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1. See State v. Peters, 534 So. 2d 760, 763 n.4 (Fla. 3d Dist. Ct. App. 1988) ("[t]he differentiation between pit bulls and other breeds has been called "canine racism."" (citing Attacks by Pit Bulls Prompt Vicious-dog Laws, CHRISTIAN SCI. MONITOR, July 3, 1987, at 1, 3)).

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In the Garden of Eden every animal obeyed Man willingly. But we blew it, and after the Fall all the animals lived as they pleased and paid us no heed. Except for dogs, who liked comradeship and loyalty enough to give us another chance."

I. INTRODUCTION

Mary Rodgers wept as her dog was dragged away by animal control workers. She could barely stand to watch as Sasha struggled with the workers, trying to break free to run up the familiar porch steps to her owner. There was confusion in her eyes as she looked at Mary. Mary’s instincts had told her to run after Sasha, to bring her back to the house where she had lived for years. But she did not. Instead, Sasha was forced into the back of a van and driven to animal control where she would be put to death. One might think Sasha committed a grievous act to receive such a harsh punishment. But she did not. She had never bitten nor hurt anyone. Her sole infraction was that she was an American Staffordshire Terrier. Mary had no choice but to let Sasha go. The county required Mary to have an 

2. Timothy Foote, That is Not a Bad Dog—That’s a Splendid Dog, SMITHSONIAN, Apr., 1992 at 60, 69 (describing author and animal trainer Vicky Hearne’s theory of the relationship between man and dog).
3. This story is fictional. However, it is an accurate example of what could happen in a municipality that bans pit bulls.
4. See Two Seized Pit Bulls to Be Euthanized, SARASOTA HERALD TRIB. (Fla.), Mar. 13, 2002, at BCE3; see also Saundra Amrhein, Unwanted, Unloved and Facing a Death Sentence, ST. PETERSBURG TIMES (Fla.), Jan. 13, 2002, at 1 (stating that the Pasco County Animal Control Center in Florida only adopts nineteen percent of the cats and dogs they take in each year, and that “[l]ast year, the shelter euthanized 3,531 of the 5,279 dogs brought in... [and] 3,796 of the 4,861 cats brought in”); Neal Thompson, The Euthanizer: Not a Sheltered Life Death, BALT. SUN, May 21, 2001, at 1E. (noting that the Baltimore shelter estimated that “euthanizing will continue at a pace of 10,000 to 12,000 a year”); Sally Kestin, Too Late For Too Many, SUN-SENTINEL (Fort Lauderdale, Fla.), June 23, 2002, at 1A.
5. American Staffordshire Terriers are one of the three recognized breeds of dog known commonly as a “pit bull.” See discussion infra Part IV.A.
extensive insurance policy in order to keep Sasha, and although Mary continuously tried, no insurance company would insure her.

In the 1980s, a spate of dog attacks prompted local governments across the country to ban pit bulls from many municipalities. While many concerned citizens encouraged these bans, others believed that pit bulls were being unfairly singled-out. Disgruntled owners claimed that such breed-specific bans violated their constitutional rights and numerous suits against municipalities followed. One by one courts addressed each of the constitutional issues claimed by owners and in turn they dismissed each of them. Courts responded to these suits almost uniformly. The judiciary had spoken: in the absence of state legislation to the contrary, municipalities were free to ban specific breeds of dog.

Recent dog attacks in Florida and other parts of the country have again brought the issue of banning particular breeds to the forefront. Citizens in Florida, frustrated by the attacks, have called on their legislators to take action. However, although courts have unanimously held that it is constitutional for municipalities to ban pit bulls, Florida cities and towns are unable to. Their hands are tied due to one line in section 767.14 of the Florida Statutes that prohibits local governments in Florida from banning

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6. See discussion infra Part II.
10. See discussion infra Parts III.C.1–5.
11. Id.
12. But see Am. Dog Owners Ass'n v. City of Lynn, 533 N.E.2d 642 (Mass. 1989) (holding that ordinance which banned pit bulls was unconstitutionally vague because of difficulty in determining if a dog was a pit bull).
14. See Erik Lacitis, Every Dog, Big or Small, Must Have its Day in Obedience School, SEATTLE TIMES, Apr. 2, 2002, at E1.
15. See, e.g., Editorial, Pit Bull Ban, SUN-SENTINEL (Fort Lauderdale, Fla.), May 16, 2002, at 24A; Dave Cebrat, Editorial, Ban Pit Bull Dogs for Safety’s Sake, SUN-SENTINEL (Fort Lauderdale, Fla.), May 26, 2002, at 4F (calling for legislators to ban pit bulls).
any specific breed of dog. This has created a situation in Florida where the judicial branch has pronounced breed-specific banning constitutional, but the legislative branch prohibits it. In a knee-jerk response to the most recent attacks, legislators have attempted to change the part of this statute that prohibits the banning of specific breeds. Although these recent attempts have failed, they represent dissatisfaction with current dog control laws. The resurfacing of this issue has prompted a closer analysis of the effectiveness of current laws in Florida. It has also triggered the question of whether breed-specific legislation is the answer to the dog control problem, or whether there are more effective alternatives.

This article begins by briefly discussing the issue of banning specific breeds of dogs. Part II details the prevalence of dog bites in the United States. Part III explains the current law in Florida pertaining to dangerous dogs. Part IV analyzes in detail the history of dangerous dog legislation in Florida. It also refers to Senate Bill 1644 that created section 767.14 of the Florida Statutes, and proposed measures to change this statute. Further, it explains significant prior case law pertaining to breed-specific legislation. It includes an analysis of the constitutional theories upon which suits have been brought and courts’ decisions regarding these theories. Part V examines pit bulls as a breed, and discusses the prevalence of illegal dogfighting and how it relates to the perceived problems with pit bulls. Part VI discusses the problems involved with banning particular breeds and the ineffectiveness of this method of dog control. Part VII outlines several alternatives to breed-specific legislation and the implications of these alternate measures. Finally, in Part VIII, this article concludes that breed-specific legislation is not an effective method for resolving Florida’s dog control problem. It explains that since this method is ineffective, it is not a rational means to achieve the legitimate government purpose of protecting the public welfare.

16. FLA. STAT. § 767.14 (2001). “Nothing in this act shall limit any local government from placing further restrictions or additional requirements on owners of dangerous dogs ... provided that no such regulation is specific to breed ...” Id.
17. See discussion infra Part III.B.
18. See id.
II. THE PREVALENCE OF DOG BITES IN THE UNITED STATES

Today, over one-third of American households have a dog. Despite their popularity, a significant number of dogs bite people every year. While there are at least four hundred known breeds of dogs in the world, only a few breeds have the reputation of being responsible for the most bites. At the forefront of this list of “dangerous dogs” is the dog commonly known as the pit bull.

The prevalence of dog bites in the United States has caused many insurance companies to refuse homeowners’ insurance to people who own pit bulls or other dog breeds that the companies deem dangerous. The Insurance Information Institute claims that one-third of homeowner’s liability claims are due to dog bites. They further assert that these bites cost insurance companies $310 million annually. In addition, insurance companies allege that certain breeds bite more than other breeds, even though others disagree.
Not all insurance companies refuse insurance coverage to people based solely on a dog's breed.\textsuperscript{29} However, based on a dog's history, even these companies may require that the policy contain a provision that if the dog bites someone, the insurance company does not have to pay.\textsuperscript{30} For homeowners who are unable to get insurance from a private company, they can usually fall back on the state's Joint Underwriting Association (JUA) to cover them.\textsuperscript{31} However, although “[t]he JUA will insure homeowners with breeds known for being vicious,” even the JUA “will not cover any dog-related claims.”\textsuperscript{32} Aside from dogs that are considered dangerous, insurance companies are not likely to provide coverage if any type of dog, regardless of breed, has ever bitten a person.\textsuperscript{33}

This creates a problem for homeowners who have a dog that is blacklisted. Homeowners insurance is vital for people who are buying a house.\textsuperscript{34} If they do not have it, then they are personally liable for the damages done by their dogs.\textsuperscript{35} Furthermore, without insurance, homeowners will not be able to get a mortgage. This leaves them in a predicament of choosing between their family pet and owning a home.\textsuperscript{36} People who choose to have insurance instead of their dog often have to leave their pet at an animal shelter and hope that someone adopts them.\textsuperscript{37}

Owning dogs can preclude people from owning homes, forcing them to rent instead. However, many apartment complexes will not allow tenants to have certain breeds of dogs.\textsuperscript{38} Landlords fear that they will be sued if a

\begin{thebibliography}{99}
\bibitem{29} See Shanklin, supra note 7 (noting that State Farm and Allstate will consider factors other than breed before denying coverage).
\bibitem{30} See Price, supra note 7.
\bibitem{31} Shanklin, supra note 7 (stating “[t]he JUA is a] state-supported insurance pool [that] covers homeowners when no other insurance company will. The JUA will insure homeowners with breeds known for being vicious . . .”).
\bibitem{32} Id.
\bibitem{33} See Marrero, supra note 7 (stating “you can almost kiss your chances of getting future coverage goodbye if your dog, even a poodle, pierces human flesh”).
\bibitem{34} Id.
\bibitem{35} FLA. STAT. § 767.04 (2001).
\bibitem{36} See Price, supra note 7.
\bibitem{37} Shanklin, supra note 7; see also Marrero, supra note 7 (stating “Danya Parks, a programs manager of the Jacksonville Humane Society . . . said most of the 15,000 dogs the shelter takes in each year are in fact rottweilers, German shepherds, chow chows and pit bulls. And it may be even harder to find them homes if people find insurance companies will not protect them when they take those dogs in.”).
\bibitem{38} See Price, supra note 7.
\end{thebibliography}
tenant's dog bites another tenant or guest. Their fears are not unfounded. Landlords can be held liable if a dog bites someone on their premises.

Insurance companies are generally given a good deal of latitude in refusing coverage to potential customers that they view as high-risk. For example, insurance companies can refuse coverage to people who are predisposed to a certain illness or have a preexisting medical condition. Although this may seem unfair, local governments cannot mandate companies to provide coverage for people.

III. CURRENT FLORIDA LAW PERTAINING TO DAMAGE BY DOGS

Florida has had significant experience with breed-specific legislation. Pit bulls became a hot issue in the 1980s, and Florida was not immune to the pit bull hysteria that had grips the country. A number of municipalities enacted ordinances to deal with dangerous dogs, some specifically banning pit bulls. The City of Miami ordinance, for example, required owners to have $50,000 of insurance in order to be able to keep their pet. The state

39. See Shanklin, supra note 7 (stating "after a number of people have been bitten at her rental houses, [animal shelter director and dog lover, Lorrie Nassofer] will no longer allow canines at those homes . . . [l]ast month, her insurance company paid $85,000 to the family of a child who was bitten at one of Nassofer's rental houses").


41. See State v. Peters, 534 So. 2d 760, 763 (Fla. 3d Dist. Ct. App. 1988) (noting that city could not require insurance companies to issue policies to pit bull owners).

42. See Am. Sun Life Ins. Co. v. Remig, 482 So. 2d 435, 436 (Fla. 5th Dist. Ct. App. 1985).

43. See Peters, 534 So. 2d at 763.

44. See, e.g., Graham, supra note 9 (stating "[t]hat hysteria reached a peak in California this summer. After two pit bull attacks in nine days, more than 300 pit bulls were turned into the Los Angeles County Animal Care and Control Department.").

45. See Christopher Wellisz, Doggone! Caring Officer Retires, MIAMI HERALD, Jan. 21, 1988, at 1BR (stating that "[i]n 1979 . . . [a] pit bull . . . severely mauled a 6-year-old Hollywood boy, Frankie Scambrough. The attack prompted a controversial ordinance controlling pit bulls.").

46. MIAMI-DADE COUNTY, FLA., CODE § 5–17.3 (Supp. 1999).

In order to protect the public and to afford relief from the severe harm and injury which is likely to result from a pit bull dog attack, every owner of a pit bull dog shall maintain and be able to provide evidence of the owner's financial ability to respond in damages up to and including the amount of fifty thousand dollars ($50,000) for bodily injury to
legislature, however, had not yet enacted any statutes to deal with dangerous dogs.47

A. Chapter 767 of the Florida Statutes

The legislature responded to the outcry for dog control laws by enacting Florida Statutes sections 767.10–15.48 The legislature specifically stated, in its legislative findings, that its reasoning for enacting these statutes was to correct the inadequacy of the current laws in dealing with unprovoked dog attacks.49 It established and defined the factors necessary to determine that a dog is legally “dangerous,” and therefore subject to certain restrictions.50

or death of any person or damage to property which may result from the ownership, keeping or maintenance of such dog.

Id.

47. See Fla. H.R. Comm. on Local Gov’t & Vet. Aff., HB 839 (2001) Staff Analysis 2 (final Mar. 20, 2001) (on file with comm.) [hereinafter H.R. Comm. HB 839 Staff Analysis]. Prior to 1990, animal control was generally regulated on a local basis, as the Florida Statutes did not specifically provide for regulating dangerous dogs. However, in 1990, the Legislature passed HB 1345 which provided a procedure for certain dogs to be classified as dangerous and required that such dogs be registered. The bill also established requirements for control and confinement of dangerous dogs, as well as an appeals procedure.

Id.

48. FLA. STAT. § 767.10–15 (2001). This statute was created by Senate Bill 1644. The bill passed favorably through the Agriculture, Judiciary-Criminal, and Appropriations Committees. The Senate then voted on it, and the next day, the House unanimously passed the bill. See H.R. Comm. HB 839 Staff Analysis, supra note 47.

49. See § 767.10.

The Legislature finds that dangerous dogs are an increasingly serious and widespread threat to the safety and welfare of the people of this state because of unprovoked attacks which cause injury to persons and domestic animals; that such attacks are in part attributable to the failure of owners to confine and properly train and control their dogs; that existing laws inadequately address this growing problem; and that it is appropriate and necessary to impose uniform requirements for the owners of dangerous dogs.

Id.

50. § 767.11(1)(a)–(d).

“Dangerous dog” means any dog that according to the records of the appropriate authority:

Has aggressively bitten, attacked, or endangered or has inflicted severe injury on a human being on public or private property;

Has more than once severely injured or killed a domestic animal while off the owner’s property;
Section 767.12 provides, in detailed description, the process for classifying a dog as dangerous. It authorizes animal control employees to investigate occurrences that may lead to a dog being considered dangerous. While an investigation is occurring, the dog in question may either be impounded or held under certain restrictions by his owner. However, a dog will not be considered dangerous if it was protecting someone from an "unjustified attack." After allowing the owner to appear at a hearing, animal control will then determine whether the dog in question is in fact dangerous. The owner can appeal the decision, but if he loses, he will

Has been used primarily or in part for the purpose of dog fighting or is a dog trained for dog fighting; or

Has, when unprovoked, chased or approached a person upon the streets, sidewalks, or any public grounds in a menacing fashion or apparent attitude of attack, provided that such actions are attested to in a sworn statement by one or more persons and dutifully investigated by the appropriate authority.

1. § 767.12.
2. § 767.12(1)(a).

(1)(a) An animal control authority shall investigate reported incidents involving any dog that may be dangerous and shall, if possible, interview the owner and require a sworn affidavit from any person, including any animal control officer or enforcement officer, desiring to have a dog classified as dangerous. Any animal that is the subject of a dangerous dog investigation, that is not impounded with the animal control authority, shall be humanely and safely confined by the owner in a securely fenced or enclosed area pending the outcome of the investigation and resolution of any hearings related to the dangerous dog classification. The address of where the animal resides shall be provided to the animal control authority. No dog that is the subject of a dangerous dog investigation may be relocated or ownership transferred pending the outcome of an investigation or any hearings related to the determination of a dangerous dog classification. In the event that a dog is to be destroyed, the dog shall not be relocated or ownership transferred.

Id.

3. Id.
4. § 767.12(1)(b).

A dog shall not be declared dangerous if the threat, injury, or damage was sustained by a person who, at the time, was unlawfully on the property or, while lawfully on the property, was tormenting, abusing, or assaulting the dog or its owner or a family member. No dog may be declared dangerous if the dog was protecting or defending a human being within the immediate vicinity of the dog from an unjustified attack or assault.

Id.

5. § 767.12(1)(c).

After the investigation, the animal control authority shall make an initial determination as to whether there is sufficient cause to classify the dog as dangerous and shall afford
have to register the dog pursuant to certain conditions. The owner also has an obligation to notify authorities if certain instances occur. However, given the likelihood that a dangerous dog may bite again, the penalties for a violation of this section seem lenient.

the owner an opportunity for a hearing prior to making a final determination. The animal control authority shall provide written notification of the sufficient cause finding and, if requested, a hearing shall be held as soon as possible, but not more than 21 calendar days and no sooner than 5 days after receipt of the request from the owner. Each applicable local governing authority shall establish hearing procedures that conform to this paragraph.

Id.

56. § 767.12(1)(d).

57. § 767.12(2)(a).

(2) Within 14 days after a dog has been classified as dangerous by the animal control authority or a dangerous dog classification is upheld by the county court on appeal, the owner of the dog must obtain a certificate of registration for the dog from the animal control authority serving the area in which he or she resides, and the certificate shall be renewed annually. Animal control authorities are authorized to issue such certificates of registration, and renewals thereof, only to persons who are at least 18 years of age and who present to the animal control authority sufficient evidence of:

(a) A current certificate of rabies vaccination for the dog.

(b) A proper enclosure to confine a dangerous dog and the posting of the premises with a clearly visible warning sign at all entry points that informs both children and adults of the presence of a dangerous dog on the property.

(c) Permanent identification of the dog, such as a tattoo on the inside thigh or electronic implantation.

Id. (emphasis added).

58. § 767.12(3)(a)–(d).

(3) The owner shall immediately notify the appropriate animal control authority when a dog that has been classified as dangerous:

(a) Is loose or unconfined.

(b) Has bitten a human being or attacked another animal.

(c) Is sold, given away, or dies.

(d) Is moved to another address.

Prior to a dangerous dog being sold or given away, the owner shall provide the name, address, and telephone number of the new owner to the animal control authority. The new owner must comply with all of the requirements of this act and implementing local ordinances, even if the animal is moved from one local jurisdiction to another within the state. The animal control officer must be notified by the owner of a dog classified as dangerous that the dog is in his or her jurisdiction.

Id.

59. See § 767.12(7) ("Any person who violates any provision of this section is guilty of a noncriminal infraction, punishable by a fine not exceeding $500.").
Section 767.14 in particular gives municipalities a significant amount of leeway in enacting ordinances pertaining to the control of dogs. However, one important line of Section 767.14 restricts how municipalities could treat specific breeds. Section 767.14 specifically authorizes municipalities to enact further restrictions that are deemed necessary to protect the public against dangerous dogs. However, these restrictions cannot be breed-specific. The statute allows ordinances that were enacted prior to its passage to remain in force, but no new breed-specific ordinances can be enacted.

These additions to Chapter 767 seemed to address the problem communities had with how to handle dangerous dogs. However, the process has been criticized as being too lengthy. Also, municipalities have taken issue with the restriction prohibiting breed-specific bans.

B. Subsequent Attempts to Change the Statute

1. House Bill 355

After it was enacted in 1990, no legislative challenges to the potentially controversial section 767.14 were raised until the 2000 legislative session. In 2000, Representative Tracy Stafford introduced a bill to amend section 767.14 by removing the line that restricts municipalities from regulating specific breeds. The bill was reviewed favorably by the House Committee on Community Affairs, which added an amendment to streamline the process for classifying a particular dog as "dangerous." The House Committee on Community Affairs noted that although the Florida League of Cities supported the bill, the Humane Society was opposed to it. There are numerous reasons why the Humane Society opposes breed-specific legislation:

60. § 767.14.
61. Id.
62. Id.
63. Id.
64. Id.
66. See discussion infra Part III.B.
68. See H.R. Comm. HB 355 Staff Analysis, supra note 65, at 6.
69. Id.
Although it supports the bill’s intent to enhance public safety, the [Humane] Society does not feel [that] allowing local governments to enact ordinances that could place restrictions regarding ownership of certain dog breeds is the answer. According to the Society, the problem the bill is addressing may not be a “breed of dog” problem but rather a pet ownership and enforcement issue. The Society also states breed specific ordinances will unfairly penalize responsible dog owners, and it is these responsible dog owners, whose dogs do not pose a threat, who will make an effort to comply with any new ordinances. In addition, it appears as though the bill does not provide any restrictions on what breed of dogs local governments can further restrict. However, the Society does support any attempt to streamline the existing statute regarding the dangerous dog classification and appeal process. It believes that by streamlining the appeal process, the law will be easier to enforce and will minimize animal authorities’ reluctance to classify a dog as dangerous.  

The bill was then placed on the calendar to be voted on, but died on the calendar after a month.  

2. House Bill 839

Although a challenge to section 767.14 had just failed in the previous legislative session, in 2001 there was another attempt to amend it. Responding to pressure from the City of Fort Lauderdale that pit bulls were scaring tourists on the beach, the Broward Legislative Delegation voted to again try to change the statute. This time they strategically crafted a bill that would change the statute only as it pertained to Broward County. Representative Stacy Ritter, a Broward Democrat, sponsored House Bill 839,
which if passed would allow municipalities within Broward County to regulate certain breeds in public places. In the Florida Legislature, county-specific legislation, if agreed upon by the respective local delegation, usually passes with little resistance. However, whether it was because Broward Democrats have little clout in a Republican-controlled legislature or because lawmakers feared that it could set a precedent for counties statewide, HB 839 died on the House calendar.

C. Significant Prior Case Law

Dogs have historically not enjoyed a great deal of deference in American courts. In the landmark case *Sentell v. New Orleans*, the plaintiff sued a railway company, alleging that it had negligently killed his dog. The United States Supreme Court held that an ordinance requiring owners to register their dogs was valid, and in the absence of registration, they were "qualified" property and not subject to the same protection as "complete" property. The Court also indicated that their lack of protection by criminal laws was also indicative of their status as "imperfect" property. The Court reasoned that, although at common law dogs were considered property, in

74. *Id.*

WHEREAS, there have been numerous incidents of tourists being threatened by pit bulls on public beaches, and
WHEREAS, there were 115 pit bull and pit-mix bites in Broward County in 1999 alone, and
WHEREAS, the number of attacks by these breeds far exceeds those of other breeds, and
WHEREAS, there is concern for the safety of the citizens of Broward County and its tourists in public places,
NOW, THEREFORE,
Be It Enacted by the Legislature of the State of Florida:
Section 1. Each municipality located within the geographic boundaries of Broward County, Florida, shall have the option of adopting an ordinance regulating the control and confinement of dogs in public places, with the authority for such regulations to be specific to breed, including mixed breeds.

*Id.*

75. See Buddy Nevins, *Broward County Democrats Fear for Local Legislation*, SUN-SENTINEL (Fort Lauderdale, Fla.), Mar. 4, 2001, at 1G.

76. See Brittany Wallman, *House Advances Dog-Ban Bill*, SUN-SENTINEL (Fort Lauderdale, Fla.), Mar. 21, 2001, at 6B (noting that "[c]ommittee members unanimously approved the bill").

77. 166 U.S. 1169 (1897).

78. *Id.*

79. *Id.* at 1170.

80. *Id.*
the absence of a statute, there was no criminal liability if they were the subjects of larceny. The Court noted that even if dogs were considered "complete" property, they would still be subject to the police power of the state, and could still be destroyed if they endangered public health. The Court also noted that while some dogs should enjoy the protection of the legislature, ones that are considered dangerous should not.

However, as there is now criminal liability for theft of a dog, this original justification for considering dogs imperfect property is weakened. Also, although this early case does not explicitly address the constitutionality of banning a particular breed of dog, it indicated that a dog should be destroyed only if it is without an owner or if it is vicious. However, this case also relied on other decisions which held as constitutional ordinances which allowed police officers or ordinary citizens to kill any dog that was outside the confines of its owner's home, even if the person who killed the dog knew that it had an owner.

The treatment of dogs has changed since Sentell was decided. Given the popularity of dogs in America, and the subsequent rise in their status, it seems no longer relevant to rely on this case as good law. As animal control divisions or Humane Societies have been established to deal with stray dogs in communities across America, it seems arcane to rely on a case that allowed people to shoot dogs on the street. To do so would be akin to relying on Plessy v. Ferguson, or other overturned cases that, in retrospect, have served to embarrass the Supreme Court. Despite its current irrelevance, Sentell has been relied upon by recent courts to uphold breed-specific regulations.

81. Id.
82. Sentell, 166 U.S. at 1171.
83. Id.
85. See Sentell, 166 U.S. at 1171.
86. Id.
88. See generally Sally Kestin, Too Late for Too Many, SUN-SENTINEL (Fort Lauderdale, Fla.), June 23, 2002, at 1A.
89. 163 U.S. 537 (1896).
90. In Plessy, a case which was later overturned, the United States Supreme Court condoned racial discrimination. Id.
While many people were pleased that cities were restricting or banning pit bulls, others were unhappy. Owners claimed that their constitutional rights were being violated by the ordinances. Dog owners sued on the grounds that the ordinances were unconstitutionally vague, violated their equal protection and due process, and were an improper use of the police power. However, with rare exception, courts upheld the validity of the ordinances. Several dog owners sued, but the Florida courts decided as the courts in other jurisdictions had. A close study of a Florida case gives an understanding of the issues that were brought up in other cases across the country. In State v. Peters, pit bull owners challenged a City of North Miami ordinance which mandated special regulations for pit bulls. The


92. See discussion infra Part III.
93. See discussion infra Part III.C.1–5.
94. See, e.g., Am. Dog Owners Ass’n v. City of Lynn, 533 N.E.2d 642 (Mass. 1989) (holding that ordinance which banned pit bulls was unconstitutionally vague because of difficulty in determining if a dog was a “pit bull”). The court, referring to the trial judge, stated:

The judge found that there is no scientific means, by blood, enzyme, or otherwise, to determine if a dog is a particular breed or any mixture thereof; that the dog officers of the city of Lynn used conflicting, subjective standards for ascertaining what animals are to be defined as “Pit Bulls” under all of the ordinances in question; and that the ordinances failed to provide law enforcement officials with ascertainable standards by which to enforce the ordinance. Based on these findings, his ruling that the third ordinance—listing three types of dogs, (American Staffordshire, Staffordshire Pit Bull Terrier or Bull Terrier), two of “dubious existence,” and one (“any mixture thereof”) impossible to ascertain—was void for vagueness, was clearly correct.

Id. at 646.

95. See cases cited supra note 91.
96. See discussion infra Parts III.C.1–5.
97. 534 So. 2d 760 (Fla. 3d Dist. Ct. App. 1988).
98. Id. at 764. The ordinance provides:

WHEREAS, dogs commonly referred to as ‘Pit Bulls’ were for centuries developed and selectively bred for the express purpose of attacking other dogs or other animals such as bulls, bears, or wild hogs; and

WHEREAS, in developing a dog for this purpose, certain traits were selected and maximized by controlled breeding, including extremely powerful jaws, a high sensitivity to pain, extreme aggressiveness towards other animals, and a natural tendency to refuse to terminate an attack once it has begun; and
ordinance in question required owners to take special precautions in order to keep a pit bull. 99

1. Vagueness

The owners in Peters claimed that the ordinance violated their constitutional rights on several grounds. The first was that the definition of pit bull used by the ordinance was unconstitutionally vague because it included "alternative and sometimes inconsistent definitions of 'pit bull.'" 100 They also claimed that according to the ordinance, a dog could technically not conform to the definitions yet still be considered a pit bull. 101 While the

WHEREAS, in addition to statistical evidence that Pit Bull Dogs have a greater propensity to bite humans than all other breeds, there exists overwhelming evidence in the form of individual experiences, that the Pit Bull is infinitely more dangerous once it does attack; and
WHEREAS, the Pit Bull's massive canine jaws can crush a victim with up to two thousand (2,000) pounds of pressure per square inch – three times that of a German Shepherd or Doberman Pinscher, making the Pit Bull's jaws the strongest of any animal, per pound; and
WHEREAS, after consideration of the facts, this Council has determined that the following Ordinance is reasonable and necessary for the protection of the public health, safety and welfare.

Id.

99. Id. at 762. The court noted that:
[The ordinance] regulates the ownership of pit bulls by requiring their owners to carry insurance, post a surety bond, or furnish other evidence of financial responsibility in the amount of $300,000 to cover any bodily injury, death or property damage that may be caused by the dog. The ordinance also requires that owners register their pit bulls with the City and confine the dogs indoors or in a locked pen. The ordinance defines pit bulls by reference to characteristics of the breed established by the American Kennel Club (AKC) and the United Kennel Club (UKC).

Id. at 762.

100. Peters, 534 So.2d at 762. The ordinance provides:
(a) The term 'Pit Bull Dog' as used within this Article shall refer to any dog which exhibits those distinguishing characteristics which:
(1) Substantially conform to the standards established by the American Kennel Club for American Staffordshire Terriers or Staffordshire Bull Terriers; or
(2) Substantially conform to the standards established by the United Kennel Club for American Pit Bull Terriers.

Id. at 762.

