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Texas Journal on Civil Liberties & Civil Rights
Letter from the Editor

Dear Reader,

Thank you for subscribing to the Texas Journal on Civil Liberties & Civil Rights. This year, 2017, marks twenty-five years since the Journal began publication. To commemorate this, we are happy to publish four thought-provoking pieces from authors who have contributed to the Journal before.

Professor Kevin Brown's piece revisits a topic that he wrote about in the Journal in 1996. In that piece, Professor Brown discussed the end of the career of a fictional African-American law professor, with the discussion set in 2036. In this issue, Professor Brown discusses the last day of the career of the professor's twin brother. With a piece that is at once creative and scholarly, Professor Brown provides a memorable study of affirmative action's past, present, and future.

An auditorium of attendees enjoyed hearing from Jay Forester at the Journal's annual conference in 2016. He and Matthew Kolodoski, both on the council of the Individual Rights and Responsibilities (IRR) Section of the State Bar of Texas, have worked hard to bring the IRR Section and the Journal closer together. Their article analyzes pressing issues in employment law. At present, that area of law is a crowded field of circuit splits and competing doctrines. Their article brings clarity.

Kevin Lipscomb and Roger Topham are the authors of separate notes in this issue. They also both put in years of service to the Journal as editors while in law school. The Journal congratulates them on their May 2017 graduations from the University of Texas School of Law. Mr. Lipscomb's note addresses new approaches that should be taken to ensure *Brady* compliance by law enforcement. Mr. Topham's note surveys society's changing views on the scope of Fourth Amendment protection and the consequent effects on the exclusionary rule. He proposes a new test that is both adaptive and resilient.

I hope you enjoy this issue of the Texas Journal on Civil Liberties & Civil Rights.

Thank you,

Jacob R. Porter
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ARTICLES

NOTES

Articles

End of the Racial Age: Reflections on the Changing Racial and Ethnic Ancestry of Blacks on Affirmative Action

Professor Kevin Brown*

Twenty years ago, I wrote an essay about the end of the career of a fictional African-American law professor at the University of Texas School of Law, Professor Marshall DuBois Douglass.[1] At that time, I had been a law professor for almost a decade. I set the discussion at the end of his legal career in 2036, forty years into the future.[2] The Fifth Circuit, in the 1996 opinion *Hopwood v. Texas*,[3] ruled that the law school could not take account of race or ethnicity in its admission process.[4] Having been a visiting professor at the law school in both 1993 and 1994 during the pendency of this litigation, I witnessed the impact of *Hopwood v. Texas* on the educational experiences of the Black and Mexican-American students, the legitimacy of whose inclusion was the subject of the litigation. Many minority students experience the environment of their law schools as hostile. However, nothing compares to the anxiety generated when during your three years the most significant legal issue debated is your very right to be there.

I decided to base that essay on the assumption that the Fifth Circuit opinion would remain the governing law for affirmative action at the law school until Professor Douglass retired. In writing that piece, I noted:

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*Richard S. Melvin Professor of Law, Indiana University Maurer School of Law & Emeritus Director of the Hudson & Holland Scholars Program-Indiana University-Bloomington; B.S., 1978, Indiana University; J.D., 1982, Yale University.

[1] He was named after three of the most famous fighters against racial subordination: Thurgood Marshall, W.E.B. DuBois, and Frederick Douglass.

[2] You can see the reflections of Professor Douglass on the end of his career in Kevin Brown, *Hopwood: Was This the African-American Nightmare or the African-American Dream?*, 2 Tex. F. on C.L. & C.R. 97 (1996).

[3] 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

[4] *Id.* at 962.

> Seeing into the future is like seeing around a corner. Such a venture is fraught with the difficulty of trying to perceive the causes of the future that may not even have begun to spin out their inevitable effect. Even the best of us have experienced how the future turns us from adroit prognosticators into doom-sayers and pessimistic fanatics.[5]

We now know that the law school reinstituted the consideration of race in the admission process after the Supreme Court's decision in *Grutter v Bollinger*.[6] True to my admonition twenty years ago, there was another important aspect of affirmative action that would come to change the essence of its very meaning, but one which could not be perceived in 1996: the changing racial and ethnic ancestry of blacks benefitting from affirmative action. I am going to follow the same path that I hued out twenty years ago, but discuss the last day of the academic career of Professor Douglass' twin brother. Only this time, in predicting the future of affirmative action, my remarks are grounded both in what has actually occurred with regard to affirmative action and how much more I have learned about affirmative action over the past two decades.

* * *

"Today is the last graduation ceremony that I will ever attend." Thurgood Burghardt Douglas (Professor T.B.D., as the black students called him) awoke on this day in early May 2036 with this thought. As he awoke, he was in a contemplative mood. After all, this was the end of a fifty-year legal career. Professor T.B.D. joined the legal academy in 1986, four years after graduating from law school with his twin brother, who also joined the University of Texas School of Law faculty that year. Though they saw the issues from different vantage points, both concentrated their scholarship on the intersection of race, law, and education. Professor T.B.D.'s scholarship, however, focused more on what the changing racial and ethnic ancestry of blacks in the U.S. meant for affirmative action policies.

Professor T.B.D. thought about how much his own academic career was intertwined with major federal court decisions on affirmative action. With his twin brother, he had enrolled as an eighteen-year-old freshmen at Indiana University in Bloomington, Indiana in 1974. This was the same year the Supreme Court denied *certiorari* on an affirmative action case,

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[5] Brown, *supra* note 2, at 97–98.

[6] *See* 539 US 306, 327 (2003).

DeFunis v Odegaard.[7] Professor T.B.D. recalled that, while he decided to spend one year between graduating from college and starting law school, he sent out his law school applications early in the spring semester of his senior year. If he was accepted to the law school of his choice, he would ask for a year deferment. Professor T.B.D. did this because the Supreme Court had heard oral arguments in *Regents of the University of California v Bakke*[8] during the fall of his senior year. He figured it was best to hedge his bets in case the Court's opinion, which was expected in the summer of 1978, eliminated affirmative action.

The beginning of Professor T.B.D.'s career as a professor also coincided with a major federal affirmative action decision. Professor T.B.D. started to teach law in 1986, just three months after the Supreme Court in *Wygant v. Jackson*[9] rejected the notion that black students' need for black academic role models was a compelling state interest that justified taking into account the race of teachers in determining a public school faculty.[10]

Professor T.B.D became the first person of color to receive tenure at his law school in 1992, three months before Cheryl J. Hopwood filed a federal lawsuit against the University of Texas School of Law in the U.S. District Court for the Western District of Texas.[11] Then, in an example of watching history repeat itself, Professor T.B.D.'s daughter applied to law school in the spring of 2003 as the Supreme Court was deciding the fate of affirmative action in the University of Michigan cases: *Grutter v. Bollinger* and *Gratz v. Bollinger*.[12]

The Supreme Court reaffirmed its support of affirmative action in its 2003 decision in *Grutter v. Bollinger*.[13] However, Justice O'Connor's opinion for the Court included the following statement at the end: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[14] The precise implications of O'Connor's twenty-five-year period were always debatable. At one extreme, the period was an essential part of the holding of *Grutter*—*Grutter* mandated that affirmative action policies must end in

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[7] 416 U.S. 312, 315 (1974).

[8] *See* 438 U.S. 265, 265 (1978).

[9] 476 U.S. 267 (1986).

[10] *Id.* at 275–76.

[11] The lawsuit was filed on September 29, 1992. *See* Hopwood v. State of Tex., 861 F. Supp. 551, 553 (W.D. Tex. 1994), rev'd, 78 F.3d 932 (5th Cir. 1996).

[12] Grutter v. Bollinger, 539 U.S. 306, 306 (2003); Gratz v. Bollinger, 539 US 244, 244 (2003). The Supreme Court granted cert. in *Grutter* on December 2, 2002. *See* Grutter v. Bollinger, 537 U.S. 1043 (2002).

[13] *Grutter*, 539 U.S. at 343.

[14] *Id.*

twenty-five years.[15] At the other extreme, the end of the twenty-five year period was when society should reexamine the continued utility of affirmative action.[16] But regardless of how supporters and critics of affirmative action thought, the twenty-five-year period created an inevitable date with destiny for affirmative action programs.

In 2013, the Supreme Court delivered its decision *Fisher v. University of Texas*,[17] where it reaffirmed its support for affirmative action as articulated in *Grutter*.[18] A year later, Professor T.B.D. published his book subtitled *The Changing Racial and Ethnic Ancestry of Blacks on Affirmative Action*.[19] While many liberal civil rights scholars breathed a collective sigh of relief after *Fisher*, even at this juncture Professor T.B.D. knew something about African-Americans benefitting from affirmative action had already changed. He was writing his book as *Fisher* was working its way through the federal courts. In fact, Professor T.B.D. intentionally delayed completion of the manuscript until after the Court's *Fisher* ruling because he was concerned that what he would reveal might negatively impact support for affirmative action. His book pointed out a seldom-discussed phenomenon in educational circles at that time: that more and more of the blacks benefitting from affirmative action were either mixed-race (whom he referred to as "Black Multiracials")[20] or first- or second-generation immigrants (whom he referred to as "Black Immigrants"). What these two groups had in common was that at least one of their parent's ancestry did not derive from blacks who lived through the history of racial discrimination in the United States. Therefore, Professor T.B.D. argued, the reality that the sons and daughters of two American-born black parents (as determined by the application of the one-drop rule) were being eliminated from the campuses of selective higher education institutions. While others had referred to this racial/ethnic group of blacks as "third-generation" or "legacy" blacks,[21] in his

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[15] *See, e.g., id.* at 375 (Thomas, J., concurring in part and dissenting in part) ("The Court also holds that racial discrimination in admissions should be given another 25 years before it is deemed no longer narrowly tailored to the Law School's fabricated compelling state interest.").

[16] *See id.* at 346 (Ginsburg, J., concurring) ("From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.").

[17] 133 S. Ct. 2411 (2013).

[18] 539 U.S. 306. The Court also reaffirmed its *Grutter* holding in Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623 (2014), and Fisher v. University of Texas, 136 S. Ct. 2198 (2016).

[19] *Cf.* KEVIN BROWN, BECAUSE OF OUR SUCCESS: THE CHANGING RACIAL AND ETHNIC ANCESTRY OF BLACKS ON AFFIRMATIVE ACTION (2014).

[20] To refer to those with some African ancestry as "Black Multiracials" is a somewhat of a misnomer. If mixed-race people with some black ancestry self-identify as multiracial, then they are not black, but simply multiracial.

[21] I wish to also specifically acknowledge the insightful article written by Angela Onwuachi-Willig. *See* Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141,

book, Professor T.B.D. referred to them as "Ascendant Blacks"[22] to capture the history of this group's ascendancy out of slavery and segregation. The ascendancy of this racial/ethnic group of blacks not only helped to bring about affirmative action, but also made possible the dramatic increases in interracial cohabitation, Black Multiracials, and Black Immigrants. In short, Professor T.B.D. focused on the fact that the Blacks who were being denied the benefits of affirmative action were the ones who had the greatest ancestral connection to the history of racial oppression in the United States that justified the program in the first place. His concern was also driven by the reality that these changes would not remain hidden forever. As 2028 approached he feared that these changes in the racial and ethnic ancestry of blacks affected by affirmative action could become a key factor in the decision by the Supreme Court to eliminate any consideration of race in the admission process. A fear that increased significantly when critical Supreme Court swing Justice Anthony Kennedy retired and was replaced by President Donald Trump's second appointee.

For most Americans concerned about racial diversity in selective higher education programs, the fact that the overwhelming majority of whites did not see much of a difference between Blacks based on any racial/ethnic distinctions obscured recognition of these differences for some time. In addition, the way that the federal government required educational institutions to collect and report racial and ethnic statistics about students and faculty further delayed the comprehension of the effect of changing racial and ethnic ancestry of Blacks affected by affirmative action. With regard to racial ancestry for Blacks, up until the entering class of 2010, applicants to selective higher education programs generally had to choose one and only one racial identification. As a result, it was not possible for those with some African ancestry to indicate that they viewed themselves as multiracial.

However, all this changed when new regulations promulgated by the Department of Education went into effect that changed the way that all educational institutions, including selective higher education pro-

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1149 n.27 (2007) (emphasizing the use of, by the author and others, the terms "descendants" and "legacy Blacks" to denote these blacks to make the connection between their ancestral lineage as descended from blacks who were enslaved and segregated).

[22] The term "Ascendants" is also used by African Americans who left America to repatriate in the Republic of Ghana. This term was first mentioned to me in the summer of 2007 by Seestah Imaakus and Brother El Shabazz, the owners and operators of Hotel One Africa located in the city of Cape Coast, Ghana. One Africa is a facility located between Cape Coast Castle (the main British administrative castle during the Tran-Atlantic Slave Trade) and Elmina Castle (the first permanent European structure built in Africa) on the Ghanaian coast. Their lifelong mission is to assist Ascendant Blacks as they go through the experience of going through those castles.

grams, collected and reported racial and ethnic data. The ability of applicants to self-identify with multiple racial categories was one of the most significant changes. Thus, from the fall of 2010 forward, Black Multiracials could self-identify with all of their racial categories. This generated the flow of more information about the changing racial ancestry of Blacks in educational institutions, especially to the admissions offices of each individual selective higher education program. For example, while varying each year, 42 percent of the black students enrolled as freshmen at Yale University in the falls of 2011–14 were multiracial (54 percent in 2014), at the University of Virginia for the same years it was 21.5 percent (with 22.4 percent in 2014), and at Indiana University-Bloomington, Black Multiracials made up 18.4 percent of all black undergraduate students on campus in the fall of 2013.[23] With regard to law school applications, 2013 figures from the Law School Admissions Council showed that 10.7 percent of Blacks who took the LSAT were Multiracials, a percentage that had increased by almost 60 percent in three years.[24] And, the Multiracials scored significantly higher on the LSAT than the single-race blacks.[25] Moreover, for black/white Multiracials, almost 40 percent of the Black Multiracials, their median LSAT scores during this time period *exceeded* the overall LSAT average.[26] In other words, unlike for single-race blacks, there was no noticeable racial gap in the LSAT scores of black/white Mulitracials and the median LSAT scores for all test-takers. This meant that in an admissions process that ignored the racial ancestry of those with some African ancestry, Black Multiracial applicants to law school had a distinct competitive advantage over single-race blacks.

New information about ethnic distinctions among blacks benefiting from affirmative action was slower to develop. Even as the ability to distinguish Black Multiracials from single-race blacks attending selective higher education institutions was increasing, distinguishing black immigrants from native blacks remained obscure. Some institutions involved in the admissions process of selective higher education institutions, like the Law School Admissions Council, continued their long-followed practices of denying blacks the ability to self-designate their ethnicity, even while granting this capacity to all the other major racial groups and Hispanic/Latinos. However, the Common Application form, which was being used as a college application form by hundreds of American colleges

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[23] Kevin Brown, *LSAC Data Reveals that Black/White Multiracials Outscore all Blacks on LSAT by Wide Margins*, 39 N.Y.U. REV. L. & SOC. CHANGE 381, 383–84 (2015).

[24] The percentage of Multiracials among blacks who took the LSAT was 6.7 percent in 2010. Brown, *supra* note 19, at 151 (2014).

[25] *Id.*

[26] *Id.*

and universities in all fifty states and the District of Columbia,[27] was changed in 2013 to allow blacks to self-identify their ethnic category by allowing students to select any combination of U.S./African American, African, Caribbean, or other.[28] Because of this and other changes, over the next dozen years more and more information started to trickle out about the percentages of Blacks enrolled in selective higher education programs who self-identified as something other than African-American.

Yet, there were enough studies and anecdotal evidence by the mid-point of the twenty-five-year *Grutter* timetable to indicate that American society was well on its way to virtually eliminating Ascendant Blacks from selective higher education programs by 2028, including from its law schools.[29] Professor T.B.D. recognized that Black Multiracials and Black Immigrants encountered racism in American society. He never had any objection to them benefiting from affirmative action. After all, historically, many of the most ardent fighters in the struggle against racial oppression throughout the history of American society included mixed-race individuals like Crispus Attucks, Josephine Baker, Frederick Douglass, Booker T. Washington, Walter White, and of course, Barack Obama. Also, many prominent figures of the Black-community were foreign-born or had at least one foreign-born black parent, including Stokley Carmichael (Kwame Ture), Shirley Chisholm, Marcus Garvey, James Weldon Johnson, Colin Powell, Malcolm X, and of course, Barak Obama. Instead, Professor T.B.D.'s concern was that the overrepresentation of Black Multiracials and Black Immigrants would continue to obscure the elimination of Ascendant Blacks from campuses of selective higher education institutions.

It wasn't just the changing racial and ethnic statistics that alarmed Professor T.B.D. When he first became aware of this phenomenon, he assumed that this was one of those colossal oversights in American history that, once brought to light, would be quickly addressed by admissions officers and university administrators. After all, who could deny that affirmative action was created to assist the descendants of those Blacks who had suffered through slavery and segregation in the United States? Surely, admissions officers and university administrators would

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[27] For a list of the over 700 institutions that accept the Common Application see Common Application—Members, see http://www.commonapp.org/search-colleges [https://perma.cc/7BGZ-7YDV].

[28] According to American Community Survey results from 2008-2009, a third of the almost 3.3 million foreign-born Blacks were from Africa and 52 percent were from the Caribbean. *See* Randy Capps, Kristen McCabe & Michael Fix, *Diverse Streams: Black African Migration to the United States*, MIGRATION POL'Y INST., Apr. 2012, at 3 tbl.1.

[29] For a discussion of the studies that verified this changing racial and ethnic ancestry of Blacks on affirmative action see Brown, *supra* note 19, at 150–53, 197–99 (2014).

quickly address this issue once someone brought it to their attention. Selective higher education programs didn't have to reduce the admissions prospects of Black Multiracials or Black Immigrants, rather they only had to provide a special focus in their processes to ensure a continued substantial presence of Ascendant Blacks. But Professor Douglass recollected discussions that he had with the appropriate officials of the American Bar Association, the American Association of Law Schools, and the Law School Admissions Council about the changing racial and ethnic ancestry of Blacks in the nation's law schools. He remembered his utter shock when all of these representatives agreed that these changes were occurring at an accelerating rate, such that the Ascendant Blacks might constitute less than 20 percent of blacks in the nation's law schools by as early as 2020, but were not prepared to address it for various reasons. One of these conversations stood out since it best encapsulated Professor T.B.D.'s greatest concern. He told an administrator who was an ardent supporter of affirmative action about the changing racial and ethnic ancestry of Blacks on affirmative action. After reflecting on this for a few days, the administrator replied, "You want us to tell the American people that the blacks benefitting from affirmative action are not the blacks that they think are benefitting? If we did that, American society would simply refuse to support affirmative action and we at least have until 2028 to live in this second best world." It was at this point that he understood a decision had already been made to watch Ascendant Blacks, like old soldiers, simply fade away from selective higher education programs. And fade away they did.

In the examinations of the current status of affirmative action leading up to 2028, several scholars published reports on the significant changes in the racial and ethnic ancestry of Blacks on affirmative action. As these reports came out, it was striking to see how low the percentages of Ascendant Blacks were among those with some African ancestry enrolled in the nation's most selective undergraduate institutions, law schools, medical schools, and elite business schools. In many places Ascendant Blacks constituted less than 10 percent of those with some black ancestry, and in some there were none at all.

The Supreme Court's decision in 2031 finally concluded that race and ethnicity could no longer be considered in the admissions processes of higher education institutions. In Justice Clarence Thomas's opinion for the Court, the final one he wrote to conclude his 40-year tenure on the highest court in the land, he prominently mentioned the changed racial and ethnic ancestry of blacks who benefitted from affirmative action:

> When affirmative action policies were first instituted, the racial and ethnic makeup of the United States was very different

from what it is today. According to the 1960 census, whites constituted 88.8 percent of all Americans, with an additional 10.6 percent classified as black.[30] The 1960 census categorized Hispanics/Latinos based on their race, not their ethnicity;[31] thus, blacks and whites comprised 99.4 percent of the American population.[32] Due to the application of the one-drop rule to determine a person's race, the concept of mixed-race blacks did not exist. In addition to the dual-racial nature of American society, dominant American cultural attitudes and social practices did not differentiate blacks who descended from those Africans brought to America in chains during the Transatlantic Slave Trade from who were recent arrivals from the Caribbean or Africa. With some justification, Americans did not recognize the existence of "black ethnicity." The principal reason was that in 1960, there were only 125,000 foreign-born blacks in the United States.[33] And they comprised only 0.7 percent of the black population.[34] As a result, the single most important assumption upon which selective higher education institutions developed affirmative action admissions policies and plans in the 1960s was that the predominant beneficiaries would be those blacks whose complete ancestry were victimized by the history of racial discrimination in the United States.

In continued recognition of the above noted assumption, our 2003 opinion in *Grutter v Bollinger* upheld the University of Michigan Law School's affirmative action policies that sought to enroll a *critical mass of students from groups that have historically been the object of discrimination* to ensure their ability to make their unique contributions to the character of the

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[30] *See* Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States*, 19 tbl.1 (U.S. Census Bureau, Population Division Working Paper Series No. 56, 2002).

[31] *See id.* at 1 (mentioning changes in census wording).

[32] *Id.* at 115.

[33] Race and Hispanic Origin of the Population by Nativity: 1850 to 1990, U.S. Bureau of the Census, https://www.census.gov/population/www/documentation/twps0029/tab08.html [https://perma.cc/9ZPC-2P5P]. The term foreign-born refers to any United States resident who was born outside the United States or its territories, except for people who were born abroad to parents who were United States citizens. Mary Mederios Kent, *Immigration and America's Black Population*, 62 POPULATION BULL. at 5 fig.1 (Dec. 2007).

[34] *See* Campbell J. Gibson & Emily Lennon, *Historical Census Statistics on the Foreign-Born Population of the United States: 1850-1990*, at 41 tbl.8 (U.S. Bureau of the Census, Population Division Working Paper No. 29, 1999).

law school.[35] Thus, in our opinion in *Grutter* we authorized the use of racial classifications for the inclusion of *underrepresented* racial minorities who have *experiences* derived from our nation's struggle with racial inequality. These *experiences* are important to include in the student body because of their educational benefits. But as Justice O'Connor pointed out, they also explain why these *underrepresented* minorities are likely not to be admitted in meaningful numbers without the consideration of their racial/ethnic backgrounds. Thus, in *Grutter* we limited the consideration of race and ethnicity to individuals who were members of groups that had a history of discrimination in the United States and were underrepresented. After all, in *Grutter* we accepted, without comment, the exclusion of Jews and Asians in the affirmative action admission policies of the University of Michigan Law School. While such individuals were members of groups with a history of discrimination, they were already being admitted to the law school in significant numbers.[36]

But now, as the petitioner's statistics clearly indicate, the racial and ethnic ancestries of beneficiaries of affirmative action have fundamentally changed since the 1960s. And we must admit the obvious: to self-identify as multiracial means that one does not self-identify as black. In addition, to self-identify as Caribbean, African, or other black also means that one does not view one's ancestry as derived from the history of discrimination of blacks in the United States. Thus, among the racial and ethnic changes of the beneficiaries of affirmative action is that virtually none of those who were intended to benefit from such admissions policies when they were created do so today. In an ironic twist of fate, selective higher education institutions have virtually eliminated from their campuses the very group for whom they intended affirmative action to benefit in the first place. As the Court examines the operation of affirmative action today, we are not presented with the question we decided in *Grutter*—whether race or ethnicity can be considered for individuals who are full members of underrepresented minority groups with a history of discrimination in the United States. When almost all of those who benefit from affirmative action are disconnected, even partially, from the groups that

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[35] Grutter v. Bollinger, 539 U.S. 306, 308 (2003).

[36] *Id.* at 319.

> suffered in the past due to racial discrimination, the justification for the consideration of race and ethnicity in the admission process is significantly attenuated. These groups may not be underrepresented and do not have a historical claim to the negative effects of racial discrimination. Thus, when the petitioners propose the question, can the current implementation of affirmative action policies be deemed compelling enough to override the violation of the fundamental values that our society has long placed on treating everyone as an individual? Our answer must be an emphatic, no!

Professor T.B.D. had been contemplating retirement for the past few years and it was the day he read Justice Thomas' opinion that he decided it was time to make his plans to retire. Over the foregoing five years, he took two year-long sabbaticals and spent one year teaching at a law school at one the nation's Historically Black Universities. When Professor T.B.D. started teaching, he felt like he was on a mission. He reflected with pride on how his cutting-edge scholarship and teaching had purpose, direction, and meaning. Professor T.B.D. was one of a few committed radical law professors writing on race and attempting to fundamentally restructure American legal discourse. With his twin brother, he had attended the first three Critical Race Theory workshops starting in 1989. The goal of these young Critical Race Scholars was to open the legal discourse to multiple perspectives and provide alternative means in which to envision solutions to problems of racial and ethnic justice. This group of law professors felt that part of what they were doing in the classroom was training a generation of progressive lawyers that would be committed to righting the historical racial and ethnic evils of American society. The mission of Critical Race Theory was poised for success in 2016 when the unexpected death of Justice Scalia raised the possibility that a majority of justices on the Supreme Court would be supportive of minority rights for the first time since the early 1970s. But the election of Donald Trump as President in November of that year eliminated such a possibility.

Professor T.B.D. noted that, over the preceding five years, only about two or three Ascendant Blacks enrolled in the first year class of his law school. His course on *Race, American Society and the Law* was still popular with the students. But he had significantly changed the material in the class over the years. When he first started teaching the course, it focused primarily on the experiences of African-Americans. Now, the course included large sections on Latinos, Black Immigrants, Multiracials, and Asians. It was obvious that many, but not all, of the Black Multiracial students viewed themselves as more multiracial than black.

They didn't seem to have the same passion for addressing the continued oppression of African-Americans that the Ascendant Blacks almost always displayed. But as Professor T.B.D. often thought, why should they? After all, logic dictated that for multiracials to embrace all of their racial heritages they must, by necessity, place less emphasis on the struggles of black people in the United States. He also knew that the first loyalty of many of the Black Immigrant students, though not all, was to their native homeland. And, once again, Professor T.B.D. thought, why shouldn't it be? How could they not be concerned with the conditions of those family and friends still in distant lands? Professor T.B.D. continued to serve as the faculty advisor for the Black Law Students Association, but its numbers had dwindled significantly over the years. Many of the students with some black ancestry now joined the Caribbean Law Students Association or the Multiracial Law Students Association.

But there was one thought that occurred to him while rereading Justice Thomas' opinion on this, the day of the last graduation that he would ever attend, that made him realize now was the time for him to retire. Professor T.B.D. grew up at a time when a person's racial identity was socially ascribed, not a matter of choice. This was true for him for his entire life. He never experienced others mistaking him for Latino, Italian, Middle Easterner, or South Asian as those with some African ancestry who are racially ambiguous often do. He never experienced the need to correct someone who assumed he was African-American and tell them that his family was from Jamaica, Haiti, Nigeria, Ghana or Somalia. But he understood the impulse of those black immigrants who did. When Professor T.B.D. visited South Africa, he often found himself pointing out with great pride to blacks, coloreds, and whites there that he was African-American, not native South African. In other words, Professor T.B.D.'s life experience was that of being a socially ascribed African-American. And for him, not only was his race not a matter of choice, but his racial group was as permanent in the United States as democracy. The first Africans disembarked off the first slave ship in Jamestown in 1619, the same year that the first legislative assembly of elected representatives in North America, the House of Burgesses, was established in Virginia.

