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# TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS
## LETTER FROM THE EDITOR

Dear Reader,

Thank you for subscribing to the Journal. It has been an exciting school year. In February, the Journal hosted its annual conference. This year's topic was "Workers' Rights in the 21st Century: New Developments / New Challenges." Judges, attorneys, and professors from across the United States joined Journal members in Austin to discuss topics like mandatory arbitration and the evolving nature of employment relationships.

In addition to a successful conference, the Journal is pleased to publish four thought-provoking pieces in this issue. Sarah Beebe and Christine Nishamura's Article discusses the failure of many school districts to serve English language learners and their families, with a particular emphasis on students with learning disabilities and their families. The Article argues that school districts have a duty to inform and cooperate with parents regardless of English proficiency, to properly identify and accommodate students with learning disabilities, and to integrate English language learners into the school community. Beebe and Nishamura describe the steps a district should take to address the needs of these students and their families and the remedies that should be made available when the school district fails them.

John P. Gross's article argues that the Supreme Court's highly deferential Fourth Amendment standard for assessing police officers' use of deadly force is insufficient and ill-suited to the reality of interactions between police officers and suspects. Data on the use of deadly force by police officers demonstrate the presumption of innocence should factor more heavily into legal analysis about whether deadly force was permissible.

I could not write this letter without mentioning the passing of Justice Antonin Scalia, who left a lasting impression on civil liberties and civil rights jurisprudence that is reflected, in part, by two of this issue's pieces. *Obergefell v. Hodges* forever changed marriage last year when the Court ruled that same-sex couples enjoy a right to marry. While a majority of the Court coalesced behind the new definition of marriage, the now-deceased Justice Scalia continued his biting criticism in dissent against increased constitutional rights for sexual minorities. Carlo A. Pedrioli's Article looks at Scalia's rhetoric in dissent from *Romer v. Evans* in 1996 to *Obergefell* in 2015 through the lens of personae theory, which examines the roles that communicators perform or create through discourse. The Article concludes that Scalia used personaes to mask hypocrisy that compromised his supposedly neutral stance as an impartial jurist.

While Scalia was not the direct focus of Olivia Luckett's Note, the late justice had a significant role in shaping its topic: the Supreme Court's ever-changing Confrontation Clause doctrine since Scalia's landmark 2005 decision in *Crawford v. Washington*. Luckett argues the Court's lack of clarity since that decision leads to confusion and miscarriages of justice and suggests the simplest method would be for the Court to return to *Crawford*.

Thanks,

Hannah Alexander
Editor in Chief

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ARTICLES



NOTE

# Articles

# Right of Limited English Proficient Students with Disabilities and Their Parents to Be Served in Their Native Language

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## I. INTRODUCTION

Currently, 20.7% of the United States population speaks a language other than English at home.[1] In Texas, it is as high as 34.7%.[2] The English language learner (ELL)[3] population has steadily increased over the last several decades. In 2011–2012, the ELL student population increased to approximately 4.4 million students, or 9.1% of the total student population.[4] Seventeen percent of students in Texas receive bilingual or English as a second language (ESL) services.[5] Although there are approximately 400 languages represented by the ELL population, Spanish is spoken by 75%.[6] With changes in demographics in Texas and the United States, due to birth rates and immigration patterns, it is projected that the number of people speaking a language other than English will only continue to grow.[7]

In this increasingly diverse nation, school districts are faced with the challenge of serving students with disabilities who have limited English proficiency,[8] as well as ensuring that their parents are able to understand and participate in the development of their education program.[9] Schools have a legal duty to ensure that both parents and students are able to access the programs, services, and information they offer to students and parents whose primary language is English,[10] yet they often fail to provide even the most basic information in a language

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[1] U.S. CENSUS BUREAU, LANGUAGE OTHER THAN ENGLISH SPOKEN AT HOME, http://quickfacts.census.gov/qfd/states/00000.html, <https://perma.cc/3G49-VRBQ>.

[2] U.S. CENSUS BUREAU, ST. & CTY. QUICK FACTS, http://quickfacts.census.gov/qfd/states/48000.html, <https://perma.cc/FSJ4-L397>.

[3] For purposes of this paper, we will refer to students as English language learners (ELL) and parents as limited English proficient (LEP) in accordance with professional practice. 20 U.S.C. § 7801(20) (2012); LIMITED ENGLISH PROFICIENCY, http://www.lep.gov, <https://perma.cc/H8KB-PVK4> (noting individuals who do not speak English as their primary language and who have a limited ability to read, speak, write, or understand English are considered LEP).

[4] GRACE KENA ET AL., NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 52 (2014), http://nces.ed.gov/pubs2014/2014083.pdf, <https://perma.cc/8RJJ-FRGT>.

[5] TEX. EDUC. AGENCY, SNAPSHOT 2014 SUMMARY TABLES: STATE TOTALS, http://ritter.tea.state.tx.us/perfreport/snapshot/2014/state.html, <https://perma.cc/D6RP-2UKW>.

[6] Alfredo J. Artiles & Alba A. Ortiz, *English Language Learners with Special Education Needs: Contexts and Possibilities*, *in* ENGLISH LANGUAGE LEARNERS WITH SPECIAL EDUCATION NEEDS: IDENTIFICATION, ASSESSMENT, AND INSTRUCTION 18 (Alfredo J. Artiles & Alba A. Ortiz eds., 2002).

[7] HYON B. SHIN & JENNIFER M. ORTMAN, LANGUAGE PROJECTIONS: 2010 TO 2020 5–6 (2011), http://www.census.gov/hhes/socdemo/language/data/acs/Shin_Ortman_FFC2011_paper.pdf, <https://perma.cc/23Z2-2SJF>.

[8] Catherine E. Lhamon & Vanita Gupta, *"Dear Colleague" Letter*, U.S. DEPT. OF JUST. & U.S. DEPT. OF EDUC. 2 (Jan. 7, 2015).

[9] *Id.*

[10] *See* 20 U.S.C. § 6318(f) (2012) (requiring that local educational agencies and schools provide full opportunities for the participation of parents with limited English proficiency, including providing information and school reports, in a language such parents understand).

other than English.[11]

The effect of these discriminatory practices is to leave ELL students with disabilities in classroom settings where they have no hope of being able to follow instruction or receive any meaningful benefit from their education no matter how appropriate their plan for services may be. These practices render parents of students with disabilities unable to meaningfully participate in the planning to address their children's disability-related needs at school. Parents of students with disabilities were meant to play a major role in the development of their children's educational services,[12] but without access to appropriate interpreter services during meetings, as well as translated copies of important disability-related documents, limited English proficient (LEP) parents are denied the same level of participation afforded to English-speaking parents.

Title VI of the Civil Rights Act of 1964 prohibits school districts that receive federal financial assistance from excluding students from participating in, denying the benefits of, or subjecting them to discrimination through, any of their programs or activities on the basis of national origin, color, or race.[13] Federally funded districts also may not engage in practices that "have the effect of subjecting individuals to discrimination because of their race, color, or national origin."[14] Courts,[15] the Department of Education,[16] and a president of the United States[17] have interpreted Title VI to require federally funded districts to provide the same meaningful access to educational benefits and equal participation to students with limited English proficiency as is provided to all other students.[18] Limited English proficiency is, therefore, treated

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[11] Orange (CA) Unified Sch. Dist., 111 LRP 65098, 1 (OCR 2011); Victor Valley (CA) Union High Sch. Dist., 50 IDELR 141, 600–01 (OCR 2007); Letter from Jennifer Coco, Staff Attorney, Southern Poverty Law Center, and Caren Short, Staff Attorney, Southern Poverty Law Center, to the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division, to file a complaint against the Jefferson Parish Public School System 17 (Aug. 22, 2012) (on file with author).

[12] *See* 34 C.F.R. §§ 300.116(a)(1), 300.321(a)(1), 300.324(a)(ii), 300.327, 300.502(a), (c) (2015) (explaining parental involvement in placement decisions, IEP development, and educational evaluations).

[13] 42 U.S.C. § 2000d (2012); Ex. Order No. 13160, 65 Fed. Reg. 39,775 § 1–101 (June 23, 2000).

[14] 34 C.F.R. § 100.3(b)(2) (2015).

[15] Lau v. Nichols, 414 U.S. 563, 568–69 (1974); Castaneda v. Pickard, 648 F.2d 989, 1015 (5th Cir. 1981).

[16] Memorandum from Michael L. Williams, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to OCR Senior Staff (Sept. 27, 1991); Memorandum from William L. Smith, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to OCR Senior Staff (Apr. 6, 1990); Memorandum from J. Stanley Pottinger, Dir., OCR, to selected school districts with students of National Origin-Minority Groups (May 25, 1970).

[17] Exec. Order No. 13166, 65 Fed. Reg. 50,121 (Aug. 11, 2000) (ordering federal agencies to implement "compliance standards that recipients [of federal financial assistance] must follow to ensure that the programs and activities they normally provide in English are accessible to LEP persons").

