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ARTICLES AND SURVEYS

NOTES AND COMMENTS

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ARTICLES AND SURVEYS

NOTES AND COMMENTS

CHECK "MATE": AUSTRALIA'S GUN LAW REFORM PRESENTS THE UNITED STATES WITH THE CHALLENGE TO SAFEGUARD THEIR CITIZENS FROM MASS SHOOTINGS[1]

BY DENISE CARTOLANO*

* Denise Cartolano graduated *magna cum laude* from Barry University School of Law, in May 2016, with a certificate in Environmental and Earth Law. She is currently working towards her L.L.M. in Homeland and National Security Law at Western Michigan University Thomas M. Cooley School of Law. She holds bar admission in the State of Florida. She currently works as an Attorney Advisor for the Executive Office for Immigration Review as part of the Department of Justice's Attorney General's Honors Program.

1. *See Urban Dictionary: Mate*, *available at* www.urbandictionary.com/define.php?term=mate (last visited Apr. 9, 2017) (defining the word "mate" as a slang term Australian's commonly use when referring to a friend); *Dictionary: Checkmate*, DICTIONARY.COM, *available at* www.dictionary.com/browse/checkmate (last visited Apr. 9, 2017) (defining the word checkmate as a maneuver in chess where the opponent's king is in a position from which it cannot escape; which brings the game to a victorious conclusion). Therefore, the title of the article is in reference to Australia gaining an advantage over the United States in regard to gun control and the reduction of mass shootings.

I. INTRODUCTION

"My biggest frustration [as President] so far is the fact that this society has not been willing to take some basic steps to keep guns out of the hands of people who can do just unbelievable damage."[2] "We know that other countries, in response to one mass shooting, have . . . [managed] to craft laws that almost eliminate mass shootings. Friends of ours; allies of ours—Great Britain, Australia; countries like ours."[3]

–President Barack Obama

The morning of June 12, 2016, I awoke in my apartment in Orlando, Florida. Everything felt like a typical relaxing Sunday morning. As I rolled over and scratched my dog on the head, I picked up my phone lying beside me. As part of my typical routine, I started to scroll through the news feed on my Facebook account. Through the myriad of posts and pictures, I came across one from a colleague of mine stating that there had been a shooting at Pulse Nightclub in Downtown Orlando. Having lived in New York City on September 11, 2001, waking up to a morning of tragedy in my hometown was not a new experience for me; but the same questions still arise: Why did

2. Press Release, The White House Office of the Press Sec'y, Remarks by the President in Q&A with David Karp, CEO of Tumblr (June 10, 2014), http://obamawhitehouse.archives.gov/the-press-office/2014/06/10/remarks-president-qa-david-karp-ceo-tumblr; *see also* Jonathan Weg, *We Don't Come from a Land Down Under: How Adopting Australia's Gun Laws Would Violate the Second Amendment of the U.S. Constitution*, 24 CARDOZO J. INT'L & COMP. L. 657, 658 (2016).

3. Press Release, Barack Obama, President, Statement by the President at Umpqua Cmty. Coll., Roseburg, Or. (Oct. 1, 2015), http://www.whitehouse.gov/the-press-office/2015/10/01/statement-president-shootings-umpqua-community-college-roseburg-oregon (statement made at a press conference on October 1, 2015, after a college campus shooting in Oregon where a twenty-six-year-old student shot a professor and eight students); *see also* Jacqueline Howard, *Australia's Mass Shootings Dropped to Zero After Gun Reforms*, CNN, http://www.cnn.com/2016/06/23/health/australia-gun-law-reform-study (last updated June 23, 2016).

this occur and what can we do as a nation to prevent this from happening again?

Mass shootings—defined by the Federal Bureau of Investigation ("FBI") as "the slaying of four or more people"—have begun to occur at record numbers and with devastating results in the United States.[4] Americans are saturated with the stories and images of those who suddenly lost their lives at the hands of a person equipped with a powerful weapon.[5]

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4. *There Have Been More Mass Shootings Since Newtown than You've Heard About (INFOGRAPHIC)*, HUFFINGTON POST (Sept. 17, 2013, 5:31 PM), http://www.huffingtonpost.com/2013/09/17/mass-shootings-2013_n_3941889.html; NAT'L CTR. FOR THE ANALYSIS OF VIOLENT CRIME, U.S. DEP'T OF JUSTICE, SERIAL MURDER: MULTI-DISCIPLINARY PERSPECTIVES FOR INVESTIGATORS 8 (Mark A. Hilts & Robert J. Morton eds., 2005); *see also infra* Part II.

5. *See August 01, 1966: An Ex-Marine Goes on a Killing Spree at the University of Texas*, HISTORY, http://www.history.com/this-day-in-history/an-ex-marine-goes-on-a-killing-spree-at-the-university-of-texas (last visited Apr. 9, 2017).

> Charles Whitman [took] a stockpile of guns and ammunition to the observatory platform atop a 300-foot tower at the University of Texas and [proceeded] to shoot [forty-six] people, killing [fourteen] people and wounding [thirty-one]. A fifteenth died in 2001 because of his injuries. Whitman, who had killed both his wife and mother the night before, was eventually shot to death after courageous Austin police officers, including Ramiro Martinez, charged up the stairs of the tower to subdue the attacker.

Id.

> On . . . [July 18, 1984], James Huberty drove to the McDonald's, 200 yards from his apartment, carrying a semi-automatic pistol, an Uzi, a [twelve]-gauge shotgun and a cloth bag filled with hundreds of rounds of ammunition and told his daughter, "Goodbye. I [will not] be back."
>
> He began to gun down his victims—who ranged in age from eight months to [seventy-four] years old—and after an hour and ten minutes, a [sixty]-member [Special Weapons and Tactics] ("SWAT") team surrounded the building and killed James Huberty with a sniper shot.

Paul Liotta, *Daughter of 1984 Gunman James Huberty Speaks Out and Gives Advice to Daughter of San Bernardino Terrorists*, DAILY NEWS (Dec. 13, 2015, 2:42 PM), http://www.nydailynews.com/news/national/daughter-1984-gunman-speaks-article-1.2464531. (He killed twenty and wounded twenty others.). *Id.*

> On the morning of Aug[ust] 20, 1986, part-time letter carrier Patrick Sherrill, [forty-four], barged through the back door of the post office in Edmond, just north of Oklahoma City. A quarter of an hour later, [fourteen] people were dead and six wounded. By the time the SWAT team stormed the place, Sherrill had put a gun to his own head and pulled the trigger.

Mara Bovsun, *Mailman Massacre: 14 Die After Patrick Sherrill 'Goes Postal' in 1986 Shootings*, DAILY NEWS (Aug. 15, 2010, 4:00 AM), http://www.nydailynews.com/news/crime/mailman-massacre-14-die-patrick-sherrill-postal-1986-shootings-article-1.204101. On October 16, 1991, in Killeen, Texas,

> [a] man smashed a pickup truck into a busy restaurant at lunchtime, . . . stepped out of the cab, shot [twenty-two] people dead and wounded at least [twenty] others.
>
> As blood-drenched patrons and employees tried to scramble to safety, dozens of police officers arrived and exchanged gunfire with the man, apparently wounding him. He then shot and killed himself with a bullet through the left eye, witnesses said.

> . . . The police said the killer, a [thirty-five]-year-old man, reloaded and emptied his Glock-17, a semiautomatic .9-millimeter pistol, several times.

Thomas C. Hayes, *Gunman Kills 22 and Himself in Texas Cafeteria*, N.Y. TIMES (Oct. 17, 1991), http://www.nytimes.com/1991/10/17/us/gunman-kills-22-and-himself-in-texas-cafeteria.html. "On April 20, 1999, two teens went on a shooting spree at Columbine High School in Littleton, Colorado, killing [thirteen] people and wounding more than [twenty] others before turning their guns on themselves and committing suicide." *Columbine High School Shootings*, HISTORY, http://www.history.com/topics/columbine-high-school-shootings (last visited Apr. 9, 2017). "Twenty-three year old Seung-Hui Cho killed [thirty-two] people on the Virginia Polytechnic Institute and State University campus in Blacksburg, Virginia, before taking his own life." *Virginia Tech Shootings Fast Facts*, CNN, http://www.cnn.com/2013/10/31/us/virginia-tech-shootings-fast-facts/ (last updated Apr. 3, 2017).

> On . . . [November 5], 2009, [thirteen] people are killed and more than [thirty] others are wounded, nearly all of them unarmed soldiers, when a [United States] Army officer goes on a shooting rampage at Fort Hood in central Texas. The deadly assault, carried out by Major Nidal Malik Hasan, an Army psychiatrist, was the worst mass murder at a [United States] military installation.

November 05, 2009: Army Major Kills 13 People in Fort Hood Shooting Spree, HISTORY, http://www.history.com/this-day-in-history/army-major-kills-13-people-in-fort-hood-shooting-spree (last visited Apr. 9, 2017). On July 20, 2012, a gunman, dressed in tactical clothing, entered a movie theater in Aurora, Colorado, set off tear gas grenades and shot into the audience with multiple firearms. Dan Frosch & Kirk Johnson, *Gunman Kills 12 in Colorado, Reviving Gun Debate*, N.Y. TIMES (July 20, 2012), http://www.nytimes.com/2012/07/21/us/shooting-at-colorado-theater-showing-batman-movie.html. "[Twelve] people . . . [were killed] and [around seventy] others [were] injured, making it [one of] the largest number of casualties" in a shooting in the United States until the Orlando nightclub shooting four years later. *Colo. Shooting DA Says Two Evaluations Found Holmes Sane*, PBS: NEWS HOUR (Apr. 27, 2015, 6:15 PM), http://www.pbs.org/newshour/bb/colo-shooting-da-says-two-evaluations-found-holmes-sane/; Julie Shapiro & Melissa Chan, *What to Know About the Pulse Nightclub Shooting in Orlando*, TIME, http://www.time.com/4365260/orlando-shooting-pulse-nightclub-what-know/ (last updated June 12, 2016). On December 14, 2012,

> [a] gunman forces his way into Sandy Hook Elementary School in Newtown, Conn[ecticut], and shoots and kills [twenty] first-graders and six adults. The shooter, Adam Lanza, [twenty], kills himself at the scene. Lanza also killed his mother at the home they shared, prior to his shooting rampage.

Deadliest U.S. Mass Shootings, 1984–2016, L.A. TIMES (June 12, 2016, 8:50 AM), http://timelines.latimes.com/deadliest-shooting-rampages/; *accord* Steve Vogel et al., *Sandy Hook Elementary Shooting Leaves 28 Dead, Law Enforcement Sources Say*, WASH. POST (Dec. 14, 2012), http://www.washingtonpost.com/politics/sandy-hook-elementary-school-shooting-leaves-students-staff-dead/2012/12/14/24334570-461e-11e2-8e70-e1993528222d_story.html. On June 18, 2015,

> Dylann Storm Roof is charged with nine counts of murder and three counts of attempted murder in an attack that killed nine people at a historic black church in Charleston, S[outh] C[arolina].
>
> Authorities say Roof, a suspected white supremacist, started firing on a group gathered at Emanuel African Methodist Episcopal Church after first praying with them. He fled authorities before being arrested in North Carolina.

Deadliest U.S. Mass Shootings, 1984–2016, *supra*. On December 2, 2015,

> two assailants killed [fourteen] people and wounded [twenty-two] more in a shooting at the Inland Regional Center in San Bernardino. The two attackers, who

As guns become more technologically advanced and capable of expelling a large number of rounds in an instant, the devastation and number of those killed or harmed increases.[6] American citizens typically respond to the news of mass shootings that occur on American soil by either disavowing guns and urging the government to remove them from the public's use[7] or feeling the need to acquire more guns in order to protect themselves and their families.[8] Regardless of the response to the horrific news of a mass shooting, what is clear to all American citizens is that mass shootings are a modern day reality and a serious issue that needs to be resolved or mitigated.[9]

In an effort to explore what the United States can do to prevent or eliminate the occurrence of mass shootings, this Article will explore the gun control legislation in Australia.[10] First, this Article will present statistics

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> were married, were killed in a gun battle with police. They were [United States] born Syed Rizwan Farook and Pakistan-national Tashfeen Malik and [they] had an arsenal of ammunition and pipe bombs in their Redlands home.

Deadliest U.S. Mass Shootings, 1984–2016, *supra*; *see also San Bernardino Shooting Updates*, L.A. TIMES (Dec. 9, 2015, 11:00 AM), http://www.latimes.com/local/lanow/la-me-ln-san-bernardino-shooting-live-updates-htmlstory.html. On June 12, 2016,

> the United States suffered the worst mass shooting in its modern history when [forty-nine] people were killed and fifty-three injured in Orlando, Florida, after a gunman stormed into a packed gay nightclub. The gunman was killed by a SWAT team after taking hostages at Pulse, a popular gay club. He was . . . identified as [twenty-nine] year old Omar Mateen.

Deadliest U.S. Mass Shootings, 1984–2016, *supra*; *see also* Shapiro & Chan, *supra*.

6. Nick Wing & Mollie Reilly, *Here's What You Need to Know About the Weapons of War Used in Mass Shootings*, HUFFINGTON POST (June 13, 2016, 9:23 PM), http://www.huffingtonpost.com/entry/mass-shootings-weapons-ar-15_us_575ec6b7e4b00f97fba8de0e (finding that "modern AR-style rifles are modeled off" the ones created for the United States military during the Vietnam War and that "[t]hese weapons are designed to fire off bullets" rapidly with "[s]ome manufacturers boast[ing] that an experienced shooter could fire as many as [forty-five] rounds in one minute.").

7. Nathan Rott & Jeff Landa, *After Mass Shootings, Action on Gun Legislation Soars at State Level*, NPR (July 12, 2016, 6:12 PM), http://www.npr.org/2016/07/12/485726439/mass-shootings-influence-spike-in-gun-related-laws-at-state-level.

8. Gregor Aisch & Josh Keller, *What Happens After Calls for New Gun Restrictions? Sales Go Up*, N.Y. TIMES, http://www.nytimes.com/interactive/2015/12/10/us/gun-sales-terrorism-obama-restrictions.html (last updated June 13, 2016); Zachary Crockett, *What Happens After a Mass Shooting? Americans Buy More Guns*., VOX (June 15, 2016, 11:00 AM), http://www.vox.com/2016/6/15/11936494/after-mass-shooting-americans-buy-more-guns; Rott & Landa, *supra* note 7.

9. *See* James Barron, *Gunman Massacres 20 Children at School in Connecticut; 28 Dead, Including Killer*, N.Y. TIMES, Dec. 15, 2012, at A16; Rick Orlov, *Gun Buyback Nets 1,500 Weapons — and Debate Over Program's Value*, L.A. DAILY NEWS (Dec. 16, 2013, 3:54 PM), http://www.dailynews.com/government-and-politics/20131216/gun-buyback-nets-1500-weapons-x2014-and-debate-over-programs-value.

10. *See infra* Parts VI–VII.

relating to gun ownership and shootings in the United States.[11] Next, this Article will discuss the details surrounding four of the most recent mass shooting tragedies in the United States to extrapolate why these events happened and what the United States deduced was the main reason for the shootings.[12] In the next section, this Article will explore the legal precedents that enable U.S. citizens to purchase firearms for private use.[13] Next, this Article will discuss a mass shooting event that took place in Australia and the resulting gun laws.[14] Finally, this Article will analyze whether or not the United States could implement Australia's gun laws, in order to reduce or eliminate—as Australia has—the occurrence of mass shootings.[15]

II. STATISTICS REGARDING GUN OWNERSHIP AND HOMICIDES IN THE UNITED STATES

In order to understand the gun control issue in the United States, it helps to understand the current statistics regarding gun ownership and homicides by firearms.[16] According to a 2007 survey, the United States has about 35-50% of the world's *civilian-owned guns*, despite holding 5% of the world's population.[17] According to a 2016 study, completed by Harvard University and Northeastern University, "there are about 265 million guns" in the United States "for only 242 million adults," which results in more than one gun for every adult.[18] However, the study estimates that there are fifty-five million gun owners in the United States that have on average three guns, with "3% of the adult population . . . hav[ing] anywhere between eight and 140 guns each."[19] Further, "[a] November 2012 Congressional Research Service report found that, as of 2009, there were approximately . . . 110 million rifles and 86 million shotguns" owned by American citizens in the

11. *See infra* Part II.
12. *See infra* Part III.
13. *See infra* Part IV.
14. *See infra* Parts V–VI.
15. *See* Jonathan Masters, *U.S. Gun Policy: Global Comparisons*, COUNCIL ON FOREIGN REL., http://www.cfr.org/society-and-culture/us-gun-policy-global-comparisons/p29735 (last updated Jan. 12, 2016); *infra* Parts VI–VII.
16. *See* Masters, *supra* note 15.
17. Aaron Karp, *Completing the Count: Civilian Firearms*, *in* SMALL ARMS SURVEY 2007 39, 46 (Eric G. Berman et al. eds., 2007); Masters, *supra* note 15.
18. Michal Addady, *A Tiny Percentage of U.S. Adults Own Half the Country's Guns*, FORTUNE (Sept. 19, 2016), http://www.fortune.com/2016/09/19/us-gun-ownership; *see also* Lois Beckett, *Gun Inequality: US Study Charts Rise of Hardcore Super Owners*, GUARDIAN (Sept. 19, 2016, 1:47 PM), http://www.theguardian.com/us-news/2016/sep/19/us-gun-ownership-survey.
19. Addady, *supra* note 18; Beckett, *supra* note 18.

United States.[20] The author found that "data [is] not available on the number of 'assault weapons' in private possession or available for sale, but one study estimated that 1.5 million assault weapons were privately owned in 1994."[21] These findings indicate that the United States is saturated with guns and an alarming amount of assault weapons.[22]

"The United States also has the highest homicide-by-firearm rate among the world's most developed nations."[23] A 2016 study, published by the American Journal of Medicine, found that "Americans are [ten] times more likely to be killed by guns than [other] people in . . . developed countries."[24] Erin Grinshteyn, the author of the study and a professor at the University of Nevada-Reno School of Community Health Science, stated: "Overall, our results show that the United States, which has the most firearms per capita in the world, suffers disproportionately from firearms compared with other high-income countries. These results are consistent with the hypothesis that our firearms are killing us rather than protecting us."[25] Further, according to the Wall Street Journal, between 1966 and 2012 the United States had "five times as many [mass shootings] as the next highest country—the Philippines."[26]

When gun homicide rates in the United States are compared to those in some of the most violent nations in the world, the findings are astonishing.[27] The Atlantic Online found that American cities have rates of gun homicides comparable to some of the most violent nations in the

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20. Justin Peters, *How Many Assault Weapons Are There in America? How Much Would It Cost the Government to Buy Them Back?*, SLATE: CRIME (Dec. 20, 2012, 4:50 PM), http://www.slate.com/blogs/crime/2012/12/20/assault_rifle_stats_how_many_assault_rifles_are_there_in_america.html.

21. *Id.*

22. *See id.*

23. Masters, *supra* note 15.

24. Robert Preidt, *How U.S. Gun Deaths Compare to Other Countries*, CBS NEWS (Feb. 3, 2016, 1:44 PM), http://www.cbsnews.com/news/how-u-s-gun-deaths-compare-to-other-countries/; *see also* Erin Grinshteyn & David Hemenway, *Violent Death Rates: The US Compared with Other High-Income OECD Countries, 2010*, 129 AM. J. MED. 266, 269 (2016).

25. Grinshteyn & Hemenway, *supra* note 24, at 272 (footnote omitted).

26. Joe Palazzolo & Alexis Flynn, *U.S. Leads World in Mass Shootings*, WALL STREET J., http://www.wsj.com/articles/u-s-leads-world-in-mass-shootings-1443905359 (last updated Oct. 3, 2015) (study completed by Adam Lankford, an Associate Professor at the University of Alabama Department of Criminal Justice, looking at the years spanning from 1966 to 2012).

27. *See* Richard Florida, *Gun Violence in U.S. Cities Compared to the Deadliest Nations in the World*, CITYLAB (Jan. 22, 2013), http://www.citylab.com/politics/2013/01/gun-violence-us-cities-compared-deadliest-nations-world/4412/.

world.[28] Using data provided by the Center for Disease Control and Prevention and the United Nations Office on Drugs and Crime, a study compared the rate of gun murders in American cities to nations around the world.[29] According to the study:

- If it were a country, New Orleans, with a rate [of] 62.1 gun murders per 100,000 people, would rank second in the world;
- Detroit's gun homicide rate, 35.9, is just a bit less than El Salvador, 39.9;
- Baltimore's rate, 29.7, is not too far off that of Guatemala, 34.8;
- gun murder in Newark, 25.4, and Miami, 23.7, is comparable to Colombia, 27.1;
- Washington, D.C., 19, has a higher rate of gun homicide than Brazil, 18.1;
- Atlanta's rate, 17.2, is about the same as South Africa, 17;
- Cleveland, 17.4, has a higher rate than the Dominican Republic, 16.3;
- gun murder in Buffalo, 16.5, is similar to Panama, 16.2;
- Houston's rate, 12.9, is slightly higher than Ecuador's, 12.7;
- gun homicide in Chicago, 11.6, is similar to Guyana, 11.5;
- Phoenix's rate, 10.6, is slightly higher than Mexico, 10;
- Los Angeles, 9.2, is comparable to the Philippines, 8.9;
- Boston's rate, 6.2, is higher than Nicaragua, 5.9;
- New York, where gun murders have declined to just four per 100,000, is still higher than Argentina, 3;
- even the cities with the lowest homicide rates by American standards, like San Jose and Austin, compare to Albania and Cambodia respectively.[30]

These statistics are alarming, as the countries being compared to the various United States cities are designated as some of the most violent countries in the world.[31] For example, El Salvador, which has comparable gun homicides as Detroit, Michigan, has been recently coined the "murder capital of the world."[32] Most of the countries listed appear on the U.S.

28. *See id.*
29. *Id.*
30. *Id.*
31. *See id.*
32. Alan Gomez, *El Salvador: World's New Murder Capital*, USA TODAY (Jan. 7, 2016, 10:57 AM), http://www.usatoday.com/story/news/world/2016/01/07/el-salvador-homicide-rate-honduras-guatemala-illegal-immigration-to-united-states/78358042/ ("Government data show[s] 6657 people were murdered in the small country [in 2015], a 70% increase from 2014."); *see also* Florida, *supra* note 27.

Department of State's travel warnings website, which urges American citizens to avoid visiting the areas or to take serious precautions if traveling to one of these countries is necessary.[33]

As the above statistics indicate, the United States has a high level of gun saturation and a startling number of guns that are categorized as assault weapons.[34] As will be demonstrated in the next section, semi-automatic and assault style weapons are commonly used during mass shootings because of their ability to effectuate the greatest amount of damage in a fraction of the time that a handgun would.[35] These statistics make it clear that there is a problem pertaining to gun violence in the United States, and new legislation needs to be implemented to prevent further mass shootings and deaths by firearms.[36]

III. OVERVIEW OF FOUR OF THE MOST RECENT MASS SHOOTINGS IN THE UNITED STATES

In order to explore possible solutions to prevent mass shootings in the United States, it is beneficial to analyze the facts and circumstances surrounding mass shooting tragedies that have occurred in the United States.[37] This Article will explain the events that unfolded in: Newton, Connecticut; Charleston, South Carolina; San Bernardino, California; and Orlando, Florida.[38]

A. *Newtown, Connecticut—December 14, 2012*

On December 14, 2012, a gunman forced his way into Sandy Hook Elementary School in Newtown, Connecticut, where he shot and killed

33. *See Alerts and Warnings*, U.S. PASSPORTS & INT'L TRAVEL, http://travel.state.gov/content/passports/en/alertswarnings.html (last visited Apr. 9, 2017); Florida, *supra* note 27.

34. *See* Florida, *supra* note 27; Peters, *supra* note 20.

35. Aisch & Keller, *supra* note 8; *Connecticut Shootings Fast Facts*, CNN, http:www.cnn.com/2013/06/07/US/Connecticut-shootings-fast-facts/ (last updated Dec. 14, 2016); Jack Date et al., *Orlando Shooter Bought Weapons at Nearby Gun Shop*, ABC NEWS (June 13, 2016, 12:19 PM), http://www.abcnews.go.com/US/Orlando-shhoter-brought-weapons-nearbygun-shop/story?id=39817471; *see also infra* Section III.A–D.

36. *See* Florida, *supra* note 27; Palazzolo & Flynn, *supra* note 26.

37. Palazzolo & Flynn, *supra* note 26; *see also* Peters, *supra* note 20; *infra* Section III.A–D.

38. *See Connecticut Shootings Fast Facts*, *supra* note 35; Date et al., *supra* note 35; Katie Zavadski, *Everything Known About Charleston Church Shooting Suspect Dylan Roof*, DAILY BEAST (June 20, 2015, 5:29 PM), http://www.thedailybeast.com/articles/2015/06/18/everything-known-about-charleston-church-shooting-suspect-dylann-roof.html; *San Bernardino Shooting Updates*, *supra* note 5.

twenty first graders and six adults.[39] The shooter, Adam Lanza, was twenty years old and killed himself at the scene.[40] Lanza also killed his mother at the home they shared, prior to his shooting rampage.[41] This was "the third deadliest mass shooting in U.S. history."[42]

"Lanza used a Bushmaster Model XM15-E2S rifle during the shooting spree. Three weapons were found next to his body: the semiautomatic .223-caliber rifle made by Bushmaster and two handguns. A[] . . . [twelve] gauge semi-automatic shotgun was found in his car."[43] All of the "[w]eapons found . . . were legally purchased by [the shooter's mother], Nancy Lanza."[44] The entire shooting spree, which killed twenty-six total, only took eleven minutes to complete from the time he entered the school, walked through the halls, and entered two separate classrooms performing the shootings.[45] The bulk of the killings, which occurred inside the classrooms, only took 264 seconds to complete.[46]

The families of nine children who were killed, along with one teacher who survived the attack, filed a wrongful death suit against the manufacturers and distributors of the Bushmaster rifle.[47] The lawsuit alleged that the gun used should not have been entrusted to the general public because it is a military assault weapon that is unsuited for civilian use.[48] Connecticut "Superior Court Judge Barbara Bellis [dismissed the lawsuit], invok[ing] a federal statute known as . . . the Protection of Lawful Commerce in Arms Act."[49] "The law prohibits lawsuits against gun manufacturers and distributors if their firearms were used in the commission of a criminal act."[50]

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39. *See* Barron, *supra* note 9, at A1.

40. *Id.*; *Connecticut Shootings Fast Facts*, *supra* note 35.

41. Barron, *supra* note 9, at A1; *Connecticut Shootings Fast Facts*, *supra* note 35.

42. *Connecticut Shootings Fast Facts*, *supra* note 35.

43. *Id.*

44. *Id.*

45. *Id.*; Matt Smith, *Sandy Hook Killer Took Motive to His Grave*, CNN (Nov. 26, 2013, 7:33 AM), http://www.cnn.com/2013/11/25/justice/sandy-hook-shooting-report/.

46. *See Connecticut Shootings Fast Facts*, *supra* note 35; Smith, *supra* note 45.

47. *See* George Zornick, *Can Sandy Hook Families Hold the Gun Industry Accountable?*, THE NATION (Feb. 22, 2016), http://www.thenation.com/article/can-sandy-hook-families-hold-the-gun-industry-accountable/.

48. *See* Deborah Feyerick & Chris Welch, *Sandy Hook: Judge Dismisses Families' Lawsuit Against Gunmaker*, CNN (Oct. 14, 2016, 9:49 PM), http://www.cnn.com/2016/10/14/health/sandy-hook-lawsuit-gun-maker/; Zornick, *supra* note 47.

49. Feyerick & Welch, *supra* note 48.

50. *Id.*

B. *Charleston, South Carolina—June 18, 2015*

On June 18, 2015, "Dylann Storm Roof . . . kill[ed] nine people at a historic black church in Charleston, [South Carolina]."[51] Authorities say Roof started firing at a group gathered at Emanuel African Methodist Episcopal Church after having first prayed with them.[52] He fled authorities and was later arrested in North Carolina.[53] "According to Roof's grandfather, [Roof's] family gave him money for his birthday [in] April, which it is believed he used to purchase a .45-caliber Glock pistol" that was used during this attack.[54]

Roof told friends that he wanted to commit the shooting to start a *race war* and wrote online: "We have no skinheads, no real KKK, no one doing anything but talking on the internet. Well, someone has to have the bravery to take it to the real world and I guess that has to be me."[55] These statements were found on a website that Roof started in February 2015.[56] "The site shows a stash of [sixty] photographs, many of them of . . . Roof at Confederate heritage sites or slavery museums, and includes a nearly 2500-word manifesto in which the author criticized blacks as being inferior while lamenting the cowardice of white flight."[57]

The Department of Justice charged him with murder, attempted murder, and use of a firearm, all in the commission of a hate crime.[58] Even with the statements he made about the intent of the shootings, he was not charged as a terrorist.[59] "Critics [argued] that the label of terrorism is too often only applied to Islamic extremists and not white supremacists or anti-government anarchists."[60]

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51. Zavadski, *supra* note 38.

52. Frances Robles, *Dylann Roof Photos and a Manifesto Are Posted on Website*, N.Y. TIMES (June 20, 2015), http://www.nytimes.com/2015/06/21/us/dylann-storm-roof-photos-website-charleston-church-shooting.html.

53. Zavadski, *supra* note 38.

54. *Id.*

55. Robles, *supra* note 52; Zavadski, *supra* note 38.

56. *See* Zavadski, *supra* note 38.

57. Robles, *supra* note 52.

58. Loretta Lynch, U.S. Atty Gen., Statement Following the Federal Grand Jury Indictment Against Dylann Storm Roof (July 22, 2015) [hereinafter Attorney General Lynch Statement].

59. *See* Jenna McLaughlin, *Why Wasn't Dylann Roof Charged with Terrorism?*, INTERCEPT (July 22, 2015, 5:43 PM), http://theintercept.com/2015/07/22/department-justice-didnt-charge-dylan-roof-domestic-terrorism/.

60. *Id.*

> Roof's crime . . . seems to fit the federal description of domestic terrorism, which the FBI defines as: activities . . . [that] involve acts dangerous to human life that violate federal or state law . . . appear [to be] intended (i) to . . . intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.[61]

However, Attorney General Loretta Lynch stated that "there is no specific domestic terrorism statute."[62] She went on to state that "[e]ven when the USA Patriot Act . . . redefined terrorism to include domestic crimes, the provision simply allowed the government to investigate more broadly what it called 'terrorism,'" and that "[a]ctually charging someone with domestic terrorism remains a separate matter."[63]

C. *San Bernardino, California—December 2, 2015*

On December 2, 2015, two shooters killed fourteen people and wounded twenty-two in a shooting at the Inland Regional Center in San Bernardino, California.[64] The attackers were United States born Syed Rizwan Farook and Pakistan-national Tashfeen Malik, who were married.[65] On the day of the attack, "the San Bernardino health department employees . . . gathered for an event in a conference room at the center, which provides services to disabled people."[66] "A police official said that Mr. Farook, a county health inspector, was at the event and left early."[67] At approximately eleven o'clock in the morning, "Mr. Farook returned with his wife, Ms. Malik."[68] The couple was

> [d]ressed in combat gear [when] they entered the building's east side and sprayed [sixty-five] to [seventy-five] rounds with assault

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61. *See* Jenna McLaughlin, *Charging Crimes as "Terrorism"*, 6 U. MIAMI NAT'L SECURITY & ARMED CONFLICT L. REV. 101, 102 (2016) (quoting 18 U.S.C. § 2331 (2012)).

62. McLaughlin, *supra* note 61, at 102; McLaughlin, *supra* note 59.

63. McLaughlin, *supra* note 61, at 103; McLaughlin, *supra* note 59.

64. Gregor Aisch et al., *What Investigators Know About the San Bernardino Shooting*, N.Y. TIMES, http://www.nytimes.com/interactive/2015/12/02/us/california-mass-shooting-san-bernardino.html (last updated Dec. 10, 2015); *San Bernardino Shooting Updates*, *supra* note 5.

65. Aisch et al., *supra* note 64; *San Bernardino Shooting Updates*, *supra* note 5.

66. Aisch et al., *supra* note 64.

67. *Id.*

68. *Id.*

> rifles. People, in nearby buildings, sheltered in place [and] remain[ed] hidden in their offices for two hours. Within four minutes, the police began clearing the scene and evacuating the injured.[69]

"The suspects . . . escaped . . . in a black S.U.V." and were later "killed in a gun battle with police."[70] It was later found that the two "had an arsenal of ammunition and pipe bombs in their Redlands, [California], home."[71]

When the FBI took over the investigation, they declared that they were treating it as a terrorist attack.[72] The female shooter made a public declaration of loyalty to the Islamic State of Iraq and Syria ("ISIS") while the attack was underway by posting to Facebook a pledge of allegiance to ISIS leader Abu Bakr al-Baghdadi.[73] The FBI director found that the assailants "had been talking of an attack as far back as two years" before they acted.[74] The FBI also "uncovered evidence that the couple were radicalized long before they got married in 2014."[75] "They have video evidence that the couple participated in target practice at ranges in the Los Angeles area and had even gone to a shooting range just days before the attack."[76] The suspects used

> two .223-caliber semiautomatic weapons and two 9mm semiautomatic pistols . . . . While they were originally sold legally, with magazine locking devices, commonly known as bullet buttons, the rifles were subsequently altered in different ways to [enhance] them . . . . Those alterations made the weapons unlawful under California's ban on assault weapons, which bans guns with magazines that can detach for quick reloading.[77]

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69. *Id.*

70. *Id.*; *San Bernardino Shooting Updates*, *supra* note 5.

71. *San Bernardino Shooting Updates*, *supra* note 5.

72. *See* Michael S. Schmidt & Richard Pérez-Peña, *F.B.I. is Treating Rampage as Act of Terrorism:* [National Desk], N.Y. TIMES, Dec. 5, 2015, at A1.

73. *Id.*; Aisch et al., *supra* note 64; Pete Williams et al., *Tashfeen Malik, Mother in San Bernardino Massacre, Pledged Allegiance to ISIS Leader: Sources*, NBC NEWS (Dec. 4, 2015, 5:04 PM), http://www.nbcnews.com/storyline/sanbernardino-shooting/tashfeen-malik-mother-san-bernardino-massacre-pledged-allegiance-isis-leader-n474246.

74. Aisch et al., *supra* note 64.

75. *Id.*; *see also* Schmidt & Perez-Pena, *supra* note 72, at A1.

76. Aisch et al., *supra* note 64.

77. Ashby Jones & Dan Frosch, *Rifles Used in San Bernardino Shooting Illegal Under State Law*, WALL STREET J., http://www.wsj.com/articles/rifles-used-in-san-bernardino-shooting-illegal-under-state-law-1449201057 (last updated Dec. 3, 2015).

D. *Orlando, Florida—June 12, 2016*

On June 12, 2016, the United States suffered the worst mass shooting in modern history when forty-nine people were killed and fifty-three injured in Orlando, Florida, after a gunman stormed into a packed gay nightclub known as *Pulse*.[78] The gunman, later identified as twenty-nine year old Omar Mateen, was killed by a SWAT team after taking hostages.[79] During the attack, Mateen called 911 and pledged his allegiance to ISIS.[80] Mateen had purchased a Sig Sauer .223 caliber assault rifle at St. Lucie Shooting Center, a firearms shop near his Florida home on June 4, 2016 and, later, a Glock 17 at the same store on June 5, 2016.[81] "Mateen had returned to the store a third time on June 9, [2016], to buy magazines for his weapons."[82] "Mateen left a third weapon [in his van], a revolver, [which is only] capable of firing . . . six shots . . . ."[83]

> The store [that sold him the weapons] is a federally licensed firearms dealer. Under law, the seller would have had to notify the [FBI] of Mateen's purchase so that his name could be checked against the National Instant Criminal Background Check System . . . . Mateen was actually listed on two federal watch lists . . . : The Terrorist Identities Datamart Environment, which contains

78. Date et al., *supra* note 35; Ralph Ellis, *Pulse Nightclub: Chilling 911 Tapes Capture Killer's Voice*, CNN, http://www.cnn.com/2016/10/31/us/orlando-pulse-911-calls/ (last updated Oct. 31, 2016); *How Did Orlando Shooter Legally Buy Guns? Your Questions Answered*, USA TODAY (June 13, 2016, 9:20 AM), http://www.usatoday.com/story/news/nation/2016/06/13/orlando-shooting-what-we-dont-know/85811424/; Shapiro & Chan, *supra* note 5.

79. Date et al., *supra* note 35; *How Did Orlando Shooter Legally Buy Guns? Your Questions Answered*, *supra* note 78; Shapiro & Chan, *supra* note 5.

80. Ellis, *supra* note 78.

> Mateen first made contact with police, calling 911 at 2:35 [A.M.] to say, "I want to let you know [I am] in Orlando and I did the shooting." When the dispatcher asked his identity, he said, "My name is I pledge allegiance to Abu Bakr al-Baghdadi of the Islamic State." Then, he hung up. The negotiator stationed at the 911 center then called and got through three times to Mateen, who was inside the nightclub. Mateen started out repeating phrases in an insistent, almost robotic manner. When the negotiator asked what was going on, meaning at the nightclub, Mateen replied, "What [is] going on is that I feel the pain of the people getting killed in Syria and Iraq," a subject he returned to repeatedly.

Id.

81. Date et al., *supra* note 35.

82. Michael Daly & Shane Harris, *How the Orlando Killer Omar Mateen Got His Guns*, DAILY BEAST (June 13, 2016, 11:26 AM), http://www.thedailybeast.com/articles/2016/06/13/how-the-orlando-killer-omar-mateen-got-his-guns.html.

83. *Id.*

> classified information, and the Terrorist Screening Database, which is the FBI's central watch list.[84]

Mateen's name had been removed from the second watch list in 2014.[85]

Even if his name had been in the system, "it [still] might not have prevented him from purchasing weapons."[86] "In December [2015], the Senate voted down an amendment that would have kept suspected terrorists from purchasing firearms."[87] The amendment was introduced by the Democratic Senator of California, Dianne Feinstein.[88] It would have allowed "the attorney general to prevent someone from buying a gun if that person is a known or suspected terrorist. A person could also be barred from buying a firearm if the attorney general has a 'reasonable belief' that the individual would use it in connection with a terrorist act."[89]

IV. CONSTITUTIONAL AUTHORITY FOR GUN OWNERSHIP AND GUN LAWS IN THE UNITED STATES

The Second Amendment of the United States Constitution, passed by Congress on September 25, 1789 and ratified on December 15, 1791 as part of the Bill of Rights, has made it possible for U.S. citizens to own firearms for personal use.[90] The Second Amendment states that "[a] well regulated [m]ilitia, being necessary to the security of a free [s]tate, the right of the people to keep and bear [a]rms, shall not be infringed."[91] There has been a great deal of controversy and debate regarding what was meant by the text of

84. *Id.*

85. *Id.*; Michelle Ye Hee Lee, *Does a Known or Suspected Terrorist Face 'a Long Waiting Period' Before Buying a Gun?*, WASH. POST (June 21, 2016), http://www.washingtonpost.com/news/fact-checker/wp/2016/06/21/does-a-known-or-suspected-terrorist-face-a-long-waiting-period-before-buying-a-gun/.

86. *How Did Orlando Shooter Legally Buy Guns? Your Questions Answered*, *supra* note 78.

87. *Id.*; *see also* Khorri Atkinson, *GOP Blocks Bill to Stop Terrorists From Buying Guns*, MSNBC (Dec. 4, 2015, 12:23 PM), http://www.msnbc.com/msnbc/gop-blocks-bill-stop-terrorists-buying-guns.

88. Atkinson, *supra* note 87; *How Did Orlando Shooter Legally Buy Guns? Your Questions Answered*, *supra* note 78.

89. *How did Orlando Shooter Legally Buy Guns? Your Questions Answered*, *supra* note 78.

90. U.S. CONST. amend. II; *see also* Nelson Lund & Adam Winkler, *The Second Amendment*, NAT'L CONST. CTR., http://www.constitutioncenter.org/interactive-constitution/amendments/amendment-ii/ (last visited Apr. 9, 2017).

91. U.S. CONST. amend. II.

the Second Amendment.[92] Scholars differ on their interpretations of the text, with some finding that the Second Amendment only allows for firearms to be owned by the militia and others arguing that it allows for firearms both in the military and for personal use.[93] The Supreme Court of the United States clarified the scope of the Second Amendment in three seminal cases.[94]

A. *Supreme Court Decisions*

In 1939, the Supreme Court of the United States heard *United States v. Miller*.[95] In *Miller*, the Court rejected a claim that indictments under the National Firearms Act of 1934 violated the right to keep and bear arms.[96] The defendants were charged with possessing a short-barreled shotgun, a firearm that was considered illegal under the Act.[97] The defendants initially persuaded the lower court to quash the indictment as a violation of the Second Amendment, but a unanimous Supreme Court reversed.[98] Justice McReynolds found that the Second Amendment "must be interpreted and applied with [the] end" of maintaining *a well-regulated militia*.[99] The Court also held:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length," at this time, has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly, it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.[100]

92. *See* Robert Hardaway et al., *The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate Over the Right to Bear Arms*, 16 ST. JOHN'S J. LEGAL COMMENT. 41, 94–95 (2002).

93. David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99, 104–07, 118 (2010); *see also* U.S. CONST. amend. II..

94. *See* McDonald v. City of Chicago, 561 U.S. 742, 750 (2010); District of Columbia v. Heller, 554 U.S. 570, 595, 635 (2008); United States v. Miller, 307 U.S. 174, 178 (1939).

95. 307 U.S. 174 (1939).

96. *Id.* at 176–78.

97. *Id.* at 175.

98. United States v. Miller, 26 F. Supp. 1002, 1003 (W.D. Ark. 1939), *rev'd*, 307 U.S. 174 (1939).

99. *Miller*, 307 U.S. at 178.

100. *Id.*

Therefore, the defendants were not entitled to any constitutional protection because a civilian-owned short-barreled shotgun did not relate to the ability to maintain a well-regulated militia.[101] The Court's decision in *Miller* was precedent for almost seventy years, until the Supreme Court of the United States heard *District of Columbia v. Heller* ("*Heller I*")[102] in 2008.[103]

In 2008, in *Heller I*, the Supreme Court of the United States held for the first time that the Second Amendment protects the right of an individual law-abiding adult citizen to possess an operable firearm, including a handgun, in his or her home for self-defense.[104] *Heller I* dealt with provisions in the District of Columbia Code that made it illegal to carry an unregistered firearm and prohibited the registration of handguns.[105] The Code also contained provisions that required owners of lawfully registered firearms to keep them "'unloaded and disassembled or bound by a trigger lock or other similar device' unless [the firearms were] located in a place of business or . . . being used for [legal] recreational activities."[106] Dick Anthony Heller was a District of Columbia "special police officer [that was] authorized to carry a handgun while on duty."[107] He applied for a one-year license for a handgun that he wanted to keep at home, but his application was denied.[108] Heller sued the District of Columbia, seeking an injunction against the enforcement of the relevant parts of the Code, by arguing that it violated his Second Amendment right to keep a functional firearm in his home without a license.[109]

Justice Scalia, writing for the *Heller I* majority, revisited the Second Amendment's text and broke it apart.[110] He found that the first clause relating to a *well-regulated militia* is *prefatory* and the second clause concerning "the right of the people to keep and bear [a]rms" is *operative*.[111] To illustrate this point, Justice Scalia stated that "[t]he Amendment could be rephrased [as]: 'Because a well-regulated [m]ilitia is necessary to the security of a free [s]tate, the right of the people to keep and bear [a]rms shall not be infringed.'"[112] The Court ultimately decided that the operative portion

101. *See id.*
102. 554 U.S. 570 (2008).
103. *Id.* at 623–25; *Miller*, 307 U.S. at 183.
104. *Heller*, 554 U.S. at 635.
105. *Id.* at 574–75.
106. *Id.* at 575.
107. *Id.*
108. *Id.*
109. *Heller*, 554 U.S. at 575–76.
110. *Id.* at 576–77.
111. *Id.* at 576, 579, 595.
112. *Id.* at 577.

"unambiguously refer[s] to individual rights, not 'collective' rights or rights that may be exercised only through participation in some corporate body."[113] Although this enabled individuals to keep a handgun in their home for self-defense, the Court clarified that "[l]ike most rights, the right secured by the Second Amendment is not unlimited."[114] Justice Scalia stated:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[115]

The Court also reaffirmed a portion of the holding in *Miller* by finding that the sorts of weapons that would be protected "were those 'in common use at the time.'"[116] In responding to the dissent, Justice Scalia reaffirmed that although handguns are not the type of weapon that would ordinarily be used in modern day militia, that would not prevent the interpretation of the Second Amendment, which would be to allow handguns to be owned by civilians.[117] Therefore, after *Heller I*, adult citizens were deemed to be allowed to possess an operable handgun in their home for self-defense.[118]

In 2010, in *McDonald v. City of Chicago*,[119] the Supreme Court of the United States held "that the Due Process Clause of the Fourteenth Amendment incorporate[d] the Second Amendment right, recognized in *Heller*," to the states.[120] In this case, "Otis McDonald, Adam Orlov, Colleen

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113. *Id.* at 579.
114. *Heller*, 554 U.S. at 626.
115. *Id.* at 626–27.
116. *Id.* at 627 (citing United States v. Miller, 307 U.S. 174, 179 (1939)).
117. *Id.* at 627–28.

> It may be objected that if weapons that are most useful in military service—M–16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But, as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the [eighteenth] century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But, the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

Id.

118. *Heller*, 554 U.S. at 635.
119. 561 U.S. 742 (2010).
120. *Id.* at 750, 791; *see also Heller*, 554 U.S. at 635.

Lawson, and David Lawson . . . [were] Chicago residents who [wanted] to keep handguns in their homes for self-defense."[121] They were "prohibited from doing so by Chicago's firearms laws."[122] A city ordinance required that, in order to possess a firearm, a person must have a "valid registration certificate for [the] firearm."[123] "The Code [also] prohibit[ed] registration of most handguns, thus, effectively banning handgun possession by almost all private citizens who reside in the City."[124] The Court found "that *Heller* had explicitly refrained from 'opin[ing] on [whether] . . . the Second Amendment'" applied to the states.[125] Justice Alito found:

> We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the [s]tates. Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the [s]tates.[126]

Therefore, after *McDonald*, the Second Amendment rights were incorporated to the states.[127]

B. *How Gun Laws Are Established in the United States*

In light of the Supreme Court holdings that firearms ownership does extend to civilians, the structure for gun laws and regulations is also important to understand.[128] Currently, the gun laws of the United States are defined and established by both state and federal statutes.[129] The federal gun laws of the United States are enforced by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF").[130] The ATF establishes the minimum requirements and leaves it to the states to develop additional legislation.[131] Most of the legislation pertaining to firearms comes from the states, and

121. *McDonald*, 561 U.S. at 750.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 752.
126. *McDonald*, 561 U.S. at 750.
127. *See id.*
128. *See id.* at 767–68, 785; District of Columbia v. Heller, 554 U.S. 570, 630 (2008); *Firearms*, ATF, http://www.atf.gov/firearms (last visited Apr. 9, 2017).
129. *See* 18 U.S.C. § 921 (2012); Nicholas Duva, *Gun Laws Vary State by State: CNBC Explains*, CNBC (Nov. 20, 2014, 8:47 AM), http://www.cnbc.com/2014/11/20/gun-laws-vary-state-by-state-cnbc-explains.html; *Firearms*, *supra* note 128.
130. *See Firearms*, *supra* note 128.
131. Duva, *supra* note 129; *Firearms*, *supra* note 128.

there is a varying degree of what is allowed depending on the state.[132] For example, Texas allows citizens to apply for open carry permits—which enables them to carry their firearms out in public without having to conceal it under clothing or within a bag—whereas New York City does not generally allow citizens to carry any firearms, whether open carry or concealed.[133] State legislation is typically necessary in today's political climate in order to see any changes to gun laws.[134] After the 2016 mass shooting in Orlando, Florida, House Democrats conducted a twenty-six hour sit-in at the Capitol, in order "to push for [federal] gun . . . legislation."[135] During the sit-in, the House Democrats chanted "'No Bill, No Break' and wav[ed] posters with the names of victims of gun violence."[136] The House Democrats stated that their intention was to forestall "House business . . . until . . . vot[ing began] on . . . gun control measures."[137] "A total of 168 House Democrats, out of 188 total, joined at least part of the sit-in . . . . A number of senators [also] joined them . . . ."[138] However, no new gun legislation at the federal level was passed.[139]

States typically see an increase in proposed legislation after a mass shooting tragedy occurs.[140] The tragedy spurs debate on gun issues and brings them to the forefront of the people's minds, and legislators see it as an opportunity to pass legislation they have been contemplating.[141] According

132. *See* Duva, *supra* note 129.