For much of his academic career, Professor T.B.D. had always assumed that the African-American community was permanent. However, he had witnessed not only the steady increase in Black Multiracials and Black Immigrants in selective higher education programs, but also their percentages among blacks in American society in general. Soon they would constitute a majority of blacks in the country. The thought that first crept into his mind five years before, when he initially read Justice

Thomas' opinion (and since reading it he could not escape its implication), was derived from one of his favorite movies from so long ago: "Everything that has a beginning has an end and I see the end coming."[37] Thus, the thought that proved to be the deciding factor in Professor T.B.D.'s decision to retire five years before was that for the first time in his life he realized that African-Americans were a socially constructed people who would not exist forever. As a group of people, they had a beginning forged in the cauldron of slavery and hardened in the fires of segregation. But over time, race became more and more a matter of personal preference as opposed to social ascription. And the ancestral ties of fewer and fewer people of African ancestry in the United States harkened back to the blacks who were brought to the United States on slave ships. What all of this meant was that African-Americans as a group were in a process of dissolution. Like the Ancient Egyptians, Romans, and Greeks, African-Americans would one day be confined to the dust bin of history.

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[37] THE MATRIX REVOLUTIONS (Warner Bros. 2003).

The Future of Collective Employment Arbitration: Reconciling the FAA with the NLRA, FLSA, & Other Federal Rights

Matthew J. Kolodoski* & Jay Forester**

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*Matthew J. Kolodoski is a law clerk working for the U.S. District Court for the Northern District of Texas. Prior to clerking, he worked as a civil trial and appellate attorney in Dallas, Texas.

**Jay Forester is a wage and hour lawyer working at Lee & Braziel, LLP in Dallas, Texas. He represents employees in individual and collective actions brought nationwide under the Fair Labor Standards Act and equivalent state laws. Both authors would like to thank Candace M. Groth for her insightful comments on multiple drafts of this article.

I. INTRODUCTION

The Supreme Court granted certiorari in January 2017 in three consolidated cases to resolve a recent and important issue on which federal circuit courts had split. At issue is whether and to what extent an employer may require individual arbitration—while prohibiting collective arbitration—of employment disputes as a condition of employment. The United States Court of Appeals for the Fifth Circuit had previously held that the right of an employer and employee to freely contract includes the right of the parties to agree that all employment disputes will be settled through binding, individual arbitration. Despite this Congressionally-recognized and judicially-protected right to arbitrate disputes, an active National Labor Relations Board ("the Board") during the administration of former President Barack Obama emphasized again and again that there must be limits on the right to arbitrate within the employer–employee relationship. Further, some courts of appeals, including the Seventh and Ninth Circuits, have recently adopted the Board's position that the protections afforded under the National Labor Relations Act make binding arbitration clauses unlawful in the employment context.

This dispute sits at the nexus of two competing doctrines—the right to contract and the protective tenets of American labor relations—and three primary procedural devices: class action, arbitration, and class arbitration. Both class action and arbitration are well-established devices in American jurisprudence, but class arbitration is a newer hybrid concept in which a class of individuals contractually consent to arbitration. The conflict over class arbitration has emerged in the sphere of the employer–employee relationship. Courts are now asked to decide the fundamental question of how traditional labor values fit into an increasingly fast and mobile economy. Today, the mere click of a button in an email or the swipe of a finger on a mobile application can easily waive the right to collective action. At stake is the future of employment disputes in the United States, and the procedural and substantive rights of employers and employees.

This article analyzes the current divide between circuit courts that

have prioritized the freedom of contract epitomized in the Federal Arbitration Act, and those that have prioritized the rights of employees and broader labor protections under the National Labor Relations Act. In this analysis, this article considers the history behind the circuit split and the values at issue, and offers insight into the practical importance and potential contours of the dispute. In addition to resolving a circuit split, the upcoming Supreme Court decision is also poised to test the outer limits of its landmark decision in *AT&T Mobility LLC v. Concepcion*,[1] which upheld class-waiver clauses in standard form contracts that also mandated arbitration. Regardless of the Supreme Court's decision, the increasing use of class waivers and arbitration clauses means that the tension between contracting rights and labor protections is likely to stay relevant for some time.

II. STATE OF THE LAW

This portion of the article examines the current state of the law regarding arbitration agreements in employment contracts. The examination has three main focuses. First, it reviews the broad principles behind both the National Labor Relations Act and the Federal Arbitration Act. Second, it considers the basic procedural devices used to advance collective and class action lawsuits. Third, it analyzes the circuit split concerning whether collective action may be contractually and lawfully waived through arbitration agreements.

A. National Labor Relations Act

Congress enacted the National Labor Relations Act (NLRA) in 1935.[2] The first section of the Act "sets forth findings with respect to the injury to commerce resulting from the denial by employers of the right of employees to organize and from the refusal of employers to accept the procedure of collective bargaining."[3] In part, the NLRA recognizes the inequality of bargaining power between employees and employers. Spe-

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1 563 U.S. 333 (2011).

2 29 U.S.C. § 151 (2012).

3 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 22–23 (1937).

cifically, it notes that employees "do not possess full freedom of association or *actual liberty of contract*,"[4] whereas employers possess greater control of wage and working conditions within and among industries.[5]

The first section of the NLRA concludes by broadly declaring that it shall be the policy of the United States to

eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by *encouraging the practice and procedure of collective bargaining* and by *protecting the exercise by workers of full freedom of association*, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[6]

As illustrated by these parts of the Act, Congress's intent in passing the NLRA was to protect "the right of employees to self-organization and to the selection of representatives of their own choosing for collective bargaining without restraint or coercion."[7] Thus, Congress appears to have placed considerable emphasis on the rights of employees to band together and act collectively when dealing with employment matters, without fear of discharge or other repercussion.[8] These rights have generally been referred to as the rights of employees to engage in "concerted activity."[9] By passing the NLRA, Congress largely preempted industrial-relations regulations by the states and placed this area of regulation under the purview of the federal government.[10]

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[4] 29 U.S.C. § 151 (emphasis added).

[5] *See id.*

[6] *Id.* (emphasis added).

[7] NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 255 (1939).

[8] *Id.* (noting that "the employer is not permitted to discharge his employees because of union activity or agitation for collective bargaining").

[9] *Concerted Activity*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining concerted activity as an "[a]ction by employees concerning wages or working conditions; esp., a conscious commitment to a common scheme designed to achieve an objective").

[10] *See* Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282, 286 (1986). The Supreme Court further explained:

> Although some controversy continues over the Act's pre-emptive scope, certain principles are reasonably settled. Central among them is the general rule set forth in *San Diego Building Trades Council v. Garmon*, that States may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits. Because "conflict is imminent" whenever "two separate remedies are brought to bear on the same activity," the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act.

Id. (internal citations omitted).

Through the NLRA, Congress charged the National Labor Relations Board with administering the Act.[11] The Board is an independent five-member body created under the NLRA to safeguard employees' rights to organize into labor unions, engage in concerted activity, and prevent or remedy unfair labor practices.[12] The Board also hears complaints and issues orders regarding unfair labor practices that violate the NLRA.[13] Its orders can be reviewed or enforced by a federal court of appeals.[14] Under the NLRA, the Board has "authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions" of the Act.[15] Because the Board has "special expertise,"[16] federal courts have repeatedly held that its interpretations of ambiguous provisions of the Act are entitled to judicial deference.[17] Moreover, as interpretations of the NLRA, the Board's rules are accorded broad deference under the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[18]

Under *Chevron*, where a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[19] Thus, courts must "respect the judgment of the agency empowered to apply the law 'to varying fact patterns,' even if the issue 'with nearly equal reason [might] be resolved one way rather than another.'"[20] This deference is

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[11] *See* 29 U.S.C. § 153 (2012) (addressing the creation, composition, appointment, and tenure of the five-member NLRB).

[12] *National Labor Relations Board*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[13] *Id.*

[14] *Id.*

[15] 29 U.S.C. § 156; *see* Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 609 (1991).

[16] Local Union No. 189, Amalgamated Meat Cutters, and Butcher Workmen of N. Am. v. Jewel Tea Co., 381 U.S. 676, 685–86 (1965).

[17] Lechmere, Inc. v. NLRB, 502 U.S. 527, 536 (1992); NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 829 (1984) (noting that when "an issue . . . implicates [the Board's] expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference").

[18] 467 U.S. 837, 843 (1984). *See* NLRB v. United Food & Comm. Workers Union, Local 23, 484 U.S. 112, 123–24 (1987). Given the Supreme Court's pre-*Chevron* level of deference, it has been noted, "the Court's pre-*Chevron* approach to the NLRB arguably anticipated the broad deference accorded to interpretive judgments under *Chevron*." James J. Brudney, Chevron *and* Skidmore *in the Workplace: Unhappy Together*, 83 FORDHAM L. REV. 497, 498 (2014) (internal citations omitted).

[19] *Chevron U.S.A., Inc.*, 467 U.S. at 843; *see Chevron Deference*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining *Chevron* deference as "[a] two-part test under which a court will uphold a federal agency's construction of a federal statute if (1) the statute is ambiguous or does not address the question at issue, and (2) the agency's interpretation of the statute is reasonable. If the court finds that the legislature's intent is clearly expressed in the statute, then that intent is upheld.").

[20] Holly Farms Corp. v. NLRB, 517 U.S. 392, 398–99 (1996) (citation omitted).

not absolute, however.[21] For example, the application of a statutory definition must have a reasonable basis in law,[22] and courts generally provide less deference to the Board's findings or conclusions on issues of law than on issues of fact.[23] Additionally, courts have been less deferential when the Board was interpreting a law in which it had no special expertise.[24] This is a somewhat complicated scheme, especially since the Board often establishes rules through adjudication. Accordingly, it is not always clear whether the Board is establishing a rule or merely analyzing the facts in a given case.

The Board's interpretive function and the courts' varying levels of deference under *Chevron* underscore the inherent tension in this area. For example, the Supreme Court has expressly noted that "[d]eference to the Board 'cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress.'"[25] Although the Board was created to administer the Act, it was not "commissioned to effectuate the policies of the [NLRA] so single-mindedly that it may wholly ignore other and equally important Congressional objectives."[26] As a result, the Supreme Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."[27]

The application of Section 7 of the NLRA, which defines the core rights protected under the Act, is one area of considerable dispute between the Board, employers, and even among different federal courts. Section 7 holds:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement

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[21] *See* Entergy Miss., Inc. v. NLRB, 810 F.3d 287, 292 (5th Cir. 2015); *see generally* Brudney, *supra* note 18, at 525 ("Support for NLRB determinations has declined noticeably since *Chevron*, even though the Court remains formally committed to broader deference.").

[22] GAF Corp. v. NLRB, 524 F.2d 492, 495 (5th Cir. 1975).

[23] *See* Hi-Craft Clothing Co. v. NLRB, 660 F.2d 910, 913 (3d Cir. 1981).

[24] *See* Cleveland Real Estate Partners v. NLRB, 95 F.3d 457 (6th Cir. 1996) (reversing an order by the NLRB finding that the owner of a shopping center violated the NLRA by preventing a local union from distributing handbills on his property); NLRB v. Fullerton Transfer & Storage Ltd., Inc., 910 F.2d 331 (6th Cir. 1990) (reversing order of back pay against related corporation and its shareholders because the corporation was not an "alter ego" of the employer).

[25] NLRB v. Fin. Inst. Emps. of Am., Local 1182, 475 U.S. 192, 202 (1986) (alteration in original) (quoting Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965)).

[26] Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942).

[27] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 144 (2002).

requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.[28]

Federal courts have interpreted Section 7's language to protect the rights of employees to self-organize;[29] form, join, or assist unions;[30] bargain collectively through representatives;[31] band together in a concerted manner for mutual aid or protection;[32] or abstain from such activity.[33] Together, these rights form a type of freedom of association under the Act for qualified employees.[34]

Section 7 effectuates the intent of Congress to equalize bargaining power between employees and employers "by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."[35] The Supreme Court has observed, "[t]here is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way."[36] One way that employees have increasingly relied on to protect their rights is through lawsuits.

B. Fair Labor Standards Act

The Fair Labor Standards Act (FLSA), a federal law that sets minimal labor guidelines for employees,[37] is "of the same general character" as the NLRA.[38] It was "enacted by Congress to be a broadly remedial

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[28] 29 U.S.C. § 157 (2012).

[29] Beth Israel Hosp. v. NLRB, 437 U.S. 483, 491 (1978) (noting that "the right of employees to self-organize" as "necessarily encompass[ing] the right effectively to communicate with one another regarding self-organization at the jobsite.").

[30] *See* Lechmere, Inc. v. NLRB, 502 U.S. 527, 533 (1992).

[31] NLRB v. Erie Resistor Corp., 373 U.S. 221, 233–34 (1963) (noting the NLRA's "repeated solicitude for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system"); *see also* NLRB v. Gissel Packing Co., 385 U.S. 575, 596 (1969).

[32] *See* NLRB v. Wash. Aluminum Co., 370 U.S. 9, 13–14 (1962).

[33] *See* NLRB v. Savair Mfg. Co., 414 U.S. 270, 278 (1973) (noting "[a]ny procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice.").

[34] Although we do not focus on who qualifies under the NLRA and who does not, other commentators have addressed that issue. *See* Anne Marie Lofaso, *The Vanishing Employee: Putting the Autonomous Dignified Union Worker Back to Work*, 5 FIU L. REV. 495, 499–500 (2010); Ellen Dannin, *Not a Limited, Confined, or Private Matter – Who Is an "Employee" Under the National Labor Relations Act*, 59 LAB. L.J. 5, 5 (2008).

[35] NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 835 (1984).

[36] *Id.*

[37] 29 U.S.C. § 201 *et seq.* (2012).

[38] Rutherford Food Corp. v. McComb, 331 U.S. 722, 723 n.1 (1947).

and humanitarian statute,"[39] and was designed to correct "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[40] To achieve these ends, Congress broadly defined many of the FLSA's key terms.[41] In addition, the law recognized that "due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation."[42] This legislation would prevent employment contracts that "endangered national health and efficiency and as a result the free movement of goods in interstate commerce."[43]

Accordingly, Congress declared the policy of the FLSA was "to correct and as rapidly as practicable to eliminate the conditions above . . . without substantially curtailing employment or earning power."[44] For example, the FLSA sets minimum wages and maximum hours.[45] In order to fully effectuate the Act's remedial purpose, the FLSA authorizes the use of "collective actions" through § 216(b) so that workers can pool their resources and bring similar claims in one action. This section establishes a notice and *opt-in* scheme under which plaintiffs must affirmatively notify the court of their intention to become parties to the suit.[46] Other employment statutes, including the Age Discrimination in Employment Act (ADEA), have likewise adopted § 216(b)'s approach. This differs from Rule 23 class actions, which are considered in more detail in the next section.

C. Class Action and Rule 23

A class action is a lawsuit in which a court authorizes one person or a small group of people to represent the interests of a larger group of

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[39] Dunlop v. Carriage Carpet Co., 548 F.2d 139, 148 (6th Cir. 1977); *accord* Tennessee Coal Co. v. Muscoda Local, 321 U.S. 590, 597 (1944) ("But these provisions, like the other portions of the [FLSA], are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.").

[40] 29 U.S.C. § 202(a) (2012).

[41] *See Dunlop*, 548 F.2d at 143.

[42] Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 706–07 (1945) (footnotes omitted).

[43] *Id.*

[44] 29 U.S.C. § 202(b).

[45] *Id.* at §§ 206–07.

[46] *See* Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1212 (5th Cir. 1995).

people in court.[47] In recent years, many class action lawsuits have been brought against companies regarding alleged problems associated with drug and drug supplements, medical devices, data breaches, appliance and vehicle defects, and—particularly relevant here—wage disputes.[48] However, the legal roots of class action lawsuits are well established and intertwined with concepts found in English law.[49]

American class action lawsuits emerged from the English courts of equity.[50] Specifically, they "developed as an exception to the formal rigidity of the necessary parties rule in equity, as well as from the bill of peace, an equitable device for combining multiple suits."[51] Under the "necessary party rule," all people with a material interest in the suit were required to be joined as a party.[52] Certain exceptions were developed because rigid application of the rule could unfairly deny recovery to a party before the court when the group of people materially interested became too numerous.[53] Among these exceptions was one that allowed for a few to sue for the benefit of the whole:

> where the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary association for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole.[54]

This early exception was codified in Rule 23 of the Federal Rules of Civil Procedure.[55]

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[47] *Class Action*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[48] LIST OF LAWSUITS, http://www.classaction.org/list-of-lawsuits [https://perma.cc/5A5F-43FZ]; CONSUMER ACTION, CLASS ACTION DATABASE, http://www.consumer-action.org/lawsuits/ [http://perma.cc/2XCG-N3NX]; *see, e.g.*, Sherry E. Clegg, *Employment Discrimination Class Actions: Why Plaintiffs Must Cover All of their Bases After the Supreme Court's Interpretation of Federal Rule of Civil Procedure 23(A)(2) in* Wal-Mart v. Dukes, 44 TEX. TECH L. REV. 1087, 1095 (2012) (employment discrimination).

[49] Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1858–60 (1998).

[50] STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 38 (1987).

[51] Ortiz v. Fibreboard Corp., 527 U.S. 815, 832 (1999) (Souter, J.) (internal citations omitted) (citing Hazard et. al., *supra* note 48, at 1859–60; ZECHARIAH CHAFEE, SOME PROBLEMS OF EQUITY 161–67, 200–03 (1950)).

[52] Hazard et al., *supra* note 49, at 1859–60 (citing cases); *see* John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 340–74 (1957) (detailing the application of the compulsory joinder rule in various contexts); *see also* Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254, 1255–89 (1961) (tracing the origins and histories of both the necessary and indispensable party rules).

[53] *Ortiz*, 527 U.S. at 832 (quoting West v. Randall, 29 F. Cas. 718, 721 (No. 17,424) (C.C.D.R.I. 1820) (Story, J.)).

[54] *Id.*

[55] *See* Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1197 (7th Cir. 1971); *see also* Danner

In 1966, Rule 23 underwent a critical revision, which supported a more liberal approach to allowing class action lawsuits.[56] "In drafting Rule 23(b), the Advisory Committee sought to catalogue in 'functional' terms 'those recurrent life patterns which call for mass litigation through representative parties.'"[57] The rule states,

One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.[58]

Unlike other forms of dispute resolution, under Rule 23 the defendant does not have to agree to handle a dispute as a class action. Rather, the rule provides a procedural device based on the practical need to effectively deal with a group of plaintiffs so numerous that litigating each case individually would not be feasible or economical, either for the parties or the courts.[59] Unlike a collective action under the FLSA, Rule 23 does not have an affirmative opt-in requirement. Thus, if an action is maintainable as a class action pursuant to Rule 23, each person within the class definition is considered to be a class member and, as such, is

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v. Phillips Petroleum Co., 447 F.2d 159, 164 (5th Cir. 1971). The Supreme Court has noted that:

> The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." In order to justify a departure from that rule, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The Rule's four requirements—numerosity, commonality, typicality, and adequate representation—"effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'"

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348–49 (2011) (internal citations omitted).

[56] *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968) (Medina, J.) (requiring a "clear showing" that the proceeding is not a proper class action based on a "proper appraisal of all [Rule 23's] factors" in order to ensure "claimants have been given an effective opportunity to join," which is consistent with the class action "as envisioned" by the drafters). *See also, e.g.*, Karan v. Nabisco, Inc., 78 F.R.D. 388 (W.D. Pa. 1978); *In re Sugar Indus. Antitrust Litigation*, 73 F.R.D. 322 (E.D. Pa. 1976); Brady v. Lac, Inc., 72 F.R.D. 22 (S.D.N.Y. 1976); Percy v. Brennan, 384 F. Supp. 800 (S.D.N.Y 1974) ("[S]ince Rule 23 grants plaintiffs the right to proceed as a class, they are entitled to do so without demonstrating the necessity of class relief."); Taliaferro v. State Council of Higher Educ., 372 F. Supp. 1378, 1387 (E.D. Va. 1974); Gerstle v. Continental Airlines, Inc., 50 F.R.D. 213 (D. Colo. 1970).

[57] *Ortiz*, 527 U.S. at 832 (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497 (1969)).

[58] Fed. R. Civ. P. 23(a).

[59] Hansberry v. Lee, 311 U.S. 32, 41 (1940); Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948).

bound by judgment, whether favorable or unfavorable, unless he has "opted out" of the suit.

The courts' willingness to allow Rule 23 class actions to proceed has ebbed and flowed since the rule was first adopted. The significant revision in 1966 made class actions more common as a litigation tool.[60] Because class action lawsuits allow the aggregation of many similar small-value claims, which may not make economic sense to bring separately, they are considered by some to serve an important public role in allowing "those who are less powerful to band together . . . to seek redress of grievances that would go unremedied if each litigant had to fight alone."[61] Even in cases where an individual plaintiff's claims are weak or frivolous, the economic realties and risks associated with fighting a class action lawsuit for a defendant can lead defendants to settle early to avoid the high costs associated with defending a class action through trial.[62] Some commentators have criticized this effect as a form of "legalized blackmail," which allows the extortion of defendants through pure economic considerations.[63] Other commentators have vigorously challenged that characterization as nothing more than needless "inflammatory rhetoric that impugns the character of plaintiffs and trial lawyers who bring class actions, and of trial judges who certify them."[64] The tension between fairness and economy for employees and employers under Rule 23 is ongoing; in recent years, parties have begun to utilize alternative dispute resolution devices, such as arbitration, to bridge the gap.

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[60] Maureen A. Weston, *The Death of Class Arbitration After* Conception*?*, 60 U. KAN. L. REV. 767, 770 (2012).

[61] *Id.*

[62] *Id.*

[63] Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1727 (2006) (citing cases and other commentators). Indeed, at least one state has attempted to unilaterally limit the availability of Rule 23. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010). In *Shady Grove*, the Supreme Court addressed whether Rule 23 took precedence in federal diversity class actions. Specifically, the Supreme Court considered whether Rule 23 preempted a state's attempts to limit class action litigation through statutory provisions that prohibited class actions in lawsuits seeking penalties or statutory minimum damages. *Id.* at 405. It then held that Rule 23 controlled the issue and rejected several lower court decisions that concluded the state law involved was substantive and should therefore govern. *Id.* at 407–16. Justice Scalia, writing for a plurality, concluded that "Rule 23 permits all class actions that meet its requirements, and a State cannot limit that permission by structuring one part of its statute to track Rule 23 and enacting another part that imposes additional requirements." *Id.* at 401. Accordingly, he found that since Rule 23 conflicted with the state law, Rule 23 controlled. *Id.*

[64] Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1429 (2003).

D. Arbitration

Arbitration is a voluntary dispute-resolution process in which parties choose one or more third-party neutral individuals to hear arguments, review evidence, and then make a final, binding decision regarding a dispute.[65] Private arbitration is a matter of party consent and a creature of contract, not coercion by the courts.[66] By consenting to arbitration, the parties take their dispute out of the normal judicial process and forego all of that process's procedural safeguards and protections.[67] One of the primary procedural safeguards that the parties forego in arbitration is the right to appeal to a higher court.[68]

Arbitration has some significant advantages for the parties. First, because the authority of an arbitrator is based on the agreement of the parties,[69] arbitration allows the parties to craft a process that is more tailored to their individual dispute than may be provided in the normal judicial system.[70] For example, the parties can agree to limit or modify certain evidentiary rules or even abandon them altogether.[71] Second, the parties may also limit the issues to be arbitrated.[72] Third, like litigation,

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[65] *Arbitration*, BLACK'S LAW DICTIONARY (10th ed. 2014); R. Gaull Silberman et al., *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1533, 1537 (1994).

[66] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.").

[67] *Arbitration*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[68] *See* Gilmer v. Interstate Corp., 500 U.S. 20, 31 (1991); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985); *see also* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution") (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001)); Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974) ("Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations").

[69] *Accord Kaplan*, 514 U.S. at 943 (noting that arbitration functions only when "parties have agreed to submit to arbitration."). *See* EEOC v. Waffle House, Inc., 534 U.S. 279, 289 (2002) ("[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, *or by any parties*, that are not already covered in the agreement" (emphasis added); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20 (1983) ("[A]n arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement"); Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581 (1960) (in explaining the labor arbitrator's function, the court affirms that he or she "has no general charter to administer justice for a community which transcends the parties" (internal quotation marks omitted)); Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 641 (2010) ("It falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties.").

[70] Silberman, *supra* note 65, at 1537–40 (noting the three main types of alternative dispute resolution).

[71] *Id.*

[72] Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995).

arbitration allows for multi-party dispute resolution, including "class arbitration," which is addressed later in this section. Finally, arbitration allows the parties to choose adjudicators with subject matter and area expertise.[73] Despite the forfeited procedural rights and protections, arbitration is an increasingly popular method of dispute resolution, and its use is buttressed by its enforceability under the Federal Arbitration Act.[74]

i. Federal Arbitration Act

In response to the initial skepticism with which courts traditionally viewed pre-dispute arbitration agreements, Congress passed the Federal Arbitration Act (FAA) in 1925. The Act addressed "widespread judicial hostility to arbitration agreements"[75] and was intended "to place arbitration agreements upon the same footing as other contracts."[76]

Section 2 of the FAA is the "primary substantive provision of the Act."[77] In relevant part, it provides that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[78] The Supreme Court has described this provision as reflecting both a "liberal federal policy favoring arbitration"[79] and the "fundamental principle that arbitration is a matter of contract."[80] In light of this, the Supreme Court has enforced arbitration agreements involving federal statutory claims,[81] and federal courts have repeatedly rejected litigants' attempts to claim that a statutory right cannot be fully vindicated

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[73] *See Pyett*, 556 U.S. at 257 ("Parties generally favor arbitration precisely because of the economics of dispute resolution"); *Circuit City Stores, Inc.*, 532 U.S. at 123; *Gardner-Denver Co.*, 415 U.S. at 57 ("Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations").

[74] *See* Nick Hall, *Alternative Dispute Resolution 2020*, HOUS. LAW., Sep.-Oct. 2000, at 37, 39 (discussing the growth of ADR as an alternative to litigation).

[75] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011); *see* Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 581 (2008).

[76] Gilmer v. Interstate Corp., 500 U.S. 20, 24 (1991); *see Federal Arbitration Act*, BLACK'S LAW DICTIONARY (10th ed. 2014)

[77] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[78] 9 U.S.C. § 2 (2012).

[79] *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24.

[80] Rent-A-Center, Inc. v. Jackson, 561 U.S. 63, 67 (2010).