101. Id. "Technical deficiencies in the dogs [sic] conformance to the standards in paragraph (b) shall not be construed to indicate that the subject dog is not a 'Pit Bull Dog' under this ordinance." Id. (alteration in original).
court admitted that the definitions of "pit bull" in the ordinance lacked "mathematical certainty," it stated that absolute certainty was not necessary for constitutionality. The court noted that the main concern with vague ordinances is that people would not have proper notice of what conduct is prohibited. However, the court determined that pit bull owners had a sufficient understanding of the ordinance terms to determine if their dogs were included in it. They further determined that the issue of "whether a dog is covered by the... ordinance is a matter of evidence, not... constitutional law." In this case, they found that the weight of evidence showed that the dogs in question were under the realm of the city ordinance.

Courts have commonly upheld ordinances against vagueness challenges. Central to the upholding of these ordinances is the notion that pit bulls are an easily identifiable breed. However, this notion has been widely criticized. There are two definitions of dogs that the American Kennel Club (AKC) recognizes as pit bulls, and one under the United Kennel Club’s (UKC) definition. Municipalities have acknowledged that they need to include all three, sometimes conflicting, definitions in order to include each breed commonly known as a pit bull.

102. Id. at 767.  
103. Peters, 534 So. 2d at 767.  
104. Id. at 768.  
105. Id.  
106. Id.  
108. See, e.g., Garcia, 767 P.2d at 357 (stating "[t]he trial court found that the American Pit Bull Terrier is a recognized breed of dog readily identifiable by laymen. We understand the trial court’s finding to have been that the breed can be identified by persons who are not qualified to be dog show judges.").  
109. See discussion infra Part V.A.  
111. See, e.g., State v. Peters, 534 So. 2d 760, 762 (Fla. 3d Dist. Ct. App. 1998) (noting that the challenged ordinance included the AKC and UKC definitions for the three types of pit bull).
Municipalities often attempt to include any dog that has any mix of "pit bull" in them within their ordinance's definition of pit bull. It is sometimes apparent that a dog is, by definition, one of the breeds commonly known as a pit bull. However, the evidentiary method for determining when a dog is a pit bull or pit bull mix can be confusing and difficult.

2. Equal Protection

The owners also challenged the ordinance on the grounds that it "violate[d] the equal protection clauses of both the federal and state constitutions." They claimed that "it irrationally differentiates between owners of pit bulls and owners of other . . . dogs." They also claimed that the definition of pit bull used in the ordinance did not "include within the pit bull definition half-breed pit bulls . . . which may be as vicious as purebred pit bulls." The court responded by explaining that "the constitutional guarantee of equal protection of the laws does not guarantee that all dog owners will be treated alike; at most, the only guarantee is that all owners of defined pit bulls will be treated alike." The court also stated that "a law is not constitutionally defective simply because it contains classifications


114. Id. at 647.

Unlike an ordinance which generally prohibits the keeping of a "vicious dog" . . . the Lynn Pit Bull ban ordinance depends for enforcement on the subjective understanding of dog officers of the appearance of an ill-defined "breed," leaves dog owners to guess at what conduct . . . is prohibited, and requires "proof" of a dog's "type" which, unless the dog is registered, may be impossible to furnish. Such a law gives unleashed discretion to the dog officers charged with its enforcement, and clearly relies on their subjective speculation whether a dog's physical characteristics make it what is "commonly understood" to be a "Pit Bull."

115. Peters, 534 So. 2d at 763.

116. Id.

117. Id.

118. Id.
which are underinclusive." Courts in other jurisdictions have addressed other equal protection challenges. A common one has been that ordinances banning pit bulls are overinclusive because they include dogs that have never shown any signs of being vicious; however, these challenges were each summarily dismissed.

3. Due Process

The third theory that the owners in Peters relied upon was that the ordinance violated their due process. The owners claimed, and the trial court agreed, "that the insurance requirement was 'unconstitutionally oppressive' in that it required pit bull owners to buy insurance even though the evidence presented showed that no insurance company would write a policy covering the harms which might be wrought by pit bulls." However, the appellate court cited Sentell and noted that even if the requirement was oppressive, it was not unconstitutional. It also noted that since municipalities likely had the power to completely ban pit bulls, they could at least regulate them.

4. Police Power

Although the owners in State v. Peters did not raise the issue of whether a municipality had the power to regulate a specific breed, several other courts decided that question in the affirmative. For example, the court in Vanater v. Village of South Point noted that it is within the police power of a local government to regulate dogs. It also held that so long as there was a rational relationship between the government’s action and the health

119. Id.
121. Id.
122. Peters, 534 So. 2d at 765.
123. Id.
124. Id.
125. Id.
128. Id. at 1241.
and safety of the general public, an ordinance regulating dogs would be upheld.\textsuperscript{129} Moreover, the court stated that municipalities could enact ordinances as long as they did not conflict with the provisions of any state statutes.\textsuperscript{130}

5. Overbroad and Overinclusive

Florida courts have not yet dealt with the issue of whether or not a breed specific ordinance or regulation is overbroad or overinclusive.\textsuperscript{131} This is probably due to the above stated Florida statute that bans any regulation or ordinance that is breed-specific.\textsuperscript{132} However, since the Statute does not apply to local ordinances enacted prior to October 1, 1990, there are still ordinances, enacted before this date, which do ban pit bulls.\textsuperscript{133} Therefore, considering the publicity surrounding breed-specific legislation, an overbroad or over inclusive attack in Florida is not unlikely in the near future.

Although Florida has not ruled on this specific issue, numerous jurisdictions have upheld breed-specific legislation against challenges that they are over inclusive or overbroad.\textsuperscript{134} The contention is that a total ban on a specific breed includes “more dogs than is necessary to accomplish the goal of protecting the public.”\textsuperscript{135} Furthermore, regulations or ordinances that ban specific breeds, such as pit bulls, treat them all as inherently dangerous

\textsuperscript{129}. Id.

As this Ordinance [banning pit bulls] does not affect any fundamental rights such as voting or the freedom of speech and does not make a “suspect classification” such as a law based on race or nationality, the test to determine its constitutionality is whether it has a rational relationship to a legitimate state interest. Id. at 1242. See also Hearn, 772 P.2d at 766; Anderson, 566 N.E.2d at 1225; Holt v. City of Maumelle, 817 S.W.2d 208, 210 (Ark. 1991).

\textsuperscript{130}. See, e.g., Vanater, 717 F. Supp. at 1241.

\textsuperscript{131}. In Peters, the court did not address whether the ordinance in question was overinclusive or overbroad. Peters, 534 So. 2d at 760.


\textsuperscript{133}. See, e.g., MIAMI-DADE COUNTY, FLA., CODE § 5–17 (1999).

\textsuperscript{134}. “An ordinance is ‘overbroad’ only if it is possible that under its terms conduct which is protected by the First Amendment may be affected.” 3299 N. Fed. Highway, Inc. v. Bd. of County Comm’rs of Broward County, 646 So.2d 215, 225 (Fla. 4th Dist. Ct. App. 1994) (citing Operation Rescue v. Women’s Health Ctr., Inc., 626 So. 2d 664, 674–75 (Fla. 1993)).

and are therefore overbroad or overinclusive.\textsuperscript{136} However, jurisdictions that have dealt with this attack have concluded, “the overbreadth doctrine applies only if the legislation is applicable to conduct protected by the First Amendment, which category does not include the ownership of dogs.”\textsuperscript{137} Additionally, in \textit{Colorado Dog Fanciers, Inc. v. Denver},\textsuperscript{138} the court said that an overbreadth challenge could not be used to attack the statute, as it was not guaranteed by the First Amendment.\textsuperscript{139} Thus, relying on what other jurisdictions have concluded, an attack that a breed specific ordinance is over inclusive or overbroad would not have a good chance of surviving in Florida.

\textbf{IV. Pit Bulls as a Breed}

\textbf{A. Characteristics}

There are actually two breeds classified by the AKC, and one by the UKC, that are known as pit bulls. It is a common conception that pit bulls have very strong jaws that can exert almost 2000 pounds of pressure in one bite.\textsuperscript{140} They are also known for their determination in not releasing their jaws once they bite.\textsuperscript{141} It is also alleged that pit bulls are unpredictable and

\textsuperscript{136} See Colo. Dog Fanciers, Inc. v. City and County of Denver, 820 P.2d 644, 645 (Colo. 1991). The Court held “[t]he dog owners ... assert[ion] that the city ordinance treats all pit bulls and substantially similar dogs as inherently dangerous and is, therefore, unconstitutionally overbroad . . . is without merit.” \textit{Id.} at 650. \textit{See also} State v. Robinson, 541 N.E.2d 1092, 1097 (Ohio Ct. App. 1989) (holding that “[t]he statutes [regulating pit bulls] are neither vague nor overbroad and do not violate appellant’s constitutional due process protections”); Am. Dog Owners Ass’n v. City of Yakima, 777 P.2d 1046, 1048 (Wash. 1989) (holding that a local “ordinance [was] constitutional even though some inoffensive pit bulls might be banned”); and Vanater v. Vill. of S. Point, 717 F.Supp. 1236, 1246 (S.D. Ohio 1989) (holding that a local “[o]rdinance [was] not overbroad as drawn”).


\textsuperscript{138} 820 P.2d 644, 650 (Colo. 1991).

\textsuperscript{139} \textit{Id.} at 650.

\textsuperscript{140} Graham, supra note 9 (stating “[a] 55-pound pit bull bites with the force of 1,800 pounds per square inch—twice the force of a German shepherd or Doberman. Its jaws and teeth are designed so that the dog can clamp onto an object with its front incisors while chewing with its back molars.”).

\textsuperscript{141} \textit{See, e.g.,} Sullivan, supra note 135, at 283.
inherently vicious. It has been said that "Pit Bull Dogs have a greater propensity to bite humans than all other breeds...[and] that the Pit Bull is infinitely more dangerous once it does attack." Because of their strength and determination, pit bulls have been exploited by drug dealers and others who use them as guard dogs.

However, despite their maligned reputation, pit bull advocates insist that the conceptions about pit bulls are false. The American Kennel Club, for example, believes that American Staffordshire Terriers are good pets for children. The AKC similarly encourages ownership of Staffordshire Bull Terriers, maintaining that they have a good temperament. The American Temperament Test Society, an organization that tests the temperament of different breeds of dogs, has rated pit bulls as having a better temperance than many other breeds of dogs.

142. Compare MIAMI-DADE COUNTY, FLA., CODE § 5-17 (1999) (stating that pit bulls have an "inbred propensity to attack other animals"), with Price, supra note 7 (quoting Stephanie Shain, director of outreach for the Washington, D.C.-based Humane Society of the United States: "the breed is not an accurate indicator if a dog is going to be aggressive or not").

143. Peters, 534 So.2d at 764.

144. See, e.g., Graham, supra note 9.

145. "Over the past 50 years, careful breeding has produced today's American Staffordshire Terrier who is affectionate, reliable, and an especially good dog for children. The American Staffordshire Terrier is a happy, outgoing, stable, and confident dog who makes a wonderful family pet." AMERICAN KENNEL CLUB, AMERICAN STAFFORDSHIRE TERRIER DESCRIPTION, at http://www.akc.org/breeds/recbreeds/amstaff.cfm (last visited June 27, 2002).

146. AMERICAN KENNEL CLUB, STAFFORDSHIRE BULL TERRIER DESCRIPTION, at http://www.akc.org/breeds/recbreeds/stbult.cfm (last visited June 27, 2002). "Staffordshire Bull Terriers are gentle, affectionate, trustworthy, and loyal." Id. "From the past history of the Staffordshire Bull Terrier, the modern dog draws its character of indomitable courage, high intelligence, and tenacity. This, coupled with affection for its friends, and children in particular, its off-duty quietness and trustworthy stability, makes it a foremost all-purpose dog." Id. "The Staffordshire Bull Terrier has great affection for people." Id.

147. "The American Temperament Test Society, Inc. (ATTS) is a national not-for-profit organization... for the promotion of uniform temperament evaluation of purebred and spayed/neutered mixed-breed dogs." AMERICAN TEMPERAMENT TEST SOCIETY, INC., GENERAL
B. Illegal Dogfighting

One reason that some pit bulls may be considered vicious is that they are commonly used in illegal dogfights.\textsuperscript{149} Illegal dogfighting involves people gathering together and pitting dogs against each other to fight.\textsuperscript{150} The dogs fight until only one is left standing.\textsuperscript{151} It is a brutal, but widespread phenomenon and a popular underground ritual.\textsuperscript{152} People bet money on the fights and raise dogs specifically for the purpose of winning these fights.\textsuperscript{153} The breeders encourage and train these dogs to be vicious, often forcing them to run on treadmills and feeding them small dogs so that they learn to like the taste of blood.\textsuperscript{154} These dogs usually suffer severe abuse.\textsuperscript{155} Owners can make a significant amount of money by having dogs that are as menacing as possible, therefore they encourage these negative characteristics in their dogs.\textsuperscript{156} A man currently serving time in the Leon County jail for...
animal cruelty said, "[s]ome people do it for the money, because there is a lot of money to be made." His partner, who was also involved in dogfighting said, "I've heard of some people making as much as $40,000 to $50,000 on one fight." Although this underground practice is widespread, it is often difficult for police to break up dogfighting rings.

A secondary problem that dogfighting has caused is the theft of pit bulls. Pit bulls are often stolen and the male dogs trained to fight, while the females are used for breeding. Other stolen dogs are used for "bait." This also creates an atmosphere where the genetic lines become tainted by the encouragement of vicious propensities. Even if these dogs are rescued from their cruel conditions, they have already been trained for fighting and may come from bloodlines where viciousness was encouraged. Sadly enough, animal control officials and the Humane Society will put these dogs to sleep instead of allowing them to be adopted because they may pose a danger to people.

Even if pit bulls are banned, individuals who participate in dogfighting will likely not turn their backs on this lucrative pastime. Other dogs can be trained to be vicious or to be used for fighting. Further, the people who are already engaged in criminal behavior will not likely adhere to the provisions of a ban and will continue to illegally keep pit bulls.

There are currently animal cruelty laws that punish people who engage in dogfighting. However, the problem lies with enforcing these laws. Also, the penalties have to be significant enough to deter these participants away from this lucrative practice. If the penalty is not significant enough, or the enforcement is lax, there is not enough incentive to end this practice.

157. Id.
158. Id.
159. Id.
160. See id.; see also Kathleen Chapman, Spate of Pit Bull Thefts Leads to Arrest of Suspect, PALM BEACH POST, May 16, 2002, at 2B.
161. Bridges, supra note 149.
162. Id.
163. Id.
164. See Two Seized Pit Bulls to Be Euthanized, supra note 4 ("[t]he [seized pit bull] dogs cannot be adopted because of the violent training they received as puppies").
166. See Bridges, supra note 149 (noting that "dogfighters are insular, and rarely open their groups to strangers"). Also, the fights occur in places that authorities may not suspect, such as in the woods or in someone's home. Id.
V. THE PROBLEM WITH BANNING PARTICULAR BREEDS

A. No Clear Definition of ‘Pit Bull’

Although many courts have upheld ordinances against vagueness challenges, there is still a valid argument that definitions of “pit bull” can be confusing and hard to apply.\(^\text{167}\) When called to testify in a hearing to determine the constitutionality of the Dade County Ordinance, even the President of the AKC said “that based on looks alone he could not identify Lassie as a Collie.”\(^\text{168}\) He said that “he would have to examine the dog’s certificate of pedigree.”\(^\text{169}\) Both he and the UKC President indicated that it was difficult to say with certainty that a certain dog is a pit bull.\(^\text{170}\) This leads to a situation where people whose dogs are not registered, or who do not know exactly what type of dog they have, are not on adequate notice of what behavior (or in this case breed) is proscribed.\(^\text{171}\)

Given the difficulty in visually distinguishing what breed a dog is, one might think that testing a dog’s DNA will give a definitive answer. However this is not the case. Even scientists who study canine genetics note that there

\(^{167}\) See Am. Dog Owners Ass’n, Inc. v. Lynn, 533 N.E.2d 642, 646 (Mass. 1989). The court stated:

[T]here may, indeed, be some dogs which, because of registration, known percentage or close conformance in appearance to commonly accepted standards representative of “Pit Bull,” would be “commonly understood” to be “Pit Bulls.” The evidence . . . indicated, however, that some dogs might appear to be “Pit Bulls” yet belong to a breed “commonly understood” not to be “Pit Bulls,” and that some dogs, “commonly understood” by the owner or dog registry to be a breed “known as Pit Bull” might not appear to be “Pit Bulls,” and so escape the notice and enforcement efforts of the Lynn dog officers.

\(^{168}\) See Derr, supra note 21, at 51.

\(^{169}\) Id.

\(^{170}\) “They both testified that they could not name a dog’s breed by comparing the animal with an official standard.” Id.

\(^{171}\) Id.

Although the Dade County ordinance was upheld, the New York regulation was suspended by the state supreme court after being challenged by the AKC and other groups . . . . Ironically, nearly everyone involved with dogs recognizes these breed-specific bans as bad legislation, passed in response to hysterical media reports of fatal attacks by “pit bulls.”
is very little difference genetically between breeds.\textsuperscript{172} In light of the difficulty involved in concluding that a dog is a particular breed, ordinances that ban particular breeds are inherently vague.

B. \textit{Other Breeds Will Be Bred for Fighting}

As some municipalities banned pit bulls, Rottweilers, who have several of the same characteristics as pit bulls, became more popular.\textsuperscript{173} If one type of dog is banned, people who look for those characteristics will just encourage them in a similar type of dog.\textsuperscript{174} In a study of breeds of dogs that caused human deaths, researchers found that as pit bull-related deaths decreased in the 1990s, deaths caused by Rottweilers increased.\textsuperscript{175} Presently, Rottweilers top the list of dogs that cause the most fatalities.\textsuperscript{176} Despite an initial drop in total number of dog bite-related fatalities, the number of casualties actually seems to be steadily increasing after more pit bull bans were enacted.\textsuperscript{177} This phenomena seems to support the theory that people who are determined to have a vicious dog will raise a vicious dog, regardless of whether or not pit bulls are banned.\textsuperscript{178} Therefore, instead of focusing on banning a particular breed, it would be more effective to focus on regulating the behavior of dog owners.\textsuperscript{179}

\begin{quote}
  \textsuperscript{172} See Derr, supra note 21, at 52 (stating “in a comparison of two American Staffordshire terriers with a whippet, one terrier appeared more closely related to the whippet than to the other terrier”).


  \textsuperscript{175} See Sacks, supra note 173, at 839; see also Sherman, supra note 174 (stating “[b]etween 1981 and 1990, pit bulls were involved in 43 dog bite-related fatalities while Rottweilers had only six. However, between 1991 and 1998, Rottweiler cases jumped to 33 while pit-bull killings dropped to 21.”).

  \textsuperscript{176} Sacks, supra note 173, at 837.

  \textsuperscript{177} \textit{Id.}

  \textsuperscript{178} See Sherman, supra note 174 (noting “Dr. Randall Lockwood, canine behavior specialist and vice president for research and educational outreach for the Humane Society in Washington, D.C., said... the new fighting dog of choice could be the Presa Canario—the dogs that killed Diane Whipple in January 2001 in San Francisco.”).

  \textsuperscript{179} See AMERICAN KENNEL CLUB, \textit{BREED-SPECIFIC LEGISLATION IN MILWAUKEE} (Jan. 24, 2002), at http://www.akc.org/love/dip/legislat/Milwaukee.cfm. “The American Kennel Club believes that dog owners should be responsible for their dogs and that laws should impose appropriate penalties on irresponsible owners. In order to be effective, such
C. Excludes Dogs That May Be Dangerous and Includes Dogs That Are Not

Municipalities seem to ban pit bulls because they believe that they are the primary source of dog attacks. However, the ineffectiveness of the bans may leave citizens with a false sense of security. For example, the dogs that attacked and killed Diane Whipple in January 2001 were Presa Canarios. These dogs are not even on several lists of "dangerous dogs" that insurance companies have formulated. Experts agree that there are a number of factors that contribute to whether a dog will be vicious or not. Furthermore, pit bull owners often insist that their dogs are not vicious.

Special precautions should be taken for dogs that pose a threat to humans or other animals. However, the criteria for determining that a dog is "dangerous" should be, as provided for in Florida Statute section 767.12, based on whether a dog, regardless of breed, has ever attacked or bitten a person or other animal. Owners who properly train their dogs should not be punished because of those who abuse their pets.

D. Not an Effective Means of Solving Dog Bite Problem

It should be noted that most courts that decided that bans are constitutional did so before there was significant time to analyze the effects of such bans. Therefore, they deferred to the judgment of the respective govern-
ments involved and accepted their findings as sound. However, in the years after breed-bans were first enacted, data shows that the number of dog bites have actually increased.\footnote{186} Furthermore, there is no scientific evidence to prove that breed-specific bans are effective.\footnote{187} On the contrary, the number of dog bite-related deaths have increased since bans were first enacted, which indicates that they are not effective.\footnote{188} Therefore, if the bans are not effective, they are not a rational means for achieving a governmental interest, and subsequently are not constitutional.

E. **Opens Pandora's Box**

The pit bull is not the only type of dog that has been the target of bans. As their popularity increased, Rottweiler bites became more prevalent and therefore may also be targeted.\footnote{189} If Rottweilers can be banned, then German Shepherds, Great Danes, or Golden Retrievers might be next. There is nothing to stop a municipality that bans one breed from continuing to ban different breeds. Furthermore, the banning of one breed makes it likely that another will be banned, as irresponsible owners choose another dog to use for fighting or otherwise encourage vicious tendencies.\footnote{190} Also, the likelihood that specific breeds will attack and others will not is negated by the fact that even unlikely dogs might bite or kill. In 2000, a Pomeranian,\footnote{191} which is generally considered to be a harmless dog, killed a baby.\footnote{192} Since local governments are given significant leeway to regulate dogs, under the provisions of House Bill 839, municipalities could conceivably ban any dog.

\footnote{186}{Sacks, supra note 173, at 837.}
\footnote{187}{Id. at 839–40.}
\footnote{188}{See discussion infra note 173.}
\footnote{189}{See Sacks, supra note 173, at 837.}
\footnote{190}{See discussion infra Part IV.B.}
\footnote{191}{See AMERICAN KENNEL CLUB, POMERANIAN DESCRIPTION, at http://www.akc.org/breeds/recbreeds/pomer.cfm (last visited June 27, 2002). The Pomeranian is described as:

[A] compact, short-backed, active toy dog. He has a soft, dense undercoat with a profuse harsh-textured outer coat. His heavily plumed tail is set high and lies flat on his back. He is alert in character, exhibits intelligence in expression, buoyant in deportment, and is inquisitive by nature. The Pomeranian is cocky, commanding, and animated as he gait. He is sound in composition and action.

Id. Further, the average Pomeranian weighs in at a mere three to seven pounds, much less than the average pit bull. See id.

192. See Lacitis, supra note 14.
This gives too much power to local governments to ban whatever breed is popularly deemed the most dangerous at a given point in time.

VI. ALTERNATIVES TO BREED-SPECIFIC LEGISLATION

Although these recent attempts to ban specific breeds have failed, they continue to be an issue. Given that breed-specific legislation is not effective and raises constitutional concerns, more effective alternatives need to be explored. There are several other things that legislators and municipalities can do to minimize the number of dog bites that occur.

A. Training

Pit bulls are strong dogs that have the ability to cause damage if they bite. However, the likelihood that they will bite is significantly lessened if they have proper training. Even a dog that has been treated improperly can be trained to be a well-adjusted dog. For example, animal trainer Vicky Hearne rescued a pit bull that was to be destroyed by animal control. Authorities had given up on him, but Hearne trained him so that he eventually scored high on a temperance test. Hearne insists that pit bulls are not inherently bad dogs and that with proper training, they can make good pets.

There are currently no regulations that require dog owners to take their dogs to obedience school. People often do not know how to relate to and properly treat their dog. Even if a dog owner does not have malicious intentions, they may lose control over the dog or inadvertently condone errant behavior in the dog. It is imperative for owners to understand how to properly handle their dog.

193. See discussion infra note 173.
195. See generally, Foote, supra note 2, at 63–66 (discussing how animal trainer Vicky Hearne rescued and successfully rehabilitated a pit bull who was to be euthanized).
196. Id.
197. Id.
198. Id.
199. Id.
200. Foote, supra note 2 (discussing animal trainer Vicky Hearne’s theories on effective and ineffective methods for training dogs).
201. See Price, supra note 7.
Educating dog owners can benefit both dog owners and insurance companies. For example, once State Farm instituted an education program for its policyholders, their dog claims significantly decreased. If other insurance companies follow this example, they might reduce the number of bites caused by all breeds, including pit bulls.

B. Crackdown on Dogfighting

One way to counter the negative characteristics often attributed to pit bulls is to more severely punish those that participate in dogfighting. Presently, there is not enough incentive for those who participate in this practice to cease doing so. Currently in Florida, the penalties for animal cruelty are codified in section 828.12 of the Florida Statutes. However, this does not adequately punish those who are involved in this practice. Gambling, theft and animal cruelty are all involved in dogfights but prosecuting these criminals has proved difficult. First, both local and state government need to recognize that there is a problem. Second, the Florida Legislature needs to enact stiffer penalties for people who engage in dogfighting. Municipalities should also allocate sufficient resources to eliminate this practice. While pit bulls appear to be the dog of choice amongst proponents of dogfighting, if pit bulls are eliminated, another breed can just as easily be trained to fight. By punishing the people who abuse pit

The Insurance Information Institute said the responsibility for a dog becoming either a menace or a well-behaved pet rests with the owner and offers these tips to help keep dogs from biting:

- Have a dog spayed or neutered. Studies show dogs are three times more likely to bite if they are not fixed.
- Socialize your dog so the dog will know how to act with people and animals.
- Discourage children from disturbing a dog that is eating or sleeping.
- Play non-aggressive games with your dog such as “fetch.” Playing aggressive games like “tug of war” can encourage aggressive behavior.
- Avoid exposing your dog to situations in which you are unsure of the dog’s response.
- Never approach a strange dog, and avoid eye contact with a dog that appears threatening.

*Id.*

202. See Shanklin, supra note 7 (noting that dog claims went from costing $76.2 million in 1997 to $73.5 million in 1999).
204. § 775.082(4)(a). Pursuant to section 775.082(4)(a), a person convicted of animal cruelty can serve up to one year in prison. *Id.*
bulls, we can help cleanse the pit bull bloodlines of vicious tendencies and at the same time prosecute the people who can easily exploit any other breed.205

C. Regulate Breeders

Dogs can be predisposed to certain traits because of their breeding.206 Because anyone with a dog can be a breeder, not all breeders are even registered or regulated. Breeders often inbreed dogs to try to promote “pure” lines, but in doing so they often encourage defective traits.207 However, even though it is against breed-specific legislation,208 the American Kennel Club has been criticized for its role in the perpetuation of irresponsible breeding practices.209 It indirectly condones inbreeding by concentrating on a dog’s appearance,210 “fail[ing] to take a stand against the puppy mills and pet stores that exploit purebred dogs,”211 and “defin[ing] purity in a breed according to an outmoded notion that is destructive of the health of the

205. See Derr, supra note 21 (noting “[t]he perpetrators are both mixed breeds and non-registered purebred animals made vicious by people. Those who illegally fight dogs today do so with animals whose bloodlines they jealously guard and maintain.” Id. at 52.
206. See id. at 52.
207. See Derr, supra note 21.
209. See Derr, supra note 21 (criticizing the AKC’s encouragement of aesthetic characteristics in dogs; arguing that inbreeding has weakened breed bloodlines and caused dogs’ health to suffer).
210. Id. at 50.
211. Id. at 50.

[The AKC defines quality in a dog primarily on the basis of appearance, paying scant heed to such other canine characteristics as health, temperament, and habits of work. Over the years this policy has led to destructive forms of inbreeding that have created dogs capable only of conforming to human standards of beauty. Many can no longer perform their traditional tasks – herding, tracking, hunting – while more than a few cannot live outside a human-controlled environment.]

Id.

[The AKC] will neither refuse to register those animals – although many dogs, produced and sold under inhumane conditions, are of questionable pedigree and genetic fitness—nor cooperate with authorities seeking to regulate them. The result has been a decline, which even the AKC recognizes, in the quality of the animals that nearly 500,000 Americans buy from retailers each year.

Id.
dogs.” The AKC should educate breeders and cooperate with authorities to identify and report people who engage in detrimental breeding practices.

D. Owner Liability

Under the common law, dog owners faced liability only if they had knowledge that their dog was likely to bite. Today in Florida, dog owners face civil liability for any injuries caused by their dogs. Section 767.13 of the Florida Statutes provides guidelines for the penalties that an owner might incur as a result of their dog’s behavior. For example, “[i]f a dog that has previously been declared dangerous attacks or bites a person or a domestic animal without provocation, the owner is guilty of a misdemeanor of the first degree,” which is punishable for up to one year in prison. However, if a dog’s owner knew that his dog was vicious but did not take

212. Id.
Under the common law rules, the keepers of a dog were not strictly liable for harms caused by the dog unless they knew of the animal’s abnormal propensity to cause harm. But statutes and ordinances often contribute to much larger liabilities for dog owners or keepers. Some statutes, for example, provide expressly or by implication that the owner of a dog is liable for a bite regardless of whether the dog was vicious or known to be vicious, so long as the plaintiff was in a public place where she could lawfully be. Ordinances and leash laws potentially imposing liability are also common. ... Although the statutes usually leave room for defenses based upon provocation or trespass by the plaintiff, the effect is that in many instances, an unconditional strict liability is imposed for dog bite injuries.