133. *Id.*; *see also Getting a NYC Handgun Permit License*, N.Y.C. GUNS, http://www.newyorkcityguns.com/getting-a-nyc-handgun-permit (last visited Apr. 9, 2017).

134. *See* Camila Domonoske & Jessica Taylor, *Almost 26 Hours Later, House Democrats End Gun Control Sit-In*, NPR (June 23, 2016, 7:51 AM), http://www.npr.org/sections/thetwo-way/2016/06/23/483205589/house-democrats-continue-gun-control-sit-in.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *See* Domonoske & Taylor, *supra* note 134.

140. Rott & Landa, *supra* note 7; *see also* Neil Irwin, *After Mass Shootings, It's Often Easier to Buy a Gun*, N.Y. TIMES: THE UPSHOT (June 14, 2016), http://www.nytimes.com/2016/06/15/upshot/policy-changes-after-mass-shootings-tend-to-make-guns-easier-to-buy.html.

> A mass shooting takes place, followed by emotional vigils, intensive news media coverage and sorrowful statements by politicians. But what does it actually mean for laws and policies around guns? Lots of gun laws are proposed in the aftermath of an attack, new research shows. But in terms of what actually is enacted, the results [are not] what you might expect. In states where a mass shooting happened, 15[%] more gun-related bills were introduced in state legislatures, three Harvard Business School professors found in a working paper published last month.

Irwin, *supra*.

141. *See id.*

> [There is] no doubt that there is a surge of attention around gun policy when a major shooting takes place. Polling data from the Pew Research Center

to a working paper released by researchers at Harvard Business School, "[m]ore than 20,400 pieces of gun-related legislation have been proposed following mass shooting events in the past [twenty-five] years. Of those bills, more than 3000 have become law . . . ."[142] One of the authors of the paper, Deepak Malhotra, stated that, "[it is] not that nothing changes after a mass shooting . . . . A lot of the action on [gun control] happens across states instead of at the federal level."[143] This was the case after the Newton, Connecticut, shooting at the elementary school.[144] According to the New York Times, "almost every state enacted at least one new gun law" in the year following Newtown; "1500 state gun bills were introduced" of which 178 passed one chamber, and of which 109 subsequently became state law.[145] Where many thought these laws would result in tightened gun restrictions, "[n]early two-thirds of the . . . laws [enacted instead] ease[d] restrictions and expand[ed] the rights of gun owners."[146]

Further, a Pew Research poll conducted between December 2012 and December 2014 asked individuals whether gun ownership in the United States did more to protect people from being crime victims or put people's safety at risk.[147] There was a nine point increase since 2012—when the Newtown, Connecticut, massacre occurred—in the percentage of Americans that said gun ownership protects people from becoming crime victims, as opposed to putting people's safety at risk; nearly 40% said gun ownership does more to put people's safety at risk.[148]

> shows sharp, but temporary, swings in public opinion on gun control after particularly high-profile, emotionally resonant attacks like the ones at Columbine High School in 1999 and Sandy Hook Elementary School in 2012. . . . [H]igh-profile shootings create a "policy window" in which an issue comes to the forefront for media and politicians alike, even if "mass shooting" [does not] automatically translate into "more restrictive gun laws."

Id.

142. Rott & Landa, *supra* note 7; *see also* Michael Luca et al., *The Impact of Mass Shootings on Gun Policy* 6–7 (Harvard Bus. Sch., Working Paper No. 16-126, 2016).

143. Rott & Landa, *supra* note 7 (alteration in original).

144. Barron, *supra* note 9, at A1.

145. Karen Yourish et al., *State Gun Laws Enacted in the Year After Newtown*, N.Y. TIMES (Dec. 10, 2013), http://www.nytimes.com/interactive/2013/12/10/us/state-gun-laws-enacted-in-the-year-since-newtown.html.

146. *Id.*

147. *More Conservative Republicans, African Americans Say Gun Ownership Protects People from Crime*, PEW RES. CTR. (Dec. 10, 2014), http://www.people-press.org/2014/12/10/growing-public-support-for-gun-rights/12-10-2014-2-23-41-pm.

148. *Id.*

C. *Current Federal Gun Laws*

Although most of the gun laws in the United States are created by the states, there are federal laws regarding gun control—specifically, in relation to background checks.[149] The Brady Handgun Violence Prevention Act of 1993 ("Brady Act") requires federally licensed firearms dealers ("FFLs") to perform background checks on prospective firearms purchasers to ensure that the firearm transfer will not violate federal, state, or local laws.[150] Through the Brady Act, the National Instant Criminal Background Check System ("NICS") was established.[151] States have the option of serving as a state point of contact and conducting their own NICS checks or having those checks performed by the FBI.[152]

FBI searches will include three federal databases: (1) The National Crime Information Center ("NCIC"), "which includes . . . records [regarding] wanted persons" and persons subject to protective or restraining orders; (2) The Interstate Identification Index, which contains state criminal history records; and (3) The NICS Index, which contains records of other persons prohibited under federal law from receiving or possessing firearms.[153] Once the initial search is complete, the FBI or point of contact notifies the dealer that the sale: (1) may proceed; (2) may not proceed; or (3) is delayed pending further investigation.[154]

Under the Brady Act, if the dealer has not been notified within three business days that the sale would violate federal or state laws, the sale may proceed by default.[155] This is known as the default proceed loophole.[156] The law pertaining to the default loophole provides:

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149. *See* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 102, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–925A (2012)); Rott & Landa, *supra* note 7.

150. Brady Handgun Violence Prevention Act § 102(a).

151. CRIMINAL JUSTICE INFO. SERVS. DIV., U.S. DEP'T OF JUSTICE, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) (2015), https://www.fbi.gov/file-repository/nics-overview-brochure.pdf; *see also* Brady Handgun Violence Prevention Act § 102(b).

152. *Id.*

153. CRIMINAL JUSTICE INFO. SERVS. DIV., U.S. DEP'T OF JUSTICE, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS): 2000 OPERATIONS REPORT 1 (2001), https://www.fbi.gov/file-repository/operations_report_2000.pdf; *see also* John Pike, *National Crime Information Center (NCIC)*, FED'N AM. SCIENTISTS, http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm (last updated June 2, 2008).

154. *See* CRIMINAL JUSTICE INFO. SERVS. DIV., *supra* note 153, at 3, 40.

155. *Id.* at 17, 37; *see also* Press Release, Richard Blumenthal, Senator, Senators Introduce "No Check, No Sale" Bill to Close Loophole Allowing Gun Sales Without a Completed Background Check (Oct. 28, 2015).

Section 25.6(c)(1)(iv)(B)—Delayed response provided to FFL:

> "Delayed" response, if the NICS search finds a record that requires more research to determine whether the prospective transferee is disqualified from possessing a firearm by [f]ederal or state law. A "[d]elayed" response to the FFL indicates that the firearm transfer should not proceed pending receipt of a follow-up "[p]roceed" response from the NICS *or the expiration of three business days*—exclusive of the day on which the query is made—whichever occurs first. Example: An FFL requests a NICS check on a prospective firearm transferee at 9:00 [A.M.] on Friday and, shortly thereafter, receives a "[d]elayed" response from the NICS. If state offices in the state in which the FFL is located are closed on Saturday and Sunday and open the following Monday, Tuesday, and Wednesday, and the NICS has not yet responded with a "[p]roceed" or "[d]enied" response, the FFL may transfer the firearm at 12:01 [A.M.] Thursday.[157]

Section 25.2—Definition of *Open* transaction:

> "Open" means those non-canceled transactions where the FFL has not been notified of the final determination. In cases of "open" responses, the NICS continues researching potentially prohibiting records regarding the transferee and, if definitive information is obtained, communicates to the FFL the final determination that the check resulted in a proceed or a deny. An "open" response *does not prohibit an FFL from transferring a firearm after three business days have elapsed* since the FFL provided to the system the identifying information about the prospective transferee.[158]

The default loophole "allowed 3849 prohibited purchasers to buy guns during the first year of operation, November 30, 1998, through November 30, 1999, of NICS."[159] "[T]he FBI has found that a purchaser whose NICS check takes longer than [twenty-four] hours to complete is [twenty] times more likely to be a prohibited purchaser than other

156. *See* Jennifer Mascia, *How America Wound Up with a Gun Background Check System Built More for Speed Than Certainty*, TRACE (July 21, 2015), https://www.thetrace.org/2015/07/brady-bill-amendment-default-proceed-loophole-amendment-nra/.

157. 28 C.F.R. § 25.6(c)(1)(iv)(B) (2012) (emphasis added).

158. 28 C.F.R. § 25.2 (2012) (emphasis added).

159. *Federal Law on Background Checks*, L. CTR. TO PREVENT GUN VIOLENCE, http://www.smartgunlaws.org/gun-laws/federal-law/sales-transfers/background-checks/ (last visited Apr. 9, 2017).

applicants."[160] Further, "between November 1998 and December 31, 2005, ATF received 26,600 referrals from the FBI requesting further review, evaluation, and possible retrieval of firearms that had been sold to ineligible persons by default."[161]

There is also a *gun show loophole* where persons who purchase firearms from private sellers are not required to undergo background checks.[162] It is estimated that 40% of all gun purchasers buy their guns from private sellers and do not have to undergo background checks.[163] The most common arena for these purchases are gun shows, however the ability to purchase a gun without a background check is available when a person purchases a firearm by any private dealer in any setting.[164]

V. MASS SHOOTING TRAGEDY IN AUSTRALIA

In order to compare gun laws in the United States to those of Australia, it is necessary to understand where Australia's motive in creating their current gun laws derives from.[165] Australia had a focusing event

160. *Federal Law on Background Checks*, *supra* note 159.

161. *Id.*

162. Andrew Goddard, *A View Through the Gun Show Loophole*, 12 RICH. J.L. & PUB. INT. 357, 357 (2009).

> The term *Gun Show Loophole* came about as a result of the passage of the Firearm Owners Protection Act of 1986 and the Brady Handgun Violence Prevention Act of 1993. These laws effectively created a dual standard for gun sales based on the federal license status of the seller. The Brady Act mandated that licensed gun dealers must conduct criminal background checks on potential buyers regardless of whether the sale takes place at the dealer's store or at a gun show, whereas the Firearm Owners Protection Act expressly exempted "persons making occasional sales or selling all or part of a personal collection" from the need to obtain a federal license to sell firearms. Thus, a private individual who is not considered to be "engaged in the business" of buying and selling guns, or who sells occasionally, is not required, or even allowed, to conduct a background check on a prospective buyer. The reason for the exception to the background check requirement for private sellers [is] to allow for the unregulated sale or transfer of guns between friends and relatives or the "occasional" sale of guns by individuals from their personal collection.

Id.

163. Kate Masters, *Just How Many People Get Guns Without a Background Check? Fast-Tracked Research Is Set to Provide an Answer*, TRACE (Oct. 21, 2015), http://www.thetrace.org/2015/10/private-sale-loophole-background-check-harvard-research/.

164. *See* Goddard, *supra* note 162, at 357.

165. Matthew Grimson, *Port Arthur Massacre: The Shooting Spree that Changed Australia's Gun Laws*, NBC NEWS (Apr. 28, 2016, 6:52 AM), http://www.nbcnews.com/news/world/port-arthur-massacre-shooting-spree-changed-australia-gun-laws-n396476; *see also* Emily Crane, *Martin Bryant's Old Volvo Crammed with Weapons, a Surfboard on the Roof and 35 Innocent Lives Lost: Harrowing Photos Show How Australia's Worst Massacre Unfolded at Port Arthur 20 Years Ago Today*, DAILYMAIL.COM

pertaining to mass shootings on April 28, 1996, at a seaside resort in Port Arthur, Tasmania.[166] It was considered the worst massacre in Australian history.[167] The gunman Martin Bryant, a twenty-eight year old that was armed with a semi-automatic rifle, killed thirty-five people and wounded twenty-three others.[168] He "drove a yellow Volvo to Port Arthur armed with a sports bag full of ammunition and a military-style semi-automatic rifle."[169] Bryant "ate lunch before pulling [out the] semi-automatic rifle from his bag and embarking on a killing spree."[170] Bryant was found guilty of the shootings and given "[thirty-five] life sentences without [the possibility of] parole."[171] After this tragedy, John Howard, the Australian Prime Minister at the time, urged for more restrictive gun laws commenting, "'I hate guns' . . . . 'One of the things I [do not] admire about America is their slavish love of guns . . . , [w]e do not want the American disease imported into Australia.'"[172]

VI. AUSTRALIA'S GUN LAWS

On May 10, 1996, twelve days after the attacks at Port Arthur, Australia enacted uniform gun control laws.[173] "Between June 1996 and August 1998, the new restrictions were . . . implemented in all six states and two territories."[174] The act is known as the National Firearms Agreement.[175]

(Apr. 27, 2016, 11:17 PM), http://www.dailymail.co.uk/news/article-3562751/Harrowing-photos-Port-Arthur-massacre-unfolded-20-years-ago.html.

166. Crane, *supra* note 165; Grimson, *supra* note 165.

167. Crane, *supra* note 165; Grimson, *supra* note 165.

168. Crane, *supra* note 165; Grimson, *supra* note 165.

169. Crane, *supra* note 165.

170. Grimson, *supra* note 165.

171. Crane, *supra* note 165.

172. Daniel Williams, *Australia's Gun Laws: Little Effect*, TIME (May 1, 2008), http://content.time.com/time/world/article/0,8599,1736501,00.html; *see also* Calla Wahlquist, *It Took One Massacre: How Australia Embraced Gun Control After Port Arthur*, GUARDIAN (Mar. 14, 2016, 4:49 PM), http://www.theguardian.com/world/2016/mar/15/it-took-one-massacre-how-australia-made-gun-control-happen-after-port-arthur.

173. *See How Australia Dealt with Mass Shootings*, CBS NEWS (Mar. 13, 2016, 10:14 AM), http://www.cbsnews.com/news/how-australia-dealt-with-mass-shootings/; Laura Smith-Spark, *This Is What Happened When Australia Introduced Tight Gun Controls*, CNN, http://www.cnn.com/2015/06/19/world/us-australia-gun-control/ (last updated June 19, 2015, 12:35 PM). "Only [twelve] days after the shootings, in John Howard's first major act of leadership and by far the most popular in his first year as Prime Minister, his government announced nationwide gun law reform." Smith-Spark, *supra*.

174. *See* Simon Chapman et al., *Australia's 1996 Gun Law Reforms: Faster Falls in Firearm Deaths, Firearm Suicides, and a Decade Without Mass Shootings*, 12 INJ. PREVENTION 365, 365 (2006).

The National Firearms Agreement: (1) prohibits automatic and semiautomatic assault rifles; (2) stiffened licensing and ownership rules—for example, the private sale and transfer of firearms is prohibited unless conducted and registered by a *licensed firearms dealer*; (3) instituted a temporary gun buyback program that took approximately 700,000 assault weapons out of public circulation; (4) requires licensees to demonstrate a *genuine need* for a particular type of gun—self-defense does not qualify; (5) requires a firearm safety course; (6) determined that licenses cannot be issued until after a waiting period of not less than twenty-eight days and for a period of no more than five years; (7) mandates that licensees need to comply with storage requirements and submit to inspection by licensing authorities, subject to immediate withdrawal of license and confiscation of firearms in certain circumstances; and (8) requires separate permits for the acquisition of every firearm.[176]

Before the National Firearms Agreement, only handguns were required to be registered.[177] As previously mentioned, after the Agreement, all jurisdictions in Australia banned the sale, resale, transfer, ownership, possession, manufacture, and the use of automatic and semi-automatic long-arms.[178] Further, the requirement that owners of guns needed a genuine reason for owning the gun only encompassed the uses of recreational shooting and hunting, bona fide gun collection, and sporting shooters with a valid membership to an approved club.[179] This effectively removed any person from claiming self-protection as a genuine reason for gun ownership.[180]

An article in Time Magazine contains a firsthand account of an avid gun owner and collector living in Australia during the time when the National Firearms Agreement was implemented.[181] The gun owner is

175. *See* Kelly Buchanan, *Australia*, *in* FIREARMS-CONTROL LEGISLATION AND POLICY 16, 17 (2013). What emerged from the APMC's meeting was the implementation of the Nationwide Agreement on Firearms, "commonly referred to as the National Firearms Agreement" (the "Agreement") in 1996. *Id.* at 17. *Legislative Reforms*, AUSTL. INST. CRIMINOLOGY http://www.aic.gov.au/publications/current%20series/rpp/100-120/rpp116/06_reforms.html (last modified June 29, 2012). The Australian government responded swiftly, and "the Australasian Police Ministers' Council ("APMC") convened a special meeting" and made resolutions to create a national plan for the regulation of firearms.

176. Buchanan, *supra* note 175, at 19–21.

177. *Legislative Reforms*, *supra* note 175.

178. *Id.*

179. *Id.*; Jeffrey Sachs, *Australia Gun Ownership Regulations*, JEFFSACHS.ORG (Dec. 16, 2012), http://www.jeffsachs.org/2012/12/australis-gun-ownership-regulations/.

180. *See Legislative Reforms*, *supra* note 175; Sachs, *supra* note 179.

181. Peter, *What It's Like to Own Guns in a Country with Strict Gun Control*, TIME (Jan. 13, 2016), http://www.time.com/4172274/what-its-like-to-own-guns-in-a-country-with-strict-gun-control/.

referenced in the article only by his first name, Peter, due to his fear that disclosing the contents of his gun collection might make him a target for weapon thieves.[182] Peter admitted that he was not thrilled about the idea of having to turn in six to eight semiautomatic rifles and shotguns to the police, but he came to the realization that the laws are actually an improvement.[183] Peter stated:

> [It is] actually not that hard to own a gun. But, you do have to have a genuine reason. You have to be a member of a target shooting club, or a hunter, and you have to prove it. For hunting, you can get written permission from a landowner who says you are hunting on his land. Or, you can join a hunting club. Pistols [handguns], on the other hand, are heavily restricted. All applicants undergo a background check by the police and there is a mandatory [thirty] day cooling off period for all license applications, both long arms and pistols. Firearms safety training courses are mandatory as well.[184]

Peter also mentions the requirements of having a trigger lock on all firearms that are being transported throughout Australia and the provision requiring firearms to only be transported unloaded with ammunition in a separate locked container.[185] Approving of the restrictions, he stated:

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182. *Id.*

183. *Id.*

> [A]fter the 1996 massacre, I probably had to hand in six to eight semiautomatic rifles and shotguns to the police. We got fair value for them but I [was not] thrilled to be doing it because I thought "Well gee, what have I done wrong?" Would anything untoward ever have happened with the firearms I owned? No.

Id.

184. *Id.*

> One of the biggest changes is that the government established different types of firearms for different categories of guns and ruled that each would need different licenses. [Here is] roughly how it works: Category A is .22s, shotguns and air rifles. [That is] the easiest license to obtain. No semiautomatics are allowed. Category B is for center fire rifles. You have to provide a reason for why you need a more powerful gun. I shoot feral pigs and foxes; [that is] a valid reason. Again, no semiautomatics. Category C is available only to farmers; they can own a semiautomatic shotgun or .22 but the cartridges are limited to five shots for the shotgun and [ten] shots for the .22. Category D, for semiautomatic guns and rifles, is only for professional shooters: [Y]ou have to have a registered business and prove that you are earning an income through shooting. An H license is for handguns. If you want to buy a pistol in Australia, [you have] . . . to be a member of a target pistol club. [You have] . . . to do a minimum of eight competition shoots per year to keep your license. If you [do not], you lose it. Category G is for collectors. For that, [you have] . . . to attend at least one meeting per year.

Peter, *supra* note 181.

185. *Id.*

> All these things I agree with. I would feel less safe in Texas where [everybody is] walking around with open carry. That would freak me out. It freaks me out enough to see the police all armed at the airport. Would I walk around the street with a pistol loaded on my waist? No way.[186]

Although he found the provision requiring a new permit for each additional firearm acquired to be tedious, overall, he believes that most Australians think the law is beneficial and still allows them to enjoy the use of firearms for particular purposes.[187]

In 2002, Australia also implemented the National Trafficking and Handgun Agreement.[188] This agreement was implemented to control the illegal trade of firearms in Australia.[189] The agreement: (1) increased border protection; (2) introduced nationally consistent regulations of the legal manufacture of firearms; (3) created tighter recording and reporting provisions for dealer transactions involving firearm and major firearm parts; and (4) established new offenses or penalties for the illegal possession and supply of firearms, the defacing of serial numbers, and conspiracy to commit interstate crimes with firearm.[190] "The [F]ederal Parliament also enacted the National Handgun Buyback Act [in] 2003," resulting in the surrender of "about 70,000 handguns and more than 278,000 parts and accessories" "that did not comply with the new restrictions."[191]

According to a study published in the Journal of the American Medical Association, after the enactment of nationwide gun law reform in May of 1996, there have been no mass shootings in Australia.[192] In Australia, mass shootings are defined as *fatal shootings*, "with five or more victims killed, not including the perpetrator."[193] The study also found that since the passing of the legislation, "gun suicides declined by an average of

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186. *Id.*

187. *Id.*

> Australia is a great country. You can go hunting, you can go shooting. And, as long as you hurt nobody and abide the law, you can continue to do it. That, to me, is freedom. The idea of having people own guns with no concept of gun safety and no reason to have a gun? That is not my idea of freedom.

Id.

188. Buchanan, *supra* note 175, at 22.

189. *Id.*

190. *Id.* at 22–23.

191. *Id.* at 24.

192. Simon Chapman et al., *Association Between Gun Law Reforms and Intentional Firearm Deaths in Australia, 1979-2013*, 316 AM. MED. ASS'N 291, 298 (2016); Howard, *supra* note 3.

193. Chapman et al., *supra* note 192, at 293; Howard, *supra* note 3.

4.8% per year and gun-related homicides declined by an average of 5.5% per year."[194]

So, how was Australia able to pass sweeping legislative change so quickly? First, the Australian Constitution does not provide an explicit individual right to bear arms.[195] Second, firearms regulation in Australia is the sole responsibility of the individual states and territories, as Section 51 of the Australian Constitution does not confer lawmaking powers to the Federal Parliament in relation to firearms.[196] "Federal laws . . . regarding the import of firearms and other weapons [can be enacted] under the overseas trade and commerce powers of the . . . Parliament."[197] Third, Australia does not have a powerful gun rights lobbying organization that has unyielding control to influence legislative reform.[198] These details are helpful in order to determine if the structure of the United States government would enable America to adopt Australia's gun law policy.

VII. CAPABILITY OF THE UNITED STATES TO ADOPT AUSTRALIA'S GUN LAW PROVISIONS

This Article will now look at the various provisions of Australia's comprehensive gun control agreement and determine if the United States can implement a similar law.[199]

A. *Australia's Genuine Use for Owning, Possessing, or Using a Firearm*

As previously mentioned, Australia's gun laws include a provision to show a genuine use for owning, possessing, or using a firearm.[200] *Personal protection*, or *self-defense*, does not qualify as a genuine reason to own a firearm in Australia.[201] Only "reasons relating to sport shooting, recreational

194. Chapman et al., *supra* note 192, at 298; Howard, *supra* note 3.

195. *See* John Howard, *I Went After Guns. Obama Can, Too*, N.Y. TIMES, Jan. 17, 2013, at A27. John Howard, the prime minister who oversaw the passage of Australia's current gun laws, stated that "we have no constitutional right to bear arms. After all, the British granted us nationhood peacefully; the United States had to fight for it." *Id.*

196. *See Australian Constitution* s 51.

197. Buchanan, *supra* note 175, at 17.

198. Howard, *supra* note 195, at A27. "Our challenges were different from America's. . . . Our gun lobby [is not] as powerful, or well-financed, as the National Rifle Association in the United States." *Id.*

199. *See* Buchanan, *supra* note 175, at 19–24; *infra* Sections VII.A-D.

200. Buchanan, *supra* note 175, at 20.

201. *Id.*

shooting, [or] hunting, collecting, and occupational requirements" are valid reasons for gun ownership or use in Australia.[202]

As discussed, the Supreme Court of the United States' cases *Heller I* and *McDonald* held that the Second Amendment protects an individual's right to keep and bear arms in the home for traditionally lawful purposes, such as self-defense, and that the Second Amendment applies against the states through the Fourteenth Amendment.[203]

Therefore, in light of the Court's interpretation of the Second Amendment, it follows that the United States cannot implement a law that excludes *self-defense* as a genuine reason for owning, possessing, or using a firearm.[204]

B. *Ban on Assault Weapons*

Although banning all handgun sales—purchased for the purpose of *self-defense*—cannot be instituted in light of the Supreme Court of the United States' decisions, a ban on assault weapons—similar to the one adopted in Australia—can be implemented.[205]

First, the United States had a nationwide ban on semiautomatic assault weapons and large capacity ammunition feeding devices from 1994 through 2004.[206] This law was known as the Federal Assault Weapons Ban.[207] The law eventually expired in 2004 and has not been reinstituted since.[208] However, the Federal Assault Weapons Ban was riddled with loopholes and did not mirror the Australian ban on assault weapons.[209] In an effort to not ban all semiautomatic weapons, Congress focused on eighteen specific firearms, thus, allowing some semi-automatic weapons to be deemed legal.[210] Further, although the law made it illegal to manufacture any of the

202. *Id.*

203. McDonald v. City of Chicago, 561 U.S. 742, 749–50 (2010); District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

204. *See Heller*, 554 U.S. at 636.

205. *See id.*; Buchanan, *supra* note 175 at 19.

206. Public Safety and Recreational Firearms Use Protection Act of 1994, Pub. L. No. 103-332, §§ 110102(a), 110103(a), 108 Stat. 1996; Brad Plumer, *Everything You Need to Know About the Assault Weapons Ban, in One Post*, WASH. POST: WONKBLOG (Dec. 17, 2012), http://www.washingtonpost.com/news/wonk/wp/2012/12/17/everything-you-need-to-know-about-banning-assault-weapons-in-one-post.

207. Plumer, *supra* note 206; *see also* Public Safety and Recreational Firearms Use Protection Act § 110101.

208. Plumer, *supra* note 206. "The original assault weapons law was written so that it would expire after ten years. When 2004 came around, some Democrats tried to renew it but there [was not] much interest in Congress." *Id.*

209. *Id.*

210. *Id.*

assault weapons laid out in the act—for use by private citizens—"[a]ny assault weapon . . . that was manufactured before the law went into effect . . . was . . . legal to own or resell."[211] There were approximately 1.5 million assault weapons already owned by private citizens at the time.[212] However, even with these loopholes, a Princeton study indicated that "the number of people [murdered] in mass shootings did go down in the years the ban was in effect."[213]

Second, seven states have taken it upon themselves to ban assault weapons in their particular states.[214] These include: California, Connecticut, the District of Columbia, Maryland, Massachusetts, New Jersey, and New York.[215]

> [I]n crafting the 1994 ban, lawmakers mainly focused on [eighteen] specific firearms, as well as certain military-type features on guns. Complicated flow charts laid it all out. Certain models of AR-15s and AK-47s were banned. Any semiautomatic rifle with a pistol grip and a bayonet mount was an "assault weapon." But, a semiautomatic rifle with just a pistol grip might be okay. It was complicated. And its complexity made it easy to evade.

Id.

211. Plumer, *supra* note 206.

212. *Id.*

213. *Id.*

214. *Assault Weapons*, L. CTR. TO PREVENT GUN VIOLENCE, http://www.smartgunlaws.org/gun-laws/policy-areas/classes-of-weapons/assault-weapons/ (last visited Apr. 9, 2017).

215. *Id.*

> Some state assault weapon bans prohibit specific weapons by listing them by name. Some bans list features that, when present, make a gun an assault weapon. The latter are known as generic feature tests. Generic feature tests, emphasizing high capacity and enhanced control during firing, are intended to identify assault weapons based on the military features that enhance a weapon's lethality. Generic feature tests that require a weapon to have only one of a list of features are more comprehensive than those that require two. A one-feature test captures more assault weapons and makes it harder for the gun industry to evade the law by modifying banned weapons. California, Connecticut, New York, and the District of Columbia have the most comprehensive approaches to defining assault weapons. California law bans roughly [seventy-five] assault weapon types, models, and series by name and provides a one-feature generic test for rifles and pistols. Connecticut bans roughly [seventy] assault weapon types, models, and series by name and uses a one-feature generic test for rifles and pistols. The District of Columbia includes a list of assault weapon types, models, and series by name that closely follows the California list and provides a one-feature generic test for rifles, pistols, and shotguns. The District also allows its Chief of Police to designate a firearm as an assault weapon based on a determination that the firearm would pose the same or similar danger to the residents of the District as other assault weapons. New York has adopted a one-feature test for assault pistols, shotguns, and rifles. New Jersey bans roughly [sixty-five] assault weapon types, models, and series and copies of those weapons by name and uses a one-feature generic test for shotguns. Connecticut and New Jersey also ban parts that may be readily assembled into an assault weapon.

Id.

Third, in several states that have enacted a ban on assault weapons, courts have found the bans to be constitutional.[216] For example, in the District of Columbia, the United States Court of Appeals for the District of Columbia heard *Heller v. District of Columbia* ("*Heller II*").[217] In this case, the court reviewed amended legislation that was introduced after *Heller I* was decided by the Supreme Court of the United States.[218] This new legislation, among other limitations, banned assault weapons in the District of Columbia.[219] In *Heller II*, the court adopted the following test: (1) Does the regulation infringe upon a Second Amendment right, and (2) If so, does the regulation pass muster under intermediate scrutiny?[220]

"The plaintiffs contend[ed] [that] semi-automatic [weapons] . . . are commonly possessed for self-protection in the home [and] for sport."[221] They also argued that high capacity magazines are needed in a stressful situation when reloading might be difficult and imposing a ban on them would be an undue burden.[222] The district court argued that "neither assault weapons, nor weapons with large-capacity magazines, are among the *[a]rms* protected by the Second Amendment because they are both *dangerous and unusual* and because prohibiting them minimally burdens the plaintiffs."[223] Additionally, "[t]he [d]istrict [court] . . . contends magazines holding more than ten rounds are disproportionately involved in the murder of law enforcement officers, as well as mass shootings, and have little value for self-defense or sport."[224] The court held:

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216. Heller v. District of Columbia, 670 F.3d 1244, 1247–48, 1264 (D.C. Cir. 2011); *Assault Weapons*, *supra* note 214; Duva, *supra* note 129.

217. 670 F.3d 1244 (D.C. Cir. 2011).

218. *Id.* at 1247–48; *see also* District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

219. *Heller*, 670 F.3d at 1247.

220. *Id.* at 1260–61. Intermediate scrutiny is one test used to determine a law's constitutionality. *Id.* at 1261. To pass intermediate scrutiny, the challenged law must further an important government interest by means that are substantially related to that interest. *Id.* at 1262. The court in *Heller II* determined that intermediate scrutiny is the proper standard by finding:

> As we did in evaluating the constitutionality of certain of the registration requirements, we determine the appropriate standard of review by assessing how severely the prohibitions burden the Second Amendment right. Unlike the law held unconstitutional in *Heller*, the laws at issue here do not prohibit the possession of "the quintessential self-defense weapon," to wit, the handgun. Nor does the ban on certain semi-automatic rifles prevent a person from keeping a suitable and commonly used weapon for protection in the home or for hunting, whether a handgun or a non-automatic long gun.

Id. at 1261–62 (citation omitted).

221. *Heller*, 670 F.3d at 1260.

222. *Id.* at 1260–61.

223. *Id.* at 1261 (citation omitted).

224. *Id.*

> We think it [is] clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in "common use," as the plaintiffs contend. Approximately 1.6 million AR-15s alone have been manufactured since 1986 and, in 2007, this one popular model accounted for 5.5[%] of all firearms, and 14.4[%] of all rifles, produced in the [United States] for the domestic market. As for magazines, . . . 18[%] of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds and approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000. There may well be some capacity above which magazines are not in common use but, if so, the record is devoid of evidence as to what that capacity is; in any event, that capacity surely is not ten.
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> Nevertheless, based upon the record as it stands, we cannot be certain whether these weapons are commonly used, or are useful specifically for self-defense or hunting, and, therefore, whether the prohibitions of certain semi-automatic rifles and magazines holding more than ten rounds meaningfully affect the right to keep and bear arms. We need not resolve that question, however, because even assuming they do impinge upon the right protected by the Second Amendment, we think intermediate scrutiny is the appropriate standard of review and the prohibitions survive that standard.[225]

Therefore, the court concluded that the ban on assault weapons had a substantial relationship with the government's interest in protecting the police and the public and upheld the ban as constitutional.[226]

Further, the California Court of Appeal held that Section 12280 of the California Penal Code, which bans assault weapons, was constitutional.[227] Here, the defendant was convicted "of unlawful possession of an assault weapon" and argued that the statute was an unconstitutional infringement on his Second Amendment rights.[228] The California Court of Appeal held that the Second Amendment did not extend to assault weapons.[229] The court looked to the legislative intent for implementing the

225. *Id.*

226. *Heller*, 670 F.3d at 1264.

227. CAL. PENAL CODE § 12280 (West 2017), *repealed by* S.B. 1080, 2010 Leg., Reg. Sess. (Cal. 2012), CAL. PENAL CODE § 30600 (West 2017); People v. James, 94 Cal. Rptr. 3d 576, 585–86 (Ct. App. 2009).

228. *James*, 94 Cal. Rptr. 3d at 583–84.

229. *Id.* at 585.

assault weapons ban and determined that the primary concern was the increase in the use of unusually dangerous weapons.[230] The court found that:

> [T]he Legislature enacted the [Roberti-Roos] Assault Weapons Control Act of 1989, and the .50 Caliber BMG Regulation Act of 2004, in order to address the proliferation and use of unusually dangerous weapons: [A]ssault weapons, with an incredibly "high rate of fire and capacity for firepower," which can be used to indiscriminately "kill and injure human beings;" and .50 caliber BMG rifles, which "have such a high capacity for long distance and highly destructive firepower that they pose an unacceptable risk to the death and serious injury of human beings, destruction or serious damage of vital public and private buildings, civilian, police and military vehicles, power generation and transmission facilities, petrochemical production and storage facilities, and transportation infrastructure."[231]

The court went on to conclude that the California Penal Code classifies assault weapons as *weapons of war*, and since there was no indication in *Heller I* that Second Amendment rights protected the use or possession of atypical weapons, California's ban on assault weapons was constitutional.[232]

Therefore, the United States could successfully implement a ban on all assault weapons as Australia did.[233] The ban would not violate the Second Amendment of the Constitution as it would pass muster under constitutional analysis by the courts.[234]

C. *Gun Buyback Programs*

If the United States is successful in banning assault weapons, the next issue for consideration would be to determine if the United States could

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230. *Id.*

231. *Id.* at 583–84 (citations omitted).

232. *Id.* at 576, 586; *see also* CAL. PENAL CODE § 12280; District of Columbia v. Heller, 554 U.S. 570, 636 (2008).

233. *See Heller*, 554 U.S. at 636; Heller v. District of Columbia, 670 F.3d 1244, 1264 (D.C. Cir. 2011); *James*, 94 Cal. Rptr. at 576, 579, 585–86; Christina Sterbenz, *Australia Enacted One of the Largest Gun Reforms Ever 2 Decades Ago — and Gun Deaths Plummeted*, BUS. INSIDER (Jun. 14, 2016, 10:32 AM), http://www.businessinsider.com/australia-gun-control-shootings-2016-6. "Australia's government . . . purchase[d] nearly 700,000 guns. Percentagewise, that [is] the equivalent of forty million in the US." Sterbenz, *supra* note.

234. *See Heller*, 554 U.S. at 636; *Heller*, 670 F.3d at 1264; *James*, 94 Cal. Rptr. 3d at 576.

legally implement a buyback program like Australia's.[235] The buyback program that Australia instituted after the National Firearms Agreement was extremely successful and removed approximately 700,000 assault weapons from civilian use.[236] A 2010 study from the Australian National University "found that the gun buyback program lowered the proportion of Australian homes with guns from 15% to 8%."[237] The author of the study stated that, "[o]ur gun buyback took about a fifth of our guns out of circulation but it approximately halved the number of gun-owning households."[238]

In order to determine if the United States could compel citizens to turn in their guns—as part of a buyback program—the underlying laws of the United States need to be assessed and compared to those of Australia.[239] The Australian and United States Constitutions each contain a Takings Clause, which allows the governments to actually or constructively seize private properties for public use as long as just compensation is provided.[240] Australia's Takings Clause is located in Section 51 of the Australian Constitution and states that

> [t]he Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.[241]

The United States Takings Clause is found in the last clause of the Fifth Amendment.[242] The clause reads, "nor shall private property be taken for public use, without just compensation."[243]

Although the United States has a long history of taking real property,[244] the Supreme Court of the United States recently held that the

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235. *See* Sterbenz, *supra* note 233.

236. *Id.*

237. Doug Stanglin, *Researcher: U.S. Could Learn from Aussie Gun Buyback*, USA TODAY (Dec. 17, 2012, 11:00 AM), http://www.usatoday.com/story/news/nation/2012/12/17/australia-gun-reform-buyback-us-national-firearm-agreement/1774549.

238. *Id.*

239. *See* U.S. CONST. amend. V; *Australian Constitution* s 51; Stanglin, *supra* note 238.

240. *See* U.S. CONST. amend. V; *Australian Constitution* s 51.

241. *See Australian Constitution* s 51 (footnote omitted).

242. U.S. CONST. amend. V.

243. *Id.*

244. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 469–70 (2005); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027–28 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 825, 841–42 (1987); Loretto v. Teleprompter Manhattan CATV

Takings Clause requires the government to pay *just compensation* for takings of personal property.[245] Justice Roberts stated that,

> Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.[246]

Therefore, in light of the Takings Clause,[247] and the Supreme Court's holding,[248] the United States would be required to pay *just compensation*, which is normally described as *fair market value* for any guns the government requires citizens to turn over as part of a buyback program, which is what Australia was required to do.[249]

In Australia, the Federal Parliament introduced the Medicare Levy Amendment Act of 1996.[250] This Act was implemented to raise the funds for the gun buyback program—which was estimated to be 500 million dollars.[251] This Act increased the rate of the Medicare levy for the 1996-1997 financial year.[252] Although there has never been a mandatory gun buyback program in the United States, there have been several voluntary buyback programs in various states.[253] Los Angeles has provided grocery-store gift cards in seven buybacks since 2009, receiving more than 12,000 guns in all.[254] On

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Corp., 458 U.S. 419, 419, 441 (1982); Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 105, 125 (1978); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926); Pa. Coal Co. v. Mahon, 260 U.S. 393, 412 (1922).

245. Horne v. Dep't of Agric., 135 S. Ct. 2419, 2426 (2015); Debra Cassens Weiss, *Takings Clause Applies to Personal Property, SCOTUS Rules in 'Major Blow' to Set-Aside Programs*, A.B.A J. (June 22, 2015, 9:23 AM), http://www.abajournal.com/news/article/us_taking_of_personal_property_requires_compensation_scotus_rules_in_major/. *See, e.g.*, *Kelo*, 545 U.S. at 469–70; *Lucas*, 505 U.S. at 1027–28; *Nollan*, 483 U.S. at 825; *Loretto*, 458 U.S. at 419, 441; *Penn Cent. Transp. Co.*, 438 U.S. at 105, 125; *Vill. of Euclid*, 272 U.S. at 397; *Pa. Coal Co.*, 260 U.S. at 412.

246. *Horne*, 135 S. Ct. at 2426; *see also* Weiss, *supra* note 245.

247. U.S. CONST. amend. V.

248. *Horne*, 135 S. Ct. at 2419, 2426, 2429, 2432.

249. *See* U.S. CONST. amend. V; *Horne*, 135 S. Ct. at 2419, 2423, 2429, 2432; Sterbenz, *supra* note 233.

250. Medicare Levy Amendment Act, No. 16 (1996) (Austl.).

251. *Id.*; *see also* Larry Sharpe, *Australia's Landmark Gun Reforms: The Aftermath of the Port Arthur Massacre*, HUFFINGTON POST AUSTL. (Apr. 28, 2016, 6:30 AM), http://www.huffingtonpost.com.au/2016/04/28/port-arthur-gun-reform_n_9717980.html.

252. Medicare Levy Amendment Act, No. 16; Sharpe, *supra* note 251.

253. *See* Eric P. Dolce, *To Keep and Bear Arms: Reconciling Firearms and the Public Health After* Heller *and* McDonald, 15 QUINNIPIAC HEALTH L.J. 155, 169 (2012).

254. Rick Orlov, *Gun Buyback Nets 1,500 Weapons — and Debate Over Program's Value*, L.A. DAILY NEWS (Dec. 16, 2013, 3:54 PM),

December 14, 2013, the one-year anniversary of the Sandy Hook massacre, California held *a statewide gun-buyback program* where more than 1500 firearms were voluntarily surrendered.[255] Further, the New Jersey Attorney General's Office launched a gun buyback initiative in 2012.[256] Through this initiative, ten events have been conducted where approximately 16,000 firearms, including 7300 handguns and 1900 illegal guns were received.[257]

Therefore, buyback programs could be implemented for guns that are made illegal—such as assault weapons—and voluntary ones can encourage citizens to turn in legal guns.[258] The United States would be required to pay *just compensation* for the guns in order to satisfy the Takings Clause of the Fifth Amendment,[259] which is plausible from what has been done with voluntary programs in various states.[260]

D. *Universal Background Checks*

Regardless of whether or not the United States implements a ban on assault weapons and introduces a buyback program, the United States should close the gun show loophole and require background checks for all gun sale purchases, as Australia has done.[261]

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http://www.dailynews.com/government-and-politics/20131216/gun-buyback-nets-1500-weapons-x2014-and-debate-over-programs-value; *see also* Kate Mather, *LAPD Collects Nearly 780 Firearms in Latest Gun Buyback Event*, L.A. TIMES (Dec. 16, 2014, 5:00 AM), http://www.latimes.com/local/crime/la-me-gun-buyback-20141216-story.html.

255. *Id.*

256. Press Release, Governor Chris Christie, Fighting to Keep New Jersey Safe (June 7, 2013); Marli Horwitz, *Gun Buyback in Hudson, Union Counties Brings in 1,600 Weapons*, NJ.COM (July 16, 2013, 5:05 PM), http://www.nj.com/hudson/index.ssf/2013/07/gun_buyback_in_hudson_union_counties_brings_in_almost_1600_weapons.html; *Record Number of Weapons Obtained Through Gun Buyback Initiative in Camden County*, CNBNEWS.NET (Dec. 19, 2012, 6:15 PM), http://www.gloucestercitynews.net/clearysnotebook/2012/12/attorney-general-chiesa-announces-record-number-of-weapons-obtained-through-gun-buyback-initiative-in-camden-county-click-o.html.

257. *See* Press Release, Governor Chris Christie, *supra* note 256; Horwitz, *supra* note 256; *Record Number of Weapons Obtained Through Gun Buyback Initiative in Camden County*, *supra* note 256.

258. *See* Press Release, Governor Chris Christie, *supra* note 256; Horwitz, *supra* note 256; *Record Number of Weapons Obtained Through Gun Buyback Initiative in Camden County*, *supra* note 256.

259. U.S. CONST. amend. V; Kelo v. City of New London, 545 U.S. 469, 477 (2005).

260. *See* Horwitz, *supra* note 256; Mather, *supra* note 254; Orlov, *supra* note 254; *Record Number of Weapons Obtained Through Gun Buyback Initiative in Camden County*, *supra* note 256.

261. *See* Buchanan, *supra* note 175, at 19–20.

Although not flawless, NICS "has prevented more than two million convicted felons and other prohibited purchasers from buying guns."[262] The law also provides a deterrent to prohibited purchasers who "are less likely to try to buy guns when they know comprehensive background check requirements are in place."[263] The United States should also look into extending the waiting period from three days to at least twenty-eight days, like Australia.[264] This can allow for a more thorough background check and a *cooling-off* period.[265]

Even though there are not any legal restrictions to implementing universal background checks, initiatives to pass a law on the issue have not been successful.[266] In April of 2013, a few months after the shooting at Sandy Hook Elementary School, a bipartisan proposal from Senators Joe Manchin, Democrat of West Virginia, and Pat Toomey, Republican of Pennsylvania, was rejected in a fifty-four to forty-six vote.[267] This legislation would have expanded background checks to cover all firearms sales at gun shows and online.[268]

One explanation for the inability to pass a universal background check law is the unyielding power of the National Rifle Association

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262. *Universal Background Checks*, CSGV, http://www.csgv.org/issues/universal-background-checks/ (last visited Apr. 9, 2017); *see also Background Check Procedures*, L. CTR. TO PREVENT GUN VIOLENCE, http://www.smartgunlaws.org/gun-laws/policy-areas/gun-dealer-sales/background-check-procedures/ (last visited Apr. 9, 2017); Miles Kohrman & Jennifer Mascia, *Everything You Need to Know About Federal Background Checks*, TRACE (July 11, 2015), http://www.thetrace.org/2015/07/background-checks-nics-guns-dylann-roof-charleston-church-shooting.

263. *Universal Background Checks*, *supra* note 262.

264. *See* Buchanan, *supra* note 175, at 20–21; Sharpe, *supra* note 251.

265. Sharpe, *supra* note 251; *see also Background Check Procedures*, *supra* note 262.

266. Ted Barrett & Tom Cohen, *Senate Rejects Expanded Gun Background Checks*, CNN, www.cnn.com/2013/04/17/politics/senate-guns-vote (last updated Apr. 18, 2013); *see also Background Check Procedures*, *supra* note 262; *Universal Background Checks*, *supra* note 262.

267. Barrett & Cohen, *supra* note 266; Laura Matthews, *Background Checks Bill Rejected by Senate by 54-46*, INT'L BUS. TIMES (Apr. 17, 2013, 4:40 PM), http://www.ibtimes.com/background-checks-bill-rejected-senate-54-46-1199553; Molly Moorhead, *A Summary of the Manchin-Toomey Gun Proposal*, POLITIFACT (Apr. 30, 2013, 2:26 PM), http://www.politifact.com/truth-o-meter/article/2013/apr/30/summary-manchin-toomey-gun-proposal/; John Whitesides & David Lawder, *Senate Democratic Leader Reid Hits "Pause" on Gun-Control Bill*, CHICAGO TRIBUNE (Apr. 18, 2013), http://articles.chicagotribune.com/2013-04-18/news/sns-rt-us-usa-gunsbre93f00d-20130415_1_gun-legislation-gun-control-proposals-nevada-democrat.

268. Barrett & Cohen, *supra* note 266; Matthews, *supra* note 267; Moorhead, *supra* note 269.

("NRA").[269] The NRA was founded in 1871 and currently has over four million members.[270] It has been referred to as the "most powerful lobbying group] in Washington."[271] The NRA contributed twenty-five million dollars of lobbying funds over the past fourteen years and plays a large role in the federal elections process.[272] From 1990 to 2010, the NRA contributed over eighteen million dollars to congressional election campaigns.[273] Nearly 85% of that money went solely to Republican candidates.[274] This extensive

269. Barrett & Cohen, *supra* note 266; Matthews, *supra* note 267; *see also A Brief History of the NRA*, NAT'L RIFLE ASS'N, http://home.nra.org/about-the-nra (last visited Apr. 9, 2017).

270. *A Brief History of the NRA*, *supra* note 269; Fox Butterfield, *Aggressive Strategy By N.R.A. Has Left Its Finances Reeling*, N.Y. TIMES, June 26, 1995, at A1.

