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NOTES AND COMMENTS

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NOTES AND COMMENTS

FIGHTING FOR EQUAL PROTECTION UNDER THE FOURTH AMENDMENT: WHY "KNOCK-AND-TALKS" SHOULD BE REVIEWED UNDER THE SAME CONSTITUTIONAL STANDARD AS "STOP-AND-FRISKS"

IAN DOOLEY*

I. INTRODUCTION

A *knock-and-talk*,[1] like a *stop-and-frisk*,[2] is a flexible investigatory tool that is used by law enforcement officials to subvert the Fourth Amendment's warrant requirement.[3] Yet knock-and-talks, unlike stop-and-

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1. State v. Land, 806 P.2d 1156, 1157 (Or. Ct. App. 1991).
2. Terry v. Ohio, 392 U.S. 1, 10, 16 (1968).
3. *See* U.S. CONST. amend. IV; *Terry*, 392 U.S. at 30; Jamesa J. Drake,

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

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

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

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4. 392 U.S. 1, 19–20, 27 (1968); United States v. Crapser, 472 F.3d 1141, 1146 (9th Cir. 2007); *see also* Drake, *supra* note 3, at 37.
5. *Terry*, 392 U.S. at 30.
6. *Crapser*, 472 F.3d at 1146; *see also* Drake, *supra* note 3, at 37.
7. Craig M. Bradley, *"Knock and Talk" and the Fourth Amendment*, 84 IND. L.J. 1099, 1122 (2009); Drake, *supra* note 3, at 36.
8. *See* Florida v. Jardines, 133 S. Ct. 1409, 1415–16 (2013); U.S CONST. amend. IV; Drake, *supra* note 3, at 37.
9. *See* U.S. CONST. amend. IV; *Jardines*, 133 S. Ct. at 1415–16.
10. 445 U.S. 573 (1980).
11. U.S. CONST. amend. IV; *Payton*, 445 U.S. at 587, 589–90.
12. *See* U.S. CONST. amends. V, XIV; Adam Carlis, *The Illegality of Vertical Patrols*, 109 COLUM. L. REV. 2002, 2002–03 (2009); Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 401 (2003); *infra* Section V.C.
13. *See* Carlis, *supra* note 12, at 2001–02; Slobogin, *supra* note 12, at 401–02; *infra* Section V.C.
14. Terry v. Ohio, 392 U.S. 1, 27 (1968); *see also* U.S CONST. amend. IV.
15. *See* Carlis, *supra* note 12, at 2002–03, 2009.

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

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

16. Bradley, *supra* note 7, at 1104, 1122.

17. *See* U.S. CONST. amends. IV, V, XIV; Carlis, *supra* note 12, at 2002–03; Slobogin, *supra* note 12, at 401–02. The designation of *citizens* to describe *persons protected by the Fourth Amendment* is used in this article for simplicity's sake, but is *not* intended to distinguish a person's right to the guarantees of the Constitution based on one's immigration status.

18. *See* Bradley, *supra* note 7, at 1104, 1122.

19. *See id.* at 1122.

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

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

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

23. Whether a homeowner stepping back from a confrontation with officers is actually inviting officers to enter the home is a common source of confusion and argument in

Victor's ninety-year-old, Spanish-speaking great-grandma![24] Great-grandma explained that she lived in the apartment with Victor and she showed the officer Victor's bedroom. Peering inside Victor's wardrobe, the officer noticed two small Ziploc bags of cocaine and a magazine clip for a handgun.

The officer returned to the living room and confronted Victor with this discovery, threatening Victor, telling him that she did not want his family to get in trouble for him and asking "where is the gun?" Victor admitted the drugs were his and told the officer there was a gun under the wardrobe. Victor was handcuffed and seated at the kitchen table while great-grandma was led into the bedroom by two officers and shown the magazine and the cocaine in the wardrobe. The officers handed her a consent-to-search form,[25] explained the purpose of the form, and asked her to sign it. She did not ask any questions; she just signed the form. A gun was recovered, and Victor was charged with possession of an unlicensed firearm.[26]

This Article argues that the series of events that led to Victor's unlawful arrest[27] should never have happened because Victor's right to be free from unreasonable searches was violated the moment police *knocked* on his door.[28] After the Supreme Court's decisions in *Kentucky v. King*[29] and *Florida v. Jardines*,[30] it is an officer's "objective purpose" for knocking on the door of a private dwelling that turns what would otherwise be a consensual encounter into a limited search.[31] And, under *Jardines*, when an officer approaches a home and knocks on the door for the purpose of gathering evidence, the officer acts with the objective purpose of completing a search.[32] This Article argues that a limited *search* within the meaning of

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the courts. *See, e.g.*, Johnson v. United States, 333 U.S. 10, 12–15 (1948); *Miller*, 933 F. Supp. at 505–06.

24. One of the officers was a native Spanish speaker who began questioning the grandmother apart from the other two officers who were questioning Victor in English.

25. A consent-to-search form may be properly used by police to support the government's case that consent to enter and search a private dwelling was voluntary. *See* State v. Hernandez, 146 So. 3d 163, 168–69 (Fla. 3d Dist. Ct. App. 2014). Normally, however, the form should be signed before the officers begin a search. *See id.*

26. *See* N.Y. PENAL LAW § 265.01 (McKinney 2013), *previous version declared unconstitutional by* People v. Bounasri, 915 N.Y.S.2d 921 (N.Y. City Ct. 2011).

27. *See* U.S. CONST. amend IV; *infra* Section III.A. After the suppression hearing, the judge granted Victor's motion to suppress the evidence that was obtained through a warrantless entry into the home and coercive police behavior. *See Miller*, 933 F. Supp. at 502, 506. This Article argues that the judge's decision to suppress the evidence was correct, but the decision was based on the wrong reasons. *See id.* at 505–06.

28. U.S. CONST. amend. IV; *see also* Florida v. Jardines, 133 S. Ct. 1409, 1416–17 (2013); Kentucky v. King, 131 S. Ct. 1849, 1858–59 (2011); *infra* Parts III–V.

29. 131 S. Ct. 1849 (2011).

30. 133 S. Ct. 1409 (2013).

31. *King*, 131 S. Ct. at 1859; *Jardines*, 133 S. Ct. at 1416–17.

32. *Jardines*, 133 S. Ct. at 1414, 1417.

the Fourth Amendment occurred the moment the police knocked on Victor's door because the police knocked on his door with the objective purpose of completing a search.[33] And, while a knock-and-talk, like a stop-and-frisk, is a *limited* search[34] within the meaning of the Fourth Amendment, the police in Victor's case did not have the reasonable suspicion required under *Terry* to conduct such a search.[35] Furthermore, the Equal Protection Clause and the Due Process Clause of the Constitution[36] require courts to consider the lawfulness of knock-and-talks under the same reasonable suspicion standard that is applied to stop-and-frisks.[37]

Part II of this Article begins by defining knock-and-talks and by explaining how government officials employ the practice.[38] Part III discusses the myriad of rules applied by courts and offered by scholars to address the reasonableness and lawfulness of knock-and-talks.[39] Part IV explains the evolution of the Supreme Court's *search* doctrine and argues that a *search* within the meaning of the Fourth Amendment occurs when police conduct a knock-and-talk for the purpose of completing a search.[40] Part V argues that *Terry*'s "reasonable suspicion" standard[41] is the appropriate standard for determining whether a knock-and-talk is lawful because providing a private dwelling with a higher level of Fourth Amendment protection than a citizen in the street is a discriminatory

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

34. *See Jardines*, 133 S. Ct. at 1416; Terry v. Ohio, 392 U.S. 1, 15–16 (1968). A limited search is subject to judicial scrutiny pursuant to the Fourth Amendment of the U.S. Constitution. U.S. CONST. amend. IV; *Terry*, 392 U.S. at 15–16. However, a limited search, unlike a full-blown search, is justified when police have a mere *reasonable suspicion* to believe criminal activity is afoot; rather than *probable cause*. *See Terry*, 392 U.S. at 24, 27.

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

36. U.S. CONST. amends. V, XIV.

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

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

39. *See infra* Part III.

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

41. *See Terry*, 392 U.S. at 37 (Douglas, J., dissenting); *infra* Part V.

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

II. WHAT IS A KNOCK-AND-TALK?

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

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

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

43. *See infra* Part VI.

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

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

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

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

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

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

While such exigent circumstances may justify a warrantless intrusion into the home, a different analysis should be conducted when officers knock on a resident's door in order to investigate the occupants of the dwelling, to conduct a search, and to otherwise subvert the Fourth Amendment's warrant requirement.[51] It has become a common and popular practice among law enforcement officers to "approach a . . . residence with a predetermined plan to circumvent the warrant requirement and convince the homeowner to let them inside using tactics designed to undermine, if not completely subjugate, the homeowner's free will."[52] Police have increasingly employed the use of knock-and-talks as an "end-run around" the Fourth Amendment.[53] Often based on an anonymous tip[54] or second hand information from the public,[55]

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49. Mincey v. Arizona, 437 U.S. 385, 392 (1978) (emphasis added); Brigham City v. Stuart, 547 U.S. 398, 400, 402 (2006).

50. *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 298–99 (1967).

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

52. Drake, *supra* note 3, at 26.

53. *Id.* at 34 ("[K]nock-and-talks . . . have caught on like wild fire.") (citation omitted); Marc L. Waite, *Reining in "Knock and Talk" Investigations: Using* Missouri v. Seibert *to Curtail an End-Run Around the Fourth Amendment*, 41 VAL. U. L. REV. 1335, 1335–36 (2007); *see also* Carroll v. Carman, 135 S. Ct. 348, 349 (2014); United States v. Hendrix, 664 F.3d 1334, 1337, 1339 (10th Cir. 2011), *cert. denied*, 135 S. Ct. 1002 (2015); United States v. Cisneros-Gutierrez, 598 F.3d 997, 1003 (8th Cir. 2010); Thorne v. State, No. CACR 02-820, 2003 WL 22021966, at *2–3 (Ark. Ct. App. Aug. 27, 2003); United States v. Reyes-Montes, 233 F. Supp. 2d 1326, 1331 (D. Kan. 2002); United States v. Hardeman, 36 F. Supp. 2d 770, 772–73, 777–78, 781 (E.D. Mich. 1999). This is by no means an exhaustive list: There are dozens of examples of officers using knock-and-talks for this purpose. *See generally* Kletter, *supra* note 47.

54. *See, e.g.*, United States v. Hatfield, 333 F.3d 1189, 1190 (10th Cir. 2003); United States v. Miller, 933 F. Supp. 501, 502 (M.D.N.C. 1996); State v. Able, 742 S.E.2d 149, 150 (Ga. Ct. App. 2013).

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

police approach a home to conduct a knock-and-talk knowing they do not have enough information to obtain an arrest warrant.[56]

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

Despite the increased and aggressive use of knock-and-talks, the practice has gone largely unnoticed by even the Supreme Court for more than sixty years[63] and has seeped its way into accepted practice for police

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

57. Drake, *supra* note 3, at 35.

58. *Id.*; *see also* Henry Pierson Curtis, *Cops' 'Knock-and-Talk' Tactic Draws Flak After Near-Fatal Shooting*, ORLANDO SENTINEL (Oct. 2, 2010), http://articles.orlandosentinel.com/2010-10-02/news/os-knock-and-talk-procedures-20100922_1_officers-show-doorstep-tactic; William Dean Hinton, *Knock and Talk*, ORLANDO WKLY. (Jan. 9, 2003), http://www.orlandoweekly.com/orlando/knock-and-talk/Content?oid=2260977.

59. Tristan Hallman, *Dallas Police Are Finding Drug Houses by Walking Up and Asking*, DALL. MORNING NEWS (Aug. 25, 2013, 10:51 PM), http://www.dallasnews.com/news/crime/headlines/20130825-dallas-police-finding-drug-houses-by-walking-up-and-asking.ece.

60. *See* Horton v. California, 496 U.S. 128, 131, 133–35 (1990).

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

62. *See Gould*, 364 F.3d at 589–90; Drake, *supra* note 3, at 34–35.

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

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

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

Although courts have recognized the knock-and-talk and given it a name,[70] courts have not considered the lawfulness of the act of *knocking* on the door of a private dwelling.[71] While courts have provided some recourse to citizens whose Fourth Amendment rights were violated *before* or *after* a knock-and-talk, courts have failed to explain what circumstances are necessary to justify police *knocking* on a citizen's door.[72] The Courts' reliance on existing *search* and *seizure* doctrine has created a patchwork of rules and case-by-case analyses, which fail to provide clear guidance to police officers conducting knock-and-talks.[73] The result is that police and citizens alike are unduly exposed to the dangerous and unconstitutional

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

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

66. 806 P.2d 1156 (Or. Ct. App. 1991).

67. *Id.* at 1156.

68. *Id.* at 1158.

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

70. Drake, *supra* note 3, at 41 ("Knock-and-talks make a good number of lower courts queasy . . . .").

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

72. *See* U.S. CONST. amend. IV; Drake, *supra* note 3, at 41–42.

73. *See King*, 131 S. Ct. at 1857; Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001). "But, we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations . . . ." *Atwater*, 532 U.S. at 347; *see also* U.S. CONST. amend. IV; *King*, 131 S. Ct. at 1861 (rejecting the test offered by respondent as *nebulous and impractical*).

interactions that result from unwarranted and unplanned intrusions into the home.[74] The inadequacy of current rules governing knock-and-talks has forced the Supreme Court to reconsider its Fourth Amendment jurisprudence and to develop a new rule that analyzes an officer's *objective purpose* for knocking on a citizen's door.[75] A brief review of how courts have applied past search and seizure rules to knock-and-talks is necessary to understand the inevitable development of the objective purpose rule.[76]

A. *Knock-and-Talks and Unlawful Seizures*

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

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74. *See* United States v. Johnson, 170 F.3d 708, 712 (7th Cir. 1999); Curtis, *supra* note 58 (discussing a misunderstanding between a police officer and a citizen during a knock-and-talk, which led to the officer shooting the homeowner in the face). In *Johnson*, for example, an attempted knock-and-talk turned into an unexpected scuffle with an armed suspect when the citizen opened the door just as the officer moved to knock on the door. *Johnson*, 170 F.3d at 712. The police momentarily lost control of the suspect and the gun. *Id.*

75. *King*, 131 S. Ct. at 1858–59; *Johnson*, 170 F.3d at 715.

76. *See generally* Kletter, *supra* note 47.

77. *See* United States v. Hatfield, 333 F.3d 1189, 1193, 1195 (10th Cir. 2003); Gompf v. State, 120 P.3d 980, 986–87 (Wyo. 2005); Carrie Leonetti, *Open Fields in the Inner City: Application of the Curtilage Doctrine to Urban and Suburban Areas*, 15 GEO. MASON U. CIV. RTS. L.J. 297, 313 (2005) ("To the extent that courts have addressed the constitutionality of the knock-and-talk, it has primarily been in the context of whether . . . police . . . [conducted] a *seizure* . . . such that the occupant . . . would not feel free to decline the officers' request to enter . . . or otherwise . . . terminate the police encounter."); Kletter, *supra* note 47 (providing a 121 page comprehensive American Law Report of state and federal cases addressing knock-and-talks, where twenty of thirty-four sections are devoted to knock-and-talks as possible *seizures*).

78. *See* Kletter, *supra* note 47 (providing a comprehensive review of state and federal case law addressing the coerciveness and reasonableness of a knock-and-talk encounter).

79. *See id.*

80. *Id.* (providing a comprehensive review of state and federal courts that have considered and rejected or accepted a requirement that police advise citizens of their "right to refuse, revoke, or limit consent to enter or search when conducting [a] knock and talk").

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

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

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81. Waite, *supra* note 53, at 1367 (finding the "goal in using the *knock and talk* is to gain consent to search, and thereby alleviate the need for a search warrant"); *see also* Scott v. State, 782 A.2d 862, 867 (Md. 2001); State v. Land, 806 P.2d 1156, 1156 (Or. Ct. App. 1991) ("When the judge declined to sign the warrant, [the officer] went to defendant's home to obtain additional information and to 'get his consent to search.'"); Drake, *supra* note 3, at 37 ("The overwhelming majority of police searches are justified by the consent exception to the warrant requirement, and it stands to reason that the overwhelming majority of *consensual* residential searches are preceded by a knock-and-talk.").

82. *See* Kletter, *supra* note 47.

83. Florida v. Bostick, 501 U.S. 429, 434 (1991) (concluding that whether a *seizure* has occurred depends on whether the citizen would have felt free to terminate the encounter); United States v. Charles, 29 F. App'x 892, 896–98 (3d Cir. 2002) (determining the lawfulness of a knock-and-talk by considering the interaction between the police and defendant after the knock on the door).

84. *See, e.g.*, United States v. Spence, 397 F.3d 1280, 1282–83 (10th Cir. 2005).

85. Bradley, *supra* note 7, at 1122 (finding that knock-and-talks have "led to widespread confusion among the courts as to precisely which police behaviors are acceptable and which are prohibited"). *See generally* Kletter, *supra* note 47 (providing 121 pages of state and federal case annotations, with no clear consensus in how best to address the knock-and-talk phenomena).

86. Drake, *supra* note 3, at 26.

87. *Id.*

88. State v. Ferrier, 960 P.2d 927, 933 (Wash. 1998).

89. *See id.* at 934.

after police intruded into a citizen's privacy.[90] Consequently, there is an increase in the unpredictable and dangerous circumstances that develop when police conduct unplanned and unwarranted intrusions into an individual's home.[91]

For instance, a homeowner in Central Florida, concerned about reports of recent escapees from a local jail, answered an early morning knock on his front door carrying a *shotgun*.[92] The *police officer* knocking on the door shined a high-intensity flashlight in the homeowner's eyes. The homeowner claimed the light startled him, causing him to accidently discharge the shotgun, which caused no injury.[93] The officer responded by drawing his own weapon and shooting the homeowner in the face![94] Undoubtedly, knocking on an individual's door unannounced, without a plan, and without a warrant "is inherently dangerous for . . . officers and . . . residents" alike.[95]

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

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

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

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

B. *Knock-and-Talks and the Curtilage Doctrine*

Whether an officer's act of knocking on the door of a private dwelling constitutes a *search* within the meaning of the Fourth Amendment has not been directly addressed by the Supreme Court of the United States or lower courts.[103] Instead, courts have analyzed the lawfulness of officers' actions *before* the knock on the door under the Supreme Court's curtilage doctrine.[104] The curtilage doctrine considers the "area 'immediately surrounding and associated with the home' [as] 'part of the home itself for Fourth Amendment purposes.'"[105] For example, a front porch[106] or attached garage[107] would be part of the curtilage of the home.[108] The open field, on

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

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

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

101. *See* Florida v Jardines, 133 S. Ct. 1409, 1423 (Alito, J., dissenting).

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

103. Drake, *supra* note 3, at 26; *see also* U.S. CONST. amend. IV.

104. *See* United States v. Dunn, 480 U.S. 294, 307, 312 (1987) (Brennan, J., dissenting); Oliver v. United States, 466 U.S. 170, 180 (1984); Kletter, *supra* note 47.

105. *Jardines*, 133 S. Ct. at 1414 (citing *Oliver*, 466 U.S. at 180).

106. *Id.* at 1415 ("The front porch is the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.'") (citing *Oliver*, 466 U.S. at 182 n. 12).

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

the other hand, is made up of certain outlying properties as distinct from the home and the curtilage.[109] Thus, a homeowner's adjacent pastureland[110] or barn that is detached and removed from the home[111] is not considered part of the home for Fourth Amendment purposes.[112] Ultimately, courts consider whether a citizen had a reasonable-expectation-of-privacy "in the areas traversed by the police" before they knocked on the citizen's door.[113] In other words, courts are only asking whether police trespassed upon a homeowner's actual home or curtilage.[114] If not, a person's private property is part of an open field, which is not protected by the Fourth Amendment.[115] Under the curtilage doctrine, courts do not consider the lawfulness of the actual act of knocking on the door.[116]

Focusing on the path and methods taken to achieve the knock-and-talk, rather than the knock itself, is problematic in a number of ways.[117] First, courts are forced to engage in a nuanced and ambiguous analysis of specific factual circumstances, providing no real guidance or notice to citizens, police, or judges as to what is and what is not an unlawful search.[118] Courts get bogged down analyzing how tall a fence was, how far a driveway was from a neighbor's house, whether a "no trespassing" sign was clearly visible, whether police smelled the odor of marijuana before or after seeing a no trespassing sign, and so on.[119] The result is a patchwork of jurisprudence, where courts languish over issues like the size of shrubs,[120] rather than whether police were constitutionally empowered to approach the citizen's home and knock on the door.[121] Like the consent and coercion doctrines used to analyze whether a seizure occurred and was lawful, analysis under

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1275, 1276 (Okla. Crim. App. 1981)); Daughenbaugh v. City of Tiffin, 150 F.3d 594, 596 (6th Cir. 1998).

108. *Jardines*, 133 S. Ct. at 1415; *Dunn*, 480 U.S. at 308 (Brennan, J., dissenting); *Daughenbaugh*, 150 F.3d at 596.

109. *See Dunn*, 480 U.S. at 308 (Brennan, J., dissenting).

110. *See, e.g., Hatfield*, 333 F.3d at 1190–91 (10th Cir. 2003).

111. *See, e.g., Oliver*, 466 U.S. at 173.

112. *Id.*; *see also* U.S. CONST. amend. IV.

113. *See* Kletter, *supra* note 47.

114. *See id.*

115. Leonetti, *supra* note 77, at 299; *see also* U.S. CONST. amend. IV.

116. Leonetti, *supra* note 77, at 301.

117. *See generally* Dunaway v. New York, 442 U.S. 200 (1979); United States v. Hall, No. 97-30296, 1998 WL 382722 (9th Cir. 1998); State v. Johnston, 839 A.2d 830 (N.H. 2004); State v. Friedli, No. 50191-7-I, 2003 WL 22173063 (Wash. Ct. App. Sept. 22, 2003).

118. *See, e.g., Hall*, 1998 WL 382722, at *2–3.

119. *See id.*; *Friedli*, 2003 WL 22173063, at *3.

120. *Johnston*, 839 A.2d at 833.

121. *See id.* at 833–34.

the curtilage doctrine fails to provide clear guidance for police during the dangerous course of their duties.[122]

A second major problem with addressing knock-and-talks only through the curtilage doctrine is that the doctrine only protects homeowners who have a defined curtilage.[123] "One of the difficulties in the application of the [curtilage doctrine] to urban areas is [the] epistemological reliance upon a suburban conceptual framework."[124] Consequently, urban apartment dwellers have less protection under the Fourth Amendment than their suburban and rural counterparts, because they do not have a buffer of curtilage protecting their home.[125] In Victor's case, for instance, the Court's curtilage doctrine would not have provided any protection from the police intrusion, because the police were lawfully standing in the hallway when they decided to approach his door.[126] This "analytical loophole" has encouraged the increased use of knock-and-talks in dense urban areas and apartment complexes.[127]

The problem is particularly acute in public housing units, where police may patrol the hallways of multi-storied apartment complexes and where each door is exposed to the common hallway.[128] One glaring example of the dangers produced by this practice is provided by the unlawful police killing of Akai Gurley in Brooklyn, New York on November 20, 2014.[129] In that case, New York Police Department ("NYPD") Officer Peter Liang had his weapon drawn during a warrantless patrol of a public housing unit when the gun discharged into a dark stairway, causing a bullet to strike twenty-eight-year-old Gurley in the chest, killing him.[130] While Gurley's death

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122. *Dunaway*, 442 U.S. at 212–14; Leonetti, *supra* note 77, at 311, 313–14. "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect . . . and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway*, 442 U.S. at 213–214.

123. Andrew Eppich, *Wolf at The Door: Issues of Place and Race in the Use of the "Knock and Talk" Policing Technique*, 32 B.C. J.L. & SOC. JUST. 119, 129–30, 132–33 (2012); *see also* Leonetti, *supra* note 77, at 311.

124. Leonetti, *supra* note 77, at 311.

125. Eppich, *supra* note 123, at 131–32; *see also* U.S. CONST. amend. IV.

126. *See* Kentucky v. King, 131 S. Ct. 1849, 1854, 1863 (2011) (finding knock-and-talk reasonable where police had lawfully entered the breezeway of an apartment complex in pursuit of a suspected narcotics dealer, and where police detected the odor of marijuana emanating from the door they chose to knock on). Police had just executed a lawful search warrant five doors down the hall from Victor's apartment.

127. *See* Leonetti, *supra* note 77, at 311.

128. *See* J. David Goodman, *Police Patrols in the Projects Draw Scrutiny*, N.Y. TIMES, Dec. 16, 2014, at A1.

129. *See* Michael Wilson, *City Officer's Errant Shot Kills Unarmed Man*, N.Y. TIMES, Nov. 22, 2014, at A1.

130. *Id.*; *see also* J. David Goodman & Vivian Yee, *Officer Charged in Akai Gurley Case Debated Reporting Gunshot, Officials Say*, N.Y. TIMES (Feb. 11, 2015),

occurred in the stairway of the public housing unit, rather than a common hallway, so-called "vertical patrols" also permit officers to patrol the hallways of the multi-storied buildings.[131] This allows police to easily access the doorways of residents in public housing, increases knock-and-talks, and leads to excessive, unwarranted encounters between police and citizens.[132] Clearly, "[r]esidents of public housing face harsh police tactics absent from more affluent communities,"[133] which "undermines efforts at community policing and has the potential to harm the population [knock-and-talks] supposedly protect[]."[134]

Poorer citizens are unequally exposed to unwarranted police intrusion in their home because analysis under the curtilage doctrine fails to consider the lawfulness of the actual police act of knocking on the door of a private home.[135] The constitutional conundrum created by knock-and-talks cannot be resolved through the curtilage doctrine.[136] Like the consent and coercion cases discussed above, it is a misnomer to consider this line of cases as knock-and-talk cases at all.[137] In *Kentucky v. King*, the Supreme Court set up the adoption of a new rule to address knock-and-talks, one that turns on an officer's objective purpose for knocking on the door.[138]

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http://www.nytimes.com/2015/02/12/nyregion/akai-gurley-shooting-death-arraignment.html?_r=0; Thomas Tracy, et. al., *Officer Peter Liang Found Guilty of Manslaughter in Fatal Shooting of Akai Gurley in Brooklyn Housing Development*, N.Y. DAILY NEWS (Feb. 12, 2016), http://www.nydailynews.com/new-york/nyc-crime/nypd-peter-liang-guilty-fatal-shooting-akai-gurley-article-1.2528827.

131. N.Y.P.D PATROL GUIDE, PROCEDURE NO. 212-60 (Aug. 1, 2013), http://www.nyc.gov/html/ccrb/downloads/pdf/pg212-60-interior-vertical-patrol-housing-authority-bldgs.pdf. "Uniformed members of the service shall frequently inspect the interior of Housing Authority buildings on assigned posts as follows . . . [p]roceed to top floor of building, . . . [p]atrol each floor, staircase, and hallway within the building from the top floor to the ground floor." N.Y.P.D. PATROL GUIDE, PROCEDURE NO. 212-60, *supra* note 131. "During [vertical] patrols, police officers conduct floor-by-floor sweeps of public housing buildings and systematically question those they encounter . . . [causing] disparity . . . in the hallways and foyers of our nation's public housing." Carlis, *supra* note 12, at 2002. "When officers conduct a *vertical patrol*, they walk through and do a sweep of the hallways, stairwells, rooftops, and landings, to ensure the building is safe and that no one is trespassing or engaging in criminal activity." Clair MacDougall, *NYPD Sued over Housing Project "Vertical Patrols"*, HUFFINGTON POST (July 15, 2010, 6:16 PM), http://www.huffingtonpost.com/clair-macdougall/nypd-sued-over-housing-pr_b_648259.html.

132. *See* Leonetti, *supra* note 77, at 311–12.

133. *See* Carlis, *supra* note 12, at 2002.

134. *See* Eppich, *supra* note 123, at 119.

135. *Id.* at 131–32.

136. Drake, *supra* note 3, at 38–42 (advocating for a rule that prohibits police trespass onto curtilage when the purpose of their trespass is to gather evidence).

137. Kletter, *supra* note 47, at 535–60 (considering dozens of cases analyzed under the curtilage doctrines as knock-and-talk cases).

138. Kentucky v. King, 131 S. Ct. 1849, 1857–59 (2011).

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

The Supreme Court's decision in *Kentucky v. King* highlighted the deficiencies in current knock-and-talk jurisprudence, and laid the groundwork for a new rule that analyzes an officer's *objective purpose* for knocking on a citizen's door.[139] However, even though the Court's decision in *Kentucky v. King* was probably the closest the Court has come to squarely addressing the constitutionality of knock-and-talks, the decision was not about a knock-and-talk.[140] Like the cases decided under the seizure and curtilage doctrines above, *Kentucky v. King* did not directly address the lawfulness of an officer's act of *knocking* on the door.[141] In *Kentucky v. King*, probable cause of criminal activity existed *before* the police knocked on the door, and exigent circumstances justified the police action that took place *after* the knock on the door.[142] While the constitutionality of knock-and-talks was not before the Court, *Kentucky v. King* set up the development of the objective purpose rule, limiting warrantless police action to that which "any private citizen might do."[143]

In *King v. Commonwealth*,[144] police had set up a "buy bust" operation where they "arranged for a confidential informant to purchase crack cocaine from a 'street level' dealer."[145] Following a controlled buy, police set out running after the suspected dealer who had moved quickly into a breezeway of an apartment complex.[146] The police entered the breezeway just in time to hear a door shut.[147] Not knowing which apartment the suspect had entered, the police followed the smell of burning marijuana to the door on the left at the end of the breezeway—the suspect had entered the door on the right.[148] They knocked on the door, announcing "police, police, police."[149] Immediately following the knock on the door, the officers heard people moving around inside the apartment, which led them to believe "that

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139. *Id.* at 1858–61.

140. *Id.* at 1853–54, 1862; *see also* Drake, *supra* note 3, at 27 ("The facts in *King* bear some resemblance to a knock-and-talk: [M]ultiple, uniformed officers approached a private residence, banged loudly on the door and eventually made their way inside. But, the similarities end there.").

141. *See King*, 131 S. Ct. at 1862; United States v. Dunn, 480 U.S. 294, 305 (1987); United States v. Hatfield, 333 F.3d 1189, 1194–95 (10th Cir. 2003).

142. *See King*, 131 S. Ct. at 1858, 1863.

143. *Id.* at 1859, 1862.

144. 302 S.W. 3d 649 (Ky. 2010), *rev'd*, 131 S. Ct. 1849 (2011).

145. *Id.* at 651.

146. *Id.*

147. *Id.*

148. *Id.*

149. *King*, 131 S. Ct. at 1854; *King*, 302 S.W.3d at 651.

drug-related evidence was about to be destroyed."[150] The officers "kicked in the door" and entered the apartment, finding King and two others smoking marijuana.[151] The officers eventually gained entry into the apartment across the hall, finding the "suspected drug dealer who was the initial target of their investigation."[152]

In rendering its decision, the Court did not directly address the lawfulness of knock-and-talks,[153] because that was not the question before the Court.[154] The question considered by the Court was whether police may rely on exigent circumstances to complete a warrantless entry into a home, when the "exigency was 'created' or 'manufactured' by the conduct of the police."[155] The exigency in *Kentucky v. King*—police belief that drugs were being destroyed—was created when the police knocked on King's door and announced their presence.[156] The Court concluded that the warrantless entry into the home to prevent the destruction of evidence was reasonable, because "the police did not create the exigency by engaging [in] or threatening to engage in conduct that violates the Fourth Amendment."[157]

Thus, the rule announced by the Court concerned whether the officers' actions leading up to, and including the knock on the door, violated the Fourth Amendment.[158] Yet, there was no question in *King v. Commonwealth* that the officers were justified in following the suspect into the breezeway after the suspect sold drugs to a confidential informant.[159] Further, once police detected the odor of marijuana emanating from King's door, the officers had probable cause to believe criminality was afoot in King's apartment, and were thus justified in knocking on his door.[160]

The Court did not directly consider the lawfulness of knock-and-talks because the officers undoubtedly were justified in approaching and knocking on the door, and because the act of knocking on the door, *by itself*,

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150. *King*, 131 S. Ct. at 1854; *King*, 302 S.W.3d at 651–52.
151. *King*, 131 S. Ct. at 1854; *King*, 302 S.W.3d at 652.
152. *King*, 131 S. Ct. at 1855; *King*, 302 S.W.3d at 652.
153. *See King*, 131 S. Ct. at 1854; Drake, *supra* note 3, at 27.
154. *King*, 131 S. Ct. at 1854, 1858, 1862–63.
155. *See id.* at 1853–54, 1857.
156. *Id.* at 1857–58.
157. *Id.* at 1858; *see also* U.S. CONST. amend. IV.
158. *King*, 131 S. Ct. at 1854; *see also* U.S. CONST. amend. IV.
159. *King*, 131 S. Ct. at 1862–63; *see also* United States v. Valez, 796 F.2d 24, 28 (2d Cir. 1986) (finding probable cause to follow and arrest suspect after suspect was observed selling narcotics to undercover officer).
160. *King*, 131 S. Ct. at 1854, 1865 (Ginsburg, J., dissenting) ("[T]he smell of marijuana seeping under the apartment door into the hallway . . . gave the police 'probable cause . . . sufficient . . . to obtain a warrant to search the . . . apartment.'") (quoting *King*, 302 S.W.3d at 653); *see also Valez*, 796 F.2d at 28; *infra* Part IV (advocating for a mere reasonable suspicion standard for reviewing knock-and-talks).

was "no more than any private citizen might do."[161] In other words, the police were lawfully empowered to approach the door and knock because they had probable cause to justify both actions.[162] The act of knocking on the door did not convert the police action from lawful to unlawful under the Fourth Amendment, because knocking on a citizen's door, in and of itself, is "no more than any citizen might do."[163] *Kentucky v. King* set up the objective purpose rule that was expressly adopted by the Court in *Jardines*.[164] Consequently, it is the officer's objective purpose for knocking on the door of a private dwelling that demonstrates whether their act of knocking was "more than any private citizen might do."[165]

IV. THE OBJECTIVE PURPOSE RULE

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

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161. *King*, 131 S. Ct. at 1862.
162. *See id.*
163. *Id.* at 1861–62; *see also* U.S. CONST. amend. IV.
164. Florida v. Jardines, 133 S. Ct. 1409, 1416–17 (2013); *King*, 131 S. Ct. at 1862.
165. *Jardines*, 133 S. Ct. at 1416 (quoting *King*, 131 S. Ct. at 1862).
166. *See* U.S. CONST. amend. IV; *e.g.*, United States v. Jones, 132 S. Ct. 945, 949–50 (2012).
167. 132 S. Ct. 945 (2012).
168. *Id.* at 946, 950, 953 (concluding that "the [g]overnment's physical intrusion on an *effect* for the purpose of obtaining information constitutes a *search*").
169. 389 U.S. 347 (1967).
170. *Jones*, 132 S. Ct. at 952; *Katz*, 389 U.S. at 360 (Harlan, J., concurring).
171. *Jones*, 132 S. Ct. at 952; *King*, 131 S. Ct. at 1861–62; *see also supra* Section II.C.
172. *King*, 131 S. Ct. at 1862.
173. Florida v. Jardines, 133 S. Ct. 1409, 1416–17 (2013); *King*, 131 S. Ct. at 1862.

was accompanied with an objective purpose to conduct a search because that is "more than any . . . citizen might do."[174] And thus, a search has occurred, within the meaning of the Fourth Amendment, when an officer knocks on the door of a private dwelling for the purpose of conducting a search.[175] A brief review of the evolution of the Court's search doctrine is crucial for understanding the implications of the *objective purpose* rule.[176]

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

The two guiding principles of the Supreme Court's search doctrine are clear.[177] Under the Fourth Amendment a search occurs when the government:

(1) invades a subjective expectation of privacy that society recognizes as reasonable[178] or

(2) physically intrudes on constitutionally protected areas.[179]

In *Katz*, the Court concluded the government could not, without a warrant supported by probable cause, listen and record an individual's conversations in a public phone booth, even though the electronic recording device employed by the officials "did not happen to penetrate the wall" of the booth.[180] In holding that physical intrusion or trespass by government officials was not necessary to trigger the Fourth Amendment's protections, the Court held that a search occurs when the government invades a subjective expectation of privacy that society recognizes as reasonable.[181] The so-called "reasonable-expectation-of-privacy" test announced in *Katz* was echoed in *Kentucky v. King*, where the Court reasoned that police may act without a warrant so long as their conduct is "no more than any . . . citizen might do."[182] The *reasonable-expectation-of-privacy* test remained the law of the land from 1967 until 2012.[183]

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174. *King*, 131 S. Ct. at 1861–62; *Jones*, 132 S. Ct. at 952; *Jardines*, 133 S. Ct. at 1416; *see also* U.S. CONST. amend. IV.

175. *See* U.S. CONST. amend. IV; Drake, *supra* note 3, at 26–27.

176. *See Jones*, 132 S. Ct. at 949–50, 952.

177. *See id.* at 1414, 1416–17; *Jones*, 132 S. Ct. at 950; Katz v. United States, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring).

178. U.S. CONST. amend. IV; *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

179. U.S. CONST. amend. IV; *Jones*, 132 S. Ct. at 951 (quoting United States v. Knotts, 460 U.S. 276, 286 (1983) (Brennan, J., concurring)).

180. *Katz*, 389 U.S. at 353.

181. *Id.* at 361 (Harlan, J., concurring); *see also* U.S. CONST. amend. IV.

182. *Katz*, 389 U.S. at 360 (Harlan, J., concurring); *see also* Kentucky v. King, 131 S. Ct. 1849, 1862 (2011).

