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Fighting for Equal Protection Under the Fourth Amendment: Why “Knock-and-Talks” Should Be Reviewed Under the Same Constitutional Standard as “Stop-and-Frisks”

IAN DOOLEY

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I. INTRODUCTION

A knock-and-talk, like a stop-and-frisk, is a flexible investigatory tool that is used by law enforcement officials to subvert the Fourth Amendment’s warrant requirement. Yet knock-and-talks, unlike stop-and-

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1. Terry v. Ohio, 392 U.S. 1, 10, 16 (1968).
frisks, are not subject to the reasonable suspicion standard announced by the Supreme Court of the United States in Terry v. Ohio.\textsuperscript{4} So, while police may not approach and detain an individual in the street absent at least reasonable suspicion that criminal activity is afoot,\textsuperscript{5} police may approach that same individual in his home and knock on his door without any suspicion of criminal activity at all.\textsuperscript{6} This absurd result has created much confusion and inconsistency in federal and state court decisions dealing with so-called knock-and-talk practices.\textsuperscript{7}

Under current Supreme Court jurisprudence, an officer’s knock on a citizen’s door is not subject to Fourth Amendment scrutiny.\textsuperscript{8} As such, police in many jurisdictions need not justify what would otherwise be considered a search or seizure under the limitations of the Fourth Amendment.\textsuperscript{9} Further troubling is that some commentators and lower courts have mistakenly interpreted the Court’s decision in Payton v. New York\textsuperscript{10} to provide higher Fourth Amendment protection to a person safely tucked away in a private dwelling than a person walking in the street.\textsuperscript{11} Such an interpretation, however, violates the Equal Protection Clause and Due Process Clause of the U.S. Constitution, where poor and minority individuals are less able to enjoy the protections of a safe and stable home\textsuperscript{12} and where current rules governing knock-and-talks unequally protect wealthier individuals and families living in suburban and rural areas.\textsuperscript{13} By failing to apply Terry’s reasonable suspicion standard to knock-and-talks, the Supreme Court has failed to provide equal protection of the law under the Fourth Amendment.\textsuperscript{14}

Not only do knock-and-talks unfairly threaten America’s poorest and minority citizens, but the runaway practice also increases the frequency of danger that police face while investigating suspected criminal activity.\textsuperscript{15}

Attempts by lower courts to fit the Supreme Court’s past search and seizure doctrines to the unique issues raised by knock-and-talks have resulted in a hodge-podge of rules, providing no clear guidance to police engaged in the course of their duties.\textsuperscript{16} Consequently, knock-and-talks not only threaten the equal protection of the law guaranteed to all persons in the United States but also unnecessarily increase the exposure of police and citizens\textsuperscript{17} to the dangerous circumstances that occur during unplanned and unwarranted intrusions into the home.\textsuperscript{18} That being so, a straightforward rule is urgently needed to provide police and citizens with proper notice and guidance as to what are and what are not justifiable circumstances under which police may knock on the door of a private dwelling.\textsuperscript{19}

Consider the following situation where police used a knock-and-talk to investigate a nineteen-year-old individual named Victor in his home under circumstances that would not have justified an investigation in the street. In Victor’s case, three police officers decided to question the occupants of Victor’s apartment because they saw a suspected drug dealer leave the apartment earlier that day.\textsuperscript{20} The police knew Victor’s mere association with the suspected dealer did not provide sufficient suspicion to obtain a warrant—or to justify a stop-and-frisk for that matter\textsuperscript{21}—and yet the officers approached and knocked on the door of the apartment, intending to gather evidence and obtain consent to search the dwelling.\textsuperscript{22} When Victor opened the door the officers immediately began questioning him about his association with the suspected dealer. As Victor stepped back from the doorway the officers moved inside the apartment\textsuperscript{23} and began questioning.

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\textsuperscript{4} 392 U.S. 1, 19–20, 27 (1968); United States v. Crapser, 472 F.3d 1141, 1146 (9th Cir. 2007); see also Drake, supra note 3, at 37.

\textsuperscript{5} Terry, 392 U.S. at 30.

\textsuperscript{6} Crapser, 472 F.3d at 1146; see also Drake, supra note 3, at 37.

\textsuperscript{7} Craig M. Bradley, "Knock and Talk" and the Fourth Amendment, 84 IND. L.J. 1099, 1122 (2009);

Drake, supra note 3, at 36.

\textsuperscript{8} See Florida v. Jardines, 133 S. Ct. 1409, 1415–16 (2013); U.S. CONST. amend. IV; Drake, supra note 3, at 37.

\textsuperscript{9} See U.S. CONST. amend. IV; Jardines, 133 S. Ct. at 1415–16.

\textsuperscript{10} 445 U.S. 573 (1980).

\textsuperscript{11} See U.S. CONST. amend. IV; Payton, 445 U.S. at 587, 589–90.

\textsuperscript{12} Patrols, 109 COLUM. L. REV. 2002, 2002–03 (2009); Adam Carlis, The Illegality of Vertical Exceptions to the Fourth Amendment, 55 FLA. L. REV. 391, 401 (2003); infra Section V.C.

\textsuperscript{13} See Carlis, supra note 12, at 2001–02; Slobogin, supra note 12, at 401–02;

\textsuperscript{14} Terry v. Ohio; 392 U.S. 1, 27 (1968); see also U.S. CONST. amend. IV.


\textsuperscript{16} Bradley, supra note 7, at 1104, 1122.

\textsuperscript{17} See U.S. CONST. amends. IV, V, XIV; Carlis, supra note 12, at 2002–03;

Slobogin, supra note 12, at 401–02. The designation of citizens to describe persons protected by the Fourth Amendment is used in this article for simplicity’s sake, but is not intended to distinguish a person’s right to the guarantees of the Constitution based on one’s immigration status.

\textsuperscript{18} See Bradley, supra note 7, at 1104, 1122.

\textsuperscript{19} See id. at 1122.

\textsuperscript{20} This example is based on police and witness testimony provided during a 2014 suppression hearing in Bronx Criminal Court in New York. The suspected drug dealer had been arrested pursuant to a warrant earlier that day. The Warrant Squad was armed with various firearms, body armor, and a door-breaching tool called a rabbit.

\textsuperscript{21} See, e.g., Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (concluding that reasonable suspicion is not satisfied by mere association with person for whom the police had probable cause to search, even when police had a search warrant for the premises).

\textsuperscript{22} See id.; United States v. Miller, 933 F. Supp. 501, 502 (M.D.N.C. 1996) (“The detectives ultimately decided to attempt a knock-and-talk procedure since they had determined that the information received from the anonymous caller was not of sufficient reliability to obtain a search warrant.”).

\textsuperscript{23} Whether a homeowner stepping back from a confrontation with officers is actually inviting officers to enter the home is a common source of confusion and argument in
Frisks, are not subject to the reasonable suspicion standard announced by the Supreme Court of the United States in Terry v. Ohio. So, while police may not approach and detain an individual in the street absent at least reasonable suspicion that criminal activity is afoot, police may approach that same individual in his home and knock on his door without any suspicion of criminal activity at all. This absurd result has created much confusion and inconsistency in federal and state court decisions dealing with so-called knock-and-talk practices.

Under current Supreme Court jurisprudence, an officer’s knock on a citizen’s door is not subject to Fourth Amendment scrutiny. As such, police in many jurisdictions need not justify what would otherwise be considered a search or seizure under the limitations of the Fourth Amendment. Further troubling is that some commentators and lower courts have mistakenly interpreted the Court’s decision in Payton v. New York to provide higher Fourth Amendment protection to a person safely tucked away in a private dwelling than a person walking in the street. Such an interpretation, however, violates the Equal Protection Clause and Due Process Clause of the U.S. Constitution, where poor and minority individuals are less able to enjoy the protections of a safe and stable home and where current rules governing knock-and-talks unequally protect wealthier individuals and families living in suburban and rural areas. By failing to apply Terry’s reasonable suspicion standard to knock-and-talks, the Supreme Court has failed to provide equal protection of the law under the Fourth Amendment.

Not only do knock-and-talks unfairly threaten America’s poorest and minority citizens, but the runaway practice also increases the frequency of danger that police face while investigating suspected criminal activity.

Attempts by lower courts to fit the Supreme Court’s past search and seizure doctrines to the unique issues raised by knock-and-talks have resulted in a hodge-podge of rules, providing no clear guidance to police engaged in the course of their duties. Consequently, knock-and-talks not only threaten the equal protection of the law guaranteed to all persons in the United States but also unnecessarily increase the exposure of police and citizens to the dangerous circumstances that occur during unplanned and unwarranted intrusions into the home. That being so, a straightforward rule is urgently needed to provide police and citizens with proper notice and guidance as to what are and what are not justifiable circumstances under which police may knock on the door of a private dwelling.

Consider the following situation where police used a knock-and-talk to investigate a nineteen-year-old individual named Victor in his home under circumstances that would not have justified an investigation in the street. In Victor’s case, three police officers decided to question the occupants of Victor’s apartment because they saw a suspected drug dealer leave the apartment earlier that day. The police knew Victor’s mere association with the suspected dealer did not provide sufficient suspicion to obtain a warrant—or to justify a stop-and-frisk for that matter—and yet the officers approached and knocked on the door of the apartment, intending to gather evidence and obtain consent to search the dwelling. When Victor opened the door the officers immediately began questioning him about his association with the suspected dealer. As Victor stepped back from the doorway the officers moved inside the apartment and began questioning him

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4. 392 U.S. 1, 19–20, 27 (1968); United States v. Crapser, 472 F.3d 1141 (9th Cir. 2007); see also Drake, supra note 3, at 37.
5. Terry, 392 U.S. at 30.
6. Crapser, 472 F.3d at 1146; see also Drake, supra note 3, at 37.
14. Terry v. Ohio, 392 U.S. 1, 27 (1968); see also U.S. CONST. amend. IV.
16. Bradley, supra note 7, at 1104, 1122.
17. See U.S. CONST. amend. IV, V, XIV; Carlisle, supra note 12, at 2002–03; Slobogin, supra note 12, at 401–02. The designation of citizens to describe persons protected by the Fourth Amendment is used in this article for simplicity’s sake, but is not intended to distinguish a person’s right to the guarantees of the Constitution based on one’s immigration status.
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23. Whether a homeowner stepping back from a confrontation with officers is actually inviting officers to enter the home is a common source of confusion and argument in
the Fourth Amendment occurred the moment the police knocked on Victor's door because the police knocked on his door with the objective purpose of completing a search. And, while a knock-and-talk, like a stop-and-frisk, is a limited search, within the meaning of the Fourth Amendment, the police in Victor's case did not have the reasonable suspicion required under Terry to conduct such a search. Furthermore, the Equal Protection Clause and the Due Process Clause of the Constitution require courts to consider the lawfulness of knock-and-talks under the same reasonable suspicion standard that is applied to stop-and-frisks.

Part II of this Article begins by defining knock-and-talks and by explaining how government officials employ the practice. Part III discusses the myriad of rules applied by courts and offered by scholars to address the reasonableness and lawfulness of knock-and-talks. Part IV explains the evolution of the Supreme Court's search doctrine and argues that a search within the meaning of the Fourth Amendment occurs when police conduct a knock-and-talk for the purpose of completing a search. Part V argues that Terry's "reasonable suspicion" standard is the appropriate standard for determining whether a knock-and-talk is lawful because providing a private dwelling with a higher level of Fourth Amendment protection than a citizen in the street is a discriminatory

33. U.S. CONST. amend. IV; see also Jardines, 133 S. Ct. at 1416-17 (concluding that a physical trespass by police was a search within the meaning of the Fourth Amendment when the police's objective purpose was to conduct a search); Drake, supra note 3, at 27 (finding that a search occurs when police conduct a knock-and-talk "in order to gather the homeowner's consent, evidence that they then use to . . . forgo a warrant altogether"); infra Section IV.C. Professor James J. Drake was counsel of record in Kentucky v. King, Drake, supra note 3, at 26 n.8.

34. See Jardines, 133 S. Ct. at 1416; Terry v. Ohio, 392 U.S. 1, 15-16 (1968).

A limited search is subject to judicial scrutiny pursuant to the Fourth Amendment of the U.S. Constitution. U.S. CONST. amend. IV; Terry, 392 U.S. at 15-16. However, a limited search, unlike a full-blown search, is justified when police have a more reasonable suspicion to believe criminal activity is afoot; rather than probable cause. See Terry, 392 U.S. at 24, 27.

35. U.S. CONST. amend. IV; see also Terry, 392 U.S. at 24.

36. U.S. CONST. amend. V; infra note 34.

37. See Jardines, 133 S. Ct. at 1423 (Alito, J., dissenting); Terry, 392 U.S. at 30 (allowing for limited searches and seizures of persons in the street, where the officer has a reasonable suspicion to believe criminal activity is afoot).

38. Herbert Gaylord, What Good Is the Fourth Amendment? "Knock and Talk" & People v. Froehriepl, 19 T.M. COOLEY L. REV. 229, 229 (2002); see also infra Part II.

39. See infra Part III.

40. See Jardines, 133 S. Ct. at 1414 (citing to United States v. Jones, 132 S. Ct. 945, 950 n.3 (2012)); infra Part IV.

41. See Terry, 392 U.S. at 37 (Douglas, J., dissenting); infra Part V.
Victor’s ninety-year-old, Spanish-speaking great-grandma explained that she lived in the apartment with Victor and she showed the officer Victor’s bedroom. Peering inside Victor’s wardrobe, the officer noticed two small Ziploc bags of cocaine and a magazine clip for a handgun.

The officer returned to the living room and confronted Victor with this discovery, threatening Victor, telling him that she did not want his family to get in trouble for him and asking “where is the gun?” Victor admitted the drugs were his and told the officer there was a gun under the wardrobe. Victor was handcuffed and seated at the kitchen table while great-grandma was led into the bedroom by two officers and shown the magazine and the cocaine in the wardrobe. The officers handed her a consent-to-search form, explained the purpose of the form, and asked her to sign it. She did not ask any questions; she just signed the form. A gun was recovered, and Victor was charged with possession of an unlicensed firearm.

This Article argues that the series of events that led to Victor’s unlawful arrest should never have happened because Victor’s right to be free from unreasonable searches was violated the moment police knocked on his door. After the Supreme Court’s decisions in Kentucky v. King and Florida v. Jardines, it is an officer’s “objective purpose” for knocking on the door of a private dwelling that turns what would otherwise be a consensual encounter into a limited search. And, under Jardines, when an officer approaches a home and knocks on the door for the purpose of gathering evidence, the officer acts with the objective purpose of completing a search. This Article argues that a limited search within the meaning of the Fourth Amendment occurred the moment the police knocked on Victor’s door because the police knocked on his door with the objective purpose of completing a search. And, while a knock-and-talk, like a stop-and-frisk, is a limited search within the meaning of the Fourth Amendment, the police in Victor’s case did not have the reasonable suspicion required under Terry to conduct such a search. Furthermore, the Equal Protection Clause and the Due Process Clause of the Constitution require courts to consider the lawfulness of knock-and-talks under the same reasonable suspicion standard that is applied to stop-and-frisks.

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application of the Fourth Amendment.42 Finally, in Part VI, this Article applies the reasonable suspicion standard to Victor's case and the most common factual circumstances arising from the use of knock-and-talks.43

II. WHAT IS A KNOCK-AND-TALK?

A knock-and-talk is a procedure used by law enforcement officers to knock on the door of a private dwelling in order to speak to the inhabitants when the officers do not have an arrest or search warrant.44 Typically, a knock-and-talk is used for the purpose of: (1) providing or obtaining information on behalf of the public good,45 (2) conducting a search,46 (3) obtaining consent to enter,47 or (4) making a warrantless arrest.48

As a matter of common sense, police officers have a right and a duty to knock on the door of a private dwelling when "they reasonably believe

42. U.S. CONST. amend. IV; see also Terry, 392 U.S. at 37 (Douglas, J., dissenting), infra Part VI.

43. See infra Part VI.

44. See United States v. Crupi, 472 F.3d 1141, 1143, 1146, 1148 (9th Cir. 2007); Gaylord, supra note 38, at 229. "Knock-and-talk is a procedure used by police when they lack probable cause to obtain a search warrant." Gaylord, supra note 38, at 229; see also Jardines, 133 S. Ct. at 1420, 1423 (Alito, J., dissenting) (defining a knock-and-talk as a warrantless knock on a citizen's door "for the purpose of gathering evidence."). Moreover, if the officers had a warrant, the procedure would be called a "knock and announce" made in anticipation of inevitable, lawful entry into the home. See Hudson v. Michigan, 547 U.S. 586, 589 (2006); Wilson v. Arkansas, 514 U.S. 927, 929-30 (1995).

45. See Terry, 392 U.S. at 22-23; Gaylord, supra note 38, at 230-31. For example, where an officer is informing residents of an impending natural disaster, or where an officer is canvassing a neighborhood in an effort to find a missing person, or a suspect who recently committed a violent crime and who may be hiding or lurking in a residential area. See Kentucky v. King, 131 S. Ct. 1849, 1856 (2011).

46. See United States v. Johnson, 170 F.3d 708, 711, 718 (7th Cir. 1999) (discussing how police use knock-and-talks to attempt to gather evidence and gain consent to enter and search a dwelling without a warrant); Drake, supra note 3, at 29 (concluding that police act with the purpose of conducting a search when their action is taken against the person or property of a private citizen in an effort to gather evidence).

47. Fern L. Kletter, Annotation, Construction and Application of Rule Permitting Knock and Talk Visits Under Fourth Amendment and State Constitutions, 15 A.L.R. 6th 515, 515 (2006) ("Knock and talk is a procedure . . . typically [used] to obtain more information regarding a criminal investigation or to obtain consent where probable cause is lacking.").

48. Bradley, supra note 7, at 1099 ("Under knock-and-talk, police go to . . . residences, with or without probable cause, and knock on the door to obtain plain views of the . . . interior of the house[s], to question the residents, to seek consent to search . . . to arrest without a warrant, often based on what they discover during the knock-and-talk."); see also e.g., Payton v. New York, 445 U.S. 573, 575-76, 601

that a person within is in need of immediate aid."49 Additionally, officers engaged in "hot pursuit" of a fleeing suspect may follow the suspect onto private premises, even if they do not have a warrant, so long as probable cause exists to arrest the suspect.50

While such exigent circumstances may justify a warrantless intrusion into the home, a different analysis should be conducted when officers knock on a resident's door in order to investigate the occupants of the dwelling, to conduct a search, and to otherwise subvert the Fourth Amendment's warrant requirement.51 It has become a common and popular practice among law enforcement officers to "approach a . . . residence with a predetermined plan to circumvent the warrant requirement and convince the homeowner to let them inside using tactics designed to undermine, if not completely subjugate, the homeowner's free will."52 Police have increasingly employed the use of knock-and-talks as an "end-run around" the Fourth Amendment.53 Often based on an anonymous tip54 or second-hand information from the public,55


51. See U.S. CONST. amend. IV; Warden, 387 U.S. at 298; Gaylord, supra note 38, at 229-30. "The right of the people to be secure in their persons [and] houses . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . ." U.S. CONST. amend. IV. Yet, "the very purpose of knock-and-talk is to thwart the need for probable cause and a search warrant, police circumvent the safeguards provided by the Fourth Amendment when they use this procedure . . ." Gaylord, supra note 38, at 230.

52. Drake, supra note 3, at 26.


55. United States v. Johnson, 170 F.3d 708, 711 (7th Cir. 1999). For example, in Johnson, police conducted a knock-and-talk based on a property manager's report that drug activity was occurring in an apartment building. Id. The property manager did not base his report on first hand knowledge; however, rather his report was motivated by another citizen report that had been shared with him. Id.
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police approach a home to conduct a knock-and-talk knowing they do not have enough information to obtain an arrest warrant.56

Police departments throughout the country have even designated entire task forces and divisions to conducting knock-and-talks.57 For instance, in Florida, the Orange County Sheriff Department completed up to three hundred knock-and-talks per month, allowing officers to gather evidence and to obtain consent to enter and search a dwelling without a warrant.58 And in Dallas, Texas, police have a "[forty-six]-member knock-and-talk" task force that investigates community members based "mostly on neighbors' tips about unusual activity."59 Once police gain entry into the home they may gather any evidence that is in plain view,60 or that is discovered during a "protective sweep."61 There is no question that knock-and-talks facilitate unwarranted interactions between police and citizens, and unwarranted gathering of evidence in private dwellings.62

Despite the increased and aggressive use of knock-and-talks, the practice has gone largely unnoticed by even the Supreme Court for more than sixty years and has seeped its way into accepted practice for police departments all over the country.64 It was not until 1991 that the term knock-and-talk was first used by a court.65 In State v. Land,66 the Oregon Court of Appeals recognized an officer's use of a knock-and-talk where the officer, who was denied a search warrant, "went to defendant's home to obtain additional information and to 'get his consent to search.'"67 The court noted the officer's use of a knock-and-talk but did not consider the lawfulness of the practice.68 The Supreme Court and lower courts have attempted to grapple with the constitutionality of knock-and-talks but in doing so, have failed to consider whether the officer's actual act of knocking on the door was reasonable under the protections guaranteed to citizens under the Fourth Amendment.69

III. CURRENT RULES GOVERNING THE USE OF KNOCK-AND-TALKS

Although courts have recognized the knock-and-talk and given it a name,70 courts have not considered the lawfulness of the act of knocking on the door of a private dwelling.71 While courts have provided some recourse to citizens whose Fourth Amendment rights were violated before or after a knock-and-talk, courts have failed to explain what circumstances are necessary to justify police knocking on a citizen's door.72 The Courts' reliance on existing search and seizure doctrine has created a patchwork of rules and case-by-case analyses, which fail to provide clear guidance to police officers conducting knock-and-talks.73 The result is that police and citizens alike are unduly exposed to the dangerous and unconstitutional
police approach a home to conduct a knock-and-talk knowing they do not have enough information to obtain an arrest warrant.\textsuperscript{56} Police departments throughout the country have even designated entire task forces and divisions to conducting knock-and-talks.\textsuperscript{57} For instance, in Florida, the Orange County Sheriff’s Department completed up to three hundred knock-and-talks per month, allowing officers to gather evidence and to obtain consent to enter and search a dwelling without a warrant.\textsuperscript{58} And in Dallas, Texas, police have a “fifty-six-member knock-and-talk” task force that investigates community members based “mostly on neighbors’ tips about unusual activity.”\textsuperscript{59} Once police gain entry into the home they may gather any evidence that is in plain view,\textsuperscript{60} or that is discovered during a “protective sweep.”\textsuperscript{61} There is no question that knock-and-talks facilitate unwarranted interactions between police and citizens, and unwarranted gathering of evidence in private dwellings.\textsuperscript{62} Despite the increased and aggressive use of knock-and-talks, the practice has gone largely unnoticed by even the Supreme Court for more than sixty years\textsuperscript{63} and has seeped its way into accepted practice for police departments all over the country.\textsuperscript{64} It was not until 1991 that the term knock-and-talk was first used by a court.\textsuperscript{65} In \textit{State v. Land},\textsuperscript{66} the Oregon Court of Appeals recognized an officer’s use of a knock-and-talk where the officer, who was denied a search warrant, “went to defendant’s home to obtain additional information and to ‘get his consent to search.’”\textsuperscript{67} The court noted the officer’s use of a knock-and-talk but did not consider the lawfulness of the practice.\textsuperscript{68} The Supreme Court and lower courts have attempted to grapple with the constitutionality of knock-and-talks but in doing so, have failed to consider whether the officer’s actual act of knocking on the door was reasonable under the protections guaranteed to citizens under the Fourth Amendment.\textsuperscript{69}

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\textsuperscript{56} See id. ("[I]t was plain when the officers decided to check out the complaint ... that they could not have obtained a warrant based on the information they then had."); Miller, 933 F. Supp. at 502 ("Detective Sturm testified that they decided to perform the knock-and-talk because admittedly they did not have probable cause to obtain a search warrant.").

\textsuperscript{57} Drake, supra note 3, at 35.


\textsuperscript{61} United States v. Gould, 364 F.3d 578, 581, 586–87 (5th Cir. 2004) (citing Maryland v. Buie, 494 U.S. 325, 327 (1990)). In Gould, the Federal Court of Appeals extended the Supreme Court’s holding in Buie to allow a protective sweep of premises where no arrest was yet made even though Buie was limited to searches incidental to arrest. Id. at 584, 586–87; see also Maryland v. Buie, 494 U.S. 325, 327, 335 (1990); Bradley, supra note 7, at 1115.

\textsuperscript{62} See Gould, 364 F.3d at 589–90; Drake, supra note 3, at 34–35.

\textsuperscript{63} See Florida v. Jardines, 133 S. Ct. 1409, 1423 (2013); Johnson v. United States, 333 U.S. 10, 12 (1948); Drake, supra note 3, at 34. The first time the Supreme Court used the phrase knock-and-talk was in 2013 in Jardines even though the practice had existed since 1948. Jardines, 133 S. Ct. at 1423; Johnson, 333 U.S. at 12; Drake, supra note 3, at 34.

\textsuperscript{64} See Jardines, 133 S. Ct. at 1423; United States v. Crapser, 472 F.3d 1141, 1148 (9th Cir. 2007); Gould, 364 F.3d at 590; Drake, supra note 3, at 34–35.

\textsuperscript{65} State v. Land, 806 P.2d 1156, 1157 (Or. Ct. App. 1991); Kate Schuyler, Right-to-Refuse Warnings: A Minority’s Crusade for Justice, 38 U. TOL. L. REV. 769, 769 (2007). The case that first used the phrase knock-and-talk was State v. Land.

\textsuperscript{66} Gould, 364 F.3d at 590; Drake, supra note 3, at 34–35.

\textsuperscript{67} Id. at 1156.

\textsuperscript{68} Id. at 1158.

\textsuperscript{69} See U.S. CONST. amend. IV; Kentucky v. King, 131 S. Ct. 1849, 1858–61 (2011); Schuyler, supra note 65, at 769.

\textsuperscript{70} Drake, supra note 3, at 41 ("Knock-and-talks make a good number of lower courts quesy.").

\textsuperscript{71} Id.; see also King, 131 S. Ct. at 1862; United States v. Dunn, 480 U.S. 294, 305 (1987); United States v. Hatfield, 333 F.3d 1189, 1193–95 (10th Cir. 2003).

\textsuperscript{72} See U.S. CONST. amend. IV; Drake, supra note 3, at 41–42.

\textsuperscript{73} See King, 131 S. Ct. at 1857; Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001). “But, we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations . . . .” Atwater, 532 U.S. at 347; see also U.S. CONST. amend. IV; King, 131 S. Ct. at 1861 (rejecting the test offered by respondent as nebulous and impractical).
interactions that result from unwarranted and unplanned intrusions into the home. The inadequacy of current rules governing knock-and-talks has forced the Supreme Court to reconsider its Fourth Amendment jurisprudence and to develop a new rule that analyzes an officer's objective purpose for knocking on a citizen's door. A brief review of how courts have applied past search and seizure rules to knock-and-talks is necessary to understand the inevitable development of the objective purpose rule.

A. Knock-and-Talks and Unlawful Seizures

Courts and scholars considering the constitutionality of knock-and-talks have largely focused on whether—after the knock on the door—the interaction between the officer and the citizen is an unreasonable seizure. The most common issues raised in this context are whether consent to enter and search the premises was voluntary, whether the citizen would have felt free to disregard the police intrusion, and whether the jurisdiction in question applies—or should apply—a rule requiring police to warn citizens of their right to refuse entry or consent to search.

74. See United States v. Johnson, 170 F.3d 708, 712 (7th Cir. 1999); Curtis, supra note 58 (discussing a misunderstanding between a police officer and a citizen during a knock-and-talk, which led to the officer shooting the homeowner in the face). In Johnson, for example, an attempted knock-and-talk turned into an unexpected scuffle with an armed suspect when the citizen opened the door just as the officer moved to knock on the door. Johnson, 170 F.3d at 712. The police momentarily lost control of the suspect and the gun. Id.
75. King, 131 S. Ct. at 1858–59; Johnson, 170 F.3d at 715.
76. See generally Kletter, supra note 47.
77. See United States v. Hatfield, 333 F.3d 1189, 1193, 1195 (10th Cir. 2003); Gompf v. State, 120 P.3d 980, 986–87 (Wyo. 2005); Carrie Leonetti, Open Fields in the Inner City: Application of the Curtilage Doctrine to Urban and Suburban Areas, 15 GEO. MASON U. CIV. RTS. L.J. 297, 313 (2005) ("To the extent that courts have addressed the constitutionality of the knock-and-talk, it has primarily been in the context of whether... police... [acted] in a seizure... such that the occupant... would not feel free to decline the officers' request to enter... or otherwise... terminate the police encounter."); Kletter, supra note 47 (providing a 121 page comprehensive American Law Report of state and federal cases addressing knock-and-talks, where twenty of thirty-four sections are devoted to knock-and-talks as possible seizures).
78. See Kletter, supra note 47 (providing a comprehensive review of state and federal case law addressing the coercion and reasonableness of a knock-and-talk encounter).
79. See id.
80. Id. (providing a comprehensive review of state and federal courts that have considered and rejected or accepted a requirement that police advise citizens of their "right to refuse, revoke, or limit consent to enter or search when conducting [a] knock and talk").
81. Waite, supra note 53, at 1367 (finding the "goal in using the knock and talk is to gain consent to search, and thereby alleviate the need for a search warrant"); see also Scott v. State, 782 A.2d 862, 867 (Md. 2001); State v. Land, 806 P.2d 1156, 1156 (Or. Ct. App. 1991) ("When the judge declined to sign the warrant, [the officer] went to defendant's home to obtain additional information and to 'get his consent to search.'"); Drake, supra note 3, at 37 ("The overwhelming majority of police searches are justified by the consent exception to the warrant requirement, and it stands to reason that the overwhelming majority of consensual residential searches are preceded by a knock-and-talk.").
82. See Kletter, supra note 47.
83. Florida v. Bostick, 501 U.S. 429, 434 (1991) (concluding that whether a seizure has occurred depends on whether the citizen would have felt free to terminate the encounter); United States v. Charles, 29 F. App'x 892, 896–98 (3d Cir. 2002) (determining the lawfulness of a knock-and-talk by considering the interaction between the police and defendant after the knock on the door).
84. See, e.g., United States v. Spence, 397 F.3d 1280, 1282–83 (10th Cir. 2005).
85. Bradley, supra note 7, at 1122 (finding that knock-and-talks have "led to widespread confusion among the courts as to precisely which police behaviors are acceptable and which are prohibited"). See generally Kletter, supra note 47 (providing 121 pages of state and federal case annotations, with no clear consensus in how best to address the knock-and-talk phenomena).
86. Drake, supra note 3, at 26.
87. Id.
89. See id. at 934.
interactions that result from unwarranted and unplanned intrusions into the home. 74 The inadequacy of current rules governing knock-and-talks has forced the Supreme Court to reconsider its Fourth Amendment jurisprudence and to develop a new rule that analyzes an officer’s objective purpose for knocking on a citizen’s door. 75 A brief review of how courts have applied past search and seizure rules to knock-and-talks is necessary to understand the inevitable development of the objective purpose rule. 76

A. Knock-and-Talks and Unlawful Seizures

Courts and scholars considering the constitutionality of knock-and-talks have largely focused on whether—after the knock on the door—the interaction between the officer and the citizen is an unreasonable seizure. 77 The most common issues raised in this context are whether consent to enter and search the premises was voluntary, 78 whether the citizen would have felt free to disregard the police intrusion, 79 and whether the jurisdiction in question applies—or should apply—a rule requiring police to warn citizens of their right to refuse entry or consent to search. 80

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The most likely reason officers conduct a knock-and-talk is to obtain consent to enter and search a dwelling when they do not have a warrant. 81 Judicial analysis of this practice considers whether consent to search or enter a dwelling was voluntarily given or whether consent was coerced against the occupant’s will. 82 Courts ask whether the citizen would have felt free to disregard the officer, whether the officer was incessant and overbearing in his or her tactics or questioning of the citizen, 83 and whether the interaction between the police and citizen ultimately resulted in a seizure, subject to scrutiny under the Fourth Amendment. 84

However, judicial analysis under consent and coercion doctrines has produced limited and ambiguous results with respect to knock-and-talks. 85 As Professor Drake recently wrote, “[f]or years, criminal defendants have argued to the lower courts that knock-and-talks coerce the homeowner into consenting to a search.” 86 “This approach has had little success because voluntariness jurisprudence is notoriously bad.” 87 Even though some courts recognize that “any knock and talk is inherently coercive to some degree,” 88 consent and coercion rules fail to mitigate the constitutional issues raised by knock-and-talks. 89 Rather than asking whether police had a justifiable reason to knock on a citizen’s door to begin with, these rules analyze what happened

81. Waite, supra note 53, at 1367 (finding the “goal in using the knock and talk is to gain consent to search, and thereby alleviate the need for a search warrant”); see also Scott v. State, 782 A.2d 862, 867 (Md. 2001); State v. Land, 806 P.2d 1156, 1156 (Or. Ct. App. 1991) (“When the judge declined to sign the warrant, [the officer] went to defendant’s home to obtain additional information and to ‘get his consent to search.’”); Drake, supra note 3, at 37 (“The overwhelming majority of police searches are justified by the consent exception to the warrant requirement, and it stands to reason that the overwhelming majority of consensual residential searches are preceded by a knock-and-talk.”).
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after police intruded into a citizen's privacy. Consequently, there is an increase in the unpredictable and dangerous circumstances that develop when police conduct unplanned and unwarranted intrusions into an individual's home.19

For instance, a homeowner in Central Florida, concerned about reports of recent escapees from a local jail, answered an early morning knock on his front door carrying a shotgun.20 The police officer knocking on the door shined a high-intensity flashlight in the homeowner's eyes. The homeowner claimed the light startled him, causing him to accidentally discharge the shotgun, which caused no injury.21 The officer responded by drawing his own weapon and shooting the homeowner in the face.45 Undoubtedly, knocking on an individual's door unannounced, without a plan, and without a warrant "is inherently dangerous for . . . officers and . . . residents" alike.95

Not only is knocking on someone's door without a warrant dangerous for police and residents, but the practice is also innately coercive in nature.96 For example, in Victor's case discussed in the introduction, Victor and his great-grandma were subjected to overbearing police tactics when armed police immediately began questioning Victor about his involvement in drug activity, when police began questioning his great-grandma, and when great-grandma watched her grandson be handcuffed and placed under guard by police in her home. This all occurred before the police asked ninety-year-old great-grandma to sign the consent-to-search form! In Victor's case, the judge concluded that the Fourth Amendment's protections were not triggered until after Victor opened the door.97 Only after the three officers made face-to-face contact with Victor were the officers' actions analyzed to determine whether they used unduly coercive tactics to gain entry into the home, to elicit a statement from Victor and to obtain consent from great-grandma to search the premises.98 This is the most

common method of analysis for courts determining the lawfulness of knock-and-talks.99

However, cases that determine the legality of a police intrusion only after the door is open are not really knock-and-talk cases at all because they are only concerned with the resulting exchange between the officers and citizens, and not the knock that made the interaction possible.100 By assessing police action only after a citizen opens the door, courts are effectively sanctioning the practice of knock-and-talks.101 The difficulty of assessing knock-and-talks under current consent and coercion rules has forced some courts to attempt to deal with knock-and-talks under the Supreme Court of the United States' curtilage doctrine.102

B. Knock-and-Talks and the Curtilage Doctrine

Whether an officer's act of knocking on the door of a private dwelling constitutes a search within the meaning of the Fourth Amendment has not been directly addressed by the Supreme Court of the United States or lower courts.103 Instead, courts have analyzed the lawfulness of officers' actions before the knock on the door under the Supreme Court's curtilage doctrine.104 The curtilage doctrine considers the "area 'immediately surrounding and associated with the home' [as] 'part of the home itself for Fourth Amendment purposes.' "105 For example, a front porch106 or attached garage107 would be part of the curtilage of the home.108 The open field, on

warnings were provided to the defendant, pursuant to the requirements of Miranda v. Arizona; Miranda v. Arizona, 384 U.S. 436, 444-45 (1966).

99. See generally Klettet, supra note 47 (providing a comprehensive report of state and federal cases that deal with knock-and-talks, the majority of which are analyzed under consent and coercion doctrines).

100. See Kentucky v. King, 131 S. Ct. 1849, 1858-59; Drake, supra note 3, at 26 n.4. Aside from the exceptional case where the officer's manner of knocking—e.g., banging on the door—contributed to unlawful coercion or obstruction of the occupant's free will. Drake, supra note 3, at 26-27.


102. See Charles, 29 F. App'x at 895.

103. See Klettet, supra note 47, at 26; see also United States v. Dunn, 480 U.S. 294, 307, 312 (1987) (Brennan, J., dissenting); Oliver v. United States, 466 U.S. 170, 180 (1984); Klettet, supra note 47.

104. See United States v. Dunn, 480 U.S. at 308 (Brennan, J., dissenting) ("[C]urtilage includes all outbuildings used in connection with a residence, such as garages, sheds [and] barns . . . connected with and in close vicinity of the residence.") (quoting Luman v. State, 629 P.2d

http://nsuworks.nova.edu/nlr/
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Not only is knocking on someone’s door without a warrant dangerous for police and residents, but the practice is also innately coercive in nature. For example, in Victor’s case discussed in the introduction, Victor and his great-grandma were subjected to overbearing police tactics when armed police immediately began questioning Victor about his involvement in drug activity, when police began questioning his great-grandma, and when great-grandma watched her grandson be handcuffed and placed under guard by police in her home. This all occurred before the police asked ninety-year-old great-grandma to sign the consent-to-search form. In Victor’s case, the judge concluded that the Fourth Amendment’s protections were not triggered until after Victor opened the door. Only after the three officers made face-to-face contact with Victor were the officers’ actions analyzed to determine whether they used unduly coercive tactics to gain entry into the home, to elicit a statement from Victor and to obtain consent from great-grandma to search the premises.

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90. See Drake, supra note 3, at 26–27.
91. See id. at 34–37.
92. See Curtis, supra note 58.
93. Id.
94. Id.
95. Id.
96. Kletzer, supra note 47.
97. U.S. Const. amend. IV. This is often the trigger point for courts to begin analyzing the lawfulness of the police intrusion. See, e.g., United States v. Thomas, 430 F.3d 274, 276 (6th Cir. 2005); United States v. Spence, 397 F.3d 1280, 1283 (10th Cir. 2005); United States v. Charles, 29 F. App’x 892, 896–97 (3d Cir. 2002).
98. See People v. Gonzalez, 347 N.E.2d 575, 579 (1976) (holding consent must be voluntary in order to authorize a warrantless search); New York v. Harris, 495 U.S. 14, 20 (1990) (holding that statements taken during custodial interrogation are unlawful unless

99. See generally Kletzer, supra note 47 (providing a comprehensive report of state and federal cases that deal with knock-and-talks, the large majority of which are analyzed under consent and coercion doctrines).
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102. See Charles, 29 F. App’x at 895.
103. Drake, supra note 3, at 26; see also U.S. CONST. amend. IV.
105. Jardines, 133 S. Ct. at 1414 (citing Oliver, 466 U.S. at 180). 106. Id. at 1415 (“The front porch is the classic exemplar of an area adjacent to the home and ‘to which the activity of home life extends.’” (quoting Lunan v. State, 629 P.2d

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the other hand, is made up of certain outlying properties as distinct from the home and the curtilage. Thus, a homeowner’s adjacent pastureland or barn that is detached and removed from the home is not considered part of the home for Fourth Amendment purposes. Ultimately, courts consider whether a citizen had a reasonable expectation of privacy “in the areas traversed by the police” before they knocked on the citizen’s door. In other words, courts are only asking whether police trespassed upon a homeowner’s actual home or curtilage. If not, a person’s private property is part of an open field, which is not protected by the Fourth Amendment. Under the curtilage doctrine, courts do not consider the lawfulness of the actual act of knocking on the door.

Focusing on the path and methods taken to achieve the knock-and-talk, rather than the knock itself, is problematic in a number of ways. First, courts are forced to engage in a nuanced and ambiguous analysis of specific factual circumstances, providing no real guidance or notice to citizens, police, or judges as to what is and what is not an unlawful search. Courts get bogged down analyzing how tall a fence was, how far a driveway was from a neighbor’s house, whether a “no trespassing” sign was clearly visible, whether police smelled the odor of marijuana before or after seeing a no trespassing sign, and so on. The result is a patchwork of jurisprudence, where courts languish over issues like the size of shrubs, rather than whether police were constitutionally empowered to approach the citizen’s home and knock on the door. Like the consent and coercion doctrines used to analyze whether a seizure occurred and was lawful, analysis under the curtilage doctrine fails to provide clear guidance for police during the dangerous course of their duties.

A second major problem with addressing knock-and-talks only through the curtilage doctrine is that the doctrine only protects homeowners who have a defined curtilage. “One of the difficulties in the application of the [curtilage doctrine] to urban areas is [the] epistemological reliance upon a suburban conceptual framework.” Consequently, urban apartment dwellers have less protection under the Fourth Amendment than their suburban and rural counterparts, because they do not have a buffer of curtilage protecting their home. In Victor’s case, for instance, the Court’s curtilage doctrine would not have provided any protection from the police intrusion, because the police were lawfully standing in the hallway when they decided to approach his door. This “analytical loophole” has encouraged the increased use of knock-and-talks in dense urban areas and apartment complexes.

The problem is particularly acute in public housing units, where police may patrol the hallways of multi-storied apartment complexes and where each door is exposed to the common hallway. One glaring example of the dangers produced by this practice is provided by the unlawful police killing of Akai Gurley in Brooklyn, New York on November 20, 2014. In that case, New York Police Department (“NYPD”) Officer Peter Liang had his weapon drawn during a warrantless patrol of a public housing unit when the gun discharged into a dark stairway, causing a bullet to strike twenty-eight-year-old Gurley in the chest, killing him. While Gurley’s death

108. Jardines, 133 S. Ct. at 1415; Dunn, 480 U.S. at 308 (Brennan, J., dissenting); Daughenbaugh, 150 F.3d at 596.
109. See Dunn, 480 U.S. at 308 (Brennan, J., dissenting).
110. See, e.g., Hayfield, 333 F.3d at 1190–91 (10th Cir. 2003).
111. Id.; see also U.S. CONST. amend. IV.
112. See Klettner, supra note 47.
113. See id.
114. Leonetti, supra note 77, at 309; see also U.S. CONST. amend. IV.
115. Leonetti, supra note 77, at 301.
118. See id.; Friedell, 2003 WL 22173063, at *3.
119. Johnston, 839 A.2d at 833.
120. See id. at 833–34.
121. 2016] KNOCK-AND-TALKS & STOP AND FRISKS 227

122. Dunaway, 442 U.S. at 212–14; Leonetti, supra note 77, at 311, 313–14. "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect ... and balance the social and individual interests involved in the specific circumstances they confront." Dunaway, 442 U.S. at 213–214.
124. Leonetti, supra note 77, at 311.
125. Eppich, supra note 123, at 131–32; see also U.S. CONST. amend. IV.
126. See Kentucky v. King, 131 S. Ct. 1849, 1854, 1863 (2011) (finding knock-and-talk reasonable where police had lawfully entered the breezeway of an apartment complex in pursuit of a suspected narcotics dealer, and where police detected the odor of marijuana emanating from the door they chose to knock on). Police had just executed a lawful search warrant five doors down the hall from Victor’s apartment.
127. See Leonetti, supra note 77, at 311.
130. Id.; see also J. David Goodman & Vivian Yee, Officer Charged in Akai Gurley Case Debated Reporting Gunshot, Officials Say, N.Y. TIMES (Feb. 11, 2015),
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occurred in the stairway of the public housing unit, rather than a common hallway, so-called “vertical patrols” also permit officers to patrol the hallways of the multi-storied buildings.\textsuperscript{131} This allows police to easily access the doorways of residents in public housing, increases knock-and-talks, and leads to excessive, unwarranted encounters between police and citizens.\textsuperscript{132} Clearly, “[r]esidents of public housing face harsh police tactics absent from more affluent communities,”\textsuperscript{133} which “undermines efforts at community policing and has the potential to harm the population [knock-and-talks] supposedly protect[].”\textsuperscript{134} Poorer citizens are unequally exposed to unwarranted police intrusion in their home because analysis under the curtilage doctrine fails to consider the lawfulness of the actual police act of knocking on the door of a private home.\textsuperscript{135} The constitutional conundrum created by knock-and-talks cannot be resolved through the curtilage doctrine.\textsuperscript{136} Like the consent and coercion cases discussed above, it is a misnomer to consider this line of cases as knock-and-talk cases at all.\textsuperscript{137} In \textit{Kentucky v. King}, the Supreme Court set up the adoption of a new rule to address knock-and-talks, one that turns on an officer’s objective purpose for knocking on the door.