[18] 20 U.S.C. § 1703(f) (2012) (". . .the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs" will constitute discrimination on the basis of race, color, or national origin).

as "an immutable characteristic like skin color . . . or place of birth."[19]

Title VI also bestows these rights on parents. In order to avoid national origin discrimination, federally funded school districts must provide the same information about school programs, reports, and activities to LEP parents as they do to English-speaking parents.[20] In fact, the Office for Civil Rights, with the Department of Education, has made clear that "[s]chool districts have a responsibility to adequately notify national-origin minority parents of school activities that are called to the attention of other parents."[21] Furthermore, the Office for Civil Rights has found that "Title VI is violated if . . . parents whose English is limited do not receive school notices and other information in a language they can understand."[22] Thus, school districts have a significant legal obligation to ensure all students and parents with limited English proficiency are aware of the programs and services available to them through the school system and can access those programs and services in a meaningful way.

## II. ENGLISH LANGUAGE LEARNERS IN SPECIAL EDUCATION

No Child Left Behind refers to LEP students,[23] but recent professional practice uses "English language learner" (ELL).[24] A basic definition of ELL students is students, ages three through twenty-one, who are enrolled, or preparing to enroll, in elementary or secondary school, that are born outside of the United States or whose native language is other than English.[25] A lack of proficiency in speaking, writing, reading, or understanding English makes it difficult for students to meet the State's proficient level of achievement on State assessments,

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[19] Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980).

[20] 20 U.S.C. § 6318(f) (2012) ("[L]ocal educational agencies and schools. . .shall provide full opportunities for the participation of parents with limited English proficiency . . . , including providing information and school reports . . . in a language such parents understand."); Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (July 18, 1970) ("School districts have the responsibility to adequately notify national origin-minority group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English").

[21] DEP'T. OF EDUC., OFFICE FOR CIVIL RIGHTS, THE PROVISION OF AN EQUAL EDUCATION OPPORTUNITY TO LIMITED-ENGLISH PROFICIENT STUDENTS, http://www2.ed.gov/about/offices/list/ocr/eeolep/index.html, <https://perma.cc/T4GT-6JPM>.

[22] *Id.*

[23] 20 U.S.C. § 7801(20) (2012).

[24] NAT'L COUNCIL OF TEACHERS OF ENGLISH, ENGLISH LANGUAGE LEARNERS 2 (2008), http://www.ncte.org/library/NCTEFiles/Resources/PolicyResearch/ELLResearchBrief.pdf, <https://perma.cc/5PPE-F8WV>.

[25] 20 U.S.C. § 7801(20) (2012). Students who are Native American or Alaska Native, or a native resident of the outlying areas; and who comes from an environment where a language other than English has had a significant impact on the individual's level of English language proficiency; or who is migratory, whose native language is a language other than English, and who comes from an environment where a language other than English is dominant also meet the definition.

successfully achieve in classrooms, or to participate fully in society.[26]

### A. Identification

With the growing number of ELL students in the United States, schools struggle to appropriately identify ELL students who have disabilities and qualify for special education services.[27] Since the 1980s, ELLs have been overrepresented in special education. Some estimates suggest that nearly 70% of all ELL students in special education are misidentified.[28] State reports identify from 0% to over 17% of their ELL populations have disabilities.[29] Furthermore, within special education, ELL students are overrepresented in the areas of specific learning disabilities, speech-language impairments, and intellectual disabilities at a rate of more than twice the rate of non-ELL students.[30] The misidentification of ELL students causes many of them to be excluded from the general education experience due to more restrictive placements.[31]

Unfortunately, overidentification of ELL students is not limited to one single cause. Part of the problem is due to language deficits and lack of language support in large districts.[32] Data shows that overrepresentation is linked to the size of the ELL population in a school district and the number of language support programs available.[33] When there is a large ELL population with little to no support through language programs, more students tend to be classified as special education students.[34] Additionally, as the ELL population moves from elementary to secondary schools, they become more likely to be misidentified.[35]

Others are misidentified due to an inability to distinguish between various types of educational struggles. Students that struggle in school

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[26] *Id.*

[27] NAT'L. EDUC. ASS'N., ENGLISH LANGUAGE LEARNERS FACE UNIQUE CHALLENGES 1 (2008), http://www.nea.org/assets/docs/HE/ELL_Policy_Brief_Fall_08_(2).pdf, <https://perma.cc/5CUZ-6MLC>; *see* NAT'L CENTER FOR EDUC. STATISTICS, ENGLISH LANGUAGE LEARNERS, http://nces.ed.gov/programs/coe/indicator_cgf.asp, <https://perma.cc/9TA4-LU4T> (showing that ELL populations are increasing).

[28] MEGAN MIKUTIS, THE DISPROPORTIONATE REPRESENTATION OF LIMITED ENGLISH PROFICIENCY (LEP) STUDENTS IN SPECIAL EDUCATION PROGRAMS 2 (2013), http://www.law.uh.edu/center4clp/policy/mikutis.pdf, <https://perma.cc/LF6Z-NH9N>.

[29] Amanda L. Sullivan, *Disproportionality in Special Education Identification and Placement of English Language Learners*, 77 EXCEPTIONAL CHILD 317, 319 (2011). National disparities in the number of ELL students in special education have been recorded at even greater differences in the 1990s. In 1993, 26.5% of ELL in Massachusetts was in special education, while Colorado, North Carolina and Maryland had less than 1% of the ELL population in special education. Artiles and Ortiz, *supra* note 8, at 8.

[30] Sullivan, *supra* note 31, at 319

[31] Artiles and Ortiz, *supra* note 8, at 9.

[32] *Id.* at 8–9.

[33] *Id.*

[34] *Id.* at 9.

[35] *Id.*

are often classified into three categories: (1) those that have difficulty because of the teaching–learning environment, (2) those with academic difficulties not related to a disability, and (3) students who are evaluated and found to have a disability.[36] For ELL students, placement in special education is due to an inability to distinguish between these three types of difficulties.[37] ELL students are found to be eligible for special education due to lower proficiency levels in either their native language or English, instead of the presence of a real disability.[38] Part of this problem is caused by similar signs of frustration existing for students with disabilities and those learning a new language. For example, ELL students struggle with grade-level academic language and concepts and may have difficulty paying attention or remembering important information.[39]

Furthermore, students are misidentified through assessments that are not adapted for ELL students.[40] Often those that need special education services have to wait months or even years before they are referred for an evaluation, and once they are, the evaluation may not be appropriate.[41] New students may need time to adjust in their surroundings, and learning a new language presents additional difficulties.[42] Unfortunately, some school districts try to impose artificial time frames on that adjustment period, postponing referrals for a year.[43]

Studies also indicate that the disproportionate representation of ELL students in special education is more than a misunderstanding of cultural, socioeconomic, and linguistic differences.[44] Some of the overrepresentation is a result of the assessments' failure to produce the necessary data needed to properly identify ELL students with disabilities.[45] There are few instruments available in languages other than English, and when adapted or translated, they often become unreliable.[46] The use of interpreters during evaluations also adversely affects the validity and reliability of assessments.[47] Additionally, most diagnosticians are not qualified to assess for both special education and

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[36] *Id.* at 31–32.
[37] *Id.* at 32.
[38] Sullivan, *supra* note 31, at 319.
[39] CONN. ADM'R OF PROGRAMS FOR ENGLISH LANGUAGE LEARNERS, ENGLISH LANGUAGE LEARNERS AND SPECIAL EDUCATION: A RESOURCE HANDBOOK 11 (2011), http://www.capellct.org/documents/SPEDresourceguideupdated6-23-11-ABSOLUTEFINAL.pdf, <https://perma.cc/VS3J-ADJT>. Assessing and identifying the causes of academic frustration in ELL students is a complex task, these similarities often lead to misdiagnosis as they can be signs of language difficulty, learning environment deficits, or other non-disability related academic difficulties. Artiles and Ortiz, *supra* note 8, at 41.
[40] *Id.* at 21, 52–53.
[41] *Id.* at 41, 43.
[42] Kristina Robertson, *How to Address Special Education Needs in the ELL Classroom*, ¡COLORÍN COLORADO! (Jan. 6, 2015), http://www.colorincolorado.org/article/19960/, <https://perma.cc/P59S-37EE>.
[43] *Id.*
[44] Artiles and Ortiz, *supra* note 8, at 16.
[45] *Id.* at 74.
[46] *Id.*
[47] *Id.* at 54.