183. *See Jones*, 132 S. Ct. at 952; *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

In 2012, the Court readopted the once cast aside "trespass" doctrine, creating a Fourth Amendment rule dependent on clear physical lines.[184] In *Jones*, the Court decided that the *reasonable-expectation-of-privacy* test relied upon by courts since *Katz* merely supplemented the citizen's absolute right to be free from "physical restraint or trespass" on their property.[185] Justice Scalia, writing for the majority, determined that physical trespass was the type of invasion specifically contemplated by the Framers of the Constitution.[186] "When 'the Government obtains information by *physically intruding*' on persons, houses, papers, or effects, 'a *search* within the original meaning of the Fourth Amendment . . . undoubtedly occurred.'"[187] After the Court's "no more than any private citizen might do" language in *Kentucky v. King* and its revival of the trespass doctrine in *Jones*, it was only a matter of time before the Court would adopt a *search* rule that depended on an officer's *objective purpose* for physically trespassing on a constitutionally protected area.[188] That time came in 2013, in the Court's decision in *Jardines*.[189]

B. Florida v. Jardines: *The Objective Purpose Rule*

In *Florida v. Jardines*, the Supreme Court held that an officer's right to approach a private dwelling is limited by the officer's "specific purpose."[190] Although police may approach a home without a warrant in hopes of speaking to its occupants, "*because that is 'no more than any private citizen might do' . . . .* whether the officers had an implied license to enter . . . *depends upon the purpose for which they entered.*"[191] Again

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184. *Jones*, 132 S. Ct. at 952.

185. *Id.* at 950 (concluding that a physical trespass by police on an individual's effects is a *search* when conducted for the purpose of obtaining information, and that at the bottom, "we must assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted") (alteration in original) (quoting Kyllo v. United States, 533 U.S. 27, 34 (2001)); *see also Katz*, 389 U.S. at 360 (Harlan, J., concurring).

186. *Jones*, 132 S. Ct. at 949; Bond v. United States, 529 U.S. 334, 338–39 (2000) (finding the core right protected by the Fourth Amendment to be the citizen's right to be free from unwarranted physical contact or trespass by government officials); *see also* U.S. CONST. amend. IV.

187. *Jardines*, 133 S. Ct. at 1414 (quoting *Jones*, 132 S. Ct. at 950 n.3) (alteration in the original) (emphasis added); *see also* U.S. CONST. amend IV.

188. Kentucky v. King, 131 S. Ct. 1849, 1862 (2011); *see also Jones*, 132 S. Ct. at 949; Drake, *supra* note 3, at 30–31 (explaining how *Jones* set up the Court's decision in *Jardines*, which was the "first post-*Jones* application of the trespass test").

189. *Jardines*, 133 S. Ct. at 1417–18.

190. *Id.* at 1416–17. In *Jardines*, police used a drug-sniffing dog to search the defendant's porch for evidence of drugs. *Id.* at 1413.

191. *Id.* (emphasis added) (internal citations omitted).

writing for the majority, Justice Scalia concluded that when police trespassed on private property, an unreasonable search occurred when, instead of acting as any citizen normally would, "their behavior objectively reveal[ed] a purpose to conduct a search, which [was] not what anyone would think he had license to do."[192] Thus, whether a search within the meaning of the Fourth Amendment occurs depends on an officer's objective purpose for trespassing on a constitutionally protected area.[193]

The Court's adoption of an *objective purpose* rule is no surprise when for decades the Court has designated government action as reasonable or unreasonable based on an official's objective purpose for taking the action.[194] Under the Court's "special needs" doctrine, for instance, the reasonableness of government action depends on officials' "primary purpose" for taking the action.[195] Similarly, in cases where the state set up roadblocks or checkpoints, the Court consistently determined the reasonableness of the government action based on the government's objective purpose for temporarily detaining the commuters.[196] And of course in *Jones*, the Court held that "the [g]overnment's *physical intrusion* on an *effect for the purpose of obtaining information* constitutes a *search*."[197] The objective purpose rule announced in *Jardines* was thus an inevitable development in the Supreme Court's Fourth Amendment jurisprudence.[198]

Importantly, the *objective purpose* rule announced in *Jardines*[199] is distinct from the *subjective intent* rule rejected by the Court in *Whren v. United States*.[200] In *Whren*, the Court held that the "constitutional reasonableness of traffic stops [does not] depend[] on the actual motivations

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192. *Jardines*, 133 S. Ct. at 1417.

193. *Id.* at 1417–18; *see also* U.S. CONST. amend. IV.

194. *See Jardines*, 133 S. Ct. at 1416–17; United States v. Jones, 132 S. Ct. 945, 950 (2012).

195. *See* Ferguson v. City of Charleston, 532 U.S. 67, 73, 76, 83–84 (2001) (finding that involuntary drug testing of pregnant women constituted an unlawful search where the primary purpose was investigating suspected criminal activity and testing for drugs); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 606, 634 (1989) (finding random urine tests of train workers after train accident reasonable because, *inter alia*, the main purpose of the tests was not enforcing criminal law).

196. *See* Illinois v. Lidster, 540 U.S. 419, 419, 427 (2004) (distinguishing *Edmond* because the primary purpose of the checkpoint was not to investigate individual motorists, but to ask passengers "for help in providing information about a crime in all likelihood committed by others"); City of Indianapolis v. Edmond, 531 U.S. 32, 48 (2000) (concluding that drug interdiction checkpoints were invalid where the *primary purpose* of the checkpoint was for general crime control).

197. *Jones*, 132 S. Ct. at 946 (emphasis added).

198. *See Jardines*, 133 S. Ct. at 1416–17; *see also* U.S. CONST. amend IV.

199. *Jardines*, 133 S. Ct. at 1416–17.

200. 517 U.S. 806, 813 (1996).

of the individual officers involved."[201] In *Whren*, it did not matter—for Fourth Amendment purposes—whether police were discriminatorily motivated to stop the citizen so long as the police also had an *objectively reasonable purpose* for making the stop.[202] In *Jardines*, Justice Scalia acknowledged "that the subjective intent of the officer is irrelevant" to a Fourth Amendment determination of reasonableness[203] and that there is no question that a "stop or search *that is objectively reasonable* is not vitiated by the fact that the officer's real reason for making the stop or search has nothing to do with the validating reason."[204] A defendant's Fourth Amendment challenge to a traffic stop, for example, will fail if his or her only argument is that "the officer's real reason for the stop was racial harassment."[205]

Under the objective purpose rule, the question "is precisely *whether* the officer's conduct was an objectively reasonable search."[206] Whether the search was reasonable "depends [on] whether the officers had an implied license to enter the [property], which in turn depends upon the *purpose* for which they entered."[207] In *Kentucky v. King*, for instance, the Court did not have the opportunity to rule on the reasonableness of the knock on the door because, although the officer's objective purpose was to conduct a search, the officer had an "implied license"[208]—supported by probable cause—to approach and knock on the door.[209] The lawfulness of the *knock* itself was never at issue.[210] In *Jardines*, the Court did not have the opportunity to rule on the reasonableness of the knock on the door because the officer's conduct violated the Fourth Amendment before the officer "applied for and received a warrant to search the residence."[211] The officer's objective purpose converted what would have been a reasonable trespass by any other citizen into a search within the meaning of the Fourth Amendment.[212] Similarly in Victor's case, the officer did not have a lawful reason to approach and knock on the door. In such circumstances, the question is whether the officer was

201. *Id.*
202. *Id.*; *see also* U.S. CONST. amend. IV.
203. *Jardines*, 133 S. Ct. at 1416; *see also* U.S. CONST. amend IV.
204. *Jardines*, 133 S. Ct. at 1416.
205. *See* U.S. CONST. amend. IV; *Jardines*, 133 S. Ct. at 1416.
206. *Jardines*, 133 S. Ct. at 1416–17.
207. *Id.* at 1417.
208. *Id.*; Kentucky v. King, 131 S. Ct. 1849, 1860, 1862–63 (2011).
209. *King*, 131 S. Ct. at 1860, 1862–63.
210. *See id.* at 1862–63.
211. *Jardines*, 133 S. Ct. at 1413, 1415–16; *see also* U.S. CONST. amend. IV.
212. *Jardines*, 133 S. Ct. at 1415–18; *see also* U.S. CONST. amend. IV.

empowered to *knock* on the door, which in turn depends on the officer's objective purpose for knocking.[213]

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

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

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

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213. *See King*, 131 S. Ct. at 1862–63.

214. *Jardines*, 133 S. Ct. at 1415–18 (holding officer's conduct as a search where "[his] behavior objectively reveal[ed] a purpose to conduct a search"); United States v. Jones, 132 S. Ct. 945, 949–50 (2012); *King*, 131 S. Ct. at 1862; *see also* U.S. CONST. amend. IV.

215. Drake, *supra* note 3, at 26; *see also Jardines*, 133 S. Ct. at 1415–16.

216. *Jardines*, 133 S. Ct. at 1413 (The case was focused on the use of a drug-sniffing dog to conduct an olfactory search of the home's curtilage.); *King*, 131 S. Ct. at 1853–54.

217. *See Jardines*, 133 S. Ct. at 1416; *King*, 131 S. Ct. at 1856, 1862.

218. *King*, 131 S. Ct. at 1862.

219. *See Jardines*, 133 S. Ct. at 1415–16.

> Complying with the terms of . . . traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do."

Id. (quoting *King*, 131 S. Ct. at 1862).

objective purpose for being there.[220] In other words, an officer may approach a home and knock on the door—for the purpose of gathering evidence[221]—if:

(1) they have sufficient suspicion to justify the knock on the door;[222]

(2) they are aware of an exigency that justifies the intrusion;[223] or

(3) they have a warrant supported by probable cause.[224]

Thus, if an officer approaches a home and knocks on the door for the purpose of conducting a search, the knock on the door will be unconstitutional unless one of these three justifications can be met.[225] Of course, if the officer is acting as any citizen might, such as collecting money for a local baseball team or selling Girl Scout cookies, then the officer's actions need not be justified.[226] When an officer knocks on a citizen's door, it is the officer's objective purpose for knocking that may convert the knock into a search within the meaning of the Fourth Amendment.[227]

The Court should not only measure the officer's actions leading up to the knock on the door under the curtilage doctrine, but the Court should determine the lawfulness of the knock itself for at least two reasons.[228] First, as discussed in Section B of Part III., current rules governing an officer's conduct before the knock on the door are inadequate to protect urban apartment dwellers from unreasonable intrusions.[229] Those who live in multi-story apartment complexes, such as in Victor's case[230] and in *Kentucky v. King*,[231] do not enjoy the buffer of Fourth Amendment protection provided by the Supreme Court's curtilage doctrine.[232] This concern is particularly significant in public housing units, where police freely patrol the hallways of

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220. *Jardines*, 133 S. Ct. at 1416–17.

221. *See King*, 131 S. Ct. at 1860; Drake, *supra* note 3, at 26–27 (concluding that police act with the purpose of conducting a search when their action is taken against the person or property of a private citizen in an effort to gather evidence).

222. *See* Terry v. Ohio, 392 U.S. 1, 10–11 (1968); *infra* Part V (arguing that *Terry*'s reasonable suspicion standard is the appropriate standard for reviewing the lawfulness of knock-and-talks).

223. *King*, 131 S. Ct. at 1853–54; *see also supra* Part II (describing exigent circumstances that justify a warrantless intrusion).

224. U.S. CONST. amend. IV.

225. *See* U.S. CONST. amend. IV; *Jardines*, 133 S. Ct. at 1416–17; *King*, 131 S. Ct. at 1860; *Terry*, 392 U.S. 10–11.

226. *See Jardines*, 133 S. Ct. at 1415–16.

227. U.S. CONST. amend. IV; *see also Jardines*, 133 S. Ct. at 1416; *supra* Section III.B.

228. *See Terry*, 392 U.S. at 19–20; Leonetti, *supra* note 77, at 310, 316–17, 320.

229. Leonetti, *supra* note 77, at 310, 319–20; *see also supra* Section III.B.

230. *See supra* Part I.

231. Kentucky v. King, 131 S. Ct. 1849, 1851 (2011).

232. *See* U.S. CONST. amend. IV; *King*, 131 S. Ct. at 1863; Leonetti, *supra* note 77, at 310; *supra* Sections I, III.B.

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

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

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

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233. *See* Leonetti, *supra* note 77, at 311; *supra* Section III.B.

234. *See* Leonetti, *supra* note 77, at 298–99, 316–17, 319.

235. *See* Terry v. Ohio, 392 U.S. 1, 20–21 (1968) ("[I]t is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen.'") (citing Camara v. Mun. Ct. of S. F., 387 U.S. 523, 534–35 (1967)).

236. *See* U.S. CONST. amend. IV; Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001); New York v. Belton, 453 U.S. 454, 458 (1981).

> Often enough, the Fourth Amendment has to be applied on the spur—and in the heat—of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made.

Atwater, 532 U.S. at 347; *see also* U.S. CONST. amend. IV.

237. *Belton*, 453 U.S. at 458; *see also* U.S. CONST. amend. IV.

238. *See Belton*, 453 U.S. at 458; Payton v. New York, 445 U.S. 573, 590 (1980); *Terry*, 392 U.S. at 19–20; Leonetti, *supra* note 77, at 310.

239. *See* U.S. CONST. amend. IV; Florida v. Jardines, 133 S. Ct. 1409, 1416, 1423 (2013); *Payton*, 445 U.S. at 590; *Terry*, 392 U.S. at 19–21.

240. *Terry*, 392 U.S. at 8.

241. *See* U.S. CONST. amend. IV; *Jardines*, 133 S. Ct. at 1423; Leonetti, *supra* note 77, at 311–12.

242. *See* U.S. CONST. amend. IV; *Jardines*, 133 S. Ct. at 1423; Leonetti, *supra* note 77, at 311–12.

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

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

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

A. Terry v. Ohio*'s Reasonable Suspicion Standard*

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

243. *See Terry*, 392 U.S. at 27; Leonetti, *supra* note 77, at 311–12.
244. *See Jardines*, 133 S. Ct. at 1423; *Terry*, 392 U.S. at 8, 19–20; Leonetti, *supra* note 77, at 311–12.
245. *See Terry*, 392 U.S. at 8–16.
246. Payton v. New York, 445 U.S. 573, 589–90 (1980).
247. *Id.*; *see also* U.S. CONST. amend IV.
248. *See* U.S. CONST. amend. IV; *Terry*, 392 U.S. at 30–31.
249. *Terry*, 392 U.S. at 31; *see also* U.S. CONST. amends. IV, V, XIV.
250. *Terry*, 392 U.S. at 30.
251. *Id.* at 19, 27, 30–31.

security" was reasonable under the circumstances.[252] Addressing the need for "an escalating set of flexible responses,"[253] the Court held that a stop-and-frisk—or *Terry* stop—may be reasonable, so long as the officer could point to "specific and articulable facts" to demonstrate a reasonable suspicion that criminal activity was afoot.[254]

The Court was clear, however, that the reasonableness of a stop-and-frisk was limited to the "scope [of] the circumstances which justified the interference in the first place."[255] For example, the frisk in a stop-and-frisk is limited to a pat down of the outer surfaces of the suspect's clothing, which allows officers to conduct a limited search for weapons.[256] The officer may not grope, explore, or otherwise manipulate the suspect's clothing.[257] A stop-and-frisk is a *limited* search-and-seizure within the meaning of the Fourth Amendment, which is allowed under a lesser standard of suspicion than specifically delineated in the Constitution.[258]

The reasonable suspicion standard articulated in *Terry* provides the bright-line rule needed to clarify knock-and-talk jurisprudence.[259] Federal appellate courts have recognized the application of *Terry*'s reasonable suspicion standard in a knock-and-talk scenario.[260] For example, the United States Court of Appeals for the Ninth Circuit concluded in *United States v. Crapser*[261] that a knock-and-talk "was a *Terry* stop supported by reasonable suspicion."[262] The court disagreed with the defendant's contention that "a

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252. *Id.* at 19–20; *see also* U.S. CONST. amend. IV.
253. *Terry*, 392 U.S. at 10, 30 (reviewing the government's argument).
254. *Id.* at 21, 30–31.
255. *Id.* at 20.
256. *Id.* at 8, 30.
257. *See* Minnesota v. Dickerson, 508 U.S. 366, 378 (1993).
258. *See* U.S. CONST. amend. IV; *Terry*, 392 U.S. at 10, 16–18, 27.
259. *See Terry*, 392 U.S. at 21–22; United States v. Crapser, 472 F.3d 1141, 1146 (9th Cir. 2007) (quoting United States v. Cormier, 220 F.3d 1103, 1109 (9th Cir. 2000)).
260. *See e.g.*, *Crapser*, 472 F.3d at 1147; United States v. Jones, 239 F.3d 716, 720 (5th Cir. 2001) ("Federal courts have recognized the *knock-and-talk* strategy as a reasonable investigative tool when officers seek to gain an occupant's consent to search or when officers reasonably suspect criminal activity."); United States v. Tobin, 923 F.2d 1506, 1511 (11th Cir. 1991) (finding that "[r]easonable suspicion cannot justify the warrantless search of a house . . . but it can justify the agents' approaching the house [and knocking on the door] to question the occupants.") (citations omitted).
261. 472 F.3d 1141 (9th Cir. 2007).
262. *Id.* at 1147. In that case, police had stopped a motorist, and in the course of the traffic stop discovered a pressure cooker, which they suspected had been used to manufacture methamphetamine. *Id.* at 1143. When they questioned the motorist about the cooker, the motorist stated the cooker belonged to someone else and gave the police the name of the individual and the motel address where he could be found. *Id.* The name given by the motorist matched the name of a person with an outstanding warrant for arrest. *Id.* Police went to the motel "to try to *knock-and-talk* [their] way into obtaining consent to search the [motel]

Terry stop cannot occur at a person's residence."[263] The court reasoned that although "police must have a warrant in order to arrest a suspect inside [the] home," a knock-and-talk supported by reasonable suspicion is lawful because "a suspect's decision to open the door exposes him to a public place, and the privacy interests [of the home remain] protected."[264] The reasonable suspicion standard is fitting to address knock-and-talks because, like stop-and-frisks, knock-and-talks are a flexible investigatory tool used by law enforcement when they do not have probable cause to arrest an individual, but when they do have a *specific and articulable* reason to believe criminal activity is afoot.[265]

Like a stop-and-frisk, a knock-and-talk results in more than a "mere 'minor inconvenience and petty indignity,'"[266] but less than a full-blown search.[267] As in a stop-and-frisk, a police officer approaching a home to conduct a knock-and-talk will often be acting on a tip from a member of the community or based on the officer's personal observations.[268] Like an officer conducting a stop-and-frisk, an officer conducting a knock-and-talk will often not have enough information to obtain an arrest warrant.[269] The knock-and-talk, like the stop-and-frisk, is an intermediate level of intrusion where the officer should have at least an articulable reason to believe criminality is afoot before they intrude on a citizen's privacy and security.[270]

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room", and to confirm that the named individual was the same person named in the warrant. *Crapser*, 472 F.3d at 1143.

263. *Id.* at 1148 (internal quotations omitted).

264. *Id.*

265. *See* Terry v. Ohio, 392 U.S. 1, 8, 21, 27, 30 (1968); *Crapser*, 472 F.3d at 1147–1148.

266. *Terry*, 392 U.S. at 10 (quoting People v. Rivera, 201 N.E.2d 32, 36 (N.Y. 1964)).

267. *Id.* at 19, 26.

268. *Compare* Navarette v. California, 134 S. Ct. 1683, 1686, 1688 (2014) (vehicle stop based on anonymous tip), United States v. Arvizu, 534 U.S. 266, 268, 270–71 (2002) (vehicle stop based on police observation), *and* Florida v. J.L., 529 U.S. 266, 268 (2000) (street encounter prompted by anonymous tip), *with* Kentucky v. King, 131 S. Ct. 1849, 1854 (2011) (knock-and-talk based on police observation), *Crapser*, 472 F.3d at 1143 (knock-and-talk based on information obtained during traffic stop), United States v. Hatfield, 333 F.3d 1189, 1190 (10th Cir. 2003) (knock-and-talk based on anonymous tip), United States v. Miller, 933 F. Supp. 501, 502 (M.D.N.C. 1996) (knock-and-talk based on anonymous tip), *and* State v. Able, 742 S.E.2d 149, 150 (Ga. Ct. App. 2013) (knock-and-talk based on anonymous tip).

269. *See King*, 131 S. Ct. at 1862.

270. *See Terry*, 392 U.S. at 21, 30 (concluding that officer must be able to point to specific and articulable facts to demonstrate a reasonable suspicion that criminal activity was afoot).

As is the case in stop-and-frisks, the scope of an officer's ability to intrude via a knock-and-talk should be limited.[271] Officers with reasonable suspicion to believe criminality is afoot amongst the occupants of a particular dwelling may knock on the door for the purpose of completing a limited search.[272] However, whether an officer's search may continue further depends on what evidence is revealed by the initial search.[273] After the officer knocks on the door, the occupants may choose to open the door, or they may choose to go about their business.[274] Unlike in the case of a stop-and-frisk, the officer completing a knock-and-talk may or may not gain access to the individual they seek, because the house, like the individual, is specifically protected in the text of the Fourth Amendment.[275] Thus, just as a frisk cannot go beyond the limited scope of its purpose, an officer conducting a knock-and-talk may not compel a further inquiry where the officer's initial search—knock on the door—does not reveal any further evidence of criminality.[276] So, while a *search* occurs the moment an officer knocks on the door of a private dwelling for the purpose of conducting a search,[277] it is a limited search that must be supported only by a reasonable suspicion of criminality.[278]

B. Terry v. Ohio *and* Payton v. New York

At least one commentator has argued, as did the defendant in *Crapser* that *Terry*'s reasonable suspicion standard cannot apply to knock-and-talks because the home is entitled to a heightened level of Fourth Amendment protection under the Supreme Court of the United States' decision in *Payton*.[279] These arguments, however, misunderstand the

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271. *See* Florida v. Jardines, 133 S. Ct. 1409, 1416–17 (2013) (limiting scope of officer's intrusion to *implied license* for being there); *Terry*, 392 U.S. at 19–20 (limiting scope of stop-and-frisk to *circumstances which justified the interference*).

272. *Terry*, 392 U.S. at 29–30.

273. *Id.* at 10, 30 (allowing initial search for weapons, and if weapons are found the police may conduct a full-blown search).

274. *King*, 131 S. Ct. at 1862.

275. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses . . . shall not be violated . . . ."); *King*, 131 S. Ct. at 1854, 1856; *Terry*, 392 U.S. at 10.

276. *See King*, 131 S. Ct. at 1856, 1862; *Terry*, 392 U.S. at 19–20.

277. Florida v. Jardines, 133 S. Ct. 1409, 1414–16 (2013).

278. *See id.* at 1415–16; *King*, 131 S. Ct. at 1856, 1862.

279. *See* U.S. CONST. amend. IV; Payton v. New York, 445 U.S. 573, 576, 586–87 (1980); *Terry*, 392 U.S. at 19–20; United States v. Crapser, 472 F.3d 1141, 1148 (9th Cir. 2007); Bradley, *supra* note 7, at 1117–18, 1120–22 (relying on *Payton* to conclude that knock-and-talks should not be permitted absent a warrant supported by probable cause).

fundamental rule announced in *Payton*.[280] The unquestionable holding of *Payton* is that police are prohibited "from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest."[281] In *Payton*, police attempted to conduct a knock-and-talk, but when there was no answer they pried their way into the home and seized evidence lying in plain view.[282] In the accompanying case, *Riddick v. New York*, the police successfully conducted a knock-and-talk and seeing the subject of their investigation beyond the opened door, entered and arrested him without a warrant.[283] The Court held that both warrantless arrests in the home violated the Fourth Amendment and that the recovered evidence should be suppressed.[284]

Payton is about defining Fourth Amendment boundaries and "protect[ing] the physical integrity of the home."[285] *Payton* does not, however, provide special protection to the lumber and rock that make up an individual's home.[286] When police have probable cause but no warrant to arrest an individual secreted in their home, they may not arrest that individual in their home and use evidence recovered from inside the home.[287] Put differently, police armed only with probable cause *may* arrest an individual in their home, but any evidence obtained *in the house* will be suppressed and inadmissible against the defendant.[288] However, if for example, police complete a warrantless arrest of a suspect inside his home and then take the suspect outside, any statements made by the suspect *outside* the home may be admissible.[289] Thus, the person inside the home, like the person in the street, may be subjected to a warrantless arrest.[290]

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280. *See Payton*, 445 U.S. at 576, 602–03; *Terry*, 392 U.S. at 19–20; *Crapser*, 472 F.3d at 1148; Bradley, *supra* note 7, at 1117–18, 1120–22.

281. *Payton*, 445 U.S. at 576, 602–03.

282. *Id.* at 576–77.

283. *Id.* at 578.

284. *Id.* at 577–79, 603; *see also* U.S. CONST. amend. IV.

285. New York v. Harris, 495 U.S. 14, 17 (1990); *see also* U.S. CONST. amend. IV; *Payton*, 445 U.S. at 576.

286. *See Harris*, 495 U.S. at 18; *Payton*, 445 U.S. at 590.

287. *See Payton*, 445 U.S. at 576, 577 n.5, 603.

288. *See id.* at 576–77.

289. *See Harris*, 495 U.S. at 21. The case assumes the statements were otherwise lawfully obtained. *Id.* at 20; *see also* Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

290. *See Harris*, 495 U.S. at 18, 20–21; United States v. Watson, 423 U.S. 411, 423–24 (1976) (holding that warrantless arrest of individual in public was valid).

Contrary to opinions that *Payton* was about providing a heightened level of protection in the home,[291] *Payton* was about preventing "breach of the entrance to an individual's home" without a warrant.[292] *Payton* answered a "narrow question."[293] *Payton* provided clear lines to police and citizens about how the Fourth Amendment protects individuals *inside* their homes.[294] The home is not entitled to a heightened standard of protection; rather, the home is simply another container—albeit, one entitled to equal Fourth Amendment protection as the person—from which an individual may secrete himself or herself from the investigatory arm of the government.[295] Because the home and the person are entitled to equal protection under the Fourth Amendment, the home should be scrutinized under the same level of suspicion as the person.[296] *Terry*'s reasonable suspicion standard should apply to knock-and-talks.[297]

C. *Equal Protection*

Terry's reasonable suspicion standard should apply to knock-and-talks because applying a higher probable cause standard would violate the Equal Protection and Due Process Clauses of the Constitution.[298] This subpart assumes—for the sake of argument and illustration—that the Supreme Court provided heightened protection to the home in *Payton*.[299] Certain Supreme Court dicta have run amuck, resulting in some courts and commentators providing more protection to the person's *castle* than to the person himself.[300] Regardless, *Terry*'s reasonable suspicion standard must govern knock-and-talks because any other interpretation of *Payton* and *Terry* would result in an unequal and discriminatory application of the Fourth Amendment's protections.[301]

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291. *See Payton*, 445 U.S. at 576, 586–87; Terry v. Ohio, 392 U.S. 1, 19–20; United States v. Crapser, 472 F.3d 1141, 1148 (9th Cir. 2007); Bradley, *supra* note 7, at 1117–18, 1120–22 (arguing that knock-and-talks are unlawful because of the *sanctity of the home*).

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

293. *Payton*, 445 U.S. at 582; 589–90.

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

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

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

297. *See* Terry v. Ohio, 392 U.S. 1, 19–20 (1968).

298. *See* U.S. CONST. amends. V, XIV; *Terry*, 392 U.S. at 19–20.

299. *Payton*, 445 U.S. at 586–87.

300. *See id.* at 596–97; United States v. Watson, 423 U.S. 411, 424–25 (1976).

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

Payton has stood for the proposition that unwarranted searches and seizures inside a home bear heightened scrutiny[302] while searches and seizures of a person are protected by a lesser standard.[303] Even Justice Scalia—who was known for his originalist and strict textual approach to interpreting the Constitution[304]—concluded that, "when it comes to the Fourth Amendment, the *home is first among equals*."[305] However, that is a counterintuitive conclusion for an originalist or textualist like Justice Scalia to make, where *persons* are *literally* first among equal rights delineated in the Fourth Amendment.[306] "The right of people to be secure in their [1] persons, [2] houses, [3] papers, and [4] effects, against unreasonable searches and seizures, shall not be violated . . . ."[307] If any Fourth Amendment right is entitled to heightened protection, it should be the right protecting persons, not houses.[308]

Moreover, much of the text in *Payton*, which suggested a heightened protection for the home, was conclusory and based on an overly strained reading of the Fourth Amendment.[309] For example, at one point in its opinion, the Court took the liberty of omitting certain text from the Fourth Amendment in order to support its proposition:

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302. *Payton*, 445 U.S. at 588–90; *see also* Illinois v. McArthur, 531 U.S. 326, 336 (2001) (concluding that a seizure of an individual in the street is less intrusive than entering his home).

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

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

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

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

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

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

309. *See* U.S. CONST. amend. IV; Payton v. New York, 445 U.S. 573, 588–90 (1980).

> "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[310]

Perhaps the Court would have been correct that the Fourth Amendment *unequivocally* establishes that the home is entitled to a heightened level of protection if the right to be secure in houses was the *only* right guaranteed under the Fourth Amendment.[311] In other words, the home would unequivocally be entitled to heightened protection if the Fourth Amendment were written the way the Court chose to write it in the passage above, citing only *houses* as being protected.[312] There is no provision in the Constitution or elsewhere in American law, however, that allows the Supreme Court of the United States to chop up the Constitution and to claim that people are entitled to less protection than property.[313]

If *Payton* is read with *Terry* in this way, it is clear that at least in certain circumstances, the Supreme Court has written out probable cause protections for citizens that were originally guaranteed by the Constitution, leaving only the home protected by the laws provided by the Framers.[314] If this is the case, then the Supreme Court has mistakenly but nonetheless, "pursuant to a policy,"[315] provided individuals who can afford a home or private dwelling with *more* protection under the Fourth Amendment—than those who reside in the street, or than those who are forced more often into the street because of the circumstances they face at home.[316]

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310. *Payton*, 445 U.S. at 589–90 (alterations in original) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

311. *See* U.S. CONST. amend. IV; *Payton*, 445 U.S. at 589–90.

312. *See* U.S. CONST. amend. IV; *Payton*, 445 U.S. at 589–90.

313. *See generally* U.S. CONST.

314. *See* U.S. CONST. amend IV; *Payton*, 445 U.S. at 589–90; Terry v. Ohio, 392 U.S. 1, 11, 15–16 (1968).

315. Floyd v. City of New York, 283 F.R.D. 153, 162, 178 (S.D.N.Y. 2012) (certifying class of defendants alleging discriminatory application of *stop-and-frisk* practices against NYPD officers); *see also* U.S. CONST. amend. IV; *Payton*, 445 U.S. at 589–90; *Terry*, 392 U.S. at 11, 15–16. *Policy* is defined as a "definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions." *Policy*, MERRIAM-WEBSTER (11th ed. 2003).

316. Slobogin, *supra* note 12, at 401.

> As a result [of the Supreme Court Fourth Amendment jurisprudence], people who live in public spaces—for instance, the homeless who reside in boxes—and people who have difficulty hiding or distancing their living space from casual observers—for instance, those who live in tenements and other crowded areas—are much more likely to experience unregulated government intrusions.

Id.

If the Supreme Court has indeed provided higher Fourth Amendment protection for the home than the person, then the Court has promulgated a rule that violates the Equal Protection and Due Process clauses of the Constitution.[317] A heightened Fourth Amendment standard for the home will result in an unequal and discriminatory impact on impoverished[318] and minority populations.[319] Poverty is more likely to exist amongst minority populations,[320] and of course poor people are more likely to be homeless than their more affluent counterparts.[321] Black people are more likely to be homeless than white people,[322] and white people are more likely to own a home than black or Hispanic people.[323] Accepting a heightened standard of protection for the home may disproportionally increase the risk that minority

317. *See* U.S. CONST. amends. IV, V, XIV.

318. *See* U.S. CONST. amend. IV; Slobogin, *supra* note 12, at 401–03. While the Court has not held *per se* that discrimination against poor people is unconstitutional, it "has found wealth-based classifications in violation of the equal protection guarantee when they deprive poor people of fundamental rights and interests . . . ." DAVID G. SAVAGE, THE SUPREME COURT AND INDIVIDUAL RIGHTS 446 (5th ed. 2009); *see also* Boddie v. Connecticut, 401 U.S. 371, 374, 380–81 (1971) (invalidating state statute that denied access to courts for purpose of obtaining divorce unless individual could pay mandated fee); Mayer v. City of Chicago, 404 U.S. 189, 193 (1971) (applying *Griffin* to appeal); Williams v. Illinois, 399 U.S. 235, 241 (1970) (ruling that states cannot hold indigent prisoners in prison beyond maximum sentence in order to work off unpaid fines); Gideon v. Wainwright, 372 U.S. 335, 340, 342–43 (1963) (finding due process violation when state refused indigent defendants court-appointed attorneys); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (denying indigent defendants free copies of trial transcript violated due process).

319. *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 560 (S.D.N.Y. 2013), *aff'd*, 770 F.3d 1051 (2d. Cir. 2014); Tracey Maclin, *"Black and Blue Encounters" Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 248 (1991).

320. CARMEN DENAVAS-WALT ET AL., INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010 14 (2011), http://www.census.gov/prod/2011pubs/p60-239.pdf (finding in 2010 that 27.4 percent of blacks and 26.6 percent of Hispanics lived below poverty, compared 9.9 percent of non-Hispanic whites).

321. *See* INST. FOR CHILDREN, POVERTY & HOMELESSNESS, INTERGENERATIONAL DISPARITIES EXPERIENCED BY HOMELESS BLACK FAMILIES 1 (2012), http://www.icphusa.org/filelibrary/ICPH_Homeless%20Black%20Families.pdf.

322. *Id.*

> Black persons in families make up 12.1[%] of the [United States] family population, but represented 38.8[%] of sheltered persons in families in 2010. In comparison, 65.8[%] of persons in families in the general population are white, while white family members only occupied 28.6[%] of family shelter beds in 2010.

Ralph da Costa Nunez, *Homelessness: It's About Race, Not Just Poverty*, CITYLIMITS (Mar. 5, 2012), http://citylimits.org/2012/03/05/homelessness-its-about-race-not-just-poverty.

323. Tami Luhby, *Whites Get Wealthier, While Blacks and Hispanics Lag Further Behind*, CNN (Dec. 15, 2014, 7:27 AM), http://money.cnn.com/2014/12/12/news/economy/wealth-by-race-pew. "Only 47.4 % of minorities were homeowners in [2013]. But 73.9 % of whites owned homes." *Id.*

populations will be unconstitutionally searched and seized by officers of the law.[324] Moreover, such a policy may increase the risk of violence occurring in the street, which will place police and civilian life at unnecessary risk.[325]

Like the stop-and-frisk program that was held discriminatory and unconstitutional in *Floyd v. City of New York*,[326] the Supreme Court of the United States' heightened protection for homes is "centralized and hierarchical."[327] Lower federal courts are bound to follow the Court's decision in *Payton*,[328] and like the NYPD officers in *Floyd*, lower court performance is subject to review and evaluation by the Court.[329] Like the stop-and-frisk policies at issue in *Floyd*, the policy of heightened protection in the home is delineated through a "chain of command" with the Supreme Court being at the command end of the chain.[330] The Supreme Court acts as

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324. *See* Maclin, *supra* note 319, at 245. "NYPD stops-and-frisks are significantly more frequent for [b]lack and [h]ispanic residents than they are for [w]hite residents, even after adjusting for local crime rates, racial composition of the local population, police patrol strength, and other social and economic factors predictive of police enforcement activity." Floyd v. City of New York, 283 F.R.D. 153, 168 (S.D.N.Y. 2012).

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

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

Id. at 253. Not much has changed since 1991 when Professor Maclin wrote the article. Adam Chandler, *Eric Garner and Michael Brown: Deaths Without Indictments*, THE ATLANTIC (Dec. 3, 2014), http://www.theatlantic.com/national/archive/2014/12/eric-garner-grand-jury-no-indictment-nypd/383392. Consider, for example, the 2014 in-the-street killings of Eric Garner and Michael Brown in Staten Island, New York and Ferguson, Missouri, respectively; coupled with the subsequent in-the-street slayings of NYPD police officers Wenjian Liu and Rafael Ramos in Bedford-Stuyvesant, New York. *Id.*; *see also* Benjamin Mueller & Al Baker, *Two Officers Ambushed, Are Killed in Brooklyn*, N.Y. TIMES, Dec. 20. 2014, at A1.

326. 959 F. Supp. 2d 540, 667 (S.D.N.Y. 2013), *aff'd*, 770 F.3d 1051 (2d Cir. 2014).

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

328. Payton v. New York, 445 U.S. 573, 602–03 (1980).

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

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

a centralized source, which makes decisions that lower courts are obligated to follow[331] and which promulgates rules governing the policing of citizens.[332] In short, increased protection for the home and diminished protection for those in the street is a direct consequence of centralized policies established by the Supreme Court.[333] There is no doubt, after all, that it was the Supreme Court that started, or at least sanctioned, the stop-and-frisk policy back in 1968.[334]

This Article does not argue that the Supreme Court has acted with discriminatory intent.[335] Rather, if the Court indeed provided heightened protection to the home, then the Court has made a mistake and failed to consider the broader, discriminatory applications of its rulings.[336] The Court would have allowed its decision in *Payton* to stand for something more than it was originally intended,[337] and the resulting impact of *Payton* is an unequal and discriminatory application of the Fourth Amendment.[338] *Terry's* reasonable suspicion standard should apply to knock-and-talks because applying a higher probable cause standard would violate the Equal Protection Clause and Due Process Clause of the Constitution.[339]

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

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time ordain and establish."); *Floyd*, 283 F.R.D. at 163 ("'The NYPD functions through a chain of command.'").