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  \item \textsuperscript{131} Id. at 1858–61.
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  \item \textsuperscript{133} See King, 131 S. Ct. at 1854; \textit{King}, 302 S.W.3d at 651.
  \item \textsuperscript{134} See 131 S. Ct. at 1858, 1863.
  \item \textsuperscript{135} Id. at 1859, 1862.
  \item \textsuperscript{136} Id.
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In Kentucky v. King, the Supreme Court set up the adoption of a new rule to address knock-and-talks, one that turns on an officer’s objective purpose for knocking on the door.

http://www.nytimes.com/2015/02/12/nyregion/akai-gurley-shooting-death-arrangement.html?_r=0

Kentucky v. King and the Development of the Objective Purpose Rule

The Supreme Court’s decision in Kentucky v. King highlighted the deficiencies in current knock-and-talk jurisprudence, and laid the groundwork for a new rule that analyzes an officer’s objective purpose for knocking on a citizen’s door. However, even though the Court’s decision in Kentucky v. King was probably the closest the Court has come to squarely addressing the constitutionality of knock-and-talks, the decision was not about a knock-and-talk. Like the cases decided under the seizure and curtailage doctrines above, Kentucky v. King did not directly address the lawfulness of an officer’s act of knocking on the door. In Kentucky v. King, probable cause of criminal activity existed before the police knocked on the door, and exigent circumstances justified the police action that took place after the knock on the door. While the constitutionality of knock-and-talks was not before the Court, Kentucky v. King set up the development of the objective purpose rule, limiting warrantless police action to that which “any private citizen might do.”

In King v. Commonwealth, police had set up a “buy bust” operation where they “arranged for a confidential informant to purchase crack cocaine from a ‘street level’ dealer.” Following a controlled buy, police set out running after the suspected dealer who had moved quickly into a breezeway of an apartment complex. The police entered the breezeway just in time to hear a door shut. Not knowing which apartment the suspect had entered, the police followed the smell of burning marijuana to the door on the left at the end of the breezeway—the suspect had entered the door on the right. They knocked on the door, announcing “police, police, police.” Immediately following the knock on the door, the officers heard people moving around inside the apartment, which led them to believe “that...”
drug-related evidence was about to be destroyed." The officers "kicked in the door" and entered the apartment, finding King and two others smoking marijuana. The officers eventually gained entry into the apartment across the hall, finding the "suspected drug dealer who was the initial target of their investigation."

In rendering its decision, the Court did not directly address the lawfulness of knock-and-talks, because that was not the question before the Court. The question considered by the Court was whether police may rely on exigent circumstances to complete a warrantless entry into a home, when the "exigency was "created" or "manufactured" by the conduct of the police." The exigency in Kentucky v. King—police belief that drugs were being destroyed—was created when the police knocked on King's door and announced their presence. The Court concluded that the warrantless entry into the home to prevent the destruction of evidence was reasonable, because "the police did not create the exigency by engaging [in] or threatening to engage in conduct that violates the Fourth Amendment."

Thus, the rule announced by the Court concerned whether the officers' actions leading up to, and including the knock on the door, violated the Fourth Amendment. Yet, there was no question in King v. Commonwealth that the officers were justified in following the suspect into the breezeway after the suspect sold drugs to a confidential informant. Further, once police detected the odor of marijuana emanating from King's door, the officers had probable cause to believe criminality was afoot in King's apartment, and were thus justified in knocking on his door.

The Court did not directly consider the lawfulness of knock-and-talks because the officers undoubtedly were justified in approaching and knocking on the door, and because the act of knocking on the door, by itself, was "no more than any private citizen might do." In other words, the police were lawfully empowered to approach the door and knock because they had probable cause to justify both actions. The act of knocking on the door did not convert the police action from lawful to unlawful under the Fourth Amendment, because knocking on a citizen's door, in and of itself, is "no more than any citizen might do." Kentucky v. King set up the objective purpose rule that was expressly adopted by the Court in Jardines. Consequently, it is the officer's objective purpose for knocking on the door of a private dwelling that demonstrates whether their act of knocking was "more than any private citizen might do."

IV. The Objective Purpose Rule

In recent years the Supreme Court has made significant changes to what it considers a search within the meaning of the Fourth Amendment. Beginning in 2012, the Court's decision in United States v. Jones drastically altered federal search jurisprudence, reviving the once cast aside trespass doctrine. Thereafter the reasonable-expectation-of-privacy test announced in Katz v. United States was merged with the trespass doctrine from Jones. As a result of this merger, and recalling the Court's reasoning in Kentucky v. King, a search has occurred when an officer's trespassory act exceeds what "any . . . citizen might do." And, after the Court's 2013 decision in Jardines, whether an officer's trespassory act is "more than any citizen might do" depends on the officer's objective purpose for completing the act. After Kentucky v. King, Jones, and Jardines, a search within the meaning of the Fourth Amendment occurs when an official's trespassory act

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151. King, 131 S. Ct. at 1854; King, 302 S.W.3d at 652.
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153. See King, 131 S. Ct. at 1854; Drake, supra note 3, at 27.
154. King, 131 S. Ct. at 1854, 1858, 1862–63.
155. See id. at 1853–54, 1857.
156. Id. at 1857–58.
157. Id. at 1858; see also U.S. CONST. amend. IV.
158. King, 131 S. Ct. at 1854; see also U.S. CONST. amend. IV.
159. King, 131 S. Ct. at 1862–63; see also United States v. Valdez, 796 F.2d 24, 28 (2d Cir. 1986) (finding probable cause to follow and arrest suspect after suspect was observed selling narcotics to undercover officer).
160. King, 131 S. Ct. at 1854, 1865 (Ginsburg, J., dissenting) ("The smell of marijuana seeping under the apartment door into the hallway ... gave the police "probable cause ... to obtain a warrant to search the apartment.");" (quoting King, 302 S.W.3d at 653); see also Valdez, 796 F.2d at 28; infra Part IV (advocating for a more reasonable suspicion standard for reviewing knock-and-talks).

161. King, 131 S. Ct. at 1862.
162. See id.
163. Id. at 1861–62; see also U.S. CONST. amend. IV.
165. Jardines, 133 S. Ct. at 1416 (quoting King, 131 S. Ct. at 1862).
168. Id. at 946, 950, 953 (concluding that "the [g]overnment's physical intrusion on an effect for the purpose of obtaining information constitutes a search").
171. Jones, 132 S. Ct. at 952; King, 131 S. Ct. at 1861–62; see supra Section II.C.
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Thus, the rule announced by the Court concerned whether the officers' actions leading up to, and including the knock on the door, violated the Fourth Amendment.\textsuperscript{158} Yet, there was no question in \textit{King v. Commonwealth} that the officers were justified in following the suspect into the breezeway after the suspect sold drugs to a confidential informant.\textsuperscript{159} Further, once police detected the odor of marijuana emanating from King's door, the officers had probable cause to believe criminality was afoot in King's apartment, and were thus justified in knocking on his door.\textsuperscript{160}

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IV. THE OBJECTIVE PURPOSE RULE

In recent years the Supreme Court has made significant changes to what it considers a search within the meaning of the Fourth Amendment.\textsuperscript{166} Beginning in 2012, the Court's decision in \textit{United States v. Jones}\textsuperscript{167} drastically altered federal search jurisprudence, reviving the once cast aside trespass doctrine.\textsuperscript{168} Thereafter the reasonable-expectation-of-privacy test announced in \textit{Katz v. United States}\textsuperscript{169} was merged with the trespass doctrine from \textit{Jones}.\textsuperscript{170} As a result of this merger, and recalling the Court's reasoning in \textit{Kentucky v. King},\textsuperscript{171} a search has occurred when an officer's trespassory act exceeds what "any . . . citizen might do."\textsuperscript{172} And, after the Court's 2013 decision in \textit{Jardines}, whether an officer's trespassory act is "more than any citizen might do" depends on the officer's objective purpose for completing the act.\textsuperscript{173} After \textit{Kentucky v. King}, \textit{Jones}, and \textit{Jardines}, a search within the meaning of the Fourth Amendment occurs when an official's trespassory act

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A. What Is a Search Within the Meaning of the Fourth Amendment?

The two guiding principles of the Supreme Court's search doctrine are clear. The Fourth Amendment a search occurs when the government:
(1) invades a subjective expectation of privacy that society recognizes as reasonable or
(2) physically intrudes on constitutionally protected areas.

In Katz, the Court concluded the government could not, without a warrant supported by probable cause, listen and record an individual's conversations in a public phone booth, even though the electronic recording device employed by the officials "did not happen to penetrate the wall" of the booth. In holding that physical intrusion or trespass by government officials was not necessary to trigger the Fourth Amendment's protections, the Court held that a search occurs when the government invades a subjective expectation of privacy that society recognizes as reasonable. The so-called "reasonable-expectation-of-privacy" test announced in Katz was echoed in Kentucky v. King, where the Court reasoned that police may act without a warrant so long as their conduct is "no more than any ... citizen might do." The reasonable-expectation-of-privacy test remained the law of the land from 1967 until 2012.

174. King, 131 S. Ct. at 1861–62; Jones, 132 S. Ct. at 952; Jardines, 133 S. Ct. at 1416; see also U.S. CONST. amend. IV.
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In 2012, the Court readopted the once cast aside "trespass" doctrine, creating a Fourth Amendment rule dependent on clear physical lines. In Jones, the Court decided that the reasonable-expectation-of-privacy test relied upon by courts since Katz merely supplemented the citizen's absolute right to be free from "physical restraint or trespass" on their property. Justice Scalia, writing for the majority, determined that physical trespass was the type of invasion specifically contemplated by the Framers of the Constitution. "When the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment ... undoubtedly occurred." After the Court's "no more than any private citizen might do" language in Kentucky v. King and its revival of the trespass doctrine in Jones, it was only a matter of time before the Court would adopt a search rule that depended on an officer's objective purpose for physically trespassing on a constitutionally protected area. That time came in 2013, in the Court's decision in Jardines.

B. Florida v. Jardines: The Objective Purpose Rule

In Florida v. Jardines, the Supreme Court held that an officer's right to approach a private dwelling is limited by the officer's "objective purpose." Although police may approach a home without a warrant in hopes of speaking to its occupants, "because that is 'no more than any private citizen might do'... whether the officers had an implied license to enter... depends upon the purpose for which they entered." Again

185. Id. at 950 (concluding that a physical trespass by police on an individual's effects is a search when conducted for the purpose of obtaining information, and that at the bottom, "we must assure[ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted") (alteration in original) (quoting Kyllo v. United States, 533 U.S. 27, 34 (2001)); see also Katz, 389 U.S. at 360 (Harlan, J., concurring).
186. Jones, 132 S. Ct. at 949; Bond v. United States, 529 U.S. 334, 338–39 (2000) (finding the core right protected by the Fourth Amendment to be the citizen's right to be free from unwarranted physical contact or trespass by government officials); see also U.S. CONST. amend. IV.
187. Jardines, 133 S. Ct. at 1414 (quoting Jones, 132 S. Ct. at 950 n.3) (alteration in the original) (emphasis added); see also U.S. CONST. amend IV.
188. Kentucky v. King, 131 S. Ct. 1849, 1862 (2011); see also Jones, 132 S. Ct. at 949; Drake, supra note 3, at 30–31 (explaining how Jones set up the Court's decision in Jardines, which was the "first post-Jones application of the trespass test.").
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writing for the majority, Justice Scalia concluded that when police trespassed on private property, an unreasonable search occurred when, instead of acting as any citizen normally would, "their behavior objectively reveal[ed] a purpose to conduct a search, which [was] not what anyone would think he had license to do." Thus, whether a search within the meaning of the Fourth Amendment occurs depends on an officer's objective purpose for trespassing on a constitutionally protected area.

The Court's adoption of an objective purpose rule is no surprise when for decades the Court has designated government action as reasonable or unreasonable based on an official's objective purpose for taking the action. Under the Court's "special needs" doctrine, for instance, the reasonableness of government action depends on officials' "primary purpose" for taking the action. Similarly, in cases where the state set up roadblocks or checkpoints, the Court consistently determined the reasonableness of the government action based on the government's objective purpose for temporarily detaining the commuters. And of course in Jones, the Court held that "the government's physical intrusion on an effect for the purpose of obtaining information constitutes a search." The objective purpose rule announced in Jardines was thus an inevitable development in the Supreme Court's Fourth Amendment jurisprudence.

Importantly, the objective purpose rule announced in Jardines is distinct from the subjective intent rule rejected by the Court in Whren v. United States. In Whren, the Court held that the "constitutional reasonableness of traffic stops [does not] depend[] on the actual motivations of the individual officers involved." In Whren, it did not matter—for Fourth Amendment purposes—whether police were discriminatorily motivated to stop the citizen so long as the police also had an objectively reasonable purpose for making the stop. In Jardines, Justice Scalia acknowledged "that the subjective intent of the officer is irrelevant" to a Fourth Amendment determination of reasonableness and that there is no question that a "stop or search that is objectively reasonable is not vitiated by the fact that the officer's real reason for making the stop or search has nothing to do with the validating reason." A defendant's Fourth Amendment challenge to a traffic stop, for example, will fail if his or her only argument is that "the officer's real reason for the stop was racial harassment.

Under the objective purpose rule, the question "is precisely whether the officer's conduct was an objectively reasonable search." Whether the search was reasonable "depends [on] whether the officers had an implied license to enter the [property], which in turn depends upon the purpose for which they entered." In Kentucky v. King, for instance, the Court did not have the opportunity to rule on the reasonableness of the knock on the door because, although the officer's objective purpose was to conduct a search, the officer had an "implied license"—supported by probable cause—to approach and knock on the door. The lawfulness of the knock itself was never at issue. In Jardines, the Court did not have the opportunity to rule on the reasonableness of the knock on the door because the officer's conduct violated the Fourth Amendment before the officer "applied for and received a warrant to search the residence." The officer's objective purpose converted what would have been a reasonable trespass by any other citizen into a search within the meaning of the Fourth Amendment. Similarly in Victor's case, the officer did not have a lawful reason to approach and knock on the door. In such circumstances, the question is whether the officer was
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empowered to *knock* on the door, which in turn depends on the officer's objective purpose for knocking. 213

C. The Objective Purpose Rule and Knock-and-Talks

After *Kentucky v. King*, *Jones*, and *Jardines*, a search within the meaning of the Fourth Amendment occurs when an officer trespasses on a constitutionally protected area for the purpose of conducting a search. 214 While the *Jardines* Court did not directly address the lawfulness of knock-and-talks, the Court "set out a roadmap for challenging one of the most common and insidious police tactics used today: the knock-and-talk. The path is short and clear, and it leads to the inescapable conclusion that the knock-and-talk—as it is actually employed in practice—is unconstitutional." 215

The Court did not directly address knock-and-talks in *Jardines*, because like in *Kentucky v. King*, *Jardines* was not specifically about a knock-and-talk but rather was about a search that preceded the issuance of a search warrant. 216 The Court has, however, repeatedly protected the purpose doctrine as applied to knock-and-talks even before *Jardines*. 217 In *Kentucky v. King*, the Court concluded that police might knock on a citizen's door without a warrant when their conduct was already supported by probable cause because "they do no more than any private citizen might do." 218 In *Jardines*, the Court affirmed that when an officer approaches and knocks on the door of a home without a warrant but is with his or her child who is a "Nation's Girl Scout" or "trick-or-treater," the homeowner cannot cry foul because the homeowner must expect such behavior. 219 Yet, an officer's implied license to trespass on private property is limited to his or her

213. See *King*, 131 S. Ct. at 1862–63.
215. *Drake*, supra note 3, at 26; see also *Jardines*, 133 S. Ct. at 1415–16.
216. *Jardines*, 133 S. Ct. at 1413 (The case was focused on the use of a drug-sniffing dog to conduct an olfactory search of the home's curtilage.); *King*, 131 S. Ct. at 1853–54.
217. See *Jardines*, 133 S. Ct. at 1416; *King*, 131 S. Ct. at 1856.
218. *King*, 131 S. Ct. at 1862.
219. See *Jardines*, 133 S. Ct. at 1415–16.
220. The objective purpose for being there. In other words, an officer may approach a home and knock on the door—for the purpose of gathering evidence—if:
   (1) they have sufficient suspicion to justify the knock on the door;
   (2) they are aware of an exigency that justifies the intrusion; or
   (3) they have a warrant supported by probable cause.

Thus, if an officer approaches a home and knocks on the door for the purpose of conducting a search, the knock on the door will be unconstitutional unless one of these three justifications can be met. Of course, if the officer is acting as any citizen might, such as collecting money for a local baseball team or selling Girl Scout cookies, then the officer's actions need not be justified. 226 When an officer knocks on a citizen's door, it is the officer's objective purpose for knocking that may convert the knock into a search within the meaning of the Fourth Amendment. 227

The Court should not only measure the officer's actions leading up to the knock on the door under the curtilage doctrine, but the Court should determine the lawfulness of the knock itself for at least two reasons. First, as discussed in Section B of Part III., current rules governing an officer's conduct before the knock on the door are inadequate to protect urban apartment dwellers from unreasonable intrusions. Those who live in multi-story apartment complexes, such as in Victor's case 230 and in *Kentucky v. King*, do not enjoy the buffer of Fourth Amendment protection provided by the Supreme Court's curtilage doctrine. This concern is particularly significant in public housing units, where police freely patrol the hallways of

221. See *King*, 131 S. Ct. at 1860; *Drake*, supra note 3, at 26–27 (concluding that police act with the purpose of conducting a search when their action is taken against the person or property of a private citizen in an effort to gather evidence).
222. See *Terry v. Ohio*, 392 U.S. 10–11 (1968) (infra Part V arguing that Terry's reasonable suspicion standard is the appropriate standard for reviewing the lawfulness of knock-and-talks).
223. *King*, 131 S. Ct. at 1853–54; see also supra Part II (describing exigent circumstances that justify a warrantless intrusion).
224. *U.S. CONST. amend. IV*.
226. See *Jardines*, 133 S. Ct. at 1415–16.
227. *U.S. CONST. amend. IV; see also Jardines, 133 S. Ct. at 1416; supra Section III.B.
228. See *Terry*, 392 U.S. at 19–20; *Leonetti*, supra note 77, at 310, 316–17.
229. *Leonetti*, supra note 77, at 310, 319–20; see also supra Section III.B.
230. *See supra Part I*.
232. *See U.S. Const. amend. IV; King*, 131 S. Ct. at 1863; *Leonetti*, supra note 77, at 310; *supra Sections I, III.B.*
empowered to knock on the door, which in turn depends on the officer’s objective purpose for knocking.\textsuperscript{213}

C. The Objective Purpose Rule and Knock-and-Talks

After Kentucky \textit{v.} King, Jones, and Jardines, a search within the meaning of the Fourth Amendment occurs when an officer trespassed on a constitutionally protected area for the purpose of conducting a search.\textsuperscript{214} While the \textit{Jardines} Court did not directly address the lawfulness of knock-and-talks, the Court “set out a roadmap for challenging one of the most common and insidious police tactics used today: the knock-and-talk. The path is short and clear, and it leads to the inescapable conclusion that the knock-and-talk—as it is actually employed in practice—is unconstitutional.”\textsuperscript{215}

The Court did not directly address knock-and-talks in \textit{Jardines}, because like in Kentucky \textit{v. King}, \textit{Jardines} was not specifically about a knock-and-talk but rather was about a search that preceded the issuance of a search warrant.\textsuperscript{216} The Court has, however, repeatedly protected the purpose doctrine as applied to knock-and-talks even before \textit{Jardines}.\textsuperscript{217} In Kentucky \textit{v. King}, the Court concluded that police might knock on a citizen’s door without a warrant when their conduct was already supported by probable cause because “they do no more than any private citizen might do.”\textsuperscript{218} In \textit{Jardines}, the Court affirmed that when an officer approaches and knocks on the door of a home without a warrant but is with his or her child who is a “Nation’s Girl Scout” or “trick-or-treater,” the homeowner cannot cry foul because the homeowner must expect such behavior.\textsuperscript{219} Yet, an officer’s implied license to trespass on private property is limited to his or her

\begin{itemize}
  \item \textit{Jardines}, 133 S. Ct. at 1416–17.
  \item See King, 131 S. Ct. at 1862–63.
  \item King, 131 S. Ct. at 1862; see also U.S. Const. amend. IV.
  \item See Terry v. Ohio, 392 U.S. 10–11 (1968); infra Part V (arguing that Terry’s reasonable suspicion standard is the appropriate standard for reviewing the lawfulness of knock-and-talks).
  \item See Terry v. Ohio, 392 U.S. 10–11.
  \item See supra Part I.
  \item See supra Part I.
  \item See supra Part I.
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  \item See infra Part V (arguing that Terry’s reasonable suspicion standard is the appropriate standard for reviewing the lawfulness of knock-and-talks).
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\end{itemize}

220. \textit{Jardines}, 133 S. Ct. at 1416–17; Drake, supra note 3, at 26–27 (concluding that police act with the purpose of conducting a search when their action is taken against the person or property of a private citizen in an effort to gather evidence).

221. \textit{Jardines}, 133 S. Ct. at 1416–17; King, 131 S. Ct. at 1860; Terry, 392 U.S. 10–11.

222. \textit{King}, 131 S. Ct. at 1853–54; see also infra Part II (describing exigent circumstances that justify a warrantless intrusion).

223. \textit{Jardines}, 133 S. Ct. at 1416–17; King, 131 S. Ct. at 1860; Terry, 392 U.S. 10–11.

224. See U.S. Const. amend. IV; see also King, 131 S. Ct. at 1862.

225. See infra Part V (arguing that Terry’s reasonable suspicion standard is the appropriate standard for reviewing the lawfulness of knock-and-talks).

226. See supra Part I.

227. See supra Part I.

228. See supra Part I.

229. See infra Part V (arguing that Terry’s reasonable suspicion standard is the appropriate standard for reviewing the lawfulness of knock-and-talks).

230. See supra Part I.

231. See supra Part I.

232. See supra Part I.

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the apartment buildings and where poor and minority citizens are unfairly exposed to knock-and-talks. 233 The rule proposed in this Article would be supplemental, not superseding, to a court’s analysis under the curtailage doctrine. 234

Second, the knock on the door provides an unambiguous point from which courts may determine whether the surrounding circumstances reasonably justified the government intrusion. 235 The Supreme Court has consistently endeavored to advance straightforward Fourth Amendment rules, which provide clear guidance to police officers carrying out the course of their duties. 236 “Fourth Amendment doctrine...is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged.” 237 For both officer and citizen safety, it is important to provide a clear rule designating the door of the home as constitutionally protected property. 238 A clear rule thus would be: A search within the meaning of the Fourth Amendment occurs when police knock on the door of a private dwelling with the objective purpose of completing a search. 239

However, the knock in the knock-and-talk, like the frisk in a stop-and-frisk, is not a “full-blown” 240 search within the meaning of the Fourth Amendment. 241 The knock on the door is a limited search within the meaning of the Fourth Amendment. 242 Because knock-and-talks conducted

for the purpose of completing a search are a limited search, their constitutionality should be measured under Terry’s reasonable suspicion standard. 243

V. TERRY V. OHIO’S REASONABLE SUSPICION STANDARD AND KNOCK-AND-TALKS

The lawfulness of knock-and-talks should be reviewed under the same standard as stop-and-frisks. 244 The Supreme Court’s decision in Terry shows how the same legal and policy concerns that arose from stop-and-frisks are at issue when dealing with knock-and-talks. 245 Further, important in understanding the legality of knock-and-talks is the Court’s decision in Payton. 246 While Payton provides clear guidance about how the Fourth Amendment protects individuals inside their homes, the decision should not be interpreted as providing heightened protection for the home. 247 Interpreting the Fourth Amendment to provide more protection to the home than the person would result in an unequal and discriminatory application of the law. 248 Knock-and-talks should be reviewed under Terry’s reasonable suspicion standard, in order to provide equal protection under the Fourth Amendment, and to avoid violating the Due Process Clause and Equal Protection Clause of the Constitution. 249

A. Terry v. Ohio’s Reasonable Suspicion Standard

In 1968, the Supreme Court of the United States adopted a new reasonable suspicion standard to address a limited search-and-seizure of a person in the street. 250 In dealing with so-called stop-and-frisks, the Court concluded that there is period of time between an officer’s initial hunch of wrongdoing and a “technical arrest” or “full-blown search,” which required an intermediate standard to determine the reasonableness of the officer’s actions. 251 The Court reasoned that the central inquiry under the Fourth Amendment is whether the “governmental invasion of a citizen’s personal

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the apartment buildings and where poor and minority citizens are unfairly exposed to knock-and-talks. The rule proposed in this Article would be supplemental, not superseding, to a court’s analysis under the curtailment doctrine.

Second, the knock on the door provides an unambiguous point from which courts may determine whether the surrounding circumstances reasonably justified the government intrusion. The Supreme Court has consistently endeavored to advance straightforward Fourth Amendment rules, which provide clear guidance to police officers carrying out the core of their duties. “Fourth Amendment doctrine . . . is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged.” For both officer and citizen safety, it is important to provide a clear rule designating the door of the home as constitutionally protected property. A clear rule thus would be: A search within the meaning of the Fourth Amendment occurs when police knock on the door of a private dwelling with the objective purpose of completing a search.

However, the knock in the knock-and-talk, like the frisk in a stop-and-frisk, is not a “full-blown” search within the meaning of the Fourth Amendment. The knock on the door is a limited search within the meaning of the Fourth Amendment. Because knock-and-talks conducted

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A. Terry v. Ohio’s Reasonable Suspicion Standard

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233. See Leonetti, supra note 77, at 311; supra Section III.B.
235. See Terry v. Ohio, 392 U.S. 1, 20–21 (1968) (“[It] is necessary for a focus upon the governmental interest which allegedly justifies official intrusion upon constitutionally protected interests of the private citizen.”) (citing Camara v. Mun. O. of L.A., 387 U.S. 523, 534–35 (1967)).
237. Often enough, the Fourth Amendment has to be applied on the spur—and in the heat of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after arrest or search is made.
238. See also U.S. CONST. amend. IV.
241. Terry, 392 U.S. at 8.
242. See U.S. CONST. amend. IV; Jardines, 133 S. Ct. at 1423; Leonetti, supra note 77, at 311–12.
243. See Terry, 392 U.S. at 27; Leonetti, supra note 77, at 311–12.
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245. See Terry, 392 U.S. at 8–16.
247. Id.; see also U.S. CONST. amend IV.
249. Terry, 392 U.S. at 31; see also U.S. CONST. amend. IV, V, XIV.
251. Id. at 19, 27, 30–31.
security” was reasonable under the circumstances. Addressing the need for “an escalating set of flexible responses,” the Court held that a stop-and-frisk—or Terry stop—may be reasonable, so long as the officer could point to “specific and articulable facts” to demonstrate a reasonable suspicion that criminal activity was afoot.

The Court was clear, however, that the reasonableness of a stop-and-frisk was limited to the “scope [of] the circumstances which justified the interference in the first place.” For example, the frisk in a stop-and-frisk is limited to a pat down of the outer surfaces of the suspect’s clothing, which allows officers to conduct a limited search for weapons. The officer may not grope, explore, or otherwise manipulate the suspect’s clothing. A stop-and-frisk is a limited search-and-seize within the meaning of the Fourth Amendment, which is allowed under a lesser standard of suspicion than specifically delineated in the Constitution.

The reasonable suspicion standard articulated in Terry provides the bright-line rule needed to clarify knock-and-talk jurisprudence. Federal appellate courts have recognized the application of Terry’s reasonable suspicion standard in a knock-and-talk scenario. For example, the United States Court of Appeals for the Ninth Circuit concluded in United States v. Cresser that a knock-and-talk “was a Terry stop supported by reasonable suspicion.” The court disagreed with the defendant’s contention that “a

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252. Id. at 19–20; see also U.S. CONST. amend. IV.
253. Terry, 392 U.S. at 10, 30 (reviewing the government’s argument).
254. Id. at 21, 30–31.
255. Id. at 20.
256. Id. at 28, 30.
258. See U.S. CONST. amend. IV; Terry, 392 U.S. at 16–18, 27.
259. See Terry, 392 U.S. at 21–22; United States v. Cresser, 472 F.3d 1141, 1146 (9th Cir. 2007) (quoting United States v. Cormier, 220 F.3d 1103, 1109 (9th Cir. 2000)).
260. See e.g. Cresser, 472 F.3d at 1147; United States v. Jones, 239 F.3d 716, 720 (5th Cir. 2001) (“Federal courts have recognized the knock-and-talk strategy as a reasonable investigative tool when officers seek to gain an occupant’s consent to search or when officers reasonably suspect criminal activity.”); United States v. Tobin, 923 F.2d 1506, 1509 (9th Cir. 1991) (finding that “[r]easonable suspicion cannot justify the warrantless search of a house . . . but it can justify the agents’ approaching the house [and knocking on the door] to question the occupants.”) (citations omitted).
261. 472 F.3d 1141 (9th Cir. 2007).
262. Id. at 1147. In that case, police had stopped a motorist, and in the course of the traffic stop discovered a pressure cooker, which they suspected had been used to manufacture methamphetamine. Id. at 1143. When they questioned the motorist about the cooker, the motorist stated the cooker belonged to someone else and gave the police the name of the individual and the motel address where he could be found. Id. The name given by the motorist matched the name of a person with an outstanding warrant for arrest. Id. Police went to the motel “to try to knock-and-talk [their] way into obtaining consent to search the [motel] room”, and to confirm that the named individual was the same person named in the warrant. Cresser, 472 F.3d at 1143.
263. Id. at 1148 (internal quotations omitted).
264. Id.
265. See Terry v. Ohio, 392 U.S. 1, 8, 21, 27, 30 (1968); Cresser, 472 F.3d at 1147–1148.
266. Terry, 392 U.S. at 10 (quoting People v. Rivera, 201 N.E.2d 32, 36 (N.Y. 1964)).
267. Id. at 19, 26.
269. See King, 131 S. Ct. at 1862.
270. See Terry, 392 U.S. at 21, 30 (concluding that officer must be able to point to specific and articulable facts to demonstrate a reasonable suspicion that criminal activity was afoot).
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258. See Terry, 392 U.S. at 21–22; United States v. Cresper, 472 F.3d 1141, 1146 (9th Cir. 2007) (quoting United States v. Cormier, 220 F.3d 1103, 1109 (9th Cir. 2000)).
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264. Id. at 1148 (internal quotations omitted).
265. Id.
266. See Terry v. Ohio, 392 U.S. 1, 8, 21, 27, 30 (1968); Cresper, 472 F.3d at 1147–1148.
267. “Like a stop-and-frisk, a knock-and-talk results in more than a mere ‘minor inconvenience and petty indignity.’” but less than a full-blown search. As in a stop-and-frisk, a police officer approaching a home to conduct a knock-and-talk will often be acting on a tip from a member of the community or based on the officer’s personal observations. Like an officer conducting a stop-and-frisk, an officer conducting a knock-and-talk will often not have enough information to obtain an arrest warrant. The knock-and-talk, like the stop-and-frisk, is an intermediate level of intrusion where the officer should have at least an articulable reason to believe criminal activity is afoot before they intrude on a citizen’s privacy and security.

269. See King, 131 S. Ct. at 1862.
270. See Terry, 392 U.S. at 21, 30 (concluding that officer must be able to point to specific and articulable facts to demonstrate a reasonable suspicion that criminal activity was afoot).
fundamental rule announced in Payton. The unquestionable holding of Payton is that police are prohibited "from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." In Payton, police attempted to conduct a knock-and-talk, but when there was no answer they pried their way into the home and seized evidence lying in plain view. In the accompanying case, Ridick v. New York, the police successfully conducted a knock-and-talk and seeing the subject of their investigation beyond the opened door, entered and arrested him without a warrant. The Court held that both warrantless arrests in the home violated the Fourth Amendment and that the recovered evidence should be suppressed.

Payton is about defining Fourth Amendment boundaries and "protect[ing] the physical integrity of the home." Payton does not, however, provide special protection to the lumber and rock that make up an individual's home. When police have probable cause but no warrant to arrest an individual secreted in their home, they may not arrest that individual in their home and use evidence recovered from inside the home. Put differently, police armed only with probable cause may arrest an individual in their home, but any evidence obtained in the house will be suppressed and inadmissible against the defendant. However, if for example, police complete a warrantless arrest of a suspect inside his home and then take the suspect outside, any statements made by the suspect outside the home may be admissible. Thus, the person inside the home, like the person in the street, may be subjected to a warrantless arrest.

270. See Payton, 445 U.S. at 576, 602-03; Terry, 392 U.S. at 19-20; Crasper, 472 F.3d at 1148; Bradley, supra note 7, at 1117-18, 1120-22.
271. See Payton, 445 U.S. at 576, 602-03.
273. Id. at 576-77.
274. Id. at 578.
275. Id. at 577-79, 603; see also U.S. CONST. amend. IV.
276. New York v. Harris, 495 U.S. 14, 17 (1990); see also U.S. CONST. amend. IV;
278. See Harris, 495 U.S. at 18; Payton, 445 U.S. at 590.
279. See Payton, 445 U.S. at 576, 577 n.5, 603.
280. See id. at 576-77.
281. See id. at 576-77.
282. See id. at 578-590.
283. See Harris, 495 U.S. at 21. The case assumes the statements were otherwise lawfully obtained. Id. at 20; see also Miranda v. Arizona, 384 U.S. 436, 444-45 (1966).
As is the case in stop-and-frisks, the scope of an officer's ability to intrude via a knock-and-talk should be limited.271 Officers with reasonable suspicion to believe criminality is afoot amongst the occupants of a particular dwelling may knock on the door for the purpose of completing a limited search.272 However, whether an officer's search may continue further depends on what evidence is revealed by the initial search.273 After the officer knocks on the door, the occupants may choose to open the door, or they may choose to go about their business.274 Unlike in the case of a stop-and-frisk, the officer completing a knock-and-talk may or may not gain access to the individual they seek, because the house, like the individual, is specifically protected in the text of the Fourth Amendment.275 Thus, just as a frisk cannot go beyond the limited scope of its purpose, an officer conducting a knock-and-talk may not compel a further inquiry where the officer's initial search—knock on the door—does not reveal any further evidence of criminality.276 So, while a search occurs the moment an officer knocks on the door of a private dwelling for the purpose of conducting a search,277 it is a limited search that must be supported only by a reasonable suspicion of criminality.278


At least one commentator has argued, as did the defendant in Crapper that Terry's reasonable suspicion standard cannot apply to knock-and-talks because the home is entitled to a heightened level of Fourth Amendment protection under the Supreme Court of the United States' decision in Payton.279 These arguments, however, misunderstand the fundamental rule announced in Payton.280 The unquestionable holding of Payton is that police are prohibited “from making a warrantless and nonconsensual entry into a suspect’s home in order to make a routine felony arrest.”281 In Payton, police attempted to conduct a knock-and-talk, but when there was no answer they pried their way into the home and seized evidence lying in plain view.282 In the accompanying case, Riddick v. New York, the police successfully conducted a knock-and-talk and seeing the subject of their investigation beyond the opened door, entered and arrested him without a warrant.283 The Court held that both warrantless arrests in the home violated the Fourth Amendment and that the recovered evidence should be suppressed.284 Payton is about defining Fourth Amendment boundaries and "protect[ing] the physical integrity of the home."285 Payton does not, however, provide special protection to the lumber and rock that make up an individual's home.286 When police have probable cause but no warrant to arrest an individual secreted in their home, they may not arrest that individual in their home and use evidence recovered from inside the home.287 Put differently, police armed only with probable cause may arrest an individual in their home, but any evidence obtained in the house will be suppressed and inadmissible against the defendant.288 However, if for example, police complete a warrantless arrest of a suspect inside his home and then take the suspect outside, any statements made by the suspect outside the home may be admissible.289 Thus, the person inside the home, like the person in the street, may be subjected to a warrantless arrest.290

271. See Florida v. Jardines, 133 S. Ct. 1409, 1416–17 (2013) (limiting scope of officer’s intrusion to implied license for being there); Terry, 392 U.S. at 19–20 (limiting scope of stop-and-frisk to circumstances which justified the interference).
273. Id. at 10, 30 (allowing initial search for weapons, and if weapons are found the police may conduct a full-blown search).
274. King, 131 S. Ct. at 1862.
275. See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses . . . shall not be violated . . .”); King, 131 S. Ct. at 1854, 1856; Terry, 392 U.S. at 10.
276. See King, 131 S. Ct. at 1856, 1862; Terry, 392 U.S. at 19–20.
278. See id. at 1415–16; King, 131 S. Ct. at 1856, 1862.
279. See U.S. CONST. amend. IV; Payton v. New York, 445 U.S. 373, 586–87 (1980); Terry, 392 U.S. at 19–20; United States v. Crapper, 472 F.3d 1141, 1148 (8th Cir. 2007); Bradley, supra note 7, at 1117–18, 1120–22 (relying on Payton to conclude the knock-and-talks should not be permitted absent a warrant supported by probable cause).
280. See Payton, 445 U.S. at 576, 602–03; Terry, 392 U.S. at 19–20; Crapper, 472 F.3d at 1148; Bradley, supra note 7, at 1117–18, 1120–22.
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290. See Harris, 495 U.S. at 18, 20–21; United States v. Watson, 423 U.S. 411, 423–24 (1976) (holding that warrantless arrest of individual in public was valid).
Contrary to opinions that Payton was about providing a heightened level of protection in the home, Payton was about preventing "breach of the entrance to an individual's home" without a warrant. Payton answered a "narrow question." Payton provided clear lines to police and citizens about how the Fourth Amendment protects individuals inside their homes. The home is not entitled to a heightened standard of protection; rather, the home is simply another container—albeit, one entitled to equal Fourth Amendment protection as the person—from which an individual may secretly himself or herself from the investigatory arm of the government. Because the home and the person are entitled to equal protection under the Fourth Amendment, the home should be scrutinized under the same level of suspicion as the person. Terry's reasonable suspicion standard should apply to knock-and-talks.

C. Equal Protection

Terry's reasonable suspicion standard should apply to knock-and-talks because applying a higher probable cause standard would violate the Equal Protection and Due Process Clauses of the Constitution. This subpart assumes—for the sake of argument and illustration—that the Supreme Court provided heightened protection to the home in Payton. Certain Supreme Court dicta have run amuck, resulting in some courts and commentators providing more protection to the person's castle than to the person himself. Regardless, Terry's reasonable suspicion standard must govern knock-and-talks because any other interpretation of Payton and Terry would result in an unequal and discriminatory application of the Fourth Amendment's protections.

See Payton, 445 U.S. at 586–87; Terry v. Ohio, 392 U.S. 1, 19–20; United States v. Crapser, 472 F.3d 1141, 1148 (9th Cir. 2007); Bradley, supra note 7, at 1117–18, 1120–22 (arguing that knock-and-talks are unlawful because of the sanctity of the home). See also U.S. CONST. amend. IV.

See U.S. CONST. amend. IV (providing equal protection for persons and houses); Payton, 445 U.S. at 589–90. See U.S. CONST. amend. IV; Payton, 445 U.S. at 589.


See U.S. CONST. amend. IV; Payton, 445 U.S. at 576, 598; Terry, 392 U.S. at 8–10.

Payton has stood for the proposition that unwarranted searches and seizures inside a home bear heightened scrutiny while searches and seizures of a person are protected by a lesser standard. Even Justice Scalia—who was known for his originalist and strict textual approach to interpreting the Constitution—concluded that, "when it comes to the Fourth Amendment, the home is first among equals." However, that is a counterintuitive conclusion for an originalist or textualist like Justice Scalia to make, where persons are literally first among equal rights delineated in the Fourth Amendment. "The right of people to be secure in their [1] persons, [2] houses, [3] papers, and [4] effects, against unreasonable searches and seizures, shall not be violated . . . ." If any Fourth Amendment right is entitled to heightened protection, it should be the right protecting persons, not houses.

Moreover, much of the text in Payton, which suggested a heightened protection for the home, was conclusory and based on an overly strained reading of the Fourth Amendment. For example, at one point in its opinion, the Court took the liberty of omitting certain text from the Fourth Amendment in order to support its proposition:

Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013); see also U.S. CONST. amend. XIV.

U.S. CONST. amend. IV; see also Jardines, 133 S. Ct. at 1414.

U.S. CONST. amend. IV.

This Article does not argue that the person is entitled to a heightened level of Fourth Amendment protection. See id. However, if the Framers had any intention to rank the Fourth Amendment's protections, it seems more logical that they would have ranked the most important right first, rather than assuming that the Supreme Court of the United States would understand the second listed right as most important. See id. This Article presumes that each right in the Fourth Amendment is entitled to equal protection. See id.

Contrary to opinions that Payton was about providing a heightened level of protection in the home, Payton was about preventing "breach of the entrance to an individual's home" without a warrant. Payton answered a "narrow question." Payton provided clear lines to police and citizens about how the Fourth Amendment protects individuals inside their homes. The home is not entitled to a heightened standard of protection; rather, the home is simply another container—albeit, one entitled to equal Fourth Amendment protection as the person—from which an individual may secrete himself or herself from the investigatory arm of the government. Because the home and the person are entitled to equal protection under the Fourth Amendment, the home should be scrutinized under the same level of suspicion as the person. Terry's reasonable suspicion standard should apply to knock-and-talks.

C. Equal Protection

Terry's reasonable suspicion standard should apply to knock-and-talks because applying a higher probable cause standard would violate the Equal Protection and Due Process Clauses of the Constitution. This subpart assumes—for the sake of argument and illustration—that the Supreme Court provided heightened protection to the home in Payton. Certain Supreme Court dicta have run amuck, resulting in some courts and commentators providing more protection to the person's castle than to the person himself. Regardless, Terry's reasonable suspicion standard must govern knock-and-talks because any other interpretation of Payton and Terry would result in an unequal and discriminatory application of the Fourth Amendment's protections.

Payton has stood for the proposition that warrantless searches and seizures inside a home bear heightened scrutiny while searches and seizures of a person are protected by a lesser standard. Even Justice Scalia—who was known for his originalist and strict textual approach to interpreting the Constitution—concluded that, "when it comes to the Fourth Amendment, the home is first among equals." However, that is a counterintuitive conclusion for an originalist or textualist like Justice Scalia to make, where persons are literally first among equal rights delineated in the Fourth Amendment. "The right of people to be secure in their [1] persons, [2] houses, [3] papers, and [4] effects, against unreasonable searches and seizures, shall not be violated . . . ." If any Fourth Amendment right is entitled to heightened protection, it should be the right protecting persons, not houses.

Moreover, much of the text in Payton, which suggested a heightened protection for the home, was conclusory and based on an overly strained reading of the Fourth Amendment. For example, at one point in its opinion, the Court took the liberty of omitting certain text from the Fourth Amendment in order to support its proposition:

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291. See Payton, 445 U.S. at 576, 586-87; Terry v. Ohio, 392 U.S. 1, 19-20; United States v. Crapper, 472 F.3d 1141, 1148 (9th Cir. 2007); Bradley, supra note 7, at 117-18, 1120-22 (arguing that knock-and-talks are unlawful because of the sanctity of the home).

292. Harris, 495 U.S. at 17-18; Payton, 445 U.S. at 589-90.


294. Payton, 445 U.S. at 589-90 ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house."); see also U.S. CONST. amend. IV.

295. See U.S. CONST. amend. IV (providing equal protection for persons and houses); Payton, 445 U.S. at 589-90.

296. See U.S. CONST. amend. IV; Payton, 445 U.S. at 589.


301. See U.S. CONST. amend. IV; Payton, 445 U.S. at 576, 598; Terry, 392 U.S. at 8-10.


303. See Watson, 423 U.S. at 424-25 (holding that warrantless arrest of individual in public was valid); Terry, 392 U.S. at 9-10 (allowing police to stop and frisk a person in the street based on mere reasonable suspicion).

304. See United States v. Jones, 132 S. Ct. 945, 949-50 (2012). Justice Scalia resurrected the trespass doctrine based on his interpretation of what the Framers of the Constitution intended the Fourth Amendment to protect against. Id. at 950 n.3 ("Our task, at a minimum, is to decide whether the action in question would have constituted a search within the original meaning of the Fourth Amendment. Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred.") (emphasis added). Prior to Jones, it was widely accepted that the reasonable expectation of privacy test from Katz had replaced the trespass doctrine. See id. at 952; Katz v. United States, 389 U.S. 347, 353 (1967).

305. Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013); see also U.S. CONST. amend. XIV.

306. U.S. CONST. amend. IV; see also Jardines, 133 S. Ct. at 1414.

307. U.S. CONST. amend. IV.

308. See id. This Article does not argue that the person is entitled to a heightened level of Fourth Amendment protection. See id. However, if the Framers had any intention to rank the Fourth Amendment's protections, it seems more logical that they would have ranked the most important right first, rather than assuming that the Supreme Court of the United States would understand the second listed right as most important. See id. This Article presumes that each right in the Fourth Amendment is entitled to equal protection. See id.

“The right of the people to be secure in their houses shall not be violated.” That language unequivocally establishes the proposition that “[a]t the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”

Perhaps the Court would have been correct that the Fourth Amendment unequivocally establishes that the home is entitled to a heightened level of protection if the right to be secure in houses was the only right guaranteed under the Fourth Amendment. In other words, the home would unequivocally be entitled to heightened protection if the Fourth Amendment were written the way the Court chose to write it in the passage above, citing only houses as being protected. There is no provision in the Constitution or elsewhere in American law, however, that allows the Supreme Court of the United States to chop up the Constitution and claim that people are entitled to less protection than property.

