the owner subsequently loses hope of finding it.[107] This is because when the finder first picked up the property, the owner still had legal title to it.[108] Thus, the law considers the finder to have picked it up as the owner's bailee—giving the owner constructive possession over the property.[109] Thus, a subsequent declaration of *yeiush* will not remove the owner's title to the property because he constructively possesses

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100. This does not have to be a formal declaration in which the owner says, "I relinquish my right;" rather, the finder can infer *yeiush* from a statement like "Oh no! I just suffered a loss." *See* Babylonian Talmud, Bava Metzia 23a; MAIMONIDES, *supra* note 88, at 14:3; SHULCHAN ARUCH, CHOSHEN MISHPAT, *supra* note 1, at 262:5.

101. Although, the finder is under a moral obligation to return lost property even before retrieving it. *See* sources cited *supra* note 87. The finder can nevertheless gain ownership of the lost item if he retrieves it after the owner relinquished his rights via *yeiush*. *See* 11 ENCYCLOPEDIA TALMUDIT *Hashavat Aveda* 56, 58 (Shlomo Yosef Zevin et al. eds., Rohr ed. 2009). *But see* LIADI, *supra* note 88, ¶ 18 (explaining that Jewish law requires the finder to go beyond the letter of the law and return lost property to its original owner even after the owner relinquished his rights via *yeiush*).

102. MAIMONIDES, *supra* note 88, at 14:3.

103. *Id.*; *see also* discussion *infra* Section III.D (explaining the finder's duties while in possession of the lost property).

104. *Tosfot*, *supra* note 98, at 27a, s.v. *mah simlah meyuchedet*; MAIMONIDES, *supra* note 88, at 14:2; LIADI, *supra* note 88, ¶ 8.

105. *Tosfot*, *supra* note 98, at 27a, s.v. *mah simlah meyuchedet*; MAIMONIDES, *supra* note 88, at 14:2.

106. *See* Babylonian Talmud, Bava Metzia 21b, 22b.

107. *See Tosfot*, *in* Babylonian Talmud, Bava Kama 66a, s.v. *Hacha*; LIADI, *supra* note 88, ¶¶ 1–2. *But see* Moses Nachmanides, *Milchemet Hashem*, *in* HILCHOT RAV ALFAS, BAVA METZIA 14b (Romm Pub. 1881), *reprinted in* Babylonian Talmud, Bava Metzia 39 (explaining that a finder who retrieves property intending to steal it gains ownership to the property once the owner loses hope of retrieving it).

108. *See* LIADI, *supra* note 88, ¶¶ 1–2.

109. *Id.* Provided that he did not pick it up intending to steal it. *Contra* Nachmanides, *supra* note 107, at 39.

it.[110] Therefore, without the owner expressly abandoning the property, the finder cannot gain title to it.[111]

Based on this, the key to whether the finder may keep lost property that does not have a *siman* depends on whether he picked it up before or after the owner was aware of its loss.[112]

Jewish law carved out three situations in which a finder can presume that the owner was already aware of the property's absence before he found and retrieved it.[113] The first is when the finder discovers lost money.[114] This is because the law presumes that people always subconsciously touch their pocket to ensure the money's presence and will therefore notice its absence almost immediately.[115] The second is when an item is particularly valuable because, like money, a person subconsciously keeps checking for it.[116] The third is when the lost item is particularly heavy because the finder can presume that its owner already noticed the difference in the weight of his load before the finder found and retrieved it.[117]

Thus, when the finder retrieves property that does not have a *siman* and falls into one of these three categories, he may keep it.[118] On the other hand, when the property does not fall into any of these three categories, the finder will not be allowed to convert the property to his own use, but he will need to hold onto it as the owner's bailee.[119]

1. Property Discovered in Someone Else's Home

In determining the finder's rights to property he discovered, Jewish law also considers the size of the property he discovered and the place where he discovered it.[120] For instance, when someone finds a small coin in another's home, where there is public traffic—like when the homeowner is hosting a public event—he may keep it.[121] This is because, as mentioned above, the law presumes that the person who dropped it is already aware of its absence, and already

110. *See* LIADI, *supra* note 88, ¶¶ 1–2.
111. *See id.*
112. *See, e.g.*, TUR CHOSHEN MISHPAT, *supra* note 59, at 262:3.
113. *Id.* at 262:6.
114. *Id.*
115. *Id.*
116. *Id.*
117. TUR CHOSHEN MISHPAT, *supra* note 59, at 262:6.
118. *Id.*
119. *See* LIADI, *supra* note 88, ¶ 2; discussion *infra* Section III.D (describing the finder's duties while in possession of the property).
120. LIADI, *supra* note 88, ¶¶ 10–11.
121. *Id.*

relinquished his rights to it via *yeiush*.[122] This is true, even if the homeowner dropped it, because when the home has a lot of outside traffic, the law presumes that even the homeowner believes that someone else already took it and thus relinquishes his rights to it.[123] So the first person to take possession of the coin gains title to it as well.[124]

The reason the homeowner does not gain possession of the coin by it being on his property is because a coin is infinitesimal and the homeowner would not necessarily have found it—even if the finder had not taken it first.[125] The homeowner therefore does not automatically gain possession of the coin by its mere presence on his property.[126] Instead, the finder is the first to gain possession of the coin and is entitled to keep it.[127] On the other hand, larger items, like dollar bills, which the homeowner will likely discover on his own—if no one else takes them first—are considered to be under the homeowner's possession by their mere presence on his property.[128] Thus, even if a third party lost it, the homeowner has a right to keep it because he is the first to gain possession of it once the original owner relinquished his rights via *yeiush*, which is presumed to have already happened.[129] So the finder will need to turn such property over to the homeowner because the homeowner is considered to have prior constructive possession of it.[130]

On the other hand, when there is very little public traffic in the home, the finder may not even keep a small coin that he finds in the home.[131] This is because when there is little public traffic in the home, the law presumes that the homeowner dropped the coin and will not lose hope of eventually finding it.[132]

2. Property Discovered in a Store

Similarly, if one finds money in a store, in an area where customers are allowed, he may keep it.[133] On the other hand, if he finds the coin in an area that is only open to the cashier—like behind the register—the finder must give the

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122. *See supra* notes 112–15 and accompanying text; *e.g.*, TUR CHOSHEN MISHPAT, *supra* note 59, at 262:3.
123. LIADI, *supra* note 88, ¶ 10.
124. *See id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *See* LIADI, *supra* note 88, ¶ 10.
129. *See id.*
130. *See id.*
131. *Id.* ¶ 11.
132. *Id.*
133. LIADI, *supra* note 88, ¶ 11.

find to the cashier because it likely does not belong to anyone else.[134] But when someone finds money on the counter near the register, some contemporary halachic authorities maintain that the customer may keep it because it may be presumed that it likely belonged to a previous customer who already relinquished his ownership rights to it via *yeiush*.[135]

C. *Property the Owner Intentionally Laid Down*

Besides the distinctions between different types of lost property, Jewish law also distinguishes between lost property and property the owner seems to have intentionally laid down.[136] For example, when a finder discovers property that an owner seems to have intentionally laid down, the law on whether the finder may keep it depends on the security of the location where the finder discovered it and whether the property has an identifying mark.[137]

1. Property Discovered in a Secure Location

For instance, if one finds property concealed in a *secure location*, he should not disturb it[138] because doing so would only burden its owner.[139] This is because when the location is secure, there is no concern that a third party will discover the property and take it before the owner can come back and retrieve it.[140] Thus, the owner would prefer to collect it from the location where he concealed it rather than having to track it down via the *siman*.[141] For these laws,

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134. *Id.*

135. BLAU, *supra* note 2, 3:11, at 329 n.30.

136. *See* LIADI, *supra* note 88, ¶ 12.

137. *See id.* ¶¶ 12–15; 1 MICROPEDIA TALMUDIT, *supra* note 82, at 13; discussion *infra* Section III.C.1–4.

138. LIADI, *supra* note 88, ¶ 12. This is true even if there is doubt whether the owner intentionally placed it down or inadvertently dropped it. *Id.* ¶ 13.

139. *Id.*

140. *See id.* Provided, however, that most of the passersby adhere to the Jewish law on finds. *Id.* ¶ 12.

141. LIADI, *supra* note 88, ¶ 13; SHULCHAN ARUCH, CHOSHEN MISHPAT, *supra* note 1, at 260:9. As mentioned above, naming the location where one placed his item serves as a *siman*. *See* sources cited *supra* note 93; LIADI, *supra* note 88, ¶ 14. If the finder retrieves the item, his obligation under Jewish law will depend on whether he is still at the location where he found it, or if he brought the property home already. LIADI, *supra* note 88, ¶ 13. If he is still at the location where he found the property, he should put it back. *Id.* On the other hand, if he already brought the property home with him, he should not bring it back to where he found it because perhaps the owner came back looking for it in the meantime, discovered that it was no longer there, and thus will not come back to that location to look for it again. *Id.* Thus, if the property has an identifying mark, the finder must take the steps necessary to locate the owner and return the property. *Id.*; *see also* discussion *infra* Section III.D (describing the finder's duties). If, however, the property does

a *secure location* may even be a place that is publicly accessible, as long as the item is concealed, like under a pile of rubble or even a garbage dump that will not be disturbed.[142]

On other hand, if the evidence shows that the property was there for a long time, for example, if the property shows signs of rust, the finder will be allowed to keep it even if the property has an identifying mark,[143] provided, however, that this *secure location* is on public property.[144] This is because the law presumes that the reason it was left there for so long is that the owner forgot where he hid it.[145] So the law presumes that he gave up on looking for it, and thus relinquished his ownership via *yeiush*.[146] But this presumption does not apply when the property is hidden on private property because the law considers it common and normal for a property owner to conceal his items on private property for a long time.[147]

2. Property Discovered in a Somewhat Secure Location

On the other hand, if the finder discovers property in a *somewhat secure location*, and the property has a valid *siman*, he should retrieve the find and seek out its owner.[148] This is because the law is concerned that someone else might discover the property and take it for himself before the owner can come back to collect it.[149] Thus, because there are means by which the finder can identify the owner, the benefit of the owner's eventual but certain reunion with his property

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not have an identifying mark, and the property is such that the law does not presume its owner already noticed its absence, the finder must act as the owner's bailee indefinitely because perhaps the owner had not yet relinquished his rights before the finder retrieved it. LIADI, *supra* note 88, ¶ 13. Thus, even if the owner subsequently demonstrates *yeiush*, it will not affect the property's title. *Id.*; *see also supra* notes 104–11 and accompanying text.

142. LIADI, *supra* note 88, ¶ 12.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. LIADI, *supra* note 88, ¶ 12. *But see* YECHIEL MICHEL EPSTEIN, ARUCH HASHULCHAN, CHOSHEN MISHPAT 260:4–5 (Oz Vehadar Friedman ed. 2006) (maintaining that when a finder discovers property hidden in a wall that divides private and public property, and there is no indication from which side of the wall the item was initially placed in it, (e.g., if a knife is hidden inside a wall and the handle is facing private property, it would indicate that the person who placed the knife inside the wall was standing on the private property when he placed the knife inside the wall because it is unlikely that the person held the knife by the blade when placing it in the wall) the finder and the owner of the private property should split the find).

148. *See* LIADI, *supra* note 88, ¶ 14; discussion *infra* Section III.D (describing the finder's duties).

149. *See* LIADI, *supra* note 88, ¶ 14.

outweighs the inconvenience of having to track it down via its *siman*.[150] On the other hand, if the property does not have a *siman*,[151] the finder should not disturb it.[152] This is because when there is no means by which the finder can identify and verify its owner, the owner's odds of being reunited with his property are better if the finder leaves the property for the owner to collect on his own.[153] For these laws, a *somewhat secure location* is a place that does not generate public traffic, but it is also not a place of concealment,[154] for example, when the item is on the other side of a chain link fence in an open field.[155]

3. Property Discovered in an Unsecure Location

Finally, when the finder discovers property in an *unsecure location*, like when the location is completely open and frequented by the public, the finder will need to consider both the probable method by which the owner parted with the property and the probability that the owner is already aware of the property's absence.[156] For example, if the item is particularly heavy, the law presumes that the owner noticed the difference in the weight of his load just after leaving the area where he first set the property down.[157] Thus, even if the item has an identifying mark, the law will presume that the owner abandoned it because he left it in an *unsecure location* where anyone can take it.[158] On the other hand, if perhaps the owner absentmindedly forgot the property there, and the property is such that its owner might not yet have noticed its absence, then, like lost property, the finder may not keep it for himself.[159]

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150. *See id.*

151. The owner can ordinarily prove his ownership by describing the location where he first set the property down, but if the property is such that it will not necessarily stay in the same place (like a soccer ball), merely describing the location is not useful. *See id.*

152. *Id.*

153. *Id.*; *see also supra* note 141 and accompanying text (discussing the process if the finder retrieved the item).

154. LIADI, *supra* note 88, ¶ 14.

155. *Id.*

156. *Id.* ¶¶ 15–16.

157. *Id.* ¶ 15.

158. *Id.* ¶ 16.

159. LIADI, *supra* note 88, ¶ 15; *see also* discussion *supra* Section III.A (explaining that a finder cannot keep property that has a *siman*); discussion *supra* Section III.B (explaining that a finder cannot keep an item that does not have a *siman* unless the item is such that the owner presumably noticed its absence already and consequently relinquished his rights to it); discussion *infra* Section III.D (describing the finder's duty while in possession of property that he cannot keep).

4. Abandoned Property

As mentioned above, property is considered abandoned when it is found in an *unsecure location* and is such that the law presumes its owner already noticed its absence.[160] Thus, when someone discovers such property, he does not have an affirmative duty to retrieve it,[161] but if the finder chooses to retrieve it, he may keep it.[162] On the other hand, if perhaps the owner inadvertently dropped the property, and the property is such that there is no presumption that its owner is already aware of its loss, the finder may not keep it for himself.[163]

D. *Finder's Duty While in Possession of Property He Discovered*

As explained above, when someone discovers property that has an identifying mark, he may not keep it unless the evidence shows that the owner already relinquished his rights to the property via *yeiush*, or abandoned it.[164] Without that evidence, however, the finder must attempt to locate the owner via *hachraza*—announcement.[165]

When the Jewish Temple existed, these announcements would take place in a designated area in Jerusalem during the pilgrimage festivals.[166] Nowadays, however, these announcements are to take place in the local synagogues.[167] Because the laws on returning property via a *siman* are complex, the law advises finders to confer with a rabbinic authority for guidance to prevent finders from mistakenly "returning" property to the wrong person.[168]

If the owner does not show up after the finder makes these announcements, then the finder must hold on to the property indefinitely on the

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160. *See supra* notes 157–58 and accompanying text; LIADI, *supra* note 88, ¶¶ 15–16.

161. *See* LIADI, *supra* note 88, ¶ 16.

162. *Id.*

163. *E.g.*, TUR CHOSHEN MISHPAT, *supra* note 59, at 262:3.

164. *See* discussion *supra* Section III.A, C.1, C.4; MAIMONIDES, *supra* note 88, at 14:3. But the finder only needs to announce the property when he finds it in a location where most passersby adhere to Jewish law. LIADI, *supra* note 88, ¶ 17. On the other hand, if most of the passersby do not follow Jewish law, and the property is such that the law does not presume that its owner is already aware of its absence, Jewish law does not impose an affirmative duty on the finder, and he should simply follow the local practice. *See id.*; MAIMONIDES, *supra* note 88, at 11:7.

165. *E.g.*, MAIMONIDES, *supra* note 88, at 14:3.

166. *See* Babylonian Talmud, Bava Metzia 28b; MAIMONIDES, *supra* note 88, at 13:1.

167. Babylonian Talmud, Bava Metzia 28b. *But see id.* (explaining that finders could not announce their find publicly because of confiscators who would claim the property in the name of the crown rather than seeking to return the property to its owner).

168. *See* LIADI, *supra* note 88, ¶¶ 2, 21.

owner's behalf.[169] Similarly, as mentioned above, when someone discovers property that does not have a *siman* and the property is such that there is no presumption that its owner is already aware of its loss, the finder cannot keep it for himself but must hold on to it indefinitely on the owner's behalf.[170] But because the item does not have an identifying mark, the finder has no duty to seek the owner via *hachraza*.[171]

While the finder is in possession of property that he has no right to keep, the law considers him to be the owner's bailee.[172] Thus, the finder cannot use the property for his own personal gain but must only use the property when it is necessary for the preservation of the property alone.[173] For example, if the property is such that it will rot if it is merely stored away—like wooden utensils—the finder must at times use the property to preserve it.[174] Also, the finder must shake off and air out woolen garments every thirty days.[175] Needless to say, the finder may not sell the property for his own gain.[176] On the other hand, when the property is perishable and selling it would benefit the owner, the finder should sell it.[177] This sale, however, must be conducted under the aegis of the *Beit Din*—Jewish Court—to ensure the fairness of the sale price and to ensure that the finder will not sell it to himself for below market value.[178] Finally, the finder must secure the property to prevent its loss, theft, or destruction.[179]

IV. THE AMERICAN COMMON LAW ON FINDS

After examining the Jewish law on finds, this Article now examines the American Common Law's provisions on finds and compares these common law provisions with the Jewish law. The common law categorizes finds into four categories[180]: lost property; mislaid property; treasure trove;[181] and abandoned

169. *Id.* ¶ 22.
170. *See* discussion *supra* Section III.B; TUR CHOSHEN MISHPAT, *supra* note 59, at 262:3; LIADI, *supra* note 88, ¶ 8.
171. LIADI, *supra* note 88, ¶ 8.
172. *See id.* ¶¶ 24, 29.
173. *Id.* ¶¶ 22–23.
174. *Id.* ¶ 22.
175. *Id.* ¶ 23.
176. LIADI, *supra* note 88, ¶ 22.
177. *Id.*
178. *See id.*
179. *Id.* ¶ 29.
180. *See, e.g.*, Benjamin v. Lindner Aviation, Inc., 534 N.W.2d 400, 406 (Iowa 1995) (en banc).
181. Some jurisdictions do not recognize treasure trove as a distinct category under the common law but categorize such property as mislaid. *E.g.*, Corliss v. Wenner, 34 P.3d 1100, 1105 (Idaho Ct. App. 2001).

property.[182] This Article will examine each of these categories and compare them with the corresponding Jewish law.[183]

A. *Lost Property*

When an owner involuntarily parts with his property through neglect, carelessness, or inadvertence and does not know where to find it, the property is considered lost.[184] For example, when someone sits in a taxi and coins slip out of his pocket and fall behind the seat cushion, the person who later discovers them will be considered to have found *lost* property.[185] Unlike Jewish law, the common law does not place an affirmative duty to retrieve lost property.[186] Instead, when someone sees lost property, he can simply ignore it.[187] Thus, under common law, the *finder* is not the first person to *see* the property but is the first person who takes charge of the item intending to reduce it to his possession.[188] Once he does so, however, he must exercise ordinary care in keeping the property safe for its true owner.[189] Also, the finder must make a reasonable attempt to find its true owner.[190] Unlike Jewish law, however, the common law does not prescribe a clear method for tracking down and determining who the true owner is.[191]

Also, unlike Jewish law, the common law allows the finder to use the property for his personal use until he locates the property's true owner.[192] The law also gives the finder relative title to the property.[193] This means, the finder's right to the property is better than anyone else's right to the property, except for that of the true owner.[194] Thus, if after finding the property, he loses it as well,

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182. *Benjamin*, 534 N.W.2d at 406.

183. *See* discussion *infra* Section IV.A–D.

184. *See, e.g.*, Morse v. Illinois Dep't of Pro. Regul., 737 N.E.2d 678, 680 (Ill. App. Ct. 2000).

185. *See* 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* § 14, Westlaw (database updated Aug. 2022).

186. *Id.* § 33; RAY ANDREWS BROWN, A TREATISE ON THE LAW OF PERSONAL PROPERTY § 15, at 27 (1936).

187. 1 AM. JUR. 2D, *supra* note 185, § 33; BROWN, *supra* note 186, § 15, at 27.

188. Powell v. Four Thousand Six Hundred Dollars ($4,600.00) U.S. Currency, 904 P.2d 153, 155 (Okla. Civ. App. 1995); BROWN, *supra* note 186, § 11, at 22.

189. 1 AM. JUR. 2D, *supra* note 185, §§ 33, 35; BROWN, *supra* note 186, § 15, at 27.

190. 1 AM. JUR. 2D, *supra* note 185, § 33.

191. *See* Brooks v. State, 35 Ohio St. 46, 49–50 (1878); *id.* at 51 (Okey, J., dissenting); 1 AM. JUR. 2D, *supra* note 185, § 35.

192. *See* 1 AM. JUR. 2D, *supra* note 185, § 29.

193. *Id.*

194. *Id.*

his right to the property will be stronger than any subsequent finder's right to it, giving him the ability to demand it from any subsequent finder in court.[195]

Similar to Jewish law, when someone finds lost property in another's home or on another's land, the common law considers both the homeowner's expectations in keeping property discovered there, as well as the finder's right to be present there, in determining whether to award the property to the finder or the owner of the premises.[196] For example, in the English case[197] *Hannah v. Peel*,[198] a solider found a brooch in someone's home, and the court awarded the brooch to the soldier because the soldier had a legal right to be in the home, and the homeowner did not have a reasonable expectation to keep the finds discovered in the home.[199] In that case, the defendant, Peel, owned the home where the brooch was found but never had a chance to occupy the home because the English military had quartered soldiers there.[200] While the soldiers were quartered there, one of them, Hannah, found a brooch, which was covered in dust and cobwebs, in a crevice atop a window frame.[201] He handed the brooch to the police to find its owner.[202] Unable to find its true owner, the police turned the brooch over to Peel, who claimed to have the best title because it was found in his home.[203] Hannah brought suit against Peel to regain possession of the brooch.[204] He argued that as the finder, his rights superseded that of Peel's.[205] The court agreed with Hannah, reasoning that Peel did not have a reasonable expectation to keep lost property found in his home because he had never occupied the home and did not know the brooch existed until after Hannah found it.[206] Thus, the court awarded the finder with the brooch.[207]

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195. *See id.*

196. JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW § 4.06[B][1], [2], at 41 (3d ed. 2012).

197. This case is discussed in American law books on property and has been heavily cited by American courts. *E.g.*, *id.*; Hill v. Schrunk, 292 P.2d 141, 142 (Or. 1956).

198. [1945] 1 K.B. 509.

199. *Id.* at 510, 521.

200. *Id.* at 510.

201. *Id.*

202. *Id.*

203. *Hannah*, [1945] 1 K.B. at 510, 511.

204. *Id.* at 510–11.

205. *Id.* at 511.

206. *Id.* at 521.

207. *Id.*

On the other hand, when the finder has no legal right to be on the land but discovers lost property while trespassing, the landowner's right to the lost property will be greater than the finder's right to it.[208]

B. *Mislaid Property*

Unlike lost property, the common law considers property that its owner voluntarily put down but forgot to retrieve to be mislaid, and requires that such property remain in the custody of the owner of the premises where the property was discovered.[209] For example, when someone takes out his wallet to pay the cashier and forgets his wallet on the counter near the cash register, and another customer finds it, the finder has no right to take possession of this wallet and must hand the wallet over to the store owner.[210] This is because the law presumes that once the true owner discovers the absence of his wallet, he will retrace his steps to the store and thereby be reunited with his wallet.[211] Like the finder of lost property, the store owner must keep mislaid goods as a gratuitous bailee on behalf of the true owner.[212] But until the true owner is ascertained, the store owner may use the property, and his title to the property is second only to the true owner's title to it.[213]

Also, when someone discovers property that was purposefully concealed above the ground or embedded in the soil, and there is no evidence that would allow the finder to presume that the owner is likely dead, the owner of the *locus in quo*'s rights will supersede the finder's rights to the property.[214] This seems much like Jewish law in that the common law does not award the finder with property that its owner is likely to return and collect.[215] The difference between Jewish law and the common law, however, is that the common law allows the owner of the premises to use the property until the true owner is ascertained,[216] whereas Jewish law prescribes that the property not be disturbed at all.[217]

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208. Favorite v. Miller, 407 A.2d 974, 978 (Conn., 1978). This is to prevent the finder from reaping benefits from his trespass. *Id.* On the other hand, there is a jurisdictional split on whether an employee who finds lost property on his employer's premises has rights superior to that of his employer over the find. *See* 1 AM. JUR. 2D, *supra* note 185, § 30.

209. *Favorite*, 407 A.2d at 976–77; 1 AM. JUR. 2D, *supra* note 185, § 37.

210. *See* SPRANKLING, *supra* note 196, § 4.03[B][3], at 36; BROWN, *supra* note 186, § 14, at 25, 26.

211. BROWN, *supra* note 186, § 14, at 26.

212. 1 AM. JUR. 2D, *supra* note 185, § 38.

213. *Id.*

214. *See* Benjamin v. Lindner Aviation, Inc., 534 N.W.2d 400, 406–07, 408 (Iowa 1995) (en banc).

215. *See* LIADI, *supra* note 88, ¶¶ 12, 13; BROWN, *supra* note 186, § 14, at 25, 26.

216. *See Benjamin*, 534 N.W.2d at 408; 1 AM. JUR. 2D, *supra* note 185, § 38.

217. *See* LIADI, *supra* note 88, ¶¶ 12, 13; discussion *supra* Section III.C.1–2.

C. *Treasure Trove*

Unlike mislaid property, if someone discovers gold, silver, or currency hidden in or above the ground, and the evidence shows that the property has been there for a long time, giving the finder reason to presume that its owner is long dead, the courts deem such property to be treasure trove, and the finder's rights to such property will supersede the premise owner's rights to it.[218] Although the courts have not expressed how long the precious metals or paper currency must be concealed to be considered treasure trove, a court found thirty-five years to be insufficient.[219]

Similarly, under Jewish law, when someone discovers old property, embedded near the bottom of an ancient wall, he may keep it,[220] provided that the wall was built before the current land owner or the current land owner's ancestors lived on the land.[221] Also, as mentioned above,[222] when someone discovers property buried in the ground or under a pile of rubble, and the property was seemingly there for a long time,[223] Jewish law allows the finder to keep it,[224] as long as the burial spot is on public property.[225] On the other hand, when property is buried or concealed on private land, Jewish law instructs the finder to leave the find alone.[226]

D. *Abandoned Property*

Unlike lost and mislaid property, the common law on finds gives full title to the person who finds abandoned property.[227] To gain title, however, the finder must be actively engaged with reducing the property to his possession intending to acquire title.[228] Merely discovering the property is not enough.[229]

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218. *Benjamin*, 534 N.W.2d at 406. On the other hand, some jurisdictions do not recognize treasure trove as a distinct category of the common law on finds. *E.g.*, Corliss v. Wenner, 34 P.3d 1100, 1105 (Idaho Ct. App. 2001). Instead, they consider such property to be mislaid, and thus award better title to the owner of the premises where the property was found. *Id.*

219. *Benjamin*, 534 N.W.2d at 407.

220. EPSTEIN, *supra* note 147, at 260:1.

221. *Id.*

222. *See* discussion *supra* Section III.C.1.

223. For example, rusted coins. LIADI, *supra* note 88, ¶ 12.

224. *Id.*

225. *Id.*

226. *Id.*

227. Benjamin v. Lindner Aviation, Inc., 534 N.W.2d 400, 406 (Iowa 1995) (en banc); 1 AM. JUR. 2D, *supra* note 185, § 25.

228. 1 AM. JUR. 2D, *supra* note 185, § 25.

229. *Id.*

Property is considered abandoned when the owner intentionally and voluntarily relinquishes all rights to the property without receiving any consideration for the property and does not expect to reacquire the property again.[230] On the other hand, when the owner relinquishes his title with the intent that a specific person takes it, the property is not abandoned.[231]

In determining whether the owner abandoned his property, and in the absence of an express declaration of abandonment, the courts consider, among other things, the condition of the property, the location where the property was found, how long passed since the owner put it there, and whether the owner attempted to regain possession of the property.[232] If there is no evidence of abandonment, the property will either be deemed as lost, mislaid, or treasure trove, and the true owner will retain the best title to it.[233]

While both the common law and Jewish law recognize that abandoned property belongs to the first person to take possession,[234] there are still two notable differences. First, Jewish law presumes property to be abandoned—irrespective of the property's condition—when the property is discovered in an *unsecure location*, and the property is such that the law presumes that its owner is already aware of its absence (e.g., money).[235] The common law, on the other hand, will consider the property's condition.[236] Second, aside from intentional abandonment, Jewish law recognizes *yeiush* as a form of relinquishing one's title to lost property.[237] For example, when an owner loses an item that does not have an identifying mark, the law presumes *yeiush*.[238] Therefore, as long as the property is such that the finder can be assured that its owner was already aware of its loss before he picked it up, the finder can keep it.[239] Under the common law, however, the true owner will always retain the best title to lost property in the absence of a formal declaration of abandonment.[240]

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230. 25 AM. JUR. PROOF OF FACTS 2D *Abandonment of Tangible Personal Property* § 2, Westlaw (database updated Aug. 2022).

231. *Id.*

232. *Id.* § 6.

233. *See id.* §§ 2, 3.

234. *See* sources cited *supra* notes 160–61, 227.

235. *See* LIADI, *supra* note 88, ¶¶ 15–16; discussion *supra* Section III.C.3.

236. *See* 25 AM. JUR. PROOF OF FACTS 2D, *supra* note 230, § 6.

237. *See, e.g.*, TUR CHOSHEN MISHPAT, *supra* note 59, at 262:3.

238. *Id.*

239. *Id. But see* LIADI, *supra* note 88, ¶ 18 (explaining that Jewish law requires the finder to go beyond the letter of the law and return the lost property to its owner, despite the owner's relinquishing his rights through *yeiush*, because *yeiush* is not a complete abandonment).

240. *See* 25 AM. JUR. PROOF OF FACTS 2D, *supra* note 230, § 3.

V. CRITICISM OF THE COMMON LAW'S INTENT-BASED CATEGORIES

Commentators criticize the common law's category system because of the emphasis that it puts on the owner's intent at the time in which he first parted with his property.[241] Such criticism is justified because it is often hard to discern the owner's intent merely based on the circumstances under which the property was discovered thereby giving rise to constant litigation.[242] For example, when someone finds a wallet on the floor of a store, it is possible that it is either lost or mislaid.[243] If the owner inadvertently dropped it, then it is lost and the finder's rights would supersede the shop owner's rights to it.[244] On the other hand, if the owner first placed it on the counter, and someone subsequently knocked it onto the floor, the property is technically mislaid, and the shop owner's rights should therefore be superior to the finder's rights thereto.[245] To avoid endless litigation on this matter, some commentators have suggested a change in the law, proposing that the finder and the owner of the *locus in quo* split the find.[246] A similar issue arises between mislaid property and treasure trove.[247] This is because when the property is considered old enough to be considered treasure trove, the finder's rights supersede the owner of the *locus in quo*'s rights.[248] On the other hand, if the courts determine that the property is not old enough, they will categorize the property as mislaid, and the owner of the *locus in quo*'s rights will be superior to the finder's rights.[249]

Another issue with the common law system is that it does not give finality to the status of the property's title because the finder's title or the owner of the *locus in quo*'s title will always be inferior to the true owner's title.[250] To

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241. SPRANKLING, *supra* note 196, § 4.03[C], at 37.

242. *Id.*; *see also* R.H. Helmholz, *Equitable Division and the Law of Finders*, 52 FORDHAM L. REV. 313, 313 (1983).

243. *See* SPRANKLING, *supra* note 196, § 4.03[B][3], at 36, § 4.03[C], at 37.

244. 1 AM. JUR. 2D, *supra* note 185, § 29.

245. *Id.* §§ 29, 37, 38.

246. Helmholz, *supra* note 242, at 314; Comment, *Lost, Mislaid, and Abandoned Property*, 8 FORDHAM L. REV. 222, 237 (1939). In some cases, Jewish law authorities also require the finder and landowner to split the find. EPSTEIN, *supra* note 147, 260:4–5. For instance, when a finder discovers an item hidden inside a wall that divides public and private property, and the item seems to have been there for a long time, and there is no way to establish from which side of the wall the item was initially placed in it, the law prescribes that the finder and the owner of the private property split the find. *Id.*

247. *See* Benjamin v. Lindner Aviation, Inc., 534 N.W.2d 400, 406–07 (Iowa 1995) (en banc).

248. *See id.* at 406.

249. *Id.* at 407.