271. Walter Hickey, *How the NRA Became the Most Powerful Special Interest in Washington*, BUS. INSIDER (Dec. 18, 2012, 1:43 PM), http://www.businessinsider.com/nra-lobbying-money-national-rifle-association-washington-2012-12; *see also* James Surowiecki, *Taking on the N.R.A.*, NEW YORKER (Oct. 19, 2015), http://www.newyorker.com/magazine/2015/10/19/taking-on-the-n-r-a#; *US Gun Control: What Is the NRA and Why Is It So Powerful?*, BBC (Jan. 8, 2016), http://www.bbc.com/news/world-us-canada-35261394; Sarah Westwood, *How Powerful Is the 'Gun Lobby?'*, WASH. EXAMINER (Dec. 5, 2015, 12:01 AM), http://www.washingtonexaminer.com/how-powerful-is-the-gun-lobby/article/2577699.

272. *See* Chris Amico & Sarah Childress, *How Loaded Is the Gun Lobby?*, FRONTLINE (Jan. 6, 2015), http://www.pbs.org/wgbh/frontline/article/how-loaded-is-the-gun-lobby; Blake Ellis & Melanie Hicken, *The Money Powering the NRA*, CNNMONEY (Oct. 15, 2015), http://money.cnn.com/news/cnnmoney-investigates/nra-funding-donors; Evan Horowitz, *Gun Rights Lobbyists Netted 7 Times the Money as Gun Control Counterparts*, BOSTON GLOBE (June 19, 2015), http://www.bostonglobe.com/news/nation/2015/06/19/tracking-influence-gun-rights-lobby/wIdnirHWAqdHh6AslPXzGI/story.html; Elisabeth Parker, *The NRA Gave These 9 Senators Over $22 Million to Vote Down Gun Laws*, REVERBPRESS (Dec. 6, 2015), http://reverbpress.com/politics/nra-pays-senators-millions/.

273. Alan Berlow & Gordon Witkin, *Gun Lobby's Money and Power Still Holds Sway Over Congress*, CTR. FOR PUB. INTEGRITY (May 1, 2013, 9:00 AM), http://www.publicintegrity.org/2013/05/01/12591/gun-lobbys-money-and-power-still-holds-sway-over-congress; Leigh Ann Caldwell, *How the NRA Exerts Influence Beyond Political Contributions*, NBC NEWS (June 15, 2016, 5:47 PM), http://www.nbcnews.com/storyline/orlando-nightclub-massacre/nra-s-political-influence-far-goes-beyond-campaign-contributions-n593051; *National Rifle Ass'n*, OPENSECRETS.ORG, http://www.opensecrets.org/pacs/lookup2.php?strID=C00053553 (last visited Apr. 9, 2017).

274. *See* Mike Spies & Sarah Ryley, *NRA Spending More Money Than Ever, Only to Help Pro-Gun GOP*, N.Y. DAILY NEWS (May 19, 2016, 9:47 PM), http://www.nydailynews.com/news/politics/nra-big-spending-stop-congress-enacting-gun-safety-laws-article-1.2643408 [hereinafter *NRA Spending More Money Than Ever, Only to Help Pro-Gun GOP*]; Mike Spies & Sarah Ryley, *The NRA's New Campaign Math: Pour More Money into Fewer Races, Defeat Democrats at Any Cost*, THE TRACE (May 19, 2016), http://www.thetrace.org/2016/05/nra-election-campaign-spending [hereinafter *The NRA's New Campaign Math*]; *How the NRA Exerts Influence Over Congress*, WASH. POST (Jan. 15, 2013), http://www.washingtonpost.com/wp-srv/special/politics/nra-congress.

lobbying has prevented legislators from exercising their ability to vote in favor of gun legislation that favors universal background checks.[275] In contrast, Australia's gun lobby—Sporting Shooters Association of Australia—has not experienced the strength or success of the NRA.[276] They gained momentum in the early 1990s, but the Port Author Massacre shifted the public focus towards stricter gun laws and defused any attempt to reduce firearm restrictions.[277]

However, even though the NRA pushed for an agenda that would not require universal background checks, numerous "[g]un owners . . . believe . . . the NRA is out of touch with them on [the] issues."[278] According to a survey:

> - 83[%] of gun owners nationally support criminal background checks on all sales of firearms, while only 14[%] of gun owners oppose them;
> - there is strong bipartisan agreement on the issue, with 90[%] of Democrat and 81[%] of Republican gun owners in support of background checks; . . .
> - 72[%] of NRA members support [universal background checks];
> - 79[%] of gun owners nationally want to see their politicians take action on this issue and require more gun sellers to conduct criminal background checks before they sell guns, while only 19[%] do not want to see their elected leaders act on this issue.[279]

These statistics demonstrate that politicians need to start listening to what their constituents actually want when it comes to particular firearm regulations, such as background checks.[280] Transitioning to background

275. *See* Tom Cahill, *See How Much the NRA Paid Your Senator to Vote Against Gun Reform*, U.S. UNCUT (June 21, 2016), http://usuncut.com/politics/see-how-much-nra-paid-your-senator/.

276. Will Oremus, *How Many Shootings Will it Take for America to Control Its Guns*?, SLATE: CRIME (Dec. 12, 2012, 10:00 PM), http://www.slate.com/blogs/crime/2012/12/16/gun_control_after_connecticut_shooting_could_australia_s_laws_provide_a.html; *see also Sporting Shooters' Association of Australia*, SSAA, http://www.ssaa.org.au/ (last visited Apr. 9, 2017).

277. *How Australia Dealt with Mass Shootings*, *supra* note 173.

278. Benton Strong, *Release: Gun Owners Overwhelmingly Support Background Checks, See NRA as Out of Touch, New Poll Finds*, CTR. FOR AM. PROGRESS (Nov. 17, 2015), http://www.americanprogress.org/press/release/2015/11/17/125618/release-gun-owners-overwhelmingly-support-background-checks-see-nra-as-out-of-touch-new-poll-finds/.

279. *Id.*

280. *See Background Check Procedures*, *supra* note 262.

checks for all firearm purchases would not be difficult to implement, as the systems to perform the checks are already in place and as background checks are required at licensed dealers.[281] Therefore, the United States should follow in Australia's footsteps and implement universal background checks.

VIII. CONCLUSION

What is clear from the glaring statistics and media coverage of multiple mass shootings occurring at elevating rates in the United States is that the gun control issue needs to be tackled and new legislation implemented. Members of federal and state legislators need to start a conversation on gun control and work collaboratively to establish policies that effectuate change. The murder of innocent American citizens at the hands of those with firearms is an issue of national importance and should be a bipartisan one. America's culture and climate of gun ownership needs to be analyzed and reevaluated in order to spare the United States from another mass shooting tragedy. Australia was able to implement sweeping legislative reform regarding gun control only twelve days after one mass shooting event.[282] As discussed in this Article, the United States can effectively implement most of the Australian gun control legislation and should work towards making that a priority.[283]

Take a moment to reflect on the following statement from former Australian Prime Minister John Howard, the conservative leader behind the Australian reform.[284] Former Prime Minister Howard made the statement after visiting the United States in the wake of the Aurora, Colorado, shooting.[285] In the Aurora shooting, a gunman dressed in tactical clothing entered a movie theater, where he set off tear gas grenades and shot into the audience with multiple firearms.[286] Twelve people were killed and around seventy others were injured.[287] The Prime Minister said:

> There is more to this than merely the lobbying strength of the National Rifle Association and the proximity of the November presidential election. It is hard to believe that their reaction would have been any different if the murders in Aurora had taken place

281. *Id.*
282. *How Australia Dealt with Mass Shootings*, *supra* note 173.
283. *See* Howard, *supra* note 3; Masters, *supra* note 15; *see also supra* Parts VI-VII.
284. *See* Oremus, *supra* note 276.
285. Stanglin, *supra* note 237.
286. Frosch & Johnson, *supra* note 5.
287. *Colo. Shooting DA Says Two Evaluations Found Holmes Sane*, *supra* note 5.

> immediately after the election of either Obama or Romney. So deeply embedded is the gun culture of the [United States] that millions of law-abiding Americans truly believe that it is safer to own a gun, based on the chilling logic that because there are so many guns in circulation, one's own weapon is needed for self-protection. To put it another way, the situation is so far gone there can be no turning back.[288]

In this statement, the former Prime Minister believes that America's gun culture and attitude towards gun ownership is blinding the United States from being able to effectuate change.[289] Instead of conceding to the belief that the United States will never be able to implement stricter gun control laws, the United States should set an example for the world and truly become "the land of the free" in reference to freedom from gun violence and fear.

288. Oremus, *supra* note 276.
289. *See id.*

EXAMINING THE IMPACTS OF CURRENT MALPRACTICE FRAMEWORKS AND EMTALA ON EMERGENCY MEDICINE

SAI BALASUBRAMANIAN*

I. INTRODUCTION

Emergency medicine is a relatively new medical specialty, and has gained popularity in the last decade for both its irreplaceable role in the healthcare system, as well as the numerous social, legal, and administrative developments that have emerged as a result of the field's exponential

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growth.[1] Emergency medicine is defined by the American College of Emergency Physicians ("ACEP") as "the medical specialty dedicated to the diagnosis and treatment of unforeseen illness or injury."[2] The actual rendering of emergency care proceeds with initially evaluating the patient; consulting with any specialists as required; issuing a diagnosis; providing treatment and performing any acute, stabilizing, or emergency procedures; and, finally, transferring the patient to the appropriate specialist for more acute care as needed.[3] Emergency medicine was first recognized as an independent and standalone medical specialty in 1979 by the American Board of Medical Specialties ("ABMS"), which acknowledged the need for dedicated emergency training and care.[4] Moreover, physician organizations and universities around the country started to become aware of the increasing trend of Emergency Department ("ED") visits by the public, which further illustrated the need for specially trained physicians rather than physicians of other specialties filling in on a transient basis.[5] Since then, emergency medicine as a field has continued to grow, and has shown increased demand both from the perspective of physician specialty choice as well as patient care.[6] Regarding increased demand for emergency patient care, data as recent as 2009 reported "124 million [ED] visits [for that year], compared to [just] 90.3 million [visits] in 1996," indicating a sharp 35% increase.[7] Notably, emergency services have also catered to the increasingly "aging population, with over 60 visits per 100 persons" correlating to individuals aged 75 years and older.[8] In 2011 alone, a "National Hospital Ambulatory Medical Care Survey revealed that EDs in the United States saw more than

1. *See* Robert E. Suter, *Emergency Medicine in the United States: A Systemic Review*, 3 WORLD J. EMERGENCY MED. 5, 6–9 (2012).

2. *Definition of Emergency Medicine*, AM. C. EMERGENCY PHYSICIANS, http://www.acep.org/Clinical---Practice-Management/Definition-of-Emergency-Medicine/ (last visited Apr. 9, 2017). The ACEP is a professional organization of emergency medicine physicians in the United States, which is committed to developing, improving, and promulgating best practices in emergency care. *About ACEP*, AM. C. EMERGENCY PHYSICIANS, http://www.acep.org/aboutus/about/ (last visited Apr. 9, 2017). With more than 30,000 physician members, the organization is the leading advocate for emergency physicians. *Id.*

3. *Definition of Emergency Medicine*, *supra* note 2.

4. *AAEM History*, AM. ACAD. EMERGENCY MED., http://www.aaem.org/about-aaem/aaem-history (last visited Apr. 9, 2017).

5. *See* Suter, *supra* note 1, at 6, 9.

6. *See id.*

7. *Id.* at 9.

8. *Id.*

136 million patient[s]," noting this figure to be the highest number of visits to date.[9]

Accordingly, to meet the increasing demand for emergency physicians, the respective medical associations and education boards have made strong efforts to emphasize the specialized training of medical students for the field.[10] Therefore, today there are over 160 board certified and accredited emergency medicine residency training programs available to medical students.[11] There are also several certified and recognized fellowship or subspecialty options available to physicians that complete residency training in emergency medicine, intended for practitioners that want to pursue a specific course of study within emergency services.[12] The most common of these include hyperbaric medicine, which entails training in the treatment of decompression and altitude based illnesses, and using hyperbaric chambers for therapeutic measures; ultrasound medicine, which trains physicians in using ultrasound technology as a diagnostic and treatment tool; wilderness medicine, which entails training to address natural, tropical, and wilderness based injuries; sports medicine, which trains physicians in preventing and diagnosing athletic and sports related injuries and the respective recovery therapies; medical toxicology, which entails training on how to diagnose and manage acute and immediate injuries related to poison or toxin exposure; and medical administrative fellowships, which focus on training physicians in the administrative and management functions of a hospital system.[13] This emphasis on general emergency medicine training, as well as specialization in acute skills, is a direct response to an aging population, an increasing proclivity by the public to seek emergency room ("ER") care, and a quickly growing general and primary care physician shortage.[14] Accordingly, thanks to the growth, flexibility, and expansiveness

9. James J. Augustine, *The Demand for Emergency Care*, PHYSICIAN'S WKLY. (Sept. 9, 2015), http://www.physiciansweekly.com/the-demand-for-emergency-care/.

10. *See* Suter, *supra* note 1, at 9.

11. *Emergency Medicine*, WASH. U. SCH. MED., http://residency.wustl.edu/CHOOSING/SPECDESC/Pages/EmergencyMedicine.aspx (last visited Apr. 9, 2017).

12. *Id.*; *see also* Suter, *supra* note 1, at 9.

13. Megan Boysen, *Fellowship Opportunities in Emergency Medicine*, AAEMRSA, http://www.aaemrsa.org/UserFiles/fellowship_opportunities_novdec08.pdf (last visited Apr. 9, 2017); *Emergency Medicine*, *supra* note 11.

14. Suter, *supra* note 1, at 9–10; Christopher Cheney, *Physician Shortage to Quadruple Within Decade, AAMC Says*, HEALTHLEADERS MEDIA (Jan. 4, 2011), http://www.healthleadersmedia.com/physician-leaders/physician-shortage-quadruple-within-decade-aamc-says?nopaging=1. The report determines that the American healthcare system will reach a shortage of 91,500 physicians by 2020. Cheney, *supra*. Specifically, as mentioned in the HealthLeaders Media Article, the Association of American Medical Colleges

of the field, emergency medicine has become a comprehensive, necessary, and vital discipline of medicine in society.[15]

As with any other field of medicine, legislative bodies, regulatory agencies, and the judicial system have independently and collaboratively designed intricate frameworks and laws to try and keep up with the expansion of emergency medicine.[16] The need for these frameworks is critical, as the field inherently entails a wide spectrum of services, ranging from the front lines of general medical care, all the way to disaster management and public health crises.[17] These frameworks, congruent to the field's growth and graduation to an independent specialty, have been promulgated in order to protect both the community and the respective healthcare providers.[18] However, while many of these frameworks and legal developments have indeed achieved their promises of helping fuel and grow the field while protecting the public and the providers, others have unequivocally stifled progress, and have made the actual delivery and execution of emergency care unnecessarily onerous.[19]

The purpose of this Article is to provide an examination of two such legal areas, which have significantly affected the field of emergency medicine.[20] These areas are: 1) malpractice/negligence frameworks in emergency medicine and 2) the Emergency Medical Treatment and Labor Act ("EMTALA").[21]

The reasons for focusing on these two issues is multifold. Most of the scholarship centered around legal medicine topics has increasingly become narrowed down to specific case scenarios or particular practice area pain points, especially on subjects which have resulted in significant legal outcomes or have raised novel ethical questions.[22] While these subjects are vital in promoting the discussion of intricate legal issues, as related to the nuances in the practice of medicine, there is also a critical need to reengage conversation and continuously reconsider larger legal frameworks and issues as well, especially given that the field of medicine is in a particularly dynamic growth and development period globally.[23]

("AAMC") predicts an overall need of approximately 45,000 primary care specialists—reflecting the general primary care crisis—and 46,000 surgeons and medical specialists. *Id.*

15. *See* Suter, *supra* note 1, at 9–10.
16. *Id.* at 6–7.
17. *See* Boysen, *supra* note 13.
18. *See* Suter, *supra* note 1, at 7–10.
19. *See infra* Section II.C.
20. *See infra* Parts II–III.
21. *See infra* Parts II–III.
22. *See infra* Part II.
23. *See infra* Part II.

Therefore, this Article takes a hybrid approach. The first part of this Article addresses a relatively dormant, yet expansive, area of legal scholarship in the recent years, providing a macroscale view of the development, nuances, and impact of ER malpractice and negligence frameworks.[24] While whitepapers and court cases on this topic are numerous, the fact remains that there has been a shift away from the larger perspective of how malpractice in emergency medicine has transformed over the years, and if there is a need to revisit the system to enact change in this arena.[25] The second portion of this Article is focused on issues regarding EMTALA, which is specific legislation that has had significant impacts on both emergency medicine providers and larger hospital systems, both of which are ultimately accountable to patients and financial stakeholders.[26] EMTALA has been a household name for hospitals and emergency physicians for a few decades, but remains contentious with regards to its financial, legal, and value-based costs.[27] These areas of contention and the nuances of the legislation deserve revived analysis, as EMTALA continues to affect healthcare from both microscopic and systemic perspectives.[28]

Overall, this Article serves to review both of these topics in order to provide an in-depth analysis of their impacts on emergency medicine, propose potential solutions for identified problem areas, and speculate what future practitioners can expect of these issues.[29]

II. MEDICAL MALPRACTICE AND NEGLIGENCE IN EMERGENCY MEDICINE

A. *What Exactly Is Medical Malpractice/Negligence?*

Medical negligence—also known as medical malpractice—entails a suit against a physician, which comports with the traditional legal elements of negligence.[30] For a plaintiff to be successful in a suit against a physician, he or she must prove a duty, a breach of duty, causation of harm as a result of the breach of duty, and damages.[31] In medical terms, the patient must first

24. *See infra* Part II.
25. *See infra* Sections II.B–E.
26. *See infra* Part III.
27. *See infra* Section III.B.
28. *See infra* Sections III.B–C.
29. *See infra* Parts II–IV.
30. B. Sonny Bal, *An Introduction to Medical Malpractice in the United States*, 467 CLINICAL ORTHOPAEDICS & RELATED RES. 339, 340 (2009); Peter Moffett & Gregory Moore, *The Standard of Care: Legal History and Definitions: The Bad and Good News*, 12 WESTERN J. EMERGENCY MED. 109, 109 (2011).
31. Bal, *supra* note 30, at 342; Moffett & Moore, *supra* note 30, at 109.

prove that the physician had a duty to treat.[32] This is essentially established in accordance with the patient-physician relationship, when a physician agrees to take on a patient and begin the diagnostic process.[33] Whereas, for most other specialties, this is a matter of choice—an emergency physician's right of refusal is extremely limited and, therefore, will often meet this prong of the negligence test by default, especially in an ER context.[34] The second prong of negligence requires that there is a breach of duty.[35] Essentially, this requires the patient to prove that the physician fell short of the standard of care, the same standard that would have been afforded to a similarly situated patient presenting a similar medical issue.[36] The definition of the standard of care has evolved over time, leaving physicians with mixed results and thresholds by which they can gauge the care that they provide.[37] However, it is generally accepted in modern litigation that the standard of care is established by employing the knowledge and the methods an average, congruently situated physician would have employed given a similar context and set of circumstances—hence, what a reasonable physician in the same situation would have done.[38] The third prong requires a showing of causation.[39] That is, the patient has to show that there was a causal relationship and a direct link between the physician's breach of duty and the

32. Bal, *supra* note 30, at 342.

33. Regina A. Bailey, *The Litigators Lions Pit: The Top 10 Medical Malpractice Issues Every Resident Should Know*, EMRA, http://www.emra.org/publications/whats-up/the-litigators-lions-pit--the-top-10-medical-malpractice-issues-every-resident-should-know/ (last visited Apr. 9, 2017); Bal, *supra* note 30, at 342.

34. *See* 42 U.S.C. § 1395dd(b)(1) (2015); David A. Ansell & Robert L. Schiff, *Patient Dumping: Status, Implications, and Policy Recommendations*, 257 JAMA 1500, 1500–01 (1987); Bailey, *supra* note 33. See discussion below regarding an emergency physician's responsibility to treat per the EMTALA of 1986. *See infra* Section II.B.

35. Bal, *supra* note 30, at 342; Moffett & Moore, *supra* note 30, at 109.

36. Bal, *supra* note 30, at 342; Moffett & Moore, *supra* note 30, at 109.

37. *See* Moffett & Moore, *supra* note 30, at 109, 112.

38. Bal, *supra* note 30, at 342; Moffett & Moore, *supra* note 30, at 109, 112. Standard of care and negligence, in general, are not limited to medical malpractice, but are legal terms of art used expansively in tort actions. Bal, *supra* note 30, at 340. Black's Law Dictionary defines negligence as "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation." *Negligence*, BLACK'S LAW DICTIONARY (10th ed. 2014). To bring a successful claim of negligence, a plaintiff has to prove the same elements discussed: duty, breach of that duty, causation, and damages. Bal, *supra* note 30, at 342; Moffett & Moore, *supra* note 30, at 109; *see also* Archive of *What Is the Medical Standard of Care?*, NOLO: MED. MALPRACTICE, http://www.webarchive.org/web/20161127091821/http://www.medicalmalpractice.com/resources/medical-standard-of-care.html (last visited Apr. 9, 2017).

39. Bal, *supra* note 30, at 342.

injury faced by the patient.[40] The final prong, damages, is typically the category that determines the compensation award that is granted as a result of the suit.[41] This is where the plaintiff has an opportunity to show the extent of damages the harm has caused him or her.[42] The extent of damages caused will take into account a variety of factors, including economic and non-economic losses, which may entail categories ranging from lost income and wages, to the need for future medical care, to pain and suffering.[43]

While the above standards dictate the general parameters which define a malpractice suit, individual states mandate the specific nuances behind personal injury cases and the respective negligence claims.[44]

B. *Medical Malpractice in the ER*

Emergency medicine, inherently based on real-time, unplanned, and immediate decisions, is a breeding ground for potential medical errors, and must comply with the same negligence standards—discussed above—as all other medical specialties.[45] Given the nature of the field, emergency physicians often do not have the time to assert their decisions based on the full calculus of context and history, but rather they are forced to make spontaneous calls to mitigate trauma and damage as much as possible.[46]

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40. *Id.* Causation, as a legal principal, has many different splits. *See But-for Cause*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Proximate Cause*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Superseding Cause*, BLACK'S LAW DICTIONARY (10th ed. 2014). The most commonly used versions entail *but-for* causation or proximate causation. *See But-for Cause*, *supra*; *Proximate Cause*, *supra*. Black's Law Dictionary defines *but-for* causation as "[t]he cause without which the event could not have occurred." *But-for Cause*, *supra*. Proximate causation is defined as "[a] cause that is legally sufficient to result in liability." *Proximate Cause*, *supra*. For negligence claims generally, showing a superseding cause can null causation by a party. *See Superseding Cause*, *supra*. Black's Law Dictionary defines a superseding cause as "[a]n intervening act or force that the law considers sufficient to override the cause for which the original tortfeasor was responsible, thereby exonerating that tortfeasor from liability." *Id.*

41. Bal, *supra* note 30, at 342.

42. *See id.* at 340.

43. *Id.* Aside from damages accounted for economic and non-economic losses, courts may also sometimes grant punitive damages, in cases of extreme recklessness or wanton negligence. *Id.* at 342. Black's Law Dictionary defines punitive damages as "[d]amages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit; specif[ically], damages assessed by way of penalizing the wrongdoer or making an example to others." *Punitive Damages*, BLACK'S LAW DICTIONARY (10th ed. 2014).

44. *See* Bal, *supra* note 30, at 340; Moffett & Moore, *supra* note 30, at 112.

45. *See* Moffett & Moore, *supra* note 30, at 109.

46. *See* AGENCY FOR HEALTHCARE RESEARCH & QUALITY, EMERGENCY SEVERITY INDEX (ESI): A TRIAGE TOOL FOR EMERGENCY DEPARTMENT CARE 1 (2012); Moffett & Moore, *supra* note 30, at 109.

This elevated level of acuity also has to be balanced with a constant inflow of patients into the ER, often which the physicians themselves cannot control.[47] Various methods of the triage process aid this balancing act.[48] Often utilizing mid-level staff, initial and brief assessments are conducted on incoming patients to determine the severity of their issues, which are then used to index patients in the hierarchy of workflow for the attending—supervising—physician.[49] This triage process is essential to both the overall inflow metrics and quality of care standards of an ER.[50] Allowing physicians to prioritize which patients to see first provides primary attention to the most severe problems and also keeps the throughput of the hospital flowing so that patients can be assessed, treated, and discharged in an organized and efficient manner.[51] There have been important efforts and initiatives made towards standardizing this process, so as to expand and promote ER management and efficiency uniformly across the country.[52] In addition to maintaining an efficient ER, physicians also have to simultaneously worry about professional metrics, such as *patient per hour* ("PPH") rates, which are commonplace in ERs around the country as viable metrics to determine the efficacy of physician performance.[53] Ultimately, this variety of factors and pressures places an inordinate burden on emergency physicians to master

47. *See* AGENCY FOR HEALTHCARE RESEARCH & QUALITY, *supra* note 46, at 1.
48. *See id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *See* AGENCY FOR HEALTHCARE RESEARCH & QUALITY, *supra* note 46, at 1. "The Emergency Nurses Association ("ENA") and the [ACEP] formed a Joint Triage Five Level Task Force in 2002 to review the literature and make a recommendation for EDs throughout the United States regarding which triage system should be used." *Id.*
53. Howard Ovens, *WTBS 4 — Emergency Physician Speed: How Fast Is Fast Enough?*, EMERGENCY MED. CASES (Sept. 22, 2015), http://www.emergencymedicinecases.com/emergency-physician-speed-how-fast-is-fast-enough. Dr. David Petrie, an emergency physician and trauma team leader, notes in the same article:

> [PPH] rates have long been used in Emergency Medicine as a rough guide to determine emergency physician ("EP") "productivity" and to compare individual workloads—relative to peers in the same work environment. Indeed, PPH rates are a component of fee-for-service ("FFS") and other volume-based payment systems. While there is a speed versus quality of care trade-off for the individual patient being treated—being too fast can compromise patient safety—there is also a speed versus quality of care trade-off for the patients waiting: If I am moving too slowly, I am compromising the care of those who are "Waiting to be Seen." Ideally, individually, we should be aiming for that "Goldilocks" optimized PPH rate—not too fast and not too slow.

Id.

their diagnosis and decision-making skills in the face of a consistently uncertain patient population.[54]

Regarding the difficulties of patient evaluation in an ER setting, studies have shown that decision-making processes condense to two primary categories, both of which become especially pertinent when confronted with traumatic stimulus.[55] The first, the intuitive/reflexive approach, is centered around pattern recognition, and becomes second nature to the physician over years of reflecting on the same patient presentations, though it has a proclivity for error in judgment.[56] The second is the analytical/problem solving approach, which involves higher levels of critical thinking and evaluation based on context and permissible alternatives; this method has been shown to be far more reliable in terms of preventing medical errors for the simple fact that it gives a physician time to work through the problem solving method for the issue at hand.[57] Both methodologies have their benefits and are used in various ER settings.[58]

Take, for example, a patient that arrives with a fall injury, complaining of arm pain and presenting no other immediate symptoms or wounds. This patient can likely afford the physician taking the analytical/problem solving approach.[59] Here, the nurse evaluates the patient, determines his placement in the pain/triage scale, and hands him off to the physician who can then do an initial evaluation, order tests, review the results, and prescribe the pertinent treatment to qualify the patient for discharge.[60] Contrast this with a trauma situation, which is equally likely to be presented to an ER physician.[61] The same patient enters except now he or she arrives in an ambulance, bleeding out from his or her arm, and is not able to provide any context or history of the incident, as the patient is unconscious. Here, the physician will likely revert to a combination of both the reflexive and problem solving methods, resorting to pattern recognition to determine the closest case in his repertoire to create an immediate diagnosis plan, while balancing it with the problem solving method to determine if that plan of action is best, given the current emergency.[62]

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54. *See id.*

55. *See* Anton Helman, *Episode 11: Cognitive Decision Making and Medical Error*, EMERGENCY MED. CASES (Feb. 4, 2011), http://www.emergencymedicinecases.com/episode-11-cognitive-decision-making-medical-error/.

56. *Id.*

57. *Id.*

58. *See id.*

59. *See id.*

60. *See* AGENCY FOR HEALTHCARE RESEARCH & QUALITY, *supra* note 46, at 1.

61. *Id.* at 10.

62. *See* Helman, *supra* note 55.

However, given the immediate trauma and circumstances of the presenting patient, this decision-making and balancing process must happen in a fraction of the time as compared to the first, broken-arm patient scenario.[63]

It is important to note that the underlying principal of both the above scenarios still relies on the physician's competence to pull from his or her clinical knowledge base.[64] Evidence-based diagnostic decision making plays a significant role in patient recovery, and is intended to:

> [(1)] [m]ake the ethical care of the patient its top priority; [(2)] [d]emand [individualized] evidence in a format that clinicians and patients can understand; [(3)] [u]se expert [judgment] rather than mechanical rule following; [(4)] [s]hare decisions with patients through meaningful conversations; [(5)] [c]ommunicate risk whilst incorporating the patient's values; and [(6)] [a]pply these principles at the community level for evidence based public health.[65]

These inherently heavy balancing factors are important aspects to consider when broaching the subject of emergency medicine malpractice.[66] The discussion must also be premised with the fact that while almost every other specialty gets to choose exactly what walks into the door on a given day, emergency medicine is unique in that attending physicians have no idea what could present itself during a given shift.[67] There are no appointments made, or rosters of patients that the physician can view before doing rounds for the day.[68] This lack of patient choice impacts both the clinical decision-making ability and the care delivery process for emergency physicians.[69] Furthermore, given the nature of emergency care, physicians cannot turn patients away from ERs unlike other specialties, which can refuse patients

63. *See id.*

64. *See id.*

65. Anton Helman, *Episode 62: Diagnostic Decision Making in Emergency Medicine*, EMERGENCY MED. CASES (Apr. 14, 2015), http://www.emergencymedicinecases.com/diagnostic-decision-making-in-emergency-medicine/.

66. *See id.*; Walter Kuhn, *Malpractice and Emergency Medicine*, AUGUSTA U., http://www.augusta.edu/mcg/clerkships/em/documents/malpracticeandem.pdf (last visited Apr. 9, 2017).

67. Marc Gorelick, *Pediatric Primary Care in the ER: Is It Better Than Waiting for an Appointment?*, 8 AMA J. ETHICS 717, 718 (2006).

68. *See id.*

69. *See id.* at 719–20.

based on potential malpractice, the evaluated risk, profitability margins, the effort of care required, and numerous other metrics of their own choice.[70]

C. *Impacts and Effects*

Emergency medicine malpractice rates can be as high as 20% of all the claims that a hospital faces, second only to surgery and obstetrics.[71] In a study of malpractice premiums as determinants of high-risk medical specialties, emergency medicine was identified as a top five-risk specialty, among surgery, obstetrics/gynecology, anesthesiology, and radiology.[72] A similar study based on defensive medicine in high-risk specialties once again identified emergency medicine as a top six contender, only after four other surgical specialties and radiology.[73] Given the heavy procedural aspects of the surgical specialties, one would reasonably expect the margins of error to be higher for surgery than a medical specialty such as emergency medicine.[74] However, one can likely account for the similar rates in emergency medicine due to the difficult nature of the diagnosis, decision-making, and treatment processes discussed above.[75]

Furthermore, failure to diagnose, lack of timely diagnosis, or improper diagnosis, contributes to a significant portion of the malpractice claims, accounting for nearly 57% of emergency medicine claims.[76] These claims demonstrate the prevalence of malpractice related to the inability of the physician to be able to attend to his or her patients in a timely and attentive manner—bringing light to the fact that overcrowded ERs somewhat

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70. *EMTALA*, AM. C. EMERGENCY PHYSICIANS, http://www.acep.org/news-media-top-banner/emtala (last visited Apr. 9, 2017). ERs cannot refuse patients who are in need of emergency medical care, per the EMTALA of 1986. *Id.* This Article also discusses EMTALA in detail, and the consequences it poses for emergency medicine as a whole. *See infra* Part III.

71. Kuhn, *supra* note 66.

72. Aaron E. Carroll & Jennifer L. Buddenbaum, *High and Low-Risk Specialties Experience with the U.S. Medical Malpractice System*, 13 BMC HEALTH SERVICES RES. 465, 465 (2013).

73. David M. Studdert et al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293 JAMA 2609, 2610 (2005); *see also* Carroll & Buddenbaum, *supra* note 72.

74. *See* Carroll & Buddenbaum, *supra* note 72. Here, the differentiation between a surgical specialty and a medical specialty refers to the former involving procedural or invasive techniques, while the latter is centered on medication and less-invasive treatment methods. *See id.*

75. *See supra* Section II.B.

76. THE DOCTORS CO., EMERGENCY MEDICINE: CLOSED CLAIMS STUDY (2015), http://www.thedoctors.com/ecm/groups/public/@tdc/@web/@kc/@patientsafety/documents/article/con_id_004776.pdf.

contribute to malpractice.[77] Claims against emergency physicians are five times more likely to occur if the patient waited more than thirty minutes to be seen by the physician.[78] This systemic issue has no waning in sight, as the number of ER visits nationally have increased, while the available resources and ERs remain stagnant or slowly decline; from 1990 to 2009, it was found that "the number [of] hospital-based ERs in non-rural areas decreased by 27% . . . [while] the number of ER visits increased [by] 44%."[79] Understandably, the more crowded an ER gets, the less time the physician has available to spend with each patient.[80] Given the limited supply of staff, this also means less time with mid-level staff per patient.[81] In turn, this leads to quicker triaging methods and the expediting of an already spontaneous decision-making process—all culminating in a higher likelihood of misdiagnosis or diagnostic error.[82] A report by the Government Accounting Office ("GAO") found that patients in the ER who were designated to the *sickest* triage category—those deemed to be a priority to be seen by the physician—were on average waiting twice the recommended length to be seen by an attending physician, due to physician and staff unavailability.[83] Further studies by Academic Emergency Medicine correlated overcrowding "to increased in-hospital mortality rates and delays in timely treatments for conditions such as acute pain and pneumonia," problems which are likely easily resolvable when provided with the full attention and time of an experienced attending physician under normal circumstances.[84] Related studies in Canada showed "that reducing ER length of stay by [one] hour could decrease the number of deaths in high-risk patients by 6.5% and by almost 13% in lower-risk patients."[85] Hence, the impact of overcrowding on patient care is empirically evident.[86] In this regard, emergency medicine physicians are automatically placed on the lower end of the playing field

77. *See* AM. COLL. OF EMERGENCY PHYSICIANS, EMERGENCY DEPARTMENT CROWDING: HIGH-IMPACT SOLUTIONS 8 (2008).

78. *Id.*

79. Robert A. Barish et al., *Emergency Room Crowding: A Marker of Hospital Health*, 123 TRANSACTIONS AM. CLINICAL & CLIMATOLOGICAL ASS'N 304, 305 (2012). The study found that the number of ER visits increased "from 88 million to 127 million" per year, while the number of ERs decreased from 2446 to 1779 units. *Id.*

80. *See* AM. COLL. OF EMERGENCY PHYSICIANS, *supra* note 77, at 8.

81. *See id.*

82. *See id.*; THE DOCTORS CO., *supra* note 76.

83. Barish et al., *supra* note 79, at 307.

84. *Id.*

85. *Id.*

86. *See id.*

with an unfair advantage as compared to other medical specialties, given their inability to control their patient inflow and workload for a given shift.[87]

These significant intricacies of emergency physician liability and malpractice are further compounded by the fact that there is not one federal standard by which these physicians can operate or tailor their care; rather, while the practice of medicine stays relatively the same across state lines, certain states may have personal injury laws more favorable than others.[88] This means that certain states become higher target locations for physicians to practice in.[89] For example, a state like Tennessee, where from 1995 to 2005 physicians saw liability premiums increase from 127% to 212%, would not be an attractive location for a physician to move to, knowing well that physicians there can expect high insurance premiums and costs.[90] Accordingly, in those same years, Tennessee saw a significant lack of providers available in the state's ninety-five counties: 85% reported not having "a residing neurosurgeon in patient care," 52% reported not having an "orthopedic surgeon in patient care," 49% reported not having an emergency physician in patient care, and 44% reported not having an obstetrician/gynecologist in patient care.[91] This lack of standardized metrics across state lines creates disparity in malpractice payments, eventually leading to systemic problems in a community's access to healthcare.[92] A study by The National Practitioner Data Bank found that the risk of malpractice payments ranges anywhere from "0.73% per physician, per year, in Alabama to a high 3.7% [for the same metric] in Wyoming."[93]

Due to this lack of accountability and standardization in liability, many emergency physicians are forced to practice *defensive medicine*, or the practice of medicine and the execution of medical decisions in fear of medical malpractice.[94] Surveys indicate that 75% of physicians admit to ordering "more tests, procedures, and medicines" than medically relevant, purely to ensure protection against malpractice.[95] This number is likely

87. *See id.*

88. *See 21 Reasons Why We Need Tort Reform Now: The Case for States*, AM. MED. NEWS (Mar. 20, 2006), http://www.amednews.com/article/20060320/opinion/303209987/4/.

89. *See id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Navid Fanaeian & Elizabeth Merwin, *Malpractice: Provider Risk or Consumer Protection?*, 16 AM. J. MED. QUALITY 43, 43 (2001).

94. Daniel P. Kessler et al., *Impact of Malpractice Reforms on the Supply of Physician Services*, 293 JAMA 2618, 2623 (2005).

95. Hal Scherz & Wayne Oliver, *Defensive Medicine: A Cure Worse Than the Disease*, FORBES (Aug. 27, 2013, 10:52 AM),

much higher in ERs, which are often the first points of contact for symptomatic patients.[96] Accordingly, it was reported that between 2001 and 2005, 50% of emergency physicians in California "were concerned with . . . malpractice litigation."[97] Two studies that were presented to the ACEP highlighted this trend of fear-based medical decision-making.[98] One study concluded that the common driver of admitting cardiac patients through the ER was malpractice litigation, while the second study equally corroborated this statistic, indicating a significant "increase in admissions for [congestive heart failure] over a 14 year period," which the authors of the study concluded was due to the increasing fears of litigation.[99]

A noteworthy aspect of the former study by David Newman indicated that many emergency physicians accounted for their admissions based on legal concerns rather than the actual medical risk indicated by presenting coronary symptoms; many of these physicians also reported that they would not have chosen to be admitted to the hospital had they been in the position of the patients themselves.[100] Overall, this fear and malpractice driven approach to patient care is "estimated to cost $46 billion annually."[101] Most of these costs come directly from unnecessary patient admittance and hospitalization.[102] The cost of defensive medicine extends across to increased harm for the patient as well.[103] Putting the patient through unnecessary and burdensome tests and procedures will likely result in psychological and physical harm to the patient in the form of increased invasive procedures, the potential for false positives and the resulting anxiety, and the general "risk of physical injury to patients" due to the increased testing measures.[104]

These onerous burdens created by emergency physician liability frameworks beg for reform. It is neither sufficient, nor plausible, to fully

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http://www.forbes.com/sites/realspin/2013/08/27/defensive-medicine-a-cure-worse-than-the-disease/#16bbc259358f.

96. *See id.*

97. M. Sonal Sekhar & N. Vyas, *Defensive Medicine: A Bane to Healthcare*, 3 ANNALS MED. & HEALTH SCI. RES. 295, 295 (2013).

98. Alicia Ault, *Defensive Medicine a Factor in Cardiac Admissions*, AM. C. EMERGENCY PHYSICIANS (Dec. 2011), http://www.acep.org/MobileArticle.aspx?id=82885&coll_id=720&parent.

99. *Id.*

100. *Id.*

101. Michelle M. Mello et al., *National Costs of the Medical Liability System*, 29 HEALTH AFF. 1569, 1574 (2010); Michael B. Rothberg et al., *The Cost of Defensive Medicine on 3 Hospital Medicine Services*, 174 JAMA INTERNAL MED. 1867, 1867 (2014).

102. Rothberg et al., *supra* note 101, at 1868.

103. *See* Lee Black, *Effects of Malpractice Law on the Practice of Medicine*, 9 AMA J. ETHICS 437, 437–38 (2007).

104. *Id.* at 438.

delegate protection of emergency physicians to the *standard of care* notion, hoping that negligence cases against the physicians will remain equitable and just by pursuing an analysis of what another emergency physician would have done in a similar situation.[105] Proponents of this approach may argue that this method provides apt coverage and takes into account all the difficulties that these physicians specifically must work with.[106] However, this method attempts to dismiss the frontline nature of emergency medicine and the inherently high burden of risk that practitioners of the field take onto themselves, instead of relying on a *hindsight*, "what should have been done" approach.[107] The elevated, real-time decision-making and diagnostic burdens of emergency medicine make it non-conducive and inequitable for retrospective arbitration on the proper standard of care.[108] Therefore, given these arduous burdens, one must ask: Why should emergency medicine practitioners answer to the same standards of malpractice as every other medical specialty, rather than the sweeping, dynamic level of protection offered to them?[109] What standards should be used to adjudicate on errors and mishaps in a field which is inherently centered on instantaneous decision-making?[110]

D. *Potential Solutions*

A sweeping movement towards some type of malpractice standardization across the nation is the concept of tort reform.[111] Tort reform laws are state laws passed which limit the amount of money that can be received for non-economic damages as a result of tort actions, and sometimes also include limits on punitive damages.[112] The purpose of these laws is to weed out overly exaggerated tort claims and retain legitimacy in negligence actions.[113] Namely, many proponents state that tort reform is necessary to protect physicians from frivolous lawsuits and vital to keep

105. *Id.* at 438.
106. *See id.*
107. *See id.* at 437–39.
108. *See* Black, *supra* note 103, at 437–39.
109. *See id.* at 438.
110. *See id.*
111. *See* Greg Roslund, *The Medical Malpractice Rundown: A State-by-State Report Card*, EMERGENCY PHYSICIANS MONTHLY (July 21, 2014), http://www.epmonthly.com/article/the-medical-malpractice-rundown-a-state-by-state-report-card/; Andrea Clement Santiago, *What is Tort Reform in a Medical Career?*, VERYWELL, http://www.verywell.com/what-is-tort-reform-1736101 (last updated Aug. 14, 2016).
112. Roslund, *supra* note 111; Santiago, *supra* note 111.
113. Roslund, *supra* note 111; Santiago, *supra* note 111.

premiums down for both physicians and healthcare systems.[114] Accordingly, it was found that states that enacted caps on their tort payouts, such as "California, Colorado, Kansas, and Texas" saw a significant decrease in malpractice litigation and malpractice premiums for physicians.[115] In contrast, in places where tort reform was not enacted, such as "New York, [Washington] D.C., Pennsylvania, New Jersey, and Delaware," litigation was commonplace and malpractice payouts were numerous.[116] Texas especially has seen tremendous value in adopting this change.[117] Since the tort reform adoption, litigation, paid claims, and premium prices have been almost cut in half in the state, while the demand for medical licenses has surged.[118] "The Texas Medical Association reported that since 2003, the [year that tort reform legislation went into effect], more than 28,000 new physicians" have become licensed to practice in Texas.[119] This accounts for nearly 3135 new physicians annually, over 770 more new physicians than the state saw on "average in the nine years prior to" the reform legislation.[120] The state also boasts the country's lowest malpractice payout per capita.[121] Data indicates that since the reform legislation was enacted, "medical malpractice claims [and] lawsuits resolved in a [given] year [decreased] by nearly two-thirds" and that the "average payout declined [twenty-two] percent to [approximately] $199,000."[122] "[A]verage malpractice . . . premiums have [also] fallen 46[%]" in the state.[123] In addition to payout rates, reforming the tort liability system, and limiting the number of frivolous claims, there are also significant positive benefits to community healthcare systems.[124] Namely, many physicians accounted for their departure from the practice of medicine due to high insurance liabilities; fortunately for Texas, tort reform measures helped revive the stamina for many to remain in practice, averting a significant healthcare access crisis.[125] These effects were no different for

114. Roslund, *supra* note 111; Santiago, *supra* note 111.
115. Roslund, *supra* note 111.
116. *Id.*
117. *Id.*
118. *Id.*
119. *10 Years of Tort Reform in Texas Bring Fewer Suits, Lower Payouts*, INS. J. (Sept. 3, 2013), http://www.insurancejournal.com/news/southcentral/2013/09/03/303718.htm.
120. *Id.*
121. Roslund, *supra* note 111.
122. *10 Years of Tort Reform in Texas Bring Fewer Suits, Lower Payouts*, *supra* note 119.
123. *Id.*
124. *See id.*; Roslund, *supra* note 111.
125. *See* Crystal Zuzek, *Gone to Texas*, TEX. MED. ASS'N (Sept. 2013), http://www.texmed.org/Template.aspx?id=27834. Albert Gros, M.D., Chief of Obstetrics and Gynecology at an Austin Center, reported that the hospital lost nearly one-third of its

emergency physicians, who reported higher confidence that the reform measures would "help decrease the cost of medicine over time" due to a decline in defensive medicine and decreased overcrowding due to unnecessary testing.[126]

Other solutions entail increasing the standard of care threshold for negligence actions and state-law based tort claims against emergency physicians, considering their unique occupational burdens.[127] Given the onerous decision-making processes explained above, the current threshold provides an overly low bar for patients to meet.[128] Various increased threshold models could be implemented.[129] One such model is for wider acceptance of the *safe harbor* method, which proposes that the threshold for the standard of care should be defined by established, pre-determined guidelines for a given medical situation, eliminating the need for expert witnesses, and instead imploring judges and juries to accept unambiguous and fixed guidelines as the conclusive standard of care.[130] One iteration of this method in practice entails that if the physician documents his or her "adherence to evidence-based clinical-practice guidelines, [uses the] qualified health information-technology systems," and uses the decision support systems, which provide guidelines for providers regarding diagnostic procedures and treatment protocols, then the physician would be entitled to use the same guidelines as the standard of care in any resulting litigation.[131] The American College of Surgeons notes that ultimately, established guidelines such as these could provide numerous benefits, eliminating ambiguity for providers and help increase the standardization of care provided for patients.[132] The College further specifies:

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obstetricians prior to reform legislation in 2003, due to the lack of economic feasibility with malpractice insurance; he also notes this drain in the physician pool created dire risk of lack of healthcare access, and that without the liability protections that tort reform offers, many physicians are "less willing to [treat] high-risk, uninsured patients." *Id.*

126. *Id.*

127. *See id.*; Zeke Emanuel et al., *Reducing the Cost of Defensive Medicine*, CTR. FOR AM. PROGRESS (June 11, 2013, 9:00 AM), http://www.americanprogress.org/issues/healthcare/reports/2013/06/11/65941/reducing-the-cost-of-defensive-medicine/.

128. Zuzek, *supra* note 125.

129. *See* Maxwell J. Mehlman, *Medical Practice Guidelines as Malpractice Safe Harbors: Illusion or Deceit?*, 40 J.L. MED. & ETHICS 286, 298–99 (2012); Emanuel et al., *supra* note 127.

130. Mehlman, *supra* note 129, at 286, 297–98; *see also* Cecilia Ong & Allen Kachalia, *Safe Harbors: Liability Reform for Patients and Physicians*, BULL. AM. C. SURGEONS (Mar. 2, 2013), http://bulletin.facs.org/2013/03/safe-harbors/.