If Payton is read with Terry in this way, it is clear that at least in certain circumstances, the Supreme Court has written out probable cause protections for citizens that were originally guaranteed by the Constitution, leaving only the home protected by the laws provided by the Framers. If this is the case, then the Supreme Court has mistakenly but nonetheless, pursuant to a policy provided individuals who can afford a home or private dwelling with more protection under the Fourth Amendment—than those who reside in the street, or than those who are forced more often into the street because of the circumstances they face at home.

311. See U.S. CONST. amend. IV; Payton, 445 U.S. at 589-90.
312. See U.S. CONST. amend. IV; Payton, 445 U.S. at 589-90.
313. See generally U.S. CONST.
315. Slobogin, supra note 12, at 401. As a result [of the Supreme Court Fourth Amendment jurisprudence], people who live in public spaces—for instance, the homeless who reside in boxes—and people who have difficulty hiding or distancing their living space from casual observers—for instance, those who live in tenements and other crowded areas—are much more likely to experience unregulated government intrusions.

If the Supreme Court has indeed provided higher Fourth Amendment protection for the home than the person, then the Court has promulgated a rule that violates the Equal Protection and Due Process clauses of the Constitution. A heightened Fourth Amendment standard for the home will result in an unequal and discriminatory impact on impoverished and minority populations. Poverty is more likely to exist amongst minority populations, and of course poor people are more likely to be homeless than their more affluent counterparts. Black people are more likely to be homeless than white people, and white people are more likely to own a home than black or Hispanic people. Accepting a heightened standard of protection for the home may disproportionally increase the risk that minority

317. See U.S. CONST. amend. IV, V, XIV.
318. See U.S. CONST. amend. IV; Slobogin, supra note 12, at 401-03. While the Court has not held per se that discrimination against poor people is unconstitutional, it has found wealth-based classifications in violation of the equal protection guarantee when they deprive poor people of fundamental rights and interests . . . .
322. Id.
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321. Black persons in families make up 12.1[%] of the [United States] family population, but represented 38.8[%] of sheltered persons in families in 2010. In comparison, 65.8[%] of persons in families in the general population are white, while white family members only occupied 28.6[%] of family shelter beds in 2010.
322. Tami Lubby, Whites Get Wealthier, While Blacks and Hispanics Lag Further Behind, CNN (Dec. 15, 2014, 7:27 AM), http://money.cnn.com/2014/12/12/news/economy/wealth-by-race-pew/ "Only 47.4 % of minorities were homeowners in [2013]. But 73.9 % of whites owned homes." Id.

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populations will be unconstitutionally searched and seized by officers of the law. Moreover, such a policy may increase the risk of violence occurring in the street, which will place police and civilian life at unnecessary risk.

Like the stop-and-frisk program that was held discriminatory and unconstitutional in *Floyd v. City of New York*, the Supreme Court of the United States' heightened protection for homes is "centralized and hierarchical." Lower federal courts are bound to follow the Court's decision in *Payton*, and like the NYPD officers in *Floyd*, lower court performance is subject to review and evaluation by the Court. Like the stop-and-frisk policies at issue in *Floyd*, the policy of heightened protection in the home is delineated through a "chain of command" with the Supreme Court being at the command end of the chain.

The Supreme Court acts as


325. See Maclin, supra note 319, at 258. The Supreme Court has failed to "confront . . . the anger and mistrust that surrounds encounters between black men and police officers." *Id.* at 248.

This is what the law is supposed to be; black men, however, know that a different law exists on the street. Black men know they are liable to be stopped at anytime and that when they question the authority of the police, the response from the cops is often swift and violent. This applies to black men of all economic strata regardless of their level of education and whatever their job status or place in the community.


327. *Id.* at 658-60 (finding that NYPD violated plaintiffs' Fourth and Fourteenth Amendment rights, where the "NYPD [was] deliberately indifferent to officers conducting unconstitutional stop-and-frisks," where unconstitutional practices "were sufficiently widespread [to have] . . . the force of law," and where plaintiffs established a policy of racial profiling and indifference to the discriminatory application of stop-and-frisks).


329. *Floyd*, 283 F.R.D. at 165, 173 (finding NYPD policy considering that "[i]nformed members . . . who do not demonstrate activities . . . or fail to engage in proactive activities . . . will be evaluated and their assignments re-assessed.").

330. U.S. CONST. art. III ("The judicial [power] of the United States, shall be vested in one [S]upreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

331. U.S. CONST. art. III, § 1; see also *Floyd*, 283 F.R.D. at 164 ("To be sure, NYPD's department-wide policies generate from a centralized source and NYPD employs a hierarchical supervisory structure to effect and reinforce its department wide-policies.").

332. E.g., *Terry* v. Ohio, 392 U.S. 1, 10-11 (1968) (creating a prophylactic rule to govern stop-and-frisks).


334. See *Terry*, 392 U.S. at 10-11.

335. See generally *Terry*, 392 U.S. 1 (1968); supra Sections V.B-V.C.


337. See *Payton*, 445 U.S. at 579, 585-90; supra Section V.B.

338. *Payton*, 445 U.S. at 585-90; Slobogin, supra note 12 at 403; U.S. CONST. amend. IV.

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Like the stop-and-frisk program that was held discriminatory and unconstitutional in Floyd v. City of New York, 238. the Supreme Court of the United States heightened protection for homes is “centralized and hierarchical.” 239. Lower federal courts are bound to follow the Court’s decision in Payton, 240. and like the NYPD officers in Floyd, lower court performance is subject to review and evaluation by the Court. 241. Like the stop-and-frisk policies at issue in Floyd, the policy of heightened protection in the home is delineated through a “chain of command” with the Supreme Court being at the command end of the chain. 242. The Supreme Court acts a centralized source, which makes decisions that lower courts are obligated to follow 243. and which promulgates rules governing the policing of citizens. 244. In short, increased protection for the home and diminished protection for those in the street is a direct consequence of centralized policies established by the Supreme Court. 245. There is no doubt, after all, that it was the Supreme Court that started, or at least sanctioned, the stop-and-frisk policy back in 1968. 246.

This Article does not argue that the Supreme Court has acted with discriminatory intent. 247. Rather, if the Court indeed provided heightened protection to the home, then the Court has made a mistake and failed to consider the broader, discriminatory applications of its rulings. 248. The Court would have allowed its decision in Payton to stand for something more than it was originally intended, and the resulting impact of Payton is an unequal and discriminatory application of the Fourth Amendment. 249. Terry’s reasonable suspicion standard should apply to knock-and-talks because applying a higher probable cause standard would violate the Equal Protection Clause and Due Process Clause of the Constitution. 250.

A brief consideration of how the reasonable suspicion standard would apply to Victor’s case and typical knock-and-talk scenarios is useful for understanding how Terry’s application to knock-and-talks would

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Id. at 658-60 (finding that NYPD violated plaintiffs’ Fourth and Fourteenth Amendment rights, where the “NYPD [was] deliberately indifferent to officers conducting unconstitutional stop-and-frisks, where unconstitutional practices were sufficiently widespread [to have] the force of law”, and where plaintiffs established a policy of racial profiling and indifference to the discriminatory application of stop-and-frisk).


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streamline judicial decision-making processes and provide equal protection under the law.340

VI. APPLYING THE REASONABLE SUSPICION STANDARD TO KNOCK-AND-TALKS

In order to show “reasonable suspicion,” police must be able to point to “specific and articulable facts” to demonstrate “that criminal activity was afoot.”341 Reasonable suspicion is determined by considering the “totality of circumstances.”342 An anonymous tip will not normally be enough to satisfy reasonable suspicion, absent specific “indicia of reliability.”343 However, if an anonymous tip is accompanied by the “correct forecast”344 of “not easily predicted” movements, reasonable suspicion may be satisfied.345 Often, a single element of suspicious behavior or circumstances will not be enough to satisfy reasonable suspicion.346 For example, presence in a “high crime area” by itself will not support reasonable suspicion to perform a stop-and-frisk or knock-and-talk.347 Yet, the smell of marijuana alone traced to a particular source will substantiate reasonable suspicion, if not probable cause, to believe criminal activity is afoot.348 Significantly, a person’s association with another person for whom police have probable cause to believe is involved in criminality is not enough to demonstrate reasonable suspicion.349

Ultimately, the “central inquiry” under the Fourth Amendment is whether the “governmental invasion of a citizen’s personal security” was reasonable under the circumstances.350 Where a search has occurred, courts are required to consider the reasonableness of the search by balancing the scope of the invasion of the citizen’s right to be left alone, against the government’s interest in effectuating the search.351 If the court deems the search unreasonable, then the search violated the Fourth Amendment, and any evidence obtained pursuant to the unlawful search may be inadmissible against the arrestee.352 Thus, if an initial knock-and-talk is an unlawful search, then any non-attenuated fruits of that search, including consent to search the home, are inadmissible against the citizen in court.353

In Victor’s case, the police would not have had reasonable suspicion to knock on Victor’s door. The police in that case had seen Victor with someone who they later had probable cause to arrest. Based on that information alone, the police approached Victor’s home with the objective purpose of completing a search.354 Thus, at the moment the officer knocked on Victor’s door, a search within the meaning of the Fourth Amendment occurred.355 Police did not have the requisite suspicion to knock on Victor’s door because Victor’s mere association with a suspected criminal was not enough to substantiate reasonable suspicion.356 There was no other evidence of criminality provided by police or Victor’s great-grandmother at the suppression hearing.357 Therefore, Victor’s family should not have suffered the embarrassment and intimidation of the police intrusion into their home, and the police should not have been subjected to the danger that lurks in unplanned, unwarranted exchanges with citizens secreted in their homes.358 Under Terry’s reasonable suspicion standard, the police in Victor’s case should never have knocked on his door, and all evidence was properly suppressed.359

In King, on the other hand, the officers had reasonable suspicion to believe criminal activity was afoot in King’s apartment when they smelled marijuana emanating from inside his apartment door.360 Significantly, a

340. See Terry, 392 U.S. at 10–11; infra Part VI.
341. Terry, 392 U.S. at 21, 30.
344. J.L., 529 U.S. at 269.
347. Id. (“An individual’s presence in a high crime area is not enough to support a reasonable, particularized suspicion of criminal activity.”).
349. Ybarra, 444 U.S. 85, 91–93 (1979) (concluding that reasonable suspicion is not satisfied by mere association with a person for whom the police had probable cause to search, even when the police had a search warrant for the premises).
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351. Terry, 392 U.S. at 20–22.
352. Mapp v. Ohio, 367 U.S. 643, 655 (1961); Weeks v. United States, 232 U.S. 383, 398 (1914); see also U.S. CONST. amend. IV.
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\textsuperscript{345} Id.; Alabama v. White, 496 U.S. 325, 332 (1990).
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\textsuperscript{358} See United States v. Johnson, 170 F.3d 708, 718 (7th Cir. 1999).
\textsuperscript{360} Kentucky v. King, 131 S. Ct. 1849, 1865 (2011) (finding the smell of marijuana emanating from behind a closed door sufficient to demonstrate probable cause).
large portion of knock-and-talk cases involves the smell or site of marijuana, marijuana plants, or related paraphernalia. Yet, the mere smell or site of marijuana no longer constitutes reasonable suspicion of criminal activity in some states, and other state executives have taken steps to limit the criminality of the drug. Nevertheless, in Kentucky v. King the officers were empowered to follow the suspect into the breezeway because they had probable cause to believe he had purchased illegal narcotics. When the officers arrived at the door they smelled the odor of marijuana and were thus justified in knocking on the door. However, if what occurred in Kentucky v. King occurred in Oregon or Colorado today, the mere smell of marijuana would not have justified police knocking on King's door, King's arrest would have been deemed unlawful, and all evidence gained pursuant to that knock-and-talk would have been suppressed.

In addition to marijuana and related paraphernalia, anonymous tips lead to a significant number of knock-and-talks. Determining whether an anonymous tip is sufficient to provide reasonable suspicion of criminality requires courts to consider the totality of circumstances. Police conducting a knock-and-talk should have to verify the veracity of anonymous tips they receive before they proceed with a knock-and-talk. This extra layer of Fourth Amendment protection may be particularly important to residents who live in states like Texas and Florida where police have entire knock-and-talk taskforces dedicated to responding to tips provided by community members. Under the reasonable suspicion standard, the citizen in their home, like the citizen in the street, will be less vulnerable to government intrusions that were initiated by mistaken or malicious allegations made by neighbors and other community members.

An officer acting on a mere hunch will not be empowered to approach a home and knock on its door for the purpose of gathering evidence. An officer will have to have a specific, articulable reason for approaching a home to conduct a knock-and-talk. Police will not be able to conduct a knock-and-talk merely because an individual in a home was seen associating with a criminal suspect. The smell, sight, or verified report of marijuana continues to provide sufficient reason for police to conduct knock-and-talks in most states, but the practice is not allowed in a growing number of states. Police will have to verify the reliability of anonymous phone tips that make up a significant number of police leads that result in knock-and-talks. Police task forces dedicated to knock-and-talks will not be able to knock on doors at random, and task force members will have to do a minimum amount of work to verify tips provided by members of the community. Applying the reasonable suspicion standard to knock-and-talks will prevent government officials from conducting suspicion-less searches of private dwellings.

Anonymous tip is sufficient to provide reasonable suspicion of criminality. Police conducting a knock-and-talk should have to verify the veracity of anonymous tips they receive before they proceed with a knock-and-talk. This extra layer of Fourth Amendment protection may be particularly important to residents who live in states like Texas and Florida where police have entire knock-and-talk taskforces dedicated to responding to tips provided by community members.

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Anonymous tip is sufficient to provide reasonable suspicion of criminality. Police conducting a knock-and-talk should have to verify the veracity of anonymous tips they receive before they proceed with a knock-and-talk. This extra layer of Fourth Amendment protection may be particularly important to residents who live in states like Texas and Florida where police have entire knock-and-talk taskforces dedicated to responding to tips provided by community members.

An officer acting on a mere hunch will not be empowered to approach a home and knock on its door for the purpose of gathering evidence. An officer will have to have a specific, articulable reason for approaching a home to conduct a knock-and-talk. Police will not be able to conduct a knock-and-talk merely because an individual in a home was seen associating with a criminal suspect. The smell, sight, or verified report of marijuana continues to provide sufficient reason for police to conduct knock-and-talks in most states, but the practice is not allowed in a growing number of states. Police will have to verify the reliability of anonymous phone tips that make up a significant number of police leads that result in knock-and-talks. Police task forces dedicated to knock-and-talks will not be able to knock on doors at random, and task force members will have to do a minimum amount of work to verify tips provided by members of the community.

Applying the reasonable suspicion standard to knock-and-talks will prevent government officials from conducting suspicion-less searches of private dwellings.
large portion of knock-and-talk cases involves the smell or site of marijuana, marijuana plants, or related paraphernalia.\footnote{et al.: Nova Law Review Full Issue} Yet, the mere smell or site of marijuana no longer constitutes reasonable suspicion of criminal activity in some states, and other state executives have taken steps to limit the criminality of the drug.\footnote{et al.: Nova Law Review Full Issue} Nevertheless, in Kentucky v. King the officers were empowered to follow the suspect into the breezeway because they had probable cause to believe he had purchased illegal narcotics.\footnote{et al.: Nova Law Review Full Issue} When the officers arrived at the door they smelled the odor of marijuana and were thus justified in knocking on the door.\footnote{et al.: Nova Law Review Full Issue} However, what occurred in Kentucky v. King occurred in Oregon or Colorado today, the mere smell of marijuana would not have justified police knocking on King's door, King's arrest would have been deemed unlawful, and all evidence gained pursuant to the knock-and-talk would have been suppressed.\footnote{et al.: Nova Law Review Full Issue}

In addition to marijuana and related paraphernalia, anonymous tip lead to a significant number of knock-and-talks.\footnote{et al.: Nova Law Review Full Issue} Determining whether a


362. See Joel Rose, Brooklyn DA Shifts Stance on Pot, but That Won't Impact NYPD, NPR (July 12, 2014, 9:04 AM), http://www.npr.org/2014/07/12/330761025/brooklyn-da-shifts-stance-on-pot-but-that-wont-impact-nypd. But see ALASKA STAT. § 17.30.005 (2015); COL. CONST. art XVIII § 16; 2015 Or. Laws 18; WASH. REV. CODE § 69.50.360 (2015). This argument is based on the fact that Colorado, Washington, Oregon, and other states have passed laws legalizing and regulating the use of marijuana. COL. CONST. art XVIII § 16; WASH. REV. CODE § 69.50.360; 2015 Or. Laws 18; ALASKA STAT. § 17.30.005.

Other state actors have taken executive action to limit the criminality of marijuana. So et al. Rose, supra note 362.\footnote{362. Kentucky v. King, 131 S. Ct. 1849, 1854 (2011).}

364. Terry v. Ohio, 392 U.S. 1, 10, 30 (1968).


an anonymous tip is sufficient to provide reasonable suspicion of criminality requires courts to consider the totality of circumstances.\footnote{367. See Navarette v. California, 134 S. Ct. 1683, 1688 (2014); United States v. Arvizu, 534 U.S. 266, 273 (2002); Florida v. J.L., 529 U.S. 266, 270 (2000); Adams v. Williams, 407 U.S. 143, 148 (1972).}

Police conducting a knock-and-talk should have to verify the veracity of anonymous tips they receive before they proceed with a knock-and-talk.\footnote{368. Terry, 392 U.S. at 20; see also U.S. CONST. amend IV.}

This extra layer of Fourth Amendment protection may be particularly important to residents who live in states like Texas and Florida where police have entire knock-and-talk taskforces dedicated to responding to tips provided by community members.\footnote{369. Terry, 392 U.S. at 26; Drake, supra note 3, at 26; see also supra Parts II–III.}


An officer will have to have a specific, articulable reason for approaching a home to conduct a knock-and-talk.\footnote{366. See Navarette v. California, 134 S. Ct. 1683, 1688 (2014); United States v. Arvizu, 534 U.S. 266, 273 (2002); Florida v. J.L., 529 U.S. 266, 270 (2000); Adams v. Williams, 407 U.S. 143, 148 (1972).}

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The smell, sight, or verified report of marijuana continues to provide sufficient reason for police to conduct knock-and-talks in most states, but the practice is not allowed in a growing number of states.\footnote{370. Terry, 392 U.S. at 26; Drake, supra note 3, at 26; see also supra Parts II–III.}

Police will have to verify the reliability of anonymous phone tips that make up a significant number of police leads that result in knock-and-talks.\footnote{371. See J.L., 529 U.S. at 269; Navarette, 134 S. Ct. at 1688.}

Finally, police task forces dedicated to knock-and-talks will not be able to knock on doors at random, and task force members will have to do a minimum amount of work to verify tips provided by members of the community.\footnote{372. Terry, 392 U.S. at 21, 30.}

Applying the reasonable suspicion standard to knock-and-talks will prevent government officials from conducting suspicion-less searches of private dwellings.

\footnote{373. See Ybarra v. Illinois, 444 U.S. 85, 91 (1979).}

\footnote{374. See supra notes 360–62 and accompanying text.}

\footnote{375. See Navarette v. California, 134 S. Ct. 1683, 1688 (2014); J.L., 529 U.S. at 266, 269.}

\footnote{376. Drake, supra note 3, at 35; see also Curtis, supra note 58; Hallman, supra note 59.}
VII. CONCLUSION

The Supreme Court should apply the same standard of review for knock-and-talks as stop-and-frisks in order to avoid an unequal and discriminatory application of the protections guaranteed by the Fourth Amendment and in order to provide for citizen and police safety. After the Court's decisions in Kentucky v. King and Jardines, a search within the meaning of the Fourth Amendment must have occurred when the police knock on the door of a private dwelling with the objective purpose of completing a search. Yet, a knock-and-talk, like a stop-and-frisk, is a limited search utilized by police during the intermediate phase of an investigation and thus, should be subjected to the same reasonable suspicion standard. It is critical for the Court to review knock-and-talks under Terry's reasonable suspicion standard because courts and commentators have mistakenly interpreted the Court's decision in Payton to provide heightened Fourth Amendment protection for the home. Coupled with the increased practice of knock-and-talks, this confusion has resulted in an unequal and discriminatory application of the Fourth Amendment, where poor and minority citizens are particularly vulnerable to knock-and-talks.

Furthermore, the Court is obligated to set rules that limit the ambiguous and dangerous circumstances that arise when police knock on a citizen's door without knowing what is behind the door, without a plan, and without a warrant. In order to provide clear rules for police and in order to ensure officer and citizen safety, the Court should engage in an initial assessment of whether an officer was constitutionally empowered to knock on a citizen's door. Rather than focusing on knock-and-talks as leading to unlawful seizures, unplanned and unwarranted police and citizen interaction should be limited by reviewing the lawfulness of knock-and-talks as searches that occurred the moment police knocked on the citizen's door.

377. See U.S. CONST. amend IV.
381. See U.S. CONST. amend. IV; Leonetti, supra note 77, at 310, 316–17, 320.
382. See Atwater v. City of Lago Vista, 532 U.S. 318, 345–47 (2001); Bradley, supra note 7, at 1122; see also U.S. CONST. amend IV.
383. Atwater, 532 U.S. at 347 (reasoning that police need clear rules to follow).
384. United States v. Hammett, 236 F.3d 1054, 1060 (9th Cir. 2001) (permitting police walk around of home in order to ensure officer safety).
385. See id.
386. See Terry v. Ohio, 392 U.S. 1, 15–16 (1968).

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Allowing knock-and-talks to evade judicial scrutiny not only threatens the equal protection guarantee to each citizen under the Fourth Amendment and Fourteenth Amendment of the Constitution but also threatens the safety of police and citizens alike. Knock-and-talks should be reviewed under the same standard as stop-and-frisks and whether that standard is met should be determined by the level of suspicion police had at the moment they knocked on the citizen's door.

387. See U.S. CONST. amend. IV, XIV; Hammett, 236 F.3d at 1060.
388. See supra Part VII.
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Furthermore, the Court is obligated to set rules that limit facts and circumstances that arise when police knock on a citizen’s door without knowing what is behind the door, without a plan, and without a warrant. In order to provide clear rules for police and in order to ensure officer and citizen safety, the Court should engage in an initial assessment of whether an officer was constitutionally empowered to knock on a citizen’s door. Rather than focusing on knock-and-talks as leading to unlawful seizures, unplanned and unwarranted police and citizen interactions should be limited by reviewing the lawfulness of knock-and-talks and searches that occurred the moment police knocked on the citizen’s door.

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387. See U.S. CONST. amend. IV, XIV; Hammett, 236 F.3d at 1060.
388. See supra Part VII.
WHAT TO EXPECT BEFORE YOU’RE EXPECTING:
CLARIFYING FLORIDA’S STATUTE GOVERNING PRE-EMBRYO DISPOSITION AGREEMENTS AND DIVORCE

ALISON P. BARBIERO

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* Alison Barbiero is a J.D. candidate for May 2017 at Nova Southeastern University, Shepard Broad College of Law. She would like to thank her friends and family, particularly her parents, Michael and Vivian Barbiero, for their love and encouragement, and her fiancé, Oliver Fowler, for his unwavering support. Alison would also like to thank Professors Camille Lamar and Phyllis Coleman for inspiring her to pursue the research and writing that led to this Comment. Lastly, she would like to thank the board members and her colleagues at Nova Law Review for their hard work and dedication to refine this Comment.
INTRODUCTION

In 2013, Sofia Vergara, actress and star of the hit television show "Modern Family," and her then fiancé Nick Loeb, a Florida businessman, sought to conceive a child through in vitro fertilization ("IVF")—a process by which an egg and sperm are fertilized outside of the body, and the resulting pre-embryo is implanted in the uterus with the objective of development to full-term. Prior to undergoing this treatment, the couple signed a form directing stating that "no unilateral action [could] be taken with regard to the embryos unless both parties consent." The couple created four female pre-embryos in total, two of which were unsuccessfully brought to term.

In May of 2014, prior to implanting the remaining two frozen pre-embryos, Ms. Vergara and Mr. Loeb separated. Three months later, Mr. Loeb filed an action to declare the form directive signed prior to undergoing treatment void and unenforceable, stating that it did not comply with California law by specifying what would happen to the pre-embryos in the event of a separation. In a New York Times op-ed, Mr. Loeb expressed his desire to have the frozen pre-embryos implanted in a surrogate and carried to term against Ms. Vergara’s wishes. Mr. Loeb wrote, "[d]oes one person’s desire to avoid biological parenthood—free of any legal obligations—outweigh another’s religious beliefs in the sanctity of life and desire to be a parent?" Meanwhile, Ms. Vergara’s attorney released a statement on her behalf, indicating that she "is content to leave the embryos frozen indefinitely, as she has no desire to have children with her ex." Mr. Loeb has amended his complaint against Ms. Vergara and continues to pursue custody and control over the pre-embryos.

In another case, Dr. Mimi Lee, a Juilliard-trained pianist and doctor, and her husband of five years, Stephen Findley, a financial analyst, are battling over their own frozen pre-embryos in San Francisco Superior Court. Like Ms. Vergara and Mr. Loeb, the couple, both graduates of Harvard University, signed a consent form prior to undergoing IVF; however, in this case, the consent form directed that their embryos be destroyed in the event of divorce. Now that they are no longer together, Ms. Lee, unlike Mr. Loeb, seeks control of the pre-embryos so she can have them implanted and brought to term. However, another major difference in this case is that unlike Mr. Loeb, Ms. Lee claims she is infertile, due to both her age and a previous battle with cancer, meaning that these embryos are her very last chance to become a biological parent.

The predicament that these two couples face highlights some important legal issues with IVF: Are pre-embryo disposition contracts binding and enforceable, and, if so, should they be mandatory for all couples prior to undergoing IVF treatment? Further, if binding, enforceable contracts are formed, should a circumstance such as Ms. Lee’s infertility matter? While current Florida law does address the issue of pre-embryo disposition agreements, the governing statute is vague and leaves many questions unanswered, and there is no California case law dealing with this issue to provide guidance for interpreting the statute.

2. See In Vitro Fertilization, STEEDMAN’S MEDICAL DICTIONARY (27th ed. 2000); Meagan R. Marold, Ice, Ice, Baby! The Division of Frozen Embryos at the Time of Divorce, 25 Hastings Women’s L.J. 179, 180 (2014). In 2005, the Court of Appeals of Arizona suggested that using the word embryo to describe cryopreserved fertilized eggs outside of the uterus might incorrectly imply that the egg is a person. Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1258 (Ariz. Ct. App. 2005). The court opted to use the word pre-embryo when referring to these un-transferred, fertilized eggs to avoid the highly charged debate about when life begins. Id. The Florida Statutes also use the word pre-embryo defining it as “the product of fertilization of an egg by a sperm prior to the appearance of its embryonic axis.” Fla. Stat. § 742.13(12) (2015). For the purposes of this Comment, the terms embryo and pre-embryo are interchangeable; they both refer to the early stages of development of a fertilized egg. See id.
4. See Loeb, supra note 1.
5. Finn, supra note 3.
6. See Loeb, supra note 1.
7. Id.
I. INTRODUCTION

In 2013, Sofia Vergara, actress and star of the hit television show *Modern Family*, and her then fiancé Nick Loeb, a Florida businessman, sought to conceive a child through in vitro fertilization (“IVF”)—a process by which an egg and sperm are fertilized outside of the body, and the resulting pre-embryo is implanted in the uterus with the objective of development to full-term. Prior to undergoing this treatment, the couple signed a form directive stating that “no unilateral action [could] be taken with regard to the embryos unless both parties consent.” The couple created four female pre-embryos in total, two of which were unsuccessfully brought to term.

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The predicament that these two couples face highlights some important legal issues with IVF: Are pre-embryo disposition contracts binding and enforceable, and, if so, should they be mandatory for all couples prior to undergoing IVF treatment? Further, if binding, enforceable contracts are formed, should a circumstance such as Ms. Lee’s infertility matter? While current Florida law does address the issue of pre-embryo disposition agreements, the governing statute is vague and leaves many questions unanswered, and there is no Florida case law dealing with this issue to provide guidance for interpreting the statute.


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7. Id.
Part II begins by providing a brief history and background of IVF. Part III discusses several prominent cases addressing the issue of pre-embryo disposition contracts and enforceability. Part IV continues with a discussion of how the previous case law would be applied to the two cases mentioned in this introduction. Part V compares Florida’s current pre-embryo disposition agreement statute with Florida’s gestational surrogacy statute as well as pre-embryo disposition agreement statutes in other jurisdictions. Part VI proposes several recommended changes that would help clarify Florida’s current statute, and Part VII discusses the future solution of freezing genetic material separately.

II. HISTORY AND LEGAL BACKGROUND OF IVF

Assisted Reproductive Technologies ("ART") are a range of techniques used to overcome infertility. One of the most common forms of ART is IVF. In 1978, the world’s first ART birth occurred by IVF. Since then, the number of couples in the United States undergoing IVF has increased rapidly, with 174,962 cycles reported by 380 clinics in 2015, resulting in the birth of 63,286 babies. This was an increase from the previous year, which reported 165,172 cycles of IVF, resulting in the birth of 61,740 babies.

The IVF procedure typically begins with hormonal injections, which stimulate a woman’s ovaries to produce multiple eggs. The eggs are removed from the woman’s body by either laparoscopy or ultrasound-directed-needle aspiration and combined with sperm in a Petri dish. Once fertilized, the pre-embryo "divides until it reaches the four-cell stage, after which several [pre-embryos] are transferred to the woman’s uterus by a cervical catheter." If successful, an embryo will implant in the uterus and develop into a fetus. Alternatively, the pre-embryos may be preserved for later use in liquid nitrogen through a process called cryopreservation. The exact numbers are not known, but sources estimate that there are approximately half a million cryopreserved pre-embryos ("frozen pre-embryos") currently in storage in the United States.

Additionally, single embryo transfer, in which only one embryo is transferred into the uterus at a time, is becoming an increasingly popular choice by couples undergoing IVF. It follows that increased use of single embryo transfer will likely result in more pre-embryos from a single course of IVF being frozen as back-ups rather than immediately transferred. While the creation of these excess frozen pre-embryos "reduces both medical and physical costs" of IVF and increases the chances of a successful implementation, it also creates a future disposition problem for couples undergoing this procedure.

The Ethics Committee for the American Society for Reproductive Medicine strongly recommends that all assisted reproduction programs require each individual or couple contemplating embryo storage to give written instructions concerning disposition of embryos in the case of death, divorce, separation, failure to pay storage charges, inability to agree on disposition in the future, or prolonged lack of contact with the program . . . . In the absence of program-specific policies, it is ethically acceptable for a program or facility to consider embryos to have been abandoned if: at least [five] years

References:

21. See infra Part II.
22. See infra Part III.
23. See infra Part IV.
24. See infra Part V.
25. See infra Part VI.
26. See infra Part VII.
31. Id.
33. Id.
34. Id. More and more women are opting to have only one pre-embryo transferred at a time. See Press Release, Am. Soc'y for Reprod. Med., supra note 27.
35. Kass, 696 N.E.2d at 175.
36. Id. Cryopreservation is the "[m]aintenance at very low temperatures of the viability of tissues or organs that have been excised from the body." Cryopreservation, STEDMAN'S MEDICAL DICTIONARY (27th ed. 2000). In 1984, the first baby produced from a frozen pre-embryo was born. First Baby Born of Frozen Embryo, N.Y. TIMES, APR. 11, 1984, at A16.
38. Press Release, Am. Soc'y for Reprod. Med., supra note 27. "Most strikingly, we observed more women, no matter their age, chose to have a single embryo transferred . . . . The increasing popularity of this choice was greatest in the youngest age group, women under thirty-five, with 22.5% of those patients having elective single embryo transfer in 2013, up from 14.8% in 2012." Id.
40. Kass, 696 N.E.2d at 175.
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18. See infra Part II.
19. See infra Part III.
20. See infra Part IV.
21. See infra Part V.
22. See infra Part VI.
23. See infra Part VII.
25. Marold, supra note 2, at 180.
28. See id.
30. Id.
31. Id. More and more women are opting to have only one pre-embryo transferred at a time. See Press Release, Am. Soc’y for Reprod. Med., supra note 27.
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37. Kass, 696 N.E.2d at 175.
have passed since contact with an individual or couple, diligent efforts have been made to contact the individual or couple, and no written instruction from the couple exists concerning disposition. 38

Despite this guidance, the standards and practices of providing pre-embryo dispositions differ from clinic to clinic. 39 Without statutes governing pre-embryo disposition, and sometimes even with statutory guidance, conflicts have surfaced regarding how these forms should be interpreted—specifically when the commissioning couples divorce or separate. 40

III. CASES: CONFLICTING APPROACHES

There is limited case law involving conflict over frozen pre-embryo disposition when a commissioning couple separates or divorces. 41 Fewer than a dozen states have heard cases involving pre-embryo disposition after divorce. Most courts have considered whether prior agreements are enforceable in deciding the issue of pre-embryo disposition when a couple divorces or separates, 42 with many enforcing their terms against the subsequent wishes of one of the parties. 43 In the event that a commissioning

couple did not enter into a prior agreement, or the prior agreement is found to be unenforceable, the courts have then looked to balancing the interests of the parties by considering factors, such as the parties’ constitutional rights both to procreate and not procreate, as well as whether other methods of having a biological child are available. 44 A few states have adopted a contemporaneous mutual consent approach, which would not treat advance agreements as binding if either party’s current intention conflicts with their prior consent. 45

A. New York: Upholding a Clinic Consent Form as a Binding Agreement

The Court of Appeals of New York examined a prior embryo disposition agreement in 1998 when faced with an issue of embryo disposition upon divorce. 46 In Kass v. Kass, 47 the appellant, Maureen Kass, sought sole custody of "five frozen, stored pre-embryos. . . . created five years' prior wishing to implant them against the objections of her ex-husband, Steven Kass. 48 The couple signed four consent forms prior to undergoing their final procedure, which was the first to involve cryopreservation of remaining embryos. 49 The forms provided that "in the event of divorce . . . legal ownership of any stored [pre-embryos] must be determined in a property settlement." 50 However, the forms also included a provision which offered the couple several choices from which they could indicate a preference "[i]n the event that . . . [they were] unable to make a decision regarding the disposition of [their] stored, frozen [pre-embryos]." 51

The couple indicated that their choice was to donate the pre-embryos to the IVF program for research. 52 The Court of Appeals of New York held that the parties’ prior agreement was binding and enforceable, reasoning that since the couple was unable to settle the matter in their divorce agreement, the second provision would apply wherein they elected to donate the embryos for research. 53 The court explained that:


40. See infra Part III.

41. See Forman, supra note 34, at 382.


43. See Szafrański, 34 N.E.3d at 1136, 1158; In re Marriage of Witten, 672 N.W.2d 768, 773-74 (Iowa 2003); A.Z., 725 N.E.2d at 1052-53; J.B. v. M.B., 783 A.2d 707 (N.J. 2001); Kass, 696 N.E.2d at 180; Roman, 193 S.W.3d at 50; In re Marriage of Litowitz, 48 P.3d at 266, 268; In re Marriage of Nash, 2009 WL 1514842, at *5.

44. See Szafrański, 34 N.E.3d at 1156; Kass, 696 N.E.2d at 175; In re Marriage of Dahl, 194 P.3d at 841; Roman, 193 S.W.3d at 54; In re Marriage of Nash, 2009 WL 1514842, at *4.
have passed since contact with an individual or couple, diligent efforts have been made to contact the individual or couple, and no written instruction from the couple exists concerning disposition. 38

Despite this guidance, the standards and practices of providing pre-embryo disposition forms differ from clinic to clinic. 39 Without statutes governing pre-embryo disposition, and sometimes even with statutory guidance, conflicts have surfaced regarding how these forms should be interpreted—specifically when the commissioning couples divorce or separate. 40

III. CASES: CONFLICTING APPROACHES

There is limited case law involving conflict over frozen pre-embryo disposition when a commissioning couple separates or divorces. 41 Fewer than a dozen states have heard cases involving pre-embryo disposition after divorce. 42 Most courts have considered whether prior agreements are enforceable in deciding the issue of pre-embryo disposition when a couple divorces or separates, 43 with many enforcing their terms against the subsequent wishes of one of the parties. 44 In the event that a commissioning couple did not enter into a prior agreement, or the prior agreement is found to be unenforceable, the courts have then looked to balancing the interests of the parties by considering factors, such as the parties’ constitutional rights both to procreate and not procreate, as well as whether other methods of having a biological child are available. 45 A few states have adopted a contemporaneous mutual consent approach, which would not treat advance agreements as binding if either party’s current intention conflicts with their prior consent. 46

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45. See Szafarznski, 34 N.E.3d at 1161-62; J.B., 783 A.2d at 716-17; Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).

46. Forman, supra note 34, at 385-86; see also infra Section III.C.


49. Id. at 175.

50. Id. at 176.

51. Id.

52. Id. at 176, 181.


54. Id. at 175, 182.

http://nsuworks.nova.edu/nlr
Knowing that advanced agreements will be enforced underscores the seriousness and integrity of the consent process. Advance agreements as to disposition would have little purpose if they were enforceable only in the event that the parties continued to agree. To the extent possible, it should be the progenitors—not the State and not the courts—who by their prior directive make this deeply personal life choice.55

The court also looked to the consent forms themselves, which were freely and knowingly made by the parties and jointly specified their choice in disposition.56 "Words of shared understanding—"we,' "us,' and 'our'—permeated the pages," indicating that the husband and wife jointly contemplated the dispositional contingencies.57 As it found the agreement to be enforceable, the court did not perform any balancing analysis in this case.58 Kass has been used as persuasive authority for many other state courts where the enforceability of clinic disposition agreements was questioned.59 The contractual approach used in Kass is the most effective approach for addressing pre-embryo disposition disputes, as it resolves uncertainty and encourages parties to carefully consider the consequences of making pre-embryos prior to undergoing IVF.60

55. Id. at 180.
56. Id. at 180-81.
57. Id. at 181. "Advance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision." Kass, 696 N.E.2d at 180; see also Roman v. Roman, 193 S.W.3d 40, 45, 50 (Tex. App. 2006). "Allowing the parties voluntarily to decide the disposition of frozen embryos in advance of cryopreservation, subject to mutual change of mind, jointly expressed, best serves the existing public policy of [Texas] and the interests of the parties." Roman, 193 S.W.3d at 50.
58. See Kass, 696 N.E.2d at 179-182.

B. Illinois: Upholding a Prior Oral Agreement Overriding a Clinic Consent Form

In Szafrański v. Dunston,61 the Appellate Court of Illinois had an opportunity to rule on a case about pre-embryo disposition.62 In Szafrański, an Illinois appellate court held that a couple's signed clinic consent form, stating that "no use [would] be made of [their frozen] embryos without the consent of both partners—if applicable"63 did not control in light of the couple's prior oral agreement.64 The respondent, Karla Dunston, sought exclusive custody over three frozen pre-embryos that she created with her ex-boyfriend, Jacob Szafrański, prior to undergoing the cancer treatment that would leave her infertile.65

The court reasoned that the couple had an oral contract under which Jacob agreed to give Karla the right to use the frozen pre-embryos without his consent.66 Evidence of this oral contract included Jacob's acceptance of Karla's offer to donate his sperm to create pre-embryos with her, including the fact that when the couple agreed to create the pre-embryos, Jacob did not mention any conditions or limitations on their future use.67 The court also noted Jacob's agreement to use his sperm to inseminate all of Karla's eggs, rather than half as the couple initially planned, after they learned that fewer eggs were harvested from Karla than expected.68 The appellate court affirmed the trial court's rejection of Jacob's argument that the oral contract should not be construed as giving Karla an unqualified right to use the pre-embryos because "the issue never entered his mind at the time he agreed to donate his sperm."69

In Szafrański, the court distinguished this case from other jurisdictions where the consent forms were found to be binding.70 The consent form in Szafrański was ambiguous as to disposition when an unmarried couple separates.71 The form provided for what would happen to the pre-embryos in three identified events: "(1) divorce or dissolution of the marriage or partnership; (2) death or legal incapacitation of one partner; and

62. Id. at 1136.
63. Id. at 1138.
64. Id. at 1157.
65. See id. at 1136.
66. Szafrański, 34 N.E.3d at 1151.
67. Id. at 1148-51.
68. See id. at 1150.
69. Id. at 1150-51.
70. See id. at 1157-61.
71. Szafrański, 34 N.E.3d at 1161.
Knowing that advanced agreements will be enforced underscores the seriousness and integrity of the consent process. Advanced agreements as to disposition would have little purpose if they were enforceable only in the event that the parties continued to agree. To the extent possible, it should be the progenitors—not the State and not the courts—who by their prior directive make this deeply personal life choice.

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The court reasoned that the couple had an oral contract under which Jacob agreed to give Karla the right to use the frozen pre-embryos without his consent.\textsuperscript{66} Evidence of this oral contract included Jacob's acceptance of Karla's offer to donate his sperm to create pre-embryos with her, including the fact that when the couple agreed to create the pre-embryos, Jacob did not mention any conditions or limitations on their future use.\textsuperscript{67} The court also noted Jacob's agreement to use his sperm to inseminate all of Karla's eggs, rather than half as the couple initially planned, after they learned that fewer eggs were harvested from Karla than expected.\textsuperscript{68} The appellate court affirmed the trial court's rejection of Jacob's argument that the oral contract should not be construed as giving Karla an unqualified right to use the pre-embryos because "the issue never entered his mind at the time he agreed to donate his sperm."\textsuperscript{69}

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\textsuperscript{61} Id. at 1132 (Ill. App. Ct. 2015).
\textsuperscript{62} Id. at 1136.
\textsuperscript{63} Id. at 1138.
\textsuperscript{64} Id. at 1157.
\textsuperscript{65} Id. at 1136.
\textsuperscript{66} Szafranski, 34 N.E.3d at 1151.
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The court also differentiated the consent form language from consent forms that were found by other courts to be legally binding.\textsuperscript{74} In the forms analyzed in those cases, words of shared understanding were used throughout, and more importantly, the couple was provided with disposition choices from which they could choose.\textsuperscript{75} Unlike these cases, the disputed provision of the contract contained no elective language or dispositional options from which the couple could choose.\textsuperscript{76} The Illinois court reasoned that “[i]f [the] provision was intended to be an expression of the parties’ dispositional intent, it would contain language more reflective of a choice . . . .”\textsuperscript{77} Significantly, however, the court noted that under different circumstances, medical informed consent form could “represent an ‘advance agreement’ that reflects a couple’s intended disposition of the pre-embryos.”\textsuperscript{78}

The Illinois court’s finding in Szafranski of an oral agreement based on Jacob’s decision to make embryos with Karla has caused some concern that without sufficient evidence to the contrary, all pre-embryos are intended for use by the very fact that the parties agreed to make them in the first place.\textsuperscript{79} This makes it even more important to have clear, unambiguous pre-embryo disposition agreements prior to undergoing IVF.\textsuperscript{80}

C. Massachusetts and New Jersey: Prior Agreements and Public Policy Concerns

In A.Z. v. B.Z.,\textsuperscript{81} the Supreme Judicial Court of Massachusetts also looked to a clinic consent form when deciding an issue of pre-embryo disposition.\textsuperscript{82} Similar to the previous cases discussed, the couple in A.Z. underwent IVF treatment, resulting in excess pre-embryos, which were frozen and stored.\textsuperscript{83} After one successful implantation, the parties divorced, and the husband sought an injunction to prohibit the wife from using their remaining frozen pre-embryos.\textsuperscript{84} The consent form signed by the parties listed disposition options from which the couple could choose and a blank line on which they could indicate their preference.\textsuperscript{85} For each round of IVF, the couple indicated that the disposition preference was to have the pre-embryos returned to the wife to be transferred to her uterus and carried to term.\textsuperscript{86} However, the court held that the disposition agreement here was unenforceable because the husband had signed the forms while they were still blank, with the wife filling in the disposition information at a later time.\textsuperscript{87} Thus, the court could not conclude that the form was representative of the parties’ joint intentions.\textsuperscript{88}

Interestingly, however, the court went on to state that as a matter of public policy, “even had the husband and the wife entered into an unambiguous agreement . . . [it] would not enforce an agreement that would compel one donor to become a parent against his or her will.”\textsuperscript{89} Thus, the court in Massachusetts indicated its preference for a contemporaneous mutual consent approach in situations where a couple’s disposition choice would force one party to become a parent against his or her will.\textsuperscript{90} The Supreme Court of New Jersey came to a similar conclusion in J.B. v. M.B.\textsuperscript{91}

In J.B., a woman sought to have her frozen pre-embryos discarded after filing for divorce from her ex-husband.\textsuperscript{92} Her ex-husband objected to the destruction of the frozen pre-embryos for religious reasons and wished to have them either used by J.B. or donated to another couple.\textsuperscript{93} “The consent form . . . [did] not manifest a clear intent . . . regarding disposition of the pre-embryos in the event of a [divorce],” instead directing that the matter be decided by a court.\textsuperscript{94} Thus, since no prior agreement controlled disposition of the pre-embryos, the court declined to “force J.B. to become a biological parent against her will.”\textsuperscript{95} However, in dicta, the court also addressed the public policy issue of whether it would ever uphold such an agreement

\textsuperscript{72} Id. at 1155–56.
\textsuperscript{73} Id. at 1156.
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\textsuperscript{75} Id.
\textsuperscript{76} Szafranski, 34 N.E.3d at 1161.
\textsuperscript{77} Id. at 1156.
\textsuperscript{78} Id. at 1158.
\textsuperscript{79} Id. at 1155; Roy Strom, Uncertainty Reigns After Frozen Embryo Ruling,
\textsuperscript{80} Chelsea Daily Bull., June 18, 2015, at 1.
\textsuperscript{81} Szafranski, 34 N.E.3d at 1155; Strom, supra note 79.
\textsuperscript{82} 725 N.E.2d 1051 (Mass. 2000).
\textsuperscript{83} Id. at 1052.
\textsuperscript{84} Id. at 1053.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 1054.
\textsuperscript{87} Id. at 1054.
\textsuperscript{88} Id. at 1057.
\textsuperscript{89} Id. at 1059; see also Forman, supra note 34, at 385–86.
\textsuperscript{90} 783 A.2d 707 (N.J. 2001).
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Interestingly, however, the court went on to state that as a matter of public policy, "even had the husband and the wife entered into an unambiguous agreement ... [it] would not enforce an agreement that would compel one donor to become a parent against his or her will."\textsuperscript{89} Thus, the court in Massachusetts indicated its preference for a contemporaneous mutual consent approach in situations where a couple's disposition choice would force one party to become a parent against his or her will.\textsuperscript{90} The Supreme Court of New Jersey came to a similar conclusion in \textit{J.B. v. M.B.}.\textsuperscript{91}

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\item[72.] Id. at 1155–56.
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\item[80.] DAKI DAULAH BULL., June 18, 2015, at 1.
\item[81.] Szafarski, supra, 34 N.E.3d at 1155; Strom, supra note 79.
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D. No Prior Agreement: The Balance of Interests Approach

The first case regarding embryo disposition, when a couple divorces or separates, occurred in a 1992 case before the Supreme Court of Tennessee. In Davis v. Davis, Mary Sue Davis and her husband, Junior Lewis Davis, were unable to conceive naturally, due to prior surgeries in which Mary Sue’s fallopian tubes were rendered non-functional. The parties elected to undergo IVF after a failed attempt at adoption, and they elected to have their remaining pre-embryos frozen to prevent Mary Sue from having to undergo additional rounds of hormonal stimulation. The parties had not formed any agreement concerning the disposition of their frozen pre-embryos in the event of a divorce prior to undergoing IVF, and both parties testified that there was no discussion or even contemplation concerning the implications of freezing and storing embryos. When Junior filed for divorce, the only issue that the parties could not agree upon was what to do with the pre-embryos they had created. Mary Sue initially wanted control of the frozen pre-embryos so that she could have them transferred into her uterus and carried to term. However, at the time the case was decided, she no longer wanted them for herself but wanted to donate them to another couple. Junior objected and wanted to have the pre-embryos thawed and discarded.