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

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

333. *Floyd*, 283 F.R.D. at 166; *see also* Illinois v. McArthur, 531 U.S. 326, 336 (2001).

334. *See Terry*, 392 U.S. at 10–11.

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

336. *See* Payton v. New York, 445 U.S. 573, 585–86 (1980). This would not be the first time; after all, the Court made a ruling that resulted in the discriminatory application of the Constitution's protections. G.M. Leasing Corp. v. United States, 429 U.S. 338, 338, 354–55 (1977) (requiring a warrant based on probable cause before the Internal Revenue Service ("IRS") could enter a *business* and seize tax documents); Wyman v. James, 400 U.S. 309, 310, 318 (1971) (allowing a warrantless search of a welfare recipient's *home*); *see also* Plessy v. Ferguson, 163 U.S. 537, 544, 548, 550–51 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (resulting in almost one hundred years of segregation and discriminatory application of the Fourteenth Amendment's protections); Slobogin, *supra* note 12, at 403.

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

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

339. U.S. CONST. amend. V, XIV; *Terry*, 392 U.S. at 10–11.

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

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

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

Ultimately, the "central inquiry" under the Fourth Amendment is whether the "governmental invasion of a citizen's personal security" was reasonable under the circumstances.[350] Where a search has occurred, courts

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340. *See Terry*, 392 U.S. at 10–11; *infra* Part VI.

341. *Terry*, 392 U.S. at 21, 30.

342. United States v. Arvizu, 534 U.S. 266, 273 (2002); *see also* Adams v. Williams, 407 U.S. 143, 148 (1972).

343. Navarette v. California, 134 S. Ct. 1683, 1688 (2014); Florida v. J.L., 529 U.S. 266, 269 (2000).

344. *J.L.*, 529 U.S. at 269.

345. *Id.*; Alabama v. White, 496 U.S. 325, 332 (1990).

346. *See* Illinois v. Wardlow, 528 U.S. 119, 124 (2000).

347. *Id.* ("An individual's presence in [a *high crime area*] . . . standing alone, is not enough to support a reasonable, particularized suspicion [of criminal activity]").

348. Kentucky v. King, 131 S. Ct. 1849, 1865 (2011) (Ginsburg, J., dissenting) (finding the smell of marijuana emanating from behind a closed door sufficient to demonstrate probable cause); United States v. Charles, 29 F. App'x. 892, 895–96 (3d Cir. 2002); United States v. McCullough, No. 92-30423, 1994 WL 171170, at *1 (9th Cir. May 5, 1994); State v. Friedli, No. 50191-7-I, 2003 WL 22173063, at *3 (Wash. Ct. App. Sept. 22, 2003).

349. *Ybarra*, 444 U.S. 85, 91–93 (1979) (concluding that reasonable suspicion is not satisfied by mere association with a person for whom the police had probable cause to search, even when the police had a search warrant for the premises).

350. Terry v. Ohio, 392 U.S. 1, 19; *see also* U.S. CONST. amend. IV.

are required to consider the reasonableness of the search by balancing the scope of the invasion of the citizen's right to be left alone, against the government's interest in effectuating the search.[351] If the court deems the search unreasonable, then the search violated the Fourth Amendment, and any evidence obtained pursuant to the unlawful search may be inadmissible against the arrestee.[352] Thus, if an initial knock-and-talk is an unlawful search, then any non-attenuated fruits of that search, including consent to search the home, are inadmissible against the citizen in court.[353]

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

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

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351. *Terry*, 392 U.S. at 20–22.

352. Mapp v. Ohio, 367 U.S. 643, 655 (1961); Weeks v. United States, 232 U.S. 383, 398 (1914); *see also* U.S. CONST. amend. IV.

353. Drake, *supra* note 3, at 38–39; Brown v. Illinois, 422 U.S. 590, 604–05 (1975).

354. *See* Drake, *supra* note 3, at 26 (concluding that police act with the purpose of conducting a search when their action is taken against the person or property of a private citizen in an effort to gather evidence).

355. *See supra* Part III.

356. *See* Ybarra v. Illinois, 444 U.S. 85, 91 (1979).

357. *See supra* Part VI.

358. *See* United States v. Johnson, 170 F.3d 708, 710, 718 (7th Cir. 1999).

359. *See* Terry v. Ohio, 392 U.S. 1, 19–20 (1968); Mapp v. Ohio, 367 U.S. 643, 654–55 (1961).

360. Kentucky v. King, 131 S. Ct. 1849, 1865 (2011) (finding the smell of marijuana emanating from behind a closed door sufficient to demonstrate probable cause).

large portion of knock-and-talk cases involves the smell or site of marijuana, marijuana plants, or related paraphernalia.[361] Yet, the mere smell or site of marijuana no longer constitutes reasonable suspicion of criminal activity in some states, and other state executives have taken steps to limit the criminality of the drug.[362] Nevertheless, in *Kentucky v. King* the officers were empowered to follow the suspect into the breezeway because they had probable cause to believe he had purchased illegal narcotics.[363] When the officers arrived at the door they smelled the odor of marijuana and were thus justified in knocking on the door.[364] However, if what occurred in *Kentucky v. King* occurred in Oregon or Colorado today, the mere smell of marijuana would not have justified police knocking on King's door, King's arrest would have been deemed unlawful, and all evidence gained pursuant to that knock-and-talk would have been suppressed.[365]

In addition to marijuana and related paraphernalia, anonymous tips lead to a significant number of knock-and-talks.[366] Determining whether an

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361. *E.g.*, United States v. Hampton, 134 F. App'x 943, 944 (7th Cir. 2005); United States v. Banks, No. CRIM.7:04 CR 00090, 2004 WL 2491616, at *1 (W.D. Va. Nov. 4, 2004); Edens v. Kennedy, 112 F. App'x. 870, 873 (4th Cir. 2004); United States v. Hatfield, 333 F.3d 1189, 1193 (10th Cir. 2003); United States v. Charles, 29 F. App'x. 892, 894 (3d Cir. 2002); United States v. Hall, No. 97-30296, 1998 WL 382722, at *1 (9th Cir. 1998); United States v. McCullough, 24 F.3d 251 (unpublished table decision), No. 92-30423, 1994 WL 171170, at *1 (9th Cir. May 5, 1994); State v. Able, 742 S.E.2d 149, 150 (Ga. Ct. App. 2013); State v. Felker, 819 N.E.2d 870, 872 (Ind. Ct. App. 2004); State v. Dwyer, 14 P.3d 1186, 1187 (Kan. Ct. App. 2000); State v. Green, 598 So. 2d 624, 626 (La. Ct. App. 1992); People v. Galloway, 675 N.W. 2d 883, 886 (Mich. Ct. App. 2003); People v. Pemberton, No. 238522, 2003 WL 1795551, at *2 (Mich. Ct. App. Apr. 3, 2003); State v. Cothran, 115 S.W.3d 513, 517 (Tenn. Crim. App. 2003); Duhig v. State, 171 S.W.3d 631, 634 (Tex. App. 2005); State v. Friedli, No. 50191-7-I., 2003 WL 22173063, at *1 (Wash. Ct. App. Sept. 22, 2003); State v. Graffius, 871 P.2d 1115, 1116–17 (Wash. Ct. App. 1994); Kletter, *supra* note 47, at 536.

362. *See* Joel Rose, Brooklyn DA Shifts Stance on Pot, but That Won't Impact NYPD, NPR (July 12, 2014, 9:04 AM), http://www.npr.org/2014/07/12/330761032/brooklyn-da-shifts-stance-on-pot-but-that-wont-impact-nypd. *But see* ALASKA STAT. § 17.38.010 (2015); COL. CONST. art XVIII § 16; 2015 Or. Laws 18; WASH. REV. CODE. § 69.50.360 (2015). This argument is based on the fact that Colorado, Washington, Oregon, and other states have passed laws legalizing and regulating the use of marijuana. COL. CONST. art. XVIII § 16; WASH. REV. CODE § 69.50.360; 2015 Or. Laws 18; ALASKA STAT. § 17.38.010. Other state actors have taken executive action to limit the criminality of marijuana. *See, e.g.*, Rose, *supra* note 362.

363. Kentucky v. King, 131 S. Ct. 1849, 1854 (2011).

364. *Id.*

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

366. *See, e.g.*, Edens v. Kennedy, 112 F. App'x. 870, 872 (4th Cir. 2004); United States v. Hatfield, 333 F.3d 1190, 1190 (10th Cir. 2003); State v. Able, 742 S.E.2d 149, 150 (Ga. Ct. App. 2013); Chenault v. Commonwealth, No. 2004-CA-000463-MR, 2005 WL 119875, at *1 (Ky. Ct. App. 2005); Traylor v. State, 817 N.E.2d 611, 614 (Ind. Ct. App.

anonymous tip is sufficient to provide reasonable suspicion of criminality requires courts to consider the totality of circumstances.[367] Police conducting a knock-and-talk should have to verify the veracity of anonymous tips they receive before they proceed with a knock-and-talk.[368] This extra layer of Fourth Amendment protection may be particularly important to residents who live in states like Texas and Florida where police have entire knock-and-talk taskforces dedicated to responding to tips provided by community members.[369] Under the reasonable suspicion standard, the citizen in their home, like the citizen in the street, will be less vulnerable to government intrusions that were initiated by mistaken or malicious allegations made by neighbors and other community members.[370]

An officer acting on a mere *hunch* will not be empowered to approach a home and knock on its door for the purpose of gathering evidence.[371] An officer will have to have a specific, articulable reason for approaching a home to conduct a knock-and-talk.[372] Police will not be able to conduct a knock-and-talk merely because an individual in a home was seen associating with a criminal suspect.[373] The smell, sight, or verified report of marijuana continues to provide sufficient reason for police to conduct knock-and-talks in most states, but the practice is not allowed in a growing number of states.[374] Police will have to verify the reliability of anonymous phone tips that make up a significant number of police leads that result in knock-and-talks.[375] Finally, police task forces dedicated to knock-and-talks will not be able to knock on doors at random, and task force members will have to do a minimum amount of work to verify tips provided by members of the community.[376] Applying the reasonable suspicion standard to knock-and-talks will prevent government officials from conducting suspicion-less searches of private dwellings.

2004); People v. Galloway, 657 N.W.2d 883, 886 (Mich. Ct. App. 2003); State v. Green, 598 So. 2d 624, 625–26 (La. Ct. App. 3d Cir. 1992).

367. *See* Navarette v. California, 134 S. Ct. 1683, 1688 (2014); United States v. Arvizu, 534 U.S. 266, 273 (2002); Florida v. J.L., 529 U.S. 266, 270 (2000); Adams v. Williams, 407 U.S. 143, 148 (1972).

368. *See J.L.*, 529 U.S. at 269; *Navarette*, 134 S. Ct. at 1688.

369. *Terry*, 392 U.S. at 20; *see also* U.S. CONST. amend IV.

370. *See J.L.*, 529 U.S. at 269, 272.

371. *Terry*, 392 U.S. at 26; Drake, *supra* note 3, at 26; *see also supra* Parts II–III.

372. *Terry*, 392 U.S. at 21, 30.

373. *See* Ybarra v. Illinois, 444 U.S. 85, 91 (1979).

374. *See supra* notes 360–62 and accompanying text.

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

376. Drake, *supra* note 3, at 35; *see also* Curtis, *supra* note 58; Hallman, *supra* note 59.

VII. CONCLUSION

The Supreme Court should apply the same standard of review for knock-and-talks as stop-and-frisks in order to avoid an unequal and discriminatory application of the protections guaranteed by the Fourth Amendment and in order to provide for citizen and police safety.[377] After the Court's decisions in *Kentucky v. King* and *Jardines*, a search within the meaning of the Fourth Amendment must have occurred when the police knock on the door of a private dwelling with the *objective purpose* of completing a search.[378] Yet, a knock-and-talk, like a stop-and-frisk, is a *limited* search utilized by police during the intermediate phase of an investigation and thus, should be subjected to the same *reasonable suspicion* standard.[379] It is critical for the Court to review knock-and-talks under *Terry*'s reasonable suspicion standard because courts and commentators have mistakenly interpreted the Court's decision in *Payton* to provide heightened Fourth Amendment protection for the home.[380] Coupled with the increased practice of knock-and-talks, this confusion has resulted in an unequal and discriminatory application of the Fourth Amendment, where poor and minority citizens are particularly vulnerable to knock-and-talks.[381]

Furthermore, the Court is obligated to set rules that limit the ambiguous and dangerous circumstances that arise when police knock on a citizen's door without knowing what is behind the door, without a plan, and without a warrant.[382] In order to provide clear rules for police[383] and in order to ensure officer and citizen safety,[384] the Court should engage in an initial assessment of whether an officer was constitutionally empowered to knock on a citizen's door.[385] Rather than focusing on knock-and-talks as leading to unlawful *seizures*, unplanned and unwarranted police and citizen interaction should be limited by reviewing the lawfulness of knock-and-talks as *searches* that occurred the moment police *knocked* on the citizen's door.[386]

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377. *See* U.S. CONST. amend IV.
378. *See* U.S. CONST. amend IV Florida v. Jardines, 133 S. Ct. 1409, 1416 (2013); Kentucky v. King, 134 S. Ct. 1849, 1859 (2011).
379. *See* Terry v. Ohio, 392 U.S. 1, 15–17 (1968).
380. *See* U.S. CONST. amend. IV; Payton v. New York, 445 U.S. 573, 603 (1980); *Terry*, 392 U.S. at 27, 30–31; Bradley, *supra* note 7, at 1117–22.
381. *See* U.S. CONST. amend. IV; Leonetti, *supra* note 77, at 310, 316–17, 320.
382. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 345–47 (2001); Bradley, *supra* note 7, at 1122; *see also* U.S. CONST. amend IV
383. *Atwater*, 532 U.S. at 347 (reasoning that police need clear rules to follow).
384. United States v. Hammett, 236 F.3d 1054, 1060 (9th Cir. 2001) (permitting police walk around of home in order to ensure officer safety).
385. *See id.*
386. *See* Terry v. Ohio, 392 U.S. 1, 15–16 (1968).

Allowing knocks-and-talks to evade judicial scrutiny not only threatens the equal protection guaranteed to each citizen under the Fourth Amendment and Fourteenth Amendment of the Constitution but also threatens the safety of police and citizens alike.[387] Knock-and-talks should be reviewed under the same standard as stop-and-frisks and whether that standard is met should be determined by the level of suspicion police had at the moment they knocked on the citizen's door.[388]

387. *See* U.S. CONST. amends. IV, XIV; *Hammett*, 236 F.3d at 1060.
388. *See supra* Part VII.

WHAT TO EXPECT BEFORE YOU'RE EXPECTING: CLARIFYING FLORIDA'S STATUTE GOVERNING PRE-EMBRYO DISPOSITION AGREEMENTS AND DIVORCE

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I. INTRODUCTION

In 2013, Sofia Vergara, actress and star of the hit television show *Modern Family*, and her then fiancé Nick Loeb, a Florida businessman, sought to conceive a child through in vitro fertilization ("IVF")[1]—a process by which an egg and sperm are fertilized outside of the body, and the resulting pre-embryo is implanted in the uterus with the objective of development to full-term.[2] Prior to undergoing this treatment, the couple signed a form directive stating that "no unilateral action [could] be taken with regard to the embryos unless both parties consent."[3] The couple created four female pre-embryos in total, two of which were unsuccessfully brought to term.[4]

In May of 2014, prior to implanting the remaining two frozen pre-embryos, Ms. Vergara and Mr. Loeb separated.[5] Three months later, Mr. Loeb filed an action to declare the form directive signed prior to undergoing treatment void and unenforceable, stating that it did not comply with California law by specifying what would happen to the pre-embryos in the event of a separation.[6] In a New York Times op-ed, Mr. Loeb expressed his desire to have the frozen pre-embryos implanted in a surrogate and carried to term against Ms. Vergara's wishes.[7] Mr. Loeb wrote, "[d]oes one person's

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1. Nick Loeb, Opinion, *Frozen Embryos Have a Right to Live*, N.Y. TIMES, Apr. 30, 2015, at A31; Justin Moyer, *Sofia Vergara's Ex Pleads to Get 'Our Girls': The Couple's Two Frozen Embryos*, WASH. POST (Apr. 30, 2015) http://www.washingtonpost.com/news/morning-mix/wp/2015/04/30/sofia-vergaras-ex-writes-intimate-op-ed-about-our-girls-the-couples-two-frozen-embryos.

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

3. Natalie Finn, *Sofia Vergara Slams Ex-Fiancé Nick Loeb's Lawsuit Over Frozen Embryos: She Never Wanted Them Destroyed*, E! ONLINE (Apr. 17, 2015, 5:15 PM), http://www.eonline.com/news/647783/sofia-vergara-slams-ex-fiance-nick-loeb-s-lawsuit-over-frozen-embryos-she-never-wanted-them-destroyed.

4. *See* Loeb, *supra* note 1.

5. Finn, *supra* note 3.

6. *See* Loeb, *supra* note 1.

7. *Id.*

desire to avoid biological parenthood—free of any legal obligations—outweigh another's religious beliefs in the sanctity of life and desire to be a parent?"[8] Meanwhile, Ms. Vergara's attorney released a statement on her behalf, indicating that she "is content to leave the embryos frozen indefinitely, as she has no desire to have children with her ex."[9] Mr. Loeb has amended his complaint against Ms. Vergara and continues to pursue custody and control over the pre-embryos.[10]

In another case, Dr. Mimi Lee, a Julliard-trained pianist and doctor, and her husband of five years, Stephen Findley, a financial analyst, are battling over their own frozen pre-embryos in San Francisco Superior Court.[11] Like Ms. Vergara and Mr. Loeb, the couple, both graduates of Harvard University, signed a consent form prior to undergoing IVF; however, in this case, the consent form directed that their embryos be destroyed in the event of divorce.[12] Now that they are no longer together, Ms. Lee, like Mr. Loeb, seeks control of the pre-embryos so she can have them implanted and brought to term.[13] However, another major difference in this case is that unlike Mr. Loeb, Ms. Lee claims she is infertile, due to both her age and a previous battle with cancer, meaning that these embryos are her very last chance to become a biological parent.[14]

The predicament that these two couples face highlights some important legal issues with IVF: Are pre-embryo disposition contracts binding and enforceable, and, if so, should they be mandatory for all couples prior to undergoing IVF treatment?[15] Further, if binding, enforceable contracts are formed, should a circumstance such as Ms. Lee's infertility matter?[16] While current Florida law does address the issue of pre-embryo disposition agreements, the governing statute is vague and leaves many questions unanswered, and there is no Florida case law dealing with this issue to provide guidance for interpreting the statute.[17]

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8. *Id.*
9. Finn, *supra* note 3.
10. *See id.* The status of this litigation is presumed to be ongoing with the last known activity in April of 2015 when the California Superior Court allowed Nick Loeb to file an amended complaint under the pseudonym, John Doe. *See id.*
11. Jesus Ayala et al., *California Woman Fights Her Ex Over Embryos in Court Battle*, ABC NEWS (July 14, 2015, 10:22 AM), http://abcnews.go.com/US/california-woman-fights-embryos-court-battle/story?id=32433327; Maura Dolan, *Divorced Couple Fighting in Court Over Frozen Embryos*, L.A. TIMES (July 13, 2015, 5:29 PM), http://www.latimes.com/local/lanow/la-me-ln-couple-embryos-trial-20150713-story.html.
12. Ayala et al., *supra* note 11; Loeb, *supra* note 1.
13. *See* Ayala et al., *supra* note 11; Loeb, *supra* note 1.
14. Ayala et al., *supra* note 11; *see also* Loeb, *supra* note 1.
15. *See infra* Part VI.
16. Ayala et al., *supra* note 11; *see also infra* Parts III–IV.
17. *See* FLA. STAT. § 742.17 (2015); *infra* Section V.A.

Part II begins by providing a brief history and background of IVF.[18] Part III discusses several prominent cases addressing the issue of pre-embryo disposition contracts and enforceability.[19] Part IV continues with a discussion of how the previous case law would be applied to the two cases mentioned in this introduction.[20] Part V compares Florida's current pre-embryo disposition agreement statute with Florida's gestational surrogacy statute as well as pre-embryo disposition agreement statutes in other jurisdictions.[21] Part VI proposes several recommended changes that would help clarify Florida's current statute,[22] and Part VII discusses the future solution of freezing genetic material separately.[23]

II. HISTORY AND LEGAL BACKGROUND OF IVF

Assisted Reproductive Technologies ("ART") are a range of techniques used to overcome infertility.[24] One of the most common forms of ART is IVF.[25] In 1978, the world's first ART birth occurred by IVF.[26] Since then, the number of couples in the United States undergoing IVF has increased rapidly, with 174,962 cycles reported by 380 clinics in 2013, resulting in the birth of 63,286 babies.[27] This was an increase from the previous year, which reported 165,172 cycles of IVF, resulting in the birth of 61,740 babies.[28]

The IVF procedure typically begins with hormonal injections, which stimulate a woman's ovaries to produce multiple eggs.[29] The eggs are removed from the woman's body by either laparoscopy or ultrasound-directed-needle aspiration and combined with sperm in a Petri dish.[30] Once fertilized, the pre-embryo "divides until it reaches the four-to-

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18. *See infra* Part II.
19. *See infra* Part III.
20. *See infra* Part IV.
21. *See infra* Part V.
22. *See infra* Part VI.
23. *See infra* Part VII.
24. *Assisted Reproductive Technology*, STEDMAN'S MEDICAL DICTIONARY (27th ed. 2000).
25. Marold, *supra* note 2, at 180.
26. Michelle Castillo, *Report: Five Million Babies Born Thanks to Assisted Reproductive Technologies*, CBS NEWS (Oct. 15, 2013, 12:08 PM), http://www.cbsnews.com/news/report-5-million-babies-born-thanks-to-assisted-reproductive-technologies.
27. Press Release, Am. Soc'y for Reprod., Over 63,000 Babies Born from IVF Cycles Performed in 2013 (Mar. 3, 2015), http://www.arsm.org/over_63000_babies_born_from_IVF_cycles_performed_in_2013.aspx.
28. *See id.*
29. Kass v. Kass, 696 N.E.2d 174, 175 (N.Y. 1998).
30. *Id.*

eight-cell stage, after which several [pre-embryos] are transferred to the woman's uterus by a cervical catheter."[31] If successful, an embryo will implant in the uterus and develop into a fetus.[32] Alternatively, the pre-embryos may be preserved for later use in liquid nitrogen through a process called cryopreservation.[33] The exact numbers are not known, but sources estimate that there are approximately half a million cryopreserved pre-embryos ("frozen pre-embryos") currently in storage in the United States.[34]

Additionally, single embryo transfer, in which only one embryo is transferred into the uterus at a time, is becoming an increasingly popular choice by couples undergoing IVF.[35] It follows that increased use of single embryo transfer will likely result in more pre-embryos from a single course of IVF being frozen as back-ups rather than immediately transferred.[36] While the creation of these excess frozen pre-embryos "reduces both medical and physical costs" of IVF and increases the chances of a successful implementation, it also creates a future disposition problem for couples undergoing this procedure.[37]

The Ethics Committee for the American Society for Reproductive Medicine strongly recommends that all assisted reproduction programs

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

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31. *Id.* More and more women are opting to have only one pre-embryo transferred at a time. *See* Press Release, Am. Soc'y for Reprod. Med., *supra* note 27.

32. *Kass*, 696 N.E.2d at 175.

33. *Id.* Cryopreservation is the "[m]aintenance at very low temperatures of the viability of tissues or organs that have been excised from the body." *Cryopreservation*, STEDMAN'S MEDICAL DICTIONARY (27th ed. 2000). In 1984, the first baby produced from a frozen pre-embryo was born. *First Baby Born of Frozen Embryo*, N.Y. TIMES, Apr. 11, 1984, at A16.

34. *See* Deborah L. Forman, *Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378, 378 (2013).

35. Press Release, Am. Soc'y for Reprod. Med., *supra* note 27. "Most strikingly, we observed more women, no matter their age, chose to have a single embryo transferred . . . . The increasing popularity of this choice was greatest in the youngest age group, women under thirty-five, with 22.5% of those patients having elective single embryo transfer in 2013, up from 14.8% in 2012." *Id.*

36. *See* Practice Comm. of the Soc'y for Assisted Reprod. Tech. & Practice Comm. of the Am. Soc'y for Reprod. Med., *Elective Single Embryo Transfer*, 97 FERTILITY & STERILITY 835, 839 (2012).

37. *Kass*, 696 N.E.2d at 175.

have passed since contact with an individual or couple, diligent efforts have been made to contact the individual or couple, and no written instruction from the couple exists concerning disposition.[38]

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

III. CASES: CONFLICTING APPROACHES

There is limited case law involving conflict over frozen pre-embryo disposition when a commissioning couple separates or divorces.[41] Fewer than a dozen states have heard cases involving pre-embryo disposition after divorce.[42] Most courts have considered whether prior agreements are enforceable in deciding the issue of pre-embryo disposition when a couple divorces or separates,[43] with many enforcing their terms against the subsequent wishes of one of the parties.[44] In the event that a commissioning

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38. Ethics Comm. of the Am. Soc'y for Reprod. Med., *Disposition of Abandoned Embryos: A Committee Opinion*, 99 FERTILITY & STERILITY 1848, 1848–49 (2013). The American Society for Reproductive Medicine is a non-profit organization "composed of over seven thousand physicians, technicians, nurses, researchers, and other professionals with significant expertise in reproductive medicine" that "endorses or disapproves of various reproductive technologies, and sets corresponding guidelines, but lacks any 'real enforcement' mechanism." Alicia J. Paller, Note, *A Chilling Experience: An Analysis of the Legal and Ethical Issues Surrounding Egg Freezing, and a Contractual Solution*, 99 MINN. L. REV. 1571, 1586 (2015).

39. Szafranski v. Dunston, 34 N.E.3d 1132, 1138 (Ill. App. Ct. 2015); A.Z. v. B.Z., 725 N.E.2d 1051, 1053–54 (Mass. 2000); *Kass*, 696 N.E. 2d at 176; *In re* Marriage of Dahl, 194 P.3d 834, 836–37 (Or. Ct. App. 2008); Roman v. Roman, 193 S.W.3d 40,42,51 (Tex. App. 2006); *In re* Marriage of Litowitz, 48 P.3d 261, 263–64 (Wash. 2002); *In re* Marriage of Nash, No. 62553-5-I, 2009 WL 1514842, at *1–2 (Wash. Ct. App. June 1, 2009).

40. *See infra* Part III.

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

42. *Id.*; *see also* Jennifer Pflanz, Comment, *Health Law — Resolving Disputes Over Pre-Embryos Requires Only Contract Review? — Szafranski v. Dunston, 993 N.E.2d 502 (2013)*, 10 J. HEALTH & BIOMEDICAL L. 159, 163 (2014).

43. *See Szafranski*, 34 N.E.3d at 1136, 1158; *In re* Marriage of Witten, 672 N.W.2d 768, 773–74 (Iowa 2003); *A.Z.*, 725 N.E.2d at 1052–53; J.B. v. M.B., 783 A.2d 707, 708 (N.J. 2001); *Kass*, 696 N.E.2d at 180; *Roman*, 193 S.W.3d at 50; *In re Marriage of Litowitz*, 48 P.3d at 266, 268; *In re Marriage of Nash*, 2009 WL 1514842, at *5.

44. *See Szafranski*, 34 N.E.3d at 1156; *Kass*, 696 N.E.2d at 175; *In re Marriage of Dahl*, 194 P.3d at 841; *Roman*, 193 S.W.3d at 54; *In re Marriage of Nash*, 2009 WL 1514842, at *4.

couple did not enter into a prior agreement, or the prior agreement is found to be unenforceable, the courts have then looked to balancing the interests of the parties by considering factors, such as the parties' constitutional rights both to procreate and not procreate, as well as whether other methods of having a biological child are available.[45] A few states have adopted a contemporaneous mutual consent approach, which would not treat advance agreements as binding if either party's current intention conflicts with their prior consent.[46]

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

The Court of Appeals of New York examined a prior embryo disposition agreement in 1998 when faced with an issue of embryo disposition upon divorce.[47] In *Kass v. Kass*,[48] the appellant, Maureen Kass, sought sole custody of "five frozen, stored pre-embryos . . . created five years" prior wishing to implant them against the objections of her ex-husband, Steven Kass.[49] The couple signed four consent forms prior to undergoing their final procedure, which was the first to involve cryopreservation of remaining embryos.[50] The forms provided that "in the event of divorce . . . legal ownership of any stored [pre-embryos] must be determined in a property settlement."[51] However, the forms also included a provision which offered the couple several choices from which they could indicate a preference "[i]n the event that . . . [they were] unable to make a decision regarding the disposition of [their] stored, frozen [pre-embryos]."[52] The couple indicated that their choice was to donate the pre-embryos to the IVF program for research.[53] The Court of Appeals of New York held that the parties' prior agreement was binding and enforceable, reasoning that since the couple was unable to settle the matter in their divorce agreement, the second provision would apply wherein they elected to donate the embryos for research.[54] The court explained that:

45. *See Szafranski*, 34 N.E.3d at 1161–62; *J.B.*, 783 A.2d at 716–17; Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).
46. Forman, *supra* note 34, at 385–86; *see also infra* Section III.C.
47. *Kass*, 696 N.E.2d at 180.
48. 696 N.E.2d 174 (N.Y. 1998).
49. *Id.* at 175.
50. *Id.* at 176.
51. *Id.*
52. *Id.* at 176, 181.
53. *Kass*, 696 N.E.2d at 177.
54. *Id.* at 175, 182.

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

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

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55. *Id.* at 180.
56. *Id.* at 180–81.
57. *Id.* at 181. "Advance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision." *Kass*, 696 N.E.2d at 180; *see also* Roman v. Roman, 193 S.W.3d 40, 45, 50 (Tex. App. 2006). "[A]llowing the parties voluntarily to decide the disposition of frozen embryos in advance of cryopreservation, subject to mutual change of mind, jointly expressed, best serves the existing public policy of [Texas] and the interests of the parties." *Roman*, 193 S.W.3d at 50.
58. *See Kass*, 696 N.E.2d at 179–182.
59. *Id.*; Szafranski v. Dunston, 34 N.E.3d 1132, 1158 (Ill. App. Ct. 2015); A.Z. v. B.Z., 715 N.E.2d 1051, 1056 (Mass. 2000); J.B. v. M.B., 783 A.2d 707, 713 (N.J. 2001); *In re* Marriage of Dahl, 194 P.3d 834, 840 (Or. Ct. App. 2008); *Roman* 193 S.W.3d at 45, 50; *In re* Marriage of Litowitz, 48 P.3d 261, 266 (Wash. 2002); *In re* Marriage of Nash, No. 62553-5-I, 2009 WL 1514842, at *6–7 (Wash. Ct. App. June 1, 2009).
60. *Kass*, 696 N.E.2d 180; Maddie Schueler, Note, *A Fertile Ground for Legislation: Proposing a Kentucky Statute Requiring Advance Directives for Couples Undergoing In Vitro Fertilization*, 49 U. LOUISVILLE L. REV. 267, 283 (2010).

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

In *Szafranski v. Dunston*,[61] the Appellate Court of Illinois had an opportunity to rule on a case about pre-embryo disposition.[62] In *Szafranski*, an Illinois appellate court held that a couple's signed clinic consent form, stating that "[n]o use [would] be made of [their frozen] embryos without the consent of both partners—if applicable"[63] did not control in light of the couple's prior oral agreement.[64] The respondent, Karla Dunston, sought exclusive custody over three frozen pre-embryos that she created with her ex-boyfriend, Jacob Szafranski, prior to undergoing the cancer treatment that would leave her infertile.[65]

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

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

61. 34 N.E.3d 1132 (Ill. App. Ct. 2015).
62. *Id.* at 1136.
63. *Id.* at 1138.
64. *Id.* at 1157.
65. *See id.* at 1136.
66. *Szafranski*, 34 N.E.3d at 1151.
67. *Id.* at 1148–51.
68. *See id.* at 1150.
69. *Id.* at 1150–51.
70. *See id.* at 1157–61.
71. *Szafranski*, 34 N.E.3d at 1161.

(3) death or legal incapacitation of both partners."[72] However, the form did not state what would happen to the couple's pre-embryos in the event of their separation.[73]

The court also differentiated the consent form language from consent forms that were found by other courts to be legally binding.[74] In the forms analyzed in those cases, words of shared understanding were used throughout, and more importantly, the couple was provided with disposition choices from which they could choose.[75] Unlike these cases, the disputed provision of the contract contained no elective language or dispositional options from which the couple could choose.[76] The Illinois court reasoned that "[i]f [the] provision was intended to be an expression of the parties' dispositional intent, it would contain language more reflective of a choice . . . ."[77] Significantly, however, the court noted that under different circumstances, medical informed consent form could "represent an 'advance agreement' that reflects a couple's intended disposition of the pre-embryos."[78]

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

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

In *A.Z. v. B.Z.*,[81] the Supreme Judicial Court of Massachusetts also looked to a clinic consent form when deciding an issue of pre-embryo disposition.[82] Similar to the previous cases discussed, the couple in *A.Z.* underwent IVF treatment, resulting in excess pre-embryos, which were

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72. *Id.* at 1155–56.
73. *Id.* at 1156.
74. *See id.* at 1161.
75. *Id.*
76. *Szafranski*, 34 N.E.3d at 1161.
77. *Id.* at 1156.
78. *Id.* at 1158.
79. *Id.* at 1155; Roy Strom, *Uncertainty Reigns After Frozen Embryo Ruling*, CHI. DAILY L. BULL., June 18, 2015, at 1.
80. *Szafranski*, 34 N.E.3d at 1155; Strom, *supra* note 79.
81. 725 N.E.2d 1051 (Mass. 2000).
82. *Id.* at 1052.

frozen and stored.[83] After one successful implantation, the parties divorced, and the husband sought an injunction to prohibit the wife from using their remaining frozen pre-embryos.[84] The consent form signed by the parties listed disposition options from which the couple could choose and a blank line on which they could indicate their preference.[85] For each round of IVF, the couple indicated that the disposition preference was to have the pre-embryos returned to the wife to be transferred to her uterus and carried to term.[86] However, the court held that the disposition agreement here was unenforceable because the husband had signed the forms while they were still blank, with the wife filling in the disposition information at a later time.[87] Thus, the court could not conclude that the form was representative of the parties' joint intentions.[88]

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

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

83. *Id.* at 1053.
84. *Id.*
85. *Id.* at 1054.
86. *A.Z.*, 725 N.E.2d at 1054.
87. *Id.* at 1057.
88. *Id.*
89. *Id.* at 1057.
90. *Id.* at 1059; *see also* Forman, *supra* note 34, at 385–86.
91. 783 A.2d 707 (N.J. 2001).
92. *Id.* at 710.
93. *Id.*
94. *Id.* at 713.
95. *Id.* at 717; *see also infra* Section III.D.

allowing one party to use the pre-embryos against the objections of the other, stating that "the laws of New Jersey . . . evince a policy against enforcing private contracts to enter into or terminate familial relationships."[96] The court, after citing *A.Z.*, adopted a rule in which it would "enforce agreements entered into at the time [IVF has] begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored pre-embryos," provided that they affirmatively notify the clinic of their change of intention in writing.[97] Critics of the approach taken in *A.Z.* and *J.B.* argue that requiring contemporaneous mutual consent undermines the notion of a binding contract, creating instead an illusory promise.[98] Thus, decisions such as these render any formal memorialization of the parties' intent pointless and ineffective.[99]

D. *No Prior Agreement: The Balance of Interests Approach*

The first case regarding embryo disposition, when a couple divorces or separates, occurred in a 1992 case before the Supreme Court of Tennessee.[100] In *Davis v. Davis*,[101] Mary Sue Davis and her husband, Junior Lewis Davis, were unable to conceive naturally, due to prior surgeries in which Mary Sue's fallopian tubes were rendered non-functional.[102] The parties elected to undergo IVF after a failed attempt at adoption, and they elected to have their remaining pre-embryos frozen to prevent Mary Sue

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96. *J.B.*, 783 A.2d at 717.

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

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

672 N.W.2d 768, 782 (Iowa 2003). Note that the approach in *A.Z.* is more of a pseudo contemporaneous mutual consent approach, in which only prior agreements to implant and bring the pre-embryos to term in the event of a future contingency would not be enforced; unlike the New Jersey and Iowa courts, the Massachusetts court has not indicated that a prior agreement to dispose of a pre-embryo in the event of a divorce would violate public policy. *Id.*; *see also A.Z.*, 725 N.E.2d at 1059; *J.B.*, 783 A.2d at 717.

98. Fazila Issa, Note, *To Dispose or Not to Dispose: Questioning the Fate of Preembryos After a Divorce in* J.B. v. M.B., 39 HOUS. L. REV. 1549, 1567 (2003); *see also* A.Z., 725 N.E.2d at 1057–58; *J.B.*, 783 A.2d at 719.

99. *J.B.*, 783 A.2d at 720; *A.Z.*, 725 N.E.2d at 1057–58; Issa, *supra* note 98, at 1567.

100. Davis v. Davis, 842 S.W.2d 588, 589 (Tenn. 1992).

101. 842 S.W.2d 588 (Tenn. 1992).