131. Emanuel et al., *supra* note 127; *see also* Mehlman, *supra* note 129, at 298.

132. Ong & Kachalia, *supra* note 130.

> By providing direct guidance for negligence determinations, safe harbors may help ameliorate some of the current ambiguities in today's litigation system for both patients and providers. At any stage in litigation, safe harbors can be a mechanism to facilitate rapid and accurate evaluation of claims for their merit. Due to the fact that they are described and documented in advance of a case, safe harbors may actually help patients—and their attorneys—better evaluate whether a claim is worth bringing forward.[133]

The availability of protection against tort claims for following approved standards may lead to greater standardization in care and better patient outcomes across the states as well.[134] This standardization would also likely help quell issues of defensive medicine.[135] If physicians are provided straightforward guidelines and the necessary steps to achieve and meet the standard of care required for a given patient, they will be less likely to order unnecessary procedures and tests, given the assurance that the guidelines will act as a safeguard for any breached standard of care claims.[136]

However, an important component of implementing such a safe harbor system would have to entail wider latitude for the emergency medicine community.[137] While established guidelines that dictate procedures and expected clinical outcomes work for scheduled patient visits and time-insensitive medical issues, emergency situations cannot always be based on predictable guidelines or outcomes.[138] While most other medical specialties commonly see atypical symptomatic presentations and pathology in non-emergent circumstances, emergency medicine is forced to see these presentations in an extremely time-sensitive environment.[139] Therefore, reconciling this unpredictability in clinical presentation with standardized diagnostic guidelines would require wide discretion given to the physician; otherwise, the guidelines will only stand to mitigate physician discretion and will ultimately degrade patient care.[140]

One solution, which would maintain standardization while providing discretion, could be to create a Most Commonly Seen ("MCS") system, which would entail the establishment of standardized guidelines for the most

133. *Id.*
134. *Id.*
135. *Id.*
136. *See id.*; Emanuel et al., *supra* note 127; Zuzek, *supra* note 125.
137. *See* Ong & Kachalia, *supra* note 130; Zuzek, *supra* note 125.
138. *See* Ong & Kachalia, *supra* note 130.
139. *See* Ong & Kachalia, *supra* note 130; Zuzek, *supra* note 125.
140. *See* Ong & Kachalia, *supra* note 130.

common and typical presentations seen in an ER.[141] This could be determined per local community standards, which would take into account local clinical outcomes and common emergencies that a community faces.[142] While these guidelines would establish the standard of care for a given community for a set of common presentations, novel presentations that do not fit into the MCS guidelines could remain as discretionary areas for the attending physician, providing latitude in the traditional manner for the physician to employ his judgment in developing the appropriate patient-physician relationship and treatment plan.[143] Though this may entail some form of defensive medicine, it will allow tailor-made solutions for otherwise rare presentations of symptoms.[144] Implementing this type of safe harbor system will require intricate legal frameworks and a dynamic definition of the standard of care.[145] The frameworks will have to provide increased attention to developing guidelines for standard situations, while providing physicians the discretion to use their medical judgment in an emergent and atypical medical situation.[146]

E. *Future Prospects*

Ultimately, whether the solution entails a modification of the standard of care for emergency medicine physicians, some type of dynamic safe harbor policy, or something as expansive as blanket liability protection, one thing is certain: Emergency medicine as a field cannot be sustained so long as emergency physicians are forced to perform in environments which inherently force substandard cognitive capabilities, while simultaneously being offered zero to little elevated levels of liability protection.[147] This failure to provide extra protection may ultimately create larger systemic problems, which will have ripple effects on the larger healthcare industry, specifically regarding the already desperate climate that healthcare is facing with the shortage of emergency physicians.[148] Instead, lawmakers and

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141. *See* Mehlman, *supra* note 129, at 288–89; Ong & Kachalia, *supra* note 130.

142. *See* Mehlman, *supra* note 129, at 288–89.

143. *See id.*; Ong & Kachalia, *supra* note 130; Roslund, *supra* note 111.

144. *See* Mehlman, *supra* note 129, at 288–89; Ong & Kachalia, *supra* note 130.

145. *See* Mehlman, *supra* note 129, at 288–89; Ong & Kachalia, *supra* note 130.

146. *See* Mehlman, *supra* note 129, at 288–89; Ong & Kachalia, *supra* note 130.

147. *See* Mehlman, *supra* note 129, at 286–87, 298.

148. *See Physician Shortages to Worsen Without Increases in Residency Training*, ASS'N AM. MED. CS.,

administrators should view this as a potential opportunity to incentivize the entry of more physicians into this field to help curtail some of the overall capacity and healthcare access problems.

III. EMTALA

A. *A Brief History*

The EMTALA was sanctioned in 1986 as a part of a larger and more expansive piece of legislation named the Consolidated Omnibus Reconciliation Act.[149] The intention behind the act was to ensure the provision of timely emergency medical services by ERs regardless of a patient's ability to pay, and to mitigate the transferring of patients in need of emergency care to other hospitals purely for financial reasons.[150] This practice of transferring patients quickly gained notoriety and became informally known as *patient dumping*, indicating the refusal of medical services to patients simply for financial or economic reasons.[151] It was repeatedly found that this practice had been on the rise, as prior to EMTALA, there was no duty for physicians to treat individuals, and hospitals could blatantly refuse patients regardless of condition or status.[152] This blatant refusal policy created situations of extreme desperation and despair.[153] The bleakest of scenarios ranged from refusing care to nearly fatal patients and transferring them to other institutions, to pregnant women

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http://www.aamc.org/download/150584/data/physician_shortages_factsheet.pdf (last visited Apr. 9, 2017).

149. 42 U.S.C. § 1395dd (2015); *EMTALA*, AM. C. EMERGENCY PHYSICIANS, http://www.acep.org/news-media-top-banner/emtala (last visited Apr. 9, 2017). The coded section for this legislation, Title 42, section 1395dd of the United States Code, is actually named: "Examination and treatment for emergency medical conditions and women in labor." 42 U.S.C. § 1395dd. However, EMTALA is the short and popular title and the legislation is commonly known by and cited with this designation. *See* 42 U.S.C. § 1395dd.

150. Joseph Zibulewsky, *The Emergency Medical Treatment and Active Labor Act (EMTALA): What It Is and What It Means for Physicians*, 14 BAYLOR U. MED. CTR. PROC. 339, 339 (2001). "The law's initial intent was to ensure patient access to emergency medical care and to prevent the practice of patient dumping, in which uninsured patients were transferred, solely for financial reasons, from private to public hospitals without consideration of their medical condition or stability for the transfer." *Id.*

151. Ansell & Schiff, *supra* note 34, at 1500. Patient dumping specifically refers to the transfer from a private to a public hospital. *Id.*

152. Hines v. Adair Cty. Pub. Hosp. Dist. Corp., 827 F. Supp. 426, 432 (W.D. Ky. 1993).

153. Emily Friedman, *The Law That Changed Everything—and It Isn't the One You Think*, HOSP. & HEALTH NETWORKS (Apr. 5, 2011), http://www.hhnmag.com/articles/5010-the-law-that-changed-everything-and-it-isn-t-the-one-you-think.

on the verge of giving birth in hospital parking lots, waiting to be admitted into the hospital for care.[154] There were also public policy concerns, as a good number of the patients being *dumped* or transferred belonged to historically estranged classes, including those of minority races and those belonging to lower socio-economic classes.[155] Increasing cost pressures on hospitals and health systems further exacerbated the situation, which paved way for hospitals to continue to take advantage of the right of refusal and only accept patients that were fiscally promising for the services provided to them.[156] Ultimately, however, the hue and cry of the larger public policy concerns highlighted the pressing need for legislative changes and was instrumental in the eventual passing of EMTALA.[157]

Congress intended EMTALA to be the solution to patient dumping and believed that the legislation would enforce a duty on physicians and ERs to at least provide enough care to stabilize patients in dire conditions, and then pursue appropriate transfer protocols if necessary.[158] Congress also carefully designed the statute to require participation by all hospitals that receive federal funding through the Medicare program.[159] While seemingly a limited condition, it is noteworthy to recognize that nearly 98% of hospitals fall under this category.[160] Given that significant portions of hospital funding come from these federal sources, many hospitals are undoubtedly forced to abide by this statute.[161]

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154. *Id.*

155. *Id.* "It should be added that the disturbing stories about improper transfers disproportionately involved patients who were members of minority groups, which raised both civil rights concerns and advocacy group ire." *Id.*

156. *See* Gatewood v. Wash. Healthcare Corp., 933 F.2d 1037, 1039 (D.C. Cir. 1991). "Reports of patient dumping rose in the 1980s, as hospitals, generally unencumbered by any state law duty to treat, faced new cost containment pressures combined with growing numbers of uninsured and underinsured patients." *Id.*

157. Victoria K. Perez, *EMTALA: Protecting Patients First by Not Deferring to the Final Regulations*, 4 SETON HALL CIR. REV. 149, 156 (2007) (quoting Cleland v. Health Care Group, Inc., 917 F.2d 266, 268 (6th Cir. 1990)).

158. *Id.* at 156–57 (citing H.R. REP. NO. 99-241, pt.1, at 27 (1985), *as reprinted in* 1986 U.S.C.C.A.N. 595). "There have been reports of situations where treatment was simply not provided." H.R. REP. NO. 99-241, pt.1, at 27. "In numerous other instances, patients in an unstable condition have been transferred improperly, sometimes without the consent of the receiving hospital." *Id.*

159. Zibulewsky, *supra* note 150, at 340.

160. *Id.*

161. *Id.*

B. *Provisions of the Statute*

The legislation contains a number of important stipulations.[162] The first provision is the mandate for a medical screening examination ("MSE"), which requires that hospital ERs provide individuals an examination to determine if an emergency medical condition ("EMC") exists upon the patient's presentation to the ER, regardless of his or her financial status or ability to pay.[163] The statute itself does not dictate the exact provisions of what an MSE should entail, but only dictates that the screening must be conducted under the hospital's inherent capabilities and as deemed sufficient to determine if an EMC exists.[164] Generally, practitioners have accepted this stipulation to mean that the MSE must be able to identify an EMC *and* must ensure the same standard of care that would be provided to a similarly situated patient.[165] Therefore, as long as there is no disparity between the assessment offered to the EMTALA patient and any other patient, and the screening provided is capable of revealing any critical issues, a physician would be considered as compliant with the statute.[166] The statute does not protect patients against misdiagnosis but only against disparate treatment.[167] Instead, courts have deferred any misdiagnosis claims or mistakes during the treatment process to traditional state malpractice law.[168]

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162. *See* 42 U.S.C. § 1395dd (2015).

163. *Id.* § 1395dd(a).

164. *Id.*

165. Correa v. Hosp. S.F., 69 F.3d 1184, 1192 (1st Cir. 1995) (citing Baber Hosp. v. Hosp. Corp. of Am., 977 F.2d 872, 879 (4th Cir. 1992); Gatewood v. Wash. Healthcare Corp., 933 F.2d 1037, 1041 (D.C. Cir. 1991)).

> A hospital fulfills its statutory duty to screen patients in its [ER] if it provides for a screening examination reasonably calculated to identify critical medical conditions that may be afflicting symptomatic patients and provides that level of screening uniformly to all those who present substantially similar complaints. The essence of this requirement is that there be some screening procedure, and that it be administered even-handedly.

Id. (citations omitted) (citing *Barber*, 977 F.2d at 879; *Gatewood*, 933 F.2d at 1041).

166. *See Correa*, 69 F.3d at 1192 (citing Brooks v. Md. Gen. Hosp., 996 F.2d 708, 711 (4th Cir. 1993); *Barber*, 977 F.2d at 879; *Gatewood*, 933 F.2d at 1041).

167. *See* 42 U.S.C. § 1395dd; Vickers v. Nash Gen. Hosp., Inc., 78 F.3d 139, 141 (4th Cir. 1996).

168. *See* 42 U.S.C. § 1395dd; *Vickers*, 78 F.3d at 141.

> Upholding appellant's EMTALA claims would eviscerate any distinction between EMTALA actions and state law actions for negligent treatment and misdiagnosis. Under appellant's reasoning, every claim of misdiagnosis could be recast as an EMTALA claim, contravening Congress' intention and this circuit's repeated admonition that EMTALA not be used as a surrogate for traditional state claims of medical malpractice.

Vickers, 78 F.3d at 141; *see also* 42 U.S.C. § 1395dd.

The statute also dictates that necessary measures must be taken by the hospital to stabilize a patient with an identified EMC.[169] This entails that the hospital either provide the requisite care to manage the symptoms, or as the second part of the statute mentions, to transfer the patient to another hospital or facility that can provide the requisite care, after obtaining the proper patient consent as dictated by the statute.[170] Refusal for treatment is also covered: Hospitals are deemed to be compliant as long as stabilizing medical treatment is offered and the hospital takes reasonable measures to document the patient's refusal of care.[171]

Expounding on the transfer element, a patient who has not been stabilized may not be transferred to another facility without meeting certain stipulations.[172] These include that either the patient requests the transfer, or a provider determines that "based upon the information available at the time of transfer, the medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual and, in the case of labor, to the unborn child from effecting the transfer."[173] The transfer must also be deemed to be an *appropriate transfer*—meaning that the receiving facility has both available space and consents to the transfer of the patient, the receiving facility obtains all pertinent medical documentation and test results related to the transferred patient from the original facility, and that "the transfer is effected through qualified personnel and transportation equipment, as required, including the use of necessary and medically appropriate life support measures during the transfer."[174] However, there are protections put into place so that the transfer provisions do not enable hospitals to revive patient dumping protocols.[175] If the receiving hospital can provide no additional value to the stabilization of the patient, it can determinatively refuse the patient transfer, forcing the initial hospital to either treat the patient or find an alternative.[176]

The penalties enforced by the statute are also noteworthy.[177] Hospitals and physicians that are in violation of the statutory provisions can

169. 42 U.S.C. § 1395dd(b).

170. *Id.* The statute also includes provisions that dictate when transfer to another facility is appropriate and the requisite conditions to do so. *See id.* § 1395dd(c).

171. *Id.* § 1395dd(b)(2).

172. *Id.*

173. 42 U.S.C. § 1395dd(c)(1)–(2).

174. *Id.*

175. *See id.*

176. *See* Ralph L. Glover II, *Hospital's Duty to Accept Transfers Under EMTALA*, AM. ACAD. EMERGENCY MED., http://www.aaem.org/em-resources/regulatory-issues/emtala/transfer (last visited Apr. 9, 2017).

177. *See* 42 U.S.C. § 1395dd(d).

face up to $50,000 per violation.[178] Patients can also file civil actions against the provider or the hospital for violation of the statute, pursuant to local jurisdictional and state personal injury law.[179] A key penalty is the risk of the hospital losing its Medicare funding agreement.[180] Critics maintain that this *Medicare death penalty* is among the most significant motivating and driving factors towards compliance.[181]

C. *The Costs of EMTALA: Unreimbursed Care*

One of the largest sources of cost from EMTALA is the legislation's promulgation of unreimbursed care.[182] Given that the legislation essentially mandates emergency care for any patient that arrives at the ED with an EMC, physicians and hospitals are on the front lines of collecting the payments for the services rendered under EMTALA.[183] Ultimately, if that patient is uninsured or unable to pay, the hospital may never receive compensation, especially since there is little that the provider can do against either the federal government or the unpaying patient, besides accepting the $50,000 penalty and not treating the patient in the first place.[184] Although uninsured patients may be covered by Medicaid, the services that hospitals provide for the MSEs and the EMCs often go unreimbursed or insufficiently reimbursed.[185] Even as early as 2000, before the exponential rise in healthcare costs, emergency physicians accounted 61% of their bad debt to EMTALA mandated care.[186] As of 2003, this unreimbursed care accounts

178. *Id.* § 1395dd(d)(1).

179. *Id.* § 1395dd(d)(2).

180. M. STEVEN LIPTON ET AL., EMTALA — A GUIDE TO PATIENT ANTI-DUMPING LAWS 1.2 (8th ed. 2012). Upon a confirmed violation of EMTALA, CMS has the authority to notify a hospital of the termination of its Medicare provider agreement. *Id.* To retain Medicare provider status, a hospital must submit an acceptable plan of correction and pass a follow-up survey. *See id.*

181. Ashley E. Booth, *Focus on — The Emergency Medical Treatment and Labor Act*, ACEP (Aug. 2008), http://www.acep.org/Clinical---Practice-Management/Focus-on---The-Emergency-Medical-Treatment-and-Labor-Act/.

182. *The Uninsured: Access to Medical Care Fact Sheet*, AM. EMERGENCY PHYSICIANS: NEWSROOM, http://newsroom.acep.org/fact_sheets?item=30032 (last visited Apr. 9, 2017).

183. *See id.*

184. Mark L. Plaster, *Who Pays the Tab for Unfunded Care?*, EMERGENCY PHYSICIANS MONTHLY (Oct. 8, 2015), http://www.epmonthly.com/article/who-pays-the-tab/. "Of course, the physician can always pursue the patient for payment. But, if they cannot or will not pay, there is very little further recourse for the physician. And the government that mandated the care is deemed exempt from any liability for the bill." *Id.*

185. *The Uninsured: Access to Medical Care Fact Sheet*, *supra* note 182.

186. *The Impact of Unreimbursed Care on the Emergency Physician*, AM. C. EMERGENCY PHYSICIANS, http://www.acep.org/clinical---practice-management/the-impact-of-

for an average loss of $138,000 each year for approximately a third of emergency physicians.[187] Accordingly, some of the largest hospital systems in the country continue to increase their forecasts and provisions for bad debt, accommodating for shortfalls in the hundreds of millions of dollars.[188] With projections indicating that bad debt levels could reach $200 billion by 2019, hospitals are forced to be proactive in their planning.[189] A prime example of this is Community Health Systems, which operates 195 hospitals and is the second largest for-profit hospital chain in the United States.[190] The company was forced to revise its 2015 fourth-quarter forecast for bad debt to

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unreimbursed-care-on-the-emergency-physician/ (last visited Apr. 9, 2017). Bad debt is defined by Black's Law Dictionary as "[a] debt that is uncollectible and that may be deductible for tax purposes." *Bad Debt*, BLACK'S LAW DICTIONARY (10th ed. 2014). A 2016 report by the American Hospital Association determined that "bad debt consists of services for which hospitals anticipated but did not receive payment." AM. HOSP. ASS'N, UNCOMPENSATED HOSPITAL CARE COST FACT SHEET 2 (2016).

187. *The Uninsured: Access to Medical Care Fact Sheet*, *supra* note 182. Referencing an AMA study: In which the American Medical Association stated that "[m]ore than one-third of emergency physicians lose an average of $138,300 each year from EMTALA-related bad debt . . . ." *Id.*

188. *See id.*

189. Beth Kutscher, *Targeting Bad Debt: Hospitals Getting Proactive on Billing*, MOD. HEALTHCARE (Aug. 17, 2013), http://www.modernhealthcare.com/article/20130817/magazine/308179957. The article also notes:

> The number of patients enrolled in high-deductible health plans has been increasing since 2005, but has accelerated over the past two years. At a growing number of companies, high-deductible plans are the only option. A survey from Aon Hewitt found that 44% of the employers it surveyed showed they are increasing deductibles and/or copayments as a way to manage their healthcare costs. At $2086, the average deductible for a consumer-directed health plan was nearly double the average annual deductible of $1097 for all health plans in 2012, according to the Kaiser Family Foundation.

Id. The Modern Healthcare article mentioned in footnote above also notes that hospitals are attempting to change their collection models in hopes of getting reimbursed for care from patients who are able to pay. *Id.* The article notes:

> Many hospitals are still using the old system of billing patients after services are provided and hoping the checks come in. But savvy medical centers are taking a more proactive approach: calling patients weeks in advance of service, using screening tools to assess their ability to pay and then setting them up with financial counselors to work out a payment plan when necessary. . . . But hospitals seeking to improve collections have to be careful, as state regulators have pushed back against overly aggressive debt-collection practices—particularly in cases where treatment was delayed or family members were denied access to a patient until bills were paid.

Id.

190. John Lauerman, *Bad Debt Is the Pain Hospitals Can't Heal as Patients Don't Pay*, BLOOMBERG (Feb. 23, 2016, 1:48 PM), http://www.bloomberg.com/news/articles/2016-02-23/bad-debt-is-the-pain-hospitals-can-t-heal-as-patients-don-t-pay.

account for an additional deficit of $169 million.[191] In the last sixteen years, hospitals have provided more than half a trillion dollars in uncompensated care to their patients.[192]

These metrics play a substantial role in the vitality of healthcare organizations.[193] Debt figures are often significant considerations when large systems negotiate mergers and acquisitions and contemplate the overall financial prospects of a potential acquisition or buyout.[194] This aspect becomes additionally vital as community and rural hospitals, which frequently do not have enough margin to afford significant bad debt, often seek to or are forced to merge with larger hospital systems.[195] These large systems also begin targeting and absorbing smaller systems, perhaps in hopes of gaining consumer market share or eliminating a barrier to entry in a specific region.[196] Either way, these mergers lead to increased consolidation of market share and the slow monopolization of macro-scaled segments, reducing competition in the healthcare marketplace, and allowing hospitals to drive up costs and fees for services.[197] When merger or bailout is not

191. *Id.*

192. Brooke Murphy, *21 Statistics On High-Deductible Health Plans*, BECKER'S HOSP. REV. (May 19, 2016), http://www.beckershospitalreview.com/finance/21-statistics-on-high-deductible-health-plans.html. The report also displays the annual AHA survey, illustrating the upward trajectory of uncompensated care costs for the last fifteen years. AM. HOSP. ASS'N, *supra* note 186, at 2–3. In 1990, the costs of uncompensated care, nationally, were estimated to be around $12.1 billion. *Id.* at 3. This nearly doubled to $21.6 billion by the year 2000. *Id.* By 2015, this figure grew to $35.7 billion. *Id.* These figures exclude underpayments or non-payments on the part of Medicaid or Medicare, which would highlight the even deeper financial woes of many hospitals. *See id.*

193. *See* AM. HOSP. ASS'N, *supra* note 186, at 3; DIXON HUGHES GOODMAN LLP, WHAT HOSPITAL EXECUTIVES SHOULD BE CONSIDERING IN HOSPITAL MERGERS AND ACQUISITIONS 8 (2013), http://www.dhgllp.com/portals/4/ResourceMedia/publications/HCG_Hospital%20MandA%20Whitepaper_ThoughtLeadership.pdf.

194. *See* DIXON HUGHES GOODMAN LLP, *supra* note 193, at 4, 8.

195. *See* Lauerman, *supra* note 190. "'We have [thirty-nine] hospitals that have negative margins and the majority of them are rural,' . . . 'They have less of a financial cushion to absorb the losses of bad debt.'" *Id.*

196. *See* Gregory Curfman, *Everywhere, Hospitals Are Merging — But Why Should You Care?*, HARV. HEALTH PUBLICATIONS: HARV. HEALTH BLOG (Apr. 1, 2015, 5:00 PM), http://www.health.harvard.edu/blog/everywhere-hospitals-are-merging-but-why-should-you-care-201504017844; DIXON HUGHES GOODMAN LLP, *supra* note 193, at 4.

197. *See* Curfman, *supra* note 196. The article also notes that while economists are focused on the reduced competition and increased prices that come with large hospital system mergers, administrators behind these mergers paint a different picture, citing the positive effects of mergers, including improved efficiency, increased quality of care, and even the potential for lower costs in the long run due to increased access to care. *Id.* "[W]hen a smaller hospital merges with a larger, better-equipped hospital system, patients at the smaller hospital may acquire better access to specialists and to advanced medical

possible, the hardest hit organizations are forced to shut down, leaving entire communities void of immediate healthcare services.[198] Further effects of the erosion of rural hospital networks beyond the lack of access to critical care include job loss, drop in gross domestic product figures, and, accordingly, a general decline in the economic fortitude of a community.[199]

D. *Because It Is Unreimbursed, Is EMTALA Unconstitutional?*

Some treatment has been given to the fact that EMTALA potentially violates the Fifth Amendment of the U.S. Constitution.[200] This school of thought was first proposed and advocated by E.H. Morreim, who has advanced the theory that the lack of just and sufficient compensation for medical services provided is no different from a traditional government taking.[201] That is, the government is *taking* private services in order to promulgate a government objective.[202]

The Takings Clause of the Fifth Amendment states that "nor shall private property be taken for public use, without just compensation."[203] This has traditionally been applied to the claiming or diminution of the value of private property by the government, including issues of eminent domain, seizure of property, and physical invasion of private property.[204] The purpose behind the original amendment was to ensure that the federal government took all steps necessary to protect private property, as a

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technologies, such as high tech imaging procedures and electronic medical record systems." *Id.*

198. *See Bad Debt Triggers Hospital Closings Around U.S.*, NBC NEWS, http://www.nbcnews.com/id/28394340/ns/health-health_care/t/bad-debt=triggers-hospital-closings-around-us/#.wjtmrrhmzx8 (last updated Dec. 28, 2005, 2:11 PM).

199. *See* Michael Wyland & Michelle Lemming, *Death by a Thousand Cuts: The Flickering Lights of the U.S. Rural Hospital*, NONPROFIT QUARTERLY (Feb. 23, 2016), http://nonprofitquarterly.org/2016/02/23/death-by-a-thousand-cuts-the-flickering-lights-of-the-u-s-rural-hospital/ (A study found that closure of 673 *vulnerable* rural hospitals would entail 11.7 million lost in patient encounters, 99,000 healthcare jobs lost, 137,000 community jobs lost, and a $277 billion loss to gross domestic product over the course of ten years.)

200. E.H. Morreim, *Dumping the Anti-Dumping Law: Why EMTALA is (Largely) Unconstitutional and Why It Matters*, 15 MINN. J. L. SCI. & TECH. 211, 217 (2014); *see also* U.S. CONST. amend. V.

201. Morreim, *supra* note 200, at 212.

202. *Id.*

203. U.S. CONST. amend. V.

204. *See id.*; Doug Linder, *Exploring Constitutional Conflicts: Takings of Private Property*, UMKC, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/takings.htm (last visited Apr. 9, 2017).

fundamental requirement of a legitimate government.[205] Proponents of the takings argument against EMTALA contend that the legislation creates a taking with regards to for-profit hospitals in requiring those hospitals to provide emergent and unreimbursed medical care.[206] Namely, the requirements of a taking are met: Property, which does not entail a single person's property but instead refers to the hospital itself, including medical equipment, pharmaceuticals, and the time of the physicians and staff; the actual taking, which comprises of requiring emergency evaluation and treatment; public use, as EMTALA entitles any member of the public to receive this care; and finally, the lack of just compensation, as EMTALA care does not itself receive any reimbursement.[207] A notable argument by proponents of EMTALA remains that hospitals do indeed receive compensation for EMTALA-based care, as the legislation only mandates Medicare participating hospitals to provide this care, ergo, giving hospitals an opportunity to extend their patient populations to include and collect from those covered by the Medicare program.[208] The logic behind this school of thought reasons that hospitals receive incentives through Medicare payouts, and if hospitals do not find it conducive to subscribe to EMTALA, even with Medicare payouts, they can simply refuse participation in the Medicare program.[209] However, for a majority of hospitals in the country, Medicare reimbursements represent such a large proportion of compensation and profits, that pulling out of the program would be a death sentence.[210] Hence, this proposition provides a binary choice of assured failure, and, essentially, acts as a *gun to the head*: Either the hospital decides to drastically reduce its margins and income via the refusal of the Medicare program and all Medicare patients, or it chooses to provide billions of dollars of unreimbursed care.[211] This situation creates an unduly coercive choice, given that the Medicare program accounts for as much as 30% of many hospital systems' budgets, a figure that has a strong proclivity to rise with the

205. *Takings Clause*, HERITAGE GUIDE TO CONST., http://www.heritage.org/constitution/#!/amendments/5/essays/151/takings-clause (last visited Apr. 9, 2017). The drafter of the original takings clause, James Madison, provided that "[a] Government is instituted to protect property of every sort . . . . This being the end of government, that alone is *a just* government, which *impartially* secures to every man, whatever is his *own*." *Id.*

206. Morreim, *supra* note 200, at 261.

207. *Id.* at 211–12.

208. *Id.* at 248.

209. *Id.* at 219, 248.

210. *Id.* at 220.

211. Morreim, *supra* note 200, at 220; *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604–05 (2012) ("In this case, the financial *inducement* Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head.").

aging population, as people above the age of sixty-five now make up more than 13% of the entire population—indicating increased Medicare participation in the future.[212] Therefore, the option to opt out of Medicare is not a viable possibility for the majority of hospitals.[213]

E. *The Costs of EMTALA: Overcrowding*

An *anyone can enter* policy has also posed severe capacity problems for ERs across the country.[214] Namely, given that participating hospitals now have an additional responsibility of conducting MSEs—to determine if there is an EMC—and provide care accordingly, ER providers have an additional patient load.[215] Given the guaranteed access that the legislation has provided, ERs have essentially become synonymous with a primary care physician's office.[216] Patients that cannot afford primary care services such as a family clinic or an internist at a local hospital, can now turn to the ER, where they can be diagnosed with accuracy and without any real obligation of payment.[217] Multiple hospital and ER representatives cite EMTALA as the cause for overuse of the ED for non-emergency needs, which increases both patient load and ER throughput.[218] Though physicians are under no obligation to treat if there is not an emergency medical condition identified, the process of conducting the initial screening and determining the nature of the situation still adds a burden to an already overloaded physician and hospital.[219] This is further exacerbated with the general growing trend of

212. Morreim, *supra* note 200, at 255. "As of 2002, the two programs comprised just over 47% of hospital revenues—approximately 30% from Medicare and 17% from Medicaid." *Id.* at 255 n.246; *see also* Emily Brandon, *65-and-Older Population Soars*, U.S. NEWS (Jan. 9, 2012, 9:15 AM), http://money.usnews.com/money/retirement/articles/2012/01/09/65-and-older-population-soars. "The 65-and-older population jumped 15.1 [%] between 2000 and 2010 . . . ." Brandon, *supra*.

213. *See* Tammy Lundstrom, *Under-Reimbursement of Medicaid and Medicare Hospitalizations as an Unconstitutional Taking of Hospital Services*, 50 WAYNE L. REV. 1243, 1248 (2004).

214. *See* Peggy Eastman, *It's Official: EMTALA Contributes to Overcrowding Delays in Care*, 23 EMERGENCY MED. NEWS 9, 9 (2001).

215. *See* Emily Newhook, *Healthcare Emergency: Overcrowding in the ER [INFOGRAPHIC]*, REFERRALMD, http://getreferralmd.com/2015/02/healthcare-emergency-overcrowding-in-the-er-infographic/ (last visited Apr. 9, 2017).

216. *Id.*

217. *See* Gorelick, *supra* note 67, at 719–20.

218. Eastman, *supra* note 214, at 9.

219. *See id.*; Gorelick, *supra* note 67, at 719.

patients preferring the ER to a regular primary care setting, under the belief of more available, flexible, acute, and quality oriented care.[220]

Overcrowding has deeper impacts on the general state of emergency care, as it causes a cyclical and self-propagating issue with large rates of patient boarding.[221] Specifically, a *boarded patient*, which the ACEP defines as "a patient who remains in the [ED] after the patient has been admitted to the facility, but has not been transferred to an inpatient unit," has been empirically proven to cause ripple effects in ER throughput.[222] ACEP also notes that,

> [t]he primary cause of overcrowding is boarding: the practice of holding patients in the [ED] after they have been admitted to the hospital, because no inpatient beds are available. This practice often results in a number of problems, including

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220. Gorelick, *supra* note 67, at 719–20. The Academy of Emergency Medicine article goes into further detail, stating that the

> findings reveal that the convenience of ED care was a very frequently cited reason for using the ED. Convenience, as defined in our study, includes factors related to the hours of operation of the ED, the ease of traveling to the ED relative to other health care facilities, and the availability of immediate medical attention.

Deborah Fish Ragin et al., *Reasons for Using the Emergency Department: Results of the EMPATH Study*, 12 ACAD. EMERGENCY MED. 1158, 1163 (2005). It goes on to mention that

> the immediate availability of the ED appeals to those who desire care without an appointment or who are unwilling to wait for a scheduled appointment. Very often, the ED is chosen because it offers care when needed and wanted, rather than when providers choose to make themselves available
>
> . . . .
>
> Preference for the ED is also driven by the comprehensive range of services available in a single location, a more attractive option than multiple visits to varying locations for laboratory tests, imaging studies, and specialty consultation. These findings, along with those regarding the convenience of the ED, suggest that structural and operational changes in primary care practices will be required to decrease ED utilization . . . .

Id. The study concluded that for most people, resorting to the ED was not a calculus of last resort, but simply came down to the belief that they had a medical emergency. *Id.* In addition to this, the choice to go to an ER over a primary care physician is a choice of convenience, flexibility, and the perception of superior operational efficiency. *Id.* This refers back to a larger conversation of potential solutions to solving ER overload and overcrowding. *Id.* Inherently, in order to solve these issues, there will have to be simultaneous attention given to solving the issues that mitigate access to other healthcare providers, namely via addressing the primary care crisis and making primary care services more accessible and affordable to the community. *See infra* Section III.C.

221. *See Definition of Boarded Patient*, AM. C. EMERGENCY PHYSICIANS, http://www.acep.org/Clinical---Practice-Management/Definition-of-Boarded-Patient-2147469010 (last visited Apr. 9, 2017).

222. *Id.*

> ambulance refusals, prolonged patient waiting times, and increased suffering for those who wait, lying on gurneys in [ED] corridors for hours, and even days, which affects not only their care and comfort but also the primary work of the [ED] staff taking care of [ED] patients. When EDs are overwhelmed, their ability to respond to community emergencies and disasters may also be compromised.[223]

Ultimately, these issues of overcrowding have significant tangible effects: 50% of all ERs report "operat[ing] at or above capacity," and "500,000 ambulances are diverted each year" due to ER overcrowding.[224] This translates to costs of nearly $38 billion wasted annually due to ER overuse, $1086 per diverted ambulance, and between $9000 to $13,000 in revenue lost daily caused by each hour of ER boarding.[225]

F. *Potential Solutions*

Specifically addressing the issue of unreimbursed care, some respite has been found with the introduction of the Affordable Care Act, which has managed to expand insurance coverage across the country.[226] Ascension Health, another expansive health network, actually saw a reduction in its bad debt in 2015.[227] Though the figure was still at an exorbitant $1.1 billion, Ascension likely saw a slight dip in uncompensated care due to the expansion of insurance coverage.[228] However, it would be a fallacy to posit an exclusively symbiotic relationship between the expansion of insurance coverage and its effect on uncompensated care provided through EMTALA.[229] Although insurance coverage has gone up significantly, there

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223. *Id.*

224. Newhook, *supra* note 215.

225. *Id.* The GWU findings also illustrate other impacts of overcrowding. *Id.* Namely, the studies indicate that patients face a 5% increased chance of dying before being discharged, if admitted to the hospital when the ER is overcrowded. *Id.* Additionally, it states that due to the overstretching of emergency personnel and staff that often results from ER overcrowding, providers may also find it difficult to respond to potential public health crises and disasters. *Id.*

226. *See* Dave Barkholz, *Moving Patient Payment Upfront*, MOD. HEALTHCARE (May 21, 2016), http://www.modernhealthcare.com/article/20160521/MAGAZINE/305219931.

227. *Id.*

228. *Id.*

229. *See Impact of Unreimbursed Care on the Emergency Physician*, AM. C. EMERGENCY PHYSICIANS, http://www.acep.org/clinical---practice-management/the-impact-of-unreimbursed-care-on-the-emergency-physician/ (last visited Apr. 9, 2017).

has been a significant prevalence of high deductible insurance plans.[230] Surveys of employers indicate a 67% increase in deductibles since 2010.[231] A Modern Healthcare finding noted that "24% of people under age [sixty-five] with private health insurance were enrolled in high-deductible health plans and another 13% in high-deductible plans with Health Savings Accounts ("HSAs") to help pay expenses on a pre-tax basis. That compares with 16% and 7%, respectively, in 2009," citing a study released in 2015 by the National Center for Health Statistics.[232]

This significant rise in deductibles makes for an interesting situation in the payer landscape; though more patients now enter the ER with insurance, many still have to take the payment liability on themselves due to not meeting the deductible threshold.[233] This effectively renders those patients back in the initial category of uninsured patients.[234] Although proponents insisted that high deductibles would encourage consumer shopping, and therefore help increase competition between healthcare providers, empirical studies proved that this was not the case.[235] Instead, the inability to pay these high out-of-pocket costs causes a high number of patients to delay getting routine and basic medical care, which further propagates the use of emergency services, often still at an unaffordable price

230. Barkholz, *supra* note 226.

231. RACHEL DOLAN, HIGH-DEDUCTIBLE HEALTH PLANS, HEALTH AFFAIRS 1 (2016), http://www.healthaffairs.org/healthpolicybriefs/brief_pdfs/healthpolicybrief_152.pdf.

232. Barkholz, *supra* note 226. The article also notes: "The ascendency of high-deductible health insurance is challenging hospitals and physicians across the country to change the way they prepare for and collect payments from people getting hit with large out-of-pocket costs for care." *Id.* Regarding the progress made by some hospitals on debt collection, it notes:

> But the rising prevalence of high-deductible plans, both on and off the exchanges, threatens to undermine that progress. Instead of a small number of people paying none of their bill, hospitals are starting to see a larger number of people struggling to pay the deductibles, which can come to thousands of dollars for a single hospital visit.

Id.

233. *See* DOLAN, *supra* note 231, at 3; Barkholz, *supra* note 226.

234. *See* Deane Waldman, *Funding the Unfunded Mandate*, AM. THINKER (Dec. 8, 2014), http://www.americanthinker.com/articles/2014/12/funding_the_unfunded_mandate.html.

235. Anna D. Sinaiko et al., *Cost-Sharing Obligations, High-Deductible Health Plan Growth, and Shopping for Health: Enrollees with Skin in the Game*, 176 JAMA INTERNAL MED. 395, 396 (2016). "Simply increasing a deductible, which gives enrollees skin in the game, appears insufficient to facilitate price shopping." *Id.* The editor further adds: "It is true that high-deductible health plan enrollees have 'skin in the game.' However, these enrollees are exposed to substantial out-of-pocket cost risk with little evidence that this risk exposure will incentivize higher-value health care decisions." *Id.* at 397–98.

point.[236] Additionally, given that uncompensated care through EMTALA comes via the identification of an emergency medical condition, there is little opportunity for patients to indulge in emergency care shopping even if they wanted to, due to the immediate need for medical attention.[237] In congruence with this cyclical logic, polls of emergency medicine physicians in 2015 indicated that ER visits have increased since the enactment of the Affordable Care Act.[238] Ultimately, the Affordable Care Act and other insurance mechanisms which offer high deductible solutions provide little to no value as a solution in specifically addressing reimbursements for uncompensated care, as they cannot solve for the millions of dollars lost due to patients that fail to meet insurance thresholds and therefore fail to pay.[239]

Another important issue to consider is the arena of malpractice, specifically regarding patients that receive care under EMTALA.[240] Given that both providers and hospitals must face the same liability towards the standard of care, regardless of whether there is reimbursement or not, perhaps there is room for a creative solution to recoup the costs of EMTALA-related care through this avenue.[241] One such proposition may be to make the negligence standard significantly more lenient for providers when administering care to EMTALA patients.[242] That is, a patient would come in, be determined as unable to pay, and be codified as such in the medical records.[243] If a negligence issue arises later on, a federally mandated definition of negligence, one that would be much more lenient than the general state standards, would be applied to the physician as a way of reducing the number of payouts a hospital would have to make and, therefore, provide one way of recouping costs.[244] However, this is not a viable, ethical, or safe precedent to create, as this could create lack of

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236. Murphy, *supra* note 192. "When patients delay necessary or preventive medical care, they may end up in hospitals' [ERs] for treatment." *Id.* "About 80[%] of emergency physicians said they are treating insured patients who have sacrificed or delayed medical care due to unaffordable out-of-pocket costs, co-insurance or high deductibles . . . ." *Id.*

237. *See* Morreim, *supra* note 200, at 214.

238. *The Uninsured: Access to Medical Care Fact Sheet*, *supra* note 182 (noting a significant increase from 2014).

239. *See* Barkholz, *supra* note 226.

240. *The Impact of Unreimbursed Care on the Emergency Physician*, *supra* note 229.

241. *See* Plaster, *supra* note 184.

242. *See* Black, *supra* note 103, at 438.

243. *See Impact of Unreimbursed Care on the Emergency Physician*, *supra* note 229.

244. *See* Bal, *supra* note 30, at 340; *supra* Section II.A. To meet negligence, a plaintiff has to prove the same elements discussed: Duty, breach of that duty, harm, and causation. *See* Bal, *supra* note 30, at 340; *supra* Section II.A.

motivation for providers to exercise their best medical judgment when confronted with a patient who they know will not be able to pay. Leniency in standards of care or in the breach of duty will only create future issues of malpractice and raise important ethical concerns—namely, the concern of why patients that cannot afford healthcare or those that must resort to ERs in times of desperate need should be provided with substandard levels of care.[245] Rather, as healthcare can be considered a basic human need, physicians should be incentivized to provide their best services and judgment in all scenarios, regardless of whether the patient is profitable or not.[246] A patient receiving intentional substandard care may as well not receive care at all.

Instead, a solution that could actually curtail negligence liability and provide cost relief to hospitals through the window of malpractice could be a federal mandate providing liability funding for physicians that face negligence claims arising out of EMTALA-based treatment.[247] Given the above discussed cognitive decision-making short-comings that emergency physicians already face, attaching the same standards for liability related payments across the board, for both paying patients as well as non-paying patients that present to the ER, places an unfair burden on hospitals, which ultimately have to shoulder the burden of payment regardless of whether profit was made off the patient or not.[248] Thus, a mandate could be enforced that dictates that non-paying patients who utilize EMTALA's treatment procedures be categorized into a different codification in a hospital's records systems, and given any issues of negligence, federal funding will be used to cover legal fees or malpractice payments on behalf of the hospital and provider. While this will likely not cover the full extent of unreimbursed care by the provider, as federal compensation will be paid out only if there is a negligence suit, it may provide some respite to hospitals, which are currently forced under the threat of malpractice regardless of whether there is any monetary value derived from a patient. Overall, this would not only reduce the amount that hospitals would have to pay out in liability, hence, helping to keep their bottom lines and profitability margins stable, but would also create strong incentives for hospitals to retain their Medicare participation status and continue to see patients under EMTALA.

Many have also proposed cost-shifting as a viable measure.[249] This proposed model suggests that in order to recover the costs for unreimbursed care due to EMTALA, hospitals simply increase the payments and costs

245. *See* Fanaeian & Merwin, *supra* note 93, at 43.
246. *See* Santiago, *supra* note 111.
247. *See* Bal, *supra* note 30, at 340.
248. *See The Uninsured: Access to Medical Care Fact Sheet*, *supra* note 182.
249. *See* Morreim, *supra* note 200, at 259.

required by paying and insured patients.[250] However, this model relays back to the original contention of EMTALA violating the Takings Clause; that is, the fact that the payment for the medical services provided has been shifted to a party that can afford it is no less a taking, but has rather just shifted the burden of unjust seizure of property to another person, whether through higher insurance premiums or lower savings remaining for that other payer.[251]

Instead, what may be another permanent, viable solution, is a stable and guaranteed funding source for hospitals to recoup their costs on lost EMTALA funds.[252] The most obvious call would be for federal funding of the mandate.[253] Congressional ability to spearhead a piece of legislation as critical as EMTALA should include with it a responsibility to create funding mechanisms.[254] While traditional routes of funding, such as the opportunity to draw from Medicare benefits, exist and can likely provide further benefits, declining reimbursement rates and expansion of mandated care is crippling providers.[255] A more viable mechanism for federally funding the mandate may be the creation of mandatory HSAs for all Americans, funded by tax dollars and providing tax incentives for those who want to contribute more than the pre-allocated amount given by the federal government.[256] These HSAs could be further mandated as being able to bypass insurance requirements and usable solely for emergency care purposes.[257]

Alternatively, instead of providing the funds directly to the consumer, perhaps the federal funding could come in the form of dynamic payments to hospital systems instead.[258] This would entail identifying each Medicare participating hospital—ergo EMTALA participating hospitals—and providing a payout specific to that hospital's unreimbursed care on an annual basis.[259] Payments would remain dynamic, as the rate of this reimbursement would change from year to year.[260] This would require that

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250. *Id.* at 259 n.267.

251. *Id.* at 260–61. "The fact that the costs of the initial taking have now been diffused onto a broader variety of parties does not render it any less a taking, nor does it mean that the death of government compensation has somehow become *just*." *Id.* at 260.

252. Waldman, *supra* note 234.

253. *Id.*

254. *See* TODD B. TAYLOR, AM. COLL. EMERGENCY PHYSICIANS, EMTALA: ADVANCED CASES (May 2011), http://www.acep.org/uploadedfiles/acep/meetings_and_events/educational_meetings/edda/phase_ii/syllabi/emtala.pdf.

255. *See id.*

256. Waldman, *supra* note 234.

257. *See id.*

258. *See* Morreim, *supra* note 200, at 261.

259. *See id.* at 267–68.

260. *See id.* at 266, 268 n.294.

each hospital present to the government their unreimbursed EMTALA-related costs at the end of a given fiscal year, and then propose a budget for the following year.[261] Throughout the course of the year, providers would have to indicate all of the patients that they see and the respective services provided under the parameters of EMTALA, helping to account for the final costs at the end of the year.[262] Providers and hospitals can work together to evaluate the cost per unit of services provided by taking into account the pharmaceuticals used, the time value of the provider, and the general cost of care to present a composite figure to the authorities without heavy problems of proof.[263] Instead of simply providing an opportunity to earn money through Medicare participation, federal undertaking of these costs would allow for hospitals to be justly compensated for the services provided.[264] Though this would ultimately be a government cost, it would help shift the burden from hospitals to the federal government, requiring it to provide compensated and basic healthcare for the entire population.[265] The government could utilize many sources to fund these costs.[266] Different sources could include increasing taxes for insurance carriers that charge high premiums or mandating a separate fund from general tax revenue towards this purpose.[267]

An auxiliary solution, though not a comprehensive one, would be to address the issue of the use of ERs for non-emergency uses, or essentially mitigating the use of ERs as primary care facilities.[268] Uninsured patients that turn to the ER as a means to get basic primary and family care add fuel to the fire by increasing the burden on hospitals.[269] Given that the demand for primary care physicians is projected to grow 14% by 2020, the misuse of ERs will only continue to grow.[270] The sheer lack of access to primary care

261. *See id.* at 268.

262. *See id.* at 263 n.279.

263. Morreim, *supra* note 200, at 262; *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 437–38 (1982) (pointing out that per se takings tend to present fewer problems of proof, compared with regulatory takings).

264. *See* Morreim, *supra* note 200, at 262–63.

265. *Id.* at 260; TAYLOR, *supra* note 254.

266. *See* Morreim, *supra* note 200, at 219–20.

267. *See id.*

268. *Low-Income Patients Say ER Is Better Than Primary Care*, ROBERT WOOD JOHNSON FOUND. (July 9, 2013), http://www.rwjf.org/en/library/articles-and-news/2013/07/low-income-patients-say-er-is-better-than-primary-care.html.

269. *See id.*

270. *See* HRSA, PROJECTING THE SUPPLY AND DEMAND FOR PRIMARY CARE PRACTITIONERS THROUGH 2020, 2 (Nov. 2013), http://www.bhw.hrsa.gov/sites/default/files/bhw/nchwa/projectingprimarycare.pdf.

physicians in many areas forces patients to turn to ERs.[271] Furthermore, excessive barriers to primary care have been cited as the reason why many patients prefer a straightforward visit to the ER, including: convenience factors—the lack of flexibility and unavailability of appointments for primary care physicians; costs—primary care physicians often promote or advise referrals, resulting in multiple high copays for patients as opposed to the ER where patients can often get comprehensive care in a single visit; and quality—a stronger focus is given to acute care in the ER.[272]

G. *Future Prospects*

Ultimately, it is uncontested that EMTALA fulfills a basic societal requirement: access to healthcare for those that require it, regardless of their ability to pay.[273] However, as this requirement is indeed an aspect of community welfare, the burdens should not be shouldered by providers and hospitals.[274] Forcing this extra financial burden will only continue to make hospital systems more unsustainable in the years to come.[275] Given the changing landscape of insurance coverage, an increasing number of people will attempt to take advantage of legislation such as this to pass their healthcare costs onto ERs, rather than taking the financial responsibility onto themselves.[276] With increasing rates of financial turmoil and hardship for health systems, this carefree attitude by government entities, which mandate such legislation upon private systems, will not bode well for the healthcare industry in the years to come.[277] Rather, it will only translate to increased healthcare costs for consumers, as hospitals will be forced to indulge in their own methods of cost shifting to maintain their respective positions as profitable market players.[278]

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271. *Low-Income Patients Say ER Is Better Than Primary Care*, *supra* note 268.

272. *Id.*

273. CAROL K. KANE, AM. MED. ASS'N, THE IMPACT OF EMTHALA ON PHYSICIAN PRACTICES 1 (2003); Perez, *supra* note 157, at 156; TAYLOR, *supra* note 254.

274. *See* KANE, *supra* note 273, at 1.

275. *See id.* at 4.

276. *See id.* at 1.

277. *See The Impact of Unreimbursed Care on the Emergency Physician*, *supra* note 229.

278. *See* KANE, *supra* note 273, at 4.