ELL services.[48] These shortcomings in assessing ELL students for special education leave decisions to be based on social constructions, rather than scientifically based diagnostic evaluations.[49]

### B. Appropriate Assessment

In order to ensure ELL students are not inappropriately identified, schools must follow the assessment requirements under the Individuals with Disabilities Education Act (IDEA), No Child Left Behind Act (NCLB), and best practices for culturally and linguistically diverse environments. First, as mentioned above, school timelines for initial evaluations can result in delayed evaluations for struggling ELL students with disabilities. Although NCLB allows the state to wait one year before requiring an ELL student to take state assessments, there is no rule requiring a school district to wait a year before assessing for ESL services or special education.[50] Schools must provide notices within thirty days from the beginning of the school year, or from when a student arrives at school, to determine an ELL student's identification and placement.[51] This means that schools must evaluate for ESL services well before the thirty-day notice requirement.[52] Under the IDEA, it is the school's responsibility to locate, identify, and evaluate all students suspected of having a disability.[53] The school is also required to respond to any parent request for evaluation.[54] When a parent requests a special education evaluation, the IDEA requires the district to obtain consent or provide prior written notice.[55] If a school provides prior written notice denying a parent's request for evaluation, the parent has a right to request an independent education evaluation.[56]

In order to avoid a premature referral for special education misidentification, children can, and should be, monitored for both obvious signs of disabilities and struggles in the academic setting.[57] If a student is making the same academic progress as other ELL students with similar backgrounds, then assessment for special education may not

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[48] *Id.* at 74.
[49] *Id.* at 54.
[50] Robertson, *supra* note 44.
[51] 20 U.S.C. §§ 6312(g)(1), 7012(a) (2012).
[52] Lhamon & Gupta, *supra* note 10, at 10.
[53] 20 U.S.C. § 1412(a)(3)(A) (2012).
[54] *See* 20 U.S.C. § 1414(a)(1)(B) (2012) (explaining that a parent may request the initial evaluation to determine if the child has a disability).
[55] 20 U.S.C. § 1414(a)(1)(D)(i)(I) (2012). Under IDEA each state can set its own timeline for an initial evaluation. In Texas, a school must provide consent forms or prior written notice within 15 school days. Following receipt of signed consent forms, the school must complete the initial evaluation within 60 school days and hold an individualized education program meeting within 30 calendar days following the completion of the evaluation. 29 TEX. EDUC. CODE ANN. § 29.004(a-1) (West 2013).
[56] 34 C.F.R. § 300.502(a)(1) (2015).
[57] Robertson, *supra* note 44.

be necessary.[58] Initial steps need to be taken, however, if a student is struggling in comparison to similarly situated peers, or has a history of educational difficulties.[59] Additionally, though IDEA allows for the use of response to intervention (RTI) and data collection prior to a referral for special education, these steps cannot delay evaluation.[60]

Second, once a school initiates the evaluation process and consents are signed, evaluations need to be appropriate and completed by qualified personnel. The IDEA requires that students be evaluated in their native language, with tests that are free of racial and cultural biases, that are validated for their purposes, and that are administered in accordance with the instruction of test publishers.[61] Assessment for special education must include a variety of assessment tools and strategies; it cannot be a single assessment.[62] NCLB also requires annual assessments in English language proficiency and that ELL students take state assessments, which can be in native languages if available.[63] Through ELL assessments, students must make adequate yearly progress, and states must establish standards and benchmarks to increase English language proficiency.[64]

The assessment tools and strategies must be appropriate to provide relevant information that directly assists in determining the educational needs of the child.[65] Therefore, the evaluation process should be tailored to meet a child's educational need. Evaluators should not rely solely on the traditional assessment tools. All relevant information should be taken into consideration, including the annual ELL assessments and performance on state assessments in either English or their native language.[66] Research indicates that multiple forms of data collection are useful in conducting effective and reliable evaluations.[67] Data collection should include information from all personnel working with the student, including any ELL teachers or other professionals with expertise in second language acquisition. It should also include a parent survey to see if similar struggles are occurring in the home[68] because parents can provide "functional, developmental, cultural, and linguistic information that professionals cannot find on their own."[69] Evaluators should also rely on a more comprehensive observation process of the student in the general education classroom, in the ELL classroom, and at home to

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[58] *Id.*
[59] *Id.*
[60] Memorandum from Melody Musgrove, Dir. of the Office of Special Educ. Programs, to State Dirs. of Educ. 1 (Jan. 21, 2011).
[61] 20 U.S.C. § 1414(b)(3)(a) (2012).
[62] *Id.*
[63] *Id.* § 6311(b)(2)(G).
[64] *Id.* § 6311(b)(2)(A).
[65] *Id.* § 1414(b)(2).
[66] Artiles and Ortiz, *supra* note 8, at 71.
[67] ELIZABETH BURR ET AL., IDENTIFYING AND SUPPORTING ENGLISH LEARNER STUDENTS WITH LEARNING DISABILITIES: KEY ISSUES IN THE LITERATURE AND STATE PRACTICES 4 (2015).
[68] Artiles and Ortiz, *supra* note 8, at 98.
[69] BURR ET. AL, *supra* note 69, at 6.

better rule out language struggles.[70] By considering other factors, such as cultural background and environment, schools can decrease misidentification.[71]

In addition to appropriate assessment tools, the IDEA requires that all assessments be administered by trained and knowledgeable personnel.[72] Qualified teachers and diagnosticians are required under the IDEA and NCLB.[73] NCLB requires all ELL teachers to be fluent in English and any other language used for instruction.[74] This must include both written and oral proficiency.[75] ELL teachers must also receive high-quality professional development.[76] Under the IDEA, all teachers must meet the applicable requirements of § 9101 of the Elementary and Secondary Education Act (ESEA) and 34 C.F.R. § 200.56(b) or (c), which includes fully licensed teachers who meet all NCLB requirements.[77] But even with these requirements, there are only a limited number of bilingual diagnosticians or licensed school psychologists who are qualified to evaluate ELL students.[78] Additionally, most general and special education teachers providing feedback to evaluators do not receive the same training as ELL instructors.[79] In order to overcome these deficits, parents and advocates should request and require more preparation on the part of evaluators.

If the evaluator is not bilingual, the use of an interpreter will be necessary. Just as it is inappropriate to use a student to translate for a parent, it is inappropriate to use unqualified personnel for evaluation interpretation.[80] If there is not a bilingual instructor on campus, the school must either request assistance from the district or use outside services.[81] The evaluator should meet with the interpreter to review procedures and content before testing.[82] Additionally, the evaluator should make observations about the interpreter's effectiveness, noting body language, patterns of reinforcement, cueing, and the amount of talk.[83]

Following an evaluation, the eligibility determination must include all persons that are knowledgeable about and able to interpret evaluations, a person who is able to discuss available programming, and others who are knowledgeable about or have special expertise regarding

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[70] Artiles and Ortiz, *supra* note 8, at 56–57.
[71] BURR ET. AL, *supra* note 69, at 6.
[72] 20 U.S.C. § 1414(b)(3)(A)(iv) (2012).
[73] *Id.* § 6311(b)(8)(C) (2012) (amended 2015).
[74] *Id.* § 6826(c).
[75] *Id.*
[76] 34 C.F.R. § 200.56(a)(2)(ii)(A)(1) (2015).
[77] 20 U.S.C. § 1401(10) (2012) (amended 2015).
[78] Artiles and Ortiz, *supra* note 8, at 66.
[79] *Id.* at 67–69.
[80] *Id.* at 70.
[81] *Id.* at 68.
[82] *Id.* at 70.
[83] *Id.*

the student.[84] A student's special education team must be able to ensure that the results of the evaluations are not due to lack of academic support or limited English proficiency,[85] and be able to support these assurances with data.[86]

### C. Meeting the Instructional Needs of ELL Students and ELL Students with Disabilities

Once an ELL student is appropriately identified as a student with a disability, the school must provide appropriate educational services to ensure the student receives meaningful educational benefit.[87] School districts must take affirmative steps to address language barriers and ensure ELL students that qualify for special education "may participate meaningfully in schools' educational programs."[88] In order to meet these requirements, a student's individualized education program (IEP)[89] must include modifications and instruction for both native language and ESL education in order to help the student improve academically and socially.

However, ELL students with disabilities are often removed from language services after becoming eligible for special education resulting in English-only instruction.[90] The Department of Justice (DOJ) and the Department of Education (ED) are aware that districts have both formal and informal polices that deny students access to both ELL programs and special education programs.[91] Not only does NCLB require the continued use of ELL services after a student enters special education, but Title III of NCLB contains its own non-discrimination provision stating that a student cannot be excluded from any federally assisted program on the basis of language status.[92]

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[84] 34 C.F.R. § 300.321(a) (2007). The Texas Education Code also ensures that appropriately trained personnel are involved in the diagnostic and evaluative procedures operating in all districts and that those personnel routinely serve on district admissions, review, and dismissal committees. TEX. EDUC. CODE ANN. § 29.001(6) (West 2013).

[85] 20 U.S.C. § 1414(b)(4)–(5) (2012).

[86] Artiles and Ortiz, *supra* note 8, at 72.

[87] 34 C.F.R. § 300.306(c)(2) (2015); 20 U.S.C. § 1414(d)(1)(A)(iv) (2012). *See* Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 192 (1982) (explaining that Congress intended to make education available to handicapped children).

[88] Lhamon & Gupta, *supra* note 10, at 5; 34 C.F.R. § 100.3(b)(1), (2) (2015); Lau v. Nichols, 414 U.S. 563, 568 (1974).

[89] The IEP is a document required by law under the IDEA for students with disabilities who receive special education services. *See* 34 C.F.R §§ 300.320–300.324 (2015) (defining the IEP and how it is to be developed). This is the document that lays out the student's entire service program including the student's eligibility for special education services; what goals and objectives the school district will measure and monitor to determine whether the student is making progress; all of the accommodations and modifications the student will receive; the related services that will be provided; and the student's placement. *Id.*

[90] Janette K. Klingner & Lucinda Soltero-Gonzalez, *Culturally and Linguistically Responsive Literacy Instruction for English Language Learners with Disabilities*, 12 MULTIPLE VOICES FOR ETHNICALLY DIVERSE EXCEPTIONAL LEARNERS 4, 4 (2009).