Id. (internal citations omitted).

214. FLA. STAT. § 767.04 (2001). This section provides:
The owner of any dog that bites any person while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of the dog, is liable for damages suffered by persons bitten, regardless of the former viciousness of the dog or the owners' knowledge of such viciousness. However, any negligence on the part of the person bitten that is a proximate cause of the biting incident reduces the liability of the owner of the dog by the percentage that the bitten person’s negligence contributed to the biting incident. ... However, the owner is not liable, except as to a person under the age of 6, or unless the damage are proximately caused by the negligent act or omission of the owner, if at the time of any such injury the owner had displayed in a prominent place on his or her premises a sign easily readable including the words “Bad Dog.” The remedy provided by this section is in addition to and cumulative with any other remedy provided by statute or common law.

Id.

215. § 767.13.
216. Id.
217. § 775.082(4)(a).
reasonable precautions, that owner could be "guilty of a misdemeanor of the second degree," and is punishable for up to sixty days in prison. Lastly, "[i]f a dog that has previously been declared dangerous attacks and causes severe injury to or death of any human, the owner is guilty of a felony of the third degree," and can face up to five years in prison. Pursuant to these sections, an owner is responsible for paying the fees incurred by their dog while it is confined by animal control.

VIII. CONCLUSION

Dog bites may be a serious problem in the United States, but banning specific breeds is not an effective method for controlling the problem. Due process requires that government restrictions be rationally related to a legitimate governmental objective. Protecting citizens is a legitimate governmental objective, and restrictions on dogs can be rationally related to that legitimate objective. However, the ineffectiveness of banning particular breeds negates the theory that it is a rational means of resolving the problem. Therefore, with its use, there is a gap between the government’s objective and the means to achieve it. Since courts defer to the findings of a legislature, these findings must be reexamined if they are purported to support breed bans. Given the ineffectiveness of breed-specific bans, courts should not consider them to be rational.

Although there is case law to the contrary, the definitions used by ordinances that ban pit bulls are inherently vague. Given the difficulty in determining what breed a dog is, the ordinances often do not give owners adequate notice of whether or not their dog is covered. When a veterinarian or animal control worker is called upon to determine whether or not a dog is a pit bull, it leaves dogs at the mercy of a subjective, unreliable method. Furthermore, statutes banning a particular breed are both overinclusive and underinclusive. Statutes pertaining to all dangerous dogs are a more effective and fair method of dealing with potentially vicious dogs.

Given the inherent problems with breed-specific legislation, alternatives to its use, both legislative and non-legislative, should be explored and implemented. In order to curb the negative effects of illegal dogfighting, there should be harsher penalties in place for offending participants.

218. § 767.13(2).
219. § 775.082(4)(b).
220. § 767.13(3).
221. § 775.082(3)(d).
222. § 767.13(1)–(3).
Municipalities should also be more proactive in eliminating this practice. While the legislature and cities can both be effective in mitigating the dog bite problem, it is ultimately the responsibility of dog owners to take necessary precautions to make sure that their dog, regardless of breed, is a safe and happy member of the community.
There Is a New Trend of Corporate “Death Care:"¹
Let the Buyer Beware

Ashley Hunt *

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I. INTRODUCTION

Recently, funeral and cemetery related scandals in Georgia, Florida, Tennessee, and California have caught the attention of the media, the Federal Government, and the American public.² This attention has led to

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¹ The AARP defines the “deathcare industry” as “the array of providers of funeral and burial goods and services, such as funeral directors, cemeterians, and third-party sellers.” SHARON HERMANSON, AARP PUBLIC POLICY INSTITUTE, THE DEATHCARE INDUSTRY 1 (2000), available at http://research.aarp.org/consume/ib44_deathcare.pdf.

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² Mary Deibel, Senate Hears Corpse Issues Role in Funeral Industry Studied, AUGUSTA CHRON., Apr. 27, 2002, at D5.
investigations into the expansive funeral industry.\textsuperscript{3} It is estimated that nearly 2.5 million Americans died in 2001, leaving the daily toll at approximately 6,849.\textsuperscript{4} In the State of Florida alone, roughly 160,000 people die each year.\textsuperscript{5} Even though death is a natural part of life, and it happens so often around us, it is still a difficult subject for many people to talk about.\textsuperscript{6} "Those who have never had to arrange for a funeral frequently shy away from its implications . . . . Those who have acquired personal and painful knowledge of the subject would often rather forget about it."\textsuperscript{7} Because of this taboo, many Americans are probably unaware that the business of death has risen to a $25 billion industry.\textsuperscript{8} Although arguably, most Americans and small independent funeral homes have not entertained thoughts of making huge sums of money from another man's death, a few large corporations have.\textsuperscript{9} Corporate chains, predominately "the Big Three," Loewen Group, Service Corporation International, and Stewart,\textsuperscript{10} have now become the owners of one-fifth of America's 22,000 funeral homes, and at least a quarter of the 880 funeral

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\textbullet\ Georgia officials brought 266 criminal charges against Brent Marsh in connection with the discovery of 339 corpses at his Tri-State Crematory in Noble.
\textbullet\ California prosecutors charged Riverside crematory operator Michael Francis Brown with 156 counts for unauthorized sale of body parts for medical research through another Brown-owned business, Bio-Tech Anatomical.
\textbullet\ Tennessee authorities investigated complaints that bone fragments and casket parts were found at a fresh grave at Mount Carmel-Hollywood Cemetery in Memphis.
\textbullet\ Florida Authorities probed charges that mortuary students at Lynn University in Boca Raton embalmed people in violation of family preferences and religious practices.
\textbullet\ Reports of bodies buried in the wrong graves and scattered in nearby woods at two Menorah Gardens & Funeral Cemeteries in Florida brought in state investigators atop class-action suits against cemetery owner Service Corp. International.

\textit{Id.}

3. \textit{Id.}
7. \textit{Id.}
9. \textit{Id.}
10. \textit{Id.}
homes in the State of Florida. These corporate chains have gained this share by craftily purchasing many of the family owned “mom and pop” funeral homes around the country, often paying up to thirteen times what they are worth, and retaining customers by deceptively continuing to operate under the previous owner’s name. One would think that since consolidation allows many funeral homes owned by the same corporation to share hearses, share staff, and embalm bodies at a central processing unit, that the savings would be passed on to the consumer in the form of cheaper prices for funerals and funeral goods. Nevertheless, this has not been the case. Due to increased pressures by management, prices have been on the incline.

In the last three years alone, funeral costs have risen three times faster than the rate of inflation. Taking a back seat only to a house and a car, a funeral will most likely be the third largest purchase made by most Americans, with an average cost of $5,000. However, if this purchase is made from one of the “big national chains” rather than a small independent funeral home, the price is likely to be over two thousand dollars more. When confronted, one large corporation justified the large discrepancy in prices by analogizing the sale of funerals to that of an automobile stating, “It’s like the difference between a Cadillac and a Ford.”

The rising cost of funerals and the increased pressures to sell funeral services and goods has led to creative ways to increase profits. Just as any other business that offers shares of stock to the public, there are always pressures to increase revenues and keep investors happy. These pressures

11. John Tuohy, Dying in Florida: Independents vs. Chains, FLA. TODAY, Apr. 30, 2002, at 1. Service Corporation International currently has the biggest share of the market with 4000 plus facilities. Id. The Loewen Group of British Columbia is the second largest, owning 920 funeral homes. Id. Stewart Enterprises is the smallest of the three with only 674 funeral homes. Id.
13. Horn, supra note 8.
14. Id.
15. Id.
18. Id.
19. Horn, supra note 8.
20. See Final Arrangements, supra note 17, at 33.
have also brought about a change in the way business is done. Some of the large corporations now require that the staff working in their funeral homes meet sales quotas. Those who meet these quotas are often given special awards to recognize their accomplishments. For those not so fortunate, there may be termination. To fulfill these goals, funeral salesmen often turn to fraudulent and deceptive sales practices. These practices have had a spiraling effect on the industry, presenting independent funeral homes with the classic “sink or swim” scenario and putting pressure on them to follow these tactics in order to compete.

This article examines the current state of Florida regulations that are designed to protect consumers in the “death care” industry, and proposes solutions to those areas in which protection is lacking. Part II of this article briefly overviews the recently emerging concept of preneed funerals, and distinguishes prepaying for a funeral from preplanning a funeral by listing the benefits and dangers of both. Part III of this article overviews the current federal and state regulations that serve to protect Florida’s consumers from fraudulent and misleading practices involved in the sale of funeral goods and services. Part IV investigates three areas which are currently under regulated, and proposes changes that will better serve to protect Florida’s consumers. Part V of this article is a summary and conclusion.


23. McLachlin I, supra note 12. The Service Corporation International manual states, “[n]ew salespeople are expected to average at least $1 in pre-need sale for every ‘at-need’ dollar ... after six months, the minimum goes up to $1.50 for every $1.” Id.

24. See Final Arrangements, supra note 17, at 28; McLachlin I, supra note 12. “A former [Florida Service Corporation International Manager] said the company rewarded its top sellers, members of the ‘Million Dollar Club,’ with banquets, prizes and trips to Hawaii, Jamaica and the Bahamas.” Id.

25. McLachlin I, supra note 12. The Service Corporation International sales manual states that, “‘[f]ailure to sell a required amount of pre-need sales may result in the termination of a family service counselor, regardless of his/her at-need volume.’” Id.

26. See Horn, supra note 8. Some fraudulent and deceptive sales tactics used include borrowing guest books to obtain contact information about people who have the topic of death fresh in their minds, pursuing sales while loved ones are visiting a friend or family member’s grave, showing the deceased’s body in a cardboard box to persuade the family to buy a more expensive casket, giving expensive gifts to Intensive Care Unit nurses to entice them to contact their funeral home when a patient passes away, and paying priests money and providing them with benefits in return for the Priest’s recommendation of their funeral home’s services upon the death of a church member. Id.

27. Id.
II. PREPLAN V. PREPAY

The purchase of a funeral after a loved one's death is a unique transaction. It places a grieving consumer in a position "to make several important and potentially costly decisions under tight time constraints." Consumers can ease the burden of having to plan a funeral under the above circumstances through the use of a preneed funeral plan or a preneed funeral contract. A preneed funeral plan has been described as "any method a consumer uses to prearrange and prepay for the costs of a funeral." A preneed funeral contract is one form of a preneed funeral plan, it presents a classic "pay now—die later" scenario. The consumer meets with the funeral provider to evaluate and arrange the specific type of service and goods he or she desires and pays for these services prior to his or her death, which may be many years in advance. Prepaid funerals are not a new concept, having been around since the 1940s, but they did not become heavily marketed or sold until the 1980s when three large chains emerged in the industry. It is now common for many funeral industry associations and consumer protection groups to encourage families to arrange their funerals in advance.

Nevertheless, consumers thinking about purchasing a funeral in advance should proceed with great caution. The preneed funeral market has become a booming business. The volume of money that is currently being held in preneed trusts alone exceeds $25 billion, with unknown amounts of additional money held by other funding mechanisms. Further, many of the large corporations have employees who specialize in selling preneed funerals

29. Id.
31. Id.
32. Id. (citations omitted).
33. Id.
34. Final Arrangements, supra note 17, at 32.
36. See Lisa Carlson, Consumer Fraud Affecting the Elderly, ATLA ANN. CONVENTION REFERENCE MATERIALS, (July 2000).
and work on commission. A recent survey revealed that “two in five persons age 50 and older had been contacted about the advance purchase of funerals (43%) or burial goods and services (39%).”

One advantage to prepaying for a funeral is that it is a way to provide “peace of mind” for loved ones, by removing the stress and decisions that are involved with planning a funeral. Another major motivator for purchasing a preneed funeral is the possibility of potential savings that may result due to increasing prices for goods and services or inflation. Medicaid applicants may benefit by prepaying for funeral arrangements because money spent on prepaid funeral arrangements is not used as a factor to determine Medicaid eligibility.

However, there is also a downside to paying for a funeral in advance. Financially, prepaid funerals are considered to be a lousy investment. Further, there is always a chance that the purchaser may move away or get divorced. The funeral home could be sold before the purchaser’s death. In the early years one funeral and memorial society promoted preplanning of a funeral, yet warned against prepaying for them on their bulletin stating: “It always pays to plan ahead. It rarely pays to pay ahead.”

III. CURRENT REGULATIONS OF THE FLORIDA “DEATH CARE” INDUSTRY

To gain a better understanding of the need for change in the Florida “death care” industry, it is important to discuss the current consumer oriented regulations and laws that have an effect on it. Making a funeral purchase immediately after a loved one’s death subjects consumers to vulnerability due to the expense and emotionally charged atmosphere.
involved. Due to this increased vulnerability, both the federal and the state government regulate the industry.

A. Federal Trade Commission Funeral Rule

In 1982, a plan was envisioned to “lower existing barriers to price competition in the funeral market and to facilitate informed consumer choice.” Two years later this vision became a reality when the Federal Trade Commission (FTC), in an effort to better protect consumers, promulgated the Funeral Rule. Being careful to minimize the intrusion on the industry’s day-to-day operations, the commission set out to eliminate many of the deceptive practices in the funeral industry. Given the “force and effect of law,” the rule establishes preventative requirements that combat unfair or deceptive acts or practices that may be used by funeral providers while selling funeral goods or services. For the purposes of this article, these requirements have been categorized into two groups: 1) mandatory disclosures, and 2) misrepresentations made to consumers about funeral goods or services.


49. Id.


54. 16 C.F.R. § 453.8 (2002). The Funeral Rule defines a funeral provider as “any person, partnership or corporation that sells or offers to sell funeral goods and funeral services to the public.” § 453.1(i). The Funeral Rule defines funeral goods as “the goods which are sold or offered for sale directly to the public for use in connection with funeral services.” § 453.1(h). The Funeral Rule also defines funeral services as “any services which may be used to: (1) Care for and prepare deceased human bodies for burial, cremation or other final disposition; and (2) arrange, supervise or conduct the funeral ceremony or the final disposition of deceased human bodies.” § 453.1(j).
1. Mandatory Price Disclosures

The Funeral Rule provides that consumers receive accurate prices on products they are inquiring about before any discussion can begin about the actual purchase of the funeral goods or services. The funeral provider must furnish a price list reflecting the accurate retail prices of the particular items being inquired about, or they must supply a general price list of the goods and services that are offered. Even if the conversation regarding the prices of goods or services takes place over the telephone, the funeral provider is still obligated to disclose the accurate prices. Additionally, the Funeral Rule requires that before the embalming of a body, funeral providers inform and receive approval from the family before the body may be embalmed; this prevents consumers from having the bodies of loved ones embalmed against their will. Also, if the consumer purchases cash advance items, funeral providers cannot charge them more than what was actually paid for these items without revealing this to the consumer.

2. Misrepresentations

The Funeral Rule also prohibits funeral providers from participating in many of the deceptive practices that have become associated with the industry over the years. Funeral providers may no longer deceptively represent that goods or services will delay decomposition for an indefinite period of time, or that the protective features included with a casket will protect the deceased's body if such is not the case. Further, funeral providers may not create an illegal tying agreement by placing a consumer's ability to purchase one good or service on the purchase of another when it is not necessary to do so, but rather, funeral providers must disclose to

55. § 453.2(a).
56. § 453.2(b)(2)(i) (requiring a casket price list); § 453.2(3)(i) (requiring an outer burial container price list); § 453.2(b)(4)(i)(A) (requiring a general price list.).
57. § 453.2(b)(1).
58. § 453.3(b)(2).
60. § 453.3(f)(1). The Funeral Rule defines a cash advance item as “any item obtained from a third party and paid for by the funeral provider on the purchaser’s behalf.” § 453.1(b).
61. § 453.3(e)(1) (requiring funeral providers not to represent that goods or services will delay decomposition indefinitely); § 453.3(e)(2) (requiring funeral providers not to represent that caskets have protective features when such is not the case).
consumers that they can choose only the items they desire. \(^{62}\) In the past, funeral providers may have forced consumers to pay the expense of embalming by erroneously informing them the law requires it, when it does not. Under the Funeral Rule, funeral providers are obligated to notify the consumer if the law does not require embalming. \(^{63}\) If a direct cremation is to be performed, containers other than caskets must be presented as an option for consumers. \(^{64}\) Furthermore, a funeral provider may not portray that outer burial containers are required when they are not. \(^{65}\) If the law does not require outer burial containers, this information must be disclosed to the consumer. \(^{66}\) Not only must the funeral provider disclose that the law does not require embalming or an outer burial container, they must not inform customers that the law requires any good or service when it does not. \(^{67}\)

B. The Funeral Rule and Florida Law

Under the Funeral Rule all state laws affording consumer protection, at least equal to or greater than the protection offered by the FTC Funeral Rule, take precedence over the Funeral Rule if they are properly administered and enforced. \(^{68}\) Though the Funeral Rule has heightened the protection of consumers through the increase in regulations on the funeral industry, eighteen states across the country, including Florida, have taken it upon themselves to tighten these protections even further. \(^{69}\)

Two chapters of the Florida Statutes, Chapter 470 and Chapter 497, comprise to regulate the “death care” industry. \(^{70}\) The principal focus of Chapter 470 is to create a requisite level of qualification for all embalmers, funeral directors, and direct disposers, and to “provide for swift and effective

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62. § 453.4(b)(1)(i) (requiring funeral providers not to create illegal tying agreements); § 453.4(b)(2)(i)(A) (requiring funeral providers to disclose that customers may choose only those items they want).

63. § 453.3(a)(1)(ii).

64. § 453.3(b)(2).

65. § 453.3(c)(1)(i).

66. § 453.3(c)(1)(ii).

67. § 453.3(d)(1).

68. § 453.9(b).

69. HERMANSON, supra note 1, at 7-8, available at http://research.aarp.org/consumer/ib44_deathcare.pdf. Other states that have adopted the FTC Rules in whole or in part are Arizona, Georgia, Maine, Minnesota, Nevada, New Jersey, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, and Wisconsin. Id.

70. FLA. STAT. chs. 470, 497 (2001).
discipline for those practitioners who violate the law." Chapter 497, more commonly known as the "Florida Funeral and Cemetery Services Act," pertains to cemetery companies and sellers of preneed funeral services and goods. It was created with the understanding that consumers of preneed funeral services or merchandise "may suffer serious economic harm if purchase money is not set aside for future use as intended by the purchaser and that the failure to maintain cemetery grounds properly may cause significant emotional stress."

Though these chapters focus primarily on different aspects of the industry, the common theme found throughout each is strong regulation aimed toward protecting Florida’s consumers. All of the same requirements that were established to protect consumers under the Funeral Rule are similarly required within Chapters 470 and 497 of the Florida Statutes. However, the Florida Legislature has gone beyond the scope of these minimum standards and adopted stricter requirements for those members of the "death care" industry who conduct business in the State of Florida. To assist in the enforcement of these requirements and to monitor the industry’s day to day operations, both Chapter 470 and Chapter 497 also call for the creation of regulatory boards. Chapter 470 created the Board of Funeral Directors and Embalmers, and Chapter 497 created the Board of Funeral and Cemetery Services.

1. Mandatory Disclosures

One of the areas in which the Florida Legislature has chosen to adopt stricter requirements for those members of the "death care" industry who operate in the State of Florida is in the amount of information that is required to be disclosed. In addition to the mandatory requirements under the Funeral Rule, Florida law requires sellers to disclose all other merchan-

71. § 470.001.
72. § 497.001.
73. § 497.005(11). A cemetery company is defined as “any legal entity that owns or controls cemetery lands or property.” Id.
74. § 497.002.
75. § 497.002(1).
77. FLA. STAT. chs. 470, 497 (2001).
78. § 470.003 (creating the Board of Funeral Directors and Embalmers); § 497.101 (creating the Board of Funeral and Cemetery Services).
79. Id.
dise and services that are available before a casket is selected. 80 Similarly, if a consumer inquires about alternatives to traditional funeral services, such as graveside service, direct disposition, or body donation without a service, the sellers are required to disclose this information to them. 81 Prior to the purchase of funeral merchandise or services, a “good faith” estimate of all fees and costs that a buyer may incur must be disclosed. 82 When making a purchase, all purchasers are to receive the seller’s policy on cancellation and refunds. 83 The signature pages of all contracts for the purchase of merchandise or services are required to disclose information about how much money is required to be placed into trust, the amount of money a customer will receive if a refund is requested, the department’s toll free hotline number, and a statement informing the customer of a thirty-day window, beginning when the contract was signed and initiated, to cancel the contract and still retain a full refund. 84

2. Misrepresentations

Another area where the standards adopted by Florida have surpassed those that are required by the Funeral Rule is in the prevention of deceptive sales tactics. Under Florida law, all caskets on display are required to be displayed in the same manner regardless of price. 85 Similarly, all caskets displayed must clearly include the price on the casket itself, or if presented in a photo album or brochure, directly on the picture in which it is presented. 86 All representations that goods or services are for sale must be “bona fide” offers. 87 Discouraging a consumer’s selection of a funeral good or service in order to entice them to purchase a more expensive good or service is prohibited. 88 Sellers may not fraudulently mislead consumers that a particular item is unavailable or that there will be a delay in obtaining it when such is not the case. 89 Making a consumer feel that it is “improper” or “inappropriate” to worry about the expense of a loved one’s funeral is

80. § 470.034(2).
81. § 470.034(4)(a)–(c).
82. § 497.333(4).
83. § 497.333(7).
84. § 497.333(8)(a)–(f).
85. § 470.033(1).
86. § 470.033(4).
87. § 470.033(2).
88. § 470.033(2).
89. Id.
prohibited. All costs that a customer may incur must be given and, if estimated, must be good faith estimates. Solicitations made after a loved one has already passed away are prohibited. The purchase of a monument may not be tied to the purchase of a grave space. Consumers may not be misled about the terms or advantages of a preneed contract. Sellers of preneed contracts may not engage in misleading or deceptive advertising. All visits by lot owners that the company requires to be made must be necessary and not for the purpose of soliciting business. Any method of solicitation that is overreaching or takes advantage of a customer’s ignorance or vulnerable state is prohibited.

3. Regulatory Boards

The Board of Funeral Directors and Embalmers, created pursuant to Chapter 470 of the Florida Statutes, is a regulatory agency within the Department of Business and Professional Regulation. This seven member board whose members serve a term of four years is comprised of funeral directors and Florida residents that are appointed by the Governor. Five of the members serving on the board must be funeral directors that are licensed in Florida. No greater than two of those five funeral directors may be in any way associated with a cemetery company. The other two members are Florida residents who have never been funeral directors and are in no way connected with any aspect of the “death care” industry. One of the two consumer members of the board must be at least sixty years of age. The board’s members are charged with “adopt[ing] rules which establish

90. Id.
91. § 497.515(3) (requiring the disclosure of all costs and fees attached to the purchase of burial rights or merchandise); § 497.333(4) (requiring that estimations must be given in good faith).
92. § 497.321(5).
93. § 497.325(1).
94. § 497.445(1)(a).
95. § 497.445(2).
96. § 497.515(1).
97. § 497.515(2).
98. § 470.003(1).
99. § 470.003(1)–(3).
100. § 470.003(2).
101. Id.
102. Id.
103. Id.
requirements for inspection of direct disposal establishments, funeral establishments, and incinerator facilities and the records directly relating to the regulated activities of the licensee to ensure compliance with the provisions of [chapter 470].\footnote{104}

The other regulatory agency that oversees the Florida “death care” industry is the Board of Funeral and Cemetery Services, which was created under the Florida Funeral and Cemetery Services Act.\footnote{105} Though the members of this board also serve a term of four years and are appointed by the Governor, its composition is different from that of the Board of Funeral Directors and Embalmers.\footnote{106} Two of the board members must be funeral directors who are licensed in Florida.\footnote{107} Two members must be owners or operators of a cemetery that is licensed in Florida.\footnote{108} The remaining three members must be residents in the State of Florida who have never been licensed funeral directors, and are in no way connected to the “death care” industry.\footnote{109} One consumer member of the board must be at least sixty years of age.\footnote{110} The board is charged with establishing requirements for the inspection of cemeteries, the adopting and enforcing of the rules, which must be published and distributed, and examining the finances of cemetery companies and preneed contract certificate holders.\footnote{111}

IV. PROBLEMS AND PROPOSED CHANGES

In many ways, Florida’s regulation of the “death care” industry provides consumers with valuable protection. However, there are still several ways in which funeral consumers are left defenseless. This section of the article explores a few of those areas that remain under regulated, and proposes solutions that will allow consumers to play on a level playing field with funeral providers.
A. Is the State of Florida "Too Trusting?"

As discussed earlier, sales of preneed funerals have seen a significant increase in growth over the last twenty years.\(^{112}\) This section discusses Florida's current regulations of preneed funeral contract trust funds, the most common way that the increased sales have been funded.\(^{113}\) Recognizing "that purchasers of preneed burial rights, funeral or burial merchandise, or funeral or burial services may suffer serious economic harm if purchase money is not set aside for future use as intended by the purchaser," the Florida Legislature found it necessary to implement regulations for money received on preneed contracts.\(^{114}\) Current regulations for the state of Florida require sellers of preneed funerals to deposit in the service trust fund: 70% of the money received for all services they are to provide and facilities they have agreed to rent; 100% of the money received on all cash advance items sold; and the greater amount of 30% of the purchase price, or 110% of the wholesale cost to the retailer, of merchandise sold.\(^{115}\)

To many people, a requirement that money received on all preneed funeral contracts be placed into a trust fund may appear as a safe and efficient way to prearrange a funeral. This was probably the understanding of the over 80,000 purchasers of preneed funerals who in recent years learned that their money had, in reality, been removed from the merchandise trust fund that was set up to ensure the payment of their funeral.\(^{116}\) In September of 2000, two of the largest funeral providers in Florida, Service Corporation International and Stewart International, encountered serious financial problems.\(^{117}\) They petitioned the Florida Board of Funeral and Cemetery Services for permission to remove preneed merchandise trust money that had been placed into merchandise trust funds by their compa-

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112. Final Arrangements, supra note 17, at 32.
113. Frank, supra note 30, at 7.
114. § 497.002(1).
115. § 497.417(1).
116. Funeral Firms to Tap Prepaid Cash the State Ok'd Two Major Companies' Using $84 Million Held for 80,000 Floridians, to be Replaced by Surety Bonds, ORLANDO SENTINEL, Sept. 26, 2000, at C1 [hereinafter Funeral Surety Bonds].
117. SCI and Stewart Raise Florida Cash by Raiding Consumers' Preneed Trusts, FUNERAL MONITOR, Oct. 9, 2000, at 1 [hereinafter SCI and Stewart Preneed Trusts]. Service Corporation International had a debt of 3.8 billion dollars and was given a negative outlook by Moody's. Id. Similarly, Stewart had a debt of 963 million dollars. Id. Prime Succession had withdrawn nine million dollars and went on to file for chapter eleven bankruptcy. Id. at 3.
nies. By a board vote of five to two, this request was granted and the companies withdrew eighty-four million dollars that had been set aside to cover the costs for merchandise in over thirty funeral homes and cemeteries across the state. The only condition on withdrawing the money was that the providers purchase surety bonds, which in the event the funeral providers were unable to fulfill their obligations, would cover the cost of the merchandise.

As fraudulent as paying off debts with money that consumers believe is being held in a trust may seem, at the time these actions were taken, they were perfectly legal. This statute has since been amended, but loopholes to withdraw money from preneed trust funds still remain.

For those sellers of preneed funeral goods or services who qualify, Florida law provides alternatives to establishing a trust fund under section 497.417 of the Florida Statutes. These include performance bonds and payment bonds. All certificate holders may annually file a written request to the Board of Funeral and Cemetery Services to purchase a performance bond from a surety company as an alternative to a trust fund. The bond must be "conditioned in such a manner to secure the faithful performance of all conditions of any preneed contracts for which the certificateholder was required to have covered by the amount of the bond." In essence, the bond guarantees that all contracts entered into by the seller will be performed.

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118. *Funeral Surety Bonds*, supra note 116; *SCI and Stewart Preneed Trusts*, supra note 117 at 2; Shelby Oppel, *Funeral Home Giants Seek Cash*, ST. PETERSBURG TIMES (Fla.), Sept. 23, 2000, at 1B.

119. *See* *Funeral Surety Bonds*, supra note 116.

120. *SCI and Stewart Preneed Trusts*, supra note 117, at 1; *Funeral Surety Bonds*, supra note 116; Oppel, supra note 118 (states that the number of funeral homes was thirty).

121. *SCI and Stewart Preneed Trusts*, supra note 117, at 1; *Funeral Surety Bonds*, supra note 116; Oppel, supra note 118.


124. *Id.*

125. § 497.423 (allowing certificate holders to file performance bonds); § 497.425 (allowing certificate holders to file payment bonds); Fla. S. Comm. on Banking & Ins., CS for SB 1610 (2001) Staff Analysis (April 16, 2001) (on file with comm.) [hereinafter S. Comm. SB 1610 Staff Analysis].

126. § 497.423(1)–(2).

127. § 497.423(5).

128. S. Comm. SB 1610 Staff Analysis, *supra* note 125.
Performance bonds are very difficult to acquire, and would most likely only be given to guarantee the performance on tangible goods like mausoleums.  