250. 1 AM. JUR. 2D, *supra* note 185, §§ 29, 38.

promote more efficiency on the laws of finds, many states, including Florida, have enacted statutes to govern these laws.[251]

VI. FLORIDA'S STATUTORY LAW ON FINDS

Florida's statutes do not differentiate between the lost and mislaid categories but categorizes them both as lost property.[252] Similar to Jewish law, Florida's statutes do not seem concerned with the owner's actual intent.[253] Rather, the statutes deal with how the property would seem to the finder.[254] For instance, under Florida's statutes, property is considered lost when it is found in an area that is open to the public, and it seems to the finder that the property would still be valuable to its owner.[255] On the other hand, if the property does not seem to be valuable to its owner, it is considered abandoned.[256]

Under Florida's statutes, when someone discovers property that is either lost or abandoned, he cannot take it for himself and must report it to the police.[257] If the finder wants title—should the owner not be found—he must deposit a reasonable sum with the police to cover transportation, storage, and publication of notice of the property.[258] If the owner is located, he will need to reimburse the finder for the sum the finder paid out to secure the property and locate the owner.[259] On the other hand, if the owner is not located within ninety days from when the police publish notice in compliance with the statute, title to the property will vest in the finder.[260]

By abolishing the common law distinctions between the various categories of lost property, delineating clear guidelines for what a finder must do when he finds property, and specifying a date for when full title will vest with the finder, Florida's statutes give a sense of finality to the law on finds.[261]

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251. *Id.* § 32; Jennifer S. Moorman, Comment, *Finders Weepers, Losers Weepers:* Benjamin v. Lindner Aviation, Inc., 82 IOWA L. REV. 717, 717 (1997); *see also* FLA. STAT. §§ 705.101(2)–(3), .102–.104 (2022). *But see* Moorman, *supra*, at 717–18 (explaining that, despite statutes to the contrary, many state courts continue to adhere to the common law distinctions, thereby causing inconsistency and confusion).

252. FLA. STAT. § 705.101(2).

253. *See id.* § 705.101(2)–(3).

254. *See id.*

255. *See id.* § 705.101(2).

256. *Id.* § 705.101(3).

257. FLA. STAT. § 705.102(1).

258. *Id.* § 705.102(2).

259. *Id.*

260. *Id.* § 705.104(1).

261. *Id.* §§ 705.101(2)–(3), .102, .104(1).

VII. CONCLUSION

As explained above, unlike both the common law and Florida's statutory law, Jewish law places an affirmative duty on the finder to retrieve lost property and personally seek out its owner.[262] But Jewish law only imposes this duty on someone who discovered property in an area where most of the passersby subscribe to Jewish law.[263] On the other hand, when someone discovers property in an area where most of the passersby do not follow Jewish law, he should follow the local government's law on finds.[264] Thus, in the latter instance, no conflict arises between Jewish law and Florida's statutes.[265]

Also, when someone discovers property that does not have a *siman*, and Jewish law presumes that its owner relinquished his rights already, there is, once again, no conflict between Jewish law and Florida's statutes on finds, and the finder must report the property to the police per Florida's statute.[266] This is because, under these circumstances, the Jewish law on finds would allow the finder to keep the property.[267] Thus, reporting the property to the police would not abrogate the Jewish law on finds.[268] This is especially so because Jewish law requires the finder to go beyond the letter of the law and return the property to its owner when the finder can ascertain him.[269]

On the other hand, when one discovers property in an area where most of the passersby follow Jewish law, and the property has a *siman*, some friction may arise.[270] This is because Jewish law—in the absence of any conflict with the local law—requires the finder to personally retrieve the property and announce it in the local synagogues.[271] Florida's statutes, on the other hand, provide that the finder should report the lost property's location to the police, and it is unclear whether picking it up to return it to its owner—and not to appropriate it for

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262. *See* sources cited *supra* notes 88, 186, 257, 260.

263. *See* LIADI, *supra* note 88, ¶ 17.

264. *See id. But see id.* (requiring a finder to return Jewish sacred items, like holy books, even when finding them in an area mostly frequented by non-Jews).

265. *See id.*

266. *See id.* ¶ 8; BLAU, *supra* note 2, 2:22, at 316 n.53; FLA. STAT. § 705.102.

267. LIADI, *supra* note 88, ¶ 8.

268. *See id.*; BLAU, *supra* note 2, 2:22, at 316 n.53.

269. LIADI, *supra* note 88, ¶ 18. However, some halachic authorities provide that a finder need not do so when he is poor, and its original owner is rich. *Id.* ¶ 20.

270. *See id.* ¶¶ 3, 17.

271. *See id.* ¶¶ 3, 17, 21. On the other hand, when the property does not have a *siman*, some halachic authorities maintain that there is no affirmative duty to retrieve it because the finder will not know to whom it must be returned. BLAU, *supra* note 2, 1:7, at 278. Thus, friction may be avoided by not retrieving it and simply reporting it to the police, pursuant to the statute. *See id.* 2:22, at 316 n.53; FLA. STAT. § 705.102.

himself—is a violation of this provision.[272] Because there is no case law on this matter, it is uncertain how courts will interpret this provision.[273] To add to this uncertainty, Jewish law is also unclear about how long the finder needs to carry on making announcements in the synagogues.[274] This issue becomes murkier as follows: if, before handing the find over to the police, the finder takes the property, makes announcements in the synagogues, and then mistakenly hands the property over to an imposter, he may be opening himself up to liability under Florida's statutory law.[275] Similarly, if the finder hands the property over to the police and the police hand the item over to an imposter, the finder may be responsible under Jewish law for not securing the property until receiving a *siman* recognized under Jewish law.[276] Thus, in instances like these, it is advisable to seek professional counsel to see how to maintain both Jewish law and Florida's statutory law.[277]

This is especially so because the doctrine of *dina d'malchuta dina* gives deference to the local government's laws on finds when they conflict with Jewish law.[278] Thus, if the finder violates Florida's statutes to maintain what he perceives as his duty under the Jewish law on finds, he may be violating this Jewish law doctrine as well.[279]

On the other hand, if the finder first gives the property to the police, and the owner is not found after ninety days, under which the statute allows the finder to gain title,[280] he would still need to comply with the Jewish law on finds and maintain the property on the owner's behalf.[281] This is because doing so after

272. FLA. STAT. § 705.102.

273. *See* FLA. STAT. ANN. § 705.102 (West 2022).

274. *See* LIADI, *supra* note 88, ¶¶ 21–22. On the other hand, the police's standards for returning property to its owner may not comply with Jewish law standards. BLAU, *supra* note 2, 2:22, at 317 n.53. Thus, if the finder hands it over to the police, and the police give the property to the wrong person, the finder would not have fulfilled his Jewish law obligation of returning lost property to its owner. *Id.* Also, the publication of notice by the police may not relieve the finder from announcing the item in the local synagogues under Jewish law. *See id.*

275. *See* 1 AM. JUR. 2D, *supra* note 185, § 33.

276. *See* BLAU, *supra* note 2, 2:22, at 317 n.53.

277. *See* LIADI, *supra* note 88, ¶ 21.

278. *See* Isserles, *supra* note 1, at 259:7; BLAU, *supra* note 2, 2:22, at 316 n.53.

279. *See* Isserles, *supra* note 1, at 259:7; BLAU, *supra* note 2, 2:22, at 316 n.53.

280. FLA. STAT. § 705.104 (2022).

281. *See* BLAU, *supra* note 2, 2:22, at 317 n.53. *But see id.* (arguing that perhaps *dina d'malchuta dina* would justify allowing the finder to at least use the property for his personal use until he finds its true owner).

complying with Florida's statutes would not violate Florida's statutory law on finds.[282]

282. FLA. STAT. §§ 705.102, .104. On the other hand, when the finder reports the property to the police, he is not obligated under Jewish law to pay the fees to receive title should the owner not be found because Jewish law does not require the finder to expend money to return lost property. LIADI, *supra* note 88, ¶ 33.

CENSORSHIP OF THE MARKETPLACE OF IDEAS: WHY CRITICAL RACE THEORY BANS IN PUBLIC SCHOOLS VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS

MARIA IGNACIA ARAYA*

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I. INTRODUCTION

Critical race theory has reemerged under the national spotlight in the last two years.[1] This theory that originated as a response to the civil rights movement, now stands at the center of political debate.[2] The topic was once an obscure academic framework circulating strictly in higher education, and now it has evolved into a catchall term for any discussion regarding systemic racism or

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1. Jacey Fortin, *Critical Race Theory: A Brief History*, S.F. EXAM'R, July 29, 2021, at 10.

2. *See id.* at 11; Ricardo Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 IOWA L. REV. 1505, 1510 (2009).

racial bias.[3] Efforts to thwart discussions about critical race theory have resulted in bans at the national level, and more recently, bans at the state level.[4] Parents and legislators in support of legislation banning critical race theory in public schools allege that educators are "'indoctrinating' students with [] lessons on race" that cause students discomfort and shame.[5] Meanwhile, critical race theorists, educators, and some parents say that opponents are misconstruing the theory's principles to reverse progress made in racial equality and add that the theory is not taught in K-12 classrooms.[6] This Comment seeks to clarify what the academic framework of critical race theory means at its core and the history of how it came to be in order to illustrate how far it has strayed from its true meaning.[7] This Comment also seeks to explain why such bans are unconstitutional.[8] Part II of this Comment provides background on the history of critical race theory and how it was established, as well as the tenets of critical race theory and the concepts that critical race theorists promote.[9] Part III of this Comment explores how critical race theory has spilled over from scholarly commentary into the political arena.[10] Part IV of this Comment reviews legislation that has been introduced and passed nationwide and briefly analyzes the general language contained in the legislation.[11] Part V explores the theme in American history to keep certain materials out of public schools.[12] Part VI explores issues of constitutionality with regard to the First Amendment, while Part VII explores issues of constitutionality with regard to the Fourteenth Amendment and includes an analysis focused on the "void for vagueness" doctrine and the Equal Protection Clause.[13] Part VIII applies the analysis to Florida law.[14]

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3. *See* Olivia B. Waxman, *'Critical Race Theory Is Simply the Latest Bogeyman.' Inside the Fight Over What Kids Learn About America's History*, TIME, http://time.com/6075193/critical-race-theory-debate (July 16, 2021, 7:42 PM); Fortin, *supra* note 1.

4. *See* Fortin, *supra* note 1; Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WEEK, http://perma.cc/LPF6-V65D (Apr. 1, 2022).

5. Kiara Alfonseca, *Critical Race Theory Thrust into Spotlight by Misinformation*, ABC NEWS (Feb. 6, 2022, 10:02 AM), http://abcnews.go.com/US/critical-race-theory-thrust-spotlight-misinformation/story?id=82443791.

6. *Id.*

7. *See* discussion *infra* Part II.

8. *See* discussion *infra* Parts VI–VII.

9. *See* discussion *infra* Part II.

10. *See* discussion *infra* Part III.

11. *See* discussion *infra* Part IV.

12. *See* discussion *infra* Part V.

13. *See* discussion *infra* Parts VI, VII.

14. *See* discussion *infra* Part VIII.

II. OVERVIEW OF CRITICAL RACE THEORY

A. *Origins*

The birth of critical race theory can be attributed to the plateau that the civil rights movement hit following the landmark decisions and legislation passed in the 1950s, 60s, and early 70s.[15] 1954 was the beginning of seeing monumental institutional changes meant to combat racism.[16] The *separate but equal* doctrine was overturned, and then liberal momentum carried the civil rights movement to victories aimed at dismantling the badges of segregation.[17] The Civil Rights Act of 1964 and the Voting Rights Act of 1965 evidenced the progress that the movement had achieved.[18] Following these successes, there was a slowdown in momentum of the civil rights movement.[19] The inauguration of Richard Nixon in 1969 opened the door for four United States Supreme Court justice nominations, which did not help streamline the path towards racial justice.[20] Rather, the United States Supreme Court decisions during Nixon's presidency indicated a drastic change in the direction that the civil rights movement was heading in.[21] For example, in 1976, the United States Supreme Court established that only governmental actions motivated by discriminatory intent violated the United States Constitution and "rejected [using] discriminatory effects as the basis for determining unconstitutional discrimination."[22] Another attack on the opportunities put forth in the civil rights movement happened in 1978 when the United States Supreme Court struck down a medical school's admission plan because it reserved sixteen of its one hundred admission seats for Black, Native American, Hispanic, and Asian students.[23] The United States Supreme Court became a vehicle by which civil rights policies

15. *See* Bernie D Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?*, 18 HARV. BLACK LETTER L.J. 1, 1, 13 (2002).

16. *See id.* at 1.

17. *See id.*; Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954); Kevin Brown & Darrell D. Jackson, *The History and Conceptual Elements of Critical Race Theory*, *in* HANDBOOK OF CRITICAL RACE THEORY IN EDUCATION 9, 9 (Marvin Lynn & Adrienne D. Dixson eds., 2013).

18. Jones, *supra* note 15, at 1, 6; Brown & Jackson, *supra* note 17, at 9–10.

19. Jones, *supra* note 15, at 1.

20. Brown & Jackson, *supra* note 17, at 10.

21. *See id.*

22. *See* Washington v. Davis, 426 U.S. 229, 242 (1976); Brown & Jackson, *supra* note 17, at 11.

23. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 271, 276 n.6 (1978); Brown & Jackson, *supra* note 17, at 11.

could be rejected, and activists viewed this as a threat to civil liberties.[24] This led scholars and activists in legal education to turn to examining race through a different lens.[25]

Critical race theorists challenged traditional civil rights discourse and instead, looked towards understanding the roots of racism and how it has persisted in the United States.[26] Derrick Bell, a pioneer of critical race theory ideas, was an attorney advocating for the civil rights movement through the National Association for the Advancement of Colored People ("NAACP").[27] Bell asserted that the United States Supreme Court's decision to declare racial segregation unconstitutional was not aimed at furthering the interests of Black Americans, but rather was decided as a product of "interest convergence."[28]

It is from the interest convergence principle that concepts about critical race theory arose, such as the idea that racism is a permanent part of American society.[29] Bell's interest convergence principle held that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[30] The development of this principle came to be because of the idea that the United States Supreme Court's actions to further racial equality did not serve to address the struggles of Black individuals.[31] Rather, they were a means to assert America's stance on racial equality to the country and to the world and to establish the nation's credibility.[32] The United States court-sanctioned racial inequality posed a massive problem in its competition with the Soviet Union for the support of developing countries.[33] As the Cold War emerged, it became difficult for the United States to justify the persistence of racial inequality in the country.[34] The Soviet Union had an advantage over the United States with international recognition of the treatment of Black individuals in the Jim Crow South, which could be overcome through the United States Supreme Court's action.[35]

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24. Jones, *supra* note 15, at 3.
25. Brown & Jackson, *supra* note 17, at 12–13.
26. *Id.* at 14; Jones, *supra* note 15, at 26.
27. Jones, *supra* note 15, at 3, 33.
28. Brown & Jackson, *supra* note 17, at 14, 17; *see also* Jelani Cobb, *The Limits of Liberalism*, NEW YORKER, Sept. 20, 2021, at 20, 24.
29. Brown & Jackson, *supra* note 17, at 14.
30. *Id.* at 17.
31. *See id.* at 16–17; Jones, *supra* note 15, at 3; Cobb, *supra* note 28, at 22.
32. *See* Brown & Jackson, *supra* note 17, at 16–17; Jones, *supra* note 15, at 3; Cobb, *supra* note 28, at 22.
33. Delgado, *supra* note 2, at 1507.
34. *See id.*
35. *See id.*

B. *Basic Principles of Critical Race Theory*

Kimberlé Crenshaw coined the term "Critical Race Theory" in the late 1980s.[36] Critical race theorists often offer different insights, but the general principles are commonly accepted.[37] Along with other Bell students, Crenshaw endorsed techniques involving storytelling to reveal one of the main foundations of critical race theory, which is the premise that racism is not an occasional part of the lives of Black individuals, but rather it surrounds every part of their lives.[38] Critical race theory views racism in a broader context and does not limit discrimination to overt acts thereof; rather, it focuses on routine activities that are often left unnoticed.[39] Critical race theorists recognize the importance of embracing the stories of Black individuals and embedding these stories into scholarship.[40]

Proponents of critical race theory assert that racial bias is a manifestation of institutions and agencies such as the economy, the criminal justice system, and the education system.[41] They assert that racism is a normal feature of American systems that are woven into the structures and embedded in public policy.[42] An example is racial inequality in education, including the dominance of culturally exclusive narratives in history courses, school funding inequalities, and racially segregated education.[43] Further, the overrepresentation of Black Americans in the criminal justice system and the way the legal system perpetuates racial inequality can also be observed through a critical race theory lens.[44] Another well-known illustration is America's War on Drugs, which invoked higher penalties for possession of crack cocaine than those for powder cocaine and resulted in Black Americans being convicted at a higher rate than White Americans.[45] Critical race theory can also be used to understand how the average

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36. Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 333 (2006).

37. *Id.* at 354–55.

38. Brown & Jackson, *supra* note 17, at 19; Jones, *supra* note 15, at 4.

39. *See* Janel George, *A Lesson on Critical Race Theory*, 46 HUM. RTS., no. 2, 2021, at 2, 2–3.

40. *See id.* at 3.

41. *See id.*

42. *Id.*

43. *Id.* at 4.

44. *See* Gabriella Borter, *Explainer: What 'Critical Race Theory' Means and Why It's Igniting Debate*, REUTERS, http://www.reuters.com/legal/government/what-critical-race-theory-means-why-its-igniting-debate-2021-09-21/ (last visited Nov. 6, 2022).

45. *Id.*

White household in the United States is seven times wealthier than the average Black one.[46] This can be traced back to the United States government's practice in the 1930s of redlining.[47] These effects are still felt today among Black homeowners.[48]

Critical race theorists generally reject the idea of "colorblindness" in the law, which implies that race should not be determinative of an individual's ability to succeed in society.[49] One of the most notable implications of colorblindness in the law was written by Justice Harlan, who wrote, "in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens."[50] Critical race theorists reject viewing race from this standpoint.[51] Instead, critical race theorists advocate for understanding the ways legal colorblindness has disadvantaged Black Americans by ignoring the social and institutional structures that maintain the systemic lack of opportunities.[52] Proponents assert that a colorblind approach to racism does not cure inequalities because it fails to acknowledge race, which is crucial to build towards progress.[53] Critical race theorists understand race to be pervasive and a creation of society rather than a biological reality.[54] "[R]ather, races are categories that society invents, manipulates, or retires when convenient."[55]

III. SPILLOVER FROM ACADEMIA INTO THE MEDIA

Critical race theory has gained attention in recent years, initially following the murder of George Floyd at the hands of police, which drew nationwide conversations about race.[56] Following the tragedy, schools

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46. Claire Suddath, *How Critical Race Theory Became a Political Target*, BLOOMBERG, http://www.bloomberg.com/news/articles/2021-10-02/how-critical-race-theory-became-a-political-target-quicktake (Nov. 30, 2021, 1:35 PM).

47. *Id.*

48. *Id.*

49. Mutua, *supra* note 36, at 334.

50. *Id.* at 335; Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

51. *See* Mutua, *supra* note 36, at 337.

52. *See id.* at 336.

53. *See id.* at 334, 336.

54. Fortin, *supra* note 1.

55. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 9 (Richard Delgado & Jean Stefancic eds., 3d ed. 2017).

56. Fortin, *supra* note 1; Marisa Iati, *What Is Critical Race Theory, and Why Do Republicans Want to Ban It in Schools?*, WASH. POST (May 29, 2021, 8:00 AM), http://www.washingtonpost.com/education/2021/05/29/critical-race-theory-bans-schools/.

nationwide began promoting diversity and inclusion efforts in their curriculum.[57] Districts have also encouraged anti-bias training for teachers and required lessons to include the experiences of marginalized groups.[58] The spillover of critical race theory into the contemporary political arena can be analyzed from the catalyst that waged the culture wars, which was conservative activist Christopher Rufo's appearance on Tucker Carlson's Fox News show in September 2020.[59] Rufo appeared on the show and denounced the federal government's alleged trainings aimed at teaching critical race theory.[60] Rufo stated that, "[c]ritical race theory has become, in essence, the default ideology of the federal bureaucracy and is now being weaponized against the American people."[61] In response to the call-to-action by Rufo to abolish critical race theory in the federal government, former President Donald Trump issued an executive order banning federal contractors from conducting racial sensitivity training, which President Biden has since revoked.[62] On September 4, 2020, Russell Vought, former Director of the Office of Management and Budget, under the instruction of former President Donald Trump, issued a Memorandum regarding training in the federal government.[63] It instructed agencies to:

> [I]dentify all contracts or other agency spending related to any training on 'critical race theory,' 'white privilege,' or any other training or propaganda effort that teaches or suggests either (1) that the United States is an inherently racist or evil country or (2) that any race or ethnicity is inherently racist or evil.[64]

57. Iati, *supra* note 56; *see also* Khiara M. Bridges, *Evaluating Pressures on Academic Freedom*, 59 HOUS. L. REV. 803, 804 (2022).

58. Iati, *supra* note 56.

59. *See* Bridges, *supra* note 57, at 812.

60. *See id.*

61. *See* Laura Meckler & Josh Dawsey, *Republicans, Spurred by an Unlikely Figure, See Political Promise in Targeting Critical Race Theory*, WASH. POST (June 21, 2021, 6:22 PM), http://www.washingtonpost.com/education/2021/06/19/critical-race-theory-rufo-republicans/.

62. *See id.*; Exec. Order No. 13,950, 85 Fed. Reg. 60683 (Sept. 28, 2020); Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

63. *See* Memorandum from Russell Vought, Dir., Off. of Mgmt. & Budget, on Training in the Fed. Gov't to the Heads of the Exec. Dep'ts & Agencies (Sept. 4, 2020) (on file with the Executive Office of the President).

64. *Id.*; Bridges, *supra* note 57, at 813.

Discourse surrounding critical race theory garnered support among conservative activists, commentators, and politicians who turned to the discussion of critical race theory in K-12 schools.[65]

Despite the true meaning of critical race theory, the term's core principles have strayed in the conservative narrative.[66] Conversative activists and politicians now use the phrase broadly and generalize the theory to include any discussion of systemic racism and racial bias.[67] Rufo has taken credit for achieving the goal of spreading critical race theory into the public conversation and driving up negative perceptions; he explained that his coalition will turn it toxic and put various "cultural insanities" under the same label.[68] The descriptions that have been disseminated suggest that efforts to ban critical race theory do not involve legal scholarship.[69] For example, Rufo's website alleges that the key concepts and quotations of critical race theory include the fact that "all whites are racist."[70] These conceptions of critical race theory that differ from the term coined decades ago have had the effect of disseminating misinformation; for example, it has resulted in the portrayal of critical race theory as the basis of policies related to race, diversity trainings, and education about racism, regardless of how much of the true theory is involved in these initiatives.[71] Critical race theory has largely existed in scholarly journals for decades and has hardly been accepted into mainstream American society.[72] Critics of what has been called "critical race theory" in the mainstream media assert that bans are intended to protect children from anti-white indoctrination; however, school officials nationwide have denied teaching critical race theory in schools, and teachers are not trained in critical race theory to be able to incorporate it into K-12 curriculum.[73] It is a school of thought that law students and theorists find challenging and difficult to transform into understandable terms, even more so for students K-12.[74]

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65. Bridges, *supra* note 57, at 813–14.

66. *See* Iati, *supra* note 56.

67. *Id.*

68. *See* Christopher F. Rufo (@realchrisrufo), TWITTER (Mar. 15, 2021, 3:14 PM), http://twitter.com/realchrisrufo/status/1371540368714428416.

69. Bridges, *supra* note 57, at 814.

70. *Critical Race Theory Briefing Book*, CHRISTOPHER RUFO, http://christopherrufo.com/crt-briefing-book/ (last visited Nov. 6, 2022).

71. *See* Iati, *supra* note 56.

72. *See* Gary Peller, Opinion, *I've Been a Critical Race Theorist for 30 Years. Our Opponents Are Just Proving Our Point for Us*, POLITICO (June 30, 2021, 4:31 AM), http://www.politico.com/news/magazine/2021/06/30/critical-race-theory-lightning-rod-opinion-497046.

73. *See id.*; Alfonseca, *supra* note 5.

74. Peller, *supra* note 72.

IV. LEGISLATION

In conjunction with the nationwide culture-wars in the media and other spaces regarding critical race theory, many states have introduced or passed legislation to regulate the discussion of race in public schools.[75] The 2020-2021 school year introduced schoolboard meetings as battlegrounds for discourse addressing loosely defined sets of ideas regarding race and racial bias.[76] As of April 1, 2022, forty-two states introduced bills or took other measures to either restrict teaching critical race theory or limit how teachers can discuss racism and sexism.[77] Fifteen states have implemented these bans through legislation or through other measures.[78] According to a study conducted by UCLA, at least 894 school districts, enrolling 17,743,850 students, or thirty-five percent of all K-12 students in the United States, have been impacted by local anti-critical race theory efforts.[79] Idaho became the first state to pass legislation aimed to enact prohibitions against critical race theory in public education on April 28, 2021.[80] Idaho House Bill 377 ("HB 377") explicitly mentions critical race theory in the language of the Bill, explaining that the basic tenets that are banned in public schools are often found in "critical race theory" and "inflame divisions on the basis of sex, race, ethnicity, religion, color, national origin, or other criteria in ways contrary to the unity of the nation and the well-being of the state of Idaho and its citizens."[81] The Bill prohibits public institutions of higher education, school districts, and other public schools from directing students to adhere to specified teachings, such as the idea that "any sex, race, ethnicity, religion, color, or national origin is inherently superior or inferior."[82] The Bill also bans funding for any curriculum related to the tenets described in section 33-138 of the Bill.[83]

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75. Alfonseca, *supra* note 5; *see also, e.g.*, H.B. 1508, 67th Leg., Spec. Sess. (N.D. 2021); H.R. 550, 130th Leg., 1st Reg. Sess. (Me. 2021).

76. *See* MICA POLLOCK ET AL., THE CONFLICT CAMPAIGN: EXPLORING LOCAL EXPERIENCES OF THE CAMPAIGN TO BAN "CRITICAL RACE THEORY" IN PUBLIC K–12 EDUCATION IN THE U.S., 2020–2021, at 24 (2022).

77. Schwartz, *supra* note 4; Ryan Teague Beckwith, *The Issues Dividing America Ahead of the Midterms, Explained*, BLOOMBERG, http://www.bloomberg.com/news/articles/2022-04-07/mandates-don-t-say-gay-and-other-u-s-culture-wars-quicktake (Apr. 11, 2022, 12:27 PM); *see also, e.g.*, N.D. H.B. 1508.

78. Schwartz, *supra* note 4.

79. POLLOCK ET AL., *supra* note 76, at 11.

80. *See id.* at 30.

81. H.B. 377, 66th Leg., Reg. Sess. (Idaho 2021).

82. *Id.*

83. *Id.*

Much of the language in HB 377 is replicated among other bills introduced across the board.[84] For example, Florida Governor Ron DeSantis signed into law House Bill 7 ("HB 7"), the "Stop W.O.K.E. Act," in February 2022, which replicated the language of racial inferiority in the Idaho Bill and added that individuals should not be made to "feel guilt, anguish, or other forms of psychological distress because of actions, in which the [individual] played no part, committed in the past by other members of the same race, color, national origin, or sex."[85] In a handout issued by the State of Florida, the government asserts that the "Stop W.O.K.E. Act" "codifies the Florida Department of Education's prohibition on teaching critical race theory in K-12 schools," and that it "[p]rohibits school districts, colleges, and universities from hiring woke CRT consultants."[86] Legislation introduced and passed across the nation has also included a ban on teaching "divisive concepts."[87] Arkansas, Louisiana, Rhode Island, and West Virginia have introduced legislation bearing this language.[88] However, only Arkansas has gone as far as enacting the legislation into law.[89]

Critics of such bans hold that the language-banning instruction on "divisive concepts" has the effect of silencing speech that can encompass many different topics.[90] Educators, in particular, have noted the chilling effects of teaching in states where laws have either been introduced or passed.[91] Testimonials from teachers show that widespread confusion exists over what teachers can and cannot teach and that there is fear over losing school funding for participating in classroom instruction that may or may not be included in the legislation of their respective state ban.[92] Teachers have also revealed that they have begun to censor discussions in advance of new policies in order to avoid

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84. *See* POLLOCK ET AL., *supra* note 76, at 17; H.B. 377; *e.g.*, Fla. CS for HB 7, § 2 (2022) (proposed Fla. Stat. § 1000.05(4)(a)(7)).

85. *See* Fla. CS for HB 7.

86. *Stop W.O.K.E. Act*, OFFICE OF FLA. GOV. RON DESANTIS (Dec. 15, 2021), http://www.flgov.com/wp-content/uploads/2021/12/Stop-Woke-Handout.pdf.

87. *See* Anuli Ononye & Jackson Walker, *The States Taking Steps to Ban Critical Race Theory*, HILL (June 9, 2021, 1:13 PM), http://thehill.com/homenews/state-watch/557571-the-states-taking-steps-to-ban-critical-race-theory/.

88. *Id.*; ARK. CODE. ANN. § 25-1-902(a) (2022); H.B. 564, 2021 Leg., Reg. Sess. (La. 2021); H. 6070, 2021 Gen. Assemb., Jan. Sess. (R.I. 2021); H.B. 2595, 2021 Leg., Reg. Sess. (W. Va. 2021); S.B. 618, 2021 Leg., Reg. Sess. (W. Va. 2021).

89. *See* ARK. CODE ANN. § 25-1-902(a); Ononye & Walker, *supra* note 87.

90. *See* POLLOCK ET AL., *supra* note 76, at 31; *Joint Statement on Efforts to Restrict Education About Racism*, AM. ASS'N UNIV. PROFESSORS (June 16, 2021), http://www.aaup.org/news/joint-statement-efforts-restrict-education-about-racism#.Y83ruOzML0o.

91. *See* POLLOCK ET AL., *supra* note 76, at 69.

92. *See id.*

conflict with the state legislature as well as with local parents.[93] Although these laws have already impacted the American education system at large, the constitutionality of such bans has remained unanswered in the courts.[94]

V. THE COMMON TREND OF AMERICAN SCHOOLS AS VENUES FOR CULTURE WARS

Censoring race-based discussions in the classroom also censors fact-based classroom instruction, which has been a common trend in the history of education in America.[95] For example, topics such as evolution and sexual education have long been contested subjects in public school classrooms.[96] In 1925, high school science teacher John Scopes was arrested for teaching evolution in violation of a Tennessee law that banned the teaching of evolution in all educational institutions in the state.[97] He was found guilty,[98] and it was not until 1968 that the Supreme Court was able to test the constitutionality of anti-evolution laws once again.[99] In 1968, the Supreme Court unanimously found that an Arkansas law that banned teaching that mankind ascended or descended from a lower order of animals was unconstitutional and violated the Establishment Clause of the First Amendment.[100] Similar to the movement against critical race theory, the fight over evolution was an effort to plant a particular ideology in America's public schools.[101] The anti-evolution bills passed in the 1920s were similarly vague and did not capture the scientific aspect of evolution, banning things like "nefarious matter" from being taught in public schools.[102]

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93. *Id.* at 71.

94. *Id.* at 2; Engy Abdelkader, *Are Government Bans on the Teaching of Critical Race Theory Unconstitutional?*, ABA J. (Oct. 7, 2021, 10:22 AM), http://www.abajournal.com/columns/article/are-government-bans-on-the-teaching-of-critical-race-theory-unconstitutional.

95. *Teaching About Racism Is Essential for Education*, SCI. AM. (Feb. 1, 2022), http://www.scientificamerican.com/article/teaching-about-racism-is-essential-for-education/.

96. *Id.*

97. Tennessee v. Scopes, 289 S.W. 363, 363 (1925); State of Tennessee v. Scopes, ACLU, http://www.aclu.org/other/state-tennessee-v-scopes (last visited Nov. 6, 2022).

98. *Scopes*, 289 S.W. at 363.

99. Epperson v. Arkansas, 393 U.S. 97, 98 (1968).

100. *Id.* at 107–09.

101. *See* Adam Laats, *The Conservative War on Education That Failed*, ATL. (Nov. 23, 2021), http://www.theatlantic.com/ideas/archive/2021/11/failed-school-ban-evolution-conservatives/620779/.