The court in Davis first clarified that pre-embryos are not persons and do not have any legal rights, as established by the Supreme Court of the United States in Roe v. Wade. However, it noted that their value as property lies only in their potential to become children, “[t]hus, the essential dispute . . . is not where or how long to store the pre-embryos, but whether the parties will become parents.” The court balanced the interests of both parties, considering first the burden that unwanted gestation of the pre-embryos would have on Junior psychologically and financially. Junior’s interests were balanced against Mary Sue’s desire to permit the pre-embryos to be carried to term. Ultimately, the court decided that Junior’s interest in avoiding parenthood was more significant. The court also noted that even if Mary Sue wished to use the pre-embryos herself, rather than donate them to another couple, Junior’s interest in not becoming a parent would still outweigh her interest in becoming a parent. The court considered that Mary Sue had other reasonable means of becoming a parent, such as future rounds of IVF or even adoption. Only “[i]f no other reasonable

96. J.B., 783 A.2d at 717.
97. Id. at 719; see also A.Z. v. B.Z., 725 N.E.2d 1051, 1057–58 (Mass. 2000).
98. The Supreme Court of Iowa adopted J.B.’s contemporaneous mutual consent rule in In re Marriage of Witten, stating:

We think judicial decisions and statutes in Iowa reflect respect for the right of individuals to make family and reproductive decisions based on their current views and values. For this reason, we think judicial enforcement of an agreement between a couple regarding their future family and reproductive choices would be against the public policy of this state.

672 N.W.2d 768, 782 (Iowa 2003). Note that the approach in A.Z. is more of a pseudo contemporaneous mutual consent approach, in which only prior agreements to implant and bring the pre-embryos to term in the event of a future contingency would not be enforced; unlike the New Jersey and Iowa courts, the Massachusetts court has not indicated that a prior agreement to dispose of a pre-embryo in the event of a divorce would violate public policy.

100. Davis v. Davis, 842 S.W.2d 588, 589 (Tenn. 1992).
101. Id. at 591.
allowing one party to use the pre-embryos against the objections of the other, stating that "the laws of New Jersey . . . evince a policy against enforcing private contracts to enter into or terminate familial relationships." The court, after citing A.Z., adopted a rule in which it would "enforce agreements entered into at the time [IVF has] begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored pre-embryos," provided that they affirmatively notify the clinic of their change of intention in writing. Critics of the approach taken in A.Z. and J.B. argue that requiring contemporaneous mutual consent undermines the notion of a binding contract, creating instead an illusory promise. Thus, decisions such as these render any formal memorialization of the parties' intent pointless and ineffective.

D. No Prior Agreement: The Balance of Interests Approach

The first case regarding embryo disposition, when a couple divorces or separates, occurred in 1992 in the Supreme Court of Tennessee. In Davis v. Davis, Mary Sue Davis and her husband, Junior Lewis Davis, were unable to conceive naturally, due to prior surgeries in which Mary Sue's fallopian tubes were rendered non-functional. The parties elected to undergo IVF after a failed attempt at adoption, and they elected to have their remaining pre-embryos frozen to prevent Mary Sue from having to undergo additional rounds of hormonal stimulation. The parties had not formed any agreement concerning the disposition of their frozen pre-embryos in the event of a divorce prior to undergoing IVF, and both parties testified that there was no discussion or even contemplation concerning the implications of freezing and storing embryos. When Junior filed for divorce, the only issue that the parties could not agree upon was what to do with the pre-embryos they had created. Mary Sue initially wanted control of the frozen pre-embryos so that she could have them transferred into her uterus and carried to term. However, at the time the case was decided, she no longer wanted them for herself but wanted to donate them to another couple. Junior objected and wanted to have the pre-embryos thawed and discarded.

The court in Davis first clarified that pre-embryos are not persons and do not have any legal rights, as established by the Supreme Court of the United States in Roe v. Wade. However, it noted that their value as property lies only in their potential to become children, "thus, the essential dispute . . . is not where or how long to store the pre-embryos, but whether the parents will become parents." The court balanced the interests of both parties, considering first the burden that unwanted gestation of the pre-embryos would have on Junior psychologically and financially. Junior's interests were balanced against Mary Sue's desire to permit the pre-embryos to be carried to term. Ultimately, the court decided that Junior's interest in avoiding parenthood was more significant. The court also noted that even if Mary Sue wished to use the pre-embryos herself, rather than donate them to another couple, Junior's interest in not becoming a parent would still outweigh her interest in becoming a parent. The court considered that Mary Sue had other reasonable means of becoming a parent, such as future rounds of IVF or even adoption. Only "[i]f no other reasonable

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103. Id. at 591–92.
104. Id. at 592.
105. Id. at 589.
106. Davis, 842 S.W.2d at 589.
107. Id. at 590.
108. Id. at 589.
109. 410 U.S. 113 (1973); Davis, 842 S.W.2d at 589–90.
110. Davis, 842 S.W.2d at 598.
111. Id. at 603.
112. Id. at 604.
113. Id.
114. Id.
115. Davis, 842 S.W.2d at 604. The court noted that the fact that Mary Sue and Junior pursued adoption at one point in their quest to become parents indicated that Mary Sue "was willing to forego genetic parenthood and would have been satisfied by the child-rearing aspects of parenthood alone." Id. The Tennessee court also recognized the trauma.
alternatives exist, then the argument in favor of using the pre-embryos to achieve pregnancy should be considered.116

Significantly, however, the Supreme Court of Tennessee noted that the balancing test should only be used when a prior agreement concerning disposition of pre-embryos has not been formed.117

[As a starting point, . . . an agreement regarding disposition of any untransferred pre-embryos in the event of contingencies—such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program—should be presumed valid and should be enforced as between the progenitors. This conclusion is in keeping with the proposition that the progenitors, having provided the gametic material giving rise to the preembryos, retain decision-making authority as to their disposition.118

In J.B., the Supreme Court of New Jersey balanced the interest of the parties after finding that a clinic consent form did not clearly manifest their intentions with regard to pre-embryo disposition.119 It agreed with the Supreme Court of Tennessee's holding in Davis and found that the wife's right not to procreate outweighed the husband's desire to become a parent because the husband was already a father and retained the ability to father additional children.120 The court in Scafşfranski, after deciding the case based on the existence of a prior agreement,121 alternatively looked at the balance of interests approach as well, noting that Karla's inability to produce eggs for IVF due to ovarian failure meant that her interest in using the frozen pre-embryos would outweigh Jacob's interest in not becoming a parent.122 Interestingly, the court did not consider adoption or use of a donated embryo as reasonable means of becoming a parent sufficient to tip the balance of

interest in Jacob's favor.123 At the time that the case was decided, Karla had, in fact, already become a parent through the use of a donated embryo.124

IV. APPLYING THE CASE LAW GOING FORWARD

Inconsistencies between the approaches used by courts in different states as well as an overall lack of case law makes predicting the outcome of scenarios, such as the ones mentioned in the introduction to this article challenging.125 In the case of Nick Loeb and Sofia Vergara, Loeb argues that the consent form signed by the couple, which stated that "any embryos created through the process could be brought to term only with both parties' consent" is not enforceable and should be void because it does not address the issue of pre-embryo disposition in the event of the couple's separation, as California law requires.126 This is somewhat similar to the issue with the consent form in Scafşfranski, which also did not address a disposition option for when an unmarried couple separates.127 However, the problem for Loeb is that even if a court were to agree that their prior agreement is not enforceable, this decision would most likely result in the court applying a balancing of interests test.128 Under the balancing of interests test, as it has been applied by courts in other jurisdictions, Vergara's interest in not becoming a parent would most likely prevail over Loeb's desire to procreate, especially as Loeb has other avenues available if he wishes to have a biological child.129

However, in the case of Mimi Lee and Stephen Findley, there is a stronger case for a balancing of interests that might result in Lee being awarded custody of the pre-embryos, due mostly to her claim of infertility.130 But unlike Vergara and Loeb's situation, Lee and Findley's prior agreement did clearly specify what would happen to the pre-embryos in the event of the
alternatives exist, then the argument in favor of using the pre-embryos to achieve pregnancy should be considered.\textsuperscript{116}

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\textsuperscript{116} Davis, 842 S.W.2d at 604.
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 597.
\textsuperscript{120} Id. at 716–17; see also Davis, 842 S.W.2d at 604.
\textsuperscript{121} Szafranski v. Dunston, 34 N.E.3d 1132, 1161 (III. App. Ct. 2015); see supra Section III.B.
\textsuperscript{122} Szafranski, 34 N.E.3d at 1161–63.
couple’s divorce—they would be thawed and discarded. The disposition agreement in Lee and Findley’s case is more similar to the disposition agreement in *Kass*, indicating specific disposition options from which the couple could choose in the event of certain contingencies, divorce included. Thus, if the court finds the prior agreement to be enforceable and chooses to use a purely contractual approach, Findley and Lee’s pre-embryos would be destroyed regardless of Lee’s infertility. However, without proper guidance from legislatures, the courts are left with many conflicting and confusing options for how to decide these cases.

V. FLORIDA’S PRE-EMBRYO DISPOSITION STATUTE AND THE CURRENT REGULATORY SCHEME

There is very little regulation from the federal government regarding ART. Further, only a few states have enacted statutes attempting to tackle the difficult question of pre-embryo dispositions. Florida’s current statute seems to support the contractual approach by requiring some form of prior written agreement regarding pre-embryo disposition. Having such legislation encourages parties to seriously contemplate their current and future intentions and execute agreements prior to undergoing IVF, which will best serve their own interests, the interest of clinics, and public policy.

A. Florida’s Pre-Embryo Disposition Statute

Florida was one of the first states to enact legislation concerning pre-embryo disposition agreements. Section 742.17 of the Florida Statutes provides that a couple commissioning IVF treatment and their treating physician “shall enter into a written agreement that provides for the disposition of the commissioning couple’s eggs, sperm, and pre-embryos in the event of a divorce, the death of a spouse, or any other unforeseen circumstance.” The language of this statute suggests the use of disposition agreements but does not specify whether such agreements are binding and enforceable against a party who changes his or her mind about disposition preferences.

The statute does not list recommended options from which the couple could choose, nor does it address consequences to either the commissioning couple or the physician who proceeds with IVF without entering into such an agreement. Furthermore, the statute provides a default rule in which “[a]bsent a written agreement, decision-making authority regarding the disposition of pre-embryos shall reside jointly with the commissioning couple.” The language of this statute provides little assistance to divorcing couples who disagree on the disposition of their frozen pre-embryos. Thus, while the statute itself suggests that a Florida court might enforce a prior disposition agreement, it gives no guidance as to...
couple’s divorce—they would be thawed and discarded. The disposition agreement in Lee and Findley’s case is more similar to the disposition agreement in Kass, indicating specific disposition options from which the couple could choose in the event of certain contingencies, diverse included. Thus, if the court finds the prior agreement to be enforceable and chooses to use a purely contractual approach, Findley and Lee’s pre-embryos would be destroyed regardless of Lee’s infertility. However, without proper guidance from legislatures, the courts are left with many conflicting and confusing options for how to decide these cases.

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131. Ayala et. al., supra note 11. Lee’s position is that she did not believe she was bound to these indications. Id. See Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998); Ayala et al., supra note 11; Dolan, supra note 11. See Kass, 696 N.E.2d at 180; Ayala et al., supra note 11; Dolan, supra note 11. The San Francisco County Superior Court filed a tentative decision and proposed statement of decision on November 18, 2015, four months after this Comment was submitted for publication. See In re Marriage of Stephen E. Findley v. Lee, No. FDI-13-780539, 2015 WL 7295217 (S.F. Ct. Super. Ct. Nov. 18, 2015). The court used the contract approach, at found that the Consent & Agreement signed by the parties was a binding contract and a valid written agreement expressing the couple’s intent to thaw and discard the pre-embryos in the event of a divorce. Id. at *20. In the eighty-three-page decision, the court reasoned that the prior agreement was “replete with indicators of a mutual agreement to the disposition of the pre-embryos. In addition to [twenty-seven] uses of some variation of ‘agreement,” words of shared understanding, such as ‘we,’ ‘us,’ and ‘our’ appear at least 160 times.” Id. at *33. The court also explained its decision to use the contract approach: “[b]inding agreements bring certain solemnity to the IVF process, and require parties undergoing IVF to be responsible for the life altering decision of starting a family.” Id. at *22.

Interestingly, after deciding that there was a valid, enforceable agreement to thaw and discard the embryos, the court considered the outcome of a balancing test, which would have been applied had the agreement been found to be unenforceable. Id. at *33. Putting the burden on Lee to prove by clear and convincing evidence all essential facts of the claim, the court noted Lee’s failure to preserve her own fertility by harvesting additional egg “after it was clear her marriage was either in serious trouble or had ended.” In re Marriage of Stephen E. Findley, 2015 WL 7295217, at *34. The court also found that Lee had not proven that she was infertile at the time, as medical testimony concluded that she had a “low but not vanishing probability of conceiving a child,” although at best the chance of live birth was between zero and five percent. Id. at *34. Ultimately, these facts coupled with “Findley’s right not to be compelled to be a parent with Lee outweigh[ed] Lee’s right to have a biologically related child.” Id. at *39.

134. See supra Part III.

135. Marold, supra note 2, at 182; Paller, supra note 38, at 1585.

136. Marold, supra note 2, at 182.

137. See FLA. STAT. § 742.17 (2015).

138. Pflanz, supra note 42, at 164; see also Kass, 696 N.E.2d at 180.

139. See Kass, 696 N.E.2d at 178.

140. FLA. STAT. § 742.17.

141. See id. The Florida Legislature has required binding and enforceable contracts in other domestic relations statutes, such as their surrogacy agreement statute. Id. § 742.15(1).

142. Marold, supra note 2, at 183.

143. FLA. STAT. § 742.17(2).

144. Marold, supra note 2, at 183.
necessary provisions in the document or the process by which it should be executed.\textsuperscript{145}

B. California’s Pre-Embryo Disposition Statute

Section 125315 of the California Health and Safety Code mandates that “[a] physician . . . or other health care provider delivering fertility treatment shall provide his or her patient with . . . information to allow the individual to make an informed and voluntary choice regarding the disposition of any human embryos remaining following the fertility treatment.”\textsuperscript{146} The statute states that “[w]hen providing fertility treatment, a . . . health care provider shall provide a form . . . that sets forth advanced written directives regarding the disposition of embryos. This form shall indicate the time limit on storage of the embryos at the clinic or storage facility and shall provide, at a minimum,” choices for disposition in the event of death of one partner, death of both partners, divorce or separation, and abandonment of the pre-embryos.\textsuperscript{147} The statute requires that the form offer several delineated options for each contingency, from which the couple can choose.\textsuperscript{148} Specifically in the case of divorce or separation, it states that the form must include the following disposition choices: “(A) [m]ade available to the female partner; (B) [m]ade available to the male partner; (C) [d]onation for research purposes; (D) [t]hawed with no further action taken; (E) [d]onation to another couple or individual; (F) [o]ther disposition that is clearly stated.”\textsuperscript{149}

Additionally, the statute addresses the issue of a physician’s failure to provide these forms to a couple, stating that this behavior constitutes unprofessional conduct.\textsuperscript{150} California’s is the only statute that has any consequence to the physician for not providing these forms; thus, it “seems to provide the most incentive for IVF . . . doctors” to ensure that a couple is informed about their disposition options.\textsuperscript{151} However, ultimately, the couple’s decision to fill out and sign these forms is voluntary.\textsuperscript{152}

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146. CAL. HEALTH & SAFETY CODE § 125315(a) (West 2015).
147. Id. § 125313(b)(1)-(4).
148. Id.
149. Id. § 125313(b)(3) (emphasis added).
150. Id. § 125315(a).
151. Marold, supra note 2, at 195.
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\(^{145}\) Deborah L. Forman, Embryo Disposition and Divorce: Why Close Consent Forms Are Not the Answer, 24 J. AM. ACAD. MATRIM. LAW. 57, 95 (2011).
\(^{146}\) CAL. HEALTH & SAFETY CODE § 125315(a) (West 2015).
\(^{147}\) Id. § 125315(b)(4).
\(^{148}\) Id.
\(^{149}\) Id. § 125313(b)(3) (emphasis added).
\(^{150}\) Id. § 125313(b).
\(^{151}\) Manold, supra note 2, at 195.
\(^{152}\) Id.
(a) [the] [i]ntended use and disposition of embryos; (b) [i]t the use and disposition of preserved embryos in the event of divorce, incapacity, ... death of one or both intended parents, or other change of circumstances such as separation or estrangement; and (c) [i]t the time at which . . . preserved embryos will be deemed abandoned and the policy . . . as to the disposition thereof. 163

Section 203 of the Model Act also indicates the following disposition options that must be disclosed to the intended parents: storage, transfer, donation—either for transfer or for research—and destruction. 164 The Model Act also states that the required agreement as to disposition of pre-embryos is subject to withdrawal of consent by either intended parent and will not be enforced if the previously agreed disposition option was to create a child. 165 Thus, the Model Act seems to adopt a stance similar to Massachusetts, in which prior agreements to procreate run contrary to public policy and will not be enforced. 166

The Model Act also provides a default rule of five years for determining when stored pre-embryos can be deemed abandoned, if no agreement is otherwise made. 167 A pre-embryo may be deemed abandoned when the storage facility has made a diligent effort to notify the intended participants and when the interested parties have formally acknowledged that they are aware of the provisions of the default rule. 168 If it complies with the rules, a storage facility will not be liable for disposition of the pre-embryos, “absent criminal intent, gross negligence, or intentional misconduct.” 169

VI. CLARIFYING FLORIDA’S STATUTE

Florida is one of the few states that have already established a foundation of legislation governing pre-embryo disposition. 170 However, Florida’s existing statute still contains ambiguity and gaps that should be clarified to prevent future disposition problems. 171 The following sections discuss different ways that the Florida Legislature could improve section 742.17 to be more clear and thorough by looking to California’s pre-embryo disposition statute, the Model Act, as well as Florida’s surrogacy statute— section 742.15. 172

A. Binding and Enforceable Agreement

In order to preserve the enforceability of prior written agreements, the Florida Legislature must have clear statutory guidelines in the context of pre-embryo disposition. 173 First, the Florida Legislature must decide whether agreements to procreate are against public policy. 174 If so, section 742.17 of the Florida Statute should include a provision allowing withdrawal of consent similar to the Model Act. 175 However, if the Florida Legislature decides that agreements to procreate are valid and enforceable, such a proviso need not be included. 176 Rather, in this case, section 742.17 of the Florida Statute should clearly indicate that these agreements will be binding and enforceable. 177

As it stands, section 742.17 states only that a commissioning couple “shall enter into a written agreement” with their physician regarding pre-embryo disposition. 178 However, the statute goes on to provide for three default provisions for instances where no written agreement exists. 179 This indicates that such an agreement is not required prior to creating embryos. 180 The language of the disposition statute would provide more clarity and certainty if it mirrored the language of section 742.15 of the Florida Statute, regarding gestational surrogacy. 181 Section 742.15 states that “prior to engaging in gestational surrogacy, a binding and enforceable gestational surrogacy contract shall be made.” 182 Using the words binding and

163. Id. § 501(1)(a)-(g).
164. Id. § 203(1)(a)-(d).
165. Id. § 501(3)(e)-(d). The Model Act goes on to state that should such a transfer occur, the individual seeking to avoid gestation would not be the parent of a resulting child. Id. § 501(3)(e).
166. See supra Section III.C.
167. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 504(1)(a).
168. Id. § 504(1)(b)-(g).
169. Id. § 504(3).
170. See Forman, supra note 145, at 89, 94.
171. See FLA. STAT. § 742.17 (2015); supra Section V.A.
172. See FLA. STAT. § 742.15 (2015); FLA. STAT. §§ 742.15, 17; MODEL ACT GOVERNING ASSISTED REPROD. TECH. §§ 203, 301, 302, 501, 504, 702; infra Section V.A.
173. See Issa, supra note 98, at 1582.
174. See supra Section III.C.
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178. See Forman, supra note 145, at 96. Forman is critical of including such a provision, as it creates confusion and undercuts the notion that the forms are binding and enforceable agreements: “It makes no sense to ask the parties to dictate whether an intended parent can use the embryos, but then to declare any such use impermissible without contemporaneous consent. Which provision controls?” Id.
179. See FLA. STAT. §§ 742.15(1), 17; MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 501(1).
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172. See CAL. HEALTH & SAFETY CODE § 125315 (West 2015); FLA. STAT. §§ 742.15, 17; MODEL ACT GOVERNING ASSISTED REPROD. TECH. §§ 203, 301, 302, 501, 504, 702; infra Sections V.A–D.
173. See Issa, supra note 98, at 1582.
174. See supra Section III.C.
175. See FLA. STAT. § 742.17; MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 501(1); supra Section V.D.
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180. See id.
181. See id. §§ 742.15(1), 17.
182. Id. § 742.15(1).
enforceable contract clearly spells out that the agreement will be enforced in a court of law, and the statute further requires that the contract be made prior to taking any action, which encourages couples to take this decision seriously.183

B. Clearly Drafted Consent Forms: Mandatory Provisions

The varied nature of clinic consent forms is an issue that permeates most of the pre-embryo disposition cases.184 Clinic consent forms are frequently drafted with confusing and conflicting language, and often fail to clearly and accurately reflect the parties’ true intentions about their disposition preferences.185 Mandatory form contracts would provide structure and uniformity among clinics.186 Furthermore, clearly drafted consent forms would allow a couple undergoing IVF to be better prepared and avoid having their “private affairs . . . forced into court and construed by strangers who can only guess at the circumstances surrounding their intent.”187 It is the responsibility of the Florida Legislature to re-draft its statute to require IVF providers to design clear and thorough consent forms.188

Thus, the Florida statute should require minimum mandatory provisions and language that must be included in consent forms.189 First, it is important that the consent forms contain the word agreement or contract, especially when referring to disposition information, which would signal to the parties that they are signing a binding document.190 Second, the mandatory provisions should include words of shared understanding to indicate joint contemplation by the parties.191 Thus, these provisions must include language such as we, us, and our.192 Third, these mandatory minimum provisions should include specific disposition options, which would provide guidance to the couple, similar to those outlined in section 125315 of the California Health and Safety Code and section 203 of the Model Act.193 Specifically, in the case of divorce or separation, there should be a list of options from which the commissioning couple must indicate their preference: 1) made available to a designated commissioning partner for use; 2) donated for research purposes; 3) thawed and discarded; 4) donated to another couple or individual; 5) other disposition that is clearly stated.194

Additionally, the Florida statute should include a default provision to address the issue of abandoned pre-embryos.195 Here, it would be helpful if the Florida Legislature looked to section 504 of the Model Act, which deems a stored pre-embryo as abandoned after five years, in the absence of a length of time designated by the couple and when the couple has been formally notified and made aware of the default standard.196 Adopting the Model Act’s pre-embryo abandonment provision would help to alleviate the growing problem of abandoned pre-embryos in storage facilities and unpaid maintenance costs, both of which pose a significant burden to storage providers and clinics.197

C. Incentivizing Physicians and Patients

Physicians, who are mainly concerned with obtaining informed consent and avoiding liability, generally lack incentive to ensure that embryo disposition agreements clearly reflect the parties’ intentions.198 Further, Florida’s current legislation puts no real burden on the provider to ensure that the rules are being followed.199 California’s statute provides an example of a statutory provision that would incentivize IVF providers to proceed as instructed.200 Section 125315(a) states that a physician who fails to provide a patient with the minimum required disposition information may be charged

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183. FLA. STAT. § 742.15(1); Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998). “Knowing that advanced agreements will be enforced underscores the seriousness and integrity of the consent process.” Kass, 696 N.E.2d at 180; see also Forman, supra note 145, at 84; Isaa, supra note 98, at 1585.


186. See Paller, supra note 38, at 1595.


188. See id.

189. See id.; Paller, supra note 38, at 1595.

190. See Forman, supra note 145, at 83.


192. See Kass, 696 N.E.2d at 181.

193. See CAL. HEALTH & SAFETY CODE § 125315(b)(2)–(4) (West 2015); MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 203(1)(a)–(d) (AM. BAR ASS’N 2008).

194. See CAL. HEALTH & SAFETY CODE § 125315(b)(3).

195. See, e.g., Kindregan, Jr. & Snyder, supra note 160, at 218.

196. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 504(1)–(3); see also supra Section V.D.

197. E.g., Kindregan, Jr. & Snyder, supra note 160, at 218.

198. Forman, supra note 145, at 85.

199. See FLA. STAT. § 742.17 (2015); Issa, supra note 98, at 1584.

200. See CAL. HEALTH & SAFETY CODE § 125315(a) (West 2015); Marold, supra note 2, at 195.
enforceable contract clearly spells out that the agreement will be enforced in a court of law, and the statute further requires that the contract be made prior to taking any action, which encourages couples to take this decision seriously. 183

B. Clearly Drafted Consent Forms: Mandatory Provisions

The varied nature of clinic consent forms is an issue that permeates most of the pre-embryo disposition cases. 184 Clinic consent forms are frequently drafted with confusing and conflicting language, and often fail to clearly and accurately reflect the parties’ true intentions about the disposition preferences. 185 Mandatory form contracts would provide structure and uniformity among clinics. 186 Furthermore, clearly drafted consent forms would allow a couple undergoing IVF to be better prepared and avoid having their “private affairs... forced into court and construed by strangers who can only guess at the circumstances surrounding that intent.” 187 It is the responsibility of the Florida Legislature to re-draft its statute to require IVF providers to design clear and thorough consent forms. 188

Thus, the Florida statute should require minimum mandatory provisions and language that must be included in consent forms. 189 First, it is important that the consent forms contain the word agreement or contract, especially when referring to disposition information, which would signal to the parties that they are signing a binding document. 190 Second, the mandatory provisions should include words of shared understanding to indicate joint contemplation by the parties. 191 Thus, these provisions must include language such as we, us, and our. 192 Third, these mandatory minimum provisions should include specific disposition options, which would provide guidance to the couple, similar to those outlined in section 125315 of the California Health and Safety Code and section 203 of the Model Act. 193 Specifically, in the case of divorce or separation, there should be a list of options from which the commissioning couple must indicate their preference: 1) made available to a designated commissioning partner for use; 2) donated for research purposes; 3) thawed and discarded; 4) donated to another couple or individual; 5) other disposition that is clearly stated. 194 Additionally, the Florida statute should include a default provision to address the issue of abandoned pre-embryos. 195 Here, it would be helpful if the Florida Legislature looked to section 504 of the Model Act, which deems a stored pre-embryo as abandoned after five years, in the absence of a length of time designated by the couple and when the couple has been formally notified and made aware of the default standard. 196 Adopting the Model Act’s pre-embryo abandonment provision would help to alleviate the growing problem of abandoned pre-embryos in storage facilities and unpaid maintenance costs, both of which pose a significant burden to storage providers and clinics. 197

C. Incentivizing Physicians and Patients

Physicians, who are mainly concerned with obtaining informed consent and avoiding liability, generally lack incentive to ensure that embryo disposition agreements clearly reflect the parties’ intentions. 198 Further, Florida’s current legislation puts no real burden on the provider to ensure that the rules are being followed. 199 California’s statute provides an example of a statutory provision that would incentivize IVF providers to proceed as instructed. 200 Section 125315(a) states that a physician who fails to provide a patient with the minimum required disposition information may be charged with a penalty.

183. Fla. Stat. § 742.15(1); Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998). “Knowing that advanced agreements will be enforced underscores the seriousness at integrity of the consent process.” Kass, 696 N.E.2d at 180; see also Forman, supra note 185, at 84; Issa, supra note 98, at 1585.


186. See Paller, supra note 38, at 1959.


188. See id.

189. See id.; Paller, supra note 38, at 1959.

190. See Forman, supra note 145, at 83.


192. See Kass, 696 N.E.2d at 181.

193. See CAL. HEALTH & SAFETY CODE § 125315(b)(1)–(4) (West 2015);

194. See CAL. HEALTH & SAFETY CODE § 125315(b)(3).

195. See, e.g., Kindregan, Jr. & Snyder, supra note 160, at 218.

196. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 203(1)(a)–(d) (AM. BAR ASS’N 2008).

197. E.g., Kindregan, Jr. & Snyder, supra note 160, at 218.

198. Forman, supra note 145, at 85.

199. See F.L.A. STAT. § 742.17 (2015); Issa, supra note 98, at 1584.

200. See CAL. HEALTH & SAFETY CODE § 125315(a) (West 2015); Marold, supra note 2, at 195.
with unprofessional conduct. A similar provision would help to ensure that physicians have greater motivation to administer IVF treatment to patients in compliance with the statute. Commissioning couples also need greater incentive to complete disposition agreements and take them seriously. Statutory default provisions, which would govern in the event that a couple fails to come to a disposition agreement prior to undergoing IVF treatment, would better encourage couples to take care to manifest their preferences with regard to pre-embryo disposition. Florida’s statute currently includes a default provision that the commissioning couple will retain joint decision-making authority absent a written agreement, but this provision neither incentivizes nor assists couples in such a scenario. The default rule needs to clearly indicate a disposition option that will control absent a written agreement, such as a default rule in which pre-embryos would be destroyed unless the couple indicates otherwise. This default rule would incentivize the couple to make any alternate preference clear and explicit, and it also would provide the courts with statutory guidance for confusing situations where the parties’ intent is not clearly manifested.

D. Other Considerations: Mental Health Evaluation and Presence of an Attorney

Some other procedural guidelines that should be considered by the Florida Legislature are the requirements of a mental health evaluation and presence of an attorney. Section 301 of the Model Act requires all ART participants to undergo mental health counseling. Section 302 provides additional counseling requirements for participants of procedures involving donor embryos or gestational carriers, stating that “[n]o ART procedure that involves the transfer of donor gametes or embryos shall be initiated or performed until...[the intended parents have undergone a mental health evaluation to determine their suitability to participate in collaborative reproduction.” This provision could easily be amended to require a mental health consultation prior to a procedure that involves the creation of any pre-embryos, which would hopefully encourage the parties to discuss the complex emotional issues that accompany the creation and disposition of pre-embryos before undergoing the procedure and better prepare them for the IVF process.

Further, the Florida Legislature should consider a provision that requires independent legal counseling to assist the commissioning couple in their disposition decision. The law governing pre-embryo disposition agreements is unsettled. Thus, the guidance of legal counsel helps to guarantee that the parties are making an informed decision and are aware of the importance of the documents they are signing. Further, independent counsel is often better situated than the IVF provider to assist the parties in understanding the complex information needed to make disposition choices. In adopting such a provision, the Florida Legislature should look to sections 702 and 703 of the Model Act, which require legal representation by all parties when making a gestational surrogacy agreement, and apply it to parties seeking to undergo IVF treatment.

VII. FREEZING EGGS AND SPERM SEPARATELY: A FUTURE SOLUTION

A future solution to the pre-embryo disposition problem is separate cryopreservation of eggs and sperm. This alternative technique to cryopreservation of pre-embryos would allow divorcing couples to merely take control of their own genetic tissues, which they could then do with as they please. While technology has enabled physicians to freeze sperm since the 1940s, there has been less success with egg freezing. Historically, there has been lower overall success with fertilization and
with unprofessional conduct. Adopting a similar provision would help to ensure that physicians have greater motivation to administer IVF treatment to patients in compliance with the statute.

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201. See Issa, supra note 98, at 1583. “This evaluation is not intended to be an evaluation of the intended parent’s suitability to parent.” MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 302(1)(d). “The results of this consultation shall not be used to arbitrarily deny any intended parent the right to procreate.” Id. § 301(1).
212. See Issa, supra note 98, at 1587.
214. See Issa, supra note 98, at 1587.
215. See id.
216. See MODEL ACT GOVERNING ASSISTED REPROD. TECH. §§ 702(1)(c), (2)(d), 703(2)(c).
218. See FLA. STAT. § 742.17(1) (2015). “[A]ny remaining eggs or sperm shall remain under the control of the party that provides the eggs or sperm.” Id.
pregnancy from frozen eggs, which are made up largely of water. It is only recently that researchers have begun to see success with egg freezing, and in 2012, the American Society for Reproductive Medicine ("ASRM") issued a report stating that due to the dramatic improvements over the past decade, this "technique should no longer be considered experimental." The report also stated that egg freezing is a "reasonable strategy for patients who are unable to cryopreserve embryos."

Despite the positive developments in egg freezing, the ASRM has also stated that it is too soon to use this technology in lieu of pre-embryo cryopreservation. Currently, the success rate of IVF using frozen eggs is about half of the success rate using frozen pre-embryos. Several studies have shown decreased success with egg freezing in older women, and researchers are unable to confirm that the risks of developmental abnormalities in children born from frozen eggs are similar to those born from frozen pre-embryos. However, down the line, improvements in reproductive technology may make freezing eggs a better alternative to freezing pre-embryos, at least from a legal standpoint.

VIII. CONCLUSION

IVF is a wonderful option for couples experiencing fertility issues. However, the question of what to do with frozen pre-embryos can cause problems for even the happiest couples. This is why it is imperative that couples seriously consider how they would like to proceed in the event of all possible contingencies, prior to creating pre-embryos. Further, some of this responsibility should be borne by both the IVF physician and clinic.

220. Id.
221. Id. at 38, 41.
222. Id. at 41.
223. Id. at 42.
225. See Mature Oocyte Cryopreservation: A Guideline, supra note 217, at 41–42.
226. See id. at 41.
228. See Forman, supra note 34, at 388. "Social science research has revealed that even for couples in intact relationships, the decision about disposition is emotionally challenging and frequently unstable over time." Id. (footnote omitted).
229. See supra Parts III, V, and VI.

230. See CAL. HEALTH & SAFETY CODE § 125315(a) (West 2015).
231. See Fla. STAT. § 742.17 (2015).
232. See id.; supra Section V.A.
233. See Fla. STAT. § 742.17; Gunnison, supra note 187, at 290; supra Part VI.
234. See Gunnison, supra note 187, at 290–91 (footnotes omitted).
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Despite the positive developments in egg freezing, the ASRM has also stated that it is too soon to use this technology in lieu of pre-embryos cryopreservation.\textsuperscript{24} Currently, the success rate of IVF using frozen eggs is about half of the success rate using frozen pre-embryos.\textsuperscript{25} Several studies have shown decreased success with egg freezing in older women, and researchers are unable to confirm that the risks of developmental abnormalities in children born from frozen eggs are similar to those born from frozen pre-embryos.\textsuperscript{26} However, down the line, improvements in reproductive technology may make freezing eggs a better alternative to freezing pre-embryos, at least from a legal standpoint.\textsuperscript{27}

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\begin{itemize}
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id. at 38, 41.
\item \textsuperscript{22} Id. at 41.
\item \textsuperscript{23} Id. at 42.
\item \textsuperscript{24} \textit{Freezing Eggs or Embryos}, BREASTCANCER.ORG, http://www.breastcancer.org/tips/flip/insertion/embryo_options/fertility/freeze_embryo (last modified Jan. 26, 2014).
\item \textsuperscript{25} \textit{See Mature Oocyte Cryopreservation: A Guideline}, supra note 217, at 41-42.
\item \textsuperscript{26} \textit{See id. at 41.}
\item \textsuperscript{27} \textit{See supra Part II.} [Over ten percent of American women suffer] for some sort of fertility problem." Marold, supra note 2, at 179 (footnote omitted). [33] estimated thirty-three percent of couples are infertile by age forty." Paller, supra note 31, at 157 (footnote omitted).
\item \textsuperscript{28} \textit{See Forman, supra note 34, at 388.} "Social science research has revealed that even for couples in intact relationships, the decision about disposition is emotionally challenging and frequently unstable over time." Id. (footnote omitted).
\item \textsuperscript{29} \textit{See supra Parts III, V, and VI.}
\item \textsuperscript{30} See CAL. HEALTH & SAFETY CODE § 125315(a) (West 2015).
\item \textsuperscript{31} See FLA. STAT. § 742.17 (2015).
\item \textsuperscript{32} See id.; supra Section V.A.
\item \textsuperscript{33} See FLA. STAT. § 742.17; Gunison, supra note 187, at 290; supra Part VI.
\item \textsuperscript{34} \textit{These regulations should stop short of regulating the science of cryopreserved embryos. As the stem cell debate has illustrated, the involvement of government regulations has severely curtailed the use of stem cells in research. Extending these regulations to the use of embryos by couples could impact how many embryos are created and how many are implanted into a woman at any one given time. These broad reaching regulations would only hamper thousands of couples' efforts to create a child.}
\end{itemize}

Gunnison, supra note 187 at 290-91 (footnotes omitted).

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ON AN ALTERNATIVE TO A PUNITIVE STATE IN RESPONSE TO A MODERN UNDERSTANDING OF THE HIV/AIDS EPIDEMIC IN FLORIDA

MARIO BRITO

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I. INTRODUCTION

Now, if you go back and you look at the themes of past World AIDS Days, if you read them one after another, [you will] see the story of how the human race has confronted one of the most devastating pandemics in our history. [You will] see that in those early years—when we started losing good men and women to a disease that no one truly understood—it was about ringing the alarm, calling for global action, proving that this deadly disease was not isolated to one area or one group of people. And [that is] part of what makes today so remarkable, because back in those early years, few could have imagined this day—that we would be looking ahead to The Beginning of the End, marking a World AIDS Day that has gone from that early beginning when people were still uncertain to now a theme, Getting to Zero. . . . But [that is] what [we are] talking about. [That is] why [we are] here. And we arrived here because of all of you and your unwavering belief that we can—and we will—beat this disease.

On June 5, 1981, the Morbidity and Mortality Weekly Report ("MMWR"), an epidemiological digest published by the Centers for Disease Control and Prevention ("CDC"), reported on a pattern of five infections of a rare form of pneumonia known as Pneumocystis Pneumonia.7 The patients were described as active homosexuals, two of which had passed away by the time of the published report in the MMWR.3 All five cases were confined to the Los Angeles metropolitan area.4 Shortly thereafter, on July 3, 1981, the New York Times published an article titled: "Rare Cancer Seen in 41 Homosexuals."5 This time, it was not Pneumocystis Pneumonia that was the centerpiece of the report but rather, a rare cancer known as Kaposi's Sarcoma.6 A mysterious outbreak of rare diseases was spreading.7 As can be appreciated from the first reports of what later came to be known as Acquired Immunodeficiency Syndrome ("AIDS"), the medical profession had very little knowledge of how the disease developed or how it could affect the general public.8 In the same New York Times article, a physician reports: "The best evidence against infection. . . . is that no cases have been reported to date outside the homosexual community or in women."9 It was only on September 9, 1983 that the MMWR published a statement stating that there was no evidence that AIDS could be transmitted "through casual contact with AIDS patients or with persons in population groups with an increased incidence of AIDS . . . [or] through food, water, air, or environmental surfaces."10 The MMWR went on to state that a classification system of those at risk for contracting AIDS would lack precision pending further epidemiological studies.11 It was not until January 11, 1985 that the CDC revised its definition of AIDS to identify the viral cause of the disease, Human Immunodeficiency Virus ("HIV").12 We now know that HIV can be contracted by any member

* Mario Brito is a J.D. candidate for May 2016 at Nova Southeastern University, Shepard Broad College of Law and received his MBA from Florida International University. Mario would like to thank the members of the Nova Law Review for all of their hard work and dedication in the refinement of this Comment. Professor Shahabudeen Khan was instrumental in the introduction of the topic which led to the writing of the first half of this Comment as related to the criminal provisions against HIV transmission. Mario would like to thank Professor Ronald Benton Brown and Professor Florence Shu-Acquaye for their projects as their research assistant. A very special thank you also goes out to Mario's family for always supporting him throughout all of his endeavors.

3. Id.
4. See id.
5. Lawrence K. Altman, Rare Cancer Seen in 41 Homosexuals, N.Y. Times, July 3, 1981, at A20 [hereinafter Altman, Rare Cancer Seen in 41 Homosexuals].
6. Id.
7. Id.; see also Pneumocystis Pneumonia — Los Angeles, supra note 2, at 250.
9. Altman, Rare Cancer Seen in 41 Homosexuals, supra note 5.
11. Id.
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2. Lawrence K. Altman, Rare Cancer Seen in 41 Homosexuals, N.Y. TIMES, July 3, 1981, at A20 [hereinafter Altman, Rare Cancer Seen in 41 Homosexuals].

3. Id.

4. See id.

5. Lawrence K. Altman, Rare Cancer Seen in 41 Homosexuals, N.Y. TIMES, July 3, 1981, at A20 [hereinafter Altman, Rare Cancer Seen in 41 Homosexuals].