[91] Lhamon & Gupta, *supra* note 10, at 25.

[92] *Id.*at 7.

Additionally, the IDEA requires schools to create an IEP based on the educational needs of the student for each student who qualifies for special education.[93] The DOJ and ED reiterated in their recent guidance that an IEP team must consider the language needs of an ELL student, and language needs must be considered in review of IEP goals.[94] The IDEA also requires related services to include consulting with others with knowledge of the student's needs.[95] IDEA clearly states that people knowledgeable about the child must make a placement decision, which should include ELL instructors or evaluators.[96] But to ensure each student's language needs are met, it is "essential that the IEP team include participants who have the requisite knowledge of the child's language needs."[97]

Once a student qualifies for ELL services and special education services, schools are required to educate students in the least restrictive environment (LRE).[98] Under IDEA, LRE means a student is educated with the student's non-disabled peers to the maximum extent appropriate.[99] LRE includes the right to participate in the general education curriculum with non-disabled peers, which would include non-disabled ELL students.[100]

Outside of special education, ELL students cannot be segregated based on their ELL status.[101] School districts are expected to use the least restrictive placement for ELL students, even though the student may need to spend some time receiving separate instruction.[102] Students should not be arbitrarily segregated from peers, and the ED and DOJ have not found any justification for removing a student from physical education, art, music, or other extracurricular activities based on a student's ELL status.[103]

Once a student is appropriately placed in special education and receiving ESL support, NCLB creates accountability requirements to ensure students are making progress in ELL programs.[104] School districts must ensure that ELL students are not only making progress acquiring

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[93] 34 C.F.R. § 300.112 (2015). Outside of the IDEA, many state policies also support a child's right to participate in ELL programs. 19 TEX. ADMIN. CODE. § 89.1201(a) (2016); *see ELL Resources by State*, ¡COLORÍN COLORADO!, http://www.colorincolorado.org/web_resources/by_state/, <https://perma.cc/3LRN-C7KS> (summarizing each states' policies and procedures to meet the requirements of NCLB).

[94] Lhamon & Gupta, *supra* note 10, at 26; 20 U.S.C. § 1414(d)(3)(B)(ii) (2012); 34 C.F.R. § 300.324(a)(2)(ii) (2015).

[95] 34 C.F.R. § 300.34(c)(10)(iv) (2015).

[96] *Id.* § 300.116(a)(1).

[97] Lhamon & Gupta, *supra* note 10, at 27.

[98] 34 C.F.R. § 300.114(a) (2015).

[99] *Id.* § 300.114(a)(2)(i).

[100] 20 U.S.C. § 1412(a)(5)(A) (2012).

[101] Lhamon & Gupta, *supra* note 10, at 22.

[102] *Id.*; memorandum from Michael L. Williams to OCR Senior Staff, *supra* note 18, at 7; Castaneda v. Pickard, 648 F.2d 989, 998 n.4 (5th Cir. 1981).

[103] Lhamon & Gupta, *supra* note 10, at 3.

[104] 20 U.S.C. § 6311(b)(1)(F) (2012).

English, but also gaining content knowledge for each grade level.[105] Students must be tested annually and show adequate yearly progress.[106] Students are required to be part of an ELL program, unless their parents choose to exempt them.[107] Students may also be exited from ELL programs for meeting the proficiency requirements in the four domains of speaking, listening, reading, and writing.[108] How a student is exited from ELL instruction is based on each state's and district's policies.[109] After a student is exited from ELL services, NCLB requires school districts to monitor an ELL student's progress for two years to make sure the student was not prematurely exited.[110] A student who struggles can be reevaluated and reenter ESL programs after being exited.[111]

In addition to maintaining access to both ELL and special education programs, this vulnerable population will benefit from culturally and linguistically responsive educational environments. Building classrooms with teachers that are culturally aware and responsive is a recommended strategy and evidence-based practice.[112] Culturally responsive instruction makes connections with students while also understanding the sociocultural history to these interactions. A successful program can bridge the gap between instruction in school and the student's world at home.[113] Cultures are fluid and teachers should be adaptable to each student's culture, not just the mainstream.[114]

When culturally responsive programs are used, they consistently show high achievement among culturally and linguistically diverse students.[115] In order to properly use culturally responsive instruction, teachers, administrators, and others who are responsible for creating an appropriate IEP need to understand the communication styles and literacy practices of their students.[116] A teacher's lack of understanding of how ELL students learn is one of the major causes for misidentification.[117] All teachers, not just ESL teachers, need to be provided professional development in this area.

Another best practice in culturally responsive programs is to involve families in the planning process. Much of a child's learning and education takes place at home, prior to ever coming to school.[118]

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[105] Lhamon & Gupta, *supra* note 10, at 32.
[106] 20 U.S.C.A. § 6311(b)(2)(G) (2015).
[107] Lhamon & Gupta, *supra* note 10, at 29. If a parent chooses to opt-out, the school must still ensure that the student is making progress in the regular education setting. *Id.* at 32.
[108] *Id.*
[109] *See id.* at 34–35 (explaining that state education agencies and school districts should develop standards for defining EL status and success in an EL program).
[110] *Id.* at 34
[111] *Id.*
[112] Artiles and Ortiz, *supra* note 8, at 198; Janette K. Klingner and Patricia A. Edwards, *Cultural Considerations with Response to Intervention Models*, 41 READING RES. Q. 108, 110 (2006).
[113] *Id.* at 109.
[114] Klingner and Soltero-Gonzalez, *supra* note 91, at 6.
[115] TANDRIA CALLINS, CULTURALLY RESPONSIVE LITERACY INSTRUCTION 4 (2004).
[116] Klingner and Edwards, *supra* note 114, at 109.
[117] BURR ET. AL, *supra* note 69, at 6–7.
[118] Klingner & Edwards, *supra* note 114, at 109.

Teachers should be encouraged to develop social connections with families and learn students' stories. Research suggests that schools should proactively reach out to parents and figure out ways to get them involved, such as hiring parent liaisons.[119]

Additionally, successful classrooms have instructors that are familiar with the education and language needs of students. Often times, general education teachers and special education teachers are not qualified ELL teachers, and never receive ELL professional development.[120] However, any teacher can implement culturally responsive instruction, as its goal is to build on the prior knowledge and interests of the students to connect what they are learning in school with their lives at home.[121]

It is important to note that culturally responsive instruction does not change the curriculum. The IDEA does not allow a parent to choose the type of curriculum or program used by a school district.[122] Instead, culturally responsive instruction is an additional resource for teachers to reach the ELL and special education populations.[123] Culturally responsive instruction can be included in a student's IEP through the use of state regulations, district policies, and school handbooks, as well as through clearly defined accommodations and modifications for each student.

Culturally responsive instruction is a not a new concept. Studies dating back to 1968 show that minorities and children from lower socioeconomic backgrounds are overrepresented in special education.[124] The vast research on the topic was not ignored by state education agencies, district policies, or school handbooks.[125] In fact, many of the state ELL programs and district policies recognize the need for culturally diverse instruction.[126] Many schools and communities are "creating programs that recognize the heritage languages of EL[L] students as valuable assets to preserve."[127] It is important for parents and advocates to locate state or district policies or practices on instructing culturally

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[119] BURR ET. AL, *supra* note 69, at 8.

[120] Artiles & Ortiz, *supra* note 8, at 35.

[121] *See* Klingner & Soltero-Gonzalez, *supra* note 91, at 6–7 (suggesting culturally responsive programs include multicultural literature, which should provide ELL students with opportunities to connect with their own lives).

[122] *See* Ridley Sch. Dist. v. M.R., 680 F.3d 260, 269 (3rd Cir. 2012) (stating that an IEP need not incorporate every program requested by parents).

[123] Artiles & Ortiz, *supra* note 8, at 128; CALLINS, *supra* note 117, at 4.

[124] Mikutis, *supra* note 30, at 3.

[125] *See generally* CONN. ST. DEP'T. OF EDUC., CULTURALLY RESPONSIVE EDUCATION: BECOMING A CULTURALLY RESPONSIVE EDUCATOR (2012) http://www.sde.ct.gov/sde/lib/sde/pdf/curriculum/cali/cre_handbook.pdf, <https://perma.cc/86ZW-KFJH> (explaining the necessity and benefits of culturally responsive education); ANCHORAGE SCH. DIST., CULTURALLY RESPONSIVE EDUCATION, http://www.asdk12.org/media/anchorage/globalmedia/documents/curriculum/cre/CRE_Continuum.pdf, <https://perma.cc/8TKH-LA2E> (giving guidelines to educators and schools for enacting culturally responsive education).

[126] *See, e.g.* AUSTIN INDEP. SCH. DIST., http://www.austinisd.org/about-us, <https://perma.cc/MSW3-FVVC> (aiming to provide culturally responsive educational experience for students).