102. *Id.* at 591.

from having to undergo additional rounds of hormonal stimulation.[103] The parties had not formed any agreement concerning the disposition of their frozen pre-embryos in the event of a divorce prior to undergoing IVF, and both parties testified that there was no discussion or even contemplation concerning the implications of freezing and storing embryos.[104] When Junior filed for divorce, the only issue that the parties could not agree upon was what to do with the pre-embryos they had created.[105] Mary Sue initially wanted control of the frozen pre-embryos so that she could have them transferred into her uterus and carried to term.[106] However, at the time the case was decided, she no longer wanted them for herself but wanted to donate them to another couple.[107] Junior objected and wanted to have the pre-embryos thawed and discarded.[108]

The court in *Davis* first clarified that pre-embryos are not *persons* and do not have any legal rights, as established by the Supreme Court of the United States in *Roe v. Wade*.[109] However, it noted that their value as property lies only in their potential to become children, "[t]hus, the essential dispute . . . is not where or how long to store the pre-embryos, but whether the parties will become parents."[110] The court balanced the interests of both parties, considering first the burden that unwanted gestation of the pre-embryos would have on Junior psychologically and financially.[111] Junior's interests were balanced against Mary Sue's desire to permit the pre-embryos to be carried to term.[112] Ultimately, the court decided that Junior's interest in avoiding parenthood was more significant.[113] The court also noted that even if Mary Sue wished to use the pre-embryos herself, rather than donate them to another couple, Junior's interest in not becoming a parent would still outweigh her interest in becoming a parent.[114] The court considered that Mary Sue had other reasonable means of becoming a parent, such as future rounds of IVF or even adoption.[115] Only "[i]f no other reasonable

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

alternatives exist, then the argument in favor of using the pre-embryos to achieve pregnancy should be considered."[116]

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

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

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

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Mary Sue had already experienced undergoing her previous unsuccessful IVF procedures and the discomfort that future procedures would cause her. *Id.* at 601. The egg retrieval process poses a significant burden to a woman's body, and the necessary hormone treatments are associated with potential long-term medical risks, including cancer. Paller, *supra* note 38, at 1583–84.

116. *Davis*, 842 S.W.2d at 604.
117. *Id.*
118. *Id.* at 597.
119. J.B. v. M.B., 783 A.2d 707, 713–14 (N.J. 2001).
120. *Id.* at 716–17; *see also Davis*, 842 S.W.2d at 604.
121. Szafranski v. Dunston, 34 N.E.3d 1132, 1161 (Ill. App. Ct. 2015); *see also supra* Section III.B.
122. *Szafranski*, 34 N.E.3d at 1161–63.

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

IV. APPLYING THE CASE LAW GOING FORWARD

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

However, in the case of Mimi Lee and Stephen Findley, there is a stronger case for a balancing of interests that might result in Lee being awarded custody of the pre-embryos, due mostly to her claim of infertility.[130] But unlike Vergara and Loeb's situation, Lee and Findley's prior agreement did clearly specify what would happen to the pre-embryos in the event of the

123. *See id.* at 1163.

124. Tamar Lewin, *Chicago Court Gives Woman Frozen Embryos Despite Ex-Boyfriend's Objections*, N.Y. TIMES, June 13, 2015, at A9. The *Szafranski* court, in finding an oral agreement in the making of the pre-embryos, implicitly indicated that the balancing of interests test may now be moot. *Szafranski*, 34 N.E.3d at 1164; *see also* Strom, *supra* note 79. The likelihood of there being neither a written or oral agreement concerning pre-embryos going forward will be very small. Strom, *supra* note 79.

125. *See supra* Part III.

126. Loeb, *supra* note 1.

127. *Szafranski*, 34 N.E.3d at 1155–56.

128. *See supra* Section III.D.

129. *See Szafranski*, 34 N.E.3d at 1137; J.B. v. M.B., 783 A.2d 707, 716–17 (N.J. 2001); Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992). In his op-ed, Loeb writes, "[m]any have asked me: Why not just move on and have a family of your own? I have every intention of doing so." Loeb, *supra* note 1.

130. *See supra* Section III.D.

couple's divorce—they would be thawed and discarded.[131] The disposition agreement in Lee and Findley's case is more similar to the disposition agreement in *Kass*, indicating specific disposition options from which the couple could choose in the event of certain contingencies, divorce included.[132] Thus, if the court finds the prior agreement to be enforceable and chooses to use a purely contractual approach, Findley and Lee's pre-embryos would be destroyed regardless of Lee's infertility.[133] However, without proper guidance from legislatures, the courts are left with many conflicting and confusing options for how to decide these cases.[134]

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

There is very little regulation from the federal government regarding ART.[135] Further, only a few states have enacted statutes attempting to tackle

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131. Ayala et. al., *supra* note 11. Lee's position is that she did not believe that she was bound to these indications. *Id.*

132. *See* Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998); Ayala et al., *supra* note 11; Dolan, *supra* note 11.

133. *See Kass*, 696 N.E.2d at 180; Ayala et al., *supra* note 11; Dolan, *supra* note 11. The San Francisco County Superior Court filed a tentative decision and proposed statement of decision on November 18, 2015, four months after this Comment was submitted for publication. *See In re* Marriage of Stephen E. Findley v. Lee, No. FDI-13-780539, 2015 WL 7295217 (S.F. Cty. Super. Ct. Nov. 18, 2015). The court used the contract approach, and found that the Consent & Agreement signed by the parties was a binding contract and a valid written agreement expressing the couple's intent to thaw and discard the pre-embryos in the event of a divorce. *Id.* at *20. In the eighty-three-page decision, the court reasoned that the prior agreement was "replete with indicators of a mutual agreement to the disposition of the [e]mbryos. In addition to [twenty-seven] uses of some variation of 'agreement,' words of shared understanding, such as 'we,' 'us,' and 'our' appear at least 160 times." *Id.* at *23. The court also explained its decision to use the contract approach: "[b]inding agreements bring a certain solemnity to the IVF process, and require parties undergoing IVF to be responsible for the life altering decision of starting a family." *Id.* at *22.

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

134. *See supra* Part III.

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

the difficult question of pre-embryo disposition.[136] Florida's current statute seems to support the contractual approach by requiring some form of prior written agreement regarding pre-embryo disposition.[137] Having such legislation encourages parties to seriously contemplate their current and future intentions and execute agreements prior to undergoing IVF, which will best serve their own interests, the interest of clinics, and public policy.[138]

A. *Florida's Pre-Embryo Disposition Statute*

Florida was one of the first states to enact legislation concerning pre-embryo disposition agreements.[139] Section 742.17 of the Florida Statutes provides that a couple commissioning IVF treatment and their treating physician "shall enter into a written agreement that provides for the disposition of the commissioning couple's eggs, sperm, and pre-embryos in the event of a divorce, the death of a spouse, or any other unforeseen circumstance."[140] The language of this statute suggests the use of disposition agreements but does not specify whether such agreements are binding and enforceable against a party who changes his or her mind about disposition preferences.[141]

The statute does not list recommended options from which the couple could choose, nor does it address consequences to either the commissioning couple or the physician who proceeds with IVF without entering into such an agreement.[142] Furthermore, the statute provides a default rule in which "[a]bsent a written agreement, decision-making authority regarding the disposition of pre-embryos shall reside jointly with the commissioning couple."[143] The language of this statute provides little assistance to divorcing couples who disagree on the disposition of their frozen pre-embryos.[144] Thus, while the statute itself suggests that a Florida court might enforce a prior disposition agreement, it gives no guidance as to

136. Marold, *supra* note 2, at 182.
137. *See* FLA. STAT. § 742.17 (2015).
138. Pflanz, *supra* note 42, at 164; *see also Kass*, 696 N.E.2d at 180.
139. *See Kass*, 696 N.E.2d at 178.
140. FLA. STAT. § 742.17.
141. *See id.* The Florida Legislature has required binding and enforceable contracts in other domestic relations statutes, such as their surrogacy agreement statute. *Id.* § 742.15(1).
142. Marold, *supra* note 2, at 183.
143. FLA. STAT. § 742.17(2).
144. Marold, *supra* note 2, at 183.

necessary provisions in the document or the process by which it should be executed.[145]

B. *California's Pre-Embryo Disposition Statute*

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

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

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145. Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J. AM. ACAD. MATRIM. LAW. 57, 95 (2011).
146. CAL. HEALTH & SAFETY CODE § 125315(a) (West 2015).
147. *Id.* § 125315(b)(1)–(4).
148. *Id.*
149. *Id.* § 125315(b)(3) (emphasis added).
150. *Id.* § 125315(a).
151. Marold, *supra* note 2, at 195.
152. *Id.*

C. *Other Statutory Schemes*

Massachusetts also has a statute that briefly addresses disposition of pre-embryos.[153] The statute mandates that a provider of IVF therapy shall provide "information sufficient to allow [the couple] to make an informed and voluntary choice regarding the disposition of any pre-implantation embryos . . . remaining following treatment."[154] It also states that "[t]he physician shall present the patient with the options of storing, donating to another person, donating for research purposes or otherwise disposing of or destroying any unused pre-implantation embryos, as appropriate," but it does not address any specific contingencies, such as separation or divorce.[155] The Massachusetts statute includes donating to another person as a disposition option,[156] which is interesting given the state's unwillingness to enforce agreements to compel parenthood in previous case law.[157] It does not require that the disposition information be recorded in any written document or signed by the parties.[158] New Jersey and Connecticut have similar statutes requiring only that physicians inform IVF patients about storage and donation options.[159]

D. *The Model Act Governing Assisted Reproductive Technology*

In 2008, the American Bar Association's House of Delegates approved the Model Act Governing Assisted Reproductive Technology ("Model Act").[160] The Model Act was intended to provide guidance to legislators as they draft statutes governing ART.[161] Section 501 of the Model Act states that *intended parents* must enter into "[b]inding agreements executed prior to embryo creation"[162] that would indicate:

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153. MASS. GEN. LAWS ch. 111L, § 4(a) (2015).
154. *Id.*
155. *Id.*
156. *Id.*
157. *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1057–58 (Mass. 2000).
158. *See* MASS. GEN. LAWS ch. 111L, § 4(a)(1)–(3). The statute does require an informational pamphlet and an informed consent form, indicating that the patient has reviewed and understands the pamphlet, be provided to the patient. *Id.* But the statute only requires the pamphlet to include information about the procedure and associated medical risks, not about disposition in the event of certain specified contingencies. *Id.*
159. Forman, *supra* note 145, at 91.
160. Charles P. Kindregan, Jr. & Steven H. Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 FAM. L.Q. 203, 203, 205 (2008).
161. *Id.* at 206.
162. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 501(1) (AM. BAR ASS'N 2008).

> (a) [the] [i]ntended use and disposition of embryos; (b) [t]he use and disposition of preserved embryos in the event of divorce, . . . incapacity, . . . death of one or both intended parents, or other change of circumstances such as separation or estrangement; and (c) [t]he time at which . . . preserved embryos will be deemed abandoned and the policy . . . as to the disposition thereof.[163]

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

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

VI. CLARIFYING FLORIDA'S STATUTE

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

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163. *Id.* § 501(1)(a)–(c).
164. *Id.* § 203(1)(a)–(d).
165. *Id.* § 501(3)(c)–(d). The Model Act goes on to state that should such a transfer occur, the individual seeking to avoid gestation would not be the parent of a resulting child. *Id.* § 501(3)(e).
166. *See supra* Section III.C.
167. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 504(1)(a).
168. *Id.* § 504(1)(b)–(c).
169. *Id.* § 504(3).
170. *See* Forman, *supra* note 145, at 89, 94.
171. *See* FLA. STAT. § 742.17 (2015); *supra* Section V.A.

disposition statute, the Model Act, as well as Florida's surrogacy statute—section 742.15.[172]

A. *Binding and Enforceable Agreement*

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

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

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172. *See* CAL. HEALTH & SAFETY CODE § 125315 (West 2015); FLA. STAT. §§ 742.15, .17; MODEL ACT GOVERNING ASSISTED REPROD. TECH. §§ 203, 301, 302, 501, 504, 702; *infra* Sections VI.A–D.

173. *See* Issa, *supra* note 98, at 1582.

174. *See supra* Section III.C.

175. *See* FLA. STAT. § 742.17; MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 501(1); *supra* Section V.D.

176. *See* Forman, *supra* note 145, at 96. Forman is critical of including such a provision, as it creates confusion and undercuts the notion that the forms are binding and enforceable agreements: "It makes no sense to ask the parties to dictate whether an intended parent can use the embryos, but then to declare any such use impermissible without contemporaneous consent. Which provision controls?" *Id.*

177. *See* FLA. STAT. §§ 742.15(1), .17; MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 501(1).

178. FLA. STAT. § 742.17.

179. *Id.* § 742.17(1)–(3).

180. *See id.*

181. *See id.* §§ 742.15(1), .17.

182. *Id.* § 742.15(1).

enforceable contract clearly spells out that the agreement will be enforced in a court of law, and the statute further requires that the contract be made prior to taking any action, which encourages couples to take this decision seriously.[183]

B. *Clearly Drafted Consent Forms: Mandatory Provisions*

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

Thus, the Florida statute should require minimum mandatory provisions and language that must be included in consent forms.[189] First, it is important that the consent forms contain the word *agreement* or *contract*, especially when referring to disposition information, which would signal to the parties that they are signing a binding document.[190] Second, the mandatory provisions should include words of shared understanding to indicate joint contemplation by the parties.[191] Thus, these provisions must

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

184. *See* Szafranski v. Dunston, 34 N.E.3d 1132, 1137–39 (Ill. App. Ct. 2015); A.Z. v. B.Z., 725 N.E.2d 1051, 1053–54 (Mass. 2000); J.B. v. M.B., 783 A.2d 707, 713 (N.J. 2001); *Kass* 696 N.E.2d at 176–78; *In re* Marriage of Dahl, 194 P.3d 834, 836–37 (Or. Ct. App. 2008); Roman v. Roman, 193 S.W.3d 40, 42 (Tex. App. 2006); *In re* Marriage of Litowitz, 48 P.3d 261, 263–64 (Wash. 2002); *In re* Marriage of Nash, No. 62553-5-I, 2009 WL 1514842, at *1–2 (Wash. Ct. App. June 1, 2009).

185. Forman, *supra* note 145, at 80–81.

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

187. Katherine Poste Gunnison, Note, *Poaching the Eggs: Courts and the Custody Battles over Frozen Embryos*, 8 J.L. & FAM. STUD. 275, 290 (2006).

188. *See id.*

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

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

191. *See* Kass v. Kass, 696 N.E.2d 174, 181 (N.Y. 1998); *supra* Section III.A.

include language such as *we*, *us*, and *our*.[192] Third, these mandatory minimum provisions should include specific disposition options, which would provide guidance to the couple, similar to those outlined in section 125315 of the California Health and Safety Code and section 203 of the Model Act.[193] Specifically, in the case of divorce or separation, there should be a list of options from which the commissioning couple must indicate their preference: 1) made available to a designated commissioning partner for use; 2) donated for research purposes; 3) thawed and discarded; 4) donated to another couple or individual; 5) other disposition that is clearly stated.[194]

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

C. *Incentivizing Physicians and Patients*

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

192. *See Kass*, 696 N.E.2d at 181.
193. *See* CAL. HEALTH & SAFETY CODE § 125315(b)(1)–(4) (West 2015); MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 203(1)(a)–(d) (AM. BAR ASS'N 2008).
194. *See* CAL. HEALTH & SAFETY CODE § 125315(b)(3).
195. *See, e.g.*, Kindregan, Jr. & Snyder, *supra* note 160, at 218.
196. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 504(1)–(3); *see also supra* Section V.D.
197. *E.g.*, Kindregan, Jr. & Snyder, *supra* note 160, at 218.
198. Forman, *supra* note 145, at 85.
199. *See* FLA. STAT. § 742.17 (2015); Issa, *supra* note 98, at 1584.
200. *See* CAL. HEALTH & SAFETY CODE § 125315(a) (West 2015); Marold, *supra* note 2, at 195.

with unprofessional conduct.[201] Adopting a similar provision would help to ensure that physicians have greater motivation to administer IVF treatment to patients in compliance with the statute.[202]

Commissioning couples also need greater incentive to complete disposition agreements and take them seriously.[203] Statutory default provisions, which would govern in the event that a couple fails to come to a disposition agreement prior to undergoing IVF treatment, would better encourage couples to take care to manifest their preferences with regard to pre-embryo disposition.[204] Florida's statute currently includes a default provision that the commissioning couple will retain joint decision-making authority absent a written agreement, but this provision neither incentivizes nor assists couples in such a scenario.[205] The default rule needs to clearly indicate a disposition option that will control absent a written agreement, such as a default rule in which pre-embryos would be destroyed unless the couple indicates otherwise.[206] This default rule would incentivize the couple to make any alternate preference clear and explicit, and it also would provide the courts with statutory guidance for confusing situations where the parties' intent is not clearly manifested.[207]

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

Some other procedural guidelines that should be considered by the Florida Legislature are the requirements of a mental health evaluation and presence of an attorney.[208] Section 301 of the Model Act requires all ART participants to undergo mental health counseling.[209] Section 302 provides additional counseling requirements for participants of procedures involving donor embryos or gestational carriers, stating that "[n]o ART procedure that involves the transfer of donor gametes or embryos . . . shall be initiated or performed until . . . [t]he intended parents have undergone a mental health evaluation to determine their suitability to participate in collaborative reproduction."[210] This provision could easily be amended to require a mental

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201. CAL. HEALTH & SAFETY CODE § 125315(a).
202. *See id.* § 125315(a); Marold, *supra* note 2, at 195.
203. *See* Forman, *supra* note 145, at 84; Issa, *supra* note 98, at 1586.
204. *See* Issa, *supra* note 98, at 1586.
205. FLA. STAT. § 742.17(2) (2015).
206. Issa, *supra* note 98, at 1586.
207. *Id.*
208. *See id.* at 1589.
209. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 301(1) (AM. BAR. ASS'N 2008).
210. *Id.* § 302(1)(d).

health consultation prior to a procedure that involves the *creation* of any pre-embryos, which would hopefully encourage the parties to discuss the complex emotional issues that accompany the creation and disposition of pre-embryos before undergoing the procedure and better prepare them for the IVF process.[211]

Further, the Florida Legislature should consider a provision that requires independent legal counseling to assist the commissioning couple in their disposition decision.[212] The law governing pre-embryo disposition agreements is unsettled.[213] Thus, the guidance of legal counsel helps to guarantee that the parties are making an informed decision and are aware of the importance of the documents they are signing.[214] Further, independent counsel is often better situated than the IVF provider to assist the parties in understanding the complex information needed to make disposition choices.[215] In adopting such a provision, the Florida Legislature should look to sections 702 and 703 of the Model Act, which require legal representation by all parties when making a gestational surrogacy agreement, and apply it to parties seeking to undergo IVF treatment.[216]

VII. FREEZING EGGS AND SPERM SEPARATELY: A FUTURE SOLUTION

A future solution to the pre-embryo disposition problem is separate cryopreservation of eggs and sperm.[217] This alternative technique to cryopreservation of pre-embryos would allow divorcing couples to merely take control of their own genetic tissues, which they could then do with as they please.[218] While technology has enabled physicians to freeze sperm since the 1940s, there has been less success with egg freezing.[219] Historically, there has been lower overall success with fertilization and

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211. *See* Issa, *supra* note 98, at 1583. "This evaluation is not intended to be an evaluation of the intended parent's(s') suitability to parent." MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 302(1)(d). "The results of this consultation shall not be used to arbitrarily deny any intended parent the right to procreate." *Id.* § 301(1).

212. *See* Issa, *supra* note 98, at 1587.

213. *See* Szafranski v. Dunston, 34 N.E.3d 1132, 1158 (Ill. App. Ct. 2015), Kass v. Kass, 696 N.E.2d 174, 181 (N.Y. 1998).

214. *See* Issa, *supra* note 98, at 1587.

215. *See id.*

216. *See* MODEL ACT GOVERNING ASSISTED REPROD. TECH. §§ 702(1)(e), (2)(d), 703(2)(c).

217. *See* The Practice Comm. of the Am. Soc'y for Reprod. Med. & the Soc'y for Assisted Reprod. Tech., *Mature Oocyte Cryopreservation: A Guideline*, 99 FERTILITY & STERILITY 37, 41 (2013).

218. *See* FLA. STAT. § 742.17(1) (2015). "[A]ny remaining eggs or sperm shall remain under the control of the party that provides the eggs or sperm." *Id.*

219. *Mature Oocyte Cryopreservation: A Guideline*, *supra* note 217, at 37.

pregnancy from frozen eggs, which are made up largely of water.[220] It is only recently that researchers have begun to see success with egg freezing, and in 2012, the American Society for Reproductive Medicine ("ASRM") issued a report stating that due to the dramatic improvements over the past decade, this "technique should no longer be considered experimental."[221] The report also stated that egg freezing is a "reasonable strategy for patients who are unable to cryopreserve embryos."[222]

Despite the positive developments in egg freezing, the ASRM has also stated that it is too soon to use this technology in lieu of pre-embryo cryopreservation.[223] Currently, the success rate of IVF using frozen eggs is about half of the success rate using frozen pre-embryos.[224] Several studies have shown decreased success with egg freezing in older women, and researchers are unable to confirm that the risks of developmental abnormalities in children born from frozen eggs are similar to those born from frozen pre-embryos.[225] However, down the line, improvements in reproductive technology may make freezing eggs a better alternative to freezing pre-embryos, at least from a legal standpoint.[226]

VIII. CONCLUSION

IVF is a wonderful option for couples experiencing fertility issues.[227] However, the question of what to do with frozen pre-embryos can cause problems for even the happiest couples.[228] This is why it is imperative that couples seriously consider how they would like to proceed in the event of all possible contingencies, prior to creating pre-embryos.[229] Further, some of this responsibility should be borne by both the IVF physician and clinic,

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220. *Id.*

221. *Id.* at 38, 41.

222. *Id.* at 41.

223. *Id.* at 42.

224. *Freezing Eggs or Embryos*, BREASTCANCER.ORG, http://www.breastcancer.org/tips/fert_preg_adopt/options/fertility/freeze_embryos (last modified Jan. 26, 2014).

225. *See Mature Oocyte Cryopreservation: A Guideline*, *supra* note 217, at 41–42.

226. *See id.* at 41.

227. *See supra* Part II. "[O]ver ten percent of American women suffer[] from some sort of fertility problem." Marold, *supra* note 2, at 179 (footnote omitted). "An estimated thirty-three percent of couples are infertile by age forty." Paller, *supra* note 38, at 157 (footnote omitted).

228. *See* Forman, *supra* note 34, at 388. "Social science research has revealed that even for couples in intact relationships, the decision about disposition is emotionally challenging and frequently unstable over time." *Id.* (footnote omitted).

229. *See supra* Parts III, V, and VI.

which must ensure that couples are given clear information sufficient to make these difficult decisions prior to going forward with the procedure.[230] The Florida Legislature has attempted to address these problems by statute.[231] However, section 742.17 is ambiguous, contains some conflicting provisions, and does not pose sufficient guidance to IVF patients, physicians, clinics, or courts seeking to apply the contract approach for pre-embryo disposition.[232] The Florida Legislature should redraft this statute to include more specific, concrete language supporting the need for binding contracts, as well as minimum mandatory consent form provisions that would take into account as many circumstances as possible.[233] Such a regulation would aid in preserving the privacy of couples commissioning IVF by empowering them to make the extremely personal decision as to what to do with their pre-embryos in the event of divorce.[234]

230. *See* CAL. HEALTH & SAFETY CODE § 125315(a) (West 2015).
231. *See* FLA. STAT. § 742.17 (2015).
232. *See id.*; *supra* Section V.A.
233. *See* FLA. STAT. § 742.17; Gunnison, *supra* note 187, at 290; *supra* Part VI.

> [T]hese regulations should stop short of regulating the science of cryopreserved embryos. As the stem cell debate has illustrated, the involvement of government regulations has severely curtailed the use of stem cells in research. Extending these regulations to the use of embryos by couples could impact how many embryos are created and how many are implanted into a woman at any one given time. These broad reaching regulations would only hamper thousands of couples' efforts to create a child . . . .

Gunnison, *supra* note 187 at 290–91 (footnotes omitted).
234. *See* Gunnison, *supra* note 187, at 290.

On an Alternative to a Punitive State in Response to a Modern Understanding of the HIV/AIDS Epidemic in Florida

Mario Brito*

I. INTRODUCTION

Now, if you go back and you look at the themes of past World AIDS Days, if you read them one after another, [you will] see the story of how the human race has confronted one of the most devastating pandemics in our history. [You will] see that in those early years—when we started losing good men and women to a disease that no one truly understood—it was about ringing the alarm, calling for global action, proving that this deadly disease was not isolated to one area or one group of people. And [that is] part of what makes today so remarkable, because back in those early years, few could have imagined this day—that we would be looking ahead to *The Beginning of the End*, marking a World AIDS Day that has gone from that early beginning when people were still uncertain to now a theme, *Getting to Zero*. . . . But [that is] what [we are] talking about. [That is] why [we are] here. And we arrived here because of all of you and your unwavering belief that we can—and we will—beat this disease.[1]

On June 5, 1981, the Morbidity and Mortality Weekly Report ("MMWR"), an epidemiological digest published by the Centers for Disease Control and Prevention ("CDC"), reported on a pattern of five infections of a rare form of pneumonia known as *Pneumocystis Pneumonia*.[2] The patients

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1. President Barack Obama, Remarks by the President on World AIDS Day at George Washington University (Dec. 1, 2011), http://www.whitehouse.gov/photos-and-video/video/2011/12/01/president-obama-world-aids-day (click "Read the Transcript").

2. *Pneumocystis Pneumonia — Los Angeles*, 30 MORBIDITY & MORTALITY WKLY. REP. 250, 250–51 (1981).

were described as *active homosexuals*, two of which had passed away by the time of the published report in the MMWR.[3] All five cases were confined to the Los Angeles metropolitan area.[4]

Shortly thereafter, on July 3, 1981, the New York Times published an article titled: *Rare Cancer Seen in 41 Homosexuals*.[5] This time, it was not *Pneumocystis Pneumonia* that was the centerpiece of the report but rather, a rare cancer known as *Kaposi's Sarcoma*.[6] A mysterious outbreak of rare diseases was spreading.[7] As can be appreciated from the first reports of what later came to be known as *Acquired Immunodeficiency Syndrome* ("AIDS"), the medical profession had very little knowledge of how the disease developed or how it could affect the general public.[8] In the same New York Times article, a physician reports: "'The best evidence against infection . . . is that no cases have been reported to date outside the homosexual community or in women.'"[9]

It was only on September 9, 1983 that the MMWR published a statement stating that there was no evidence that AIDS could be transmitted "through casual contact with AIDS patients or with persons in population groups with an increased incidence of AIDS . . . [or] through food, water, air, or environmental surfaces."[10] The MMWR went on to state that a classification system of those at risk for contracting AIDS would lack precision pending further epidemiological studies.[11]

It was not until January 11, 1985 that the CDC revised its definition of AIDS to identify the viral cause of the disease, *Human Immunodeficiency Virus* ("HIV").[12] We now know that HIV can be contracted by any member

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3. *Id.*
4. *See id.*
5. Lawrence K. Altman, *Rare Cancer Seen in 41 Homosexuals*, N.Y. TIMES, July 3, 1981, at A20 [hereinafter Altman, *Rare Cancer Seen in 41 Homosexuals*].
6. *Id.*
7. *Id.*; *see also Pneumocystis Pneumonia — Los Angeles*, *supra* note 2, at 250.
8. *See Update: Acquired Immunodeficiency Syndrome (AIDS) — United States*, 32 MORBIDITY & MORTALITY WKLY. REP. 465, 465–66 (1983); Altman, *Rare Cancer Seen in 41 Homosexuals*, *supra* note 5.
9. Altman, *Rare Cancer Seen in 41 Homosexuals*, *supra* note 5.
10. *Update: Acquired Immunodeficiency Syndrome (AIDS) — United States*, *supra* note 8, at 467.
11. *Id.*
12. *Provisional Public Health Service Inter-Agency Recommendations for Screening Donated Blood and Plasma for Antibody to the Virus Causing Acquired Immunodeficiency Syndrome*, 34 MORBIDITY & MORTALITY WKLY. REP. 1, 1 (1985) [hereinafter *Provisional Public Health Service Inter-Agency Recommendations*]; *see also HIV Infection and Risk, Prevention, and Testing Behaviors Among Injecting Drug Users — National HIV Behavioral Surveillance System 20 U.S. Cities, 2009*, MORBIDITY & MORTALITY WKLY. REP., July 4, 2014, at 2.

of the general public and not just by *men who have sex with men* ("MSM").[13] In Surgeon General C. Everett Koop's *Report on Acquired Immune Deficiency Syndrome* on October 22, 1986, the following acknowledgements were made: "Although the initial discovery was in the homosexual community . . . AIDS is found in heterosexual people as well. AIDS is not a black or white disease. AIDS is not just a male disease. AIDS is found in women; it is found in children."[14] "AIDS no longer is the concern of any one segment of society; it is the concern of us all."[15]

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

That same year, three criminal statutory provisions were enacted in the states of Florida, Tennessee, and Washington, making it illegal to transmit HIV.[20] They were the first three states in the United States to criminalize the transmission of the virus.[21] HIV-specific criminal laws vary tremendously in form and function, from specifically criminalizing transmission of the virus to serving as sentence enhancers for people living

13. *See Provisional Public Health Service Inter-Agency Recommendations*, *supra* note 12, at 1 (recognizing HIV statistics for intravenous drug users and women).

14. C. EVERETT KOOP, SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 14 (1986).

15. *Id.* at 27.

16. *Id.* at 26.

17. *Id.* at 29–30.

18. *Id.* at 29.

19. *See infra* Parts III–IV (detailing a general lack of understanding and stigma towards HIV-positive individuals permeating into the legal system of many states).

20. J. Stan Lehman et al., *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States*, 18 AIDS & BEHAV. 997, 999 (2014).

21. *Id.*

with HIV/AIDS ("PLWHA") who have been convicted of certain crimes.[22] Florida has enacted five such provisions.[23]

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

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

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22. *See generally* THE CTR. FOR HIV LAW & POLICY, POSITIVE JUSTICE PROJECT, ENDING & DEFENDING AGAINST HIV CRIMIALIZATION: STATE AND FEDERAL LAWS AND PROSECUTIONS, VOL. 1 (updated May 2015) (2010) [hereinafter VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS] (containing all HIV-specific criminal provisions for every state to date).

23. FLA. STAT. § 381.0041(11)(b) (2015); FLA. STAT. § 384.24(2) (2015); FLA. STAT. § 775.0877(3) (2015); FLA. STAT. § 796.08(5) (2015); FLA. STAT. § 384.34(3) (Supp. 1986).

24. THE WHITE HOUSE OFFICE OF NAT'L AIDS POLICY, NATIONAL HIV/AIDS STRATEGY FOR THE UNITED STATES vii (2010), http://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf; *see also* The White House, *National HIV/AIDS Strategy for the United States: Updated to 2020*, AIDS.GOV (July 2015), http://www.aids.gov/federal-resources/national-hiv-aids-strategy/nhas-update.pdf (outlining a vision analogous to the one encouraged by this Comment on a national scale, emphasizing the need for a comprehensive campaign to fight HIV/AIDS by mobilizing resources and citizens to meet specific goals by 2020).

25. THE WHITE HOUSE OFFICE OF NAT'L AIDS POLICY, *supra* note 24, at 1.

26. *See id.* at vii.

27. *Id.* at 37.

28. *See infra* Part IV.

support its public health interest in the prevention of HIV transmission rather than through the criminalization of the acts of persons affected by a medical condition.[29]

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

II. ON THE CRIMINAL TRANSMISSION OF HIV IN FLORIDA

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

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

Section 384.24 of the Florida Statutes regulates the transmission of *sexually transmissible diseases*.[36] In its current form, the statutory provision defines all of the following as *sexually transmissible diseases*, as encoded

29. *See* FLA. STAT. § 775.0877(1), (5) (2015); *How Do You Get HIV or AIDS?*, AIDS.GOV, http://www.aids.gov/hiv-aids-basics/hiv-aids-101/how-you-get-hiv-aids (last revised Aug. 27, 2015); *infra* Section IV.B.

30. *See infra* Part II.

31. *See infra* Part III.

32. *See infra* Part IV.

33. *See infra* Sections II.A–C.

34. *See* FLA. STAT. § 381.0041 (2015); FLA. STAT. § 796.08(5) (2015). These provisions have been omitted in order to focus on the main issue of HIV transmission; however, they too suffer from their own issues. Kim Shayo Buchanan, *When Is HIV a Crime? Sexuality, Gender and Consent*, 99 MINN. L. REV. 1231, 1248–53 (2015). For a discussion on how HIV-specific criminal laws fail to punish the client in instances in which the worker is punished as retribution for prostitution, see *id.* at 1253.

35. *See infra* Sections II.A–C.

36. FLA. STAT. § 384.24 (2015).

into section 384.24(1): "[C]hancroid, gonorrhea, granuloma inguinale, lymphogranuloma venereum, genital herpes simplex, chlamydia, nongonococcal urethritis, . . . pelvic inflammatory disease, . . . or syphilis . . . ."[37] Note how HIV is absent from section 384.24(1), as HIV is specifically referenced to in section 384.24(2).[38] Section 384.24(2) is a provision that reads in a roughly identical manner to section 384.24(1) but explicitly relates to HIV:

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

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

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

37. *Id.* § 384.24(1).
38. *Id.* § 384.24(1)–(2).
39. *Id.* § 384.24(2).
40. *Id.* § 384.24(2).
41. *See* FLA. STAT. § 384.24(2) (2015).
42. *See id.* § 384.24(2). *General intent* is defined as:

> The intent to perform an act even though the actor does not desire the consequences that result. This is the state of mind required for the commission of certain common-law crimes not requiring a specific intent or not imposing strict liability. General intent usu[ally] takes the form of recklessness, involving actual awareness of a risk and the culpable taking of that risk, or negligence, involving blameworthy inadvertence. —Also termed *general criminal intent, general mens rea.*

General Intent, BLACK'S LAW DICTIONARY (10th ed. 2014). *Specific intent* is defined as "[t]he intent to accomplish the precise criminal act that one is later charged with. At common law, the specific-intent crimes were robbery, assault, larceny, burglary, forgery, false pretenses, embezzlement, attempt, solicitation, and conspiracy. Also termed *criminal intent*." *Specific Intent*, BLACK'S LAW DICTIONARY (10th ed. 2014).

required under Florida law that a person charged with violating section 384.24 have a specific intent to transmit the virus.[43]

This provision has gone through a legal evolution.[44] As noted in the introduction to this Comment, HIV was introduced to the criminal code in 1986.[45] It followed a basic structure until it was amended in 1997.[46] Until the 1997 amendment, the statute read as follows:

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

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

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43. *See* FLA. STAT. § 384.24(2) (2015); *infra* Section IV.A.2.a (discussing the absence of specific intent for the criminal transmission of HIV in Florida).
44. *See* FLA. STAT. § 384.24 (2015); FLA. STAT. § 384.24 (1997); FLA. STAT. § 384.24 (1995); FLA. STAT. § 384.24 (Supp. 1986).
45. *See* FLA. STAT. § 384.24 (Supp. 1986); *supra* Part I.
46. *See* FLA. STAT. § 384.24 (1997); FLA. STAT. § 384.24 (Supp. 1986).
47. FLA. STAT. § 384.24 (1995); *see also* FLA. STAT. § 384.24 (1997).
48. *See* FLA. STAT. § 384.24 (1995).
49. *See id.*
50. *See* FLA. STAT. § 384.24 (1997); FLA. STAT. § 384.24 (1995); *Pneumocystis Pneumonia — Los Angeles*, *supra* note 2, at 250.
51. *See* FLA. STAT. § 384.24 (1995); FLA. STAT. § 384.24 (Supp. 1986).
52. *See* FLA. STAT. § 384.24 (1995); FLA. STAT. § 384.24 (Supp. 1986). *But see* FLA. STAT. § 384.24 (1997).

terms of our understanding of the condition—HIV had not been as severely criminalized as it suddenly became in 1997.[53]

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

The changes enacted in section 384.24 of the Florida Statutes were made along with changes to the respective penalties provisions in section 384.34, effectively targeting HIV transmission as somehow more reprehensible than the transmission of any other sexually transmissible disease.[54] Up until the 1997 amendment, this statutory provision referred to the transmission of any of the sexually transmissible diseases listed in section 384.24 of the Florida Statutes as a *misdemeanor of the first-degree*.[55]

When the provision was amended in 1997, it was changed to read as follows: "(1) [a]ny person who violates the provisions of [section] 384.24(1) commits a misdemeanor of the first degree . . . [and] (5) [a]ny person who violates the provisions of [section] 384.24(2) commits a felony of the third degree . . . ."[56]

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

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53. *See* FLA. STAT. § 384.24 (1997). For the general criminal provision, see FLA. STAT. § 384.24 (1995); FLA. STAT. § 384.24 (Supp. 1986). *But see* FLA. STAT. § 384.24 (1997). For the penalties provision, see FLA. STAT. § 384.34 (Supp. 1996); FLA. STAT. § 384.34(1) (Supp. 1986). *But see* FLA. STAT. § 384.34(5) (1997).

54. *See* FLA. STAT. § 384.24 (1997); FLA. STAT. § 384.34 (1997). For the general criminal provision, see FLA. STAT. § 384.24 (1995); FLA. STAT. § 384.24 (Supp. 1986). *But see* FLA. STAT. § 384.24 (1997). For the penalties provision, see FLA. STAT. § 384.34 (Supp. 1996); FLA. STAT. § 384.34(1) (Supp. 1986). *But see* FLA. STAT. § 384.34(5) (1997).