Another option that is available for some large companies to remove money from trusts created pursuant to section 497.417 of the Florida Statutes is a modified version of the same mechanisms both Service Corporation International and Loewen utilized in 2000. All certificate holders who have as of July 1, 2001 a total bonded liability of greater than $100 million may file a written request to the Board of Funeral and Cemetery Services to purchase a “payment bond” from a surety company as an alternative to trust funds for all contracts written prior to December 31, 2004. The payment bond must be “in an amount not less than the aggregate value of outstanding liabilities on” all goods or services that have been contracted for, but not delivered. Payment bonds are easier to obtain than performance bonds because the company issuing them is only held financially responsible for any goods or services contracted on, but do not have to guarantee that the funeral service is actually carried out.

Florida’s current regulatory standard, which allows for the surety bond option rather than 100% trust protection, has been argued as being bad policy. The Florida Legislature “must give thought to the unthinkable.” With the recent corporate scandals like Enron and WorldCom, it is becoming apparent that corporations can manipulate a balance sheet to mislead others. Without 100% trust protection, the only guaranteed source that Florida consumers currently have, which offers some form of protection to purchasers of preneed funerals’ is the Preneed Funeral Contract Consumer Protection Trust Fund. Regulated and administered by the Board of Funeral and Cemetery Services, this fund is maintained by predetermined deposits of money that are required to be paid on each preneed contract sold. Money that accrues in the fund may be used to

129. Interview with Bill Stephenson, Licensed Funeral Director, in Leesburg, Fla., (July 1, 2002).
130. § 497.425(1)(a).
131. Id.
132. Interview with Bill Stephenson, supra note 129.
133. See Funeral Surety Bonds, supra note 116.
134. Id.
135. See generally Eric Hanson & Mary Flood, Ex-Enron Exec Found Shot Dead, Houston Chron., Jan. 26, 2002, at 1; Jared Sandberg et al., Inside WorldCom’s Unearthing of a Vast Accounting Scandal, WALL ST. J., June 27, 2002, at Al (deceptive accounting principles of large telecommunications company led to the companies bankruptcy).
136. § 497.413.
137. § 497.413(1)–(2).
provide restitution to any preneed contract purchaser or owner whose
preneed contract was breached. However, this fund currently only has
between six and eight million dollars in it. If another withdrawal the
magnitude of Service Corporation International’s and Loewen’s were to take
place, and those companies and the companies backing them were unable to
perform on their promises, these funds would not be enough to cover the
losses. Florida should follow the lead of the states in this country that
require 100% of the money received on a preneed contract to be placed into
trust and remain there until the contract is performed. The only guarantee
consumers have for protecting their full investment in preneed contracts is to
require 100% trust protection without removal until contract performance.

B. Disclosure of Ownership: Never Judge a Book by its Cover

In a time when it has become customary for “the Big Three” to acquire funeral homes and cemeteries across the country, very few consumers are actually aware when a change of ownership has occurred between the trusted local family and the large corporation. Properties are

138. § 497.413(6)-(7).
139. Telephone Interview with Funerals and Cemetery Hotline, Florida Comptrollers
Office (July 5, 2002).
140. See SCI and Stewart Preneed Trusts, supra note 117 at 3.
141. Frank, supra note 30, at 26 (noting statutes from states that have chosen to require
100% trust protection include: ALASKA STAT. § 45.50.471(b)(24) (Michie 2000); ARK. CODE
ANN. § 23-40-114(a) (Michie 2000 & Supp. 2001); ARIZ. REV. STAT. ANN. § 32-1391.05(A)
(West 2001); CAL. BUS. & PROF. CODE § 7735 (West 1995 & Supp. 2002); CONN. GEN. STAT.
ANN. § 42-202(a) (West 2000); DEL. CODE ANN. tit. 5, § 302(a) (1993); IND. CODE ANN. § 30-
2-9-1(a) (Michie 2000); KAN. STAT. ANN. § 16-301 (1995); KY. REV. STAT. ANN. §
367.934(1) (Michie 2001); LA. REV. STAT. ANN. § 861(A)(1)(a) (West 2000); ME. REV. STAT.
ANN. tit. 32 § 1401(1)(A) (West 1999 & Supp. 2001); MINN. STAT. ANN. § 149A.97(2) (West
STAT. ANN. § 59A-49-6(A) (Michie 2000); N.Y. GEN. BUS. LAW § 453(1)(a) (McKinney 1996
& Supp. 2002); OHIO REV. CODE ANN. § 1111.19(B) (Anderson 1996 & Supp. 2001); R.I.
WIS. STAT. ANN. § 445.125(1)(a)1 (West 1998 & Supp. 2001)). Id. at n. 143. Statutes
updated by author to reflect current law.
142. Horn, supra note 8.
143. John McKinnon, Consolidation in Death Care Seen as Costly, FlA. J., Oct. 28,
1998, at Fl. Sen. Donald Sullivan thinks there is a need for legislation regarding disclosure of
ownership, because “some of the facilities are deliberately disguising their ownership, so that
consumers will think funeral homes or cemeteries are still family-owned and operated.” Id.
purchased silently and physical appearances are rarely changed, particularly the local family name on the sign.\footnote{144} Most often, the new corporate owner follows standard operating procedures specifically to avoid drawing the attention of the community.\footnote{145} The corporate goal of course is internal changes that will overwhelmingly affect the local consumer.\footnote{146} Currently, it is perfectly legal in Florida for funeral home owners to operate under the previous family-owned name without having to disclose actual ownership.\footnote{147}

One way consumers may be able to distinguish a change in ownership is by examining the operational structure of each facility.\footnote{148} Large corporations often operate under a profit driven price structure, resulting in prices much higher than most “mom-and-pop” businesses.\footnote{149} In a survey conducted by one town’s local newspaper, corporations often charged up to sixty two percent more than many of the independent homes.\footnote{150} Why are the corporately owned facilities so fixated on nondisclosure of true identity? In the 1990s when many corporations began to go on buying sprees purchasing properties all over the country, they were sometimes paying up to thirteen times the amount of actual worth.\footnote{151} Many funeral businesses in operation for several generations struggled with lack of enough capital to compete and no young family member to carry on tradition.\footnote{152} The corporate financial offers were too lucrative to decline.\footnote{153} In defending the failure to disclose, corporate owners argued that much of the premium price they paid for the business was calculated by factoring in the cost of the local name and goodwill that had been established over the years.\footnote{154} Further, if

\begin{itemize}
\item 145. \textit{See id.}
\item 146. \textit{See id.}
\item 147. \textit{Id.}
\item 148. \textit{See Final Arrangements, supra note 17, at 31.}
\item 149. \textit{Id.}
\item 150. Robin Fields & Mitch Lipka, \textit{Death Inc.: In Surprising Numbers, Chains are Buying up Funeral Homes but Keeping the Names}, \textit{SUN SENTINEL} (Ft. Lauderdale, Fla.) Mar. 21, 1999, at 1A. Collecting price lists throughout Broward and Palm Beach counties, the \textit{Sun Sentinel} found on average that Loewen and Service Corporation International charge sixty-two percent more than independent homes. \textit{Id.} “[C]remation typically costs $400 more at a Loewen home and about $600 more at a SCI home than at an independent. The most basic burial averages $1,251 at an independent [home], vs. $2,026 at a Loewen mortuary and $1,800 at an SCI mortuary.” \textit{Id.}
\item 151. McLachlin I, \textit{supra} note 12.
\item 152. \textit{Id.}
\item 153. \textit{Id.}
\item 154. Corder, \textit{supra} note 144.
\end{itemize}
they were forced to disclose the corporate ownership, the consideration paid for this name and goodwill would be seriously devalued. Another justification given by the corporate owners is that if disclosure were required, both the corporations and many of the independent homes would suffer by being "robbed" of their respective values. The independents would lose the value of all the goodwill that in some cases has been passed down from generation to generation, and the corporations would in turn lose this same value of goodwill. To combat the lack of disclosure by these corporate funeral homes, some local funeral providers have actually taken matters into their own hands by placing advertisements in the local paper to inform the community of properties sold and now owned by a corporation rather than a local family.

In 1999, the Florida Senate Committee on Regulated Industries introduced a bill to resolve the issue of disclosureship. In the interest of better protecting consumers, the bill proposed to require sellers of funeral goods and services, including publicly owned corporations, to clearly disclose their ownership. If passed, all advertisements, sales to prospective purchasers, and contracts entered into would have to disclose the actual owners of the business. Further, any contract entered into without the proper disclosures would be deemed voidable, with the seller having the burden of proof. Though the Florida Legislature did not pass this legislation, several other states across the country, including Connecticut, Maine, Michigan, and Minnesota, have passed similar legislation. Connecticut made it a requirement that persons or corporations who own 10% or more of the company disclose this information by visibly displaying it on a sign inside the business and including it on all contracts. Similarly, Maine required that ownership information be disclosed on all contracts and agreements. Additionally, to protect their consumers,

155. Id.
156. McKinnon, supra note 143.
157. Id.
158. Corder, supra note 144.
160. Id. at §1(5)–(7).
161. Id. at §4(7).
162. Id. at §4(7).
164. CONN. GEN. STAT. ANN. § 20-222b (West 2002).
Michigan requires the owner's name to be displayed at the entrance of the funeral home,\footnote{Mich. Comp. Laws Ann. § 339.1809(1) (West 1992).} and consumers in Minnesota are provided the name of the owner on "all business literature, correspondence, and contracts."\footnote{Minn. Stat. Ann. § 149A.70(8) (West 1998 & Supp. 2002).} The State of Florida should follow suit and address these same issues with strong consumer protection laws.

Consumers have a right to know with whom personal business is transacted. Family members who are "in a daze, often pick [] a particular home because it . . . has a familiar name or once buried some other member of the family."\footnote{Erik Larson, 
Fight to the Death, TIME, Dec. 9, 1996.} Regulations such as the federal rules governing the Funeral\footnote{16 C.F.R. § 453 (2002).} and Florida Statutes Chapters 470 and 497\footnote{Fla. Stat. chs. 470, 497 (2002).} provide purchasers of funeral goods with the opportunity to compare prices with different sellers, but if they are unaware of the identity of the legal owner, comparing prices may serve no purpose. For example, a person living in South Florida desiring to purchase funeral goods or services can compare prices of all of the funeral homes in his or her county.\footnote{Fields & Liptka, supra note 150.} What this person probably does not realize is that the same corporation could own several or all of these funeral homes.\footnote{Id. In the State of Florida, many of Broward and Palm Beach Counties' funeral homes that were previously owned by families have been purchased. Id. "Loewen has swallowed up all seven Kraeer homes, the five Levitt-Weinsteins and Fred Hunter's seven-home Broward empire." Id. Service Corporation International "picked off Babione's three Palm Beach County sites, as well as four Riverside homes, four Menorahs and three Baird-Cases." Id.} By not disclosing ownership, these corporations, in a very cruel and inconsiderate gesture, allow this person, who has just lost a loved one, to spend time and energy traveling to many of the same corporately owned facilities in the area comparing duplicated pricing structures and operating procedures.\footnote{Fields & Liptka, supra note 150.} Furthermore, many other factors consumers consider when deciding where to have funeral services may be irrelevant if funeral homes fail to disclose their ownership. Though the reasons behind making certain individual choices may vary, "[m]ost people choose funeral and cemetery services based on a religious, ethnic, communal or geographic..."
affinity."  

This could present problems in areas that have a large concentration of a certain religious or ethnic groups. Many religions and ethnic groups have certain procedures and formalities that are to be followed after death. Consumers in areas where funeral homes have historically catered to certain religions or were owned by a member of that faith have no way of learning that ownership has changed hands. Since purchasing a funeral is a one shot deal, any lack of knowledge or expertise by a funeral director could have serious repercussions.

C. Inefficiencies and Consolidation

The poor enforcement of regulations by the Board of Funeral and Cemetery Services, which operates under the Department of Banking and Finance, is another problem area. The inadequacies of this board have been exposed through the media frenzied allegations brought against Menorah Gardens and Funeral Chapels. Some of the allegations brought against the cemetery include burial of decedents in incorrect plots, errors within the burial records, and disinterring remains before receiving approval. The Menorah Gardens case represents a perfect example of the deficiencies in the regulating powers of the Board of Funeral and Cemetery Services. The board performed examinations at Menorah Gardens and found, in 1996 and 1998, that burial records contained errors, and that descendants were buried in wrong burial plots. After the first inspection, in 1996, the board sent a copy of the report to the company, but failed to make sure corrective actions were taken. In 1998, the board only sent a

177. Id. at 1.
178. Id.
179. Marian Dozier, Audit Cites Regulators in Burial Woes, SUN SENTINEL (Ft. Lauderdale, FL) Mar. 7, 2002, at 1B.
181. Id. at 1.
182. Id. at 6.
letter informing them that they violated Florida law, but again no action was taken to discipline the company for their irresponsible actions. Menorah Gardens did not get their license suspended or revoked and did not even receive a fine for their misconduct.

A majority of the faults with the Board of Funeral and Cemetery Services involves the need for improvement in the examination process. "Examinations of entities licensed under [Chapter] 497, Florida Statutes, [should] be conducted at least once every three years and that licensed cemeteries [should] be inspected each year." Often the examinations and inspections of cemeteries are not done on a timely basis, they are not complete, and they do not check the accuracy and comprehensiveness of burial records. Also, once the examinations are performed and the noncompliance of an entity is uncovered, there is often inadequate follow-up. The board frequently relies on mere letters warning the entity or accepts promises made by the entity to address the issues, rather than disciplinary actions for violations. Without timely follow-up by the department and no punishment for breaking regulations, there is absolutely no assurance for consumers that noncompliance or errors will ever be corrected.

In addition to the problems the Board of Funeral and Cemetery Services has with its examination process, it is also lacking sufficient legal requirements for the disclosure of information to the department and consumers. Currently there are minimal requirements for entities to survey the burial grounds and provide maps to identify each plot. Cemetery companies are only required to provide a description of the cemetery, including acreage,
and a map showing where the cemetery is located. Without a correct survey of the land and the development of detailed maps, there is no means to properly identify plots. Decedents may possibly be buried in the wrong plot, and the same plot may be sold to two different consumers. With the unrelenting marketing of prepayment for burial plots and the lack of disclosure of cemetery maps, consumers are vulnerable and could possibly have purchased a plot already owned by someone or one that does not exist.

Florida State Senator Ken Pruitt requested an audit of the funeral industry to help answer questions regarding the increasing discoveries of misconduct by some of Florida's cemeteries, and to provide support for his proposal that the regulation of the death care industry should be under one central agency rather than the two boards that currently oversee the industry. Once the audit was released, Ken Pruitt stated, "we've been treating this as historically a mom-and-pop industry. What the report tells me is we're dealing with a bunch of sophisticated operators and we have to be as sophisticated as they are." Over the years, practitioners in the death care industry have seen major changes in its structure. In the past, the industry had a pretty distinct separation between the two areas of business, which included family-owned funeral homes and cemeteries. Today with the expansion of big corporations, the ownership and control of the funeral homes and cemeteries usually falls under one corporate entity. Now that one owner typically controls the two business areas of the industry, the regulation should be under one governing body and board. Currently the death care industry is overseen by two state agencies, the Department of Business and Professional Regulation and the Department of Banking and Finance. Since the main purpose for regulating the death care industry is

194. Id.
195. Englehardt, supra note 190.
196. Mary McLachlin, Cemeteries Operate with Little Oversight, PALM BEACH POST, Jan. 6, 2002, at 1A. [hereinafter McLachlin fl].
197. Dozier, supra note 179.
198. Id.
199. Englehardt, supra note 190.
200. Interview with Bill Stephenson, supra note 129.
201. Id.
202. Id.
203. Id.
“to protect [the] consumer[] from economic harm and/or emotional distress,”
and it currently is not fulfilling that need, some reforms need to be made.\footnote{205}{Id. at 1.}

The current regulatory structure is the source of numerous inefficiencies, including both agencies having similar “licensing, support, and management systems.”\footnote{206}{Id. at 12.} Also, “the dual regulations result in multiple visits
to licensees and their businesses by state inspectors.”\footnote{207}{Id.} In addition,
businesses and consumers must contend with two separate agencies “for
resolution of licensing, complaint, and enforcement issues.”\footnote{208}{Id.} Many states
including California, Minnesota, and Oregon have created one agency to
regulate the death care industry and have managed to avoid the ineffectiveness
of having two separate agencies.\footnote{209}{Death Care Industry Analysis, supra note 48, at 12, available at
(West 1995 & Supp. 2002) (creating the State Board of Funeral Directors and Embalmers
within the Department of Consumer Affairs); Or. Rev. Stat. § 692.300 (2001) (creating the
State Mortuary and Cemetery Board); Minn. Stat. Ann. § 149.A.02 Subd. 37a (West Supp.
2002-2003) (naming the commissioner of health the regulator of funeral providers).}

Although both agencies have expertise in different areas of regulation,
the two existing boards that operate under the two agencies should be
combined to form one unified, effective regulating body.\footnote{210}{Id.} The Department
of Business and Professional Regulation would be the superior agency under
which the consolidation should take place.\footnote{211}{Id.} Its expertise in the area of
regulation would provide the perfect foundation for the consolidation, while
simply transferring employees could easily shift the expertise of auditing by
the Department of Banking and Finance to the new consolidated board.\footnote{212}{Id.}

V. CONCLUSION

There is one common absolute; every human being will experience
death. No matter what a person accomplishes in life, or how much money or
power he acquires, death will always win in the end. Traditionally, in this
country, the care of the dead was delivered by the local, small, family-owned
business. Genuine care, concern, and compassion were ministered to loved
ones from family to family. Never was the business of death care managed in the same manner as purchasing an automobile or any other American product. This “slippery slope” shift of mindset began several decades ago with the greedy realization that death care, as a product, would be an inevitable goldmine. The invasive deception of the “bigger is better and cheaper” corporate mantra has positioned American death care where it is today. Just as the configuration of the “death care industry has changed, so too must the rules that regulate this industry. The State of Florida, with its high death rate and many frail citizens, should take a leadership role in the investigation, evaluation, and ultimate solutions related to the laws and governing bodies that will protect its vulnerable consumers.
Attorney-Client Privilege for Suspected Terrorists: Impact of the New Federal Regulation on Suspected Terrorists in Federal Custody

Frank Kearns*

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I. INTRODUCTION

In response to the terrorist attacks on September 11, 2001, the United States Government has passed many new laws and regulations to strengthen national security in an effort to better prepare for a new era in which terrorists acting on American soil have become a constant threat.1 On October 30, 2001, the United States Attorney General, John Ashcroft,

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authorized a Justice Department rule that permits the Director of the Bureau of Prisons and other components of the Justice Department to monitor traditional confidential communications between specified federal inmates and their attorneys when senior intelligence and law enforcement officials determine that the information could endanger national security or could lead to other acts of violence and terrorism.²

On April 11, 2002, Lynne Stewart, a criminal defense attorney, was arrested for providing material support and resources to a terrorist organization. The Government’s case developed from an investigation, which included the monitoring of her communications with her client, convicted terrorist Sheik Omar Abdel Rahman.³ The Sheik, as he is commonly known, was convicted in 1995 of the World Trade Center bombing in 1993 and for conspiring to blow up other New York City landmarks. It is likely nobody would argue that The Sheik presents an obvious security threat to the United States, therefore, it may appear that the monitoring of his conversations with his lawyer were reasonable to prevent future acts of terrorism. But, what are the implications of this rule on other people in federal custody, others that may not appear as such obvious threats? Does this new regulation unnecessarily abridge the rights of these people to have confidential communications with their attorney in order to be effectively represented?

The attorney-client privilege under federal law “is the oldest of the privileges for confidential communications known to the common law.”⁴ It is very likely that the constitutionality of this rule will be challenged in the near future. As a result, this article will explore the constitutional arguments that could be raised to challenge this regulation, and will examine the legal context through the existing line of cases that have already placed limitations on the attorney-client privilege. This article will begin by first examining the federal regulations prior to September 11th that permitted the Bureau of Prisons to place special administrative measures on inmates in federal custody in order to prevent future acts of violence or terrorism. Second, it will look at the new federal regulation that was implemented by the Attorney General after September 11th that permits the government to monitor the communications between inmates and their attorneys under special administrative measures. Third, this article will examine how the procedures

of the federal regulation attempt to preserve the attorney-client privilege. Fourth, it will examine the limited scope of protection the attorney-client privilege receives under the Fourth and Sixth Amendments of the United States Constitution. Fifth, this article will look into the crime-fraud exception, under which communications between a client and an attorney are not privileged if they are used to further an act of fraud or a crime. Sixth, since this regulation affects inmates in federal custody, it will examine how inmate rights are weighed against the governmental interest in maintaining security at prisons through a limitation of constitutional rights and federal wiretapping regulations. Seventh, this article will examine whether such an intrusion into the attorney-client privilege will cause irreparable harm to effective legal representation. Finally, this article will conclude that this new federal regulation is a reasonable response to a real security threat, and, if fairly applied, will adequately protect the rights of the inmate while serving the legitimate governmental interest of preventing potential acts of violence and terrorism.

II. NEW FEDERAL RULE

A. Regulations Prior to September 11, 2001

The threat imposed by terrorist acts on American soil was a prime concern for the government even before September 11, 2001. One response to the growing awareness of these potential attacks was from the Bureau of Prisons. On June 20, 1997, the Bureau had finalized its interim regulations of inmates in federal custody in order to maintain security at prison facilities and to prevent future acts of violence and terrorism.\(^5\) Terrorism is defined in the Code of Federal Regulations as any acts dangerous to human life that violate the criminal laws of the United States and intends to intimidate or coerce a civilian population or conduct and policy of a government.\(^6\) These rules were instituted to manage inmates who could possibly disclose information that could harm national security or could lead to acts of violence or terrorism.\(^7\) These regulations give the Director of the Bureau of Prisons, upon direction of the Attorney General, authorization to implement the special administrative measures.\(^8\) The Bureau of Prisons has complete

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8. § 501.3(a).
discretionary power to determine what restrictions are implemented and whom they are placed upon.9

Under the special administrative measures, an inmate can be housed in segregated administrative detention as well as have certain other privileges limited, including the use of a telephone, correspondence, visitation, and interviews with the media.10 These restrictive measures reduce the risk that an inmate, who has been shown to be a serious security risk, is able to cause or facilitate a future act of violence or terrorism through their communications or contact with persons outside the prison.11 For example, if a suspected terrorist were arrested before they were able to carry out an attack, the Bureau of Prisons would want to prevent the chance that they could communicate with other members involved in the conspiracy or to pass along the location of money or explosives that could be used to plan another terrorist attack. This is not as far fetched as it might sound. Ramzi Yousef was convicted for his participation in the World Trade Center bombing in 1993 and for conspiracy to blow up American-owned airplanes.12 Because of Mr. Yousef’s terrorist activities, the then Attorney General, Janet Reno, authorized the Bureau of Prisons to place Mr. Yousef under special administrative measures.13

Before these restrictive measures are imposed, an inmate is given written notification of the restrictions and reasons for its imposition.14 The reasons why they have been imposed, however, may be limited for security reasons or to prevent violence or terrorism.15 These restrictive measures may be imposed for up to 120 days or for up to one year with approval of the Attorney General.16 The Director of the Bureau of Prisons can also renew the restrictions for up to one-year increments upon the written notification by the Attorney General.17 These measures cannot be renewed automatically.18 A fresh risk assessment must be done at the end of every period.19

10. § 501.3(a).
11. Id.
12. Yousef, 254 F.3d at 1216.
13. Id.
14. 28 C.F.R. § 501.3(b).
15. Id.
16. § 501.3(c).
17. Id.
18. Yousef, 254 F.3d at 1219 (citing United States v. Johnson, 223 F.3d 665, 672 (7th Cir. 2000)).
19. Id.
B. New Regulation Post September 11, 2001

In response to the growing fear of additional terrorist attacks after September 11th, Attorney General John Ashcroft instituted a new restriction on inmates already under special administrative measures to include the monitoring of attorney-client communications. This new restriction closed a loophole that allowed an inmate to communicate freely with his attorney. Before the Bureau of Prisons is allowed to monitor attorney-client communications under this new regulation, the Attorney General must first receive information from the head of a federal law enforcement or intelligence agency that "reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism." Upon such a finding, the Attorney General may then instruct the Director of the Bureau of Prisons to begin the appropriate procedures for the monitoring or review of the communications between the inmates and their attorneys. Such procedures include a written notification to both the inmate and the inmate’s attorney prior to the start of the monitoring or review. This written notification, however, need not be given where a court order directing that no notice be made is obtained.

C. Preservation of the Attorney-Client Privilege Under This Regulation

Although all communications between an inmate and his or her attorney are subject to monitoring and review under this new regulation, the communications are still, for the most part, covered by the attorney-client privilege. The only communications that lose the attorney-client protection are those that could "facilitate criminal acts or a conspiracy to commit criminal acts," or are not related to legal advice or strategy. The latter category is, of course, communication that does not fall within the definition of attorney-client privilege under any evidentiary rule or state statute. The

22. Id.
23. § 501.3(d).
24. § 501.3(2).
25. § 501.3(i).
27. Id.

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory
former category is also a well-recognized exception to the attorney-client privilege, which provides that an attorney cannot assist his client in committing a crime.\textsuperscript{29}

Given that any conversation being monitored can contain both privileged and non-privileged information, the regulation sets forth procedures for the review of this information to determine whether it is privileged and confidential, or whether it should be disclosed to the investigating body.\textsuperscript{30} These procedures include the establishment of a "privilege team," which consists of independent individuals that are not involved in the investigation.\textsuperscript{31} This team follows monitoring procedures that minimize the intrusion of the team into the privileged communications between the inmate and the attorney.\textsuperscript{32} The regulation, however, is not exactly specific as to what these procedures are, but it does state that the team does not retain any communications that are found to be privileged.\textsuperscript{33} Once the team makes a decision that this information is not protected and should be disclosed, it still must obtain a court order to release the information.\textsuperscript{34} The team leader, however, can make a unilateral decision to disclose the information to the investigating body, prior to receiving a court order when the privilege team leader determines that potential act of violence or terrorism is imminent.\textsuperscript{35}

An inmate who feels the restrictions are too severe or unwarranted does have legal recourse. Section 501.3 provides that affected inmates have a right to seek a review of the restrictions that have been imposed through the Administrative Remedy Program.\textsuperscript{36} In \textit{Yousef v. Reno},\textsuperscript{37} the plaintiff-inmate challenged the special administrative measures that were imposed on him after his conviction, arguing that the measures imposed violated his rights

\begin{flushright}
\textit{Id.}
\end{flushright}

\begin{itemize}
\item \textsuperscript{29} Clark v. United States, 289 U.S. 1, 16 (1933) (holding the communication intended to further an act of fraud or crime is not protected by the attorney-client privilege).
\item \textsuperscript{30} 28 C.F.R. § 501.3(3).
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} 28 C.F.R. § 501.3(d)(3).
\item \textsuperscript{36} Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3(e) (2001).
\item \textsuperscript{37} 254 F.3d 1214 (10th Cir. 2001).
\end{itemize}
under the First, Sixth, and Eighth Amendments.\textsuperscript{38} The Tenth Circuit Court of Appeals, however, dismissed Mr. Yousef’s claims because he failed to exhaust all his administrative remedies.\textsuperscript{39} Thus, the court seemed to leave the door open to these claims once all remedies were exhausted.

III. THE LIMITED SCOPE OF THE ATTORNEY-CLIENT PRIVILEGE

A. Sixth Amendment Protection of the Attorney-Client Privilege

Despite the long history behind the attorney-client privilege, no such explicit privilege exists in the United States Constitution. The Sixth Amendment does, however, afford an individual the right to counsel in all criminal prosecutions.\textsuperscript{40} The issue that often arises is whether an intrusion into the attorney-client privilege damages the effectiveness of an attorney’s representation of his client and thus violates the Sixth Amendment.\textsuperscript{41} An example of this is discussed in \textit{Massiah v. United States}.\textsuperscript{42} In that case, Massiah, a merchant seaman, was arrested for smuggling cocaine into the United States aboard a ship he was working on.\textsuperscript{43} While he was out on bail, a federal agent, who was investigating the case, succeeded in getting another man involved in the smuggling operation to cooperate with the government by helping to gather more information on Massiah.\textsuperscript{44} So, without Massiah’s knowledge, a listening device was placed in the informant’s car and a few days later a lengthy conversation was recorded between Massiah and the informant.\textsuperscript{45} This recording included several incriminating statements that Massiah made which were later used at his trial, and ultimately led to his

39. \textit{Id.} at 1222.
40. \textit{U.S. Const. amend. VI.} This amendment states that:
   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witness in his favor, and to have the Assistance of Counsel for his defense.
\textit{U.S. Const. amend. VI.}
42. 377 U.S. 201 (1964).
43. \textit{Id.}
44. \textit{Id.} at 202.
45. \textit{Id.} at 202–03.
conviction. On appeal, Massiah argued that his Sixth Amendment rights were violated because the government agents sought to gain incriminating evidence against him after he was indicted and without the presence of his attorney. The Court held that the incriminating evidence gained without the presence of his lawyer violated his Sixth Amendment right to counsel.

Further, the Court noted:

[A] Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less, it was said, might deny a defendant "effective representation by counsel at the only stage when legal aid and advice would help him."

In Massiah, the prosecution's use of the incriminating evidence led to the defendant's conviction and thus clearly caused injury to the defendant. But what happens when a violation of a defendant's Sixth Amendment rights does not injure or prejudice the defendant?