IV. CONCLUSION

A. *What's Next for Emergency Medicine?*

Both the larger issues regarding medical malpractice/negligence and the impacts created by EMTALA are significant points of contention regarding the current state of emergency medicine practice.[279] However, they are by no means the only issues that need to be addressed.[280] Emergency medicine providers still face many difficult legal battles and are riddled with litigation in subject areas ranging from consent based issues, against-medical-advice directives, and poor charting practices, just to name a few.[281] Indeed, the sheer amount of litigation centered on these topics provides the legal community with an even stronger reason to develop and tailor policies and frameworks for the field, as generic and *across-the-board* policies cannot be reconciled with such an intricate and complicated field of medicine.[282]

Moreover, the legal community will be forced to remain dynamic and on alert in the coming years with regards to the development of frameworks suited to emergency medicine, as the field is rapidly evolving. As mentioned in the beginning of this Article, given both the growing aging population as well as the demand for primary care services, emergency medicine will be at the forefront of providing healthcare for the public.[283] Accordingly, EDs and hospitals alike will have to strike a balance between cost and quality, ultimately carrying the heavy burden of showing that improved quality of care will decrease long-term costs.[284] This efficiency will be augmented by the continuous growth of healthcare information technology, which will provide the valuable information that providers need

279. Black, *supra* note 103, at 439.

280. *See id.*

281. *See* Kuhn, *supra* note 66.

282. *See* Black, *supra* note 103, at 437; Kuhn, *supra* note 66.

283. David P. Sklar et al., *The Future of Emergency Medicine: An Evolutionary Perspective*, 85 ACAD. MED. 490, 490 (2010); *see also supra* Part I.

284. Sklar et al., *supra* note 283, at 493. The article also states that an important premium will be placed on medical research to determine the exact factors that have the largest room for improvement in the cost and quality of care debate:

> Research in practice areas that overlap health services and clinical improvement will be increasingly important and will warrant funding by EM organizations and foundations. Growth will be in areas of demonstrated quality and cost reduction: [T]ime-sensitive conditions, disease-state-specific care pathways, guideline-based clinical protocols, checklists, and reductions in the variability of care—as in sepsis care and abdominal pain workups. Observational and short-stay diagnostic strategies will flourish to reduce inpatient costs and improve patient satisfaction.

Id.

on a real-time basis, aiding the diagnostic and patient management process.[285]

Related to the growth of health information technology, telemedicine will also heavily affect emergency medicine.[286] Telemedicine technology has allowed the field of medicine to take advantage of cutting-edge telecommunication systems to deliver quality healthcare.[287] It was reported that nearly fifteen million people received care through this medium in 2015—a figure which is sharply expected to rise.[288] However, this large number of users is no surprise, as companies have already developed the technology to bring telemedicine to the daily smartphone user via mobile applications.[289] This healthcare application revolution has increasingly allowed consumers to now have access to physician consultations directly through their mobile phones, bringing the power of diagnosis and disease management to their fingertips.[290] It will be interesting to examine the effects of these technologies on emergency medicine generally, and their impacts on the profitability metrics of EDs around the country in the decades to come. Aside from financial conundrums, this technology poses questions of liability that legal experts will be forced to address in the coming years.[291] Should physicians be able to refer their patients to an ER through a mobile consultation?[292] If so, will the referring mobile app physician share some of the liability as a part of the stream of diagnosis, or will the recipient physician in the ER still hold ties to all liability, as he or she had the opportunity for a physical examination?[293]

Furthermore, given the expansive reach of Internet and mobile data, telemedicine is not easily controlled by state lines or tangible boundaries.[294] Rather, states will have to continue to collaborate and together develop procedures that address the discrepancies in state licensing laws, ultimately enacting changes to encourage physicians to practice medicine across state

285. *Id.*
286. *Id.* at 492.
287. John Donohue, *Telemedicine: What the Future Holds*, HEALTHCARE IT NEWS (Sept. 6, 2016, 11:06 AM), http://www.healthcareitnews.com/blog/telemedicine-what-future-holds.
288. *Id.*
289. *Id.*
290. *See id.*
291. *See id.*
292. *See* Donohue, *supra* note 287.
293. *See id.*
294. *See* Matthew Loughran, *Telemedicine Cracks Top Ten Health Law Issue List for 2016*, BLOOMBERG BNA: HEALTH CARE BLOG (Jan. 11, 2016), http://www.bna.com/telemedicine-cracks-top-b57982066002.

lines.[295] Issues such as these will require heavy involvement of both the legal and medical community in developing apt frameworks that will allow the efficient use of healthcare technology to benefit society.[296]

Ultimately, emergency medicine as a distinct field of medicine still remains in its infancy, posing an onerous burden for legal scholars who attempt to gauge the exact trajectory the field will pursue in the coming generations.[297] However, certain elements will remain inherent to this medical specialty, such as the need for highly trained and intelligent providers; the critical service that ERs provide in fulfilling a basic societal need for healthcare services; and the growth potential of the field in terms of technology, innovation, and the promise of making healthcare more accessible.[298] Thus, the legal community must remain cognizant of these elements, as it strives to not only protect patients and providers alike, but also in order to ensure the continued promulgation of frameworks and regulations in a manner that continues to fuel the growth and development of this vital field of medicine.

295. *See id.* "One of the major hurdles that telemedicine will have to face in the coming years is the differences that exist in state physician licensing laws." *Id.*

296. *See id.*

297. *See* Sklar et al., *supra* note 283, at 494.

298. *See id.*

FIRST AMENDMENT FORA REVISITED: HOW MANY CATEGORIES *ARE* THERE?

BY MARC ROHR*

I. INTRODUCTION

In 2009, I published an article which focused on the remarkable lack of clarity surrounding the term "limited public forum" in the law of freedom of speech.[1] I asserted then:

> More than twenty-five years after the United States Supreme Court, in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, purported to define and elucidate the components of its "public forum" doctrine, the meaning—and legal significance—of the "limited public forum" concept remains startlingly unclear. Confessions of uncertainty by courts as to the meaning of this term—and its relationship to its doctrinal siblings, the "designated" public forum and the "non-public forum"—are, in fact, surprisingly common in reported judicial decisions.[2]

"The uncertainty surrounding this body of First Amendment doctrine," I concluded, cries out for resolution.[3]

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1. Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299, 301 (2009).

2. *Id.* at 300 (footnote omitted); *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–48 (1983).

3. Rohr, *supra* note 1, at 355.

But the clarity for which I hoped has not been provided by the Supreme Court. Instead, the Court has, since I begged it for clarification in 2009, amplified the confusion associated with its forum categories, to the point that it is no longer even certain how many such categories there are.[4]

The modest goal of this Article is simply to try to answer that question.[5]

II. THE ESSENCE OF THE "PUBLIC FORUM" DOCTRINE, PRIOR TO 2009

For the sake of the uninitiated, it should be said, without further delay, that all of this pertains to the issue of access, for expressive purposes, to governmentally-controlled properties or channels of communication that have not traditionally been deemed available to the citizenry for such purposes.[6] *Perry Education Ass'n v. Perry Local Educators' Ass'n*,[7] in 1983, represented the Supreme Court's first attempt to impose order on the case law addressing questions of this kind, which arise continually.[8] I summarized *Perry*'s well-known taxonomy in my earlier article, as follows:

> Justice White set forth, in this [majority] opinion, the tripartite breakdown of governmental "fora" . . . that continues to be quoted regularly. The first category, he stated, consists of "places which by long tradition or by government fiat have been devoted to assembly and debate," embracing—at least—"streets and parks." "In these quintessential public forums, he went on to say, restrictions on expression would be evaluated pursuant to the tests usually employed to gauge the constitutionality of content-based or content-neutral regulations of speech.[9] A second

4. At least one colleague agrees: "[T]here is not even agreement as to how many levels of forum exist within the public forum doctrine. . . . It is a bad sign if the doctrine is so confused that reasonable observers cannot even agree on how many categories of forum exist." Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 WILLAMETTE L. REV. 647, 654 (2010).

5. *See infra* Parts II–VII.

6. Rohr, *supra* note 1, at 300–01.

7. 460 U.S. 37 (1983).

8. *See id.* at 43–44, 43 n.6, 46.

9. As Justice White explained, at this point:

> For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression, which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Perry Educ. Ass'n, 460 U.S. at 45 (citation omitted). I will refer to these tests as "the higher levels of scrutiny."

> category, he continued, "consists of public property which the State has opened for use by the public as a place for expressive activity . . . . This second category is important because, [as] Justice White instructed us, the First Amendment "forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." At this point a key point was made in a footnote: "A public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects." A significant caveat was added: "Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum"—thus introducing the term "traditional public forum" to describe the first category in this taxonomy.[10]
>
> Finally, he addressed the third category, described simply as "[p]ublic property which is not by tradition or designation a forum for public communication." In such locations, . . . "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Oddly, it was not until later in his opinion that Justice White gave this third type of governmental property a name, and he did so only in passing: . . . "Implicit in the concept of the non-public forum," he wrote, "is the right to make distinctions in access on the basis of subject matter and speaker identity."[11]

At that point in my earlier article, still discussing Justice White's opinion in *Perry*, I began my critique:

> But with respect to the concept of the "limited" public forum, the opinion was distinctly unhelpful. First, as with the term "non-public forum," Justice White used the term "limited public forum" only in passing, never defining it . . . ; readers of the opinion were thus left to infer that the "limited public forum" was the aforementioned forum "created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects."
>
> Second, and most inexcusably, the legal significance of the label was never made explicit in Justice White's opinion. He stated that the designated public forum would be treated as if it were a traditional public forum, but said nothing, in general terms, as to how the constitutionality of an exclusion of a particular

10. Rohr, *supra* note 1, at 304.
11. *Id.* at 306; *see also Perry Educ. Ass'n*, 460 U.S. at 45, 46 n.7, 49.

> speaker from a designated public forum limited for "use by certain groups" would be assessed.[12]

I argued then—based on what I deemed to be clues lurking in the remainder of Justice White's *Perry* opinion,[13] along with the Court's earlier ruling in *Widmar v. Vincent*[14]—that this was the proper understanding of the legal significance of the limited public forum concept:

> In a limited public forum, we must first identify the speakers to whom the forum has been opened—the favored class of speakers, if you will—and then ask whether the speaker who seeks access to the forum—the challenger—is an "entit[y] of similar character" to those to whom the forum has been opened. In other words, we must ask whether the challenger falls within the favored class of speakers. If the answer is "yes," then that challenger enjoys a "right of access" to the forum. To put it another way, a limited public forum would be "open" to speakers who fall into the same class as those to whom the forum has already been opened. . . . So it would appear, from the totality of the *Perry* decision, that a limited public forum will be treated as either a traditional public forum or a non-public forum, depending on whether the challenger does or does not fall within the favored class of speakers.[15]

To my knowledge, this was the only understanding of the limited public forum concept that gave it real meaning, as a category distinct from all the others.[16] And I was not alone in drawing this inference from *Perry* and *Widmar*; along with dictum in 1992's *International Society for Krishna Consciousness, Inc. v. Lee*[17] decision,[18] several federal appellate courts embraced the same approach.[19]

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12. Rohr, *supra* note 1, at 306; *see also Perry Educ. Ass'n*, 460 U.S. at 46 n.7, 47–48.

13. Rohr, *supra* note 1, at 306–08; *see also Perry Educ. Ass'n*, 460 U.S. at 46 n.7, 47–48.

14. 454 U.S. 263 (1981).

15. Rohr, *supra* note 1, at 307–08 (alteration in original) (footnotes omitted); *see also Perry Educ. Ass'n*, 460 U.S. at 46 n.7, 47–48; *Widmar*, 454 U.S. at 269–70.

16. Rohr, *supra* note 1, at 306–09.

17. 505 U.S. 672 (1992).

18. *Id.* at 678–79.

19. *See* Rohr, *supra* note 1, at 332–34. Remarkably, this theory has continued to be put forth by one of those courts of appeals, albeit inconsistently and in dictum. *See* Children First Found., Inc. v. Fiala, 790 F.3d 328, 340 (2d Cir.), *reh'g granted*, 611 F. App'x 741 (2d Cir. 2015); Zalaski v. City of Bridgeport Police Dep't, 613 F.3d 336, 342 (2d Cir. 2010) (per curiam). *But see* Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30, 36 (2d Cir. 2011); Ochshorn *ex rel.* R.O. v. Ithaca City Sch. Dist., 645 F.3d 533, 540 (2d Cir. 2011). I say "remarkably" because this understanding was pretty clearly repudiated by the Supreme

But the actual holding of *Perry*,[20] along with the Court's other public forum cases decided between 1985 and 1998,[21] provided little or no support for that theory.[22] Then, in 2001, in *Good News Club v. Milford Central School*,[23] the Court, speaking through Justice Thomas, administered the coup de grace:

> When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics." The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be "reasonable in light of the purpose served by the forum."[24]

Intentionally or not, Justice Thomas thereby equated, for purposes of First Amendment analysis, the category of the limited public forum with that of the non-public forum—with no explanation, or even any explicit acknowledgment, whatsoever, that he was doing so.[25] But, of course, lower courts took the hint.[26] Writing in 2009, I concluded:

> The federal courts of appeals remain strikingly divided with respect to their understanding of what it means to pin the

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Court in 2001. Bloedorn v. Grube, 631 F.3d 1218, 1232 (11th Cir. 2011); *infra* text accompanying notes 18–19.

20. *See Perry Educ. Ass'n*, 460 U.S. at 55; Rohr, *supra* note 1, at 309–12.

21. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 669 (1998); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995); United States v. Kokinda, 497 U.S. 720, 724 (1990); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 796 (1985). Justice Kennedy's majority opinion in *Forbes*, however, did arguably lend some support to the limited public forum theory which I have advocated, but too ambiguously to cite, with any confidence, as supportive thereof. *See* Rohr, *supra* note 1, at 320–25.

22. *See Perry Educ. Ass'n*, 460 U.S. at 55.

23. 533 U.S. 98 (2001).

24. *Id.* at 106–07 (alteration in original) (citations omitted).

25. Rohr, *supra* note 1 at 320; *see also Good News Club*, 533 U.S. at 102, 106, 120, 131. That important doctrinal development had been strongly implied, six years earlier, by Justice Kennedy's majority opinion in Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819, 829–30 (1995). I criticized the *Rosenberger* pronouncement as well. Rohr, *supra* note 1, at 325; *see also Rosenberger*, 515 U.S. at 829–30. With regard to both decisions, I pointed out that, because each of them found impermissible viewpoint discrimination, no categorizing of the relevant forum was even necessary. Rohr, *supra* note 1, at 325; *see also Good News Club*, 533 U.S. at 106–07; *Rosenberger*, 515 U.S. at 829–30.

26. *See* Rohr, *supra* note 1 at 332.

> label "limited public forum" upon a governmentally controlled property or channel of communication. At the risk of over-simplification, these courts can essentially be placed into one of two groups: Those who, like your humble author, are guided by the implications of *Perry* and *Forbes*, and those who have been influenced primarily by the misleading statements made in the *Rosenberger* [*v. Rector & Visitors of University of Virginia*] and *Good News Club* decisions.[27]

III. SUBSEQUENT SUPREME COURT PRONOUNCEMENTS

As unhelpful as the Court was, in cases prior to 2009, in elucidating its public forum doctrine, it did, at least, faithfully list the three dominant categories of First Amendment fora: traditional, designated, and "non."[28] That changed in 2009, in Justice Alito's majority opinion in *Pleasant Grove City v. Summum*.[29] Because the Court found the Ten Commandments monument at issue therein to be, in the context of the case, a species of government speech,[30] Justice Alito's discussion of public forum principles was entirely dictum; nonetheless, any statement made in a Supreme Court majority opinion obviously carries weight. So what did he say that has influenced the presentation of public forum concepts in lower courts? He listed the categories of traditional and designated public fora, and then added this: "The Court has also held that a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects. In such a forum, a government entity may impose restrictions on speech that are reasonable and viewpoint neutral."[31]

For the first time, the non-public forum received no mention.[32] While Alito did not use the term "limited public forum," had he effectively replaced the non-public forum category with the limited public forum category? The Court had already—in dictum in *Good News Club*—equated those two categories for analytical purposes, but were we now supposed to conflate them completely—despite the fact that some "non-public" fora are

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27. *Id.*; *see also Good News Club*, 533 U.S. at 120; Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 683 (1998); *Rosenberger*, 515 U.S. at 846; *Perry Educ. Ass'n*, 460 U.S. at 55.

28. *Forbes*, 523 U.S. at 677; Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992); United States v. Kokinda, 497 U.S. 720, 726 (1990); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

29. 555 U.S. 460 (2009).

30. *Id.* at 472–73.

31. *Id.* at 469–70 (citation omitted) (citing Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001).

32. *See id.* at 464, 469; Good News Club v. Milford Cent. Sch., 533 U.S. at 106–07.

closed to *all* private expressive activity[33]—and abandon the "non-public forum" label? No explanation was provided.

All that Alito said about First Amendment fora in *Summum* was repeated the following year, in Justice Ginsburg's majority opinion in *Christian Legal Society v. Martinez*,[34] and this time it was not dictum.[35]

But, in 2015, in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*,[36] the non-public forum reappeared![37] The Court held that the words or symbols on a specialty license plate were government speech.[38] For the majority, Justice Breyer rejected the argument that a specialty plate was some kind of "forum for private speech."[39] In doing so, he bypassed the usual practice of setting out the forum categories, instead simply rejecting, in turn, the applicability of each category of forum—traditional, designated, limited, and non-public.[40]

Had order, such as it was, thereby been restored? Perhaps, but one's confidence is further weakened by the fact that, the following year, Justice Thomas, joined by Justice Alito in dissenting from a denial of certiorari, made reference to "a limited public forum, also called a nonpublic forum."[41]

So a legitimate question remains: How many forum categories are there?

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33. *E.g.*, *Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. at 672; Adderley v. Florida, 385 U.S. 39, 47, 52 (1966) (*Adderley* pre-dated the *Perry* terminology, but provides a clear example of a government property that had been opened to no one for expressive purposes).

34. 561 U.S. 661 (2010).

35. *See id.* at 679 n.11.

36. 135 S. Ct. 2239 (2015).

37. *See id.* at 2252.

38. *Id.* at 2246–47.

39. *Id.* at 2250.

40. *Id.* at 2250–51. Writing for four Justices in dissent, Justice Alito said:

> What Texas has done by selling space on its license plates is to create what we have called a limited public forum. It has allowed state property . . . to be used by private speakers according to rules that the State prescribes. Under the First Amendment, however, those rules cannot discriminate on the basis of viewpoint. But that is exactly what Texas did here.

Walker, 135 S. Ct. at 2262 (Alito, J., dissenting) (citations omitted).

41. Am. Freedom Def. Initiative v. King Cty., 136 S. Ct. 1022, 1022 (2016) (Thomas, J., dissenting). Thomas observed that "[d]istinguishing between designated and limited public forums has proved difficult," and that the guidance provided by the Supreme Court on this point "has bedeviled federal courts." *Id.*

IV. THEORETICAL DISARRAY IN THE COURTS OF APPEALS

Since 2010, federal appellate courts have remarkably, but understandably, exhibited considerable confusion regarding the *number* of public forum categories.[42] In some circuits, panels continued to adhere to the pre-*Summum* list of three categories—traditional, designated, and non-public[43]—as though the Supreme Court had said nothing that mattered in *Summum* or *Christian Legal Society*.[44] Opinions from other circuits, variously and inconsistently, set forth either those three categories;[45] all four categories;[46] the three categories identified in *Summum* and *Christian Legal Society*;[47] or those three categories, specifically said to be public fora, along with a separately-identified—apparently *sui generis*—type of government property, the "non-public forum."[48]

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42. *See id.*

43. Hodge v. Talkin, 799 F.3d 1145, 1157–58 (D.C. Cir. 2015) *cert. denied*, 136 S.Ct. 2009 (2016) (decided post-*Walker*, but not citing it); Sons of Confederate Veterans, Va. Div. v. City of Lexington, 722 F.3d 224, 229–30 (4th Cir. 2013); Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp., 698 F.3d 885, 890 (6th Cir. 2012); Satawa v. Macomb Cty. Rd. Comm'n, 689 F.3d 506, 517–18 (6th Cir. 2012); McGlone v. Bell, 681 F.3d 718, 732 (6th Cir. 2012);, *cert. denied*, 136 S. Ct. 2009 (2016); Oberwetter v. Hilliard, 639 F.3d 545, 551 (D.C. Cir. 2011); *see also* Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth., 781 F.3d 571, 578 (1st Cir. 2015); Minn. Majority v. Mansky, 708 F.3d 1051, 1057 (8th Cir. 2013) (each asking whether a transportation authority's advertising program was a designated or non-public forum). Opinions in which the term "non-public forum" is used, without any list of categories, include International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles, 764 F.3d 1044 (9th Cir. 2014); United States v. Szabo, 760 F.3d 997 (9th Cir. 2014); and K.A. *ex rel.* Ayers v. Pocono Mountain School District, 710 F.3d 99 (3d Cir. 2013).

44. *See* Christian Legal Soc'y Chapter of the Univ. of Cal. Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 669 (2010); Pleasant Grove City v. Summum, 555 U.S. 460, 481 (2009).

45. Keeton v. Anderson-Wiley, 664 F.3d 865, 871 (11th Cir. 2011); Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cty., 653 F.3d 290, 295 (3d Cir. 2011) (citing *Martinez*, 561 U.S. at 679 n.11).

46. Wright v. Incline Vill. Gen. Improvement Dist., 665 F.3d 1128, 1134 (9th Cir. 2011) (citing *Martinez*, 561 U.S. at 679 n.11; Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998)).

47. Galena v. Leone, 638 F.3d 186, 197 (3d Cir. 2011); Bloedorn v. Grube, 631 F.3d 1218, 1230 (11th Cir. 2011); *see also* Newton v. LePage, 700 F.3d 595, 602 (1st Cir. 2012) (rejecting the applicability of those three categories, with no mention of the non-public forum).

48. Kaahumanu v. Hawaii, 682 F.3d 789, 799 (9th Cir. 2012); Miller v. City of Cincinnati, 622 F.3d 524, 535 n.1 (6th Cir. 2010). In *Kaahumanu*, the court actually said this: "The Supreme Court has divided public forums into three categories: '[T]raditional public forums,' 'designated public forums,' and 'limited public forums.' The rest of government property is either a non-public forum or no forum at all." *Kaahumanu*, 682 F.3d at 799 (citing *Martinez*, 561 U.S. at 679 n.11); *see also Forbes*, 523 U.S. at 678.

The Second Circuit has consistently identified four categories.[49] The Tenth Circuit has also done so, but, somewhat oddly, has listed the original three major *Perry* categories first, adding that the Supreme Court "has *since* identified a separate category—the 'limited public forum'—although the Court's use of this term has been inconsistent,"[50] despite the fact that the limited public forum made its first appearance in *Perry*.[51] Even more oddly, the same court went on to observe that "'the boundary between a designated public forum for a limited purpose . . . and a limited public forum . . . is far from clear.'"[52] The Seventh Circuit has also treated the limited public forum as less than a full-fledged member of the family of forum categories, listing the three established categories and then adding: "Some decisions recognize a fourth category, variously called a 'limited designated public forum' . . . a 'limited public forum,' or a 'limited forum.'"[53]

A different Seventh Circuit panel had earlier equated the limited and non-public categories, asserting that "[a] limited public forum—sometimes called a 'non-public forum'—is a place the government has opened only for specific purposes or subjects. . . ."[54] Other circuits have also equated the two concepts.[55] In the Third,[56] Eighth,[57] and Ninth[58] Circuits, there are,

49. Children First Found., Inc. v. Fiala, 790 F.3d 328, 339 (2d Cir.), *reh'g granted*, 611 F. App'x 741 (2d Cir. 2015); Ochshorn *ex rel.* R.O. v. Ithaca City Sch. Dist., 645 F.3d 533, 539 (2d Cir. 2011); Zalaski v. City of Bridgeport Police Dep't, 613 F.3d 336, 341–42 (2d Cir. 2010) (per curiam); *see also* Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30, 36 (2d Cir. 2011) (finding a public school to be a limited public forum, with no reference to any other categories).

50. Doe v. City of Albuquerque, 667 F.3d 1111, 1128 (10th Cir. 2012) (emphasis added); *see also* Verlo v. Martinez, 820 F.3d 1113, 1129 n.6 (10th Cir. 2016).

51. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983); Miller v. City of Cincinnati, 622 F.3d 524, 535 n.1 (6th Cir. 2010) (citing the *Summum* decision as having "resolve[d] the confusion over terminology . . . after the Supreme Court first articulated the concept of a 'limited public forum' in *Good News Club*").

52. *Doe*, 667 F.3d at 1129 (quoting Summum v. Callaghan, 130 F.3d 906, 916 n.14 (10th Cir. 1997)).

53. Women's Health Link, Inc. v. Fort Wayne Pub. Transp. Corp., 826 F.3d 947, 951 (7th Cir. 2016). Judge Posner provided no citations supporting the use of the first or third of those terms, which this author has never encountered anywhere else. *See id.*

54. Milestone v. City of Monroe, 665 F.3d 774, 783 n.3 (7th Cir. 2011). But in his later *Women's Health Link* opinion, Judge Posner defined "designated public forum" as "a facility that the government has created to be, or has subsequently opened for use as, a site for expressive activity. Usually, . . . 'designated forums' are available for specified forms of private expressive activity or at specified times . . . . Such limitations are permitted." *Women's Health Link, Inc.*, 826 F.3d at 951.

55. *See* NAACP v. City of Phila., 834 F.3d 435, 441 (3d Cir. 2016); Powell v. Noble, 798 F.3d 690, 699 (8th Cir. 2015); Seattle Mideast Awareness Campaign v. King Cty., 781 F.3d 489, 496 n.2 (9th Cir. 2015); Victory Through Jesus Sports Ministry Found. v. Lee's Summit R-7 Sch. Dist., 640 F.3d 329, 334 (8th Cir. 2011).

accordingly, only three forum categories, because the "limited" and "non-public" fora are viewed—albeit a bit tentatively—as one and the same.[59] The Third Circuit's pronouncement on the point is worth quoting:

> There appears to be some inconsistency in federal courts' opinions, even those of the Supreme Court, as to whether a limited public forum is a separate category or a subset of a designated public forum with a third category of forums being "non-public forums." Recently, the Court has used the term "limited public forum" interchangeably with "non-public forum," thus suggesting that these categories of forums are the same. Because the continued existence *vel non* of a "non-public forum" category has no bearing in this case, we need not dwell on the possible distinction between limited public forums and nonpublic forums.[60]

Similarly the Ninth Circuit, guided by *Christian Legal Society*, set forth the traditional, designated, and limited categories, observing, with respect to limited public fora, that "in past cases they've sometimes been labeled 'non-public' forums."[61]

But less than a month later, a Ninth Circuit panel stated that, in light of the Supreme Court's decision in *Walker*, "the proper term likely is 'non-

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56. *See City of Phila.*, 834 F.3d at 441. "The final category is sometimes called a limited public forum and other times labeled a non-public forum." *Id.* The court went on to "assume, without deciding, that the [district] [c]ourt was correct" in "conclud[ing] that the advertising space [at issue was] a limited public/non-public forum." *Id.* at 442 (citation omitted).

57. *See Powell*, 798 F.3d at 699; *Victory Through Jesus Sports Ministry Found.*, 640 F.3d at 334. "A limited public forum, like a non-public forum, may be 'limited to use by certain groups or dedicated solely to the discussion of certain subjects,' and the public entity 'may impose restrictions on speech that are reasonable and viewpoint-neutral.'" *Victory Through Jesus Sports Ministry Found.*, 640 F.3d at 334–35 (quoting Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 679 n.11 (2010)).

58. *See Seattle Mideast Awareness Campaign*, 781 F.3d at 496 n.2.

59. *See City of Phila.*, 834 F.3d at 441; *Powell*, 798 F.3d at 699; *Seattle Mideast Awareness Campaign*, 781 F.3d at 496 n.2; *Victory Through Jesus Sports Ministry Found.*, 640 F.3d at 334.

60. Galena v. Leone, 638 F.3d 186, 197 n.8 (3d Cir. 2011) (citations omitted). The court added, "[w]e have stated that 'we have generally applied to limited public fora the constitutional requirements applicable to designated public fora.' In light of *Pleasant Grove*, this statement may no longer be good law." *Id.* at 198 n.9 (citations omitted); *see also* Pleasant Grove City v. Summum, 555 U.S. 460, 461, 469–70 (2009).

61. *Seattle Mideast Awareness Campaign*, 781 F.3d at 496 n.2. The Court added that "[t]he label doesn't matter, because the same level of First Amendment scrutiny applies to all forums that aren't traditional or designated public forums." *Id.*

public forum.'"[62] Indeed, one might reasonably expect that, given Justice Breyer's recognition of four categories of forum in *Walker*,[63] all prior semantic confusion will be dispelled.[64] But a few months later, yet another Ninth Circuit panel reverted, without explanation, to a list of three categories that included the limited public forum—but not the non-public forum.[65] Given the fact that some courts appeared to be uninfluenced by the language used by the Court in *Summum* and *Christian Legal Society*,[66] along with the propensity of courts to keep quoting from their own precedents, *Walker* will probably *not* signal the end of judicial inconsistency in the listing of forum categories.

V. MAKING SENSE OF THE CATEGORIES

In a very recent Seventh Circuit opinion, Judge Posner made this surprising and somewhat cryptic comment: "[I]t is rather difficult to see what work 'forum analysis' in general does."[67] Is he right?[68] I would suggest, more modestly, that it is difficult to see what is accomplished by having three or four forum categories, particularly if, as it now appears, two of them are deemed to be essentially synonymous.[69]

Let us first consider, then, whether it makes any sense to evaluate a speech restriction in a limited public forum just as we would evaluate such a restriction in a non-public forum. Start by recognizing that, stray judicial pronouncements to the contrary notwithstanding[70], the boundaries of the two

62. Am. Freedom Def. Initiative v. King Cty., 796 F.3d 1165, 1169 n.1 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1022 (2016).

63. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2248–51 (2015).

64. *See id.*

65. *See* Reza v. Pearce, 806 F.3d 497, 502 (9th Cir.), *reh'g denied*, 2015 U.S. App. LEXIS 20118 (9th Cir. 2015).

66. *See supra* text accompanying note 43.

67. Women's Health Link, Inc. v. Fort Wayne Pub. Transp. Corp., 826 F.3d 947, 951 (7th Cir. 2016).

68. I took the position, earlier, that the doctrine made presumptive sense. Rohr, *supra* note 1, at 349–50.

69. In my earlier article, I boldly asked, "how any reasonable jurist could believe that, in a scheme apparently comprising four categories, two of them—one labeled 'limited' and one labeled 'non'—are to be treated as exactly the same." Rohr, *supra* note 1, at 334.

70. *See supra* text accompanying notes 54–61. Consider also judicial definitions of "non-public forum" that tend to conflate the two categories, such as this: "The third category–the "nonpublic forum"–consists of government-owned facilities . . . that could be and sometimes are used for private expressive activities but are not primarily intended for such use." Women's Health Link, Inc. v. Fort Wayne Pub. Transp. Corp., 826 F.3d 947, 951 (7th Cir. 2016). But Judge Posner clearly meant to distinguish this third category from a

categories are not precisely coterminous—which is why it made sense to identify them originally as two different categories.[71] Courts—including the Supreme Court—have often applied the "non-public" label to government properties that were, in fact, opened to some speakers for expressive activity,[72] but a non-public forum might also be a venue that had never been so opened.[73]

Still, might it make sense to treat them similarly? It might. Justice Kennedy's majority opinion in *Arkansas Educational Television Commission v. Forbes*[74] paves the way toward this conclusion. While that opinion perpetuated existing doctrinal confusion in some respects,[75] it provided some helpful guidelines as well. Kennedy never used the term "limited public forum" in this opinion, instead describing a non-public forum—by way of distinguishing it from a designated public forum—*as if it were* a limited forum.[76] His key statement, made after discussing some earlier precedents, was this:

> These cases illustrate the distinction between "general access," which indicates the property is a designated public forum, and "selective access," which indicates the property is a non-public forum. . . . [T]he government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, "obtain permission" to use it.[77]

The "non-public forum" label was thus correlated with "selective access," despite the facts that: (a) the non-public category was originally described as encompassing venues that were not intended as First Amendment fora at all,[78] and (b) selective access would seem to be an intrinsic feature of a limited forum.[79] Now that the Supreme Court has

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fourth, the "limited public forum."

71. *See* United States v. Kokinda, 497 U.S. 720, 730 (1990); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

72. *See Kokinda*, 497 U.S. at 730; *Perry*, 460 U.S. at 46.

73. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 (1992); Adderley v. Florida, 385 U.S. 39, 41–42 (1966).

74. 523 U.S. 666 (1998).

75. *See* Rohr, *supra* note 1, at 320–25.

76. *See id.* at 693 n.18; Rohr, *supra* note 1, at 327.

77. *Forbes*, 523 U.S. at 679 (citations omitted).

78. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983). Justice White, in *Perry Educucation Association*, introduced the third category—soon known as the non-public forum—as "[p]ublic property which is not by tradition or designation a forum for public communication." *Id.*

79. *See id.* at 46 n.7, 48.

repeatedly stated that both labels lead to the same judicial analysis,[80] whether the forum is closed to all (for expressive purposes) or open to some (on a selective basis with permission still required) the merger appears complete.

Given that the existence of a designated public forum has always been all about the government's intent to make it so,[81] this arguably makes sense; neither "no access for any speakers," nor "access for some speakers with permission required" is consistent with an intent to *open* the forum to speakers.[82] Justice Kennedy went on, in *Forbes*, to supply a policy reason for making "general" versus "selective" access the governing distinction.[83] By taking this approach, he wrote, "we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all."[84]

The "mystery of the limited public forum," of which I complained several years ago, is thus solved, albeit without the help of a clear explanation by the Supreme Court: Rather than being a sub-set of the designated public forum, as first appeared,[85] the limited public forum turns out to be a non-identical twin of the non-public forum.[86] But why continue to use two different labels?

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80. *See supra* text accompanying notes 31 and 34. The two-part test—reasonableness and the absence of viewpoint discrimination—linked, in *Summum* and *Martinez*, to the limited public forum is of course the same test that applied to non-public fora from the outset. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 679, 679 n.11 (2010); Pleasant Grove City v. Summum, 555 U.S. 460, 469–70 (2009).

81. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

82. *See Cornelius*, 473 U.S. at 802; *Perry Educ. Ass'n*, 460 U.S. at 52–53. This understanding is consistent with, and helps explain, this otherwise odd statement made by Justice O'Connor in her plurality opinion in *Kokinda*, referring to a post office sidewalk to which some speakers had been granted access: "Even conceding that the forum here has been dedicated to some First Amendment uses, and thus is not a purely nonpublic forum, under *Perry*, regulation . . . would still require application of the reasonableness test." *Kokinda*, 497 U.S. at 730.

83. *Forbes*, 523 U.S. at 680.

84. *Id.*

85. *See Cornelius*, 473 U.S. at 802; *Perry Educ. Ass'n* 460 U.S. at 46 n.7; Rohr, *supra* note 1, at 306. What appears to be Justice White's definition of a limited public forum, presented for the first time in *Perry Educ. Ass'n*, was set forth in a footnote that sprang from his discussion of the category that soon came to be known as "the public forum created by government designation," thereby suggesting that "limited" was a subset of "designated." *Cornelius*, 473 U.S. at 802; *Perry Educ. Ass'n*, 460 U.S. at 46 n.7. *See also* this statement, in Chief Justice Rehnquist's majority opinion in *International Society for Krishna Consciousness, Inc.*: "The second category of public property is the designated public forum, whether of a limited or unlimited character . . . ." Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992).

86. Rohr, *supra* note 1, at 300.

VI. THE RIGHT TERMINOLOGY

If the two categories were to be consolidated as one, what should that category be called? One could simply do what several courts have recently done—namely, to use one of the two terms and quickly add that it is sometimes called the other,[87] but that is an unsatisfying solution because, again, the two terms are really not synonymous.[88] Is there a better phrase that accurately includes: (a) government properties that are not open to any speakers and (b) those that are open only to some? Quite frankly, I cannot think of one.

But the phrase "non-public forum," while awkward and misleading from the very beginning,[89] *might* be serviceable—preferably with *two* hyphens—*i.e.*, "non-public-forum"—if understood as denoting that a government property, having been consistently off limits to all private expression, is not a "forum" at all.[90] And that *might* be expanded to include "selective-access" fora that, legally, do not trigger the higher levels of judicial scrutiny that apply in "traditional" public fora. The "limited public forum" label could thus be eliminated. Limited and non-public fora would therefore be lumped together, and defined simply by what they are not.

Meanwhile, at the other end of the spectrum, are there really two categories of general-access fora? Specifically, does the designated public forum—consistently acknowledged by the Supreme Court, and on every court's list of categories—truly exist? One can argue that, logically, it does not, because it is defined as a government property that has been intentionally opened for general access by private speakers;[91] as long as that

87. Milestone v. City of Monroe, 665 F.3d 774, 783 n.3 (7th Cir. 2011); *see also* NAACP v. City of Phila., 834 F.3d 435, 441 (3d Cir. 2016); Powell v. Noble, 798 F.3d 690, 699 (8th Cir. 2015); Victory Through Jesus Sports Ministry Found. v. Lee's Summit R-7 Sch. Dist., 640 F.3d 329, 334 (8th Cir. 2011).

88. *See supra* text accompanying notes 71–73.

89. *See* Rohr, *supra* note 1, at 302. As I observed in my earlier article: "Because we are dealing, by definition, with public—and not private—property, the term ['non-public forum'] is something of a misnomer. It would be more accurate to speak, in such a case, of a 'public non-forum' . . . ." *Id.* at 302 n.10.

90. *See Powell*, 798 F.3d at 699; *Milestone*, 665 F.3d at 783 n.3. Concededly, I cannot confidently cite any judicial decision as clearly supporting this understanding. Note, too, that Justice Kennedy, in his majority opinion in the *Forbes* case, cryptically introduced the third forum category thusly: "Other government properties are either non-public fora or not fora at all." Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998). That statement was quoted, still without any explanation, in Kaahumanu v. Hawaii, 682 F.3d 789, 800 (9th Cir. 2012). I point this out simply to show that the concept of "not [a] forum at all" has been taken seriously—but (a) apparently conceived of as something other than a non-public forum, yet (b) never explained.

91. *See Forbes*, 523 U.S. at 679.

description fits the property, speech restrictions are subject to strict or intermediate judicial scrutiny.[92] But the government actor in charge of the property is not obligated to maintain its general-access policy, and as soon as it denies a speaker access to the property, has it not switched to a policy of selective access, thereby throwing the venue into the non-public forum category?[93] The designated forum would therefore seem capable of existing, but only as a utopian place in which, by definition, no occasion for litigation would ever arise; conflict immediately ends the property's "designated" status. The category could therefore be eliminated.

But, notwithstanding this logic, courts—other than the Supreme Court—*have* held government properties to be designated public fora.[94] The unspoken explanation of such a holding, which would seem necessary to render it consistent with prevailing forum theory, is that the government's primary intention is to allow general access to speakers, the exclusion of the challenger thereby being viewed as somehow aberrational.[95]

Could the "traditional" and "designated" categories be usefully combined into one? In fact, that consolidation was suggested by Justice White's initial identification of (what quickly came to be known as) the traditional public forum, back in 1983 in *Perry*; that "first" category was described as comprising "places which by long tradition or by government fiat have been devoted to assembly and debate . . . ."[96] The coupling of tradition and government fiat, however, did not last long; "traditional" public fora have been defined largely by historical practice,[97] without regard for the

92. *See supra* note 9.

93. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 825 (1985) (Blackmun, J., dissenting). My argument corresponds to that put forth by Justice Blackmun, joined by Justice Brennan, in his dissenting opinion—which was highly critical of the Court's emerging public forum rules—in *Cornelius*. *Id.* Notably, Blackmun, throughout this opinion, referred to the "limited public forum" rather than the "designated public forum," clearly viewing a "limited" forum as presumptively open to speakers. *See id.*

94. Sons of Confederate Veterans, Va. Div. v. City of Lexington, 722 F.3d 224, 230 (4th Cir. 2013); *Doe*, 667 F.3d at 1128–30; Bloedorn v. Grube, 631 F.3d 1218, 1234 (11th Cir. 2011); Bowman v. White, 444 F.3d 967, 979 (8th Cir. 2006); Justice for All v. Faulkner, 410 F.3d 760, 769 (5th Cir. 2005); Giebel v. Sylvester, 244 F.3d 1182, 1188 (9th Cir. 2001).

95. In the words of Professor Post, criticizing *Cornelius* in 1987: "There is only one way out of this vicious circle, and it is not very satisfactory. It would require the Court to distinguish between the intent to include the class of speakers or subjects of which the plaintiff is the representative, and the intent to exclude the plaintiff." Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1757 (1987).

96. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

97. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678–79 (1992). "These precedents foreclose the conclusion that airport terminals are public

government's intent, while "government fiat" seems pretty clearly to correlate with the governmental intent needed to establish a "designated" forum. But the fact that the two concepts did make their debut in tandem supports the possibility of reuniting them, under the singular heading of the "open" public forum—the openness of which could be established either by historical practice or governmental intent. But the availability—at least in theory—of two separate paths to openness leads to the conclusion that the two separate labels—"traditional" and "designated"—might as well be retained.

VII. CONCLUSION

So how many public forum categories do we really have? From a practical standpoint, there are really only two options: Either the forum is open—by virtue of either tradition or designation—in which case the higher levels of judicial scrutiny apply, or it is not, in which case the more deferential judicial analysis is employed.[98] But four labels remain in use, although the growing and prevailing view seems to be that two of those labels—"limited" and "non"—are now synonymous. It truly appeared, two or three decades ago, that the "limited" forum was a viable, non-redundant category of its own, but there has been scant support for that understanding in recent years. For the sake of clarity, that label should now be abandoned, preferably via a clear and explicit judicial pronouncement that will make speculative queries such as this little essay unnecessary.

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fora. . . . [T]he tradition of airport activity does not demonstrate that airports have historically been made available for speech activity." *Id.* at 680.

The standard pronouncement is that streets, sidewalks, and parks are traditional public fora, *e.g.*, United States v. Kokinda, 497 U.S. 720, 726–27 (1990), and the implication appears to be that those are the *only* properties worthy of inclusion in the category, but courts have at times stretched to pin the "traditional" label on other kinds of government property that are seen as sufficiently similar to streets, sidewalks, and parks. *E.g.*, ACLU of Nev. v. City of Las Vegas, 333 F.3d 1092, 1099, 1106 (9th Cir. 2003) (publicly-owned pedestrian mall); Pouillon v. City of Owosso, 206 F.3d 711, 715–17 (6th Cir. 2000) (city hall steps).

98. *Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. at 678–79 (1992); *Kokinda*, 497 U.S. at 726; *Perry Educ. Ass'n*, 460 U.S. at 45–46.

FROM STREET PHOTOGRAPHY TO FACE RECOGNITION: DISTINGUISHING BETWEEN THE RIGHT TO BE SEEN AND THE RIGHT TO BE RECOGNIZED

CLAUDIA CUADOR*

I. INTRODUCTION

"'Critical eyes are sizing you up right now. Keep your face fresh, firm, fit,' threatened the manufacturers of Williams' Shaving Cream."[1] Such holds true in the streets of today's society, as technology advances with incredible speed.[2] A recent article emphasizes the danger of a new Russian mobile application, FindFace, which allows a stranger to snap a photo of another and, within seconds, learn of that person's intimate information.[3] A

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1. SAMANTHA BARBAS, LAWS OF IMAGE: PRIVACY AND PUBLICITY IN AMERICA 91 (2015).

2. *See* Ben Guarino, *Russia's New FindFace App Identifies Strangers in a Crowd with 70 Percent Accuracy*, WASH. POST (May 18, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/05/18/russias-new-findface-app-identifies-strangers-in-a-crowd-with-70-percent-accuracy/.

3. *Id.* (The Russian identification application, FindFace, was created by Alexander Kabakov, 29, and Artem Kukharenko, 26, in February of 2016); Shaun Walker, *Face Recognition App Taking Russia by Storm May Bring End to Public Anonymity*,

series of photographs by Russian photographer, Yegor Tsvetkov, titled "'Your Face is Big Data' . . . shows how powerful facial recognition software has become; . . . a complete stranger can find you [with] the click of a button."[4] Even more alarming than the danger posed by the application is the creators' inability to control its use.[5]

Jurisprudence revolving around the topic of invasion of privacy in public spaces generally recognizes that, under most circumstances, one who reveals himself in public does not hold a reasonable expectation of privacy.[6] This reasoning is applied to general surveillance systems, such as videotaping; and artistic mediums, such as street photography.[7] "But facial recognition [is] more fraught because, like DNA sequencing, it measures and

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GUARDIAN (May 17, 2016, 4:39 AM), https://www.theguardian.com/technology/2016/may/17/findface-face-recognition-app-end-public-anonymity-vkontakte.

> [FindFace] works by comparing photographs to profile pictures on Vkontakte, a social network popular in Russia and the former Soviet Union, with more than [two hundred] million accounts. . . . In the short time since the launch, FindFace has amassed 500,000 users and processed nearly [three million] searches, according to its founders . . . .

Walker, *supra*.

> [T]he Russian developers say their facial recognition software could be used by authorities to fight crime—and, just as easily, score dates with attractive strangers. . . . FindFace can identify random passersby with about [seventy] percent accuracy, given two conditions: You need to snap a photo of them, and they need to have a social media profile.

Guarino, *supra* note 2.

4. Elena Cresci, *Russian Photographer Identifies Strangers with Facial Recognition App*, GUARDIAN (Apr. 14, 2016, 10:27 AM), https://www.theguardian.com/world/2016/apr/14/russian-photographer-yegor-tsvetkov-identifies-strangers-facial-recognition-app ("One girl in the project texted [Yegor Tsvetkov] after the publication and said that it was a bad feeling when she saw herself . . . but she fully understood [his] idea.").

5. *See* Alex Heath, *This Russian Technology Can Identify You with Just a Picture of Your Face*, BUS. INSIDER (June 21, 2016, 5:33 PM), http://www.businessinsider.com/findface-facial-recognition-can-identify-you-with-just-a-picture-of-your-face-2016-6 ("'We see that the advantages for society from our technology are more helpful [than harmful],' said Kabakov. 'We can[not] stop this process, but we should make it public.'") (alteration in original).

6. Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1003–04 (1995). "Intrusion is limited in some jurisdictions by the requirement of a physical trespass, and in virtually all jurisdictions by the rule that no intrusion can occur in a public place." *Id.* (footnote omitted).

7. *See* Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World That Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1377, 1384 (2004); Nancy Danforth Zeronda, Note, *Street Shootings: Covert Photography and Public Privacy*, 63 VAND. L. REV. 1131, 1133, 1135 (2010).

records biological patterns unique to individuals."[8] When asked about invasion of privacy and loss of anonymity concerns the application's creator, Alexander Kabakov, responded: "A person should understand that, in the modern world, he is under the spotlight of technology. You just have to live with that."[9]

The courts have addressed street photography—the capturing of another's image in public spaces—as a generally permitted intrusion.[10] Part of the reasoning behind the legality of street photography is that the photographer is merely sharing information—an image—that was already in plain sight.[11] Such interpretation lacks the presence of more recent technology and needs revision.[12] Face recognition not only shares an already visible image but also uses that image to share what is not in plain sight—personal information.[13] Mobile applications that use facial recognition technology, such as FindFace, potentially offer strangers an advanced platform to begin persecution:

> Kabakov says the app[lication] could revolutioni[z]e dating: "If you see someone you like, you can photograph them, find their identity, and then send them a friend request." The interaction [does not] always have to involve the rather creepy opening gambit of clandestine street photography, he added: "It also looks for similar people. So you could just upload a photo of a movie star you like, or your ex[-girlfriend], and then find [ten] girls who look similar to her and send them messages."[14]

"In [the] future, the designers imagine a world where people walking past you on the street could find your social network profile by sneaking a photograph of you, and shops, advertisers, and the police could pick your face out of crowds and track you down via social networks."[15] Today, this

8. Natasha Singer, *When No One Is Just a Face in the Crowd*, N.Y. TIMES (Feb. 1, 2014), http://www.nytimes.com/2014/02/02/technology/when-no-one-is-just-a-face-in-the-crowd.html.