55. FLA. STAT. § 384.34(1) (Supp. 1996); *see also* FLA. STAT. § 384.24 (1995).

56. FLA. STAT. § 384.34(1), (5) (1997); *see also* FLA. STAT. § 384.24 (1997); FLA. STAT. § 384.34(1) (Supp. 1996).

57. *See* FLA. STAT. § 384.34(5) (1997); FLA. STAT. § 384.34(1) (Supp. 1996).

58. FLA. STAT. § 384.34(5) (Supp. 1998).

59. FLA. STAT. § 384.34(5) (2015); *see also* FLA. STAT. § 384.24(2) (2015).

60. *See* FLA. STAT. § 384.34(5) (Supp. 1998); FLA. STAT. § 384.34(5) (1997); FLA. STAT. § 384.34(1) (Supp. 1996); FLA. STAT. § 384.34 (Supp. 1986).

C. *Section 775.0877 of the Florida Statutes: The Sentence Enhancement Provision*

Section 775.0877 of the Florida Statutes is Florida's sentence enhancement provision, which is applied when PLWHA commit certain crimes.[61] In Florida, being HIV-positive is akin to an aggravating circumstance during the commission of certain listed crimes, despite the fact that the statute does not use the term *aggravated circumstance*.[62] The law contains a list of separate crimes under section 775.0877(1) from paragraph (a) through (o).[63] Anyone who pleads guilty, nolo contendere, or has been found guilty of any of the listed crimes, in addition to having exchanged bodily fluids during its commission thereof—and while aware of an HIV-positive diagnosis—commits the criminal transmission of HIV.[64]

Section 775.0877(3) specifies that the criminal transmission of HIV, in this context, is a third-degree felony.[65] The list of crimes to which HIV-positive status becomes a penalty enhancer is extensive and includes but is not limited to: sexual battery, incest, lewd or lascivious offenses, assault, battery, child abuse, elder abuse, prostitution, and the donation of blood.[66] When these independent crimes are commited by PLWHA who have knowledge of their condition—while inclusive of an exchange of bodily fluids—the criminal transmission of HIV, which is in itself a separate crime, is also commited.[67] While not exactly an aggravating circumstance by definition, an HIV-positive status in Florida can certainly act as one by increasing the punishment of the accused substantially through the addition of a third-degree felony.[68]

The provision is vague as to the type of bodily fluid that must be exchanged to result in its application.[69] The statute speaks only of the *transmission of bodily fluids*.[70] Section 775.0877(5) specifies that the actual

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61. *See* FLA. STAT. § 775.0877 (2015).
62. *Id.* *Aggravating circumstance* is defined as "[a] fact or situation that increases the degree of liability or culpability for a criminal act. . . . A fact or situation that relates to a criminal offense or defendant and that is considered by the court in imposing punishment." *Aggravating Circumstance*, BLACK'S LAW DICTIONARY (10th ed. 2014).
63. FLA. STAT. § 775.0877(1)(a)–(o) (2015).
64. *Id.* § 775.0877(1), (3).
65. *Id.* § 775.0877(3).
66. *Id.* § 775.0877(1)(a)–(n).
67. *Id.* § 775.0877(1), (3).
68. *See* FLA. STAT. § 775.0877(3) (2015); *Aggravating Circumstance*, *supra* note 62.
69. *See* FLA. STAT. § 775.0877(1) (2015).
70. *Id.* § 775.0877(1).

transmission of HIV is not required in order for PLWHA to commit the criminal transmission of HIV.[71]

III. ON A MODERN UNDERSTANDING OF HIV

A. *A History of Stigmatization*

1. Phobia of Minorities

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

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

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

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71. *Id.* § 775.0877(5).

72. *See* Lawrence K. Altman, *New Homosexual Disorder Worries Health Officials*, N.Y. TIMES, May 11, 1982, at C1 [hereinafter Altman, *New Homosexual Disorder Worries Health Officials*].

73. *See id.*; George A. Oswald et al., *Attempted Immune Stimulation in the "Gay Compromise Syndrome"*, 285 BRIT. MED. J. 1082, 1082 (1982); *Pneumocystis Pneumonia — Los Angeles*, *supra* note 2, at 250 (reporting on first known AIDS cases in the United States among young gay men in Los Angeles).

74. *See* Altman, *New Homosexual Disorder Worries Health Officials*, *supra* note 72; Oswald et al., *supra* note 73.

75. *See* Cooper v. State, 539 So. 2d 508, 511 (Fla. 1st Dist. Ct. App. 1989); Altman, *New Homosexual Disorder Worries Health Officials*, *supra* note 72.

76. Altman, *New Homosexual Disorder Worries Health Officials*, *supra* note 72.

> epidemiologist who coordinates the Centers for Disease Control's task force . . . told the Congressional hearing.[77]

It was not until that same year, in 1982, that the CDC began to use the term AIDS to describe the disease, as is evidenced by the language in the MMWR updates.[78] The MMWR also began to detail a considerable number of cases in population groups other than MSM, such as Haitians, intravenous drug users, and hemophiliacs.[79] It also recognized known cases found in women and the heterosexual community at large.[80]

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

Homophobia can be easily perceived in the news articles circling the media during the 1980s–1990s.[84] For example, in the same New York Times article referenced above, the following was stated as a fact: "After testing for more than 130 potential risk factors, they found that the median number of lifetime male sexual partners for affected homosexual men was 1,160, compared to 524 for male homosexual men who did not have the syndrome."[85] This suggests that MSM with HIV/AIDS are somehow at least

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77. *Id.*

78. *See Current Trends Update on Acquired Immune Deficiency Syndrome (AIDS) — United States*, 31 MORBIDITY & MORTALITY WKLY. REP. 507, 507–08, 513–14 (1982).

79. *Id.*

80. *Id.*

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

82. *Today's HIV/AIDS Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 2015), http://www.cdc.gov/nchhstp/newsroom/docs/factsheets/todaysepidemic-508.pdf. The CDC reports that MSM constituted 63% of all new HIV infections in 2010. *Id.*

83. *See id.* The CDC notes that African-Americans constituted forty-four percent of all new HIV infections in 2010, while Hispanics/Latinos constituted twenty-one percent of all new HIV infections in 2010. *Id.*

84. *See* Altman, *New Homosexual Disorder Worries Health Officials*, *supra* note 72.

85. *Id.*

twice as promiscuous as MSM without HIV/AIDS.[86] Even if it were true that HIV-positive MSM are somehow more promiscuous than HIV-negative MSM—whether it is 1160 sexual partners or 524 sexual partners—both of these estimates are exorbitant numbers for either the average homosexual or the average heterosexual member of society.[87]

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

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

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86. *See id.*

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

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

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

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

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

92. 539 So. 2d 508 (Fla. 1st Dist. Ct. App. 1989).

to the AIDS virus . . . ."[93] The defendant's sentence for sexual battery, solicitation, and aggravated battery was enhanced beyond the sentencing guideline recommendations because he tested positive for HIV prior to sentencing.[94]

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

2. Fear of Infection

The cause behind the stigma associated with HIV/AIDS is a complex sociological phenomenon that cannot simply be explained out of a dislike of minorities.[99] It also stems from other factors, such as from an irrational fear of infection, for example—a fear that is exaggerated in the collective mind—as the actual probability of getting infected with HIV is less than one in fifty for condomless receptive anal intercourse from an HIV-positive insertive partner, which is the riskiest of all sexual activities in terms of HIV transmission; a probability which decreases to one in two thousand when the roles are reversed, and the HIV-positive partner is the receptive one.[100] For vaginal sex, the risk is one in one thousand for male-to-female transmission,

93. *Id.* at 511 (exemplifying the homophobic language of the court).

94. *Id.* at 509. Note that the defendant tested positive for HIV prior to sentencing, therefore no previous knowledge of an HIV-positive diagnosis existed as required by Florida law for the criminal transmission of HIV. *Id.* at 511. In fact, the defendant's *knowledge* was construed from his *active homosexual lifestyle*—which is what is so shocking about this particular case. *Id.*

95. *See supra* Part II.

96. *Cooper*, 539 So. 2d at 511.

97. *Id.* at 512 (Shivers, J., dissenting).

98. *See id.* at 511.

99. *See* Anish P. Mahajan et al., *Stigma in the HIV/AIDS Epidemic: A Review of the Literature and Recommendations for the Way Forward*, 22 AIDS (SUPP. 2) S67, S72 (2008).

100. *See* Sarah J. Newman, *Prevention, Not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform*, 107 NW. U. L. REV. 1403, 1409–10 (2013).

and one in two thousand for female-to-male transmission.[101] Intravenous drug users, while constituting a far smaller proportion of the population than those engaged in an active sexual lifestyle, constitute a sizable proportion of new HIV transmissions and have the highest risk of HIV transmission amongst all subgroups.[102] Although it is true that just one sexual encounter has the potential to transmit HIV from one person to another, and the engagement in risky sexual behaviors is fully discouraged by this Comment, the low transmission rates amongst HIV-negative people engaged in risky sexual activities with PLWHA—without the utilization of any means of protection—suggests that the risk of HIV transmission has become irrationally exaggerated in the collective mind.[103]

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

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

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

101. *Id.* at 1410.

102. Dita Broz et al., *HIV Infection and Risk, Prevention, and Testing Behaviors Among Injecting Drug Users — National HIV Behavioral Surveillance System 20 U.S. Cities, 2009*, 63 MORBIDITY & MORTALITY WKLY REP. 1, 2 (July 4, 2014).

103. *See* Newman, *supra* note 100, at 1409–10.

104. *14-Year-Old Boy with AIDS Attends School After 2 Years*, N.Y. TIMES, Aug. 26, 1986, at B3.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *14-Year-Old Boy with AIDS Attends School After 2 Years*, *supra* note 104.

110. *Family in AIDS Case Quits Florida Town After House Burns*, N.Y. TIMES, Aug. 30, 1987, at A1.

111. *Id.*

112. 666 F. Supp. 1524, 1538 (M.D. Fla. 1987).

that all three children were hemophiliacs; (2) that all three children came into contact with HIV through the Factor VIII clotting agent; (3) that the Ray family voluntarily decided to disclose the HIV status of the children, at which time they were removed from school; and (4) that the school board subsequently denied enrollment to Richard, Robert, and Randy Ray.[113] The court depicts the science behind HIV in 1987 quite accurately, stating that: "A *full-blown* case of AIDS is believed by the medical community to be 'incurable and almost inevitably fatal.' As stated by Surgeon General C. Everett Koop, M.D., Sc.D., in an interview on July 31, 1987, this is the *real thing*."[114]

The court goes on to compare the HIV epidemic to a polio outbreak of forty-five years prior, which caused a panic in the community.[115] But the court goes on to note that despite the memories, "[t]he [c]ourt must take medical science as it *now* finds it."[116] The medical science summarized by the court recognized the following: (1) that the CDC reported its first cases of AIDS in 1981; (2) that AIDS was caused by an infection of HIV; (3) that HIV weakens the immune system; (4) that there was no cure for HIV and that finding one would be complex; (5) that casual contact with people infected with HIV was found not to lead to infection in others; and (6) that in one study, none of the closest casual contacts of hemophiliac subjects had contracted HIV.[117]

A preliminary injunction was issued against the DeSoto County School Board.[118] The concern and fear of the parents, although real, was not substantiated by science.[119] The harm that the Ray children could pose to the public was merely *theoretical*, and the irreparable injury that would be done to the children by depriving them of their education outweighed any theoretical harm that they could possibly pose to society by attending school.[120] Because of this victory in court, the Ray family home was burned, and they subsequently relocated out of South Florida.[121]

Perhaps it is an irrational fear of infection that drives society to reject those with HIV/AIDS time and again.[122] But an irrational fear of infection, just as are homophobia, racism, and any other fear that is unsubstantiated by

113. *Id.* at 1527–28.
114. *Id.* at 1529 (citation omitted).
115. *Id.*
116. *Id.*
117. *Ray*, 666 F. Supp. at 1529–31.
118. *Id.* at 1538.
119. *Id.* at 1529–31.
120. *Id.* at 1534–35.
121. *Family in AIDS Case Quits Florida Town After House Burns*, *supra* note 110; *see also Ray*, 666 F. Supp. at 1538.
122. *See* Mahajan et al., *supra* note 99, at 67.

science—should have no place within our legal system.[123] The Florida Legislature should rethink its laws by scrutinizing the current science behind HIV, just as Judge Elizabeth A. Kovachevich of the Middle District of Florida reasoned through the facts presented in the *Ray* decision.[124] The Florida Legislature should not allow for unsubstantiated fears to dictate the law of the land in Florida.[125]

B. *The Science Behind HIV/AIDS*

1. AZT and the Need for Better Treatment

News that the Food and Drug Administration ("FDA") approved the first medication developed specifically to combat HIV infection reached the public on March 20, 1987.[126] The drug developed was zidovudine, most commonly known as AZT.[127] With AZT came grants by the Health Resources and Health Administration ("HRSA") to the individual states, with amounts in relation to the relative spread of the virus amongst their populations.[128] New York, California, Texas, Florida, and New Jersey received the most money.[129] The money was provided through the HRSA's AZT Drug Reimbursement Program, a precursor to the Ryan White CARE Act, introduced below.[130]

The first medication approved for the treatment of HIV proved to be plagued with problems.[131] AZT is known to cause severe life-threatening adverse effects on its users.[132] Such adverse effects include an extensive list provided in the official description of the medication, including but not limited to "liver damage, blood toxicities, and muscle disorders," along with a general disclaimer that the list provided is not exhaustive of all side effects that may occur.[133] In addition to the drastic side effects of AZT, the HIV virus was found to develop resistance to the medication, rendering it

123. *See Ray*, 666 F. Supp. at 1529; *infra* Section IV.A (suggesting changes to the law in order to repeal or amend provisions at odds with modern science).

124. *See Ray*, 666 F. Supp. at 1529–31; *infra* Sections III.B, IV.A.

125. *See* Newman, *supra* note 100, at 1406.

126. *AZT Program Launches with Awards of $30 Million*, HRSA.GOV, http://hab.hrsa.gov/livinghistory/timeline/1987.htm (last visited Feb. 8, 2016).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*; *see also* 42 U.S.C. § 300ff (2012); *Who Was Ryan White?*, HRSA.GOV, http://hab.hrsa.gov/abouthab/ryanwhite.html (last visited Feb. 8, 2016).

131. *See* U.S. Nat'l Library of Med., *Zidovudine Injection*, NIH.GOV, http://nlm.nih.gov/medlineplus/druginfo/meds/a601168.html (last revised Oct. 15, 2012).

132. *Id.*

133. *Id.*

ineffective.[134] Statistical studies found that while AZT was beneficial from about twelve to twenty-four months, during longer periods of time the effectiveness of AZT decreased until there was no statistically significant difference between groups taking AZT and groups taking a placebo.[135] These results indicated the need for a better combination of HIV medications for people living with the condition in order to prevent it from turning into full-blown AIDS.[136]

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

Thankfully, current medical advances behind HIV are very different from the ones presented in the *Ray* case.[141] Current pharmacological treatments give PLWHA more than just hope for a cure, they give them life.[142] Society must recognize that what was not possible for Ryan White in 1990 is possible today thanks to the advances in medicine that have come

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134. *See* Nat'l Inst. of Allergy & Infectious Diseases, *AZT and AIDS*, NIH.GOV, http://www.niaid.nih.gov/topics/HIVAIDS/Understanding/Treatment/Pages/AZTandAIDS.aspx (last updated Mar., 23, 2010); U.S. Nat'l Library of Med., *supra* note 131.

135. Nat'l Inst. Of Allergy & Infectious Diseases, *supra* note 134. *Placebo* is defined as a pill or substance that is given to a patient like a drug but that has no physical effect on the patient. *See Placebo*, MERRIAM-WEBSTER'S, COLLEGIATE DICTIONARY (11th ed. 2003).

136. *See* Lawrence K. Altman, *Experts to Review AZT Role As the Chief Drug for H.I.V.*, N.Y. TIMES, Sept. 17, 1995, at 1.38 [hereinafter Altman, *Experts to Review AZT Role As the Chief Drug for H.I.V.*].

137. 42 U.S.C. § 300ff (2012); *see also infra* Section III.B.2.

138. *Who Was Ryan White?*, *supra* note 130; *see also supra* Section III.A.2.

139. 42 U.S.C. § 300ff; *About the Ryan White HIV/AIDS Program*, HRSA.GOV, http://hab.hrsa.gov/abouthab/aboutprogram.html (last visited Feb. 8, 2016).

140. *See* 42 U.S.C. § 300ff; *About the Ryan White HIV/AIDS Program*, *supra* note 139.

141. *See* Ray v. Sch. Dist, 666 F. Supp. 1524, 1529 (M.D. Fla. 1987); *About the Ryan White HIV/AIDS Program*, *supra* note 139.

142. *See Who Was Ryan White?*, *supra* note 130.

about in the last few decades.[143] If today's medications had existed in 1990, Ryan White would likely be living today.[144]

2. The Advent of Modern Treatment

In September 1995, The New York Times reported:

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

Researchers found a new class of drugs that radically altered the course of the HIV/AIDS epidemic.[146] Today, there are six major classes of drugs used to treat HIV/AIDS—the antiretroviral drugs.[147] As scientists have learned, various drugs must be taken in conjunction because HIV is highly adaptive to the drugs used to combat its proliferation, and therefore, only a combination of various classes of drugs can effectively reduce the HIV viral load.[148] The combination must be of at least three drugs from a separate combination of at least two classes of drugs, which is termed antiretroviral therapy ("ART").[149] ART greatly reduces the amount of HIV in the blood of PLWHA—often to levels so low that HIV cannot even be

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143. *See id.*
144. *See id.*
145. *See* Altman, *Experts to Review AZT Role As the Chief Drug for H.I.V.*, *supra* note 136.
146. *See Types of HIV/AIDS Antiretroviral Drugs*, NIH.GOV, http://www.niaid.nih.gov/topics/hivaids/understanding/treatment/Pages/arvDrugClasses.aspx (last updated Sept. 23, 2013).
147. *Id.*
148. *Id.*
149. *HIV Overview: FDA-Approved HIV Medicines*, AIDSINFO, http://aidsinfo.nih.gov/education-materials/fact-sheets/21/58/fda-approved-hiv-medicines# (last updated May 4, 2015); *Types of HIV/AIDS Antiretroviral Drugs*, *supra* note 146.

detected by standard highly-sensitive laboratory tests.[150] Such a low viral count is known as an *undetectable viral load*.[151] Having an undetectable viral load has been found to reduce the transmission of HIV by up to ninety-six percent.[152]

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

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

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150. *Viral Load*, AIDS.GOV, http://www.aids.gov/hiv-aids-basics/just-diagnosed-with-hiv-aids/understand-your-test-results/viral-load (last updated Sept. 3, 2015).

151. *Id.*

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

153. *See* Andrew Pollack, *New Medicine for AIDS Is One Pill, Once a Day*, N.Y. TIMES, July 9, 2006 at 10. Atripla was the first once-a-day pill approved by the FDA in 2006. *See* Cynthia Brinson, *Stribild, a Single Tablet Regimen for the Treatment of HIV Disease*, 3 COMBINATION PRODUCTS THERAPY 1, 1 (2013).

154. *See* Brinson, *supra* note 153, at 1 (detailing the effectiveness of Stribild as a once-a-day pill regimen for PLWHA).

155. *See id.*

156. Patrick G. Clay et al., *"One Pill, Once Daily": What Clinicians Need to Know About Atripla*, 4 THERAPEUTICS & CLINICAL RISK MGMT. 291, 299–300 (2008).

157. *Id.* at 300.

158. *How Is Truvada Used to Treat HIV-1 Infection?*, TRUVADA, http://www.truvada.com/treatment-for-hiv (last visited Feb. 8, 2016).

159. *Pre-Exposure Prophylaxis (PrEP)*, AIDS.GOV, http://www.aids.gov/hiv-aids-basics/prevention/reduce-your-risk/pre-exposure-prophylaxis/index.html (last revised Mar. 24, 2015). AIDS.gov defines PrEP succinctly as "Pre-Exposure Prophylaxis." *Id.* The word *prophylaxis* means, "'to prevent or control the spread of an infection or disease.'" *Id.* "PrEP is a way for people who [do not] have HIV to prevent HIV infection by taking a pill every day." *Id.*

serodiscordant relationships, to protect themselves against HIV transmission.[160]

A study conducted in the countries of Kenya and Uganda with 4758 couples revealed the effectiveness of this drug combination for the prevention of HIV transmission.[161] The couples were members of serodiscordant relationships, where one partner was HIV-positive, and the other partner was HIV-negative.[162] The couples were randomized into one of three groups.[163] The first group was given tenofovir by itself, the second group a combination of tenofovir-emtricitabine, and the remaining group was given a placebo.[164] Tenofovir-emtricitabine, the combination found within Truvada, proved effective in the prevention of HIV transmission.[165] In women, results suggest the efficacy of preventing HIV transmission to be 71% for tenofovir and 66% for tenofovir-emtricitabine when compared directly to the placebo.[166] Among men, the results were similar, with the efficacy of tenofovir as opposed to tenofovir-emtricitabine at 63% and 84%, respectively.[167] The discrepancy between the use of a single drug and the use of a combination of the two drugs proved to be negligible, but the use of these drugs as an antiretroviral PrEP proved effective.[168] Another study conducted in various countries suggests that MSM who inconsistently take Truvada as PrEP may reduce their risk of contracting HIV by 44% while the risk of contracting HIV for MSM who take Truvada consistently is reduced by 92%.[169]

It should be noted that all of these drugs, regardless of how effective or advanced they are in their ability to prevent HIV transmission—can still cause serious side effects.[170] However, to put the effectiveness of the drugs into perspective, a recent study conducted in the United Kingdom with a

160. *See How Is Truvada Used to Treat HIV-1 Infection?*, *supra* note 158; *Mixed-Status Couples*, AIDS.GOV, http://www.aids.gov/hiv-aids-basics/staying-healthy-with-hiv-aids/friends-and-family/mixed-status-couples (last revised Oct. 27, 2014).

161. J.M. Baeten et al., *Antiretroviral Prophylaxis for HIV Prevention in Heterosexual Men and Women*, 367 NEW ENG. J. MED. 399, 399 (2012).

162. *Id.* at 400.

163. *Id.* at 399.

164. *Id.*

165. *Id.* at 407.

166. Baeten et al., *supra* note 161, at 404.

167. *Id.*

168. *Id.*

169. Robert M. Grant et al., *Preexposure Chemoprophylaxis for HIV Prevention in Men Who Have Sex with Men*, 363 NEW ENG. J. MED. 2587, 2594, 2596–97 (2010).

170. *Stribild Side Effects*, DRUGS.COM, http://www.drugs.com/sfx/stribild-side-effects.html (last visited Feb. 8, 2016); *Truvada Side Effects*, DRUGS.COM, http://www.drugs.com/sfx/truvada-side-effects.html (last visited Feb. 8, 2016).

large sample of more than twenty-thousand individuals living with HIV, estimates the life expectancy of men diagnosed with HIV at the ages of twenty, thirty-five, and fifty—at sixty-eight, seventy-three, and seventy-seven, respectively.[171] This was compared to HIV-negative men in the general population, whose life expectancy at the ages of twenty, thirty-five, and fifty were estimated to be seventy-seven, seventy-eight, and seventy-nine, respectively.[172] For HIV-positive women, the figures are similar, with minimal variation from the general population.[173] This is a truly novel development considering that an HIV-positive diagnosis had been widely regarded as a death sentence.[174]

Consistent condom use can reduce HIV transmission by 80% to 90%;[175] ART has been found to reduce HIV transmission by up to 96% through its ability to achieve an undetectable viral load,[176] and Truvada has been found to be 92% effective against the transmission of HIV.[177] Drugs may also be taken immediately after exposure to HIV for preventing infection, which can happen in medical settings or due to other causes such as rape.[178] This is known as post-exposure prophylaxis ("PEP"), and it has been shown to be so effective that less than one in one hundred medical professionals have acquired HIV in this way after exposure to the virus.[179] Medical advances have also aided in reducing the risk of transmission of HIV from mother to child during and immediately following a pregnancy.[180]

Current medical advances are no longer those of the 1990s that failed to save the life of Ryan White, nor are they part of the science of 1997 when Florida amended its statutes to make HIV transmission a felony.[181] The

171. Margaret T. May et al., *Impact on Life Expectancy of HIV-1 Positive Individuals of CD4+ Cell Count and Viral Load Response to Antiretroviral Therapy*, 28 AIDS 1193, 1195–96 (2014).

172. *Id.*

173. *Id.*

174. *See supra* Section III.A.

175. Markus Steiner & Pamela DeCarlo, *What is the Role of Male Condoms in HIV Prevention?*, U. CAL. S.F., http://caps.ucsf.edu/uploads/pubs/FS/pdf/condomFS.pdf (last revised Jan. 2005).

176. *See HIV Treatment as Prevention*, *supra* note 152; *Viral Load*, *supra* note 150.

177. *See* Grant et al., *supra* note 169, at 2590.

178. *Post-Exposure Prophylaxis*, AIDS.GOV, http://www.aids.gov/hiv-aids-basics/prevention/reduce-your-risk/post-exposure-prophylaxis/index.html (last revised Sept. 21, 2015) (explaining what PEP is).

179. *Id.*

180. *See* Shahabudeen K. Khan, *The Threat Lives On: How to Exclude Expectant Mothers from Prosecution for Mere Exposure of HIV to their Fetuses and Infants*, 63 CLEV. ST. L. REV. 429, 434–35 (2015) (discussing medical advances in HIV/AIDS prevention from mother to child).

181. *See* FLA. STAT. § 384.34 (1997); *supra* Parts II–III.

medical advances of today have greatly expanded our understanding on the mechanisms behind HIV/AIDS, on proven methods to reduce HIV transmission, and on pharmacological advances effective at improving the quantity and quality of life of those infected with HIV.[182]

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

In the United States, there are a number of jurisdictions that criminalize the transmission of HIV by statute.[183] The number of states with HIV-specific criminal laws fluctuates, but it is consistently reported to be slightly above thirty.[184] The Florida Statutes are very punitive in relation to the transmission of HIV.[185] Section 384.34 makes the criminal transmission of HIV a third-degree felony, and when involving multiple acts, the statute attributes to the criminal transmission of HIV status as a first-degree felony.[186] Florida was the first state in the country to criminalize the transmission of HIV amid widespread fears of infection following media reports that an HIV-positive woman had been working as a prostitute.[187] Furthermore, the irrational fears of HIV infection acquired from negative press were a driving force behind the revisions and Florida's subsequent adoption of the 1997 amendments to sections 384.24 and 384.34 of the Florida Statutes, which effectively segregated HIV from other sexually transmissible diseases and enhanced its penalties provision from a misdemeanor to a felony.[188]

President Reagan was not the swiftest in addressing the HIV/AIDS epidemic and has been widely criticized for waiting too long to recognize the existence of an epidemic.[189] In fact, it was not until 1987, six years after the

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182. *See supra* Part III.

183. VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 2 (containing a comprehensive list of all HIV-specific criminal laws in the nation).

184. *See* Lehman et al., *supra* note 20, at 1000 (depicting patterns in the adoption of such HIV-specific criminal laws throughout the country).

185. *See generally* FLA. STAT.(2015). *See* VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 39–45 (discussing at length the way in which HIV-specific criminal provisions have been used in Florida to prosecute PLWHA).

186. FLA. STAT. § 384.34(5) (2015).

187. Buchanan, *supra* note 34, at 1299.

188. *Id.* at 1299–1300 (pointing out that the Florida legislature cited infamous HIV-transmission cases in making HIV-transmission a class I felony); *see also* FLA. STAT. §§ 384.24, .34(5) (1997).

189. *See* RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC 466 (1987) (chronicling the difficulty of getting the Reagan administration to act during the early years of the HIV/AIDS epidemic); Newman, *supra* note 100, at 1412–

beginning of the epidemic, that President Reagan initiated the *Presidential Commission on the Human Immunodeficiency Virus Epidemic*.[190] What resulted was a report from the Commission that called for, amongst many other recommendations, an end to the transmission of the disease through the utilization of the criminal justice system.[191] The creation of new criminal provisions to combat HIV were encouraged, as traditional criminal laws such as assault were deemed *too lenient* by the commission.[192] Recommendation 96–47 encourages the following:

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

The above language is eerily similar to Florida's chief criminal transmission provision in spirit and purpose.[194] It is also proper to note here, just as it was noted in Part III above, that the Ryan White CARE Act has had an effect on this area of the law.[195] When the Ryan White CARE Act was enacted, a temporary provision was incorporated that called for every state to certify that its criminal laws were "adequate to prosecute any HIV infected individual" who knowingly exposed another to HIV.[196] Although many states had already passed HIV-specific criminal laws, many other states that

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15 (detailing the reaction of the Reagan Administration to the advent of the HIV/AIDS epidemic).

190. *See* Newman, *supra* note 100, at 1412.

191. REPORT OF THE PRESIDENTIAL COMM'N ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 130–31 (1988), http://ia700402.us.archive.org/14/items/reportofpresiden00pres/reportofpresiden00pres.pdf.

192. *Id.* at 130.

193. *Id.* at 131.

194. *Compare id.* (articulating recommendation 9-46), *with* FLA. STAT. § 384.24(2) (2015).

195. Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No 10-381, § 2, 104 Stat. 576, 603 (1990); *see also* Leslie E. Wolf & Richard Vezina, *Is There a Role for Criminal Law in HIV Prevention?*, U. CAL. S.F., (May 2005), http://caps.ucsf.edu/uploads/pubs/FS/pdf/criminalizationFS.pdf (pointing out the effect of the Ryan White CARE Act in the promulgation of new state HIV-criminalization laws); *supra* Part III.

196. § 2647, 104 Stat. at 603.

had not adopted such provisions passed them after 1990.[197] Within this atmosphere encouraging the criminalization of HIV transmission by the Federal Government, it would be unfair to wholly blame Florida for the draconian changes it made to its HIV-specific laws in 1997, abruptly segregating HIV from other sexually transmissible diseases, and drastically enhancing criminal penalties for PLWHA.[198] Since then, the national atmosphere has experienced a drastic change and as noted in the introduction to this Comment, the stance of the Federal Government is now reversed with the National HIV/AIDS Strategy.[199] A national effort has been launched that is inclusive of the desire to see the criminal laws of the past revised updated to match with modern science.[200]

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

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197. *See* Lehman et al., *supra* note 20, at 1000 (depicting patterns in the adoption of HIV-specific criminal laws throughout the country).

198. *See* FLA. STAT. §§ 384.24(2), .34(5) (1997).

199. *See* Lehman et al., *supra* note 20, at 998 (noting the change in the stance of the national government from the time of the passage of the Ryan White CARE Act to the present National HIV/AIDS Strategy); The White House, *supra* note 24, at 37 (encouraging legislatures, under recommendation 3.3, to revisit HIV-specific criminal laws and ensure that they are up to date with current scientific knowledge in methods of transmission).

200. The White House, *supra* note 24, at 6 (encouraging modern HIV-specific criminal laws to be "scientifically based, and that prosecutors and others in law enforcement have an accurate understanding of transmission risks").

201. *See* Medical Student Section Resolution 8 (AM. MED. ASS'N 2013); Richard Elliot, *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper*, UNAIDS 5 (June 2002), http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/SUMMARY%20OF%20ACTIONS%20Medical%20Student%20Section%20Resolutions.pdf; *Position Statement: HIV Criminalization Laws and Policies Promote Discrimination and Must Be Reformed*, ASS'N NURSES AIDS CARE (Nov. 2014), http://www.nursesinaidscare.org/files/public/ANAC_PS_Criminalization_December22014_FinalforJANAC.pdf [hereinafter *Position Statement*].

202. *See* Medical Student Section Resolution 8, *supra* note 201; *Position Statement*, *supra* note 201.

203. *See* Medical Student Section Resolution 8, *supra* note 201; *Position Statement*, *supra* note 201.

> Discrimination *and Criminalization* Based on HIV Seropositivity. Our AMA: (1) Remains cognizant of and concerned about society's perception of, and discrimination against, HIV-positive people; (2) Condemns any act and opposes any legislation of categorical discrimination based on an individual's actual or imagined disease, including HIV infection; this includes [c]ongressional mandates calling for the discharge of otherwise qualified individuals from the armed services solely because of their HIV seropositivity; (3) Encourages vigorous enforcement of existing antidiscrimination statutes, incorporation of HIV in future federal legislation that addresses discrimination, and enactment and enforcement of state and local laws, ordinances, and regulations to penalize those who illegally discriminate against persons based on disease; and (4) Encourages medical staff to work closely with hospital administration and governing bodies to establish appropriate policies regarding HIV-positive patients; *and (5) Supports consistency of federal and state criminal laws with current medical and scientific knowledge and accepted human rights-based approaches to disease control and prevention, including avoidance of any imposition of unwarranted punishment based on health and disability status; and (6) Encourages public education and understanding of the stigma created by HIV criminalization statutes and subsequent negative clinical and public health consequences.*[204]

The above public health policy statement is important because it demonstrates that the AMA supports the premises of this Comment.[205] Points (5) and (6) stand in support of the following subsection, calling for criminal laws to be updated in relation to medical scientific advances and encouraging an understanding of the negative social implications of such laws on persons living with this condition.[206] The ANAC's policy, while more extensive in detail than the AMA's, mirrors the AMA's as to points (5) and (6) yet offers another main objective: "[The] [r]epeal of punitive laws that single out HIV infection or any other communicable disease and that include inappropriate or enhanced penalties for alleged nondisclosure, exposure, and transmission."[207] This is squarely in accordance with the following section, calling for the repeal of unjust provisions that enhance penalties for people living with HIV.[208] The ANAC's policy also contains

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

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

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

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

A. *On Crimes*

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

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

209. *Position Statement*, *supra* note 201.
210. *See infra* Section IV.A.
211. *See infra* Section IV.B.
212. Elliot, *supra* note 201, at 5 (questioning the policy behind HIV-specific criminal laws).
213. *Id.* at 15.
214. *Id.* at 20–22.
215. *See id.*
216. *See id.* at 20.

amongst the population, but instead a prisoner will likely engage in risky sexual practices while incarcerated.[217] As a matter of fact, when a prisoner and those who had sexual contact with him are released, more people are now at risk of HIV transmission.[218]

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

Retribution is also not an adequate justification for incarcerating someone for HIV transmission, particularly where there is an absence of a guilty mind as part of the *mens rea* component required of the defendant.[223] This point is particularly important because the law in Florida does not require the specific intent to transmit HIV—which casts doubt over any attempt to seek retribution for acts that do not entail such guilty mind.[224]

Likewise, deterrence as a goal is not a good way to prevent transmission of HIV, as sexual acts are not driven so much by reason but rather by many other complex emotional drives that deterrence cannot destroy.[225] For deterrence to be effective, reasoning and logic must be the driver behind the decision not to engage in the prohibited act.[226] The criminal prosecution of HIV transmission is elusive as to its utility in a philosophical sense—and yet its ability to have a tangible negative effect on

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

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

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

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

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

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

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

227. *See* Catherine Dodds & Peter Keogh, *Criminal Prosecutions for HIV Transmission: People Living with HIV Respond*, 17 INT. J. OF STD & AIDS 315, 316–18 (2006) (noting the psychological stigmatization that HIV-specific criminal laws have on PLWHA, as well as the public health repercussions that such stigmatization fosters); Elliot, *supra* note 201 at 23–25; Clare Dyer, *HIV Conviction Is a Landmark Case*, BBC NEWS (Oct. 14, 2003, 3:30 PM), http://news.bbc.co.uk/2/hi/uk_news/3191312.stm.

228. Elliot, *supra* note 201, at 32

229. *Id.* at 23.

230. *See* Elliot, *supra* note 201, at 7, 23–25; *infra* Section IV.B.3.b (discussing the public health objective of promoting individual responsibility for safer sex practices).

231. Dodds & Keogh, *supra* note 227, at 315, 317–18.

232. *Id.* at 315.

scrutinized, and comments were divided into twelve thematic categories.[233] Of all comments, 90% were critical of the criminalization of the *reckless* transmission of HIV.[234] The comments fell into two major categories: (1) shared responsibility, and (2) stigma and discrimination.[235] One of the comments identified by these researchers, which typifies the *shared responsibility* concern, reads as follows: "There is something called collective responsibility. I think . . . [the complainant] should be responsible for their lives in the first place—female African respondent."[236] In a comment illustrating the second category, another participant stated: "So I don't want to go back to that hospital. I even fear to go back there because of the Dica case [first successful HIV prosecution in England and Wales]—male African respondent."[237]

The research study referenced in the preceding paragraph indicates that PLWHA felt a heightened sense of stigma after successful prosecutions in the United Kingdom.[238] HIV-related prosecutions roll back public health efforts aimed at treating PLWHA, as suggested by their direct comments, as well as by the collective concern of professional associations within the public health system.[239]

It is our role to challenge the State of Florida as to the rationale behind its HIV criminalization laws—and as to their necessity.[240] PLWHA are no more of a threat to society today than they were in 1997, 1986, or 1981, just as they are no more of a threat to the United Kingdom today than they were before that country's first effective prosecution against HIV transmission took place.[241] The State of Florida has taken it upon itself to revisit its criminal laws time and again throughout the living years of the HIV epidemic in order to further penalize transmission of the condition.[242]

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233. *Id.* at 316.

234. *Id.*

235. *Id.*

236. Dodds & Keogh, *supra* note 227, at 316; *see also infra* Section IV.B.3.b (discussing the public health objective of promoting individual responsibility for safer sex practices).

237. *See* Dodds & Keogh, *supra* note 227, at 316; Dyer, *supra* note 227 (reporting on the first HIV-specific criminal conviction in England and Wales).

238. *See* Dodds & Keogh, *supra* note 227, at 316–18.

239. *See Position Statement*, *supra* note 201; *supra* Section IV.A.