A further example of the damage or injury needed is illustrated by the case of Weatherford v. Bursey. In that case, the plaintiff, along with the defendant, who was an undercover agent, were arrested for a state criminal offense. The defendant went through the charade of the arrest in order to maintain his undercover status. Although the defendant retained his own counsel, he attended two pretrial meetings with the plaintiff and his attorney. The plaintiff's attorney requested the defendant's presence in order to obtain additional information or advice for the trial. At no time did the defendant discuss the content of the meetings with his superiors or with the prosecution team. After the defendant had been seen in the company of police officers, which compromised his cover, he was called as a

46. Id.
47. Massiah, 377 U.S at 204.
48. Id. at 207.
49. Id. at 204 (citing Spano v. New York, 360 U.S. 315, 326 (1959) (Douglas, J., concurring)).
51. Id. at 547.
52. Id.
53. Id.
54. Id. at 548.
55. Weatherford, 429 U.S. at 548.
witness for the prosecution.\textsuperscript{56} After the plaintiff's conviction, he brought suit against the defendant claiming the defendant’s participation in the two pretrial meetings compromised the effectiveness of his counsel and thus violated his rights under the Sixth and Fourteenth Amendments.\textsuperscript{57} The district court found in favor of the defendant, but the Fourth Circuit Court of Appeals reversed, holding that ""whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship, the right to counsel is sufficiently endangered to require reversal and a new trial.""\textsuperscript{58}

The United States Supreme Court, however, disagreed with the Fourth Circuit Court of Appeals, holding that this per se rule was incorrect.\textsuperscript{59} In reaching its decision, the Court distinguished three of its earlier opinions relied upon by the Fourth Circuit.\textsuperscript{60} Specifically, those decisions were the Supreme Court's opinions in \textit{Black v. United States},\textsuperscript{61} \textit{O'Brien v. United States},\textsuperscript{62} and \textit{Hoffa v. United States}.\textsuperscript{63}

In \textit{Black}, the defendant was charged with evading federal income taxes.\textsuperscript{64} In a matter unrelated to his tax situation, the Federal Bureau of Investigation ("FBI") placed a listening device in Black's hotel suite in Washington D.C.\textsuperscript{65} Over a three-month period, the FBI recorded conversations that included conversations Black had with his attorney concerning the federal income tax charges.\textsuperscript{66} The FBI stated that they destroyed the recorded tapes but that notes were kept which summarized and quoted these conversations.\textsuperscript{67} When the government attorneys prosecuting the tax case began trial preparation, they received information and transcripts from the FBI, including the summaries of the conversations Black had with his attorney.\textsuperscript{68} It was not until after the trial began that the government attorney realized that the information from the FBI included conversations between Black and his attorney.\textsuperscript{69} The Solicitor General argued that since the tax

\begin{thebibliography}{99}
\bibitem{56} Id. at 549.
\bibitem{57} Id.
\bibitem{58} Id. (quoting Weatherford v. Bursey, 528 F.2d 483, 486 (4th Cir. 1975)).
\bibitem{59} Id. at 551.
\bibitem{61} 385 U.S. 26 (1966).
\bibitem{62} 386 U.S. 345 (1967).
\bibitem{63} 385 U.S. 293 (1966).
\bibitem{64} See \textit{Black}, 385 U.S. at 27–29.
\bibitem{65} Id. at 27.
\bibitem{66} Id.
\bibitem{67} Id. at 27–28.
\bibitem{68} Id. at 28.
\bibitem{69} \textit{Black}, 385 U.S. at 28.
\end{thebibliography}
division attorneys did not find anything relevant in the transcripts from the FBI, a new trial should not be granted, rather the judgment should be vacated to the district court to determine if the materials were irrelevant and the conviction should stand. The Supreme Court did not agree and it held that "[i]n view of these facts it appears that justice requires that a new trial be held so as to afford the petitioner an opportunity to protect himself from the use of evidence that might be otherwise inadmissible." The other case the Fourth Circuit relied upon in its decision was *O'Brien v. United States*. In this case, which is very similar to *Black*, Charles O'Brien was convicted on several counts of stealing merchandise from a United States Customs Service facility. The FBI placed a listening device in a commercial establishment owned by O'Brien's friend. During the surveillance, the FBI recorded conversations O'Brien had with his attorney concerning his upcoming trial over the theft from the customs service facility. The conversations between O'Brien and his attorney were then summarized in the FBI's logs, but were never mentioned in any report and were in no way communicated to the attorneys for the Department of Justice, which was prosecuting O'Brien's case. In a per curiam decision, the United States Supreme Court vacated the judgment and remanded it back to the district court for a new trial if the government desired to retry the case. In his dissent, Justice Harlan argued that the order to vacate for a new trial was premature. Justice Harlan agreed that O'Brien was entitled to a hearing to determine how much, if any, of the recorded material was possibly used at trial, but stated that "a new trial is not an appropriate vehicle for sorting out the eavesdropping issue because, until it is determined that such occurrence vitiates the original conviction, no basis for a retrial exists. The Court's action puts the cart before the horse." The decision in *Hoffa* was more in line with Justice Harlan's view. In that case, a government informant sat in on Hoffa's conversations with his

70. Id.
71. Id. at 28–29.
72. 386 U.S. at 345.
73. Id.
74. Id. at 346.
75. Id.
76. Id.
78. Id. at 346–47 (Harlan, J., dissenting).
79. Id. at 346 (Harlan, J., dissenting).
80. Id. at 347 (Harlan, J., dissenting) (quoting *Black*, 385 U.S. at 31 (Harlan, J., dissenting)).
Kearns

lawyers and other people during his trial of a Taft-Hartly Act violation. Although that trial ended in a hung jury, there were allegations of jury tampering on the part of Mr. Hoffa and new charges were brought against him. At the second trial, the government informant testified to conversations that he had overheard between Hoffa and other third parties, but this did not include any conversations that Hoffa had with his lawyers. Hoffa was convicted of jury tampering and he subsequently challenged his conviction on the grounds that the government informant violated his Sixth Amendment right to counsel. The Supreme Court held that Hoffa's Sixth Amendment right was not violated, however, because the testimony by the informant did not deal with conversations that Hoffa had with his lawyers. Yet, the Court noted that, had Hoffa been convicted in his first case, it would have been reversed because the informant had listened to conversations between Hoffa and his lawyers and reported at least some of this information back to the authorities.

To distinguish these cases, the Supreme Court's opinion in Weatherford notes that the only inference that can be made from Black, O'Brien, and Hoffa, is that when conversations between clients and their attorneys are overheard, a Sixth Amendment violation depends upon whether the communications led to evidence, either direct or indirect, at trial. The Court also held that a Sixth Amendment violation might occur if the privileged conversations between a client and his or her counsel, was the subject of testimony at trial, was the origination of evidence used later at trial, or was "used in any other way to the substantial detriment of the client." Therefore, as long as information obtained from the meetings is not communicated, there is no substantial threat to a defendant's Sixth Amendment rights.

81. Weatherford, 429 U.S. at 552–53 (citing Hoffa v. United States, 385 U.S. 293 (1966)).
82. Id. at 553 (citing Hoffa v. United States, 385 U.S. 293, 294 (1966)).
83. Id. (citing Hoffa v. United States, 385 U.S. 293, 307–08 (1966)).
84. Id. (citing Hoffa v. United States, 385 U.S. 293, 295 (1966)).
85. Id. at 553–54 (citing Hoffa v. United States, 385 U.S. 293, 307–08 (1966)).
86. Weatherford, 429 U.S. at 553 (citing Hoffa v. United States, 385 U.S. 293 (1966)).
87. Id. at 552.
88. Id. at 554.
89. Id. at 558.
Thus, in order to prove a Sixth Amendment violation, there must be at least a showing of prejudice to the defendant or a benefit to the State. A two-part test is used to determine if there is sufficient prejudice.

[A] prejudice analysis is employed at two levels in the Sixth Amendment context. First, some amount of prejudice is required in order to establish the existence of a Sixth Amendment violation, but the prejudice need not be "outcome determinative." Second, once a violation is established the level of prejudice will determine the remedy, if any, which is required.

A court will not dismiss an indictment as a sanction for government intrusion into the attorney-client relationship unless the required amount of prejudice to the defendant is shown.

In order for an inmate to show that his Sixth Amendment right to counsel is violated under section 501.3 of the United States Code, some amount of prejudice will have to be established. The only way that this could happen is if the privilege team, who is monitoring the communications between the inmate and his attorney, saves the recording or creates a summary of the conversations, and provides it to the prosecution team if the inmate has not already been convicted. The prosecution team would also have to use this information in the trial in order to get the heaviest sanction of having the indictment dismissed.

B. Fourth Amendment Protection of the Attorney-Client Protection

Section 501.3 provides procedures whereby the prosecution, if applicable, is walled off from the "privilege team" that monitors potentially privileged attorney-client communications to prevent its disclosure. These procedures prevent a Sixth Amendment violation from occurring, but an individual's Fourth Amendment rights might be still be violated. Because

91. Id. at 1490 n.8 (quoting United States v. Kelly, 790 F.2d 130, 138 n.6 (D.C. Cir. 1986)).
92. Id. at 1489–90 (citing United States v. Morrison, 449 U.S. 361 (1981)).
the Sixth Amendment protects the attorney-client privilege only in the context of a criminal prosecution, the Fourth Amendment may offer more protection because its privacy protection is broader. A Fourth Amendment challenge to section 501.3 is likely because

[it] should be read to protect this entire range of communication. To begin, surely an inmate in federal detention whose every movement is tracked by the government has been "seized" with the meaning of the Amendment; and eavesdropping on conversations has long been held to be a Fourth-Amendment protected "search."

A Fourth Amendment challenge to monitored communications was raised in *United States v. Noriega*. In that case, Manuel Noreiga, the former dictator of Panama, was being held at the Metropolitan Correctional Center ("MCC") in Miami awaiting trial on drug trafficking charges. The security procedures at MCC provided that all calls made by inmates on its phones were automatically and randomly monitored by a central recording system. Under MCC's regulations, if an inmate wanted to make an unmonitored call, a specific request had to be made to a guard and explicitly request that the call be unmonitored or that he "wishe[d] to engage in a 'privileged' attorney-client communication." The phone which Noriega had access to also had a sticker on it which stated "that all calls made on that phone, with the exception of 'properly placed' calls to an attorney, were subject to monitoring and recording by the Bureau of Prisons." During a period of nine months, "Noriega made over 1,400 telephone calls, including some to his attorneys, from that phone."

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

U.S. CONST. amend. IV.

96. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 1485.
101. *Id.* at 1483.
conversations." In order to shield itself from privileged attorney-client conversations, the trial team had the calls screened by a Spanish-speaking DEA agent to remove all privileged communications from the tapes that would be turned over to the trial team. Despite the screening process, some of Noriega's privileged communications accidentally reached the trial team through summaries of the tapes. Upon learning of this intrusion into the attorney-client privilege, Noriega moved to have the charges against him dropped on the grounds that it violated his rights under the Sixth and Fourth Amendments.

Noriega's Sixth Amendment argument was dismissed by the district court because he failed to show the prejudice or injury required to prove a Sixth Amendment violation. The court also rejected Noriega's Fourth Amendment claim holding that this Amendment "protects only those subjects or areas in which there is a legitimate expectation of privacy." There is also no expectation of privacy when information is passed voluntarily to third parties. The court held that there was no evidence to suggest that Noriega had an expectation of privacy when he made the calls. Noriega was given adequate notice that his calls were subject to being monitored and he had no subjective expectation of privacy because he often warned the people to whom he was talking to be careful about what they discussed as well as using cryptic language during the conversations.

Thus, a Fourth Amendment violation will not be found when there is no expectation of privacy. Since section 501.3 is applicable to inmates who are given notice that they are under special administrative measures and that their conversations with their attorneys may be monitored, there is no realistic expectation of privacy for these inmates. Therefore, it is likely that an inmate's Fourth Amendment challenge to section 501.3 would fail if its provisions are carried out properly.

103. Id.
104. Id.
105. Id. at 1484.
106. Id.
108. Id. at 1492 (citing Smith v. Maryland, 442 U.S. 735, 743–44 (1979)).
109. Id.
110. Id.
111. Id.
IV. CRIME-FRAUD EXCEPTION

One of the principle legal foundations of section 501.3’s intrusion into the attorney-client privilege is the crime-fraud exception. This rule exempts communication used to further a future criminal act from the traditional protections afforded by the attorney-client privilege. One of the earliest Supreme Court cases that discussed the limitations of privileged communications is *Clark v. United States*. In that case, a juror was convicted of criminal contempt for knowingly giving false and misleading testimony during voir dire in order to remain on the jury and thereby thwart the prosecution of her former employer. The petitioner challenged the admissibility of the testimony of her conduct during jury deliberations because the arguments and votes of jurors are privileged and cannot be disclosed unless they are waived.

In discussing the origin and policy reasons supporting the privilege, the Court noted that the social policy behind the privilege might conflict with other competing social policies. The free and independent debate of the jury room may be chilled if the juror’s comments and votes were made publicly available. The Court noted that “the function of the court to weigh these competing policies is more essential when there is little guidance in either case law or treaties that precisely limit the privilege in question.” The Court then held that this privilege is “not applicable when the circumstances giving rise to the privilege were fraudulently begun or continued.” In support of its decision, the Court looked to analogies in other privileges for precedent, specifically citing an early case that held that the attorney-client privilege did not protect a client who consults with an attorney in order to help him commit a fraud. The Court noted that although many early cases required only an unsubstantiated charge of illegality to remove this privilege, later rulings held that specific evidence of illegality must be shown before such privilege is destroyed. The Court

114. Id. at 6–7.
115. Id. at 12.
116. Id. at 13.
117. Id.
119. Id. at 14.
120. Id. at 15.
121. Id. (citations omitted).
122. Id.
further stated that the confidences of a client and his or her attorney are protected only until abuse has been adequately demonstrated to the satisfaction of the judge.\footnote{Clark, 289 U.S. at 16.}

In \textit{United States v. Gordon-Nikkar},\footnote{518 F.2d 972, 974 (5th Cir. 1975).} the Fifth Circuit denied a petitioner's appeal from a cocaine trafficking and possession conviction because of the testimony of a government witness regarding two meetings the petitioner had with her attorney.\footnote{Id. at 974.} At one of the meetings, which included several other co-defendants including the government witness, the petitioner and the other people present agreed to give false testimony to hide their crime.\footnote{Id.} The court held that it was not a confidential communication because some of the participants at the meeting were not clients of the attorney.\footnote{Id. at 975.} Yet, the court further opined that, even if it was considered confidential, the testimony of the government witness was admissible because the attorney-client privilege does not include communications regarding the intent to commit a crime.\footnote{Id. at 975.} "The policy underlying the attorney-client privilege is to promote the administration of justice. It would be a perversion of the privilege to extend it so as to protect communication designed to frustrate justice by committing other crimes to conceal past misdeeds."\footnote{Gordon-Nikkar, 518 F.2d at 975.}

The rules and procedures that a court uses in determining whether the crime-fraud exception is applicable in a given situation, greatly impact the strength of the attorney-client privilege. The issues facing the application of the crime-fraud exception were examined in the United States Supreme Court's opinion in \textit{United States v. Zolin}.\footnote{491 U.S. at 556.} In that case, the Internal Revenue Service ("IRS") issued a summons that demanded the production of certain materials involving an investigation into the tax returns of L. Ron Hubbard, the founder of the Church of Scientology.\footnote{Id. at 557.} These materials included some tapes that the church claimed were protected by the attorney-client privilege.\footnote{Id. at 558.} "The IRS filed a petition to enforce its summons with the United States District Court for the Central District of California."\footnote{Id. at 557.}

123. Clark, 289 U.S. at 16.
124. 518 F.2d 972, 974 (5th Cir. 1975).
125. Id. at 974.
126. Id.
127. Id.
128. Id. at 975.
129. Gordon-Nikkar, 518 F.2d at 975.
130. Zolin, 491 U.S. at 556.
131. Id.
132. Id. at 557.
133. Id. at 558.
argued that the tapes were not privileged communications as the respondents claimed, but rather, fell within the crime-fraud exception." In support of its request to have the court listen to the tapes, the IRS offered partial transcripts of the tapes that it had lawfully obtained. The district court ruled that while the transcripts showed some evidence of past crimes, there was nothing to indicate that future crimes were planned.

The respondents appealed to the Ninth Circuit on other grounds and the IRS cross-appealed claiming, in part, that the district court incorrectly ruled on the crime-fraud exception without listening to the tapes in camera. The Ninth Circuit held that in order for the crime-fraud exception to apply to privileged communication, the party opposing the privilege must base its assertion on "sources independent of the attorney-client communications recorded on the tapes." The Ninth Circuit held that the IRS's "independent evidence" did not support a finding of the crime-fraud exception. This case was then granted certiorari to the United States Supreme Court.

The Supreme Court stated that many questions can arise when a crime-fraud exception claim is made. The three principle questions raised in Zolin were: 1) whether a district court can review privileged communications in order to determine if the crime-fraud exception applies; 2) what minimum amount of evidence must be shown before a court can undertake a review; and 3) if there is an evidentiary threshold requirement needed before an opposing party claims a crime-fraud exception, whether the privileged material itself can be used to satisfy it. The Court first looked at the Federal Rules of Evidence to determine if it bars an in camera review of privileged communications. It noted that two rules, specifically Rule 104(a) and Rule 1101(c), of the Federal Rules of Evidence, stand out when first examining these questions. When taken together, these rules can be

134. Id.
136. Id. at 559.
137. Id. at 560.
138. Id. at 561 (quoting United States v. Zolin, 809 F.2d 1411, 1418 (9th Cir. 1987), overruled on other grounds by United States v. Jose, 131 F.3d 1325 (9th Cir. 1999)).
139. Zolin, 809 F.2d at 1418–19.
140. Zolin, 491 U.S. at 560.
141. Id. at 563.
142. Id. at 564–65.
143. Id. at 565.
144. Id. at 565–66. Rule 104(a) states:

Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the
read to conclude that a court cannot review the privileged communication to determine the crime-fraud exception. But this interpretation leads to a result that, once a court finds that the communication is privileged, it would be almost impossible to ever prove a crime-fraud exemption. Thus, the Court rejected this interpretation and stated that the plain language of Rule 104 does not explicitly exclude “all materials” from a court’s consideration of an exception. Therefore, the Court held that the district court in Zolin was permitted to conduct an in camera review of the tapes.

In its decision, the Supreme Court held that, while a blanket rule allowing an in camera review in every circumstance would jeopardize the policy reasons behind the attorney-client privilege, “the costs of imposing an absolute bar to consideration of the communications in camera for purpose of establishing the crime-fraud exception are intolerably high.”

We conclude that evidence that is not “independent” of the contents of allegedly privileged communications—like the partial transcripts in this case—may be used not only in the pursuit of in camera review, but also may provide the evidentiary basis for the ultimate showing that the crime-fraud exception applies. We see little to distinguish these two uses: in both circumstances, if the evidence has not itself been determined to be privileged, its exclusion does not serve the policies which underlie the attorney-client privilege.

The Court further held that since an in camera review of privileged communication is a lesser intrusion on the attorney-client privilege than a public disclosure, a lower evidentiary threshold is required than would be to overcome the privilege itself. But, a party claiming a crime-fraud exception “must present evidence sufficient to support a reasonable belief
that an *in camera* review may yield evidence that establishes the exception's applicability. ¹⁵² This requirement may be met by using any lawfully obtained evidence that the court has not adjudicated to be privileged. ¹⁵³

If under section 501.3 the "privilege team" monitors conversations that are used to further acts of terrorism, it is permitted to release it to the proper authorities. ¹⁵⁴ This is what occurred in the case of the Sheik when he was using his conversations with his lawyer to direct the terrorist activities of his followers. ¹⁵⁵ This obviously falls within the crime-fraud exception and is precisely the type of information section 501.3 was designed to prevent. ¹⁵⁶

**V. LIMITATIONS ON INMATE RIGHTS**

**A. Constitutional Limitations of Inmate Rights**

Since section 501.3 is applicable to inmates under the supervision of the Bureau of Prisons, as well as other people in federal custody, it is important to examine how the rights of inmates are limited under existing law and how the courts balance the constitutional rights of inmates and the government's legitimate interest in protecting society. One of the leading cases in this area is *Pell v. Procunier*. ¹⁵⁷ In that case, three professional journalists and four inmates brought suit against various California Department of Corrections officials, claiming that a corrections department rule, which prohibited face-to-face media interviews with specific inmates, violated their rights of free speech under the First and Fourteenth Amendments. ¹⁵⁸ This rule prohibited media and press interviews with specific inmates, but still permitted interviews with a random selection of inmates. ¹⁵⁹

The United States Supreme Court began its decision with the proposition that "[l]awful incarceration brings about the necessary withdrawal or limitations of many privileges and rights, a retraction justified by the considerations underlying our penal system." ¹⁶⁰ "In the First Amendment context a corollary of this principle is that a prison inmate

152. *Id.* at 574–75.
153. *Id.* at 575.
158. *Id.* at 819.
159. *Id.*
160. *Id.* at 822 (quoting Price v. Johnson, 334 U.S. 266, 285 (1948)).
retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."161 Thus, any constitutional challenges to prison regulations must be weighed against the legitimate policies and goals of a correctional system, which is principally to deter crime by separating convicted criminals from society and hopefully to rehabilitate them for their return to society.162

In its decision, the Court stated that the alternative means of communication available to the inmates should be a relevant factor when weighing the inmates’ First Amendment rights against any legitimate governmental interests.163 Because the inmates in California still had other reasonable and effective means of communication available to them and the regulations were uniformly applied, the regulations did not violate the inmate’s rights under the First and Fourteenth Amendments.164 The Court further noted that “[t]he nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner are reasonable.”165 In a prison environment, in which security concerns are of great importance, the restrictions of people allowed to enter the prison and interview inmates are considered reasonable.166

B. Inmate Exemptions from Federal Wiretapping Statutes

The governmental interest in maintaining security in prisons also restricts an inmate’s ability to make unmonitored phone calls while in custody. Title III of the Omnibus Crime Control and Safe Streets Act, "forbids the willful interception of wire communications, including telephone conversations, without prior judicial authorization."167 However, this limitation of governmental power does not fully apply to inmates. There are two exceptions to this statute that allow prison officials to tape the conversations of inmates.168 Prison officials can intercept communications through wiretaps if: 1) it falls within their routine duties; or 2) one of the parties to the communication gives their consent to the interceptions.169

161. Id.
163. Id. at 824 (citing Kleindienst v. Mandel, 408 U.S. 753, 765 (1972).
164. Id. at 826.
165. Id. (quoting Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) (internal quotation marks omitted)).
166. Id. at 827.
168. Id.
The first exception, section 2510(5)(a)(ii), states that a law enforcement officer, which includes prison officials, are permitted to use wiretaps to intercept inmate calls when it is done “in the ordinary course of his duties.”70 In United States v. Sababu,71 the Seventh Circuit held that taping of inmate phone calls is permitted when it is done according to prison regulations and within the normal routine.72 The routine use of phone taps is authorized by 28 C.F.R. section 540.100. This regulation states that “[i]nmate telephone use is subject to limitations and restrictions which the Warden determines are necessary to insure the security, good order, and discipline of the institution and to protect the public. The Warden shall establish procedures and facilities for inmate telephone use.”73

The interception of communications is also authorized when “one of the parties to the communication has given prior consent to such interception.”74 A violation of this statute was raised in the prison context in Noriega.75 The district court rejected Noriega’s claim because Noriega’s conversations were recorded under the normal routine of the prison and were based on legitimate security concerns.76 Noriega’s claim was also rejected because his consent to be monitored could be inferred from the ample warnings he received through the stickers on the phone, orientation manual, and other consent forms.77

How the courts interpret Title III may be useful in understanding how the courts might view challenges to the intrusion into the attorney-client privilege in section 501.3. First of all, before any inmate can be subject to having his conversations between himself and his attorney monitored, they must first be placed under “special administrative measures.”78 The inmates are given written notification of the restrictions that will be imposed as well as the reasons why they are having the restrictions placed on them.79 If the security risks are severe enough, the inmate may have the additional measure of monitoring his or her attorney-client communications placed on him or her by the Attorney General, once he is notified by law enforcement or

171. 891 F.2d 1308 (7th Cir. 1989).
172. Sababu, 891 F.2d at 1329.
173. Id. at 1329 n.7 (quoting 28 C.F.R. § 540.100).
176. Id. at 1491.
177. Id.
179. § 501.3(b).
intelligence officials of the heightened security risk. The selected inmate also receives an additional notice of this extra security measure, unless a court gives its authorization not to provide the additional warning.

Since under most circumstances section 501.3 provides the inmate with sufficient notice of the extra security measures that are being imposed, it would be hard to establish that there is any expectation of privacy. The rights enjoyed by regular inmates are initially limited by the fact that they are in custody. The security concerns of maintaining a prison naturally reduce the rights and privileges enjoyed by inmates. Add to this the security concerns needed to apply “special administrative measures” and finally, the highest level of a security threat needed to impose the monitoring of attorney-client communications, and any expectation of privacy by the inmate is minimal.

VI. IRREPARABLE HARM TO EFFECTIVE LEGAL REPRESENTATION?

The courts and the public at large have accepted the reduced rights and privileges of inmates, but the issue of monitoring attorney-client communications has caused substantial unease among the legal community. Many lawyers and civil rights activists are concerned that monitoring the communications of people who qualify under section 501.3, including suspected terrorists, will have a chilling effect on the lawyers who represent them. But, is this an irreparable harm to effective legal representation?

There is no doubt that the knowledge that the government is taping the communications between someone who is in federal custody and his or her lawyer would cause them both to closely guard their words. The client would be very apprehensive about giving details that might be potentially incriminating to him. This would, in turn, hurt the ability of the attorney to know as much as possible about the client’s case and thus, limit the effectiveness of the attorney’s representation. In fact, the courts recognize that the purpose of the attorney-client privilege is to “encourage clients to make full disclosure to their attorneys.”

180. § 501.3(d).
181. § 501.3(d)(2).
182. Chiang, supra note 155.
183. Id.
[The attorney-client privilege's] purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such sound legal advice or advocacy depends on a lawyer being fully informed.\(^\text{185}\)

There is no denying that this regulation will have a detrimental effect on the inmate's legal representation, but it is not irreparable. The inmates that are subject to having their conversations with their attorneys monitored are not the typical inmates in federal custody. These inmates have been determined by the Attorney General or by other intelligence and law enforcement officials to pose a serious threat of continued acts of violence and terrorism. It is unlikely that these inmates have a great deal of trust for any government or prison officials. It seems reasonable that they would be reluctant to speak open and candidly about any act of violence or terrorism that they committed in the past, regardless of whether their conversations with their attorneys were being recorded.\(^\text{186}\)

In addition, the inmates could be reassured by the fact that, as long as their attorney-client communications do not fall within the crime-fraud exception, they will remain privileged. If the privilege team fails to follow its proper procedures and transfers privileged communications to the prosecution team, there is legal recourse. If the privileged materials were intentionally disclosed to the prosecution by the privilege team, and if the prejudice caused to the inmate was substantial, the court could order a new trial.\(^\text{187}\)

VII. CONCLUSION

This new regulation was implemented in a response to real and substantial threats faced by the United States. Its purpose was to prevent a limited group of people in federal custody from abusing the attorney-client privilege to cause future acts of violence and terrorism. Any time a privilege is chipped away, even for just a very select group of people, it can be a

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186. See, e.g., *Noriega*, 764 F. Supp. 1480, 1492 (S.D. Fla. 1991) (noting that Manual Noriega frequently warned the people he was talking on the phone with not to discuss sensitive matters and repeatedly used coded and cryptic language).
dangerous step toward limiting the privilege for everyone. But, the conditions in this particular case warrant this unprecedented measure. The regulation is carefully drawn to protect privileged communication that is monitored and gives redress procedures to inmates who feel that this measure is unwarranted. In addition, this regulation is extremely limited in scope. At the moment, only about sixteen prisoners in federal custody qualify to have their conversations with their attorneys monitored. 188

Although some people feel that this regulation is too intrusive and that the threat of terrorism is overstated, the regulation is necessary. As mentioned in the introduction, this regulation enabled the Department of Justice to arrest a lawyer who has been accused of helping her client, the man responsible for the planning of the World Trade Center bombing in 1993, to pass messages to his followers in order to direct terrorist activities from his jail cell. 189 In another example, Isabelle Coutant Peyre, the fiancée and lawyer of the notorious terrorist Carlos “The Jackal”, offered to represent Zacarias Moussaoui, who is under indictment for his role in the September 11, 2001 destruction of the World Trade Center. 190 It is understandable that allowing her to have private conversations with Moussaoui could possibly impose an unreasonable security risk.

This regulation can be effective, but will it be able to withstand a legal challenge? It is the opinion of the author that the courts will find that the regulation does not violate the Constitution. As detailed above, the attorney-client privilege is not absolute and courts have acknowledged that there are exceptions to it. An attempt to abuse this privilege to further an act of fraud or further a crime is not protected. Second, if privileged attorney-client communications are monitored by the government, but are not used to prejudice the defendant or to benefit the government, there is no violation of the privilege. Third, this article has shown that, when the rights of inmates are weighed against the governmental interest in maintaining peace and security in the prisons as well as the country at large, the governmental interest prevails.