[127] Lhamon & Gupta, *supra* note 10, at 1.

diverse students. If they do not exist, parents and advocates should question the type of ELL professional development being provided to all teachers by the district.

By using the IDEA, NCLB, and state and district policies, culturally responsive instruction can arguably qualify as accommodations and modifications for ELL students with disabilities. For example, in terms of literacy, the goal of culturally responsive instruction is to connect to students' prior knowledge, build on their interests, and connect what they are learning at school to their home lives.[128] An IEP can accomplish these goals by using books of interest for assignments, using real life examples during instruction, pairing ELL students with peers, allowing students to use native languages, and emphasizing connections between subject areas.[129]

Like most other best practices, culturally responsive instruction also requires high expectations—IEPs should include academic, behavior, and language goals.[130] The IDEA states that any person with specific expertise related to the student should be present to develop an IEP.[131] If a student qualifies for ELL services, then a bilingual or English language instructor should be present at all IEP meetings.[132] Education teams, which include general education and special education instructors, should have additional meetings at appropriate intervals outside of the IEP process to discuss student data. The student's IEP should outline the frequency of these meetings.

IEPs should also outline parent involvement. Parent and school relationships are always key to a student's success, but especially for ELL students with disabilities.[133] IEPs should incorporate parent–teacher conferences to discuss family history, changes in the home, student interests, or family traditions that can be incorporated in the student's IEP.[134] School districts and teachers need to ensure parents can fully participate in their student's education, regardless of their English proficiency.

## III. LIMITED ENGLISH PROFICIENT PARENTS OF STUDENTS WITH DISABILITIES

As with students, school districts have a responsibility to provide Limited English Proficient (LEP) parents with information in their native

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[128] Klingner & Soltero-Gonzalez, *supra* note 91, at 6–7.
[129] *Id.* at 14.
[130] Artiles & Ortiz, *supra* note 8, at 119–120.
[131] 34 C.F.R. § 300.321 (a)(6) (2015).
[132] *See* Artiles & Ortiz, *supra* note 8, at 127 (recommending that meetings be conducted in the parents' language and be translated for school personnel).
[133] *Id.* at 34.
[134] *See id.* at 102 (concluding that family involvement is crucial to understanding the culture and needs of the student).

language.[135] Title VI of the Civil Rights Act of 1964 requires school districts that receive federal funding to provide the same information about school programs, reports, and activities to LEP parents as they do to English-speaking parents.[136] This does not mean, however, that school districts must translate every document into another language. Rather, entities subject to Title VI are permitted to identify certain written materials as "vital documents" and as long as those documents are translated for LEP individuals, entities do not have to translate all documents they regularly provide in English.[137] The U.S. Department of the Interior issued guidance explaining that whether a document is vital "may depend on the importance of the program, information, encounter, or service involved, and the consequence to the LEP person if the information is not provided accurately or in a timely manner."[138]

Similarly, the Limited English Proficiency website, a federal interagency website, describes vital documents as those that contain "information that is critical for obtaining the federal services and/or benefits, or is required by law."[139] The IEP contains information a parent must be able to read and understand in order to properly access the services and benefits of the special education system, making it the most important document for LEP parents of students with disabilities to receive in their native language.

Although all LEP parents have the right to receive information in their native language, LEP parents of students who receive special education services arguably have an enhanced right to receive documents pertaining to their child's disability-related services in their native language because those documents should be classified as vital documents. Undoubtedly, there are significant consequences for parents who cannot read or understand what disability-related services and programs are being provided to their children. If a parent cannot fully participate in the complex decision-making processes and procedures used by school districts to determine what services will be provided to a student with disabilities, the student could fail to make progress at school, receive excessive discipline for disability-related behaviors, or be placed in an inappropriate, restrictive classroom setting.

While the IDEA requires school districts to provide parents with a

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[135] 20 U.S.C. § 6318(f) (2012); *see* Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (July 18, 1970) ("School districts have the responsibility to adequately notify national origin-minority group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.").

[136] *Id.*

[137] U.S. DEP'T OF THE INT., GUIDANCE TO FEDERAL FINANCIAL ASSISTANCE RECIPIENTS REGARDING TITLE VI PROHIBITION AGAINST NATIONAL ORIGIN DISCRIMINATION AFFECTING LIMITED ENGLISH PROFICIENT PERSONS, http://www.doi.gov/pmb/eeo/LEP-Guidance.cfm, <https://perma.cc/KZJ5-BLQF>.

[138] *Id.*

[139] LIMITED ENGLISH PROFICIENCY, COMMONLY ASKED QUESTIONS AND ANSWERS REGARDING LIMITED ENGLISH PROFICIENT (LEP) INDIVIDUALS, http://www.lep.gov/faqs/faqs.html, <https://perma.cc/RCX9-5N95>.

great deal of information in their native language, it does not specifically require school districts to translate IEPs into a parent's native language.[140] The IDEA states that school districts must provide parents with prior written notice and procedural safeguards in their native language, unless it is clearly not feasible to do so.[141] If the parent's native language is not a written language, the district must take steps to ensure that: (1) the notice is translated orally or by other means to the parent in the parent's native language or other mode of communication, (2) the parent understands the content of the notice, and (3) there is written evidence that the parent has received and understood the information.[142] Furthermore, before a parent can sign consent for evaluations or services, school districts must ensure that: (1) the parent has been fully informed of all information relevant to the activity for which consent is sought in the parent's native language, (2) the parent understands and agrees to allow the district to take the action requested, and (3) the consent describes the activity and lists any records that will be released, and to whom, in order to complete the evaluation or provide the service.[143]

In addition, the IDEA requires school districts to ensure parents are able to meaningfully participate in IEP meetings.[144] The regulations state that school districts "must *take whatever action is necessary* to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English."[145] This is strong language mandating that school districts make a concerted effort to ensure parents are able to understand the IEP development process. But with the IDEA's silence on the matter of providing parents with IEPs in their native language, many parents have attempted to record IEP team meetings so that they can listen to the recording and translate the discussion themselves.[146] These efforts have been thwarted by some school districts that choose to limit a parent's ability to record IEP meetings.[147] The Office for Special Education Programs (OSEP) in the Department of Education has made clear, however, that if a school district has a policy of limiting recordings of IEP meetings, the policy must provide for exceptions that ensure a parent is able to understand the

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[140] Letter from Patricia J. Guard, Acting Dir., Office of Special Educ. Programs, to Linda Boswell (Sept. 4, 2007); Adams Cty. Sch. Dist., 55 IDELR 210, 1027 (SEA CO 2010); *In re*: Student with a Disability, 111 LRP 39015, 11 (SEA NM 2011).

[141] 34 C.F.R. § 300.503(c) (2015).

[142] *Id.*

[143] *Id.* § 300.9(a), (b).

[144] *Id.* § 300.322(e).

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

[146] *See generally* E.H. v. Tirozzi, 735 F. Supp. 53 (D. Conn. 1990) (regarding a school that refused to provide tape recordings to a parent); *see also*, Dall. Indep. Sch. Dist., 110 LRP 36304, 6 (SEA TX 2010) (Tape recording IEP meetings might have maximized a parent's grasp of the IEP process, but that alone did not require her Texas district to allow it. The district's policy prohibited tape recording unless all participants consented).

[147] *Id.*; *In re*: Norwood Pub. Sch., 44 IDELR 104, 500 (SEA MA 2005).

IEP or IEP process.[148]

At least one federal court has held that the IDEA permits parents to audiotape meetings in cases where it will help them understand the program and participate meaningfully in the process.[149] In *E.H. v. Tirozzi*, an LEP parent asked the district for permission to tape record her child's IEP meeting so she could review it at home with her dictionary to help her understand what was said, but the district refused.[150] The court ordered the district to allow the parent to record the meeting, and specifically stated that:

> tape recording would allow E.H. to go home and review what was said at the meeting with the aid of a dictionary. It would allow her to go over the meeting again and again, until she was absolutely clear about what her child's IEP for the coming year entailed. It is therefore an essential part of her participation in the planning and evaluation of the IEP, a right she is guaranteed under the [IDEA].[151]

While the IDEA does not require school districts to translate the IEP document into a parent's native language, states may create this duty for school districts on their own.[152] In Texas, the legislation that implements the IDEA states that school districts must provide LEP Spanish-speaking parents "a written or audiotaped copy of the child's individualized education program translated into Spanish if Spanish is the parent's native language."[153] For LEP parents whose native language is other than Spanish, Texas requires school districts to meet the above requirement to the best of their ability.[154]

Although Texas has decided to go above and beyond the federal requirement for translation of IEP documents, many school districts still fail, or even actively refuse, to meet this obligation.[155] Failure of school districts to comply with state and federal law begs the question: What legal remedies exist for LEP parents of students with disabilities who are not being provided information in their native language?

## IV. LEGAL REMEDIES TO ADDRESS SCHOOL DISTRICTS' FAILURE

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[148] Stephanie S. Lee, *Letter to Anonymous*, OFFICE OF SPECIAL EDUC. PROGRAMS, 40 IDELR 70, 272–73 (June 4, 2003).

[149] E.H. v. Tirozzi, 735 F. Supp. 53, 59 (D. Conn. 1990).

[150] *Id.* at 57.