[81] *See* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 89 (2000) (citing Rodriguez de Quijas v. Shearson, 490 U.S. 477 (1989) (Securities Act of 1933); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220 (1987) (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S.

through arbitration.[82] Additionally, the Supreme Court has rejected generalized attacks based on "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,"[83] and has held that employment contracts are within the scope of the FAA, except for those agreements related to transportation.[84]

The final part of Section 2, however, permits an arbitration agreement to be invalidated and declared unenforceable in limited circumstances, i.e., "upon such grounds as exist at law or in equity for the revocation of any contract."[85] These circumstances have been interpreted to include "generally applicable contract defenses, such as fraud, duress, or unconscionability,"[86] but not to include "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[87]

In *AT&T Mobility LLC v. Concepcion*, the Supreme Court considered the enforceability of a class action waiver in a standard form contract.[88] Specifically, California state law classified most collective-arbitration waivers in consumer contracts as unconscionable and, therefore, unenforceable.[89] Accordingly, under California state law, a court could either refuse to enforce any contract it found "to have been unconscionable at the time it was made" or "limit the application of any unconscionable clause."[90] Relying on the specific language of Section 2 of the FAA and the clear intent of the FAA as a whole, the Supreme Court held that the FAA preempted the state law and that "courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms."[91]

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614 (1985) (Sherman Act)).

[82] "In every case the Supreme Court has considered involving a statutory right that does not explicitly preclude arbitration, it has upheld the application of the FAA." Walton v. Rose Mobile Homes LLC, 298 F.3d 470, 474 (5th Cir. 2002) (citing cases); *see also* CompuCredit v. Greenwood, 565 U.S. 96 (2012) (considering in the context of the Credit Repair Organization Act).

[83] *Rodriguez de Quijas*, 490 U.S. at 481.

[84] EEOC v. Waffle House, Inc., 534 U.S. 279, 299 (2002) (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001)).

[85] 9 U.S.C. § 2 (2012).

[86] Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996); *see also* Perry v. Thomas, 482 U.S. 483, 492–93 n.9 (1987).

[87] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

[88] *Id.*

[89] *Id.* at 340.

[90] CAL. CIV. CODE ANN. § 1670.5(a) (West 2016). Under California's rules, unconscionability finding required "a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." Armendariz v. Found. Health Pyschcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000); *accord* Discover Bank v. Superior Court, 113 P.3d 1100, 1108 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

[91] *Concepcion*, 563 U.S. at 339 (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468,

A year later in *CompuCredit Corp. v. Greenwood*, the Supreme Court considered the FAA in conjunction with another federal statute.[92] Specifically, the Supreme Court considered "whether the Credit Repair Organization Act (CROA) precludes enforcement of an arbitration agreement in a lawsuit alleging violations of that Act."[93] In considering the case, the Supreme Court first noted the FAA established a clear, liberal policy favoring arbitration.[94] In contrast, the Supreme Court found that CROA did not provide a clear, "contrary congressional command" to preclude arbitration agreements.[95] According to the Supreme Court, "[h]ad Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest."[96] Because the federal statute was silent on this issue, however, the majority held that the arbitration agreement should be enforced according to its agreed terms.[97]

In 2013, the Supreme Court in *American Express Co. v. Italian Colors Restaurant*, considered whether a contractual waiver of class arbitration was enforceable under the FAA when the cost to a plaintiff of individually arbitrating a claim would exceed what the plaintiff could potentially recovery in the case.[98] Relying on the purpose of the FAA and the overarching principle that arbitration is a matter of contract, the Supreme Court again held that no contrary congressional command required it to reject the waiver of class arbitration, even if the individual cost of arbitration exceeded the potential recovery.[99]

Finally, in *DIRECTV, Inc. v. Imburgia*, the Supreme Court considered a case in which a consumer sought damages from a television service provider for early termination fees in violation of California law.[100] Prior to the lawsuit, the customers and DIRECTV entered into a service agreement, which provided that "any Claim either of us asserts will be resolved only by binding arbitration."[101] The agreement then set out a waiver of class arbitration, stating that "[n]either you nor we shall be entitled to join or consolidate claims in arbitration."[102] The agreement

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478 (1989)) (internal citations omitted).

92 565 U.S. 95 (2012).

93 *Id.* at 96 (internal citations omitted).

94 *Id.* at 97–98.

95 *Id.* at 98.

96 *Id.* at 103.

97 *Id.* at 104–05.

98 133 S. Ct. 2304, 2307 (2013).

99 *Id.* at 2312.

100 136 S. Ct. 463, 466 (2015).

101 *Id.*

102 *Id.*

also included language that said the arbitration provision would be unenforceable if the "law of [the customer's] state" would make the class arbitration waiver unenforceable.[103] A California court of appeals held the agreement unenforceable under California state law, despite preemption of that law by the FAA.[104] After the California Supreme Court denied review, the U.S. Supreme Court reversed and held that a preempted state law could not invalidate the parties' waiver because doing so would treat arbitration contracts differently than other kinds of contracts.[105] In sum, the Supreme Court's recent jurisprudence reflects a clear deference to the rights of the parties to contract for arbitration—in diverse contexts—and its enforcement under the FAA.

ii. Class Arbitration

A byproduct of the popularity of arbitration agreements has been the development of class arbitration. Class arbitration, like class action lawsuits, is a form of multi-party dispute resolution, and is a "uniquely American" method.[106] It co-opts elements of a class action lawsuit and transfers them into an arbitration-based framework.[107] Accordingly, it becomes "[a]n arbitration conducted on a representative basis similar to that of a class action in court, with a single person or small group of people representing the interests of a larger group."[108] Unlike class action under Rule 23, however, which provides a legal basis for consolidation even without the parties' express agreement, class arbitration is, as with arbitration generally, based on the consent of the parties at the time of the contract.[109]

Class arbitration developed in the early 1980s.[110] It was not until the Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle*,[111] however, that class arbitration gained widespread acceptance in the United States.[112] In *Bazzle*, a plurality of the Supreme Court held that

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[103] *Id.*

[104] *Id.* at 467.

[105] *Id.* at 467, 471.

[106] S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration?* Stolt-Nielsen, AT&T, *and a Return to First Principles*, 17 HARV. NEGOT. L. REV. 201, 205 (2012) (quoting *The President and Fellows of Harvard College Against JSC Surgutneftegaz*, 770 PLI/LIT. 127, 155 (2008)).

[107] *Id.* at 205–06.

[108] *Class Arbitration*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[109] D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 358 (5th Cir. 2013) (internal citation omitted).

[110] Strong, *supra* note 106, at 206.

[111] 539 U.S. 444 (2003).

[112] Strong, *supra* note 106, at 206.

class arbitration was not clearly prohibited by a broad arbitration clause in a commercial lending contract, which provided that "[a]ll disputes . . . arising from or relating to this contract or the relationships which result . . . shall be resolved by binding arbitration by one arbitrator selected by [the lender] with consent of [the borrower]."[113] Thus, as long as the lender selected an arbitrator with the consent of the named borrower, the FAA did not prohibit the use of class arbitration.[114] The plurality opinion then held that whether class arbitration was permissible under the agreement's arbitration clause was a matter of contract interpretation under state law.[115] In taking this approach, the Supreme Court, in effect, deferred to the parties' right to contract with each other under mutually agreed terms.[116]

Seven years later in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the Supreme Court considered a consolidated action where shipping companies sought to vacate a ruling allowing their customers to arbitrate antitrust claims as a class.[117] In considering the arbitration agreement (and clarifying the plurality opinion in *Bazzle*), the Supreme Court first held that "[w]hile the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'"[118] The majority then explained,

An implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.[119]

The majority then noted the fundamental changes that resulted when the parties moved from bilateral to class arbitration, including binding absent parties to an arbitration agreement.[120] Accordingly, the Supreme Court stressed that consent is required before parties can enter into class

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[113] *Bazzle*, 539 U.S at 448.

[114] *Id.* at 450–51.

[115] *Id.* at 454.

[116] Based largely on the same position, i.e., the right of the parties to contract under express terms, the dissent argued "the Supreme Court of South Carolina imposed a regime that was contrary to the express agreement of the parties as to how the arbitrator would be chosen." *Id.* at 459 (Rehnquist, C.J., O'Connor and Kennedy, JJ., dissenting).

[117] 559 U.S. 662, 669 (2010).

[118] *Id.* at 681 (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 629–30 (2009); Perry v. Thomas, 482 U.S. 483, 493 n.9 (1987); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)) (internal citations omitted).

[119] *Id.* at 685.

[120] *Id.* at 686.

arbitration, and reversed the decision of the court of appeals.[121]

E. Circuit Split

On their own, as considered previously, courts have repeatedly shown a willingness to preserve the remedial goals of the NLRA and the FAA. Yet the NLRA and FAA are not always considered in isolation. The Board and several circuit courts have recently considered how the two acts interact with one another. This section of the article will consider several recent circuit court decisions that have considered this issue.[122]

i. D.R. Horton, Inc. v. NLRB (5th Cir. 2013)

In 2006, a homebuilding company required all of its existing and new employees to sign a mutual arbitration agreement as a condition of their employment.[123] The employees agreed that all "disputes and claims," including for compensation and benefits, would be resolved by individual, "binding arbitration," rather than in class or collective action proceedings.[124] In 2008, a group of employees who signed the arbitration agreement initiated a collective arbitration proceeding regarding misclassification under the FLSA.[125] The company responded by claiming that collective arbitration was barred, but that individual arbitration by the employees was allowed.[126] One of the employees, Michael Cuda, subsequently filed an unfair labor charge, claiming that the agreement waiving class action was a violation of the NLRA.[127]

An administrative law judge held that the company's agreement violated Sections 8(a)(1) and 8(a)(4) of the NLRA "because its language would cause employees to reasonably believe that they could not file unfair labor practice charges with the Board."[128] The Board then issued a

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[121] *Id.* at 687.

[122] The cases included in this section are not the only recent ones to have analyzed these issues. *See, e.g.*, Chan v. Fresh & Easy LLC, No. 15-51897 (Bankr. D. Del. Oct. 11, 2016) (endorsing the Seventh and Ninth Circuits' approach); Owens v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013) (upholding the company's arbitration clause).

[123] D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 349 (5th Cir. 2013).

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] D.R. Horton, Inc. & Michael Cuda, an Individual, No. 12-CA-25764, 2011 WL 11194

decision upholding the finding that the agreement violated Section 8(a)(1) because the waiver deprived the employees of their right to engage in protected activity under Section 7 of the NLRA.[129] The decision noted that "[t]he Board has long held, with uniform judicial approval, that the NLRA protects employees' ability to join together to pursue workplace grievances, including through litigation. . . . Collective pursuit of a workplace grievance in arbitration is equally protected by the NLRA."[130] The Board also determined that the agreement violated Section 8(a)(1) because it required employees to waive their right to maintain joint, class, or collective employment-related actions in any forum.[131] Accordingly, the Board ordered the company to rescind the arbitration agreement or revise it to clarify that its employees were not prohibited from filing charges with the Board, nor resolving employment-related claims collectively or as a class.[132]

The company appealed. The Fifth Circuit disagreed with the Board's decision in part because it did not give proper weight to the FAA.[133] Despite recognizing the judicial deference that should be given to the Board's decisions when interpreting ambiguous provisions of the NLRA, it nonetheless found, based on Supreme Court precedent, including *Concepcion*, that:

The NLRA should not be understood to contain a congressional command overriding application of the FAA. The burden is with the party opposing arbitration, and here the Board has not shown that the NLRA's language, legislative history, or purpose support finding the necessary congressional command. Because the Board's interpretation does not fall within the FAA's "saving clause," and because the NLRA does not contain a congressional command exempting the statute from application of the FAA, the Mutual Arbitration Agreement must be enforced according to its terms.[134]

Accordingly, the Fifth Circuit determined that the rights of collective action embodied in the NLRA do not make it distinguishable from the Supreme Court authority that clearly directed enforcement of arbitration agreements.[135] The Fifth Circuit then followed this approach in *Murphy Oil USA, Inc. v. NLRB*.[136]

(N.L.R.B. Div. of Judges Jan. 3, 2011).

[129] *In re D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2283 (N.L.R.B. 2012).

[130] *Id.* at 2278.

[131] *Id.* at 2288.

[132] *Id.* at 2289–90.

[133] *D.R. Horton*, 737 F.3d at 362.

[134] *Id.* (internal citation omitted).

[135] *Id.*

[136] 808 F.3d 1013 (5th Cir. 2015).

ii. Murphy Oil USA, Inc. v. NLRB (5th Cir. 2015)

In *Murphy Oil*, the operator of gas stations across multiple states required its employees to sign agreements to individually arbitrate employment disputes, thus waiving their rights to file or participate in a group, class, or collective action.[137] The agreement explicitly made employment conditional on signing the agreement.[138]

Nevertheless, four employees filed a collective action lawsuit against the company in federal district court alleging various FLSA violations.[139] The alleged violations included the company's failure to pay the plaintiffs for overtime and other off-the-clock activities, like visiting competitors' stations to compare their listed gas prices.[140] The company moved to compel individual arbitration of the claims and to dismiss the collective action as provided by the arbitration clause.[141] Ultimately, the district court granted the company's motion.[142] After the motion was filed but not yet decided, the lead plaintiff filed an unfair labor practice charge against the company, alleging violations of Section 8(a)(1) of the NLRA.[143] The charge alleged that the company's mandatory arbitration agreement essentially prohibited employees from engaging in protected, concerted activities and that the language of the clause could lead employees to reasonably believe that they were not permitted to file unfair labor practice charges with the Board.[144]

The Board issued its decision in October 2014, reaffirming the Board's *D.R. Horton* theory,[145] and noting, "With due respect to the courts that have rejected *D.R. Horton*, and to our dissenting colleagues,

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[137] *Murphy Oil USA, Inc.*, 361 N.L.R.B. 72, at *3 (October 28, 2014). Under the agreement,

> {d}isputes related to employment include, but are not limited to, claims or charges based upon federal or state statutes, including, but not limited to, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, and any other civil rights statute, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act or other wage statutes, the WARN Act, claims based upon tort or contract laws or common law or any other federal or state or local law affecting employment in any manner whatsoever.

Id.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.* at *3–4.

[142] *Id.* at *4.

[143] *Id.*

[144] *Id.*

[145] *Id.* at *7, *30

we adhere to its essential rationale for protecting workers' core substantive right under the [NLRA]."[146] The Board began its analysis by noting that it has the primary responsibility for developing and applying national labor policy, "which is built on the principle that workers may act collectively—at work and in other forums, including the courts—to improve their working conditions."[147] It then criticized the Fifth Circuit's *D.R. Horton* opinion for "giv[ing] too little weight to this policy," and arguing that "[t]he costs to Federal labor policy imposed by the Fifth Circuit's decision would be very high."[148] The Board then reaffirmed its position that collective rights under Section 7 are substantive rather than procedural (with the exception of the right to refrain from concerted activity).[149] Therefore, "[b]ecause mandatory arbitration agreements like those involved in *D.R. Horton* purport to extinguish a substantive right to engage in concerted activity under the NLRA, they are invalid."[150] The Board then argued that there was not inherent conflict between the NLRA and the FAA.[151] Accordingly, the Board found that the company had committed unfair labor practices, violating the NLRA.[152] The company then petitioned the Fifth Circuit for review of the Board's decision.

The Fifth Circuit granted the petition in part, upholding general enforcement of arbitration agreements.[153] Relying on its previous ruling in *D.R. Horton*, the Fifth Circuit noted "an employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration."[154]

iii. Lewis v. Epic-Systems Corp. (7th Cir. 2016)

In *Lewis*, a company emailed its employees an arbitration agreement, which contained a provision that required individual arbitration for any wage and hour claims brought by an employee.[155] Under the terms

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[146] *Id.* at *6.
[147] *Id.* at *7.
[148] *Id.*
[149] *Id.* at *8.
[150] *Id.*
[151] *Id.* at *10.
[152] *Id.* at *21.
[153] Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1015 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (2017).
[154] *Id.* at 1016.
[155] Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1151 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017).

of the agreement, employees could not decline the agreement if they wanted to keep their jobs, and they were deemed to have accepted the terms if they continued to work for the company.[156] The email requested that recipients agree to the terms by clicking two buttons.[157]

One employee who clicked these buttons, Jacob Lewis, subsequently had a dispute with the company regarding overtime pay.[158] Instead of proceeding under the arbitration clause, however, Lewis sued the company in federal court, contending the company had violated the FLSA and Wisconsin law by misclassifying him and other employees as exempt from overtime and thereby depriving them of overtime pay.[159] The district court declined to dismiss the suit because the arbitration clause violated the NLRA by interfering with the employee's right to engage in concerted activities for mutual aid and protection under Section 7, and Epic appealed.[160]

On appeal, the Seventh Circuit unanimously affirmed the district court's decision based on the rationale promulgated in the National Labor Relation Board's—rather than the Fifth Circuit's—*D.R. Horton* decision.[161] Namely, the Seventh Circuit held that engaging in class, collective, or representative proceedings is a "concerted activity" under Section 7 of the NLRA.[162] Under Section 8 of the NLRA, such "concerted activity" is protected from employers engaging in the unfair labor practice of interfering with, restraining, or coercing employees who exercise these rights.[163] The Seventh Circuit also rejected the position that the arbitration agreement had to be enforced under the FAA, noting "[l]ooking at the arbitration agreement, it is not clear to us that the FAA has anything to do with this case."[164]

In considering the FAA, however, the Seventh Circuit attempted to harmonize the NLRA and FAA. The Seventh Circuit reasoned that the "savings clause" of the FAA states that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at

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[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.* at 1161.
[162] *Id.* at 1154 ("Congress was aware of class, representative, and collective legal proceedings when it enacted the NLRA. The plain language of Section 7 encompasses them, and there is no evidence that Congress intended them to be excluded. Section 7's plain language controls, and protects collective legal processes. Along with Section 8, it renders unenforceable any contract provision purporting to waive employees' access to such remedies.") (internal citation omitted).
[163] *Id.* at 1161.
[164] *Id.* at 1156.

law or in equity for the revocation of any contract," including illegality.[165] Moreover, the NLRA prohibits contractual provisions that strip away employees' rights to engage in concerted activities, including the collective action in arbitration at issue in *Lewis*. The court, therefore, found that "[b]ecause the provision at issue is unlawful under Section 7 of the NLRA, it is illegal, and meets the criteria of the FAA's saving clause for nonenforcement. Here, the NLRA and FAA work hand in glove."[166] Notably, the Seventh Circuit took the position that the right to engage in "concerted activity" through class or collective action is a substantive right under the NLRA, even though the class action device is procedural, noting "[t]he right to collective action in section 7 of the NLRA . . . lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the statute."[167] Accordingly, the Seventh Circuit held that because the waiver required employees to relinquish a right that the Board has declared to be substantive, the waiver was not enforceable under the FAA.[168]

iv. Morris v. Ernst & Young, LLP (9th Cir. 2016)

In *Morris v. Ernst & Young, LLP*, two employees were required to sign agreements as a condition of employment that required individual arbitration and prohibited collective arbitration or collective action in court.[169] An employee subsequently brought a class and collective action case against the company in federal district court regarding misclassification to deny overtime wages in violation of the FLSA and California labor laws.[170] On the company's motion, the district court ordered individual arbitration and dismissed the case, and the employee appealed.[171]

The Ninth Circuit, relying on *Chevron*, found that the intent of Congress was clear from the NLRA and was consistent with the Board's interpretation.[172] According to the Ninth Circuit, because the FAA did not mandate the enforcement of contract terms that waived substantive—rather than procedural—federal rights, the FAA's savings clause prevents

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[165] *Id.*
[166] *Id.* at 1157.
[167] *Id.* at 1160.
[168] *Id.* at 1159.
[169] 834 F.3d 975, 979 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017).
[170] *Id.*
[171] *Id.*
[172] *Id.* at 981.

a conflict between the acts.[173] Therefore, the Ninth Circuit found that the FAA's enforcement mandate evinced the employee's substantive right to collective action under the NLRA.[174] The court then held that the agreement violates the NLRA, reversed the district court's dismissal, and remanded the case.[175]

Unlike the Seventh Circuit's unanimous decision in *Lewis*, however, the Ninth Circuit's *Morris* decision included a scathing dissent from Judge Sandra Ikuta.[176] Judge Ikuta argued that the Ninth Circuit majority should have endorsed the Fifth Circuit's *D.R. Horton* ruling and a similar ruling by the Second Circuit involving the same arbitration clause at issue in *Morris*.[177]

F. Procedural & Substantive Rights

The nature of the rights at issue in the aforementioned cases, i.e., whether they are procedural or substantive, though not the primary focus of the opinions, is critically important because it impacts how courts must view the rights and how they are treated when in conflict. "The line between procedural and substantive law is hazy," however,[178] and the two types are not "mutually exclusive categories with easily ascertainable contents."[179] In some situations, "procedure and substance are so interwoven that rational separation becomes well-nigh impossible."[180] Justice Felix Frankfurter has even observed that "substance" and "procedure"

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[173] *Id.* at 986.

[174] *Id.*

[175] *Id.* at 990.

[176] *Id.*

[177] *Id.* at 998 (referencing Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013)).

[178] Erie R. Co. v. Tompkins, 304 U.S. 64, 92 (1938) (Reed, J., concurring in result); *see* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 419–20 (2010) (Stevens, J., concurring in part and in judgment) (considering the nature of procedure and substance).

[179] Sibbach v. Wilson & Co., 312 U.S. 1, 17 (1941) (Frankfurter, J., dissenting).

[180] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting).

mean different things in different contexts.[181] Nevertheless, generally speaking, a procedural right is a right that derives from legal or administrative procedure.[182] It helps to protect and enforce a substantive right.[183] Conversely, a substantive right is "a right of substance rather than form."[184] It is a right that can be protected by law and enforced.[185]

G. Supreme Court

On January 13, 2017, the Supreme Court granted cert and consolidated the appeals from decisions in the Fifth Circuit's *Murphy Oil* case, the Seventh Circuit's *Lewis* case, and the Ninth Circuit's *Morris* case.[186] At the time of publication, the Supreme Court had adopted a briefing schedule for the consolidated cases, which was not yet complete.

III. THE SUPREME COURT & BEYOND

As reflected by the foregoing discussion, the Board and several of the circuit courts have taken vastly different approaches to the FAA, NLRA, and the very nature of the rights at issue. Because of this split in the circuits and the need for clarity on the appropriate approach, it is unsurprising that the Supreme Court granted review of these decisions.[187]

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[181] *See* Guaranty Tr. Co. v. York, 326 U.S. 99, 108 (1945). In writing for the majority, Justice Frankfurter observed:

> Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same keywords to very different problems. Neither "substance" nor "procedure" represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. And the different problems are only distantly related at best, for the terms are in common use in connection with situations turning on such different considerations as those that are relevant to questions pertaining to *ex post facto* legislation, the impairment of the obligations of contract, the enforcement of federal rights in the State courts and the multitudinous phases of the conflict of laws.

Id. (citations omitted).

[182] *Right*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] NLRB v. Murphy Oil, Inc., 137 S. Ct. 809 (2017); Epic Sys. Corp. v. Lewis, 137 S. Ct. 809 (2017); Ernst & Young, LLP v. Morris, 137 S. Ct. 809 (2017).

[187] *Id.*

At the time of publication, Associate Justice Neil Gorsuch had recently been confirmed to the Supreme Court. A review of Justice Gorsuch's prior judicial writing has shown him to be skeptical of certain core doctrines of administrative law and agency deference in particular.[188]

The stage is now set for one of the most important employment and arbitration cases in years, with the potential for far reaching implications that may impact millions of working Americans. While the Supreme Court has yet to rule on the issue presented, the addition of Justice Gorsuch and recent case law, as addressed previously, make it likely that the Supreme Court will adopt the Fifth Circuit's approach. However, resolution could also come in a narrower form, rather than as a sweeping decision. This section considers the future of class waivers in the employment context at the Supreme Court and the impact of such waivers generally.

A. Likely Affirmation of the Fifth Circuit Approach

Recent case law from the Supreme Court shows a strong deference to the FAA.[189] While the Supreme Court has yet to consider class waivers in the employment context,[190] its language in *Morris* that "an arbitrator cannot hear a class arbitration unless such a proceeding is explicitly provided for by agreement," is particularly sweeping in the FAA context.[191] Additionally, the Supreme Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."[192] Given the current composition of the Supreme Court, along with this recent precedent and trend in favor of arbitration rights, the Supreme Court is likely to adopt the reasoning of the Fifth Circuit in *D.R. Horton* and *Murphy Oil*, and expand its ruling in *Concepcion* to the employment context. Adopting a narrower approach, however, would allow the Supreme Court to avoid

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[188] *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016); De Niz Robles v. Lynch, 803 F.3d 1165 (10th Cir. 2016); United States v. Nichols, 784 F.3d 666 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc); *see generally*, Eric Citron, *The Roots and Limits of Gorsuch's Views on* Chevron *Deference*, SCOTUSBLOG (Mar. 17, 2017, 11:26 AM), http://www.scotusblog.com/2017/03/roots-limits-gorsuchs-views-chevron-deference [https://perma.cc/LW65-XKDU].

[189] *See supra* Part II.D.i (discussing the FAA and recent Supreme Court cases reflecting judicial deference toward arbitration and freedom of contract).

[190] It has, however, considered the applicability of the FAA in the employment context in Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

[191] Morris v. Ernst & Young, LLP, 834 F.3d 975, 998 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017). *See supra* text accompanying notes 117-21 (addressing *Stolt-Nielsen*).

[192] *See supra* note 27.

unintended consequences while still providing the clarity that both employers and employees desire. This section will first consider a broad approach to deciding the consolidated cases, and then outline the benefits of a narrower alternative.

i. Broad Approach

Under a broad approach, the Supreme Court would weigh the right to contract against the right to engage in concerted, collective, or class-based activity. This approach necessarily entails consideration of procedural and substantive rights.[193] To date, the circuit courts have evaluated this issue through the lens of the statutory frameworks and intent of the FAA and the NLRA, i.e., the broad approach.[194] As each of the now-consolidated cases was litigated by the Board, it makes sense why this approach was taken.[195] The inclination to view each employment dispute under the NLRA's framework is problematic, however. As explained by the Fifth Circuit in *D.R. Horton*, viewing all employment disputes as falling under the NLRA's concerted activity protections could pose a challenge to the benefits of arbitration generally, and to the FAA.[196] Judge Sandra Ikuta shared this concern in her dissent to the Ninth Circuit's *Morris* decision, stating:

> the majority exhibits the very hostility to arbitration that the FAA was passed to counteract. The Court recognized in *Concepcion* that the pre-FAA judicial antagonism to arbitration agreements "manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy."[197]

Because the NLRA's notion of concerted activity is vaguely defined, it is conceivable that an active Board or skilled practitioners could convert Section 7's protections into a tool to circumvent the FAA.

Conversely, broadly extending the FAA to the employment context would not just be extending *Concepcion*, but could be viewed as an act of judicial lawmaking. While there is a clear argument that the broad language embodied by the NLRA and FAA *can* be read in concert, as

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[193] *See supra* Part II.F (describing procedural and substantive rights).

[194] *See supra* Part II.E (discussing the Fifth, Seventh, and Ninth Circuit Court cases in which the courts considered the FAA's application the NLRA).

[195] *Id.* (reflecting that the Fifth, Seventh, and Ninth Circuit Court cases were litigate by the Board).

[196] *See* D.R. Horton v. NLRB, 737 F.3d 344, 349 (5th Cir. 2013) (discussing 29 U.S.C. § 157 (2012)).