102. *See id.*

The culture war surrounding sex education has also persisted between the right and the left.[103] More recently, Florida Governor Ron DeSantis signed House Bill 1557 (hereinafter referred to as "HB 1557") into law in March of 2022, which prohibits instruction regarding sexual orientation or gender identity in K-3 classrooms.[104] Opponents of the Bill have referred to HB 1557 as the "Don't Say Gay" bill.[105] Opponents of the Bill have argued that the constitutional right to have open classroom discussions regarding gender and sexuality in public is rooted in the First Amendment, which is analogous to the right to receive an education that promotes racial equality.[106] Critics of HB 1557 have argued that public school students may not be deprived of access to information just because the state disagrees with the material, just as critics of critical race theory bans have argued.[107]

VI. FIRST AMENDMENT VIOLATION

The First Amendment provides that no law shall be made "abridging the freedom of speech."[108] The scope of the First Amendment's protection in school settings remains a subject for debate.[109] The courts have recognized that "[s]chool authorities, not the courts, are charged with the responsibility of deciding what speech is appropriate in the classroom."[110] It is well established in American jurisprudence that neither teachers nor students shed their First Amendment right to free speech at the schoolhouse gate.[111] In *Tinker v. Des Moines Independent Community School District*,[112] the Court held that a student's decision to wear an armband in protest of the Vietnam War was constitutionally protected, reasoning that "state-operated schools may not be

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103. *See id.*

104. Fla. CS for HB 1557, § 1 (2022) (proposed Fla. Stat. § 1001.42); Jaclyn Diaz, *Florida's Governor Signs Controversial Law Opponents Dubbed 'Don't Say Gay,'* NPR, http://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis (Mar. 28, 2022, 2:33 PM).

105. Diaz, *supra* note 104.

106. *See* Complaint & Demand for Jury Trial at 73, Equal. Fla. v. DeSantis, No. 4:22-cv-00134-AW-MJF (N.D. Fla. Mar. 31, 2022), ECF No. 1.

107. *See id.*

108. U.S. CONST. amend. I.

109. *See* Garcetti v. Ceballos, 547 U.S. 410, 413 (2006); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

110. Wood v. Arnold, 915 F.3d 308, 315 (4th Cir. 2019).

111. *Tinker*, 393 U.S. at 506; David L. Hudson Jr., *Rights of Teachers*, FIRST AMEND. ENCYC., http://www.mtsu.edu/first-amendment/article/973/rights-of-teachers (last visited Nov. 6, 2022).

112. 393 U.S. 503 (1969).

enclaves of totalitarianism."[113] Different standards have been applied by the courts when ruling on matters of First Amendment issues in relation to public employees, although none specifically address the question of a teacher's speech related to school curricula.[114] In 1968, the Supreme Court held in *Pickering v. Board of Education*[115] that a teacher does not, as a public employee, relinquish his or her First Amendment protections.[116] In *Pickering*, the Court established a balancing test to determine First Amendment protection, weighing the teacher's interest as a citizen in making a public comment against the State's interest in promoting the efficiency of its employees' public services.[117] Teachers' speech on matters of public concern, therefore, became constitutionally protected under *Pickering*.[118]

Garcetti v. Ceballos[119] established a different framework for evaluating public employees' speech.[120] *Garcetti* established that the First Amendment does not protect the expressions that public employees make pursuant to their professional duties.[121] As a result, the reinvented framework for analyzing cases where public employees' First Amendment protections are at issue became a multi-part test.[122] First, the inquiry is whether the employee speaks regarding his official duties.[123] If the employee does speak pursuant to his official duties, he is not afforded First Amendment protections.[124] If the employee speaks as a matter of public concern, then the state must balance the competing interests defined in *Pickering*.[125] However, *Garcetti* raised the question of whether this test should apply in teaching-related cases.[126] The majority acknowledged this inquiry, stating that "[w]e need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."[127]

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113. *Id.* at 509, 511.
114. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968); *Garcetti*, 547 U.S. at 421.
115. 391 U.S. 563 (1968).
116. *See id.* at 568.
117. *Id.*
118. *See id.* at 574.
119. 547 U.S. 410 (2006).
120. *See id.* at 421.
121. *See id.* at 421, 423.
122. *See id.* at 423.
123. *See id.*
124. *See Garcetti*, 547 U.S. at 424.
125. *See id.* at 417.
126. *See id.* at 425.
127. *Id.*

Nonetheless, this framework has been used in the lower courts to deny First Amendment protections to teachers regarding academic freedom in the classroom.[128] In *Evans-Marshall v. Board of Education*,[129] a public school teacher, Shelley Evans-Marshall, assigned Ray Bradbury's *Fahrenheit 451* to her students.[130] To explore the book's theme of government censorship, the teacher distributed a list issued by the American Library Association of the "100 Most Frequently Challenged Books."[131] She instructed her students to pick a book from the list and search why the book was contested in order to lead in-class discussion regarding the book.[132] Two of the groups in Evans-Marshall's class chose *Heather Has Two Mommies* by Lesléa Newman.[133] After the conclusion of that assignment, Evans-Marshall taught *Siddhartha* by Hermann Hesse.[134] During the school year, approximately twenty-five parents "complained about the curricular choices . . . including the teaching of *Siddhartha* and the book-censorship assignment."[135] The Sixth Circuit found that the content of Evans-Marshall's speech did "relate[] to . . . matters of political, social, or other concern to the community."[136] Evans-Marshall also passed the test in which "her 'interests . . . as a citizen, in commenting upon matters of public concern' through her in-class speech, outweighed the school board's interest[s] . . . ."[137] Nonetheless, the Sixth Circuit concluded that Evans-Marshall could not overcome *Garcetti*.[138]

In the *Garcetti* dissent, Justice Souter warned against the dangers of applying *Garcetti* to academic freedom.[139] The *Pickering-Garcetti* test applied to teachers regarding conversations surrounding race directly conflicts with the overwhelming case law that supports preserving academic freedom regarding classroom instruction that promotes ideas and open dialogue.[140] The test is contradictory to the right to academic freedom and the right to receive

128. *See* Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 343 (6th Cir. 2010).
129. 624 F.3d 332 (6th Cir. 2010).
130. *Id.* at 334.
131. *Id.* at 334–35.
132. *Id.* at 335.
133. *Id.*
134. *Evans-Marshall*, 624 F.3d at 335.
135. *Id.*
136. *Id.* at 338 (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)).
137. *Id.* at 339 (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).
138. *Id.* at 340; *see also* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).
139. *See Garcetti*, 547 U.S. at 438 (Souter, J., dissenting).
140. *See id.* at 438–39; Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

information, both of which are well established doctrines.[141] For example, in *Keyishian v. Board of Regents*,[142] appellants were faculty members of a state university who were required by state law to sign a certificate asserting that they were not members of the Communist Party.[143] Appellants were instructed that failure to do so would result in their dismissal.[144] The Court held in favor of the faculty, reasoning that the country is "deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."[145] The Court further noted "[t]hat freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[146]

Thus, it cannot be the case that public school teachers are restricted in their speech while acting within their professional duties if, at the same time, they have the duty of fostering an environment to stimulate authentic discussions in the classroom.[147] America's public schools have been recognized by the Supreme Court to be "the nurseries of democracy."[148] In *Mahoney Area School District v. B.L.*,[149] the Supreme Court held that a student's off-campus speech regarding cheerleading was protected by the First Amendment, reasoning that America's public schools foster an environment where democracy is born.[150]

> [T]he school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus. America's public schools are the nurseries of democracy. [The United States'] representative democracy only works if we protect the 'marketplace of ideas.' This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection. Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known

141. *See Garcetti*, 547 U.S. at 438–39 (Souter, J., dissenting); Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982).
142. 385 U.S. 589 (1967).
143. *Id.* at 592.
144. *Id.*
145. *Id.* at 603.
146. *Id.*
147. *See Keyishian*, 385 U.S. at 603; Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).
148. Mahoney Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021).
149. 141 S. Ct. 2038 (2021).
150. *Id.* at 2042, 2046, 2048.

> aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'[151]

Adequate instruction includes teaching about history and race relations unapologetically; thus, it is inconsistent for an educator to be limited in their instruction on race discussions in the classroom if they are acting in their capacity as a teacher while being held responsible for properly educating America's youth.* For the First Amendment to adequately protect the freedom of expression, it should extend to ideas that promote academic freedom and the right to receive information in the classroom.[152] In *Board of Education v. Pico*,[153] school board members attended a conference sponsored by a politically conservative organization where they obtained lists of books described as "objectionable."[154] Some of these books were held in two school libraries within the school district, and the board responded by directing that the books be removed from the schools pending board review, reasoning that such books were "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."[155] Students brought suit, alleging that the board violated their First Amendment rights.[156] The Court explained that their precedents have held that the role of the First Amendment is to "foster[] individual self-expression" and that it affords "public access to discussion, debate, and the dissemination of information and ideas."[157] In asserting that the school board had violated the students' First Amendment rights, the Court reasoned that access to diverse ideas prepares students for active participation in society and that the Constitution ensures that no state officials shall direct the orthodoxy "in politics, nationalism, religion, or other matters of opinion."[158] Although the school board retains discretion to regulate the content contained in school libraries, that discretion may not be exercised in a narrow manner in order to conform to a partisan or political interest.[159] *Pico* established that school boards may not deprive students of access to information merely because they dislike certain ideas, and that if it is the school board's intention to

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151. *Id.* at 2046.
152. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982).
153. 457 U.S. 853 (1982).
154. *Id.* at 856.
155. *Id.* at 857 (quoting Pico v. Bd. of Educ., 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).
156. *Id.* at 859.
157. *Id.* at 866 (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978)).
158. *Pico*, 457 U.S. at 868, 872 (quoting Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).
159. *See id.* at 870.

do so, they will be in violation of the Constitution.[160] The Court established that "access to ideas makes it possible for citizens . . . to exercise their rights of free speech and press in a meaningful manner, [which] prepares students [to be] active [members of] pluralistic, often contentious society in which they will soon be adult members."[161] For students to be adequately equipped to be members of society with proper knowledge and skills on how inequality and race operate in society, it must be the case that open dialogues about race in society are constitutionally protected.[162] When teachers are not limited in their discussions regarding systemic racism and justice, students are better equipped to understand the foundations of American society and the origins of inequality.[163] Students are in the best position to begin to tackle the systems that build barriers to opportunities when race-based discussions and accurate instruction about history take place in the classroom.[164] Silencing discussions that are rooted in racial equity is inconsistent with the doctrines that are well established in case law.[165] For example, the court's reasoning in *Brown v. Board of Education*[166] established that education "is the very foundation of good citizenship" and that it is critical to "awakening the child to cultural values . . . ."[167]

The test outlined in *Garcetti* ignores the fact that public employees, more specifically public school teachers, possess information worth disseminating, which warrants constitutional protection.[168] If public school teachers are prohibited from speaking on matters of concern to the public, even if they are speaking in their capacity as public school teachers, the community would be deprived of informed opinions on important societal issues.[169] It is well understood that in American public schools, students build the knowledge and skills necessary to improve public life and to enter society as dynamic and well-versed individuals.[170] In order to do so, students must accurately understand the United States' history, society, and rich diversity.[171] In order to sustain

160. *Id.* at 871, 872.
161. *Id.* at 868.
162. *See Teaching About Racism Is Essential for Education*, *supra* note 95.
163. *See id.*
164. *See id.*
165. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).
166. 347 U.S. 483 (1954).
167. *Id.* at 493.
168. *See* Garcetti v. Ceballos, 547 U.S. 410, 419–20 (2006) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 572, 573 (1968)).
169. *See id.* at 420; United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 470 (1995).
170. *E.g.*, POLLOCK ET AL., *supra* note 76, at vi.
171. *Id.*

classrooms that have fact-driven curricula that accurately recite the history and culture of America, teachers must be able to freely hold classroom discussions related to race and racism.*

VII. FOURTEENTH AMENDMENT VIOLATION

A. *Void for Vagueness*

Laws across the United States that aim to ban the teaching of critical race theory in public schools are largely, if not completely, unclear in the behavior they seek to prohibit.[172] These laws invoke the "void-for-vagueness" legal doctrine, which rests on the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution.[173] The doctrine holds that a law is invalid if it does not specify what is required or what conduct is punishable.[174] More specifically, in reference to the First Amendment, a facial challenge to a state law asserting vagueness holds that the law lacks specificity such that individuals are unable to decipher whether or not their behavior is in violation of the law.[175] For example, in *Reno v. ACLU*,[176] the Court examined whether the anti-indecency provisions enacted to protect minors from "indecent" and "patently offensive" communications on the internet violated the First Amendment.[177] In finding that the Communications Decency Act ("CDA") violated the First Amendment, the Court reasoned that the language of the Act provoked uncertainty and was far too vague for readers to understand the standard being applied.[178] The Court established that, under the First Amendment, there is a level of precision required when a statute regulates the content of speech and, if not narrowly tailored, such statutes violate the First Amendment.[179] In *Keyishian*, the Supreme Court also explored whether a state law was overbroad.[180] The Court held that the state law was unconstitutional for being overbroad and reasoned that laws restricting speech may be crafted with narrow specificity.[181] The Supreme Court explained that "[w]hen one must guess

172. *See* Schwartz, *supra* note 4.
173. Philip A. Dynia, *Vagueness*, FIRST AMEND. ENCYC., http://www.mtsu.edu/first-amendment/article/1027/vagueness (last visited Nov. 6, 2022).
174. *Id.*
175. *Id.*
176. 521 U.S. 844 (1997).
177. *Id.* at 849.
178. *Id.* at 870–71.
179. *See id.* at 874.
180. Keyishian v. Bd. of Regents, 385 U.S. 589, 595 (1967).
181. *Id.* at 604, 609.

what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone.'"[182]

Legislation introduced and passed relating to critical race theory generally describes the same sweeping language.[183] Toolkits and memorandums alike can be the reason for such shared language across the board.[184] The language contained in the bills "fails to provide [reasonable] notice of what [teachers] can and cannot include in their courses . . . ."[185] Further, much of the language mirrors the language in former President Trump's Executive Order ("Order") issued in 2020.[186] The California Northern District Court partially struck down the Order, reasoning that the Order was void for vagueness because it infringed on the plaintiff's constitutionally protected right to free speech and did not raise proper notice of the conduct it sought to prohibit.[187] Opponents argue that vague language, which does not explicitly define prohibited speech with specificity, puts the livelihood of teachers at risk.[188] They further argue that, without proper notice, teachers risk losing their jobs or facing disciplinary action for teaching about historical events and notable figures who may subscribe to the viewpoints outlined in the laws, regardless of whether they are denouncing certain positions or simply holding discussions objectively.[189] Additionally, they argue that much of the language contained in anti-critical race theory bills across the United States prohibits discussion regarding unconscious bias and systemic racism.[190] Notably, studies have shown that such concepts are "innate to the human experience" and that these discussions create more inclusive spaces for historically marginalized students.[191]

182. *Id.* at 604 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

183. POLLOCK ET AL., *supra* note 76, at 17; *see also, e.g.*, GA. CODE ANN. § 20-1-11(a) (2022); H.B. 564, 2021 Leg., Reg. Sess. (La. 2021).

184. POLLOCK ET AL., *supra* note 76, at 34.

185. Amended Complaint at 67, Black Emergency Response Team v. O'Connor, No. 5:21-cv-1022-G (W.D. Okla. Nov. 9, 2021), ECF No. 50.

186. *See* Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 28, 2020); Memorandum from Russell Vought to Heads of the Exec. Dep'ts & Agencies, *supra* note 63; *e.g.*, GA. CODE ANN. § 20-1-11(a); La. H.B. 564.

187. Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 545 & n.3 (N.D. Cal. 2020).

188. Amended Complaint, *supra* note 185, at 24.

189. *See id.* at 24, 67.

190. *See id.* at 22; POLLOCK ET AL., *supra* note 76, at 6.

191. Amended Complaint, *supra* note 185, at 5.

B. *Equal Protection*

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[192] If a state law is not discriminatory on its face, it may still be unconstitutional if its enactment was motivated by a discriminatory purpose.[193] A plaintiff does not have to prove that the discriminatory purpose was the sole purpose, but rather only that it was a motivating factor.[194] In *Village of Arlington Heights v. Metropolitan Housing*,[195] the Supreme Court provided factors that a court should consider when analyzing whether a defendant acted with a discriminatory purpose, which includes: "(1) the impact of the official action and whether it bears more heavily on one race than another; (2) the historical background of the decision; (3) the specific sequence of events leading to the challenged action; (4) the defendant's departures from normal procedures or substantive conclusions; and (5) the relevant legislative or administrative history."[196]

The Ninth Circuit employed this analysis in 2015 in *Arce v. Douglas*.[197] In *Arce*, the school board of Tucson initiated a Mexican American Studies ("MAS") program in public schools in an effort to promote education about Mexican cultural heritage for the students of the district—the majority of whom are of Mexican or other Hispanic descent.[198] The Arizona legislature passed House Bill 2281 ("HB 2281"), which eliminated the MAS program and prohibited a school district or charter school from including in the school curriculum any classes that: (1) "promote the overthrow of the United States government," (2) "promote resentment toward a race or class of people," (3) "are designed primarily for pupils of a particular ethnic group," or (4) "advocate ethnic solidarity instead of the treatment of pupils as individuals."[199] Applying the standard in *Arlington*, the Ninth Circuit found that the enactment of HB 2281 had a disproportionate impact on Mexican American students.[200]

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192. U.S. CONST. amend. XIV, § 1.

193. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977).

194. *Id.* at 265.

195. 429 U.S. 252 (1977).

196. Acre v. Douglas, 793 F.3d 968, 977 (9th Cir. 2015) (citing *Vill. of Arlington Heights*, 429. U.S. at 266–68).

197. 793 F.3d 968, 977 (9th Cir. 2015).

198. *Id.* at 973.

199. H.B. 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010); *Arce*, 793 F.3d at 973.

200. *See Arce*, 793 F.3d at 978; *Vill. of Arlington Heights*, 429 U.S. at 266, 267, 268.

In a study conducted by UCLA, it was found that 35.46% of the school districts impacted by the campaign to ban instruction of critical race theory in public schools fell into the "Majority Students of Color" category, while 46.87% of the school districts fell into the "Racially Mixed Majority White" category.[201] This means that students in "Majority Students of Color" districts could largely be limited in their education about issues of race and diversity in history and present-day America.[202] Although students from all different backgrounds alike benefit from learning about such topics, opponents of critical race theory bans assert that Black students are disproportionately disadvantaged by such bans.[203] Opponents further address that curriculum that is under attack largely closes the existing achievement gaps among minorities.[204] Research has shown that curriculum focused on culturally responsive teaching, or teaching that engages learners whose experiences and cultures are typically ignored in mainstream education, is critical to fostering engagement and deep, meaningful learning.[205] States are required to meet academic content standards for math and reading, but not for social studies and United States history.[206] This means that teaching about subjects such as the institution of slavery or chilling parts of America's history goes unguided.[207] There exists widespread illiteracy among students regarding their understanding of slavery; for example, in a 2017 survey of over 1,700 social-studies teachers and 1,000 high-school seniors, more than a third of survey respondents thought that the Emancipation Proclamation formally ended slavery.[208] Opponents of critical race theory bans assert that censoring inclusive discussions causes disproportionate injury to students of color, who already do not receive adequate representation in educational curricula, because they do not see their communities reflected in the curricula, resulting in less engagement and interactivity at school.[209]

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201. POLLOCK ET AL., *supra* note 76, at 93.

202. *See id.* at 92.

203. Amended Complaint, *supra* note 185, at 62.

204. *See id.*

205. *See id.*; *Understanding Culturally Responsive Teaching*, NEW AM., http://www.newamerica.org/education-policy/reports/culturally-responsive-teaching/understanding-culturally-responsive-teaching/ (last visited Nov. 6, 2022).

206. Nikita Stewart, *'We Are Committing Educational Malpractice': Why Slavery Is Mistaught – and Worse – in American Schools*, N.Y. TIMES, http://www.nytimes.com/interactive/2019/08/19/magazine/slavery-american-schools.html (Nov. 9, 2021).

207. *See id.*

208. *Id.*; KATE SHUSTER, SW. POVERTY L. CTR., TEACHING HARD HISTORY: AMERICAN SLAVERY 22 (Maureen Costello ed., 2018).

209. Amended Complaint, *supra* note 185, at 63.

VII. APPLICATION TO FLORIDA LAW

Florida's "Stop W.O.K.E. Act" took effect on July 1, 2022, and its effects have since been felt throughout the state.[210] The same month, the University of Central Florida removed anti-racist statements from some of the university's academic departments' websites in an effort to maintain compliance with the new state law.[211] The website stated, "we acknowledge the key place of the university as a site of struggle for social justice and are committed to addressing the problem of anti-Blackness, white supremacy, and all forms of implicit and explicit racism in our professions, wherever we find it, even if in our own department."[212]

Although the Florida law does not mention critical race theory by name, the legislation was a part of Governor Ron DeSantis' efforts to keep critical race theory out of schools.[213] In a meeting with the State Board of Education, DeSantis named several examples of what he deemed to be critical race theory, including an occurrence where "Seattle Public Schools told teachers that the education system is guilty of 'spirit murder' against black children and that white teachers must 'bankrupt [their] privilege in acknowledgement of [their] thieved inheritance.'"[214] This illustrates the misconceptions of what the academic framework of critical race theory actually encompasses.[215] Florida law ensures that "all K-12 public school students are entitled to a uniform, safe, secure, efficient, and high quality system of education, one that allows students the opportunity to obtain a high quality education."[216] Florida law also guarantees that "[a]ll education programs . . . must be made available without discrimination on the basis of race, ethnicity, national origin, gender, disability, religion, or marital status . . . ."[217] The State of Florida thus recognizes the importance of guaranteeing a meaningful education for its students free from discrimination,

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210. Susan Svrluga, *Florida University Removes Some Anti-Racism Statements, Worrying Faculty*, WASH. POST, http://www.washingtonpost.com/education/2022/07/14/ucf-anti-racism-statements-removed/ (July 14, 2022, 3:04 PM); *see also* FLA. STAT. § 1000.05(4)(a) (2022).

211. *See* Svrluga, *supra* note 210.

212. *Id.*

213. *See* Press Release, Ron DeSantis, Governor of Fla., Governor DeSantis Emphasizes Importance of Keeping Critical Race Theory Out of Schools at State Board of Education Meeting (June 10, 2021), http://www.flgov.com/2021/06/10/governor-desantis-emphasizes-importance-of-keeping-critical-race-theory-out-of-schools-at-state-board-of-education-meeting/.

214. *Id.*

215. *See id.*; Iati, *supra* note 56; Tiana Headley, *Laws Aimed at Critical Race Theory May Face Legal Challenges*, BLOOMBERG L., http://news.bloomberglaw.com/us-law-week/laws-curbing-critical-race-theory-may-face-legal-challenges (July 7, 2021, 10:24 AM).

216. FLA. STAT. § 1002.20(1) (2022).

217. *Id.* § 1002.20(7).

and HB 7 goes against the well-established principles carved out in Florida law due to its sweeping effects.[218]

According to the Florida Department of Education's reports, approximately twenty-one percent of students enrolled in Florida public schools are Black or African American.[219] Thus, the Florida law has wide-reaching effects.[220] Applying the *Arlington Heights* standard, the impact of the Florida law "bears more heavily on one race than another;" thus, it violates the Equal Protection Clause of the Fourteenth Amendment.[221] Individuals who identify as "'Black[]' are more likely than [others] to say that their race is central to their identity" and how they see themselves in the world.[222] Thus, restricting instruction on race-related subjects, such as Black history, more heavily impacts this group than others.[223] According to a study by the Pew Research Center, the majority of Black Americans say that they have experienced discrimination because of their race or ethnicity, and a majority of Black Americans find that race relations in the United States are generally bad.[224] Thus, opponents argue that legislation that interferes with the ability of public school teachers to promote race consciousness and teach Black history to improve students' understanding of how America stands where it is today has a disparate effect on Black students.[225] Opponents assert that the purpose and effect of the Florida law banning critical race theory in public schools is to treat classroom discussions related to race different than any other fundamental concept taught in schools.[226] This effectively violates the constitutional guarantee of Equal Protection under the law because, due to the law's lack of clarity, teachers are restricted from covering certain topics involving race out of fear of disciplinary action or termination.[227]

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218. *See id.*; Fla. CS for HB 7.

219. *See* FLA. DEP'T EDUC., FLORIDA ENROLLMENT/MEMBERSHIP BY GRADE BY RACE/ETHNICITY 2021-22, SURVEY 2 (AS OF DECEMBER 23, 2021) (2021), http://www.fldoe.org/core/fileparse.php/7584/urlt/2122MembBySchoolByGradeByRace.xlsx.

220. *See id.*

221. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265, 266 (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).

222. JULIANA MENASCE HOROWITZ ET AL., PEW RSCH. CTR., RACE IN AMERICA 2019, at 13 (2019), http://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2019/04/Race-report_updated-4.29.19.pdf.

223. *See id.*; *Understanding Culturally Responsive Teaching*, *supra* note 205.

224. HOROWITZ ET AL., *supra* note 222, at 13, 17.

225. *See* Amended Complaint, *supra* note 185, at 72–73.

226. *See id.*

227. *See* Headley, *supra* note 215.

The Florida law's ambiguity furthers its discriminatory effect, such that teachers are unable to decipher what their curriculum may or may not include.[228] It prohibits:

> [I]nstruction that espouses, promotes, advances, inculcates, or compels [a] student . . . to believe [that] [a] person, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin, or sex.[229]

It also prohibits teaching that compels a student to think that "[a] person, by virtue of his or her race, color, national origin, or sex, bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, national origin, or sex."[230] The vagueness of the law has the potential to ban any discussion that may cause an individual to believe that any of the preceding concepts are true.[231]

Topics regarding slavery, racial oppression, racial discrimination, and segregation all have the potential to cause an emotional reaction from students, and opponents argue that such reactions will now have the potential to give rise to lawsuits under Florida law.[232] The classroom is an open space for discourse and conversations, which sometimes may be difficult spaces for students.[233] This law has the potential to open a floodgate of litigation and allow many litigants, most of whom would be parents, to bring claims against schools and teachers when teachers are only going as far as teaching United States history, which could overwhelm the courts.[234] Further, according to the State Board of Education Rules in Florida, instruction on topics "such as the Holocaust, slavery, the Civil War and Reconstruction, the civil rights movement and the contributions of women, African American and Hispanic people to our country . . . " "must be factual and objective, and may not suppress or distort significant historical events."[235] Thus, this rule promulgated by the Florida Department of Education is evidently in conflict with section 1000.05 of the Florida Statutes because significant historical events told accurately bear the potential to have a

228. *See id.*
229. FLA. STAT. § 1000.05(4)(a)(7) (2022).
230. *Id.* § 1000.05(4)(a)(5).
231. *See id.* § 1000.05(4)(a)(5), (7).
232. *See* Amended Complaint, *supra* note 185, at 25–26.
233. *See id.*
234. *See id.* at 30, 31.
235. FLA. ADMIN. CODE ANN. r. 6A-1.094124 (2022).

strong, emotional impact on students.[236] Under the Florida law, these discussions cannot be held if they cause a student to believe that a person, due to their race, color, or national origin, must feel some form of psychological distress because of actions committed in the past by members of that person's same race, color, or national origin.[237] The law also fails to define the terms: "espouses," "promotes," "advances," "inculcates," and "compels," which is especially troublesome in an academic environment where any classroom instruction by a teacher can be received differently depending on the interpretation of the student.[238] Because of this language, the law has a broad scope and reaches protected expression; thus, it is void for vagueness.[239]

Moreover, the law chills free speech in the classroom.[240] The law's ban on instruction that causes an individual "psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin, or sex" is in direct violation of *Tinker*, where the Court explained the value of openness in education and how it is the "basis of our national strength."[241] The Court provided that any departure from uniformity in our society may cause discomfort but that the Constitution says it is a risk to be taken.[242]

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But [the] Constitution says we must take this risk . . . and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[243]

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236. *See id.*; FLA. STAT. § 1000.05(4)(a); Amended Complaint, *supra* note 185, at 25–26.

237. FLA. STAT. § 1000.05(4)(a)(7); *see also* Amended Complaint, *supra* note 185, at 25–26.

238. *See* FLA. STAT. § 1000.05(4)(a).

239. *See* Headley, *supra* note 215.

240. *See id.*

241. *See* FLA. STAT. § 1000.05(4)(a)(7); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508–09 (1969).

242. *See Tinker*, 393 U.S. at 508.

243. *Id.* at 508–09 (citation omitted).

Opinions that spur controversy may arise in classroom discussions, which is what deems the classroom the "marketplace of ideas."[244] By limiting instruction related to race and racism, the American values that promote academic freedom, which are recognized by the courts, will be defeated.[245] The courts overwhelmingly denounce prohibiting the expression of opinions, and such opinions that may cause a specific reaction may be within the scope of instruction that the law bans.[246] Additionally, large parts of Florida's uncomfortable history with issues of race go largely ignored in the classroom as is.[247] On November 2, 1920, the same day that women were able to vote for the first time in the United States, Florida experienced the worst instance of Election day violence.[248] A Black man named Mose Norman was turned away at the polls.[249] When he returned to the polls to take note of the individuals who had denied him his right to vote, as instructed by an attorney, he incited a mob of white men, many of whom were involved with the Ku Klux Klan.[250] During the violence, the mob targeted Julius "July" Perry, beat him, shot him, and lynched him.[251] The mob murdered between thirty to sixty Black residents, and "[w]ithin one year of the massacre, all Black residents [had been] driven out of Ocoee."[252] Much of America's dark history may cause discomfort or shame, and it is a natural response.[253] Until the Supreme Court reviews the constitutionality of anti-critical race theory legislation, widespread uncertainties will exist among America's educators and much of America's dark history will remain ignored.[254]

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244. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

245. *See id.*

246. *See id.*; W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); Bd. of Educ. v. Pico, 457 U.S. 853, 870 (1982).

247. Kirk Bailey & Zuri Davis, *Historical Erasure Is Dangerous for Democracy. A New Florida Law Would Erode Students' Fundamental Right to Learn History Accurately*, ACLU OF FLA. (May 3, 2022, 12:30 PM), http://www.aclufl.org/en/news/historical-erasure-dangerous-democracy-new-florida-law-would-erode-students-fundamental-right.

248. Gillian Brockell, *A White Mob Unleashed the Worst Election Day Violence in U.S. History in Florida a Century Ago*, WASH. POST (Nov. 2, 2020, 7:00 AM), http://www.washingtonpost.com/history/2020/11/02/ocoee-florida-election-day-massacre/.

249. Bailey & Davis, *supra* note 247.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *See* Laura Meckler & Hannah Natanson, *New Critical Race Theory Laws Have Teachers Scared, Confused and Self-Censoring*, WASH. POST (Feb. 14, 2022, 6:00 AM), http://www.washingtonpost.com/education/2022/02/14/critical-race-theory-teachers-fear-laws/.

SOLVING THE BLURRED LINES OF WARRANTLESS SEARCHES: MARIJUANA ODOR ALONE AS PROBABLE CAUSE

DIEGO ELIAS*

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I. INTRODUCTION

Pursuant to the Fourth Amendment to the United States Constitution, warrantless searches are per se unconstitutional unless the search falls under a judicially recognized exception.[1] When the police conduct a *Terry* stop, the officer may search a vehicle (without a warrant) if the officer reasonably believes that such "vehicle contains evidence of the offense [to] arrest."[2] Nevertheless, the arrest must be based on probable cause.[3] The Fourth Amendment to the

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1. *See* U.S. CONST. amend. IV.
2. Arizona v. Gant, 556 U.S. 332, 346 (2009).
3. *See* Popple v. State, 626 So. 2d 185, 186 (Fla. 1993).

United States Constitution states that "no [w]arrants shall issue, but upon probable cause," but it does not address what constitutes probable cause.[4] Thus, the courts are left to interpret what encompasses probable cause.[5] The Supreme Court of the United States has attempted to formulate a concrete definition of probable cause, as it recognizes that the concept is ambiguous and dependent on interpretation.[6] In 1983, the Court favored a more lenient approach, perceiving probable cause as a "practical, nontechnical" standard based upon the "factual and practical considerations of everyday life on which reasonable and prudent men . . . act."[7] Probable cause is based on the totality of the circumstances, meaning that it is based on what the arresting officer knows or reasonably believes at the time the arrest is made.[8] Nonetheless, the totality of the circumstances standard mostly depends on how the court interprets the reasonableness of the circumstances that led to such a search.[9]

In Florida, the most used judicially recognized exceptions to conduct a warrantless search of a vehicle are search incident to lawful arrest and the plain view doctrine.[10] The exceptions are often used when an officer perceives odor of marijuana emanating from a vehicle.[11] Search incident to a lawful arrest allows an officer to conduct a warrantless search if the officer reasonably believes, through circumstantial evidence, that the vehicle contains evidence of a crime.[12] The plain view doctrine enables an officer to conduct warrantless searches if the officer expressly sees evidence in the vehicle that makes it immediately apparent that a crime is being committed.[13] With the recent legalization of hemp derivatives and medical marijuana in Florida, the logic behind these two judicially recognized exceptions is at stake.[14] Therefore, it is of utmost importance to clarify and adopt new guidelines regarding probable cause based on odor of marijuana alone.*

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4. *See* U.S. CONST. amend. IV.
5. *See* Illinois v. Gates, 462 U.S. 213, 231–32 (1983).
6. *See id.*
7. *Id.* at 231 (quoting Brinegar v. United States, 338 U.S. 160, 175–76 (1949)).
8. *See id.* at 238.
9. *See id.* at 234.
10. *See, e.g.*, State v. Brookins, 290 So. 3d 1100, 1105 (Fla. 2d DCA 2020); Adoue v. State, 408 So. 2d 567, 570–71 (Fla. 1981).
11. *See Adoue*, 408 So. 2d at 569.
12. *See* Chimel v. California, 395 U.S. 752, 763–64 (1969).
13. Minnesota v. Dickerson, 508 U.S. 366, 375 (1993).
14. *See* FLA. STAT. §§ 381.986, 581.217 (2022); Andrew Pantazi, *State's New Hemp Law Complicates Pot Cases*, FLA. TIMES-UNION, http://www.jacksonville.com/story/news/crime/2019/08/07/florida-legalized-hemp-now-prosecutors-are-dropping-marijuana-charges-and-retiring-dogs/4514065007/ (Aug. 7, 2019, 8:26 PM).