240. *See* FLA. STAT. §§ 381.0041, 796.08(5) (2015); *Position Statement*, *supra* note 201; *infra* Sections IV.A.1–3 (questioning the function and framework of such laws).

241. *See, e.g.*, Ray v. Sch. Dist., 666 F. Supp. 1524, 1529–31 (M.D. Fla. 1987); Dodds & Keogh, *supra* note 227, at 315–18; *supra* Part III (pointing out the unfounded fears that form a part of the history of stigmatization behind HIV/AIDS).

242. *See, e.g.*, FLA. STAT. § 384.34(5) (Supp. 1998); FLA. STAT. § 384.34(5) (1997); FLA. STAT. § 384.34(1) (Supp. 1996); *supra* Part II (mentioning the various changes Florida has made to its HIV-specific criminal laws, making them increasingly punitive).

The state should revisit them again today. Below are three models that Florida may turn to in reforming its HIV criminalization laws.[243]

1. The Texas Model

Florida can repeal its HIV-specific criminal laws in their entirety. A number of states have never passed HIV-specific criminal laws and instead rely on their traditional criminal codes.[244] Texas is one of them;[245] New York is another.[246] Texas applies its aggravated assault and attempted murder statutes to HIV transmission.[247] In reversing and remanding a lower court's prosecution, an appellate court in Texas ruled that HIV constituted a deadly weapon.[248]

The lack of HIV-specific laws does not mean that such states do not use their traditional criminal laws in order to convict suspects where such convictions are based on unfounded science.[249] Texas uses its laws in the prosecution of cases that could not possibly result in HIV transmission.[250] In 2008, a Texas court sentenced a homeless man to thirty-five years for allegedly spitting at an officer.[251] The saliva of the suspect was deemed a deadly weapon in spite of the fact that HIV cannot possibly be transmitted through saliva.[252] The officer did not acquire HIV, as expected.[253] The convicted man will only be eligible for parole halfway through his sentence.[254] He maintains to this day that he never spat at the officer.[255] The

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243. *See infra* Sections IV.A.1–3.

244. *See generally* VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22 (specifying each state where HIV-specific criminal laws do not exist).

245. *See id.* at 222 (noting that no HIV-specific criminal laws exist in Texas).

246. *See id.* at 151–52 (noting that no HIV-specific criminal laws exist in New York).

247. *See id.* at 222–29 (providing numerous examples in which Texas has used its general criminal code to prosecute PLWHA).

248. Mathonican v. State, 194 S.W.3d 59, 67–68 (Tex. Ct. App. 2006).

249. *See* VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 222–29 (providing numerous examples in which Texas has used its general criminal code to prosecute PLWHA).

250. *Id.*

251. Gretel C. Kovach, *Prison for Man with H.I.V. Who Spit on a Police Officer*, N.Y. TIMES, May 16, 2008, at A16.

252. *Id.*; *see also How Do You Get HIV or AIDS?*, *supra* note 29 (noting that HIV cannot be transmitted through air, water, saliva, tears, sweat, insects, dishes, bottles, toilet seats, or casual contact).

253. *See* Kovach, *supra* note 251.

254. *Id.*

255. *Id.*

law in Florida does not function exactly like Texas' law in this respect,[256] but it should be noted that section 775.0877 of the Florida Statutes is similar in spirit to the case law in Texas in that it utilizes rather ambiguous language to encompass erroneously perceived means of HIV transmission, such as the term *body fluids*, which may or may not encompass saliva.[257] Section 775.0877 of the Florida Statutes even specifies that transmission of HIV is not required.[258]

Such spitting cases are not restricted to places where HIV-specific criminal laws are lacking, such as in Texas; they happen in Florida as well, where HIV-specific criminal laws exist.[259] This brings up several questions: (1) what is the purpose of section 775.0877 of the Florida Statutes, Florida's sentence enhancement provision; (2) is it to prevent criminal transmission of HIV, or is it simply to penalize PLWHA because of their HIV-positive status; and (3) why does the law in Florida not require HIV transmission, or even the mere possibility of HIV transmission—, as it is a fact that certain bodily fluids could not possibly transmit the virus.[260] The law in Florida seems to accomplish the same thing that Texas has accomplished through its general aggravated assault provisions; it renders the imagined plausibility of HIV transmission as an aggravated circumstance.[261] If the purpose of HIV-specific criminal laws is to prevent HIV-transmission, a true concern for the transmission of HIV would be backed by laws that actually punish the intentional transmission of the virus or at the very least the possibility of

256. *See* FLA. STAT. § 775.0877(1) (2015); VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 42, 222 (noting that an HIV-positive Florida man was charged with attempted murder under the state's traditional criminal laws in Florida for yelling that he had HIV and biting an officer—he was subsequently sentenced to fifteen years in prison for aggravated battery with a deadly weapon).

257. FLA. STAT. § 775.0877(1) (2015); *see also How Do You Get HIV or AIDS?*, *supra* note 29; VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 42, 222, 222 nn.1208–09.

258. FLA. STAT. § 775.0877(5) (2015).

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

260. *See* FLA. STAT. § 775.0877 (2015); *How Do You Get HIV or AIDS?*, *supra* note 29.

261. *See* VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 222; *supra* Section II.C (discussing how HIV-positive status under section 775.0877 of the 2015 Florida Statutes is treated as an aggravated circumstance).

such transmission.[262] It is conceivable to imagine a case in Florida where elder abuse has occured and where the HIV-positive aggressor spits during the course of the abuse, and subsequently section 775.0877 of the Florida Statutes is applied to enhance sentencing by incorporation of the criminal transmission of HIV as an additional offense.[263]

The conduct of the state should reflect modern science, either where HIV-specific laws exist or where such laws are lacking, and the general criminal code is used instead.[264] States should not use statutes to strip people of their freedom in situations where such people could not possibly have committed the crimes they are being convicted of, particularly if such convictions are based on irrational fears or discredited science.[265] The saliva of PLWHA is not a dangerous weapon.[266] If Florida entirely repeals its HIV-specific criminal provisions, it is urged not to use the remainder of its criminal code to prosecute cases that do not serve the public interest and only undermine public health efforts by spreading unfounded fears of HIV infection.[267] Such fears would only serve to further stigmatize PLWHA.[268]

2. The California Model

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

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

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

264. *See* Ray v. Sch. Dist., 666 F. Supp. 1524, 1529 (M.D. Fla. 1987); *supra* Sections III.A.2, B.2 (discussing the modern science behind HIV).

265. *See* VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 225; Dodds & Keogh, *supra* note 227, at 315–16; Kovach, *supra* note 251; *How Do You Get HIV or AIDS?*, *supra* note 29; *supra* Part IV (providing examples of cases where the criminal law is utilized at odds with science in order to prosecute PLWHA where HIV-transmission cannot occur).

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

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

268. *Id.*; Dodds & Keogh, *supra* note 227, at 316–17 (documenting negative feelings of PLWHA following a highly publicized prosecution for the criminal transmission of HIV).

therefore analogous to section 384.24 of the Florida Statutes.[269] It reads as follows:

> (a) Any person who exposes another to the human immunodeficiency virus—HIV—by engaging in unprotected sexual activity when the infected person knows at the time of the unprotected sex that he or she is infected with HIV, has not disclosed his or her HIV-positive status, and acts with the specific intent to infect the other person with HIV, is guilty of a felony punishable by imprisonment in the state prison for three, five, or eight years. Evidence that the person had knowledge of his or her HIV-positive status, without additional evidence, shall not be sufficient to prove specific intent.[270]

Three main differences can be appreciated when comparing California's law to Florida's.[271] In California, (1) the criminal provision explicitly criminalizes unprotected sexual activity, (2) it requires the specific intent to transmit the virus, and (3) it makes explicitly clear that mere knowledge of an HIV-positive diagnosis is not enough to obtain a conviction where further evidence of intent is lacking.[272] All three of these additional requirements are absent in the Florida provision.[273]

a. *Specific Intent*

The value in having specific intent codified in the law ties into the discussion of the objective behind the criminal law.[274] If the objective of section 384.24 of the Florida Statutes is to either seek retribution for or to deter criminal acts, then Florida should amend the provision to target only acts where the specific intent to transmit HIV exists.[275] This would ensure that the public health of citizens is protected from the intentional spread of

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269. *See* CAL. HEALTH & SAFETY CODE § 120291 (West 2015); FLA. STAT. § 384.24 (2015).

270. CAL. HEALTH & SAFETY CODE § 120291(a) (West 2015).

271. *Compare id., with* FLA. STAT. § 384.24 (2015).

272. CAL. HEALTH & SAFETY CODE § 120291 (West 2015).

273. *Compare id., with* FLA. STAT. § 384.24 (2015).

274. *See* CAL. HEALTH & SAFETY CODE § 120291(a) (West 2015); THE GLOB. COMM'N ON HIV & THE LAW, RISKS, RIGHTS & HEALTH 20, 24 (2012), http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf.

275. THE GLOB. COMM'N ON HIV & THE LAW, *supra* note 274, at 24 (noting that HIV-related criminalization is only justified for prosecuting intentional cases of HIV transmission); *see also* FLA. STAT. § 384.24(1)–(2) (2015).

HIV where criminal intent exists and that PLWHA are not prosecuted for crimes they did not commit.[276]

Merely knowing of an HIV-positive diagnosis should not be enough to construe a criminal intent to transmit the virus.[277] Proper care under an ART regimen can make the viral load of people living with HIV undetectable, significantly reducing the risk of HIV transmission to undetectable levels.[278] PLWHA cannot be said to desire the transmission of HIV merely because of engaging in sexually active lifestyles.[279] The law in Florida effectively ignores the science behind the probability of HIV transmission—irrespective of the facts of a particular case—regardless of whether ART, Truvada, or condoms are involved.[280] This effectively ensures the targeting of PLWHA for merely carrying the virus through the cold disregard of any actual intent to transmit the disease.[281] The answer as to why someone who knows that he or she has an HIV-positive diagnosis and may not wish to disclose such a status is a complex one and often involves varying factors, such as the fear of being rejected, a person's present engagement in an abusive relationship, or the belief that the virus will not be transmitted because of precautions that the person has taken against HIV transmission.[282]

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276. *See* THE GLOB. COMM'N ON HIV & THE LAW, *supra* note 274, at 23–25 (noting that prosecutions of PLWHA where the intent to transmit HIV is not proven raise a set of questions as to the motivations behind the alleged acts that do not lead to verifiable answers).

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

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

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

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

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

282. Buchanan, *supra* note 34, at 1257 (discussing complex reasons on why PLWHA may fail to disclose their HIV status to a partner).

The Center for HIV Law and Policy, a national organization dedicated to advocating in favor of the human rights of PLWHA, applauds the modernization of HIV-specific state laws, and even suggests additional changes for the state of California.[283] It notes that specific intent may not be necessary in some instances, given that "[c]ases in which people living with HIV engage in conduct with the specific intent and actual likelihood to inflict harm through transmission of HIV are exceedingly rare and, regardless, can be addressed through existing criminal assault statutes," which falls back on the Texas model above.[284]

In Florida's case, a simple amendment to its provisions can ensure that only criminals are incarcerated for true, intentional crimes.[285] The best route for Florida may be either to repeal sections 384.24 and 775.0877 of the Florida Statutes in their entirety or to amend them to fit the crime by adding the requirement of a specific intent to transmit HIV.[286] Such a determination will rest on the Florida Legislature.[287] However, allowing the provisions to remain in their present form is cruel and unjust considering how they are often used to prosecute people who did not intend to transmit HIV.[288]

b. *Affirmative Defenses*

The law in California also offers the affirmative defense of condom use.[289] That is, if PLWHA use condoms, it negates the criminal transmission

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283. THE CTR FOR HIV LAW & POLICY, ENDING AND DEFENDING AGAINST HIV CRIMINALIZATION: THIS IS HOW WE WIN, A TOOLKIT FOR COMMUNITY ADVOCATES, VOL. 3, at i, 21–22 (2013).

284. *Id.* at 34; *see also* Buchanan, *supra* note 34, at 1254 (pointing out the rarity of intentional HIV transmission, and noting that when it does happen, it often involves means other than through sexual contact such as the deliberate injection of contaminated blood through needles); *supra* Part IV.A.1.

285. THE GLOB. COMM'N ON HIV & THE LAW, *supra* note 274 at 24–25; *see generally* FLA. STAT. § 384.24 (2015); FLA. STAT. § 775.0877 (2015).

286. THE GLOB. COMM'N ON HIV & THE LAW, *supra* note 274, at 24–25; *Specific Intent*, *supra* note 42; *see generally* FLA. STAT. § 384.24 (2015); FLA. STAT. § 775.0877 (2015).

287. *See* Elliot, *supra* note 201, at 8; THE GLOB. COMM'N ON HIV & THE LAW, *supra* note 274, at 15; VOL. I STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 23.

288. *See* THE GLOB. COMM'N ON HIV & THE LAW, *supra* note 274, at 24–25 (pointing out a myriad of questions that surface over the fairness in prosecuting PLWHA when the specific intent to transmit HIV is not required by HIV-specific criminal provisions); VOL. I STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 8, 14, 29, 41 (providing many examples of prosecutions where the specific intent to transmit HIV is absent).

289. *See* CAL. HEALTH & SAFETY CODE § 120291(b)(2) (West 2015) (defining the unprotected sexual activity required to violate the provision as "sexual activity without the

of HIV pursuant to section 120291 of the California Health and Safety Code.[290] Other protective measures that PLWHA may use against HIV transmission include ART, Truvada as PrEP for usage by a sexual partner, and engaging in sexual practices that minimize infection—such as engaging in oral sex.[291] Such measures would not amount to an affirmative defense under California law as per the language in the present statute, but they may raise a valid argument in court.[292]

In Florida, the usage of condoms does not serve as an affirmative defense against the criminal transmission of HIV.[293] PLWHA are always suspects under the law when they engage in sexual activity in Florida.[294] The only affirmative defense in Florida is either a lack of knowledge of an HIV-positive status on the side of the accused or an acknowledgement form recognizing disclosure on the side of the accused and consent from the other party—which is a sure means to prove that such disclosure and consent took place prior to engagement in sexual activity.[295]

The Sero Project, a national network of PLWHA and their families fighting the discrimination and stigmatization associated with an HIV-positive status, is glad to provide such an acknowledgement form ensuring that adequate notification was provided to the presumably uninfected partner.[296] This may be an exaggerated measure, but unfortunately, it may also be necessary to protect PLWHA from being accused of crimes they did not commit in states such as Florida.[297] Otherwise, the court's arguments are

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use of a condom"). Affirmative defense is defined as: "A defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all [of] the allegations in the complaint are true. The defendant bears the burden of proving an affirmative defense. . . . Also termed *plea in avoidance*; *plea in justification*." *Affirmative Defense*, BLACK'S LAW DICTIONARY (10th ed. 2014).

290. *See* CAL. HEALTH & SAFETY CODE § 120291(a)–(b).

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

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

293. *See* FLA. STAT. §§ 384.24(2), 775.0877(6) (2015).

294. FLA. STAT. §§ 384.24, 775.0877 (2015); *see also* VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTION, *supra* note 22, at 3.

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

296. *HIV Criminalization: What You Need to Know*, *supra* note 295 (providing an HIV status disclosure form for PLWHA).

297. *See id.*; THE GLOB. COMM'N ON HIV & THE LAW, *supra* note 274, at 24–25 (pointing out a myriad of questions that surface over the fairness in prosecuting of PLWHA);

prone to involvement of a *he said, she said* style litigation, where one party claims the disclosure of HIV status and consent, while the other party asserts the non-disclosure of HIV status and a lack of consent to sexual intimacy.[298] Recommendations by the Sero Project to PLWHA in order to prove disclosure, include:

> [1)] Save email[s], text exchanges, voicemail recordings, social media profiles or other evidence that you disclosed your HIV-[positive] status—if arrested, your computer may be seized; save copies in a safe separate location; [2)] [t]ake your partner with you to your doctor or caseworker and ask them to note your partner's knowledge of your HIV-[positive] status in your file; [3)] [t]alk about your HIV-[positive] status in front of your partner and a third party you trust who could testify that you disclosed; [4)] [m]ake a video with your partner . . . about your HIV status [discussing] your HIV status [with your partner]; [5)] [k]eep a diary . . . [of] occasions when you discussed your HIV status with your partner; [6)] [m]ake note of physical evidence of your HIV-[positive] status, like medications in clear sight, doctor visit reminders, HIV-related brochures or magazines, etc., that others have seen; [and] [7)] [h]ave your partner sign an acknowledgement form . . . .[299]

Section 384.24 of the Florida Statutes can be changed with a simple amendment, providing protection to PLWHA from frivolous claims by including new defenses—affirmative or otherwise—for responsible individuals, such as a presumption of innocence where: (1) a condom was used; (2) the individual had an undetectable viral load; (3) Truvada as PrEP was used by an individual's sexual partner; (4) consensual engagement in sexual acts with a low risk of HIV transmission occurred as a means to mitigate the possibility of transmission; or (5) no actual HIV transmission took place between parties.[300]

VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 3, 3 n.8, 4, 4 n.13, 8, 14–15, 15 n.39 29, 44 (providing many examples of prosecutions where partners have accused HIV-positive people of non-disclosure).

298. *See* VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 8, 14–15, 29, 44 (providing many examples of prosecutions where partners have accused HIV-positive people of non-disclosure).

299. *HIV Criminalization: What You Need to Know*, *supra* note 295 (depicting such points under the heading *PROTECT YOURSELF*).

300. FLA. STAT. § 384.24 (2015); *see also* CAL. HEALTH & SAFETY CODE § 120291 (West 2015); FLA. STAT. § 775.0877(5) (2015); IOWA CODE ANN. § 709D.3 (West 2015); *How Is Truvada Used to Treat HIV-1 Infection?*, *supra* note 158; *Viral Load*, *supra* note 150; *supra* Part III (discussing such prevention methods against HIV transmission); *infra*

c. *Limiting Sentence Enhancement to Sexual Offenses*

Section 12022.85 of the California Penal Code is California's sentence enhancement provision for specific crimes committed by PLWHA.[301] Unlike section 775.0877 of the Florida Statutes, the California provision limits sentence enhancement to sexual crimes, such as rape and unlawful intercourse, as defined by the code.[302] Florida's law is more encompassing of a longer list of crimes and includes crimes such as battery, aggravated assault, and elder abuse, which may or may not include sex crimes.[303]

HIV is most commonly transmitted through sexual contact and intravenous drug use.[304] Such recognition is central to the HIV criminal transmission provisions of both states, as it is an essential element of the crimes described in both section 120291 of the California Health and Safety Code and section 384.24 of the Florida Statutes for the transmission of HIV to happen through sexual contact.[305] It is inconsistent with modern science that section 775.0877 of the Florida Statutes requires *only* "the transmission of body fluids from one person to another" in addition to one of its listed crimes in order for the *criminal transmission of HIV* to take place.[306] To make matters even more disturbing, the Florida provision does not even require the actual the transmission of the virus.[307]

Florida must recognize that saliva, tears, and several other bodily fluids do not transmit HIV.[308] A good place to start is by limiting section 775.0877 of the Florida Statutes in scope to sexual offenses, just as section 384.24 is limited only to sexual acts.[309] The Florida Legislature may also limit the scope of section 775.0877 by deleting from the provision crimes,

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

301. CAL. PENAL CODE § 12022.85 (West 2015).

302. *Compare id.* § 12022.85(b) (West 2015), *with* FLA. STAT. § 775.0877(1) (2015).

303. FLA. STAT. § 775.0877(1) (2015).

304. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, HIV PREVENTION: PROGRESS TO DATE (2013), http://www.cdc.gov/nchhstp/ux-test-2015/newsroom/docs/factsheets/progress-508.pdf.

305. *See* CAL. HEALTH & SAFETY CODE § 120291 (West 2015); FLA. STAT. § 384.24(2) (2015).

306. FLA. STAT. § 775.0877(1), (3) (2015).

307. *Id.* § 775.0877(5) (explicitly denoted in the provision as a separate point).

308. *See How Do You Get HIV or AIDS?*, *supra* note 29 (noting that HIV cannot be transmitted through air, water, saliva, tears, sweat, insects, dishes, bottles, toilet seats, or casual contact).

309. *Compare* FLA. STAT. § 775.0877(1) (2015), *with* FLA. STAT. § 384.24(2) (2015).

such as battery and aggravated assault, both of which are difficult to conceive in relation to the transmission of HIV when a crime such as rape is absent.[310] This provision is squarely at odds with modern medical science.[311]

3. The Iowa Model

Iowa is the only state that has modernized its HIV-specific criminal laws after the National HIV/AIDS Strategy was launched in 2010.[312] The State of Iowa has come a long way in modernizing its HIV-specific criminal laws, from a state in which the supreme court took judicial notice of the erroneous belief that "oral sex is a well [known] recognized means of transmission of the HIV" in 2006,[313] to one that takes into account "practical means to prevent transmission."[314]

Section 709D.3 of the Iowa Code contains one of the most scientifically sound HIV criminalization laws in the nation.[315] It takes into account the intent to transmit HIV, brings the condition into parity with other infectious diseases, makes available a number of defenses, and takes into account whether or not the virus was actually transmitted to the alleged victim.[316]

The Iowa provision makes an intentional act culminating in infection a class "B" felony; an intentional act not resulting in infection a class "D" felony; an unintentional yet "reckless" act as to the life of another, where such act culminated in infection of the other, a class "D" felony; and an unintentional yet "reckless" act as to the life of another, where such act did not culminate in infection to the other, as a "serious misdemeanor."[317] The

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310. *See* FLA. STAT. § 775.0877(1) (2015). *But see* CAL. HEALTH & SAFETY CODE § 120291 (West 2015).

311. *See* FLA. STAT. § 775.0877(1) (2015); *How Do You Get HIV or AIDS?*, *supra* note 29.

312. *HIV is Not a Crime*, ONEIOWA, http://www.oneiowa.org/work/hiv (last visited Feb. 8, 2016); *see also* Iowa Dep't of Pub. Health, *Discussion of Revisions to Iowa Code 709C — Criminal Transmission of HIV*, CTR. FOR HIV L. & POL'Y (Jan. 2012), http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/709C%20Fact%20Sheet%20for%20IDPH.pdf (depicting the topics officials discussed in reforming Iowa's draconian model, with an eye to aligning the state with the National HIV/AIDS Strategy).

313. State v. Stevens, 719 N.W.2d 547, 551 (Iowa 2006); *see also* Buchanan, *supra* note 34, at 1248 (pointing to this fact).

314. *See* IOWA CODE ANN. §§ 709D.2, 709D.3 (West 2015).

315. *See id.* § 709D.3; *HIV is Not a Crime*, *supra* note 312 (pointing to the success of the organization in lobbying the Iowa Legislature to modernize its draconian laws into ones that are not at odds with modern science).

316. IOWA CODE ANN. § 709D.3 (West 2015).

317. *Id.*

provision is therefore a tiered system that weighs different factors relative to the harm caused by either intentional or reckless acts.[318]

The provision outlines several defenses, including: (1) the act of becoming pregnant and continuing the pregnancy to term, and thereon declining treatment;[319] (2) for purposes of proving the intent to transmit the virus, it is not enough to have evidence that a person knew or should have known that he or she was HIV-positive and exposed others to the disease, regardless of the frequency of the conduct; (3) the fact that an HIV-positive person either informed his or her partner of an HIV-positive diagnosis or took preventive measures against transmission of the virus precludes the attribution of either the intent to transmit the virus or a reckless disregard for the life of another; and (4) previous knowledge by the complainant of the HIV status of the accused is explicitly categorized as an affirmative defense.[320] Florida may choose to adopt any of such defenses.

a. *HIV in Parity with Other Infectious Diseases*

One of the most important changes in the Iowa Code was that it brought HIV to parity with other infectious diseases.[321] In fact, section 709D.3 of the Iowa Code does not mention HIV at all and instead refers to a *contagious or infectious disease*.[322] This is noteworthy because it shows that in 2014, the Iowa Legislature made the opposite decision that the Florida Legislature made in 1997.[323] Recall from Part II that Florida has returned to section 384.24 of the Florida Statutes at various points in time, and in 1997, it did so in order to bifurcate the statute into parts (1) and (2) in order to separate HIV from other transmissible diseases.[324] Iowa did the reverse in

318. *See id.*; *HIV is Not a Crime*, *supra* note 312 (noting that the legislation "has converted sentencing to a tiered system instead of the one size fits all approach used in 709C.").

319. *See* Khan, *supra* note 180, at 440–52 (discussing the repercussions of using the criminal law to prosecute expectant mothers with an emphasis on expanding legal protections for such women).

320. *See* IOWA CODE ANN. § 709D.3(5)–(8) (West 2015).

321. *See id.* § 709D.2 (defining "a [c]ontagious or infectious disease [a]s hepatitis in any form, meningococcal disease, AIDS or HIV as defined in section 141A.1, or tuberculosis.").

322. *See id.* § 709D.3.

323. *Compare* Iowa Dep't of Pub. Health, *supra* note 312 (detailing considerations by Iowa officials in reforming the Iowa Code in 2012), *and* IOWA CODE ANN. § 709D.3 (West 2015) (depicting the changes encoded into that came about to the Iowa Code from such reforms), *with* FLA. STAT. § 384.24 (1997), and Sections II.A, II.B (detailing how Florida changed its HIV-specific criminal provisions in 1997, making HIV transmission a third degree felony as opposed to a first degree misdemeanor).

324. *See* FLA. STAT. § 384.24 (1997); *supra* Sections II.A–B.

2014 and now defines a *contagious or infectious disease* as "hepatitis in any form, meningococcal disease, AIDS or HIV . . . or tuberculosis."[325] This reform was a centerpiece of the new Iowa law, which stemmed widely from major criticisms on the lack of such parity in its former provisions.[326] Why segregate HIV from other potentially dangerous diseases? Various contagious diseases can pose a grave harm to the human body, and their intentional transmission is often not accounted for in the law.[327] Hepatitis, syphilis, and tuberculosis could all potentially pose grave harm when transmitted from one person to another.[328]

Florida treats HIV as if its transmission were a death sentence, modern science has made HIV a maneagable chronic condition; the disease is no longer a death sentence if it is treated with proper medication.[329] Hepatitis C is more common than HIV, is highly communicable, and kills more people in the United States than the latter.[330] Human Papillomavirus, or HPV, can cause cervical and anal cancers, among other forms of cancer and also happens to be much more common than HIV.[331]

If Florida's desire is to protect its citizens from the possible transmission of a viral infection that may potentially kill its host, then it is only logical for Florida to criminalize other similarly infectious diseases in parity with HIV under the law.[332] Section 384.34 of the Florida Statutes is

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325. IOWA CODE ANN. § 709D.2(1) (West 2015).

326. *See* Iowa Dept. of Pub. Health, *supra* note 312 (pointing to authority in its recommendation to bring HIV to parity with other diseases: "The statute should avoid stigmatizing or singling out a specific disease, such as HIV, especially when there is currently very good evidence that the statutes do not change a person's risk or disclosure behaviors (Burris, 2007)," while recognizing that there are other communicable diseases that should be treated in the same manner as HIV/AIDS in line with scientific knowledge).

327. *See id.*; Buchanan, *supra* note 34, at 1278–84 (discussing this point in detail while highlighting other diseases whose transmission often goes unpunished).

328. *See* Buchanan, *supra* note 34, at 1278–84.

329. *See HIV Treatment as Prevention*, *supra* note 152; *supra* Section III.B.2 (discussing the scientific advances that have made HIV/AIDS a chronic condition as opposed to a fatal disease).

330. Steven Reinberg, *Hepatitis C Now Kills More Americans Than HIV*, U.S. NEWS & WORLD REP. (Feb. 20, 2012, 5:00 PM), http://health.usnews.com/health-news/news/articles/2012/02/20/hepatitis-c-now-kills-more-americans-than-hiv; *see also* Buchanan, *supra* note 34, at 1280 (discussing hepatitis amongst other communicable diseases of concern that are often not criminalized at parity with HIV); FLA. STAT. § 384.24(a) (2015) (criminalizing several transmissible diseases while excluding Hepatitis C).

331. Buchanan, *supra* note 34, at 1281–84 (discussing communicable diseases of concern that are often not criminalized at parity with HIV).

332. *See* Iowa Dep't of Pub. Health, *supra* note 312 (recognizing that there are other communicable diseases that should be treated in the same manner as HIV/AIDS in line with scientific knowledge); Buchanan, *supra* note 34, at 1278–84 (discussing communicable

underinclusive in terms of the diseases it aims to protect the public against; it is also unfairly bifurcated in two, stigmatizing HIV infection through segregation irrespective of modern science.[333] Florida can ameliorate this by collapsing HIV back into section 384.24(1), effectively ending its segregation from other sexually transmissible diseases as a condition worthy of more punishment than syphilis or genital herpes simplex.[334]

It is highly suggested that Florida consider thoroughly revisiting section 384.24(1), which lists various sexually transmissible diseases that section 384.34(1) specifies the transmission of to be a misdemeanor of the first degree.[335] The state should ensure that its provisions are backed by a current scientific understanding, as there may be other areas of concern within the statutory language worth reviewing. Notably, section 384.24(1) specifies that the transmission of *pelvic inflammatory disease* or *acute salpingitis* may result in a misdemeanor.[336] Pelvic inflammatory disease ("PID") is an infection of the female reproductive system that is often but not exclusively caused by sexually transmissible diseases, such as chlamydia and gonorrhea.[337] It is not transmitted from one partner to another in a manner akin to a virus.[338] Acute salpingitis is a narrower term that describes infection of the fallopian tubes.[339] PID is not a sexually transmissible disease.[340] Women cannot pass on PID onto men or other women.[341] PID is a serious inflammation of the female reproductive system that requires immediate treatment, as it may lead to serious complications, and this should not require incarceration.[342] Florida should strongly consider taking another

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diseases of concern that are often not criminalized at parity with HIV); *but cf.* FLA. STAT. § 384.24(2) (2015) (criminalizing only the transmission of HIV as a third degree felony).

333. FLA. STAT. § 384.24(1)–(2) (2015). The statute criminalizes only the transmission of HIV as a third-degree felony, while criminalizing other sexually transmissible diseases as a first-degree felony. *Id.* § 384.34. It also criminalizes several transmissible diseases while excluding Hepatitis C. *Id.* § 384.24(1).

334. FLA. STAT. § 387.24 (1997); *see also supra* Section II.A (discussing how Florida did the reverse in 1997, bifurcating the provision in two).

335. FLA. STAT. §§ 384.24(1), .34(1) (2015).

336. *Id.*

337. *Pelvic Inflammatory Disease (PID) — CDC Fact Sheet*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/std/pid/stdfact-pid.htm (last updated May 4, 2015).

338. *Pelvic Inflammatory Disease (PID)*, PLANNED PARENTHOOD, http://www.plannedparenthood.org/learn/stds-hiv-safer-sex/pelvic-inflammatory-disease-pid (last visited Feb. 8, 2016).

339. *See* FLA. STAT. § 389.24(2) (2015); *Pelvic Inflammatory Disease (PID)*, *supra* note 338.

340. *Pelvic Inflammatory Disease (PID)*, *supra* note 338.

341. *See id.*

342. *See id.*; FLA. STAT. § 384.24(2) (2015).

look into the medical science behind the conditions it aims to prevent the transmission of as listed in section 384.24 of the Florida Statutes.[343]

b. *HIV Transmission Taken into Account*

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

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

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343. *See* FLA. STAT. § 384.24 (2015).
344. *See id.* §§ 384.24(2), 775.0877(5).
345. *See* FLA. STAT. § 775.0877(5) (2015).
346. *See id.* §§ 384.24(2), 775.0877(5).
347. *See id.* §§ 384.34(5), 775.0877(3).
348. *See id.* § 384.34(5).
349. *See* IOWA CODE § 709D.3 (West 2015).
350. *Id.*
351. *Id.*
352. *See* Elliot, *supra* note 201, at 8, 15; *supra* Section IV.A.1 (discussing instances of prosecutions for HIV transmission where such transmission could not have taken place and how applicable criminal provisions in Florida facilitate these prosecutions).
353. *See* Buchanan, *supra* note 34, at 1241–43 (commenting on the public health critique behind a lack of recognition of such advances by the criminal law); *supra* Section III.B (discussing such advances in preventive means against HIV transmission).

B. *On An Alternative to a Punitive State*

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

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

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

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

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354. *See $1 Million Grant from State of Florida Will Support UM HIV/AIDS Research*, U. MIAMI (Sept. 24, 2014), http://med.miami.edu/news/1-million-grant-from-state-of-florida-will-support-um-hiv-aids-research.

355. *See id.* (highlighting the importance of medical research for HIV/AIDS).

356. *Id.*

357. *Id.*

358. *Id.*

359. Press Release, The AIDS Inst., The AIDS Inst. Praises Fla. Governor Rick Scott & Legislature for Increased Funding to AIDS Drug Assistance Program Will Help Alleviate Long Wait List to Receive Medications (Apr. 30, 2012), http://www.theaidsinstitute.org/sites/default/files/attachments/floridaadapstatebudget.pdf.

360. *ADAP Premium Plus: Understanding Your Health Insurance Options*, FLORIDAHEALTH.GOV 3–6, http://www.floridahealth.gov/diseases-and-conditions/aids/adap/_

federal governments combine in order to provide low-income individuals who do not have the means to pay for HIV medications the financial means to do so.[361] At one point before the governor signed this budget, Florida had an extensive wait list of over four thousand people who could not pay for their medications.[362]

The preceding paragraph highlights the importance of state funding in order to ensure the wellbeing of PLWHA. If it is that the economy truly has improved as the governor states, and Florida truly has more available funds in its state budget as a result, then the governor and the Florida Legislature should adopt a comprehensive prevention plan to combat the transmission of HIV in Florida.[363] Below is a set of statistics that highlight the dire need for the launch of such a comprehensive campaign, followed by a model that Florida may use in both developing and implementing such a campaign.

1. Statistics

a. *Florida and Miami-Dade County*

Florida's HIV infection rate is not decreasing.[364] Official estimates by the Florida Department of Health places the transmission rate of HIV for the entire State of Florida in 2014 at 31.4, up from 28.3.[365] This translates to 6147 total new infections in 2014, as opposed to a total of 5467 infections in 2013.[366] From 2009 to 2013, the incidence of new transmissions had not risen above 6000 per year.[367] While the population in Florida has been

documents/understanding-your-health-insurance-options-9-22.pdf (last visited Feb. 8, 2016); *see also* Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 10–38, § 2647, 104 Stat. 576, 603 (1990).

361. Press Release, The AIDS Inst., *supra* note 359.

362. *Id.*

363. *See $1 Million Grant from State of Florida Will Support UM HIV/AIDS Research*, *supra* note 354 ("[W]e have turned our economy around. So as our economy gets better, we have more money in the budget, and we can do more things. Healthcare is clearly one of them. We must work together to treat these complex diseases . . . .").

364. *Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, FLORIDAHEALTH.GOV (Dec. 4, 2014), http://www.floridahealth.gov/diseases-and-conditions/aids/surveillance/_documents/HIV-AIDS-slide-sets/2014/state-trends-2014.pdf.

365. *Id.* All transmission rates are consistently referred to as per every hundred thousand individuals. *Id.*

366. *Id.*

367. *Id.*

steadily growing, the rate of transmission in 2009 was lower than in 2014—at 29.5 as opposed to 31.4.[368]

Miami-Dade County suffers from one of the highest HIV/AIDS transmission rates in the nation, much higher than the State of Florida's combined HIV transmission rate;[369] The metropolitan area also suffers from a similar problem to Florida's problem in that its HIV transmission rate is not decreasing.[370] In fact, just as with the trend in the state as a whole, 2013 saw the highest transmission rate since 2009 for Miami-Dade County at 55.6.[371] Contrast this with a transmission rate of 53.2 in 2009.[372]

A sharp downturn can be observed in HIV transmission rates between 2008 and 2009 across the country due to the quicker initiation of ART, particularly as implemented at the moment of HIV-positive diagnosis as opposed to later on during the progression of the disease.[373] Such a decrease in transmission rates due to better ART is evidence that proper treatment, along with the implementation of HIV prevention strategies, can reduce transmission rates across the board.[374]

b. *San Francisco*

San Francisco is important because its HIV transmission rate has traditionally been very high, similar in light to that of Miami-Dade County's and also because it has become a center for innovation in the implementation of interventions geared at lessening HIV transmission.[375] In absolutes, the number of new infections do not seem very high for the City and County of

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368. *Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364.

369. *Id.*; *$1 Million Grant from State of Florida Will Support UM HIV/AIDS Research*, *supra* note 354.

370. *$1 Million Grant from State of Florida Will Support UM HIV/AIDS Research*, *supra* note 354; *see also Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364; *HIV/AIDS Epidemiology Partnership 11a*, FLORIDAHEALTH.GOV (Jan. 2, 2014), http://www.floridahealth.gov/diseases-and-conditions/aids/surveillance/_documents/partnership-slide-sets/part11a-13.pdf.

371. *HIV/AIDS Epidemiology Partnership 11a*, *supra* note 370.

372. *Id.*

373. *See* Dana P. Goldman et al., *Early HIV Treatment in the United States Prevented Nearly 13,500 Infections Per Year During 1996–2009*, 33 HEALTH AFF. 362, 364–65 (2014) (finding that early ART treatment within that period also reduced HIV transmission rates); *HIV/AIDS Epidemiology Partnership 11a*, *supra* note 370.

374. *See* Goldman et al., *supra* note 373, at 364–65.

375. *See Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364; *HIV/AIDS Epidemiology Partnership 11a*, *supra* note 370; S.F. DEP'T OF PUB. HEALTH, HIV EPIDEMIOLOGY ANNUAL REPORT 1–3 (2013), http://www.sfdph.org/dph/files/reports/RptsHIVAIDS/HIVAIDAnnlRpt2013.pdf.