9. Walker, *supra* note 3.

10. Zeronda, *supra* note 7, at 1131 n.1, 1140.

11. Daily Times Democrat v. Graham, 162 So. 2d 474, 477–78 (Ala. 1964); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 538 (2006) ("This reasoning was based on the secrecy paradigm—that once something is disclosed to the public, it is no longer secret.").

12. *See* Derek J. Sarafa et al., *Use of Biometric Information as a Basis for Civil Liability*, LAW360 (May 20, 2015, 10:14 AM), http://www.law360.com/articles/654052/use-of-biometric-information-as-a-basis-for-civil-liability.

13. *See* Walker, *supra* note 3.

14. *Id.*

15. *Id.*

invasive technology is available to everyone, not just law enforcement agencies, and thus requires regulation.[16] Facial recognition technology must be regulated for one fundamental distinction, the right to be seen versus the right to be recognized.[17] While one cannot reasonably expect to not be seen in public, it is likely that a majority of people do in fact have a reasonable expectation of not being recognized.[18] As such, the United States must amend its current laws to reflect the growing danger of extreme invasion and severe crime.[19]

Part II begins by providing a brief legal history of street photography, addressing the issue of invasion of privacy.[20] Part III continues with a discussion of the complex relationship between privacy rights and freedom of speech, focusing on the paradox of invasion of privacy in public spaces.[21] Part IV describes face recognition—highlighting the scarce attention it receives in the United States and the risks resulting from the inaccuracy of face recognition technology.[22] Part V, using street photography case law as a starting point, proposes a line of reasoning that will help guide litigation dealing with the misuse of facial recognition technology in an effort to protect citizens from invasion of privacy.[23] Finally, Part VI concludes by urging legal reform in order to arrive at a more encompassing scheme of privacy laws.[24]

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16. Sarafa et al., *supra* note 12 ("Despite the proliferation of the use of biometrics, there are very few state statutes—and no federal statutes—that create civil remedies based on the capture and disclosure of biometric data by private businesses.").

17. *See* Russell Brandon, *Someone's Trying to Gut America's Strongest Biometric Privacy Law*, VERGE (May 27, 2016, 8:27 AM), http://www.theverge.com/2016/5/27/11794512/facial-recognition-law-illinois-facebook-google-snapchat.

18. *See* Solove, *supra* note 11, at 496.

19. *See* Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1007 (N.H. 2003).

> Public concern about stalking has compelled all fifty States to pass some form of legislation criminalizing stalking. Approximately one million women and 371,000 men are stalked annually in the United States. Stalking is a crime that causes serious psychological harm to the victims, and often results in the victim experiencing post-traumatic stress disorder, anxiety, sleeplessness, and sometimes, suicidal ideations. Not only is stalking itself a crime, but it can lead to more violent crimes, including assault, rape, or homicide.

Id. (citations omitted).

20. *See infra* Part II.

21. *See infra* Part III.

22. *See infra* Part IV.

23. *See infra* Part V.

24. *See infra* Part VI.

II. STREET PHOTOGRAPHY AND UNWANTED NOTORIETY

In 1890, *The Right to Privacy*, a law review article by Supreme Court Justice Louis Brandeis and Professor Samuel Warren, revolutionized privacy law.[25] In the article, the law is recognized to be an ever-evolving product of society's "[p]olitical, social, and economic changes [which] entail the recognition of new rights."[26] They remind us that "common law [too], in its eternal youth, grows to meet the demands of society."[27] The piece was inspired, in part, by new privacy concerns sparked by developments in photographic technology:

> "Prior to 1884, cameras were large, expensive, . . . minimally portable, and they required subjects to sit still for extended periods of time to have their photograph taken." "In 1884, the Eastman Kodak Company introduced the *snap camera*, an inexpensive, handheld camera that could take instantaneous photographs of people in public." "With the [arrival] of this technology and the growing popularity of print media, Warren and Brandeis . . . [anticipated that covertly] taken photographs would threaten the 'right to be let alone' . . . ."[28]

Just as developments in photographic technology stimulated groundbreaking scholarly discussion regarding the laws of privacy, facial recognition technology is doing the same in the twentieth century.[29]

"Street photography is a tradition nearly as old as photography itself."[30] In the early 1880s, as cameras and processing techniques became "portable and practical enough to leave the confines of the studio, . . . photographers began documenting the world around them" and unlocking new levels of privacy concerns.[31] In particular, they photographed "urban areas where life moved quickly and the urge to record and document change and progress was instinctive."[32] In order to fully comprehend the connection

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25. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); Zeronda, *supra* note 7, at 1135.

26. Warren & Brandeis, *supra* note 25, at 193.

27. *Id.*

28. Zeronda, *supra* note 7, at 1135; *see also* Warren & Brandeis, *supra* note 25, at 193.

29. *See* Warren & Brandeis, *supra* note 25, at 196.

30. Emily Airton, *London Street Photography Festival*, UNDO.NET (June 30, 2011), http://1995-2015.undo.net/it/mostra/122873.

31. *Id.*; *see also* Zeronda, *supra* note 7, at 1135–37.

32. Airton, *supra* note 30; *see also* Charles Hagen, *What Walker Evans Saw on His Subway Rides*, N.Y. TIMES (Dec. 31, 1991),

between street photography and the law, and for purposes of clarity throughout this piece, it is important to offer a clear definition.[33] According to the London Street Photography Festival, "[s]treet photography captures people and places within the public domain."[34] More specifically, it is an "un-posed, un-staged photography [that] captures, explores, or questions contemporary society and the relationships between individuals and their surroundings."[35] The essential element in this method of photographing is that the scene being captured is unplanned, and, consequentially, un-consented.[36] Thus, with the advent of street photography, the twentieth century saw the creation of the "*law[s] of public image*, and the phenomenon of *personal image litigation*," a set of cases that address the issue of being photographed, and, more importantly, the use of those photographs without one's consent.[37]

Walker Evans' renowned *Subway Passengers* photography series remains one of the earliest examples of street photography during the Great Depression era.[38] Using a hidden camera, Evans snapped photos of unsuspecting passengers traveling around New York City: "'He had the camera around his neck, resting on his chest, and a long cable going down his sleeve to his hand,' said Helen Levitt, [ninety-one], . . . who accompanied Evans as he took many of the subway portraits. 'So he just pointed his chest at whomever he wanted to shoot . . . .'"[39] The series of photos contains people of both genders, all races, and all ages.[40] Particularly, in one of the portraits, an approximately seven-year-old girl is photographed.[41] None of the subjects were asked for permission before having their photo taken,

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http://www.nytimes.com/1991/12/31/arts/review-photography-what-walker-evans-saw-on-his-subway-rides.html.

33. *See* Airton, *supra* note 30; Zeronda, *supra* note 7, at 1131 n.1, 1133.

34. Airton, *supra* note 30.

35. *Id.*

36. *See id.*; Philip Gefter, *Street Photography: A Right or Invasion?*, N.Y. TIMES (Mar. 17, 2006), http://www.nytimes.com/2006/03/17/arts/street-photography-a-right-or-invasion.html?_r=0; Zeronda, *supra* note 7, at 1132, 1140.

37. BARBAS, *supra* note 1, at 1–2, 4, 190–91 ("The laws of image protect the right to control one's public image, to defend one's image, and to feel good about one's image and public presentation of self.").

38. *See* Gefter, *supra* note 36; Hagen, *supra* note 32; Sewell Chan, *Want Shots Like This? Get a Permit*, N.Y. TIMES (Jan. 7, 2005), http://www.nytimes.com/2005/01/07/nyregion/want-shots-like-this-get-a-permit.html.

39. Chan, *supra* note 38.

40. Hagen, *supra* note 32; *see also The Streets of New York: American Photographs from the Collection, 1938-1958*, NAT'L GALLERY ART, http://www.nga.gov/content/ngaweb/features/slideshows/the-streets-of-new-york-american-photographs-from-the-collectio.html (last visited Apr. 9, 2017).

41. *See* Hagen, *supra* note 32; *The Streets of New York: American Photographs from the Collection, 1938-1958*, *supra* note 40.

manipulated, or sold.[42] Moreover, no personal information of the subjects was presented.[43]

Walker Evans influenced many other artists to record and document America in similar ways.[44] Andrew Bush's *Vector Portraits* series, from 1989 through 1996, mimics the notion behind *Subway Passengers*.[45] For about seven years, Bush would photograph people driving on the highway.[46] In an interview regarding his photographs, he described the series as "pictures of people as they were driving on freeways, . . . the notion of making a very still image of a person moving at a great velocity, . . . [the] notion of movement with a direction."[47] Bush created a moving tripod out of his car, "[w]here [he] attached a camera to . . . the passenger side and fixed a light so [he] could drive and look through [his] window and get an idea of what the framing . . . was."[48] According to Bush, several of his subjects, upon noticing that their picture had been taken, chased him, "wanting to know whether or not [he] was a detective involved with their divorce."[49] In this series, like with most street photography, the subjects were left unidentified.[50]

Finally, Philip-Lorca DiCorcia, recognized as one of the most influential and innovative photographers working today,[51] "set up his camera on a tripod in Times Square, attached strobe lights to scaffolding across the

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42. *See* Chan, *supra* note 38; Hagen, *supra* note 32; *The Streets of New York: American Photographs from the Collection, 1938-1958*, *supra* note 40.

43. *See* Chan, *supra* note 38; *The Streets of New York: American Photographs from the Collection, 1938-1958*, *supra* note 40.

44. *See* Chan, *supra* note 38; Hagen, *supra* note 32.

45. Charles Hagen, *Review/Photography; People in Their Cars, Driving Along*, N.Y. TIMES (Mar. 27, 1992), http://www.nytimes.com/1992/03/27/news/review-photography-people-in-their-cars-driving-along.html; *see also* Gefter, *supra* note 36.

46. Hagen, *supra* note 45.

47. *See* VernissageTV, *Andrew Bush: Vector Portraits. Car Fetish, Museum Tinguely* at 00:38-00:59, YOUTUBE (July 21, 2011), http://www.youtube.com/watch?v=09as_OM5i-s.

48. *Id.* at 1:37–1:53.

49. *Id.* at 2:44–2:52.

50. *See* Airton, *supra* note 30; Chan, *supra* note 38; Hagen, *supra* note 45 (Although the photographs do not identify the subjects by their personal names or addresses, Bush recorded "where and when each photograph was taken, but also how fast the car was going, what the weather was like and so on.").

51. *See* U.S. CONST. amend. IV; Nussenzweig v. DiCorcia, No. 108446/05, 2006 WL 304832, at *3 (N.Y. Sup. Ct. Feb. 8, 2006)

> Defendant DiCorcia is a professional photographer for over [twenty-five] years. His body of work has drawn international artistic acclaim and has been exhibited in fine art museums around the world, including but not limited to, the Museum of Modern Art . . . , The Whitney Museum of Art . . . , the Museo National Centrio de Arte Reina Sofia . . . , and Art Space Gizo . . . .

Id.

street, and in the time-honored tradition of street photography, took a random series of pictures of strangers passing under his lights."[52] "The project continued for two years, [concluding] in an exhibition of a [series of seventeen] photographs called *Heads* at the Pace/MacGill Gallery in New York City."[53] DiCorcia was taken to court years later, after one of the subjects included in the series filed a lawsuit claiming that his right to privacy had been violated.[54] Surely, it must have been striking to see his image printed in the catalogue, seeing as it was more than just a regular photograph: "They are . . . more intimate, the paradox of standing farther away being enhanced intimacy."[55] Indeed, Mr. Erno Nussenzweig, after seeing his photograph in a copy of the exhibition catalogue, was horrified to discover that his image had been commodified, exhibited, and sold without his knowledge.[56] In *Nussenzweig v. DiCorcia*,[57] the plaintiff filed a complaint arguing that not only was DiCorcia's process of making art, and the subsequent exhibition and sale of it, a violation of his personal right to privacy, but that these actions also violated his religious beliefs.[58] The plaintiff is an Orthodox Hasidic Jew, and for him, the dissemination of his representation violated Orthodox religious views, namely the second commandment prohibition of graven images.[59] Nussenzweig considered DiCorcia's photograph to be a type of graven image, and such a thing could have profound spiritual consequences—all the more so because it was

52. Gefter, *supra* note 36.

53. *Id.*; *see also Nussenzweig*, 2006 WL 304832, at *3 (None of the seventeen subjects included in *Heads* consented to having their photographs taken or exhibited.) "Pace [Gallery] is a photographic and picture gallery that exhibits and sells photographic art . . . . It considers itself one of the nation's leading art galleries specializing in art photography." *Nussenzweig*, 2006 WL 304832, at *3.

54. *Id.* at *1.

55. Michael Kimmelman, *Art in Review; Philip-Lorca diCorcia — 'Heads'*, N.Y. TIMES (Sept. 14, 2001), http://www.nytimes.com/2001/09/14/arts/art-in-review-philip-lorca-dicorcia-heads.html; *see Nussenzweig*, 2006 WL 304832, at *3.

56. *Nussenzweig*, 2006 WL 304832, at *3–4; BARBAS, *supra* note 1, at 190 ("Public figures had no privacy, said some courts, having *waived* it by pursuing a career in the spotlight. Celebrities assumed the risk of having their privacy invaded when they embarked on a path towards public recognition and fame."); Gefter, *supra* note 36 (It is important to note, for purposes of the law, that Nussenzweig was not famous, or in any way a public figure.).

57. No. 108446/05, 2006 WL 304832 (N.Y. Sup. Ct. Feb. 8, 2006).

58. *Id.* at *3–4; Gefter, *supra* note 36 ("The suit sought an injunction to halt sales and publication of the photograph, as well as $500,000 in compensatory damages and $1.5 million in punitive damages."); *see also* U.S. CONST. amend. IV.

59. *Nussenzweig*, 2006 WL 304832, at *4; *Exodus* 20:4–5 (King James) ("Thou shalt not make unto thee any graven image, or [a] likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth. Thou shalt not bow down thyself to them, or serve them . . . .").

reproduced countless times.[60] According to the Supreme Court of New York's ruling, laws were in place to address Nussenzweig's claim that DiCorcia had violated his right to privacy.[61] As "[r]ight of privacy laws are intended to defend the average person from unwanted public exposure and the potential emotional damage thereby inflected,"[62] it appears that the court would have ruled in favor of the plaintiff, for he certainly suffered from unwanted exposure that resulted in emotional harm and psychological distress.[63] But the court did not.[64] Instead, on February 8, 2006, the court entered summary judgment dismissing Nussenzweig's complaint and articulated the tension that exists between experiencing a violation of one's right to privacy in the legal sense, and experiencing such a violation in the personal sense.[65] Moreover, it rejected the claim on First Amendment grounds that the possibility of such a photograph is simply "the price every person must be prepared to pay for . . . [in] a society in which information and opinion flow freely."[66] The court expressed its sympathy for the plaintiff, but dismissed his case nonetheless:

> Clearly, [the] plaintiff finds the use of the photograph bearing his likeness deeply and spiritually offensive. The sincerity of his beliefs is not questioned by defendants or this court. While sensitive to plaintiff's distress, it is not redressable in the courts of civil law. In this regard, the courts have uniformly upheld Constitutional [First] Amendment protections, even in the face of a deeply offensive use of someone's likeness.[67]

III. PRIVACY AND LOCATION

"[C]ourts often view privacy as a binary status—information is either completely private or completely public," with much middle ground to

60. *Nussenzweig*, 2006 WL 304832, at *3–4 ("A catalogue was published to coincide with the exhibition and the catalogue contained . . . the photograph of plaintiff. According to defendant, a *substantial* number of catalogues were distributed to the public during the period of September through October 2001.").

61. *Id.* at *5; *see also* U.S. CONST. amend. IV.

62. *Id.*

63. *See id.* at *4–5; Daily Times Democrat v. Graham, 162 So. 2d 474, 476 (Ala. 1964) (discussing "[e]vidence offered by [subject of an unconsented photograph] during the trial tended to show that the [plaintiff], as a result of the publication of the picture, became embarrassed, self-conscious, upset, and was known to cry on occasions.").

64. *Nussenzweig*, 2006 WL 304832, at *8.

65. *Id.*; *see also* U.S. CONST. amend. IV.

66. *Id.*; *see also* U.S. CONST. amend. I.

67. *Id.*

be desired.[68] Ironically, in *Katz v. United States*,[69] the Supreme Court of the United States discussed that "the Fourth Amendment protects people, not places."[70] Later in the discussion, however, it reiterated the common view that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."[71] An article published by Professor of Law Daniel J. Solove attempts to reconcile these complex notions of privacy, acknowledging its elusive role in the legal sphere, stating that "[p]rivacy is far too vague a concept to guide adjudication and lawmaking, as abstract incantations of the importance of *privacy* do not fare well when pitted against more concretely stated countervailing interests."[72] In *Nussenzweig*, the laws of invasion of privacy proved to be deficient in protecting citizens from inquisitive lenses in public spaces.[73]

Prima facie, the invasion caused by street photography seems instinctually threatening to our notions of privacy.[74] Individuals are photographed and then exhibited in famous museums, national media, and circulated in catalogues all around the world without their consent.[75] Their images bring fortune to the photographer, for these photographs are often sold for thousands of dollars to the interested consumer, and today, they are further published on the Internet for all to see—posing new privacy concerns altogether.[76] The ruling in *Nussenzweig* begs the public to assuage their

68. Solove, *supra* note 11, at 540; *see also* Katz v. United States, 389 U.S. 347, 351 (1967); McClurg, *supra* note 6, at 1003–04, 1025.

69. 389 U.S. 347 (1967).

70. *Id.* at 351; *see also* U.S. CONST. amend. IV.

71. *Katz*, 389 U.S. at 351; *see also* U.S. CONST. amend. IV.

72. Solove, *supra* note 11, at 478; *see also* Daily Times Democrat v. Graham, 162 So. 2d 474, 476 (Ala. 1964); Zeronda, *supra* note 7, at 1156 (This notion of freedom of expression as being upheld over a person's right to privacy is seen uniformly throughout case law).

> There is a fertile medium in this field of torts for the production of conflicts between the right of the individual to be let alone, and the right of the public to know—the latter concept being crystalized in our age old concept of freedom of speech and of the press. The right of action for invasion of privacy has had to give way to the interest of the public to be informed . . . .

Daily Times Democrat, 162 So. 2d at 476; *Nussenzweig*, 2006 WL 304832, at *8 ("Plaintiff argues that the use of [his] photograph interferes with his constitutional right to practice his religion. The free exercise clause, however, restricts state action.").

73. *See Nussenzweig*, 2006 WL 304832, at *8.

74. *See* McClurg, *supra* note 6, at 1041; Hagen, *supra* note 45 ("One driver was so incensed that he chased Mr. Bush for miles, and when he caught up with him at a stoplight, grabbed the keys of his car and demanded that he hand over the film.").

75. *See Nussenzweig*, 2006 WL 304832, at *3; Gefter, *supra* note 36.

76. *Nussenzweig*, 2006 WL 304832, at *4 ("[The] Pace [Gallery] sold all [ten] edition prints of the [plaintiff's] photograph, which were priced between $20,000 and $30,000 a piece."); BARBAS, *supra* note 1, at 210 ("The permanence of online information—the inability of online material to ever be fully deleted—is said to pose a profound threat to an

intuitions and accept an undoubtedly undesirable outcome, as the court emphasizes that this case is just one of many "examples illustra[ting] the extent to which the constitutional exceptions to privacy will be upheld—notwithstanding that the speech or art may have unintended, devastating consequences on the subject, or may even be repugnant."[77] Currently, the law addresses surveillance but generally does so by focusing on where surveillance takes place, rather than on the problematic effects it has on its subjects.[78] Solove discusses the privacy dilemma when the debate involves location—i.e., private versus public areas—because, "for the tort of public disclosure, 'there is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public.'"[79]

Such seems to be the case in the aforementioned instances of street photography: All subjects were captured in an already public area, and, thus, because there was no extra personal information added to the series of photos, the artists released no *new* information:

> On the public street, or in any other public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description of a public sight which anyone present would be free to see.[80]

However, the issue is not so black and white and fails to account for the broader truth.[81] Once a photograph is made public, it is made a permanent record, and, thus, duplicates the impact that it has on the victim.[82] To hold that nothing new is disclosed when a photograph is disseminated is a

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important aspect of our image rights: our *right to be forgotten*.") (emphasis added); Brian Fung, *You Could Be in This FBI Facial-Recognition System and Not Even Know It*, WASH. POST (June 16, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/06/16/you-could-be-in-this-fbi-facial-recognition-system-and-not-even-know-it/ (explaining that not surprisingly, Americans are highly concerned about who has access to their personal information and the kinds of decisions that are made about them with that information). "[People do not] expect that their faces will become part of a permanent digital line-up." Fung, *supra*.

77. *Nussenzweig*, 2006 WL 304832, at *8.

78. *See* Solove, *supra* note 11, at 549 ("The harm, then, is an impingement on the victim's freedom in the authorship of [his or] her self-narrative, not merely her loss of profits.").

79. *Id.* at 540 (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (AM. LAW INST. 1977)).

80. Daily Times Democrat v. Graham, 162 So. 2d 474, 478 (Ala. 1964).

81. *See* McClurg, *supra* note 6, at 1042.

82. *Id.*

misstatement.[83] Each series of photographs discussed above created a compilation of information.[84] Although each subject was captured in a public place, by making his or her image part of a collage intended for publication, each subject suffered from exposure to increased accessibility.[85] Solove recommends considering the extent to which the information is made more accessible:

> In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, the Supreme Court recognized the problem of increased accessibility. . . . In addition to concluding that there was a difference between scattered pieces of information and a fully assembled dossier, the Court recognized that "there is a vast difference between the public records that might be found after a diligent search of courthouse files . . . and a computerized summary located in a single clearinghouse of information."[86]

The notion that "visual observation is not a search because the eyes cannot be guilty of trespass," is devastating to our anonymity.[87] Fortunately, in some narrow instances, courts have reconciled the holding of a reasonable expectation of privacy while being physically present in a public space:

> [I]n *Nader v. General Motors Corp.*, Ralph Nader [claimed] that General Motors' automobiles were unsafe. General Motors [then] undertook a massive investigation seeking information discrediting Nader. Among other things, General Motors wiretapped his telephone [conversations] and placed him under extensive surveillance while in public. The court recognized that certain kinds of public surveillance might amount to an invasion of privacy; although observation "in a public place does not amount to an invasion of . . . privacy," in certain instances, "surveillance may [also] be so *overzealous* as to render it actionable." The court noted: "A person does not automatically make public everything he does merely by being in a public place, and the mere fact that

83. *Id.*

84. *See* Nussenzweig v. DiCorcia, No. 108446/05, 2006 WL 304832, at *3–8 (N.Y. Sup. Ct. Feb. 8, 2006); *The Streets of New York: American Photographs from the Collection, 1938-1958*, *supra* note 42; VernissageTV, *supra* note 47, at 1:00.

85. *See Nussenzweig*, 2006 WL 304832, at *3.

86. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 764 (1989); Solove, *supra* note 11, at 541.

87. *See* Susan McCoy, Comment, *O'Big Brother Where Art Thou?: The Constitutional Use of Facial-Recognition Technology*, 20 J. MARSHALL J. COMPUTER & INFO. L. 471, 481 (2002).

> Nader was in a bank did not give anyone the right to try to discover the amount of money he was withdrawing."[88]

Therefore, it is clear that although the law focuses on whether surveillance occurs in a public or private place, surveillance may be harmful in all settings, not just private.[89] In Bush's *Vector Portraits*, it is not so obvious that the photographs captured people in an evidently public space.[90] In fact, all of the subjects were within the confines of their automobiles, and "[n]ot surprisingly, some people [felt] threatened by this invasion of the *semipublic-semiprivate* space of their cars."[91] In 1985, *United States v. Karo*,[92] the Supreme Court of the United States compared invasion of privacy as it applied to private and public places: the home versus an automobile.[93] While the Court held that a tracking device placed inside a person's home violated the Fourth Amendment, it looked to another case by the Supreme Court of the United States in which the police placed an electronic tracking device was placed in the plaintiff's car to track the location of the vehicle.[94] The Court concluded that the Fourth Amendment did not apply to the automobile because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy," since it, "could have been observed by the naked eye."[95] Despite this holding and the fact that each of the *Vector Portraits* were taken in the streets of Los Angeles, California, the notion of a person's car as semipublic-semiprivate property should hold true.[96] Like a house—the ultimate symbol of private property—an automobile should also be considered private property in which one holds a reasonable expectation of privacy.[97] It is easy

88. Solove, *supra* note 11, at 498; *see also Nader v. General Motors Corp.*, 255 N.E.2d 765, 771 (N.Y. 1970).

89. *See* Daily Times Democrat v. Graham, 162 So. 2d 474, 477–78 (Ala. 1964).

90. *See* Hagen, *supra* note 45.

91. *Id.* (emphasis added).

92. 468 U.S. 705 (1984).

93. *See id.* at 709–12.

94. *Id.* at 713 (citing to United States. v. Knotts, 460 U.S. 276 (1983)); *see also* U.S. CONST. amend. IV.

95. *Knotts*, 460 U.S. at 281; *Karo*, 468 U.S. at 714; *see also* U.S. CONST. amend. IV.

96. *See* California v. Carney, 471 U.S. 386, 392–94 (1985); *Knotts*, 460 U.S. at 281–82; Hagen, *supra* note 45.

97. *See Carney*, 471 U.S. at 390–94; *Karo*, 468 U.S. at 714, 734 ("[P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable."); Solove, *supra* note 11, at 496 ("[T]he Fourth Amendment draws a firm line at the entrance of the house.") (quoting Kyllo v. United States, 533 U.S. 27, 40 (2001)).

to imagine instances of people engaging in activities inside of their cars that they would otherwise not do in public spaces, such as apply make-up, talk loudly on the phone, play loud music, or pick their nose.[98] This phenomenon is due to the perception of being within a protected private area.[99] Certainly, this is not the case in public streets.[100] People walking in Times Square for instance, surrounded by others and unprotected by their car windows and doors, will likely not take part in these behaviors.[101] This is evident in the two series themselves.[102] Bush's automobile portraits seem instantly more humorous, since they depict people engaging in acts not normally seen in public.[103] DiCorcia's, on the other hand, is more solemn for people are aware of their surroundings and knowingly restrain their emotions and actions.[104] Furthermore, simply because the cars featured were in public places—i.e., a freeway—it should not be the case that the artist is authorized to take the photo.[105] One cannot say that just because a person's house is not located within a gated community others are free to take photos of the person through his or her window.[106] Here, it is important to reference Solove's distinction between exposure and disclosure:

> Exposure is related to disclosure in that concealed information is revealed to others, but the information is not revealing of anything we typically use to judge people's character. Unlike disclosure, exposure rarely reveals any significant *new information* that can be used in the assessment of a person's character or personality. Exposure creates injury because we have developed social

98. Solove, *supra* note 11, at 493–95.

99. *See Karo*, 468 U.S. at 735; *The Streets of New York: American Photographs from the Collection, 1938-1958*, *supra* note 42 ("Aware that people would inevitably compose themselves and alter their expressions if they knew they were being photographed, [Walker Evans] did not raise the camera to his eye to look through [his] viewfinder, nor did he adjust its focus or exposure, or use a flash.").

100. *See* Solove, *supra* note 11, at 493, 495–96, 498 (explaining that being aware of the general *possibility* of being watched, without certainty, can cause similar phenomenon. "[B]ased on Jeremy Bentham's 1791 architectural design for a prison called . . . Panopticon," the *Panoptic effect* describes this very scenario).

101. *See id.* at 493–95.

102. *See* Hagen, *supra* note 45; Kimmelman, *supra* note 55.

103. Hagen, *supra* note 45 ("A pouty blonde in a purple sweater . . . [a] beefy tattooed man in ridiculous sunglasses drives a canary-yellow car with delicate racing stripes.").

104. *See* Kimmelman, *supra* note 55.

105. *See* Hagen, *supra* note 45; McClurg, *supra* note 6, at 991, 995, 1043.

106. *See* United States v. Karo, 468 U.S. 705, 735 (1984); Hagen, *supra* note 45.

> practices to conceal aspects of life that we find animal-like or disgusting.[107]

This distinction is relevant to our photographers: In *Heads*, DiCorcia discloses information about people—namely their faces as they walk down the street—and in *Vector Portraits*, Bush oftentimes exposes the individuals by showing them in vulnerable situations.[108] One may argue that yawning, kissing, or singing in one's car is hardly animal-like or disgusting behavior and is surely different from nudity or sexual acts.[109] Nonetheless, these examples constitute a set of behaviors that we are often taught to avoid in public spaces.[110] It is likely that the man would have covered his mouth had he known he was being watched, that the couple would not have kissed so intimately, and that the girl would not have sang aloud.[111] The court supported this notion in *Daily Times Democrat v. Graham*,[112] in which air jets blew up a woman's dress while she was in a country fair, exposing her underwear.[113] At that very moment, a photographer for the local newspaper took her photograph, and the picture was printed on the front page of the paper.[114] The newspaper contended that the picture was taken in public, and that, accordingly, there was no privacy interest.[115] "However, the court concluded that the woman still had a right to be protected from 'an indecent and vulgar' violation of privacy . . . ."[116]

"Understood broadly, these actions are all forms of *intrusion*. Intrusion involves invasions or incursions into one's life. It disturbs the victim's daily . . . [life and] solitude . . . ."[117] As we have noted, courts throughout the United States have not held uniformly in regards to privacy laws.[118] In some cases, they have ruled solely based on the location of said invasion:

> [G]iven . . . the increasing presence of cameras in public, people were said to assume the risk of unwanted publicity whenever they went outside their homes. While a person might have a cause of

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107. Solove, *supra* note 11, at 536 (emphasis added).
108. *See* Hagen, *supra* note 45; Kimmelman, *supra* note 55.
109. Solove, *supra* note 11, at 536–37.
110. *See id.*; VernissageTV, *supra* note 47, at 2:20–2:53.
111. *See* Solove, *supra* note 11, at 495.
112. 162 So. 2d 474 (Ala. 1964).
113. *Id.* at 476.
114. *Id.*
115. *Id.* at 477–78.
116. Solove, *supra* note 11, at 538 (quoting *Daily Times Democrat*, 162 So. 2d at 478).
117. *Id.* at 553; *see also Daily Times Democrat*, 162 So. 2d at 476.
118. *See* Solove, *supra* note 11, at 498.

> action for intrusion upon seclusion if a paparazzo broke down his door to get a picture, an individual in a public place was fair game. The dominant rule was that 'photographers on public property may take pictures of anyone they want to, objection or not.'[119]

In other cases, the court ruled based on the harms that the said invasion caused to the victim.[120] Location should not, under any circumstances, be the sole factor in making a decision in cases dealing with privacy laws.[121] As the court in *Daily Times Democrat* stated, "a purely mechanical application of legal principles should not be permitted to create an illogical conclusion."[122] There are more significant factors involved—in particular, the injury resulting from the invasion and the revelation of new private information.[123] Especially today, as privacy seems to lose popularity with the development of more complex technological systems, anonymity must be safeguarded and privacy laws reviewed with modern glasses.[124]

IV. FACIAL RECOGNITION TECHNOLOGY

"Instantaneous photographs and newspaper enterprise[s] have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'" [125] Although Professor Warren and Justice Brandeis were referring to the advances in photographic technology, the same statement applies today, perhaps more appropriately than it did a century ago: "In the past hundred years, in increasing numbers, Americans have turned to the law to help them defend and control their public images."[126] Street photography announced its sequel, one that is more covert, more sophisticated, and vastly more intrusive: face recognition.[127] "Face recognition is a subset of biometrics, a

119. BARBAS, *supra* note 1, at 191.
120. *See Daily Times Democrat*, 162 So. 2d at 476, 478.
121. *See id.* at 478.
122. *Id.*
123. *See* Nussenzweig v. DiCorcia, No. 108446/05, 2006 WL 304832, at *8 (N.Y. Sup. Ct. Feb. 8, 2006).
124. *See* Walker, *supra* note 3.
125. Warren & Brandeis, *supra* note 25, at 195.
126. BARBAS, *supra* note 1, at 1; *see also* Warren & Brandeis, *supra* note 25, at 195.
127. *See* Blitz, *supra* note 7, at 1383; Natasha Singer, *Consumer Groups Back Out of Federal Talks on Face Recognition*, N.Y. TIMES: BITS (June 16, 2015, 12:10 AM), http://bits.blogs.nytimes.com/2015/06/16/consumer-groups-back-out-of-federal-talks-on-face-recognition/?_r=o.

technology that involves recording and analyzing people's unique physiological characteristics, like their fingerprint ridges or facial features, to learn or confirm their identities."[128] Today, people seek to defend and control not only their public images, but also the way in which their personal information is acquired and used.[129] Although "[f]acial recognition technology was first developed in the 1960s, . . . [it] only recently became accurate enough for widespread use."[130] Facial recognition has indeed become widespread—becoming one of the most powerful tracking tools in modern technology:

> Face recognition technology works by scanning a photo or video still of an unknown face and comparing its unique topography against a facial-scan database of people whose names are already known. Because the technology can be used covertly, civil liberties advocates say its popularization has the potential to undermine people's ability to conduct their personal business anonymously in . . . public spaces.[131]

The technology "*became famous* when it was [used as an experiment during] the 2001 Super Bowl in Tampa."[132] Facial recognition technology has the power to "link a person's online persona with his or her actual offline self at a specific public location," thus becoming a threat to our ability to

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> Whatever one thinks of these impressive technological advances in . . . surveillance, they are not accurately described as a mere automated equivalent of human vision that captures nothing more than "what any passerby would easily have been able to observe." Rather, they change public space into something it would not otherwise be, something which in a sense preserves and processes records of people's movements and activities in a way that primitive cameras . . . have not done before.

Blitz, *supra* note 7, at 1383 (quoting United States v. Jackson, 213 F.3d 1269, 1281 (10th Cir. 2000)).

128. Singer, *supra* note 127.

129. *See* BARBAS, *supra* note 1, at 209–10; Singer, *supra* note 8. "Facebook in 2011 introduced *Sponsored Stories*, a system that enabled advertisers to use Facebook users' *likes* as product endorsements. If you *liked* Coca-Cola on Facebook, for example, Coke could then use your name and image in an advertisement. . . . The company settled with the users for [twenty] million." BARBAS, *supra* note 1, at 209–10. This is similar to the issue of facial recognition and mobile apps—i.e., what differentiates these circumstances, where a person voluntarily reveals their likes, to that person's image being published and shared with a larger audience? *See id.*

130. Timothy Williams, *Facial Recognition Software Moves from Overseas Wars to Local Police*, N.Y. TIMES (Aug. 12, 2015), http://www.nytimes.com/2015/08/13/us/facial-recognition-software-moves-from-overseas-wars-to-local-police.html.

131. Singer, *supra* note 127; *see also* Fung, *supra* note 76.

132. McCoy, *supra* note 87, at 476.

remain anonymous in public.[133] Although the need for a stronger right to privacy in the digital world has been the subject of a good deal of campaigning and discussion, there is still much work left to be done.[134]

A. *Comparing the Law*

At common law, "a set of tort rights . . . protect[s] against four types of invasion of privacy: . . . (1) intrusion upon one's seclusion; (2) public disclosure of private facts; (3) publicity that places one in a false light before the public; and (4) appropriation of one's name or likeness without permission."[135] As technology advances, however, our current world becomes less common, and the common law of invasion of privacy becomes less useful in protecting our images.[136] As Paul M. Schwartz, Professor of Law, notes, "[v]arious limitations that the common law places on each of these four branches eliminate their usefulness in responding to violations of

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133. Singer, *supra* note 8 ("[F]acial recognition technology has the potential to provide important benefits and to support a new wave of technological innovation, . . . but it also poses consumer privacy challenges.").

134. *See* U.S. CONST. amend. IV; BARBAS, *supra* note 1, at 210; Singer, *supra* note 127.

135. Paul M. Schwartz, *Beyond Lessig's Code for Internet Privacy: Cyberspace Filters, Privacy Control, and Fair Information Practices*, 2000 WIS. L. REV. 743, 777 (2000) (citing to RESTATEMENT (SECOND) OF TORTS, § 652A (AM LAW. INST. 1977)).

> General Principle: (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other. (2) The right to privacy is invaded by[:] (a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or (b) appropriation of the other's name or likeness, as stated in § 652C; or (c) unreasonable publicity given to the other's private life, as stated in § 652D; or (d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.

RESTATEMENT (SECOND) OF TORTS, § 652A–D. "[E]ach [of the four torts] involves interference with the interest of the individual in leading, to some reasonable extent, a secluded and private life, free from the prying eyes, ears, and publications of others." *Id.* § 652A.

136. Schwartz, *supra* note 135, at 777–78; *see also* McClurg, *supra* note 6, at 1008 (citing to Jackson v. Playboy Enters., Inc., 574 F. Supp. 10, 11 (S.D. Ohio 1983)).

> Consider the case of the three boys who were photographed without their consent while they spoke with a policewoman on a public sidewalk. The photo subsequently appeared in *Playboy* magazine next to nude photos of the policewoman, and the three boys sued the magazine for invasion of privacy. Their position evokes sympathy. It seems wrong for one to secretly photograph a person without his consent and then to disseminate the photo to a wide audience, particularly in a manner and publication many would find objectionable. However, the court held that the facts fell short of satisfying the requirements of any of the four invasion of privacy torts and dismissed the plaintiffs' complaint. The court ruled that no intrusion occurred because the photo was taken on a public sidewalk 'in plain view of the public eye.'

McClurg, *supra* note 6, at 1008.

privacy in cyberspace."[137] To further illustrate the weakness of current laws, it is useful to contrast American jurisprudence regarding privacy against that of other countries:

> American laws do not protect the right to one's public image and persona as extensively as in other parts of the world. In some European countries, under certain conditions, newspapers or websites can be forbidden from publishing ostensibly newsworthy pictures of people, or facts in public record, without the subject's authorization. This broad protection of public image would be unimaginable in the United States. Since the 1940s, the image torts have been substantially constrained by freedom of speech and press, and it is difficult to recover under them. Despite this, the laws of image remain alive, not only on court dockets but in legal culture—in Americans' beliefs about the law, the legal system, and their legal rights and entitlements.[138]

In *Karo*, the Supreme Court of the United States held that, "[i]t is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence."[139] Facial recognition does not merely exist; rather, it is being used rather aggressively and "remains largely unregulated in the United States."[140] Further, the majority reasoning in *Nader* noted that "extensive public surveillance can reveal hidden details that would not ordinarily be observed by others. . . . The court did not recognize the surveillance as a harm itself—only surveillance that destroyed secrecy represented an actionable harm."[141] The sole function of facial recognition is destroying people's secrecy.[142] Advocates of privacy, amidst the growing danger of invasion, are aware of these risks and have begun to propose necessary regulations.[143] During an event organized by the White House in which technology industry experts and consumer advocates confronted the issue of facial recognition, "[p]articipants . . . agreed to endorse notices that app[lication]s could display before they were downloaded, alerting users if

137. Schwartz, *supra* note 135, at 777–78.

138. BARBAS, *supra* note 1, at 5.

139. United States v. Karo, 468 U.S. 705, 712 (1984); *see also* U.S. CONST. amend. IV.

140. Jeff John Roberts, *Facebook and Google Really Want to Kill This Face-Scanning Law*, FORTUNE (June 30, 2016, 10:17 AM), http://www.fortune.com/2016/06/30/facebook-google-facial-recognition-lawsuits/.

141. Solove, *supra* note 11, at 498–99 (citing Nader v. Gen. Motors Corp., 255 N.E.2d 765, 769, 771 (N.Y. 1970)).

142. *See* Singer, *supra* note 8; Singer, *supra* note 127.

143. *See* Singer, *supra* note 8; Singer, *supra* note 127.

an app[lication] collected material, like photos or contact lists, from their phones."[144] Further:

> In 2012, the Obama administration [announced] a plan for a consumer privacy bill of rights. Among other things, the report called for the Commerce Department to [organize] a series of *multi-stakeholder processes* in which trade and advocacy groups were to create industry codes of conduct for the use of drones, data-mining by mobile apps, and other consumer-tracking technologies.[145]

Few of their efforts, however, have been successful, as companies like Google and Facebook make it difficult for legal reform by pouring money into lobbying and litigation:

> In the last [sixteen] months, the two sides had been meeting periodically under the auspices of the National Telecommunications & Information Administration, a division of the Commerce Department. But the privacy advocates said they were giving up on talks because they could not achieve what they consider minimum rights for consumers—the idea that companies should seek and obtain permission before employing face recognition to identify individual people on the street. 'At a base minimum, people should be able to walk down a public street without fear that companies [they have] never heard of are tracking their every movement—and identifying them by name—using facial recognition technology . . . . Unfortunately, we have been unable to obtain agreement even with that basic, specific premise.'[146]

The state of California, the mecca of technology development and the place "where many businesses that use [facial] recognition technology are located," has failed to enact any pertinent regulation; "the most recent attempt to pass a biometric information law died in committee."[147] Fortunately, several states like Texas and Illinois continue to fight for reform, enacting laws to allow citizens some degree of control over their images by requiring companies to notify people and obtain their permission before taking facial scans or sharing their biometric information.[148] Illinois'

144. Singer, *supra* note 8.
145. Singer, *supra* note 127.
146. *Id.*; *see also* Roberts, *supra* note 140.
147. Sarafa et al., *supra* note 12.
148. 740 ILL. COMP. STAT. 14/15(b) (2015); TEX. BUS. & COM. CODE ANN. § 503.001 (West 2015); *see also* Russell Brandom, *Someone's Trying to Gut America's*

Biometric Information Privacy Act ("BIPA") is "a simple law, requiring a person's explicit consent before" his biometric information is taken.[149] Its strength, however, is the fact that it allows for a private right of action.[150] "[S]ince the law was first passed, [facial recognition technology has] become a central part of products like Google Photos, Snapchat filters, and Facebook's photo-tagging system."[151] Under Illinois law, "[a]ll three companies are currently facing lawsuits for allegedly violating [BIPA], producing biometric face prints without notifying Illinois citizens."[152] Consequently, the law has proven to be a nuisance for technology giants like Google and Facebook.[153] According to a recent article, under BIPA, "companies that collect *biometric identifiers* without consent can be forced to pay $1,000 or $5,000 for each violation," or, if the class action lawsuits were to succeed, "they could force the companies to pay millions of dollars in damages and, in what would likely be a greater nuisance, force them to change their policies around how they use faces."[154]

Strongest Biometric Privacy Law, VERGE (May 27, 2016, 8:27 AM), http://www.theverge.com/2016/5/27/11794512/facial-recognition-law-illinois-facebook-google-snapchat; Sarafa et al., *supra* note 12 ("Texas has statutory provisions addressing biometric data, but only the Texas attorney general can bring an action to enforce the statute and collect a civil penalty.").

149. Brandom, *supra* note 148.

> No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first: (1) informs the subject or the subject's legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored; (2) informs the subject or the subject's legally authorized representative in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and (3) receives a written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative.

740 ILL. COMP. STAT. 14/15(b).

150. 740 ILL. COMP. STAT. 14/20 (2015); Sarafa et al., *supra* note 12.

151. Brandom, *supra* note 148.

152. *Id.*; *see also* 740 ILL. COMP. STAT. 14/15(b)(1)–(3).

153. Roberts, *supra* note 140; *see also* 740 ILL. COMP. STAT. 14/15(b).

> [O]n April 1, 2015, a class action was filed against Facebook Inc. in the Circuit Court of Cook County, Illinois, seeking to extend the reach of the BIPA. The plaintiff claims that Facebook's *Photo Tag Suggest* function—which analyzes photos uploaded by users and *suggests* which of the user's Facebook friends is pictured—runs afoul of the act because it relies on facial recognition software to scan uploaded photos and extract and compare unique biometric facial characteristics. This claim is made despite the fact that this technology is not being used for financial transactions or security screenings and does not collect biometric information directly—it does so only through photos.

Sarafa et al., *supra* note 12.

154. Roberts, *supra* note 140 ("Earlier this year, the online scrapbook company Shutterfly . . . quietly settled a case that alleged its face-scanning violated the law."); *see also* 740 ILL. COMP. STAT. 14/15, 20.

In Germany, where online privacy enjoys much more protection than in other countries, facial recognition technology has faced many legal challenges.[155] In 2011, German officials responded with legal action to privacy threats posed by facial recognition technology employed by Facebook.[156] Johannes Caspar, a Hamburg data protection official, stated:

> The legal situation is clear in my opinion . . . . If the data were to get into the wrong hands, then someone with a picture taken on a mobile phone could use biometrics to compare the pictures and make an identification . . . . Such a system could be used by undemocratic governments to spy on the opposition or by security services around the world. The right to anonymity is in danger . . . .[157]

According to Caspar, "[t]he software offered potential for *considerable abuse* and was illegal."[158] Although Facebook responded in opposition, saying that users can easily disable its facial recognition feature, it failed to capture the essence of German data protection law: express consent.[159] Caspar, in a different interview, discussed an essential aspect of Facebook's policy that made its use of the intruding technology more troublesome: The inability for a user to expressly consent to storage of their personal data.[160] "[W]e have demanded that biometric data be stored with the subject's express consent. At first any company has to ask whether the user wants his or her data stored or not. Facebook just gives [users] the possibly to opt-out. If you [do not] opt-out, [you are] not consenting."[161] This policy of express consent by users remains at the core of German data protection laws and should be mirrored in the United States.[162] People want

155. Helen Pidd, *Facebook Facial Recognition Software Violates Privacy Laws, Says Germany*, GUARDIAN (Aug. 3, 2011, 10:08 AM), http://www.theguardian.com/technology/2011/aug/03/facebook-facial-recognition-privacy-germany.

156. *Id.*

157. *Id.*

158. *Id.*; *see also* Cyrus Farivar, *Facebook Violates German Law, Hamburg Data Protection Official Says*, DEUTSCHE WELLE (Feb. 8, 2011), http://www.dw.com/en/facebook-violates-german-law-hamburg-data-protection-official-says/a-15290120 [http://dw.com/p/129eq] ("Germany has among some of the strictest data protection and privacy laws in the European Union, largely created in the wake of informational abuses perpetrated by the Nazis and the Stasi, the East German secret police.").

159. Farivar, *supra* note 158.

160. *See id.*

161. *Id.*

162. *See id.*; Roberts, *supra* note 140.

to protect information that makes them vulnerable to potential violent crimes.[163]

In *Remsburg v. Docusearch, Inc.*,[164] the defendant was seemingly obsessed with Amy Lynn Boyer.[165] He purchased Boyer's social security number and employment address, among other information, from a database company called Docusearch.[166] The man went to Boyer's workplace, waited for her to leave, and murdered her.[167] The court concluded that, "threats posed by stalking and identity theft lead us to conclude that the risk of criminal misconduct is sufficiently foreseeable so that an investigator has a duty to exercise reasonable care in disclosing a third person's personal information to a client."[168] While it may be feasible to expect an individual investigator to exercise reasonable care in sharing one's personal information, expecting multi-million dollar companies to adhere to this standard is not.[169] The only foreseeable solution is requiring express consent from users before these companies can sell and distribute their intimate information.[170]

B. *Inaccuracy and Risks*

Although street photography is intrusive, especially if the image is later published and distributed, it does not run the risk of inaccuracy.[171] Courts have held that street photography, despite its possible negative

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163. *See* Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1007 (N.H. 2003).

164. 816 A.2d 1001 (N.H. 2003).

165. *See id.* at 1005–06.

166. *Id.*

167. *Id.* at 1006.

> On October 15, 1999, [the defendant] drove to Boyer's workplace and fatally shot her as she left work. [The defendant] then shot and killed himself. A subsequent police investigation revealed that [he] kept firearms and ammunition in his bedroom, and maintained a website containing references to stalking and killing Boyer as well as other information and statements related to violence and killing.

Id.

168. *Remsburg*, 816 A.2d at 1008.

169. *See id.*; Roberts, *supra* note 140.

170. *See* FLA. STAT. § 540.08(1) (1997) ("No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the *express* written or oral consent to such use . . . .") (emphasis added); Roberts, *supra* note 140.