Finally, this article recognizes that this regulation could possibly harm the legal representation of the inmates who are subject to having their conversations monitored.


189. See infra part I.

attorney-client communications monitored. This harm, however, is not irreparable and there are legal recourses available to ensure that privileged communication stays protected. The courts of this country shape the contours of a privilege "in the light of reason and experience." When the costs imposed on an affected inmate’s rights are weighed against the legitimate governmental interest and benefit in preventing acts of violence and terrorism, this regulation will likely be deemed reasonable.

Ring v. Arizona: How Did This Happen, and Where Do We Go?

Gary Scott Turner*

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I. INTRODUCTION

Charles Andrew Bates, the Defendant in State v. Bates,1 listened to his
friends and former neighbors give testimony about his character, as he sat at

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B.A., University of South Florida. I would like to acknowledge and thank my loving wife,
Liz, for her unwavering support, Professor Michael Dale for his role as advisor and mentor,
and members of the Nova Law Review junior staff for their tireless efforts.

1 Fictional case. Bates' story is designed to give the reader an understanding of
how a sentencing hearing progresses.
a table in a hot Florida courtroom. Bates’ defense attorney called these character witnesses in a final effort to save his client’s life. The jury has already returned a guilty verdict on one count of first-degree murder; therefore, Bates is facing either life imprisonment or death. The Defendant is in danger of the jury recommending death to the judge if his attorney is unable to present mitigating circumstances that equalize or outweigh the several aggravating circumstances presented by the prosecutor.  

Prior to the defense attorney’s attempt at presenting mitigating circumstances, the prosecutor presented evidence to demonstrate aggravating circumstances. During the prosecutor’s argument, she presented several pieces of evidence, which could have been classified as aggravating factors. The prosecutor demonstrated, as she had done to establish guilt at trial, that the Defendant stabbed his seventy-two year-old victim twenty-six times. After killing the victim, the Defendant looted the victim’s apartment, stealing precious family heirlooms and a modest savings of cash. The prosecutor also demonstrated that the Defendant kept the victim bound and gagged in a dark bathroom for two days, providing limited food and water before killing her. The prosecutor closed her argument by stating that according to the state statute, three aggravating factors were present. First, the Defendant killed the victim in an especially heinous and cruel manner.  

Second, the victim was an elderly woman, whom he physically and mentally abused, and killed. Finally, the Defendant committed this murder for pecuniary gain.
Bates' attorney focused on the Defendant's age, mental state at the time of the crime, and limited criminal history to mitigate the aggravating factors presented by the prosecutor. First, the defense attorney explained to the jury that while the defendant is currently nineteen, he was only eighteen at the time of the murder.\(^6\) Thus, while the law sees the Defendant as an adult, his young age should be considered when analyzing his decisions. Second, the defense attorney attempted to reason the Defendant's actions based upon his mental state at the time of the murder.\(^7\) To do this, the Defendant's friends testified that they had taken illegal drugs with the Defendant only one day prior to the Defendant's felonious act, causing the Defendant to react aggressively. Finally, the defense attorney presented the Defendant's limited criminal history.\(^8\) Bates had only been arrested one time prior, for a misdemeanor.

Upon completion of the arguments, the judge gave the jury brief instructions, and allowed them to deliberate so they might form a recommendation of either life imprisonment or death. The jury returned after two short hours. The jury informed the judge that they had reached a decision. By a vote of twelve to zero, they found that the Defendant's age, limited criminal history, and mental state at the time of the murder were sufficient mitigating circumstances to offset the aggravating factors presented by the prosecution. Thus, the jury recommended that the judge impose a sentence of life imprisonment.

One week later, the court reconvened for the judge's decision. The judge explained that while he gives great weight to the jury's recommendation, he is not bound by it, and he must rule appropriately. Moreover, the judge explained that while the jury is often swayed by the emotion of witnesses at a sentencing trial, his experience and understanding of the procedure allows him to see things more objectively than juries might. Therefore, the judge explained that he was ready to make his ruling. As all ears in the courtroom listened attentively, the judge sentenced Charles Andrew Bates to death by the electric chair.\(^9\) The judge stated that he was

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\(^6\) In Florida, the "age of the defendant at the time of the crime" can be considered a mitigating factor. § 921.141(6)(g).

\(^7\) In Florida, the aggravating factors may be mitigated if "[t]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." § 921.141(6)(b).

\(^8\) In Florida, lack of a significant criminal history can be a mitigating factor. § 921.141(6)(a).

not persuaded by the argument that the Defendant’s age was a mitigating circumstance. When the judge weighed the three aggravating circumstances against the two remaining mitigating circumstances, he felt death was the appropriate punishment.

Although the sentencing hearing previously described is fictional, the possibility of its likeness becoming a reality is true, due to the current process required by death penalty statutes in eight states. In those eight states, either: 1) a judge makes the decision alone, 2) a panel of judges makes the decision together, or 3) a judge makes the decision with a recommendation from the jury, as was the case in the Bates’ trial. As of April 1, 2001, a total of 3701 inmates resided on death row. Of those 3701 inmates, 758 were sentenced to death by one of the three previously mentioned processes.

This article will deal directly with the 758 inmates who were sentenced to death by a judge or panel of judges. Initially, this article will briefly analyze the effects of Furman v. Georgia. In the analysis of Furman, the article will discuss the Court’s holding, as well as Furman’s effects on the death penalty in 1972. Finally, this section will discuss the implementation of aggravating and mitigating factors into state death penalty statutes, as a direct result of Furman.

In Part III, this article will survey the various ways states have formed their death penalty statutes. In this section, the article will first discuss those state statutes where a judge, or panel of judges makes the sentencing determination, independent of a jury. Next, the article will discuss state


14. DEATH PENALTY INFO. CTR., DEATH ROW INMATES BY STATE, at http://www.deathpenaltyinfo.org/DRowInfo.html (Apr. 1, 2001). At the time of the writing of this article, this was the most current information.

15. See id.

16. 408 U.S. 238 (1972) (per curiam).
Turner statutes that require a judge to determine the sentence, after receiving a recommendation from the jury. Finally, this section will analyze a state statute that requires the jury to make the final sentencing determination, and does not allow the judge to overrule the jury’s decision, as he can in other states.\(^{17}\)

In Part IV, this article will begin to look at landmark United States Supreme Court cases that set the stage for Ring v. Arizona.\(^{18}\) In this section, it becomes apparent that the Court is conflicted over the appropriate level of involvement by the judge in the sentencing process. The first case analyzed to demonstrate this point is Walton v. Arizona.\(^{19}\) In Walton, a 1990 case, the Court upheld the Arizona death penalty statute, finding that it did not violate the Sixth Amendment.\(^{20}\) The article then shifts forward to the year 2000 and discusses Apprendi v. New Jersey,\(^ {21}\) another significant United States Supreme Court case. In the discussion of Apprendi, the paper will show how a conflict between Apprendi and Walton existed, even though the Court stated in Apprendi that Walton remained good law.\(^ {22}\) Also at this juncture, the article will discuss Justice O'Connor's dissenting opinion in Apprendi, which predicted that appeals, such as Ring, would be quickly forthcoming.\(^ {23}\)

In Part V, this article will analyze Ring. In the analysis of Ring, the paper will show that Apprendi and Walton could not coexist, and how the Court chose not to tip-toe the line any longer. Also in this section, the article will revisit Justice O'Connor in another dissenting opinion, as she opines that the majority sided with the wrong case, Apprendi, and instead should have chosen Walton.\(^ {24}\)

Finally, in Part VI, this article will discuss the legal ramifications of the Ring decision. There are both long and short-term effects of Ring, and in this section, the article will examine both. In the short-term, will those currently on death row, who were sentenced by a judge, have their sentences commuted, as was done after Furman; or will they only receive new sentencing trials? In the long-term, what will this mean for current death penalty statutes, or for the administration of the death penalty? Will Ring

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20. Id. at 639.
22. Id. at 496.
23. Id. at 551 (O'Connor, J., dissenting).
only be a speed bump, slowing down executions until state legislatures can cleverly create new death penalty statutes that comply with the *Ring* ruling, or will this decision result in a permanent slowing of executions in this country?

II. *Furman v. Georgia*

The United States Supreme Court’s decision in *Furman v. Georgia* is the most significant reason death penalty statutes exist in their current form. Prior to *Furman*, the Court did not interpret punishment by death as cruel, “unless the manner of execution [could] be said to be inhuman and barbarous.” However, as Justice Douglas pointed out in his concurring opinion, “the Eighth Amendment ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’” Thus, the *Furman* Court sought to measure the death penalty against the existing “standards of decency.”

A. The Court’s Opinion

In *Furman*, three convicted felons, two from Georgia and one from Texas, were sentenced to death by juries in their respective states. *Furman*, from Georgia, was sentenced to death for murder, while Jackson, the other petitioner from Georgia, and Branch, the petitioner from Texas, were sentenced to death for rape. All three petitioners were black, and none had an education exceeding high school, as was the case for a large number of defendants sentenced to death at that time. As a result, the petitioners’ attorney argued that the death penalty was imposed arbitrarily because a

26. *Id.* at 241 (citing *In re Kemmler*, 136 U.S. 436, 447 (1890)). The Eighth Amendment states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII (emphasis added).
28. *See id.*
29. *Id.* at 239.
30. *Id.* at 252.
31. *Id.* at 252–53.
33. *Id.* at 249–50.
large majority of deathrow inmates were minorities with limited education, thus, the capital punishment statutes were a violation of the Eighth and Fourteenth Amendments. The sole issue addressed in Furman was whether the “imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?” The decision of the Court in Furman was five to four, with the five justices making up the majority filing separate opinions. The majority held that “the imposition and carrying out of the death penalty in these cases constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments,” and thus, was unconstitutional. All five concurring Justices rationalized their decision based on inequality. "Justices Brennan and Marshall concluded that the death penalty was per se unconstitutional, in part based on its inevitably unequal application." The other three concurring Justices, Justices Douglas, Stewart, and White, found fault with the inequality rooted in the sentencing procedure, as opposed to the punishment itself. Justice White wrote in his concurring opinion that “the Due Process Clause of the Fourteenth Amendment would render unconstitutional ‘capital sentencing procedures that are purposely constructed to allow maximum possible variation from one case to the next, and [that] provide no mechanism to prevent that consciously maximized

35. Id. The Eighth Amendment of the United States Constitution states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” U.S. CONST. amend. VIII. The Due Process Clause of the Fourteenth Amendment of the United States Constitution states that
[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
U.S. CONST. amend. XIV, § 1.
36. Furman, 408 U.S. at 239.
37. Id. at 240.
38. Id. at 239–40.
40. Howe, supra note 34, at 405.
41. Id.
variation from reflecting merely random or arbitrary choice." Thus, the
Court left the door open for state legislatures to devise a system, whereby a
defendant could be sentenced to death, if procedurally the sentencing state
could avoid random or arbitrary choice of those defendants selected for
death.

B. After Furman v. Georgia

During the three years following Furman, thirty-five states passed new
death penalty statutes. Most states elected to implement statutes that
mandated execution upon conviction. Conversely, a small number of states
created statutes mandating a separate post-conviction sentencing hearing,
combined with guidelines designed to funnel the judge's or jury's decision
in a certain direction, based upon the circumstances surrounding the criminal
act. In 1976, the Court was asked to determine the constitutionality of the
revised capital punishment statutes. Therefore, the Supreme Court granted
certiorari in five cases, originating in North Carolina, Louisiana, Georgia,
Florida, and Texas. Of the five state statutes analyzed by the Court, North
Carolina and Louisiana mandated capital punishment upon conviction for
murder, whereas Georgia, Florida, and Texas mandated a separate post-con-
viction sentencing hearing. Ultimately, the Court found North Carolina's
and Louisiana's capital punishment statutes unconstitutional, on the same
grounds as Furman. However, the Court held that the death penalty
statutes of Georgia, Florida, and Texas were constitutional, because the
guidelines put into place by those state legislatures reduced the "substantial

42. Furman, 408 U.S. at 248 n.11 (White, J., concurring) (quoting McGautha v.
43. Howe, supra note 34, at 405 n.241 (citing John W. Poulos, The Supreme Court,
Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory
Capital Punishment, 28 ARIZ. L. REV. 143, 226 (1986)).
44. Id. at 405–06.
45. Id. at 406.
46. Id.
47. Id.
48. Howe, supra note 34, at 406.
the North Carolina system); Roberts v. Louisiana, 428 U.S. 325 (1976) (rejecting the
Louisiana statute)).
50. Id. at 406 (citing to Gregg v. Georgia, 428 U.S. 153 (1976) (upholding the
Georgia system); Proffitt v. Florida, 428 U.S. 242 (1976) (upholding the Florida scheme);
Jurek v. Texas, 428 U.S. 262 (1976) (upholding the Texas system)).
risk' that the capital sanction would be imposed 'in an arbitrary and capricious manner.'

Hence, the Court effectively gave notice to state legislatures that it was necessary for any sentencing scheme to somehow narrow the number of defendants eligible for the death penalty.

III. SURVEY OF STATE DEATH PENALTY STATUTES

States have created three different procedural ways to impose capital punishment. The first procedural design mandates that a single judge, or panel of judges, independently make a finding and weighing of aggravating or mitigating circumstances, before imposing a sentence. The second procedural scheme requires a judge to make a finding and weighing of any aggravating or mitigating circumstances after the jury has made a sentencing recommendation to the judge based upon their finding of aggravating or mitigating circumstances. The third procedural style calls for a jury to determine the sentence based upon their finding and weighing of aggravating and mitigating circumstances. In the third procedural style, the judge does not make the final decision as he or she would in the first two procedural styles.

A. State Statutes That Require the Judge to Impose a Sentence, Independent of a Jury

Five states require a judge, without any recommendation from the jury, to impose a sentence in capital cases. Of these five states, Arizona,

51. Id. at 406 (quoting Gregg, 428 U.S. at 188 (plurality opinion)).
54. See Ark. Code Ann. § 5-4-603 (Michie 1997).
55. See Liptak, supra note 11.

The Arizona statute states in relevant part:
A. A person guilty of first degree murder as defined in § 13-1105 shall suffer death or
imprisonment in the custody of the state department of corrections for life . . . .

C. When a defendant is found guilty of or pleads guilty to first degree murder as
defined in § 13-1105, the judge who presided at the trial or before whom the guilty
plea was entered, or any other judge in the event of the death, resignation, incapacity or
disqualification of the judge who presided at the trial or before whom the guilty plea
was entered, shall conduct a separate sentencing hearing to determine the existence or
nonexistence of the circumstances included in subsections G and H of this section, for
the purpose of determining the sentence to be imposed. The hearing shall be con-
ducted before the court alone. The court alone shall make all factual determinations
required by this section or the constitution of the United States or this state.

D. Any information relevant to any mitigating circumstances included in subsection H
of this section may be presented by either the prosecution or the defendant, regardless
of its admissibility under the rules governing admission of evidence at criminal trials,
but the admissibility of information relevant to any of the aggravating circumstances
set forth in subsection G of this section shall be governed by the rules of evidence at
criminal trials . . .

E. The court shall return a special verdict setting forth its findings as to the existence
or nonexistence of each of the circumstances set forth in subsection G of this section
and as to the existence of any of the circumstances included in subsection H of this
section. In evaluating the mitigating circumstances, the courts shall consider any
information presented by the victim regarding the murdered person and the impact of
the murder on the victim and other family members. The court shall not consider any
recommendation made by the victim regarding the sentence to be imposed.

F. In determining whether to impose a sentence of death or life imprisonment, the
court shall take into account the aggravating and mitigating circumstances included in
subsections G and H of this section and shall impose a sentence of death if the court
finds one or more of the aggravating circumstances enumerated in subsection G of this
section and that there are no mitigating circumstances sufficiently substantial to call
for leniency.

G. The court shall consider the following aggravating circumstances:
1. The defendant has been convicted of another offense in the United States for which
under Arizona law a sentence of life imprisonment or death was imposable.
2. The defendant was previously convicted of a serious offense, whether preparatory or
completed.
3. In the commission of the offense the defendant knowingly created a grave risk of
death to another person or persons in addition to the person murdered during the
commission of the offense.
4. The defendant procured the commission of the offense by payment, or promise of
payment, of anything of pecuniary value.
5. The defendant committed the offense as consideration for the receipt, or in expecta-
tion of the receipt, of anything of pecuniary value.
6. The defendant committed the offense in an especially heinous, cruel or depraved
manner.
Idaho,\textsuperscript{58} and Montana\textsuperscript{59} call for a single judge to impose the penalty, while the two others, Nebraska\textsuperscript{60} and Colorado,\textsuperscript{61} require a panel of judges to impose the sentence. For all five states, the judge is burdened with the task of determining if any aggravating or mitigating circumstances were present

7. The defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.

8. The defendant has been convicted of one or more other homicides, as defined in § 13-1101, which were committed during the commission of the offense.

9. The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older.

10. The murdered person was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the murdered person was a peace officer.

H. The court shall consider as mitigating circumstances any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant’s character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant’s capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provisions of §13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant’s age.

Id.

58. \textit{Idaho Code Ann.} § 19-2515 (Michie 1997 & Supp. 2002). This section of the Idaho statute is similar to the process provided in section 13-703 of the Arizona statute, including a listing of aggravating and mitigating factors. \textit{Id.}

59. \textit{Mont. Code Ann.} § 46-18-301, -303, -304 (2001). These three Montana statute sections combine to form a process similar to section 13-703 of the Arizona statute, including a listing of aggravating and mitigating factors. \textit{Id.}

60. \textit{Neb. Rev. Stat.} § 29-2520 (1995). The Nebraska statute is similar to section 13-703 of the Arizona statute, except Nebraska uses a panel of judges to determine the appropriate sentence in a capital case. \textit{Id.}

during the crime. If the judge determines that such circumstances existed, then the judge must weigh those circumstances to determine if the aggravating circumstances outweigh the mitigating. If they do, then the judge can impose death; however, if the mitigating circumstances outweigh the aggravating circumstances, then the judge cannot impose death.

B. State Statutes That Require the Jury to Make a Sentencing Recommendation, but Mandate the Judge Make the Final Sentence Determination

Three states require a judge to impose a sentence in capital cases after first receiving a sentencing recommendation by a jury in a separate sentencing hearing. Those states include Florida, Alabama, and Delaware. In these three states, after a jury renders a guilty verdict, the trial moves on to a separate sentencing hearing. In the sentencing hearing, the jury determines if any aggravating circumstances existed during the crime. If the answer is no, the jury then advises that life imprisonment should be imposed. However, if an aggravating circumstance is found, then the jury determines if any mitigating circumstances are present to offset the aggravating circumstances. The jury weighs all possible factors and

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renders a recommendation to the judge.\textsuperscript{72} Once the recommendation has been made, the judge completes the same process as the jury, and renders his or her decision.\textsuperscript{73} Even though the judge often times sides with the jury, he or she is not required to do so.\textsuperscript{74} Thus, while the jury has input, the judge makes the ultimate decision, as is done in Arizona, Colorado, Idaho, Montana, and Nebraska.

C. State Statutes that Require the Jury to Determine a Sentence

The remaining twenty-eight states that allow capital punishment require the jury to impose the sentence, and not the judge.\textsuperscript{75} The statutes in these states are similar to those in states where the judge makes the decision after the jury rendered their sentencing recommendation. However, in these states, the jury renders a final decision, and not only a recommendation.\textsuperscript{76} For example, section 5-4-604 of the Arkansas Code provides a list of aggravating factors,\textsuperscript{77} and section 5-4-605 of the Arkansas Code provides a list of possible mitigating factors.\textsuperscript{78} Both lists are very similar to those factors found in the Florida Statutes discussed above. In states such as Arkansas, even though relatively the same aggravating and mitigating factors are weighed, the jury does this service exclusively.

IV. CASES THAT CREATED THE CONFLICT LEADING TO \textit{RING V. ARIZONA}

A. Walton v. Arizona

In the case of \textit{Walton v. Arizona},\textsuperscript{79} Walton was convicted of first-degree murder in Arizona for the shooting death of one Thomas Powell.\textsuperscript{80} During

\textsuperscript{72} \textsc{Ala. Code} \S 13A-5-46(c) (1994); \textsc{Del. Code Ann.} tit. 11, \S 4209(c)(3)(b) (1995); \textsc{Fla. Stat.} \S 921.141(2)(c) (2001).
\textsuperscript{73} \textsc{Ala. Code} \S 13A-5-46(a) (1994); \textsc{Del. Code Ann.} tit. 11, \S 4209(d) (1995); \textsc{Fla. Stat.} \S 921.141(3) (2001).
\textsuperscript{74} \textit{See} Susan Clary, \textit{Appeal: Don't Put 2 to Death}, \textsc{Orlando Sentinel}, July 6, 2002, at B1.
\textsuperscript{76} \textit{See} Liptak, supra note 11.
\textsuperscript{77} \textsc{Ark. Code Ann.} \S 5-4-604 (Michie 1997 & Supp. 2001).
\textsuperscript{78} \textsc{Ark. Code Ann.} \S 5-4-605 (Michie 1997).
\textsuperscript{79} 497 U.S. 639 (1990).
\textsuperscript{80} \textit{Id.} at 644-45.
the separate sentencing hearing, as was mandated by Arizona law, the judge found two aggravating factors. The first aggravating factor was that the murder was committed "in an especially heinous, and cruel or depraved manner," because Walton shot Thomas as Walton held Thomas to the ground with his foot on Thomas' neck. This act was done after Walton and his two accomplices spoke in front of Thomas about their plan for disposing of him. The second aggravating factor was that the murder was "committed for pecuniary gain." This finding was made because Walton and his accomplices murdered Powell in an effort to steal his car.

In his defense, Walton argued several potential mitigating factors. However, the judge found that the aggravating factors outweighed the mitigating; therefore, the judge sentenced Walton to death.

The issue before the United States Supreme Court was whether the Arizona law, which allowed a judge to determine the existence of aggravating and mitigating circumstances in a separate sentencing hearing, was constitutional, or did it violate the defendant's Sixth Amendment right to a jury trial? The Court held that the Arizona capital punishment statute was constitutional, because the aggravating circumstances were not elements of the crime, which the jury was required to find. Rather, the aggravating circumstances were merely "sentencing considerations."

In justification of its holding, the Court stated that the rule governing a fact finder in a criminal trial is that the jury must decide questions of fact, as it pertains to the elements of the crime. This means that a jury must make the factual findings to determine guilt or acquittal. The Court went on to say that this rule did not affect the Arizona statute, because the Arizona statute allowed the jury to make the findings of fact regarding the elements,

81. ARIZ. REV. STAT. ANN. § 13-703(c) (West 1989).
82. Walton, 497 U.S. at 645.
83. ARIZ. REV. STAT. ANN. § 13-703(g)(6) (West 1989).
84. Walton, 497 U.S. at 644.
85. Id.
86. Id. at 645; see ARIZ. REV. STAT. ANN. § 13-703(g)(5) (West 2001 & Supp. 2001).
87. Walton, 497 U.S. at 644.
88. Id at 645.
89. Id.
90. Id. at 642.
91. Id. at 649.
92. Walton, 497 U.S. at 648.
93. Id.
94. Id.
and thus, the jury determined guilt or acquittal.\(^{95}\) Moreover, during the sentencing portion of the trial, after the jury judged the elements, the judge was able to examine factors as “considerations,” not elements, and choose between death or life imprisonment.\(^{96}\) In making this determination, the Court relied on *Hildwin v. Florida* as precedent.\(^{97}\) Walton attempted to distinguish the Florida statute by claiming that it used aggravating factors as considerations, and the Arizona statute used them as elements.\(^{98}\) The Court addressed Walton’s argument by citing *Poland v. Arizona*, \(^{99}\) where the Court stated that “[a]ggravating circumstances are not separate penalties or offenses, but are ‘standards to guide the making of [the] choice’ between the alternative verdicts of death and life imprisonment.”\(^{100}\) Thus, under the Arizona statute, the judge’s findings did not result in a conviction or acquittal, and therefore, were not findings of elements; rather, they were sentencing considerations.

**B. Apprendi v. New Jersey**

Only ten years after *Walton*, the United States Supreme Court was, again, faced with the issue of whether a judge could make a finding of fact that increased the defendant’s sentence. That issue was raised in *Apprendi v. New Jersey*.\(^{102}\) In *Apprendi*, the defendant was charged with “fir[ing] several .22- caliber bullets into the home of an African-American family that had recently moved into a previously all-white neighborhood.”\(^{103}\) At the hearing, the “grand jury returned a 23-count indictment.”\(^{104}\) The defendant took “a plea agreement, pursuant to which [the defendant] pleaded guilty to two counts of second-degree possession of a firearm,” and one count of third-

\(^{95}\) Id.

\(^{96}\) Id.

\(^{97}\) 490 U.S. 638, 639–40 (1989). In *Hildwin*, the Court upheld the decision of *Spaziano v. Florida*, 468 U.S. 447 (1984), and found the Florida statute at issue was constitutional because “the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.” *Hildwin*, 490 U.S. at 640–41.

\(^{98}\) Walton, 497 U.S. at 648.


\(^{100}\) Id. at 156.

\(^{101}\) Walton, 497 U.S. at 648.

\(^{102}\) 530 U.S. 466 (2000).

\(^{103}\) Id. at 469.

\(^{104}\) Id.
degree unlawful possession of an antipersonnel bomb. 105 "[T]he prosecutor dismissed the [remaining] 20 counts." 106 "As part of the plea agreement . . . the State reserved the right to request the court to impose a higher ‘enhanced sentence’ on one of the counts, on the basis that it was racially motivated." 107 Also, as part of the agreement, the defendant reserved the right to challenge the constitutionality of the hate crime sentencing enhancement. 108

The trial judge accepted the guilty pleas, and upon the prosecutor’s motion for an extended sentence, held an evidentiary hearing. 109 The judge “concluded that the evidence supported a finding ‘that the crime was motivated by racial bias.’” 110 Having made this finding “by a preponderance of the evidence,” the judge sentenced the defendant to twelve years imprisonment. 111 The statutory maximum for this crime was ten years. 112 Therefore, the sentence imposed by the trial judge exceeded the statutory maximum by two years. 113

The defendant appealed, stating the Due Process Clause of the Fourteenth Amendment required that the finding of bias be “proved to a jury beyond a reasonable doubt.” 114 The appellate court affirmed the decision because the “‘hate crime enhancement’ [was] a ‘sentencing factor,’ rather than an element of an underlying offense, and that decision was within the State’s established power to define the elements of its crimes.” 115 Moreover, the appellate court stated that the factor in dispute was “motive,” which is a “traditional ‘sentencing factor,’ one not considered an ‘essential element.’” 116

Upon reaching the United States Supreme Court, the issue was whether the defendant “had a constitutional right to have a jury find such [racial] bias on the basis of proof beyond a reasonable doubt.” 117 The Court held that a

105. Id. at 469–70.
106. Id. at 470.
107. Apprendi, 530 U.S. at 470.
108. Id.
109. Id.
111. Id.
112. Apprendi, 530 U.S. at 470.
113. Id. at 471.
114. Id.
116. Id.
117. Apprendi, 530 U.S. at 475–76.
defendant does have that right.\textsuperscript{118} The Court referenced to \textit{Jones v. United States},\textsuperscript{119} and said that:

under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.\textsuperscript{120}

Moreover, the Court said the Fourteenth Amendment deserved the same treatment, and thus, extended the rule to include state courts.\textsuperscript{121}

In the Court’s analysis of the issue, it stated that nothing throughout history indicates that it is “impermissible for judges to exercise discretion;” however, that discretion must be made “within the range prescribed by statute.”\textsuperscript{122} To support this proposition, the Court looked at \textit{McMillan v. Pennsylvania},\textsuperscript{123} where it decided that mandatory minimum sentences were constitutional because the mandatory minimum was within the range prescribed by the statute.\textsuperscript{124} The Court also stated in regard to \textit{McMillan}, that as long as the judge “neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty,” then the judge may change the sentence.\textsuperscript{125}

The Court then examined the sole exception to the rule from \textit{McMillan}. The exception, according to \textit{Almendarez-Torres v. United States},\textsuperscript{126} is a defendant’s prior felony conviction.\textsuperscript{127} This exception was restated in \textit{Jones} as follows: “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”\textsuperscript{128} Thus, the exception would have applied in \textit{Apprendi} if the defendant had a prior felony conviction. However, a prior felony conviction was never

\textsuperscript{118} Id. at 476.
\textsuperscript{119} 526 U.S. 227 (1999).
\textsuperscript{120} \textit{Apprendi}, 530 U.S. at 476 (quoting \textit{Jones}, 526 U.S. at 243).
\textsuperscript{121} Id. at 476.
\textsuperscript{122} Id. at 481 (emphasis in original).
\textsuperscript{123} 477 U.S. 79 (1986).
\textsuperscript{124} \textit{Apprendi}, 530 U.S. at 485–486 (citing \textit{McMillan}, 477 U.S. at 86–88).
\textsuperscript{125} Id. at 486 (citing \textit{McMillan}, 477 U.S. at 86–88).
\textsuperscript{126} 523 U.S. 224 (1998).
\textsuperscript{127} \textit{Apprendi}, 530 U.S. at 488 (citing \textit{Almendarez-Torres}, 523 U.S. at 230).
\textsuperscript{128} Id. at 490 (quoting \textit{Jones}, 526 U.S. at 243).
introduced; and therefore, the rule from McMillan applied in Apprendi, leaving the judge without the ability to increase the defendant's sentence beyond the statutory maximum.