[151] *Id.*; *but see*, *In re*: Norwood Pub. Sch., 44 IDELR 104, 500 (SEA MA 2005) (A parent was not harmed by the district's refusal to allow her to tape the IEP meeting as she requested. Although English was her second language, the parent did not allege that she did not understand what was discussed at the meeting).

[152] U.S. CONST. amend. X.

[153] TEX. EDUC. CODE ANN. § 29.005(d) (West 2013).

[154] *Id.*

[155] *See, e.g.*, Diane Wann, Program Specialist, Hous. Indep. Sch. Dist., TEA Corrective Action: Individualized Education Program in Native Language (Sept. 23, 2014) (on file with author) (explaining that procedures require providing interpreters and sending notices in native languages).

TO PROVIDE LEP PARENTS INFORMATION IN THEIR NATIVE LANGUAGE

### A. Systemic Complaints Through the Special Education Complaint Process

The IDEA establishes a special education complaint process that requires State Education Agencies (SEAs) to investigate alleged violations of the IDEA.[156] Where an SEA finds that a local school district has violated the IDEA, it can issue corrective actions against the district in an effort to remedy the harm experienced by an individual special education student, or to address systemic problems that affect many special education students within a district.[157] The scope of an SEA's investigative authority is very broad. SEAs have the authority and responsibility to investigate complaints filed by an organization or individual alleging a school district has violated any requirement of Part B of the IDEA.[158] In its discussion of state complaint procedures, the Department of Education explained that "state complaint procedures can be used to resolve any complaint . . . [regarding] matters concerning the identification, evaluation or educational placement of the child, or the provision of [free appropriate public education] to the child."[159] This means SEAs have the authority to investigate systemic violations that affect multiple students.[160] From experience with SEA complaints, the most successful SEA complaints involve both policy issues and individual stories.

For example, parents in Texas were able to achieve a systemic victory using the special education complaint process against Houston Independent School District (ISD), the largest district in the state, by obtaining an order from the Texas Education Agency (TEA) for the district to provide all monolingual, Spanish-speaking parents of students with disabilities with a copy of their child's IEP in their native language.[161] As stated above, Texas law requires school districts to provide LEP Spanish-speaking parents "a written or audiotaped copy of the child's individualized education program translated into Spanish if Spanish is the parent's native language."[162] The IDEA plainly defines an

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[156] 34 C.F.R. § 300.151 (2015).
[157] *Id.* § 300.152.
[158] *Id.* § 300.153(b)(1).
[159] Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540, 46,601 (Aug. 14, 2006).
[160] *Id.*
[161] Special education complaint investigative report by Tex. Educ. Agency to Sarah Beebe, staff attorney, Disability Rights Tex., Terry Grier, Superintendent, Hous. Indep. Sch. Dist., and Sowmya Kumar, Spec. Educ. Director, Hous. Indep. Sch. Dist. 1 (Feb. 6, 2015) (on file with author).
[162] TEX. EDUC. CODE ANN. § 29.005(d) (West 2013).

IEP as "a *written statement* for each child with a disability."[163] The U.S. Supreme Court confirmed that the IEP "consists of a written document."[164] Thus, section 29.005(d) of the Texas Education Code confers on LEP Spanish-speaking parents the right to receive a Spanish-translated copy of a written statement for each child with a disability.[165]

Houston ISD, along with many other school districts in Texas, only provide LEP Spanish-speaking parents of students with disabilities (1) an audio-cassette tape or CD of the IEP meeting, which does not typically include a verbatim reading of each section of the IEP document; (2) a copy of the IEP in English; (3) a copy of the meeting minutes or deliberations in English; and (4) a copy of prior written notice in English. Houston ISD portends to comply with the Texas law requiring IEPs to be provided to parents in Spanish, when that is their native language, by providing them with an audio recording of the poorly translated IEP meeting.[166]

Disability Rights Texas (DRTx), the federal protection and advocacy organization for people with disabilities in the state, filed a complaint with the Texas Education Agency (TEA) in March 2014 on behalf of three named complainants at three different Houston ISD campuses, and all similarly-situated LEP Spanish-speaking parents of students with disabilities.[167] The complaint alleged that Houston ISD's compliance was inadequate at best, and deliberately offensive at worst, since an audio recording of the IEP meeting is neither functionally, nor logically, equivalent to an audiotaped copy of the child's IEP translated into Spanish.[168] To properly comply with Texas law, Houston ISD would either have to provide LEP Spanish-speaking parents of students with disabilities a written copy of their child's IEP translated into Spanish, or, if the parent cannot read Spanish, the district could provide an audio recording in which a person reads the written IEP verbatim in Spanish.[169] DRTx also included IDEA violations in the complaint alleging that Houston ISD violated Code of Federal Regulations Section 300.503, which requires school districts to provide LEP parents prior written notice in their native language.[170]

The TEA investigated the complaint and issued its final report in May 2014 substantiating all claims. Through their investigation, TEA "found no evidence to show that the parents were provided with a copy, either in written or audio format, of a Spanish translation of the student's

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[163] 20 U.S.C. § 1414(d)(1)(A)(i) (2012) (emphasis added).
[164] Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 182 (1982) (emphasis added).
[165] TEX. EDUC. CODE ANN. § 29.005(d) (West 2013).
[166] Wann, *supra* note 162.
[167] Complaint against Hous. Indep. Sch. Dist. by Sarah Beebe, staff attorney, Disability Rights Tex., to Tex. Educ. Agency 2 (Mar. 12, 2014) (on file with author).
[168] *Id.* at 3.
[169] TEX. EDUC. CODE ANN. § 29.005(d) (West 2013).
[170] Complaint by Sarah Beebe to Tex. Educ. Agency, *supra* note 171, 6.

IEP."[171] TEA required Houston ISD to provide Spanish translated versions of IEPs and other documents to parents of all students with disabilities at the three campuses named in the complaint if Spanish was the language spoken at home and the parent required an interpreter at IEP meetings.[172]

Because TEA failed to remedy the problem for all monolingual, Spanish-speaking parents in Houston ISD, DRTx filed a second complaint with TEA on December 11, 2014 on behalf of an individual client and all similarly situated parents of special education students in Houston ISD.[173] On February 6, 2015, TEA confirmed that, as a whole, Houston ISD does not provide Spanish-speaking parents with copies of their students' IEP in their native language.[174] TEA ordered Houston ISD to provide all monolingual, Spanish-speaking parents of students with disabilities a copy of their student's most recent IEP in Spanish and ensure that, going forward, Houston ISD continues to provide parents who need a translated version of the IEP with copies of that documentation in Spanish.[175] This is concrete evidence that where a school district actively fails to provide LEP parents of students with disabilities copies of special education documents in their native language, the State Education Agency can be called upon to investigate and remedy the systemic violation.

### B. Complaints with the Office for Civil Rights

The Office for Civil Rights (OCR) in the U.S. Department of Education has the authority to investigate complaints alleging that a public entity, including a public school district, has discriminated on the basis of race, color, national origin, sex, disability and age.[176] In its January 7, 2015 joint guidance, the DOJ and ED outlined several areas of concern that they are willing to investigate.[177] Some of those issues include: providing language assistance programs that are proven successful, sufficiently staffing the language assistance programs, determining whether the disability determination of an ELL student is based on criteria that measures the student's abilities—not language skill—and ensuring ELL students have equal access to participate in

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[171] Special education complaint investigative report by Tex. Educ. Agency to Sarah Beebe, staff attorney, Disability Rights Tex., Terry Grier, Superintendent, Hous. Indep. Sch. Dist., and Sowmya Kumar, Spec. Educ. Director, Hous. Indep. Sch. Dist. 4 (May 30, 2014) (on file with author).

[172] *Id.* at 5.

[173] Complaint against Hous. Indep. Sch. Dist. by Sarah Beebe, staff attorney, Disability Rights Tex., to Tex. Educ. Agency 1 (Dec. 5, 2014) (on file with author).

[174] Report by Tex. Educ. Agency to Sarah Beebe, Terry Grier, and Sowmya Kumar, *supra* note 165, at 4.

[175] *Id.* at 6.

[176] 6 C.F.R. § 21.1 (2016).