6. Id.

7. Id.; see also Pneumocystis Pneumonia — Los Angeles, supra note 2, at 250.


9. Altman, Rare Cancer Seen in 41 Homosexuals, supra note 5.


11. Id.

of the general public and not just by men who have sex with men ("MSM").
In Surgeon General C. Everett Koop’s Report on Acquired Immune
Deficiency Syndrome on October 22, 1986, the following acknowledgements
were made: “Although the initial discovery was in the homosexual
community . . . AIDS is found in heterosexual people as well. AIDS is not a
black or white disease. AIDS is not just a male disease. AIDS is found
in women; it is found in children.”14 “AIDS no longer is the concern of any one
segment of society; it is the concern of us all.”15

The report acknowledged that while it remained a mysterious
disease, scientists had learned more about AIDS in the span of five years
than they had been able to learn of many other diseases in a larger span of
time.16 The Surgeon General emphasized the need to educate the public
on the disease, particularly on risky behaviors that exposed the public to the
virus and on the special role of the states in helping to combat the disease.17
He pointed out that some would not heed his message.18 He was right; the
states did not heed his message.19

That same year, three criminal statutory provisions were enacted in
the states of Florida, Tennessee, and Washington, making it illegal to
transmit HIV.20 They were the first three states in the United States to
criminalize the transmission of the virus.21 HIV-specific criminal laws vary
tremendously in form and function, from specifically criminalizing
transmission of the virus to serving as sentence enhancers for people living
with HIV/AIDS ("PLWHA") who have been convicted of certain crimes.22
Florida has enacted five such provisions.23

The National HIV/AIDS Strategy is an effort by the Executive
Office of the United States to combat HIV.24 It originally had three goals:
“(1) [r]educing the number of people who become infected with HIV; (2)
[increasing access to care and optimizing health outcomes for people living
with HIV; and (3) [r]educing HIV-related health disparities;” but it has
recently been updated to encompass a fourth goal—“(4) achieving a more
coordinated national response to the HIV epidemic,” which is the main
objective of this Comment on a state level.25 The 2010 National HIV/AIDS
Strategy incorporated many recommendations to the states—as does the
2015 update—without which these national efforts would be substantially
reduced.26 Recommendation 3.3 of the 2010 National HIV/AIDS Strategy—
which is aimed at state legislatures—encourages the “[p]romot[ion] of
public health approaches to HIV prevention and care,” while urging the
states to revisit criminal statutes in order to “ensure that they are consistent
with [the] current knowledge of HIV transmission and [that] support
public health approaches to preventing and treating HIV.”27

The purpose of this Comment is both to: (1) encourage the Florida
Legislature to revisit its criminal statutes by offering different models that it
may look to in doing so; and (2) setting forth recommendations on how to
more adequately address the HIV/AIDS epidemic through the adoption of
a proactive public health approach to dealing with the epidemic.28 Florida’s
criminal laws are inconsistent with our current knowledge behind HIV
transmission, and there are better ways in which the State of Florida can

13. See Provisional Public Health Service Inter-Agency Recommendations, supra note 12, at 1 (recognizing HIV statistics for intravenous drug users and women).
14. C. EVERETT KOOP, SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE
DEFICIENCY SYNDROME 14 (1986).
15. Id. at 27.
16. Id. at 26.
17. Id. at 29-30.
18. Id. at 29.
19. See infra Parts III-IV (detailing a general lack of understanding and
stigma towards HIV-positive individuals permeating into the legal system of many states).
20. J. Stan Lehman et al., Prevalence and Health Implications of Stigma
21. Id.
22. See generally THE CTR. FOR HIV LAW & POLICY, POSITIVE JUSTICE
PROJECT, ENDING & DEFENDING AGAINST HIV CRIMINALIZATION: STATE AND FEDERAL LAWS
FEDERAL LAWS AND PROSECUTION] (containing all HIV-specific criminal provisions for every
state to date).
23. FLA. STAT. § 381.0041(11)(b) (2015); FLA. STAT. § 384.24(2) (2015);
FLA. STAT. § 775.0877(3) (2015); FLA. STAT. § 796.08(5) (2015); FLA. STAT. § 384.34(3)
(Supp. 1986).
24. THE WHITE HOUSE OFFICE OF NAT'L AIDS POLICY, NATIONAL HIV/AIDS
fight HIV/AIDS by mobilizing resources and citizens to meet specific goals by 2020).
25. THE WHITE HOUSE OFFICE OF NAT'L AIDS POLICY, supra note 24, at 1.
26. See id. at vii.
27. Id. at 37.
28. See infra Part IV.
of the general public and not just by men who have sex with men ("MSM"). In Surgeon General C. Everett Koop's Report on Acquired Immune Deficiency Syndrome on October 22, 1986, the following acknowledgements were made: "Although the initial discovery was in the homosexual community...AIDS is found in heterosexual people as well. AIDS is not a black or white disease. AIDS is not just a male disease. AIDS is found in women; it is found in children." "AIDS no longer is the concern of any one segment of society; it is the concern of us all." The report acknowledged that while it remained a mysterious disease, scientists had learned more about AIDS in the span of five years than they had been able to learn of many other diseases in a larger span of time. The Surgeon General emphasized the need to educate the public on the disease, particularly on risky behaviors that exposed the public to the virus and on the special role of the states in helping to combat the disease. He pointed out that some would not heed his message. He was right; the states did not heed his message.

That same year, three criminal statutory provisions were enacted in the states of Florida, Tennessee, and Washington, making it illegal to transmit HIV. They were the first three states in the United States to criminalize the transmission of the virus. HIV-specific criminal laws vary tremendously in form and function, from specifically criminalizing transmission of the virus to serving as sentence enhancers for people living with HIV/AIDS ("PLWHA") who have been convicted of certain crimes. Florida has enacted five such provisions.

The National HIV/AIDS Strategy is an effort by the Executive Office of the United States to combat HIV. It originally had three goals: (1) reducing the number of people who become infected with HIV; (2) increasing access to care and optimizing health outcomes for people living with HIV; and (3) reducing HIV-related health disparities; but it has recently been updated to encompass a fourth goal—"(4) achieving a more coordinated national response to the HIV epidemic," which is the main objective of this Comment on a state level. The 2010 National HIV/AIDS Strategy incorporated many recommendations to the states—as does the 2015 update—which is contained in state legislatures—encourages the "[p]romote[ion] of public health approaches to HIV prevention and care," while urging the states to revisit criminal statutes in order to "ensure that they are consistent with [the] current knowledge of HIV transmission and that they support public health approaches to preventing and treating HIV.

The purpose of this Comment is both to: (1) encourage the Florida Legislature to revisit its criminal statutes by offering different models that it may look to in doing so; and (2) setting forth recommendations on how to more adequately address the HIV/AIDS epidemic through the adoption of a proactive public health approach to dealing with the epidemic. Florida's criminal laws are inconsistent with our current knowledge behind HIV transmission, and there are better ways in which the State of Florida can

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13. See Provisional Public Health Service Inter-Agency Recommendations, supra note 12, at 1 (recognizing HIV statistics for intravenous drug users and women).
15. Id. at 27.
16. Id. at 26.
17. Id. at 29-30.
18. Id. at 29.
19. See infra Parts III-IV (detailing a general lack of understanding and stigma towards HIV-positive individuals permeating into the legal system of many states).
21. Id.
support its public health interest in the prevention of HIV transmission rather than through the criminalization of the acts of persons affected by a medical condition.\textsuperscript{29}

Part II of this Comment will look into relevant statutory provisions of interest in the criminalization of HIV transmission within Florida, pointing to both their origin and evolution in an effort to better understand the laws' structure and function.\textsuperscript{30} Part III will examine the context in which HIV/AIDS arose, as well as delve into an overview on past and present medical advances behind the HIV/AIDS epidemic.\textsuperscript{31} And finally, in terms of substance, Part IV will offer various recommendations and models that the Florida Legislature may consider in reforming its current approach to HIV from both a criminal and a public health perspective.\textsuperscript{32}

II. ON THE CRIMINAL TRANSMISSION OF HIV IN FLORIDA

The following is a layout of Florida's HIV-specific laws dealing explicitly with the criminalization of HIV transmission.\textsuperscript{33} The analysis below is not inclusive of two HIV-specific criminal provisions that Florida has codified into law, one of which deals with HIV transmission through prostitution and the other which deals with HIV transmission through blood donation.\textsuperscript{34} A general knowledge of the structure and function of the following laws will help in understanding the remainder of this Comment.\textsuperscript{35}

A. Section 384.24 of the Florida Statutes: The Criminal Transmission of HIV Provision

Section 384.24 of the Florida Statutes regulates the transmission of sexually transmissible diseases.\textsuperscript{36} In its current form, the statutory provision defines all of the following as sexually transmissible diseases, as encoded into section 384.24(1): "[C]anceroid, gonorrhea, granuloma inguinale, lymphogranuloma venerum, genital herpes simplex, chlamydia, nongonococcal urethritis, . . . pelvic inflammatory disease, . . . syphilis . . . .\textsuperscript{37} Note how HIV is absent from section 384.24(1), as HIV is specifically referenced to in section 384.24(2).\textsuperscript{38} Section 384.24(2) is a provision that reads in a roughly identical manner to section 384.24(1) but explicitly relates to HIV:

(2) It is unlawful for any person who has human immunodeficiency virus infection, when such person knows he or she is infected with this disease and when such person has been informed that he or she may communicate this disease to another person through sexual intercourse, to have sexual intercourse with any other person, unless such other person has been informed of the presence of the sexually transmissible disease and has consented to the sexual intercourse.\textsuperscript{39}

The language above contains the following legal elements that constitute the unlawful act described: (1) a person with HIV, (2) who has been informed of the possibility of communicating the disease to another through intercourse, (3) who has sexual intercourse with another, (4) without disclosing the HIV-positive status to the other, and (5) without obtaining consent of the other thereof, violates section 384.24(2) of the Florida Statutes.\textsuperscript{40}

Roughly stated, the list above consists of the legal elements required for the criminal transmission of HIV in Florida.\textsuperscript{41} Note how this is a general intent law, as the specific intent to commit the crime is absent.\textsuperscript{42} It is not

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  \item \textsuperscript{34} See infra Sections I.A, II.D.
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required under Florida law that a person charged with violating section 384.24 have a specific intent to transmit the virus.43

This provision has gone through a legal evolution.44 As noted in the introduction to this Comment, HIV was introduced to the criminal code in 1986.45 It followed a basic structure until it was amended in 1997.46 Until the 1997 amendment, the statute read as follows:

It is unlawful for any person who has chancroid, gonorrhea, granuloma inguinale, lymphogranuloma venerum, genital herpes simplex, chlamydia, nongonococcal urethritis ("NGU"), pelvic inflammatory disease ("PID") or acute salpingitis, syphilis, or human immune deficiency virus infection, when such person knows he or she is infected with one or more of these diseases and when such person has been informed that he or she may communicate this disease to another person through sexual intercourse, to have sexual intercourse with any other person, unless such other person has been informed of the presence of the sexually transmissible disease and has consented to the sexual intercourse.47

As can be noted from the language above, the provision once consisted of only one part.48 Section 384.24 of the Florida Statutes treated all sexually transmissible diseases equally in one category, for purposes of the unlawful act described.49 It was not until 1997, sixteen years after the start of the HIV epidemic, that the Florida Legislature decided to amend the law to read in the fashion that it does today with a separate category for HIV.50 For sixteen years, HIV was treated in parity with the other sexually transmissible diseases mentioned in the provision.51 Up until 1997, the Florida Legislature treated HIV as no more of an evil than genital herpes simplex or chlamydia.52 What this means is that during the most obscure years of the epidemic—in terms of our understanding of the condition—HIV had not been as severely criminalized as it suddenly became in 1997.53

B. Section 384.34 of the Florida Statutes: The Penalties Provision

The changes enacted in section 384.24 of the Florida Statutes were made along with changes to the respective penalties provisions in section 384.34, effectively targeting HIV transmission as somehow more reprehensible than the transmission of any other sexually transmissible disease.54 Up until the 1997 amendment, this statutory provision referred to the transmission of any of the sexually transmissible diseases listed in section 384.24 of the Florida Statutes as a misdemeanor of the first degree.55 When the provision was amended in 1997, it was changed to read as follows: "(1) [a]ny person who violates the provisions of [section] 384.24(1) commits a misdemeanor of the first degree . . . and (5) [a]ny person who violates the provisions of [section] 384.24(2) commits a felony of the third degree . . . ."56

The transmission of HIV suddenly turned into a third-degree felony, as opposed to a first-degree misdemeanor.57 In 1998, the provision became even more punitive, reading: "(5) [a]ny person who violates . . . [section] 384.24(2) commits a felony of the third degree . . . ." and "[a]ny person who commits multiple violations of . . . [section] 384.24(2) commits a felony of the first degree . . . ."58 Therefore, multiple violations of section 384.24(2) of the Florida Statutes can now result in convictions of first-degree felonies for PLWHA within Florida.59 The state has become increasingly punitive towards PLWHA throughout the lifespan of the HIV/AIDS epidemic.60

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43. See FLA. STAT. § 384.24(2) (2015); infra Section IV.A.2.a (discussing the absence of specific intent for the criminal transmission of HIV in Florida).
45. See FLA. STAT. § 384.24 (Supp. 1986); supra Part I.
47. See FLA. STAT. § 384.24 (1995); see also FLA. STAT. § 384.24 (1997).
49. See id.
transmission of HIV is not required in order for PLWHA to commit the criminal transmission of HIV.\(^{21}\)

III. ON A MODERN UNDERSTANDING OF HIV

A. A History of Stigmatization

1. Phobia of Minorities

HIV/AIDS is a disease that emerged with a substantial amount of stigmatization.\(^{72}\) The first cases of the disease, when people knew the least about its etiology, made it seem as if the disease were contained exclusively within the gay male population.\(^{73}\) First, the disease was known as Gay Cancer—then, as Gay-Related Immunodeficiency (“GRID”) or simply as “[G]ay [C]ompromise [S]yndrome.”\(^{74}\)

The stigma attributed to the disease is evident from the news sources and case law of the day.\(^{75}\) A New York Times article titled New Homosexual Disorder Worries Health Officials stated that researchers called the disease “A.I.D., for acquired immunodeficiency disease, or GRID, for [G]ay-[R]elated [I]mmunodeficiency.”\(^{76}\) The report further emphasized a connection between GRID and gay males:

[Immunological tests have led some Federal health officials to fear that tens of thousands of homosexual men may have the acquired immune dysfunction and be at risk for developing complications such as Kaposi’s cancer, infections and other disorders at some future date. GRID is “a matter of urgent public health and scientific importance,” Dr. James W. Curran, a Federal

\(^{21}\) Id. § 775.0877(5).

\(^{71}\) See Lawrence K. Altman, New Homosexual Disorder Worries Health Officials, N.Y. TIMES, May 11, 1982, at C1 [hereinafter Altman, New Homosexual Disorder Worries Health Officials].

\(^{72}\) See id.; George A. Oswald et al., Attempted Immune Stimulation in the “Gay Compromise Syndrome”, 285 BRT. MED. J. 1082, 1082 (1982); Pneumocystis Pneumonia—Los Angeles, supra note 2, at 250 (reporting on first known AIDS cases in the United States among young gay men in Los Angeles).

\(^{73}\) Id. § 775.0877(5).

\(^{74}\) See Altman, New Homosexual Disorder Worries Health Officials, supra note 72; Oswald et al., supra note 73.

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It was not until that same year, in 1982, that the CDC began to use the term AIDS to describe the disease, as is evidenced by the language in the MMWR updates. The MMWR also began to detail a considerable number of cases in population groups other than MSM, such as Haitians, intravenous drug users, and hemophiliacs. It also recognized known cases found in women and the heterosexual community at large.

However, despite the recognition in 1982 that HIV/AIDS was a disease that affected all population groups, the negative stigma remained. Some of the stigma associated with HIV/AIDS is a byproduct of mere statistics, as infections for MSM have consistently been reported high relative to other population groups to the present day—making MSM an easy target for discrimination; likewise, much stigma comes from the fact that traditionally marginalized minorities, such as African-Americans and Hispanics/Latinos, have since experienced a disproportionate increase in infection rates in comparison to the general population.

Homophobia can be easily perceived in the news articles circling the media during the 1980s–1990s. For example, in the same New York Times article referenced above, the following was stated as a fact: “After testing for more than 130 potential risk factors, they found that the median number of lifetime male sexual partners for affected homosexual men was 1,160, compared to 524 for male homosexual men who did not have the syndrome.” This suggests that MSM with HIV/AIDS are somehow at least twice as promiscuous as MSM without HIV/AIDS. Even if it were true that HIV-positive MSM are somehow more promiscuous than HIV-negative MSM—whether it is 1160 sexual partners or 524 sexual partners—both of these estimates are exorbitant numbers for either the average homosexual or the average heterosexual member of society.

More accurate numbers can be found in a study utilizing data compiled by the CDC, estimating the mean number of sexual partners for MSM from 2006–2010—for twelve-month periods—was about 2.3, significantly lower than 2.9, the average number of sexual partners reported in 2002 alone. At the average rate, it is unlikely that the average number of lifetime sexual partners of MSM could possibly be 524—much less 1160—as reported in the New York Times in 1982. In fact, the average number of sexual partners for MSM in a twelve-month period was found to be no greater than that of heterosexual males.

Homophobia as linked to HIV/AIDS has also permeated modern case law. Cooper v. State exemplifies homophobia enshrined within the judiciary, as evidenced by the language in the opinion, stating: “Because of his life-style, Cooper knew or should have known that he had been exposed to HIV/AIDS.”

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78. Id.

79. Id.

80. Id.

81. See id.; Provisional Public Health Service Inter-Agency Recommendations, supra note 12, at 1; Altman, New Homosexual Disorder Worries Health Officials, supra note 72 (suggesting HIV/AIDS is a gay-related disease while utilizing exaggerated statistics to inflate the perceived promiscuity of gay males).

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86. See id.

87. See id. In line with CDC statistics, the average number of sexual partners for heterosexual men and for MSM is not very different. See Anjani Chandra et al., Sexual Behavior, Sexual Attraction, and Sexual Identity in the United States: Data from the 2006–2008 National Survey of Family Growth, NAT'L HEALTH STAT. REP., no. 36, Mar. 3, 2011, at 1, 18, 20 (showing the average amount of sexual partners for heterosexuals in a twelve-month period, among other statistics pertaining to sexual conduct); Jami S. Leichliter et al., Temporal Trends in Sexual Behavior Among Men Who Have Sex with Men in the United States, 2002 to 2006–2010, 63 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES 254, 255 (2013) (showing the average amount of sexual partners for MSM in a twelve-month period—utilizing CDC data—finding no statistical difference between the average amount of sexual partners for MSM and heterosexual males); Today's HIV/AIDS Epidemic, supra note 82.

88. Leichliter et al., supra note 87, at 255.

89. See id.; Altman, New Homosexual Disorder Worries Health Officials, supra note 72. At the average rate, supposing 2.3 sexual partners every year for eighty years, which is a rather exaggerated and unrealistic proposition, the amount of sexual partners of such a highly active sexually male would be: 2.3 × 80 = 184. See Leichliter et al., supra note 87, at 255. Even if utilizing the most exaggerated estimates, conceiving of average amount of MSM to have from 524 to 1160 sexual partners in a lifetime would be an over-exaggeration. See id. (finding no statistical difference in the average amount of sexual partners between heterosexual males and MSM within a twelve-month period).

90. See Leichliter et al., supra note 87, at 255.

91. See Angela Perone, From Punitive to Proactive: An Alternative Approach for Responding to HIV Criminalization that Departs from Penalizing Marginalized Communities, 24 HASTINGS WOMEN'S L.J. 363, 379–83 (2013) (discussing case law stigmatizing minorities living with HIV, including a discussion of the Cooper case introduced infra note 92).

92. 539 So. 2d 508 (Fia. 1st Dist. Ct. App. 1989).
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However, despite the recognition in 1982 that HIV/AIDS was a disease that affected all population groups, the negative stigma remained. 81 Some of the stigma associated with HIV/AIDS is a biproduct of mere statistics, as infections for MSM have consistently been reported high relative to other population groups to the present day—making MSM an easy target for discrimination; 82 likewise, much stigma comes from the fact that traditionally marginalized minorities, such as African-Americans and Hispanics/Latinos, have since experienced a disproportionate increase in infection rates in comparison to the general population. 83

Homophobia can be easily perceived in the news articles circulating the media during the 1980s–1990s. 84 For example, in the same New York Times article referenced above, the following was stated as a fact: "After testing for more than 130 potential risk factors, they found that the median number of lifetime male sexual partners for affected homosexual men was 1,160, compared to 524 for male homosexual men who did not have the syndrome." 85 This suggests that MSM with HIV/AIDS are somehow at least twice as promiscuous as MSM without HIV/AIDS. 86 Even if it were true that HIV-positive MSM are somehow more promiscuous than HIV-negative MSM—whether it is 1160 sexual partners or 524 sexual partners—both of these estimates are exorbitant numbers for either the average homosexual or the average heterosexual member of society. 87

More accurate numbers can be found in a study utilizing data compiled by the CDC, estimating the number of sexual partners for MSM from 2006–2010—for twelve-month periods—was about 2.3, significantly lower than 2.9, the average number of sexual partners reported in 2002 alone. 88 At the average rate, it is unlikely that the average number of lifetime sexual partners of MSM could possibly be 524—much less 1160—as reported in the New York Times in 1982. 89 In fact, the average number of sexual partners for MSM in a twelve-month period was found to be no greater than that of heterosexual males. 90

Homophobia as linked to HIV/AIDS has also permeated modern case law. 91 Cooper v. State 92 exemplifies homophobia enshrined within the judiciary, as evidenced by the language in the opinion, stating: "Because of his life-style, Cooper knew or should have known that he had been exposed

77. Id.
79. Id.
80. Id.
81. See id.; Provisional Public Health Service Inter-Agency Recommendations, supra note 12, at 1; Altman, New Homosexual Disorder Worries Health Officials, supra note 72 (suggesting HIV/AIDS is a gay-related disease while utilizing exaggerated statistics to inflate the perceived promiscuity of gay males).
83. See id. The CDC notes that African-Americans constituted forty-four percent of all new HIV infections in 2010, while Hispanics/Latinos constituted twenty-one percent of all new HIV infections in 2010. Id.
84. See Altman, New Homosexual Disorder Worries Health Officials, supra note 72.
85. Id.
86. See id.
87. See id. In line with CDC statistics, the average number of sexual partners for heterosexual men and for MSM is not very different. See Anjani Chandra et al., Sexual Behavior, Sexual Attraction, and Sexual Identity in the United States: Data from the 2006–2008 National Survey of Family Growth, NAT'L HEALTH STAT. REP., no. 36, Mar. 3, 2011, at 1, 18, 20 (showing the average amount of sexual partners for heterosexuals in a twelve-month period; among other statistics pertaining to sexual conduct); Jamil S. Leichliter et al., Temporal Trends in Sexual Behavior Among Men Who Have Sex with Men in the United States, 2002 to 2006–2010, 63 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES 254, 255 (2013) (showing the average amount of sexual partners for MSM in a twelve-month period—utilizing CDC data—finding no statistical difference between the amount of sexual partners for MSM and heterosexual males); Today's HIV/AIDS Epidemic, supra note 82.
88. Leichliter et al., supra note 87, at 255.
89. See id.; Altman, New Homosexual Disorder Worries Health Officials, supra note 72. At the average rate, supposing 2.3 sexual partners every year for eighty years, which is a rather exaggerated and unrealistic proposition, the amount of sexual partners of such a highly active sexually male would be 2.3 $\times$ 80 = 184. See Leichliter et al., supra note 87, at 255. Even if utilizing the most exaggerated estimates, conceiving of average MSM to have from 524 to 1160 sexual partners in a lifetime would be an over-exaggeration. See id. (finding no statistical difference in the average amount of sexual partners between heterosexual males and MSM within a twelve-month period).
90. See Leichliter et al., supra note 87, at 255.
91. See Angela Perone, From Punitive to Proactive: An Alternative Approach for Responding to HIV Criminalization that Departs from Penalizing Marginalized Communities, 24 HASTINGS WOMEN'S L.J. 363, 379–83 (2013) (discussing case law stigmatizing minorities living with HIV, including a discussion of the Cooper case introduced infra note 92).
92. 539 So. 2d 508 (Fla. 1st Dist. Ct. App. 1989).
to the AIDS virus .... "93 The defendant's sentence for sexual battery, solicitation, and aggravated battery was enhanced beyond the sentencing guideline recommendations because he tested positive for HIV prior to sentencing.94

This case was decided without the application of any of the Florida provisions aforementioned in Part II.95 As evidenced by the language in the decision, it was because of the stigma associated with his homosexual lifestyle that the defendant either knew or should have known of his HIV-positive status.96 Even the dissent, when pointing to the language of the lower court, cannot alienate itself from the stigma inherent in the language, when quoting: "[T]his defendant, having been an admitted homosexual for years, knew or should have known the likelihood of his having AIDS as a result of these homosexual contacts ...." 97 Certainly, at least in this case, having an HIV-positive diagnosis served as an aggravating circumstance within the confines of the court, so much so that the court stepped out of the bounds of its sentencing guidelines 98.

2. Fear of Infection

The cause behind the stigma associated with HIV/AIDS is a complex sociological phenomenon that cannot simply be explained out of a dislike of minorities.99 It also stems from other factors, such as from an irrational fear of infection, for example—a fear that is exaggerated in the collective mind—as the actual probability of getting infected with HIV is less than one in fifty for condomless receptive anal intercourse from an HIV-positive insertive partner, which is the riskiest of all sexual activities in terms of HIV transmission; a probability which decreases to one in two thousand when the roles are reversed, and the HIV-positive partner is the receptive one.100 For vaginal sex, the risk is one in one thousand for male-to-female transmission, and one in two thousand for female-to-male transmission.101 Intravenous drug users, while constituting a far smaller proportion of the population than those engaged in an active sexual lifestyle, constitute a sizable proportion of new HIV transmissions and have the highest risk of HIV transmission amongst all subgroups.102 Although it is true that just one sexual encounter has the potential to transmit HIV from one person to another, and the engagement in risky sexual behaviors is fully discouraged by this Comment, the low transmission rates amongst HIV-negative people engaged in risky sexual activities with PLWHAs—without the utilization of any means of protection—suggests that the risk of HIV transmission has become irrationally exaggerated in the collective mind.103

Only an irrational fear of infection can explain why in 1984, a young boy by the name of Ryan White was expelled from school.104 The boy suffered from AIDS after acquisition of HIV from a blood transfusion.105 His family fought a long battle to keep him in school so that he may attend classes along with other children his age.106 Expressions of disgust can be appreciated in what a classmate had to say when he was readmitted into school.107 A girl by the name of Sabrina Johnson said the following regarding his re-admittance: "[We have] fought it and fought it, and [it is] over now...As long as he keeps his distance, [he is okay]."108

Ryan White was not the only child afflicted by HIV/AIDS against whom society cruelly turned.109 In fact, the State of Florida made headlines in 1987, when the home of a family of three children afflicted by the disease was burned down following a court order mandating the integration of the children into the DeSoto County School System.110 All three children were hemophiliacs.111

The case that ended in the order to reintegrate the children is Ray v. School District of DeSoto County.112 It was acknowledged by the court (1)

93. Id. at 511 (exemplifying the homophobic language of the court).
94. Id. at 509. Note that the defendant tested positive for HIV prior to sentencing, therefore no previous knowledge of an HIV-positive diagnosis existed as required by Florida law for the criminal transmission of HIV. Id. at 511. In fact, the defendant's knowledge was construed from his active homosexual lifestyle—which is what is shocking about this particular case. Id.
95. See supra Part II.
96. Cooper, 539 So. 2d at 511.
97. Id. at 512 (Shivers, J., dissenting).
98. See id. at 511.
101. Id. at 1410.
103. See Newman, supra note 100, at 1409–10.
105. Id.
106. Id.
107. Id.
108. Id.
109. 14-Year-Old Boy with AIDS Attends School After 2 Years, supra note 104.
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that all three children were hemophiliacs; (2) that all three children came into contact with HIV through the Factor VIII clotting agent; (3) that the Ray family voluntarily decided to disclose the HIV status of the children, at which time they were removed from school; and (4) that the school board subsequently denied enrollment to Richard, Robert, and Randy Ray. The court depicts the science behind HIV in 1987 quite accurately, stating that: "A full-blown case of AIDS is believed by the medical community to be 'incurable and almost inevitably fatal.' As stated by Surgeon General C. Everett Koop, M.D., Sc.D., in an interview on July 31, 1987, this is the real thing." The court goes on to compare the HIV epidemic to a polio outbreak of forty-five years prior, which caused a panic in the community. But the court goes on to note that despite the memories, "[t]he court must take medical science as it now finds it." The medical science summarized by the court recognized the following: (1) that the CDC reported its first cases of AIDS in 1981; (2) that AIDS was caused by an infection of HIV; (3) that HIV weakens the immune system; (4) that there was no cure for HIV and that finding one would be complex; (5) that casual contact with people infected with HIV was found not to lead to infection in others; and (6) that in one study, none of the closest casual contacts of hemophiliac subjects had contracted HIV.

A preliminary injunction was issued against the DeSoto County School Board. The concern and fear of the parents, although real, was not substantiated by science. The harm that the Ray children could pose to the public was merely theoretical, and the irreparable injury that would be done by the children by depriving them of their education outweighed any theoretical harm that they could possibly pose to society by attending school. Because of this victory in court, the Ray family home was burned, and they subsequently relocated out of South Florida.

Perhaps it is an irrational fear of infection that drives society to reject those with HIV/AIDS time and again. But an irrational fear of infection, just as are homophobia, racism, and any other fear that is unsubstantiated by science—should have no place within our legal system. The Florida Legislature should rethink its laws by scrutinizing the current science behind HIV, just as Judge Elizabeth A. Kovachевич of the Middle District of Florida reasoned through the facts presented in the Ray decision. The Florida Legislature should not allow for unsubstantiated fears to dictate the law of the land in Florida.

B. The Science Behind HIV/AIDS

1. AZT and the Need for Better Treatment

News that the Food and Drug Administration ("FDA") approved the first medication developed specifically to combat HIV infection reached the public on March 20, 1987. The drug developed was zidovudine, most commonly known as AZT. With AZT came grants by the Health Resources and Health Administration ("HRSA") to the individual states, with amounts in relation to the relative spread of the virus amongst their populations. New York, California, Texas, Florida, and New Jersey received the most money. The money was provided through the HRSA's AZT Drug Reimbursement Program, a precursor to the Ryan White CARE Act, introduced below.

The first medication approved for the treatment of HIV proved to be plagued with problems. AZT is known to cause severe life-threatening adverse effects on its users. Such adverse effects include an extensive list provided in the official description of the medication, including but not limited to "liver damage, blood toxicities, and muscle disorders," along with a general disclaimer that the list provided is not exhaustive of all side effects that may occur. In addition to the drastic side effects of AZT, the HIV virus was found to develop resistance to the medication, rendering it ineffective.
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113. See Ray, 666 F. Supp. at 1529; infra Section IV.A (suggesting changes to the law in order to repeal or amend provisions at odds with modern science).
114. See Ray, 666 F. Supp. at 1529–31; infra Sections III.B, IV.A.
115. See Newman, supra note 100, at 1406.
119. Id.; see also Ray, 666 F. Supp. at 1535–36.
ineffective. 134 Statistical studies found that while AZT was beneficial from about twelve to twenty-four months, during longer periods of time the effectiveness of AZT decreased until there was no statistically significant difference between groups taking AZT and groups taking a placebo. 135 These results indicated the need for a better combination of HIV medications for people living with the condition in order to prevent it from turning into full-blown AIDS. 136

Before delving into the scientific advances that have in connection to our understanding of HIV, it is only fair to acknowledge that many of the advances in medicine that have been made available to PLWHA throughout the years have reached them through the Ryan White CARE Act, enacted in 1990. 137 Ryan White, one of the boys mentioned in the preceding subsection who was expelled from school for being HIV-positive, died of AIDS-related complications just a few months before the Act that bears his name was enacted into law. 138 The federal Act provides financial assistance to people who otherwise could not pay for the HIV medications that they need to survive. 139 It is a payer of last resort that has been consistently funded throughout the years. 140

Thankfully, current medical advances behind HIV are very different from the ones presented in the Roy case. 141 Current pharmacological treatments give PLWHA more than just hope for a cure, they give them life. 142 Society must recognize that what was not possible for Ryan White in 1990 is possible today thanks to the advances in medicine that have come about in the last few decades. 143 If today’s medications had existed in 1990, Ryan White would likely be living today. 144

2. The Advent of Modern Treatment

In September 1995, The New York Times reported:

After years of recommending AZT as the first-line drug for treating the virus that causes AIDS, Federal health officials are considering a change because of surprising results with other drugs. Dr. Anthony S. Fauci, the director of the National Institute of Allergy and Infectious Diseases, said in an interview that he planned to convene a meeting where independent experts could decide whether AZT should remain the first choice. . . . The findings should lead scientists to focus on developing improved combinations of anti-HIV. drugs, Dr. Fauci said. For instance, recent studies have shown favorable results from a combination of AZT and a drug called 3TC. And with AIDS experts hailing the promise of a new class of drugs known as protease inhibitors, studies of different combinations may demonstrate substantially increased benefits, Dr. Fauci said. 145

Researchers found a new class of drugs that radically altered the course of the HIV/AIDS epidemic. 146 Today, there are six major classes of drugs used to treat HIV/AIDS—the antiretroviral drugs. 147 As scientists have learned, various drugs must be taken in conjunction because HIV is highly adaptive to the drugs used to combat its proliferation, and therefore, only a combination of various classes of drugs can effectively reduce the HIV viral load. 148 The combination must be of at least three drugs from a separate combination of at least two classes of drugs, which is termed antiretroviral therapy ("ART"). 149 ART greatly reduces the amount of HIV in the blood of PLWHA—often to levels so low that HIV cannot even be
ineffective.\textsuperscript{134} Statistical studies found that while AZT was beneficial from about twelve to twenty-four months, during longer periods of time the effectiveness of AZT decreased until there was no statistically significant difference between groups taking AZT and groups taking a placebo.\textsuperscript{135} These results indicated the need for a better combination of HIV medications for people living with the condition in order to prevent it from turning into full-blown AIDS.\textsuperscript{136}

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\item \textsuperscript{134} See Nat'l Inst. of Allergy & Infectious Diseases, AZT and AIDS, NIH.GOV, http://www.niaid.nih.gov/topics/HIVAIDS/Understanding/Treatment/Pages/AZT andAIDS.aspx (last updated Mar. 23, 2010); U.S. Nat'l Library of Med., supra note 131.
\item \textsuperscript{135} Nat'l Inst. Of Allergy & Infectious Diseases, supra note 134. Placebo is defined as a pill or substance that is given to a patient like a drug but that has no physical effect on the patient. See Placebo, MERRIAM-WEBSTER'S, COLLEGIATE DICTIONARY (11th ed. 2003).
\item \textsuperscript{136} See Lawrence K. Altman, Experts to Review AZT Role As the Chief Drug for H.I.V., N.Y. TIMES, Sept. 17, 1995, at 1-38 [hereinafter Altman, Experts to Review AZT Role As the Chief Drug for H.I.V.].
\item \textsuperscript{137} 42 U.S.C. § 300f (2012); see also infra Section III.B.2.
\item \textsuperscript{138} Who Was Ryan White?, supra note 130; see also supra Section III.A.2.
\item \textsuperscript{139} HRSA.GOV, http://hiv.hrsa.gov/about/services/aboutprogram.html (last visited Feb. 8, 2016).
\item \textsuperscript{140} See 42 U.S.C. § 300f, About the Ryan White HIV/AIDS Program, supra note 139.
\item \textsuperscript{141} See Ray v. Sch. Dist., 666 F. Supp. 1524, 1529 (M.D. Fla. 1987); About the Ryan White HIV/AIDS Program, supra note 139.
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\item \textsuperscript{146} See Types of HIV/AIDS Antiretroviral Drugs, NIH.GOV, http://www.niaid.nih.gov/topics/hivaids/understanding/treatment/Pages/artDrugClasses.aspx (last updated Sept. 23, 2013).
\item \textsuperscript{147} Id.
\item \textsuperscript{148} Id.
\item \textsuperscript{149} HIV Overview: FDA-Approved HIV Medicines, AIDSINFO, http://aidsinfo.nih.gov/education-materials/fact-sheets/21/58/fda-approved-hiv-medicines# (last updated May 4, 2015); Types of HIV/AIDS Antiretroviral Drugs, supra note 146.
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detected by standard highly-sensitive laboratory tests.\textsuperscript{150} Such a low viral count is known as an \textit{undetectable viral load}.\textsuperscript{151} Having an undetectable viral load has been found to reduce the transmission of HIV by up to ninety-six percent.\textsuperscript{152}

Several single drugs to be taken once a day have been approved by the FDA since 2006.\textsuperscript{153} An example of one such drug is Stribild, which was approved in 2012 and is a combination of a set of drugs itself.\textsuperscript{154} Patients may therefore now choose to take one pill, once a day, instead of several independent pills.\textsuperscript{155} Studies have found that such once-a-day pill regimens reduce the risk of missed dosages often accompanying complex multidrug regimens that require the administration of several pills over the course of a day.\textsuperscript{156} As more PLWHA adhere to their medication regimen, there is a reduction in the the HIV viral load on an individual level, which in turn reduces the HIV viral load in the community as a whole.\textsuperscript{157}

Another recent pharmacological development in the treatment of HIV is usage of the drug combination tenofovir-emtricitabine—most commonly referred to as Truvada—as an antiretroviral pre-exposure prophylaxis ("PrEP").\textsuperscript{158} PrEP is used as a pharmacotherapeutic agent to decrease HIV infection among uninfected persons.\textsuperscript{159} Such usage can help people in high-risk populations, such as MSM or others who are at an elevated risk of engaging in high-risk sexual activity such as persons in


\textsuperscript{151} Id.

\textsuperscript{152} HIV Treatment As Prevention, AVERT, http://www.avert.org/professionals/hiv-prevention-programming/treatment-as-prevention (last reviewed May 1, 2015).

\textsuperscript{153} See Andrew Pollack, New Medicine for AIDS Is One Pill, Once a Day, N.Y. TIMES, July 9, 2006 at 10.

\textsuperscript{154} Atripla was the first once-a-day pill approved by the FDA in 2006.

\textsuperscript{155} See Cynthia Brinson, Stribild, a Single Tablet Regimen for the Treatment of HIV Disease, 3 COMBINATION PRODUCTS THERAPY 1, 1 (2013).

\textsuperscript{156} See Brinson, supra note 153, at 1 (detailing the effectiveness of Stribild as a once-a-day pill regimen for PLWHA).

\textsuperscript{157} Id. at 500.


\textsuperscript{161} J.M. Baeten et al., Antiretroviral Prophylaxis for HIV Prevention in Heterosexual Men and Women, 367 NEW ENGL. J. MED. 399, 399 (2012).

\textsuperscript{162} Id. at 400.

\textsuperscript{163} Id. at 399.

\textsuperscript{164} Id.

\textsuperscript{165} Id. at 407.

\textsuperscript{166} Baeten et al., supra note 161, at 404.

\textsuperscript{167} Id.

\textsuperscript{168} Id.


detected by standard highly-sensitive laboratory tests. Such a low viral count is known as an undetectable viral load. Having an undetectable viral load has been found to reduce the transmission of HIV by up to ninety-six percent.

Several single drugs to be taken once a day have been approved by the FDA since 2006. An example of one such drug is Stribild, which was approved in 2012 and is a combination of a set of drugs itself. Patients may therefore now choose to take one pill, once a day, instead of several independent pills. Studies have found that such once-a-day pill regimens reduce the risk of missed dosages often accompanying complex multitudes of medication that require the administration of several pills over the course of a day. As more PLWHA adhere to their medication regimen, there is a reduction in the HIV viral load on an individual level, which in turn reduces the HIV viral load in the community as a whole.

Another recent pharmacological development in the treatment of HIV is the use of the drug combination tenofovir-emtricitabine—most commonly referred to as Truvada—as an antiretroviral pre-exposure prophylaxis ("PreP"). PreP is used as a pharmacotherapeutic agent to decrease HIV infection among uninfected persons. Such usage can help people in high-risk populations, such as MSM or others who are at an elevated risk of engaging in high-risk sexual activity such as persons in serodiscordant relationships, to protect themselves against HIV transmission.

A study conducted in the countries of Kenya and Uganda with 4758 couples revealed the effectiveness of this drug combination for the prevention of HIV transmission. The couples were members of serodiscordant relationships, where one partner was HIV-positive, and the other partner was HIV-negative. The couples were randomized into one of three groups. The first group was given tenofovir by itself, the second group a combination of tenofovir-emtricitabine, and the remaining group was given a placebo. Tenofovir-emtricitabine, the combination found within Truvada, proved effective in the prevention of HIV transmission. In women, results suggest the efficacy of preventing HIV transmission to be 71% for tenofovir and 66% for tenofovir-emtricitabine when compared directly to the placebo. Among men, the results were similar, with the efficacy of tenofovir as opposed to tenofovir-emtricitabine at 63% and 84%, respectively. The discrepancy between the use of a single drug and the use of a combination of the two drugs proved to be negligible, but the use of these drugs as an antiretroviral PreP proved effective. Another study conducted in various countries suggests that MSM who inconsistently take Truvada as PreP may reduce their risk of contracting HIV by 44% while the risk of contracting HIV for MSM who take Truvada consistently is reduced by 92%.

It should be noted that all of these drugs, regardless of how effective or advanced they are in their ability to prevent HIV transmission—can still cause serious side effects. However, to put the effectiveness of the drugs in perspective, a recent study conducted in the United Kingdom with a

151. Id.
154. See Brinison, *supra* note 153, at 1 (detailing the effectiveness of Stribild as a once-a-day pill regimen for PLWHA). See id.
156. Id. at 300.
157. See *Id.*
159. Pre-Exposure Prophylaxis (PreP), AIDS.GOV, http://www.aids.gov/hiv-aids-basics/prevention/reduce-your-risk/pre-exposure-prophylaxis/index.html (last revised Mar. 24, 2015). AIDS.GOV defines PreP succinctly as "Pre-Exposure Prophylaxis." Id. The word prophylaxis means, "to prevent or control the spread of an infection or disease." Id. "PreP is a way for people who [do not] have HIV to prevent HIV infection by taking a pill every day." Id.
large sample of more than twenty-thousand individuals living with HIV, estimates the life expectancy of men diagnosed with HIV at the ages of twenty, thirty-five, and fifty—at sixty-eight, seventy-three, and seventy-seven, respectively. This was compared to HIV-negative men in the general population, whose life expectancy at the ages of twenty, thirty-five, and fifty were estimated to be seventy-seven, seventy-eight, and seventy-nine, respectively. For HIV-positive women, the figures are similar, with minimal variation from the general population. This is a truly novel development considering that an HIV-positive diagnosis had been widely regarded as a death sentence.

Consistent condom use can reduce HIV transmission by 80% to 90%. ART has been found to reduce HIV transmission by up to 96% through its ability to achieve an undetectable viral load, and Truvada has been found to be 92% effective against the transmission of HIV. Drugs may also be taken immediately after exposure to HIV for preventing infection, which can happen in medical settings or due to other causes such as rape. This is known as post-exposure prophylaxis ("PEP"), and it has been shown to be so effective that less than one in one hundred medical professionals have acquired HIV in this way after exposure to the virus. Medical advances have also aided in reducing the risk of transmission of HIV from mother to child during and immediately following a pregnancy. Current medical advances are no longer those of the 1990s that failed to save the life of Ryan White, nor are they part of the science of 1997 when Florida amended its statutes to make HIV transmission a felony. The medical advances of today have greatly expanded our understanding on the mechanisms behind HIV/AIDS, on proven methods to reduce HIV transmission, and on pharmacological advances effective at improving the quantity and quality of life of those infected with HIV.

IV. RECOMMENDATIONS: ON CRIMES AND ON AN ALTERNATIVE TO A PUNITIVE STATE

In the United States, there are a number of jurisdictions that criminalize the transmission of HIV by statute. The number of states with HIV-specific criminal laws fluctuates, but it is consistently reported to be slightly above thirty. The Florida Statutes are very punitive in relation to the transmission of HIV. Section 384.34 makes the criminal transmission of HIV a third-degree felony, and when involving multiple acts, the statute attributes to the criminal transmission of HIV status as a first-degree felony. Florida was the first state in the country to criminalize the transmission of HIV amid widespread fears of infection following media reports that an HIV-positive woman had been working as a prostitute. Furthermore, the irrational fears of HIV infection acquired from negative press were a driving force behind the revisions and Florida’s subsequent adoption of the 1997 amendments to sections 384.24 and 384.34 of the Florida Statutes, which effectively segregated HIV from other sexually transmissible diseases and enhanced its penalties provision from a misdemeanor to a felony.

President Reagan was not the swiftest in addressing the HIV/AIDS epidemic and has been widely criticized for waiting too long to recognize the existence of an epidemic. In fact, it was not until 1987, six years after the

172. Id.
173. Id.
174. See supra Section III.A.
176. See HIV Treatment as Prevention, supra note 152; Viral Load, supra note 150.
177. See Grant et al., supra note 169, at 2590.
179. Id.
181. See Fla. Stat. § 384.34 (1997); supra Parts II–III.