The State presented two arguments in opposition to the Court's application of the McMillan rule in this case. The Court began with the State's argument that the "finding of biased purpose is not an 'element'" of the crime; rather, it is a "sentencing factor." The Court disagreed with New Jersey on this point. The Court stated that the statute required the judge to make a determination of "whether the defendant possessed, at the time he committed the subject act, a 'purpose to intimidate' on account of . . . race." Thus, the statute required the determination "of the defendant's state of mind," which is commonly known as mens rea. The Court went on to say that "[t]he defendant's intent in committing the crime is perhaps as close as one might hope to come to a core criminal offense 'element.'" The Court concluded their analysis of this argument by saying the "relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"

The State's second argument was that the exception created by Almendarez-Torres allowed the judge to impose a sentence beyond the maximum provided by the substantive statute under which a defendant is charged. This meant that a sentence could be increased above the maximum if a statute allowed a judge to do so. The Court distinguished Almendarez-Torres from Apprendi by stating that recidivism had nothing to do with the New Jersey statute. Instead, "New Jersey's biased purpose inquiry goes precisely to what happened in the 'commission of the offense.'" Thus, the Court was allowing the objective exception of a prior felony conviction to remain, but eliminating the allowance of any subjective exceptions found by a judge.

129. Id. at 466.
130. Id. at 492.
131. Id.
132. Apprendi, 530 U.S. at 492.
133. Id.
134. Id. (citing BLACK'S LAW DICTIONARY 1137 (rev. 4th ed. 1968)).
135. Id. at 493.
136. Id. at 494.
137. Apprendi, 530 U.S. at 492.
138. Id. at 496.
139. Id. (quoting Almendarez-Torres, 523 U.S. at 244).
In the final section of the majority opinion it stated that Walton remained good law, and furthermore, Apprendi did not overrule Walton.\(^{140}\) However, as Justice O'Connor pointed out in her dissent, Walton and Apprendi could not coexist.\(^{141}\) Also in Justice O'Connor's dissent, she wrote, regarding the conflict between Apprendi and Walton, that "the most significant impact of the Court's decision will be a practical one—its unsettling effect on sentencing conducted under current federal and state determinate—sentencing schemes."\(^{142}\) Justice O'Connor felt that "the Court's decision threaten[s] to unleash a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part on the authority of the Court's decision [in Apprendi]."\(^{143}\) Thus, Justice O'Connor predicted the procedural problems that were certain to ensue because of the majority's decision.

V. RING V. ARIZONA

As Justice O'Connor predicted,\(^{144}\) within two years of its decision, the Supreme Court was faced with an appeal based on Apprendi. In 2002, the Court granted certiorari in the case of Ring v. Arizona.\(^{145}\) In Ring, the defendant, Timothy Stuart Ring, was charged with murder during the robbery of an armored van with two other accomplices.\(^{146}\) At trial, "[t]he jury deadlocked on premeditated murder"\(^{147}\) because "the evidence admitted at trial failed to prove, beyond a reasonable doubt, that [Ring] was a major participant in the armed robbery or that he actually murdered Magoch, [the victim]."\(^{148}\) However, the jury did return a verdict of first-degree felony murder for Ring's participation in the act.\(^{149}\)

Between the guilt phase of the trial and the sentencing hearing, James Greenham, Ring's accomplice, came forward after accepting a plea agreement,\(^{150}\) and testified that Ring planned "the robbery for several weeks before it occurred," and "[t]ook the role as leader because he laid out all the

\(^{140}\) Id. at 496–97.

\(^{141}\) See id. at 538 (O'Connor, J., dissenting).

\(^{142}\) Apprendi, 530 U.S. at 550 (O'Connor, J., dissenting).

\(^{143}\) Id. at 551 (O'Connor, J., dissenting).

\(^{144}\) See id. (O'Connor, J., dissenting).

\(^{145}\) 122 S. Ct. 2428 (2002).

\(^{146}\) Id. at 2432–33.

\(^{147}\) Id. at 2433.

\(^{148}\) Id. at 2434 (quoting State v. Ring, 25 P.3d 1139, 1152 (Ariz. 2001)).

\(^{149}\) Id. at 2433.

\(^{150}\) Ring, 122 S. Ct. at 2435.
Ring's accomplice went on to say that "Ring shot [Magoch] with a rifle equipped with a homemade silencer." Lastly, Greenham stated that while the three "were dividing up the money, Ring upbraided him and Ferguson for 'forgetting to congratulate [Ring] on [his] shot.'"

At the sentencing hearing, the judge cited Greenham's testimony before concluding "that Ring '[was] the one who shot and killed Mr. Magoch.' Based on this conclusion, the judge "turned to the determination of aggravating and mitigating circumstances." The judge "found two aggravating factors." First, "that Ring committed the offense in expectation of receiving something of 'pecuniary value,' as described in § 13-703; '[t]aking the cash from the armored car was the motive and reason for Mr. Magoch's murder and not just the result." Second, the judge found that the offense was committed 'in an especially heinous, cruel or depraved manner.' To mitigate the crime, the judge found only one "factor[,] Ring's 'minimal' criminal record.'"

On appeal, Ring challenged the constitutionality of the Arizona statute under Apprendi, but the Supreme Court of Arizona upheld the sentence because the majority in Apprendi stated "that Walton remained good law." However, the Supreme Court of Arizona went on to confirm that Justice O'Connor's dissent in Apprendi was correct when she stated that "'without that critical finding [of an aggravating factor], the maximum sentence to which the defendant [was] exposed is life imprisonment, and not the death penalty.'" Therefore, the Supreme Court of Arizona agreed with Justice O'Connor's interpretation of the Arizona statute. However, "the Arizona court understood that it was bound by the Supremacy Clause to apply Walton, which [the] Court had not overruled. It therefore rejected Ring's constitutional attack on the State's capital murder judicial sentencing system."
On appeal to the United States Supreme Court, the issue was "whether an aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury[?]". The Court found "that Walton and Apprendi [were] irreconcilable." Therefore, the Court overruled Walton, and held that a jury must make such a determination.

The Court began its analysis of this issue by discussing the cases which led to this point, Walton and Apprendi. The Court stated that in the Walton holding, the aggravating and mitigating factors were seen "as 'sentencing considerations.'" However, in Apprendi, the Court stated that a judge could not increase "a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." Furthermore, the Court restated its reconciliation of the two cases in Apprendi by finding that "[t]he key distinction... was that a conviction of first-degree murder in Arizona carried a maximum sentence of death." However, based upon the Supreme Court of Arizona's opinion confirming Justice O'Connor's observation regarding the Arizona statute, it appeared that the maximum sentence was life imprisonment before the judge made a determination of aggravating or mitigating factors.

Arizona's first argument was the same argument it made in Walton, that Ring was sentenced within the range of the law. However, unlike in Walton, the Court stated that the state’s argument "overlook[ed] Apprendi’s instruction that 'the relevant inquiry is one not of form, but of effect.' In effect 'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict.'"

Arizona's second argument was also based on Walton, which was the distinction "between elements of an offense and sentencing factors." The Court rejected that argument as well, stating that "[a]s to elevation of the

164. Id. at 2437.
165. Ring, 122 S. Ct. at 2443.
166. Id.
167. Id. at 2437–40.
168. Id. at 2437 (quoting Walton v. Arizona, 497 U.S. 639, 648 (1990)).
169. Id. at 2439 (quoting Apprendi v. New Jersey, 530 U.S. 466, 482–83 (1990)).
170. Ring, 122 S. Ct. at 2440.
171. Id.
172. Id. (quoting Apprendi, 530 U.S. at 494).
173. Id. at 2441.
maximum punishment . . . *Apprendi* repeatedly instructs in that context that the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." 174 Thus, the Court appeared to see no difference between an "element" and a "sentencing factor" if the judge’s decision increased the defendant’s sentence beyond the maximum allowed under the statute.

Arizona’s third argument was that "'[d]eath [was] different,"' and hence, a judge should make the decision to impose death, rather than a jury. 175 Arizona based this theory on *Furman*, which required states to impose factors to minimize the risk of arbitrary rulings of death sentences. 176

Aside from the Eighth Amendment argument, which the *Furman* Court relied upon, "Arizona present[ed] 'no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent.'" 177 Moreover, the Court went on to say that a state legislature could not create laws that restrict one’s constitutional protection in order to preserve another. 178 However, Arizona continued that argument by stating "that judicial authority over the finding of aggravating factors may . . . be a better way to guarantee against the arbitrary imposition of the death penalty." 179 The Court responded to this version of the argument by stating that "'[t]he Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders.'" 180 The Court concluded its analysis of this argument by stating that the majority of states that impose the death penalty do so without compromising the Eighth Amendment. 181

In closing, Justice Ginsburg clarified the ruling in this case by stating "'[b]ecause Arizona’s enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense,’ the Sixth Amendment requires that they be found by a jury." 182

Justice O’Connor, again dissenting as she did in *Apprendi*, stated that she would have chosen to overrule *Apprendi*, not *Walton*. 183 Justice O’Connor went on to say that “*Apprendi* was a serious mistake,” and that

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175. *Id.*
176. *Id.* at 2441–42 (citing *Apprendi*, 530 U.S. at 522–23).
177. *Id.* at 2442 (quoting *Apprendi*, 530 U.S. at 539).
178. *See id.*
180. *Id.*
181. *Id.*
182. *Id.* at 2443 (quoting *Apprendi*, 530 U.S. at 494 n.19).
183. *Id.* at 2448 (O’Connor, J., dissenting).
"[t]he Court ha[d] failed, both in Apprendi and in the [Ring] decision . . . to offer any meaningful justification for deviating from years of cases both suggesting and holding that application of the increase in the 'maximum penalty rule' is not required by the Constitution." 184 Furthermore, Justice O'Connor stated that the "destabilizing effect" that Apprendi had on the criminal justice system is disastrous. 185 She went on to opine that "[i]t is simply beyond dispute that Apprendi threw countless criminal sentences into doubt and thereby caused an enormous increase in the workload of an already overburdened judiciary." 186 Justice O'Connor concluded by identifying the four state capital sentencing schemes, other than Arizona's, that Ring effectively declared unconstitutional: Colorado's, Idaho's, Montana's, and Nebraska's; and further identified four other states whose capital sentencing schemes are now in doubt: Alabama's, Delaware's, Florida's, and Indiana's. 187

VI. LEGAL RAMIFICATIONS OF RING

A. Short-Term

Due to the Court's decision in Ring, states will be required to decide three very important issues. First, the states must decide whether their state's death penalty statute was affected by the ruling. Second, if their statute was affected, whether death row inmates in their state will receive new sentencing trials or have their sentences commuted to life imprisonment, as all death penalty sentences were after the landmark decision of Furman? 188 Finally, if their statute was affected, how will they revise their death penalty statutes?

185. Id. at 2449 (O'Connor, J., dissenting).
186. Id.
187. Id. at 2449–50 (O'Connor, J., dissenting). Indiana's new capital sentencing scheme, which requires a unanimous jury to render the final sentencing decision, went into effect on July 1, 2002. DEATH PENALTY INFO. CTR.; INDIANA, at http://www.deathpenaltyinfo.org/indiana.html (last visited Mar. 22, 2003). Thus, while Indiana's new capital sentencing scheme appears to be safe from constitutional challenges, current death row inmates sentenced under the old scheme may have a constitutional claim. See Death Sentence Laws in Five States Overturned, (June 24, 2002), at http://www.msnbc.com/news/771488.asp?pne=msn.
The *Ring* decision makes the death penalty statutes in Arizona, Idaho, Montana, Colorado, and Nebraska unconstitutional, because a judge makes the sole determination in those states of aggravating or mitigating factors. Thus, the judge is essentially making factual findings to increase the sentence beyond what the jury finding of guilt deemed appropriate. Therefore, those state statutes are in direct violation of *Ring*, and thus, unconstitutional.

The fate of Alabama, Delaware, and Florida’s death penalty statutes are not so easily determined. In those states, the judge renders a final order after the jury makes a sentencing recommendation to the judge. This process is misleading because one might think that the jury’s extended role makes the statute constitutional. This procedure, however, is unconstitutional. First, since the judge is not required to sentence the defendant in accordance with the jury’s verdict, the judge, in essence, possesses the same power in these three states as the judge possessed in Arizona. Second, as Justice Ginsburg said in *Ring*, the test is in effect, not form. Therefore, if you look at the effect of these three state statutes on a defendant’s sentencing hearing, instead of the form, it becomes clearer that the jury’s recommendation means little or nothing, and the judge makes the necessary factual finding of any aggravating or mitigating circumstances. Thus, when *Apprendi* is applied to the state death penalty statutes of Alabama, Delaware, and Florida, it appears they will be declared unconstitutional, even though they have been declared constitutional in the past, as was *Walton*.

All other states possessing the death penalty currently require the jury to sentence the defendant in capital cases. Meaning, the judge plays no role in determining whether aggravating or mitigating circumstances are present. Therefore, those statutes should be unaffected by *Ring*.

For the eight states mentioned as having unconstitutional death penalty statutes, their legislatures must decide what procedure to put into place for the death row inmates who were sentenced under those unconstitutional statutes.

190. The Supreme Court of Florida has already stayed the executions of two death row inmates until it can decide how *Ring* effects, if at all, Florida’s death penalty statute. Phil Long, *Florida Supreme Court Halts Two Executions*, MIAMI HERALD, July 9, 2002, at A2. The Supreme Court of Florida’s decision is expected in the Fall of 2002. *Id.*
sentencing procedures. For example, after Furman was decided, all inmates on death row had their sentences commuted to life. The states at that time did not have the aggravating or mitigating circumstances in place to offer as sentencing guidelines for juries and judges. Therefore, commuting the sentences appears to have been the only viable choice. However, at this moment, other state death penalty statutes can work as a model for a constitutional statute, and new sentencing hearings are more possible. Thus, it is just a matter of whether the states are willing to spend the money and time to provide new sentencing hearings.

Regardless of whether the affected states create a new death penalty statute for new sentencing hearings, or the states choose to commute the death sentences to life imprisonment, they must still decide how to create a new capital punishment statute for future offenders. Three obvious options exist. First, the affected states can model their statutes after a state statute that has not been declared unconstitutional, and thus, require a jury to make the final sentencing decision. Second, an affected state can attempt to cleverly structure a statute where the judge still has some input in the process, in hopes that the Supreme Court will find the new statute constitutional. One thing is certain, a state cannot get around Ring by making death the mandatory sentence, and allowing the judge to lower the sentence to life in prison, because this idea was struck down in Furman. Finally, the state can abolish the death penalty. While this may be possible in some of the affected states, those such as Florida may find this option politically impossible since it executes such a high number of prisoners, and a large majority of the public supports its use.

B. *Long-Term*

The long-term effects of *Ring* are fewer in number, but possibly greater in value. Ring might not bring an end to the death penalty, but it could decrease the number of defendants sentenced to death. According to Ronald J. Tabak, the co-chairman of an American Bar Association committee on the death penalty, “[f]ar, far, far more often when the judges override the jury, it is in order to impose the death penalty when the jury has recommended life.”

Mr. Tabak stated that this is evident in those states, such as Florida and Alabama, where the jury only provides a sentencing recommendation, but the judge still has the final say. Thus, if all eight states where death penalty statutes have been called into question are forced to change their death sentencing procedure, then there might be a reduction in the number of death sentences rendered in the future.

**VII. CONCLUSION**

In conclusion, the Court succeeded in providing some clarity of *Apprendi* in *Ring*, but left an unsettling question for some states as to *Ring*’s range. The Court has experienced difficulty in determining how to allow states to apply the death penalty. This difficulty apparently began in 1972 with *Furman*, extended through 1990 with *Walton*, and apparently has continued through 2002 with *Ring*. It is possible that inevitable appeals from states such as Alabama, Florida, and Delaware will clarify *Ring*’s impact even more, but unfortunately, death row inmates in those states will have to wait patiently until the Supreme Court decides to revisit the issue—once again.

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200. If you value life over questionable deterrence and retribution, then less executions might provide a greater value.
201. Liptak, *supra* note 11.
202. “James S. Liebman, [a law professor at Columbia University], said that: ‘about a quarter of the death row in Alabama is made up of people whom juries sentenced to life in prison but judges sentenced to death.’” Liptak, *supra* note 11.
203. *Id.*
Reformation of the Hatch-Waxman Act, an Unnecessary Resolution
Sarah M. Yoho*

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I. INTRODUCTION

In an era flourishing with scientific innovation, the importance of pharmaceutical drug development is evident. Pharmaceutical drugs aid in the fight against cancer, heart disease, mental illness, and a plethora of other diseases that affect the daily lives of many Americans.1 However, for

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1. See Pharmaceutical Research and Manufacturers of America, Delivering on the Promise of Pharmaceutical Innovation: The Need to Maintain Strong and Predictable
something that affects life so tremendously, there is a drawback—the cost of pharmaceuticals. Due to the patent protection provided for new drugs, pioneer companies may enjoy a twenty-year monopoly. Patent exclusivity available for an innovator is a key factor in promoting the entrance of new drugs to the market. Without the exclusivity provided to pioneer drug companies, the rate of innovation would likely be dampened. With the temporary monopoly, pioneer drug companies may set drug prices at a level necessary to regain the investment of discovery and research. Yet, with the approval of new drugs comes the opportunity for a generic company to rely on a pioneer company’s studies to apply for approval of a generic drug even before the patent expires on the pioneer drug.

The complicated process of pioneer drug and generic drug approval is detailed in the Hatch-Waxman Act ("Act"). Although criticized for containing loopholes that allegedly allow pioneer companies to extend their exclusivity, the Act serves the purpose Congress originally intended. Currently, a bill is being reviewed by Congress, which will amend the Act in order to promote an increase in generic drug marketing. However, the provisions of the bill do not accurately address the problems of the Hatch-Waxman Act. Instead, an alternate solution is more advisable to precisely reflect the original purposes of the Act. Furthermore, it is the Food and Drug Administration (FDA) that ultimately decides whether a new or generic drug is approved for marketing.

The purpose of this note is to examine whether reformation of the Hatch-Waxman Act is the appropriate solution to further promote the dual purposes of the Act. Part II reviews the importance of patent rights in

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5. Julie Appleby & Jayne O'Donnell, Consumers Pay as Drug Firms Fight Over Generics, USA Today, June 6, 2002, at 1A. Senator Charles Schumer, D-N.Y., criticized the pioneer companies when stating, "These companies figure out a new way to keep the dollars rolling in, stooping to a new low every day to maintain their exclusivity rights." Id. at 2A.
stimulating innovation, especially in the pharmaceutical industry. Part III explores the history and provisions of the Act, which create a balance between the interests of generic drug and pioneer drug companies. Part IV discusses the successful enforcement of the Act by the FDA and the courts. Part V details the inadequate provisions of the bill introduced in the Senate to reform the Act. Finally, the note concludes by suggesting a possible alternative to revising the Act to further maintain balance between promoting generic marketing and pioneer innovation.

II. THE RELATIONSHIP BETWEEN PATENT LAW AND DRUG APPROVAL

Patent rights are an important part of society, stemming back to the United States Constitution. Patents serve “to promote invention, to encourage development and commercialization of inventions, and to encourage inventors to disclose their inventions.” A patent issued by the United States Patent and Trademark Office provides an inventor with the right to exclude others from manufacturing, using or selling the patented invention for twenty years. The right to exclude others is exemplified in the right to sue those who infringe upon the patent. “Patent infringement is defined as making, using, offering to sell, or selling a patented invention without authority.” Without patent protection, an invention could be copied by competitors at significantly lower prices, thereby reducing an inventor’s ability to recover costs associated with innovation.

The profit protection provided by patents is clearly evidenced in statutes regarding drug innovation. In 1984, Congress enacted the Hatch-Waxman Act, also known as the Drug Price Competition and Patent Term Restoration Act of 1984, which amended Title 21, section 355 of the United States Code (known as the Federal Food, Drug, and Cosmetic Act) and Title 35, sections 156 and 271 of the United States Code, which are sections of the patent code. In relation to patent protection, section 156 was amended in order to provide pioneer drug companies with an extension on their patents based on the time lost in obtaining FDA approval. In addition, section 271 was amended to allow generic drug companies to apply for FDA approval before the pioneer drug patent expires. The provision authorizes generic drug companies to conditionally infringe on pioneer drug patents without the consequences of a patent infringement lawsuit. However, the authorization has its limits. The exemption from infringement only allows generic drug companies to infringe so long as it is related to gaining FDA approval. If generic drug companies go beyond simply seeking approval by the FDA, pioneer drug companies may seek money damages or injunctive relief in order to protect their patent interests.

III. HISTORY OF THE HATCH-WAXMAN ACT

A. Drug Approval Process Before 1984

Before the Act was introduced in 1984, the drug industry was regulated by the 1962 amendments to the Federal Food, Drug, and Cosmetic Act, “which required proof that a drug was safe and effective” before the FDA submitted approval. However, the 1962 amendments did not include

14. See id. at 231.
18. See § 271(e)(3).
19. Upadhye, supra note 17, at 43.
provisions for a separate and more economical approval process for generic drugs. Instead, generic drug companies were forced to go through the same procedures for FDA approval as pioneer drug companies—filing a New Drug Application (NDA). However, the procedure for filing an NDA is complex and costly considering that:

The NDA is a massive report on the drug, and contains summaries of all the animal and human studies conducted, demonstrating that the new drug is safe and efficacious, details of how and where the new drug will be manufactured, how the manufacturing process is validated, how the drug’s performance will be maintained, stability tests on the drug, and how the drug will be packaged, labeled, and marketed.

Due to the lack of finances to undertake the expensive process of clinical studies to prove a drug was safe and effective, few generic drugs entered the market by filing NDAs.

B. Provisions of the Hatch-Waxman Act

As a result of long debates over the contents of the Act, Congress finally came to a compromise and President Ronald Reagan enacted the bill into law on September 24, 1984. Provisions of the Act enable inventors to have an opportunity to recover development costs, and to ultimately make a profit off of the specified exclusivity period. In addition to recovering development time, the Act also gives generic drug companies advantages unavailable before 1984.

The first advantage to generics is evident in Title I of the Act, which amended section 355 of Title 21 of the United States Code by introducing an

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22. Id.
23. Id. at 396–97 (citing Alan H. Kaplan, Fifty Years of Drug Amendments Revisited: In Easy-To-Swallow Capsule Form, 50 Food & Drug L.J. 179, 188–89 (1995)).
25. See Engelberg, supra note 21, at 397.
abbreviated process for generic drug availability. 28 Through an Abbreviated
New Drug Application (ANDA), a generic drug company may rely on the
accomplishments of pioneer drug companies to obtain faster FDA ap-
proval. 29 Ultimately, the ANDA allows generic drugs to reach the market at
reasonable costs to consumers. 30 Furthermore, Title II aided generics by
amending section 271 of Title 35 of the United States Code to allow generic
drug companies to conditionally infringe on pioneer drug companies
patents. 31 So long as the infringement is for the purpose of obtaining FDA
approval of a generic drug, a generic drug company’s use of patented
methods or products does not constitute infringement. 32 In addition to
allowing generic drugs to be approved based upon the safety and efficacy of
a pioneer drug, the Act also provides a way for a generic drug company to
challenge a pioneer’s patent. 33

1. Generic Drug Approval Process

As discussed, one of the purposes of the Act is to “enabl[e] competitors
to bring low-cost, generic copies of [pioneer] drugs to the market.” 34 Instead
of filing an NDA with the FDA, as was required before 1984, generic drug
companies may file an ANDA with information detailing that the generic
drug is the bioequivalent of a previously approved pioneer drug, referred to
as the “listed drug.” 35 Essentially, a generic drug must contain the same
active ingredient as the listed drug, but the inactive ingredients may vary. 36
Along with bioequivalency information, the ANDA applicant must certify

32. Id. Section 271(e)(1) states:
It shall not be an act of infringement to make, use, offer to sell, or sell within the
United States or import into the United States a patented invention . . . solely for uses
reasonably related to the development and submission of information under a Federal
law which regulates the manufacture, use, or sale of drugs . . . .

Id.
34. Andrx Pharms., Inc., 276 F.3d at 1371. The other purpose of the Act is to
“induc[e] pioneering research and development of new drugs.” Id.
that the drug will not interfere with the listed drug patents of an NDA holder by submitting

a certification, in the opinion of the applicant and to the best of his knowledge, with respect to each patent which claims the listed drug

... (I) that such patent information has not been filed, (II) that such patent has expired, (III) of the date on which such patent will expire, or (IV) that such patent is invalid or will not be infringed by the manufacture, use, or sale of the new drug for which the application is submitted ... 37

The specific certification submitted by the generic drug company is referred to as either a Paragraph I, II, III, or IV certification. 38

Furthermore, if a generic drug company files an ANDA with a Paragraph IV certification, the company is required to give the patent holder and the NDA holder notice of the reasons why the patent listed is invalid or why the generic drug does not infringe on the listed patent. 39 According to the Act, the requisite notice must include a "detailed statement of the factual and legal basis of the [ANDA] applicant’s opinion that the patent is not valid or will not be infringed." 40 The purpose of the notice is to provide NDA and patent holders with an opportunity to protect their patent rights through "inquiry, investigation or litigation." 41 However, the ANDA applicant is not required to submit the notice to the FDA. 42 The FDA does not review the notice because it lacks the expertise in patent law. Moreover, neither the FDA nor the United States Patent and Trademark Office currently has access to the additional resources that would be necessary to review these notices, and a patent certification review system would subject the agency's decisions to questioning that would require further re-

38. Andrx Pharms., Inc., 276 F.3d at 1371.
source expenditures and create delays in the statutory patent certification and challenge process.\textsuperscript{43}

In addition, Paragraph IV certification brings forth another obstacle generic drug companies must tackle. Pursuant to Title 35, section 271(e)(2)(A), the filing of a Paragraph IV certification is considered an act of infringement.\textsuperscript{44} Subsequent to receiving notice from the ANDA applicant, the NDA and patent holders have forty-five days to commence a lawsuit against the generic drug company for patent infringement.\textsuperscript{45} The Act states:

If the [ANDA] applicant made a [Paragraph IV] certification . . . the [FDA] approval shall be made effective immediately unless an action is brought for infringement of a patent which is the subject of the certification before the expiration of forty-five days from the date the notice . . . is received. If such an action is brought before the expiration of such days, the approval shall be made effective upon the expiration of the thirty-month period beginning on the date of the receipt of the notice provided . . . or such shorter or longer period as the court may order because either party to the action failed to reasonably cooperate in expediting the action . . . .\textsuperscript{46}

The thirty-month stay allows the parties to litigate the patent infringement suit, thereby guaranteeing that the generic drug will not immediately enter the market.\textsuperscript{47}

Generic drug companies take a significant risk by filing a Paragraph IV certification. If the patent holder timely files suit, initiating the stay of generic drug approval up to thirty months, the generic drug company is forced to await a court's decision concerning the patent before the generic may hit the market.\textsuperscript{48} However, generic drug companies have a great

\textsuperscript{43} Id. at 788 (Garjarsa, J., concurring).
\textsuperscript{44} 35 U.S.C. § 271(e)(2)(A); aaiPharma Inc. v. Thompson, 296 F.3d 227, 232 (4th Cir. 2002).
\textsuperscript{46} Id.
incentive to file a Paragraph IV certification with their ANDA. Under the Act, the first company to file an ANDA with a Paragraph IV certification is granted a 180-day marketing exclusivity period.

Although the 180-day period enables the first ANDA filer with a Paragraph IV certification to temporarily block out other ANDA applicants from marketing their versions of the drug, subsequent ANDA filers may be able to bypass this provision. According to Title 21, section 355(j)(5)(B)(iv), if a second ANDA also containing a Paragraph IV certification is submitted, the FDA will not approve the application until 180 days after:

(I) the date the Secretary [of the FDA] receives notice from the applicant under the previous application of the first commercial marketing of the drug under the previous application, or
(II) the date of a decision of a court in an action described in an action... holding the patent which is the subject of the certification to be invalid or not infringed, whichever is earlier.

Section 355(j)(5)(B)(iv)(II) of the Act includes not only court decisions finding that the first ANDA filer has not infringed or that the patent is invalid, but also decisions involving the second ANDA filer. If the NDA or patent holder sues a second ANDA filer, the case could be resolved prior to a case against the first ANDA filer. Therefore, a second ANDA filer may ultimately succeed in obtaining the 180-day exclusivity period, thereby excluding the first ANDA filer from the market for the period. "The provision allowing a second ANDA filer to trigger the period by a 'court decision' comports with the statute and the intent of Congress." The various provisions of the Act enable generic drug companies to reap benefits. The benefits of the 180-day exclusivity period, in addition to the financial advantages of relying on a pioneer drug company's studies,

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51. Id.
52. Minn. Mining & Mfg., 289 F.3d at 778 (citing Teva Pharmas., USA, Inc. v. United States FDA, 182 F.3d 1003, 1010 (D.C. Cir. 1999)).
53. Minn. Mining & Mfg. Co. v. Barr Labs., Inc., 289 F.3d 775, 780 (Fed. Cir. 2002). “The District of Columbia Circuit has explicitly held that § 355(j)(5)(B)(iv)(II) is triggered by the termination of an action commenced by the second ANDA filer . . . .” Id. (citing Teva Pharmas., 182 F.3d at 1010).
54. Id. at 786 (Garjarsa, J., concurring).
allow generic drugs to gain approval by the FDA and enter the market at a rate unknown before 1984. Yet, the Act goes beyond benefiting simply generic drug companies. Besides promoting competition of low-cost generics, the Act also allows patent term restoration for pioneer drug companies.  