[197] Morris v. Ernst & Young, LLP, 834 F.3d 975, 998 (9th Cir. 2016) (Ikuta, J., dissenting), *cert. granted*, No. 16-300, 2017 WL 125665 (U.S. Jan. 13, 2017).

the Seventh and Ninth Circuit opinions did, trying to do so has resulted in judges who have also needed to weigh competing policy interests.[198] If this Supreme Court is asked to make a ruling that will turn on policy preference, it is unlikely that true clarity will be achieved. Rather, the decision will be subject to review as the composition of the Justices change. Similarly, the very nature of the FAA and NLRA may shift in step with the Justices of the Supreme Court.

Ultimately, viewing each employment dispute under the NLRA's framework is as unnecessary as it is problematic. As presented, the consolidated cases do not require the Supreme Court to stretch to try to engage in a strained textual analysis in the name of policy neutrality. Each consolidated case stems from a dispute that was originally brought under the FLSA or equivalent state wage laws.[199] Therefore, the Supreme Court could review the consolidated cases through the narrower lens of the FLSA's collective action provisions. This would functionally adopt a case-by-case approach, and therefore avoid expressly weighing a fundamental aspect of the NLRA against the FAA.

ii. Narrower Alternative

Instead of endorsing the Fifth Circuit's sweeping proposition that concerted, collective, or class rights do not involve substantive rights and may broadly be preempted by the FAA, the Supreme Court could endorse a case-by-case or statute-by-statute approach, which could harmonize *Concepcion* and related case law with specific employment law statutes, such as the FLSA. If a case involves no such statute, then *Concepcion* and *Stolt-Nielsen* suggest that the class waiver would be valid.[200] Similarly, federal statutes that do not explicitly provide for class or collective mechanisms would also likely be subject to class waivers. As the cases on appeal each implicate the FLSA, the Supreme Court could narrow its focus to the FAA and FLSA, rather than the FAA and NLRA.[201]

Taking this approach, the Supreme Court might find that the FLSA,

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[198] *See supra* Parts II.E.iii and iv (reviewing the Seventh and Ninth Circuit Courts of Appeals decisions).

[199] *See supra* Parts II.E.ii, iii, and iv (discussing the nature of the claims brought in each of the Fifth, Seventh, and Ninth Circuit Court cases).

[200] *See supra* text accompanying notes 88–91 (analyzing *Concepcion*) and text accompanying notes 117–21 (analyzing *Stolt-Nielsen*).

[201] *See supra* Parts II.E.ii, iii, and iv (describing the FLSA claims brought in each of the Fifth, Seventh, and Ninth Circuit Court cases).

unlike Rule 23 and perhaps also unlike the NLRA, precludes class waivers because it contains explicit provisions authorizing, sanctioning, and protecting collective activity.[202] Unlike in Rule 23 class actions, collective actions under the FLSA require employees to "opt-in."[203] This means that employees neither bear the costs nor reap the benefits of a pending action unless they affirmatively "consent" to being involved in that matter.[204] This requirement was added by Congress to limit how many and what types of plaintiffs could be joined in these types of collective actions.[205] This opt-in requirement is also why FLSA collective actions are subject to standards that are distinct from those of Rule 23 class actions.[206] In the context of an FLSA collective action, the Supreme Court could find more explicit text[207] and Congressional intent in the statute to overcome any preemption by the FAA.[208]

Although the Court has not always provided deference to the decisions of the NLRB,[209] it has recently and explicitly recognized the policy and remedial goals of the FLSA.[210] For example, to facilitate the ability of employees to make timely and informed decisions as to whether to opt-in to an FLSA collective action, courts are authorized to facilitate notice to eligible employees and determine the contours of the FLSA notice process.[211] "Even if a collective action is not ultimately certified, the process of allowing individual . . . workers to lodge their claims in a forum where they can be recognized, evaluated, and possibly settled, is consistent with the policy choice Congress made when it created the FLSA right of action."[212] In contrast, class waivers would likely preclude

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[202] *See* 29 U.S.C. § 216(b) (2012). The Supreme Court may also find the same regarding the Age Discrimination in Employment Act (which incorporates procedural provisions from the FLSA; 29 U.S.C. § 626(b)) and other federal statutes with explicit collective provisions.

[203] *Id.*

[204] *See* Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 916 (5th Cir. 2008) (quoting LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288 (5th Cir.1975) (per curiam)).

[205] *See* Chase v. AIMCO Props., L.P., 374 F. Supp. 2d 196, 199 (D.D.C. 2005).

[206] *Id.* (granting first stage FLSA conditional certification but denying certification under Rule 23 standards).

[207] *See, e.g.*, Frye v. Baptist Mem'l Hosp., Inc., 495 F. App'x 669 (6th Cir. 2012) (construing the text of the FLSA literally to require each plaintiff to file a consent in court, which could also be interpreted to requiring a plaintiff to first proceed to court before consenting to arbitration in each FLSA dispute, regardless of whether the plaintiff had also agreed to arbitrate the dispute).

[208] *But see* Sutherland v. Ernst & Young LLP, 726 F.3d 290, 296–97 (2d Cir. 2013) (construing the FLSA's opt-in requirement as compatible with a class waiver's consent to "opt-out" of collective activity).

[209] *See, e.g.*, *supra* note 27.

[210] *See, e.g.*, Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1047 (2016).

[211] *See supra* notes 37–46, 203–04 and accompanying text (discussing the FLSA and its procedures).

[212] Chase v. AIMCO Props., L.P., 374 F. Supp. 2d 196, 201 (D.D.C. 2005).

additional employees from obtaining notice of their ability to join a pending matter, which the FLSA permits under certain conditions.[213] This notice and affirmative opt-in requirement is not merely a procedural tool because it protects access to employees' substantive wage rights.[214] In a world of class waivers, many employees will likely never receive this notice, and will thus lose their ability to evaluate their potential wage claims and to timely, accurately, and efficiently pursue these statutory rights as Congress intended.

Some courts have suggested that because the FLSA permits an employee to opt-in to an FLSA collective action, the employee should also be able to contract to waive this right.[215] However, the FLSA provides specific, intentional, and important redress for employees whom Congress has already recognized may not be empowered to truly bargain as to their working conditions.[216] For instance, the FLSA does not allow an employee to contract away his or her right to receive lawful minimum wage, if the employee is lawfully entitled to such wage.[217] The FLSA also does not allow an employee to forego his or her entitlement to overtime wages when the law says the employee is entitled to the overtime wage.[218] Similarly, the FLSA likely should not permit an employee to contract away his or her right to notice of a pending collective action, or the rights of putative class members.

Although the Supreme Court could still split along policy lines, following this narrower, statute-specific approach would provide clearer text and Congressional intent for the Court to evaluate than is possible under the broader approach taken by the appellate courts. This approach could also avoid the need to reach a sweeping ruling while still providing further clarity than currently exists. The Supreme Court could adopt the reasoning of *D.R. Horton* but find that employment statutes like the FLSA and ADEA, which explicitly provide for collective rights, preclude enforcement of class waiver provisions. This approach could be appealing to Chief Justice John Roberts who has shown a tendency to avoid sweeping rulings when possible and to look for a way to avoid

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[213] *See supra* text accompanying notes 37–46, 203–04 (describing the FLSA and its procedures as mandated by Congress).

[214] *See supra* Part II.F (discussing substantive and procedural rights, including in the context of the Fifth Circuit's *D.R. Horton* case).

[215] *See, e.g.*, Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297 (2d Cir. 2013) (citing Owen v. Bristol Care, Inc., 702 F.3d 1050, 1052–53 (8th Cir. 2013) ("Even assuming Congress intended to create some 'right' to class actions, if an employee must affirmatively opt in to any such class action, surely the employee has the power to waive participation in a class action as well."); *see also*, Long John Silver's Rests., Inc. v. Cole, 514 F.3d 345, 350 (4th Cir. 2008).

[216] *See supra* text accompanying notes 37–46 (discussing the FLSA and its procedures).

[217] *See id.*

[218] *See id.*

political encroachment.[219]

B. Additional Rights at Issue

If the Supreme Court does, in fact, adopt the Fifth Circuit's reasoning in *D.R. Horton* and *Murphy Oil*, the employer and management-side community would rightfully view the holding as an enormous victory. The NLRA and FLSA were both passed into law because Congress recognized that employees generally possess unequal bargaining power with their employers.[220] However, affirming the Fifth Circuit's reasoning would, in effect, require the Supreme Court to conclude that employees are sufficiently powerful to negotiate arbitration agreements with their employers and voluntarily consent to such agreements' terms.[221] Such an outcome could have far-reaching implications because it would alter how courts view the nature of the employment relationship.

Regardless of how the Supreme Court rules on the circuit split, it is unlikely there will be full resolution to this issue. The Board was bullish during the Administration of President Obama on labor rights, but that attitude may change under the new Trump Administration.[222] It is even possible that NLRA enforcement efforts may fundamentally change or largely dissipate. Nevertheless, there are already other cases that focus on the outer limits of what constitutes concerted activity. For example, in *Three D, LLC v. NLRB*, the Second Circuit affirmed the Board's decision and recognized that employees' Facebook posts and "likes" were protected concerted activity.[223] In reaching its decision, the Second Circuit explicitly found that a contrary view would pose limitless threats to employees' free speech rights.[224]

Importantly, without the ability to engage in collective activity through class arbitration, social media could become an even more vital forum for employees to voice their employment concerns. In recent years, there has generally been a decline in union activity;[225] however,

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[219] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 574 (2012) (finding the individual mandate portion of the Affordable Care Act to be a tax).

[220] *See supra* note 42.

[221] Otherwise, the class waiver agreements would be unenforceable pursuant to common law principles.

[222] *See supra* Part II.E (discussing several of the Board's decisions during the Obama administration).

[223] 629 F. App'x 33, 36–38 (2d Cir. 2015) (citing Three D, LLC (Triple Play), 361 N.L.R.B. No. 31 (2014)).

[224] *Id.*

[225] The union membership rate—the percent of wage and salary workers who were members of

employment review websites and social media give individual employees some means to confront seemingly unfair working conditions and seek empowerment.[226] Employers, rewarded by a broad victory at the Supreme Court and a less active Board, may push other work-related issues forward in a manner that could implicate—if not existentially threaten—broader free speech considerations.

Notwithstanding the Supreme Court's ultimate decision or breadth of approach, employees will need to be educated so they can make informed decisions in this new reality. Advocates for workers' rights may need to find new and extra-judicial alternatives to preserve traditional labor, wage, and speech rights and educate the public so that a fair balance between the rights of employers and employees may be preserved.

IV. CONCLUSION

As set forth in this article, class arbitration is a relatively new phenomenon compared to traditional labor and collective rights.[227] As of the publication of this article, the judicial system seems poised to further sanction the use of arbitration as an acceptable alternative to Congressionally-recognized means to enforce substantive rights. Presently, the focus is on the propriety of class waivers in the employment context.[228] While a Supreme Court review of these waivers is likely to focus on the FAA and judicial economy, the issues involved are complex and paramount for both employers and employees.

In essence, the judicial system is now asked to decide how traditional labor values should fit into an increasingly fast and mobile economy, where the right to contract may be used to waive or limit an employee's rights at the click of a button or the swipe of a screen. The future of employment disputes in the United States, and both procedural and substantive rights, are at stake. The discord on this question challenges

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unions—was 11.1 percent in 2015, unchanged from 2014, according to the U.S. Bureau of Labor Statistics. The number of wage and salary workers belonging to unions, at 14.8 million in 2015, was little different from 2014. In 1983, the first year for which comparable union data are available, the union membership rate was 20.1 percent, and there were 17.7 million union workers. BUREAU OF LABOR STATISTICS, UNION MEMBERS—2016 (2017), http://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/Y9MN-CA9G].

[226] *See, e.g.*, GLASSDOOR, http://www.glassdoor.com/reviews/index.htm [https://perma.cc/ME5D-ZW32].

[227] *See supra* Part II.D.ii (analyzing class arbitration).

[228] *See supra* text accompanying note 186 (discussing the three cases before the Supreme Court related to class waivers in the employment arbitration context).

how and whether traditional labor values will continue to impact the employment relationship. While the Supreme Court may resolve this narrower issue soon, the competing interests at stake are poised to stay relevant for years to come.

Notes

Fulfilling the Promise of *Brady*: The Need for Open Files and Complete Disclosure Between the Prosecution and the Police

Kevin Lipscomb*

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*B.A., Austin College, 2014; J.D., The University of Texas School of Law, May 2017. Many thanks to the staff editors and board of the Texas Journal on Civil Liberties & Civil Rights, and to Sara Dhanji and Adam Royal, the editors in charge of this piece. I especially want to thank Professor Jennifer Laurin who helped me research and develop this note.

I. INTRODUCTION

Jurisprudence on *Brady v. Maryland* and its applicability to police action leaves criminal defendants with little chance of success in civil court and without meaningful remedies in criminal court. This jurisprudence does not encourage police agencies to be thorough with their *Brady* compliance. Therefore, new approaches must be taken to ensure *Brady* compliance by law enforcement. This paper will argue that the best approach to ensuring *Brady* compliance is an open file policy between the police and the prosecution, including police personnel records. Further, this paper recognizes that a change in police culture may be necessary to ensure full compliance, and that police chiefs may be best situated to create this change.

Imagine a criminal defendant who maintains his innocence to his attorney, to the police, to the prosecutor, and to the court. His attorney investigates the matter and is unable to expose any exculpatory evidence. He requests that the prosecutor turn over any such evidence in the state's file, and the prosecutor does so. This evidence includes police reports, witness statements, photographs, and DNA tests. The one thing that is not turned over, that the attorney believes exists, is the police officer's dash cam video. The defense attorney makes another request, specifically asking for the dash cam, and the prosecutor realizes it is not in the file. The prosecutor asks the police to turn it over and then realizes that it does not exist. The officer failed to turn the dash cam video over in time, and it has been erased.

The video is the only real evidence of what happened during the stop. It contains what the officer and the defendant said to each other, how they behaved, and when the stop happened. It could give rise to Fourth or Fifth Amendment suppression issues. It could support a much more viable defense than the attorney currently believes can be proven. Without the video, all of this is unavailable to the defendant, and the potential harm is immense.

Seemingly, the prosecutor complied with the duties on the state for the purposes of *Brady v. Maryland*, and yet, a piece of exculpatory evidence has gone missing. This paper will first establish that the police's failure to turn over the video was still a violation under *Brady v. Maryland*. It will then assert that *Brady* violations occur as a result of both intentional and negligent acts by the police. Next, it will analyze what remedies are available to criminal defendants who find themselves in this

situation and establish that these remedies are inadequate for ensuring police compliance. Finally, it will call for an open file policy between police and prosecutors, and analyze and recommend approaches for this policy's implementation.

II. *BRADY* IMPOSES A DUTY TO DISCLOSE EXCULPATORY AND IMPEACHMENT MATERIAL ON THE ENTIRE PROSECUTION TEAM

In 1963, the Supreme Court decided *Brady v. Maryland*, holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution."[1] This holding established several crucial things. First, the defense must request that favorable evidence be turned over.[2] Second, the favorable evidence must be material.[3] Third, if there is material evidence favorable to the accused—for either guilt or punishment—in the prosecution's possession, the prosecution must turn it over.[4] Finally, *any* failure to do so is a violation of due process, regardless of whether or not the prosecution was acting in good faith.[5] This holding establishes the prosecution's duty to do justice in discovery procedures.[6] If they possess any material exculpatory evidence, it is their duty to turn it over.[7] To hide, destroy, or ignore such evidence would hinder a defendant's ability to put on his best defense, violating due process and the prosecution's duty to pursue justice instead of convictions.[8]

Since *Brady*, the Court's holding has been expanded and explained over the course of several cases. In *Giglio v. United States*, the Supreme Court clarified that a state witness's credibility is a material issue, and any promises made to witnesses in exchange for testimony is favorable to the defense, and therefore, must be turned over to the defense.[9] Further, any such promises made by a prosecutor are imputed to the entire

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1 Brady v. Maryland, 373 U.S. 83, 87 (1963).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *See Brady*, 373 U.S. at 88 (explaining that by withholding exculpatory evidence from a defendant, a prosecutor fails to comport with standards of justice).

7 *Id.* at 87.

8 *See id.* at 87–88 ("A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant.").

9 Giglio v. United States, 405 U.S. 150, 154–55 (1972).

government; the entire entity should have knowledge of the promise and any failure to disclose the promise is a violation of due process.[10]

Although the requirements of *Brady* have been broadly applied to the prosecution, the Court has been less willing to apply such broad requirements to the police. *Brady* requires that prosecutors turn over all material exculpatory evidence in the state's file, but that file is built through the investigatory efforts of the police. In *Arizona v. Youngblood*, the Supreme Court again held that the good faith of the state is irrelevant when the state fails to disclose to the defendant material exculpatory evidence.[11] However, the Court limited what ought to be considered exculpatory evidence, and it also limited the type of evidence that police must preserve.[12] The Court held that due process does not require the preservation of evidence that *may* result in exoneration if future tests are conducted.[13] The Court was unwilling to impose a duty on police to preserve *all* evidence that might be conceivably significant to a prosecution.[14] In doing so, they required that defendants must show the police acted in bad faith in order to show a violation of due process.[15] In so holding, the Court harmed both the prosecution and the defense. The same type of evidence that may be exculpatory in one case could be inculpatory in another. For example, the results of a DNA test may inculpate one defendant and exculpate another.

Finally, in *Kyles v. Whitley*, the Supreme Court addressed the responsibility of the prosecution when material exculpatory evidence is in the hands of the police.[16] Holding that the police are part of the same government body as the prosecution, the Court found that if someone in law enforcement has the evidence, it is a *Brady* violation if the evidence never reaches the defendant.[17] If the evidence is known to the police, the prosecutor has a duty to disclose it.[18] However, rather than establishing an affirmative duty of the police to turn over *Brady* material, the Court suggested that prosecutors should establish procedures through which the police can inform the prosecution of anything that tends to prove the innocence of the defendant.[19] Although the Court suggested the implementation of new procedures, it did not obligate prosecutors to personally

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[10] *Id.* at 154.
[11] Arizona v. Youngblood, 488 U.S. 51, 55 (1988).
[12] *Id.* at 58.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Kyles v. Whitley, 514 U.S. 419, 437–38 (1995).
[17] *Id.*
[18] *Id.*
[19] *Id.* at 438 (quoting *Giglio*, 405 U.S. at 154).

review police files in search of exculpatory information.[20]

III. WHY MIGHT POLICE OFFICERS VIOLATE THEIR DUTY UNDER *BRADY*?

When police officers fail to turn over exculpatory evidence, these failures can be boiled down into two categories: negligent failures and intentional failures. Intentional failures can be explained by what this paper will refer to as "conviction-minded officers." These officers feel that the right suspect has been arrested, and with that in mind, they want to give the prosecution the strongest version of the case, protect victims, avoid a harmful cross-examination, and be sure that criminals do not avoid punishment.[21] Each and every one of these goals puts pressure on officers to violate *Brady* because doing so keeps useful exculpatory evidence out of the defendant's hands.

Negligent violations of *Brady* occur when officers fail to recognize a piece of evidence as *Brady* material. This sort of failure can be explained by a failure to train on the requirements of *Brady*, but it can also be explained by the phenomenon of tunnel vision.[22] Tunnel vision is a natural human tendency that can lead investigators to "focus on a suspect, select and filter the evidence that will 'build a case' for conviction, while ignoring or suppressing evidence that points away from guilt."[23] In effect, evidence that supports an officer's theory of the case becomes significant, relevant, and probative.[24] Evidence that does not fit the theory is overlooked or dismissed because it is not relevant or reliable.[25] Tunnel vision's impact under *Brady* is severe; even if an officer understands the

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[20] *See generally id.* (explaining that police should implement procedures to disclose all exculpatory evidence, but never suggesting that prosecutors should review police files themselves).

[21] *See* TEX. DIST. & CTY. ATTORNEYS ASS'N., *BRADY* AND LAW ENFORCEMENT: TIPS FOR WORKING WITH LOCAL POLICE 2 (2014), http://www.tdcaa.com/sites/default/files/Brady%20and%20Law%20Enforcement%20REV.pdf [https://perma.cc/TS86-KELK] (listing reasons an officer may not turn over *Brady* evidence); *see also* Cynthia Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 429-30 (2010) ("More disturbing however, is the undisputed fact that intentional *Brady* violations have resulted in near executions in numerous death penalty cases."); *see also Government Misconduct*, INNOCENCE PROJECT, http://www.innocenceproject.org/causes/government-misconduct [https://perma.cc/SDG9-2ZR5] (listing "failing to turn over exculpatory evidence to prosecutors" as a common form of misconduct by law enforcement officials).

[22] *See generally* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006) (providing multiple cases where tunnel vision affected the outcomes of a case).

[23] *Id.* at 292.

[24] *Id.*

[25] *Id.*

duty imposed by *Brady*, exculpatory evidence might not be turned over because it has mistakenly been deemed irrelevant or unreliable.[26]

In order to curb intentional violations of *Brady* and overcome the harmful effects of tunnel vision, pressure needs to be put on police officers and their departments to learn what *Brady* requires, to always comply with *Brady*, and to turn over all evidence gathered in an investigation—even if the officer has mistakenly decided it is irrelevant. Unfortunately, *Brady* doctrine does not apply this pressure.

IV. REMEDIES IN CRIMINAL COURT DO NOT INCENTIVIZE POLICE DISCLOSURE UNDER *BRADY*

Most remedies in criminal court do little to pressure the police towards *Brady* compliance. Although this duty is established in case law, as shown in the foregoing cases, the majority of remedies do not actually incentivize disclosure. For conviction-minded officers, there are few, if any, doctrinal incentives for turning over their *Brady* materials. Further, these remedies are nowhere near meaningful enough to encourage officers to keep an open mind and avoid tunnel vision.

For the purposes of criminal court, a *Brady* violation occurs if exculpatory evidence is known to either the police or the prosecution, and it does not wind up in the hands of the defendant.[27] Whether or not the violation is the result of the good or bad faith of the police is irrelevant.[28] It is still a violation. In order to reduce such violations, the remedy should be tailored to incentivize disclosure from the police.

As it stands, the law provides no such incentive. If it comes to light—during or after a trial—that exculpatory evidence has been withheld, the typical remedy is a new trial in which the exculpatory evidence is made available.[29] If the evidence is discovered pre-trial, then it is turned over to the defendant.[30] If the defense needs more time to build its case, given that there is new evidence to incorporate, it may get a continuance in order to do so.[31] These remedies are nothing more than

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[26] *See generally* Janet C. Hoeffela & Stephen I. Singer, *Activating a* Brady *Pretrial Duty to Disclose: From the Mouths of Supreme Court Justices to Practice*, 38 N.Y.U. REV. L. & SOC. CHANGE 467, 475–76 (2014) (presenting research on cognitive bias that demonstrates even prosecutors acting in good faith will underestimate the potential exculpatory value of evidence).

[27] *Kyles*, 514 U.S. at 437; *Brady*, 373 U.S. at 87.

[28] *Kyles*, 514 U.S. at 437–38.

[29] Jones, *supra* note 21, at 443.

[30] *Id.*

[31] *Id. See generally* United States v. Kelly, 14 F.3d 1169, 1176 (7th Cir. 1994) (finding that "[i]n

what *Brady* already requires.[32] They allow the defendant access to exculpatory evidence in time for its effective use at trial.[33] In short, these remedies provide delayed compliance with *Brady*, rather than encouraging compliance from the outset.

What makes this problematic is that the defense has to recognize that there has been a *Brady* violation before petitioning the court for a remedy.[34] Since it is unlikely that a defense attorney will ever learn that the *Brady* material exists, most violations will never be remedied.[35] In situations where a *Brady* violation occurs but is never noticed, the evidence will never be used at trial.[36] A conviction-minded officer may want to gamble on these outcomes. Either the violation is never noticed, and the defendant is forced to put on a weaker case, or the violation *is* noticed, and the officer merely has to fulfill the duty that was already imposed.[37] Further, the proceedings are delayed, and if a defendant is waiting in jail or forced to continue complying with burdensome bond conditions, the pressures to accept a plea are increased.[38]

Although dismissal of the case is a potential remedy, its use is rare.[39] This remedy would certainly incentivize disclosure for the conviction-minded officer, but because it is typically only used for egregious violations or when the evidence is completely unavailable, the remedy is not likely to encourage compliance in an officer who wants to suppress evidence or ignore its exculpatory value.[40] Another remedy, the *Brady* instruction, allows for the absence of evidence to be used against the

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situations such as this, in which a *Brady* disclosure is made during trial, the defendant can seek a continuance of the trial to allow the defense to examine or investigate, if the nature or quantity of the disclosed *Brady* material makes an investigation necessary").

[32] Jones, *supra* note 21, at 443 ("[T]he consequences of noncompliance with *Brady* are identical to the consequences of compliance—disclosure of favorable evidence to the defense.").

[33] *Id.*

[34] *See id.* at 433–34 (explaining the unlikelihood of a defense attorney uncovering a *Brady* violation).

[35] *See id.* ("In the overwhelming majority of cases, the defense learns of *Brady* evidence by pure accident."); *see also* Hoeffela & Singer, *supra* note 26, at 477 ("If a prosecutor does not disclose favorable evidence, he or she is aware chances are good it will never be discovered."); *see also* Elizabeth Napier Dewar, *A Fair Trial Remedy for* Brady *Violations*, 115 YALE L.J. 1450, 1453–54 (2006) ("Defendants only rarely unearth suppressions. And, even when they do, their convictions are rarely overturned because they face a tremendous burden on appeal.").

[36] *See* Jones, *supra* note 21, at 433 (explaining that a defendant cannot compel disclosure of favorable evidence withheld by the prosecution if he does not know the evidence exists).

[37] *Id.* at 443.

[38] *See id.* ("First, defendants that have been detained pretrial are forced to endure a more prolonged loss of liberty if a continuance of the trial date is necessitated by the government's failure to comply with its *Brady* disclosure duty. In jurisdictions with crowded court dockets, the length of the delay could extend for several months.").

[39] *Id.* at 443.

[40] *See id.* at 444–46 (explaining that dismissal as a sanction for *Brady* violations is typically used only when "there is a pattern of egregious *Brady* violations or when *Brady* evidence has been permanently lost or destroyed").

prosecution in its case.[41] The jury is instructed that it may take note of the absence of such evidence, and hold it against the state in its deliberations.[42] However, this again requires the knowledge that a *Brady* violation occurred. If no one ever notices the violation, then the instruction never happens. If the violation *is* noticed, then the defense has to proceed through trial without the exculpatory evidence to which it is entitled.[43] Although the harm may be remedied to an extent, the probative value of the instruction cannot be the same as the evidence itself.[44]

Unfortunately, the jurisprudence on *Brady* and the disclosure of exculpatory evidence is linked only to the evidence's use at trial.[45] This is problematic for two reasons. First, evidence might not be turned over until the night before trial, severely hindering a defense team's ability to prepare.[46] Second, a defendant may enter into a plea agreement without ever knowing about exculpatory evidence.[47] The Supreme Court has refused to extend the *Brady* right to pre-trial negotiations and plea deals.[48] In *United States v. Ruiz*, the defendant, Angela Ruiz, was offered a plea bargain for a downward departure under the sentencing guidelines.[49] Part of her pleading guilty involved a waiver of the *Brady* right to disclosure of impeachment evidence. Because of that waiver, Ruiz refused to agree to the deal, but still pleaded guilty, asking the judge to grant the same reduced sentence.[50] The government opposed her request, and the judge refused to downgrade Ruiz's punishment.[51] Arguing that the Constitution

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[41] *Id.* at 447.