San Francisco; for example, in 2008, there were 515 new cases of HIV within the city, and in 2009, there was a decrease to 463.[376] However, the proportion of new HIV cases in relation to the total population for San Francisco is analogous to Miami-Dade's.[377] San Francisco had an HIV transmission rate of 63.74 in 2008 and 56.78 in 2009.[378] The HIV transmission rates in Miami-Dade County for the same period were 71.1 and 53.2, respectively.[379]

The statistics above show that Miami-Dade County and San Francisco are both affected by high HIV transmission rates.[380] But in the years following 2009, San Francisco has utilized its resources to decrease the proliferation of the epidemic through effective prevention strategies, and its HIV transmission rate has been declining while Miami-Dade Countys has at best remained stagnant.[381] In 2013, San Francisco had only 359 new cases of HIV, which translates to a transmission rate of 42.87.[382] Miami-Dade was still at a transmission rate of 55.6 for 2013—and has recently been named the

376. S.F. DEP'T OF PUB. HEALTH, *supra* note 375, at 3.

377. *See HIV/AIDS Epidemiology Partnership 11a*, *supra* note 370; S.F. DEP'T OF PUB. HEALTH, *supra* note 375, at 3–4, 8.

378. *See* U.S. CENSUS BEREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR COUNTIES OF CALIFORNIA: APRIL 1, 2000 TO JULY 1, 2009 2 (Mar. 2010), http://www.census.gov/popest/data/counties/totals/2009/CO-EST2009-01.html (follow "XLS" link under "California"); *Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364. The San Francisco Department of Public Health does not publish transmission rates. *See* S.F. DEP'T OF PUB. HEALTH, *supra* note 375, at 3–4. HIV transmission rates are yielded per 100,000 with the simple formula: number of cases in a specified time / population at that time × 100,000 = rate. *Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364. Utilizing the formula and data by the U.S. Census Bureau, the transmission rate for San Francisco is easily ascertainable. *See* U.S. CENSUS BEREAU, *supra*, at 2; *Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364. The population of San Francisco in 2008 was approximately 808,001, while the population in 2009 was approximately 815,358. U.S. CENSUS BEREAU, *supra*, at 2; *Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364. 515 / 808,001 × 100,000 = 63.74; and 463 / 815,358 × 100,00 = 56.78. *See* U.S. CENSUS BEREAU, *supra*, at 2; *Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364; S.F. DEP'T OF PUB. HEALTH, *supra* note 375, at 3–4.

379. *HIV/AIDS Epidemiology Partnership 11a*, *supra* note 370.

380. *See id.*; S.F. DEP'T OF PUB. HEALTH, *supra* note 375, at 3–4, 8.

381. *See HIV/AIDS Epidemiology Partnership 11a*, *supra* note 370; S.F. DEP'T OF PUB. HEALTH, *supra* note 375, at 2–4 (depicting a declining number of cases within the 2009–2013 period with a minute spike in 2012).

382. S.F. DEP'T OF PUB. HEALTH, *supra* note 375, at 3; *see also Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364. The population of San Francisco in 2013 was approximately 837,442. *San Fransisco County QuickFacts from the U.S. Census Bereau*, U.S. CENSUS BEREAU, http://quickfacts.census.gov/qfd/states/06/06075.html (last updated May 28, 2015). 359 / 837,442 × 100,000 = 42.87. *See Epidemiology of HIV Infection Florida Reported Through 2014*, *supra* note 364; S.F. DEP'T OF PUB. HEALTH, *supra* note 375, at 3.

number one place in the nation for new HIV infections per 100,000 residents in 2014, with Broward County closely behind in second place.[383] With the official epidemiology report for 2014 released, San Francisco city officials reported an 18% drop in the transmission rate from 2013 to 2014.[384] The following subsection will explore the programs that the City and County of San Francisco has set in place in order to combat the HIV/AIDS epidemic—in hopes that Florida may encourage or adopt a more proactive approach to addressing HIV transmission.[385]

2. Proactive Programs to End HIV/AIDS

a. *San Francisco and Getting to Zero*

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

> Coordinate a strategic plan to get San Francisco to zero new HIV infections, zero HIV-associated deaths and zero stigma [through]: (1) [c]onvey[ing] a sense of urgency and possibility among San Franciscans; (2) [e]mpower[ing] and engag[ing] a broad diversity of stakeholders and creat[ing] shared responsibility for achieving the vision; (3) [c]reat[ing] communication and coordination

383. *HIV/AIDS Epidemiology Partnership 11a*, *supra* note 370; Steve Bousquet & Michael Auslen, *Florida Leads U.S. in New HIV Cases After Years of Cuts in Public Health*, MIAMI HERALD (Jan. 22, 2016, 9:08 PM), http://www.miamiherald.com/news/state/florida/article56192770.html (detailing the negative effects that cuts on public health programs targeting HIV/AIDS have had on Florida's HIV transmission rate during Gover Rick Scott's time in office).

384. Chris Roberts, *SF Records All-Time Low in HIV Infections, Deaths*, S.F. EXAMINER (July 6, 2015, 10:11 PM), http://www.sfexaminer.com/sf-records-all-time-low-in-hiv-infections-deaths. Note that the statistics are adjusted from year to year and vary slightly within both the Florida Department of Health and the San Francisco Department of Public Health estimates, but the trends are consistent. *See Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364; S.F. DEP'T OF PUB. HEALTH, *supra* note 375, at 3. A slight difference in numbers yields slightly different HIV transmission rates. *See Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364; S.F. DEP'T OF PUB. HEALTH, *supra* note 375, at 3. San Francisco is reporting 371 new cases of HIV for 2013 within updated numbers for 2014 pending an official report. *"Getting to Zero" in San Francisco Consortium: Zero New HIV Infections, Zero HIV Deaths, Zero Stigma, and Discrimination*, GETTING TO ZERO S.F., http://www.sfdph.org/dph/files/hc/HCAgen/HCAgen2015/July%207/Getting%20to%20Zero%20July%202015%20Health%20Commission%20to%20MM.pdf (last visited Feb. 8, 2016); *see also* S.F. DEP'T OF PUB. HEALTH, *supra* note 375, at 3. That number was estimated at 359 for the same period within the 2013 official report. S.F. DEP'T OF PUB. HEALTH, *supra* note 375, at 3.

385. *See infra* Section IV.B.2.

> amongst the various stakeholders to implement the strategic plan; (4) [m]obiliz[ing] all necessary resources to achieve the vision; (5) [d]evelop[ing] robust metrics, and report[ing] progress annually on World AIDS Day; [and] (6) [a]chiev[ing] this vision by ensuring the health and wellness of individuals and communities living with HIV and at risk for HIV.[386]

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

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

386. Susan Buchbinder, *"Getting to Zero" in San Francisco: Zero HIV Infections, Zero HIV Deaths, Zero HIV Stigma*, S.F. DEP'T PUB. HEALTH, http://www.sfdph.org/dph/files/sfchip/GettingToZero-HIV.pdf (last visited Feb. 8, 2016).

387. *See id.*

388. *See id.*

389. *See* Russell Sabin, *City Endorses New Policy for Treatment of H.I.V.*, N.Y. TIMES, Apr. 4, 2010, at A25.

390. Mehroz Baig, *How San Francisco Is Getting to Zero on HIV*, HUFFINGTON POST (Dec. 10, 2014, 11:31 AM), http://www.huffingtonpost.com/mehroz-baig/how-san-francisco-is-getting-to-zero-on-hiv_b_6290636.html; *see also* Buchbinder, *supra* note 386; *Heroes in the Flight: Meet Hiroyu*, S.F. AIDS FOUND., http://staf.org/hiv-info/hot-topics/from-the-experts/heroes-in-the-fight-meet-3.html (last visited Feb. 8, 2016).

391. *See* Baig, *supra* note 390.

392. *See id.*; Grant Colfax, *Moving Towards Reduced HIV Incidence: How the San Francisco Experience Can Inform National HIV/AIDS Strategy Implementation*, S.F.

quickly reducing the viral load to undetectable levels, which in effect reduces the probability that more people will become infected with the virus.[393]

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

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

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DEP'T PUB. HEALTH, http://www.uchaps.org/assets/DrColfaxHHS.pdf (last visited Feb. 8, 2016); *Viral Load*, *supra* note 150.

393. *Viral Load*, *supra* note 150; *see also* Buchbinder, *supra* note 386.

394. Baig, *supra* note 390; Buchbinder, *supra* note 386.

395. *See* Baig, *supra* note 390 (detailing how San Francisco plans to increase its retention rate under *Retention*).

396. *Guidelines for the Use of Antiretroviral Agents in HIV-1-Infected Adults and Adolescents*, AIDSINFO, http://aidsinfo.nih.gov/contentfiles/lvguidelines/glchunk/glchunk_18.pdf (last updated Apr. 8, 2015).

397. *See* Buchbinder, *supra* note 386; Colfax, *supra* note 392; *HIV/AIDS Epidemiology Partnership 11a*, *supra* note 370.

398. *See* Colfax, *supra* note 392.

399. *See How San Francisco Plans to 'Get to Zero' New Infections of HIV*, PBS (Apr. 11, 2015, 11:40 AM), http://www.pbs.org/newshour/bb/san-francisco-plans-get-zero-new-infections-hiv. The transcript of a PBS news report depicts how a San Francisco Public Health worker implements the *Getting to Zero* effort:

> JOHN CARLOS FREY: We followed social worker Sandra Torres on the bus as she checked up on a few patients who needed extra help keeping up with their appointments. She and other social workers are continually tracking people down. SANDRA TORRES: We're going to knock on the door. JOHN CARLOS FREY: In the gritty Tenderloin district we went to a single-room occupancy hotel where an HIV positive patient was staying. He's an intravenous drug user and not taking medication. SANDRA TORRES: Hi Honey, how you doing? JOHN CARLOS FREY: Torres dropped off an appointment reminder and I asked her about the patient afterward. JOHN CARLOS FREY: It seems like an enormous effort for one person. SANDRA TORRES: That's what it's gonna take, though. That is absolutely what it's gonna take.

Id.

communities in order to better address treatment and prevention by placing its emphasis and resources on the areas with the highest need.[400]

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

b. *How the State of Florida Can Help*

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

400. *See* Colfax, *supra* note 392.
401. *See* Baig, *supra* note 390; Buchbinder, *supra* note 386.
402. *Buchbinder*, *supra* note 386; *How San Francisco Plans to 'Get to Zero' New Infections of HIV*, *supra* note 399.
403. *See How San Francisco Plans to 'Get to Zero' New Infections of HIV*, *supra* note 399.
404. *See* Mark Mascolini, *Wider PrEP Use in San Francisco Could Cut New HIV Rate by 70%*, NATAP, http://www.natap.org/2015/CROI/croi_08.htm (last visited Feb. 8, 2016).
405. *See How San Francisco Plans to 'Get to Zero' New Infections of HIV*, *supra* note 399.
406. *See* Buchbinder, *supra* note 386.
407. *Id.*
408. *See About Test Miami*, TEST MIAMI, http://www.testmiami.org/EN-About-Us (last visited Feb. 8, 2016); Baig, *supra* note 390.

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

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

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

409. *Enhanced Comprenhensive HIV Prevention Planning and Implementation for Metropolitan Statistical Areas Most Affected by HIV/AIDS*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/hiv/prevention/demonstration/echpp (last updated Apr. 19, 2013). These are efforts by the federal government under its National HIV/AIDS strategy in order to improve its understanding of the HIV/AIDS epidemic in selected areas and better implement interventions to help combat the disease. *Id.*

410. *See id.*; *supra* Section IV.B.2.a (demonstrating how the local government in San Francisco can make a difference by launching a comprehensive prevention campaign).

411. *See About Test Miami*, *supra* note 408; *supra* Section IV.B.2.a (depicting how San Francisco coordinates *Getting to Zero*).

412. *See About Test Miami*, *supra* note 408; Buchbinder, *supra* note 386; *supra* Section IV.B.2.a (depicting how San Francisco coordinates *Getting to Zero*).

413. *See About Test Miami*, *supra* note 408.

414. *See* FLA. STAT. § 381.0046 (2014); Buchbinder, *supra* note 386; *supra* Section IV.B.2.a (depicting how San Francisco coordinates *Getting to Zero*).

415. *See* FLA. STAT. § 381.004.

> of the target group to ensure its effectiveness. The campaign shall provide information on the risk of HIV and AIDS infection and strategies to follow for prevention, early detection, and treatment. The campaign shall use culturally sensitive literature and educational materials and promote the development of individual skills for behavior modification. (2) The Department of Health shall establish dedicated positions within the department for HIV and AIDS regional minority coordinators and a statewide HIV and AIDS minority coordinator. The coordinators shall facilitate statewide efforts to implement and coordinate HIV and AIDS prevention and treatment programs.[416]

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

Florida can become a pioneer in the fight against HIV/AIDS by proving to the world that it too can strive to get to "zero new HIV infections, zero HIV-associated deaths, and zero stigma," as does the City and County of San Francisco.[421] Much of the groundwork has already been set by efforts from the state and federal governments, along with private actors such as organizations devoted to the prevention and treatment of HIV/AIDS.[422] It is

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416. *Id.*

417. *See id.*

418. *See* Buchbinder, *supra* note 386 (recommendations mirror the "*Getting to Zero*" campaign); *supra* Section IV.B.2.a (depicting how San Francisco coordinates "*Getting to Zero*").

419. *See* FLA. STAT. § 381.0046 (2015); *supra* Section IV.B.2.a (depicting how San Francisco coordinates "*Getting to Zero*").

420. *See* FLA. STAT. § 381.0046 (2015).

421. *See* Buchbinder, *supra* note 386; *supra* Section IV.B.2.a (depicting how San Francisco coordinates "Getting to Zero").

422. *See About the Ryan White HIV/AIDS Program*, *supra* note 139 (noting how the Ryan White CARE act has funded programs throughout the states in order

about time that all parties in Florida work together rather than in isolation from each other in order to deliver a public health campaign that can truly make a difference in the spread of the HIV/AIDS epidemic.[423]

c. *More Funding Necessary*

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

> (1) The Budget contains [three] million [dollars] General Fund ongoing for a syringe exchange program that will allow for the statewide purchasing of syringe disposal containers, sterile syringes, and other materials to be used by local health departments and community-based organizations to reduce the transmission of bloodborne pathogens such as HIV and Hepatitis C. . . . (2) The Budget provides [two] million [dollars] General Fund ongoing for Pre-Exposure Prophylaxis outreach and education pilot programs. These programs are intended to reduce new HIV infections for uninsured and underinsured at-risk

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to provide services to those in need); *About Test Miami*, *supra* note 408. Efforts exist in South Florida to stop the spread of HIV, for example, Test Miami describes itself as:

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

About Test Miami, *supra* note 408.

423. *See About Test Miami*, *supra* note 408; Press Release, The Aids Inst., *supra* note 359; *$1 Million Grant from State of Florida Will Support UM HIV/AIDS Research*, *supra* note 354.

424. *See* Press Release, The Aids Inst., *supra* note 359; MAYOR'S 2015–2016 & 2016–2017 PROPOSED BUDGET, MAYOR EDWIN M. LEE, CITY & COUNTY OF SAN FRANCISCO, CALIFORNIA 14 (2015), http://sfmayor.org/ftp/uploadedfiles/mayor/budget/Budget_Book_fy_2015_16_and_2016_17_Final_web.pdf [hereinafter SAN FRANCISCO MAYOR'S PROPOSED BUDGET].

425. *See* CALIFORNIA 2015–16 STATE BUDGET 31 (2015), http://www.dof.ca.gov/documents/FullBudgetSummary-2015.pdf; SAN FRANCISCO MAYOR'S PROPOSED BUDGET, *supra* note 424, at 14.

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

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

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

Florida Governor Rick Scott proposed and set aside a specific grant in 2014 for "high-impact HIV prevention [in] Orange County."[431] But his recommendation was absent for 2015.[432] Other than consistent funding for ADAP, which is very crucial funding, HIV/AIDS funding in Florida reveals a lack of cohesiveness.[433] There is no HIV/AIDS prevention plan such as *Getting to Zero* or any funding specifically encouraging the usage of Truvada

426. CALIFORNIA 2015–16 STATE BUDGET, *supra* note 425, at 31.
427. *Id.*
428. SAN FRANCISCO MAYOR'S PROPOSED BUDGET, *supra* note 424, at 14.
429. Press Release, The Aids Inst., *supra* note 359; *$1 Million Grant from State of Florida Will Support UM HIV/AIDS Research*, *supra* note 354.
430. *See $1 Million Grant from State of Florida Will Support UM HIV/AIDS Research*, *supra* note 354; Press Release, The Aids Inst., *supra* note 359.
431. *Community Public Health (Program); County Health Departments Local Health Needs*, KEEP FLA. WORKING, http://www.keepfloridaworking.com/web%20forms/Budget/BudgetServiceIssueList.aspx?rid1=237141&rid2=207272&si=64200700&title=COMMUNITY%20PUBLIC%20HEALTH%20(Program);COUNTY%20HEALTH%20DEPARTMENTS%20LOCAL%20HEALTH%20NEEDS (last visited Feb. 8, 2016).
432. *See id.*
433. *See id.* The governor has not recommended ADAP funding for 2015, and has been consistent in the absence of a recommendation to do so despite actual approval of funds for the program. *$1 Million Grant from State of Florida Will Support UM HIV/AIDS Research*, *supra* note 354.

as PrEP.[434] Florida needs to set aside a specific fund for ongoing and robust HIV-prevention programs.[435] The HIV transmission rate in Florida is not decreasing, and several highly populated areas within Florida, such as Miami-Dade County, Broward County and Orange County, suffer disproportionately from some of the highest HIV transmission rates in this nation.[436]

3. Expanding Educational Bounds

a. *Comprehensive HIV/AIDS Education for the Youth*

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

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

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434. *Community Public Health (Program); County Health Departments Local Health Needs*, *supra* note 431; *$1 Million Grant from State of Florida Will Support UM HIV/AIDS Research*, *supra* note 354; *see also* Buchbinder, *supra* note 386.

435. *See* Buchbinder, *supra* note 386; *Community Public Health (Program); County Health Departments Local Health Needs*, *supra* note 431.

436. *$1 Million Grant from State of Florida Will Support UM HIV/AIDS Research*, *supra* note 354; *see also* Bousquet & Auslen, *supra* note 383 (emphasizing the damage that Governor Rick Scott's budget cuts on HIV/AIDS public health funds have caused on both the State of Florida as a whole and on the areas most affected by the HIV/AIDS epidemic, such as Miami-Dade and Broward counties). *Compare Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364, *with HIV/AIDS Epidemiology Partnership 11a*, *supra* note 370.

437. *See Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364.

438. *Id.*

439. *Id.*

440. *See HIV/AIDS Epidemiology Partnership 11a*, *supra* note 370.

previous decades.[441] Therefore, it is crucial that Florida provide the youth with comprehensive sexual education throughout its public school system in order to reduce the transmission of the disease within this age group.[442] Empowering students with knowledge of the disease and methods of prevention are necessary so that young people can understand how HIV is transmitted and how to prevent infection.[443] Section 1003.46 of the Florida Statutes is on point and reads as follows:

> (1) Each district school board may provide instruction in acquired immune deficiency syndrome education as a specific area of health education. Such instruction may include . . . the known modes of transmission, signs and symptoms, risk factors associated with acquired immune deficiency syndrome, and means used to control the spread of acquired immune deficiency syndrome . . . (2) a school shall: (a) Teach abstinence from sexual activity outside of marriage . . . while teaching the benefits of monogamous heterosexual marriage; (b) [e]mphasize . . . abstinence; . . . (c) [t]each that each student has the power to control personal behavior and; . . . (d) [p]rovide instruction and material that is appropriate for the grade and age of the student.[444]

The instruction provided to students in Florida does not adequately address the HIV epidemic.[445] Instead, it focuses on an ideological paradigm emphasizing *abstinence* and *heterosexual marriage*.[446] But the fact is MSM are disproportionately affected by HIV transmission, and their explicit exclusion from educational instruction effectively negates addressing this reality in schools across the state.[447] The Florida provision implies that monogamous same-sex marriages are not a means of HIV prevention.[448] This is flawed and simply untrue—as monogamous relationships, irrespective of the sexual orientation of those taking part in them, function as

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441. *See id.*

442. *See About Test Miami*, *supra* note 408; *HIV/AIDS Epidemiology Partnership 11a*, *supra* note 370.

443. *See About Test Miami*, *supra* note 408.

444. FLA. STAT. § 1003.46 (2015).

445. *See id.*; *supra* Section III.B.2 (discussing methods of prevention known to reduce HIV transmission that are not explicitly included in section 1003.46 of the Florida Statutes).

446. FLA. STAT. § 1003.46 (2015).

447. *See id.* § 1003.46(2)(a); *Today's HIV/AIDS Epidemic*, *supra* note 82 (noting that the Centers for Disease Control & Prevention reports that MSM constituted sixty-three percent of all new HIV infections in 2010).

448. FLA. STAT. § 1003.46 (2015). It specifically excludes monogamous same-sex marriages from its definition. *Id.*

a proper means of prevention for HIV transmission.[449] What is the purpose of having educational instruction meant to teach youth on HIV prevention if the state excludes disproportionately affected minorities from such instruction?[450]

The structure of section 1003.46 of the Florida Statutes is lacking in substance and should be amended to encompass all known facts on HIV transmission in a direct and explicit manner.[451] An example of a thorough educational structure for instruction on HIV/AIDS can be found in the California Education Code, reading as follows:

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

449. *See Lower Your Sexual Risk of HIV*, AIDS.GOV, http://www.aids.gov/hiv-aids-basics/prevention/reduce-your-risk/sexual-risk-factors (last revised Aug. 13, 2015) (describing ways in which one can lower the risk of HIV transmission without limiting monogamy to male-female relationships). Also worth mentioning is that the Supreme Court has ruled that laws banning marriages between people of the same sex violates the United States Constitution. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015). From the words of the Court: "There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices." *Id.* at 2599.

450. FLA. STAT. § 1003.46(2)(a) (2015).

451. *See id.*; *Lower Your Sexual Risk of HIV*, *supra* note 449.

> HIV/AIDS, including stereotypes and myths regarding persons with HIV/AIDS. This instruction shall emphasize compassion for persons living with HIV/AIDS.[452]

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

The provision in Florida is also written in terms of *may*, rather than *shall* as it is in California.[458] HIV prevention should not be a matter of *may* but should instead be a matter of *shall*.[459] HIV is a lifelong chronic condition that can kill its host if not properly treated.[460] It is a medical condition, and its prevention should be a state interest.[461] HIV is not a moral issue; HIV is a

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452. CAL. EDUC. CODE § 51934 (West 2015).
453. *Id.* § 51934(b)(3); FLA. STAT. § 1003.46(2)(a) (2015).
454. CAL. EDUC. CODE § 51934(b)(3) (2015).
455. FLA. STAT. § 1003.46(2)(a)–(b) (2015).
456. Office of Adolescent Health, *Florida Adolescent Reproductive Health Facts*, U.S. DEP'T HEALTH & HUMAN SERVS., http://www.hhs.gov/ash/oah/adolescent-health-topics/reproductive-health/states/pdfs/fl.pdf (last updated Nov. 13, 2014).
457. *See id.*; *About Test Miami*, *supra* note 408; Steiner & DeCarlo, *supra* note 175.
458. *Compare* CAL. EDUC. CODE § 51934(a) (2015), *with* FLA. STAT. § 1003.46 (2015).
459. *See* CAL. EDUC. CODE § 51934(a) (2015).
460. *See Current Trends Update on Acquired Immune Deficiency Syndrome (AIDS) — United States*, *supra* note 78; Dana P. Goldman et al., *supra* note 373; *supra* Section III.B.2 (discussing the scientific advances that have made HIV/AIDS a chronic condition as opposed to a fatal disease—albeit a serious one requiring medical attention).
461. *See Types of HIV/AIDS Antiretroviral Drugs*, *supra* note 146; *supra* Section III.B.2 (discussing the scientific advances that have made HIV/AIDS a chronic condition as opposed to a fatal disease—albeit a serious one requiring medical attention).

medical condition.[462] Therefore, the state should treat HIV as a medical condition and teach its students the correct information without withholding known methods of transmission, statistics, or an understanding of the scientific knowledge that we have acquired throughout the years about this epidemic.[463] The State of Florida should not shy away from the dissemination of information to its youth.[464]

b. *Accepting Responsibility for One's Actions*

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

In the absence of rape and infidelity, it is hard to conceive of scenarios where each sex partner is not equally responsible for safer sex practices.[469] Even in monogamous relationships, some sense of shared responsibility should exist, as public health experts suggest that everyone should take precaution against HIV transmission.[470] It is unjust to say that people living with HIV/AIDS are at total fault for HIV transmission where the other partner did not take precautions to reduce the possibility of

462. *See* Altman, *New Homosexual Disorder Worries Health Officials*, *supra* note 72; *Current Trends Update on Acquired Immune Deficiency Syndrome (AIDS) — United States*, *supra* note 78; *supra* Section III.A (discussing the moral stigma that has surrounded this medical condition).

463. *See Types of HIV/AIDS Antiretroviral Drugs*, *supra* note 146; *supra* Section III.B.2 (discussing the methods of prevention against HIV transmission).

464. *See* CAL. EDUC. CODE § 51934 (2015).

465. *See Position Statement*, *supra* note 202.

466. *Id.*

467. *See* Buchanan, *supra* note 34, at 1256–62 (discussing the complex reasons on why PLWHA may fail to disclose their HIV status to a partner).

468. *Id.* at 1246 (noting that public health officials fear that HIV-specific criminal laws may foster a false sense of security in HIV-negative people).

469. *See id.* at 1254–55.

470. *See* Elliot, *supra* note 201, at 7 (recommending everyone to take precaution against HIV transmission and to not rely on the "false sense of security" the criminal law provides).

infection.[471] Merely pointing fingers at another and having that person prosecuted for engaging in sex acts hampers the public health interest in reducing stigma;[472] instead, we should be ensuring that PLWHA seek adequate health services and encouraging everyone to adopt a heightened sense of individual responsibility for safer sex practices.[473] Florida should recognize the concept of a shared responsibility in sexual practices in its public health campaign against HIV by explicitly incorporating it into section 381.0046 of the Florida Statutes and in school curriculums by explicitly incorporating it into section 1003.[474] Florida should also consider the concept of a shared responsibility in sexual practices when choosing either to amend or repeal its HIV-specific criminal provisions—as it is unjust for the law to punish those who have a communicable medical condition—while simultaneously turning a blind eye to the failure of those who do not carry such a medical condition in adequately preventing their exposure to the condition through their own volition.[475]

V. CONCLUSION

The HIV/AIDS epidemic arose in a context of confusion and fear of infection that led to a quick stigmatization of the condition.[476] This in turn led to the passage of HIV-specific criminal laws throughout the nation in order to prevent the transmission of HIV.[477] Modern scientific advances in medicine have made HIV a chronic condition that may be prevented through the usage of proper prevention mechanisms known to date, inclusive of (1) safer sex practices, (2) ART, (3) Truvada as PrEP, (4) PeP, and (5) condoms.[478] Florida should either amend or repeal its HIV-specific criminal provisions in recognition of such scientific advances and recognize HIV/AIDS is no longer a death sentence.[479]

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471. *See id.* at 11.

472. *See* Dodds & Keogh, *supra* note 227, at 316 (depicting the feelings of an HIV-positive woman regarding her thoughts on the subject of the collective responsibility that should be shared between sex partners regardless of HIV status—as part of a study aiming at understanding the effects of stigma on PLWHA).

473. *See* THE GLOB. COMM'N ON HIV & THE LAW, *supra* note 275 at 20 (noting that we should all carry a shared sense of moral responsibility in the fight against this condition).

474. *See* FLA. STAT. §§ 381.0046, 1003.46 (2015).

475. *See* FLA. STAT. § 384.34 (2015).

476. *See* Altman, *New Homosexual Disorder Worries Health Officials*, *supra* note 72; *supra* Section III.A.

477. *See supra* Part II.

478. *See supra* Section III.B.

479. *See* FLA. STAT. § 384.34 (2015); *supra* Section III.B, IV.A.

Florida suffers from a steady HIV transmission rate that is not decreasing.[480] The state's resources are better utilized in launching a more comprehensive public health campaign against HIV transmission than it currently has in place. San Francisco's *Getting to Zero* intiative can serve as an excellent model for reform in Florida.[481] Funding for such a comprehensive campaign is absolutely necessary.

The State of Florida must also change its message to its youth, who have seen a relative increase in HIV transmission rates in relation to other age groups in the last couple of years.[482] Comprehensive instruction on methods of HIV prevention with an emphasis on a shared responsibility for sexual practices is key to a reformed education system that will keep everyone up to date on the present reality of the HIV/AIDS epidemic.

480. *See Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364; Bousquet & Auslen, *supra* note 383; *supra* Section IV.B.

481. *See* Buchbinder, *supra* note 386; *supra* Section IV.B.2.a.

482. *See supra* Section IV.B.3.

THE DOCTRINE OF COMITY AND THE RECOGNITION OF FOREIGN DECISIONS IN THE UNITED STATES

MARINA DE LARA MUÑOZ*

I. INTRODUCTION

María José Carrascosa is a Spanish citizen who fell in love and subsequently married Peter W. Innes, a citizen from the United States.[1] A

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year after their marriage they had a daughter, Victoria, and for five years they lived together in New Jersey.[2] In early 2004, Carrascosa and Innes decided to put an end to their marital relationship.[3] That same year the parties signed "an agreement . . . concerning parenting time, restrictions, and the appointment of a third-party parenting coordinator."[4] Moreover, the parties agreed that Victoria could not travel outside of the United States without the written permission of the other parent.[5] Despite this restrictive clause, "Carrascosa and Victoria traveled to Spain without the . . . knowledge of Innes."[6] Given these circumstances, each party decided to appeal to a different justice system—Carrascosa appealed to the Spanish justice seeking a civil annulment of her marriage, and Innes filed a complaint for a divorce, equitable distribution, and joint legal custody in New Jersey.[7] While the case was legally pending in Spain, Judge Parsons of the Superior Court of New Jersey established that the Spanish court did not have the required jurisdiction over the parties, granted Innes temporary custody of Victoria, and ordered the return of the minor to the United States within three weeks.[8] On the other hand, the Spanish court considered that Carrascosa did not remove her daughter wrongfully under the Hague Convention on the Civil Aspects of International Child Abduction, and therefore, there was not a legal obligation to return the minor to the United States.[9] As a consequence of violating the New Jersey court orders, Carrascosa was arrested in New York and incarcerated.[10] Since 2006, Victoria has been living with her maternal grandparents in Valencia.[11] Over all these years, she has not seen her father or her mother who was incarcerated in the Bergen County jail.[12] As Judge Lyons states in the opinion of the Superior Court of New Jersey, this heartbreaking case greatly affected the life of a child who has grown up without the affection of her mother or father.[13]

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1. Innes v. Carrascosa, 918 A.2d 686, 691 (N.J. Super. Ct. App. Div. 2007).
2. *See id.*
3. *Id.*
4. *Id.* at 692.
5. *Id.*
6. *Innes*, 918 A.2d at 692.
7. *Id.*
8. *Id.* at 693.
9. *Id.* at 694–95; The Hague Convention on the Civil Aspects of International Child Abduction, art. 4, Oct. 25, 1980, T.I.A.S. No. 11670.
10. *Innes*, 918 A.2d at 702.
11. *Id.* at 692.
12. *See id.* at 691, 702.
13. *Id.* at 691.

International private law—also called conflict of laws—can be interpreted as the protection of the rights that a nation grants to its citizens through its enforcement within the territory and the dominions of another nation.[14] This body of rules is also considered part of the laws governing within the territory of each country.[15] For that reason, they "must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation."[16] Each country has its own rules regarding the legal proceedings that are going to take place in its own court.[17] This circumstance that causes the relationship among citizens from different states triggers unusual problems: Which court has personal jurisdiction over the defendant and subject matter jurisdiction to hear the case, which law must be applied, and would the decision be recognized and enforced in a foreign country?[18] It has been considered a problematic area for decades, and those parties involved in international disputes have to face more difficulties.[19] The presence of international private law has increased exponentially during the twenty-first century, in which citizens around the world interact with each other through the newest technology or by traveling to foreign countries.[20] It is surprising that despite its complexity and importance in our modern society, there are few articles that deal with the difficulty of the international private law.[21] Indeed, the difficulty of the subject matter regarding the recognition and enforcement of foreign decisions is *scholarly desert*.[22]

Taking as an example the *Carrascosa* case, the purpose of this Comment is to analyze the endeavor of the international community to codify international private law through the work of the Hague Conference

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14. Hilton v. Guyot, 159 U.S. 113, 163 (1895).
15. *Id.*
16. *Id.*
17. *See Overview*, HAGUE CONF. ON PRIV. INT'L L., http://www.hcch.net/index_en.php?act=text.display-tid=26 (last visited Mar. 29, 2016).
18. S.L. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45, 49, 61, 84 (2014).
19. *Id.* at 49; Hans Smit, *International Control of International Litigation: Who Benefits?*, 57 LAW & CONTEMP. PROBS. 25, 25 (1994).
20. *See* Smit, *supra* note 19, at 28; *Foreign-Country Money Judgments Recognition Act Summary*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/ActSummary.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act (last visited Mar. 29, 2016).
21. Strong, *supra* note 18, at 49.
22. *Id.*

and evaluate the American system of recognition and enforcement of foreign countries' decisions.23

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

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

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

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23. *See* Innes v. Carrascosa, 918 A.2d 686, 694, 709 (N.J. Super. Ct. App. Div. 2007); *The Hague Conference on Private International Law*, THE HAGUE, http://www.denhaag.nl/en/residents/to/The-Hague-Conference-on-Private-International-Law.htm (last visited Mar. 29, 2016); Strong, *supra* note 18, at 50–51; *infra* Parts II–III.

24. *See* Hilton v. Guyot, 159 U.S. 113, 163 (1895); Smit, *supra* note 19, at 25; *supra* Part I.

25. *See Overview*, *supra* note 17; *The Hague Conference on Private International Law*, *supra* note 23.

26. *See The Hague Conference on Private International Law*, *supra* note 23.

27. *Overview*, *supra* note 17.

28. *See infra* Sections II.A–B.

29. *See* Statute of The Hague Conference on Private International Law art. 1 *adopted* Oct. 31, 1951, 15 U.S.T. 2228 (entered into force Oct. 15, 1964).

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

Faced with the challenges that rise up in a globalized world, the Hague Conference on Private International Law was created during the nineteenth century to provide a solution to those challenges and respond to the new needs of citizens.[30] It is considered one of the most important and influential organizations with eighty members representing all continents, one of them being the European Union.[31] However, the Hague Conference did not obtain its status of permanent intergovernmental organization until its seventh session in 1951.[32] This new era for the Hague Conference began with the creation and the enforcement of its statute in July of 1955.[33] The statute, which is composed of fifteen articles, establishes the central principles and values that govern the Hague Conference.34 As recognized in Article 1 of the statute, the Hague Conference has the main mission "to work for the progressive unification of the rules of private international law."[35] Therefore, it is the only intergovernmental organization that has a *legislative goal*.[36] In order to provide a higher level of security to individuals and companies when acting in a foreign country, several methods and instruments were created by this leading intergovernmental organization.[37] To overcome those legal impediments that individuals and companies face when cross-border relations and transactions are established, the methods of negotiation and drafting of the Hague Conventions stand out.[38] These conventions developed by the Hague Conference are considered multilateral treaties and deal with diverse fields of private international law, such as

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30. *Overview*, *supra* note 17.
31. *Id.*
32. *More About HCCH*, HAGUE CONF. ON PRIV. INT'L L., http://www.hcch.net/index_en.php?act=text.display&tid=4 (last visited Mar. 29, 2016).
33. *Id.*
34. *See* Statute of The Hague Conference on Private International Law, *supra* note 29.
35. *Id.*, art. 1.
36. *Overview*, *supra* note 17. With these words, The Hague Conference on Private International Law expressed its mission:

> The statutory mission of the Conference is to work for the *progressive unification* of these rules. This involves finding internationally-agreed approaches to issues such as jurisdiction of the courts, applicable law, and the recognition and enforcement of judgments in a wide range of areas, from commercial law and banking law to international civil procedure and from child protection to matters of marriage and personal status.

Id.

37. *The Hague Conference on Private International Law*, *supra* note 23.
38. *See id.*

"international judicial and administrative co-operation; conflict of laws for contracts, torts, maintenance obligations, status and protection of children, relations between spouses, wills and estates or trusts; recognition of companies; [and] jurisdiction and enforcement of foreign judgments."[39] Through the signature and following ratification of these multilateral treaties, the members of the Hague Conference encourage and promote the construction of bridges between the different existing legal systems while respecting their diversity.[40] The active role of the Hague Conference in the unification and codification of the different international private law rules governing in each state facilitates all civil and commercial situations that connect more than one country since the conventions progressively resolve all those differences regarding the jurisdiction of the courts, applicable law, and recognition and enforcement of foreign decisions.[41]

The first session of the Hague Conference on Private International Law took place in August of 1893 by the convening of the Netherland's government.[42] This first session basically consisted of the discussion of family law and general principles of the conflicts of law topics.[43] It had as an outcome the drafting of the first Hague Convention—referred to as the Convention on Civil Procedure with Additional Protocol.[44] The commission decided to write several articles regarding the service of process, taking evidence abroad, deposits for costs, legal aid, and physical detention of foreign debtors.[45] This first Hague Convention, signed on November 14, 1896, and entered into force on May 23, 1899, was considered a huge success due to the ratification by fourteen European countries.[46] Between the first session of the organization and 1904, seven international conventions were adopted by the Hague Conference.[47] Six of these treaties were replaced by modern instruments, including the New Convention on Civil Procedure on March 1, 1954.[48] Following these first conventions, the broad subject of civil procedure was broken down through the drafting of three treaties: the 1965 Convention about service of documents abroad;, the 1970 Convention covering taking of evidence abroad; and the 1980 Convention on

39. *More About HCCH*, *supra* note 32.
40. *See id.*
41. *See id.*
42. *See* Georges A.L. Droz, *A Comment on the Role of The Hague Conference on Private International Law*, 57 LAW & CONTEMP. PROBS. 3, 3 (1994).
43. *Id.*
44. *Id.*
45. *Id.* at 3–4.
46. *Id.* at 3.
47. *More About HCCH*, *supra* note 32.
48. *Id.*; Droz, *supra* note 42, at 3.