II. FLORIDA HEMP LAW

In 2019, the Florida Legislature adopted a hemp law that allows for the cultivation, distribution, and consumption of judicially recognized hemp and hemp extracts, making it evident that the Florida Legislature is moving towards a more amicable approach towards marijuana laws.[15] The Florida hemp statute describes hemp and its derivatives as follows:

> (d) "Hemp" means the plant *Cannabis sativa L.* and any part of that plant, including the seeds thereof, and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers thereof, whether growing or not, that has a total delta-9-tetrahydrocannabinol concentration that does not exceed 0.3 percent on a dry-weight basis.
> (e) "Hemp extract" means a substance or compound intended for ingestion, containing more than trace amounts of cannabinoid, or for inhalation which is derived from or contains hemp and which does not contain other controlled substances. The term does not include synthetic CBD or seeds or seed-derived ingredients that are generally recognized as safe by the United States Food and Drug Administration.[16]

To understand what motivated the Florida Legislature to adopt the Florida Hemp Law, it is crucial to appreciate the transition that the United States is making towards marijuana laws.* By way of background, in 2018, the United States Legislature passed the Agriculture Improvement Act (2018 Farm Bill), which allowed the cultivation, distribution, and consumption of hemp and its derivatives on a national level.[17] The 2018 Farm Bill states:

> The term 'hemp' means the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.[18]

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15. *See* FLA. STAT. §§ 381.986, 581.217(1).
16. *Id.* § 581.217(3)(d)–(e).
17. *See* Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 10113, 132 Stat. 4490, 4908 (2018).
18. *Id.*; FLA. DEP'T AGRIC. CONSUMER SERVS. OFF. AGRIC. L. ENF'T, HEMP AND CBD INFORMATION [FLORIDA] FOR LAW ENFORCEMENT 3, http://www.fdacs.gov/content/download/94417/file/hemp-and-cbd-information-for-law-enforcement.pdf (last visited Nov. 17, 2022).

Additionally, the 2018 Farm Bill allowed the removal of hemp from the federal Controlled Substances Act.[19] The Florida Senate Bill 1020, also known as the State Hemp Program, enabled the legislature to adopt the Hemp Law.[20] Senate Bill 1020 describes hemp as "an agricultural commodity" and found that "hemp-derived cannabinoids, including, but not limited to, cannabidiol, are not controlled substances or adulterants."[21] The Bill also moved the Florida Legislature to amend the definition of "Cannabis" in Florida Statute section 893.02.[22] Further, the Bill amended the definition of "Cannabis" in the criminal statutes to exclude hemp or industrial hemp.[23] As a result, hemp is now legal in the state of Florida.[24]

A. *Hemp and Marijuana*

Hemp and marijuana both come from the same plant, Cannabis, and the same species, Cannabis sativa L.[25] However, recent research studies have found hemp to be genetically distinguishable from marijuana.[26] The current Florida state law only distinguishes the two substances by the psychoactive chemical compound, recognized as delta-9 tetrahydrocannabinol ("D9-THC").[27] Using this THC-oriented approach, the U.S. Congress affirmatively legalized hemp production and clarified that the prohibition is not against any part of the cannabis plant but against the psychoactive chemical compound.[28] Congress affirmed the

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19. Agriculture Improvement Act § 12619; FLA. DEP'T AGRIC. CONSUMER SERVS. OFF. AGRIC. L. ENF'T, *supra* note 18, at 3.

20. Fla. SB 1020, § 1 (2019) (proposed FLA. STAT. § 581.217); *see also* FLA. DEP'T AGRIC. CONSUMER SERVS. OFF. AGRIC. L. ENF'T, *supra* note 18, at 3.

21. Fla. SB 1020, § 2 (2019) (proposed FLA. STAT. § 893.02)); FLA. DEP'T AGRIC. CONSUMER SERVS. OFF. AGRIC. L. ENF'T, *supra* note 18, at 3.

22. FLA. DEP'T AGRIC. CONSUMER SERVS. OFF. AGRIC. L. ENF'T, *supra* note 18, at 3; *see also* FLA. STAT. § 893.02(3) (2022); Fla. SB 1020, § 3 (2019) (proposed amendment to FLA. STAT. § 1004.4473).

23. FLA. STAT. § 893.02(3); FLA. DEP'T AGRIC. CONSUMER SERVS. OFF. AGRIC. L. ENF'T, *supra* note 18, at 3.

24. *See* FLA. STAT. § 893.02(3); Agriculture Improvement Act § 12619(b).

25. *See* Ernest Small & Arthur Cronquist, *A Practical and Natural Taxonomy for Cannabis*, 25 TAXON 405, 411 (1976).

26. George D. Weiblen et. al., *Gene Duplication and Divergence Affecting Drug Content in* Cannabis sativa, 208 NEW PHYTOLOGIST 1241, 1244, 1249 (2015).

27. *See, e.g.*, FLA. STAT. § 581.217(3)(d).

28. *See* Agriculture Improvement Act § 12619(b); 21 U.S.C. § 812 Sched. I (c)(17) (2020).

standards of this approach through a section of the U.S. code titled "Legitimacy of Industrial Hemp Research."[29] The referenced clause provides:

> Notwithstanding the Controlled Substances Act (21 U.S.C. 801 et seq.), chapter 81 of title 41, or any other Federal law, an institution of higher education (as defined in section 1001 of title 20) or a State department of agriculture may grow or cultivate industrial hemp if—
> (1) the industrial hemp is grown or cultivated for purposes of research conducted under an agricultural pilot program or other agricultural or academic research; and
> (2) the growing or cultivating of industrial hemp is allowed under the laws of the State in which such institution of higher education or State department of agriculture is located and such research occurs.[30]

It is undoubtedly established that both hemp and marijuana smell, feel, and look the same.[31] Since hemp is now legal in Florida, there is no reasonable way to automatically determine that based on the odor alone, there is a probability that a crime is being committed.[32] Nevertheless, set precedent in Florida establishes that marijuana odor alone serves as probable cause to conduct a warrantless search.[33] As a result, citizens could be taken into custody if an officer sees or acquires, through a search, what is believed to be marijuana, but might also be hemp, allowing officers to arrest people without inquiring on whether the actual substance is hemp or marijuana.[34] The set precedent prejudices citizens who legally possess hemp because it puts those users at a greater risk of being arrested simply because their vehicle smells very similar to marijuana, even when marijuana is not possessed.[35]

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29. 7 U.S.C. § 5490(a) (2015).
30. *Id.*
31. Jason Hackett, *The Hemp Frontier: Building a Statewide Network of Research Pioneers on a New Crop*, SEEK, 2020, at 36, 37; Pantazi, *supra* note 14.
32. Pantazi, *supra* note 14.
33. State v. T.P., 835 So. 2d 1277, 1278 (Fla. 4th DCA 2003); Pantazi, *supra* note 14.
34. *See* Brent Batten, *The Nose No Longer Knows the Smell of Illegality*, NAPLES DAILY NEWS (Aug. 11, 2020, 5:00 AM), http://www.naplesnews.com/story/news/columnists/brent-batten/2020/08/11/brent-batten-nose-no-longer-knows-smell-illegality/333605300.
35. Pantazi, *supra* note 14.

B. *Legality and Commerciality of Hemp in Florida*

With the legalization of hemp in Florida, the legislature adopted the "Industrial Hemp Pilot Projects."[36] Its purpose is to "cultivate, process, test, research, create, and market safe and effective commercial applications for industrial hemp in the agricultural sector in this state."[37] Pursuant to this statute, land grant universities in Florida with a college of agriculture can cultivate, process, and research hemp.[38] To further support the legislative purpose of the statute, the Florida Department of Agriculture and Consumer Services adopted Rule 5B-57 which incorporates the transportation of industrial hemp.[39] Particularly, Rule 5B-57.013(2)(a)(5)(c) merely requires that the hemp be covered and transported in absolute containment.[40] Surprisingly, Rule 5B-57.013(2)(a)(5)(c) does not address the limit for the transportation of hemp and does not require that the hemp odor be prevented or concealed during transportation.[41] Therefore, hemp cultivators in Florida can transport hemp on public roads without obscuring the smell.[42]

As of 2020, Florida commercialized industrial hemp.[43] Similarly, many states have also commercialized the cultivation, distribution, and consumption of hemp.[44] Consequently, many hemp growers have made hemp available to neighboring states and nationwide through online sales.[45] For this reason, Florida vape stores are constantly importing hemp flowers from neighboring states that

36. FLA. STAT. § 1004.4473 (2019).
37. *Id.* § 1004.4473(2)(a).
38. *Id.*
39. *See* FLA. ADMIN. CODE ANN. r. 5B-57.013(2)(a)(5)(c), .014(11)(a)(1) (2022).
40. *Id.* r. 5B-57.013(2)(a)(5)(c).
41. *See id.*
42. *See id.*
43. *See* FLA. STAT. § 1004.4473(1)(d).
44. *See, e.g.*, COLO. REV. STAT. § 35-61-108(3) (2022); Assemb. B. 45, 2021–2022 Leg., Reg. Sess. (Cal. 2021).
45. *See, e.g.*, Luke Knapp, *10 Best CBD Wholesale Suppliers in 2022*, DISCOVER, http://www.discovermagazine.com/sponsored/10-best-cbd-wholesale-suppliers-in-2021 (last visited Nov. 17, 2022).

have legalized hemp.[46] Thus, Florida residents now have access to a wide range of hemp flowers legally.[47]

III. FLORIDA LEGALIZATION OF MEDICAL MARIJUANA

On the brink of 2016, Florida residents voted to amend the Florida Constitution in an attempt to legalize medicinal marijuana.[48] Florida's First District Court of Appeals stated that the amendment does not require legislation because the Florida Legislature can execute laws as long as they are consistent with the Amendment.[49] The Amendment is aimed at protecting users and distributors of medical marijuana against the penalties included in the Drug Abuse Prevention and Control Act.[50] In addition, the Amendment also extended its safeguards to include "Low-THC cannabis," plants which consist of less than 0.8% of THC but more than 10% cannabidiol.[51] Hence, as of today, Florida has legalized marijuana in three forms: hemp, low-THC cannabis and medical cannabis.[52] The following section of this Comment will focus on low-THC cannabis and medical cannabis since these are the types embodied in the realm of medicinal marijuana.[53]

Low-THC cannabis and medical cannabis are codified in the Florida Statute as follows:

> (e) "Low-THC cannabis" means a plant of the genus *Cannabis*, the dried flowers of which contain 0.8 percent or less of tetrahydrocannabinol and more than 10 percent of cannabidiol weight for weight; the seeds thereof; the resin extracted from any part of such plant; or any compound, manufacture, salt, derivative, mixture, or preparation of such plant or its seeds or resin that is dispensed from a medical marijuana treatment center.

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46. *See* Alex Deluca, *South Florida Smoke Shop Owners on Delta-8 THC Regulation*, MIA. NEW TIMES (Dec. 28, 2021, 9:00 AM), http://www.miaminewtimes.com/marijuana/florida-smoke-shop-owners-on-delta-8-thc-regulation-13540456.

47. *See* FLA. DEP'T AGRIC. CONSUMER SERVS. OFF. AGRIC. L. ENF'T, *supra* note 18, at 3, 11.

48. *See* Fla. Dep't of Health v. People United for Med. Marijuana, 250 So. 3d 825, 827 (Fla. 1st DCA 2018) (per curiam); FLA. CONST. art. X, § 29.

49. *People United for Med. Marijuana*, 250 So. 3d at 827.

50. *See* FLA. STAT. § 893.02(3)–(4) (2022).

51. *See id.* § 381.986(1)(e).

52. *See id.* §§ 581.217(3)(d), 381.986(1)(e), (j).

53. *See* discussion *infra* Section III.A; FLA. STAT. § 381.986(1)(e)–(f).

> (f) "Marijuana" means all parts of any plant of the genus *Cannabis*, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin, including low-THC cannabis, which are dispensed from a medical marijuana treatment center for medical use by a qualified patient.[54]

Low-THC cannabis and medical cannabis have a smell tantamount to that of hemp, making each of these types indistinguishable to an officer without supplementary query regarding the composition of the substance.[55] Thus, since a police officer cannot distinguish between Low-THC cannabis or medical cannabis and marijuana based on order alone, an officer cannot arbitrate the legality of the odor.[56] As a result, odor alone cannot serve as probable cause for a search or arrest without further inquiry into the substance.[57]

A. *Transportation of Marijuana Flowers on Public Roads*

Medical marijuana in Florida is regulated by Florida Statute Section 381.986 and, pursuant to this statute, legally approved agencies have cultivated and transported cannabis on public roads since mid-2017.[58] The Statute explicitly reads:

> As soon as practicable, but no later than July 3, 2017, the department shall license as a medical marijuana treatment center any entity that holds an active, unrestricted license to cultivate, process, transport, and dispense low-THC cannabis, medical cannabis, and cannabis delivery devices, under former s. 381.986, Florida Statutes 2016, before July 1, 2017, and which meets the requirements of this section.[59]

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54. FLA. STAT. § 381.986(1)(e)–(f).

55. *See* Batten, *supra* note 34; Pantazi, *supra* note 14; Hackett, *supra* note 31, at 37, 40; FLA. STAT. § 581.217(1)(d).

56. Seth Shapiro, *Marijuana Enforcement in Florida – A Haze of Confusion*, MORRIS L. FIRM (Aug. 25, 2019), http://www.criminalattorneystpetersburg.com/news/2019/august/marijuana-enforcement-in-florida-a-haze-of-confu; Hackett, *supra* note 31, at 40; Pantazi, *supra* note 14.

57. Pantazi, *supra* note 14; *see also* Hackett, *supra* note 31, at 40.

58. FLA. STAT. § 381.986(8)(a)(1).

59. *Id.*

Moreover, the Statute allows approved agencies and patients to possess "Low-THC cannabis," and it allows patients to publicly consume "Low-THC cannabis."[60] The statute states that:

> (j) "Medical use" means the acquisition, possession, use, delivery, transfer, or administration of marijuana authorized by a physician certification. The term does not include: . . .
>
> 2. Possession, use, or administration of marijuana in a form for smoking, in the form of commercially produced food items other than edibles or of marijuana seeds.
>
> 5. Use or administration of marijuana in the following locations:
> a. On any form of public transportation, except for low-THC cannabis not in a form for smoking.
> b. In any public place, except for low-THC cannabis not in a form for smoking.
> f. In a school bus, a vehicle, an aircraft, or a motorboat, except for low-THC cannabis . . . .[61]

It is critical to note that the statute is silent regarding multiple key terms that are relevant to the topic of this Comment.[62] First, the statute does not address the terms "smell" or "odor" at any point.[63] Second, the statute does not force patients and agencies to obscure or conceal the odor of cannabis from the public as it does not define order or smell.[64] Third, the statute does not set any standards regarding marijuana odor when transporting medical cannabis.[65] Fourth, the statute sets some subjective restrictions regarding the quantity of cannabis that can be transported.[66] As one example within the statute asserts:

> [A] qualified patient and the qualified patient's caregiver may purchase from a medical marijuana treatment center for the patient's medical use a marijuana delivery device and up to the amount of marijuana authorized in the physician certification, but may not possess more than a 70-day supply of marijuana . . . at any given time . . . .[67]

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60. *See id.* § 381.986(1)(j).
61. *Id.* § 381.986(1)(j)(1)–(5).
62. *Id.* § 381.986.
63. FLA. STAT. § 381.986.
64. *See id.* § 381.986(8).
65. *See id.* § 381.986(8)(g).
66. *Id.* § 381.986(8)(g)(1)(d), (14)(a).
67. *Id.* § 381.986(14)(a).

Further, the statute does not address a limit for the quantity of cannabis that can be prescribed to a patient.[68] It merely states that "a . . . physician may not issue . . . more than three 70-day supply limits of marijuana or more than six 35-day supply limits of marijuana. . . ."[69] However, a 70-day supply is not a concrete and definitive quantity because it depends on how much cannabis is prescribed to an individual patient.[70] Conclusively, the statute enables Florida residents and qualified agencies to transmit an unregulated quantity of Low-THC cannabis and cannabis containing over 0.8% of D9-THC, disregarding the need to obscure the cannabis odor.[71]

Licensed cannabis distributors in Florida dispense a significant amount of cannabis on a consistent basis.[72] A 2021 report from the Office of Medical Marijuana Use illustrates the exponentially burgeoning figures.[73] Notably, the report addresses that Florida-approved agencies collectively dispensed more than 155,000,000 milligrams (mgs) of THC and over 3,000,000 mgs of Low-THC from January 22 to January 28 in 2021.[74] Among the biggest providers of medical cannabis are Trulieve, Surterra Wellness, Curaleaf, and AltMed Florida.[75] It is paramount to break down the figures of each major cannabis provider to truly acknowledge the medical cannabis industry's growth.*

The Medical Marijuana Treatment Centers Dispensations report places Trulieve as the major provider of medical cannabis, having seventy-four different dispensing locations.[76] Unsurprisingly, Trulieve dispensed more than 75,500,000 mgs THC of medical marijuana and more than 1,500,000 mgs of Low-THC cannabis.[77] Surterra Wellness has thirty-nine different dispensing locations, and dispensed more than 20,500,000 mgs of THC and upwards of 1,400,000 mgs of Low-THC cannabis between January 22 and January 28 in 2021.[78] Further, Curaleaf reported thirty-six dispensing locations and dispensed

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68. *See* FLA. STAT. § 381.986(4)(f).
69. *Id.*
70. *Id.*
71. *See id.* § 381.986.
72. *See* OFF. OF MED. MARIJUANA USE, FLA. DEP'T OF HEALTH, ANNUAL UPDATE ON THE STATEWIDE CANNABIS AND MEDICAL MARIJUANA EDUCATION AND ILLICIT USE PREVENTION CAMPAIGN 15 (2021), http://knowthefactsmmj.com/wp-content/uploads/2021/02/ommu_anuual_report_2021_final.pdf.
73. *See id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. OFF. OF MED. MARIJUANA USE, *supra* note 72, at 15.
78. *Id.*

more than 12,500,000 mgs of THC and more than 200,000 mgs of Low-THC.[79] Finally, AltMed Florida reported thirty different dispensing locations and dispensed over 17,500,000 mgs of THC and over 180,000 mgs of Low-THC cannabis.[80]

Importantly, the consumption and transit of Low-THC cannabis is not only guarded by the Florida Statutes,[81] but also federally protected under the "Rohrabacher-Blumenauer" Amendment.[82] In 2016, the Ninth Circuit U.S. Court of Appeals addressed the practicability and intended purpose of the "Rohrabacher-Blumenauer" Amendment.[83] Specifically, the Ninth Circuit in *United States v. McIntosh*,[84] stated that:

> In December 2014, Congress enacted the following rider in an omnibus appropriations bill funding the government through September 30, 2015: None of the funds made available in this Act to the Department of Justice may be used, with respect to the States . . . to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.[85]

Cannabis odor alone cannot serve as probable cause of a crime.[86] Simply because a police officer cannot distinguish between the cannabis odor and that of low-THC substances, he or she should not conduct a search of the vehicle and/or person without further query of the possessed cannabis derivative.[87] To say otherwise would mean that qualified cannabis users are protected to a lesser extent by the Fourth Amendment safeguards.[88] Moreover, if the current search and seizure guidelines are preserved, qualified users of cannabis are left to choose between two rights assured by the Florida Constitution.[89] Such citizens would

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79. *Id.*
80. *Id.*
81. *See* FLA. STAT. § 381.986 (2022).
82. *See Rohrabacher–Blumenauer Amendment Included in Omnibus FY 2018 Spending Bill*, THOMPSON COBURN LLP: TRACKING CANNABIS BLOG (Mar. 28, 2018), http://www.thompsoncoburn.com/insights/blogs/tracking-cannabis/post/2018-03-28/rohrabacher-blumenauer-amendment-included-in-omnibus-fy-2018-spending-bill.
83. United States v. McIntosh, 833 F.3d 1163, 1169 (9th Cir. 2016).
84. 833 F.3d 1163 (9th Cir. 2016).
85. *Id.* at 1169.
86. Batten, *supra* note 34; Shapiro, *supra* note 56.
87. *See* Batten, *supra* note 34; Pantazi, *supra* note 14; Shapiro, *supra* note 56.
88. *See* U.S. CONST. amend. IV.
89. *See* FLA. CONST. art. I, § 12; FLA. CONST. art. X, § 29.

have to elect either the right to possess medical marijuana or the fundamental right to be free from unreasonable searches and seizures.[90]

IV. FLORIDA COURTS MUST NOT BE INDEFINITELY BOUND BY STARE DECISIS REGARDING MARIJUANA ODOR AS PROBABLE CAUSE

Courts need not be strictly bound to set precedent when repercussions are evident as a result of following the law.[91] One of the main reasons the court may sometimes part from settled precedent is because the law is not practically efficient or workable.[92] The Florida Supreme Court has consistently held that binding to established precedent creates stability in the law and the citizens who are bound by it.[93] Additionally, the Florida Supreme Court has held that, when the established precedent proves to be inefficient, the court must not blindly follow the precedent.[94] Instead, the court must provide a workable alternative to guide lower courts in the matter.[95] In 2009, the Florida Supreme Court established factors that the court must consider to overcome established precedent.[96] Some of the several questions the courts ask when deciding whether the settled precedent should be overruled include: whether the set precedent has proved to be unworkable as a result of a reliance on a quixotic legal theory, whether the decided rule of law can be reversed without causing unreasonable injustice and disruption to those who have relied on the stability of the law, and whether the factual premises supporting the precedent have changed dramatically to leave the precedent's holding without legal vindication.[97] These factors also apply to the analysis of whether marijuana odor alone can serve as probable cause of a crime.[98] Thus, the reversal of established precedent regarding marijuana odor alone as probable cause would not create injustice to the people that have relied on the law.*

90. *See* FLA. CONST. art. I, § 12; FLA. CONST. art. X, § 29.
91. State v. Sturdivant, 94 So. 3d 434, 440 (Fla. 2012).
92. *Id.*
93. *See id.*
94. Valdes v. State, 3 So. 3d 1067, 1076 (Fla. 2009).
95. *See Sturdivant*, 94 So. 3d at 440.
96. *Valdes*, 3 So. 3d at 1067, 1077.
97. *Id.* at 1077.
98. *See id.*; State v. T.P., 835 So. 2d 1277, 1279 (Fla. 4th DCA 2003).

A. *Factual Changes Regarding the Odor-Alone Standard Require a New Probable Cause Analysis*

Recent developments in Florida's statutory laws call for a change to the probable cause standard.* Before hemp and medical marijuana were legalized in Florida, odor of marijuana alone could potentially alert officers of some criminal activity.[99] Nevertheless, because the factual support regarding probable cause based on cannabis odor alone has been significantly altered, the legal rationale is no longer practicable.[100] The Supreme Court of the United States has established that probable cause demands a fair probability that evidence of a crime will be found in a particular place.[101] Consequently, because cannabis and hemp now have a legal status in Florida, a police officer's reasonable calculation of a crime is hindered.* The wide availability of hemp and medical marijuana in Florida creates a drastic change for the probability element of probable cause when it is based on the odor of cannabis alone.[102] As a result, Florida courts can no longer determine criminality based on cannabis odor alone, because of the unmeasured amount of hemp and medical marijuana being distributed.[103]

An *odor plus* standard would serve as a clearer standard for police officers.[104] This standard prohibits officers from relying on plain odor of marijuana to conduct a search.[105] Instead, officers need to see illegal activity, drug paraphernalia, a firearm, or signs of deceptions admission of possession.[106] Furthermore, because police officers constantly receive supplemental information about how to adapt to changes in the law, providing additional training regarding a new standard of probable cause would furnish clearer guidelines and a just procedure before conducting a warrantless search of a person or vehicle.*

B. *Application of Plain View Doctrine*

The plain view doctrine has been widely accepted as an exception to the Fourth Amendment of the United States Constitution, which requires officers to

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99. *See infra* Sections II.A, III.A.
100. *See* Batten, *supra* note 34; Pantazi, *supra* note 14.
101. Illinois v. Gates, 462 U.S. 213, 238 (1983).
102. Batten, *supra* note 34; *see also* Pantazi, *supra* note 14.
103. *See* Batten, *supra* note 34.
104. *See* Shapiro, *supra* note 56.
105. *Id.*
106. *Id.*

obtain a warrant before conducting a search and seizure.[107] However, as stated before, the recent legal changes in the cannabis industry have rendered the plain view doctrine impracticable and unjust.[108] Warrantless search and seizure cases regarding prescription pills help illustrate how the plain view doctrine is now impracticable.[109] In order to suffice probable cause for warrantless search and seizure it must be "immediately apparent to the officer that the [seized] object constitutes evidence of a crime."[110] To be "immediately apparent" signifies that, "at the time police view the object to be seized, they must have probable cause to believe that the object is contraband or evidence of a crime."[111]

Florida Courts of Appeal have addressed the issue of illegal possession of prescription pills.[112] The First, Second, and Fifth District Court of Appeal have all refused to adopt a plain view doctrine regarding unlawful possession of prescription pills.[113] The holdings from the different Florida Court of Appeals furnish a clear rationale about the practicability of the plain view doctrine.[114] For instance, if a certain substance is not intrinsically illegal, then simple apprehension of such substance cannot serve as probable cause.[115] Consequently, police officers should be demanded to further inquire into the substance before conducting a search incident to arrest of the citizen's vehicle, person or property.[116] Thus, the law and procedure should adapt accordingly to the new legislation surrounding the marijuana industry.*

In comparison, the established precedent for warrantless searches in Florida seems to be in contradiction, rather than in conformity, with the recent legislative changes.[117] Since the odor of marijuana is no longer directly consistent with criminal activity, a warrantless search is not justified merely on

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107. Olivia Khazam, *It's Right Under Your Nose! The Trial of the Senses and the "Plain Smell" Doctrine*, CTR. FOR SENSORY STUD. (Apr. 23, 2014), http://centreforsensorystudies.org/occasional-papers/its-right-under-your-nose-the-trial-of-the-senses-and-the-plain-smell-doctrine; U.S. Const. amend. IV.

108. *See* FLA. STAT. §§ 381.986, 581.217 (2022).

109. *See, e.g.*, Gay v. State, 138 So. 3d 1106, 1109 (Fla. 2d DCA 2014); Smith v. State, 95 So. 3d 966, 969 (Fla. 1st DCA 2012); Sawyer v. State, 842 So. 2d 310, 312 (Fla. 5th DCA 2003).

110. M.L. v. State, 47 So. 3d 911, 912 (Fla. 3d DCA 2010).

111. *Gay*, 138 So. 3d at 1109.

112. *See id.* at 1110; *Sawyer*, 842 So. 2d at 312.

113. *See, e.g.*, *Gay*, 138 So. 3d at 1110; *Smith*, 95 So. 3d at 970.

114. *See, e.g.*, *Smith*, 95 So. 3d at 969–70.

115. *See id.* at 969.

116. *See id.*

117. *See id.*

cannabis odor alone.[118] The First Circuit Court of Appeals in 2012, examined the following factors before reversing the trial court's holding:

> Appellant appeared passed out on the ground; when aroused he appeared intoxicated with slurred speech; and he tried to obscure the bag of pills . . . . [T]he deputy did not testify to any markings on the pills, or lack thereof, which helped him identify what they were; he observed only that they were larger than a certain brand of breath mint and larger than aspirin tablets. Again, it is not uncommon, in the deputy's experience, for individuals to carry their legally prescribed medication in plastic bags.[119]

The court reasoned that "the incriminating nature of the pills was not immediately apparent to the deputy such that he had probable cause to seize the bag under the plain-view doctrine."[120] The court in *Smith v. State*,[121] in addition to disapproving the odor alone standard, also asserted that signs of intoxication and efforts to hide the pills are insufficient for probable cause.[122] On the other hand, the Second Court of Appeals in 2014 reached an analogous conclusion to the court in *Smith*.[123] The Second Court of Appeals, in *Gay v. State*,[124] evaluated the following factors before advancing a final judgement:

> The driver consented to the search. The officer then asked Gay to step out of the vehicle. Gay did not take her purse with her when she exited the vehicle. The officer testified that he immediately noticed a "faint odor" of cannabis upon beginning his search of the passenger compartment of the vehicle. He continued his search of the passenger compartment, including searching Gay's purse. During his search of Gay's purse, the officer found "a small, metal pill container—an aftermarket pill container" available for purchase in many drug stores. He removed the pills and box from the vehicle and returned to his patrol car where he learned, via the website Drugs.com, that some of the pills were Ritalin and [T]ramadol. He then returned to the vehicle, read Gay her *Miranda* rights, and began to question her about the pills. The officer testified that at the time he found the pills he did not know what they were; he identified them only through the Drugs.com

118. *See* Batten, *supra* note 34; Pantazi, *supra* note 14.
119. *See Smith*, 95 So. 3d at 969–70.
120. *Id.* at 969.
121. 95 So. 3d 966 (Fla. 1st DCA 2012).
122. *Id.* at 969.
123. Gay v. State, 138 So. 3d 1106, 1109 (Fla. 2d DCA 2014).
124. 138 So. 3d 1106 (Fla. 2d DCA 2014).

> website. The officer testified that although he knew the purse belonged to Gay and not the driver, he did not seek consent from Gay to search the purse. He confirmed that he did not ask Gay for permission to search the pill box or permission to take the pills or pill box from the vehicle back to his patrol car. The officer also confirmed that he would not have allowed Gay to leave the scene at that point and that no marijuana was found in the vehicle.[125]

Even though in *Gay*, no illegal substances were found after the officer conducted a full search of Gay's purse, it is crucial to acknowledge the court's reasoning.[126] The court in *Gay* quoted *Crawford v. State*[127] to reason that "[p]robable cause does not exist when the circumstances are equally consistent with noncriminal activity as with criminal activity."[128] The court expressly noted that at the time the officer removed the pills from Gay's vehicle, it was unknown to the officer the type of pills Gay possessed and whether such possession was legal.[129] Thus, the officer did not have any indication of probable cause.[130] In *Sawyer v. State*,[131] the Fifth District Court of Appeals held similarly to the courts in *Smith* and *Gay*.[132] There, it stated that the plain view doctrine is not satisfied when an officer seizes a white pill from an individual's vehicle, but he must inspect the pill to determine its incriminating nature because, under such circumstances, the incriminating nature of the pill was not "immediately apparent."[133]

C. *Comparing the Regalado/Mackey Analysis with Odor-Alone Standard*

Although Florida courts have not litigated the issue of marijuana odor alone as probable cause in depth, the courts have analyzed extremely similar cases regarding other regulated areas of the law.[134] To understand the repercussions of the probable cause standard based on odor alone, it is crucial to

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125. *Id.* at 1108.
126. *See id.*
127. 980 So. 2d 521 (Fla. 2d DCA 2007).
128. *Gay*, 138 So. 3d at 1109 (quoting Crawford v. State, 980 So. 2d 521, 525 (Fla. 2d DCA 2007)).
129. *Id.* at 1109–10.
130. *See id.* at 1110.
131. 842 So. 2d 310 (Fla. 5th DCA 2003).
132. *See Gay*, 138 So. 3d at 1109; Smith v. State, 95 So. 3d 966, 969 (Fla. 1st DCA 2012).
133. *Sawyer*, 842 So. 2d at 312.
134. *See, e.g.*, Mackey v. State, 124 So. 3d 176, 181 (Fla. 2013); Regalado v. State, 25 So. 3d 600, 606 (Fla. 4th DCA 2009).

discern the holdings in *Regalado v. State*[135] and *Mackey v. State*.[136] The cases of *Regalado* and *Mackey* explain the procedures and guidelines of probable cause that police officers must follow when an officer reasonably suspects an individual is carrying a concealed weapon without a valid permit.[137]

In *Regalado*, the Forth District Court of Appeals held that "stopping a person solely on the ground that the individual possesses a gun violates the Fourth Amendment."[138] The court reasoned that since it is legal in Florida to carry a concealed weapon with a valid license, and a police officer cannot immediately observe the defendant's license without further inquiry, the police officer lacks probable cause to conduct a warrantless search if it is merely based on the detection of a firearm.[139] A few years later, the Third District Court of Appeals found itself in a similar conflict.[140] The court in *Mackey* asked the Florida Supreme Court "whether an officer who believes that someone is carrying a concealed firearm, without more, has reasonable suspicion to conduct a *Terry* stop."[141] The Florida Supreme Court held that:

> the absence of a license [to carry a firearm] is not an element of the crime [for purposes of determining whether an officer's observation of a firearm in defendant's pocket gave rise to reasonable suspicion necessary for stop], but it is considered an "exception" to the crime, and proof that a defendant possessed a license to carry a concealed firearm must be raised as an affirmative defense.[142]

In addition, the court added that:

> "[w]hen the person blatantly lied to the police officer here about possession of a firearm while he was in a geographic area well known for illegal narcotics and firearms with the weapon in view, … the officer had a reasonable, articulable suspicion that the person may have been engaged in illegal activity, and th[e] brief detention to further investigate whether a crime was being committed is constitutionally valid".[143]

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135. 25 So. 3d 600 (Fla. 4th DCA 2009).
136. 124 So. 3d 176 (Fla. 2013).
137. *See Mackey*, 124 So. 3d at 181; *Regalado*, 25 So. 3d at 602, 604.
138. *Regalado*, 25 So. 3d at 606.
139. *See id.* at 602, 604.
140. *See Mackey*, 124 So. 3d at 179, 181.
141. *Id.* at 177, 181.
142. *Id.* at 181.
143. *Id.* at 184.