[42] Jones, *supra* note 21, at 447–48.

[43] *Id.* at 447.

[44] *See id.* (explaining that a jury may infer that if the absent evidence had been produced, it would have been damaging to the party that failed to produce the evidence, but an instruction to the jury will likely never have the exact effect as a piece of evidence).

[45] *Id.* at 432. *But see* Crim. Prac. Guides, *Timing of* Brady *Disclosure*, 15(3) CRIM. PRAC. GUIDE NL 6 (2014) (explaining that some lower courts have held that some exculpatory evidence must be turned over for its effective use at plea proceedings or trial.).

[46] Jones, *supra* note 21, at 432. ("[P]rosecutors can (and do) purposely withhold *Brady* evidence until the last possible minute . . . ."). *See* Bennett L. Gershman, *Litigating* Brady v. Maryland: *Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 560 (2007) ("Assuming that a prosecutor is aware of the significance of the evidence to the defense, and that for different reasons it must be disclosed, a prosecutor strategically may wait as long as she can until the trial actually commences before making the disclosure."); *see also* John G. Douglass, *Fatal Attraction: The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 454 (2001) ("It is quite typical, for example, for prosecutors to delay disclosure of *Brady* material relating to the impeachment of government witnesses—so-called 'Giglio material'—until the eve of trial.").

[47] United States v. Ruiz, 536 U.S. 622, 633 (2002) ("[T]he Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.").

[48] *Id.*

[49] *Id.* at 625.

[50] *Id.* at 626.

[51] *Id.*

requires prosecutors to turn over exculpatory evidence before a plea agreement is entered, Ruiz challenged her sentence.[52]

The Supreme Court held that the sentence and the practice of waiving the *Brady* right were Constitutional.[53] The Court explained that "[w]hen a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees."[54] These guarantees include the privilege against self-incrimination, the right to confront one's accusers, and the right to trial by jury.[55] The balance against these waivers is that a plea and the requisite waivers must be made knowingly and voluntarily.[56] According to the Court, the *Brady* right is inherent to the fairness of a trial, not plea negotiations; therefore, the defendant is not guaranteed disclosure of material impeachment information prior to entering a plea agreement.[57]

This holding is problematic to say the least. Although the court has established a right to impeachment and exculpatory evidence, *Ruiz* stands for the proposition that it is not necessary to disclose the evidence prior to a plea agreement.[58] This holding allows for an unnecessary and unjust imposition of pressure on criminal defendants to accept plea deals that might be unfavorable to them. Much more than guilt and innocence go into the decision to plea.[59] Pleading to a crime is the result of risk analysis between the possible outcomes at trial and the possible outcomes of a plea.[60] For that reason, *Alford* pleas exist to allow defendants to enter into an agreement without admitting guilt.[61] The risk of greater punishment at trial explains why a defendant would take a plea bargain while still maintaining innocence.[62] It also explains why between 90% and 95% of criminal cases result in plea bargaining.[63] In such a system, where the pressure and tendency to accept a plea bargain are so high, a defendant's knowledge about exculpatory evidence can aid in negotiations, if not convince the defendant to go to trial.[64]

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[52] *Id.*

[53] *Id.* at 633.

[54] *Id.* at 628

[55] *Id.* at 628–29.

[56] *Id.* at 629.

[57] *Id.* at 633.

[58] *Id.*

[59] Curtis J. Shipley, *The* Alford *Plea: A Necessary But Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063, 1063 (1987).

[60] *Id.*

[61] *Id.*

[62] LINDSEY DEVERS, U.S. DEPT. OF JUSTICE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 3 (2011), https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf [https://perma.cc/6NGM-NUU2].

[63] *Id.*

[64] *See generally* Douglass, *supra* note 46, at 461 ("[R]isk assessment is at the heart of most plea

Without knowledge of all exculpatory evidence, it is impossible to fully evaluate the merits of a defense case and actually be able to balance the risks of a trial against the value of an agreement. However, the Court allows plea deals to be entered in this exact situation. For a conviction-minded officer, this means that some exculpatory evidence does not need to be turned over immediately, and it is in fact beneficial to withhold the evidence until it is certain that the case is going to trial. In doing so, the pressure to accept a conviction is heightened for the defendant. For those cases that do make it to trial, the officer can then turn over the evidence without fear of violating the defendant's rights.[65] In doing so, the officer has still turned over the evidence "in time for its effective use at trial."[66]

V. CIVIL LITIGATION DOES NOT INCENTIVIZE POLICE DISCLOSURE UNDER *BRADY*

In civil court, it is possible to hold individual police officers directly responsible for *Brady* violations.[67] Because of the harms that *Brady* violations impose, courts have allowed for damages to be awarded to plaintiffs who successfully prove a police violation of *Brady* under § 1983.[68] However, the Circuits take different approaches to imposing liability based on the good or bad faith of the police officer.[69]

In *Jean v. Collins*, Lesly Jean brought a § 1983 action against police officers who had failed to turn over exculpatory and impeachment evidence to the prosecutor.[70] The state accused Jean of committing rape, and

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bargaining and information is at the heart of that risk assessment. At present, however, our system has few, if any, clear rules regarding disclosure of information to a defendant before he pleads guilty.").

[65] *See* Jones, *supra* note 21, at 432 (explaining that prosecutors can and do purposely withhold evidence until the last possible minute without violating the current state of the law; because the same timing is applied to the police as the prosecution, the same motivations can result in the same behavior).

[66] Crim. Prac. Guides, *supra* note 45 (quoting United States v. Villa, Criminal No. 3:12cr40 (JBA), 2014 WL 280400, *3 (D. Conn. Jan. 24, 2014)).

[67] Robert Hochman, Brady v. Maryland *and the Search for the Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673, 1698–99, 1703–04 (1996); Martin A. Schwartz, *The Supreme Court's Unfortunate Narrowing of the Section 1983 Remedy for* Brady *Violations*, CHAMPION (2013), https://www.nacdl.org/Champion.aspx?id=28482 [https://perma.cc/8C48-MKYH] ("It is well established that a § 1983 Brady due process claim may be asserted against a law enforcement officer based on the officer's failure to disclose favorable material to the prosecutor.").

[68] Andrew Case, *Protecting Rights by Rejecting Lawsuits: Using Immunity to Prevent Civil Litigation from Eroding Police Obligations Under* Brady v. Maryland, 42 COLUM. HUM. RTS. L. REV. 187, 208 (2010).

[69] *Id.* at 209 (discussing the circuit split with regard to whether an officer can be liable for unintentional actions).

[70] Jean v. Collins, 221 F.3d 656, 658 (4th Cir. 2000).

in the investigation the police had recorded several statements, hypnotized and unhypnotized, made by both the complaining witness and an officer who had encountered a suspect.[71] Despite multiple inconsistencies in these statements, in which identifying information of the suspect changed multiple times, the prosecution never provided the statements to Jean.[72] Jean alleged that the police officers violated his due process rights by failing to turn over exculpatory evidence to the prosecutor.[73]

The Fourth Circuit held that Jean had, at most, alleged a negligent miscommunication between the officers and the prosecutor.[74] Looking to *Brady*, the court determined that the disclosure rules established there were applicable to prosecutors, not the police.[75] Explaining that such material evidentiary concepts about "exculpatory" and "impeachment" value are not to be left to police officers, the Fourth Circuit determined it would be inappropriate to charge police with answering such legal questions.[76] Further, the court was not willing to hold police liable for § 1983 violations when the police acted in good faith while causing the unintended loss, withholding, or suppression of evidence.[77] Although unwilling to hold police liable for good-faith failures, the court determined that bad-faith failures must still be eligible for § 1983 damages.[78] To hold otherwise would fail to protect the innocent and the judicial process.[79]

In so holding, the Fourth Circuit established that § 1983 actions cannot lie where an officer has not "intentionally withheld the evidence for the purpose of depriving the plaintiff of the use of that evidence during his criminal trial."[80] Additionally, the court explained that by failing to claim the officers destroyed or failed to preserve evidence, Jean negated any inferences of bad faith.[81] Although Jean argued that the recordings were "patently exculpatory," the court found that there had been no "evidence showing that the officers actually knew of the significance of these items."[82] This holding leaves the door open for civil liability in only the narrowest of circumstances. It cannot reach the alleged behaviors of the officers in *Jean*, where multiple inconsistent descriptions were not

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71 Jean v. Collins, 155 F.3d 701, 703 (4th Cir. 1998).

72 *Id.* at 704.

73 *Jean*, 221 F.3d at 658.

74 *Id.*

75 *Id.* at 660 ("[To] speak of the duty binding police officers as a *Brady* duty is simply incorrect. The Supreme Court has always defined the *Brady* duty as one that rests with the prosecution.").

76 *Id.* at 660.

77 *Id.*

78 *Id.* at 663.

79 *Jean*, 221 F.3d at 663.

80 *Id.*

81 *Id.* at 662.

82 *Id.*

turned over to the prosecution.[83] Further, the court implied that in order to reach the bad faith threshold, there must be allegations that the evidence was destroyed or not preserved, as well as evidence that the officer *actually* knew of the evidence's *Brady* value.[84]

Although the court's stated purpose in *Jean* is to protect the innocent and the judicial process, its holding could have done more to ensure this goal.[85] Civil liability holds the potential to shape or encourage behavior, and with broader civil applicability of *Brady*, the court could have encouraged compliance in a much more meaningful way. Under *Jean*, civil liability only takes hold in cases where an officer intentionally withholds or suppresses evidence.[86] However, the harm to the defendant occurs regardless of the officer's intent. A broader, more proactive holding could have simply required an open file between the police department and the prosecutor's office. Some of the language in *Jean* already hinted at this result. Specifically, the court recognized that determining whether evidence has exculpatory or impeachment value is a decision better suited to the prosecutor's office.[87] Since prosecutors are equipped to make that decision, and police officers are not, it seems prudent to have only prosecutors make that decision.[88] Rather than evaluate evidence for its exculpatory value, police officers could turn over everything gathered in their investigation, and prosecutors would sift through the evidence to determine its *Brady* value.[89] However, *Jean* did not take the decision out of the police's hands.[90] It only stated that it would not blame police for the good-faith mistakes they might make when determining the answers to questions they are not equipped to answer.[91] This holding cannot meaningfully encourage the disclosure that *Brady* promised.

It must be stated that not every Circuit has decided to follow the reasoning employed in *Jean*. Most notably, the Sixth Circuit refused to apply *Jean* in *Moldowan v. City of Warren*, and held that bad faith is not

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[83] *Id.* at 663.

[84] *Id.* at 662.

[85] *See Jean*, 221 F.3d at 663 (holding that "what occurred [in *Jean*] was at worst a negligent miscommunication," rather than an act of bad faith that would amount to a *Brady* violation).

[86] *Id.*

[87] *See id.* at 660 (stating that "[t]he *Brady* duty is framed by the dictates of the adversary system and the prosecution's legal role therein").

[88] *See id.* (noting that the police officer's "job of gathering evidence is quite different from the prosecution's task of evaluating it"); *see also* Hochman, *supra* note 67, at 1700–01 ("There may be cases in which the exculpatory evidence was in the government's possession, but it was unreasonable for any state actor to realize its significance to a criminal trial.").

[89] *See Jean*, 221 F.3d at 660 (reasoning that "the prosecutor can view the evidence from the perspective of the case as a whole while police officers, who are often only involved in one portion of the case, may lack necessary context").

[90] *Id.*

[91] *Id.*

required to hold an officer liable for a failure to turn over evidence to the prosecution.[92] Looking to *Kyles*, where the Supreme Court imposed a duty on the prosecution to learn of any favorable evidence known to the police, the Sixth Circuit held that the obligation "applies to relevant evidence in the hands of the police, whether the prosecutors knew about it or not, whether they suppressed it intentionally or not, and whether the accused asked for it or not."[93] By applying this standard, rather than a bad-faith requirement, the Sixth Circuit sought to ensure fair trials for criminal defendants and *Brady* compliance from the police.[94] The police play a crucial role in providing defendants with *Brady* evidence, and although they are not prosecutors, they are a part of the prosecution team, and their compliance with *Brady* is every bit as important.[95]

The Sixth Circuit is not alone in holding that good faith *Brady* violations can still create liability for police officers.[96] However, of the circuits that have addressed the issue, the bad faith requirement has been the majority's holding.[97] For criminal defendants in these circuits, there can be no meaningful redress for an officer's negligent failure to comply with *Brady*, despite having suffered the associated harms: time in prison, loss of work, wrongful convictions, and harmful plea agreements. Therefore, these circuits are failing to take advantage of every means possible to ensure fair trials for criminal defendants, and they are failing to encourage proactive *Brady* compliance from the police. In circuits where there are no controlling cases on the issue, the bad faith requirement's status as the majority opinion holds persuasive weight, and may influence future outcomes of *Brady* litigation. Finally, wherever liability is found, it must be stated that civil remedies may not do enough to encourage the type of *Brady* compliance that the courts aim for.[98] The effectiveness of civil remedies as behavior modifiers begs analysis that is outside of the scope of this paper, but for municipalities that pay damages on behalf of the officers or for police departments with litigation insurance, the costs of the damages may never reach the officer responsible for the failure.[99] If those costs never reach the officers, there must be other ways to ensure compliance.

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[92] Moldowan v. City of Warren, 578 F.3d 351, 383 (6th Cir. 2009).

[93] *Id.* at 378 (quoting Harris v. Lafler, 553 F.3d 1028, 1033 (6th Cir. 2009) (citations omitted)).

[94] *Id.* at 381.

[95] *Id.*

[96] Case, *supra* note 68, at 209.

[97] *See id.* (explaining that the Fourth, Eleventh, and First Circuits require bad faith to hold officers liable, while the Ninth and Sixth Circuits do not).

[98] *Id.* at 208.

[99] *See* Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1507 (1993) (stating that individual officers are likely to be indemnified by their employers for any § 1983 judgment).

VI. AN OPEN FILE SHOULD BE REQUIRED BETWEEN THE POLICE AND THE PROSECUTION

This paper has identified the possible explanations for *Brady* violations. There are conviction-minded officers, who may hide or suppress evidence from the prosecution, in turn withholding it from the defense.[100] There are also negligent failures, which can be explained by failures to train, as well as tunnel vision in investigations.[101] Because *Brady* doctrine fails to impose adequate pressure on police officers to comply with *Brady*, there are three things that must happen to impose the adequate pressure and avoid intentional failures and negligent mistakes.

First, an open file between the police and prosecution must be implemented. The open file can be imposed and enforced by prosecutors, legislatures, or courts. Second, police personnel files need to be treated like all other *Brady* material, if not made subject to open records requests. Finally, police chiefs must make training on tunnel vision a priority, in addition to training on the importance of *Brady*.

A. Open File is the Best Practice

As shown in the foregoing, the promise of *Brady* often falls short when the failure is the fault of the police and not the prosecution. There are few remedies built into the case law to encourage or require compliance from officers, but nothing to encourage *timely* compliance. Therefore, in order to put the appropriate pressure on the police, other approaches must be taken to ensure that the promise of *Brady* is fulfilled. These approaches can be implemented by a prosecutor or prosecutor's office, state, local, or federal legislators, or proactive police departments.

As established in *Kyles*, the burden of disclosure is upon the prosecutor's office, and as such, the prosecutor's office should establish regular procedures with police departments to ensure compliance with *Brady*.[102] One procedure that would ensure regular compliance is the full flow of information between the two offices.[103] Although the full flow of

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[100] *See supra* Section IV.

[101] *See supra* Section V.

[102] *Kyles*, 514 U.S. at 437–38.

[103] *See* Symposium, *New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1972 (2010) ("At the outset, the Working Group agreed on the principle that there should be a full flow of information from police

information may cause concerns for some officers and prosecutors who want to limit the materials that reach the defendant, a symposium at Cardozo School of Law, *New Perspectives on* Brady *and Other Disclosure Obligations: What Really Works?*, found that when all information flows freely, some material will be subject to *Brady* disclosure, but much of the information will be beneficial to the prosecution.[104] Without the open file, this helpful information would not have wound up in the hands of the prosecution.[105] When the determination of whether information is material or exculpatory is left to the police, the choice to only turn over some information is inherently risking failure to comply with *Brady*, while also risking that the prosecution will never see information that could be beneficial to their case.[106] In addition, it holds the potential to avoid all of the harms that defendants suffer from *Brady* violations resulting from negligent and intentional behavior by the police. In this way, the free flow of information benefits every actor in the criminal justice system.[107]

By suggesting an open file between the police and prosecutors, this paper does not seek to change the way that officers investigate their cases. Police should not have to pursue every possible theory of the case or travel down every rabbit hole that their investigation uncovers. Instead, open file would only ask officers to catalogue or memorialize what they uncover, and it would remove the *Brady* decision—determining a piece of evidence's exculpatory value—from the police's hands. In doing so, the existence of these rabbit holes, whether they be manifested in a photograph, a witness statement, or any other medium, could still be made known to a defendant. However, if they are never catalogued or disclosed, a defendant may never become aware of them. An open file could solve this problem.

Several jurisdictions have already implemented this approach. As seen in *Brady* materials hosted by the Texas District and County Attorney's Association, some prosecutors in Texas encourage police to turn over everything that results from their investigation.[108] Their materials make clear that prosecutors are better equipped to make the *Brady* deter-

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to prosecutors, so that prosecutors can ensure that they comply with their *Brady* obligations.").

[104] *Id.* at 1973.

[105] *Id.*

[106] *See id.* at 1972–73 ("[T]he withheld information is most often not *Brady* material, but inculpatory information that the State would like to use in its case.")

[107] *See id.*

[108] TEX. DIST. & CNTY. ATTORNEYS ASS'N., *supra* note 21 (compiling *Brady* education materials, gathered from prosecutor offices in the state, for education purposes; these PowerPoints are intended for officer training, and encourage turning over everything in the police department's file).

mination, and therefore, the police should turn over every piece of evidence so that the prosecutor is able to make it.[109] Further, if *Brady* evidence is not turned over, the violation could result in a reversal, a damaged reputation, or a wrongful prosecution.[110] All of these are considerations should speak to a police officer interested not just in convictions, but also convictions of the right person.[111] By turning everything over to the prosecution, the prosecution will take the *Brady* decision-making out of the police's hands, avoiding problems with tunnel vision for both the prosecutors and the police, reducing *Brady* violations, and maintaining the legitimacy of the justice system.[112] The sentiment mirrors the reasoning employed in *Jean*.[113] However, rather than forgiving *Brady* mistakes made by the police, this solution seeks to avoid the mistakes altogether.

In other jurisdictions, concrete procedures have been implemented by prosecutors to ensure that everything gets turned over from the police to prosecutors. In Prince George's County, Maryland, a charging memo acts as an information checklist: a form that allows police and prosecutors to track what exists and what has been disclosed.[114] In Oregon, prosecutors use a paperless file system that allows documents to be identified by type of record and by whether the document has been given to the defense.[115] A similar system can be used by police. All materials gathered in an investigation can be stored in an electronic file—one for each case. All that the police would have to do is make that electronic file available to the prosecution through email, storage devices, or cloud storage. The prosecutors can aid in making these files complete by creating case information checklists similar to the charging memos in Prince George's County.[116] These checklists can provide general requirements that apply to every case (witness statements, photographs, physical evidence, etc.) and provide case-specific requirements (blood alcohol results in DWI cases, DNA samples for sexual assaults, and agreements made in cases using confidential informants).[117] If a prosecutor determines that something has not been provided, the checklist allows him to memorialize

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[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *See Jean*, 221 F.3d at 660 (explaining that it would be inappropriate to charge police with answering legal questions such as whether an item of evidence has "exculpatory" or "impeachment" value).

[114] Symposium, *supra* note 108, at 1976.

[115] *Id.*

[116] *See id.*

[117] *See id.*

what is missing and request the missing information from the police.[118] This approach reduces the risk that material will not be turned over, it provides rules and guidelines to the police, and it eliminates the problem of tunnel vision for police officers conducting an investigation—if the checklists require that certain evidence be turned over, the officer's opinion about its relevance no longer enters into whether it gets turned over.[119] By utilizing both approaches, the police can be sure that their file is complete and that the file is easy to store and share with the prosecution.

If the prosecutor's office implements these procedures, the prosecutor's office also has the ability to enforce them. Because prosecutors have the discretion to decide which cases are pursued, they can decide to stop accepting cases from officers who refuse to maintain an open file. This trend has already surfaced under the term "*Brady* Cops."[120] Where an officer's conduct gives a prosecutor reason to worry about that officer's credibility on the stand, that officer may not be trusted to testify in any future cases.[121] By failing to maintain an open file, a police officer could give a prosecutor grounds for these worries.

Another crucial way to ensure compliance is to involve the court and defense counsel in discovery conversations. In Massachusetts, the rules of criminal procedure require that discovery discussions happen at pre-trial conferences with the court, the prosecution, and defense counsel in attendance.[122] By involving the courts in the discovery discussion, determinations about what must be turned over are given more weight because they are being made by the court, and the legitimacy of discovery requests are increased when the court agrees with them.[123] By having these conferences with the court, the prosecutors and police are also reminded "to double-check their due diligence to obtain and disclose *Brady* materials."[124] Although these conferences already serve as a reminder, the rules can go further by requiring attendance from police officers

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[118] *Id.* at 1974 ("If, upon completion of the checklist, prosecutors determine that they have not received everything that should be provided, prosecutors should then submit a formal request to police . . . memorializing the additional information the prosecutor needs from the police.").

[119] *Id.*

[120] *See* Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 746 (2015) (referring to officers that cannot testify as "*Brady* Cops").

[121] *See id.* ("Officers whose credibility is called into question by police misconduct may not be able to testify in future cases.").

[122] MASS. R. CRIM. P. 11(a)(1) (2017).

[123] *See* Symposium, *supra* note 103, at 1979–80.

[124] *Id.* at 1979.

themselves.[125] With police in attendance, the officers would be accountable to courts and prosecutors alike, greatly increasing the likelihood of full cooperation and compliance.[126]

A regime like this—where defense counsel is inserted into the discovery conversation—is likely to benefit from the knowledge that only defense counsel and the defendant have. Because defense counsel will have spoken with the client about the facts of the case and what sort of *Brady* material should exist, giving defense counsel access to the police in a courtroom setting will allow for inquiries about *Brady* material that the prosecution may never think to make. Because a judge would be present for these inquiries, officers would be likely to turn over everything they think is *Brady* beforehand in order to avoid having their mistakes made known to the court.[127] For the officers that want to avoid this situation, an open file would remove the risk entirely.

Finally, legislatures have the ability to compel open file regimes. By enacting a statute that requires an open file between the police and the prosecution, legislators can remove *Brady* decision-making from the hands of the police and reduce the number of violations. State and local legislators have already taken steps to encourage meaningful *Brady* compliance. In North Carolina, for example, "discovery laws require the production of all field notes, documents, pictures, and reports in any media to the prosecution."[128] In Texas, the Michael Morton Act was passed to codify the defendant's right to relevant information.[129] The Act "provides the defense with the right to receive 'relevant [material and information] that may be helpful' in the preparation of its case."[130] These examples show that *Brady* compliance can be expanded and made more meaningful by legislatures that wish to do so. In creating an open file policy, legislatures can also create meaningful penalties for failures to comply. These could include fines, and in serious cases, suspension or firing.[131]

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[125] *See id.* at 1979–80 ("The Working Group also thought that it is important to provide feedback to police about their performance that extends beyond case clearance records based on arrest and charging. One way to do that might be to require that police, as well as prosecutors, participate in pretrial discovery consequences.").

[126] *Id.*

[127] *See* Symposium, *supra* note 103, at 1979–80 (explaining that officers are more likely to comply with *Brady* when made accountable to the court).

[128] Julie Risher, *Chief's Counsel:* Brady *is Middle-Aged—but is Compliance in its Infancy for Some Agencies?*, THE POLICE CHIEF (2008), http://iacpmag.wp.matrixdev.net/chiefs-counsel-brady-is-middle-agedbut-is-compliance-in-its-infancy-for-some-agencies/ [https://perma.cc/6A7L-BCJK].

[129] TEX. APPLESEED & TEX. DEFENDER SERV., TOWARDS MORE TRANSPARENT JUSTICE: THE MICHAEL MORTON ACT'S FIRST YEAR 9 (2015).

[130] *Id.*

[131] *See* Cadene A. Russell, *When Justice is Done: Expanding a Defendant's Right to the Disclosure of Exculpatory Evidence on the 51st Anniversary of* Brady v. Maryland, 58 HOW. L.J. 237, 268

B. Personnel Files Should Not be Treated Differently Than Other *Brady* Evidence

One area in which both best and worst practices are readily on display is the treatment of police personnel files under *Brady*. The value of police personnel files as impeachment or character evidence is clear. If an officer has received numerous sanctions for illegal searches and seizures, wrongful arrests, harassment or abuse of suspects, or any number of other wrongful behaviors, that evidence can be crucial to the defense.[132] In fact, a number of public defender offices keep "bad cop" files for this very purpose.[133] A defense case can be built entirely around the bad acts of a police officer, whether they involve a misidentification based on a faulty photo or in-person lineups, a false arrest based on officer prejudice or bias, or a wrongful arrest due to a less than thorough investigation.[134] An officer's personnel files can provide the defense with valuable information about the officer's past, and these files can provide a jury with reasonable doubt.[135]

Although the exculpatory nature of personnel files are clear, there are at least four approaches to their treatment under *Brady*.[136] The most harmful practice is one in which prosecutors and police are the only actors with access to personnel files; they do not see them as *Brady* evidence, and therefore, the files are never turned over to the defense.[137] The harm to defendants in such a situation should be clear: valuable evidence—around which a defense theory can be built—is turned over by neither the police nor the prosecutors, robbing defendants of their ability

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(2014) (arguing for fines or firing in the case of intentional *Brady* misconduct).

[132] Abel, *supra* note 120, at 743 ("These files contain valuable evidence of police misconduct that can be used to attack an officer's credibility on the witness stand and can make the difference between acquittal and conviction.").

[133] *See, e.g.*, Mark H. Moore et al, *The Best Defense Is No Offense: Preventing Crime Through Effective Public Defense*, 29 N.Y.U. REV. L. & SOC. CHANGE 57, 67 (2004) (detailing how the Los Angeles County Public Defender began "a database which compiled evidence of misconduct and disciplinary actions against individual police officers").

[134] *See generally* Jones, *supra* note 21, at 460–61 ("[E]vidence of intentional *Brady* misconduct significantly bolsters the credibility of this defense theory because the jury learns that the government intentionally concealed exculpatory evidence and went to great lengths to keep the evidence hidden in violation of its disclosure duty. This kind of purposeful misconduct lends credence to defense claims that the government might have 'cut corners' or engaged in other acts of misconduct in the investigation and preparation of the case.").

[135] Abel, *supra* note 120, at 743.

[136] *Id.* at 762.