182. See supra Part III.
183. VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS, supra note 22, at 2 (containing a comprehensive list of all HIV-specific criminal laws in the nation).
184. See Lehman et al., supra note 20, at 1000 (depicting patterns in the adoption of such HIV-specific criminal laws throughout the country).
185. See generally Fla. Stat. (2015). See VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS, supra note 22, at 39–45 (discussing at length the way in which HIV-specific criminal provisions have been used in Florida to prosecute PLWHA).
187. Buchanan, supra note 34, at 1299.
188. Id. at 1299–1300 (pointing out that the Florida legislature cited infamous HIV-transmission cases in making HIV-transmission a class I felony); see also Fla. Stat. §§ 384.24, .34(5) (1997).
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President Reagan was not the swiftest in addressing the HIV/AIDS epidemic and has been widely criticized for waiting too long to recognize the existence of an epidemic. In fact, it was not until 1987, six years after the
beginning of the epidemic, that President Reagan initiated the Presidential Commission on the Human Immunodeficiency Virus Epidemic.\textsuperscript{190} What resulted was a report from the Commission that called for, amongst many other recommendations, an end to the transmission of the disease through the utilization of the criminal justice system.\textsuperscript{191} The creation of new criminal provisions to combat HIV were encouraged, as traditional criminal laws such as assault were deemed too lenient by the commission.\textsuperscript{192} Recommendation 96–47 encourages the following:

Adoption by the states of a criminal statute—directed to those HIV-infected individuals who know of their status and engage in behaviors which they know are, according to scientific research, likely to result in transmission of HIV—clearly setting forth those specific behaviors subject to criminal sanctions. With regard to sexual transmission, the statute should impose on HIV-infected individuals who know of their status specific affirmative duties to disclose their condition to sexual partners, to obtain their partners’ knowing consent, and to use precautions, punishing only for failure to comply with these affirmative duties.\textsuperscript{193}

The above language is eerily similar to Florida’s chief criminal transmission provision in spirit and purpose.\textsuperscript{194} It is also proper to note here, just as it was noted in Part III above, that the Ryan White CARE Act has had an effect on this area of the law.\textsuperscript{195} When the Ryan White CARE Act was enacted, a temporary provision was incorporated that called for every state to certify that its criminal laws were “adequate to prosecute any HIV infected individual” who knowingly exposed another to HIV.\textsuperscript{196} Although many states had already passed HIV-specific criminal laws, many other states that had not adopted such provisions passed them after 1990.\textsuperscript{197} Within this atmosphere encouraging the criminalization of HIV transmission by the Federal Government, it would be unfair to wholly blame Florida for the draconian changes it made to its HIV-specific laws in 1997, abruptly segregating HIV from other sexually transmissible diseases, and drastically enhancing criminal penalties for PLWHA.\textsuperscript{198} Since then, the national atmosphere has experienced a drastic change and as noted in the introduction to this Comment, the stance of the Federal Government is now reversed with the National HIV/AIDS Strategy.\textsuperscript{199} A national effort has been launched that is inclusive of the desire to see the criminal laws of the past revised updated to match with modern science.\textsuperscript{200}

There are various prominent organizations that have taken a stance against the prosecution of the criminal transmission of HIV.\textsuperscript{201} Of particular importance are the American Medical Association (“AMA”) and the Association of Nurses in AIDS Care (“ANAC”).\textsuperscript{202} The stance of such organizations is important because they are professional associations composed of leaders within the healthcare industry who are charged with providing adequate medical care to those suffering from HIV/AIDS and are therefore uniquely situated to opine about HIV/AIDS in relation to public health issues.\textsuperscript{203} The AMA recently amended its policy H-20.914 to read as follows, with changes denoted in italics:

\begin{quote}
\textit{197. See Lehman et al., supra note 20, at 1000 (depicting patterns in the adoption of HIV-specific criminal laws throughout the country).}
\textit{198. See FLA. STAT. §§ 384.24(2), 34(5) (1997).}
\textit{199. See Lehman et al., supra note 20, at 998 (noting the change in the stance of the national government from the time of the passage of the Ryan White CARE Act to the present National HIV/AIDS Strategy); The White House, supra note 24, at 37 (encouraging legislatures, under recommendation 3.3, to revisit HIV-specific criminal laws and ensure that they are up to date with current scientific knowledge in methods of transmission).}
\textit{200. The White House, supra note 24, at 6 (encouraging modern HIV-specific criminal laws to be “scientifically based, and that prosecutors and others in law enforcement have an accurate understanding of transmission risks”).}
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Discrimination and Criminalization Based on HIV Seropositivity. Our AMA: (1) Remains cognizant of and concerned about society’s perception of, and discrimination against, HIV-positive people; (2) Condemns any act and opposes any legislation of categorical discrimination based on an individual’s actual or imagined disease, including HIV infection; this includes [c]ongressional mandates calling for the discharge of otherwise qualified individuals from the armed services solely because of their HIV seropositivity; (3) Encourages vigorous enforcement of existing antidiscrimination statutes, incorporation of HIV in future federal legislation that addresses discrimination, and enactment and enforcement of state and local laws, ordinances, and regulations to penalize those who illegally discriminate against persons based on disease; and (4) Encourages medical staff to work closely with hospital administration and governing bodies to establish appropriate policies regarding HIV-positive patients; and (5) Supports consistency of federal and state criminal laws with current medical and scientific knowledge and accepted human rights-based approaches to disease control and prevention, including avoidance of any imposition of unwarranted punishment based on health and disability status; and (6) Encourages public education and understanding of the stigma created by HIV criminalization statutes and subsequent negative clinical and public health consequences.204

The above public health policy statement is important because it demonstrates that the AMA supports the premises of this Comment.205 Points (5) and (6) stand in support of the following subsection, calling for criminal laws to be updated in relation to medical scientific advances and encouraging an understanding of the negative social implications of such laws on persons living with this condition.206 The ANAC’s policy, while more extensive in detail than the AMA’s, mirrors the AMA’s in all points (5) and (6) yet offers another main objective: “[T]he [r]epeal of punitive laws that single out HIV infection or any other communicable disease and that include inappropriate or enhanced penalties for alleged nondisclosure, exposure, and transmission.”207 This is squarely in accordance with the following section, calling for the repeal of unjust provisions that enhance penalties for people living with HIV.208 The ANAC’s policy also contains

204. See Medical Student Section Resolution 8, supra note 201.
205. See id.
206. Id.; see also infra Section IV.A.
207. Position Statement, supra note 201; see also Medical Student Section Resolution 8, supra note 201.
208. See Elliot, supra note 201, at 5; infra Section IV.A.

the following language about HIV-specific criminal laws which directly supports the arguments presented in the following subsections, stating:

These laws are based on outdated and erroneous information about HIV risk and transmission and further promote misinformation that contributes to stigma and discrimination. These criminal laws contradict public health messages regarding individual responsibility for safer sex, do not alter behavior, can create a disincentive for seeking HIV testing, and potentially alienate patients from health care providers. These laws disregard current knowledge about treatment efficacy, including significantly reduced transmission potential when a person living with HIV has an undetectable HIV viral load.209

Expanding on the message promulgated by the AMA and the ANAC through their official stances on these issues, section A below touches upon the harm that HIV-specific criminal laws pose on the public health system and proposes alternatives for either repealing or reforming these provisions within Florida.210 Section B, on the other hand, focuses on finding an alternate pathway to a punitive state through the proposal of a proactive model to better address and combat the transmission of HIV.211

A. On Crimes

The purpose behind the criminal laws targeting HIV transmission must be evaluated.212 The Joint United Nations Programme on HIV/AIDS (“UNAIDS”) points out that the main purpose of HIV-specific criminal laws must be to prevent HIV transmission.213 This report provides a detailed analysis of how such laws fail to meet traditional criminal law objectives, which will typically include either: (1) incapacitation, (2) rehabilitation, (3) retribution, or (4) deterrence.214

HIV-specific criminal laws do not serve any of the criminal law objectives mentioned above.215 UNAIDS points out that, in terms of incapacitation, prisons and jails are just another venue for the transmission of HIV.216 A prisoner is not truly incapacitated from stopping infection

209. Position Statement, supra note 201.
210. See infra Section IV.A.
211. See infra Section IV.B.
212. Elliot, supra note 201, at 5 (questioning the policy behind HIV-specific criminal laws).
213. Id. at 15.
214. Id. at 20–22.
215. See id.
216. See id. at 20.
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amongst the population, but instead a prisoner will likely engage in risky sexual practices while incarcerated.217 As a matter of fact, when a prisoner and those who had sexual contact with him are released, more people are now at risk of HIV transmission.218

Just as with incapacitation, the goal of rehabilitation will not serve its purpose.219 Complex human drives, such as a person’s desire to engage in sexual activities, are not altered through imprisonment.220 Risky sexual behaviors can be better addressed through counseling and proactive measures rather than through criminal punishment.221 No data has shown that people who are incarcerated pursuant to HIV-specific criminal laws change their behavior following such incarceration.222

Retribution is also not an adequate justification for incarcerating someone for HIV transmission, particularly where there is an absence of a guilty mind as part of the mens rea component required of the defendant.223 This point is particularly important because the law in Florida does not require the specific intent to transmit HIV—which casts doubt over any attempt to seek retribution for acts that do not entail such guilty mind.224 Likewise, deterrence as a goal is not a good way to prevent transmission of HIV, as sexual acts are not driven so much by reason but rather by many other complex emotional drives that deterrence cannot destroy.225 For deterrence to be effective, reasoning and logic must be the driver behind the decision not to engage in the prohibited act.226 The criminal prosecution of HIV transmission is elusive as to its utility in a philosophical sense—and yet its ability to have a tangible negative effect on

217. See Elliot, supra note 201, at 20.
218. See id.
219. See id.
220. Id.
221. Id.
222. Elliot, supra note 201, at 20.
223. Id. at 20–21. Mens rea is defined as:

The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime. . . . Mens rea is the second of two essential elements of every crime at common law, the other being the actus reus. Under the Model Penal Code, the required levels of mens rea—expressed by the adverbs purposely, knowingly, recklessly, and negligently—are termed culpability requirements. Also termed mental element; criminal intent; guilty mind.

Mens Rea, BLACK'S LAW DICTIONARY (10th ed. 2014).

224. See Fla. STAT. § 384.24 (2015); Elliot, supra note 201, at 21; infra Section IV.A.2.a (discussing the need for specific intent within Florida’s HIV-specific criminal provisions).
225. See Elliot, supra note 201, at 21.
226. See id.

2016] ON AN ALTERNATIVE TO A PUNITIVE STATE

PLWHA is quite real, as it leaves behind lasting psychological and physiological repercussions.227

The stance of the United Nations on the criminalization of HIV transmission is clear; as an institution, it opposes it.228 UNAIDS points out that criminalization of HIV transmission undermines public health initiatives.229 Noted in UNAIDS’s policy statement are a number of powerful statements related to HIV-specific criminal laws and their threat to the public health, including the following: (1) when a prosecution of HIV is depicted through media sources, real people perceive HIV carriers as threats to the general public; (2) erroneous ideas about how HIV is contracted are therefore spread, stigmatizing stigma, fear and discrimination—as many statutes criminalize the transmission of HIV through means that could not possibly transmit the virus, such as through saliva; (3) the criminal laws serve as a disincentive for PLWHA to seek HIV-related counseling, testing, treatment and support because of the negative consequences that they believe that may arise from seeking help—such as believing that they will be prosecuted, or that their private information will be divulged to others; (4) criminal laws undermine the efforts of social workers and counselors to promote confidence between PLWHA and themselves, because their confidence may be subject to judicial orders to testify against the very same PLWHA that they seek to aid; and (5) HIV-specific criminal statutes undermine public health initiatives by providing the public with a false sense of security, as HIV-negative people should not rely on such laws in place of practicing safe sex.230

A research study conducted in the United Kingdom following the first criminal prosecution for HIV transmission in that country suggests prosecutions based on HIV transmission serve only to stigmatize those living with HIV/AIDS and pose a threat to public health initiatives.231 A sample of 125 HIV-positive participants was used, consisting of 20 focus groups, each composed of 5 to 12 participants.232 Transcripts from the conversations were

228. Elliot, supra note 201, at 32.
229. Id. at 23.
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232. Id. at 315.
scrutinized, and comments were divided into twelve thematic categories. Of all comments, 90% were critical of the criminalization of the "reckless" transmission of HIV. The comments fell into two major categories: (1) shared responsibility, and (2) stigma and discrimination. One of the comments identified by these researchers, which typifies the shared responsibility concern, reads as follows: "There is something called collective responsibility. I think...[the complainant] should be responsible for their lives in the first place—female African respondent." In a comment illustrating the second category, another participant stated: "So I don't want to go back to that hospital. I even fear to go back there because of the Dica case [first successful HIV prosecution in England and Wales]." Male African respondent.

The research study referenced in the preceding paragraph indicates that PLWHA felt a heightened sense of stigma after successful prosecutions in the United Kingdom. HIV-related prosecutions roll back public health efforts aimed at treating PLWHA, as suggested by their direct comments, as well as by the collective concern of professional associations within the public health system. It is our role to challenge the State of Florida as to the rationale behind its HIV criminalization laws—and as to their necessity. PLWHA are no more of a threat to society today than they were in 1997, 1986, or 1981, just as they are no more of a threat to the United Kingdom today than they were before that country’s first effective prosecution against HIV transmission took place. The State of Florida has taken it upon itself to revisit its criminal laws time and again throughout the living years of the HIV epidemic in order to further penalize transmission of the condition.

233. Id at 316.
234. Id.
235. Id.
236. (discussing the public health objective of promoting individual responsibility for safer sex practices).
237. See Dods & Keogh, supra note 227, at 316; Dyer, supra note 227 (reporting on the first HIV-specific criminal conviction in England and Wales).
238. See Dods & Keogh, supra note 227, at 316–18.
239. See Position Statement, supra note 201; infra Sections IV.A.1–3 (questioning the function and framework of such laws).
241. See, e.g., Fla. STAT. § 384.34(5) (Supp. 1998); Fla. STAT. § 384.34(5) (Supp. 1996); supra Part II (mentioning the various changes Florida has made to its HIV-specific criminal laws, making them increasingly punitive).
242. See infra Sections IV.A.1–3.

The state should revisit them again today. Below are three models that Florida may turn to in reforming its HIV criminalization laws.

I. The Texas Model

Florida can repeal its HIV-specific criminal laws in their entirety. A number of states have never passed HIV-specific criminal laws and instead rely on their traditional criminal codes. Texas is one of them; New York is another. Texas applies its aggravated assault and attempted murder statutes to HIV transmission. In reversing and remanding a lower court’s prosecution, an appellate court in Texas ruled that HIV constituted a deadly weapon.

The lack of HIV-specific laws does not mean that such states do not use their traditional criminal laws in order to convict suspects where such convictions are based on unfounded science. Texas uses its laws in the prosecution of cases that could not possibly result in HIV transmission. In 2008, a Texas court sentenced a homeless man to thirty-five years for allegedly spitting at an officer. The saliva of the suspect was deemed a deadly weapon in spite of the fact that HIV cannot possibly be transmitted through saliva. The officer did not acquire HIV, as expected. The convicted man will only be eligible for parole halfway through his sentence. He maintains to this day that he never spat at the officer.

243. See infra Sections IV.A.1–3.
244. See generally Vol. I STATE AND FEDERAL LAWS AND PROSECUTIONS, supra note 22 (specifying each state where HIV-specific criminal laws do not exist).
245. See id. at 222 (noting that no HIV-specific criminal laws exist in Texas).
246. See id. at 151–52 (noting that no HIV-specific criminal laws exist in New York).
247. See id. at 222–29 (providing numerous examples in which Texas has used its general criminal code to prosecute PLWHA).
249. See Vol. I STATE AND FEDERAL LAWS AND PROSECUTIONS, supra note 22, at 222–29 (providing numerous examples in which Texas has used its general criminal code to prosecute PLWHA).
250. Id.
252. Id.; see also How Do You Get HIV or AIDS?, supra note 29 (noting that HIV cannot be transmitted through air, water, saliva, tears, sweat, insects, dishes, bottles, toilet seats, or casual contact).
253. See Kovach, supra note 251.
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233. Id. at 316.
234. Id.
235. Id.
236. Doods & Keogh, supra note 227, at 316; see also infra Section IV.B.3.b (discussing the public health objective of promoting individual responsibility for safer sex practices).
237. See Doods & Keogh, supra note 227, at 316; Dyer, supra note 227 (reporting on the first HIV-specific criminal conviction in England and Wales).
238. See Doods & Keogh, supra note 227, at 316–18.
239. See Position Statement, supra note 201; see also infra Section IV.A.
240. See Fla. Stat. §§ 381.0041, 796.08(5) (2015); Position Statement, supra note 201; infra Sections IV.A.1–3 (questioning the function and framework of such laws).
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253. See Kovach, supra note 251.
254. Id.
255. Id.
law in Florida does not function exactly like Texas’ law in this respect, but it should be noted that section 775.0877 of the Florida Statutes is similar in spirit to the case law in Texas in that it utilizes rather ambiguous language to encompass erroneously perceived means of HIV transmission, such as the term body fluids, which may or may not encompass saliva. Section 775.0877 of the Florida Statutes even specifies that transmission of HIV is not required.

Such spitting cases are not restricted to places where HIV-specific criminal laws are lacking, such as in Texas; they happen in Florida as well, where HIV-specific criminal laws exist. This brings up several questions: (1) what is the purpose of section 775.0877 of the Florida Statutes, Florida’s sentence enhancement provision; (2) is it to prevent criminal transmission of HIV, or is it simply to penalize PLWHA because of their HIV-positive status; and (3) why does the law in Florida not require HIV transmission, or even the mere possibility of HIV transmission—, as it is a fact that certain bodily fluids could not possibly transmit the virus. The law in Florida seems to accomplish the same thing that Texas has accomplished through its general aggravated assault provisions; it renders the imagined plausibility of HIV transmission as an aggravated circumstance. If the purpose of HIV-specific criminal laws is to prevent HIV-transmission, a true concern for the transmission of HIV would be backed by laws that actually punish the intentional transmission of the virus or at the very least the possibility of such transmission.

It is conceivable to imagine a case in Florida where elder abuse has occurred and where the HIV-positive aggressor spits during the course of the abuse, and subsequently section 775.0877 of the Florida Statutes is applied to enhance sentencing by incorporation of the criminal transmission of HIV as an additional offense.

The conduct of the state should reflect modern science, either where HIV-specific laws exist or where such laws are lacking, and the general criminal code is used instead. States should not use statutes to strip people of their freedom in situations where such people could not possibly have committed the crimes they are being convicted of, particularly if such convictions are based on irrational fears or discredited science. The saliva of PLWHA is not a dangerous weapon. If Florida entirely repeals its HIV-specific criminal provisions, it is urged not to use the remainder of its criminal code to prosecute cases that do not serve the public interest and only undermine public health efforts by spreading unfounded fears of HIV infection. Such fears would only serve to further stigmatize PLWHA.

2. The California Model

Section 120291 of the California Health and Safety Code is California’s main provision on the criminal transmission of HIV and is

256. See Fla. Stat. § 775.0877(1) (2015); Vol. I State and Federal Laws and Prosecutions, supra note 22, at 42, 222 (noting that an HIV-positive Florida man was charged with attempted murder under the state’s traditional criminal laws in Florida for yelling that he had HIV and biting an officer—he was sentenced to fifteen years in prison for aggravated battery with a deadly weapon).


259. See id. § 775.0877(1) (2015); BSO: HIV-Infected Woman Jailed for Spitting on Deputy; CBS Miami (Apr. 18, 2014, 5:15 PM), http://miami.cbslocal.com/2014/04/18/police-trespassing-turns-to-transmitting-disease (reporting on a case where a woman got charged with the criminal transmission of HIV because she spit on an officer and while ignoring scientific knowledge that HIV cannot be transmitted through saliva—the officer was provided medical treatment for exposure to HIV); Vol. I State and Federal Laws and Prosecutions, supra note 22, at 222.


261. See Vol. I State and Federal Laws and Prosecutions, supra note 22, at 222; supra Section I.C (discussing how HIV-positive status under section 775.0877 of the 2015 Florida Statutes is treated as an aggravated circumstance).
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261. See Vol. 1 State and Federal Laws and Prosecutions, supra note 22, at 222; supra Section II.C (discussing how HIV-positive status under section 775.0877 of the 2015 Florida Statutes is treated as an aggravated circumstance).

262. See Elliot, supra note 201, at 15 (noting that the only purpose of HIV-specific criminal laws should be the prevention of HIV-transmission).

263. See Fla. Stat. § 775.0877 (2015); BSO: HIV-Infected Woman Jailed for Spitting on Deputy, supra note 259. If it happens when an officer is spat at, what is there to prevent Florida’s HIV penalty enhancement provision from being utilized in a domestic setting? See Fla. Stat. § 775.0877 (2015); BSO: HIV-Infected Woman Jailed for Spitting on Deputy, supra note 259.


265. See Vol. 1 State and Federal Laws and Prosecutions, supra note 22, at 225; Dodds & Keogh, supra note 227, at 315–16; Kovach, supra note 251; How Do You Get HIV or AIDS?, supra note 29; Part IV (providing examples of cases where the criminal law is utilized at odds with science in order to prosecute PLWA where HIV-transmission cannot occur).

266. See How Do You Get HIV or AIDS?, supra note 29 (noting that HIV cannot be transmitted through saliva). But see Mathurian v. State, 194 S.W.3d 59, 67–68 (Tex. Ct. App. 2006) (where the judge insists that the saliva of PLWA is a deadly weapon).

267. See Elliot, supra note 201, at 23–25 (pointing out that criminal prosecutions for HIV transmission lead to inflammatory media coverage that exacerbates stigma against PLWA, in turn hindering public health efforts).

268. Id.; Dodds & Keogh, supra note 227, at 316–17 (documenting negative feelings of PLWA following a highly publicized prosecution for the criminal transmission of HIV).
therefore analogous to section 384.24 of the Florida Statutes. It reads as follows:

(a) Any person who exposes another to the human immunodeficiency virus—HIV—by engaging in unprotected sexual activity when the infected person knows at the time of the unprotected sex that he or she is infected with HIV, has not disclosed his or her HIV-positive status, and acts with the specific intent to infect the other person with HIV, is guilty of a felony punishable by imprisonment in the state prison for three, five, or eight years. Evidence that the person had knowledge of his or her HIV-positive status, without additional evidence, shall not be sufficient to prove specific intent.373

Three main differences can be appreciated when comparing California's law to Florida's. In California, (1) the criminal provision explicitly criminalizes unprotected sexual activity, (2) it requires the specific intent to transmit the virus, and (3) it makes explicitly clear that mere knowledge of an HIV-positive diagnosis is not enough to obtain a conviction where further evidence of intent is lacking. All three of these additional requirements are absent in the Florida provision.373

a. Specific Intent

The value in having specific intent codified in the law ties into the discussion of the objective behind the criminal law. If the objective of section 384.24 of the Florida Statutes is to either seek retribution for or to deter criminal acts, then Florida should amend the provision to target only acts where the specific intent to transmit HIV exists.375 This would ensure that the public health of citizens is protected from the intentional spread of HIV where criminal intent exists and that PLWHA are not prosecuted for crimes they did not commit.376

Merely knowing of an HIV-positive diagnosis should not be enough to construe a criminal intent to transmit the virus. Proper care under an ART regimen can make the viral load of people living with HIV undetectable, significantly reducing the risk of HIV transmission to undetectable levels. PLWHA cannot be said to desire the transmission of HIV merely because of engaging in sexually active lifestyles. The law in Florida effectively ignores the science behind the probability of HIV transmission—irrespective of the facts of a particular case—regardless of whether ART, Truvada, or condoms are involved. This effectively ensures the targeting of PLWHA for merely carrying the virus through the cold disregard of any actual intent to transmit the disease. The answer as to why someone who knows that he or she has an HIV-positive diagnosis and may not wish to disclose such a status is a complex one and often involves varying factors, such as the fear of being rejected, a person's present engagement in an abusive relationship, or the belief that the virus will not be transmitted because of precautions that the person has taken against HIV transmission.378

269. See CAL. HEALTH & SAFETY CODE § 120291 (West 2015); FLA. STAT. §
270. CAL. HEALTH & SAFETY CODE § 120291(a) (West 2015).
272. CAL. HEALTH & SAFETY CODE § 120291 (West 2015).
275. THE GLOB. COMM'N ON HIV & THE LAW, supra note 274, at 24 (noting that HIV-related criminalization is only justified for prosecuting intentional cases of HIV transmission).
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See THE GLOB. COMM’N ON HIV & THE LAW, supra note 274, at 23–25 (noting that prosecutions of PLWHA where the intent to transmit HIV is not proven raise a set of questions as to the motivations behind the alleged acts that do not lead to verifiable answers).

See id. at 24 (noting that prosecutions based on recklessness and negligence require proof of mens rea that are difficult to verify, and that such prosecutions raise a myriad of doubts regarding the psychological and physical condition of the defendant, whose prosecution may result in injustice).

Viral Load, supra note 150 (pointing out that ART can result in an undetectable viral load, which has been found to reduce the transmission of HIV by up to ninety-three percent); see also HIV Control Through Treatment Durably Prevents Heterosexual Transmission of Virus, AIDS.GOV; BLOG (July 20, 2015), http://blog.aids.gov/2015/07/hiv-control-through-treatment-durably-prevents-heterosexual-transmission-of-virus.html.

See THE GLOB. COMM’N ON HIV & THE LAW, supra note 274, at 20 (pointing out the fundamental injustice of laws which criminalize HIV transmission in imposing systems of surveillance and punishment upon sexually active PLWHA).

See FLA. STAT. § 384.24(2) (2015); FLA. STAT. § 775.0877(1)–(5) (2015); THE GLOB. COMM’N ON HIV & THE LAW, supra note 274, at 20, 22; How Is Truvada Used to Treat HIV-1 Infection?, supra note 158; Steiner & DeCarlo, supra note 175; Viral Load, supra note 150.

See FLA. STAT. § 384.24(2) (2015); FLA. STAT. § 775.0877(1)–(5) (2015); General Intent, supra note 42.

Buchanan, supra note 34, at 1257 (discussing complex reasons on why PLWHA may fail to disclose their HIV status to a partner).
The Center for HIV Law and Policy, a national organization dedicated to advocating in favor of the human rights of PLWHAs, applauds the modernization of HIV-specific state laws, and even suggests additional changes for the state of California. It notes that specific intent may not be necessary in some instances, given that “[s]mores in which people living with HIV engage in conduct with the specific intent and actual likelihood to inflict harm through transmission of HIV are exceedingly rare and, regardless, can be addressed through existing criminal assault statutes,” which falls back on the Texas model above.

In Florida’s case, a simple amendment to its provisions can ensure that only criminals are incarcerated for true, intentional crimes. The best route for Florida may be either to repeal sections 384.24 and 775.0877 of the Florida Statutes in their entirety or to amend them to fit the crime by adding the requirement of a specific intent to transmit HIV. Such a determination will rest on the Florida Legislature. However, allowing the provisions to remain in their present form is cruel and unjust considering how they are often used to prosecute people who did not intend to transmit HIV.

b. Affirmative Defenses

The law in California also offers the affirmative defense of condom use. That is, if PLWA use condoms, it negates the criminal transmission of HIV pursuant to section 120291 of the California Health and Safety Code. Other protective measures that PLWHAs may use against HIV transmission include ART, Truvada as PrEP for usage by a sexual partner, and engaging in sexual practices that minimize infection—such as engaging in oral sex. Such measures would not amount to an affirmative defense under California law as per the language in the present statute, but they may raise a valid argument in court.

In Florida, the usage of condoms does not serve as an affirmative defense against the criminal transmission of HIV. PLWA are always suspects under the law when they engage in sexual activity in Florida. The only affirmative defense in Florida is either a lack of knowledge of an HIV-positive status on the side of the accused or an acknowledgement form recognizing disclosure on the side of the accused and consent from the other party—which is a sure means to prove that such disclosure and consent took place prior to engagement in sexual activity.

The Sero Project, a national network of PLWA and their families fighting the discrimination and stigmatization associated with an HIV-positive status, is glad to provide such an acknowledgement form ensuring that adequate notification was provided to the presumably uninfected partner. This may be an exaggerated measure, but unfortunately, it may also be necessary to protect PLWA from being accused of crimes they did not commit in states such as Florida. Otherwise, the court’s arguments are an exaggerated assertion of facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all [of] the allegations in the complaint are true. The defendant bears the burden of proving an affirmative defense. Also termed ‘plea in avoidance; plea in justification.’


See CAL. HEALTH & SAFETY CODE § 120291(a)-(b).

See Truvada Side Effects, supra note 170; Viral Load, supra note 150.

See CAL. HEALTH & SAFETY CODE § 120291(b)(2) (specifying only condoms as a means of protected sexual activity).


See Fla. Stat. § 384.24(2) (2015) (specifying that criminal HIV transmission only occurs ‘when such person knows that he or she is infected with this disease and when such person has been informed that he or she may communicate this disease’ and when his or her partner ‘has been informed of the presence of the sexually transmissible disease and has consented to the sexual intercourse’); HIV Criminalization: What You Need to Know, SEROPROJECT.COM (2012), http://www.seroproject.com/wp-content/uploads/2012/10/sero brochure_colorprint-1-1.pdf (providing an HIV-status disclosure form for PLWA).

HIV Criminalization: What You Need to Know, supra note 293 (providing an HIV status disclosure form for PLWA).

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The law in California also offers the affirmative defense of condom use. That is, if PLWHAs use condoms, it negates the criminal transmission of HIV pursuant to section 12029.1 of the California Health and Safety Code. Other protective measures that PLWHAs may use against HIV transmission include ART, Truvada as PrEP for usage by a sexual partner, and engaging in sexual practices that minimize infection—such as engaging in oral sex. Such measures would not amount to an affirmative defense under California law as per the language in the present statute, but they may raise a valid argument in court.

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284. Id. at 34; see also Buchanan, supra note 34, at 1254 (pointing out the rarity of intentional HIV transmission, and noting that when it does happen, it often involves more than through sexual contact such as the deliberate injection of contaminated blood through needle; supra Part IV.A.1).
285. THE GLOB. COMM’N ON HIV & THE LAW, supra note 274, at 24-25 (generally FLA. STAT. § 384.24 (2015); FLA. STAT. § 775.0877 (2015)).
286. THE GLOB. COMM’N ON HIV & THE LAW, supra note 274, at 24-25 (Specific source, supra note 42; see generally FLA. STAT. § 384.24 (2015); FLA. STAT. § 775.0877 (2015)).
287. See id., supra note 201, at 8; THE GLOB. COMM’N ON HIV & THE LAW, supra note 274, at 15; Vol. 1 STATE AND FEDERAL LAWS AND PRODUCTIONS, supra note 22, at 13.
288. See THE GLOB. COMM’N ON HIV & THE LAW, supra note 274, at 24-25 (pointing out a myriad of questions that surface over the fairness in prosecuting PLWHAs where the specific intent to transmit HIV is not required by HIV-specific criminal provisions; Vol. 1 STATE AND FEDERAL LAWS AND PRODUCTIONS, supra note 22, at 8, 14, 20, 41 (providing many examples of prosecutions where the specific intent to transmit HIV is absent).
289. See CAL. HEALTH & SAFETY CODE § 12029.1(b)2 (West 2015) (defining the unprotected sexual activity required to violate the provision as “sexual activity within the

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prone to involvement of *he said, she said* style litigation, where one party claims the disclosure of HIV status and consent, while the other party asserts the non-disclosure of HIV status and a lack of consent to sexual intimacy. Recommendations by the Sero Project to PLWHA in order to prove disclosure, include:

1. Save email[s], text exchanges, voicemail recordings, social media profiles or other evidence that you disclosed your HIV-positive status—if arrested, your computer may be seized; save copies in a safe separate location;
2. Take your partner with you to your doctor or caseworker and ask them to note your partner's knowledge of your HIV-positive status in your file;
3. Talk about your HIV-positive status in front of your partner and a third party who you trust who could testify that you disclosed;
4. Make a video with your partner . . . about your HIV status (discussing) your HIV status [with your partner];
5. Keep a diary . . . of occasions when you discussed your HIV status with your partner;
6. Take note of physical evidence of your HIV-positive status, like medications in clear sight, doctor visit reminders, HIV-related brochures or magazines, etc., that others have seen; and
7. Have your partner sign an acknowledgement form . . .

Section 384.24 of the Florida Statutes can be changed with a simple amendment, providing protection to PLWHA from frivolous claims by including new defenses—affirmative or otherwise—for responsible individuals, such as a presumption of innocence where: (1) a condom was used; (2) the individual had an undetectable viral load; (3) Truvada as PrEP was used by an individual's sexual partner; (4) consensual engagement in sexual acts with a low risk of HIV transmission occurred as a means to mitigate the possibility of transmission; or (5) no actual HIV transmission took place between parties.

Section IV.B.3 (referencing the Iowa Code while offering further models for incorporation of defenses).

5. See also CAL. HEALTH & SAFETY CODE § 120291 (West 2015);
6. Fla. Stat. § 775.0877(5) (2015);
7. IOWA CODE ANN. § 709D.3 (West 2015);
8. How Is Truvada Used to Treat HIV-1 Infection?, supra note 158; Viral Load, supra note 150; Part III (discussing such prevention methods against HIV transmission); infra.
prone to involvement of a he said, she said style litigation, where one party claims the disclosure of HIV status and consent, while the other party asserts the non-disclosure of HIV status and a lack of consent to sexual intimacy. Recommendations by the Sero Project to PLWHAs in order to prove disclosure, include:

1. Save email[s], text exchanges, voicemail recordings, social media profiles or other evidence that you disclosed your HIV-positive status—if arrested, your computer may be seized; save copies in a safe separate location;
2. [t]ake your partner with you to your doctor or caseworker and ask them to note your partner’s knowledge of your HIV-positive status in your file;
3. [t]alk about your HIV-positive status in front of your partner and third party you trust who could testify that you disclosed;
4. [m]ake a video with your partner about your HIV status discussing your HIV status with your partner;
5. [k]eep a diary... of occasions when you discussed your HIV status with your partner;
6. [m]ake note of physical evidence of your HIV-positive status, like medications in clear sight, doctor visit reminders, HIV-related brochures or magazines, etc., that others have seen; and
7. [h]ave your partner sign an acknowledgement form.  

Section 384.24 of the Florida Statutes can be changed with a simple amendment, providing protection to PLWHAs from frivolous claims by including new defenses—affirmative or otherwise—for responsible individuals, such as a presumption of innocence where: (1) a condom was used; (2) the individual had an undetectable viral load; (3) Truvada as PrEP was used by an individual’s sexual partner; (4) consensual engagement in sexual acts with a low risk of HIV transmission occurred as a means to mitigate the possibility of transmission; or (5) no actual HIV transmission took place between parties.

Section IV.B.3 (referencing the Iowa Code while offering further models for incorporation of defenses).

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such as battery and aggravated assault, both of which are difficult to conceive in relation to the transmission of HIV when a crime such as rape is absent. This provision is squarely at odds with modern medical science.

3. The Iowa Model

Iowa is the only state that has modernized its HIV-specific criminal laws after the National HIV/AIDS Strategy was launched in 2010. The State of Iowa has come a long way in modernizing its HIV-specific criminal laws, from a state in which the supreme court took judicial notice of the erroneous belief that “oral sex is a well [known] recognized means of transmission of the HIV” in 2006, to one that takes into account “practical means to prevent transmission.”

Section 709D.3 of the Iowa Code contains one of the most scientifically sound HIV criminalization laws in the nation. It takes into account the intent to transmit HIV, brings the condition into parity with other infectious diseases, makes available a number of defenses, and takes into account whether or not the virus was actually transmitted to the alleged victim.

The Iowa provision makes an intentional act culminating in infection a class “B” felony; an intentional act not resulting in infection a class “D” felony; an unintentional yet “reckless” act as to the life of another, where such act culminated in infection of the other, a class “D” felony; and an unintentional yet “reckless” act as to the life of another, where such act did not culminate in infection to the other, as a “serious misdemeanor.”

313. State v. Stevens, 719 N.W.2d 547, 551 (Iowa 2006); see also Buchanan, supra note 34, at 1248 (pointing to this fact).
315. See id. § 709D.3; HIV Is Not a Crime, supra note 312 (pointing to the success of the organization in lobbying the Iowa Legislature to modernize its draconian laws into ones that are not at odds with modern science).
316. IOWA CODE ANN. § 709D.3 (West 2015).
317. Id.

ON AN ALTERNATIVE TO A PUNITIVE STATE

provision is therefore a tiered system that weighs different factors relative to the harm caused by either intentional or reckless acts.

The provision outlines several defenses, including: (1) the act of becoming pregnant and continuing the pregnancy to term, and thereon declining treatment; (2) for purposes of proving the intent to transmit the virus, it is not enough to have evidence that a person knew or should have known that he or she was HIV-positive and exposed others to the disease, regardless of the frequency of the conduct; (3) the fact that an HIV-positive person either informed his or her partner of an HIV-positive diagnosis or took preventive measures against transmission of the virus precludes the attribution of either the intent to transmit the virus or a reckless disregard for the life of another; and (4) previous knowledge by the complainant of the HIV status of the accused is explicitly categorized as an affirmative defense.

Florida may choose to adopt any of such defenses.

a. HIV in Parity with Other Infectious Diseases

One of the most important changes in the Iowa Code was that it brought HIV to parity with other infectious diseases. In fact, section 709D.3 of the Iowa Code does not mention HIV at all and instead refers to a contagious or infectious disease. This is noteworthy because it shows that in 2014, the Iowa Legislature made the opposite decision that the Florida Legislature made in 1997. Recall from Part II that Florida has returned to section 384.24 of the Florida Statutes at various points in time, and in 1997, it did so in order to bifurcate the statute into parts (1) and (2) in order to separate HIV from other transmissible diseases. Iowa did the reverse in

318. See id.; HIV Is Not a Crime, supra note 312 (noting that the legislation “has converted sentencing to a tiered system instead of the one size fits all approach used in 709C.”).
319. See Khan, supra note 180, at 440-52 (discussing the repercussions of using the criminal law to prosecute expectant mothers with an emphasis on expanding legal protections for such women).
321. See id. § 709D.2 (defining “a contagious or infectious disease [as] hepatitis in any form, meningococcal disease, AIDS or HIV as defined in section 141A.1, or tuberculosis.”).
322. See id. § 709D.3.
323. Compare Iowa Dep’t of Pub. Health, supra note 312 (detailing considerations by Iowa officials in reforming the Iowa Code in 2012), and IOWA CODE ANN. § 709D.3 (West 2015) (depicting the changes encoded into that came about to the Iowa Code from such reforms), with F.L.A. STAT. § 384.24 (1997), and Sections II.A, II.B (detailing how Florida changed its HIV-specific criminal provisions in 1997, making HIV transmission a third degree felony as opposed to a first degree misdemeanor).
324. See F.L.A. STAT. § 384.24 (1997); supra Sections II.A–B.
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317. Id.
2014 and now defines a contagious or infectious disease as "hepatitis in any form, meningooccal disease, AIDS or HIV . . . or tuberculosis." This reform was a centerpiece of the new Iowa law, which stemmed widely from major criticisms on the lack of such parity in its former provisions. Why segregate HIV from other potentially dangerous diseases? Various contagious diseases can pose a grave harm to the human body, and their intentional transmission is often not accounted for in the law. Hepatitis, syphilis, and tuberculosis could all potentially pose grave harm when transmitted from one person to another.

Florida treats HIV as its transmission were a death sentence, modern science has made HIV a manageable chronic condition; the disease is no longer a death sentence if it is treated with proper medication. Hepatitis C is more common than HIV, is highly communicable, and kills more people in the United States than the latter. Human Papillomavirus, or HPV, can cause cervical and anal cancers, among other forms of cancer and also happens to be much more common than HIV.

If Florida's desire is to protect its citizens from the possible transmission of a viral infection that may potentially kill its host, then it is only logical for Florida to criminalize other similarly infectious diseases in parity with HIV under the law. Section 384.34 of the Florida Statutes is

325. JABA ANN. § 709 D 2(1) (West 2015).
326. See Iowa Dept. of Pub. Health, supra note 312 (pointing to authority in its recommendation to bring HIV to parity with other diseases: "The statute should avoid stigmatizing or singling out a specific disease, such as HIV, especially when there is currently very good evidence that the statutes do not change a person's risk or disclosure behaviors (Burris, 2007), while recognizing that there are other communicable diseases that should be treated in the same manner as HIV/AIDS in line with scientific knowledge).
327. See id.; Buchanan, supra note 34, at 1278–84 (discussing this point in detail while highlighting other diseases whose transmission often goes unpunished).
328. See Buchanan, supra note 34, at 1278–84.
329. See HIV Treatment as Prevention, supra note 152; supra Section III.R.2 (discussing the scientific advances that have made HIV/AIDS a chronic condition as opposed to a fatal disease).
330. Steven Reinberg, Hepatitis C Now Kills More Americans Than HIV, U.S. NEWS & WORLD REP. (Feb. 20, 2012, 5:00 PM), http://health.usnews.com/health-news/articles/2012/02/20/hepatitis-c-now-kills-more-americans-than-hiv; see also Buchanan, supra are often not criminalized at parity with HIV; FLA. STAT. § 384.24(4) (2015) (criminalizing several communicable diseases while excluding Hepatitis C).
331. Buchanan, supra note 34, at 1281–84 (discussing communicable diseases of concern that are often not criminalized at parity with HIV).
332. See Iowa Dept. of Pub. Health, supra note 312 (recognizing that there are other communicable diseases that should be treated in the same manner as HIV/AIDS in line with scientific knowledge); Buchanan, supra note 34, at 1278–84 (discussing communicable diseases of concern that are often not criminalized at parity with HIV).
333. FLSA. STAT. § 384.24(1)–(2) (2015). The statute criminalizes only the transmission of HIV as a third-degree felony, while criminalizing other sexually transmissible diseases as a first-degree felony. Id. § 384.34. It also criminalizes several transmissible diseases while excluding Hepatitis C. Id. § 384.24(1).
334. FLA. STAT. § 387.24 (1997); see also supra Section I.I.A (discussing how Florida did the reverse in 1997, bifurcating the provision in two).
336. Id.
339. See FLA. STAT. § 389.24(2) (2015); Pelvic Inflammatory Disease (PID), supra note 338.
340. See id.
341. See id; FLA. STAT. § 384.24(2) (2015).
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Why segregate HIV from other potentially dangerous diseases? Various contagious diseases can pose a grave harm to the human body, and their intentional transmission is often not accounted for in the law. Hepatitis, syphilis, and tuberculosis could all potentially pose grave harm when transmitted from one person to another.

Florida treats HIV as if its transmission were a death sentence. Modern science has made HIV a manageable chronic condition; the disease is no longer a death sentence if it is treated with proper medication. Malaria is more common than HIV, highly communicable, and kills more people than the United States. More people, before HIV, can cause cervical and anal cancers, among other sorts of cancer and also happens to be much more common than HIV.

If Florida’s desire is to protect its citizens from the possible transmission of a viral infection that may potentially kill its host, then it is only logical for Florida to criminalize other similarly infectious diseases in parity with HIV under the law. Section 384.34 of the Florida Statutes is underinclusive in terms of the diseases it aims to protect the public against; it is also unfairly bifurcated in two, stigmatizing HIV infection through segregation irrespective of modern science. Florida can ameliorate this by collapsing HIV back into section 384.24(1), effectively ending its segregation from other sexually transmissible diseases as a condition worthy of more punishment than syphilis or genital herpes simplex.

It is highly suggested that Florida consider thoroughly revisiting section 384.24(1), which lists various sexually transmissible diseases that section 384.34(1) specifies the transmission of to be a misdemeanor of the first degree. The state should ensure that its provisions are backed by a current scientific understanding, as there may be other areas of concern within the statutory language worth reviewing. Notably, section 384.24(1) specifies that the transmission of pelvic inflammatory disease or acute salpingitis may result in a misdemeanor. Pelvic inflammatory disease (“PID”) is an infection of the female reproductive system that is often but not exclusively caused by sexually transmissible diseases, such as chlamydia and gonorrhoea. It is not transmitted from one partner to another in a manner akin to a virus. Acute salpingitis is a narrower term that describes infection of the fallopian tubes. PID is not a sexually transmissible disease. Women cannot pass on PID onto men or other women. PID is a serious inflammation of the female reproductive system that requires immediate treatment, as it may lead to serious complications, and this should not require incarceration. Florida should strongly consider taking another

325. IOWA CODE ANN. § 709D.2(1) (West 2015).
326. See Iowa Dep’t of Pub. Health, supra note 312 (pointing to authority in its recommendation to bring HIV to parity with other diseases: “The statute should avoid stigmatizing or singling out a specific disease, such as HIV, especially when there is currently very good evidence that the statutes do not change a person’s risk or disclosure behaviors while recognizing that there are other communicable diseases that should be treated in the same manner as HIV/AIDS in line with scientific knowledge.”)
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331. Buchanan, supra note 34, at 1281–84 (discussing communicable diseases of concern that are often not criminalized at parity with HIV).
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341. See id.
look into the medical science behind the conditions it aims to prevent the transmission of as listed in section 384.24 of the Florida Statutes.\textsuperscript{343}

b. HIV Transmission Taken into Account

Currently, neither section 384.24 nor section 775.0877 of the Florida Statutes require actual transmission of HIV in order for the criminal transmission of HIV to take place.\textsuperscript{344} In fact, the latter explicitly specifies that actual transmission is not required.\textsuperscript{345} This is concerning, given that the specific intent to transmit is not a prerequisite under either of the two provisions.\textsuperscript{346} Therefore, a person without the intent to transmit HIV, who did not in fact transmit HIV, and who knows of an HIV-positive diagnosis, may in fact be found guilty of a third-degree felony;\textsuperscript{347} and if a pattern of conduct exists, such a person could face conviction of a first-degree felony.\textsuperscript{348}

The Iowa Code takes transmission into account.\textsuperscript{349} Therefore, even if the accused intended to transmit the virus, the offense would be more culpable under the law if actual transmission took place rather than when no transmission took place.\textsuperscript{350} The same is true for reckless acts under the Iowa Code that lack the specific intent to transmit any of the diseases listed.\textsuperscript{351} Florida should take HIV transmission into account, as well as the relative potential of the particular conduct in transmitting the virus under the circumstances.\textsuperscript{352} Advances in science have made it unlikely that there will be transmission of HIV when parties engaged in sexual conduct take certain precautions.\textsuperscript{353} Florida should recognize such realities.