Even though the court in *Mackey* found that the defendant's motion to suppress was properly denied, the court also said that the case was distinguishable from *Regalado*.[144] In *Regalado*, the officer did not further inquire about the possession of the gun; however, in *Mackey,* the officer did inquire further into the possession of the gun.[145] Additionally, in *Mackey*, the defendant's answer furnished the officer with reasonable suspicion.[146] Nevertheless, the court unequivocally indicated that the resolution was based on the varying circumstances leading to the vehicular stop as well as the difference in the degree of intrusion of the defendant's fundamental Fourth Amendment right.[147]

Warrantless searches and seizures based on marijuana odor alone constitute far worse police intrusion than the stops discussed in *Regalado* and *Mackey*, because warrantless searches require reasonable suspicion to conduct a *Terry* stop and probable cause to conduct such a search.[148] Applying the rationale in *Regalado* and *Mackey*, it is evident that conducting a *Terry* stop based on marijuana odor alone significantly violates the Fourth Amendment.[149] This is because possession and transportation of hemp is legal for all Florida residents, but marijuana is legal only for some Florida residents.[150] Similar to the circumstances in *Regalado*, whether a defendant has a medical license or not, is not directly observable by an officer.[151] So, if an officer fails to further inquire into the cannabis odor, the officer lacks probable cause when relying solely on the odor.[152]

Undisputedly, the marijuana odor-alone standard cannot be harmonized with the sight plus standard addressed in *Regalado* and *Mackey*, even though both are standards for a stop and frisk.[153] Notably important is the fact that the *Regalado*/*Mackey* analysis also applies to *Terry* stops, a standard that requires far more suspicion than the standard for probable cause.[154] The facts of *Regalado* and *Mackey* are identical to the factual premises of warrantless searches based

144. *Id.* at 185; *Regalado*, 25 So. 3d at 606–07.
145. *See Mackey*, 124 So. 3d at 184; *Regalado*, 25 So. 3d at 601–02.
146. *See Mackey*, 124 So. 3d at 184.
147. *See id.*
148. *See id.* at 181; *Regalado*, 25 So. 3d at 608; Batten, *supra* note 34.
149. *See Mackey*, 124 So. 3d at 181,185; *Regalado*, 25 So. 3d at 606; Batten, *supra* note 34.
150. *See* Batten, *supra* note 34.
151. *See Regalado*, 25 So. 3d at 606.
152. *See id.*
153. *Id.*; *see also Mackey*, 124 So. 3d at 177.
154. *See Mackey*, 124 So. 3d at 181; *Regalado*, 25 So. 3d at 604, 606.

on odor of marijuana alone cases.[155] Therefore, if sight alone cannot constitute probable cause of criminality, odor alone definitely cannot serve as probable cause of a crime.[156] Moreover, in *Mackey*, the court neither mentioned the Second Amendment nor the fundamental right to bear arms when reaching its decision.[157] The court simply applied a totality of the circumstances standard—the same one applied to warrantless searches based on cannabis odor alone.[158] Consequently, the court reasoned that it is necessary for police officers to further inquire when the officer reasonably believes that an individual is carrying a concealed firearm.[159] This standard can easily be applied to cases where a police officer detects the mere odor of marijuana emanating from a vehicle.[160] Thus, it is imperative for Florida courts to employ a standard that is consistent with Florida legislation, rather than remaining blindly bound to the odor-alone standard.[161] Ignorance of this idea will just promote excessive invasion of privacy and unwarranted repercussions for Floridians.[162]

V. SOLUTION TO MARIJUANA ODOR-ALONE STANDARD

The foundational basis of the Fourth Amendment to the United States Constitution is reasonableness.[163] Florida courts must balance its citizens' right to be free from unreasonable searches and seizures from police intrusion in order to reach a probable cause standard consistent with the legislation.[164] Demanding police officers to further inquire into the possession of cannabis upon detecting cannabis odor establishes a standard that is congruous with Florida law.[165] In addition, applying this standard does not place any apparent burden on either side of the conflict.[166] On one hand, this standard would protect Florida residents from being hauled from their vehicles and being subject to a search upon an

155. *See Mackey*, 124 So. 3d at 179; *Regalado*, 25 So. 3d at 601–02.
156. State v. Betz, 815 So. 2d 627, 633 (Fla. 2002).
157. *See Mackey*, 124 So. 3d at 181.
158. *Id.*; *Betz*, 815 So. 2d at 633.
159. *Mackey*, 124 So. 3d at 184.
160. *See id.*
161. *See* Batten, *supra* note 34.
162. *See id.*
163. Kentucky v. King, 563 U.S. 452, 459 (2011) (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)); United States v. Knights, 534 U.S. 112, 118 (2001); U.S. CONST. amend. IV.
164. *See Knights*, 534 U.S. at 113, 118–19, 121.
165. *See* FLA. STAT. §§ 381.986, 581.217; Batten, *supra* note 34; Pantazi, *supra* note 14; Shapiro, *supra* note 56.
166. *See* State v. Jones, 222 So. 2d 216, 217–18 (Fla. 3d DCA 1969); Shapiro, *supra* note 56.

officer's mere detection of marijuana odor.[167] On the other side of the spectrum, the effort and cost that this standard places on law enforcement is slight.[168] Police officers know how to conduct a *Terry* stop.[169] They know how to question individuals during a vehicular stop, detect signs of probable cause, and dismiss such signs of probable cause if it is apparent, during questioning, that the individual is not committing a crime.[170] Police officers also collect and dismiss potential probable cause evidence through succinct interrogation.[171] Thus, placing the additional task of conducting a brief questioning, does not create injustice.[172] In essence, to arrive at a reasonable standard for probable cause based on marijuana odor alone, Florida courts should require officers to obtain some other indication of criminality and conduct a brief questioning before conducting a warrantless search incident to arrest.[173]

A. *Protocols and Guidelines of Other States*

It is paramount to analyze the protocols and guidelines that other states have employed regarding whether marijuana odor alone constitutes evidence of probable cause.[174] There is ample research that supports the enforcement of an *odor plus* standard.[175] Other states similar to Florida have abolished the odor-alone standard in order to have a criminal procedure consistent with the state's legislature.[176] The states that have employed an *odor plus* standard include: Arizona, California, Connecticut, Delaware, Maryland, Massachusetts, Montana, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and the District of Columbia.[177]

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167. *See Jones*, 222 So. 2d at 217–18.
168. *See* Shapiro, *supra* note 56.
169. *See* FLA. STAT. §§ 901.151(1)–(5),856.021(2) (2021).
170. *See id.* § 901.151(2), (4).
171. *See id.*
172. *See id.* §§ 901.151(1)–(5), 856.021(2).
173. *See supra* Section V; Shapiro, *supra* note 56; Pantazi, *supra* note 14.
174. *See* PERKINS COIE LLP, 2021 STATE ANALYSIS CHART: PROBABLE CAUSE TO STOP AND SEARCH BASED ON THE SMELL OF CANNABIS ALONE (2021), http://www.mpp.org/assets/pdf/issues/legalization/2021.11.19%20State%20Analysis%20Chart.pdf.; *Should the Odor of Cannabis Constitute Probable Cause in Florida*, THE LAW OFF. OF JOHN GUIDRY, http://www.jgcrimlaw.com/should-the-odor-of-cannabis-constitute-probable-cause-in-florida.html (last visited Nov. 17, 2022).
175. *See, e.g.*, Shapiro, *supra* note 56.
176. *See* PERKINS COIE LLP, *supra* note 174, at 2–44.
177. *See id.* at 4–44.

Most states that have similar legislation to Florida regarding cannabis and hemp have departed from an odor-alone standard.[178] Arizona poses slightly different circumstances than Florida, simply because the Arizona legislature has legalized recreational marijuana for all citizens over twenty-one years of age.[179] Unsurprisingly, medical marijuana is also legal in Arizona.[180] Arizona state law makes clear that cannabis odor alone cannot constitute probable cause.[181] Specifically, Arizona's Responsible Adult Use of Marijuana statute addresses that "the odor of marijuana or burnt marijuana does not by itself constitute reasonable articulable suspicion of a crime" unless law enforcement is investigating whether a person is driving or in actual physical control of a vehicle while under the influence.[182] Arizona's case law helps illustrate how the state has transitioned from one point of view to another, in regards to cannabis odor alone as probable cause.[183]

During the pre-legalization period in 2016, the Arizona Supreme Court held that "probable cause" exists when, "based on the smell or sight of marijuana alone unless, under the totality of the circumstances, other facts would suggest to a reasonable person that marijuana use or possession complies with" the Arizona Medical Marijuana Act ("AMMA").[184] Nevertheless, the decision was premised on the fact that the AMMA did not decriminalize marijuana, thus marijuana and its derivatives were still illegal in Arizona altogether.[185] It is important to note that after Arizona's Responsible Adult Use of Marijuana statute was passed, it abrogated the decision in *Sisco v. State*.[186] Consequently, the *Sisco* decision only survives to the extent that an officer searches a citizen based on cannabis odor alone because the officer suspects the citizen is driving intoxicated.[187] Conclusively, Arizona now requires police officers to observe

178. *See id.* at 1; *e.g.*, VA. CODE ANN. § 4.1-1302(A) (2021); ARIZ. REV. STAT. ANN. § 36-2852(C) (2020).

179. ARIZ. REV. STAT. ANN. § 36-2852(A); *see also* PERKINS COIE LLP, *supra* note 174, at 4–5.

180. ARIZ. REV. STAT. ANN. § 36-2801 (2010); *see also* PERKINS COIE LLP, *supra* note 174, at 5.

181. ARIZ. REV. STAT. ANN. § 36-2852(C); *see also* PERKINS COIE LLP, *supra* note 174, at 6.

182. ARIZ. REV. STAT. ANN. § 36-2852(C).

183. *See* PERKINS COIE LLP, *supra* note 174, at 5.

184. State v. Sisco, 373 P.3d 549, 555 (Ariz. 2016).

185. *Id.* at 553.

186. 373 P.3d 549 (Ariz. 2016); *see also* ARIZ. REV. STAT. ANN. § 36-2852(C).

187. *See* ARIZ. REV. STAT. ANN. § 36-2852(C); PERKINS COIE LLP, *supra* note 173, at 6.

more than merely the odor of cannabis to conduct a search and seizure that is predicated on the odor of marijuana.[188]

Delaware is another state that is similarly situated to Florida.[189] Delaware has decriminalized possession of marijuana for amounts under one ounce.[190] Additionally, the Delaware legislature has decreased the severity of the penalties for possession of marijuana over one ounce and for minors possessing any amount of marijuana.[191] Moreover, medical marijuana has been legal in Delaware since 2011.[192] Delaware's case law provides guidance and support for an *odor plus* standard when a search and seizure is based on cannabis odor alone.[193]

In 2021, the Delaware Supreme Court held that, when an arrest is solely predicated on cannabis odor, the arrest violates citizens' fundamental Fourth Amendment rights.[194] Nonetheless, the Delaware Supreme Court noted that the odor of cannabis cannot be the sole factor justifying a vehicular search, but can be a contributing factor to an officer's probable cause analysis.[195] The Delaware Supreme Court held similarly in *Valentine v. State*,[196] a case that served as the predecessor to *Juliano v. State*.[197] Essentially, Delaware case law and legislature make clear that the odor of cannabis alone cannot serve as probable cause, but it can be a contributing factor to the analysis.[198]

Maryland legislature offers a very similar view regarding cannabis to the Florida legislature and provides guidance for an *odor plus* standard.[199] The Maryland legislature decriminalized possession of marijuana under ten grams and now addresses that such an offense constitutes a civil crime.[200] The Maryland legislature specifically asserts that "a police officer shall issue a citation to a person who the police officer has probable cause to believe has

188. ARIZ. REV. STAT. ANN. § 36-2852(C); PERKINS COIE LLP, *supra* note 174, at 4; *Sisco*, 373 P.3d at 555.

189. PERKINS COIE LLP, *supra* note 174, at 9–10.

190. *Id.* at 9; Del. Code Ann. tit. 16, §§ 4701(36), 4764(d) (2015).

191. PERKINS COIE LLP, *supra* note 174, at 9; *see also* Del. Code tit. 16 § 4764(c)(3).

192. PERKINS COIE LLP, *supra* note 174, at 9; *see also* 16 Del. Code Ch. 49A, The Delaware Medical Marijuana Act (2011).

193. PERKINS COIE LLP, *supra* note 174, at 9; Juliano v. State, 260 A.3d 619, 622 (Del. 2021) (en banc).

194. *Juliano*, 260 A.3d at 622.; PERKINS COIE LLP, *supra* note 174, at 9.

195. *Juliano*, 260 A.3d at 631.

196. 207 A.3d 166, 1 (Del. 2019) (unpublished table decision).

197. 260 A.3d 619, 630–31 (Del. 2021) (en banc).

198. *See id.*; PERKINS COIE LLP, *supra* note 174, at 9.

199. *See* PERKINS COIE LLP, *supra* note 174, at 10, 16; MD. CODE ANN., CRIM. LAW § 5-601(2)(i) (LexisNexis 2022).

200. MD. CODE ANN., CRIM. LAW § 5-601(c)(2)(ii)(1).

committed a violation of § 5-601 of this part involving the use or possession of less than 10 grams of cannabis."[201] Additionally, Maryland employed a medical marijuana statute and makes medical marijuana legal for citizens over the age of eighteen.[202] Maryland's case law illustrates how the courts have departed from a cannabis odor-alone standard to require officers to detect other factors besides cannabis odor in order to conduct a search and seizure.[203]

In 2017, the Maryland Supreme Court held that "a law enforcement officer has probable cause to search a vehicle where the law enforcement officer detects an odor of marijuana emanating from the vehicle."[204] That same year, the Maryland Supreme Court later held that, when an officer detects the odor of marijuana emanating from a vehicle with various occupants, the officer may conduct a frisk if there are other factors besides the smell that provide an officer with a reasonable articulable suspicion that an occupant is armed and dangerous.[205] Furthermore, the Maryland Supreme Court unequivocally noted that, "[a]n odor of marijuana alone emanating from a vehicle with multiple occupants does not give rise to reasonable articulable suspicion that the vehicle's occupants are armed and dangerous and subject to frisk."[206]

Two years later, the Maryland Supreme Court expanded on its interpretation of probable cause based on odor of marijuana alone.[207] In 2019, the Maryland Supreme Court held that "possession of a joint and the odor of burnt marijuana [does not give] police probable cause to believe that [a suspect is] in possession of a criminal amount of that substance."[208] Moreover, in 2020, the Maryland Supreme Court held that the odor of marijuana alone does not constitute probable cause to allow an officer to conduct a warrantless search incident to arrest.[209] In 2021, the Maryland Supreme Court reaffirmed its holding in *Lewis v. State*,[210] and other previous decisions.[211] The Court asserted once again that odor alone does not furnish reasonable suspicion to execute an investigatory stop because an officer simply cannot conclude from the odor of

201. *Id.* § 5-601.1(a).
202. PERKINS COIE LLP, *supra* note 174, at 16; MD. CODE ANN. § 5-601(c)(3)(ii)(2).
203. *See* Norman v. State, 156 A.3d 940, 962 (Md. 2017); PERKINS COIE LLP, *supra* note 174, at 16.
204. Robinson v. State, 152 A.3d 661, 664–65 (Md. 2017).
205. *Norman*, 156 A.3d at 940, 962.
206. *Id.* at 944, 962.
207. Pacheco v. State, 214 A.3d 505, 518 (Md. 2019).
208. *Id.*
209. Lewis v. State, 233 A.3d 86, 91 (Md. 2020).
210. 233 A.3d 86 (Md. 2020).
211. *See* In re D.D., 250 A.3d 284, 295 (Md. Ct. Spec. App. 2021).

cannabis alone that an individual is involved in a crime.[212] Maryland case law clearly provides that marijuana odor by itself cannot constitute probable cause to frisk vehicle occupants, search a suspect's person, or arrest and perform a warrantless search of the suspect's person incident to arrest.[213]

The Michigan legislature adopts a more liberal view than the Florida legislature.[214] In 2018, Michigan voters approved the Michigan Regulation and Taxation of Marihuana Act ("the Act").[215] The Act legalized recreational marijuana for adults at least twenty-one years old and decriminalized possession and use of cannabis by minors.[216] It is important to note that the Act does not address whether cannabis odor alone serves as probable cause for a warrantless search.[217] Thus, it is paramount to examine Michigan's case law to appreciate how the Michigan courts have addressed the issue of whether cannabis odor alone constitutes probable cause.[218] Furthermore, medical marijuana has been legal in Michigan since 2008 under the Michigan Medical Marijuana Act ("MMMA").[219] In addition, before Michigan voters legalized either medicinal or recreational marijuana, the Michigan Supreme Court held that "the smell of marijuana alone by a person qualified to know the odor may establish probable cause to search a motor vehicle, pursuant to the motor vehicle exception to the warrant requirement."[220] The Michigan Supreme Court has not revisited the standard for probable cause based on cannabis odor alone after they legalized medical and recreational cannabis.[221]

In *People v. Moorman*,[222] which occurred during the pre-legalization period, the defendant was stopped for a vehicular infraction and the officer

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212. *Id.*

213. People v. Kazmierczak, 605 N.W.2d 667, 668 (Mich. 2000); Norman v. State, 156 A.3d 940, 944 (Md. 2017).

214. *See* PERKINS COIE LLP, *supra* note 174, at 10, 19.

215. *Id.*; MICH. COMP. LAWS § 333.27951 (2018); *see also* People v. King, 804 N.W.2d 911, 915 (Mich. Ct. App. 2011), *rev'd sub nom.* People v. Kolanek, 491 Mich. 382 (2012).

216. PERKINS COIE LLP, *supra* note 174, at 19; MICH. COMP. LAWS § 333.27954 (2022).

217. PERKINS COIE LLP, *supra* note 174, at 19.

218. *See id.*

219. MICH. COMP. LAWS § 333.26424 (2022); PERKINS COIE LLP, *supra* note 174, at 19; *see also King*, 804 N.W.2d at 915 ("[T]he MMMA grants narrowly tailored protections to qualified persons . . . if the marijuana is grown and used for . . . medical purposes).

220. People v. Kazmierczak, 605 N.W.2d 667, 668 (Mich. 2000).

221. PERKINS COIE LLP, *supra* note 174, at 19; *see also* People v. Moorman, 952 N.W.2d 597, 600 (Mich. Ct. App. 2020) (arguing that defendant's deception about presence of marijuana in the vehicle would give rise to probable cause to believe that the amount possessed was greater than permitted under the MMMA).

222. 952 N.W.2d 597 (Mich. Ct. App. 2020).

claimed he perceived cannabis odor emanating from the vehicle as he approached it.[223] Upon questioning, the defendant initially lied about having marijuana in the vehicle, then subsequently stated the odor was present because he was harvesting marijuana earlier that day in accordance with MMMA.[224] The officer then conducted a warrantless search and found a legal quantity of cannabis, pursuant to the MMMA.[225] Upon culminating the search, the officer arrested the defendant for possession of other controlled substances, but the defendant did not face criminal charges for cannabis possession.[226] Nevertheless, the Michigan Supreme Court held that the officer had probable cause to conduct a warrantless search because the defendant lied to the officer about possessing cannabis.[227] Although Michigan's case law does not expressly address whether an officer can execute a warrantless search based on cannabis odor alone, the last time the Michigan Court of Appeals analyzed the question it addressed that cannabis odor alone is not the sole factor of probable cause.[228]

Rhode Island is another state that employs a more permissive approach in comparison to Florida regarding cannabis legislation.[229] In 2006, the Rhode Island legislature legalized medical cannabis.[230] Furthermore, the Rhode Island legislature also passed a cannabis decriminalization law that lessens the penalty for possession of cannabis under one ounce and provides other civil violations for a minor's possession of cannabis.[231] The question of whether marijuana odor alone constitutes probable cause to conduct a warrantless search has not been litigated in the Rhode Island Supreme Court.[232] Notwithstanding that fact, the issue has been litigated at the trial court level.[233] In 2021, the trial court held that while cannabis odor alone cannot serve as probable cause to conduct a warrantless search, the smell can serve as a contributing factor to the totality of the circumstances analysis.[234] Conclusively, although the Rhode Island

223. *Id.* at 598.
224. *Id.* at 598–99.
225. *See id.* at 599, 601.
226. *Id.* at 598, 599, 601.
227. *Moorman*, 952 N.W.2d at 601.
228. PERKINS COIE LLP, *supra* note 174, at 19; *see also Moorman*, 952 N.W.2d at 600.
229. PERKINS COIE LLP, *supra* note 174, at 38.
230. 21 R.I. GEN. LAWS § 21-28.6-4 (2022); *see also* PERKINS COIE LLP, *supra* note 174, at 38.
231. 21 R.I. GEN. LAWS ANN. § 21-28-4.01(c)(2)(iv) (2022); *see also* PERKINS COIE LLP, *supra* note 174, at 38.
232. *See* PERKINS COIE LLP, *supra* note 174, at 38; State v. Li, No. K2-2019-0513A, 2021 WL 1970577, at *9 (R.I. Super. May 10, 2021).
233. PERKINS COIE LLP, *supra* note 174, at 38; *Li*, 2021 WL 1970577, at *9.
234. PERKINS COIE LLP, *supra* note 174, at 38; *Li*, 2021 WL 1970577, at *9.

legislature offers limited guidelines on the issue, Rhode Island courts have suggested that an officer must observe other factors besides the cannabis odor to conduct a warrantless search.[235]

B. *Applicability of an Odor Plus Standard*

An application of the *odor plus* standard for warrantless searches predicated solely upon cannabis odor would create more stability and trust toward law enforcement.[236] The fundamental inquiry here is that an odor-alone standard, as a result of Florida's cannabis legislation, is not congruous with the state's law and thus creates a sentiment of distrust among Florida residents towards police officers.[237] Moreover, this standard would certainly help stabilize communities where police officers are more prone to conduct warrantless searches.[238] As stated before, police officers have always used cannabis odor as an excuse to conduct warrantless searches and seizures.[239] "It is surprisingly common to see cases involving an officer who conducted a search after 'smelling marijuana' only to find a weapon or a drug other than marijuana, but no actual marijuana."[240] Notably, a vast majority of warrantless searches and seizures based solely on marijuana odor are driven by racial profiling.[241] It is widely reported that police officers are far more inclined to arrest black citizens than white citizens when it comes to marijuana arrests.[242] Moreover, law enforcement

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235. PERKINS COIE LLP, *supra* note 174, at 38; *see also* 31 R.I. GEN. LAWS § 31-21.2-5 (2015).

236. PERKINS COIE LLP, *supra* note 174, at 35; *see also* Shapiro, *supra* note 56; Batten, *supra* note 34.

237. *See* FLA STAT. §§ 381.986, 581.217; Batten, *supra* note 34; Pantazi, *supra* note 14.

238. Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1048 (2010); *see also* Batten, *supra* note 34; Pantazi, *supra* note 14.

239. *See* Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing*, 7 J. EMPIRICAL LEGAL STUD. 591, 591 (2010).

240. Alex Kreit, *Marijuana Legalization and Pretextual Stops*, 50 U.C. DAVIS L. REV. 741, 752 (2016).

241. *See* Johnson, *supra* note 238, at 1048; Geller & Fagan, *supra* note 239, at 591, 593; Kreit, *supra* note 240, at 757.

242. *See* AM. C.L. UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE 4 (2013), http://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf; Johnson, *supra* note 238, at 1047–48.

departments have tried to mediate this sentiment of distrust with the implementation of body-worn cameras.[243]

Body-worn cameras provide a transparent method of evaluating how an officer conducts an arrest instead of solely relying on the officer's arrest report, which can be altered by the officer's bias.[244] Contrastingly, while body-worn cameras avert certain types of pretextual stops by documenting what the officer observed and heard during the stop before executing the arrest, such technology does not provide evidence regarding whether the officer truly detected marijuana odor. The implementation of an *odor plus* standard would undoubtedly remedy this fault by requiring the officer to further inquire into the cannabis odor before executing a warrantless search with incident to arrest.[245] Demanding such behavior would provide a more factual basis to support an arrest solely based on marijuana odor.[246] Although body-worn cameras cannot corroborate whether an officer detected marijuana odor or not, they could provide concrete evidence regarding additional factors of criminality beyond the smell.[247] An *odor plus* standard would require law enforcement to remain truthful throughout the entirety of a stop and arrest, thus furnishing more validity and reliance in warrantless searches and seizures, as well as providing trial courts with additional factual basis in order to arrive at a fair and legitimate final judgment.[248]

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243. *See Body-Worn Cameras*, ELEC. FRONTIER FOUND., http://www.eff.org/pages/body-worn-cameras (Oct. 18, 2017).

244. *See id.*; Kreit, *supra* note 240, at 757 ("It is very difficult to combat the problem of racial disparities in pretextual stops . . . . Although the Equal Protection Clause forbids . . . racial profiling, it provides no protection against profiling animated by unconscious bias.").

245. PERKINS COIE LLP, *supra* note 174, at 35.

246. *See id.*

247. *See Body-Worn Cameras*, *supra* note 243.

248. *See* PERKINS COIE LLP, *supra* note 174, at 35; Shapiro, *supra* note 56 ("While conducting a traffic stop, you detect the odor of cannabis . . . . Prior to searching . . . ask the subject, "Do you have any marijuana or hemp in the vehicle?" If . . . answer[] [is] "No", you have reached the threshold to detain and search." (quoting Florida Highway Patrol)).

DISCUSSING WHETHER CONGRESS SHOULD IMPLEMENT A NATIONAL UNIFORM NON-COMPETITION AGREEMENT AND WHY NON-COMPETITION AGREEMENTS DISCOURAGE DYNAMISM PARTICULARLY IN FLORIDA

TIFFANY GUERRERO*

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I. INTRODUCTION

Florida's non-competition statute is the most restrictive covenant in the United States.[1] Florida's non-competition agreement, otherwise known as a restrictive covenant, has failed to implement its purpose of protecting employers and employees.[2] Ameliorating Florida's unethical abuse of non-compete contracts should require the implementation of a Uniform Non-Compete Act on the federal level.[3] Part II of this Comment provides a broader context of the evolution of Florida's non-compete statute.[4] Florida's statute has transitioned from a moderate non-compete statute to an overly general and pro-employer statute because of the 1996 legislation, which changed the statute's language.[5] The implementation is reflected in the Florida Supreme Court's ruling in the case of *White v. Mederi Caretenders Visiting Services of Southeast Florida, L.L.C.*[6] This Comment also analyzes the impact of the blue pencil doctrine on employees and how different states have highly criticized Florida's statute.[7] Part III reviews a non-compete agreement's impact on low-income workers and its effect on labor market participation and employee mobility.[8] It also describes current federal regulatory attempts by the White House and legislatures to implement and rid the enforcement of non-compete statutes in the United States.[9] Although there have been recent efforts to advocate for more regulations for non-compete agreements, this Comment shows the problems that accompany different non-compete statutes in other states.[10] Part IV concludes with a discussion of the issues with economic and business dynamism through a Florida case study while also

1. Hank Jackson, *Florida's Noncompete Statute: "Reasonable" or "Truly Obnoxious?,"* FLA. BAR J., Mar. 2018, at 11, 12; *see also* Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751, 778 (2011).
2. *See* Jackson, *supra* note 1, at 12; Bishara, *supra* note 1, at 778.
3. *See* discussion *infra* Parts I–V.
4. *See* discussion *infra* Part II.
5. *See* discussion *infra* Part II.
6. *See* discussion *infra* Part II; 226 So. 3d 774 (Fla. 2017).
7. *See* discussion *infra* Part II.
8. *See* discussion *infra* Part III.
9. *See* discussion *infra* Part III.
10. *See* discussion *infra* Part III.

reviewing competing theories on a non-compete agreement's effect on free market labor mobility between firms and industries.[11]

II. THE EVOLUTION OF FLORIDA'S EXCESSIVELY RESTRICTIVE NON-COMPETE STATUTE AND THE HISTORY OF NON-COMPETE AGREEMENTS

The primary focus of this Comment is to gauge the strength of non-compete agreements in fostering dynamism through its broad and restrictive terms throughout different jurisdictions.[12] A non-compete agreement encourages innovation by preventing workers from transferring one company's protected intellectual property and confidential legitimate business information to a rival company.[13] State law governs the enforceability of restrictive covenants that restrict competition between employers and employees.[14] Thus, on the one hand, Florida utilizes an overly broad covenant, while states such as California and North Dakota have contractually banned the implementation of contractual restrictions on employee mobility.[15] Non-competition agreements seek not to punish former employees but to protect the employer from unfair competition.[16] However, Florida's provisions mainly aim to benefit an employer's interest in protecting confidential business information regardless of the hardship an employee may endure resulting from the termination.[17] Despite Florida's excessive restraint on trade, some states—like New York—take a similar approach.[18] Non-competition statutes in similar states must be reasonable in time, scope, and geographical location and tied to a legitimate business purpose.[19] Florida was one of the few states that considered non-competition agreements contrary to public policy.[20] Nevertheless, the subject of enforceability of a

11. *See* discussion *infra* Part IV.

12. *See* discussion *infra* Parts I–V.

13. THE WHITE HOUSE, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGES, POTENTIAL ISSUES, AND STATE RESPONSES 2 (2016), http://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf.

14. *See id.* at 11.

15. Bishara, *supra* note 1, at 757, 778.

16. Griffin Toronjo Pivateau, *An Argument for Restricting the Blue Pencil Doctrine*, 7 BELMONT L. REV. 1, 4 (2019).

17. *See* FLA STAT. § 542.335(1)(g)(1) (2022).

18. Jackson, *supra* note 1, at 14.

19. *Id.*

20. *See* Love v. Miami Laundry Co., 160 So. 32, 42 (Fla. 1934) (Brown, J., dissenting in part) (concluding that contracts should be carefully scrutinized by the courts when the covenant is unreasonable and should not be enforced "unless there is a clear showing that the loss to the employer is irreparable and [the] remedy at law [would be] inadequate.").

restrictive covenant has undergone a substantial evolution through Florida's enactment of statutes and amendments.[21]

Non-compete agreements are contractual agreements that limit an employee's ability to start or work for a competing firm after a job separation.[22] While these agreements protect a company's legitimate business interest and its investment in workers, it also limits an employee's ability to earn a living by eroding the worker's future bargaining position for finding employers.[23] Employers have utilized non-competition agreements to protect trade secrets and the company's individualized and unique information, reduce labor turnover, and improve employer leverage in future negotiations with workers.[24] However, the benefits of a restrictive covenant have often come at the expense of a worker's ability to earn a living and the economy as a whole.[25] Although non-compete statutes vary throughout jurisdictions, Florida's statute governing non-competition agreements has faced criticism for its pro-employer nature.[26]

For many years in the twentieth century, Florida had considered the importance of contract construction and voided non-competition agreements on the ground that it was against public policy to impose an undue hardship on the employee.[27] Florida courts determined that these restrictive covenants be scrutinized by not allowing a court of equity to lend its aid to the covenant's enforcement of unreasonable terms.[28] The Florida Supreme Court followed the common law in England, which determined that prohibiting a man's right to pursue his calling was void as against public policy.[29] Common law paved the way for considering an employee's pursuit of trade in the field where the employee had developed an imperative skillset.[30] Nevertheless, restrictive

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21. *See* Jackson, *supra* note 1, at 12.