171. *See* Airton, *supra* note 30; McClurg, *supra* note 6, at 1041–43; Mike Orcutt, *Are Face Recognition Systems Accurate? Depends on Your Race*, MIT TECH. REV. (July 6, 2016), https://www.technologyreview.com/s/601786/are-face-recognition-systems-accurate-depends-on-your-race/. It is important to note that the term *inaccurate*, as used in this section, only refers to those photographs that are left untouched after shooting; in other words, photographs that have not later been altered or distorted. Airton, *supra* note 30; Orcutt, *supra*.

consequences, simply reflects "a public sight which any one present would be free to see."[172] Moreover, they have noted that these photographs run parallel with the traditional notion that they "do not reveal anything private."[173] Although this Comment has suggested that, in some instances, street photography does have the ability to reveal intimate details, it does not stand for the proposition that the *new* details *can* be erroneous.[174] Facial recognition technology, on the other hand, often presents mistaken information.[175] Unlike Evans, Bush, and DiCorcia, whose photography did not reveal the identity of its subjects, facial recognition does.[176] As of June 2016, "the Government Accountability Office issued a report saying that the FBI has not properly tested the accuracy of its face matching system, nor that of the massive network of state-level face matching databases it can access."[177] Facial recognition not only reveals intimate, personal information that is not visible to the naked eye, but it also does so at the risk of being wrong, as "people who are not criminal suspects are included in the database, and the error rate for the software is as high as [twenty] percent—meaning the authorities could misidentify millions of people."[178] The risk of misidentification is even more rampant among minority groups.[179] According to Anil Jain, head of the biometrics research group at Michigan State University:

> The algorithms can also be biased due to the way they are trained . . . . If a gender, age group, or race is underrepresented in the training data, that will be reflected in the algorithm's performance . . . . [After] examin[ing] the performance of several commercially available face recognition systems . . . . The algorithms were consistently less accurate on women, African-Americans, and younger people. Apparently they were trained on data that was not representative enough of those groups . . . .[180]

172. Zeronda, *supra* note 7, at 1139; *see also* McClurg, *supra* note 6, at 1008.

173. Zeronda, *supra* note 7, at 1140.

174. *Id.* at 1149–50. By *new* information, this section refers to photography that is, for example, presented in a different angle or captured under different lighting, which would otherwise not be seen by the average person walking on the street. *Id.* at 1136 n.32, 1149.

175. Blitz, *supra* note 7, at 1390 ("[T]est in 2002 showed that even the most effective current systems had difficulty identifying faces outdoors—the best recognition rate was only [fifty percent] . . . .").

176. Cresci, *supra* note 4; Guarino, *supra* note 2; Singer, *supra* note 8; Walker, *supra* note 3.

177. Orcutt, *supra* note 171.

178. Blitz, *supra* note 7, at 1390; Williams, *supra* note 130.

179. *See* Orcutt, *supra* note 171.

180. *Id.*

Other factors can affect the risk of misidentification, such as poor image quality, unusual poses or facial expressions, and the age of the photograph; the more images a database has, "the greater the chance of such errors—either incorrect matches or failure to match photos of people already in the database."[181] Advocates of facial recognition technology claim that it "is necessary to prevent further terrorist attacks, and it should not be dismissed because of a mere potential for abuse."[182] Evidently, the risk is more than just the mere potential.[183] Facial recognition, despite its chilling capacity, receives little attention from federal agencies.[184] The technology goes beyond that of making a vulgar image public—it can place criminal liability on an innocent person.[185] In such scenarios, the negative emotional consequences on its victim are virtually doubled, as few things can compare to the stripping of one's freedom.[186]

V. RECOMMENDATION

In molding the current laws to encompass modern trends in technology, a specific court ruling provides helpful insight.[187] In *Daily Times Democrat*, the court stated that "[t]o hold that one who is involuntarily and instantaneously enmeshed in an embarrassing pose forfeits her right of privacy merely because she happened at the moment to be part of a public scene would be illogical, wrong, and unjust."[188] This line of reasoning, although intuitive, only applies to photographs showing subjects in *embarrassing pose[s]*.[189] In other words, the court's holdings surrounding invasion of privacy generally seem to be more sensitive to the protection of people's physical presence, striving to bury *obscene* images, or those that may seem "offensive to modesty or decency," more willingly than those sharing and publishing the one's personal information.[190] Although this Comment would not go as far as proposing face scans as a battery, or a

181. Mike Orcutt, *As It Searches for Suspects, the FBI May Be Looking at You*, MIT TECH. REV. (June 23, 2016), https://www.technologyreview.com/s/601738/as-it-searches-for-suspects-the-fbi-may-be-looking-at-you/; Orcutt, *supra* note 171.

182. McCoy, *supra* note 87, at 483.

183. *See* Orcutt, *supra* note 171; Walker, *supra* note 3.

184. *See* Williams, *supra* note 130 ("There is very little oversight on the local level, and little concern from the federal agencies providing the grants.").

185. *See* Orcutt, *supra* note 181; Williams, *supra* note 130; Zeronda, *supra* note 7, at 1150.

186. *See* Williams, *supra* note 130; Zeronda, *supra* note 7, at 1154.

187. *See* Daily Times Democrat v. Graham, 162 So. 2d 474, 478 (Ala. 1964).

188. *Id.*

189. *Id.*

190. *Id.* at 477–78.

complete ban on facial recognition technology, civil law must provide a means to place liability on those who, without consent, take a scan of one's image or body.[191] It is crucial that facial recognition technology is recognized as able to capture information that is just as intimate as an image of our physical bodies, and thus considered a search under the Fourth Amendment.[192]

In an article by *The New York Times*, some regulators expressed that "Congress [should] pass a law giving consumers basic rights to control how *intimate* details about them are collected and used, no matter the technology."[193] Terms like *unique topography*, *DNA*, and *genetic data*, are just a few of the descriptors of the sort of information captured by facial recognition technology.[194] It would be *illogical, wrong, and unjust* to treat the threat of facial recognition technology different from the threat of being physically exposed in an image.[195] Equally as important as recognizing its capabilities is understanding that the technology is still quite new—"so new that experts say they are unaware of major legal challenges."[196] To say that the use of facial recognition technology is not a violation "because there are no reasonable expectations of privacy in public places and facial-recognition technology is used in public places," fails to see the second part of the issue, the revelation of secret information that is not, in fact, visible to the naked eye.[197]

To further claim that "[f]acial-recognition technology is . . . similar to fingerprinting," also fails to acknowledge a key difference: Fingerprinting is rarely done without the person's consent, whereas facial recognition asks for no permission.[198] The executive director of the Center on Privacy and Technology at Georgetown Law expressed this same notion of innate wrongness surrounding facial recognition technology: "What the FBI is doing may be legal, but it [is not] right."[199] He added, "I know what I touch, and I certainly know if I give fingerprints for a background check . . . [but] I

191. *See* McCoy, *supra* note 87, at 483; Zeronda, *supra* note 7, at 1156 ("While the First Amendment could still serve as a defense against a battery claim, characterizing street shootings as battery might mitigate the problems that result when privacy rights are pitted against the right to freedom of expression.").

192. *See* U.S. CONST. amend. IV; *e.g.*, Roberto Iraola, *New Detection Technologies and the Fourth Amendment*, 47 S.D. L. REV. 8, 30 (2002); Singer, *supra* note 8; Singer, *supra* note 127.

193. Singer, *supra* note 8 (emphasis added).

194. *See* Singer, *supra* note 127; Singer, *supra* note 8.

195. *Daily Times Democrat*, 162 So. 2d at 478.

196. Williams, *supra* note 130.

197. McCoy, *supra* note 87, at 487.

198. *Id.* at 489.

199. Fung, *supra* note 76.

[do not] think [there is] anyone who keeps track of every surveillance or smartphone camera."[200] In 2013, Boston authorities tested facial recognition technology but felt that an instinctual wrong would be done to its citizens if they adopted it as a tool in their investigations; "'I [do not] want people to think [we are] always spying on them,' said William B. Evans, Boston's police commissioner."[201] Ultimately, they decided not to use it, "saying it crossed an ethical line."[202] Since there is no feasible way for the average citizen to know where all surveillance cameras are located, express consent must be required.[203]

VI. CONCLUSION

A Wall Street Journal poll in 1999 asked individuals what concerned them most about the next century from a list of options.[204] "Threats to personal privacy came in at the top of the list—ahead of terrorism, the destruction of the environment, and overpopulation."[205] The same poll showed that "[n]inety-five percent of Americans would be uncomfortable about a [w]ebsite creating a profile that included [their] real name as well as *additional personal information*."[206] Their fears are now a reality, and the technology behind it is virtually unstoppable.[207] In trying to explain the severity of disclosure, this Comment does not undermine freedom of speech as another detriment: "Although protecting against disclosure does limit freedom of speech, [unconsented] disclosure . . . inhibit[s] the very interests [that] free speech protects.[208] Protection from disclosure, like free speech, promotes individual autonomy."[209] It is imperative that the law recognizes technological advances and adapts to their changes as it has done throughout history.[210]

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200. Orcutt, *supra* note 181.

201. Williams, *supra* note 130.

202. *Id.*

203. *See id.*

204. Christy Harvey, *Optimism Outduels Pessimism*: *Breakthroughs in Medicine, Technology Are Forecast; But the Auto Is Still Here*, WALL STREET J., Sept. 16, 1999, at A10; *see also* Schwartz, *supra* note 135, at 744 n.2.

205. Schwartz, *supra* note 135, at 744 n.2.

206. *Id.*; *see also* Harvey, *supra* note 209.

207. Heath, *supra* note 5.

208. Solove, *supra* note 11, at 532–33.

209. *Id.* at 532–33 (pointing to several consequences suffered by victims of disclosure, such as preventing them from engaging in activities that further their own self-development, threatening their security, and making them a prisoner of their recorded past).

210. *See* McClurg, *supra* note 6, at 1074.

As technology progressed, the law took cognizance of the fact that new forms of communication such as radio and television could cause harm as great or greater

According to the company behind the technology in FindFace, NTechLab, "widespread facial recognition [is] an inevitable reality—for better or for worse."[211] The company hopes that "everyone [will] have the ability to find someone online, not just governments and big tech[nology] companies."[212] When NTechLab reaches its objective, it is crucial that the appropriate laws are in place to protect the citizens of the United States and preserve their ever diminishing right to privacy.[213]

> than written words. The drafters of the *Restatement (Second) of Torts* recognized this development by defining libel broadly to include, in addition to written words, "any . . . form of communication that has the potentially harmful qualities characteristic of written or printed words."

Id. (alteration in original).

211. Heath, *supra* note 5.

212. *Id.*

213. Schwartz, *supra* note 135, at 761 ("'[P]rivacy is not only a personal predilection, though it may be that, too. It is a requirement of social systems.' Information privacy does not derive from the state of nature or an inborn capacity of autonomy, but depends on its essential relation to the health of a democratic society.").

INTENTIONAL GROUNDING: HOW THE NCAA AND NFL HAVE ENGAGED IN PRACTICES THAT UNREASONABLY RESTRAIN THE FOOTBALL PLAYER LABOR MARKET

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I. INTRODUCTION

Young athletes often dream of becoming the next star in their respective sports.[1] A select few go on to realize that dream and become professional athletes.[2] Within this group of superb athletes, there are a rare few who almost seem as though they were *meant for the game*, showing flashes of greatness at a young age.[3] National Basketball Association ("NBA") superstar, LeBron James, was being touted as an elite player, drawing comparisons to the all-time great—Kobe Bryant—despite still being a high school junior.[4] Although the NBA has since amended its draft eligibility, the delay in going professional after high school is limited to one year.[5] There still remains the possibility of basketball players profiting financially from their abilities immediately after high school graduation while foregoing college.[6]

Baseball prospects are afforded an opportunity to enter the professional ranks, becoming draft eligible, immediately upon high school graduation.[7] Similarly, the National Hockey League ("NHL") allows players, age eighteen or older, to enter the draft.[8]

Unlike these sports leagues, the National Football League ("NFL") imposes a draft eligibility requirement stipulating that a prospective player

1. *See* John Underwood, *Does Herschel Have Georgia on His Mind?*, SPORTS ILLUSTRATED, Mar. 1, 1982, at 22, 22; NCAA RESEARCH, ESTIMATED PROBABILITY OF COMPETING IN COLLEGE ATHLETICS (2016), http://www.ncaa.org/sites/default/files/2016RES_probability-chart-web-pdf_20160502.pdf.

2. *See* Underwood, *supra* note 1, at 22; NCAA RESEARCH, *supra* note 1.

3. *See* Grant Wahl, *Ahead of His Class*, SPORTS ILLUSTRATED, Feb. 18, 2002, at 62, 64.

4. *Id.*

5. *See NBA Draft Rules*, DRAFTSITE.COM, http://www.draftsite.com/nba/rules/ (last visited Apr. 9, 2017).

6. *See* Pete Thamel, *At 19, Plotting New Path to N.B.A., Via Europe*, N.Y. TIMES, Oct. 5, 2008, at 1.

7. *MLB Draft Rules*, DRAFTSITE.COM, http://www.draftsite.com/mlb/rules/ (last visited Apr. 9, 2017).

8. *NHL Draft Rules*, DRAFTSITE.COM, http://www.draftsite.com/nhl/rules/ (last visited Apr. 9, 2017).

be at least three years removed from high school.[9] Furthermore, these prospects are not afforded a realistic interim alternative to college that produces a monetary benefit.[10] Essentially, the only legitimate path to becoming a professional football player begins by playing at the collegiate level.[11] The problem arising from the disparity between the NFL draft eligibility requirements in comparison to the other *Big Four* American sports leagues is magnified by the average career spans of each sport's athletes.[12] Professional football players in the NFL have the shortest career spans in comparison to players in the NBA, NHL, and Major League Baseball ("MLB").[13] As of 2013, NFL players average a full year less than the average NBA player, and two years less than NHL and MLB players.[14] Additionally, the NFL provides the lowest average player salary of the four major sports.[15] This results in the lowest average potential earnings in what has been documented as an extremely violent sport that could potentially have dangerous long-term health effects.[16]

Due to these draft eligibility restrictions, football prospects are forced to attend college in an attempt to showcase their talents to prospective employers in the NFL.[17] Under the National Collegiate Athletic Association ("NCAA") guidelines, these colleges essentially operate as a de facto farm system that guarantees the maturation and development of players at no cost to the NFL.[18] There are some players that have been viewed as NFL-ready once they have graduated from high school.[19] However, these players are

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9. *NFL Draft Rules*, DRAFTSITE.COM, http://www.draftsite.com/nfl/rules/ (last visited Apr. 9, 2017).

10. Underwood, *supra* note 1, at 24; *see also CFL Adjusts Eligibility Rules for Draft*, CANADIAN FOOTBALL LEAGUE (Sept. 06, 2013), http://www.cfl.ca/2013/09/06/cfl-adjusts-eligibility-rules-for-draft/. The CFL has more stringent eligibility standards than the NFL, requiring players to be from a Canadian school—CIS is the Canadian equivalent of NCAA—or having non-import status. *Id.*

11. Underwood, *supra* note 1, at 22.

12. *See* Nick Schwartz, *The Average Career Earnings of Athletes Across America's Major Sports Will Shock You*, USA TODAY (Oct. 24, 2013, 10:07 AM), http://ftw.usatoday.com/2013/10/average-career-earnings-nfl-nba-mlb-nhl-mls.

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*; Jason M. Breslow, *New: 87 Deceased NFL Players Test Positive for Brain Disease*, PBS: FRONTLINE (Sept. 18, 2015), http://www.pbs.org/wgbh/frontline/article/new-87-deceased-nfl-players-test-positive-for-brain-disease/. In a recent study about 87 out of 91 players tested positive for brain disease CTE. *Id.*

17. *See NFL Draft Rules*, *supra* note 9.

18. Underwood, *supra* note 1, at 24, 26.

19. Skip Bayless, *Clarett Belonged in the NFL*, ESPN.COM (Aug. 11, 2006), http://www.espn.com/espn/page2/story?page=bayless/060811; Jeff Legwold, *Adrian Peterson*

subjected to the threat of an injury that could negatively affect, or entirely eliminate, their earning potential due to the restrictive practices instituted by the NFL and NCAA.[20] Despite the talents of a top prospect, an injury could potentially shrink the market for their services, as teams will be less willing to invest millions into a player who may never fully recover.[21]

While in college, a football player is considered an *amateur student-athlete*.[22] The NCAA operates as a non-profit organization that promotes the academic and overall well-being of the student-athlete.[23] Notwithstanding the threat of injury, a college football player must submit to the strict compensation restrictions imposed by the NCAA.[24] A player who receives compensation for their athletic abilities or violates other provisions within the bylaws may be deemed ineligible to participate in all collegiate sports.[25] Since playing college football serves as the sole realistic option to obtaining employment for their athletic abilities, athletes are forced to accept a free education as compensation without protest.[26] Furthermore, they must refrain from receiving any compensation that may be attributed to their athletic abilities.[27] This restriction enables only the conference and school that the player attends to benefit financially from his or her talents.[28] Although the NCAA prides itself on protecting the *student* aspect of the *student-athlete* label for college football players, it has hypocritically committed an act that the organization was originally founded to protect against: *exploitive athletic*

Among Few Who Could Make Leap from High School to NFL, ESPN.COM: NFL NATION (Oct. 2, 2015), http://www.espn.go.com/blog/nflnation/post/_/id/182078/adrian-peterson-among-few-who-could-make-leap-from-high-school-to-nfl.

20. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, 2009-10 NCAA DIVISION I MANUAL art. 12.1.2.1 (2009); John Harris, *2016 NFL Draft: Injury Crushes Draft Stock of Notre Dame LB Jaylon Smith*, WASH. POST (Feb. 29, 2016), http://www.washingtonpost.com/news/sports/wp/2016/02/29/2016-nfl-draft-injury-crushes-draft-stock-of-notre-dame-lb-jaylon-smith/; Mark Viera, *Rutgers Player Is Paralyzed Below the Neck*, N.Y. TIMES, Oct. 18, 2010, at D1.

21. *See* Harris, *supra* note 20.

22. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 20, at art. 12.01, 12.1.

23. *Finances*, NCAA, http://www.ncaa.org/about/resources/finances (last visited Apr. 9, 2017).

24. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 20, at art. 12.1.

25. *Id.*

26. *See id.* at art. 12.1.2.1, 15.1.

27. *Id.* at art. 12.1.

28. *See id.*; Kristi Dosh, *College Football Playoff: Conference Payouts*, BUS. C. SPORTS (Dec. 8, 2014), http://www.businessofcollegesports.com/2014/12/08/college-football-playoff-conference-payouts/. Over $50 million in revenue was distributed to each Power 5 conference for the 2014 through 2015 bowl season. Dosh, *supra*.

practices.[29] It is no secret that college football is a massive source of revenue for schools.[30] However, these schools are operating under the guise of the NCAA's core values, enabling them to use unfair bargaining power to obtain the services of football players without fair compensation.[31] On average, college football players are less prepared academically to succeed in the classroom.[32] If they are not able to maintain a certain grade point average, they may not only lose their scholarship, but also their ability to obtain employment in the NFL.[33] There are similarities between a development league like the MLB minor league system and the college ranks of football.[34] The most notable is the ability to develop talent to play at a professional level.[35] However, a minor league prospect is able to simultaneously hone his or her skills while benefitting financially from these same talents, whereas a college football player must endure at least three years of schooling prior to receiving an opportunity to be compensated financially for his or her athletic prowess.[36] Some student-athletes benefit from the education received from this arrangement.[37] However, a substantial amount of college football players enter college with the sole intention of going to the NFL without obtaining a college degree.[38]

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29. *See* Dosh, *supra* note 28; *History*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.web.archive.org/web/20110807060521/http://www.ncaa.org:80/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/about+the+ncaa+history (last visited Apr. 19, 2017).

30. *See* Steve Berkowitz et al., *NCAA Finances: 2014-15 Finances*, USA TODAY, http://www.sports.usatoday.com/ncaa/finances/ (last visited Apr. 9, 2017); Dosh, *supra* note 28.

31. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1058–59 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

32. Doug Lederman, *The Admissions Gap for Big-Time Athletes*, INSIDE HIGHER ED (Dec. 29, 2008, 4:00 AM), http://www.insidehighered.com/news/2008/12/29/admit. "[C]ritics tend to argue that the colleges are doing a disservice to athletes who come in underprepared, and suggest that colleges may be achieving those higher graduation rates, in part, by directing athletes into less demanding academic programs . . . ." *Id.*

33. *See* Seth Soffian, *College Sports: Scholarships Not Four-Year Guarantees*, NEWS-PRESS.COM (Oct. 17, 2015, 5:59 PM), http://www.news-press.com/story/sports/college/fgcu/2015/10/16/college-sports-scholarships-not-four-year-guarantees/74009542/.

34. *See* Legwold, *supra* note 19; *MLB Draft Rules*, *supra* note 7.

35. *See* Legwold, *supra* note 19; *MLB Draft Rules*, *supra* note 7.

36. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 20, at art. 12.1.2.1; *MLB Draft Rules*, *supra* note 7; *NFL Draft Rules*, *supra* note 9.

37. *See* Christopher Bogan, *41% in NFL Graduate from College: Rate in Pacific 10 Conference Only 38%, Report Shows*, L.A. TIMES (Jan. 27, 1986), http://articles.latimes.com/print/1986-01-27/sports/sp-719_1_graduation-rate; Lederman, *supra* note 32.

38. Bogan, *supra* note 37; *see also* Lederman, *supra* note 32.

This Comment will explain how the application of antitrust laws has affected previous sports related litigation.[39] Furthermore, it will explain the rule of reason, a test courts have used to determine whether certain conduct falls within the purview of antitrust scrutiny.[40] Subsequently, this Comment will apply the rule of reason to the deceptive practices engaged by the NFL and NCAA, revealing unreasonable labor market restrictions whilst debunking the previous litigation defenses used by both entities.[41]

II. ANTITRUST LAWS

The Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is [hereby] declared to be illegal."[42] While the broad language of the Sherman Act may encompass almost any contract, the Supreme Court of the United States has consistently recognized that the Act is "intended to prohibit only unreasonable restraints of trade."[43]

A. *Labor Exemption*

The National Labor Relations Act was enacted primarily to "promote collective bargaining and to protect . . . concerted employee" efforts—including unionizing.[44] Unfortunately, unions are inherently anticompetitive, as the "Court has recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards."[45] By relinquishing individual rights to obtain an employment contract, employees are able to collectively benefit as a group in negotiations based on their strength in numbers.[46] A sacrifice for the greater good can certainly be identified as anticompetitive.[47] Labor

39. *See infra* Part II.
40. *See infra* Section II.B.
41. *See infra* Part III.
42. 15 U.S.C. § 1 (2012).
43. *Id.*; Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 98 (1984).
44. 29 U.S.C. §§ 151–169 (2012); Robert A. McCormick & Matthew C. McKinnon, *Professional Football's Draft Eligibility Rule: The Labor Exemption and the Antitrust Laws*, 33 EMORY L.J. 375, 383 (1984).
45. McCormick & McKinnon, *supra* note 44, at 383–84; *see also* United Mine Workers of Am. v. Pennington, 381 U.S. 657, 666 (1965).
46. *See* McCormick & McKinnon, *supra* note 44, at 384–85.
47. *See id.* at 383–85.

negotiations such as standard wages may benefit some workers, but may be detrimental for others who may be able to command a higher wage based on experience or other factors.[48] This ultimately leads to the conflict regarding whether agreements between employers and unions fall under antitrust scrutiny due to their inherent anticompetitive nature.[49] After all, the Sherman Act was created "to promote freedom of competition in the marketplace."[50] Although agreements between employers and unions are considered to be restraints on trade, a "[[n]on-statutory exemption] generally applies when a union, acting with a non-labor party, seeks to attain goals which are mandatory or *permissive* subjects of bargaining under the National Labor Relations Act, unless the Union acts with a predatory anti-competitive purpose."[51] Mandatory subjects of bargaining have been defined as "wages, hours, and other terms and conditions of employment."[52]

B. *Rule of Reason*

Since sports leagues consist of numerous competing teams, mutual agreements to have restraints on competition are necessary to maintain the integrity of the product.[53] Therefore, it is likely that, while the rules of these leagues may constitute a per se violation, the appropriate rule to apply would be the rule of reason.[54] The rule of reason test is comprised of three steps.[55] In the first step, the plaintiff must demonstrate that the conduct has a substantial adverse effect on competition within a market.[56] Second, the defendant must provide evidence that the challenged conduct promotes competition.[57] Third, the plaintiff must demonstrate that there are substantially less restrictive means to achieve the procompetitive justifications provided by the defendant.[58] After each side has presented its arguments on the issue, the court will apply a balancing test to determine whether the conduct presents an unreasonable restraint.[59]

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48. *Id.* at 384–85.
49. *See id.* at 385.
50. *Id.* at 383.
51. Clarett v. Nat'l Football League, 369 F.3d 124, 139 n.17 (2d Cir. 2004).
52. Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 392 (S.D.N.Y. 2004); *see also* 29 U.S.C. § 158(d) (2012).
53. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1069 (9th Cir. 2015), *cert denied*, 137 S. Ct. 277 (2016).
54. *Id.* at 1064.
55. Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062–63 (9th Cir. 2001).
56. *Id.* at 1063.
57. *Id.*
58. *Id.*
59. *Id.* at 1062.

C. *Litigation History Based on Labor Market Restraint in Sports Leagues*

1. The *Spencer Haywood* Rule

Spencer Haywood was a tremendous basketball prospect hailing from Detroit, Michigan.[60] During his prep years, he won several prestigious accolades, including *All-Detroit*, *All-Michigan*, and *All-American* honors.[61] His success would continue after his graduation from high school in 1967.[62] At the collegiate level, he earned *All-American* honors during his lone seasons at Trinidad Junior College and the University of Detroit.[63] More impressive was the fact that he was named Outstanding Player at the Olympic basketball games[64] at the age of nineteen.[65] At the age of twenty, he entered into a contract with the Denver Rockets of the American Basketball Association ("ABA").[66] His talents clearly transcended across every level of competition, as he would go on to be "named 'Rookie of the Year,' and 'Most Valuable Player in the ABA' for the 1969-70 [s]eason."[67]

After his rookie season, he signed a new contract with the Rockets but would later refuse to render services due to its fraudulent terms.[68] Later that year, he signed with a NBA team, the Seattle Supersonics, despite a provision in the NBA bylaws that would deem him ineligible to play.[69] Haywood would then file claims against the NBA and its member teams for

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60. *See* Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1052 (C.D. Cal. 1971).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Denver Rockets*, 325 F. Supp. at 1052; Scoop Jackson, *It's Time to Honor Spencer Haywood's Impact on Hoops and History*, ESPN.COM (Sept. 10, 2015), http://www.espn.com/nba/story/_/id/13627349/spencer-haywood-impact-hoops-history.

> One thing that will probably be overlooked in Spencer Haywood's induction into the Basketball Hall of Fame . . . is the gift God gave him to play the game. How, as a [twenty-one] year-old playing in the NBA, Haywood was a rarity. How, at [nineteen] years old, he became the youngest American to make an Olympic basketball team.

Jackson, *supra*.

66. *Denver Rockets*, 325 F. Supp. at 1052.

67. *Id.*

68. *Id.* at 1053–54. "The contract does not provide for compensation for Haywood's services for six years in the amount of $1,900,000. Compensation in excess of $394,000 is illusory and indefinite." *Id.* at 1053.

69. *Id.* at 1054. "At the time that Haywood contracted to play professional basketball for Denver, the ABA had a four-year rule similar to that provided for in By-Law 2.05 of NBA. The ABA found that its four-year rule was a hardship on Haywood and waived it." *Denver Rockets*, 325 F. Supp. at 1054.

engaging in an "unlawful conspiracy to monopolize and restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 2 of the Sherman Act, 15 U.S.C. § 2."[70] Shortly following a decision by the Supreme Court of the United States to lift a stay on an injunction allowing him to play for his team,[71] the NBA and Haywood would reach an out-of-court settlement that allowed him to play for the Supersonics.[72]

> The argument in Haywood's favor was that, as the sole wage earner in his struggling family, he was a *hardship case* and therefore had a right to begin earning his living. . . . Beginning in 1971, underclassmen were allowed to enter the NBA Draft provided they could give evidence of *hardship* to the NBA office. In 1976, the hardship requirement was eliminated in favor of the current Early Entry procedure, whereby any athlete with remaining college eligibility can enter the NBA Draft on the condition that he notifies the league office at least [forty-five] days before the draft.[73]

Although the court did not ultimately rule on the draft eligibility rule, it provided insight into the court's view on the restraint it created.[74] The NBA provision at the time provided that:

> A person who has not completed high school or who has completed high school but has not entered college, shall not be eligible to be drafted or to be a Player [in the NBA] until four years after he has been graduated or four years after his original high school class has been graduated . . . .[75]

The court determined that without an injunction, the rule would eliminate Haywood's chances of playing basketball, at any level, for an

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70. *Id.* at 1054.

71. Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 1207 (1971); *see also* William C. Rhoden, *Early Entry? One and Done? Thank Spencer Haywood for the Privilege*, N.Y. TIMES (June 29, 2016), http://www.nytimes.com/2016/06/30/sports/basketball/spencer-haywood-rule-nba-draft-underclassmen.html.

72. Rhoden, *supra* note 71.

73. *Spencer Haywood*, NBA.COM, http://www.nba.com/history/players/haywood_bio.html (last visited Apr. 9, 2017).

74. *See Denver Rockets*, 325 F. Supp. at 1056. "There is a substantial probability in light of all the evidence presented to this [c]ourt that the so-called *college draft* . . . constitutes an arbitrary and unreasonable restraint upon the rights of Haywood and other potential NBA players to negotiate freely for the rendition of their services to NBA teams." *Id.*

75. *Id.* at 1055, 1058 (alteration in original) (stating that the conduct by the NBA "[was] in furtherance of . . . violations of the antitrust laws").

entire year, because it would deem him ineligible to play in the NBA.[76] Furthermore, he was already ineligible to participate at the collegiate level.[77] This would certainly be a travesty, given the fact that Haywood had already proven that he could compete and dominate in the professional ranks.[78] The court found that "[a] professional basketball player [had] a very limited career."[79]

> If Haywood is unable to continue to play professional basketball for Seattle, he will suffer irreparable injury in that a substantial part of his playing career will have been dissipated, his physical condition, skills and coordination will deteriorate from lack of high-level competition, his public acceptance as a super star will diminish to the detriment of his career, his self-esteem and his pride will have been injured and a great injustice will be perpetrated on him.[80]

The impact of this case can be felt still today, as underclassmen entering the draft has become commonplace.[81] Although the NBA argued that the influx of young players would destroy the league and college basketball by "siphoning . . . talent from college basketball teams . . . [effectively] ruin[ing] the NBA's pool of talent,"[82] both entities are thriving.[83]

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76. *See id.* at 1057, 1060.

77. *Id.* at 1056. Due to NCAA amateurism rules, Haywood would be considered ineligible as he already signed and played for a professional team. *See Denver Rockets*, 325 F. Supp. at 1060–61.

78. *See Spencer Haywood*, *supra* note 73. Haywood led the league in scoring, averaging 30 points a game and rebounding 19.5 rebounds per game while also winning the league's Most Valuable Player. *Id.*

79. *Denver Rockets*, 325 F. Supp. at 1057.

80. *Id.*

81. *See* Rhoden, *supra* note 71.

82. *Id.*

83. *Id.*; *see also Total NBA League Revenue from 2001/02 to 2014/15 (in Billion U.S. Dollars)*, STATISTA, http://www.statista.com/statistics/193467/total-league-revenue-of-the-nba-since-2005/ (last visited Apr. 9, 2017). During the 2014–15 season the NBA posted revenue of 5.18 billion. *Total NBA League Revenue from 2001/02 to 2014/15 (in Billion U.S. Dollars)*, *supra*; Chris Isidore, *Most Profitable NCAA Teams*, CNN: MONEY (Mar. 16, 2015, 10:13 AM), http://www.money.cnn.com/2015/03/16/news/companies/ncaa-most-profitable/. The Louisville Cardinals "posted $24 million in profits on [college basketball] revenue of about $40 million during the 2013–14 school year . . . ." Isidore, *supra*.

2. Maurice Clarett

Before his legal troubles, Maurice Clarett was a star in the making.[84] To this day, he is still arguably one of the best prep football players in Ohio's prep football history.[85] During his high school senior season, he amassed 2194 rushing yards, a mind-blowing thirty-eight touchdowns, and was on his way to being named "USA Today National Offensive Player of the Year and Mr. Football."[86] In 2002, he would enroll at Ohio State University, becoming the first freshman running back to start for the school since 1943.[87] Standing at six feet tall and weighing two hundred and thirty pounds, he was already bigger than some of the NFL's all-time great running backs.[88] During his freshman campaign, he set freshman rushing and touchdown records, while also providing an influential performance that resulted in Ohio State emerging victorious in the National Championship over favored Miami.[89]

Close friend LeBron James was just finishing his senior season at St. Vincent-St. Mary when this was transpiring.[90] After all the glory Clarett had brought to Ohio State, he still had to wait two more years to be draft-eligible.[91] To add insult to injury, James called Clarett to inform him of a massive, seven-year, $93 million deal with Nike before he had even been drafted.[92] Being immersed in the luxuries that accompany a professional

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84. *See Timeline: The Rise and Fall of Maurice Clarett*, ESPN.COM (Sept. 18, 2006), http://www.espn.com/nfl/news/story?id=2545204.

85. Eric Frantz, *Ohio's Top 50 Athletes of the Decade: No. 36 Maurice Clarett*, JJHUDDLE.COM (Feb. 5, 2010), http://www.jjhuddle.com/2010/02/05/ohios-top-50-athletes-of-the-decade-no-36-maurice-clarett/. To cap his senior season, Clarett rushed for 785 yards and eight touchdowns in the playoffs—in three games. *Id.*

86. *Id.*

87. *Timeline: The Rise and Fall of Maurice Clarett*, *supra* note 84.

88. Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 388 (S.D.N.Y. 2004). "Clarett . . . is taller and heavier than some of the NFL's all-time greatest running backs, including Walter Payton—5'10", 200, Barry Sanders—5'8", 203, and Emmitt Smith—5'9", 207." *Id.*

89. *See* Frantz, *supra* note 85; *Timeline: The Rise and Fall of Maurice Clarett*, *supra* note 84.

90. *See* Pablo S. Torre, *Lost Stories of Lebron, Part 2*, ESPN.COM, http://www.espn.com/nba/story/_/id/9825057/lebron-james-maurice-clarett-were-fellow-ohio-natives-drastically-different-futures-espn-magazine (last updated October 19, 2013, 10:13 AM). The Ohioans were "born one year and [fifty] miles of I-76 apart"—James hailing from Akron, and Clarett from Youngstown. *Id.*

91. *See* Clarett v. Nat'l Football League, 369 F.3d 124, 126 (2d Cir. 2004); Torre, *supra* note 90.

92. Torre, *supra* note 90. Clarett was often with James during James' rise to fame. *Id.* This included meeting numerous celebrities. *Id.* ("There was the time they hung out with Jay Z backstage. There was the time they attended a party in Cleveland and Biz

career, Clarett fell victim to wanting compensation for his athletic achievements as well.[93] "Clarett sa[id] he was intoxicated by being *a somebody*. And, if [you are] a somebody, you want to be around another somebody."[94] NFL executives commenting about Clarett's status as a NFL caliber player, despite not being eligible, certainly boosted his ego as well.[95] Before his sophomore season, Clarett was suspended for the entire season "for accepting *thousands of dollars* in illicit extra benefits," coupled with allegations of academic fraud.[96] Unable to play at the collegiate level for a year and not wanting his skills to diminish from inactivity, Clarett decided to challenge the NFL's draft eligibility rule that mandated a player be three years removed from high school.[97]

a. *Clarett: Circuit Court of Appeals Reversal*

A district court ruled in Maurice Clarett's favor in *Clarett v. National Football League* ("*Clarett I*"),[98] holding that the NFL's eligibility rules were an unreasonable restraint of trade in violation of antitrust laws.[99] On appeal, the court reversed the ruling.[100] The stark difference between these two rulings was that the appellate court found that the eligibility rule was afforded non-statutory exemption status from antitrust scrutiny, whereas the district court did not.[101] In *Brown v. Pro Football, Inc.*,[102] the Supreme Court of the United States provided that although a collectively bargained provision may be a mandatory bargaining subject, it should be examined by

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Markie deejayed. There was the time Clarett traded numbers with Snoop Dogg, who knew the tailback from controlling him on PlayStation."). *Id.*

93. *See id.*

94. Torre, *supra* note 90.

95. *See* Bob Glauber, *Clarett Sues NFL for Right to Enter Draft*, NEWSDAY (Sept. 23, 2003, 8:00 PM), http://www.newsday.com/sports/clarett-sues-nfl-for-right-to-enter-draft-1.399287. "If Clarett is deemed eligible for the draft, it [is] likely he would be a first-round choice, according to several league executives . . . . 'I [am] sure someone would take a chance on him,' one NFL personnel director said." *Id.*

96. Rusty Miller, *Clarett Suspended for 2003 Season for 16 NCAA Violations*, USA TODAY (Sept. 10, 2003, 2:36 PM), http://usatoday30.usatoday.com/sports/college/football/bigten/2003-09-10-clarett-suspension_x.htm; *see also* Mike Freeman, *When Values Collide: Clarett Got Unusual Aid in Ohio State Class*, N.Y. TIMES, July 13, 2003, at SP1.

97. *See* Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 382 (S.D.N.Y. 2004).

98. 306 F. Supp. 2d 379 (S.D.N.Y. 2004).

99. *Id.* at 410–11.

100. Clarett v. Nat'l Football League, 369 F.3d 124, 143 (2d Cir. 2004).

101. *Compare Clarett II*, 369 F.3d at 138, *with Clarett I*, 306 F. Supp. 2d at 397.

102. 518 U.S. 231 (1996).

balancing the "interests of union members" served by the restraint against "its relative impact on the product market," before being granted exemption status.[103]

The court reasoned:

> [T]o permit antitrust suits against sports leagues on the ground that their concerted action imposed a restraint upon the labor market would seriously undermine many of the policies embodied by these [federal] labor laws, including the congressional policy favoring collective bargaining, the bargaining parties' freedom of contract, and the widespread use of multi-employer bargaining units.[104]

Rather than determine the impact on the product market in accordance with the test formulated by Justice White, the court provided support for the power of unions and their importance in the labor law relations.[105] Additionally, they found that "the eligibility rules constitute a mandatory bargaining subject because they have tangible effects on the wages and working conditions of current NFL players."[106] This Comment will further examine those tangible effects in Part B.[107]

3. O'Bannon Case

Ed O'Bannon was a former All-American basketball player at the University of California, Los Angeles ("UCLA") who was informed by a friend that his likeness was being used in a video game.[108] In 2009, O'Bannon sued the NCAA and the Collegiate Licensing Company ("CLC") in *O'Bannon v. NCAA* ("*O'Bannon I*"),[109] claiming "that the NCAA's amateurism rules [prohibited] . . . student-athletes from [receiving]

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103. *Id.* at 261. The court agreed with Justice White's approach "[w]hen confronted with allegations that agreements between labor and employers damaged competition in the business or product market, we have previously regarded Justice White's decision in *Jewel Tea* as setting forth the 'classic formulation' of the non-statutory exemption." *Clarett II*, 369 F.3d at 132 n.12 (citing Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 689–90 (1965)).

104. *Id.* at 135.

105. *See id.* at 132, 138–39. "The players union's representative possesses 'powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents.'" *Id.* at 139.

106. *Id.* at 140.

107. *See infra* Section III.B.2.

108. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1055 (9th Cir. 2015), *cert. denied*, 137 S.Ct. 277 (2016).

109. 802 F.3d 1049 (9th Cir. 2015).

compensat[ion] for the use of their [name, image, and likeness]."[110] Meanwhile, Sam Keller, a former college quarterback filed a separate suit against the NCAA, CLC, and Electronic Arts ("EA"), "a software company that produced video games based on college football and men's basketball from the late 1990s until around 2013."[111] The two cases were consolidated, receiving class certification.[112] After the plaintiffs settled their claims with EA and CLC, the cases were deconsolidated, and in 2014, the antitrust claims against the NCAA went to trial before the district court.[113] The district court ruled in favor of the plaintiff, holding that the NCAA's rules prohibiting student-athletes from receiving compensation for their name, image, and likeness violated Section 1 of the Sherman Act.[114] On appeal, the NCAA asserted that because the NCAA court held amateur rules valid, any challenge to them must fail.[115] Rather than categorically approving all amateurism rules, the NCAA explained why its rules should be analyzed under the rule of reason.[116] Although the opinion on amateurism served as mere dicta, the *O'Bannon I* court held high regard for its contents.[117] Summarily, despite amateurism rules serving a procompetitive purpose, it "can . . . be invalid[ated] under the rule of reason if a substantially less restrictive rule would further the same objectives equally well."[118] The appellate court's decision "reaffirm[ed] that NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the [r]ule of [r]eason."[119]

110. *Id.* at 1055.
111. *Id.*
112. *Id.*
113. *Id.* at 1056.
114. *O'Bannon*, 802 F.3d at 1056; *see also* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 1009 (N.D. Cal. 2014).
115. *O'Bannon*, 802 F.3d at 1061; *see also* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104 (1984).
116. *O'Bannon*, 802 F.3d at 1062–63; *see also Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 113–20.
117. *O'Bannon*, 802 F.3d at 1063. "To be sure, '[w]e do not treat considered dicta from the Supreme Court lightly;' such dicta should be accorded *appropriate deference*." *Id.* (alteration in original).
118. *Id.* at 1063–64.
119. *Id.* at 1079. "[T]he NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules." *Id.*

III. NFL AND NCAA RESTRAINT ON LABOR MARKET

It can be argued that football, and not baseball, is America's true national pastime.[120] Despite the violence of the sport, its media appeal has helped the sport grow tremendously.[121] Colleges and NFL teams profit from the services of a distinct individual—a football player.[122] The demarcation of college football players and professional football players are monotonous when the horrifying possibility of permanent injury is a common threat faced on any play.[123] Yet, these college football players subject their bodies to this threat for a hopeful financial reward.[124] Given the rise in player contract values,[125] or the huge investments into athletic facilities by colleges to lure recruits,[126] the market for football players' services is ever-growing. As fans' demands grow, so too does the supply.[127] In 2008, ESPN agreed to pay the Southeastern Conference ("SEC") "a staggering $2.25 billion over the

120. *See* Lucy McCalmont, *Football Has Taken Over Baseball as the True National Pastime*, HUFFINGTON POST (Apr. 16, 2015, 11:35 AM), http://www.huffingtonpost.com/2015/04/16/football-national-pastime_n_7078660.html.

121. *Id.*

> It has been a long, long time since baseball was truly America's pastime, and it has nothing to do with anything baseball has done wrong. It has been since . . . television. . . . The NFL is terrific to watch on television in a way baseball [is not] and never was, and we are a nation of television watchers. The minute people realized how easy football was to follow on television—even if it really tells you very little of [what is] actually going on—was the minute baseball stopped being America's pastime.

Id.

122. *See* Will Hobson & Steven Rich, *Colleges Spend Fortunes on Lavish Athletic Facilities*, CHI. TRIB. (Dec. 23, 2015, 6:40 AM), http://www.chicagotribune.com/sports/college/ct-athletic-facilities-expenses-20151222-story.html.

123. *See* Viera, *supra* note 20, at D1.

124. *See id.*; Adam Schefter & Jeff Legwold, *Broncos Sign Von Miller for 6 Years; Deal Worth $114.5M, Sources Say*, ESPN.COM (July 15, 2016), http://www.espn.com/nfl/story/_/id/17084231/denver-broncos-von-miller-agree-6-year-1145-million-deal.

125. *See* Schefter & Legwold, *supra* note 123.

126. Hobson & Rich, *supra* note 121.

> Big-time college athletic departments are taking in more money than ever—and spending it just as fast. A decade of rampant athletics construction across the country has redefined what it takes to field a competitive top-tier college sports program. Football stadiums and basketball arenas now must be complemented by practice facilities, professional-quality locker rooms, players' lounges with high-definition televisions and video game systems, and luxury suites to coax more money from boosters.

Id.

127. *See ACC, ESPN Partner for New Conference Channel*, ESPN.COM (July 18, 2016), http://www.espn.go.com/college-sports/story/_/id/17102933/acc-espn-agree-20-year-rights-deal-lead-2019-launch-acc-network.

next [15] years—about $150 million a year—for the conference's TV rights."[128] More recently, Mercedes-Benz purchased the naming rights to a newly constructed NFL stadium for $1.4 billion.[129] This is all driven by the on-field product provided by these football players.[130]

A. *NCAA*

Due to the NFL's draft eligibility rules, it is common practice for a football prospect to play at the collegiate level prior to becoming a professional.[131] In fact, colleges serve as a de facto development league for the NFL.[132] The NFL is grateful for the financial rewards of having colleges as a supplier of premier football services.[133] Although both the NFL and NCAA may identify as competitors providing similar products, they both benefit financially from practices that unreasonably restrain the market for football players.[134] This is possible because of their firm control on the market for the players' services.[135]

128. Michael Smith & John Ourand, *ESPN Pays $2.25B for SEC Rights*, SPORTS BUS. J. (Aug. 25, 2008), http://www.sportsbusinessdaily.com/Journal/Issues/2008/08/20080825/This-Weeks-News/ESPN-Pays-$225B-For-SEC-Rights.aspx.

129. Tim Tucker, *Falcons Officially Announce Mercedes-Benz as Naming Rights Partner*, AJC.COM (Aug. 24, 2015, 10:04 AM), http://www.ajc.com/news/sports/football/falcons-officially-announce-mercedes-benz-as-namin/nnP9Y/.

130. *See* Underwood, *supra* note 1, at 22.

131. *See id.* at 22–23; *NBA Draft Rules*, *supra* note 5.

132. Underwood, *supra* note 1, at 24.

133. *See id.*

134. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1062 (9th Cir. 2015) *cert denied*, 137 S. Ct. 277 (2016); Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 409 (S.D.N.Y. 2004).

135. Michael Janofsky, *U.S.F.L. Loses in Antitrust Case; Jury Assigns Just $1 in Damages*, N.Y. TIMES (July 30, 1986), http://www.nytimes.com/1986/07/30/sports/usfl-loses-in-antitrust-case-jury-assigns-just-1-in-damages.html. Despite losing, the U.S.F.L. succeeded in proving that the NFL was a monopoly. *Id.*; *see also* United States v. Walters, 997 F.2d 1219, 1225 (7th Cir. 1993).

> The NCAA depresses athletes' income—restricting payments to the value of tuition, room, and board, while receiving services of substantially greater worth. The NCAA treats this as desirable preservation of amateur sports; a more jaundiced eye would see it as the use of monopsony power to obtain athletes' services for less than the competitive market price.

Walters, 997 F.2d at 1225.

1. Amateurism

Founded in 1906, the NCAA sought out to remedy the problem that was being created by colleges competing for the best players.[136] In doing so, "one of [its] earliest reforms . . . was a requirement that . . . participants be amateurs."[137] To maintain amateurism, a student-athlete must not receive compensation other than what is permitted by the NCAA.[138] Even then, the compensation received was insufficient.[139] In 2014, the NCAA finally allowed scholarships to be awarded up to the full cost of attendance.[140] In addition to the compensation rules, the NCAA adopted several other amateurism protecting rules that restrain the market for football players' services.[141] An amateur may lose their eligibility to play at the collegiate level if they sign a contract with a professional team, enter a professional league's player draft, or hire an agent.[142] Additionally, the NCAA generally limits the mobility of an athlete by imposing a transfer penalty, mandating that a transferring athlete sit-out one season immediately after transferring before being eligible to play.[143] This can potentially affect an athlete's ability to market themselves to the future purchasers of their services, the NFL.[144]

> Players, however, suffer a severe penalty for transferring—the loss of a year of athletics eligibility. This can make them a very unattractive option for coaches who are under constant *win now* pressure. The NCAA's transfer rules restrain players' ability to make the best choices for themselves, including

136. *O'Bannon*, 802 F.3d at 1054; *History*, *supra* note 29.

137. *O'Bannon*, 802 F.3d at 1054.

138. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 20, at art. 12 § 12.1.2.

139. *See O'Bannon*, 802 F.3d at 1054.

> The *cost of attendance* at a particular school includes the items that make up a grant in aid plus '[nonrequired] books and supplies, transportation, and other expenses related to attendance at the institution.' The difference between a grant in aid and the cost of attendance is a few thousand dollars at most schools.

Id. at 1054 n.3 (alteration in original).