International Access to Justice regarding "legal aid, deposits for costs, safe conduct of witnesses, and detention of foreign debtors."[49] These modern conventions are the reflection of the main objective of the Hague Conference to create a close relationship and a bridge between those civil law countries—that is to say those thirty states that signed the Convention on Civil Procedure of 1954 [50] and those countries having common law procedural systems.[51]

Nowadays, the Hague Conference on Private International Law is also aware of the importance of providing to all citizens a constantly updated source of information.[52] For the purpose of keeping individuals informed of the activity and work of the Hague Conference, the Permanent Bureau is in charge of frequently publishing and maintaining a collection of conventions and of creating handbooks that clearly explain the operation of a particular convention.[53] Additionally, the Secretariat edits the proceedings of each session that may be available on CD-ROM or microfiches.[54] Furthermore, the development and new advances of technology have had a substantial impact on this intergovernmental organization.[55] Currently, the Hague Conference makes available three free electronic channels to all citizens interested in the Hague Conference.[56] Through the main webpage of the Hague Conference, general information concerning the international organization may be found.57 Besides this basic information, the different texts of the conventions have also been uploaded: "full status reports, bibliographies, information regarding the authorities designated under the [c]onventions on judicial and administrative co-operation, explanatory

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49. Droz, *supra* note 42, at 4.

50. *Id.* at 3–4. The following forty-two countries have signed the Civil Procedure Convention of 1954: Albania, Argentina, Armenia, Austria, Belarus, Belgium, Bosnia and Herzegovina, People's Republic of China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Finland, France, Germany, Hungary, Iceland, Israel, Italy, Japan, Latvia, Lithuania, Luxembourg, Montenegro, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Suriname, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, and Ukraine. *Status Table: 02: Convention of 1 March 1954 on Civil Procedure*, HAGUE CONF. ON PRIV. INT'L L., http://www.hcch.net/index_en.php?act=conventions.status&cid=33 (last updated Sept. 17, 2015).

51. Droz, *supra* note 42, at 4.

52. *Overview*, *supra* note 17.

53. *Id.*; *see also infra* Section II.B.

54. *Overview*, *supra* note 17.

55. *See id.*

56. *See id.*

57. *Id.*

reports."[58] The development of INCADAT, the International Child Abduction Database, facilitated the access to important judicial decisions taken by national courts regarding the 1980 Hague Convention on the Civil Aspects of International Child Abduction.[59] Finally, the electronic statistical database called INCASTAT—created by the Annual Statistical Forms—is only available for those Central Authorities designated under the 1980 Child Abduction Convention, and it contains return and access applications.[60]

B. *Organization and Operation of the Hague Conference*

The Netherland State Commission, "established by royal decree [on] February 20, 1897, for the purpose of promoting the codification of [P]rivate [I]nternational [L]aw," has the duty to guarantee the correct operation of the Hague Conference through a Permanent Bureau.[61] The Permanent Bureau—also known as Secretariat—has its headquarters at The Hague, Netherlands, and it is "composed of a Secretary General and two Secretaries, of different nationalities, who . . . [are] appointed by the Government of the Netherlands upon presentation by the State Commission . . . [and] have the proper legal knowledge and practical experience."[62] This multinational Secretariat communicates directly with the members of the conference through the experts and central authorities designated by each member.[63] Moreover, the Permanent Bureau also establishes and maintains contacts with international organizations and with any national organ of the member states.[64] The main task adjudicated to the Permanent Bureau by Article 5 of the statute is to prepare and organize the sessions of the Hague Conference and the several

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58. *Id.*
59. *Overview*, *supra* note 17; *see also infra* Section II.B.
60. *Overview*, *supra* note 17.
61. Statute of The Hague Conference on Private International Law, *supra* note 29, art. 3.
62. *Id.* art. 4–5; *see also More About HCCH*, *supra* note 32.
63. Statute of The Hague Conference on Private International Law, *supra* note 29, art. 6; *see also More About HCCH*, *supra* note 32.
64. *See* Statute of The Hague Conference on Private International Law, *supra* note 29, art. 5; *More About HCCH*, *supra* note 32. Among the international organizations to whom The Hague Conference maintains continuing contact are:

> [T]he United Nations—particularly its Commission on International Trade Law (UNCITRAL), UNICEF, the Committee on the Rights of the Child (CRC), and the High Commissioner for Refugees (UNHCR)—the Council of Europe, the European Union, the [Organization] of American States, the Commonwealth Secretariat, the Asian-African Legal Consultative [Organization] (AALCO), the International Institute for the Unification of Private Law (Unidroit) . . . .

More About HCCH, *supra* note 32.

meetings of the special committees that take place.[65] These special committees are established in those periods in which there is no ordinary session of the Hague Conference "for the purpose of preparing draft conventions or studying any questions of private international law that comes within the purpose of the [Hague] Conference."[66] In order to organize both meetings, the members of the Secretariat have the duty to execute the basic research needed for any subject discussed by the Hague Conference.[67]

The statute also establishes two different procedures to obtain the status of a member of the Hague Conference.[68] The first procedure automatically granted the condition of member to those states that had met the following requirements before the drafting of the Statute of the Hague Conference in 1951: (1) participation and attendance to at least one session of the Hague Conference; and (2) signature of the aforementioned multilateral agreement.[69] However, the statute does not bar other states that did not meet with the conditions established on the first procedure to become a member.[70] This status will be conceded to any state as long as its "participation . . . is of judicial interest to the work of the [Hague] Conference."[71] The state concerned will not become a member immediately.[72] Its admission will be contingent upon the decision of the government of the participating states: The new member should be approved by a majority vote on its proposal.[73] This vote must take place "within six months from the day on which [they] have been informed of such proposal."[74] Nevertheless, the admission as a member will only become definitive with the signature of the Statute of the Hague Conference on Private International Law by the state concerned.[75]

The organization functions through the assistance of its members at a periodical and mandatory meeting every four years in plenary session.[76] The

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65. Statute of The Hague Conference on Private International Law, *supra* note 29, art. 5.
66. *Id.* art. 7; *see also More About HCCH*, *supra* note 32.
67. *More About HCCH*, *supra* note 32.
68. *See* Statute of The Hague Conference on Private International Law, *supra* note 29, art. 2.
69. *Id.*
70. *See id.*; *More About HCCH*, *supra* note 32.
71. Statute of The Hague Conference on Private International Law, *supra* note 29, art. 2.
72. *See id.*
73. *Id.*; *see also More About HCCH*, *supra* note 32.
74. Statute of The Hague Conference on Private International Law, *supra* note 29, art. 2.
75. *Id.*
76. *Id.* art. 3; *see also More About HCCH*, *supra* note 32.

statute foresees the call of an extraordinary session in case of need.[77] In this situation, the special meeting of the Hague Conference will be called by the Government of Netherlands upon the requesting of the State Commission, with the approval of the members.[78] It is in the plenary sessions where the different countries discuss and adopt the draft of conventions and recommendations that have been prepared by the Special Commissions.[79] Each state has only one vote and all decisions are adopted through obtaining the majority of the votes by the delegations of the member states that have attended the session.[80] The ordinary meeting concludes with the delegations of the member states signing a Final Act where all the texts have been brought together.[81]

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

> The expenses resulting from the regular sessions of the [Hague] Conference shall be borne by the Government of the Netherlands. In the event of a special session, the expenses shall be apportioned among the [m]embers of the [Hague] Conference who are represented at the session. In any case, compensation for the travel and living expenses of the [d]elegates shall be paid by their respective [g]overnments.[82]

The state members not only have the right and the duty to assist the mandatory plenary session, but they are also responsible for the correct functioning of the organization.[83] Although the Statute vested the power to ensure the organization of the Hague Conference to the Netherlands Standing Government Committee, in practice, due to a tendency and natural evolution towards constitutionalism and democracy, the member states have a decisive role and influence on the decision-making of the direction the Hague Conference is taking.[84]

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77. Statute of The Hague Conference on Private International Law, *supra* note 29, art. 3; *see also More About HCCH*, *supra* note 32.
78. Statute of The Hague Conference on Private International Law, *supra* note 29, art. 3.
79. *Id.* art. 7; *More About HCCH*, *supra* note 32.
80. *More about HCCH*, *supra* note 32.
81. *Id.*
82. Statute of The Hague Conference on Private International Law, *supra* note 29, art. 10.
83. *More About HCCH*, *supra* note 32.
84. *Id.*; *see also* Statute of The Hague Conference on Private International Law, *supra* note 29, art. 3.

In our current days, where there is a constant flow of international transactions, the importance of the Hague Convention on International Private Law is indisputable.[85] With more than forty conventions drafted and signed by countries from all continents, the Hague Conference has developed a crucial instrument to guard the rights of the citizens when confronting a lawsuit in a foreign country, as seen in the Convention of 1965, as well as to erase any doubt regarding the authority of the court, the governing law, and the recognition and enforcement of foreign decisions through the unification of the private international rules of every state.[86]

C. *The Hague and the United States of America*

The system of treaties institutionalized by the Hague Conference has been seen from the internationalist's point of view as a functional instrument to achieve international cooperation.[87] There is no dispute on the fact that each country has ancient roots in its judicial system that defines the country's systems of procedural law.[88] These differences among countries cause many lawyers that deal exclusively with domestic litigation to see rules of procedure from other systems of law as objectionable, which appear to be reasonable and logical in their own country.[89] From the United States approach, the impression that the United States presents "the best possible model for emulation by foreign countries"[90] regarding procedural laws leads to the idea that the treaties created by the Hague Conference do not improve international cooperation in litigation.[91] Therefore, this objective may be achieved through the work of each state in improving its domestic procedures.[92]

85. *See The Hague Conference on Private International Law*, *supra* note 23.

86. *See Conventions*, HAGUE CONF. ON PRIV. INT'L L., http://www.hcch.net/index_en.php?act=conventions.listing (last visited Mar. 29, 2016); *The Hague Conference on Private International Law*, *supra* note 23.

87. *See* Cornelis D. van Boeschoten, *Hague Conference Convention and the United States: A European View*, 57 LAW & CONTEMP. PROBS. 47, 50–51 (1994).

88. *Id.* at 48.

89. *Id.* at 50–51.

90. Smit, *supra* note 19, at 34.

91. *See id.* at 44–45.

92. *Id.* at 33.

1. The Influence of the United States of America in the International Organization

The influence of the United States in the work of the Hague Conference to harmonize rules of procedure is palpable since its entry as a member in 1964.[93] Following the inspiration of the common law system, there was a replacement of diplomatic and consular channels with judicial and administrative channels when establishing and maintaining relationships with foreign countries.94 This change was possible thanks to the creation of a *central authority* mechanism.[95] Each member of the Hague Conference has the obligation to designate a central governmental authority, and the states must commit themselves to effectuate and return service abroad through that central authority when required to do so.[96] The designation of central authorities had as another consequence the addition of two new tasks to the work of the Permanent Bureau: circulating information regarding recent changes in the central authorities and observing how those conventions that involved international and central authorities are functioning.[97] The importance of both assignments has substantially increased during the last fifteen years.[98] However, part of this shift was also consequence of the growth of the relationships among private individuals after World War II that increased the international civil procedural traffic.[99] Another example of the effect that the incorporation of the United States had in the heart of this international organization was the drafting of Articles 15 and 16 of the 1965 Convention.[100] Both provisions were inspired by the Fifth and Fourteenth Amendments of the U.S. Constitution, where the due process requirement is established.[101] The implementation of these articles provide all defendants

93. Droz, *supra* note 42, at 4.
94. *Id.*
95. *Id.*
96. *Id.* at 5.
97. *Id.* at 8.
98. Droz, *supra* note 42 at 8.
99. *Id.* at 4.
100. *Id.*; *see also* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Feb. 10, 1969, 20 U.S.T. 1965, 364–65.
101. U.S. CONST. amends. V, XIV.
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

from the United States the protection required to not suffer any kind of injustice that might take place in a lawsuit in any of the twenty-one countries that signed and ratified the Convention of 1965.[102] Specifically, Article 15 reads as follows:

> Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that (a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or (b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention, and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend. Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled (a) the document was transmitted by one of the methods provided for in this Convention, (b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document, (c) no

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U.S. CONST. amend. V.

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

U.S. CONST. amend. XIV, § 1.

102. *See* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 100, at 364–65; *Status Table 14: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, HAGUE CONF. ON PRIV. INT'L L., http://www.hcch.net/index_en.php?act=conventions.status&cid=17 (last updated June 17, 2015). The following fifty-four countries have signed the Convention of 1965: Albania, Argentina, Armenia, Australia, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, People's Republic of China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Ireland, Israel, Italy, Japan, Republic of Korea, Latvia, Lithuania, Luxembourg, Malta, Mexico, Monaco, Montenegro, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom of Great Britain and Northern, United States of America, and Venezuela. *Id.*

> certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed. Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.[103]

The inclusion of this article in the convention gives all defendants whose lawsuits are filed abroad to not face a judgment against them if the defendant did not appear during the process after the correct service of the summons or an equivalent document.[104] Therefore, the court will only be authorized to render a judgment if the conditions established in the article take place.[105] However, the judge will have discretion to order provisional or protective measures every time that extraordinary circumstances occur.[106] Hence, this method has the goal of requiring the compliance of a standard of international procedural due process in all judicial proceedings involving private individuals.[107] The safety measure of procedural due process of Article 15 is complimented by the requirement of substantive due process of Article 16.[108]

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

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103. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 100, at 364.
104. *Id.*
105. *Id.*
106. *Id.*
107. *See id.*
108. *See* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 100, at 364–65.

one year following the date of the judgment. This article shall not apply to judgments concerning status or capacity of persons.[109]

As seen in Article 15, when procedural due process has not been violated, the judge has the ability to issue a judgment against an absent defendant.[110] If due cause is shown, any defendant has the possibility to file a bill of review to reopen a default judgment pursuant to Article 16 of the Convention of 1965.[111]

During the 1990s, the U.S. Government realized that its citizens had to overcome a big obstacle when enforcing a valid judgment in the context of civil international litigation since foreign countries were reticent to enforce and recognize judgments from United States courts.[112] In light of this reality, Cornelis D. van Boeschoten, member of the Netherlands delegations to sessions and special commission meeting of the Hague Conference on Private International Law from 1972 to 1989, foretold that "[t]he better solution [] for the United States [is] to become a party to a convention on jurisdiction and enforcement."[113] On May 5, 1992, the United States formally proposed that the Hague Conference should end this unfair legal situation through the creation of a new multilateral treaty that will lead to the implementation of a worldwide system of recognition and enforcement.[114] This proposed convention had, as a main objective, to regulate the bases of judicial jurisdiction and the recognition and enforcement of foreign judgments.[115] It was based on the annexation of a *white list* with internationally acceptable and approved jurisdictional bases.[116] The assumption of jurisdiction of a court, pursuant one of the grounds of this detailed white list, would have provided full and valid recognition and enforcement of its judgment abroad.[117] The United States was also willing to establish a *black list* containing those grounds for jurisdiction categorized as

109. *Id.* at 364–65.
110. *See id.* at 364.
111. *See id.* at 364–65.
112. Eric B. Fastiff, Note, *The Proposed Hague Convention on the Recognition and Enforcement of Civil and Commercial Judgments: A Solution to Butch Reynolds's Jurisdiction and Enforcement Problems*, 28 CORNELL INT'L L.J. 469, 471–73 (1995).
113. *See* van Boeschoten, *supra* note 87, at 52.
114. Fastiff, *supra* note 112, at 470.
115. Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319, 324 (2002).
116. van Boeschoten, *supra* note 87, at 53.
117. Fastiff, *supra* note 112, at 480.

unacceptable.[118] If a contracting member would have assumed jurisdiction based on impermissible jurisdictional bases or grounds of jurisdiction not specified in the convention, the decision could have been recognized under the domestic law of the country where the enforcement was sought.[119] Therefore, this mixed convention would have allowed the contracting members to maintain part of their sovereignty with the impediment that the decision would not have been automatically recognized and enforced.[120] However, the European countries expressed their discontent at the 17th Hague Conference session.[121] This opposition was the result of the different perspective that each country has regarding the assumption of jurisdiction.[122] For example, European countries have, as a main objective, to diminish the possibilities of implementing a forum shopping system and do not recognize the exercise of personal jurisdiction based on the presence of the defendant within the boundaries of the state, no matter how temporary his or her presence is.[123] This first draft did not prosper and was followed by a second attempt of creating a multilateral agreement regarding required jurisdictions on June of 2001.[124] Although the Hague Conference expressed its interest in the project submitted by the United States, the lack of agreement among its members has discouraged the idea of an appropriate compromise regarding a universal system of jurisdictions and recognition and enforcement of judgments.[125] In 2012, the Hague Conference reconsidered creating a group which special task was to reflect on the system proposed by the United States at the beginning of 1990s.[126] However, no new convention has been adopted concerning the recognition and enforcement of judgments decided by foreign judicial authorities, and, as occurred in the previous attempts, there is no guarantee that the project would finalize successfully with the draft of a new multilateral treaty.[127] Still, there are great hopes regarding a future coordination of the efforts of the United States with the work of the international community.[128]

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118. *Id.* at 483.
119. *See id.* at 482–83.
120. *See id.* at 483.
121. *Id.* at 480. *See generally* Hague Conference on Private International: Final Act of the 17th Session, 32 I.L.M. 1134 (1993).
122. *See* Fastiff, *supra* note 112, at 480.
123. Silberman, *supra* note 115, at 328; *see also* Fastiff, *supra* note 112, at 483.
124. Silberman, *supra* note 115, at 331.
125. Fastiff, *supra* note 112, at 480, 482–83.
126. Strong, *supra* note 18, at 48, 51.
127. *Id.* at 51–52.
128. *See id.* at 51.

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

Regarding the relationship between the conventions redacted by the Hague Conference and the domestic rules governing in the United States, the Supreme Court of the United States has determined the scope of application of the multilateral treaties drafted by this important international organization.[129]

In *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*,[130] the Supreme Court defined the scope of the application of the Hague Convention of March 18, 1970, on the taking of evidence abroad in civil and commercial matters in relation to the applicability of the Federal Rules of Civil Procedure.[131] The United States as contracting member of the Hague Evidence Convention had accepted the rules contained in that international treaty as the law of the land.[132] However, the Court considered that the signature of this multilateral convention does not preempt the application of domestic rules to civil procedures within the United States jurisdiction.[133] All nine Justices of the Supreme Court of the United States believed that Evidence Convention merely sets forth "optional procedures that would facilitate the taking of evidence abroad."[134] Therefore, the signature of this Convention does not force the United States to modify the Federal Rules of Civil Procedure or to use first the permissible procedures of the Evidence Convention.[135]

Since the Supreme Court issued this opinion, trial courts have a tendency to use the Federal Rules of Civil Procedure instead of the proceedings drafted by the Hague Conference.[136] This decision has not only been seen as a loss of influence of the Permanent Bureau but also, as a digression from the international will of a "multinational *comity analysis* that

129. *See* Droz, *supra* note 42, at 8.
130. 482 U.S. 522 (1987).
131. *Id.* at 524, 529–30, 533.
132. *See id.* at 529, 533.
133. *Id.* at 537.
134. *Id.* at 538.
135. *Société National Industrielle Aérospatiale*, 482 U.S. at 534, 537–38. "The text of the Evidence Convention itself does not modify the law of any contracting state, require any contracting state to use the Convention procedures, either in requesting evidence or in responding to such requests, or compel any contracting state to change its own evidence-gathering procedures." *Id.* at 534.
136. *See* Droz, *supra* note 42, at 9.

should facilitate international evidence-taking with a minimum of friction."[137]

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

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

A. *The Comity of the Nations*

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

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137. *Id.*
138. *See id.*
139. Strong, *supra* note 18, at 50.
140. *Id.* at 51.
141. *See* Hilton v. Guyot, 159 U.S. 113, 163 (1895).
142. *Id.* In the preamble of the U.S. Constitution, it is established that individuals are the source of legitimacy of the power given to the Government through the constitutional text.

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

U.S. CONST. pmbl.

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

treaties or the draft of an act by its legislative authority.[145] In those situations where no treaty or international agreement must be applied, a law of a foreign nation will operate and trigger its effects within the boundaries of the United States depending upon the comity of the nations.[146] Consequently, the decisions of its courts will be the ones that manifest the tacit consent of the state concerned.[147]

For the purposes of this Comment, it is convenient to clarify the difference between the doctrine of comity and the system of full faith and credit.148 The U.S. Constitution, in its first section of Article IV, requires all states to automatically recognize and give effect to sister-states judgments in their territory.[149] However, there is no provision in the supreme law of the land or in any federal statute that imposes such an obligation regarding the recognition of judgments of foreign courts.[150] Hence, the constitutional text implicitly considers a decision rendered by a foreign court "as prima facie evidence, and not conclusive," in the absence of any statute or treaty.[151] Therefore, any foreign country's decision based on its own laws, which are considered reviewable upon the merits by the highest court of the United States, is not entitled to full credit and conclusive effect.[152]

The absence of a uniform federal law about this topic is the product of the congressional choice of not exercising its authority to regulate decisions from a foreign nation.[153] Granted by the People through the Constitution of the United States, Congress has the "[p]ower [t]o regulate

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145. *Id.*

146. *Id.*

147. *See id.*

148. U.S. CONST. art. IV, § 1; *see also* Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185, 190 (1912).

149. U.S. CONST. art. IV, § 1. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records[,] and Proceedings shall be proved, and the Effect thereof." *Id.*

150. *Tremblay*, 223 U.S. at 190. "No such right, privilege, or immunity [of having full faith and credit], however, is conferred by the Constitution or by any statute of the United States in respect to the judgments of foreign states or nations, and we are referred to no treaty relative to such a right." *Id.*

151. Hilton v. Guyot, 159 U.S. 113, 228 (1895).

> It is not to be supposed that, if any statute or treaty had been [made] or should be made, it would recognize . . . conclusive the judgments of any country, which did not give like effect to our own judgments. In the absence of statute or treaty, it appears to us equally unwarrantable to assume that the comity of the United States requires anything more.

Id.

152. *Id.* at 227.

153. Fastiff, *supra* note 112, at 472 n.4.

Commerce with foreign Nations, and among several States, and with the Indian Tribes."[154] The scope of the Commerce Clause has been a topic extensively debated in the jurisprudence of the United States.[155] In our modern era, Congress has the same authority over all of those activities related with interstate commerce as it does through its regulation of foreign commerce.[156] This power granted to Congress regarding foreign commerce "would then, of itself, support legislation equivalent to a large part of the law 'enacted' by treaty."[157] Moreover, its scope is not exclusively limited to regulate the means of foreign commerce.[158]

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

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

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

Although Congress decided not to create a unifying rule, it would be imprecise to affirm that there is no force promoting consistency in this subject matter in the United States.[162] In the enforcement and recognition of foreign judgments, each state is allowed to regulate and create its own

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154. U.S. CONST. art. 1, § 8, cl. 3.

155. *See* United States v. Morrison 529 U.S. 598, 607 (2000). "As we discussed at the length in *Lopez*, our interpretation of the Commerce Clause has changed as our Nation has developed." *Id.*; United States v. Lopez, 514 U.S. 549 (1995).

156. Louis Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 915 (1959).

157. *Id.*

158. *Id.*

159. *Id.*

160. Strong, *supra* note 18, at 56–57.

161. *Id.* at 57.

162. *Id.* at 58.

rules.[163] That situation has not prevented the Uniform Law Commission in its endeavor to create a consistency across the rules of the different states.[164] Besides the attempts of the Uniform Law Commission to promote a uniform system of this topic, the Supreme Court of the United States has developed some common rules through its jurisprudence.[165]

1. The Uniform Law Commission

Two different approaches of legislation about the recognition and enforcement of foreign judgments have been proposed by the Uniform Law Commission.[166]

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

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

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163. *Id.* at 66.
164. *Id.*
165. Strong, *supra* note 18, at 58–59.
166. *Id.* at 66.
167. *About the ULC*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/Narrative. aspx?title=About%20the%20ULC (last visited Mar. 29, 2016).
168. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (NAT'L CONFERENCE COMMR. UNIF. STATE LAWS 1962).
169. *Foreign-Country Money Judgments Recognition Act Summary*, *supra* note 20.
170. *Id.*
171. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 2 (1962).
172. *Id.* § 4.
173. Strong, *supra* note 18, at 67.

Columbia and eighteen states.[174] There are several elements incorporated in the 2005 Act that differentiate it from the 1962 Act.[175] First of all, it expresses the burden of proof that the party seeking the recognition must carry: The petitioner has the obligation to produce the evidence that the judgment is subject to the 2005 Act.[176] It also describes the specific procedure that must be followed and includes a provision relating to a statute of limitations.[177]

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

2. The Supreme Court of the United States

In order to harmonize the different state laws regarding enforcement of foreign decisions, the Supreme Court of the United States has developed common rules through its jurisprudence.[179] However, as a result of the application of the Erie doctrine, the federal common law principles will only govern in cases involving a federal question.[180] In this context, the case of *Hilton v. Guyot*[181] is fundamental where the Supreme established the main six factors that courts must look at before giving effects to a foreign judgment through the doctrine of comity.[182] In addition to these requirements, the Court added the prerequisite of mutual comity and reciprocity on the part of the courts of the nation that desires the recognition.[183] However, the doctrine of reciprocity established in *Hilton* was extremely criticized and was applied reluctantly by the states.[184]

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174. Strong, *supra* note 18.

175. *Compare* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (1962), *with* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (2005); Strong, *supra* note 18, at 67.

176. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 3(c) (2005).

177. *Id.* at § 6.

178. *Frequently Asked Questions*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/Narrative.aspx?title=Frequently%20Asked%20Questions (last visited Mar. 29, 2016).

179. *See* Strong, *supra* note 18, at 58.

180. *Id.* at 63.

181. 159 U.S. 113 (1895).

182. *See id.* at 202–03.

183. *Id.* at 227–28.

184. Strong, *supra* note 18, at 58–59. "Commentators also have concluded that reciprocity rule[s] should be retired from our jurisprudence." de la Mata v. Am. Life Ins. Co., 771 F. Supp. 1375, 1383 (D. Del. 1991); *see also Hilton*, 159 U.S. at 202–03.

a. *The Guidelines in* Hilton v. Guyot

In *Hilton*, the Court described the guidelines that most states follow when enforcing any judgment not decided within the boundaries of the United States.[185] The defendants, Henry Hilton and William Libbey—both American citizens—conducted business as merchants in the cities of New York and Paris and had a regular store and place of business in the capital of France.[186] They did a large amount of business with the plaintiffs—the surviving members of the firm of Charles Fortin & Co. and Gustave Bertin Guyot, its official liquidator.[187] The plaintiffs who were all citizens of the Republic of France brought five suits against the defendants for non-payment of sums due.[188] After a proceeding where apparently all due process requirements were respected, the Tribunal of Commerce of the Department of the Seine, sitting at Paris, rendered final judgment for the plaintiffs.[189] While the judgment of the French court was "still . . . in full force and effect,"[190] the plaintiffs filed an action at law against the defendants in the Circuit Court of the United States for the Southern District of New York.[191] In the answer of such complaint, Hilton and Libbey claimed that they discovered fraud on the accounts presented by the plaintiffs since they falsely made up and modified the accounts and statements of the firm.[192] Moreover, the defendants alleged that they did not have the opportunity to a "full and fair trial of the controversies before the arbitrator [during the French proceeding], [where] no witness was sworn or affirmed."[193] The answer further alleged that without the introduction of the false and fraudulent accounts given during the trial, the plaintiffs would have never obtained an award judgment against the defendants.[194] Given these circumstances, the circuit court decided not to admit any of the evidence introduced by the defendants regarding the fraudulent books and papers of Charles Fortin & Co., or any other proof showing irregularities of the trial at the French judicial system and gave a verdict for the plaintiffs in the same amount as the

185. *See Hilton*, 159 U.S. at 163.
186. *Id.* at 114.
187. *Id.*
188. *Id.*
189. *See id.* at 114–15.
190. *Hilton*, 159 U.S. at 115.
191. *Id.* at 114–15.
192. *Id.* at 117.
193. *Id.* at 114–15, 117.
194. *Id.* at 117–18.

one established in the foreign judgment.[195] The defendants appealed claiming that the court should have examined the merits of the case.[196]

The Supreme Court defines the doctrine of comity as a discretionary decision of a U.S. court to recognize a foreign decision where a matter does not need to be litigated any longer since it has already been decided in a foreign judgment.[197] The highest court of the American judicial system considers this choice as a "mere courtesy and good will" of the United States courts upon courts of other nations when such judgments are not prejudicial to the rights of their citizens or to their own interest.[198] Hence, in those situations in which the rights of individuals are concerned, the comity of nations will be applied as a voluntary act of the state where the foreign law seeks to have effect in order to promote justice and create a course of friendly international relations among nations.[199] However, not all judgments rendered by judicial authorities of other sovereignties are going to be recognized by the doctrine of comity.[200] In order to trigger the comity of the United States, different prerequisites must have been present in the foreign proceeding.[201] After a long analysis of the opinion of several authorities on the topic and the trend in the United States and in England, the Court described the requirements that all judgments rendered in another nation must meet in order to be recognized and reduced to a judgment in the enforcing U.S. court:

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

195. *Hilton*, 159 U.S. at 121–22.
196. *Id.*
197. *Id.* at 163.
198. *Id.* at 163–64.
199. *Id.* at 164.
200. *Hilton*, 159 U.S. at 164.
201. *Id.* at 202–03.

> or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.[202]

Therefore, it can be concluded that judgments decided abroad will find comity in the United States as long as the they do not conflict with the six factors listed in *Hilton*: 1) defendants had the opportunity for a full and fair trial; 2) the court that heard the case had competent jurisdiction; 3) the foreign trial was considered a regular proceeding where all due process requirements where met; 4) the proceeding took place after the adverse party who was properly served or appeared voluntary; 5) an impartial administration of justice between the citizens of the country and aliens was secured during the trial through the national system of jurisprudence; and 6) there is no evidence that demonstrates either that the court was biased, the existence of fraud in obtaining the verdict, or the prejudice of the system of laws that are applied for resolving the case.[203] These criteria cannot be considered as a restricted list since a court can deny the permission of a judgment from a court of another nation to have full effect in the United States based on "any other special reason."[204]

Among all the requirements, it is of vital importance that there is an absence of any evidence showing fraud.[205] The Supreme Court of the United States often indicated that a party is not entitled to impeach the judgment and contest the validity or the effect of such judgment if that party only proves that false and fraudulent evidence was introduced to the tribunal.[206] In the opinion, the Court hesitated if the United States should follow the trend of the English courts where false and fraudulent representation, testimony, or documents would be a sufficient ground for impeaching a foreign judgment that was obtained through such erroneous evidence.[207] However, the Court did not give an answer to this issue since there is an independent basis that bars the recognition of the French decision.[208] Reciprocity is the last

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

condition deeply explained in *Hilton* that must be met in order to conclusively recognize a judgment of a foreign court.[209] In this case, the Court considered that the requirement of a demonstration of reciprocity as a condition precedent to the enforcement of a foreign judgment is a common rule in the international jurisprudence.[210] In 1895, the French courts would have only considered the conclusiveness of a foreign judgment if it had been previously examined into its merits.[211] Founding its decision on this situation, the Supreme Court of the United States decided to reverse the judgment of the Circuit Court of the United States for the Southern District of New York and consider that the judgment Mr. Guyot obtained in France was not entitled to be considered conclusive.[212]

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

In *de la Mata v. American Life Insurance Co.*,[213] the federal court hearing the case decided to reject the application of the reciprocity doctrine set out in *Hilton* based on the criticism of commentators, the abandonment of the rule by New York's court, and the previous opinions of the Supreme Court of Delaware where the requirement was limited.[214]

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

Id. at 210.

209. *Id.* at 227.

210. *Id.* at 228.

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

Id.

211. *Hilton*, 159 U.S. at 215.

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

Id.

212. *Id.* at 228.

213. 771 F. Supp. 1375 (D. Del. 1991).

214. *Id.* at 1382–83.

In this case, Victoria de la Mata Mendoza, a Bolivian citizen and widow of Eduardo de la Mata, sued ALICO, a life insurance company incorporated in Delaware and certified to do business transactions in the Republic of Bolivia since 1982, seeking payment under the life policy and two endowment policies purchased by her husband in 1982.[215] Three years after the death of her husband, de la Mata filed a complaint in the Superior Court of the Judicial District of Santa Cruz.[216] The complaint was forwarded to the Second Ordinary Court for Civil Matters in the Judicial District of Santa Cruz.[217] After the defendant had the opportunity for a full and fair trial, the district court granted judgment for the plaintiff and awarded her with a sum of three hundred thirty thousand dollars.[218] The fact that the Delaware company decided not to initiate an ordinary procedure provoked the Bolivian superior court to consider the decision of the district court as res judicata.[219] Later, the United States District Court for the District of Delaware received letters issued by the Bolivian court soliciting the recognition and enforcement of the Bolivian money judgment against ALICO in Delaware.[220]

In order to recognize the judgment for de la Mata, the district court followed the six requirement criteria listed by the Supreme Court in *Hilton*.[221] Nevertheless, the court decided not to consider the reciprocity of the Bolivian courts as a condition precedent to the recognition.[222] The district court identified two main objectives that the Supreme Court desired to achieve through the application of the reciprocity requirement: (1) the protection of American citizens when facing a trial in a foreign judicial system; and (2) the encouragement of other nations to give effect to United States judgments in their territory.[223] However, it is doubtful that *Hilton* reaches both goals.[224] To begin with, the interest of the federal government in protecting their citizens abroad, despite having a judicial proceeding pursuant with the requirements of due process, is not considered a valid interest.[225] Moreover, it is important to remember that international law is

215. *Id.* at 1377.
216. *Id.* at 1378.
217. *Id.*
218. *de la Mata*, 771 F. Supp. at 1378.
219. *See id.* at 1380.
220. *Id.*
221. *Id.* at 1381.
222. *Id.* at 1383.
223. *de la Mata*, 771 F. Supp. at 1383
224. *Id.* at 1383.
225. Nicol v. Tanner, 256 N.W.2d 796, 801 (Minn. 1976). "'[W]hile protecting nationals from unfair treatment abroad is a valid exclusive interest of a state,

based on a course of kind relations among sovereignties.[226] For that reason, the persuasion of the United States aimed at other countries to recognize the decisions of the American courts does not have its desired effect.[227] The thought of other nations that their judgments are not going to be recognized within the boundaries of the United States causes foreign courts to look with hostility at the enforcement of judgments rendered by the courts of the United States.[228] Therefore, as the Delaware court suggests while quoting the Minnesota Supreme Court, the elimination of the reciprocity as a precondition for applying the doctrine of comity "might be a more effective method of obtaining the recognition for American judgments in many other nations."[229]

Although de la Mata was not required by the court to demonstrate the reciprocity of Bolivian courts, the United States District Court for the District of Delaware declined to recognize the Bolivian judgment on the grounds that the defendant was not properly served pursuant to notions of constitutional due process or that the foreign judgment was obtained by fraud.[230]

IV. CONCLUSION

International private law has become an indispensable area of all legal systems as a result of the increase in international intercourse since the end of World War II.[231] By itself, it is considered a difficult topic; but also, the complexity of the doctrine of comity applied within the United States provokes strong negative comments from the international community, which demands a change in the enforcement regime governing in the United States.[232] It does not seem beneficial from the perspective of the United States to keep favoring and protecting its citizens facing a trial abroad, even though they do not suffer any injustice and despite the international treaties the country has signed.[233] The unification and consistency of rules of enforcement and recognition of foreign judgments through a multilateral treaty will be extremely valuable in simplifying individuals' lives and

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

226. *See* Hilton v. Guyot, 159 U.S. 113, 164 (1895).
227. *de la Mata*, 771 F. Supp. at 1383.
228. *See id.* at 1383, 1389–90.
229. *Id.* at 1383.
230. *Id.* at 1390.
231. Smit, *supra* note 19, at 25.
232. *See* Strong, *supra* note 18, at 51.
233. *de la Mata*, 771 F. Supp. at 1383; *see also* Droz, *supra* note 42, at 9.

encouraging commercial transactions between countries.[234] Moreover, a wider enforcement of foreign judgments would not only have a local effect, but it would also give effect to certain international human rights norms.[235] The adoption of international treaties or the elimination of rules that are part of the law of the land of each nation cannot be reasonably expected to erase all kind of differences between nations.[236] However, the draft in the future of a convention about jurisdiction and enforcement regimes containing flexible provisions, such as the ones proposed by the United States at the end of 1990s, will have as a consequence the maximization of the recognition and enforcement of foreign judgments between countries with similar traditions and legal cultures.[237]

234. Droz, *supra* note 42, at 9.
235. Strong, *supra* note 18, at 57.
236. van Boeschoten, *supra* note 87, at 50, 52.
237. Silberman, *supra* note 115, at 349.