[137] *See id.* at 775 ("In some jurisdictions, even though prosecutors have special access to the personnel files, they do not put in place systems to seek out *Brady* material in the files.").

to put on a case.[138]

California considers police personnel files confidential, and the police do not make them available to prosecutors or defendants.[139] Therefore, acquiring them involves more effort than acquiring other *Brady* evidence. Defense attorneys must file a *Pitchess* motion,[140] which may require that a defendant allege fabrications by the police or excessive force,[141] in order to get a court order for the personnel files to be released. If granted, the defense receives information about officers such as prior uses of excessive force, citizen complaints, and background investigations of the officer.[142] The determination about what gets turned over is made by a judge in camera.[143]

Although the *Pitchess* approach is far from the worst practice, it illustrates a willingness to put roadblocks between the defendant and useful evidence.[144] Because the records are confidential, the *Pitchess* approach is the only way to acquire them. The process requires specific allegations, a motion, and a court order, which may be subject to a judge's discretion—meaning that the disclosure of this evidence is not guaranteed.[145] When compared to approaches taken in other jurisdictions, *Pitchess* is far from the best.

Reasonable minds can differ about the better practice between "access and disclosure" and "public access." In jurisdictions where the prosecutors and police are the only actors with access to personnel files and personnel files are considered to be *Brady* evidence, the police regularly give the files to the prosecution, who can turn them over to the defense without a court's permission.[146] The other approach, taken in eight states,

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[138] *See id.* ("[P]rosecutors, police, and the courts effectively ignore *Brady's* application to personnel files, leaving defendants to make do with whatever impeachment material they can scrounge from the files via subpoena.").

[139] *Id.* at 763.

[140] CAL. EVID. CODE §1043 (West 2016).

[141] MARK B. SIMMONS, SIMMONS CALIFORNIA EVIDENCE MANUAL § 5:79 (2017) ("Often, though not always, *Pitchess* motions are made in cases where the defendant is charged with a violent assault on a police officer.")

[142] *Id.* ("Personnel records that show acts of dishonesty, including a history of misstating or fabricating facts in police reports, are discoverable.").

[143] *See* Abel, *supra* note 120, at 763 ("If good cause is shown, the judge will review the files in camera to decide what must be disclosed. The officer and the officer's representative are the only ones allowed to attend this in camera review.").

[144] *See id.* ("The legislative history shows no indication that lawmakers were thinking of prosecutors or *Brady* when they passed the *Pitchess* laws; the legislation was designed to block discovery requests by defendants and civil litigants.").

[145] *See id.* ("By statute, law enforcement personnel records are 'confidential and shall not be disclosed in any criminal or civil proceeding' unless the party seeking the information shows 'good cause for the discovery or disclosure sought.'").

[146] *Id.* at 773.

is one where personnel files are subject to open records requests.[147] Rather than receiving the evidence through a discovery request, defense attorneys should make it a part of their investigation to obtain personnel files through a records request.

In an "access and disclosure" jurisdiction, prosecutors can access police personnel files and have the obligation to disclose *Brady* evidence in those files.[148] In a "public access" jurisdiction, the defense must make a separate request to a separate entity, and it may be the case that less-than-thorough defense attorneys will never make this request.[149] Because disclosure is not part of the police's *Brady* duty, evidence may never reach a defendant whose attorney is less than diligent. However, by making these records public, the *Brady* decision is still taken out of the police's hands; they will simply turn over everything. For the police, the burden is the same as in an open file, disclosure jurisdiction. Only the recipient of the records changes. Either of these regimes, "access and disclosure" or "open records," could satisfy the requirements of an open file jurisdiction. In "access and disclosure," the personnel records would be handed over to the prosecution with the rest of the materials. In "public access," the files are not subject to *Brady* requirements, but will still make it into the hands of the defense so long as the defense attorney acts with due diligence.[150]

C. Police Chiefs Can Encourage Disclosure and Help Avoid Tunnel Vision

Encouraging open file and compliance is not limited to courts or prosecutors' offices. Police departments themselves can be proactive about training their officers in the requirements of *Brady* and encouraging full disclosure.[151] Recognizing that mistakes in the investigation and prosecution of crimes are a system-wide problem in Texas, the Court of Criminal Appeals, the State Bar of Texas, and several Chiefs of Police

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[147] *Id.* at 770 ("Florida is the flagship for this public access group, which includes Texas, Minnesota, Arizona, Tennessee, Kentucky, Louisiana, and South Carolina.").

[148] *Id.* at 773 ("Prosecutors have access to police personnel files while defendants do not, which places a *Brady* obligation on the prosecutors to learn of and disclose material from these files.").

[149] *See* Abel, *supra* note 120, at 770 ("The fact that these records are public eliminates the prosecutor's obligation to discover and disclose them under *Brady*. That is because, under the reasonably diligent defendant doctrine, the prosecutor does not have to learn of or disclose any information that a reasonably diligent defendant could have accessed on his own.").

[150] *Id.*

[151] *See, e.g.*, TEX. DIST. & CNTY. ATTORNEYS ASS'N., *supra* note 21, at 3–12 (presentation demonstrating how law enforcement can be trained to comply with *Brady* and ensure fairness).

worked together to produce a training video to address this issue.[152]

The first segment of the video addresses the dangerous effects of tunnel vision and the importance of keeping an open mind.[153] The speaker, then-Brownwood Chief of Police Mike Corley, spoke about a case in which a man was convicted after a photo-lineup identification.[154] After 23 years in prison, it was revealed through DNA evidence that the convicted man was innocent.[155] Chief Corley emphasized how crucial it is to continue learning about the best investigatory procedures.[156]

The video continues with then-Austin Chief of Police Art Acevedo explaining the law governing disclosure.[157] Chief Acevedo makes clear that *Brady* overrides any work-product privilege applied to investigative reports, which must still be turned over.[158] Further, Chief Acevedo explains that there is no "good faith" exception to the duty to disclose, and that the duty to disclose continues past conviction.[159]

This training video was the first of its kind in the nation, and it has the potential to set the tone for investigations and disclosure in police departments.[160] By stressing the importance of *Brady* compliance, Texas's police chiefs have taken meaningful steps towards ensuring that all material evidence gets turned over to the prosecutors and defendants. Police chiefs have the ability to shape the culture of their offices through hiring, firing, and training, and by making open-mindedness and disclosure a priority.[161]

Texas's chiefs are not alone in making meaningful *Brady* compliance a priority. In *Police Chief Magazine*, it is again stated how detrimental tunnel vision can be to a criminal investigation.[162] If an officer's focus is narrowed on a single suspect, all evidence suddenly becomes

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[152] Barbara Hervey & Sadie Fitzpatrick, *Full Disclosure: Using* Brady v. Maryland *to Train Law Enforcement Officers*, 76 TEX. B.J. 427, 428 (2013).

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] Hervey & Fitzpatrick, *supra* note 152, at 428.

[158] *Id.*

[159] *Id.* at 428–29.

[160] *Id.*

[161] *See* Findley & Scott, *supra* note 22, at 396–97 ("Cognitive distortions such as confirmation bias, hindsight bias, outcome bias, and a host of other psychological phenomena make some degree of tunnel vision inevitable. . . . Yet, instead of countering those pressures and tendencies, normative features of the criminal justice system, from police training to legal doctrine, institutionalize them . . . . We have suggested a range of tangible measures that can be taken to mitigate the effects of tunnel vision, but perhaps the most important factor toward that end is one that cannot be prescribed merely by rule: creating and sustaining an ethical organization and ethical culture.").

[162] Risher, *supra* note 128.

incriminating or irrelevant.[163] Evidence that would be exculpatory is ignored because the officer has already made a decision about the truth. Although the officer may not willfully choose to ignore the requirements of *Brady*, defendants do not receive the exculpatory evidence that they are entitled to.[164] For that reason, police chiefs everywhere should encourage open minds and a refusal to characterize anything as irrelevant until well into the investigation.[165] Coupled with an open file, this free flow of information policy would substantially limit the likelihood of a *Brady* violation.

Looking to the materials created by Texas's District and County Attorney Association and its police chiefs, it is clear that Texas views *Brady* compliance as an important part of investigation and prosecution. However, like in many jurisdictions, the *Brady* determination in Texas is often still left to police officers. In Austin, the Police Department manual has no policy requiring officers to turn over all investigative materials.[166] Further, police personnel files are confidential in Texas, and the manual makes it clear that the *Brady* determination regarding these files, absent a court order, is made by the police.[167] For a state that prides itself on leading the charge in police reform, it is clear that police compliance under *Brady* is ripe for change.[168]

VII. CONCLUSION

Brady v. Maryland established a crucial right for criminal defendants—access to exculpatory information. Tied directly to the defendant's ability to put on a case, the ability to cross-examine witnesses, and her decision to testify, this right levels the playing field between the prosecution and defense, and gives defendants access to materials that even the most thorough investigator may never find.

However, the lack of pressure on police to turn over *Brady* materials raises serious concerns about the effectiveness of current *Brady* jurisprudence. Although the duty placed on the prosecution team is clear, the remedies for violations do nothing to encourage compliance. Instead, the

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[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *See* Austin Police Department Policy Manual (2015), https://lintvkxan.files.wordpress.com/2015/11/apd-body-camera-policy-2015.pdf [https://perma.cc/5M2M-TZP4] (containing no policies about turning over *Brady* materials, save for police personnel files).

[167] *Id.* at § 910.7 (2015).

[168] *See* Hervey & Fitzpatrick, *supra* note 152.

remedies only order that *Brady* be complied with. Absent an outright dismissal—the rarest remedy for *Brady* violations—there is no legal remedy in criminal court to encourage *Brady* compliance from the police.

In civil court, if a defendant seeks damages for a *Brady* violation under § 1983, a negligent *Brady* violation in certain circuits will never be enough to redress the harm done to a defendant because the violation did not occur in bad faith. In any circuit, even if liability is found, it is likely that individual officers will never have to pay the costs themselves. Since cities indemnify their officers, the costs will not reach those responsible for *Brady* violations, and the deterrent effect of civil litigation is wasted.

With the lack of meaningful remedies, pressure must be exerted on the police to comply with *Brady*, and if this happens, the defense, the prosecution, the police, and the courts will all benefit. The best way to ensure this type of compliance is with open file policies between the police and the prosecution, as well as training to prevent tunnel vision and negligent violations. These approaches can be implemented by prosecutors, courts, legislators, and police chiefs to fulfill the promise of *Brady* and ensure fairer trials for criminal defendants. "The constitutional right of criminal defendants to acquire exculpatory evidence for use at trial should not depend on sheer luck or the industriousness of the defense investigative team."[169]

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[169] Jones, *supra* note 21, at 434.

Attenuated Deterrence: How the Supreme Court Broke the Causal Chain Between Illegal Policing and Evidence Exclusion

Roger Topham*

*The University of Texas School of Law, J.D. Candidate 2017. Many thanks are due to Professor Jennifer Laurin for her invaluable guidance and inspiration over the course of this project and to my fellow members of Professor Laurin's *Policing the Police* seminar for their scintillating conversation throughout the course.

I. INTRODUCTION

The exclusionary rule began as, and for the first half-century or so of its existence largely remained, a broad-bladed scythe: a no-nonsense corrective tool wielded by the Court to cut away illegally obtained evidence from criminal trials. Not only did it serve as a bulwark for judicial integrity[1] (and only later as a deterrent),[2] but indeed it also was viewed as the only way to provide any teeth for Fourth Amendment enforcement. Justice Oliver Wendell Holmes declared that allowing the government's use of illegally-acquired evidence "reduces the Fourth Amendment to a form of words."[3] When the Court extended the exclusionary rule to be applied by state courts, Justice Tom Clark made the sweeping decree that "we hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible."[4] It is important to note the wide landscape that the rule used to occupy in order to appreciate just how small a parcel it covers today.

Conservative Courts over the last several decades have whittled that scythe down to a toothpick, used only as a "last resort"[5] when a particularly stubborn popcorn kernel gets lodged in the Court's teeth. The first

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[1] *See, e.g.*, Weeks v. United States, 232 U.S. 383, 394 (1914) ("To sanction [the illegal seizure of private papers by allowing their use at trial] would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution . . . ."); Mapp v. Ohio, 367 U.S. 643, 660 (1961) ("Our decision, founded on reason and truth, gives . . . to the courts, that judicial integrity so necessary in the true administration of justice").

[2] *Mapp*, 367 U.S. at 656 ("Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it'") (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)). Interestingly, it is this line from *Elkins* that sired later Court opinions declaring deterrence the *only* purpose of the exclusionary rule. *Calandra* quoted it first. United States v. Calandra, 414 U.S. 338, 347 (1974). *Leon* then pointed back to *Calandra*. United States v. Leon, 468 U.S. 897, 906 (1984). And many recent cases cite *Leon*. *See, e.g.*, Herring v. United States, 555 U.S. 135, 141 (2009) (citing Leon for the proposition that "the exclusionary rule is not an individual right and applies only where it 'result[s] in appreciable deterrence'"). All these cases overlook that Justice Stewart in *Elkins* also said that "there is another consideration—the imperative of judicial integrity." *Elkins*, 364 U.S. at 222. Justice Stewart then went on to admiringly quote Justices Holmes and Brandeis in extolling the virtue of judicial integrity. *Id.* at 222–23.

[3] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); *see also Mapp*, 367 U.S. at 648 ("If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value, and . . . might as well be stricken from the Constitution.") (quoting *Weeks*, 232 U.S. at 393).

[4] *Mapp*, 367 U.S. at 655.

[5] Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016) (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)). The assertion that "[s]uppression . . . has always been our last resort" is nothing short of a bald-faced lie. Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court's*

critical step was limiting the rule's purpose to embrace only the deterrence of future illegal conduct.[6] This focus has led to the rule being subjected to an increasingly rigorous (and strained) cost–benefit analysis,[7] which in turn has spawned a proliferation of expanded exceptions to the rule's enforcement.[8] It is increasingly clear that a number of justices have been of a mind to eliminate the rule entirely, despite pronouncements to the contrary.[9] All of this is encapsulated by the Supreme Court's most recent look at the exclusionary rule in *Utah v. Strieff*[10]: once again, the Court has employed several analytical methods of dubious validity, contorting itself into a constitutionally uncomfortable position so as to sustain a conviction supported only by evidence obtained as a result of a concededly illegal stop.[11]

As an introductory matter, this Note will begin with an important stipulation in mind: it will take the Court at its word that the rule still serves the important purpose of deterring illegal conduct by law enforcement.[12] With that in mind, let us consider what exclusionary rule jurisprudence should look like if it is to accomplish its stated goal of deterrence. Put programmatically, the deterrence analysis (admittedly

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Latest Assault on the Exclusionary Rule, 99 J. CRIM. L. & CRIMINOLOGY 757, 759 (2009).

[6] Indeed, the effectiveness of the rule as a deterrent has been questioned by the Court itself. *See infra* subpart III.A. This skepticism (following the elimination of judicial integrity as a basis for exclusion) may be close to the heart of the reason that certain justices have drifted towards interpreting the rule as narrowly as possible.

[7] *See infra* subpart II.A.

[8] Most notable is the attenuation exception, which "attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." *Leon*, 468 U.S. at 911 (quoting Brown v. Illinois, 422 U.S. 590, 609 (1975)).

[9] *See infra* subpart IV.A.

[10] 136 S. Ct. 2056 (2016).

[11] *See infra* subpart IV.B.

[12] The author and others believe that judicial integrity (i.e., that the Court has a duty to exclude tainted evidence, lest it be an accomplice to unconstitutional law enforcement) remains an important goal, and that the exclusionary rule would better serve our Constitution with this purpose in mind. For an argument that "the exclusionary rule be returned to its previous prominence by reinstating judicial integrity as its primary purpose," see generally Robert M. Bloom & David H. Fentin, *"A More Majestic Conception": The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47 (2010). That battle, however, has been long lost in Supreme Court jurisprudence and is beyond the scope of this Note. *Compare Brown*, 422 U.S. at 599 ("[A]pplication of the exclusionary rule . . . protect[s] Fourth Amendment guarantees in two respects: 'in terms of deterring lawless conduct by federal officers,' and by 'closing the doors of the federal courts to any use of evidence unconstitutionally obtained.' These considerations of deterrence and of judicial integrity, by now, have become rather commonplace . . . ." (citation omitted) (quoting Wong Sun v. United States, 371 U.S. 471, 486 (1963))), *with Strieff*, 136 S. Ct. at 2061 ("[T]he significant costs of this rule have led us to deem it 'applicable only . . . where its deterrence benefits outweigh its substantial social costs'" (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006))). However, the rule can still play an important role in reining in lawless police conduct, as long as its deterrent purpose is analyzed sensibly by the Court.

oversimplified) looks something like this: "Officer Jones wants to accomplish law enforcement objective *x*. The most direct path to that goal is by pursuing method *y*. However, Officer Jones knows that method *y* is illegal. Officer Jones further knows that accomplishing *x* by employing *y* would subject any evidence so gathered to exclusion. Evidence exclusion is undesirable, due to the primary goal of convicting criminals. Therefore, Officer Jones will choose not to employ the illegal method *y*." For this to work, law enforcement entities must be able to predict that certain conduct ("illegal method *y*") is likely to result in evidence exclusion if they are to weigh that undesirable outcome against their other priorities as they go about their business.[13] Not only is this predictability demanded by common sense,[14] but the Supreme Court has itself also acknowledged this link.[15]

There are many ways to reduce the certainty of the application of a rule. One is to riddle the rule with exceptions. Let us look at a simple illustration. "If you're not home by 9 p.m. on a school night, you will be grounded" is a straightforward, broad rule that is predictable and easy to follow. But if that rule is modified to exclude every other Tuesday, and the second Wednesday of each month, and federal holidays, and days of the month that are a prime number, and nights when cello practice runs late . . . well, a child trying to follow this rule is much more likely to make a mistake in determining when she can or cannot stay out past 9 p.m. And if the list of exceptions grows so long that the days when the rule is actually enforced become the minority, figuring out when the rule applies may become more trouble than it is worth, since the overall likelihood of running afoul of the original rule is so slight. This result is even more likely in the case of the exclusionary rule, since police must often make quick decisions, making it difficult or impossible to analyze the potential application of an increasingly Byzantine rule.

Adding subjectivity into the application of a rule is even more inimical to predictability. "If you're not home by 9 p.m. on a school night, you will be grounded . . . unless you have a good excuse" is likely to

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[13] *See, e.g.*, VALERIE WRIGHT, SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 1 (2010), http://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf [https://perma.cc/M75M-5YNN] ("Research to date generally indicates that increases in the *certainty* of punishment, as opposed to the *severity* of punishment, are more likely to produce deterrent benefits."). Note that in the case of evidence exclusion, the certainty of "punishment" is the only adjustable factor; the magnitude of the consequence is always the same.

[14] Why would an actor adjust his behavior to avoid an outcome he did not think would occur?

[15] United States v. Ceccolini, 435 U.S. 268, 283 (1978) (Burger, J., concurring) ("[T]he concept of effective deterrence assumes that the police officer consciously realizes the probable consequences of a presumably impermissible course of conduct.").

result in far-too-frequent weeknight shouting matches and very little actual deterrence.

So is the Supreme Court's application of the exclusionary rule sufficiently predictable? Hardly. The Court's approach to analyzing the requisite conditions for exclusion has become so artificially narrowed by exceptions—and worse, wide open to subjectivity—that it greatly undermines any deterrent effect the rule could possibly have. Specifically, this Note will examine how fuzzy cost–benefit analysis, hand-in-hand with a concept of "deterrence" that refuses to be pinned down, injects altogether too much subjectivity and unpredictability into exclusionary rule jurisprudence. This problem is compounded by three further issues: the subjective interpretation of the *Brown v. Illinois*[16] factors[17] in attenuation cases, a recent tendency by the Court to dissect events into pieces in order to hide causation through sleight-of-hand, and—potentially—the wild-card "constitutional interest" test asserted by Justice Scalia in *Hudson v. Michigan*[18].

Finally, I suggest a new, straightforward test that remains flexible enough to change with the pendulum swing of society's views on the scope of Fourth Amendment protection, while being clear enough to be predictable, thus incentivizing police behavior modification in line with the rule's stated deterrent purpose.

II. "DETERRENT-ONLY" PURPOSE AND RESULTING FOCUS ON COST–BENEFIT ANALYSIS

Once the exclusionary rule was no longer seen as a vindication of an individual's rights but rather only as a deterrent upon future misconduct,[19] the door was opened to a gale-force flurry of questions from the

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[16] 422 U.S. 590 (1975).

[17] *See infra* subpart III.A.

[18] 547 U.S. 586 (2006).

[19] A problematic move in itself. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 356 (1976) (Brennan, J., dissenting). Believing that emphasizing the exclusionary rule's deterrent effect misunderstands the historical purpose of the rule and undercuts its value as an enforcement tool under the Fourth Amendment, Justice Brennan warned:

> This downgrading of the exclusionary rule to a determination whether its application in a particular type of proceeding furthers deterrence of future police misconduct reflects a startling misconception, unless it is a purposeful rejection, of the historical objective and purpose of the rule.

Court, asking, "Well, how deterrent is it, exactly?"[20] Because the Court is poorly suited for this type of assessment and its resulting analysis is unsurprisingly scattershot, a large helping of subjectivity haunts the foundation of modern exclusionary rule analysis, like a courthouse built upon a desecrated burial ground.

A. Cost-Benefit Analysis: Clear as Mud

It is the deterrent side of the equation—the benefit side—that the Court always chooses to examine. This focus is because the cost is seen to be a static value: "the criminal is to go free because the constable has blundered."[21]

But this formulation of the deterrence analysis is fundamentally flawed. The cost—that a certain degree of law enforcement facility is to be sacrificed for the benefit of the guarantee of security in one's person and effects—has already been contemplated by the Fourth Amendment itself.[22] Justice Potter Stewart expressed this best: "Much of the criticism leveled at the exclusionary rule is misdirected," as the "critics fail to acknowledge that, in many instances, the same extremely relevant evidence would not have been obtained had the police officer complied with

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> The commands of the Fourth Amendment are, of course, directed solely to public officials. Necessarily, therefore, only official violations of those commands could have created the evil that threatened to make the Amendment a dead letter. But curtailment of the evil, if a consideration at all, was at best only a hoped-for effect of the exclusionary rule, not its ultimate objective. Indeed, there is no evidence that the possible deterrent effect of the rule was given any attention by the judges chiefly responsible for its formulation. Their concern as guardians of the Bill of Rights was to fashion an enforcement tool to give content and meaning to the Fourth Amendment's guarantees.

Id.

[20] *See, e.g.*, Stone v. Powell, 428 U.S. 465, 493 (1976) ("The view that the deterrence of Fourth Amendment violations would be furthered rests on the dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal."); Herring v. United States, 555 U.S. 135, 147–48 (2009) ("[W]e conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.'" (citing United States v. Leon, 468 U.S. 897, 907–08 n.6 (1984))).

[21] This oft-quoted line is attributable to Justice (then Judge) Benjamin Cardozo. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926). While the Court occasionally elaborates on the cost, its analysis always boils down to weighing the benefit. *See, e.g.*, *Stone*, 428 U.S. at 489–90 ("The costs of applying the exclusionary rule . . . are well known: the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding.").

[22] LaFave, *supra* note 6, at 762.

the commands of the [F]ourth [A]mendment in the first place."[23] From this perspective, at least in those cases in which the illegal conduct was a but-for cause of the acquisition of critical evidence, the Court is double-counting when it adds the loss of that evidence to the cost side of the equation. In those cases, then, the extra cost should be essentially zero, thus rendering *any* deterrent effect sufficient for the exclusion of evidence to "pay its way." Realizing this would allow a bright-line rule in such cases, thus greatly enhancing predictability and therefore actual deterrence.

Further undermining any cost–benefit analysis of the exclusionary rule is the fact that the Supreme Court (and the judicial branch as a whole) is simply not properly situated to make reliable judgments of the quantifiable social benefit, the quantum of deterrence, that will likely result from evidentiary exclusion in a given scenario.[24] As Rachel Harmon explains,

> Courts also often know so little about the institutional structures, occupational norms, market pressures, political influences, and nonconstitutional laws that shape police conduct that they cannot ask the right questions in making judgments about the police. Even when courts are able to engage in effective empirical analysis, they have little opportunity or ability to adjust a doctrine as the facts and social science underlying the doctrine evolve. As a result, courts have a systematic and profound disability in ensuring that doctrine accurately reflects the expected effects of criminal procedure rulings on the behavior of police.[25]

Justice William Brennan described the Court's flailing attempts at such evaluation as "inherently unstable compounds of intuition, hunches, and occasional pieces of partial and often inconclusive data."[26] Such ineptitude is on full display in *Hudson*, in which Justice Antonin Scalia attempted to downplay the value of exclusion generally by puffing up the

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[23] Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1392–93 (1983).

[24] Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 772–75 (2012); *see also* Albert W. Alschuler, *The Exclusionary Rule and Causation: Hudson v. Michigan and Its Ancestors*, 93 IOWA L. REV. 1741, 1753 (2007) ("No one can know what level of 'deterrence' through exclusion is optimal, especially when exclusion achieves its instrumental goals primarily through long-term guidance and habit formation rather than push-pull deterrence. Ignorance may be bliss, however, for it enables judges and scholars to assert that almost any rule they like produces 'sufficient' deterrence.").

[25] *Id.* at 774 (footnote omitted).

[26] United States v. Leon, 468 U.S. 897, 942 (Brennan, J., dissenting).

supposed deterrent effect of § 1983[27] suits ("As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts."[28] Very reassuring!). In fact, the deterrent effect of such lawsuits is highly questionable, given the killer combination of qualified immunity,[29] widespread police indemnification,[30] and municipal bodies that are motivated more by politics than pure dollars.[31] These things all soften the blow of any financial penalty incurred because of illegal policing. Justice Scalia also asserted the "increasing professionalism of police forces, including a new emphasis on internal police discipline."[32] In fact, the author Justice Scalia relied on to evidence these improvements responded that he had been misconstrued and that the increased professionalism actually owed much to the exclusionary rule for its evolution.[33] Furthermore, the assertion that contemporary law enforcement adheres to constitutional norms to such a pervasive extent that the exclusionary rule no longer serves a purpose should be shocking—to put it mildly—to anyone who hasn't been living under a proverbial rock.[34]

Even if we put these issues aside, there is still plenty to question in the Court's imprecise accounting of the level of deterrence in any given set of facts.

B. Deterrence: What Is It?

The Oxford English Dictionary defines "deter" as "discourage

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[27] 42 U.S.C. § 1983 (2012) authorizes lawsuits against state actors by plaintiffs whose constitutional or federal rights have been violated.

[28] Hudson v. Michigan, 547 U.S. 586, 598 (2006).

[29] Qualified immunity "shields [public] officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)).

[30] *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (reporting that "officers financially contributed to settlements and judgments in just 0.41% of . . . damages actions resolved in plaintiffs' favor, and their contributions amounted to just 0.02% of the over $730 million spent . . . in these cases").

[31] *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345–48 (2000) (describing how "[g]overnment actors respond to political incentives, not financial ones—to votes, not dollars").

[32] *Hudson*, 547 U.S. at 598.

[33] Alschuler, *supra* note 25, at 1772.

[34] *See, e.g.*, Carl Bialik, *Why Are So Many Black Americans Killed by Police?*, FIVETHIRTYEIGHT (Jul. 21, 2016), http://fivethirtyeight.com/features/why-are-so-many-black-americans-killed-by-police/ [https://perma.cc/UY33-8A8J] (analyzing why "[b]lack Americans are more than twice as likely as white Americans to be killed by police officers").