[177] *See generally* Lhamon & Gupta, *supra* note 10 (describing what the Departments consider in their investigations).

specialized programs, just to name a few.[178]

OCR has investigated complaints where ELL students were denied access to programs available to non-ELL students under Title III of the ESEA.[179] In 2011, the OCR Western Division investigated Orange Unified School District (OUSD) for its discriminatory policies excluding special education and ELL students from magnet school lotteries.[180] Following OCR's decision to investigate, OUSD agreed to revise the lottery system, making it clear that the lottery was open to ELL and special education students.[181] OUSD also agreed to implement a school improvement plan for the inclusion of ELL and special education students.[182]

The OCR has investigated many complaints regarding discrimination on the basis of national origin where a school district has failed to provide LEP parents information in their native language in violation of Title VI of the Civil Rights Act. In *Victor Valley (CA) Union High Sch. Dist.*, OCR criticized the district for failing to provide a Spanish interpreter at an IEP meeting or to inform the parent of her right to request a copy of the IEP in her native language.[183] OCR noted that the student's IEP included a line that allowed the parent to request a copy of the document in her native language, but pointed out that the provision was written in English.[184] OCR stated that, "[a]s a result, [the parent] was not aware that she could request a translated copy of the IEP."[185] OCR ordered the district to develop policies regarding the oral interpretation and translation services it offered to LEP parents.[186]

The Southern Poverty Law Center (SPLC), a legal non-profit organization, sought to address the failure of a school district to provide information to parents in their native language through a complaint it filed against Louisiana's Jefferson Parish Public School System (JPPSS) in August 2012.[187] SPLC alleged discrimination on the basis of national origin in its complaint to the DOJ and OCR asserting that JPPSS failed to provide adequate translation and interpretation services for Spanish-speaking parents.[188] While the district provided school notices in English to English-speaking parents, they failed to provide this information to Spanish-speaking parents in their native language.[189] Through the Early Complaint Resolution process, SPLC entered into a settlement agreement with JPPSS where the district agreed to amend their policies and

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[178] *Id.*
[179] Orange (CA) Unified Sch. Dist., 111 LRP 65098, 1 (OCR 2011).
[180] *Id.*
[181] *Id.* at 2.
[182] *Id.* at 3.
[183] Victor Valley (CA) Union High Sch. Dist., 50 IDELR 141, 600 (OCR 2007).
[184] *Id.*
[185] *Id.* at 599.
[186] *Id.* at 600–02.
[187] Letter from Jennifer Coco and Caren Short to U.S. Department of Education and U.S. Department of Justice, *supra* note 13, 1–2 (on file with author).
[188] *Id.*
[189] *Id.*

procedures to ensure LEP parents would be provided interpreter services as well as the same information and notices in their native language that are provided to English-speaking parents.[190]

### C. Special Education Due Process Hearings

One of the primary legal remedies available to students who receive special education services and their parents to address violations of the IDEA is the special education due process hearing.[191] Due process hearings are administrative proceedings that address both procedural and substantive violations of the IDEA.[192] When a parent or school district does not prevail at the administrative hearing level, the case can be appealed to a district court,[193] then the circuit court, and finally, to the United States Supreme Court.

One of the most common issues addressed through the due process hearing system is whether a student who receives special education services has been provided a Free Appropriate Public Education (FAPE)[194] by the school district. In its landmark special education decision, *Board of Education of Hendrick Hudson Central School District v. Rowley*, the Supreme Court laid out a two-prong test for determining whether a student has been provided a FAPE.[195] The first inquiry is whether the school district complied with the IDEA's procedural requirements, and the second is whether the student's IEP is reasonably calculated to confer an educational benefit to the student.[196] Typically, the failure of a school district to meet the procedural requirements of the IDEA will not amount to a finding that a student has been denied a FAPE; that outcome usually requires the court to find that they have failed both prongs of the *Rowley* test.[197] Where a court finds that procedural violations alone amount to a denial of a FAPE, the court need not address the second prong.[198] One scenario in which courts have found that a procedural violation is so egregious as to lead to a denial of a FAPE is where a parent is denied the opportunity to participate in the

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[190] Press Release, Department of Justice, Departments of Justice and Education Reach Settlement Agreement with Jefferson Parish Public School System Ensuring Equal Access and Non-discrimination in Schools, 2014 WL 3345066 (July 9, 2014).
[191] 34 C.F.R. §§ 300.507, 300.508 (2015).
[192] *Id.*
[193] *Id.* § 300.516.
[194] *Id.* § 300.17.
[195] Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 459 U.S. 176, 206–07 (1982).
[196] *Id.*
[197] *See* Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 811–12 (5th Cir. 2003) (finding that procedural violations amount to a denial of FAPE only when the error impedes the student's right to a FAPE, significantly interferes with the parents' ability to participate in the decision-making process regarding the provision of FAPE, or causes a deprivation of an educational benefit).
[198] Doug C. ex. rel. Spencer C. v. Hawaii Dep't of Educ., 720 F.3d 1038, 1043 (9th Cir. 2013).

IEP development process.[199]

The importance of parent participation in the IEP development process is evident in the numerous procedural protections outlined in the IDEA. Parents are mandatory members of the IEP team.[200] School districts must take parents' suggestions into consideration and, to the extent appropriate, incorporate them into the student's IEP.[201] School districts must consider outside evaluations provided by parents,[202] discuss placement options with parents,[203] and include parents in any decision-making.[204] School districts must also provide parents with copies of the child's IEP at no cost to the parents to ensure they are always able to refer to that document and know what services are being provided to their child.[205]

In *Doug C. v. Hawaii*, the Ninth Circuit Court of Appeals found that a school district's refusal to schedule an IEP meeting at a time convenient for the student's father resulted in a change of placement that was inappropriate for the student and denied him a FAPE.[206] The fact that it was difficult or frustrating to schedule the meeting did not excuse the district's failure to include the student's father in the meeting after he had made clear that he wanted to participate.[207] The Ninth Circuit found that the IDEA obligates schools to prioritize parents' schedules, not school members' schedules.[208] A follow-up IEP meeting to inform the parent of decisions made at the original meeting did not cure the harm caused by the school district's failure to include the parent.[209] The IDEA requires parental participation during the creation process, not after the fact.[210]

Despite acknowledgement from courts that failure to adequately include parents in the IEP development process can amount to a denial of a FAPE, due process complaints filed by parents do not often raise this issue where a school district has failed to provide the parent with information and documentation in their native language as required by the IDEA and the Civil Rights Act of 1964. Perhaps this oversight is due to the fact that due process hearing decisions affect only one child and the issue of failure to provide parents with information in their native language tends to be a systemic issue better addressed through the special education state complaint or OCR complaint processes described

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[199] Deal v. Hamilton Cty. Bd. of Educ., 392 F.3d 840, 859 (6th Cir. 2004); *see Adam J.*, 328 F.3d at 811–12 (explaining that circuit courts consistently hold that procedural defects alone can constitute a violation of the right to a FAPE when they result in the loss of an educational opportunity).
[200] 34 C.F.R. § 300.321(a)(1) (2015).
[201] *Id.* § 300.324(a)(1)(ii).
[202] *Id.* § 300.502(c)(1).
[203] *Id.* § 300.116(a)(1).
[204] *Id.* § 300.327.
[205] *Id.* § 300.502(a)(3)(ii).
[206] Doug C. ex. rel. Spencer C. v. Hawaii Dep't of Educ., 720 F.3d 1038, 1044–45 (9th Cir. 2013).
[207] *Id.*
[208] *Id.*
[209] *Id.* at 1045.
[210] *Id.* at 1044 (citing 34 C.F.R. § 300.322(d) (2015)).

above. However, because a judge can find a FAPE denial due to a procedural violation without having to reach the second prong of the *Rowley* test, which is far more burdensome, parents and their advocates would be wise to include the denial of parent participation in due process complaints where a school district has failed to provide an interpreter at IEP meetings, procedural safeguards, prior written notice, or IEPs in the parents' native language, and this failure has resulted in the parents' inability to fully understand and participate in the IEP development process.

The second, and more challenging, prong of the *Rowley* test relates to the services being provided directly to the student. In order to determine whether the student's IEP is reasonably calculated to confer an educational benefit, the Fifth Circuit created a four part test: (1) is the program individualized on the basis of the student's assessment and performance, (2) is the program administered in the LRE, (3) are the services provided in a coordinated and collaborative manner by the key stakeholders, and (4) are positive academic and non-academic benefits demonstrated?[211] These *Michael F.* factors provide an opportunity for parents of ELL students with disabilities to request a due process hearing, alleging a denial of FAPE on the basis that a student has not been provided appropriate ESL services.

Though due process complaints alleging failure to provide ESL services are not common, the concerns outlined by the ED and DOJ's joint guidance are in line with a FAPE analysis under *Michael F.*[212] A failure by the district to complete evaluations in a student's native language or to consider multiple forms of data would result in the creation of an inappropriate IEP.[213] Since the evaluation results would not be accurate, it would be difficult to decide what related services a student would need in order to make progress. Segregating an ELL student from their non-ELL peers or denying them access to special education services would violate *Michael F.*'s LRE requirement.[214]

A due process complaint for a failure to provide ESL services resulting in a denial of a FAPE may be strongest under *Michael F.*'s third factor: whether services are provided in a coordinated and collaborative manner with key stakeholders.[215] ESL services are provided through general education programs, and ESL service providers are often left out of IEP meetings. Furthermore, the IDEA itself makes clear that the development and implementation of an IEP for a student who qualifies for ESL and special education services should include general education, special education, and ESL instructors.[216] A failure to bring all three

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[211] Cypress Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 253 (5th Cir. 1997).
[212] *Michael F.*, 118 F.3d at 253; *See generally* Lhamon & Gupta, *supra* note 10 (recommending educational programs that track the factors of *Michael F.*).
[213] 34 C.F.R. §§ 300.304(c)(1)(ii), 300.324(a)(1)(i)–(iv) (2015).
[214] *Michael F.*, 118 F.3d at 247.
[215] *Id.*
[216] 34 C.F.R. § 300.324(a)(2) (2015).

groups to the table is a violation of the IDEA and should be challenged through a due process hearing.