2. Patent Right Protection

As a compromise to the provisions of the Act allowing a generic drug company to rely on a pioneer company’s studies to obtain FDA approval, the patent provisions of the Act provide pioneer drug companies with an incentive. Since obtaining FDA approval for an innovator drug takes a considerable amount of time, the patent holder loses time available to profit from marketing the drug. Thus, an additional purpose of the Act is to provide pioneer companies with patent term extensions to make up for the time involved in regulatory approval. Pioneer companies receive “an extension [of the patent] term equal to one-half of the time of the investigational new drug (IND) period.” The IND period begins when the pioneer company commences human clinical studies and ends when the FDA approves the NDA.

Along with patent term extension, the Act also protects the patent rights of pioneer companies. If a generic drug company files an ANDA with a Paragraph IV certification, the pioneer company has forty-five days to file a lawsuit against the generic company for patent infringement. If the pioneer company does not file a lawsuit by then, the FDA may approve the ANDA upon expiration of the forty-five day period. However, if the pioneer company does file a lawsuit within the time allotted, approval of the ANDA is stayed pending

56. Giles, supra note 11, at 361 (citing David J. Bloch, If It’s Regulated Like a Duck . . . Uncertainties in Implementing the Patent Exceptions of the Drug Price Competition and Patent Term Restoration Act, 54 Food & Drug L.J. 111, 112 (1999)). “This loss of patent protection as a result of regulatory delay is referred to as ‘front end distortion.’” Id.
57. Id.
59. Id. at 192.
61. Id.
the expiration of the thirty-month period beginning on the date of
the receipt of notice provided [to the NDA and patent holder] or
such shorter or longer period as the court may order because either
party to the action failed to reasonably cooperate in expediting the
action, except that—
(I) if before the expiration of such period the court decides that
such patent is invalid or not infringed, the approval shall be made
effective on the date of the court decision,
(II) if before the expiration of such period the court decides that
such patent has been infringed, the approval shall be made effec-
tive on such date as the court orders . . . or
(III) if before the expiration of such period the court grants a pre-
liminary injunction prohibiting the applicant form engaging in the
commercial manufacture or sale of the drug until the court decides
the issues of patent validity and infringement and if the court de-
cides that such patent is invalid or not infringed, the approval shall
be made effective on the date of such court decision. 62

The thirty-month stay provision of the Act enables pioneer companies to
protect their patent rights prior to approval of generic drugs for marketing. 63
The provision "is a trade-off for having stripped the pharmaceutical industry
of the other patent protection afforded to every other U.S. industry." 64
However, if pioneer companies do not list applicable patents appropriately
relating to FDA approved drug, then pioneer companies cannot take
advantage of the ANDA stay in order to protect their rights. 65

Restoration of time, which pioneer companies lose in the FDA approval
process, is an adequate measure, considering the tremendous investment
pioneer companies make in developing drugs. Pioneers are able to take
advantage of the extended patent term to regain finances while generics take
advantage of pioneers' financial investments to develop generic versions.
Although the procedures to obtain these advantages are complex, the success
of the intricate drug approval process is evident through the interaction
between pioneers, generics, the FDA, and the courts.

62. Id.
63. aaiPharma Inc. v. Thompson, 296 F.3d 227, 232 (4th Cir. 2002).
64. Plain Talk About Prescription Drug Patents, at
65. aaiPharma, 296 F.3d at 232.
IV. ENFORCEMENT OF THE ACT

A. FDA Review and Approval

The FDA is responsible for supporting the public interest, which may be a difficult task considering the complex role it has in approving drugs. The FDA accepts applications for drug approval, and determines whether approval for marketing is appropriate based on safety and efficacy studies. Since an ANDA for a generic drug relies on the studies performed by pioneer companies, the generic drug companies, in certifying their application, are required to refer to a pioneer's listed patent. Thus, the Act requires that pioneer drug companies provide the FDA with a list of all patents that claim an FDA approved drug or a method of using the drug. When a related patent is issued subsequent to NDA approval, the NDA holder has thirty days to list the patent with the FDA. However, if the NDA holder does not notify the FDA of the patent, an ANDA applicant is not required to amend its application to include the late-listed patent. Late listing comports with the dual purposes of the Act by protecting ANDA filers from having to re-certify late patent submissions, yet allowing NDA holders to "benefit from the public notice that stems from listing."

Regardless of the timing of the submission of patents, the list of patents is published by the FDA in the Approved Drug Products with Therapeutic

69. aaiPharma, 296 F.3d at 230; see 21 U.S.C. § 355(b)(1), (c)(2).
70. 21 U.S.C. § 355(c)(2).
71. Am. Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1079 (D.C. Cir. 2001). The FDA refers to the listing of patents subsequent to the thirty days provided as "late listing." See Shalala, 142 F. Supp. 2d at 11. The FDA regulation regarding "late listing" provides:

72. Id. at 14.
Equivalence Evaluations, generally referred to as the Orange Book. However, the FDA only plays a ministerial role in overseeing the Orange Book listings. The role of the FDA "is not to ensure the correctness of the list of patents submitted for Orange Book listing, but simply to ensure that either a patent list has been filed or a declaration has been made that there are no patents to be listed."

Although the Act does not contain a provision allowing a cause of action to challenge a listing in the Orange Book,

the FDA has provided a limited process for disputing the accuracy or relevance of patent information submitted to the FDA and listed in the Orange Book. One who questions the accuracy of the patent information may write to the FDA, and the FDA will request that the applicant confirm the information. According to the FDA's regulations, however, "unless the application holder withdraws or amends its patent information in response to FDA's request, the agency will not change the patent information in the list" and an ANDA applicant must still make certifications for each patent despite its disagreement.

Even so, the FDA warns that if a pioneer company does submit an invalid list, the company may be liable to the FDA.

In addition, the generic drug company may still gain approval despite the improper listing if established by a court order. Since the Act does not require the FDA to review listing of patents in the Orange Book, the approval of an ANDA with Paragraph IV certification rests on a court's decision that the ANDA does not infringe upon the listed patent.

73. See Thompson, 269 F.3d at 1079.
74. aaiPharma Inc. v. Thompson, 296 F.3d 227, 237 (4th Cir. 2002).
75. Id. at 239.
76. Mylan Pharms., Inc. v. Thompson, 268 F.3d 1323, 1327 (Fed. Cir. 2001) (alteration in original) (citations omitted).
77. aaiPharma, 296 F.3d at 242.
B. Court Decisions Reflecting Balance

1. Listing of Additional Patents

The listing of additional patents in the Orange Book has not only caused lawsuits filed by pioneer drug companies against generic drug companies, but has also led to lawsuits initiated by generic drug companies against the FDA. A pinnacle case discussing the listing of additional patents was *Mylan Pharmaceuticals, Inc. v. Thompson.*

In *Mylan,* a generic drug company was ready to market their approved drug upon expiration of the listed pioneer drug, but hours before expiration the pioneer company listed additional patents in the Orange Book. Mylan filed suit against the pioneer company and the FDA seeking a declaratory judgment that the pioneer improperly listed the patent. The United States Court of Appeals for the Federal Circuit reversed the district court’s decision, which directed the pioneer company to delist its patent from the Orange Book. The court held that there is no private right of action for delisting a patent under the Act.

In rendering this decision, the court reviewed the purpose and relevant legislative history of the Act, and it stated the generic drug company’s

claim is not a recognized defense to patent infringement. There is no indication in 21 U.S.C. § 355(j)(5)(B)(iii)(III) that Congress intended to provide an additional defense. Instead it indicates that Congress only envisioned that recognized defenses could be raised in declaratory judgments in patent infringement actions.

Finally, the parties have shown nothing in the scant legislative history of the amendments pointing to an intent to provide such a defense, or to create a private action for delisting a patent from the Orange Book for a patentee’s failure to comply with section 355.

Even though there is no private right of action for delisting a patent, there may be other avenues to obtain ANDA approval. In another case

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80. 268 F.3d 1323 (Fed. Cir. 2001).
81. *Id.* at 1327–28.
82. *Id.* at 1328.
83. *Id.* at 1325. The district court reasoned that Mylan was entitled to relief because Mylan could have used the claim of improper listing as a defense in an infringement suit initiated by the pioneer company. *Id.* at 1328.
84. *Mylan Pharms.*, 268 F.3d at 1332.
85. *Id.* (emphasis added) (citations omitted).
before the Federal Circuit, *Andrx Pharmaceuticals, Inc. v. Biovail Corp.*, the court suggested in dicta that a generic ANDA applicant could sue the FDA directly under the Administrative Procedure Act (APA). Under the APA, if the FDA’s denial of the ANDA is “arbitrary, capricious, or not in accordance with law,” the FDA may be compelled to approve the ANDA. Therefore, if a generic drug company prevails in an APA claim, the remedy usually will be vacature of the FDA’s order and immediate approval of the ANDA. In addition, the Federal Circuit in *Abbott Laboratories v. Novopharm Ltd.* affirmed a lower court decision that a court may order an additional patent to be delisted by the patent holder.

The United States Court of Appeals for the District of Columbia has also rendered a decision involving a claim brought against the FDA under the APA. In *American Bioscience v. Thompson, Inc.*, the patent holder of a listed drug patent sued the FDA, claiming that the agency acted contrary to the APA when it approved an ANDA, regardless of the listing of a related patent in the Orange Book. The court vacated the FDA’s order approving the generic, holding that the agency’s actions were “arbitrary and capricious.”

Ultimately, the courts have enforced patent listing in the Orange Book. The Act specifically empowers the courts to review the validity of patents in patent infringement suits initiated according to section 355(j)(5)(B)(iii) of Title 21 of the United States Code.

### 2. Paragraph IV Certification

In addition to patent listing disputes, Paragraph IV certification has stimulated various lawsuits between drug companies. Since a company submitting a Paragraph IV certification with their ANDA has to wait for FDA approval to market the drug, there is technically no actual infringement of the listed patent. However, in *Eli Lilly & Co., v. Medronic, Inc.*, Justice

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86. 276 F.3d 1368 (Fed. Cir. 2002).
87. *Id.* at 1378; see 5 U.S.C. §§ 702–706.
88. *Id.*
89. *Id.* at 1379.
90. 104 F.3d 1305, 1309 (Fed. Cir. 1997).
92. *Id.*
93. *Id.* at 1083.
94. *Id.* at 1086.
Scalia, writing for the United States Supreme Court, stated that submitting an ANDA with a Paragraph IV certification is a “highly artificial act of infringement.” Therefore, the court is allowed to decide whether infringement will occur, once the drug is marketed upon FDA approval of the ANDA. In order to succeed in a patent infringement lawsuit, the patentee must prove “by a preponderance of the evidence that the alleged infringer will likely market an infringing product.” In conducting infringement analysis the court reviews the ANDA, the materials submitted to the FDA, and other evidence submitted by the parties.

The Federal Circuit recently heard a case concerning the controversial use of the requirements of the Paragraph IV certification to obtain the 180-day exclusivity. In *Minnesota Mining & Manufacturing Co. v. Barr Laboratories, Inc.*, a second ANDA filer did not provide enough information in the required notice of Paragraph IV certification to the NDA holder. The NDA holder subsequently filed a lawsuit against the second ANDA filer within the forty-five day statutory window of time. The initiation of the suit caused ANDA approval of the generic drug to be stayed for thirty months or until termination of the litigation. Through discovery, the NDA holder was convinced that the second generic applicant did not infringe on the listed patent held by the pioneer drug company. The NDA holder filed a motion to dismiss the case without prejudice in order to

97. *Id.* at 678.

98. *Glaxo, Inc. v. Novopharm, Ltd.*, 110 F.3d 1562, 1569 (Fed. Cir. 1997). The court stated:

[S]ection 271(e)(2)(A) makes it possible for a patent owner to have the court determine whether, if a particular drug were put on the market, it would infringe the relevant patent. If the court determines that the patent is not invalid and that infringement would occur, and that therefore the ANDA applicant's paragraph IV certification is incorrect, the patent owner is entitled to an order that FDA approval of the ANDA containing the paragraph IV certification not be effective until the patent expires. *See* 21 U.S.C. § 355(j)(4)(B)(iii)(II); 35 U.S.C. § 271(e)(4)(A).

*Id.* (alteration in original) (emphasis in original).

99. *Id.* at 1570. In *Glaxo*, the court affirmed the district court's decision that the patentee, Glaxo, Inc., had not proven infringement of its patents by Novopharm, Ltd. by a preponderance of the evidence. *Id.* at 1572.

100. *Id.* at 1570.


102. *Id.*

103. *See id.* at 779.

104. *Id.*

105. *Id.*

106. *Minn. Mining & Mfg.*, 289 F.3d at 779.
prevent the second ANDA filer from obtaining the 180-day exclusivity. The district court, however, dismissed the case with prejudice, thereby triggering the exclusivity period. Subsequently, the NDA holder filed an appeal of the decision in the Federal Circuit. The main issue on appeal was whether the district court erred in determining that the second ANDA filer complied with the notice requirement of the Act. On appeal, the court held that the NDA holder could not “seek a judicial determination of whether a private party’s Paragraph IV certification complies with 21 U.S.C. § 355(j)(2)(B).”

3. Allegations of Patent Infringement

Although lawsuits initiated by pioneer drug companies have recently been scrutinized, it is up to the courts to decide whether the cases are meritorious. Patent infringement suits initiated by pioneer companies against ANDA applicants are literally provided for as a method for a generic drug to enter the market before patent expiration. However, it is the court’s obligation as a tribunal to review the cases for merit and decide whether the ANDA actually infringes on the listed patent. Patents for pharmaceutical drugs may be extremely complex and difficult to determine if they infringe on another patent; therefore, it may be necessary to review every component of the patent before deciding on the issue of infringement. For example, in Biovail Corp. International v. Andrx Pharmaceuticals, Inc., the court was faced with determining whether a “homogeneous admixture” was formed in the generic product, thus infringing on the pioneer company’s patent. The patent history was reviewed and expert testimony was heard in order for the court to properly determine the meaning of terms...

107. Id. The NDA holder, 3M, felt that the second ANDA filer had tricked 3M into filing an infringement lawsuit in order to gain the 180-day exclusivity period, although the ANDA did not infringe the listed patent. Id.

108. Id. The district court found that the second ANDA filer’s assurances that the generic drug did not infringe the listed patent were “sufficient to satisfy the notice requirements of the [Act].” Id. (quoting Minn. Min. & Mfg. Co. v. Bar Labs. Inc., 139 F. Supp. 2d 1109, 1115 (D. Minn. 2001)).

109. Minn. Mining & Mfg., 289 F.3d at 779.

110. Id. at 779–80.

111. Id. at 783.

112. Appleby & O’Donnell, supra note 5.


114. 239 F.3d 1297 (Fed. Cir. 2001).

115. 239 F.3d 1297, 1303 (Fed. Cir. 2001).
The court ultimately determined that the generic patent did not infringe upon the pioneer patent. However, without a thorough review by the court, the issues of infringement could not have been properly determined.

Recently, the patent infringement lawsuits commenced by pioneer companies have been labeled as a frivolous attempt to enjoy the financial benefits of the thirty-month stay. A recent case decided by the District Court for the Southern District of New York was confronted with this proposition. In *In re Buspirone Antitrust Litigation*, the pioneer company, Bristol-Myers, listed an additional patent in the Orange Book hours before its original patent was to expire. Bristol-Myers claimed that the new patent “covered a method of using the [pioneer] drug,” when the patent actually did not. However, Bristol-Myers filed suit against the generic drug company for patent infringement, thereby initiating the thirty-month stay. The district court judge granted summary judgment of non-infringement against Bristol-Myers.

Following the court’s decision, the plaintiffs filed suit alleging that Bristol-Myers abused the provisions of the Act in order to obtain “an unlawful monopoly over the market.” Essentially, the plaintiffs alleged that Bristol-Myers exercised bad faith in interfering with the marketing of a generic version of its drug by abusing the provisions of the Act to obtain the thirty-month stay. In granting a pre-trial motion in this case, the court

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116. *Id.*
117. *Id.* at 1305.
118. See Appleby & O'Donnell, *supra* note 5. The authors discuss the problems with the thirty-month stay, stating:

> Because blockbuster drugs—those earning more than $1 billion a year—are so profitable, antitrust enforcers say the firms will try almost anything to keep the market to themselves, even for a few additional months. The companies spend millions of dollars pursuing patent-infringement lawsuits or cutting deals with potential generic competitors because the potential payoff is so huge.

*Id.*

119. *Id.* at 516.
121. *Id.* at 518–19.
122. *Id.* at 519.
123. *Id.*
125. *Id.* at 519.
126. *Id.*
stated that Bristol-Myers had to be active in the litigation process or the court would order the stay terminated.\textsuperscript{127}

The courts involved in Bristol-Myers' attempt to delay the introduction of generic drugs onto the market have disposed of the cases properly. The case is an example of courts' roles in assuring that pioneer companies do not take unfair advantage of the stay provided to them in patent infringement suits. Although pioneer companies at times abuse the provisions of the Act establishing the thirty-month stay of generic drug approval, the courts have adequately prevented the abuse by granting motions for summary judgment in favor of generic companies.\textsuperscript{128} In fact, provisions of the Act specifically authorize courts to shorten the thirty-month stay if "either party to the action fail[s] to reasonably cooperate in expediting the action."\textsuperscript{129}

As part of a litigious society, pioneer companies are justified in protecting their legal rights and interests. It is up to the courts "to determine whether the parties are complying with that requirement of the statute."\textsuperscript{130} Although a trend has been set by Mylan and Andrx regarding the consistently discussed issues of the Act, involving patents to be settled by the APA,\textsuperscript{131} courts are still "in the best position to assess the conduct of the parties and grant appropriate relief."\textsuperscript{132} Furthermore, if a pioneer company alleges patent infringement and a court rules that the generic company did not infringe on the patent, the generic company also has the opportunity to sue for attorneys' fees.

4. Exceptional Cases for Attorneys' Fees

The patent code allows the court to award attorneys' fees to the prevailing party "in exceptional cases."\textsuperscript{133} Types of misconduct that lead to

\textsuperscript{127} Id. at 525.
\textsuperscript{128} See, e.g., Minn. Mining & Mfg. Co. v. Barr Labs., Inc. 289 So. F.3d 775 (Fed. Cir. 2002); Abbott Labs. V. Vovopharm Ltd., 104 F.3d 1305 (Fed. Cir. 1997); In re Buspirone Patent Litig., 185 F. Supp. 2d 340 (S.D.N.Y. 2002).
\textsuperscript{129} 21 U.S.C. § 355(j)(5)(B)(iii) (2000); Minn. Mining & Mfg. Co. v. Barr Labs., Inc., 295 F.3d 1274, 1276 (Fed. Cir. 2002) (stating "if an NDA holder sought to delay the litigation [and thus prolong its exclusivity] by challenging compliance with § 355(j)(2)(B)(ii), the district court could expedite the suit so as to mitigate any timing advantage the NDA holder might have gained.").
\textsuperscript{130} Minn. Mining & Mfg., 295 F.3d at 1276.
\textsuperscript{131} Id. at 1277 (referring to Mylan Pharms, Inc. v. Thompson, 268 F.3d 1323 (Fed. Cir. 2001) and Andrx Pharms., Inc., v. Biovail Corp., 276 F.3d 1368 (Fed. Cir. 2002)).
\textsuperscript{132} Id.
an exceptional case include "willful infringement, inequitable conduct before the [Patent Trademark Office], offensive litigation tactics, vexatious or unjustified litigation, or frivolous filings." Exceptions have been based not only on the actions of pioneer companies, but also on the actions of generic drug companies. For example, in *Yamanouchi Pharmaceutical Co. v. Danbury Pharmacal, Inc.*, the court found that the generic drug company, Danbury, had willfully infringed on the pioneer company's patent. The court determined that the actions by Danbury, in willfully infringing on the patent, constituted an exceptional case for an award of attorney fees to Yamanouchi.

Conversely, there have been cases in which courts have not found an exceptional case to merit an award of attorneys' fees. In *Merck & Co. v. Mylan Pharmaceuticals, Inc.*, the generic drug company, Mylan, was granted summary judgment on non-infringement and later initiated a motion to recover attorneys' fees on the basis that Merck "engaged in vexatious or unjustified litigation techniques in order to delay FDA approval of Mylan's generic compound and increase the burdens on Mylan." The court denied the motion, holding that "the evidence... does not meet the clear and convincing standard of outrageous or exceptional behavior which warrants an award of attorney fees." The judge further acknowledged:

Merck's infringement claim, albeit erroneous, was not baseless. Its course of conduct in pursuing the claim was neither vexatious, unusual nor disproportionate to the rather high stakes involved. Finally, Merck's alternate form of relief, whether meritorious or not, cannot alone support an award of one and a half million dollars in attorneys fees, especially when the claim was never pursued by either party.

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134. *Yamanouchi Pharm. Co. v. Danbury Pharmacal, Inc.*, 231 F.3d 1339, 1347 (Fed. Cir. 2000) (internal citation omitted) (citing Avia Group Int'l, Inc. v. L.A. Gear Cal., Inc., 853 F.2d 1557, 1567 (Fed. Cir. 1988); Rosemount, Inc. v. Beckman Instruments, Inc., 727 F.2d 1540, 1548 (Fed. Cir. 1984); Hoffmann-La Roche, Inc. v. Invamed, Inc., 213 F.3d 1359, 1365 (Fed. Cir. 2000); Beckman Instruments, Inc. v. LKB Produkter AB, 892 F.2d 1547, 1551 (Fed. Cir. 1989)).
135. *Id.* at 1339.
136. *Id.* at 1341.
137. *Id.* at 1343.
138. *Id.* at 553.
139. *Id.* at 558.
140. *Id.*
Ultimately, the interpretation of whether actions meet the "exceptional" standard is up to the courts to determine in awarding attorneys' fees.

V. UNNECESSARY REFORMATION OF THE ACT

A. Proposed Reformation

On May 7, 2001, Senators John McCain and Charles Schumer introduced a bill in the United States Senate to amend the Act in order "to loosen the restrictions on generic ANDA applicants." The proposed purposes of the Greater Access to Affordable Pharmaceuticals Act of 2001 are: "(1) to increase competition, thereby helping all Americans, especially seniors and the uninsured, to have access to more affordable medication; and (2) to ensure fair marketplace practices and deter pharmaceutical companies (including generic companies) from engaging in anticompetitive action or actions that tend to unfairly restrain trade." The bill is estimated to save consumers sixty billion dollars in prescription drugs, but, this estimate is "highly speculative" according to the Pharmaceutical Research and Manufacturers of America. The terms of the bill include, among other things, amending the thirty-month stay provision "by preventing any stay for patents listed after the initial NDA filing (even if they are listed before an ANDA is submitted)."


143. S. 812.

144. Senator Schumer Claims His Bill Saves Consumers Money—But How Much?, at http://www.phrma.org/mediaroom/press/releases/25.07.2002.467.cfm (July 25, 2002). The Pharmaceutical Research and Manufacturers of America notes that over 60% of total savings are predicted to take place in 2010–12—and nominal in comparison to the savings conferred by a prescription drug benefit. Further, these savings do not consider the ultimate cost of S.812. The uncertainty created by the bill may jeopardize the lengthy, costly research needed to develop new cures and better treatments.


B. Compromising Patent Rights

The major problem with the proposed bill is that it does not comply with the original purposes of the Act. Recall that one of the purposes of the Act is to provide pioneer companies with patent term restoration for the time spent in obtaining FDA approval.\(^{146}\) The bill instead "would forfeit the patent rights of the innovator companies altogether if they do not comply with the bill's arbitrary procedural requirements."\(^{147}\)

Moreover, a patent is presumed to be valid unless proven by clear and convincing evidence to the contrary.\(^{148}\) Perhaps some drug companies are initiating infringement suits against generic companies to illegitimately prolong entrance of generics on the market; however, other infringement suits are created to resolve valid patent disputes.\(^{149}\) Patent rights give pioneer companies an incentive to devote time and finances to research and develop new drugs "that are expensive to [initially] produce but quite inexpensive to copy."\(^{150}\) Generic drug companies take advantage of the benefits of provisions of the Act, and then criticize the parts of the Act that benefit pioneer companies. However, the Act was not written solely to benefit generic drug companies.\(^{151}\) The Act is a compromise between patent restoration for pioneer companies and the speedy introduction of generics into the market.\(^{152}\)

C. Reduction of Incentives for New Drug Innovation

The reformation of the Act would also contravene the very purpose of Title II of the Act, which "is to create a new incentive for increased expenditures for research and development of certain products which are

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149. See Glasgow, supra note 13, at 238–39.
subject to premarket government approval."¹⁵³ The process of introducing a
new drug to the market is very time consuming. The drug development
process itself takes an estimated fourteen years and seven months to
complete.¹⁵⁴ Generic drug development, on the other hand, takes only
approximately three to five years.¹⁵⁵ However, "there is no real incentive to
develop a generic drug until the market has been established and any post-
approval issues of safety and efficacy have been resolved by broad use in the
general population."¹⁵⁶ The fact is that forty-nine percent of drugs
prescribed are generic.¹⁵⁷ Moreover, since 1984, "[o]f the 8,000 drugs that
have come off patent . . . 94% moved from brand name to generic without a
patent dispute."¹⁵⁸

Nevertheless, without the option to litigate a patent dispute, the purpose
of the Act's patent term restoration provision would be meaningless.¹⁵⁹
Patent term restoration gives drug companies the incentive to introduce new
drugs into the market.¹⁶⁰ By revising the Act to prevent "the ability of brand-
name companies to automatically win those 30 months of exclusivity,"¹⁶¹
there will be no way to adequately assure that pioneer companies are
provided with the patent term restoration they deserve. Pioneer companies
should not be disadvantaged by a loss in ability to enforce their patent rights.
Regardless, the ability of pioneer companies to protect their finances gained
through the marketing exclusivity of drugs further promotes discovery and
research of new drugs, which in turn may later be copied into an inexpensive
generic version.

(1999). There are four phases to the drug development process:

During the clinical testing period, originators conduct tests for safety in Phase I,

efficacy in Phase II, and for side effects and long-term use effects in Phase III . . . prior
to submitting a new drug application (NDA) and receiving Food and Drug Administra-
tion (FDA) approval. After FDA approval, postmarketing testing continues in Phase
IV for, inter alia, side effects, clinical education, and possible new indications.

¹⁵⁵. Id. at 229.
¹⁵⁶. Engelberg, supra note 21, at 406.
¹⁵⁷. Appleby & O'Donnell, supra note 5, at 2A.
¹⁵⁸. Id. (discussing the response of Jeff Trewhitt, spokesman for the Pharmaceutical
Research and Manufacturers of America, to the proposed legislation to change the Act).
¹⁶¹. Appleby & O'Donnell, supra note 5, at 2A.
VI. CONCLUSION

"The Congressional policy with respect to generic drugs is clear: generic manufacturing of a drug should be allowed as soon as it is determined that it does not violate patent rights."162 Congress was not only concerned with marketing generics faster in order to save consumers money, but also with not violating the patent rights of pioneer companies. However, problems have arisen that have instigated the idea in the minds of generic drug companies and legislators that the Act needs to be reformed. Through analysis of the Act and court cases, it is apparent that the true problem with the Act is the Paragraph IV certification. It allows generic drug companies to challenge a pioneer company’s listed patent. In essence, when a generic drug company files an ANDA with a Paragraph IV certification, it should expect the pioneer company to fight for its patent rights. If a generic drug company wants to enter the market before the pioneer patent has expired, the generic is going to have to fight for the position. Patent rights provide innovators with the exclusive right to sell the product for the patent term. "Exclusive" is the key term. If a generic drug company wants to challenge the validity of a patent listed in the Orange Book, then it must take the issue to court. Complaining about the drafting of the Act does not further the goals the Act was set forth to accomplish.

To review, the purpose of the Act is to promote the availability of generic drugs and to give back pioneers some of the patent protection time lost in the drug approval process.163 Redrafting the Act to make the provisions of the Act weigh more heavily towards only promoting the availability of generics would go against the very purpose of the Act. If the Act were meant to only benefit generic drug companies then the official name of the Act would not have included the terms “Patent Term Restoration.” The Act has provided generic drug companies with an opportunity to save money in discovery and research, which in turn saves consumers millions of dollars. If any reform is necessary, it is the reform of the FDA’s role in administering the Act. The FDA should be responsible for overseeing that a patent listed in the Orange Book actually “claims the drug... or which claims a method of using such drug.”164 Although the FDA claims


164. 21 U.S.C. § 355(c)(2) (2000). The pioneer company is required to file any patents issued after the NDA was approved, no later than thirty days after the patent was issued. Id.
that this may not be feasible due to the scientific expertise required to interpret the patents, perhaps the FDA should consider hiring a few patent attorneys and pharmaceutical experts. Reformation of the Act is an unnecessary resolution to the underlying problem—administration of the Act.

However, according to the provisions of the Act, the courts are responsible for determining whether the patent is valid. See § 355(j)(5)(B)(iii).