(someone) from doing something by instilling doubt or fear of the consequences," or secondarily, "prevent the occurrence of."[35] Viewed in the context of police misconduct, it is clear that this definition could be viewed broadly or narrowly. *Herring v. United States*[36] provides a useful illustration. In *Herring*, a man was arrested for the illegal possession of methamphetamine and a firearm following an arrest based on a warrant that was later found to be invalid.[37] We can imagine that the exclusion of the gun and drugs found by the police would not instill doubt or fear in future police officers of the consequences of following an apparently valid arrest warrant; such a state of affairs would cripple law enforcement from doing the job we ask it to do. Thus, if deterrence is viewed narrowly to apply only to police officers themselves, exclusion under these facts would serve no purpose. But such a view artificially quarantines officers from the system in which they work and loses sight of the reason we wish to deter police misconduct in the first place. Society—and justice—has an interest in deterring police misconduct because it has an interest in preventing unconstitutional intrusions generally. An unconstitutional intrusion does no less violence to one's rights when the misconduct originated somewhere in the machine of law enforcement other than in the arresting officer himself. So, under this broader view of deterrence, could exclusion of the gun and drugs instill fear or doubt of the consequences of certain conduct in *someone*, such that it would discourage that conduct? Of course: police departments have a strong interest in attaining convictions of defendants they know to be guilty. If a police chief or other manager knows that a department's system of storing and communicating warrant information is faulty to some degree or that some of its employees are inattentive to their duties in some way, exclusion would discourage the chief from maintaining such a faulty system.[38] If the acknowledged purpose of the exclusionary rule is the deterrence of constitutional intrusions, then it is self-defeating to limit its application to only the direct acts of police officers themselves. This artificial narrowing of the concept of deterrence by delimiting the types of actors to whose conduct it may apply has now also excluded judges[39] and judicial staff.[40]

The Court has not only taken a narrow view of deterrence regarding

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[35] *Deter*, OXFORD ENGLISH DICTIONARY.

[36] 555 U.S. 135 (2009).

[37] *Id.* at 137–38.

[38] *Id.* at 154 (Ginsburg, J., dissenting).

[39] *See* United States v. Leon, 468 U.S. 897, 926 (1984) (holding that suppression is not appropriate unless the judge "abandoned his detached and neutral role" or "the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause").

[40] *See* Arizona v. Evans, 514 U.S. 1, 16 (1995) ("Application of the *Leon* framework supports a categorical exception to the exclusionary rule for clerical errors of court employees.").

to *whom* it applies, but also in framing the connection between evidentiary exclusion and deterrent effect. In *United States v. Ceccolini*[41] for example, the Court refused to imagine a potential deterrent effect of excluding the evidence (in this case, witness testimony) found indirectly through an illegal search of an envelope spied behind the counter of a flower shop, simply because the police officer (according to the Court) had no *specific intent* "of finding tangible evidence bearing on an illicit gambling operation, . . . [or] of finding a willing and knowledgeable witness to testify against respondent."[42] Chief Justice Burger went even further, suggesting that "[e]ven if we suppose that the officer suspects that his illegal actions will produce a lead to a witness, he faces the intractable problem of understanding how valuable that person will be to his investigation."[43] In other words, a deterrent effect was unimaginable to Burger if the officer cannot with certainty predict that his illegal search will lead to valuable evidence of a specific crime that he is investigating.

These conjured requirements are nothing short of preposterous. Any police officer should know that examining the contents of an envelope found within private property without a warrant is unconstitutional. And it is patently absurd to believe that an agent of law enforcement would go around peeking into people's envelopes (especially in a location under suspicion of involvement in illegal activities) without the intent and expectation of finding evidence of a crime. Knowing that *any* evidence discovered through an illegal search will be excluded from use at trial would in fact deter police officers from conducting blatantly illegal searches. The Court's determination that police officers could not be deterred without foreknowledge of the exact nature of the evidence they might discover has no basis in the reality of predicting actual deterrence; Burger's explanation can be seen as nothing but grasping at straws in an effort to justify admitting illegally obtained evidence.

Finally, the Court has devalued deterrence by claiming its utility "depends upon the strength of the incentive to commit the forbidden act."[44] Therefore, the Court reasoned, if police have little incentive to commit, for example, knock-and-announce violations (the conduct in

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[41] 435 U.S. 268 (1978).

[42] *Id.* at 280. Beyond this novel requirement of finding a specific intent in the officer's illegal search, the Court's assertion that he had no such intent is highly debatable, as the shop had been under surveillance by the FBI for suspected illegal gambling operations only one year prior. *Id.* at 271–72.

[43] *Id.* at 284 (Burger, C.J., concurring).

[44] Hudson v. Michigan, 547 U.S. 586, 596 (2006). This is, of course, a different argument than the assertion that a particular type of actor (e.g., a judge) will not be deterred by the exclusionary rule because she has *no* incentive to "commit the forbidden act."

question in *Hudson*),[45] significant deterrence is unnecessary.[46] This reasoning rings false. The object of deterrence is the constitutional intrusion; the illegal conduct is no less an intrusion on the defendant's rights when the police act inexplicably or without a strong incentive. A vandal has little rational incentive to spray-paint the sides of bridges, but society hasn't given up on attempting to deter such conduct with laws. What the *Hudson* Court suggested is that conduct the police have relatively less incentive to engage in will occur relatively less frequently, and therefore does not call for "massive" deterrence.[47] But this is just bad algebra, for the infrequence factor weighs in equally on both sides of a cost–benefit analysis: even if the exclusionary rule will infrequently deter misconduct that simply doesn't occur often, it will just as infrequently incur a cost in the form of excluded probative evidence.

This repeated restriction of the concept of deterrence along multiple vectors only serves to undermine the mechanism that allows deterrence to work in the first place. With every new exception, law enforcement agents will be less certain in any given situation that their conduct will lead to the exclusion of evidence and are therefore less likely to conform to constitutional requirements in order to avoid that result. Furthermore, a broad array of opportunities to effect deterrence (such as guarding against negligence by law enforcement support staff) are being ignored, allowing policies that condone or encourage illegal police conduct to continue unchecked.

III. A VARIABLE APPROACH TO ATTENUATION DOCTRINE AMPLIFIES SUBJECTIVITY

The attenuation doctrine is an exception to the exclusionary rule that stems from language in *Nardone v. United States*[48]: "Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated

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[45] This is another dubious proposition. The Court points out that police may forego knock-and-announce when they have reasonable suspicion that evidence may be destroyed during the wait to enter or that the occupants may have time to prepare to harm the officers. *Id.* However, the incentive to preclude such possibilities even in situations where the police do *not* have articulable reasonable suspicion would appear to be non-trivial.

[46] *Id.*

[47] *Id.*

[48] 308 U.S. 338 (1939).

as to dissipate the taint."[49] This concept took on a life of its own in *Wong Sun v. United States*[50], in which a confession by defendant Wong Sun was deemed admissible because, although he had been initially arrested without probable cause, he had made the statement upon turning himself in several days after having been released from the initial illegal arrest.[51] The Court invoked the *Nardone* language in its holding that the statement should be admissible.[52] The next landmark was *Brown v. Illinois*, in which the Court applied a multi-factor test to determine attenuation.[53]

The *Brown* test has been applied inconsistently at best since its inception, and the analysis of its various factors (in particular the "intervening circumstance" and "purpose or flagrance" of the illegal conduct) has been so plainly open to subjective interpretation that the predictability necessary for effective deterrence has suffered greatly.[54] Furthermore, the Court has gotten creative in finding other ways to "attenuate" the connection between the illegality and the evidence sought to be suppressed. Several times it has split seemingly unitary events into discrete parts in support of a claim of lessened (or eliminated) causal connection.[55] In *Hudson v. Michigan*, Justice Scalia invoked an "alternative" test that attempts to find attenuation where "even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained."[56] Justice Scalia than used this opportunity to interpret the "constitutional interest" quite narrowly.[57]

Justice Scalia's alternative test helps to illustrate that, despite the "attenuation doctrine" being viewed as a distinct exception to the rule, the concept of attenuation (broadly speaking) is central to *all* of the exceptions the Court has outlined. Again, this stems from the decision to

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[49] *Id.* at 341. *Nardone*, interestingly, bore little similarity to a modern "attenuation" case; rather, it would be viewed as an "independent source" case. The question before the Court was whether or not the evidence used against Nardone was in fact "fruit of the poisonous tree" (in this case, illegal wire-tapping) *at all*, or whether it had instead been "gained from an independent source." *Id.* The lower court had not allowed Nardone to question government witnesses in order to determine the source of their information. *Id.* at 339.

[50] Wong Sun v. United States, 371 U.S. 471, 491 (1963).

[51] *Id.* at 491.

[52] *Id.*

[53] *See infra* subpart III.A. The voluntariness of a statement is considered a threshold requirement for admissibility, and the presence or absence of a *Miranda* warning is "an important factor . . . in determining whether the confession is obtained by exploitation of an illegal arrest." Brown v. Illinois, 422 U.S. 590, 603 (1975). This section, however, will focus on the other three factors (temporal proximity, intervening circumstances, and the purpose or flagrancy of police conduct) because their application is not limited to statements. *Id.* at 603–04.

[54] *See infra* subpart III.A.

[55] *See infra* subpart III.B.

[56] Hudson v. Michigan, 547 U.S. 586, 596 (2006).

[57] *See infra* subpart III.C.

focus only on deterrence: any time the Court finds that the deterrent value of suppressing the evidence in question would be limited (at least in relation to the public's interest in convicting criminals), it finds a way to allow the evidence. The low deterrent value is the result of a weakened (i.e., *attenuated*) causal link between the illegal conduct and the collection of the evidence. This weakening could be attributed to acting in good faith on the error of another,[58] the fact that the evidence either was found or would have ultimately been found by another method (the "independent source doctrine" and its close cousin, the "inevitable discovery doctrine"),[59] the partitioning of an event in such a way that the illegal act is cordoned off from the acquisition of evidence,[60] or any other facts the Court can find to thin out such a connection between the illegal conduct and the evidence.

I do not suggest that the admission of challenged evidence is wrong in all of these cases, but the Court has pushed attenuation beyond its common-sense limits. This Section examines tactics employed by the Court in the name of "attenuation," which conspire to inject unhealthy doses of subjectivity into exclusionary rule analysis, hampering any deterrent effect the rule might otherwise have.

A. The *Brown* Factors in Attenuation Cases

The inconsistent use and subjective interpretation of the multi-factor test established in *Brown v. Illinois*, used (sometimes) to determine whether the evidence sought to be suppressed is sufficiently attenuated from the illegal conduct so that it "dissipates the taint,"[61] further undermines the exclusionary rule's deterrent effect by making its application more unpredictable.

Defendant Richard Brown was illegally arrested for murder, without either probable cause or a valid warrant.[62] He made two inculpatory

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[58] *E.g.*, Herring v. United States, 555 U.S. 135, 137 (2009) ("[T]he question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct. Here the error was the result of isolated negligence attenuated from the arrest.").

[59] *See, e.g.*, Murray v. United States, 487 U.S. 533, 544–45 (1988) ("The independent source exception, like the inevitable discovery exception, is primarily based on a practical view that under certain circumstances the beneficial deterrent effect that exclusion will have on future constitutional violations is too slight to justify the social cost of excluding probative evidence from a criminal trial.").

[60] *See infra* subpart III.B.

[61] Brown v. Illinois, 422 U.S. 590, 609 (1975) (Powell, J., concurring in part); Wong Sun v. United States, 371 U.S. 471, 491 (1963).

[62] *Brown*, 422 U.S. at 591.

statements while in custody,[63] which were subsequently used to convict him at trial.[64] The lower courts had allowed the statements based on the assumption that "the Miranda warnings [given to Brown after his arrest], by themselves, assured that the statements . . . were of sufficient free will as to purge the primary taint of the unlawful arrest."[65] The *Brown* Court held, rather, that while *Miranda* warnings were "an important factor" in finding the statements to have been voluntary,[66] and that voluntariness was a threshold requirement for admissibility of the statements,[67] these requirements alone were not enough to deter violations of the Fourth Amendment. "If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest . . . [a]ny incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all.'"[68] Further findings were necessary to sufficiently quarantine and "purge the taint" from illegally acquired confession. The Court decided it was obliged to consider "the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrance of the official misconduct."[69]

These factors have been relied upon by the Court in several attenuation cases, despite (1) it being unclear that the *Brown* Court intended them to apply to types of evidence besides confessions or other statements, and (2) the *Brown* Court having concluded its opinion by saying, "We emphasize that our holding is a limited one. We decide only that the Illinois courts were in error in assuming that the Miranda warnings, by themselves, under *Wong Sun* always purge the taint of an illegal arrest."[70] This statement suggests it was not the intention of that Court to institute a broadly-applied test for future use. Indeed, in some cases applying the attenuation doctrine, the *Brown* factors are either not referred

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[63] *See id.* at 594. Narrating the circumstances of the defendant's interrogation, the Court explained:

> [The officers] then informed [Brown] that they knew of an incident that had occurred in a poolroom on May 5, when Brown, angry at having been cheated at dice, fired a shot from a revolver into the ceiling. Brown answered: "Oh, you know about that." Lenz informed him that a bullet had been obtained from the ceiling of the poolroom and had been taken to the crime laboratory to be compared with bullets taken from Corpus' body. Brown responded: "Oh, you know that, too."

Id. (footnote omitted) (citations omitted).

[64] *Id.* at 596.

[65] *Id.* at 600.

[66] *Id.* at 603.

[67] *Id.* at 604.

[68] *Id.* at 602.

[69] *Id.* at 603–04 (citations omitted).

[70] *Id.* at 605.

to at all or quickly glossed over.[71] But in others, such as *Utah v. Strieff*, they provide the foundation of the Court's analysis.[72]

This inconsistency of use itself undermines the predictability of the exclusionary rule's application, thus undermining deterrence. But the demonstrable subjectivity the Court employs in analyzing the factors is likely even more damaging. The wide gulf between Justice Thomas's majority opinion in *Strieff* and Justice Kagan's dissent places this subjectivity on full display.

Strieff's story unfolded like this: an anonymous tip led Salt Lake City Police Officer Douglas Fackrell to surveil a residence suspected of being used for dealing drugs.[73] Having seen defendant Edward Strieff leave the residence in question on foot, Fackrell detained him and queried Strieff as to his activities at the residence.[74] During the stop, Fackrell asked Strieff for his identification, which Strieff produced.[75] Strieff's record came back from the police dispatcher with an outstanding traffic warrant, for which Fackrell arrested Strieff, subsequently discovering drug paraphernalia and some methamphetamine in the search incident to the arrest.[76] Having stipulated that the stop itself was unconstitutional for lack of reasonable suspicion, the question before the Court was whether the discovery of the drugs was sufficiently attenuated from the illegal stop so as to allow their admission into evidence. Namely, the Court had to address a conflict among courts regarding whether discovery of an arrest warrant implies attenuation.[77]

Both the majority and the dissent agreed that the discovery of the drugs was temporally proximate to the illegal stop, which weighed in favor of suppression.[78] But the similarity of their analyses ends there. The majority found that the discovery of a valid warrant amounted to an "intervening circumstance."[79] For this proposition it relied heavily on

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[71] *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 603 (2006) (holding that "the causal link between a violation of the knock-and-announce requirement and a later search is too attenuated to allow suppression," without examining the *Brown* factors); New York v. Harris, 495 U.S. 14, 18–19, 23–24 (1990) (distinguishing *Brown* and thus ignoring its test, despite the dissent arguing *Brown* is applicable); United States v. Ceccolini, 435 U.S. 268, 279–80 (1978) (holding that the evidence was attenuated from the illegality, but, of the three *Brown* factors, referring only cursorily to "temporal proximity").

[72] *See* 136 S. Ct. 2056, 2061–63 (2016) ("The three factors articulated in *Brown v. Illinois* . . . guide our analysis.").

[73] *Id.* at 2059.

[74] *Id.* at 2060.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 2072 (Kagan, J., dissenting).

[79] *Id.* at 2062 (majority opinion).

Segura v. United States,[80] which had "suggested that the existence of a valid warrant favors finding that the connection between unlawful conduct and the discovery of evidence is 'sufficiently attenuated to dissipate the taint.'"[81] *Segura*, however, had applied the "independent source" doctrine, rather than attenuation, because the evidence in question had been discovered through means other than the illegal conduct.[82] *Strieff*, in stark contrast, featured illegal conduct that was a but-for cause of the subsequent discovery of first the warrant and then the drugs. But the *Strieff* majority relied on the existence of the warrant prior to the illegal stop and the police officer's "obligation" to arrest Strieff once he found the warrant.[83] Therefore, the arrest "was independently compelled by the pre-existing warrant," and once the officer "was authorized to arrest Strieff, it was undisputedly lawful to search Strieff as an incident of his arrest."[84]

Justice Kagan saw the situation differently.[85] She explained that the idea of an "intervening circumstance" that breaks the causal chain between illegal conduct and evidence subsequently discovered is taken directly from the doctrine of proximate causation, as understood in tort law.[86] As such, an event can only be "intervening" when it is unforeseeable.[87] Fackrell's discovery of Strieff's traffic warrant, on the other hand, was entirely foreseeable.[88] Justice Kagan pointed out that "the department's standard detention procedures—stop, ask for identification, run a check—are partly designed to find outstanding warrants. And find them they will, given the staggering number of such warrants on the books."[89] Because of this foreseeability, Justice Kagan would not have found the

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[80] 468 U.S. 796 (1984).

[81] *Strieff*, 136 S. Ct. at 2062 (quoting *Segura*, 468 U.S. at 815).

[82] The *Strieff* Court admits as much. *Id.* In *Segura*, police had entered a residence illegally, and the evidence that was in plain sight during that entry was indeed suppressed. *Segura*, 468 U.S. at 801–02, 804. Evidence gathered later by way of a valid warrant (issued based on information known prior to the illegal entry) was admitted under the "independent source" doctrine. *Id.* at 799.

[83] *Strieff*, 136 S. Ct. at 2062.

[84] *Id.* at 2063.

[85] As did Justice Sotomayor, who wrote a separate dissent, and Justice Ginsburg, who joined both.

[86] *Id.* at 2072 (Kagan, J., dissenting) (citing Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 658–59 (2008); Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L. J. 1077, 1099 (2011)).

[87] *Id.* at 2073 (citing W. KEETON, D. DOBBS, B. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS 312 (5th ed. 1984)).

[88] *Id.*

[89] *Id.* Here, Justice Kagan points to her colleague's dissent, which discusses the widespread existence of outstanding arrest warrants for minor offenses: for example, "[t]he Department of Justice recently reported that in the town of Ferguson, Missouri, with a population of 21,000, 16,000 people had outstanding warrants against them." *Id.* at 2068 (Sotomayor, J., dissenting).

discovery of the warrant to constitute an intervening event.[90]

After concluding the existence of an open warrant did constitute intervening circumstance, the majority examined the purpose and flagrance of Fackrell's conduct.[91] The majority described Fackrell as having been "at most negligent" and having made only "two good-faith mistakes."[92] The majority faulted him only for stopping Strieff despite not knowing how long he had been at the house (and thereby diminishing the suspicion that Strieff was purchasing drugs) and for demanding that Strieff speak to him, rather than asking.[93] This analysis focused solely on the "flagrance" of Fackrell's illegal stop, leaving "purpose" completely out of the equation. The Court admitted that "Officer Fackrell's stated purpose was to 'find out what was going on [in] the house.'"[94] Searching through Strieff's pockets would certainly help Fackrell attain that goal, would it not?

The dissenters thought so. Justice Kagan goes so far as to substitute some facts and names from *Strieff* into a paragraph from the *Brown* decision in an illustration of how neatly the situation at hand fits precisely what the *Brown* Court thought was ripe for exclusion:

> [I]t is not disputed that [Fackrell stopped Strieff] without [reasonable suspicion]. [He] later testified that [he] made the [stop] for the purpose of questioning [Strieff] as part of [his] investigation. . . . The illegality here . . . had a quality of purposefulness. The impropriety of the [stop] was obvious. [A]wareness of that fact was virtually conceded by [Fackrell] when [he] repeatedly acknowledged, in [his] testimony, that the purpose of [his] action was 'for investigation': [Fackrell] embarked upon this expedition for evidence in the hope that something might turn up.[95]

Justice Sotomayor also concluded that Fackrell's sole reason for illegally stopping Strieff was to find out whether drugs were being sold at the residence he was surveilling.[96] And because a warrant check was "part and parcel" of the officer's illegal fishing expedition, Fackrell's conduct

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[90] *See id.* at 2073 (Kagan, J., dissenting) (concluding that because it is "the run-of-the-mill results of police stops," discovery of an outstanding warrant is "nothing like what intervening circumstances are supposed to be").

[91] *Id.* at 2063 (majority opinion).

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.* at 2072 (Kagan, J., dissenting) (alteration in original) (quoting Brown v. Illinois, 422 U.S. 590, 592 (1975)).

[96] *Id.* at 2066 (Sotomayor, J., dissenting).

had the kind of purposefulness that warrants exclusion.[97] Kagan concluded, "The majority's misapplication of *Brown* 's three-part inquiry creates unfortunate incentives for the police—indeed, practically invites them to do what Fackrell did here."[98] I agree, and in more than one way. Not only did the majority's artificially narrow interpretation of the *Brown* factors create a safe haven for illegal conduct that should be deterred by application of the exclusionary rule, it further undermined the deterrent effect more generally by once again showing that the rule is quite susceptible to subjective interpretation, diminishing the predictability that is so central to effective deterrence.

B. Splitting *Harris*: One More Layer of Subjective Distinction

Another method the Court has resorted to in finding an attenuation exception to the exclusionary rule is the arguably artificial partitioning of an event into discrete pieces.[99] This practice is especially notable in *New York v. Harris*[100], *Hudson v. Michigan* and *Utah v. Strieff*.

Three New York City police officers went to the apartment of Bernard Harris with the intention of arresting him based on their probable cause to believe he had murdered Ms. Thelma Staton.[101] They proceeded to enter his home, read Harris the *Miranda* warning, and arrest him.[102] Harris proceeded to make statements on three separate occasions: inside the house, in which he admitted the killing; in an inculpatory written statement at the police station; and in a similarly incriminating interview with a district attorney.[103] Harris had been informed of his rights prior to each statement, but this last interview took place after Harris indicated that he did not want to answer any more questions.[104]

The warrantless, nonconsensual entry into Harris's house was deemed illegal based on precedent that held it unconstitutional to make

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[97] *Id.*

[98] *Id.* at 2073 (Kagan, J., dissenting).

[99] For further exploration of this issue through examining some different cases applying this approach, see generally James J. Tomkovicz, *Hudson v. Michigan and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819, 1849–62 (2008).

[100] 495 U.S. 14 (1990).

[101] *Id.* at 15.

[102] *Id.* at 15–16. Oddly, the Court states first that "Harris let them enter," but then accepts the view of both lower courts that the entry was nonconsensual. The entire case would be pointless had the officers had Harris's consent, so this verbal contradiction must be chalked to as a minor miscue on the Court's part.

[103] *Id.* at 16.

[104] *Id.*

such an entry to perform a "routine felony arrest."[105] Thus the statement made at the house had been suppressed; the third statement had also been suppressed, due to Harris's request to cease the interview.[106] The New York Court of Appeals had applied *Brown*, finding that the second statement should be suppressed as it was not sufficiently attenuated from the illegal entry.[107] The question before the Court was whether to suppress the written second statement, made at the police station, based on the illegal entry in effecting Harris's arrest.[108]

The Supreme Court reversed.[109] In doing so, it stated an early version of Justice Scalia's "purpose" test from *Hudson*, drawing on language from *Ceccolini* to support it.[110] Specifically, the Court ruled, "[W]e decline to apply the exclusionary rule in this context because the rule in *Payton* was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects, like Harris, protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime."[111] The Court invents several counterfactuals[112] to support this holding, including the suggestion that Harris could have been released and then immediately re-arrested—legally this time—outside the house.[113] Additionally, the Court imagined the police could have waited and arrested Harris outside his home, in which case any accompanying statements would of course be admissible.[114] The Court also added an arguably incorrect hypothetical that "the legal issue is the same as it would be had the police arrested Harris on his doorstep, illegally entered his home to search for evidence, and later interrogated Harris at the station house."[115] This last example is distinguishable on its face, since illegally searching the house for evidence does not causally connect to a suspect's statements in the same way that an arrest of that suspect does.

But it is exactly this issue that is at the heart of the Court's ruling. Just as the search of the house is an activity clearly distinct from the taking of statements, the Court attempts to draw a line at the threshold of

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[105] *Id.* (citing Payton v. New York, 445 U.S. 573 (1980)).

[106] *See id.* ("The trial court suppressed Harris' first and third statements; the state does not challenge that ruling.").

[107] *Id.*

[108] *Id.*

[109] *Id.* at 17, 21.

[110] *Id.*

[111] *Id.*

[112] For an in-depth look at the Court's manipulative use of counterfactuals in but-for causation analysis, see generally Alschuler, *supra* note 25, at 1758–61.

[113] *Harris*, 495 U.S. at 18.

[114] *Id.*

[115] *Id.*

Harris's house, so that his illegal arrest *inside* the house magically becomes legal once Harris is transported *outside* the house.[116] The "purpose" argument appears tacked on to attempt to disguise this bizarre incongruity. In reality, the Court was only able to distinguish *Harris* from *Brown*, *Dunaway v. New York*[117], and *Taylor v. Alabama*[118] by relying on the existence of probable cause, which allows them the use of their "arrest-outside-the-house" counterfactuals.[119]

Now, the existence of probable cause is undeniably a major distinction. Certainly one can understand why the Court was particularly hesitant to let a murderer off the hook when the illegality of the arrest depended on the relative technicality of its location, rather than the more blatant violation of arrest without probable cause. Because of this distinction, the case could have been decided the same way based solely on the *Brown* factors of intervening circumstances and the purpose and flagrance of the violation, without having to dive into this murky distinction between the legality of Harris's custody inside and outside the house, propped up by the shaky "purpose-of-the-constitutional-protection" argument. Let's walk through the *Brown* test. The threshold requirement of voluntariness had been met; *Miranda* warnings had also been given. Both facts argue in favor of finding attenuation. The temporal proximity was quite close; this fact is a point in Harris's favor. But the Court could certainly have found that the officers' purpose was merely to arrest Harris as expediently as possible and not to go on a fishing expedition for statements they could not otherwise collect. Nor was the arrest (arguably) particularly flagrant, given the existence of probable cause (at least it was less flagrant than the arrests in *Brown*, *Dunaway*, and *Taylor*). While the Court may have tried to find moving Harris outside or to the police station to amount to an "intervening circumstance," this would not be very different from the arbitrary partitioning of the event of his arrest that I oppose. Still, based on the totality of the circumstances, the Court might have found Harris's statement "sufficiently an act of free will to purge the primary taint of the unlawful invasion."[120]

Indeed, the dissent would have decided the case based solely on examination of the *Brown* factors.[121] While it is true that the dissenters

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[116] *See id.* ("Because the officers had probable cause to arrest Harris for a crime, Harris was not unlawfully in custody when he was removed to the station house.").

[117] 442 U.S. 200 (1979).

[118] 457 U.S. 687 (1982).