\textsuperscript{343.} See FLA. STAT. § 384.24 (2015).
\textsuperscript{344.} See id. §§ 384.24(2), 775.0877(5).
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\textsuperscript{352.} See Elliot, supra note 201, at 8, 15; supra Section IV.A.1 (discussing instances of prosecutions for HIV transmission where such transmission could not have taken place and how applicable criminal provisions in Florida facilitate these prosecutions).
\textsuperscript{353.} See Buchanan, supra note 34, at 1241–43 (commenting on the public health critique behind a lack of recognition of such advances by the criminal law); supra Section III.B (discussing such advances in preventive means against HIV transmission).

B. On An Alternative to a Punitive State

Instead of engaging in the prosecution of PLWHA, the State of Florida should take an evidence-based public health approach to the epidemic. Funding for HIV/AIDS research is necessary in order to combat this epidemic.\textsuperscript{354} Ongoing research in the medical field to promote a search for a vaccine, a cure, or to create more evidence-based intervention programs will certainly help Florida to combat HIV transmission;\textsuperscript{355} but a comprehensive prevention campaign utilizing the resources that we already have is also needed in Florida to combat the spread of HIV.\textsuperscript{356}

Florida Governor Rick Scott recently provided the University of Miami with a million dollar grant to fund HIV/AIDS research, as part of the 2014-2015 Florida Budget.\textsuperscript{357} In the governor's own words at the University of Miami, he said:

"Funding research to cure the horrible diseases that afflict our loved ones has to be one of our top priorities. One of the nice things to happen in our state in the last four years is that we have turned our economy around. So as our economy gets better, we have more money in the budget, and we can do more things. Healthcare is clearly one of them. We must work together to treat these complex diseases, which require much more research and development."\textsuperscript{358}

The governor was praised for retaining funding on the 2012–2013 Florida Budget for the AIDS Drug Assistance Program ("ADAP") on a recurring fund for 2.5 million dollars.\textsuperscript{359} This funding is crucial, as it forms a part of the money available to PLWHA under the Ryan White laws when they cannot afford their medications, and while this program is already largely funded by the federal government, state funds are necessary in order for it to function adequately.\textsuperscript{360} Together, the funds of both the state and

\textsuperscript{355.} See id. (highlighting the importance of medical research for HIV/AIDS).
\textsuperscript{356.} Id.
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344. See id. §§ 384.24(2), 775.0877(5).
346. See id. §§ 384.24(2), 775.0877(5).
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348. See id. § 384.34(5).
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federal governments combine in order to provide low-income individuals who do not have the means to pay for HIV medications the financial means to do so. At one point before the governor signed this budget, Florida had an extensive waiting list of over four thousand people who could not pay for their medications.

The preceding paragraph highlights the importance of state funding in order to ensure the wellbeing of PLWHA. If it is that the economy truly has improved as the governor states, and Florida truly has more available funds in its state budget as a result, then the governor and the Florida Legislature should adopt a comprehensive prevention plan to combat the transmission of HIV in Florida. Below is a set of statistics that highlight the dire need for the launch of such a comprehensive campaign, followed by a model that Florida may use in both developing and implementing such a campaign.

I. Statistics

a. Florida and Miami-Dade County

Florida’s HIV infection rate is not decreasing. Official estimates by the Florida Department of Health places the transmission rate of HIV for the entire State of Florida in 2014 at 31.4, up from 28.3. This translates to 6147 total new infections in 2014, as opposed to a total of 5467 infections in 2013. From 2009 to 2013, the incidence of new transmissions had not risen above 6000 per year. While the population in Florida has been steadily growing, the rate of transmission in 2009 was lower than in 2014—at 29.5 as opposed to 31.4.

Miami-Dade County suffers from one of the highest HIV/AIDS transmission rates in the nation, much higher than the State of Florida’s combined HIV transmission rate. The metropolitan area also suffers from a similar problem to Florida’s problem in that its HIV transmission rate is not decreasing. In fact, just as with the trend in the state as a whole, 2013 saw the highest transmission rate since 2009 for Miami-Dade County at 55.6. Contrast this with a transmission rate of 53.2 in 2009.

A sharp downturn can be observed in HIV transmission rates between 2008 and 2009 across the country due to the quicker initiation of ART, particularly as implemented at the moment of HIV-positive diagnosis as opposed to later on during the progression of the disease. Such a decrease in transmission rates due to better ART is evidence that proper treatment, along with the implementation of HIV prevention strategies, can reduce transmission rates across the board.

b. San Francisco

San Francisco is important because its HIV transmission rate has traditionally been very high, similar in light to that of Miami-Dade County’s and also because it has become a center for innovation in the implementation of interventions geared at lessening HIV transmission. In absolutes, the number of new infections do not seem very high for the City and County of

369. Id.; $1 Million Grant from State of Florida Will Support UM HIV/AIDS Research, supra note 354.
371. HIV/AIDS Epidemiology Partnership 11a, supra note 370.
372. Id.
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San Francisco; for example, in 2008, there were 515 new cases of HIV within the city, and in 2009, there was a decrease to 463. However, the proportion of new HIV cases in relation to the total population for San Francisco is analogous to Miami-Dade's. San Francisco had an HIV transmission rate of 63.74 in 2008 and 56.78 in 2009. The HIV transmission rates in Miami-Dade County for the same period were 71.1 and 53.2, respectively.

The statistics above show that Miami-Dade County and San Francisco are both affected by high HIV transmission rates. But in the years following 2009, San Francisco has utilized its resources to decrease the proliferation of the epidemic through effective prevention strategies, and its HIV transmission rate has been declining while Miami-Dade Counties has at best remained stagnant. In 2013, San Francisco had only 359 new cases of HIV, which translates to a transmission rate of 42.87. Miami-Dade was still at a transmission rate of 55.6 for 2013—and has recently been named the

376. S.F. DEPT OF PUB. HEALTH, supra note 375, at 3.
377. See HIV/AIDS Epidemiology Partnership 11a, supra note 370; S.F. DEPT OF PUB. HEALTH, supra note 375, at 3–4, 8.
378. See U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR COUNTIES OF CALIFORNIA 2000 TO JULY 1, 2009 2 (Mar. 2010), http://www.census.gov/popest/data/counties/totals/2009/CO-EST2009-01.html (follow “XLS” link under “California”); Epidemiology of HIV Infection Trends in Florida Reported Through 2014, supra note 364. The San Francisco Department of Public Health does not publish transmission rates. See S.F. DEPT OF PUB. HEALTH, supra note 375, at 3–4. HIV transmission rates are yielded per 100,000 with the simple formula: number of cases in a specified time / population at that time × 100,000 = rate. Epidemiology of HIV Infection Trends in Florida Reported Through 2014, supra note 364. Using the formula and data by the U.S. CENSUS BUREAU, the transmission rate for San Francisco is easily ascertainable. See U.S. CENSUS BUREAU, supra, at 2; Epidemiology of HIV Infection Trends in Florida Reported Through 2014, supra note 364. The population of San Francisco in 2008 was approximately 808,001, while the population in 2009 was approximately 815,358. U.S. CENSUS BUREAU, supra, at 2; Epidemiology of HIV Infection Trends in Florida Reported Through 2014, supra note 364; S.F. DEPT OF PUB. HEALTH, supra note 375, at 3–4.

2. Proactive Programs to End HIV/AIDS

As per the San Francisco Department of Public Health ("S.F. DPH"), the mission statement of the “Getting to Zero” in San Francisco project is:

Coordinate a strategic plan to get San Francisco to zero new HIV infections, zero HIV-associated deaths and zero stigma [through]:

(1) [c]onvey[ing] a sense of urgency and possibility among San Francisco residents; (2) [e]mpower[ing] and engaging[ing] a broad diversity of stakeholders and creat[ing] shared responsibility for achieving the vision; (3) [c]reate[ing] communication and coordination

San Francisco; for example, in 2008, there were 515 new cases of HIV within the city, and in 2009, there was a decrease to 463. However, the proportion of new HIV cases in relation to the total population for San Francisco is analogous to Miami-Dade’s. San Francisco had an HIV transmission rate of 63.74 in 2008 and 56.78 in 2009. The HIV transmission rates in Miami-Dade County for the same period were 71.1 and 53.2, respectively.

The statistics above show that Miami-Dade County and San Francisco are both affected by high HIV transmission rates. But in the years following 2009, San Francisco has utilized its resources to decrease the proliferation of the epidemic through effective prevention strategies, and its HIV transmission rate has been declining while Miami-Dade County has seen the highest rates remain stagnant.

In 2013, San Francisco had only 359 new cases of HIV, which translates to a transmission rate of 42.87. Miami-Dade was still at a transmission rate of 55.6 for 2013—and has recently been named the number one place in the nation for new HIV infections per 100,000 residents in 2014, with Broward County closely behind in second place. With the official epidemiology report for 2014 released, San Francisco city officials reported an 18% drop in the transmission rate from 2013 to 2014.

The following subsection will explore the programs that the City and County of San Francisco has set in place in order to combat the HIV/AIDS epidemic—such as getting to zero.

2. Proactive Programs to End HIV/AIDS

a. San Francisco and Getting to Zero

As per the San Francisco Department of Public Health ("S.F. DPH"), the mission statement of the “Getting to Zero” in San Francisco project is to:

Coordinate a strategic plan to get San Francisco to zero new HIV infections, zero HIV-associated deaths and zero stigma [through]:
(1) conveying a sense of urgency and possibility among San Franciscans;
(2) empowering and engaging a broad diversity of stakeholders and creating shared responsibility for achieving the vision;
(3) creating communication and coordination.
amongst the various stakeholders to implement the strategic plan; (4) [mobilizing] all necessary resources to achieve the vision; (5) [developing] robust metrics, and reporting progress annually on World AIDS Day; and (6) [achieving] this vision by ensuring the health and wellness of individuals and communities living with HIV and at risk for HIV. 386

The vision in San Francisco is advanced by a number of intertwined actors, which includes but is not limited to: (1) the City and County of San Francisco; (2) the S.F. DPH; (3) many local health care providers; and (4) institutions of higher learning, such as the University of California San Francisco (“UCSF”).387 The goals of the project are achieved through three main venues: (1) the expansion of ART; (2) the promotion of Truvada as PrEP; and (3) an increase in patient retention rates for people living with HIV/AIDS. 388

A significant amount of the effort is centered on providing quick and comprehensive treatment to those recently diagnosed with HIV. 389 This begins at the moment of diagnosis through a system called rapid antiretroviral program initiative for new diagnoses ART (“RAPID ART”)—consisting of making essential medications available to ensure the initiation of ART immediately. 390 Such a system aims to remove logistical problems traditionally associated with the initiation of treatment; problems that would otherwise exacerbate the epidemic given because of delays in treatment implementation. 391 The decline in HIV transmission rates that has been seen across the nation is due to quick implementations of ARTs and is evidence as to the effectiveness of such programs—and San Francisco is attempting to remove all barriers between patients and treatment providers in order to quickly reduce the viral load. 392 The delivery of RAPID ART helps in quickly reducing the viral load to undetectable levels, which in effect reduces the probability that more people will become infected with the virus. 393

In line with the delivery of RAPID ART programs to the newly diagnosed, San Francisco is attempting to increase its patient retention rate. 394 This is the proportion of people living with HIV who remain under medical programs while taking ART medications. 395 The discontinuation of medication, even in the short term, can lead to an increase in the viral load in the blood of PLWHA, which in turn exacerbates the transmission rate of the disease. 396 Statistics show that San Francisco is achieving a much higher retention rate than Miami-Dade and Washington, D.C.—both of which are disproportionately affected by similarly high HIV transmission rates. 397

Additionally, the City and County of San Francisco has implemented mental health programs, housing assistance, patient engagement initiatives, substance abuse treatment programs, and treatment adherence into its retention efforts. 398 Such efforts include hiring public health workers to engage in door-to-door efforts to ensure that patients have access to their medications and are adhering to their medical provider’s recommendations. 399 San Francisco’s advanced system of HIV surveillance takes into account the spatial distribution of the virus in the most affected

http://nsuworks.nova.edu/nlr
amongst the various stakeholders to implement the strategic plan: (4) mobilizing all necessary resources to achieve the vision; (5) developing robust metrics, and reporting progress annually on World AIDS Day; and (6) achieving this vision by ensuring the health and wellness of individuals and communities living with HIV and at risk for HIV.\textsuperscript{386}

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\textsuperscript{387} See id.

\textsuperscript{388} See id.


\textsuperscript{391} See Baig, supra note 390.

\textsuperscript{392} See id.; Grant Colfax, Moving Towards Reduced HIV Incidence: How the San Francisco Experience Can Inform National HIV/AIDS Strategy Implementation, S.F.
communities in order to better address treatment and prevention by placing its emphasis and resources on the areas with the highest need.400

The last crucial centerpiece of the Getting to Zero project is the expansion of Truvada as PrEP amongst the general public with a particular emphasis on high-risk populations, such as MSM and intravenous drug users.401 The concept is simple: Truvada works, and it is extremely effective when used consistently to decrease HIV infection.402 Therefore, the expanded use of Truvada as PrEP must be made available to those at an increased risk of infection, given that it can substantially reduce the rate of HIV transmission.403 The use of Truvada as PrEP is predicted to have the ability to substantially decrease HIV transmission rates by 70% for the city in the coming years if San Francisco can achieve a 75% increase in Truvada usage as PrEP.404 San Francisco’s efforts have created an increase in the demand for Truvada, yet barriers to its use amongst high-risk groups remain—ranging from the high costs of the medication to a lack of awareness about the drug.405 However, the city’s efforts have culminated in a higher number of referrals and a general increase in the usage of the drug.406 Most insurance plans now cover Truvada as PrEP in one form or another—ranging from full coverage to different types of co-payment options.407

b. How the State of Florida Can Help

The State of Florida can help fund initiatives that incorporate state agencies, such as the incorporation of the Florida Department of Health, in a robust campaign aimed at reducing HIV transmission with initiatives similar to those currently being implemented in San Francisco.408 The state must work directly with hospitals, universities, and other state and federal agencies in order to implement its prevention strategies. Through the

400. See Colfax, supra note 392.
401. See Baig, supra note 390, Buchbinder, supra note 386.
402. Buchbinder, supra note 386; How San Francisco Plans to ‘Get to Zero’ New Infections of HIV, supra note 399.
403. See How San Francisco Plans to ‘Get to Zero’ New Infections of HIV, supra note 399.
405. See How San Francisco Plans to ‘Get to Zero’ New Infections of HIV, supra note 399.
406. See Buchbinder, supra note 386.
407. Id.

National HIV/AIDS Strategy, the federal government has funded various programs in Miami-Dade County, including interventions under its Enhanced Comprehensive HIV Prevention Planning and its subsequent Twelve Cities Project.409 The state and local governments can implement cohesive strategies in ways that the federal government is simply not situated to implement.410 Local hospitals, universities, and the Florida Department of Health can collaborate to bring RAPID ART to patients, expand Truvada as PrEP for at-risk persons, and ensure medical retention in areas that have a high HIV transmission rate, such as Miami-Dade County.411 Such a combination of actors is also better situated to utilize its HIV surveillance data to reduce the community viral load in specific cities and jurisdictions where it is known that viral transmission has surpassed the average rate of infection for the state.412

The State of Florida should direct the Florida Department of Health so that it may reconstruct its prevention campaign in a more proactive manner.413 Rather than responding to patients seeking medical services, the state should engage in a more pragmatic approach to the HIV/AIDS epidemic through the collaboration of many stakeholders in the community, ensuring the adequate allocation of its resources.414 The legislature can amend section 381.0046 of the Florida Statutes to include such a vision.415 The provision currently reads as follows:

(1) The Department of Health shall develop and implement a statewide HIV and AIDS prevention campaign that is directed towards minorities who are at risk of HIV infection. The campaign shall include television, radio, and outdoor advertising; public service announcements; and peer-to-peer outreach. Each campaign message and concept shall be evaluated with members

409. Enhanced Comprehensive HIV Prevention Planning and Implementation for Metropolitan Statistical Areas Most Affected by HIV/AIDS, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/hiv/prevention/demonstration/echpp (last updated Apr. 19, 2013). These are efforts by the federal government under its National HIV/AIDS strategy in order to improve its understanding of the HIV/AIDS epidemic in selected areas and better implement interventions to help combat the disease. Id.
410. See id.; supra Section IV.B.2.a (demonstrating how the local government in San Francisco can make a difference by launching a comprehensive prevention campaign).
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407. Id.
of the target group to ensure its effectiveness. The campaign shall provide information on the risk of HIV and AIDS infection and strategies to follow for prevention, early detection, and treatment. The campaign shall use culturally sensitive literature and educational materials and promote the development of individual skills for behavior modification. (2) The Department of Health shall establish dedicated positions within the department for HIV and AIDS regional minority coordinators and a statewide HIV and AIDS minority coordinator. The coordinators shall facilitate statewide efforts to implement and coordinate HIV and AIDS prevention and treatment programs.416

An amendment should be in addition to, rather than in substitution of, the language already found in the provision above.417 It can be done with a simple addition of a third point directing the Florida Department of Health to: (a) work with other entities in the community in order to deliver the latest advances known in medicine to HIV/AIDS patients; (b) inclusive of all methods of prevention against HIV transmission—provided to both existing HIV patients and members of high-risk populations in need of such services; (c) while encouraging patient retention.418 Such a change in the law would add a whole new direction to the fight against HIV/AIDS in Florida, marking a new phase its public health campaign against its proliferation.419 In fact, the provision as it stands today is titled Statewide HIV and AIDS Prevention Campaign, and it is about time that such campaign live up to its and reflect a much more pragmatic effort in Florida aimed at the prevention of HIV transmission.420

Florida can become a pioneer in the fight against HIV/AIDS by proving to the world that it too can strive to get to “zero new HIV infections, zero HIV-associated deaths, and zero stigma,” as does the City and County of San Francisco.421 Much of the groundwork has already been set by efforts from the state and federal governments, along with private actors such as organizations devoted to the prevention and treatment of HIV/AIDS.422 It is about time that all parties in Florida work together rather than in isolation from each other in order to deliver a public health campaign that can truly make a difference in the spread of the HIV/AIDS epidemic.423

c. More Funding Necessary

A proactive campaign to fight HIV transmission in Florida similar to San Francisco’s campaign, will require additional funding.424 Funding for such initiatives in California can be found in both the California state budget and the San Francisco budget.425 For example, the 2015–2016 California State Budget includes the following:

(1) The Budget contains [three] million [dollars] General Fund ongoing for a syringe exchange program that will allow for the statewide purchasing of syringe disposal containers, sterile syringes, and other materials to be used by local health departments and community-based organizations to reduce the transmission of bloodborne pathogens such as HIV and Hepatitis C. . . . (2) The Budget provides [two] million [dollars] General Fund ongoing for Pre-Exposure Prophylaxis outreach and education pilot programs. These programs are intended to reduce new HIV infections for uninsured and underinsured at-risk to provide services to those in need; About Test Miami, supra note 408. Efforts exist in South Florida to stop the spread of HIV, for example, Test Miami describes itself as:

The “Test Miami” Initiative is an unprecedented collaborative effort between the Miami-Dade County Health Department and Florida Department of Health, HIV counselors, community-based organizations, private and public sector, faith-based organizations, health care providers, University of Miami Developmental Center for AIDS Research, Florida International University School of Public Health and the School of Journalism, Nova Southeastern University, Emory University Rollins School of Public Health, city, county, state and national officials and concerned citizens that aims to: (1) Promote routine HIV testing by physicians; (2) Improve Miami-Dade residents’ understanding of HIV, and (3) Reduce the transmission of HIV.


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About Test Miami, supra note 408.


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individuals who are in communities experiencing significant increases in new HIV infections. 426

As can be appreciated from the text above, the state budget sets aside three million dollars for its intravenous drug user program and two million dollars for the expansion of PrEP outreach and education throughout the state. 427 The San Francisco 2015–2016 Budget is also very ambitious, setting aside “[two] million dollars in new funding to continue San Francisco’s leadership in the fight against HIV/AIDS” for the Getting to Zero initiative, which focuses on achieving zero new HIV Infections, zero AIDS deaths, and zero stigma. 428

While it is laudable that Florida Governor Rick Scott approved 2.5 million dollars to keep the ADAP program running back in 2012 and provided a one million dollar grant to the University of Miami more recently in 2014, this is insufficient to counteract the high HIV/AIDS transmission rates in Florida—the Florida state budget desperately needs a comprehensive HIV/AIDS funding package to launch a large prevention campaign against HIV transmission. 429 The University of Miami is an isolated entity that cannot on its own solve the widespread problem Florida has in its ever-present need to control the spread of HIV. 430

Florida Governor Rick Scott proposed and set aside a specific grant in 2014 for “high-impact HIV prevention [in] Orange County.” 431 But his recommendation was absent for 2015. 432 Other than consistent funding for ADAP, which is very crucial funding, HIV/AIDS funding in Florida reveals a lack of cohesiveness. 433 There is no HIV/AIDS prevention plan such as Getting to Zero or any funding specifically encouraging the usage of Truvada as PrEP. 434 Florida needs to set aside a specific fund for ongoing and robust HIV-prevention programs. 435 The HIV transmission rate in Florida is not decreasing, and several highly populated areas within Florida, such as Miami-Dade County, Broward County and Orange County, suffer disproportionately from some of the highest HIV transmission rates in the nation. 436

3. Expanding Educational Bounds

a. Comprehensive HIV/AIDS Education for the Youth

The Florida Department of Health statistics accurately reflect a need for immediate intervention; there has been an increase in HIV transmission from 2008 onward in the proportion of people newly diagnosed with HIV within the age range of twenty through twenty-nine. 437 In 2008, around 20% of people newly diagnosed with HIV that year were in the age range of twenty through twenty-nine, as opposed to in 2014, when the number for people in that age range had risen closer to 30% of all newly diagnosed HIV cases. 438 These are not just isolated percentages—an upward trend can clearly be seen in the statistics released from year-to-year. 439 The same is true for Miami-Dade County, where the jump in numbers relating to new HIV infections from 2008 to 2014 steadily increased from the early teens to the late twenties in terms of percentages, marking a clear exacerbation of the HIV transmission rate amongst people within the age range of twenty through twenty-nine. 440

The statistics above are concerning because they show that people in Florida are being diagnosed with HIV at relatively younger ages than in

427.  Id.
428. SAN FRANCISCO MAYOR’S PROPOSED BUDGET, supra note 424, at 14.  
432. See id.
433. See id. The governor has not recommended ADAP funding for 2015, and has been consistent in the absence of a recommendation to do so despite actual approval of funds for the program. $1 Million Grant from State of Florida Will Support UM HIV/AIDS Research, supra note 354.
434. Community Public Health (Program): County Health Departments Local Health Needs, supra note 431; $1 Million Grant from State of Florida Will Support UM HIV/AIDS Research, supra note 354; see also Buchbinder, supra note 386.
435. See Buchbinder, supra note 386; Community Public Health (Program): County Health Departments Local Health Needs, supra note 431.
436. $1 Million Grant from State of Florida Will Support UM HIV/AIDS Research, supra note 354; see also Bousquet & Auslen, supra note 383 (emphasizing the damage that Governor Rick Scott’s budget cuts on HIV/AIDS public health funds have caused on both the State of Florida as a whole and on the areas most affected by the HIV/AIDS epidemic, such as Miami-Dade and Broward counties). Compare Epidemiology of HIV Infection Trends in Florida Reported Through 2014, supra note 364, with HIV/AIDS Epidemiology Partnership 11a, supra note 370.
438. Id.
439. Id.
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individuals who are in communities experiencing significant increases in new HIV infections.\textsuperscript{426}

As can be appreciated from the text above, the state budget sets aside three million dollars for its intravenous drug user program and two million dollars for the expansion of PrEP outreach and education throughout the state.\textsuperscript{427} The San Francisco 2015–2016 Budget is also very ambitious, setting aside “[two] million [dollars] in new funding to continue San Francisco’s leadership in the fight against [HIV/AIDS] for the Getting to Zero initiative, which focuses on achieving zero new HIV Infections, zero AIDS deaths, and zero stigma.”\textsuperscript{428}

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\textsuperscript{426} Califonia 2015–16 State Budget, supra note 425, at 31.

\textsuperscript{427} Id.

\textsuperscript{428} San Francisco Mayor’s Proposed Budget, supra note 424, at 14.


\textsuperscript{432} See id.

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previous decades. Therefore, it is crucial that Florida provide the youth with comprehensive sexual education throughout its public school system in order to reduce the transmission of the disease within this age group. Empowering students with knowledge of the disease and methods of prevention are necessary so that young people can understand how HIV is transmitted and how to prevent infection. Section 1003.46 of the Florida Statutes is on point and reads as follows:

(1) Each district school board may provide instruction in acquired immune deficiency syndrome education as a specific area of health education. Such instruction may include . . . the known modes of transmission, signs and symptoms, risk factors associated with acquired immune deficiency syndrome, and means used to control the spread of acquired immune deficiency syndrome . . . (2) a school shall: (a) Teach abstinence from sexual activity outside of marriage . . . while teaching the benefits of monogamous heterosexual marriage; (b) [e]nhance . . . abstinence; . . . (c) [t]each that each student has the power to control personal behavior and; . . . (d) [p]rovide instruction and material that is appropriate for the grade and age of the student.

The instruction provided to students in Florida does not adequately address the HIV epidemic. Instead, it focuses on an ideological paradigm emphasizing abstinence and heterosexual marriage. But the fact is MSM are disproportionately affected by HIV transmission, and their explicit exclusion from educational instruction effectively negates addressing this reality in schools across the state. The Florida provision implies that monogamous same-sex marriages are not a means of HIV prevention. This is flawed and simply untrue—as monogamous relationships, irrespective of the sexual orientation of those taking part in them, function as a proper means of prevention for HIV transmission. What is the purpose of having educational instruction meant to teach youth on HIV prevention if the state excludes disproportionately affected minorities from such instruction?

The structure of section 1003.46 of the Florida Statutes is lacking in substance and should be amended to encompass all known facts on HIV transmission in a direct and explicit manner. An example of a thorough educational structure for instruction on HIV/AIDS can be found in the California Education Code, reading as follows:

(a) A school district shall ensure that all pupils in grades [seven] to [twelve], inclusive, receive HIV/AIDS prevention education . . . Each pupil shall receive this instruction at least once in junior high or middle school and at least once in high school. (b) HIV/AIDS prevention education . . . shall accurately reflect the latest information and recommendations from the United States Surgeon General, the federal Centers for Disease Control and Prevention, and the National Academy of Sciences . . . including the following: (1) Information on the nature of HIV/AIDS and its effects on the human body; (2) Information on the manner in which HIV is and is not transmitted, including . . . on activities that present the highest risk of HIV infection; (3) Discussion of methods to reduce the risk of HIV infection. This instruction shall emphasize that sexual abstinence, monogamy, the avoidance of multiple sexual partners, and abstinence from intravenous drug use are the most effective means for HIV/AIDS prevention, but shall also include statistics based upon the latest medical information citing the success and failure rates of condoms and other contraceptives in preventing sexually transmitted HIV infection, as well as information on other methods that may reduce the risk of HIV transmission from intravenous drug use; (4) Discussion of the public health issues associated with HIV/AIDS; (5) Information on local resources for HIV testing and medical care; (6) Development of refusal skills to assist pupils in overcoming peer pressure . . . ; (7) Discussion about societal views on

441. See id.
442. See About Test Miami, supra note 408; HIV/AIDS Epidemiology Partnership 11a, supra note 370.
443. See About Test Miami, supra note 408.
444. FLA. STAT. § 1003.46 (2015).
445. See id.; supra Section III.B.2 (discussing methods of prevention known to reduce HIV transmission that are not explicitly included in section 1003.46 of the Florida Statutes).
446. FLA. STAT. § 1003.46 (2015).
447. See id. § 1003.46(2)(a); Today's HIV/AIDS Epidemic, supra note 82 (noting that the Centers for Disease Control & Prevention reports that MSM constituted sixty-three percent of all new HIV infections in 2010).
448. FLA. STAT. § 1003.46 (2015). It specifically excludes monogamous same-sex marriages from its definition. Id.
449. See Lower Your Sexual Risk of HIV, AIDS.gov, http://www.aids.gov/hiv-aids-basics/prevention/reduce-your-risk/sexual-risk-factors (last revised Aug. 13, 2015) (describing ways in which one can lower the risk of HIV transmission without limiting monogamy to male-female relationships). Also worth mentioning is that the Supreme Court has ruled that laws banning marriages between people of the same sex violate the United States Constitution. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015). From the words of the Court: "There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices." Id. at 2599.
451. See id.; Lower Your Sexual Risk of HIV, supra note 449.
previous decades. Therefore, it is crucial that Florida provide the youth with comprehensive sexual education throughout its public school system in order to reduce the transmission of the disease within this age group. Empowering students with knowledge of the disease and methods of prevention are necessary so that young people can understand how HIV is transmitted and how to prevent infection. Section 1003.46 of the Florida Statutes is on point and reads as follows:

(1) Each district school board may provide instruction in acquired immune deficiency syndrome education as a specific area of health education. Such instruction may include . . . the known modes of transmission, signs and symptoms, risk factors associated with acquired immune deficiency syndrome, and means used to control the spread of acquired immune deficiency syndrome . . . (2) a school shall: (a) Teach abstinence from sexual activity outside of marriage . . . while teaching the benefits of monogamous heterosexual marriage; (b) [emphasize . . . abstinence; . . . (c) [teach that each student has the power to control personal behavior and; . . . (d) [provide instruction and material that is appropriate for the grade and age of the student.

The instruction provided to students in Florida does not adequately address the HIV epidemic. Instead, it focuses on an ideological paradigm emphasizing abstinence and heterosexual marriage. But the fact is MSM are disproportionately affected by HIV transmission, and their explicit exclusion from educational instruction effectively negates addressing this reality in schools across the state. The Florida provision implies that monogamous same-sex marriages are not a means of HIV prevention. This is flawed and simply untrue—as monogamous relationships, irrespective of the sexual orientation of those taking part in them, function as

441. See id.
442. See About Test Miami, supra note 408; HIV/AIDS Epidemiology Partnership 11a, supra note 370.
443. See About Test Miami, supra note 408.
444. FLA. STAT. § 1003.46 (2015).
445. See id; supra Section III.B.2 (discussing methods of prevention known to reduce HIV transmission that are not explicitly included in section 1003.46 of the Florida Statutes).
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451. See id.; Lower Your Sexual Risk of HIV, supra note 449.
HIV/AIDS, including stereotypes and myths regarding persons with HIV/AIDS. This instruction shall emphasize compassion for persons living with HIV/AIDS.\(^{452}\)

As can be appreciated from California’s analogous provision to section 1003.46 of the Florida Statutes, the language of the statute also emphasizes monogamy amongst other preventive measures against HIV transmission.\(^{453}\) The statute directs school districts to take into account “recommendations from the United States Surgeon General, the federal Centers for Disease Control and Prevention, and the National Academy of Sciences,” as well as requiring instruction on prevention methods, such as condom usage.\(^{454}\) Florida’s provision places a disproportionate emphasis on abstinence, and while abstinence is one method of prevention, it does not provide sexually active youth with the information needed to prevent them from contracting sexually transmitted infections.\(^{455}\) Statistics indicate that teenagers are sexually active in Florida and that the abstinence education provided by the state is not lessening such activities.\(^{456}\) Therefore, it is imperative to educate teenagers on effective prevention methods, including the proper use of condoms and other means that lessen HIV transmission—and that it be explicitly incorporated by statute in order to ensure the dissemination of such information.\(^{457}\)

The provision in Florida is also written in terms of may, rather than shall as it is in California.\(^{458}\) HIV prevention should not be a matter of may but should instead be a matter of shall.\(^{459}\) HIV is a lifelong chronic condition that can kill its host if not properly treated.\(^{460}\) It is a medical condition, and its prevention should be a state interest.\(^{461}\) HIV is not a moral issue; HIV is a medical condition.\(^{462}\) Therefore, the state should treat HIV as a medical condition and teach its students the correct information without withholding known methods of transmission, statistics, or an understanding of the scientific knowledge that we have acquired throughout the years about this epidemic.\(^{463}\) The State of Florida should not shy away from the dissemination of information to its youth.\(^{464}\)

### b. Accepting Responsibility for One’s Actions

As advanced by the ANAC, the HIV-specific criminal provisions scrutinized in the first half of this Comment “contradict public health messages regarding individual responsibility for safer sex, [and] do not alter behavior . . . .”\(^{465}\) As such, the last recommendation of this Comment is that Florida implement educational methods on taking responsibility for safer sex practices.\(^{466}\) The behavior of people living with HIV/AIDS may or may not lead to HIV status disclosure, and such reality may be due to a number of factors.\(^{467}\) It is imperative that individuals take responsibility for their actions and that they not engage in sexual behavior that may exacerbate the spread of sexually transmissible diseases.\(^{468}\)

In the absence of rape and infidelity, it is hard to conceive of scenarios where each sex partner is not equally responsible for safer sex practices.\(^{469}\) Even in monogamous relationships, some sense of shared responsibility should exist, as public health experts suggest that everyone should take precaution against HIV transmission.\(^{467}\) It is unjust to say that people living with HIV/AIDS are at total fault for HIV transmission where the other partner did not take precautions to reduce the possibility of transmission.

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452. CAL. EDUC. CODE § 51934 (West 2015).
453. Id. § 51934(b)(3); Fla. STAT. § 1003.462(a) (a) (2015).
455. FLA. STAT. § 1003.462(a)-(b) (2015).
457. See id.; About Test Miami, supra note 408; Steiner & DeCarlo, supra note 175.
460. See Current Trends Update on Acquired Immune Deficiency Syndrome (AIDS) — United States, supra note 78; Dana P. Goldman et al., supra note 373; supra Section III.B.2 (discussing the scientific advances that have made HIV/AIDS a chronic condition as opposed to a fatal disease—albeit a serious one requiring medical attention).
461. See Types of HIV/AIDS Antiretroviral Drugs, supra note 146; supra Section III.B.2 (discussing the scientific advances that have made HIV/AIDS a chronic condition as opposed to a fatal disease—albeit a serious one requiring medical attention).
462. See Altman, New Homosexual Disorder Worries Health Officials, supra note 72; Current Trends Update on Acquired Immune Deficiency Syndrome (AIDS) — United States, supra note 78, supra Section III.A (discussing the moral stigma that has surrounded this medical condition).
463. See Types of HIV/AIDS Antiretroviral Drugs, supra note 146; supra Section III.B.2 (discussing the methods of prevention against HIV transmission).
466. Id.
467. See Buchanan, supra note 34, at 1256–62 (discussing the complex reasons on why PLWHA may fail to disclose their HIV status to a partner).
468. Id. at 1246 (noting that public health officials fear that HIV-specific criminal laws may foster a false sense of security in HIV-negative people).
469. See id. at 1254–55.
470. See Elliot, supra note 201, at 7 (recommending everyone to take precaution against HIV transmission and to not rely on the “false sense of security” the criminal law provides).
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\(^{454}\) See CAL. EDUC. CODE § 51934 (2015).

\(^{455}\) See Position Statement, supra note 202.

\(^{456}\) See Buchan, supra note 34, at 1256-62 (discussing the complex reasons why PI/WHI may fail to disclose their HIV status to a partner).

\(^{457}\) Id. at 1246 (noting that public health officials fear that HIV-specific criminal laws may foster a false sense of security in HIV-negative people).

\(^{458}\) See Elliot, supra note 201, at 7 (recommending everyone to take precaution against HIV transmission and to not rely on the “false sense of security” the criminal law provides).
infection. Instead, we should be ensuring that PLWHA seek adequate health services and encouraging everyone to adopt a heightened sense of individual responsibility for safer sex practices. Florida should recognize the concept of a shared responsibility in sexual practices in its public health campaign against HIV by explicitly incorporating it into section 381.0046 of the Florida Statutes and in school curriculums by explicitly incorporating it into section 1003. Florida should also consider the concept of a shared responsibility in sexual practices when choosing to amend or repeal its HIV-specific criminal provisions—as it is unjust for the law to punish those who have a communicable medical condition—while simultaneously turning a blind eye to the failure of those who do not carry such a medical condition in adequately preventing their exposure to the condition through their own volition.

V. CONCLUSION

The HIV/AIDS epidemic arose in a context of confusion and fear of infection that led to a quick stigmatization of the condition. This in turn led to the passage of HIV-specific criminal laws throughout the nation in order to prevent the transmission of HIV. Modern scientific advances in medicine have made HIV a chronic condition that may be prevented through the usage of proper prevention mechanisms known to date, inclusive of (1) safer sex practices, (2) ART, (3) Truvada as PrEP, (4) PeP, and (5) condoms. Florida should either amend or repeal its HIV-specific criminal provisions in recognition of such scientific advances and recognize HIV/AIDS is no longer a death sentence.

471. See id. at 11.
472. See Dodds & Keogh, supra note 227, at 316 (depicting the feelings of an HIV-positive woman regarding her thoughts on the subject of the collective responsibility that should be shared between sex partners regardless of HIV status—as part of a study aiming at understanding the effects of stigma on PLWHA).
473. See THE GLOB. COMM’N ON HIV & THE LAW, supra note 275 at 20 (noting that we should all carry a shared sense of moral responsibility in the fight against this condition).
476. See Altman, New Homosexual Disorder Worries Health Officials, supra note 72; supra Section III.A.
477. See supra Part II.
478. See supra Section III.B.
479. See Fla. Stat. § 384.34 (2015); supra Section III.B, IV.A.
480. See Epidemiology of HIV Infection Trends in Florida Reported Through 2014, supra note 364; Bousquet & Auslen, supra note 383; supra Section IV.B.
481. See Buchbinder, supra note 386; supra Section IV.B.2.a.
482. See supra Section IV.B.3.
infection.\textsuperscript{471} Merely pointing fingers at another and having that person prosecuted for engaging in sex acts hampers the public health interest in reducing stigma;\textsuperscript{472} instead, we should be ensuring that PLWHA seek adequate health services and encouraging everyone to adopt a heightened sense of individual responsibility for safer sex practices.\textsuperscript{473} Florida should recognize the concept of a shared responsibility in sexual practices in its public health campaign against HIV by explicitly incorporating it into section 381.0046 of the Florida Statutes and in school curriculums by explicitly incorporating it into section 1003.\textsuperscript{474} Florida should also consider the concept of a shared responsibility in sexual practices when choosing either to amend or repeal its HIV-specific criminal provisions—as it is unjust for the law to punish those who have a communicable medical condition—while simultaneously turning a blind eye to the failure of those who do not carry such a medical condition in adequately preventing their exposure to the condition through their own volition.\textsuperscript{475}

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\item \textsuperscript{474} See Fla. Stat. §§ 381.0046, 1003.46 (2015).
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I. INTRODUCTION

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   A. History and Role of the Hague Conference on Private International Law
   B. Organization and Operation of the Hague Conference
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IV. CONCLUSION

I. INTRODUCTION

María José Carrascosa is a Spanish citizen who fell in love and subsequently married Peter W. Innes, a citizen from the United States. A

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http://nsuworks.nova.edu/nlr
year after their marriage they had a daughter, Victoria, and for five years they lived together in New Jersey. In early 2004, Carrascosa and Innes decided to put an end to their marital relationship. That same year the parties signed "an agreement ... concerning parenting time, restrictions, and the appointment of a third-party parenting coordinator." Moreover, the parties agreed that Victoria could not travel outside of the United States without the written permission of the other parent. Despite this restrictive clause, "Carrascosa and Victoria traveled to Spain without the ... knowledge of Innes." Given these circumstances, each party decided to appeal to a different justice system—Carrascosa appealed to the Spanish court seeking a civil annulment of her marriage, and Innes filed a complaint for a divorce, equitable distribution, and joint legal custody in New Jersey. While the case was legally pending in Spain, Judge Parsons of the Superior Court of New Jersey established that the Spanish court did not have the required jurisdiction over the parties, granted Innes temporary custody of Victoria, and ordered the return of the minor to the United States within three weeks. On the other hand, the Spanish court considered that Carrascosa did not remove her daughter wrongfully under the Hague Convention on the Civil Aspects of International Child Abduction, and therefore, there was not a legal obligation to return the minor to the United States. As a consequence of violating the New Jersey court orders, Carrascosa was arrested in New York and incarcerated. Since 2006, Victoria has been living with her maternal grandparents in Valencia. Over all these years, she has not seen her father or her mother who was incarcerated in the Bergen County jail. As Judge Lyons states in the opinion of the Superior Court of New Jersey, this heartbreaking case greatly affected the life of a child who has grown up without the affection of her mother or father.

2. Id.
3. Id.
4. Id. at 692.
5. Id.
6. Id., 918 A.2d at 692.
7. Id.
8. Id. at 693.
10. Id., 918 A.2d at 702.
11. See id. at 691, 702.
12. Id. at 691.
13. Id.
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2. See id.
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10. Innes, 918 A.2d at 702.
11. See id. at 691, 702.
12. See id. at 691, 702.
13. Id. at 691.
15. Id.
16. Id.
21. Strong, supra note 18, at 49.
22. Id.
and evaluate the American system of recognition and enforcement of foreign countries’ decisions.23

II. THE PROMOTION OF THE CODIFICATION OF PRIVATE INTERNATIONAL LAW: THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

As stated before, the presence of international private law is continuous in our current and interconnected society, but it also involves huge difficulties in its enforcement.24 In order to provide an answer to all those questions resulting from the application of the conflict of laws, several states have voluntarily signed different treaties and conventions where guidelines are set forth.25 In the context of unification and codification of international private law, the role of the Hague Conference of International Private Law and its conventions stand out.26 The Hague Conference has created a body of normative material through its intense work during more than a century that applies to its eighty members.27

In order to provide a better knowledge of the Hague Conference, I will proceed to the examination of its background and how the organization was created.28 Moreover, the analysis of its statute and the way this international organization operates will reveal a solid structure based on a democratic system where its members maintain part of their sovereignty while they cooperate in order to reach the aim of unifying the rules of international private law.29

24. See Hilton v. Guyot, 159 U.S. 113, 163 (1895); Smit, supra note 19, at 25; supra Part I.
27. Overview, supra note 17.
28. See infra Sections II.A–B.

2016] COMITY AND FOREIGN DECISIONS IN U.S.

A. History and Role of the Hague Conference on Private International Law

Faced with the challenges that rise up in a globalized world, the Hague Conference on Private International Law was created during the nineteenth century to provide a solution to those challenges and respond to the new needs of citizens.30 It is considered one of the most important and influential organizations with eighty members representing all continents, one of them being the European Union.31 However, the Hague Conference did not obtain its status of permanent intergovernmental organization until its seventh session in 1951.32 This new era for the Hague Conference began with the creation and the enforcement of its statute in July of 1955.33 The statute, which is composed of fifteen articles, establishes the central principles and values that govern the Hague Conference.34 As recognized in Article 1 of the statute, the Hague Conference has the main mission “to work for the progressive unification of the rules of private international law.”35 Therefore, it is the only intergovernmental organization that has a legislative goal.36 In order to provide a higher level of security to individuals and companies when acting in a foreign country, several methods and instruments were created by this leading intergovernmental organization.37 To overcome those legal impediments that individuals and companies face when cross-border relations and transactions are established, the methods of negotiation and drafting of the Hague Conventions stand out.38 These conventions developed by the Hague Conference are considered multilateral treaties and deal with diverse fields of private international law, such as

30. Overview, supra note 17.
31. Id.
33. Id.
35. Id., art. 1.
36. Overview, supra note 17. With these words, The Hague Conference on Private International Law expressed its mission:
The statutory mission of the Conference is to work for the progressive unification of these rules. This involves finding internationally-agreed approaches to issues such as jurisdiction of the courts, applicable law, and the recognition and enforcement of judgments in a wide range of areas, from commercial law and banking law to international civil procedure and from child protection to matters of marriage and personal status.
37. See id.
38. Id.
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24 See Hilton v. Guyot, 159 U.S. 113, 163 (1895); Smit, supra note 19, at 25; supra Part I.


27 See Overview, supra note 17.

28 See infra Sections II.A–B.

"international judicial and administrative co-operation; conflict of laws for contracts, torts, maintenance obligations, status and protection of children, relations between spouses, wills and estates or trusts; recognition of companies; [and] jurisdiction and enforcement of foreign judgments."

Through the signature and following ratification of these multilateral treaties, the members of the Hague Conference encourage and promote the construction of bridges between the different existing legal systems while respecting their diversity. The active role of the Hague Conference in the unification and codification of the different international private law rules governing in each state facilitates all civil and commercial situations that connect more than one country since the conventions progressively resolve all those differences regarding the jurisdiction of the courts, applicable law, and recognition and enforcement of foreign decisions.