22. John M. McAdams, *Non-Compete Agreements: A Review of the Literature* 2 (Federal Trade Commission, Working Paper, 2019), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3513639.

23. *Id.* at 5, 6–7.

24. OFF. OF ECON. POL'Y, U.S. DEP'T OF TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 3 (2016), http://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf.

25. *Id.*

26. Jackson, *supra* note 1, at 12.

27. Kendall B. Coffey & Thomas F. Nealon, III, *Noncompete Agreements Under Florida Law: A Retrospective and a Requiem?*, 19 FLA. ST. U. L. REV. 1105, 1106 (1992).

28. Love v. Miami Laundry Co., 160 So. 32, 42 (Fla. 1934).

29. Standard Newspapers, Inc. v. Woods, 110 So. 2d 397, 399–400 (Fla. 1959).

30. *Id.* at 399.

covenants not to compete have presented centuries-old problems.[31] The earliest cases surrounding non-compete agreements in England considered the chronic shortage of skilled workers and the epidemics of the Black Death during the fourteenth century.[32] For this reason, restraints on trade were void against public policy.[33] By the eighteenth century, after England expanded commercialization, courts upheld restraints on trade provided it was reasonably limited both in geographical locations and duration of time.[34]

The common law framework quickly became criticized by employers who discovered no legal way to limit the competitive advantage learned by former employees.[35] Although Florida followed common law, the importance of an employee's ability to earn a living slowly eroded with the adoption of section 542.12 of the Florida Statutes in 1953.[36] Before the statute's enactment, Florida courts held discretionary power to strike down laws that prevented an individual from supporting himself and his or her family.[37] The Florida Supreme Court in *Arond v. Grossman*[38] stated that no Florida decisions had enforced non-competition agreements against former employees absent some particular equity and on the grounds of lack of mutuality.[39] Florida Statute section 542.12 was the first statute to authorize contractual restrictions for competition in the state by prohibiting employees from learning about a company's confidential business information and subsequently leaving for a competing business.[40] This statute also created a presumption of irreparable injury, which did not require an employer to allege or prove the existence of harm.[41]

In 1980, section 542.12 was recodified as section 542.33, and in 1990, the section was amended after several conflicting rulings led to unpredictable outcomes for employers.[42] The amendment was imperative in providing a backdrop for considering Florida's statute as the most restrictive covenant in the

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31. Socko v. Mid-Atlantic Sys. of CPA, Inc., 99 A.3d 928, 931 (Pa. Super. Ct. 2014).

32. *Id.*

33. *Id.*

34. *Id.*

35. Kendall B. Coffey, *Noncompete Agreements by the Former Employee: A Florida Law Survey and Analysis*, 8 FLA. ST. U. L. REV. 727, 728 (1980).

36. *See* Coffey & Nealon, III, *supra* note 27, at 1107; FLA. STAT. § 542.33 (1989). On October 1, 1980, § 542.12 was renumbered as § 542.33. Coffey & Nealon, III, *supra* note 27, at 1107 n.8.

37. *See* Coffey & Nealon, III, *supra* note 27, at 1106–07.

38. 75 So. 2d 593 (Fla. 1954).

39. *Id.* at 595.

40. *See* Coffey & Nealon, III, *supra* note 27, at 1133; FLA. STAT. § 542.33.

41. *See* FLA. STAT. § 542.33(2)(a).

42. Coffey & Nealon, III, *supra* note 27, at 1133; FLA. STAT. § 542.33.

United States.[43] The amended statute provides that courts could not enforce a non-compete agreement against employees, independent contractors, or agents when the agreement is contrary to public health, safety, or welfare, when the agreement is unreasonable, and when a showing of irreparable injury does not support the agreement.[44] This statute restricted the presumption that the employer would be irreparably injured when a past employee joins the employer's competitor.[45] A presumption would only arise in specific circumstances, limited to the use of trade secrets, customer lists, direct solicitation of existing customers, or where the seller of a goodwill of a business or a shareholder is selling or disposing of all of his or her shares in a corporation breaches an agreement to refrain from engaging in a similar business.[46] Thus, in any other circumstance, the party seeking to enforce the covenant must allege and prove the existence of irreparable injury to the company before seeking injunctive relief.[47] The issue with the amended statute arose because courts could not identify how to measure the unreasonableness of a restrictive covenant.[48]

The application of a legitimate business interest test, which determines whether an employer seeking to enforce a non-compete agreement has a legitimate business interest rather than just a restraint against the employee leaving to work for a competitor, is detailed in Florida's Second District Court decision in *Hapney v. Central Garage, Inc*.[49] In this case, the plaintiff had over seven years of experience installing and repairing auto and truck air-conditioning systems before he began to work for Central Garage for nine-and-a-half months.[50] He signed a non-compete agreement at the start of his previous employment before working for the company's direct competitor.[51] The plaintiff had not received additional training, did not have access to the company's confidential business information or trade secrets, and he did not develop significant relationships with the company's customers.[52] The court concluded that reasonableness extended beyond the time and geographical scope of the statute to the protection of a legitimate business interest.[53] Despite implementing

43. *See* Coffey & Nealon, III, *supra* note 27, at 1112–13.
44. *Id.* at 1133–34; FLA. STAT. § 542.33(2)(a).
45. Coffey & Nealon, III, *supra* note 27, at 1135–36.
46. *Id.* at 1133–34; FLA. STAT. § 542.33(2)(a).
47. *See* Coffey & Nealon, III, *supra* note 27, at 1135.
48. *See id.* at 1112.
49. 579 So. 2d 127, 129–31 (Fla. 2d DCA 1991), *disapproved on other grounds by* Gupton v. Vill. Key & Saw Shop, Inc., 656 So. 2d 475 (Fla. 1995).
50. *Id.* at 128.
51. *Id.*
52. *Id.* at 129.
53. *See id.* at 133.

the legitimate business interest test, different circuits disagreed with the test and applied a balancing test.[54] The rules governing restrictive covenants became blurred with the inconsistent use of a legitimate business interest test and the possibility of different court rulings on the same case.[55] In 1996, the Florida legislature enacted Florida Statute section 542.335, which governs all restrictive covenants, effective on and after July 1, 1996.[56] The statute's implementation contains a detailed framework for enforcing a covenant in Florida.[57]

Florida's non-compete law, section 542.335, is the most pro-employer statute in the country.[58] The statute states that "[i]n determining the enforceability of a restrictive covenant, a court: [s]hall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought."[59] Second, the statute also asserts that "[a] court shall not employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly, against the restraint, or against the drafter of the contract."[60] Although these two provisions face high scrutiny among different states, Florida's blue pencil rule poses a greater issue when analyzing how employers can utilize this doctrine to the detriment of the person against whom the enforcement is sought in court.*

A. *Out-of-State Criticism*

Although Florida enacted a statute that provides a more detailed framework than section 542.33, different jurisdictions have disagreed with Florida's overly restrictive guidance in construing covenants.[61] For example, the New York Court of Appeals in *Brown & Brown, Inc. v. Johnson*,[62] found that Florida's non-compete statute was unenforceable because it was contrary to public policy and, thus, violated a fundamental principle of justice.[63] In this case, the defendant worked for the plaintiff, Brown & Brown, Inc., and signed a non-solicitation agreement whereby she was prohibited from soliciting, accepting, or

54. *See* Jewett Orthopaedic Clinic, P.A. v. White, 629 So. 2d 922, 926 (Fla. 5th DCA 1993).
55. *See id.*
56. FLA. STAT. § 542.335(3) (2022).
57. *See id.* § 542.335(1)(h).
58. Jackson, *supra* note 1, at 12; Bishara, *supra* note 1, at 778, 787.
59. FLA. STAT. § 542.335(1)(g)(1).
60. *Id.* § 542.335(1)(h).
61. *See* discussion *supra* Part II; Jackson, *supra* note 1, at 11.
62. 34 N.E.3d 357 (N.Y. 2015).
63. *Id.* at 360; *see also* Jackson, *supra* note 1, at 11.

servicing any customer or entity of the New York offices.[64] Brown & Brown, Inc. is a Florida corporation with a subsidiary in New York.[65] The defendant was terminated and began working for the plaintiff's competitor.[66] The appellate court held that Florida's choice-of-law provision was unenforceable against public policy and that the provision was overbroad.[67] Additionally, in *Bremen v. Zapata Off-Shore Co.*,[68] the United States Supreme Court held that a contractual choice-of-forum clause should be unenforceable if enforcement defies the forum's public policy declared by statute or by judicial decision.[69] Similarly, in *Unisource Worldwide, Inc. v. South Central Alabama Supply, L.L.C.*,[70] the Alabama court held that utilizing Florida's non-compete agreement under the choice-of-forum clause would be contrary to Alabama's position in disfavoring contracts that restrain employment.[71]

Similarly, in 2008, the Illinois Appellate Court in *Brown & Brown, Inc. v. Mudron*,[72] denied enforcing the choice-of-law provision that required Florida law application.[73] Illinois law requires that, in determining whether a restrictive covenant is reasonable, a court must consider the hardship the covenant imposes on an individual employee.[74] In this case, the court considers Illinois' law, which provides its workers with greater protection from the adverse effects of restrictive covenants.[75]

B. *Rethinking* White v. Mederi Caretenders Visiting Services of Southeast Florida, L.L.C.

To further illustrate how Florida's statute has been under attack by different jurisdictions, the Florida Supreme Court in *White* explores whether Florida's non-compete statute unreasonably restricts employees.[76] In this case, Caretenders, a home healthcare company, hired the defendant, White, as a

64. *Johnson*, 34 N.E.3d at 359.
65. *Id.*
66. *Id.*
67. *Id.* at 360.
68. 407 U.S. 1 (1972).
69. *Id.* at 15.
70. 199 F. Supp. 2d 1194 (M.D. Ala. 2001).
71. *Id.* at 1201.
72. 887 N.E.2d 437 (Ill. App. Ct. 2008).
73. *Id.* at 440.
74. *Id.*
75. *Id.*
76. *See* White v. Mederi Caretenders Visiting Servs. of Se. Fla., L.L.C., 226 So. 3d 774, 779 (Fla. 2017).

marketing representative to solicit medical facilities and physicians for home health service referrals.[77] White signed a non-compete agreement with Caretenders, which prohibited her from working for a competitor one year after her termination.[78] Subsequently, White left Caretenders and sought employment with a direct competitor, where she solicited customers from her previous employer.[79] On appeal, the Court found that Caretenders had a legitimate business interest in its referral sources.[80] The Florida Supreme Court reversed the trial court's ruling that Caretenders did not have a legitimate business interest in referral sources because section 542.335 of the Florida Statutes does not identify referral sources as a legitimate business interest.[81]

The case of *White* is imperative in analyzing how the Florida Supreme Court reads section 542.335 because the case overbroadly expands on legitimate business interest considerations separate from that of the statute.[82] In doing so, Florida courts have mistakenly circumvented the bounds of the statutory directive that a legitimate business interest regarding customers must be substantial and identifiable.[83] A referral list of customers—with which a company has no specific, identifiable, or substantial relationship with the individuals listed—cannot become a legitimate business interest simply because a physician refers to it.[84]

C. *The Blue Pencil Rule*

When a court addresses an unreasonable restrictive covenant, a court can either refuse to enforce the covenant or apply a legal doctrine termed the blue pencil rule.[85] The blue pencil rule is a doctrine that allows courts to strike out unreasonable and overbroad provisions in a non-compete agreement but may not add or change the language of the agreement.[86] Courts have three options when

77. *Id*. at 778.
78. *Id.*
79. *Id.*
80. *Id.* at 786.
81. *White*, 226 So. 3d at 781–82; *see also* FLA. STAT. § 542.335(1)(b) (2022).
82. *Compare White*, 226 So. 3d at 785, *with* Hiles v. Americare Home Therapy, Inc., 183 So. 3d 449, 454 (Fla. 5th DCA 2015), *aff'd in part, quashed in part sub nom.* White v. Mederi Caretenders Visiting Servs. of Se. Fla., L.L.C., 226 So. 3d 774 (Fla. 2017) (holding that "unidentified prospective patients, and correspondingly referral physicians, do not qualify as legitimate business interests for the purpose of enforcing [employment] restrictive covenants").
83. *See White*, 226 So. 3d at 780; FLA. STAT. § 542.335(1)(b)(3).
84. *See White*, 226 So. 3d at 780; FLA. STAT. § 542.335(1)(b)(3).
85. *See* Pivateau, *supra* note 16, at 2.
86. *Id.* at 23.

addressing an unreasonable non-compete agreement.[87] First, the court can void the entire contract, including reasonable terms and provisions, otherwise known as the red pencil rule.[88] Second, the court can strike out only the unreasonable provisions and maintain the rest of the contract, or third, the court may reform the contract to make the terms reasonable.[89] "More than [thirty] states have adopted the practice of contract reformation, including Massachusetts, New York, New Jersey, and Tennessee."[90] Essentially, courts have the authority to either strike unreasonable clauses, leaving the rest to be enforced, or modify the agreement to make it enforceable.[91] The blue pencil rule has faced extreme criticism because it allows employers to rely on the court system when there is a mistake in the contracting process or errors that need correction.[92] The issue with the blue pencil rule is that it allows courts to disregard the express language of a non-compete agreement to make the agreement reasonable.[93] In striking out clauses the court finds unreasonable, the original contracting parties choose to agree to a new contract.[94]

Because the blue pencil doctrine creates uncertainty in employment contracts, an employee's rights may become uncertain because the employee will not know what sort of conduct is prohibited.[95] In addition, an employee may have no choice but to accept a low-salary job from a new employer because of the fear of litigation.[96] Despite the confusion of the blue pencil doctrine to employees, employers are also affected by the inconsistencies of the doctrine.[97] The doctrine leaves employers guessing how far an agreement can be drafted before the court implements the blue pencil rule.[98] Therefore, companies are forced to weigh the benefits of the agreement against the burden of having to enforce the agreement.[99] However, employers continue to lack guidance

87. Jacqueline A. Carosa, *Employee Mobility and the Low Wage Worker: The Illegitimate Use of Non-Compete Agreements*, 67 BUFF. L. REV. DOCKET D1, D18 (2019).
88. *Id.*
89. *Id.*
90. *Id.* at D19.
91. *See id.* at D18.
92. *See* Pivateau, *supra* note 16, at 2.
93. *Id.*
94. *See* Carosa, *supra* note 87, at D7; Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 674 (2008).
95. Pivateau, *supra* note 94, at 691.
96. *Id.* at 692.
97. *Id.*
98. *Id.*
99. *Id.*

regarding the enforceability of the non-compete agreement because courts have consistently interpreted similar cases in different ways.[100]

The Florida statute enforcing the blue pencil doctrine states that "if a contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest or interests, a court shall modify the restraint and grant only the relief reasonably necessary to protect such interest or interests."[101] The issue with the Florida statute is the use of the word "shall" instead of "may" since "shall" forces the court system to modify an agreement to protect a legitimate business interest while "may" provides discretion to the court system in deciding whether to keep part of the agreement that was agreed upon by the contracting parties, the narrow language used in the word "shall" encourages litigation.* Litigation in the court system around non-compete agreements has been before the courts for more than five hundred years.[102] Through these cases, the court system has handled the evolution of business methods, including the ebb and flow of contract construction, business ethics, and personal economic freedom.[103]

1. *In Terrorem* Effect

The blue pencil rule places a significant burden on employees.[104] "The problem is commonly referred to as the *in terrorem* effect."[105] The blue-penciling of a contract permits an *in terrorem* effect on an employee who must attempt to interpret an ambiguous provision in a restrictive covenant to decide whether it is the right decision to accept employment.[106] Many courts have addressed the blue pencil doctrine's effect on the overuse of broad provisions.[107] For example, the court in *Richard P. Rita Personnel Services, International, Inc. v. Kot*[108] found that many covenants exercise the *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear

100. *See* Pivateau, *supra* note 94, at 692.
101. FLA. STAT. § 542.335(1)(c) (2022).
102. Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 626 (1960).
103. *Id.* at 626–27.
104. Pivateau, *supra* note 94, at 689.
105. *Id.* at 690.
106. Lanmark Tech., Inc. v. Canales, 454 F. Supp. 2d 524, 529 (E.D. Va. 2006) (noting that an employer may try to limit the *in terrorem* effect of an ambiguous provision in a non-compete agreement by interpreting it narrowly but a request for limited relief could not cure a defective non-competition agreement).
107. Pivateau, *supra* note 94, at 690.
108. 191 S.E.2d 79 (Ga. 1972).

complications if they employ a covenantor or are anxious to maintain relations with their competitors.[109] The court stated, "[i]f severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable."[110] Thus, a non-compete agreement harms employees unaware of the nature of the agreement.[111]

2. Liberal Blue Pencil States

In strict blue pencil states, the courts will find the agreement unenforceable if the agreement fails to meet the standard of reasonableness in scope, duration, or geographical location.[112] "The strict blue pencil rule holds that a court may not, under the guise of interpretation, redraft a non-competition agreement to make it more reasonable or narrow."[113] In contrast, liberal blue pencil states provide courts with greater deference in redrafting a non-compete agreement.[114] A court may utilize the liberal blue pencil rule only to the extent that it is reasonably necessary to protect the employer; however, courts may enforce an unreasonable contract partially rather than completely voiding it.[115] For example, New Jersey applies the blue pencil rule liberally.[116] New Jersey's law on partially enforcing a non-compete agreement depends on whether the enforcement is possible without causing injury to the public and without any injustice to the parties involved.[117] In contrast, although Maine utilizes the blue pencil rule liberally, the Supreme Judicial Court in Maine held that the reasonableness of a covenant depends upon the case's specific facts.[118] The scope of the covenant would be interpreted how the employer intended to enforce it.[119] Thus, the court will not consider the parties' bargained-for-exchange or its enforcement by its plain terms.[120]

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109. *Id.* at 81.
110. *Id.*
111. *See id.*; Pivateau, *supra* note 16, at 44.
112. Pivateau, *supra* note 16, at 25.
113. *Id.*
114. *See id.* at 27.
115. *Id.*
116. *Id.*
117. Pivateau, *supra* note 16, at 27.
118. Chapman & Drake v. Harrington, 545 A.2d 645, 647 (Me. 1988); Pivateau, *supra* note 16, at 28.
119. Pivateau, *supra* note 16, at 28 (citing Everett J. Prescott, Inc. v. Ross, 383 F. Supp. 2d 180, 190 (D. Me. 2005)).
120. *See id.*

III. NON-COMPETITION AGREEMENTS EFFECT ON LOW-INCOME WORKERS

The Florida statute governing non-competition agreements unduly burdens an employee by prohibiting the consideration of an employee's individualized or economic hardship resulting from an employer's termination and construing the contract against the employee.[121] Thus, many low-income workers are disproportionately affected.[122] Utilizing national survey data for about 11,000 labor force participants, approximately thirty-eight percent of workers have agreed to a non-compete agreement in the past, and nearly one in five workers in the United States is employed under a non-compete agreement.[123] Although the purpose of a non-compete agreement is more likely to be found in highly skilled sectors, non-compete agreements are also found in low-skill, low-paying jobs and in some states where these agreements are unenforceable.[124] In 2014, 34.7% of employees without a bachelor's degree entered a non-compete agreement at least once, while 14.3% are currently working under one.[125] Of those individuals who earn less than $40,000 a year, 13.3% are currently subject to a non-compete agreement.[126] Many technologically-driven companies, such as Amazon, have been criticized for making workers sign non-compete agreements.[127] Amazon prohibited workers from engaging in or supporting "the development, manufacture, marketing, or sale of any product or service" that competes with the company.[128] Amazon's low-wage workers, including seasonal, hourly workers, were not likely to object to a non-compete clause.[129] Because Amazon's services and products could range worldwide, its restrictive covenant threatened its employees' livelihood.[130] Subsequently, Amazon removed the non-compete clause for hourly workers in the United States.[131] A

121. *See* FLA. STAT. § 542.335 (2022); Evan P. Starr et al., *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & ECON. 53, 53–54 (2021).
122. Starr et al., *supra* note 121, at 64.
123. *Id.* at 60.
124. *Id.* at 53, 55, 61.
125. *Id.* at 55, 64.
126. *Id.* at 64.
127. Jana Kasperkevic, *Amazon Removes Crazy Non-Compete Clause from Hourly Workers' Contracts*, BUS. INSIDER (Mar. 29, 2015, 10:42 AM), http://www.businessinsider.com/amazon-removes-non-compete-clause-for-hourly-workers-2015-3.
128. *Id.*
129. *Id.*
130. *See id.*
131. *See id.*

company's inclusion of non-compete clauses in contracts has yielded limited wage growth by "restraining labor market competition from product market competit[ion] . . . and preempting future competition from departing employees."[132] Further, the fields of architecture and engineering executed thirty-six percent of non-compete agreements, and computer and mathematical vocations executed thirty-five percent of non-compete agreements.[133] Nevertheless, the farm, fishing, and forestry vocations executed six percent of non-compete agreements.[134] However, big corporations and small businesses that seek to limit labor market participation continue to utilize these restrictive covenants.[135] Because of non-compete agreements' effect on low-income workers, many states have recently banned these restrictive covenants for low-wage or hourly workers.[136] States such as Virginia, Maryland, and Nevada have banned most restrictive covenants for low-wage employees.[137] Non-compete agreements may also reduce the availability of jobs for an employee.[138] An employee may not find opportunities for employment that would foster or advance skills the employee has experienced.[139] The inability to find an employer that will help the employee contribute to the tax base or collect a paycheck can lead to unemployment or reliance on other public support programs.[140]

A. *Employee Mobility*

"The importance of employee mobility cannot be understated."[141] Employee mobility is a valuable commodity because it allows workers to find better opportunities, boosts employee morale, and helps employers find more workers to fill positions.[142] At-will-employment principles also favor employee

132. Starr et al., *supra* note 121, at 55.
133. *Id.* at 64, 67 fig.5.
134. *Id.*
135. *See id.* at 55, 73–77; Bishara, *supra* note 1, at 758; THE WHITE HOUSE, *supra* note 13, at 4.
136. Teresa Lewi et al., *Recent Federal and State Laws Restrict Use of Employee Non-Competition Agreements by Government Contractors and Other Employers*, COVINGTON (Aug. 19, 2021), http://www.insidegovernmentcontracts.com/2021/08/recent-federal-and-state-laws-restrict-use-of-employee-non-competition-agreements-by-government-contractors-and-other-employers/.
137. *Id.*
138. Carosa, *supra* note 87, at D32.
139. *See id.* at D32–33.
140. *Id.* at D33.
141. *Id.*
142. *Id.*

mobility because it permits employers to terminate employment at any time, for any reason.[143] The issue with non-compete agreements, particularly that of Florida's, is that employment mobility remains more imperative to low-wage workers than to high-wage counterparts because a low-wage worker will change jobs for a small increase in compensation while a high-wage worker would be less likely to begin working for a new employer.[144] Consequently, Florida's overly restrictive covenant harshly impacts low-wage workers.[145] In the low-wage sector, where non-compete agreements are often utilized to control costs rather than safeguard legitimate business interests, non-compete agreements can benefit the employer at the employee's expense.[146] The employer benefits at the employee's expense because the employee is still bound to the non-compete agreement even after the employer has safely recouped its investment.[147]

B. *Non-Uniform Regulation*

Because of the many issues accompanying the implementation of a non-compete clause into a contract, there is currently no federal law governing the restrictions of non-compete agreements.[148] "Traditionally, the enforceability of these agreements has largely been a matter of common law and subject to state contract principles."[149] However, over the past few years, many states have implemented regulations that limit the enforcement of restrictive covenants.[150] To illustrate, in May 2021, Oregon amended its non-compete statute to state that overbroad non-compete agreements are "void" instead of "voidable."[151] Similarly, Nevada also amended its laws, penalizing employers who attempted to enforce non-compete agreements prohibited by law.[152] The only federal action addressing non-compete agreements has been in the form of presidential

143. Carosa, *supra* note 87, at D34.
144. *See id.*
145. *See id.*; Bishara, *supra* note 1, at 778.
146. Carosa, *supra* note 87, at D37, D38.
147. *Id.* at D38.
148. *See id.* at D12.
149. Lewi et al., *supra* note 136.
150. *See id.*
151. *Id.*; OR. REV. STAT. § 653.295(1) (2022).
152. Lewi et al., *supra* note 136; Assemb. B. 47, 2021 Leg., 81st Sess. (Nev. 2021) (prohibiting a "noncompetition covenant from applying to an employee who is paid solely on an hourly wage basis, exclusive of any tips or gratuities" and requiring courts to award attorney's fees and costs where an employer restricts a former employee from providing services to a former customer or client under certain circumstances).

recommendations and recommendations by the legislature.[153] The problem with non-compete agreements arising at the federal level comes from the foundation of restrictive covenants as a matter of contract law.[154] Restrictive covenants in restraint of trade are enforceable if the employer satisfies the following three requirements.[155] First, "the covenant must relate . . . to either a contract for the sale of goodwill or other subject property or to a contract of employment."[156] Second, "the covenant must be supported by adequate consideration," and third, "the application of the covenant must be reasonably limited in both time and territory."[157] "All three requirements must coalesce before a restrictive covenant is enforceable."[158] Because contract law is a matter reserved to the states, government action towards non-compete agreements has been minimal.[159] While contract law is up to the states, it does not immunize the state employment laws from preemption if Congress decides to preempt such laws.[160]

C. *Current Federal Regulatory Attempts to Control Non-Compete Agreements*

In 2015, Congress introduced the Mobility and Opportunity for Vulnerable Employees Act to prohibit employers from requiring low-wage employees to enter into covenants not to compete.[161] However, the bill failed to be enacted.[162] Additionally, in 2015, Senator Marco Rubio introduced the Freedom to Compete Act, legislation protecting entry-level, low-wage workers from non-compete agreements that limit employment opportunities and the ability to negotiate for higher wages.[163] Federal legislative action is needed because many states implement different laws on handling non-compete agreement cases, and many courts often apply various rulings on the same or similar cases.[164] Because many states have different statutes governing

153. Carosa, *supra* note 87, at D46–47.

154. *But see id.* at D12, D47.

155. Socko v. Mid-Atlantic Sys. of CPA, Inc., 99 A.3d 928, 932–33 (Pa. Super. Ct. 2014) (citing Maint. Specialties, Inc. v. Gottus, 314 A.2d 279, 282 (Pa. 1974) (Jones, C.J., concurring)).

156. *Id.*

157. *Id.*

158. *Id.*

159. *See* Carosa, *supra* note 87, at D47.

160. *Id.*

161. MOVE Act, S. 1504, 114th Cong. (2015).

162. Carosa, *supra* note 87, at D47.

163. Freedom to Compete Act, S. 124, 116th Cong. (2019); *see also* Carosa, *supra* note 87, at D48–49.

164. *See* Carosa, *supra* note 87, at D48.

restrictive covenants, it is essential to address each state's diversification and unique necessities.[165] Although the proposal of a uniform act would fail to take this into account, the impact of these covenants on low-income workers will remain the same.[166] The Mobility and Opportunity for Vulnerable Employees Act effectively advocated for the deregulation of non-compete agreements for low-wage employees who are often left unemployed resulting from the terms of the covenant.[167] Thus, a uniform federal act restricting the implementation of non-compete agreements and low-income workers would effectively stimulate employee mobility, job diversification, and employment opportunities.[168] A uniform non-compete act would provide stakeholders and legislatures with predictability and clarity on issues that states often do not know how to address, especially for states like New York, which would find Florida's statute contrary to public policy.[169] Despite the benefits of a uniform federal act for non-compete agreements, it would be more beneficial to create a bill in which general rules would regulate non-compete agreements nationwide.[170] Therefore, because of the socio-economic landscapes of the states, state legislators should define low-wage workers and design legislation that would reflect the unique needs of each state.[171]

IV. DYNAMISM AND THE EFFECT OF A NON-COMPETE BAN FOR LOW-INCOME WORKERS

Banning non-compete agreements for low-wage workers would likely lead to increased hourly wages.[172] When non-compete agreements are enforced on low-wage workers, any additional compensation received by workers due to firm investments has been associated with the threat of within-industry mobility.[173] For example, a 2008 study on the Oregon ban on non-compete agreements for hourly-paid workers showed positive wage effects.[174] The increase in positive wage effects results from findings that low-wage workers

165. *See id.* at D49.
166. *See id.*
167. *See id.*; Kasperkevic, *supra* note 127.
168. *See* Carosa, *supra* note 87, at D58.
169. *See* Jackson, *supra* note 1, at 12.
170. *See* Carosa, *supra* note 87, at D49.
171. *See id.*
172. *See* Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Non-Compete Agreements*, 68 MGMT. SCI. 143, 143 (2022).
173. *Id.* at 144.
174. *Id.* at 143.

have less bargaining power in contracting around non-compete agreements.[175] The Current Population Survey found that Oregon's ban on non-compete agreements for low-wage workers increased hourly wages by 2.2%–3.1% on average, with effects of six percent over seven years.[176] Consequently, after the non-compete agreement ban, monthly job-to-job mobility among hourly workers increased by twelve to eighteen percent.[177]

While studies have shown that advanced high-wage markets implement many non-compete agreements, low-wage workers are more likely than high-wage workers to transition across industries.[178] The issue arises with a low-wage worker's ability to transfer industry-specific human capital.[179] Thus, these restrictive covenants strip workers of the opportunity to take high-paying jobs within the industry and bind workers to firms with no incentive to increase wages.[180] Historically, it is rare for states to ban non-compete agreements entirely.[181] If there was a federal ban on non-compete agreements for low-wage workers, employers might choose to avoid the effects by switching from hourly to salary compensation; for instance, the 2008 Oregon ban reflected how companies manipulated job characteristics to avoid the non-compete ban.[182] The study proved that if salaried jobs are more desirable with the elimination of non-compete agreements, the ban's effect improved job quality.[183]

Further, significant efforts over the past decades to ban non-compete agreements are reflected in presidential action.[184] The White House's Chief Economic Advisor under the Obama administration stated that when there is less of an ability to threaten to leave one job for another, there is less of an ability to earn.[185] The administration believed that the advantages of banning a non-compete were individual freedom, personal fulfillment, and the opportunity to

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175. *Id.*
176. *Id.*
177. Lipsitz & Starr, *supra* note 172, at 144.
178. *Id.*
179. *Id.* at 146.
180. *Id.*
181. *Id.* at 147 (citing Russell Beck, *The Changing Landscape of Trade Secrets Laws and Noncompete Laws Around the Country*, FAIR COMPETITION L., http://faircompetitionlaw.com/changing-landscape-of-trade-secrets-laws-and-noncompete-laws/ (July 12, 2022)).
182. *See* Lipsitz & Starr, *supra* note 172, at 159.
183. *Id.*
184. *See* Carosa, *supra* note 87, at D46–47.
185. Omri Ben-Shahar, *California Got It Right: Ban the Non-Compete Agreements*, FORBES (Oct. 27, 2016, 3:02 PM), http://www.forbes.com/sites/omribenshahar/2016/10/27/california-got-it-right-ban-the-non-compete-agreements/?sh=7d02bb2a3538.

change employment, thus guaranteeing that individuals would be paid wages that reflected their value to the firm.[186] The White House's position on non-compete agreements under the Obama administration was like that of California, where non-compete agreements are banned.[187] In California, employers are prohibited from enforcing restrictive covenants on trade.[188] In 2019, California's Attorney General, Xavier Becerra, called for a nationwide ban on non-compete agreements.[189] The attorney general urged the Federal Trade Commission to take a stand against non-compete agreements in response to competition and consumer protection hearings.[190] Additionally, an alliance of labor unions, public interest groups, and legal advocates submitted a letter requesting the Federal Trade Commission to "initiate a rulemaking effort to classify worker non-compete provisions as . . . illegal under the Federal Trade Commission Act."[191] Labor market concentration has also been excluded from review by the Department of Justice and the Federal Trade Commission.[192]

Similarly, in July 2021, President Biden signed an executive order that directed the Federal Trade Commission to reduce the use of non-competes nationwide to help stimulate competition and regulate the economy.[193] Nearly one dozen states have applied restrictions on the enforcement of non-compete agreements.[194] Biden's executive order asked the Federal Trade Commission to adopt rules that would enhance competition nationwide to promote job fluidity.[195] Typically, "the [Federal Trade Commission] enforces federal statutes passed by Congress and signed into law by the Chief Executive."[196] Therefore, because common law or statutory law governs non-compete agreements, it is questionable

186. *See id.*
187. *Id.*
188. Press Release, Rob Bonta, Att'y Gen., Off. of Att'y Gen., Attorney General Becerra Calls for Nationwide Ban on Non-Compete Agreements, Reminds Businesses of Existing Prohibition in California (Nov. 15, 2019), http://oag.ca.gov/news/pressreleases/attorny-general-becerra-calls-nationwide-ban-non-compete-agreements-reminds.
189. *Id.*
190. *Id.*
191. *Id.*
192. Kenneth Dau-Schmidt et al., *The American Experience with Employee Noncompete Clauses: Constraints on Employees Flourish and Do Real Damage in the Land of Economic Liberty*, 42 COMPAR. LAB. L. & POL'Y J. 585, 589 (2022).
193. Andrew P. Botti, *Non-Competes May Become a Thing of the Past Across the Nation*, MCLANE MIDDLETON (July 12, 2021), http://www.employmentlawbusinessguide.com/2021/07/non-competes-may-become-a-thing-of-the-past-across-the-nation/.
194. *Id.*
195. *See id.*
196. *Id.*

whether the Federal Trade Commission has the power to implement such recommendations.[197]

A. *The Problem with Economic and Business Dynamism*

Silicon Valley remains the most vital and global center of the technological industry in the United States.[198] An explanation for the apparent success of California's culture is the free flow of workers between companies absent the enforcement of non-compete agreements in the state; thus, the re-distribution of workers in various ways has spurred innovation because workers are switching to different employers rather than staying with one.[199] The most common way for communication to effectively reach different individuals in different corporations is by switching employers.[200] Thus, employee mobility is restrained when workers are required to sign non-compete agreements.[201] The "legal rules governing employee mobility influence the dynamics of high technology industrial districts by [either] encouraging rapid employee movement between employers and startups."[202] Because California does not enforce non-competes throughout the state, knowledge spillovers between firms have aided in the success of Silicon Valley.[203] "The success of Silicon Valley suggests that per capita firm value will be greater where intellectual property protection is [weak]."[204]

The effectiveness of non-compete agreements illustrates the limited life of information in advanced technological industries.[205] Enforcing non-compete agreements slows down high-velocity employment to the extent that knowledge spillovers are too low to support a districtwide innovation cycle.[206] Consequently, an employee's unique information learned from a former employer is likely to be inapplicable during the covenant's term.[207] Silicon

197. *Id.*

198. Noah Smith, *Non-Compete Agreements Take a Toll on the Economy*, BLOOMBERG (Mar. 22, 2018, 8:00 AM), http://www.bloomberg.com/opinion/articles/2018-03-22/noncompete-agreements-take-a-toll-on-the-economy.