[119] *Harris*, 495 U.S. at 18–20. *Brown*, *Dunaway*, and *Taylor* all involved statements obtained after illegal arrests (made without probable cause); in each, the statements were ultimately suppressed. *Brown*, 422 U.S. at 591, 604–05; *Dunaway*, 442 U.S. at 203, 218–19; *Taylor*, 457 U.S. at 688–89, 694.

[120] Wong Sun v. United States, 371 U.S. 471, 486 (1963).

[121] *Harris*, 495 U.S. at 23–26. (Marshall, J., dissenting).

would have found *Brown* to support suppression,[122] their analysis does not match the hypothetical analysis outlined above that the majority might have used.[123] I do not address which side might be correct in such an imagined disagreement, as this Note has already examined the subjectivity inherent in *Brown*-based analysis.[124] What is important to note here is that the Court added yet another layer of needless subjectivity and unpredictability by conjuring the novel possibility that the Court might slice the magician's assistant in twain, as it were. Dividing a seemingly unitary event such as the arrest of a suspect into discrete pieces leaves one tingling with a sensation distinctly suggestive of judicial hocus-pocus.

The Court employed this type of event partitioning again in *Hudson*, in which the manner of entry was amputated from the rest of a search performed by police in order to support a finding that evidence procured in that search was not tainted by a knock-and-announce violation. The majority begins by stating that "the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence."[125] Justice Scalia then invoked *Harris* to assert his "purpose-of-the-constitutional-guarantee" test, which of course was only of any use to him because he wanted to differentiate between the interests (supposedly) protected by the knock-and-announce requirement with those protected by the Fourth Amendment's more general prohibition on unreasonable searches and seizures.[126] Finally, Justice Scalia invoked *Harris* again, specifically comparing the distinction made in that case between the illegal arrest and the rest of the "process that culminated in acquisition of the evidence sought to be excluded," with the distinction he wanted to draw here between the illegal entry and the search that followed.[127] He also cited *Segura v. United States*,[128] in which the Court had deemed a search "wholly unrelated to the prior entry."[129] This is a specious comparison. *Segura* had been decided on "independent source" grounds, since the evidence sought to be excluded had been found in a second, legal search of the apartment pursuant to a valid warrant.[130] The only

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[122] *Id.* at 26.

[123] See *id.* at 26 (finding the arrest to be a fragrant violation of "Harris' Fourth Amendment rights so [the police] could get evidence that they could not otherwise obtain" with little elapsed time and no intervening circumstances other than the *Miranda* warning between the arrest and the challenged statement).

[124] *See supra* subpart III.A.

[125] Hudson v. Michigan, 547 U.S. 586, 592 (2006).

[126] *Id.* at 593–94.

[127] *Id.* at 601.

[128] *Id.* at 600–01.

[129] Segura v. United States, 468 U.S. 796, 814 (1984).

[130] *Id.* Moreover, "[n]one of the information on which the warrant was secured was derived from or related . . . to the initial entry into petitioners' apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry." *Id.*

thing connecting the second search with the first illegal entry was that two officers had remained on the premises for nineteen hours waiting for the search warrant to be issued.[131] As such, it is easier to separate the illegal conduct in *Segura* from the resulting discovery of evidence. As in *Harris*, four dissenters opposed this cutting of still frames from the moving picture of the unfolding arrest and evidence gathering, instead taking the view that the entry was indeed a but-for cause of the search that followed.[132] In any event, the Court took another step in instituting an analytic practice—slicing up events into discrete parts—that adds unpredictability and subjectivity to exclusionary rule jurisprudence.

In the Court's most recent take on the exclusionary rule, *Utah v. Strieff*, the same technique is put to use, albeit in an arguably subtler way. Strieff, recall, was arrested for possession of methamphetamine after a police officer—having initially stopped Strieff without reasonable suspicion and therefore illegally—ran Strieff's record, found an outstanding traffic warrant, and then discovered the drugs in a search incident to an arrest based on the warrant.[133] Separating the illegal stop from the search by drawing a line at the discovery of the warrant is arguably less effective than what was done in *Harris* and *Hudson* because, unlike those cases, the splitting of the event into pieces doesn't even eliminate the causal connection between the illegality and the procurement of the evidence. There is no counterfactual the court could turn to in which Officer Fackrell would have discovered the warrant without making the illegal stop. At best, it posits the discovery of the warrant as a "more proximate" cause of finding the drugs, thus, in the mind of the Court, attenuating the evidence from the illegal conduct. But as the dissenters point out, the more natural reading of these facts is that the search was a continuous unfolding of events inextricably tied to the source: the illegal stop.[134] Once again the Court has shown that it is willing to interpret fact scenarios in novel and unpredictable ways, making it increasingly difficult to imagine when law enforcement agents can reliably expect the exclusionary rule to apply.

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[131] *Id.* at 801.

[132] *Hudson*, 547 U.S. at 604, 615–16 (Breyer, J., dissenting).

[133] Utah v. Strieff, 136 S. Ct. 2056, 2060 (2016).

[134] *See id.* at 2066 (Sotomayor, J., dissenting) ("The warrant check, in other words, was not an 'intervening circumstance' separating the stop from the search for drugs. It was part and parcel of the officer's illegal 'expedition for evidence in the hope that something might turn up.'" (quoting Brown v. Illinois, 422 U.S. 590, 605 (1975))); *id.* at 2073 (Kagan, J., dissenting) ("[O]utstanding warrants do not appear as bolts from the blue. They are the run-of-the-mill results of police stops—what officers look for when they run a routine check of a person's identification and what they know will turn up with fair regularity. In short, they are nothing like what intervening circumstances are supposed to be." (footnote omitted)).

C. The Belt Tightens Further: Justice Scalia's "Constitutional Interest" Test in *Hudson*

In *Hudson*, the Court was faced with the question whether to exclude evidence obtained in a search following a failure by police to knock-and-announce prior to entering the defendant's home.[135] Citing dicta from both *Ceccollini*[136] and *Harris*,[137] Justice Scalia asserted that the attenuation exception to the exclusionary rule applies not only when the causal connection between the illegal conduct and the evidence subsequently collected is remote, but also when "even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained."[138] This novel "rule" is quoted by Justice Thomas in *Utah v. Strieff*,[139] although he does not explicitly rely on it for the Court's holding.[140]

Taken alone and at face value, this rule (or at least its corollary, that evidence *should* be excluded when its suppression *would* serve the interest protected by the constitutional guarantee that has been violated) might actually represent an effective crystallization of the essential purpose of the exclusionary rule. Indeed, it embraces both a deterrent and remedial purpose: one could certainly identify deterrence of future illegal conduct as something that would serve the interest protected by the constitutional guarantee that had been violated; similarly, restoring the defendant to the position he would have been in but for the constitutional violation would also "serve the interest of the constitutional guarantee."

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[135] *Hudson*, 547 U.S. at 588.

[136] United States v. Ceccolini, 435 U.S. 268, 279 (1978) ("The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve.").

[137] New York v. Harris, 495 U.S. 14, 20 (1990) ("[S]uppressing [Harris's] statement taken outside the house would not serve the purpose of the rule that made Harris' in-house arrest illegal.").

[138] *Hudson*, 547 U.S. at 593.

[139] 136 S. Ct. 2056, 2061 (2016) (citing *Hudson*, 547 U.S. at 593). Interestingly, Justice Thomas's language suggests it is either an additional requirement to or an alternative formulation of the *Brown* factor test, while Justice Scalia's original formulation suggests his "rule" is an additional, entirely separate avenue by which attenuation may be found. *Compare id.* ("Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, *so that* 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" (emphasis added)), *with Hudson*, 547 U.S. at 593 ("Attenuation can occur . . . when the causal connection is remote . . . *[but] also* occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." (emphasis added) (citation omitted)).

[140] *See Strieff*, 136 S. Ct. at 2063 (holding that the drugs found on Strieff's person were admissible through attenuation based on application of the *Brown* factors).

Alas, Justice Scalia did not apply the test in that manner at all. Instead, he first isolated the knock-and-announce requirement from the rest of the understood requirements of the Fourth Amendment (such as obtaining a warrant),[141] before distinguishing the manner of entry from both the continued presence in the home and the search itself.[142] Justice Scalia identified the only interests of knock-and-announce as "protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident," protection of property (e.g., a broken-down door), and "those elements of privacy and dignity that can be destroyed by a sudden entrance."[143] He elaborated that while the warrant requirement contemplated "one's interest in preventing the government from seeing or taking evidence described in a warrant," the knock-and-announce rule did not.[144]This is a terribly narrow reading of his own rule, achieved only through the artificial distinction between the entry and search stages of the execution of a warrant. Certainly the suppression of evidence found in a search following a failure to knock-and-announce would encourage police to think twice about their manner of entry, thus reducing future violations of this type and protecting the interest of the knock-and-announce guarantee.[145]

IV. So, Where Does That Leave Us?

Conservative-leaning majorities on the Supreme Court have shown an ever-increasing willingness—indeed, desire—to open up the rule to as many exceptions as they could justify, stretching analysis of the rule into a form that would be barely recognizable to Justices Holmes or Warren. The Roberts Court promises to keep the train speeding in the same direction, as the Court's most recent decision in *Utah v. Strieff* presents an amalgam of several of the key "innovations" in exclusionary rule jurisprudence. In its current state, it is hard to imagine the rule having much use as a deterrent, given the subjectivity and unpredictability incorporated into its application. Much of the rule's intended deterrent effect could be restored, however, by employing a simple test that echoes the

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[141] *Hudson*, 547 U.S. at 593–94.

[142] See *id.* at 600 (discussing a trio of cases where an unlawful entry was held insufficient to necessitate the exclusion of evidence obtained in an otherwise lawful search).

[143] *Id.* at 594.

[144] *Id.*

[145] *See id.* at 608–09 (Breyer, J., dissenting) (concluding that the "purpose underlying the exclusionary rule, namely, the deterrence of unlawful government behavior, argues strongly for suppression" because "[w]ithout such a rule . . . police know that they can ignore the Constitution's requirements without risking suppression of evidence discovered after an unreasonable entry").

spirit of ancestral exclusionary rule cases: we should simply ask, "Was the evidence in question discovered by exploiting illegal conduct?"

A. The War on Exclusion: Open Hostility from Select Justices

Keeping in mind the ever-expanding wiggle room in exclusionary rule jurisprudence, it is illuminating to note that several justices who have been happy to exploit (and create) these new opportunities to sanction illegal evidence collection have been openly hostile to the rule's very existence. Current Chief Justice John Roberts, for example, is well known to favor abolishing the rule entirely: Adam Liptak, a *New York Times* reporter who covers the Supreme Court, has written that Roberts was working to dismantle the exclusionary rule as far back as 1983, when he was working in the Reagan White House.[146] It is no wonder then that Roberts begins his analysis in *Herring* with a now-boilerplate listing of the most fundamental constraints placed on the rule over the last several decades.[147]

The Court has also sometimes paired its observation of the rule's deterrent purpose with a suggestion that it doesn't actually deter anything.[148] Concurring in *Ceccolini*, Chief Justice Burger went so far as to call the connection between exclusion and deterrence "largely and dubiously speculative."[149] He went on to say, "Empirically speaking . . . I have the gravest doubts as to whether the exclusion of evidence . . . has any direct appreciable effect on a policeman's behavior in most situations."[150]

Doubts like these, percolating in the Supreme Court since the early days of the exclusionary rule's curtailment, combined with the increasing insistence of the Court on a strong deterrent effect—while simultaneously bending over backwards to avoid finding such an effect—paint a clear picture that a steady majority of the Court would like to see the rule

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[146] Adam Liptak, *Justices Step Closer to Repeal of Evidence Ruling*, N.Y. TIMES, (Jan. 30, 2009), http://www.nytimes.com/2009/01/31/washington/31scotus.html [https://perma.cc/HP9R-VAHG], *noted in* Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L. J. 1183, 1188 (2012).

[147] Herring v. United States, 555 U.S. 135, 140–41 (2009). Those constraints are: (1) a violation does not mean the rule automatically applies and exclusion "has always been [the] last resort"; (2) exclusion is not an individual right but rather a deterrent measure only; and (3) the benefit of deterrence in a particular application must outweigh the costs. *Id.*

[148] *See, e.g.*, Stone v. Powell, 428 U.S. 465, 492 (1976) (highlighting an "absence of supportive empirical evidence" for a deterrent effect from the exclusionary rule).

[149] United States v. Ceccolini, 435 U.S. 268, 281 (1978) (Burger, C.J., concurring).

[150] *Id.* at 281 n.1.

resigned to history. It is no coincidence that this view has been consistently taken (and likewise, the increasingly restrictive rules invoked) by the more conservative members of the bench; most decisions are split exactly along perceived partisan lines. This suggests the potential for a reversal of course if the makeup of the Court were to shift to the left, although at the time of this writing that would appear to be a dream of a distant future.[151]

A final thought on this subject: I believe judicial integrity still lurks unacknowledged in the substrata of the Court's approach to exclusion. In fact, I believe it may be the only thing saving the rule from extinction. For should the Court abandon exclusion entirely, the most salient blowback from such a move would not be in the form of, "How could you give up such an essential deterrent?," but rather, "How can the Court put its stamp of approval on evidence collected by employing even the worst imaginable illegal conduct?" And that is a consideration of judicial integrity.

B. Where the Rule Stands Today, After *Strieff*

Utah v. Strieff, the Supreme Court's latest interpretation of the exclusionary rule, is a bit of an odd bird compared to its recent brethren. The primary difference is that Justice Thomas in *Strieff* relies exclusively on analysis of the *Brown* factors, whereas other relatively recent cases have made varying use of these factors,[152] even when they were considered attenuation cases (which does indeed seem to be the catch-all exception employed by the Court of late). These cases instead focus heavily on the predicted deterrent effect under each set of facts.[153]

There is nary a whiff of deterrence-talk in *Strieff*, save a general observation in the opening boilerplate and an oblique reference in the discussion of Officer Fackrell's "flagrance." This absence is especially suspect because in these days of the long-established "deterrent-purpose-only" exclusionary rule, a finding of attenuation between the illegal conduct and the discovery of the evidence is inextricably linked to a finding that suppressing said evidence would have insufficient deterrent effect on said conduct.[154] One can only imagine that this conspicuous omission is

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[151] *Donald Trump Wins 2016 Election*, TIME (Nov. 9, 2016), http://time.com/4563685/donald-trump-wins/ [https://perma.cc/V22F-ACKU].

[152] *See supra* subpart III.A.

[153] For a discussion of cost–benefit analysis and deterrence, see *supra* Section I.

[154] This link is recognized in *Strieff* itself in one of its very few explicit references to deterrence: "[T]his exclusionary rule does not apply when the costs of exclusion outweigh its deterrent

due to the reality that it would be difficult to argue that suppression in this case would *not* deter similar illegal stops in the future. This conclusion of course is tied to the reality that, although the Court found the discovery of the warrant to "break the causal chain" between the illegal stop and the discovery of the drugs, the stop was an undeniable but-for cause in the discovery of the warrant. As discussed above, no counterfactual was available to the Court in which the drugs could have been found without the illegal stop, distinguishing the case from others such as *Hudson* and *Harris*.[155]

So instead of engaging in questionable cost–benefit analysis, the *Strieff* Court exploited the subjectivity inherent in *Brown*-factor analysis. Unfortunately, this only illustrates how the Court has laid out a buffet of available frameworks to buttress whatever conclusion it wishes to make a meal out of. Indeed, Justice Thomas makes another move, perhaps with the intention of keeping another option on the menu for future consumption. He invokes Justice Scalia's "constitutional interest" test from *Hudson*, but curiously never refers to it again during the analysis.[156] In the end, the decision in *Strieff* only compounds the problems in exclusionary rule jurisprudence that undermine its purported deterrent purpose: too much subjectivity, not enough predictability, and an increasingly narrow band of conduct to which it might conceivably apply.

C. A Better Way

The exclusionary rule has become a tangled mess of exceptions, cost–benefit analysis, event partitioning, and terminology with shifting meanings. Navigating through this bog invites subjective interpretation at every twist and turn, for the decaying signposts have all been uprooted from their original stations. Although this doctrinal transmogrification is arguably the objective of a Court whose steadily conservative majority over the last several decades has shown open hostility to the exclusionary rule, the argument presented here is that the Court cannot continue to

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benefits. In some cases, for example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression." Utah v. Strieff, 136 S. Ct. 2056, 2059 (2016). *See also* United States v. Leon, 468 U.S. 897, 911 (1984) ("[T]he 'dissipation of the taint' concept that the Court has applied in deciding whether exclusion is appropriate in a particular case 'attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.'" (quoting Brown v. Illinois, 422 U.S. 590, 609 (1975) (Powell, J., concurring in part))).

[155] *See supra* subpart III.B.

[156] *Strieff*, 136 S. Ct. at 2061. For a discussion of the differences between Justice Thomas's and Justice Scalia's statement of this "test," see *supra* note 139.

operate in this way—while simultaneously narrowing the application of the rule more generally—and persist in maintaining the charade that it believes the exclusionary rule serves a deterrent purpose. Extremely narrow application of the rule and subjective interpretation of its parameters make its application entirely unpredictable by law enforcement, thus obliterating any deterrent effect it might have.

A possible compromise would be to apply the rule more broadly but to employ a remedy that opponents of exclusion would view as less damaging to the process of "truth-seeking." For example, evidence could be admitted, but some sort of mitigating instruction could be given to the jury. But only the most enlightened jurors would think twice about convicting a defendant faced with damning evidence, even if instructed on the illegality of some police conduct; the presentation of the evidence is simply too prejudicial. Perhaps some consideration could be given at the punishment phase. One could certainly come up with more alternatives. All, however, would share the same shortcoming: none would likely have any impact on the actual outcome of the guilt/innocence phase of the trial. This result, of course, is what the opponents of exclusion want. But if the trial should go on as if no illegality has occurred, then we truly have erased any possibility of a deterrent effect on unconstitutional policing. The prospect of a slightly shorter sentence will not convince anyone in law enforcement to pull his punches. Moreover, even if the measurable deterrent effect of the exclusionary rule is debatable,[157] can anyone suggest with a straight face that if there were *no rule at all*, constitutional invasions would not be even more widespread?[158] And it has been argued that the rule's primary effect on police is not deterrence *per se* but rather *influence*: namely, "that the rule works in a more positive way by allowing the courts to give guidance to officials who ultimately prove willing to receive it."[159] Professor LaFave has noted "such post-exclusionary rule occurrences as the dramatic increase in the use of search warrants where virtually none had been used before, stepped-up efforts to educate the police on the law of search and seizure where such training had before been virtually nonexistent, and the creation and development of working relationships between police and prosecutors to ensure the obtaining of evidence by means that would not result in its suppression."[160] For these

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[157] *See, e.g.*, Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821, 832 (2013) (observing that "commentators across the political spectrum representing a variety of jurisprudential disciplines have acknowledged that deterrence is not susceptible to empirical proof and thus at some level is largely a matter of conjecture").

[158] Perhaps Justice Scalia would have; for a discussion of his opinion in *Hudson* that policing has improved to the point of making the exclusionary rule less necessary, see *supra* subpart II.A.

[159] Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 469 (2009).

[160] 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §

reasons, the suppression of evidence obtained illegally is a necessary and effective judicial remedy for police misconduct.

I propose a simple, alternative test, to be applied to all cases in which evidence exclusion is considered: simply ask, "Was the evidence in question discovered by exploiting illegal conduct?" This straightforward investigation echoes language expressing the spirit of the rule's origins. Indeed, one of the most repeated statements in attenuation cases—and remember, all the exceptions represent attenuation in some form[161]—is from *Wong Sun*:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "*whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality* or instead by means sufficiently distinguishable to be purged of the primary taint."[162]

The Court has gone off the rails by obsessively focusing on the last phrase in that quotation, contorting itself like double-jointed circus performers to find "means sufficiently distinguishable to be purged of the primary taint." But that statement is simply the inverse of finding an exploitation. Answering the first question of "was the illegal conduct exploited?" is a much more straightforward analysis. To illustrate, consider the difference between the two questions "Is this place a home?" and "Is this place used in ways sufficiently distinguishable from the ways in which a home is primarily used?" The latter question invites far more interpretation and (relative to the first question) inherently favors finding that the place is *not* a home. By focusing its analysis on this "negative" invocation of the question of exploitation, the Court has biased itself heavily against actually *finding* exploitation, while simultaneously making the question a lot more difficult to answer. This difficulty leads to confusion, which in turn translates in practical terms to an inability of law enforcement agents to predict the rule's application. Illegal policing no longer leads certainly to the exclusion of evidence from trial; by—dare I say—attenuating the connection between police misconduct and its apparent remedy, the Court has greatly undermined the exclusionary

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1.2(b) (5th ed. 2016) (footnotes omitted).

[161] *See supra* Section II.

[162] Wong Sun v. United States, 371 U.S. 471, 487–88 (1963) (emphasis added) (quoting JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT: RESTRICTIONS UPON ITS DISCOVERY OR COMPULSIVE DISCLOSURE 221 (1959)).

rule's deterrent purpose.

Of course, the Justices may not always agree on what constitutes "exploitation." One major question would certainly be whether this includes an element of "knowing" or "intentional" conduct. If it is deemed to mean "knowing," for example, so-called "good faith" cases would not call for evidence suppression. If "intentionality" is required, it would be similar to requiring a high level of "purpose or flagrance" (one of the *Brown* factors) on the officer's part. Of course, if neither of these are deemed necessary, the rule could be much more broadly applied and thus have a greater deterrent effect. But even if "exploit" is interpreted narrowly, at least its contours will be much more easily traceable than those of whatever amorphous rule the Court is operating under now. As such, it will provide a distinctly more predictable rule for law enforcement to consider, and therefore its deterrent effect will be substantially augmented. A further benefit of this rule would be that its contours (such as the subjective elements described above) could be adjusted over time as the Court's composition changes or the values of society shift. It is a flexible rule, but one that can draw bright lines once its limits have been clarified by the Court. And it will always retain a connection to the purpose of the exclusionary rule's existence, for it is the exploitation of illegal methods that is such an affront to the Constitution.

How would this "exploitation of the illegality" rule work in practice? Applied to the facts in *Herring*, in which a police officer relied on an apparently valid warrant to make an arrest, and the warrant was later discovered to have been erroneous, a Court with a broad understanding of "exploit" (in the sense of simple "use" or "employment") would suppress the evidence, since there is no doubt that the arrest was made by employing the invalid warrant. In this case, while suppression of evidence of this nature wouldn't (and shouldn't) affect the behavior of the arresting officer, police departments would be deterred in the sense that they would be encouraged to implement policies that maintained a high level of vigilance in their record-keeping. On the other hand, a Court reading more culpability into "exploit," such that the discovery of evidence had to have been made by one who *knew* (or reasonably should have known) a constitutional right had been violated, would allow this evidence. Interpreting "exploit" in such a way would amount to a policy decision on the Court's part regarding how far it wished the rule's effect to extend. Some (myself included) might find such an interpretation too narrow, but at least, the Court having made it, we would have clarity as to the rule's boundaries.

In *Strieff*, the evidence should be excluded under either of the above hypothetical understandings of "exploit." Even under the narrower view requiring culpability, a reasonable officer should have known that he

lacked reasonable suspicion for the stop. And there is no question that the stop was employed in discovering the *warrant*, even if the warrant then led to the search that produced the evidence. Similarly, it would be hard to find in *Ceccolini* that the illegal search of the envelope was not "exploited" (by any definition) in obtaining the employee's testimony. In both cases, the deterrent effect is obvious: police conducting illegal stops or searches should know that any evidence they ultimately turn up would be subject to exclusion.

A case such as *Hudson* may present the most difficult scenario. A very broad understanding of "exploit" would probably exclude the evidence, because the illegal entry was employed in the course of searching the residence. But even a somewhat narrower interpretation reading "but-for" causation into "exploit" would leave the Court with the same quandary it faced in reality: the majority found that the failure to knock-and-announce was *not* a but-for cause of the discovery of the evidence, while the dissent found that it was.

Still, even if certain types of fact patterns would leave open questions for the Court to address, a test based on "exploitation" would greatly simplify the jurisprudence applied to the exclusionary rule. Most of the subjectivity in the current approach would be eliminated, and one would not have to wonder which framework the Court would apply. Good faith? Rigorous cost–benefit analysis? The *Brown* factors? Eliminating these alternative pathways would go a long way towards more predictable outcomes in suppression questions, and therefore more deterrence in practice. Furthermore, the concept of "exploitation" still envisions a tangible connection between the illegal conduct and the evidence sought to be suppressed. This connection in turn supports the potential of evidence suppression to deter future misconduct. The potential becomes much stronger once one adopts a broader (and more realistic) view of "deterrence" than the Court has in recent years and takes into account the great variety of influences—from prosecutors to policymakers—that may be brought to bear on the manner in which police go about their business.[163]

A potential downside to the "illegality exploitation" rule is that due to its flexibility it may depend too heavily on a Supreme Court that favors exclusion in the first place. A Court hostile to exclusion could interpret "exploit" in such a way as to largely accomplish their goal of only excluding evidence in the most flagrant of cases. Even in such a worst-case scenario, however, there are two advantages over the current process. First, the rule could and likely would enjoy more liberal application in a

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[163] For a discussion on the Court's strained understanding of "deterrence," see *supra* subpart II.B.

number of state courts. Many borderline cases could be decided in favor of exclusion, as long as the decision did not directly contravene Supreme Court precedent. Second, it is easier to reverse course on the interpretation of one simple rule than it is to roll back decades of convoluted judge-made exceptions.

V. CONCLUSION

When the Supreme Court decided that the only legitimate purpose of the exclusionary rule was deterrence, the remedy became subject to cost–benefit analysis, where a rule based on judicial integrity had not been. This doctrinal shift opened a Pandora's Box, out from which flew a swarm of exceptions and alternative analytical frameworks, employed with increasing variability by a Court that clearly dislikes letting the criminal go free because the constable blundered. The common-sense notion that in some cases the causal connection between illegal police conduct and evidence subsequently acquired "may have become so attenuated as to dissipate the taint" transformed into a rationale for conservative Courts to search high and low for ways to weaken said connection. In the end, the variety of potential approaches to a given exclusion question (despite the fact that they are all based on some notion of "attenuation"), along with the subjectivity inherent in some of the analysis (such as cost–benefit analysis itself, measuring the "purpose" or "flagrance" of an officer's conduct, unnaturally partitioning events to quarantine the conduct from the evidence, or imagining potential deterrence in unreasonably narrow terms) obliterated the predictability of the rule's application. This lack of predictability, in turn, neuters any deterrent effect the exclusionary rule might be hoped to have.

This Note proposes a test applicable to any exclusionary rule question: "Was the evidence in question discovered by exploiting illegal conduct?" This test echoes language in the vintage exclusionary rule cases; it is the exploitation of illegal conduct that so fundamentally offends the Constitution. The Supreme Court would retain some flexibility in its definition of "exploit," allowing it to read the test along a fairly wide spectrum of breadth. Essentially, how the Court understands "exploit" would define the strength and character of the connection it requires between the illegal conduct and the evidence sought to be suppressed. A narrow understanding, of course, would deter less. But at least what deterrence there was would not be undermined by a jurisprudence fraught with subjectivity and unpredictability.

Until we have in any form a much more straightforward test for

exclusionary rule application, the rule will fail to serve what is now its only Court-endorsed purpose.