The first session of the Hague Conference on Private International Law took place in August of 1893 by the convening of the Netherlands' government. This first session basically consisted of the discussion of family law and general principles of the conflicts of law topics. It had as an outcome the drafting of the first Hague Convention—referred to as the Convention on Civil Procedure with Additional Protocol. The commission decided to write several articles regarding the service of process, taking evidence abroad, deposits for costs, legal aid, and physical detention of foreign debtors. This first Hague Convention, signed on November 14, 1896, and entered into force on May 23, 1899, was considered a huge success due to the ratification by fourteen European countries. Between the first session of the organization and 1904, seven international conventions were adopted by the Hague Conference. Six of these treaties were replaced by modern instruments, including the New Convention on Civil Procedure on March 1, 1954. Following these first conventions, the broad subject of civil procedure was broken down through the drafting of three treaties: the 1965 Convention about service of documents abroad; the 1970 Convention covering taking of evidence abroad; and the 1980 Convention on International Access to Justice regarding “legal aid, deposits for costs, safe conduct of witnesses, and detention of foreign debtors.” These modern conventions are the reflection of the main objective of the Hague Conference to create a close relationship and a bridge between those civil law countries—that is to say those thirty states that signed the Convention on Civil Procedure of 1954 and those countries having common law procedural systems.

Nowadays, the Hague Conference on Private International Law is also aware of the importance of providing to all citizens a constantly updated source of information. For the purpose of keeping individuals informed of the activity and work of the Hague Conference, the Permanent Bureau is in charge of frequently publishing and maintaining a collection of conventions and of creating handbooks that clearly explain the operation of a particular convention. Additionally, the Secretariat edits the proceedings of each session that may be available on CD-ROM or microfiche. Furthermore, the development and new advances of technology have had a substantial impact on this intergovernmental organization. Currently, the Hague Conference makes available three free electronic channels to all citizens interested in the Hague Conference. Through the main webpage of the Hague Conference, general information concerning the international organization may be found. Besides this basic information, the different texts of the conventions have also been uploaded: "full status reports, bibliographies, information regarding the authorities designated under the conventions on judicial and administrative co-operation, explanatory notes, etc."
international judicial and administrative co-operation; conflict of laws for contracts, torts, maintenance obligations, status and protection of children, relations between spouses, wills and estates or trusts; recognition of companies; [and] jurisdiction and enforcement of foreign judgments. Through the signature and following ratification of these multilateral treaties, the members of the Hague Conference encourage and promote the construction of bridges between the different existing legal systems while respecting their diversity. The active role of the Hague Conference in the unification and codification of the different international private law rules governing in each state facilitates all civil and commercial situations that connect more than one country since the conventions progressively resolve all those differences regarding the jurisdiction of the courts, applicable law, and recognition and enforcement of foreign decisions.

The first session of the Hague Conference on Private International Law took place in August of 1893 by the convening of the Netherlands' government. This first session basically consisted of the discussion of family law and general principles of the conflicts of law topics. It had as an outcome the drafting of the first Hague Convention—referred to as the Convention on Civil Procedure with Additional Protocol. The commission decided to write several articles regarding the service of process, taking evidence abroad, deposits for costs, legal aid, and physical detention of foreign debtors. This first Hague Convention, signed on November 14, 1896, and entered into force on May 23, 1899, was considered a huge success due to the ratification by fourteen European countries. Between the first session of the organization and 1904, seven international conventions were adopted by the Hague Conference. Six of these treaties were replaced by modern instruments, including the New Convention on Civil Procedure on March 1, 1954. Following these first conventions, the broad subject of civil procedure was broken down through the drafting of three treaties: the 1965 Convention about service of documents abroad, the 1970 Convention covering taking of evidence abroad; and the 1980 Convention on International Access to Justice regarding "legal aid, deposits for costs, safe conduct of witnesses, and detention of foreign debtors." These modern conventions are the reflection of the main objective of the Hague Conference to create a close relationship and a bridge between those civil law countries—that is to say those thirty states that signed the Convention on Civil Procedure of 1954 and those countries having common law procedural systems.

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49. Droz, supra note 42, at 4.
50. Id. at 3-4. The following forty-two countries have signed the Civil Procedure Convention of 1954: Albania, Argentina, Armenia, Austria, Belarus, Belgium, Bosnia and Herzegovina, People’s Republic of China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Finland, France, Germany, Hungary, Iceland, Israel, Italy, Japan, Latvia, Lithuania, Luxembourg, Montenegro, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Suriname, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, and Ukraine. Status Table: 02: Convention of 1 March 1954 on Civil Procedure, HAGUE CONF. ON PRIV. INT’L L., http://www.hcch.net/index_en.php?act=conventions.status&cid=33 (last updated Sept. 17, 2015).
52. Overview, supra note 17.
53. Id.; see also infra Section II.B.
54. Overview, supra note 17.
55. See id.
56. See id.
57. Id.
The development of INCADAT, the International Child Abduction Database, facilitated the access to important judicial decisions taken by national courts regarding the 1980 Hague Convention on the Civil Aspects of International Child Abduction. Finally, the electronic statistical database called INCASTAT—created by the Annual Statistical Forms—is only available for those Central Authorities designated under the 1980 Child Abduction Convention, and it contains return and access applications.

B. Organization and Operation of the Hague Conference

The Netherlands Commission, “established by royal decree [on] February 20, 1897, for the purpose of promoting the codification of [P]rivate [I]nternational [L]aw,” has the duty to guarantee the correct operation of the Hague Conference through a Permanent Bureau. The Permanent Bureau—also known as Secretariat—has its headquarters at The Hague, Netherlands, and it is “composed of a Secretary General and two Secretaries, of different nationalities, who ... [are] appointed by the Government of the Netherlands upon presentation by the State Commission ... [and] have the proper legal knowledge and practical experience.” This multinational Secretariat communicates directly with the members of the conference through the experts and central authorities designated by each member. Moreover, the Permanent Bureau also establishes and maintains contacts with international organizations and with any national organ of the member states. The main task adjudicated to the Permanent Bureau by Article 5 of the statute is to prepare and organize the sessions of the Hague Conference and the several meetings of the special committees that take place. These special committees are established in those periods in which there is no ordinary session of the Hague Conference “for the purpose of preparing draft conventions or studying any questions of private international law that comes within the purpose of the Hague Conference.” In order to organize both meetings, the members of the Secretariat have the duty to execute the basic research needed for any subject discussed by the Hague Conference.

The statute also establishes two different procedures to obtain the status of a member of the Hague Conference. The first procedure automatically granted the condition of member to those states that had met the following requirements before the drafting of the Statute of the Hague Conference in 1951: (1) participation and attendance to at least one session of the Hague Conference; and (2) signature of the aforementioned multilateral agreement. However, the statute does not bar other states that did not meet with the conditions established on the first procedure to become a member. This status will be conceded to any state as long as its “participation... is of judicial interest to the work of the [Hague] Conference.” The state concerned will not become a member immediately. Its admission will be contingent upon the decision of the government of the participating states: The new member should be approved by a majority vote on its proposal. This vote must take place “within six months from the day on which [they] have been informed of such proposal.” Nevertheless, the admission as a member will only become definitive with the signature of the Statute of the Hague Conference on Private International Law by the state concerned.

The organization functions through the assistance of its members at a periodical and mandatory meeting every four years in plenary session.

58. Id.
59. Overview, supra note 17; see also infra Section II.B.
60. Overview, supra note 17.
62. Id. art. 4-5; see also More About HCCH, supra note 32.
63. Statute of The Hague Conference on Private International Law, supra note 29, art. 6; see also More About HCCH, supra note 32.
64. See Statute of The Hague Conference on Private International Law, supra note 29, art. 5; More About HCCH, supra note 32. Among the international organizations to whom The Hague Conference maintains continuing contact are: [The United Nations—particularly its Commission on International Trade Law (UNCITRAL), UNICEF, the Committee on the Rights of the Child (CRC) and the High Commissioner for Refugees (UNHCR)—the Council of Europe, the European Union, the Organization of American States, the Commonwealth Secretariat, the Asian-African Legal Consultative Organization (AALCO), the International Institute for the Unification of Private Law (Unidroit)]... More About HCCH, supra note 32.
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66. Id. art. 7; see also More About HCCH, supra note 32.
67. More About HCCH, supra note 32.
69. Id.
70. See id.; More About HCCH, supra note 32.
72. See id.
73. Id.; see also More About HCCH, supra note 32.
75. Id.
76. Id. art. 3; see also More About HCCH, supra note 32.
statute foresees the call of an extraordinary session in case of need. In this
situation, the special meeting of the Hague Conference will be called by the
Government of Netherlands upon the requesting of the State Commission,
with the approval of the members. It is in the plenary sessions where the
different countries discuss and adopt the draft of conventions and
recommendations that have been prepared by the Special Commissions. Each
state has only one vote and all decisions are adopted through obtaining
the majority of the votes by the delegations of the member states that have
attended the session. The ordinary meeting concludes with the delegations
of the member states signing a Final Act where all the texts have been
brought together.

Regarding the expenses of the ordinary session of the Hague
Conference, the Statute establishes the following in Article 10:

The expenses resulting from the regular sessions of the [Hague]
Conference shall be borne by the Government of the Netherlands.
In the event of a special session, the expenses shall be apportioned
among the [m]embers of the [Hague] Conference who are
represented at the session. In any case, compensation for the travel
and living expenses of the [d]elegates shall be paid by their
respective [g]overnments.

The state members not only have the right and the duty to assist the
mandated plenary session, but they are also responsible for the correct
functioning of the organization. Although the Statute vested the power
to ensure the organization of the Hague Conference to the Netherlands Standing
Government Committee, in practice, due to a tendency and natural evolution
towards constitutionalism and democracy, the member states have a decisive
role and influence on the decision-making of the direction the Hague
Conference is taking.

77. Statute of The Hague Conference on Private International Law, supra note
29, art. 3; see also More About HCCCH, supra note 32.
78. Statute of The Hague Conference on Private International Law, supra note
29, art. 3.
79. Id. art. 7; More About HCCCH, supra note 32.
80. More about HCCCH, supra note 32.
81. Id.
82. Statute of The Hague Conference on Private International Law, supra note
29, art. 10.
83. More About HCCCH, supra note 32.
84. Id.; see also Statute of The Hague Conference on Private International
Law, supra note 29, art. 3.
86. See Conventions, HAGUE CON.. ON PRIV. INT'L L., http://www.hcch.net/
index_en.php?act=conventions.listing (last visited Mar. 29, 2016); The Hague Conference
on Private International Law, supra note 23.
87. See Cornelis D. van Boeschoten, Hague Conference Convention and the
88. Id. at 48. 
89. Id. at 50-51.
90. Smit, supra note 19, at 34.
91. See id. at 44-45.
92. Id. at 33.
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The state members not only have the right and the duty to assist the mandatory plenary session, but they are also responsible for the correct functioning of the organization. Although the Statute vested the power to ensure the organization of the Hague Conference to the Netherlands Standing Government Committee, in practice, due to a tendency and natural evolution towards constitutionalism and democracy, the member states have a decisive role and influence on the decision-making of the direction the Hague Conference is taking.

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80. More about HCCH, supra note 32.
81. Id.
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84. Id.; see also Statute of The Hague Conference on Private International Law, supra note 29, art. 3.
88. Id. at 48.
89. Id. at 50–51.
90. Smith, supra note 19, at 34.
91. See id. at 44–45.
92. Id. at 33.
1. The Influence of the United States of America in the International Organization

The influence of the United States in the work of the Hague Conference to harmonize rules of procedure is palpable since its entry as a member in 1964.93 Following the inspiration of the common law system, there was a replacement of diplomatic and consular channels with judicial and administrative channels when establishing and maintaining relationships with foreign countries.94 This change was possible thanks to the creation of a central authority mechanism.95 Each member of the Hague Conference has the obligation to designate a central governmental authority, and the states must commit themselves to effectuate and return service abroad through that central authority when required to do so.96 The designation of central authorities had as another consequence the addition of two new tasks to the work of the Permanent Bureau: circulating information regarding recent changes in the central authorities and observing how those conventions that involved international and central authorities are functioning.97 The importance of both assignments has substantially increased during the last fifteen years.98 However, part of this shift was also consequence of the growth of the relationships among private individuals after World War II that increased the international civil procedural traffic.99 Another example of the effect that the incorporation of the United States had in the heart of this international organization was the drafting of Articles 15 and 16 of the 1965 Convention.100 Both provisions were inspired by the Fifth and Fourteenth Amendments of the U.S. Constitution, where the due process requirement is established.101 The implementation of these articles provide all defendants

94. Id.
95. Id.
96. Id. at 5.
97. Id. at 8.
98. Droz, supra note 42 at 8.
99. Id. at 4.
101. U.S. Const. amend. V, XIV.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

from the United States the protection required to not suffer any kind of injustice that might take place in a lawsuit in any of the twenty-one countries that signed and ratified the Convention of 1965.102 Specifically, Article 15 reads as follows:

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that (a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or (b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention, and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend. Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled (a) the document was transmitted by one of the methods provided for in this Convention, (b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document, (c) no
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The implementation of these articles provide all defendants from the United States the protection required to not suffer any kind of injustice that might take place in a lawsuit in any of the twenty-one countries that signed and ratified the Convention of 1965. Specifically, Article 15 reads as follows:

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U.S. CONST. amend. V:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

102. See Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, supra note 100, at 364-65; Status Table 14: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, HAGUE CONF. ON PRIV. INT’L L., http://www.btpl.net/index_en.php?act=conventions.status&cid=17 (last updated June 17, 2015). The following fifty-four countries have signed the Convention of 1965: Albania, Argentina, Armenia, Australia, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, People’s Republic of China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Ireland, Israel, Italy, Japan, Republic of Korea, Latvia, Lithuania, Luxembourg, Malta, Mexico, Monaco, Montenegro, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom of Great Britain and Northern, United States of America, and Venezuela. Id.
certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed. Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.  

The inclusion of this article in the convention gives all defendants whose lawsuits are filed abroad to not face a judgment against them if the defendant did not appear during the process after the correct service of the summons or an equivalent document. Therefore, the court will only be authorized to render a judgment if the conditions established in the article take place. However, the judge will have discretion to order provisional or protective measures every time that extraordinary circumstances occur. Hence, this method has the goal of requiring the compliance of a standard of international procedural due process in all judicial proceedings involving private individuals. The safety measure of procedural due process of Article 15 is complimented by the requirement of substantive due process of Article 16.

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled (a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and (b) the defendant has disclosed a prima facie defense to the action on the merits. An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment. Each contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than

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103. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, supra note 100, at 364.
104. Id.
105. Id.
106. Id.
107. See id.
109. Id. at 364-65.
110. See id. at 364.
111. See id. at 364-65.
112. See id. at 364-65.
113. See van Boeschoten, supra note 87, at 52.
114. Fastiff, supra note 112, at 470.
116. van Boeschoten, supra note 87, at 53.
117. Fastiff, supra note 112, at 480.
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104. Id.
105. Id.
106. Id.
107. See id.
108. See Convention on the Service Abroad of Judicial and Extrajudicial
Documents in Civil or Commercial Matters, supra note 100, at 364–65.
If a contracting member would have assumed jurisdiction based on impermissible jurisdictional bases or grounds of jurisdiction not specified in the convention, the decision could have been recognized under the domestic law of the country where the enforcement was sought. Therefore, this mixed convention would have allowed the contracting members to maintain part of their sovereignty with the impediment that the decision would not have been automatically recognized and enforced. However, the European countries expressed their discontent at the 17th Hague Conference session. This opposition was the result of the different perspective that each country has regarding the assumption of jurisdiction. For example, European countries have, as a main objective, to diminish the possibilities of implementing a forum shopping system and do not recognize the exercise of personal jurisdiction based on the presence of the defendant within the boundaries of the state, no matter how temporary his or her presence is. This first draft did not prosper and was followed by a second attempt of creating a multilateral agreement regarding required jurisdictions on June of 2001. Although the Hague Conference expressed its interest in the project submitted by the United States, the lack of agreement among its members has discouraged the idea of an appropriate compromise regarding a universal system of jurisdictions and recognition and enforcement of judgments. In 2012, the Hague Conference reconsidered creating a group which special task was to reflect on the system proposed by the United States at the beginning of 1990s. However, no new convention has been adopted concerning the recognition and enforcement of judgments decided by foreign judicial authorities, and, as occurred in the previous attempts, there is no guarantee that the project would finalize successfully with the draft of a new multilateral treaty. Still, there are great hopes regarding a future coordination of the efforts of the United States with the work of the international community.

118. Id. at 483.
119. See id. at 482–83.
120. See id. at 483.
122. See Fastiff, supra note 112, at 480.
123. Silberman, supra note 115, at 328; see also Fastiff, supra note 112, at 483.
124. Silberman, supra note 115, at 331.
125. Fastiff, supra note 112, at 480, 482–83.
126. Strong, supra note 18, at 48, 51.
127. Id. at 51–52.
128. See id. at 51.
129. See Droz, supra note 42, at 8.
131. Id. at 524, 529–30, 533.
132. See id. at 529, 533.
133. Id. at 537.
134. Id. at 538.
135. Société National Industrielle Aéropatiale, 482 U.S. at 534, 537–38. “The text of the Evidence Convention itself does not modify the law of any contracting state, require any contracting state to use the Convention procedures, either in responding to evidence requests, or compel any contracting state to change its own evidence-gathering procedures.” Id. at 534.
136. See Droz, supra note 42, at 9.
unacceptable. 118 If a contracting member would have assumed jurisdiction based on impermissible jurisdictional bases or grounds of jurisdiction not specified in the convention, the decision could have been recognized under the domestic law of the country where the enforcement was sought. 119 Therefore, this mixed convention would have allowed the contracting members to maintain part of their sovereignty with the impediment that the decision would not have been automatically recognized and enforced. 120 However, the European countries expressed their discontent at the 17th Hague Conference session. 121 This opposition was the result of the different perspective that each country has regarding the assumption of jurisdiction. 122 For example, European countries have, as a main objective, to diminish the possibilities of implementing a forum shopping system and do not recognize the exercise of personal jurisdiction based on the presence of the defendant within the boundaries of the state, no matter how temporary his or her presence is. 123 This first draft did not prosper and was followed by a second attempt of creating a multilateral agreement regarding required jurisdictions on June of 2001. 124 Although the Hague Conference expressed its interest in the project submitted by the United States, the lack of agreement among its members has discouraged the idea of an appropriate compromise regarding a universal system of jurisdictions and recognition and enforcement of judgments. 125 In 2012, the Hague Conference reconsidered creating a group which special task was to reflect on the system proposed by the United States at the beginning of 1990s. 126 However, no new convention has been adopted concerning the recognition and enforcement of judgments decided by foreign judicial authorities, and, as occurred in the previous attempts, there is no guarantee that the project would finalize successfully with the draft of a new multilateral treaty. 127 Still, there are great hopes regarding a future coordination of the efforts of the United States with the work of the international community. 128

118. Id. at 483.
119. See id. at 482–83.
120. See id. at 483.
121. Id. at 480. See generally Hague Conference on Private International:
122. See Fastiff, supra note 112, at 480.
123. Silberman, supra note 115, at 328; see also Fastiff, supra note 112, at 483.
124. Silberman, supra note 115, at 331.
125. Fastiff, supra note 112, at 480, 482–83.
126. Strong, supra note 18, at 48, 51.
127. Id. at 51–52
128. See id. at 51.

2. The Supreme Court of the United States’ Perspective Concerning the Hague Conventions

Regarding the relationship between the conventions redacted by the Hague Conference and the domestic rules governing in the United States, the Supreme Court of the United States has determined the scope of application of the multilateral treaties drafted by this important international organization. 129 In Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa, 130 the Supreme Court defined the scope of application of the Hague Convention of March 18, 1970, on the taking of evidence abroad in civil and commercial matters in relation to the applicability of the Federal Rules of Civil Procedure. 131 The United States as contracting member of the Hague Evidence Convention had accepted the rules contained in that international treaty as the law of the land. 132 However, the Court considered that the signature of this multilateral convention does not preempt the application of domestic rules to civil procedures within the United States jurisdiction. 133 All nine Justices of the Supreme Court of the United States believed that Evidence Convention merely sets forth "optional procedures that would facilitate the taking of evidence abroad. 134 Therefore, the signature of this Convention does not force the United States to modify the Federal Rules of Civil Procedure or to use first the permissible procedures of the Evidence Convention. 135 Since the Supreme Court issued this opinion, trial courts have a tendency to use the Federal Rules of Civil Procedure instead of the proceedings drafted by the Hague Conference. 136 This decision has not only been seen as a loss of influence of the Permanent Bureau but also, as a digression from the international will of a "multinational comity analysis that

129. See Droz, supra note 42, at 8.
131. Id. at 524, 529–30, 533.
132. See id. at 529, 533.
133. Id. at 537.
134. Id. at 538.
135. Société National Industrielle Aérospatiale, 482 U.S. at 534, 537–38. “The use of the Evidence Convention itself does not modify the law of any contracting state, require any contracting state to use the Convention procedures, either in requesting evidence or in responding to such requests, or compel any contracting state to change its own evidence-gathering procedures.” Id. at 534.
136. See Droz, supra note 42, at 9.
should facilitate international evidence-taking with a minimum of friction.137

III. THE RECOGNITION OF FOREIGN DECISION IN THE UNITED STATES:
THE DOCTRINE OF COMITY

For those lawyers not familiarized with the United States legal
system, its enforcement regime, the doctrine of comity, may appear
problematic, odd, and confusing.138 This method appears to be a challenging
and complex system that causes legal insecurity and several difficulties to
foreign and U.S. citizens.139 The numerous problems created by this current
method of enforcement and recognition of judgments of foreign states or
nations advocates a review of the enforcement regime governing in the
United States.140

A. The Comity of the Nations

The recognition and enforcement of foreign judgment deals with the
idea of how far a foreign law or decision shall have on another nation, which
has its own sovereignty.141 It is well recognized that the effect of a law
derives from the legality and authority that has been granted to the
organization or person that created it.142 Therefore, "[n]o law has any effect,
of its own force, beyond the limits of the sovereignty from which its
authority is derived."143 In the United States, the decision to give effect
to foreign laws or judgments rests exclusively "on the express or tacit consent
of that State."144 A state will expressly give its authorization to allow a
foreign law to be applied in its territory through the signature of international

137. Id.
138. See id.
139. Strong, supra note 18, at 50.
140. Id. at 51.
142. Id.
143. In the preamble of the U.S. Constitution, it is established that
individuals are the source of legitimacy of the power given to the Government through the
constitutional text. We the People of the United States, in order to form a more perfect
Union, establish [Justice, Insure domestic [Tranquility, provide for the common defence,[be
promote the general [Welfare, and secure the [Blessings of [Liberty to ourselves and our
[posterity, do ordain and establish this Constitution for the United States of
America.
U.S. CONST. pmbl.
144. Hilton, 159 U.S. at 163.
145. In those situations where no treaty or international agreement must be applied, a law of
a foreign nation will operate and trigger its effects within the boundaries of the
United States depending upon the comity of the nations. Consequently, the decisions of its courts will be the ones that manifest the tacit consent of the state concerned.

146. For the purposes of this Comment, it is convenient to clarify the
difference between the doctrine of comity and the system of full faith and
credit. The U.S. Constitution, in its first section of Article IV, requires all
states to automatically recognize and give effect to sister-states judgments in
their territory. However, there is no provision in the supreme law of the
land or in any federal statute that imposes such an obligation regarding the
recognition of judgments of foreign courts. Hence, the constitutional text
implicitly considers a decision rendered by a foreign court "as prima facie
evidence, and not conclusive," in the absence of any statute or treaty. Therefore,
any foreign country's decision based on its own laws, which are
considered reviewable upon the merits by the highest court of the United
States, is not entitled to full credit and conclusive effect.

147. The absence of a uniform federal law about this topic is the product
of the congressional choice of not exercising its authority to regulate
decisions from a foreign nation. Granted by the People through the
Constitution of the United States, Congress has the "powers to regulate

148. U.S. CONST. art. IV, § 1; see also Acta Life Ins. Co. v. Tremblay, 223
U.S. 185, 190 (1912).
149. U.S. CONST. art. IV, § 1. "Full Faith and Credit shall be given in each
State to the public Acts, Records, and Judicial Proceedings of every other State. And the
Congress may by general Laws prescribe the Manner in which such Acts, Records[,] and
Proceedings shall be proved, and the Effect thereof." Id.
150. Tremblay, 223 U.S. at 190. "No such right, privilege, or immunity of
having full faith and credit[,] however, is conferred by the Constitution or by any statute of
the United States in respect to the judgments of foreign states or nations, and we are referred to no
statute relative to such a right." Id.
152. Id. at 227.
153. Fasistiff, supra note 112, at 472 n.4.
III. THE RECOGNITION OF FOREIGN DECISION IN THE UNITED STATES: THE DOCTRINE OF COMITY

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A. The Comity of the Nations

The recognition and enforcement of foreign judgment deals with the idea of how far a foreign law or decision shall have on another nation, which has its own sovereignty. It is well recognized that the effect of a law derives from the legality and authority that has been granted to the organization or person that created it. Therefore, “[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived.” In the United States, the decision to give effect to foreign laws or judgments rests exclusively “on the express or tacit consent of that State.” A state will expressly give its authorization to allow a foreign law to be applied in its territory through the signature of international

treaties or the draft of an act by its legislative authority. In those situations where no treaty or international agreement must be applied, a law of a foreign nation will operate and trigger its effects within the boundaries of the United States depending upon the comity of the nations. Consequently, the decisions of its courts will be the ones that manifest the tacit consent of the state concerned.

For the purposes of this Comment, it is convenient to clarify the difference between the doctrine of comity and the system of full faith and credit. The U.S. Constitution, in its first section of Article IV, requires all states to automatically recognize and give effect to sister-states judgments in their territory. However, there is no provision in the supreme law of the land or in any federal statute that imposes such an obligation regarding the recognition of judgments of foreign courts. Hence, the constitutional text implicitly considers a decision rendered by a foreign court “as prima facie evidence, and not conclusive,” in the absence of any statute or treaty. Therefore, any foreign country’s decision based on its own laws, which are considered reviewable upon the merits by the highest court of the United States, is not entitled to full credit and conclusive effect.

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137. Id.
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140. Id. at 51.
142. Id. In the preamble of the U.S. Constitution, it is established that individuals are the source of legitimacy of the power given to the Government through the constitutional text.

We the People of the United States, in [o]rder to form a more perfect [u]nion, establish [j]ustice, insure domestic [r]epublican, provide for the common defen [s]e, promote the general [w]elfare, and secure the [b]lessings of [l]iberty to ourselves and our [p]erpetuity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. pmb.

143. Hilton, 159 U.S. at 163.
144. See id. at 166.

145. Id.
146. Id.
147. See id.
148. U.S. CONST. art. IV, § 1; see also Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185, 190 (1912).
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151. Id. at 227.
152. Id. at 227.
153. Pantell, supra note 112, at 472 n.4.
Commerce with foreign Nations, and among several States, and with the Indian Tribes.\textsuperscript{154} The scope of the Commerce Clause has been a topic extensively debated in the jurisprudence of the United States.\textsuperscript{155} In our modern era, Congress has the same authority over all of those activities related with interstate commerce as it does through its regulation of foreign commerce.\textsuperscript{156} This power granted to Congress regarding foreign commerce "would then, of itself, support legislation equivalent to a large part of the law 'enacted' by treaty."\textsuperscript{157} Moreover, its scope is not exclusively limited to regulate the means of foreign commerce.\textsuperscript{158}

Congress can reach all interstate or foreign 'intercourse'; it can reach matter precedent to or subsequent to interstate or foreign commerce; it can reach what relates to or affects as well as what is commerce; it can reach strictly local commerce and activities when necessary to make effective a regulation of interstate or foreign commerce.\textsuperscript{159}

The deficiency of not having a uniform federal and state regulation regarding this complex area of law negatively impacts the relations of the United States with foreign nations.\textsuperscript{160} The absence of a federal statute on enforcement and recognition of foreign decision also increases the risk of possible alterations of the national policy as a consequence of the interference with local interests.\textsuperscript{161}

B. The Unifying Forces Present in the U.S. Enforcement Regime

Although Congress decided not to create a unifying rule, it would be impracticable to affirm that there is no force promoting consistency in this subject matter in the United States.\textsuperscript{162} In the enforcement and recognition of foreign judgments, each state is allowed to regulate and create its own rules.\textsuperscript{163} That situation has not prevented the Uniform Law Commission in its endeavor to create a consistency across the rules of the different states.\textsuperscript{164} Besides the attempts of the Uniform Law Commission to promote a uniform system of this topic, the Supreme Court of the United States has developed some common rules through its jurisprudence.\textsuperscript{165}

1. The Uniform Law Commission

Two different approaches of legislation about the recognition and enforcement of foreign judgments have been proposed by the Uniform Law Commission.\textsuperscript{166}

Since the creation of the Uniform Law Commission in 1982, many acts have been created in order to provide stability, guidance, and clarity to confusing areas of state law.\textsuperscript{167} The first form is the 1962 Uniform Foreign Money-Judgments Recognition Act.\textsuperscript{168} It was promulgated by this non-profit association composed of state commissioners from each state as a complement of the Uniform Enforcement of Foreign Judgment Act of 1948.\textsuperscript{169} However, there are main differences between both texts.\textsuperscript{170} While the Act drafted in 1948 addresses the issue of enforcing sister-states judgments through the Full Faith and Credit Clause of the U.S. Constitution, the Act of 1962 dealt with the conclusiveness and enforcement of judgment rendered by a foreign court.\textsuperscript{171} Currently, thirty-two states have adopted the 1962 Act that recognizes the effect of all foreign judgments that fall within its scope, unless any of the factors for non-recognition established in section 4 are shown.\textsuperscript{172}

Forty-three years later, the Uniform Law Commission decided to revise the 1962 Act.\textsuperscript{173} The reformulated act was adopted by the District of

\textsuperscript{154} U.S. CONST. art. I, § 8, cl. 3.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Strong, supra note 18, at 56–57.
\textsuperscript{161} Id. at 57.
\textsuperscript{162} Id. at 58.
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157. Id.
158. Id.
159. Id.
160. Strong, supra note 18, at 56–57.
161. Id. at 57.
162. Id. at 58.
Columbia and eighteen states.\textsuperscript{174} There are several elements incorporated in the 2005 Act that differentiate it from the 1962 Act.\textsuperscript{175} First of all, it expresses the burden of proof that the party seeking the recognition must carry: The petitioner has the obligation to produce the evidence that the judgment is subject to the 2005 Act.\textsuperscript{176} It also describes the specific procedure that must be followed and includes a provision relating to a statute of limitations.\textsuperscript{177}

With no doubt, the important work carried by the Uniform Law Commission had a significant impact on the American judicial system since it provides unification of the rules and procedures of each state while encouraging international business transactions.\textsuperscript{178}

2. The Supreme Court of the United States

In order to harmonize the different state laws regarding enforcement of foreign decisions, the Supreme Court of the United States has developed common rules through its jurisprudence.\textsuperscript{179} However, as a result of the application of the Erie doctrine, the federal common law principles will only govern in cases involving a federal question.\textsuperscript{180} In this context, the case of 

\textit{Hilton v. Guyot}\textsuperscript{181} is fundamental where the Supreme established the main six factors that courts must look at before giving effects to a foreign judgment through the doctrine of comity.\textsuperscript{182} In addition to these requirements, the Court added the prerequisite of mutual comity and reciprocity on the part of the courts of the nation that desires the recognition.\textsuperscript{183} However, the doctrine of reciprocity established in \textit{Hilton} was extremely criticized and was applied reluctantly by the states.\textsuperscript{184}

\textsuperscript{174} Strong, \textit{supra} note 18.


\textsuperscript{176} \textit{Unif. Foreign Money-Judgments Recognition Act} § 3(a) (2005).

\textsuperscript{177} Id. at § 6.


\textsuperscript{179} See Strong, \textit{supra} note 18, at 58.

\textsuperscript{180} Id. at 63.

\textsuperscript{181} 159 U.S. 113 (1895).

\textsuperscript{182} See id. at 202-03.

\textsuperscript{183} Id. at 227-28.

\textsuperscript{184} Strong, \textit{supra} note 18, at 58-59. “Commentators also have concluded that reciprocity rule[s] should be retired from our jurisprudence.” de la Mata v. Am. Life Ins. Co., 771 F. Supp. 1375, 1383 (D. Del. 1991); see also \textit{Hilton}, 159 U.S. at 202-03.
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174. Strong, supra note 18.
175. Compare UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (1962), with UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (2005); Strong, supra note 18, at 67.
176. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 3(c) (2005).
177. Id. at § 6.
179. See Strong, supra note 18, at 58.
180. Id. at 63.
181. 159 U.S. 113 (1895).
182. See id. at 202-03.
183. Id. at 227-28.

In Hilton, the Court described the guidelines that most states follow when enforcing any judgment not decided within the boundaries of the United States. The defendants, Henry Hilton and William Libby—both American citizens—conducted business as merchants in the cities of New York and Paris and had a regular store and place of business in the capital of France. They did a large amount of business with the plaintiffs—the surviving members of the firm of Charles Fortin & Co. and Gustave Bertin Guyot, its official liquidator. The plaintiffs who were all citizens of the Republic of France brought five suits against the defendants for non-payment of sums due. After a proceeding where apparently all due process requirements were respected, the Tribunal of Commerce of the Department of the Seine, sitting at Paris, rendered final judgment for the plaintiffs. While the judgment of the French court was "still ... in full force and effect," the plaintiffs filed an action at law against the defendants in the Circuit Court of the United States for the Southern District of New York. In the answer of such complaint, Hilton and Libbey claimed that they discovered fraud on the accounts presented by the plaintiffs since they falsely made up and modified the accounts and statements of the firm. Moreover, the defendants alleged that they did not have the opportunity to a "full and fair trial of the controversies before the arbitrator [during the French proceeding], [where] no witness was sworn or affirmed." The answer further alleged that without the introduction of the false and fraudulent accounts given during the trial, the plaintiffs would have never obtained an award judgment against the defendants. Given these circumstances, the circuit court decided not to admit any of the evidence introduced by the defendants regarding the fraudulent books and papers of Charles Fortin & Co., or any other proof showing irregularities of the trial at the French judicial system and gave a verdict for the plaintiffs in the same amount as the
one established in the foreign judgment. The defendants appealed claiming that the court should have examined the merits of the case.

The Supreme Court defines the doctrine of comity as a discretionary decision of a U.S. court to recognize a foreign decision where a matter does not need to be litigated any longer since it has already been decided in a foreign judgment. The highest court of the American judicial system considers this choice as a "mere courtesy and good will" of the United States courts upon courts of other nations when such judgments are not prejudicial to the rights of their citizens or to their own interest. Hence, in those situations in which the rights of individuals are concerned, the comity of nations will be applied as a voluntary act of the state where the foreign law seeks to have effect in order to promote justice and create a course of friendly international relations among nations. However, not all judgments rendered by judicial authorities of other sovereignties are going to be recognized by the doctrine of comity. In order to trigger the comity of the United States, different prerequisites must have been present in the foreign proceeding. After a long analysis of the opinion of several authorities on the topic and the trend in the United States and in England, the Court described the requirements that all judgments rendered in another nation must meet in order to be recognized and reduced to a judgment in the enforcing U.S. court:

Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial

196. Id.
197. Id. at 163.
198. Id. at 163-64.
199. Id. at 164.
201. Id. at 202-03.

202. Id.
203. Id.
204. Id. at 202.
205. Hilton, 159 U.S. at 206. "There is no doubt that both in this country . . . and in England, a foreign judgment may be impeached for fraud." Id.
206. Id. at 207. "It has often, indeed, been declared by this court that the fraud which entitles a party to impeach the judgment of one of our own tribunals must be fraud extrinsic to the matter tried in the cause, and not merely consist in false and fraudulent documents or testimony submitted to that tribunal, and the truth of which was contested before it and passed upon by it." Id.
207. Id. at 207-210.

But whether those decisions can be followed in regard to foreign judgments, consistently with our own decisions as to impeaching domestic judgments for fraud.
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196. Id.

197. Id. at 163.

198. Id. at 163–64.

199. Id. at 164.


201. Id. at 202–03.

or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

Therefore, it can be concluded that judgments decided abroad will find comity in the United States as long as the they do not conflict with the six factors listed in Hilton: 1) defendants had the opportunity for a full and fair trial; 2) the court that heard the case had competent jurisdiction; 3) the foreign trial was considered a regular proceeding where all due process requirements were met; 4) the proceeding took place after the adverse party who was properly served or appeared voluntary; 5) an impartial administration of justice between the citizens of the country and aliens was secured during the trial through the national system of jurisprudence; and 6) there is no evidence that demonstrates either that the court was biased, the existence of fraud in obtaining the verdict, or the prejudice of the system of laws that are applied for resolving the case. These criteria cannot be considered as a restricted list since a court can deny the permission of a judgment from a court of another nation to have full effect in the United States based on "any other special reason."

Among all the requirements, it is of vital importance that there is an absence of any evidence showing fraud. The Supreme Court of the United States often indicated that a party is not entitled to impeach the judgment and contest the validity or the effect of such judgment if that party only proves that false and fraudulent evidence was introduced to the tribunal. In the opinion, the Court hesitated if the United States should follow the trend of the English courts where false and fraudulent representation, testimony, or documents would be a sufficient ground for impeaching a foreign judgment that was obtained through such erroneous evidence. However, the Court did not give an answer to this issue since there is an independent basis that bars the recognition of the French decision. Reciprocity is the last
condition deeply explained in Hilton that must be met in order to conclusively recognize a judgment of a foreign court. In this case, the Court considered that the requirement of a demonstration of reciprocity as a condition precedent to the enforcement of a foreign judgment is a common rule in the international jurisprudence. In 1895, the French courts would have only considered the conclusiveness of a foreign judgment if it had been previously examined into its merits. Founding its decision on this situation, the Supreme Court of the United States decided to reverse the judgment of the Circuit Court of the United States for the Southern District of New York and consider that the judgment Mr. Guyot obtained in France was not entitled to be considered conclusive.

b. The Criticism of Hilton's Reciprocity Rule through de la Mata

In de la Mata v. American Life Insurance Co., the federal court hearing the case decided to reject the application of the reciprocity doctrine set out in Hilton based on the criticism of commentators, the abandonment of the rule by New York's court, and the previous opinions of the Supreme Court of Delaware where the requirement was limited.

It is unnecessary in this case to determine, because there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France; and that ground is, the want of reciprocity, on the part of France, as to the effect to be given to the judgments of this and other foreign countries.

Id. at 210.

209. Id. at 227.
210. Id. at 228.

In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injuries done to another, but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our country, which is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.

Id.


By the law of France, settled by a series of uniform decisions of the court of cassation, the highest judicial tribunal, for more than one century, no foreign judgment can be rendered executory in France without a review of the judgment upon which the judgment rests.

Id.

212. Id. at 228.
214. Id. at 1382-83.

In this case, Victoria de la Mata Mendoza, a Bolivian citizen and widow of Eduardo de la Mata, sued ALICO, a life insurance company incorporated in Delaware and certified to do business transactions in the Republic of Bolivia since 1982, seeking payment under the life policy and two endorsement policies purchased by her husband in 1982. Three years after the death of her husband, de la Mata filed a complaint in the Superior Court of the Judicial District of Santa Cruz. The complaint was forwarded to the Second Ordinary Court for Civil Matters in the Judicial District of Santa Cruz. After the defendant had the opportunity for a full and fair trial, the district court granted judgment for the plaintiff and awarded her with a sum of three hundred thirty thousand dollars. The fact that the Delaware company decided not to initiate an ordinary procedure provoked the Bolivian superior court to consider the decision of the district court as res judicata. Later, the United States District Court for the District of Delaware received letters issued by the Bolivian court soliciting the recognition and enforcement of the Bolivian money judgment against ALICO in Delaware.

In order to recognize the judgment for de la Mata, the district court followed the six requirement criteria listed by the Supreme Court in Hilton. Nevertheless, the court decided not to consider the reciprocity of the Bolivian courts as a condition precedent to the recognition. The district court identified two main objectives that the Supreme Court desired to achieve through the application of the reciprocity requirement: (1) the protection of American citizens when facing a trial in a foreign judicial system; and (2) the encouragement of other nations to give effect to United States judgments in their territory. However, it is doubtful that Hilton reaches both goals. To begin with, the interest of the federal government in protecting their citizens abroad, despite having a judicial proceeding pursuant with the requirements of due process, is not considered a valid interest. Moreover, it is important to remember that international law is

215. Id. at 1377.
216. Id. at 1378.
217. Id.
218. de la Mata, 771 F. Supp. at 1378.
219. See id. at 1380.
220. Id.
221. Id. at 1381.
222. Id. at 1383.
223. de la Mata, 771 F. Supp. at 1383
224. Id. at 1385.
225. Nicol v. Tanner, 256 N.W.2d 796, 801 (Minn. 1976). "While protecting nationals from unfair treatment abroad is a valid exclusive interest of a state,
condition deeply explained in *Hilton* that must be met in order to conclusively recognize a judgment of a foreign court. In this case, the Court considered that the requirement of a demonstration of reciprocity as a condition precedent to the enforcement of a foreign judgment is a common rule in the international jurisprudence. In 1895, the French courts would have only considered the conclusiveness of a foreign judgment if it had been previously examined into its merits. Founding its decision on this situation, the Supreme Court of the United States decided to reverse the judgment of the Circuit Court of the United States for the Southern District of New York and consider that the judgment Mr. Guyot obtained in France was not entitled to be considered conclusive.

b. The Criticism of *Hilton’s Reciprocity Rule through de la Mata*

In *de la Mata v. American Life Insurance Co.*, the federal court hearing the case decided to reject the application of the reciprocity doctrine set out in *Hilton* based on the criticism of commentators, the abandonment of the rule by New York’s court, and the previous opinions of the Supreme Court of Delaware where the requirement was limited.

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It is unnecessary, in this case to determine, because there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France; and that ground is, the want of reciprocity, on the part of France, as to the effect to be given to the judgments of this and other foreign countries.

_id. at 210._

209. _Id. at 277._

210. _Id. at 228._

In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another, but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our country, which is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.

_id. at 215._


By the law of France, settled by a series of uniform decisions of the court of cassation, the highest judicial tribunal, for more than one century, no foreign judgment can be rendered executory in France without a review of the judgment at law—to the bottom—including the whole merits of the cause of action on which the judgment rests.

_id. at 228._

212. _Id. at 228._


214. _Id. at 1382-83._

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215. _Id. at 1377._

216. _Id. at 1378._

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219. _See id. at 1380._

220. _Id._

221. _Id. at 1381._

222. _Id. at 1383._

223. _Id. at 1383._

224. _Id. at 1383._

225. Nicol v. Tanner, 256 N.W.2d 796, 801 (Minn. 1976). "While protecting nationals from unfair treatment abroad is a valid exclusive interest of a state,
based on a course of kind relations among sovereignties. For that reason, the persuasion of the United States aimed at other countries to recognize the decisions of the American courts does not have its desired effect. The thought of other nations that their judgments are not going to be recognized within the boundaries of the United States causes foreign courts to look with hostility at the enforcement of judgments rendered by the courts of the United States. Therefore, as the Delaware court suggests while quoting the Minnesota Supreme Court, the elimination of the reciprocity as a precondition for applying the doctrine of comity "might be a more effective method of obtaining the recognition for American judgments in many other nations."

Although de la Mata was not required by the court to demonstrate the reciprocity of Bolivian courts, the United States District Court for the District of Delaware declined to recognize the Bolivian judgment on the grounds that the defendant was not properly served pursuant to notions of constitutional due process or that the foreign judgment was obtained by fraud.

IV. CONCLUSION

International private law has become an indispensable area of all legal systems as a result of the increase in international intercourse since the end of World War II. By itself, it is considered a difficult topic; but also, the complexity of the doctrine of comity applied within the United States provokes strong negative comments from the international community, which demands a change in the enforcement regime governing in the United States. It does not seem beneficial from the perspective of the United States to keep favoring and protecting its citizens facing a trial abroad, even though they do not suffer any injustice and despite the international treaties the country has signed. The unification and consistency of rules of enforcement and recognition of foreign judgments through a multilateral treaty will be extremely valuable in simplifying individuals' lives and

favoring national despite fair treatment abroad should not be commended . . . ." de la Mata, 771 F. Supp. at 1378.

227. de la Mata, 771 F. Supp. at 1383.
228. See id. at 1383, 1389-90.
229. Id. at 1383.
230. Id. at 1390.
231. Smitt, supra note 19, at 25.
232. See Strong, supra note 18, at 51.
233. de la Mata, 771 F. Supp. at 1383; see also Droz, supra note 42, at 9.

235. Strong, supra note 18, at 57.
236. van Boeschoten, supra note 87, at 50, 52.
237. Silberman, supra note 115, at 349.
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