199. *See id.*

200. *Id.*

201. *See id.*

202. Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 575, 578 (1999).

203. *Id.* at 575.

204. *Id.*

205. *Id.* at 603.

206. *Id.*

207. *See* Gilson, *supra* note 202, at 603–04.

Valley's employers' efforts to prevent employees from leaving and spilling over tacit knowledge failed because employees knew they could leave at any time.[208] Employers learned that high-velocity employment and knowledge spillovers were inevitable.[209] This legal infrastructure helped employers cooperate and compete, leading to a unique dynamic process that infected Silicon Valley's characteristics.[210]

Non-compete agreements hurt economic dynamism.[211] However, the main benefit of these agreements is increased business investments.[212] Non-compete agreements cause existing companies in knowledge-intensive industries to invest more because companies are more willing to commit to new projects.[213] Because there are higher investments in projects, there is an increase in economic activity; however, investments spur economic growth when there are more new companies.[214] Many states, such as Hawaii and New Mexico, ban non-compete agreements for specific jobs related to technology and health care.[215] Massachusetts, which lost to Silicon Valley in its strive to become the country's prominent technological center, is also considering reform for restrictive covenants that affect high and low-wage workers.[216]

1. Florida

Florida's non-compete statute favors the establishment of large firms over small firms.[217] A 2020 Florida case study illustrates how Florida's 1996 legislative change to non-competes has led to larger firms, higher business concentration, and greater employment by larger firms.[218] Although most studies focus on how non-compete agreements affect employees, Florida's 1996 legislative change to non-compete agreements has impacted firm location choice,

208. *Id.* at 608.
209. *Id.*
210. *Id.*
211. Smith, *supra* note 198.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. Smith, *supra* note 198.
217. Jessica Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship* 6 (The Kauffman Found., Working Paper, 2019), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040393.
218. Hyo Kang & Lee Fleming, *Non-competes, Business Dynamism, and Concentration: Evidence from a Florida Case Study*, 29 J. ECON. MGMT. STRATEGY 663, 664 (2020).

growth, and regional concentration.[219] In turn, this has highly impacted business and economic dynamism throughout Florida.[220]

Florida is an attractive state to study non-compete business dynamism for three reasons.[221] First, Florida's 1996 legislation focused on implementing an enforceable non-compete agreement.[222] Second, the legislation sought to enforce the restrictive covenant in the state.[223] Lastly, employers and employees in Florida are accustomed to non-competes because of the four-decade-long history governing non-compete agreements.[224]

Startup companies prefer locations with weak non-compete agreement enforcement because companies want to hire experienced employees.[225] Startups are less likely to value the legal strategies that come with non-compete agreements because startups often lack the resources to pursue legal action and will most likely place a lower value on a location with strong non-compete enforcement.[226] On the other hand, big firms find that retaining existing employees is necessary because big companies have systematic processes in place through which employees have access to strategic assets and information.[227] Big firms want to retain these employees because they fear that employees will leave to work for a competitor or unwillingly share confidential information.[228] Big firms also might favor states with strong enforcement of non-compete agreements because big firms are often diversified and may run different businesses in different fields.[229] Thus, big companies can relocate employees without breaching the non-compete agreement.[230] In contrast, small firms are likely to lack diversity and are more likely to grow in a specific area.[231] Because of the new non-compete legislation in 1996, large firms have built establishments in Florida.[232] Large firms will likely be attracted to hiring new employees in Florida because of Florida's strong non-compete enforcement.[233] Therefore,

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219. *Id.*
220. *See id.*
221. *Id.* at 666.
222. *Id.*
223. Kang & Fleming, *supra* note 218, at 666.
224. *Id.*
225. *Id.* at 667.
226. *Id.*
227. *Id.*
228. Kang & Fleming, *supra* note 218, at 667.
229. *Id.* at 668.
230. *Id.* at 667–68.
231. *Id.* at 668.
232. *Id.* at 664, 681.
233. *See* Kang & Fleming, *supra* note 218, at 668.

large firms can recoup their investment and retain employees because an employee's alternatives to his current employment are limited.[234]

a. *Statistical Analysis*

A study utilizing the Business Dynamics Statistics provided by the United States Census Bureau on the effect of Florida's 1996 non-competition statute consistently revealed that Florida went from a moderately enforcing state to the most extreme non-compete enforcing regime in the country.[235] This study could not run industry-specific analyses; however, the Quarterly Census of Employment and Wages provided industry-specific information.[236] This census was constructed from the unemployment insurance accounting system for each state in the United States and was provided by the Bureau of Labor Statistics.[237] Florida's stark change after the 1996 non-compete legislation altered business dynamism and the regional size distribution of firms.[238] States that strongly enforce non-compete agreements showed a positive correlation between large firm establishments and employment and tended to have a smaller proportion of small firm establishments.[239] In 1997, the entry of business units of small firms decreased by 5.6%, while that of large firms increased.[240] In addition, small firms decreased job creation by 1.8%, whereas large firms increased job creation by 7.6%.[241] After the implementation of the 1996 statute, establishment concentration increased by 0.0036 points or about 2.82%.[242] On average, the establishment concentration in Florida was 0.1278 before the 1996 law change.[243]

Moreover, after the enforcement of Florida's non-compete statute in 1996, large firms were more likely to move their businesses to Florida.[244] Small firms appeared less likely or less able to create new jobs.[245] Across all U.S. states, this study observed a negative cross-sectional correlation between non-compete enforcement and small firm establishment and employment.[246] This study

234. *Id.*
235. *See id.* at 680.
236. *Id.* at 669.
237. *Id.*
238. Kang & Fleming, *supra* note 218, at 664.
239. *Id.*
240. *Id.* at 673.
241. *Id.* at 675.
242. *Id.* at 676.
243. Kang & Fleming, *supra* note 218, at 676.
244. *Id.* at 681.
245. *Id.*
246. *Id.*

strengthens the finding that low-wage workers, typically those in small business entities, are disproportionately affected compared to high-wage workers.[247]

2. A Free-Market Perspective

Free market advocates have argued for the enforcement of non-compete agreements.[248] This economic argument assumes that labor markets are competitive and employees freely choose to enter such covenants.[249] Economic theory also opposes the view that employers utilize non-compete agreements to limit labor market competition.[250] While both opposing views have truths, the two free-market perspectives predicted lower worker mobility and longer job tenure.[251] Moving from a non-compete unenforceability regime to the highest level of enforceability, like in Florida, would reduce a worker's probability of changing employers by 26.1%.[252]

Generally, "courts will not protect employer customer contacts absent express contractual . . ." provisions.[253] Although employers utilize non-compete agreements to protect investments in training an employee, this is unsupported by common law.[254] For example, in the Alabama Supreme Court of *Chavers v. Copy Products Company*,[255] the defendant, Chavers, signed a non-compete agreement with the plaintiff company.[256] The agreement prohibited the defendant from competing against his former employer in the business of selling office copiers and providing office copier supplies and maintenance.[257] The court reasoned that a simple skill is insufficient to give an employer a substantial protectable right unique to his business.[258] The accepted solution indicates that the employee should reimburse the employer for demonstrable costs if the employee leaves within a specified period.[259] Although the Florida statute does not reflect such a solution, it is crucial to recognize that non-competes are often

247. *See id.* at 664, 667–68.
248. Dau-Schmidt et al., *supra* note 192, at 586.
249. *Id.*
250. *Id.*
251. *Id.* at 615.
252. *Id.*
253. Dau-Schmidt et al., *supra* note 192, at 594.
254. *Id.* at 595 (citing Restatement (Third) of Employment Law § 8.07 (Am. L. Inst. 2015)).
255. 519 So. 2d 942 (Ala. 1988).
256. *Id.* at 942–43.
257. *Id.* at 943.
258. *Id.* at 944 (citing Greenlee v. Tuscaloosa Off. Prod. & Supply, Inc., 474 So. 2d 669, 672 (Ala. 1985)).
259. Dau-Schmidt et al., *supra* note 192, at 595.

invalidated because they frustrate the public good.[260] Cases involving the public interest often consider a small number of individuals that provide an imperative good or service to a distinct or uncommon market.[261]

V. CONCLUSION

The abuse of restrictive covenants in the U.S. labor market, particularly for low-wage workers, is a piercing issue requiring federal action.[262] Because states commonly address contract law,[263] federal enforcement of a uniform and coherent non-compete act is not likely without significant efforts for reform.* However, recent efforts by President Joe Biden and different state court rulings have indicated the pressing issues of forum selection clauses.[264] The issues with forum selection clauses in each state regarding non-compete agreements arise because every state governs its statute differently.[265] Implementing a uniform non-compete act would solve uncertainties surrounding employer-employee relationships and boost economic and business dynamism in the United States by providing clear procedural rules governing enforceability.* Although this Comment sheds a negative light on non-compete agreements and their impact on labor mobility and the American labor market, legitimate business interests still require some form of protection.[266] A uniform non-compete act would provide legislatures and congressional districts with guidance in the court system and relief for low-wage employees disproportionately affected by non-compete agreements.[267] Promoting uniformity in state law over restrictive covenants is likely to affect transparency and bargains for exchange for workers who do not receive notice of the restrictive covenant before accepting employment, specifically for low-wage workers.[268] Even though non-competes can benefit employers and employees, it is difficult to say that continuing to enforce these covenants at the state level, especially in Florida, will positively impact dynamism.*

260. *Id.* at 600.
261. *Id.*
262. *But see* Carosa, *supra* note 87, at D12.
263. *Id.* at D47.
264. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972); Botti, *supra* note 193; *see also* Exec. Order No. 14,036, 3 C.F.R. 615 (2022).
265. *Bremen*, 407 U.S. at 15; *see also* discussion *infra* Section II.A.
266. *See* Carosa, *supra* note 87, at D28; discussion *infra* Part II.
267. *See* Carosa, *supra* note 87, at D49.
268. *See id.* at D50.

SOCIAL MEDIA'S INFLUENCE ON THE OUTCOME OF TRIALS: STATE V. CASEY ANTHONY & DEPP V. HEARD—HOW FLORIDA CAN PREVENT A BREAKDOWN IN THE ADVERSARIAL PROCESS

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I. INTRODUCTION

Social media has become entrenched in our lives.[1] The progressive advancement of technology has given individuals the ability to use social media to communicate and share information.[2] Although social media can be beneficial, it can also be used to spread disinformation and influence public opinion.[3] The vast use of social media by billions of people around the world is having an impact on the American legal system.[4] More specifically, the use of social media platforms presents challenges to individuals' Sixth Amendment right to an impartial jury.[5] Today, overwhelming numbers of people share their opinions through social media platforms.[6] While prominent figures are regularly subjected to these opinions—extensive media coverage of their pretrial and trial experiences can potentially impact the outcome of their cases.[7] The law today has not evolved to take the prejudice that arises from social media into consideration.[8] Like fire, social media needs to be handled with caution because user opinions can turn from something small to something large in the blink of an eye—which can be very difficult to control.[9]

Florida has not reconsidered the media's presence in the courtroom in over thirty years.[10] This Comment seeks to address the question, how can Florida protect the media's right to free press while combating the effects of social media

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1. Emily M. Janoski-Haehlen, *The Courts Are All a 'Twitter': The Implications of Social Media Use in the Courts*, 46 VAL. U. L. REV. 43, 43 (2011).

2. *Id.*

3. *See id.* at 44.

4. *See* Nicola A. Boothe-Perry, *Friends of Justice: Does Social Media Impact the Public Perception of the Justice System?*, 35 PACE L. REV. 72, 82–84 (2014); Ethan Wall, *How Social Media Affects the Law*, NEAL SCHAFFER: SOC. MEDIA & THE L., http://nealschaffer.com/social-media-affects-law/ (July 12, 2022).

5. *See* Leslie Y. Garfield Tenzer, *Social Media, Venue, and the Right to a Fair Trial*, 71 BAYLOR L. REV. 421, 422 (2019).

6. *See* Thomas R. Romano, Note, *Modern Media and Its Effect on High–Profile Cases*, 32 SYRACUSE J. SCI. & TECH. L. 1, 2 (2016).

7. *See* Douglas E. Lee, *Cameras in the Courtroom*, FREEDOM F. INST., http://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-the-press/cameras-in-the-courtroom/ (last visited Nov. 17, 2022).

8. *See* Riley Moran, *Casey Anthony and the Social Media Trial*, WOMEN LEADING CHANGE: CASE STUD. WOMEN, GENDER, & FEMINISM, May 2019, at 44, 48.

9. *See id.* at 54–55.

10. *See* Martin Dyckman, *Cameras in Florida's Courts*, THE FLA. BAR (Apr. 1, 2009), http://www.floridabar.org/the-florida-bar-news/cameras-in-floridas-courts/.

on one's right to a fair trial?[11] To protect the adversarial process and highly talked about individuals during their trial, it is imperative for Florida to take into consideration the effects of social media on a trial and narrow their laws regarding public access to information and the media's presence in the courtroom.[12]

This Comment will begin by highlighting the media's right to report on trials under the First Amendment right to free press as well as the defendant's right under the Sixth Amendment to a fair and impartial jury.[13] From there, the obsession with social media today and how it presents a major problem for courtrooms will be discussed.[14] Following this discussion, this Comment will examine the effects of the media on two cases that received extensive publicity—a case from the pioneer days of social media and a more recent case that was litigated during the height of the evolution of social media and the vast expansion of user platforms.[15] Lastly, this Comment will view the current remedies that are in place in Florida to ensure that a fair trial is provided without affecting the rights of the media, analyze whether those remedies are effective, and suggest further remedies to prevent a breakdown in the adversarial process.[16]

II. RIGHT TO FREE PRESS AND AN IMPARTIAL JURY

In the age of social media, one's Sixth Amendment right to a fair trial and reasonable punishment conflicts with the media's First Amendment right to free expression, as well as the general public's right to consume news sources of their choosing.[17] Balancing the freedom of the press and the rights of parties during trial is essential to upholding the United States Constitution's goal of protecting the rights of the people.[18]

A. *First Amendment: Right to Free Press*

The First Amendment of the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right

11. *See* discussion *infra* Part VII.
12. *See* discussion *infra* Part VII.
13. *See* discussion *infra* Section II.A–B.
14. *See* discussion *infra* Section III.A.
15. *See* discussion *infra* Parts IV–VI.
16. *See* discussion *infra* Section VII.A–B.
17. *See* Moran, *supra* note 8, at 50, 56.
18. *See id.*

of the people peaceably to assemble, and to petition the Government for a redress of grievances."[19] Despite the improvements in media technology, courts have so far refused to recognize televised court proceedings as a First Amendment right.[20] Throughout the years, the rights of the media to report on court cases have been decided by policymakers in the federal and state courts.[21] These rights allow the media to essentially conduct almost unrestricted reporting.[22] While trials are "presumptively open to the public . . . many state legislatures and the courts have exercised their power to limit the media's access to such information when the rights of the parties to the case could potentially be harmed."[23] There are varying rules governing the use of cameras in the courtrooms.[24] For instance, the District of Columbia prohibits televised coverage of all proceedings.[25] However, many state courts allow cameras into the courtroom whenever the trial judge deems it appropriate, while other states allow coverage only if all trial participants agree.[26]

In 1965, the United States Supreme Court ruled unfavorably towards allowing courtroom media coverage in *Estes v. Texas*.[27] In this case, the defendant was charged with defrauding several farmers which created extensive national media coverage.[28] The defendant presented a pretrial motion to prevent media coverage of the trial via telecasting, photography, and radio broadcasting; the Court's discussion on the pretrial motion was covered by the media and broadcasted to the public during the same pretrial hearing.[29] The pretrial hearing also garnered significant attention from the public.[30] The trial judge ultimately allowed television coverage of the trial.[31] After the defendant was found guilty of the charges, he later appealed his conviction arguing the television coverage had denied him a fair trial.[32] Upon appeal, the Court agreed with the defendant and held that live television coverage was distracting to jurors, judges, and defendants, and was likely to impair witness testimony.[33] The Court recognized

19. U.S. CONST. amend. I.
20. Lee, *supra* note 7.
21. *See id.*
22. Romano, *supra* note 6, at 3.
23. *Id.* at 3–5.
24. *See* Lee, *supra* note 7.
25. *Id.*
26. *Id.*
27. 381 U.S. 532, 534–35 (1965).
28. *See id.* at 534 n.1.
29. *Id.* at 532.
30. *Id.*
31. *Id.* at 535, 537.
32. *See Estes*, 381 U.S. at 534–35.
33. *Id.* at 546, 547, 548, 549.

that technology could make cameras less disruptive in the future, but nonetheless held: "[o]ur judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today."[34]

In 1981, the Court revisited courtroom media coverage and its ruling in *Estes*.[35] In *Chandler v. Florida*,[36] the Court held that Florida could allow radio, television, and still photography coverage of a trial even if the defendant objected.[37] In doing so, the Court analyzed the various opinions in *Estes*, concluding the majority did not offer any constitutional rule that all photographic or broadcast coverage of trials was inherently a denial of one's constitutional right.[38] Therefore, the Court held that absent a showing of prejudice, there was no reason to endorse or to invalidate Florida's experiment.[39] The ruling in *Chandler* prompted some states to adopt rules allowing cameras in courtrooms.[40]

While technology has advanced significantly since these rulings, denying cameras access to courtrooms has not changed considerably since 1965.[41] "The Judicial Conference and the federal courts still believe live television coverage distracts trial participants, unfairly affects the outcome of trials and diminishes the [integrity] of the courts."[42] Meanwhile, the media continues to argue that courtroom coverage is no longer "distracting" or "disruptive," and televising the proceedings are beneficial to both the courts and the public.[43] Even though state courts have been more accepting of these arguments, none have granted a general right to broadcast a trial.[44] The courts that are most accepting of cameras in the courtroom give judges broad discretion to determine whether to allow televised coverage of the proceedings.[45] Other states limit that discretion in certain cases, such as those involving minors.[46]

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34. *Id.* at 551–52.

35. *See* Chandler v. Florida, 449 U.S. 560, 570, 573, 574 (1981); Lee, *supra* note 7; *Estes*, 381 U.S. at 551–52.

36. 449 U.S. 560 (1981).

37. *Id.* at 573, 574, 582–83; Lee, *supra* note 7.

38. *Chandler*, 449 U.S. at 570, 573, 574; Lee, *supra* note 7.

39. *Chandler*, 449 U.S. at 582; Lee, *supra* note 7.

40. Lee, *supra* note 7; *see also Chandler*, 449 U.S. at 582–83 (holding that the Constitution does not prohibit a state from adopting a program for televising its judicial proceedings).

41. *See* Lee, *supra* note 7.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. Lee, *supra* note 7.

States that are the most restrictive only allow trial coverage if all parties consent.[47]

B. *Sixth Amendment: Right to an Impartial Jury*

The United States Constitution, through the Sixth Amendment provides the inalienable right to a speedy and public trial by an impartial jury.[48] This right was established to "prevent a prejudiced application of justice and provide transparency and fairness. . . ."[49] While the Sixth Amendment presents many important rights, for the purpose of this Comment, the focus will be on the right to an impartial jury.[50] With respect to civil trials, language in the Seventh Amendment may make it seem as though there is no constitutional right to an impartial jury however, this is not the case.[51] Even though the Seventh Amendment states that a party is entitled only to a trial by jury, not necessarily an impartial jury, the drafters envisioned a civil jury trial because it also states under the Seventh Amendment, "where the value in controversy . . . exceed[s] twenty dollars, the right of a trial by jury [will] be preserved, and no fact tried by a jury, [will] be . . . re-examined in any Court of the United States . . . ."[52]

An impartial jury can be defined as a jury that does not hold any bias surrounding the case.[53] In theory, a juror should be barred from participating in a trial if the juror is unable to provide a fair verdict based solely on the facts presented at trial.[54] A problem that is becoming more prevalent due to the evolution of media is that jurors may receive information from extraneous sources, which may affect their impartiality.[55] It is problematic for jurors to lack impartiality because the purpose of the jury is to ensure the courts punish wrongdoers and prevent arbitrary decisions against United States citizens.[56] For

47. *Id.*
48. Moran, *supra* note 8, at 47; U.S. CONST. amend. VI.
49. Moran, *supra* note 8, at 47.
50. *See* discussion *infra* Part I; U.S. CONST. amend. VI.
51. Tatum Lowe, Note, *The Power of the Modern Media on an "Impartial" Jury: A Deeper Look at the Kobe Bryant Wrongful Death Lawsuit*, 42 LOY. L.A. ENT. L. REV. 43, 49 (2021).
52. *Id.*; *see also* U.S. CONST. amend. VII.
53. *Impartial Jury: Definition & Legal Meaning*, THE L. DICTIONARY, http://thelawdictionary.org/impartial-jury (last visited Nov. 17, 2022).
54. Romano, *supra* note 6, at 6.
55. *See id.*
56. Moran, *supra* note 8, at 47.

the judicial system to function fairly, jurors must remain impartial.[57] "Punishment by a court of law results in serious lasting consequences, and thus the judicial process is meant to err on the side of freedom."[58] Therefore, many measures have been implemented to ensure the impartiality of the jury.[59] To ensure the court's objective stance, "[j]ury members need an accurate and transparent account of all the facts surrounding [the case] so they can [choose] the most effective course of action within the context of our judicial system's freedoms."[60] While no trial will be completely free from bias, the courts have established legal rules and standards to ensure that the initial jury selection and decision-making processes are as fair as possible.[61] The prosecution and defense must select jurors from a panel that is indicative of the demographics of the community.[62] Once the court determines that the panel is fair, the prosecution and defense determine bias by asking the potential jurors questions.[63] A certain number of potential jurors can be dismissed by the prosecution or defense without reason on "peremptory challenges" and on "valid challenges for cause that prove a person unable to make a fair decision."[64] In some instances, selected jurors are subjected to jury sequestration, which means they are isolated from the public to prevent incurring accidental biases.[65] When jurors are sequestered, they cannot access Wi-Fi, phones, or the media.[66] During this period of sequestration, jurors usually stay in hotels and are only allowed to visit with people that have no connection to the case under police supervision.[67] While sequestration ensures a jury remains untampered and uninfluenced by public discourse during the trial, it is ineffective in preventing the jury from bias pretrial.[68]

57. *Id.*
58. *Id.* at 48.
59. *Id.* at 47.
60. *Id.*
61. Moran, *supra* note 8, at 48.
62. *Id.*; *see also* Taylor v. Louisiana, 419 U.S. 522, 538 (1975).
63. Moran, *supra* note 8, at 48.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *See* Moran, *supra* note 8, at 48.

III. THE MEDIA'S INFLUENCE ON TRIAL OUTCOMES

Modern technology has drastically impacted not only how we access information–but how we process and interpret it.[69] In today's globalized world, social media is now one of the most important tools for communicating, spreading information, and entertaining.[70] Over 4.76 billion people around the world use social media, which equates to fifty-nine percent of the total global population, and this number continues to increase rapidly with the advancement of technology.[71] Within the last year, 137 million new users joined social media.[72] Over sixty percent of Americans rely on social media as their main source of news.[73] Due to the audience reach that social media provides, the news is no longer contained in the area where the event occurred, and there is no "delay in the mass population hearing some interpretation of the events that [transpired]."[74] Thus, the public may not only have knowledge of specific events before a trial but may have also already formulated a preconceived opinion on the matter.[75] While these opinions may have been centered on some facts, many of these opinions are shaped by what users are saying on social media and by how the media portrays the story.[76] While traditional media outlets cannot release material such as confidential information, these outlets are able to

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69. *See, e.g.*, *id.* at 54. An example of modern technology drastically impacting how we process and interpret information was seen in the Casey Anthony trial. *Id.* The prosecution presented "expert attestation and crime scene material," meanwhile the media published images of Anthony "scantily clad at parties, getting a tattoo on her shoulder, [and] participating in a hot body contest at the Fusion nightclub . . . ." *Id.* The media's publications "incited frustration among the general public," and despite jurors being sequestered, "the jury had access to sources within and outside of the courtroom," inevitably influencing the jury. *Id.*

70. *See* Dave Chaffey, *Global Social Media Statistics Research Summary 2023*, SMART INSIGHTS (Jan. 30, 2023), http://www.smartinsights.com/social-media-marketing/social-media-strategy/new-global-social-media-research/; Sydelle Fernandes, *58% of World's Population Now Use Social Media*, BIZZ BUZZ (Mar. 10, 2022, 11:24 PM), http://www.bizzbuzz.news/trendz/58-of-worlds-population-now-use-social-media-1116814.

71. Chaffey, *supra* note 70.

72. *Global Social Media Statistics*, DATAREPORTAL, http://datareportal.com/social-media-users (last visited Nov. 17, 2022); Chaffey, *supra* note 70.

73. *See* Andrew Hutchinson, *New Research Shows That 71% of Americans Now Get News Content via Social Platforms*, SOC. MEDIA TODAY (Jan. 12, 2021), http://www.socialmediatoday.com/news/new-research-shows-that-71-of-americans-now-get-news-content-via-social-pl/593255.

74. Lowe, *supra* note 51, at 72.

75. *Id.*

76. *Id.*

"sensationalize reports and overemphasize aspects of a story [to] appeal to viewers."[77] The media is a participant in the market economy, and the success of their business centers on their network ratings.[78] By sensationalizing reports and overemphasizing pieces of a story, traditional media outlets make these events more appealing to the public, and it follows that more viewers will be inclined to tune into that specific outlet.[79]

The press has exercised their freedom of speech, reporting to the masses both facts and opinions in high-profile cases, even prior to television and the internet.[80] Though, it has long been acknowledged by members of the court that the media's influence is an injury to one's right to a fair trial.[81] As early as 1931, "Judge Stuart H. Perry took issue with [the] local newspaper reports' [ability to] influence . . . court trials . . . ."[82] During his time in the courts, Perry noticed that newspapers had "asserted their moral authority over their audiences," and if the jury did not conform to "the verdict championed by the media," widespread anger would result.[83] While Perry had admitted that the press' critiques to the court offer a vital check to their judicial power, he also claimed that "the function of newspapers as a forum for mobilization is compromised when it is the papers influencing the general public, and not the other way around."[84]

Social media profiles, unlike traditional media formats, are held to a no sub judice standard.[85] The public can post information that news networks are not allowed to.[86] Additionally, a person can make a TikTok video or a Facebook post about a court case without corroborating any of the information they decide to discuss.[87] The phrase "trial by social media," describes the impact that "media coverage of a court case can have on the public perception of guilt or innocence of an accused . . . ."[88] The press' infringement on the inviolability of jury trials has drawn increased attention due to the growing diversification of media outlets.[89]

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77. Moran, *supra* note 8, at 49.
78. *Id.*
79. *Id.*
80. *Id.* at 48–49.
81. *Id.* at 49.
82. Moran, *supra* note 8, at 49.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. Moran, *supra* note 8, at 49.
88. *Id.* (explaining the phrase "trial by social media").
89. *Id.*

A. *The Negative Impact the Media Has on the Court*

Under the Sixth Amendment, all defendants are entitled to a trial by an impartial jury.[90] With the vast use of social media today, the exacerbated present trends of spectacle, and the need to choose sides, it makes it rather difficult for trials to be impartial.[91] Additionally, jurors may decide differently knowing that they will be scrutinized by the world based on their decision and opinion.[92]

According to the latest data from Pew Research, "[a] little under half (48%) of U.S. adults say they get news from social media."[93] That number has fluctuated since 2018.[94] This demonstrates how social media has become a critical news source.[95] The reliance on social media platforms like Facebook and TikTok for news and information greatly influences how people think.[96] These platforms show you other users' opinions about a particular topic.[97] Given the level of interest in high profile cases, content creators on social media platforms are using trials that are highly publicized to drive their engagement numbers.[98] These easily accessible insights into what others think greatly influences individuals' own opinions.[99] This can be very prejudicial to a party if mass media portrays these types of events in a "dooming or fault-assigning" light to only one of the parties.[100] What follows is a party being stuck with a prejudicial jury or a

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90. U.S. CONST. amend. VI.

91. *See Media Influence in Capital Cases*, CAP. PUNISHMENT IN CONTEXT, http://capitalpunishmentincontext.org/issues/media (last visited Nov. 17, 2022).

92. *Id.*

93. MASON WALKER & KATERINA EVA MATSA, PEW RSCH. CTR., NEWS CONSUMPTION ACROSS SOCIAL MEDIA IN 2021, at 3 (2021), http://www.pewresearch.org/journalism/wp-content/uploads/sites/8/2021/09/PJ_2021.09.20_News-and-Social-Media_FINAL.pdf.

94. *Id.*

95. *Id.*

96. *See id.*

97. *See id.*

98. Zama Ndlovu, *The Bad Lessons from Johnny Depp and Amber Heard for Victims of Abuse*, MAIL & GUARDIAN (June 15, 2022), http://mg.co.za/thoughtleader/2022-06-15-amber-heard-crucified-in-the-court-of-public-opinion/; Heavy Spoilers, *Johnny Depp vs Amber Heard Trial Recap | Full Breakdown and Analysis*, YOUTUBE (Apr. 26, 2022), http://www.youtube.com/watch?v=71ACRkNlhQg&t=1s.

99. *See* Hutchinson, *supra* note 73.

100. Lowe, *supra* note 51, at 72; *see also* Romeo Vitelli, *How "Trial by Media" Can Undermine the Courtroom*, PSYCH. TODAY (Aug. 22, 2018), http://www.psychologytoday.com/gb/blog/media-spotlight/201808/how-trial-media-can-undermine-the-courtroom.

jury with subconscious biases because of the news and media the jury consumed.[101]

Jurors are likely to develop biases about the case based on the media coverage they have been exposed to prior and during trial.[102] While jurors are supposed to avoid the media, it is virtually impossible to abstain from hearing and viewing the media's perception in this day and age, especially when it involves prominent figures.[103] Due to how rapidly social media is changing, jurors are more vulnerable to unintentionally hearing about a trial since they are likely to see pop-up social media notifications on their electronic devices.[104] Approximately eighty-five percent of Americans own a smartphone, a thirty-five percent increase from a survey that was taken in 2011.[105] With eighty-five percent of Americans having a smartphone, it makes it challenging for courts to ensure that jury members render their verdicts based only on what they see and hear in the courtroom, as is required.[106]

The impact of today's modern media on jury impartiality has never been more prevalent.[107] Courts are increasingly being faced with adjudicating cases with constant media coverage both in criminal and civil trials.[108] This becomes concerning when these issues gain nationwide coverage, leaving very few people without some sort of opinion on the case.[109] Courts today are now facing jury pools that come in with knowledge of the "facts" and predetermined opinions before any party has had an opportunity to present their case.[110] Research studies regarding highly publicized cases have consistently found that "potential jurors often have extremely negative attitudes toward the accused."[111] However, studies have also shown that jurors have "extremely positive attitudes" towards "high-profile litigants."[112] This was the instance in Florida's first "Trial by

101. Lowe, *supra* note 51, at 72–73.

102. *See id.* at 73; Vitelli, *supra* note 100.