140. *Id.* at 1054–55.

141. *Id.* at 1055.

142. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 20, at art. 12 § 12.1.2.

143. Joe Nocera, *With College Transfer Rules, Hypocrisy Never Sits Out a Year*, N.Y. TIMES (Apr. 1, 2016), http://www.nytimes.com/2016/04/02/sports/ncaabasketball/with-college-transfer-rules-hypocrisy-never-sits-out-a-year.html; *see also* NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 20, at art. 14 § 14.5.1.

144. *See* Nocera, *supra* note 143; NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 20, at art. 14 § 14.5.1.

> ones based on financial considerations, academic considerations, athletics considerations, and personal circumstances.[145]

However, the most important rule prohibits athletes—with a few exceptions—from receiving, either direct or indirect, payment for their athletic skill.[146]

The NCAA, with varying success, has used the defense that all amateurism rules are legally valid.[147] Recently, *O'Bannon I* provided a clearer depiction of the intent in the *NCAA v. Board of Regents of the University of Oklahoma*[148] case, holding that not all rules that are linked to amateurism were immune from antitrust scrutiny.[149]

2. Rule of Reason Application to Amateurism Rules

The NCAA's bylaws applying to amateurism may be afforded antitrust scrutiny due to their effect on commerce.[150] "[T]he modern legal understanding of *commerce* is broad, 'including almost every activity from which the actor anticipates economic gain.'"[151] "Despite the nonprofit status

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145. Steve Berkowitz, *Lawsuit Challenges Rule for Transfers Between NCAA Division I Football Schools*, USA TODAY (Mar. 9, 2016, 6:44 AM), http://www.usatoday.com/story/sports/ncaaf/2016/03/08/lawsuit-ncaa-division-football-transfer-rules-peter-deppe-iowa-hawkeyes-northern-illinois-huskies/81510022/; *see also* Nocera, *supra* note 143.

> [T]he case of Baker Mayfield, the Sooners' current quarterback, who walked on to the Texas Tech team as a freshman, then transferred to Oklahoma, where he walked on to its football team, too. Mayfield not only had to sit out a year but also lost a year of eligibility because of a Big 12 rule that punishes players who dare to move to a different college within the conference. The fact that Mayfield [did not] have an athletic scholarship made no difference.

Nocera, *supra* note 143.

146. *O'Bannon*, 802 F.3d at 1055; NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 20, at art. 12 § 12.1.2.1. "[M]ost importantly, an athlete is prohibited—with few exceptions—from receiving *any pay* based on his athletic ability, whether from boosters, companies seeking endorsements, or would-be licensors of the athlete's name, image, and likeness, NIL." *O'Bannon*, 802 F.3d at 1055 (alteration in original).

147. *See O'Bannon*, 802 F.3d at 1063. "Quoting heavily from the language in *Board of Regents* that we have emphasized, the NCAA contends that any Section 1 challenge to its amateurism rules must fail as a matter of law because the *Board of Regents* Court held that those rules are presumptively valid." *Id.*; *see also* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984).

148. 468 U.S. 85 (1984).

149. *O'Bannon*, 802 F.3d at 1063; *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 120.

150. *O'Bannon*, 802 F.3d at 1065.

151. *Id.*; *see also* Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 340 (7th Cir. 2012). "No knowledgeable observer could earnestly assert that big-time college

of NCAA member schools, the transactions those schools make with premier athletes—full scholarships in exchange for athletic services—are not noncommercial, since schools can make millions of dollars as a result of these transactions."[152] Student-athletes considering scholarship offers often weigh economic factors, such as the earning potential of a degree or the likelihood of entering the NFL.[153] Therefore, the transactions that take place between the NCAA and student-athletes are somewhat commercial in nature.[154]

"In December 2010, the Buckeyes suspended star quarterback Terrelle Pryor," and four other players "for the first five games of the 2011 season for selling memorabilia and receiving discounted services at a local tattoo parlor."[155] "Pryor sold his 2008 Big Ten championship ring, Fiesta Bowl sportsmanship award," and other personal items.[156] "He was ordered to repay a total of $2500."[157] This punishment seems counterintuitive to the promotion of capitalism to prevent anyone from profiting from his or her own hard work in any capacity.[158]

a. *Substantial Adverse Effect on Competition Within the Market*

There is a market for football players' services, in which some football players are the reluctant sellers—and the schools are the purchasers—of their "athletic services and licensing rights."[159] The NCAA thus operates as a monopsony,[160] in that it is the only purchaser of this particular good for a reserved population of football players.[161] Consequently, price-fixing occurs when the compensation awarded to

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football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program." *Agnew*, 683 F.3d at 340.

152. *Agnew*, 683 F.3d at 340; *see also* Berkowitz et al., *supra* note 30.

153. *Agnew*, 683 F.3d at 341.

154. *Id.*

155. Zach Dirlam, *Scandal at Ohio State (Part 1 of 5): The Tattooed Five and Tressel's Cover Up*, BLEACHER REP. (June 1, 2011), http://www.bleacherreport.com/articles/719411-scandal-at-ohio-state-part-1-of-5-the-tattooed-five-tressels-cover-up.

156. *Id.*

157. *Id.*

158. Kevin Trahan, *How the NCAA's Marxist Philosophy is Hurting its Athletes*, FORBES (Aug. 18, 2014, 4:49 PM), http://www.forbes.com/sites/kevintrahan/2014/08/18/how-the-ncaa-hurts-the-players-it-claims-to-protect/.

159. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 991 (N.D. Cal. 2014).

160. *Id.*

161. *See id.*

student-athletes is limited to the grant-in-aid provided by the school, despite the level of talent.[162] The students have no bargaining power.[163] Likewise, the schools cannot exceed the compensation awarded without facing penalty.[164] However, due to the same rule, the schools still have another profitable venture in which they have no competition—the licensing rights of their players.[165] Although the NCAA prohibits the use of a student-athlete's name, image, or appearance to promote commercial ventures,[166] it is able to profit from student-athletes through disingenuous means.[167]

Throughout college stadiums, fans don the jerseys of their favorite players.[168] Every year, a portion of the revenue from different programs across the nation can be attributed to jersey sales.[169] Although a student-athlete cannot sell his or her own personal belongings attributable to their athletic ability, a school can sell a replica jersey of that same player under the facade that it does not reflect the player's likeness or image simply because their name is missing from the jersey.[170] This thinking is pure lunacy.[171] The

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162. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1054 (9th Cir. 2015), *cert. denied*, 85 U.S.L.W. 3139 (Oct. 3, 2016). "The 'combination[s] condemned by the [Sherman] Act' also include 'price-fixing . . . by purchasers' even though 'the persons specially injured . . . are sellers, not customers or consumers.'" *Id.* at 1070 (alteration in original).

163. Nicolas A. Novy, *"The Emperor Has No Clothes": The NCAA's Last Chance as the Middle Man in College Athletics*, 21 SPORTS LAW. J. 227, 232 (2014).

164. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 20, at art. 16 § 16.01.1; Eric Dodds, *The 'Death Penalty' and How the College Sports Conversation Has Changed*, TIME (Feb. 25, 2015), http://www.time.com/3720498/ncaa-smu-death-penalty/. SMU infamously violated several NCAA rules, by providing illegal compensation for recruits to attend the university. Dodds, *supra*. The NCAA imposed what was dubbed the *death penalty*, with sanctions including the program being banned from bowl games and stripped of forty-five scholarships for two years. *Id.* "There[] [is] a reason that a popular sports joke in the early '80s was that [Eric] Dickerson took a pay-cut when he graduated and went to the NFL." *Id.*

165. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 20, at art. 31 § 31.6.4.2.

166. *Id.* at art. 12.5.1.1.

167. Joseph Milord, *It's All Profit and No Pay: How the NCAA is an Ingenious Business*, ELITE DAILY (Mar. 20, 2014, 1:03 PM), http://www.elitedaily.com/money/ncaa-ingenious-business-ever-created-tuesday/.

168. *See* Novy, *supra* note 163, at 237.

169. *See id.* at 236; Milord, *supra* note 167; Marc Tracy, *Days of Selling Popular College Players' Jerseys Seems Numbered*, N.Y. TIMES (Aug. 5, 2015), http://www.nytimes.com/2015/08/06/sports/ncaafootball/days-of-selling-popular-college-players-jerseys-seem-numbered.html.

170. Novy, *supra* note 163, at 236–37; Milord, *supra* note 167; Tracy, *supra* note 169.

171. *See* Kevin Trahan, *Long Past Time for College Football Teams to Stop Selling Real Player Jerseys*, SB NATION (June 5, 2014, 2:23 PM),

number 23 is forever linked to Michael Jordan, just like any other sports hero's number will be forever tied to that team.[172] If we are to believe that jersey numbers are ambiguous representations of the school themselves and not the player, then why do schools retire a revered student-athlete's number, a la professionals?[173] It is evident that this practice presents an anticompetitive arrangement that allows only the school to profit from the marketability of their athletes.[174] Even so, schools still use their current student-athletes likeness in a commercial setting.[175] Meanwhile, players are subjected to watch as schools reap the financial reward from their services, while they are unable to receive a breadcrumb for their efforts.[176]

b. *Challenged Conduct Promotes Competition*

While the courts have generally recognized the importance of maintaining the amateurism aspect of the college football product,[177] they have also determined "that the NCAA's definition of amateurism [is] *malleable*, changing frequently over time in 'significant and contradictory ways.'"[178] The NCAA's current rules do serve a procompetitive benefit by

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http://www.sbnation.com/college-football/2014/6/5/5783202/college-football-player-jerseys-real-numbers.

172. *See* Maureen Callahan, *Jeter's Retirement Marks End of Yanks' Single-Digit Numbers*, N.Y. POST (Mar. 30, 2014, 3:45 AM), http://nypost.com/2014/03/30/jeters-retirement-marks-end-of-yanks-single-digit-numbers/; Tracy, *supra* note 169. "The Yankees will hit another milestone this season besides the retirement of Derek Jeter: [It is] the last time a single-digit jersey will be worn by a Bronx Bomber." Callahan, *supra*. The Yankees are famous for not displaying player names on their uniform. *See id.*

173. *See* Craig Barnes, *Seminoles to Retire Deion's Number Tonight*, SUN SENTINEL (Oct. 7, 1995), http://articles.sun-sentinel.com/1995-10-07/sports/9510060566_1_doak-campbell-stadium-sanders-charlie-ward.

174. *See* Tracy, *supra* note 169; Trahan, *supra* note 171. "Worried about the ramifications of selling the numbers tied to student-athletes, several schools have decided not to sell football jerseys with star players names on it this upcoming season, sources tell ESPN." Trahan, *supra* note 171.

175. Jason Kirk, *NCAA President Faces Fact That Colleges Sell Jerseys with Real Player Numbers*, SB NATION (June 20, 2014, 12:20 PM), http://www.sbnation.com/college-football/2014/6/20/5827802/ncaa-player-jerseys-numbers-mark-emmert-obannon. During the *O'Bannon* case, "Georgia Tech tweeted an image of football schedule cards, each with a current [player] posed next to a corporate sponsor's logo." *Id.* Although the schedules were handed out by the school, and not sold, the presence of commercial sponsors implies a mutual partnership that financially benefits both parties, through advertising. *See id.*

176. *See* Novy, *supra* note 163, at 228.

177. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1062 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

178. *Id.* at 1058.

promoting amateurism, which helps drive the consumer's demand for the product that is college football.[179] However, studies have shown that these rules "do not promote competitive balance" amongst football programs.[180] In fact, "restrictions on student-athlete compensation lead many schools . . . to spend larger portions of their athletic budgets on coaching, recruiting, and training facilities."[181] It is hard to argue that competitive balance is a true driving force, with the increasing number of bowl games awarded to teams.[182]

> The number of bowls has doubled in the last [twenty] years and [it is] unknown if there will even be enough teams to fill the slots. In order to qualify for a bowl game, teams must win at least six games, but a [five-seven] team can fill out a waiver to play for an available slot.[183]

To fulfill consumers' insatiable demand for football, the NCAA has capitalized on the time period when the NFL season is dwindling down to steadily increase the number of games available to the market.[184] It is

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> The court suggested that, even today, the NCAA's definition of amateurism is inconsistent: [A]lthough players generally cannot receive compensation other than scholarships, tennis players are permitted to accept up to $10,000 in prize money before enrolling in college, and student-athletes are permitted to accept Pell grants even when those grants raise their total financial aid package above their cost of attendance. It thus concluded that amateurism was not, in fact, a *core principle*[] of the NCAA.

Id. at 1058–59 (citations omitted).

179. *Id.* at 1059.

180. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 978 (N.D. Cal. 2014).

> [S]ince the 1970s, numerous sports economists have studied the NCAA's amateurism rules and nearly all have concluded that the rules have no discernible effect on the level of competitive balance. . . . [Also], a 2007 study by economist Jim Peach published in the *Social Science Journal*, found that there is 'little evidence that the NCAA rules and regulations have promoted competitive balance in college athletics and no *a priori* reason to think that eliminating the rules would change the competitive balance situation.'

Id.

181. *Id.*

> The fact that high-revenue schools are able to spend freely in these other areas cancels out whatever leveling effect the restrictions on student-athlete pay might otherwise have. The NCAA does not do anything to rein in spending by the high-revenue schools or minimize existing disparities in revenue and recruiting.

Id. at 978–79.

182. *See* Nick Schwartz & Laken Litman, *Are There Too Many College Football Bowl Games?*, USA TODAY (May 6, 2015, 3:11 PM), http://ftw.usatoday.com/2015/05/are-there-too-many-college-football-bowl-games.

183. *Id.* "Playing in a bowl game used to be a reward. Now [it is] getting overly commercial and out of control." *Id.*

184. *See id.*

apparent that this is mainly commercially driven based on the astounding profits from bowl games, despite the dilution of competition.[185]

Although the NCAA promotes a product that is unique from the NFL, and amateurism is an integral component of that product, student-athlete compensation is not the driving force behind consumer demand for its product.[186] "Dr. Emmert, [the NCAA commissioner], himself noted that much of the popularity of the NCAA's annual men's basketball tournament stems from the fact that schools from all over the country participate 'so the fan base has an opportunity to cheer for someone from their region of the country.'"[187]

The NCAA has also argued that the restraints on student-athlete compensation integrates athletics and academics, and promotes competition for football players' services by increasing the quality of the educational services its member schools provide to student-athletes.[188] Contrarily, one of the NCAA's expert witnesses in the *O'Bannon v. NCAA* ("*O'Bannon II*")[189] case, Dr. James Heckman, "testified that the long-term educational and academic benefits that student-athletes enjoy stem from their increased access to financial aid, tutoring, academic support, mentorship, structured schedules, and other educational services that are unrelated to the [compensation] rules."[190] It is well documented how schools exploit the talents of student-athletes while shuffling them through the education

185. *See* Dosh, *supra* note 28. An increase in bowl games from thirty-five games in 2014 to thirty-nine in 2015, resulted in a $196 million increase in revenue. *College Bowl Payouts Surpass $500 Million*, ESPN.COM (Apr. 14, 2015), http://www.espn.com/college-football/story/_/id/12688517/college-bowl-game-payouts-surpass-500-million-first-year-college-football-playoff. Surprisingly, schools' expenses in relation to the revenue declined more than ten percent over this span. *See id.*

186. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1059 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016). "[C]onsumers are primarily attracted to college sports for reasons unrelated to amateurism, such as loyalty to their alma mater or affinity for the school in their region of the country." *Id.* (citation omitted).

187. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 978 (N.D. Cal. 2014).

188. *Id.* at 980.

189. 7 F. Supp. 3d 955 (N.D. Cal. 2014).

190. *Id.* at 980.

> The only evidence that the NCAA has presented that suggests that its challenged rules might be necessary to promote the integration of academics and athletics is the testimony of university administrators, who asserted that paying student-athletes large sums of money would potentially *create a wedge* between student-athletes and others on campus. These administrators noted that, depending on how much compensation was ultimately awarded, some student-athletes might receive more money from the school than their professors. Student-athletes might also be inclined to separate themselves from the broader campus community by living and socializing off campus.

Id. (citation omitted).

system.[191] Recently, before a Congressional Committee, Myron Rolle, a former football player and Rhodes Scholar at Florida State University, "said that many universities [do not] prioritize an athlete's education, rendering the term *student-athlete* inaccurate."[192]

> Calling himself an anomaly, Rolle, who was a Rhodes Scholar, said the number of hours occupied by games, traveling, workouts, injury treatments, and practices left little time for studying. With so few athletes continuing their sport after college, he said, many students do not have much to show for their work upon graduation.[193]

A 1980s study done by Northeastern University showed the sad state of educational affairs for prep athletes, placing "the functional illiteracy rate for . . . high school football and basketball players at 25[%} to 30[%], twice the national average."[194]

Ed O'Bannon, a former UCLA basketball star, testified that he felt like "'an athlete masquerading as a student' during his college years."[195] A 1986 study revealed that roughly six out of every ten NFL players did not have a college degree.[196] Though players' early departure to the league may have contributed to this statistic, several were ill-equipped to thrive in an academic setting anyhow.[197] Couple this with the rigorous demands the sport

191. *See id.* at 975, 984.

192. Paul Cottle, *Former FSU Football Star Tells Congressional Committee About College Athletes: "A Lot of Them Would Go Through this Academic Machinery and Get Spit Out, Left Torn, Worn, and Asking Questions."* BRIDGE TO TOMORROW (July 10, 2014), https://bridgetotomorrow.wordpress.com/2014/07/10/former-fsu-football-star-tells-congressional-committee-about-college-athletes-a-lot-of-them-would-go-through-this-academic-machinery-and-get-spit-out-left-torn-worn-and-asking-questions/ (emphasis added). "'Many of my fellow teammates struggled in that environment,' Rolle said. 'Some of them sent some of their scholarship money home to help their families. They struggled academically. A lot of them would go through this academic machinery and get spit out, left torn, worn, and asking questions.'" *Id.*

193. *Id.*

194. Diana Nyad, *How Illiteracy Makes Athletes Run*, N.Y. TIMES, May 28, 1989, at S8. Former NFL and Oklahoma State football player, Dexter Manley, was a functioning illiterate, but somehow was accepted into and studied at the school for four years. *Id.*

195. *O'Bannon*, 7 F. Supp. 3d at 980–81.

196. Bogan, *supra* note 37.

197. *See* Lederman, *supra* note 32. The Atlanta Journal Constitution conducted a study of admission reports for fifty-four colleges between 1990 and 2006. *Id.* There was a noticeable difference between football players' average SAT score when compared to the average SAT score of a non-athlete incoming student. *Id.*

requires,[198] and football players are left with little time to realistically focus on the education aspect that the NCAA vehemently declares is a core value.[199]

B. *NFL*

The NFL's draft eligibility rule is not foreign to antitrust suits.[200] However, they have escaped antitrust scrutiny due to the non-statutory exemption that promotes a national labor policy favoring free and private collective bargaining and requiring good-faith bargaining over wages, hours, and working conditions.[201] The NFL and its player union negotiated the current collective bargaining agreement that includes the agreed upon eligibility rules.[202] While the National Labor Relations Act was enacted primarily "to promote collective bargaining and to protect . . . concerted employee" efforts,[203] eligibility rules that regulate commercial activity certainly create a restraint on trade.[204]

> The mere fact that a rule can be characterized as an *eligibility rule*, however, does not mean the rule is not a restraint of trade; were the law otherwise, the NCAA could insulate its member schools' relationships with student-athletes from antitrust scrutiny by

198. *See* Chris Isidore, *Playing College Sports: A Long, Tough Job*, CNN MONEY (Mar. 31, 2014, 6:58 AM), http://www.money.cnn.com/2014/03/31/news/companies/college-athletes-jobs/.

> Up until the season starts, the workload trails off to [fifty] to [sixty] hours a week. That eases to [forty] to [fifty] hours a week once the season, and classes, begin. Weeks with road games include a [thirty-seven] hour stretch that includes travel, practice, a [three] to [four] hour game and some time to sleep in a strange hotel.
>
> The season usually runs until late November—unless the team is successful. Then it has to work through to a bowl game, sometimes played on New Year's Day. There might be a brief break for the holidays, but, as the NLRB found, 'While the players are allowed to leave campus for several days before Christmas, they must report back by Christmas morning.'

Id.

199. *Finances*, *supra* note 23.

200. *See* Clarett v. Nat'l Football League, 369 F.3d 124, 125 (2d Cir. 2004).

201. *Id.* at 130. "[F]ederal labor statutes . . . delegate related rulemaking and interpretive authority to the National Labor Relations Board." Brown v. Pro Football Inc., 518 U.S. 231, 236 (1996).

202. *Clarett*, 369 F.3d at 126–27.

203. McCormick & McKinnon, *supra* note 44, at 383.

204. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1065 (9th Cir. 2015), *cert. denied*, 85 U.S.L.W. 3139 (Oct. 3, 2016).

> renaming every rule governing student-athletes an *eligibility rule*.[205]

The broad scope in which the Supreme Court of the United States determined whether an employer-union agreement could be afforded exemption status, was announced in Justice White's opinion "advocat[ing] that the application of the non-statutory exemption should be determined by balancing the 'interests of union members' served by the restraint against 'its relative impact on the product market.'"[206] Even so, there is ongoing debate regarding the boundaries of the exemption and what test to apply in determining whether a rule is truly a mandatory subject of collective bargaining.[207]

1. Dispelling the *Mandatory Bargaining Subject* Ruling of Clarett

In an age in which player safety has come to the forefront for issues involving the sport, it seems counterintuitive to restrain the labor market when it is known that these players will subject themselves to the same threat of injury, albeit at an *amateur* level.[208] With the average career being around 3.5 years,[209] the shortest of any major North American professional sport, the rule accomplishes one thing—prolonging the chance of injury without freely negotiated compensation, ensuring that "the cream [of NFL talent] will rise to the top."[210]

While it is the NFL Players Association's ("NFLPA") duty to seek the best deal for NFL players, it is far-fetched to still believe—with the rookie salary amendments—that the "eligibility rules . . . have tangible effects on the wages and working conditions of current NFL players."[211] The court in *Clarett v. NCAA* ("*Clarett II*")[212] opined that "the complex scheme by which individual salaries in the NFL . . . was built around the longstanding restraint on the market for entering players imposed by the

205. *Id.*
206. *Clarett*, 369 F.3d at 132.
207. *See id.* at 131–34.
208. *See id.* at 129.
209. Schwartz, *supra* note 12.
210. *See id.*; Chris Vannini, *David Shaw: A College Coach's No. 1 Job is NOT to Get Players to the NFL*, COACHINGSEARCH.COM (Apr. 16, 2016), http://www.coachingsearch.com/article?a=David-Shaw-A-college-coachs-No1-job-is-NOT-to-get-players-to-the-NFL.
211. *Clarett*, 369 F.3d at 140.
212. 369 F.3d 124 (2d Cir. 2004).

eligibility rules and the related expectations about the average career length of NFL players."[213]

The court later states, "by reducing competition in the market for entering players, the eligibility rules also affect[ed] the job security of veteran players."[214] In a dangerous sport where job security and health are so deeply intertwined that the average career span is *shorter* than the average contract length for a rookie player,[215] this problem seems de minimis.[216] The NFL has the largest roster size of the major professional sports, yet feels compelled to impose the strictest draft eligibility rules to prevent younger players from securing jobs seemingly meant for veterans.[217] "[I]t is unlikely that such *raiding* would destroy college football . . . since there are relatively few athletes who are capable of playing professional football without the benefit of . . . college competition."[218]

Furthermore, the NFL has taken less restrictive alternative steps that have directly addressed job security concerns of veteran players in the league.[219] In the latest collective bargaining agreement, the players' union and the league agreed to modify rookie contracts by predetermining the contract amount for each draft pick.[220] "[T]he NFLPA negotiating team, led by veterans who were frustrated with rookies entering the league and making more than proven players, was only too happy to shift funds to established guys."[221] Through this amendment, veteran players gained more leverage in contract negotiations for their proven skills, rather than have unproven rookies set an inflated market price for their position.[222]

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213. *Id.* at 140.

214. *Id.*

215. *See* McCormick & McKinnon, *supra* note 44, at 434, 438 n.284; Cork Gaines, *Here's How Much Money Players Lose When They Fall in the NFL Draft*, BUS. INSIDER (Apr. 27, 2016, 3:06 PM), http://www.businessinsider.com/nfl-draft-contract-values-2016-4. Rookies generally sign a four-year contract. Gaines, *supra*.

216. *See* McCormick & McKinnon, *supra* note 44, at 434.

217. *Id.* at 407.

218. *Id.* at 433; *see also* Legwold, *supra* note 19.

219. *See* Andrew Brandt, *The New Age of Rookie Contract Negotiations*, SPORTS ILLUSTRATED: MMQB (May 22, 2014), http://mmqb.si.com/2014/05/22/nfl-rookie-contract-negotiations.

220. *Id.*

221. *Id.*

222. *See* John Czarnecki, *Rookie Cap Biggest Win from New CBA*, FOX SPORTS (July 27, 2011, 1:00 AM), http://www.foxsports.com/nfl/story/NFL-rookie-salary-cap-biggest-win-from-new-CBA-less-risk-for-owners-072711. "The new collective bargaining agreement somewhat changes what had become a ridiculous system in which a rookie, an unproven professional, often was suddenly making more money than most of his veteran teammates, even Pro Bowl selections." *Id.*

Conversely, the NFL has taken measures that have proven to be detrimental to players' job security.[223] NFL Europe lasted for sixteen years, operating as the NFL's development league, prior to the NFL terminating the league in 2007.[224] On a roster, where more than twenty players are considered reserves, it is a constant battle to stay employed.[225] The defunct development league helped to develop talents in ways unobtainable with the current teams.[226] Due to player safety concerns, offseason training activities have been reduced,[227] causing coaches to focus more on contributing players rather than developing depth on their roster.[228] NFL Europe, though costly,[229] allowed players *on the fringe* of making an NFL roster to gain valuable practice opportunities and experience, which certainly enhanced their prospects of securing and maintaining a job in the NFL.[230] From a business perspective, the league simply closed NFL Europe to maximize profits,[231] thanks, in part, to the free farm system that is college football.[232] It can certainly be argued that the draft eligibility rule does not primarily

223. *See* Sean Keeler, *'You Didn't Play to Get Rich': What Killed NFL Europe?*, GUARDIAN (June 23, 2016, 6:00 AM), http://www.theguardian.com/sport/2016/jun/23/you-didnt-play-to-get-rich-what-killed-nfl-europe.

224. *Football: After 16 Years, NFL Closes European League*, N.Y. TIMES (June 30, 2007), http://www.nytimes.com/2007/06/29/sports/29iht-nfl.4.6417232.html.

225. *See* Marc Lillibridge, *The Anatomy of a 53-Man Roster in the NFL*, BLEACHER REP. (May 16, 2013), http://bleacherreport.com/articles/1640782-the-anatomy-of-a-53-man-roster-in-the-nfl; *Released? Waived? Practice Squad? An NFL Roster Moves Primer*, FOX SPORTS (Sept. 2, 2016, 5:38 PM), http://www.foxsports.com/nfl/story/released-waived-practice-squad-an-nfl-roster-moves-primer-090216; Keeler, *supra* note 223.

226. *See* Keeler, *supra* note 223.

227. Judy Battista, *Players Like Camp Restrictions; They're Growing on Coaches*, N.Y. TIMES, Aug. 20, 2012, at B8.

228. *See id.*

229. *Football: After 16 Years, NFL Closes European League*, *supra* note 224. "The league was reportedly losing about [thirty] million a season." *Id. But see Total Revenue of all National Football League Teams from 2001 to 2015 (in Billion U. S. Dollars)*, STATISTA, http://www.statista.com/statistics/193457/total-league-revenue-of-the-nfl-since-2005/ (last visited Apr. 9, 2017). In 2007, when NFL Europe closed, league posted revenue of 7.09 billion. *Id.* Meaning that an expense of 30 million still equated to less than 1% of their revenue. *See id.*

230. *See* Keeler, *supra* note 223. "The value [of NFL Europe] was just in terms of [the fact] guys that are on the lower end of the roster, you [a]re not getting much better in OTAs. You [a]re not getting much better, honestly, in camps." *Id.* (alteration in original).

231. *See Football: After 16 Years, NFL Closes European League*, *supra* note 224. "Goodell said it was time to develop a new international strategy, describing the move to fold NFL Europa as the *best business decision*." *Id.*; Keeler, *supra* note 223.

232. Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 408 n.181 (S.D.N.Y. 2004); Keeler, *supra* note 223; *see also Football: After 16 Years, NFL Closes European League*, *supra* note 224.

address a mandatory bargaining subject, instead acting as a market barrier for a certain population of players which forces them to bargain their services for a scholarship.[233]

2. Rule of Reason Application to Draft Eligibility Rules

Despite the unsuccessful challenge to the eligibility rules in *Clarett I*, courts have found that similar entry barriers violated the antitrust laws.[234] Since the NFL has been recognized as a monopoly controlling the market for football players' services,[235] it is pertinent to ensure that their practices are not unreasonable restraints on the market for these players' services.[236]

a. *Substantial Adverse Effect on Competition Within the Market*

The Supreme Court of the United States has allowed an intermediate inquiry, known as *quick-look*, if the conduct is a naked restriction.[237] They explained that a *quick-look* analysis, under the rule of reason, is appropriate where "the great likelihood of anticompetitive effects can easily be ascertained," and "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect."[238]

As previously addressed, the market is clearly for football players' services.[239] The market for professional football players and college football players is illusory, as the players providing this labor market involuntarily submit to the mandatory pre-requisite that they provide services as a *college football player* prior to becoming a professional.[240] Certainly, few players can make the jump from the high school rank to the pros,[241] but they should be afforded the right to pursue their profession free of unreasonable obstructions.[242] The only alternative to college football that would provide monetary compensation is the minuscule Arena Football League ("AFL").[243]

233. *Clarett*, 306 F. Supp. 2d at 395, 401–02.

234. Clarett v. Nat'l Football League, 369 F.3d 124, 125 (2d Cir. 2004); *Clarett*, 306 F. Supp. 2d at 395, 401–02. *But see* Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1058 (C.D. Cal. 1971).

235. *Clarett*, 306 F. Supp. 2d at 407; Janofsky, *supra* note 135.

236. *See Clarett*, 369 F.3d at 138; *Clarett*, 306 F. Supp. 2d at 401–02.

237. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 769–70 (1999).

238. *Id.* at 770.

239. *See Clarett*, 369 F.3d at 138; *Clarett*, 306 F. Supp. 2d at 401–02.

240. *See Clarett*, 369 F.3d at 141; *Clarett*, 306 F. Supp. 2d at 401, 409 n.185.

241. Legwold, *supra* note 19.

242. *See id.*

243. *See* COLLECTIVE BARGAINING AGREEMENT, NEGOTIATED BY AND BETWEEN ARENA FOOTBALL ONE, LLC AND ARENA FOOTBALL LEAGUE PLAYERS UNION 13

Based on the pay,[244] it seems unfeasible to choose this path given the risk of injury and the fact that the game itself is different than the NFL style of play.[245]

In *Denver Rockets v. All-Pro Management, Inc.*,[246] the court considered an NBA bylaw that restricted eligibility to players who were at least four years removed from the date of their high school graduation an unreasonable restraint of trade.[247] Since then, the NBA has amended their draft eligibility rules to once again prevent immediate eligibility to high school graduates, albeit a reasonable restraint of only one year.[248] Similar age-based restrictions have been struck down in professional hockey.[249] Therefore, it is evident that the restriction constitutes a naked restriction that has the anticompetitive effect of excluding players' ability to render their services to the NFL.[250]

b. *Challenged Conduct Promotes Competition*

The *Clarett I* case provides the NFL's procompetitive justifications for the rule:

> The purposes of the eligibility rule include [1] protecting younger and/or less experienced players—that is, players who are less mature physically and psychologically—from heightened risks of injury in NFL games; [2] protecting the NFL's entertainment product from the adverse consequences associated with such injuries; [3] protecting the NFL clubs from the costs and potential

(Aug. 10, 2012), www.aflpu.org/resources/ALFPU+AFL+CBA+2012.pdf; *Sharks to Host Open Tryout in Georgia*, ARENAFOOTBALL.COM (Dec. 9, 2015), http://www.arenafootball.com/sports/a-footbl/spec-rel/120915aad.html.

244. *See* COLLECTIVE BARGAINING AGREEMENT, *supra* note 239, at 13. AFL salary range for veteran/rookie, $17,220–$18,375, over a twenty-one-game schedule, based on fixed salary. *Id.*

245. *See* Matt Bonesteel, *Movement to Eliminate Kickoffs in College Football Reportedly Gaining Steam*, WASH. POST (July 18, 2016), http://www.washingtonpost.com/news/early-lead/wp/2016/07/18/movement-to-eliminate-kickoffs-in-college-football-reportedly-gaining-steam/.

246. 325 F. Supp. 1049 (C.D. Cal. 1971).

247. *Id.* at 1054.

248. *NBA Draft Rules*, *supra* note 5.

249. Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1317, 1320–21 (D. Conn. 1977) (preliminarily enjoining a rule declaring players younger than twenty ineligible for the hockey league draft because it was an illegal "group boycott, or a concerted refusal to deal, [which] has been long and consistently classified as a *per se* violation of the Sherman Act").

250. Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 398, 408 (S.D.N.Y. 2004); *see also Linseman*, 439 F. Supp. at 1321.

> liability entailed by such injuries; and [4] protecting from injury and self-abuse other adolescents who would over-train—and use steroids—in the misguided hope of developing prematurely the strength and speed required to play in the NFL.[251]

While the NFL wants to ensure the health of the younger players, the first and fourth justifications are misguided attempts to feign caring for players' health, because it simply does not want to have the players injured at its expense.[252] These players face the same threat of injury at the collegiate level.[253] Under this notion, the NCAA should not allow *true freshmen* to play against upperclassmen who have completed at least a year of a semi-professional training regimen.[254] This does not occur because of the numerous opportunities high school prospects have to perfect their craft.[255] The temptation of steroid use and overtraining exists, regardless of this rule, as prep players are exposed to the pressures of reaching the exclusive collegiate level to continue their aspirations of becoming a professional.[256] Furthermore, the Supreme Court of the United States emphasized that justifications offered under the rule of reason may be considered only to the extent that they tend to show that "the challenged restraint enhances competition."[257] Consequently, the first and fourth justifications hoping to protect younger players' wellbeing do not promote competition.[258] The second explanation prescribes that by "limiting the occurrence of player injuries, [the rule] maintains the high quality of its *entertainment product* and, thus, presumably enables the League to better compete with other providers of sports entertainment such as other professional sports leagues or amateur football."[259] Here, the league incorrectly assumes the validity of the rule simply because it provides competition in a market—sports entertainment—other than the market—football players' service—in which

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251. *Clarett*, 306 F. Supp. 2d at 408.

252. *See id.* at 408, 408 n.181.

253. *See* Bonesteel, *supra* note 245.

254. *See id.* "NCAA moved kickoffs to the [thirty-five] yard line," similar to the NFL's kickoff amendment in lieu of player safety concerns. *Id.*

255. *See* Edwin Weathersby, *Top 10 Camps Where College Football Recruits Get Noticed*, BLEACHER REP. (Mar. 26, 2014), http://www.bleacherreport.com/articles/2005928-top-10-camps-where-college-football-recruits-get-noticed/page/9.

256. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 20, at art. 16 § 31.2.3.4. Percentage of high school football players to play in NCAA is 6.7%. NCAA RESEARCH, *supra* note 1.

257. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 103–04 (1984); *Clarett*, 306 F. Supp. 2d at 408 n.182.

258. *Clarett*, 306 F. Supp. 2d at 408.

259. *Id.* at 409.

the rule has an anticompetitive effect.[260] Lastly, the NFL asserts that the rule shields its teams from these injury-related costs.[261] Cost reduction, alone, is not considered a legitimate procompetitive justification;[262] rather, it is a component of a bargain that is "favorably affected by [competition]."[263] Based on the reasons provided, it seems that the NFL has not offered any strong justifications that the rule promotes competition in the market for football players' services.[264]

IV. CONCLUSION

The NCAA and NFL are the two biggest providers of American football entertainment.[265] There is an undeniable nexus between these organizations, in that one serves as the de facto development league for the other.[266] Both have implemented practices that unreasonably restrain this shared labor market to their economic benefit.[267]

The NFL identified that they are direct competitors in the sports entertainment market with *amateur football*.[268]

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260. *See id.* at 408–09, 409 n.185.

> [T]he freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.

United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

261. *Clarett*, 306 F. Supp. 2d at 408.

262. Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1022 (10th Cir. 1998). "[C]ost-cutting by itself is not a valid procompetitive justification." *Id.*

263. *Id.*; *see also* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423 (1990).

> [T]he 'Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices but, also, better goods and services.' This judgment 'recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.'

FTC, 493 U.S. at 423 (citation omitted).

264. *See Clarett*, 306 F. Supp. 2d at 408–10. Let it be noted that the only case to analyze the procompetitive justifications of the modern draft eligibility rule held that "the League . . . failed to offer *any* legitimate procompetitive justifications for the Rule." *Id.* at 409.

265. *See* Clarett v. Nat'l Football League, 369 F.3d 124, 126 (2d Cir. 2004); *Clarett*, 306 F. Supp. 2d at 409, n.185.

266. Underwood, *supra* note 1, at 24.

267. *See Clarett*, 306 F. Supp. 2d at 409.

268. *Id.*

> The conspiracy or agreement to fix prices or to rig bids is the key element of a Sherman Act criminal case. In effect, the conspiracy must comprise [of] an agreement, understanding or meeting of the minds between at least two competitors or potential competitors, for the purpose or with the effect of unreasonably restraining trade.[269]

More damning is the fact that the NFL attempted to justify their draft eligibility rule by "excluding the most talented college players from the NFL, [to sustain] 'the NCAA's ability to compete in the entertainment market.'"[270] With the dissolution of NFL Europe, it is apparent that the NFL has a keen interest in the viability of its free farm system.[271] Unfortunately, this is in direct conflict with the precedent established in *United States v. Topco Associates, Incorporated*,[272] that competition in one market—football players services—may not be suppressed in favor for another market—entertainment market.[273] Additionally, the NCAA has further impacted the restraints on football players' services by promoting *amateurism rules* that render any hopeful professional player an indentured servant for a minimum of three years.[274]

Since the NCAA has now allowed for student-athletes to receive scholarships capped at the full cost of attendance,[275] it seems that any further compensation may contradict the idea of amateurism.[276] With perpetual

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269. Antitrust Resource Manual: Elements of the Offense, U.S. DEP'T JUST., https://www.justice.gov/usam/antitrust-resource-manual-7-elements-offense (last updated Oct. 2011).

270. *Clarett*, 306 F. Supp. 2d at 409 n.185.

271. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972); *Football: After 16 Years, NFL Closes European League*, *supra* note 220; Mike Florio, *Fournette Definitely Should Take a Year off in 2016*, NBC SPORTS (Sept. 30, 2015, 9:33 AM), http://profootballtalk.nbcsports.com/2015/09/30/fournette-definitely-should-take-a-year-off-in-2016/.

272. 405 U.S. 596 (1972).

273. *Id.* at 610.

274. *See* Daniel Roberts, *Does the NCAA Make Its Money from Indentured Servants?*, YAHOO: FIN. (Feb. 19, 2016), http://finance.yahoo.com/news/does-the-ncaa-make-its-money-from-indentured-servants-184409356.html.

> [T]he athletes are promised an education, but in fact [do not] get the same one their fellow students get because they devote the vast majority of their time to their sport. Second, the NCAA's strict rules around amateurism bring down harsh punishments on athletes for even the tiniest of infractions . . . . The third problem is the big money the NCAA sees, while its athletes see none of it. "The NCAA is running a cartel," Nocera rails, "where everybody gets rich except the labor force." He likens NCAA athletes to indentured servants.

Id.

275. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1054–55 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

276. *See id.* at 1058; Novy, *supra* note 163, at 229.

yearly revenue increases,[277] this appears to be a temporary solution to an aspect of a larger problem.[278] Schools will continue to benefit financially from the services provided by football players at a fixed cost of attendance, which ensurs unfathomable profit margins.[279] The state of college sports will continue to have *improper benefits* scandals, ironically, due to the collusion by the NFL and NCAA to promote the importance of college.[280] As students are forced to attend class each day and go through the rigors of being a college athlete, they realize the limited earning potential of their fragile careers.[281] With the popularity of the sport being at an all-time high, student-athletes see the earnings that their respective programs gross as a result of their hard work.[282] Yet they face unreasonable restrictions that, if violated, could effectively end their ability to earn a living from their skill before it ever materialized.[283] This greedy practice has led sports pundits to call for star college players to sit-out seasons to remain healthy and keep their professional aspirations intact.[284] However, it would take a selfless individual to do so, because this is a daunting task to place on a nineteen or twenty year old who does not want to offend the *establishment*.[285] This displays the overwhelming amount of power these two entities possess.[286]

Some students choose to attend college to obtain marketable skills that will benefit them in their career.[287] Although the likelihood of reaching the professional level is low,[288] some football players only want to acquire

277. *See* Berkowitz et al., *supra* note 30. Texas A&M's 2014 revenue increased by $73,133,004 in comparison to the previous year. *Id.*

278. *See* Novy, *supra* note 163, at 230.

279. *See O'Bannon*, 802 F.3d at 1054–55; Berkowitz et al., *supra* note 30.

280. *See O'Bannon*, 802 F.3d at 1054. "[T]he NFL has required aspiring professional football players to wait a sufficient period of time after graduating high school to accommodate and encourage college attendance before entering the NFL draft." Clarett v. Nat'l Football League, 369 F.3d 124, 126 (2d Cir. 2004). This statement makes the rule seem far less stringent than it actually is. *See id.* It appears as though football players are truly given a choice to either play at the collegiate level in exchange for only a college education or become a professional. *See id.* Since there is no realistic alternative to college, they are forced to accept the only option on the table. *Id.*

281. *See O'Bannon*, 802 F.3d at 1055; Novy, *supra* note 163, at 229–30.

282. *See Clarett*, 369 F.3d at 126; Berkowitz et al., *supra* note 30.

283. *See Clarett*, 369 F.3d at 126; Florio, *supra* note 271.

284. Florio, *supra* note 271. The position Fournette plays, running back, has the second shortest average career span, at only two and a half years. Rob Arthur, *The Shrinking Shelf Life of NFL Players*, WALL ST. J., http://www.wsj.com/articles/the-shrinking-shelf-life-of-nfl-players-1456694959 (last updated Feb. 29, 2016, 12:42 AM).

285. *See* Florio, *supra* note 271.

286. *See id.*

287. *Id.*

288. *See* NCAA RESEARCH, *supra* note 1.

marketable skills that will benefit them in their professional careers.[289] In *Denver Rockets*, the court stated, "[p]rofessional basketball is the only trade in which Haywood can employ his unusual talents and skills. Unless Haywood plays professional basketball, those skills and talents will depreciate."[290] Taking the same approach in regards to football players, professional football is the only trade in which players can employ their talents and skills.[291] Though some players have no desire to obtain a college education, the NFL sees fit to force it upon them—possibly depreciating a players' talent and worth at that players' expense.[292] Unlike other careers, where certain skills transcend across a variety of jobs giving an individual several options to establish a career path, the unique skill of a football player is forced down the same beaten path.[293] Even in other professional sports, players are afforded various options into the labor market.[294] This liberty would certainly help improve the amateur image that the NCAA tries so vehemently to uphold because athletes would be given a true choice to attend school for the benefit of an education rather than begin their professional careers.[295]

It is unfortunate that arguably the most violent sport is controlled by two entities that continually exploit the skills of football players.[296] It is almost a guarantee that a football player will suffer some type of injury prior to embarking on their professional career.[297] The limits placed on these individuals ensures that both the NCAA and NFL can milk a player for six or seven years of labor while only paying compensation, at an equitable rate,[298] for half that time.[299] The NFL gets a player that is possibly already in their

289. *See* Florio, *supra* note 271.

290. Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1053 (C.D. Cal. 1971).

291. *See* Glauber, *supra* note 95.

292. Thamel, *supra* note 6, at 42.

293. *See* Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 382 (S.D.N.Y. 2004); Glauber, *supra* note 95.

294. *MLB Draft Rules*, *supra* note 7. A baseball prospect can turn professional immediately after graduating from high school or after their junior college season. *Id.* If prospects elect to go to junior or community college, they can declare for the draft regardless of time spent in school. *Id.* Basketball prospects can play a season overseas to avoid college and immediately turn professional once graduating high school. *See* Thamel, *supra* note 6.

295. Thamel, *supra* note 6; *see also* Roberts, *supra* note 274.

296. *See* Viera, *supra* note 20, at D1.

297. *See id.*

298. *See* Soffian, *supra* note 33; Underwood, *supra* note 1, at 24. Until 2015, a majority of school scholarships were year-to-year and renewable at the school's discretion. Soffian, *supra* note 33. Ironically, the athlete's performance on the field could determine whether he remained a student. *Id.*

299. Underwood, *supra* note 1, at 24.

prime without spending a dime to develop them, while the NCAA just milked that *cash cow* and maybe did not even have to pay for a fourth year of schooling.[300] The average NFL career span shows the sacredness of every snap in a player's career—meaning that a lot of players may not be able to maximize their earnings because the NFL would of course devalue them as *damaged goods*.[301] Yes, there are superstar football players being paid boatloads of cash, but there are only a few of these players on every team roster.[302] For a majority, lasting past their rookie contract is a blessing and they are willing to take what a NFL team deems is their value.[303] Older players commanding a higher *veteran minimum* salary are essentially ushered out of the league because they are considered to have too much *wear and tear* on their bodies.[304] It is a tragedy to limit these players' talents as their value diminishes with each hit.[305]

Pending the conclusion of *O'Bannon*, the NCAA's amateurism rules may receive another chink in its armor.[306] However, hopes are that this Comment has displayed the collusive practices that the NCAA and NFL have engaged in to effectively control the labor market for all football players' services.[307] The NFL and NCAA have a symbiotic relationship in that the League's eligibility rule provides a steady flow of talent to colleges—whom fatten their wallets from this talent—while colleges provide the best developed talent at no cost to the league.[308] Forget the *Fail Mary* or the *Immaculate Reception*, this arrangement between the NCAA and NFL is the biggest logic-defying play in the sport's history.[309] There's just one problem: There is a flag.[310]

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300. *See id.*

301. *See* Gaines, *supra* note 215; Schwartz, *supra* note 12.

302. *See* Gaines, *supra* note 215; Schwartz, *supra* note 12.

303. *See* Gaines, *supra* note 215; Schwartz, *supra* note 12.

304. Brandt, *supra* note 215.

305. *See* Breslow, *supra* note 16.

306. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1062–63 (9th Cir. 2015), *cert. denied*, 85 U.S.L.W. 3139 (Oct. 3, 2016).

307. *Id.*; Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 408–09 (S.D.N.Y. 2004); Janofsky, *supra* note 135.

308. *See Clarett*, 306 F. Supp. 2d at 409; Underwood, *supra* note 1, at 22.

309. John McTigue, *MNF Moments, No. 1: The Fail Mary*, ESPN.COM (Sept. 8, 2014), http://www.espn.go.com/blog/nflnation/post/_/id/138835/mnf-moments-no-1-the-fail-mary; *see also* Gary Meyers, *Top 10 Greatest Plays in NFL History: From the Immaculate Reception to John Elway's Helicopter Ride*, N.Y. DAILY NEWS (Sept. 9 2015, 8:51 PM), http://www.nydailynews.com/sports/football/top-10-greatest-plays-nfl-history-article-1.2354371. During a brief NFL referee lockout, a replacement referee notoriously incorrectly declared an interception a touchdown to give the Seattle Seahawks an improbable win over the Green Bay Packers. McTigue, *supra*.

> Just [twenty-two] seconds remained and [the Steelers] trailed the Raiders 7–6 in the divisional round of the playoffs. Steelers owner Art Rooney was already on his

way to the locker room to console his players when Terry Bradshaw threw a pass intended for John *Frenchy* Fuqua at the Oakland [thirty-five]. Safety Jack Tatum, one of the hardest hitters in NFL history, crashed into Fuqua and the ball went flying backwards. [Franco] Harris grabbed it . . . just before it hit the ground and ran [forty-two] yards for a touchdown.

Meyers, *supra*.

310. *See* McTigue, *supra* note 309.


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