103. *A Non-Biased Jury: Do They Really Exist?*, LEXISNEXIS, http://www.lexisnexis.co.uk/research-and-reports/bar/a-non-biased-jury-do-they-really-exist.html (last visited Nov. 17, 2022).

104. *New Jury Instructions Strengthen Social Media Cautions*, U.S. CTS. (Oct. 1, 2020), http://www.uscourts.gov/news/2020/10/01/new-jury-instructions-strengthen-social-media-cautions.

105. *Mobile Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), http://www.pewresearch.org/internet/fact-sheet/mobile/.

106. *See id.*; Lowe, *supra* note 51, at 64–65.

107. Lowe, *supra* note 51, at 45, 71–72.

108. *See id.*

109. *See id.*

110. *Id.* at 46.

111. *Id.* at 73; Vitelli, *supra* note 100.

112. Lowe, *supra* note 51, at 73.

Media" case—the trial of Casey Anthony—and the recently litigated case in Virginia—*Depp v. Heard*.[113]

IV. STATE V. ANTHONY: 2011 COURT CASE TRIED BY SOCIAL MEDIA

Casey Anthony was charged in Florida back in 2008, with the first degree murder of her two-year-old daughter, Caylee Anthony.[114] Casey Anthony's trial was one of the first court cases tried by social media.[115] While the trial began in 2011, the media was already in a frenzy before the start of the trial reporting on interpretations of the evidence and accounts of Anthony's personal life prior to the crime.[116] As a result of the media's craze, a mass amount of information became easily accessible to the public before jury selection began.[117] Although Anthony had been acquitted by the selected jury in the courtroom, outside the courtroom, social and economic punishments were imposed on Anthony because the court of public opinion found her guilty of murdering her daughter.[118]

A. *Implications of Media Reports*

The few years between the death of Caylee Anthony and jury selection, the media reported extensively on the disappearance of Caylee Anthony, the investigation, and what the trial would look like for Casey Anthony.[119] Over the course of the forty-two day trial, the atmosphere inside and outside the

113. No. CL-2019-2911, 2019 WL 2683058 (Va. Cir. July 25, 2019); *see also* Elizabeth Blair & Ayana Archie, *Amber Heard Says Social Media Was a Factor for Her Defamation Trial Jury*, NPR, http://www.npr.org/2022/06/15/1104925752/amber-heard-says-social-media-was-a-factor-for-her-defamation-trial-jury (June 15, 2022, 5:00 AM); Nicholas A. Battaglia, Comment, *The Casey Anthony Trial and Wrongful Exonerations: How "Trial by Media" Cases Diminish Public Confidence in the Criminal Justice System*, 75 ALB. L. REV. 1579, 1586–87 (2011).

114. Battaglia, *supra* note 113, at 1587; Moran, *supra* note 8, at 45.

115. Moran, *supra* note 8, at 48. "[T]he court of public opinion—a term coined by government official Alger Hiss in his book *In the Court of Public Opinion* to refer to public support for one side of a court case due to the influence of news media . . . ." *Id.* at 47. To win in the court of public opinion, a person involved in the case must gain majority support from the public. *See* Battaglia, *supra* note 113, at 1584–85.

116. Moran, *supra* note 8, at 47.

117. *Id.* at 48, 49.

118. *Id.* at 55.

119. *Id.* at 47.

courthouse was chaotic.[120] Several million onlookers tuned in to the trial.[121] The media grappled for coverage, swarming the area surrounding the county courthouse where the trial took place.[122] Broadcast news stations assembled multi-story, air-conditioned structures in an open lot directly across from the courthouse because the screen time dedication to Anthony's trial was so intense.[123] In their news reports, the media relied on documents, interviews, tapes, and photos made or received by public agencies during the course of the investigation, which described the details of the case.[124] This was allowed because Florida's Public Records Laws provide that documents made or received by public agencies in the course of official business may be inspected by any individual who wants to examine such documents, unless a document is exempt from inspection.[125] These measures were established to "ensure transparency in the Floridian government and court system."[126]

Due to Florida's law and the media's obsession with this event, the court of public opinion, was able to easily form an opinion on Anthony and what a judicious outcome for her should look like, since they had access to information on Anthony's life, character, and the alleged crimes.[127] The court of public opinion focused on Anthony's character, and the commentary was highly gendered.[128] A majority of the public "perceived Anthony as cold and unfeeling, not the image of a grieving mother society expects of a pretty, white, middle-class woman."[129] Unfortunately, narratives like this, which obstruct justice have existed long before the influence of the media and public opinion; but with the creation of social media, such narratives became wide-spread.[130] Instances of Anthony laughing and smiling during the investigation and her lack of emotion during the trial spiked discussions on social media of nearly 100 posts per minute.[131] Access to media has had positive effects for many, but for Casey Anthony, it was a powerful punishment.[132]

120. *Id.* at 52–53.
121. Moran, *supra* note 8, at 52–53.
122. *Id.* at 53.
123. *Id.*
124. *Id.* at 47.
125. *Id.*; FLA. STAT. §§ 119.011(12), .07(1)(a), .071 (2022).
126. Moran, *supra* note 8, at 47; *see also* FLA. STAT. § 119.07(1)(a).
127. Moran, *supra* note 8, at 47.
128. *Id.* at 54.
129. *Id.*
130. *Id.* at 56.
131. *Id.* at 54.
132. Moran, *supra* note 8, at 56.

Prior to the trial, the media had years to make their case through newspapers, television, and social media platforms.[133] These outlets led to Anthony's conviction in the court of public opinion long before the official trial.[134] Commentators argue that although "a conviction in the court of public opinion holds no legal weight, the social repercussions of this decision entail punishment through ostracization."[135] They further argue that even though Anthony was acquitted by the court appointed jury using all credible information and evidence from the trial, the verdict was still widely perceived as a wrongful discharge.[136] Public consensus would arguably recall this case as "miscarriage of justice," regardless of whether the jury was impartial.[137] The court of public opinion raises questions as to the effectiveness of the United States judicial system.[138] The media's ability to reach a wide audience reflects highly on the attainments of the First Amendment;[139] however, could this same wide-reaching quality compromise one's right to a fair trial?[140]

B. *The Impact of the Media on the Jury & the Courts Attempt to Combat Bias*

Deliberation on social media over Anthony's innocence began to occur before the jury selection process, resulting in information flowing freely and the risk of prejudiced jurors.[141] "Over the years leading up to the Casey Anthony trial, [the media] retold the events preceding and following the death of Caylee Anthony."[142] The judicial process of the Casey Anthony case became difficult as a result of the media's sensationalized reports and overemphasized aspects of the events, as the spread of disinformation by the media preceded the selection of the jury.[143] Commentators state that "[t]he impact of the media on the Casey

133. *Id.* at 54.
134. *Id.* at 50.
135. *Id.*
136. *Id.*
137. Moran, *supra* note 8, at 50.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 49.
142. Moran, *supra* note 8, at 49.
143. *Id.*; *The Fight Against Disinformation*, MINISTERIO DE ASUNTOS EXTERIORES, UNIÓN EUROPEA Y COOPERACIÓN, http://www.exteriores.gob.es/en/PoliticaExterior/Paginas/LaLuchaContraLaDesinformacion.aspx (last visited Nov. 17, 2022) ("Disinformation is one of the major concerns of democratic countries. Behind false news or fake news, strategies are often articulated to manipulate public opinion . . . .

Anthony trial is a pertinent example of the difficult balance between the fundamental right to access information and speak freely and the right to a fair trial."[144]

The Florida courts acknowledged the threat of biased public opinions and took action to ensure Casey Anthony's due process.[145] However, the Casey Anthony trial was among the first cases to attract significant media attention where the public was offering predictions as to the cause of death of Caylee Anthony.[146] Given the novelty of social media, no historical precedents could offer a solution for the influence of social media platforms on the impartiality of not just the jury but also the population at large.[147] Due to how widely circulated this case's media coverage was, the court had to select jury members from a county nearly a hundred miles away because "media coverage may have been less prominent there."[148] Despite selecting jurors from a different county, the jury selection occurred three years after police arrested Anthony, making it, arguably, highly probable that people from this county already had knowledge on the highly publicized case.[149] In an effort to combat bias, the defense dismissed all potential jurors who had already made up their mind about Anthony's guilt due to the information they learned from the media and sequestered the selected jurors for forty-three days.[150]

C. *The Verdict*

On July 5, 2011, the jury returned their verdict and found that Casey Anthony was not guilty of murder because they could not confirm how Caylee Anthony died beyond a reasonable doubt.[151] Despite the decision, society did not accept Casey Anthony back.[152] Everyone had something to say about the verdict: from popular news networks like CNN, Fox, and A&E, to Nancy Grace, and Facebook groups.[153] Society vehemently rejected the jury's decision,

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The development and widespread use of digital media allow for campaigns to spread quickly, making disinformation a more pressing problem.").

144. Moran, *supra* note 8, at 50.
145. *Id.* at 48.
146. *Id.*
147. *Id.*
148. *Id.*
149. *See* Moran, *supra* note 8, at 48.
150. *Id.*
151. Battaglia, *supra* note 113, at 1590; *see also* Moran, *supra* note 8, at 56.
152. Moran, *supra* note 8, at 56.
153. *Id.* at 55.

particularly on social media platforms like Twitter.[154] Criticism against Anthony's verdict was so robust that the release of juror names was postponed by the judge because of concerns about the jurors' safety due to public disagreement with the final decision.[155] Following the verdict, Casey Anthony went into hiding.[156] While the jury decided not the punish Anthony, the public felt she deserved punishment and decided to impose social and economic punishments on her.[157] Following the trial, it was difficult for Anthony to find work and businesses frequently denied her services.[158] "The function of the court system is to legitimize and substantiate punishments," but the laws do not require the public to agree with the court's outcome and they cannot stop the effect of the public's social force.[159] Anthony's trial is a testament to the current deterioration of the United States court systems as a result of the media's wide-reaching impact.[160]

Social media's presence today is far larger than it was during the 2011 Casey Anthony trial.[161] With the pioneer days of social media far behind us, we have now entered an era of immense global use of social media.[162] With over half the world on social media platforms and an enormous increase in the number of users posting their opinions online daily, it is imperative we find a way to ensure American citizens have unobstructed access to both fundamental pillars of democracy.[163] The following section will emphasize that, like Casey Anthony, others are feeling the wrath of social media during their trials and the social punishments implicated by public opinion.[164]

V. DEPP V. HEARD: 2022 COURT CASE TRIED BY SOCIAL MEDIA

Johnny Depp, an American actor, sued Amber Heard, an American actress, claiming that an op-ed Heard wrote for the Washington Post in which

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154. *Id.*
155. *See id.*
156. *Id.*
157. Moran, *supra* note 8, at 55.
158. *Id.*
159. *See id.* at 56.
160. *Id.*
161. *See* Brian Dean, *Social Network Usage & Growth Statistics: How Many People Use Social Media in 2022?*, BACKLINKO, http://backlinko.com/social-media-users (Oct. 10, 2021).
162. *See id.*
163. *Id.*; *see also* Moran, *supra* note 8, at 56.
164. *See* discussion *infra* Part V.

she claimed to be "a public figure representing domestic abuse," was defamatory and caused him to lose lucrative acting roles.[165] Heard countersued Depp claiming that Depp's attorney's statements asserting that her op-ed was "an abuse hoax" which she considered an attempt to capitalize on the #MeToo movement, were defamatory.[166]

On June 1, 2022, in a Virginia court, the seven-person jury unanimously ruled in favor of Depp.[167] The court awarded Depp $15 million for the three counts of defamation that Depp claimed were inflicted on him by Heard in her Washington Post article, however, that number was reduced to $10.35 million due to Virginia law.[168] Heard won on one counterclaim, with jurors awarding the actress $2 million in damages.[169] However, these rulings came after social media was already flooded with pro-Johnny Depp and anti-Amber Heard content throughout the six-week trial.[170]

A. *The Effect of Public Opinion on the Trial and the Social Repercussions*

Public opinion on the trial was hard to avoid.[171] The negative coverage that was immeasurably spread throughout the media "likely influenced the jury and the outcome of the trial."[172] In addition to the impartiality of jurors that arguably resulted from the mass public opinion, Heard faced and continues to face social punishments from the public.[173]

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165. Emily Yahr, *What to Know About Johnny Depp and Amber Heard's Defamation Trial*, WASH. POST (Apr. 10, 2022, 12:09 PM), http://www.washingtonpost.com/arts-entertainment/2022/04/10/johnny-depp-amber-heard-case/.

166. Matthew Weaver, *Amber Heard Reportedly Plans to Appeal Against Johnny Depp Defamation Verdict*, GUARDIAN (June 2, 2022), http://www.theguardian.com/film/2022/jun/02/amber-heard-reportedly-planning-appeal-johnny-depp-defamation-verdict.

167. Edward Helmore, *Depp-Heard Trial Verdict: Jury Rules in Favor of Johnny Depp*, GUARDIAN (June 1, 2022), http://www.theguardian.com/film/2022/jun/01/johnny-depp-amber-heard-verdict-trial-ruling.

168. *Id.*; Weaver, *supra* note 166.

169. Weaver, *supra* note 166; Helmore, *supra* note 167.

170. *See* Anya Zoledziowski, *Did Social Media Sway the Johnny Depp Jury?*, VICE NEWS (June 3, 2022, 6:43 PM), http://www.vice.com/en/article/qjkd4q/johnny-depp-heard-trial-jury-social-media.

171. *See id.*

172. *Id.*

173. Kayla Cotter, *Johnny Depp, Amber Heard, and the Court of Public Opinion*, DAILY PENNSYLVANIAN: 34TH ST. (June 28, 2022, 12:00 AM), http://www.34st.com/article/2022/06/johnny-depp-amber-heard-domestic-violence-court-trial-social-media-public-opinion.

In this case, social media reached a verdict long before the jury reached theirs.[174] The burden of proof fell on Johnny Depp to prove by clear and convincing evidence that Heard acted with actual malice, but one look at social media will tell you it did not.[175] For over a month, platforms like TikTok, Twitter, Facebook, and Instagram, had become saturated with online jokes and memes, a majority of which painted Depp in a favorable light.[176] Even if social media had convinced many to believe that Depp was not the primary aggressor, some commentators believe the media put Depp on a pedestal.[177]

When Depp lost his United Kingdom libel case in 2020, Heard supporters did not declare that justice had been served or that Depp was the wrongdoer, although the judge found that twelve of the fourteen allegations of abuse were "substantially true."[178] When the United Kingdom's verdict was decided, many of Depp's fans claimed that the outcome was unjust.[179] From the start, the media had cast Depp as misunderstood and a victim, and assigned Heard as the villain.[180]

Content creators mocked Heard's testimony throughout the 2022 defamation trial, for profile engagement.[181] From "#AmberTurd . . . to comedy skits mocking her legal team's performance, her viral ridicule was impossible to escape" for anyone with a smartphone or internet.[182] Internet users became crime experts and body language analysts, capable of deciphering how a victim should behave.[183] Trends sparked on these platforms with creators cutting and editing trial footage to make Heard's accusations seem unfounded.[184] As of June 3, there were over 20 billion views on TikTok for the hashtag #justiceforjohnnydepp; in comparison, #justiceforamberheard had only approximately 80 million views

174. *Id.*

175. *Id.*; Zoledziowski, *supra* note 170; *see also* Smriti Sneh, *'You Think This Has Been Fair?': Amber Heard Calls Johnny Depp Fans Cowards Who Can't Look Her in the Eye*, ANIMATED TIMES (June 13, 2022), http://www.animatedtimes.com/you-think-this-has-been-fair-amber-heard-calls-johnny-depp-fans-cowards-who-cant-look-her-in-the-eye/.

176. Cotter, *supra* note 173.

177. *Id.*

178. *Id.*; Yahr, *supra* note 165; *see also* Sneh, *supra* note 175.

179. Cotter, *supra* note 173.

180. *Id.*

181. *Id.*

182. *Id.*; *see also* Benita Fernando, *Explained: The Social Media Trial of Amber Heard*, INDIAN EXPRESS, http://indianexpress.com/article/explained/explained-the-social-media-trial-of-amber-heard-7945993 (last updated June 1, 2022, 7:23 AM).

183. Cotter, *supra* note 173; *see also* Fernando, *supra* note 182.

184. *See* Zoledziowski, *supra* note 170; Cotter, *supra* note 173.

and about 900 million views for the hashtag #amberheardisguilty.[185] The public believed that Heard was a liar long before her testimony was found to be inconsistent.[186] On social media, Depp's abnormal "behaviors were written off as courtroom quirks."[187] Depp's "stardom won over [the social media] platforms before Heard had the chance to take the stand, and when she did [take the stand], her every move worked to dismantle her case."[188] Heard's every move was scrutinized—to many, it was proof that furthered the narrative depicting her as a "manipulative, cruel, and an emotionally unstable" woman.[189] Unlike Depp, Heard was not "given sympathy or the benefit of the doubt."[190] If Heard cried, she was faking it and exaggerating; if she did not cry, she was unsympathetic.[191] Regardless if Heard's claims were fabricated, the fight was never fair in the court of public opinion.[192] When Heard openly alleged "disturbing, graphic accusations of sexual violence such as a 'cavity search' for cocaine and being penetrated with a liquor bottle," the allegations of abuse were mocked by social media users rather than the public being skeptical.[193] Heard's "visible bruises in photos, text message [evidence], and even Depp's . . . aggressive comments and destructive rampages [were not] given their due diligence."[194] "Heard wasn't somebody the public began to gradually doubt . . . she was the target of [an attack by] social media seeking to poke holes in her story."[195]

Nonetheless, there was also evidence working against Heard.[196] An audio recording exposed her instigating Depp to "'tell the world' that he's a victim of domestic violence," and it was discovered that the promise she made to donate the entirety of her divorce settlement to the American Civil Liberties Union and the Children's Hospital Los Angeles was not done.[197] "Yet, Depp's vile text messages to . . . Paul Bettany, in which [Depp] said he would 'f—[Amber Heard's] burnt corpse' after drowning and burning her 'to make sure she's dead' were brushed off by many as an unfortunate error in judgment."[198]

185. Sneh, *supra* note 175.
186. Cotter, *supra* note 173.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. Cotter, *supra* note 173.
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. Cotter, *supra* note 173.
197. *Id.*
198. *Id.*

Neither Depp nor Heard conformed to the idea of a perfect victim, but, as journalists point out, the public was undoubtedly "more inclined to excuse [Depp's] toxicity over [Heard's]."[199]

B. *A Dangerous Precedent*

Every allegation should be properly investigated, which requires accusations to be taken seriously.[200] For Heard, her accusations were "met with global humiliation."[201] Making a big media display of *Depp v. Heard* is a dangerous precedent to set.[202] Undoubtedly, there were multiple issues with Heard's case that tarnished her credibility; however, the issue is not that Heard was found liable, it is that the public considered her liable from the start.[203] In a way, Heard is still in an abusive relationship, but now it is with the world.[204]

Like Casey Anthony, Amber Heard was met with social punishment.[205] Viewers heard distressing testimony, particularly from Heard, who alleged she was sexually assaulted and attacked by Depp, causing her to fear for her life.[206] Since Heard's Washington Post article, her life has been consumed by public anger and embarrassment.[207] Heard mentioned "it was 'humiliating' to relive those moments in front of cameras."[208]

VI. "SOCIAL MEDIA TRIALS" 2011 TO 2022

Since the Casey Anthony trial, social media platforms have "almost tripled their total user base . . . from 970 million in 2010 to [over] 4.48 billion users in July 2021."[209] Since 2015, the growth rate of social media has been "an average of 12.5% year-over-year."[210] As of 2021, "[t]he average social media user

199. *Id.*
200. *Id.*
201. Cotter, *supra* note 173.
202. *Id.*
203. *Id.*
204. *See id.*
205. *See* Moran, *supra* note 8, at 44; Cotter, *supra* note 173.
206. *See* Cotter, *supra* note 173; Gene Maddaus, *Why Was Depp-Heard Trial Televised? Critics Call It 'Single Worst Decision' for Sexual Violence Victims*, YAHOO! FIN. (May 27, 2022), http://finance.yahoo.com/news/why-depp-heard-trial-televised-231520293.html.
207. *See* Cotter, *supra* note 173.
208. *See* Helmore, *supra* note 167; Maddaus, *supra* note 206.
209. Dean, *supra* note 161.
210. *Id.* (emphasis omitted).

engages with an average of 6.6 various social media platforms."[211] Hence, "with the growth of technology, media, and information sharing today, there has been [increasing] concern over whether jurors can fulfill their constitutional duty to be 'impartial'. . . ."[212] Even before social media, trials have been highly publicized.[213] However, the manner in which the public consumes the news, the speed at which news spreads, and the information potential jurors learn prior to the trial largely owed to social media is particularly new.[214] Not only has social media erroneously convinced potential jurors that they know the facts prior to a high-profile trial, learning information beforehand gives "jurors additional time to form [biased] opinions on guilt or liability."[215]

Are courts supposed to turn a blind eye to the power and influence the modern media has over potential jurors and adjudicators?[216] "Subjecting parties with legitimate impartiality concerns to the media in the courtrooms hardly seems to be the correct legal solution, especially when access to an impartial jury is a constitutionally protected right."[217]

VII. FLORIDA MOVING FORWARD

Unfortunately, it is unlikely that the Casey Anthony and Johnny Depp trials are the last trials subjected to mass public opinion.[218] Social media's impact on swaying the public's perception of an individual can be highly detrimental to one's ability to obtain a fair trial.[219] With the increasing number of social media users, Florida must examine how the State can adapt to the existence of social media and still protect the principles of a fair trial.[220] Florida must go farther than confiscating electronic devices from jurors in the courtroom and reminding them of their zealous duty as jurors.[221] Realistically, just because judicial directions are given, does not mean that they will be followed.[222] Giving

211. *Id.* (emphasis omitted).
212. Lowe, *supra* note 51, at 45.
213. *See* Moran, *supra* note 8, at 48–49.
214. Lowe, *supra* note 51, at 45.
215. *Id.*
216. *See* Moran, *supra* note 8, at 48–49.
217. *See* U.S. CONST. amend. VI; Lowe, *supra* note 51, at 47.
218. *See* Lowe, *supra* note 51, at 43, 45 (discussing how the media has changed over time and the increase of the public expressing their opinions on social media platforms).
219. *See* Narrelle Harris, *Social Media and the Fair Trial*, LA TROBE UNIV., http://www.latrobe.edu.au/nest/social-media-and-the-fair-trial/ (last visited Nov. 17, 2022).
220. *See* Janoski-Haehlen, *supra* note 1, at 68.
221. *See id.* at 48.
222. *See id.*

direction will not stop a juror from googling the contents of the case or seeing opinions on social media when they get home.[223]

A. *Florida's Current Rules Regarding Media in the Courtroom*

Florida's Rules of Judicial Administration permit "electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts . . . ."[224] Rule 2.450 provides that the media coverage is subject only "to the authority of the presiding judge" who may limit or prohibit coverage of the proceedings to "control the conduct of proceedings before the court . . . and ensure the fair administration of justice . . . ."[225] Judges have the ability to exclude or limit the use of cameras in the courtroom only if a party can show that the presence of cameras will cause harm.[226] This burden is high for the parties, and attorneys representing the media must be heard in opposition.[227] Currently, Florida's Rules of Judicial Administration regarding media in the courtroom are broad, with some claiming Florida has the "nation's broadest rule allowing cameras into courtrooms."[228]

The media's reporting of proceedings has always been thought to be sufficient to keep the public informed by making citizens more knowledgeable and better able to partake in bringing necessary changes to the justice system.[229] It has been more than thirty years since the Florida Supreme Court heard the concerns about cameras in the courtrooms.[230] Despite "Florida's success with cameras [in the courtrooms] for [over thirty] years and the successes experienced in the courtrooms of numerous other states," social media has taken a drastic turn within the last few years.[231]

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223. *See id.*
224. FLA. R. JUD. ADMIN. 2.450(a).
225. *Id.*
226. Dyckman, *supra* note 10.
227. *Id.*
228. *Id.*
229. *See id.*
230. *See id.*
231. *See* Dyckman, *supra* note 10; Lowe, *supra* note 51, at 45; *Cameras in the Court: A State-by-State Guide (Alabama-Idaho)*, RTDNA, http://www.rtdna.org/article/cameras_in_the_court_a_state_by_state_guide (last visited Nov. 17, 2022).

B. *Preventing a Breakdown in the Adversarial Process*

Many high-profile cases have sparked a plethora of discussions on social media, and while public discourse has its benefits, it can also be extremely detrimental in upholding the fairness and reliability of the adversarial process.[232] Protecting the rights of news sources is essential because they provide the public with reliable information and enable the public to make informed decisions, which benefits society at large.[233] However, one of the hallmarks of a democratic political system is the protection of the right to a fair trial.[234] If parties are to receive a fair trial, assessments of their guilt or innocence should be decided in the confines of a controlled courtroom by an impartial jury, untainted by the frenzy of sensationalistic press bombardment.[235] Nevertheless, "[a] limit to journalism would compromise both the Constitution and our democratic processes."[236] So, how can Florida ensure the protection of the vital fundamental right of an accused person to an impartial jury without compromising the media's ability to report?[237]

To prevent the breakdown of the adversarial process caused by social media, Florida should re-evaluate its laws regarding media in the courtrooms and consider adopting a practice similar to the United Kingdom.[238] In the United Kingdom, the media is banned from reporting on rulings made at pretrial hearings until after the trial has fully concluded.[239] The reporting ban on pretrial hearings can only be lifted if the judge assigned determines it is in the interests of justice to do so.[240] By contrast, under the First Amendment, the press in the United States generally has a right to report on pretrial hearings.[241] However, a judge could close a pretrial hearing from the public if requested by the defense or

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232. *See* Moran, *supra* note 8, at 50.

233. *Id.*

234. *See id.*; U.S. CONST. amend. VI.

235. *See* U.S. CONST. amend. VI; Moran, *supra* note 8, at 47.

236. Moran, *supra* note 8, at 50.

237. *Id.*; *see also* Romano, *supra* note 6, at 26.

238. *See* Dayna M. Chikamoto, *Trial by Media: The Risks to Defendants of Differing US and UK Approaches*, KRAMER LEVIN (Mar. 3, 2022), http://www.kramerlevin.com/en/perspectives-search/trial-by-media-the-risks-to-defendants-of-differing-us-and-uk-approaches.html (describing the United Kingdom's practice regarding media in the courtroom).

239. *Id.*; Criminal Procedure and Investigations Act 1996, c. 25, pt. VI, § 41(1), (6) (UK), http://www.legislation.gov.uk/ukpga/1996/25/section/41.

240. Chikamoto, *supra* note 238; Criminal Procedure and Investigations Act 1996, c. 25, pt. VI, § 41(3)–(4).

241. U.S. CONST. amend. I; Chikamoto, *supra* note 238.

prosecution.[242] Special findings are required to be made on the record that: "closure [is] necessary to preserve 'higher' or 'overriding' values, and the order [is] narrowly tailored to serve those higher or overriding values."[243]

It is essential for Florida to provide leeway in what journalists report and how they cover ongoing trials because "the American system values the scrutiny of the press in criminal proceedings and views the media's criticisms as a tool to hold the justice system accountable."[244] However, to protect parties from the barrage of social media, Florida should consider limiting the information released to the public as well as limiting the presence of the media during both pretrial and trial proceedings.[245] Currently, Florida has laws that govern limitations on media in court proceedings, but the burden for limitations is high.[246] For instance, cases involving minors cannot be televised from inside the courtroom, and certain information is concealed from the public.[247] A couple of Florida's reasons for adopting this law are "[t]o provide an environment that fosters healthy social, emotional, intellectual, educational, and physical development" and "[t]o ensure the protection of society."[248] Implementing a system in Florida that postpones, not bans, the media from recording the trial and getting insights on a case until after the verdict will ensure that the public violence entrenched in our societies does not find itself in courtrooms, "perpetuating injustice against those brave enough to seek justice."[249] Limiting the press' knowledge of information before and during trial will significantly decrease media sensationalism and will still allow the media to freely report.[250] The compromise of allowing the media to continue to report but delaying the availability of information until the end of trial will allow parties to obtain a fair trial in addition to giving the public all available information at once to make an informed opinion—not one resting on prediction.[251]

Although the legal system has many significant deficiencies, some parties go to trial and are tried by a jury that has not been contaminated by pretrial publicity.[252] As previously discussed, the media participates in a market

242. Chikamoto, *supra* note 238.
243. *Id.*; Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 9–10 (1986).
244. Chikamoto, *supra* note 238.
245. *See id.*
246. Lowe, *supra* note 51, at 56; *see also* FLA. STAT. § 985.035(1) (2022).
247. *See* FLA. STAT. §§ 985.035(1), .04(1)(a)–(b), (7)(a), (8).
248. *Id.* § 985.01(1)(c), (d).
249. Ndlovu, *supra* note 98; *see also* Chikamoto, *supra* note 238.
250. *See* Moran, *supra* note 8, at 49.
251. *See* Chikamoto, *supra* note 238.
252. *See* Moran, *supra* note 8, at 48.

economy and wants to report on what will bring in viewership.[253] Not all trials are sufficiently newsworthy to garner press attention.[254] However, some parties are not so lucky.[255] In these circumstances, the media is eager to publish all the evidence they can find without regard to the effects on prospective jurors.[256] Therefore, it may be argued that this deferment of information is not beneficial to all Floridians.[257] However, the delay of the release of information and courtroom footage of the trial will reap many benefits in addition to fair trials for parties.[258] The Florida Bar conducted a poll in 2005 that showed most of Americans' understanding of the court system came from what they learned in a single high school class.[259] Livestreaming and reporting court proceedings one day at a time would likely mis-educate the American people because only a portion of the proceedings would be shown.[260] Unless all portions of a legal proceeding are shown and viewed, lay citizens may not be able to understand the issues at hand and how the court resolves those issues.[261] The criticism of 'mis-education' regarding media reporting has not really been discussed; therefore, it is difficult for the remark to be taken seriously.[262] Proper education of the court system will increase educated opinions rested on facts.[263] Releasing trial footage and key details on the case all at once will better educate the American people on our judicial system and the steps that are crucial to reaching a verdict.[264]

VIII. CONCLUSION

This Comment identifies the dangers that social media can conjure in the courtroom and the compromise of a right to a fair trial in the court of law by a simultaneous trial in the court of public opinion.[265] Thus, greater protections in Florida are imperative to extinguish the negative effects caused by social media that have been imputed on the justice system.[266] Attempting to find a solution

253. *See id.* at 49.
254. *Id.*
255. *See id.*
256. *See id.*; Garfield Tenzer, *supra* note 5, at 436.
257. *See* Moran, *supra* note 8, at 50; Chikamoto, *supra* note 238.
258. *See* Chikamoto, *supra* note 238.
259. Dyckman, *supra* note 10.
260. *Id.*
261. *Id.*
262. *Id.*
263. *See id.*
264. Dyckman, *supra* note 10.
265. *See* Janoski-Haehlen, *supra* note 1, at 45.
266. *See* Garfield Tenzer, *supra* note 5, at 465.

for cases like Casey Anthony's and *Depp v. Heard* are crucial with the ongoing rise of social media and the easy access to both accurate and inaccurate information.[267] Without a concrete solution for this increasingly inherent problem, a party who must go up against the court of public opinion will continue to put their livelihood on the line as they try to combat not only the issue at trial, but also the modern media.[268]

When the concern of public opinion is brought to light, citizens begin to question the fairness and reliability of the United States legal system and the purpose it serves.[269] It is the responsibility of legal practitioners and the courts to address this matter head on and begin to consider the standards that are in place and the changes that need to be made to better serve the needs of those utilizing the legal system under these circumstances.[270]

267. *See* Janoski-Haehlen, *supra* note 1, at 45.
268. *See* Moran, *supra* note 8, at 49, 55.
269. *See* Boothe-Perry, *supra* note 4, at 94–95.
270. *See* Janoski-Haehlen, *supra* note 1, at 68.


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