Finally, a FAPE requires that a student make progress in all areas, not just academics.[217] Therefore, when the communication needs of an ELL student who is also eligible for special education services are not being met, a due process complaint can be filed.[218] With the requirement from NCLB for school districts to provide services to ensure ELL students make progress, a strong case for finding a denial of a FAPE can be made when an ELL student with disabilities does not receive related services. However, proving a denial of a FAPE may be more difficult where a student does not make adequate progress in speaking, listening, writing, reading, or core content.

In *Los Angeles Unified School District (LAUSD)*, a hearing officer found that the district provided a FAPE to a student, even though the student did not make adequate progress in the four domains.[219] Though the Van Nuys' school provided the student with ESL services, the hearing officer noted that the "student's performance in 2010, 2011, and 2012 placed her in the beginning range in all domains, without significant progress year after year."[220] However, the hearing officer also found that the school provided a FAPE because ESL services were provided by a certified bilingual special education teacher, the district had a master plan for ELL students in special education, and the school modified their evaluations of students after they failed to make progress.[221]

It is likely that decisions similar to the *LAUSD* decision discourage parents and attorneys from filing due process complaints against school districts. However, with so few cases to compare, it is hard to say whether other parents may have more success. Parents and attorneys should use the due process avenue for FAPE denials, especially now that the ED and DOJ have issued strong guidance clearly outlining common violations seen in school districts.

## V. STEPS SCHOOL DISTRICTS CAN TAKE TO ENSURE ADEQUATE LEP PARENT PARTICIPATION

The ED and DOJ's guidance highlights several corrective action steps school districts can take to avoid violations of both Title VI of the Civil Rights Act and the IDEA for failure to provide appropriate language services to special education students or translation and interpreter services to LEP parents, including the following:

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[217] Mr. I. *ex rel.* L.I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 7–8 (1st Cir. 2007).
[218] 34 C.F.R. § 300.508(a) (2015).
[219] L.A. Unified Sch. Dist., 114 LRP 53431, 3 (SEA CA 2014).
[220] *Id.* at 6.
[221] *Id.* at 5, 8.

- Develop a process for notifying LEP parents, in a language they will understand, of the availability of free translation and interpreter services through the school district;[222]
- Develop a process for identifying LEP parents who need language assistance and appropriately identifying ELL students for both language and special education services;[223]
- Develop procedures that do not delay evaluation of ELL students or special education students;[224]
- Monitor students to ensure they are making adequate progress in all four domains: speaking, listening, reading, and writing;[225]
- Create a policy that parents do not have to be limited English proficient in speaking, reading, writing, and comprehension to be considered LEP, but rather they need only to be LEP in one of those areas;[226]
- A policy that the district will accept parents' claims that they need language assistance without requiring proof;[227]
- A process that ensures the school district and individual campuses have a list of LEP parents, including the type of language assistance they need, and a log of the language assistance that has been provided to them;[228]
- A process to ensure that the information about a parent's need for language assistance transfers when the student transfers schools;[229]
- A process that ensures students are not inappropriately segregated from non-ELL peers and have equal access to grade level curricula, specialized programs, and high level programs;[230]
- A process for the school staff to obtain qualified translators and interpreters in a timely and appropriate manner;[231]
- A process by which the school district ensures their translators and interpreters are properly trained and have knowledge of any specialized terms or concepts that pertain to the program or activity being provided to the student;[232]
- Provide appropriate and qualified staff for ELL instruction, including professional development for teachers regarding ELL learning styles;[233]

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[222] Lhamon & Gupta, *supra* note 10, at 39.
[223] *Id.* at 10, 38.
[224] *Id.* at 11, 25.
[225] *Id.* at 10–11.
[226] *Id.* at 37.
[227] *Id.* at 38.
[228] *Id.* at 39.
[229] *Id.* at 28–29.
[230] *Id.* at 21.
[231] *Id.* at 39.
[232] *Id.*
[233] *Id.* at 6.

- Notice to all staff that using family members and friends for language assistance is not acceptable as it may raise issues of confidentiality, privacy and conflict of interest;[234] and
- A process for identifying and translating vital written documents into the language of each frequently encountered LEP parent group eligible to be served.[235]

Rather than being forced or ordered to amend policies and procedures to ensure LEP parents have access to information in their native language through complaint processes, the Office for Special Education Programs (OSEP) in the ED has suggested school districts should have an incentive to provide translated documents and interpreter services on their own.[236] In *Letter to Boswell*, OSEP informed the superintendent of an Arkansas district that, while the IDEA does not require school districts to translate IEP documents into a parent's native language, districts that offer to provide a translated IEP can protect themselves from subsequent claims that it did not obtain consent for proposed services or placements.[237] In other words, a district that provides parents information in their native language should be able to demonstrate that the parent was fully informed about the IEP process when they agreed to the actions the district proposed, making potential future claims that the district violated the IDEA's procedural protections or failed to provide a FAPE less likely to succeed.

## VI. CONCLUSION

As the country becomes more culturally diverse, it is important that our schools do as well. The IDEA, NCLB, and Title VI of the Civil Rights Act of 1964 provide numerous strategies to ensure that ELL students with disabilities receive a FAPE and that LEP parents are able to fully participate in their child's education in their native language.

The OCR of ED and the DOJ have recognized that culturally responsive instruction is a strategy school personnel should be using to ensure that students are receiving a FAPE.[238] When an ELL student with disabilities is not receiving a FAPE because teachers are not implementing culturally responsive strategies and the student is not receiving any meaningful benefit, then as advocates, our next step is to challenge this practice through impartial due process hearings and state complaints as a violation of the IDEA.

Although the IDEA does not specifically require school districts to

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[234] *Id.* at 39.
[235] *Id.* at 38.
[236] Letter from Patricia J. Guard, Acting Director, Office of Special Education Programs, to Linda Boswell, 2 (Sep. 4, 2007).
[237] *Id.*
[238] Lhamon & Gupta, *supra* note 10, at 29.

provide LEP parents with copies of their child's IEP, it enumerates the many other steps districts must take to ensure parent participation in the IEP development process, including translation of many other special education documents and providing interpreters at IEP meetings.[239] Failure to provide parents the opportunity to participate in the IEP decision-making process can amount to a denial of FAPE under the IDEA and is one of the only procedural violations that, by itself, can result in that heightened level of harm to students.[240] More parents and advocates should include denial of parent participation claims in due process hearing complaints where school districts fail to provide parents with IEPs in their native language, or interpreters at IEP meetings, and the result is an inability on the part of the parent to make decisions about their child's disability-related services at school.

In addition, there are arguments to be made that an IEP is a vital document, and the failure of a school district to translate that document into a parent's native language constitutes discrimination on the basis of national origin, and is therefore a violation of Title VI of the Civil Rights Act of 1964.[241] Those who encounter discrimination by a school district's refusal to provide IEPs and other important disability-related documents in a parent's native language should consider filing a complaint with the OCR of ED or the DOJ citing a violation of Title VI.

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[239] 34 C.F.R. §§ 300.503(c)(1), 300.504(d), 300.9, 300.322(e) (2015).

[240] Doug C. ex. rel. Spencer C. v. Hawaii Dep't of Educ., 720 F.3d 1038, 1047 (9th Cir. 2013).

[241] *See* LIMITED ENGLISH PROFICIENCY, *supra* note 142. ("A document will be considered vital if it contains information that is critical for obtaining the federal services and/or benefits, or is required by law." Vital documents include, for example: applications; consent and complaint forms; notices of rights and disciplinary action; notices advising LEP persons of the availability of free language assistance; rule books; written tests that do not assess English language competency, but rather competency for a particular skill for which English competency is not required; and letters or notices that require a response).

# Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers

John P. Gross*



## I. INTRODUCTION

A series of shootings has started a national debate about the use of deadly force by law enforcement officers. Though this debate has entered mainstream media and the public consciousness, the law gives little guidance on when the use of force by police is justified. While the Supreme Court has made it clear that the Fourth Amendment applies to questions about the use of deadly force, the Court has never given any specific guidance to law enforcement on when the use of deadly force is

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justified—and the standard of review the Court has promulgated is highly deferential to the judgment of police officers.[1]

The first part of this article examines the Supreme Court's decisions regarding the use of deadly force by police officers, concluding that the Court has failed to provide law enforcement with any meaningful guidance on when the use of deadly force is appropriate.

The second part of this article calls into question the Court's justifications for not limiting the use of deadly force by law enforcement. The Court overestimates the deterrent effect of civil rights litigation and places too much confidence in police professionalism on the one hand, while failing to take into account the militarization of law enforcement and exaggerating the inherent dangerousness of police work on the other.

The third part of the article illustrates the malleability of the reasonable officer standard promulgated by the Supreme Court. Three recent cases in which a police officer was charged with homicide are explored in order to demonstrate how officers can use unscientific training and tactical practices, along with exaggerated claims regarding the dangerousness of police work, to justify the use of deadly force.

The fourth part of the article evaluates the purported need for broad use of force doctrine—the dangerousness of police work—by analyzing available data on the number of homicides committed by law enforcement and number of officers feloniously killed in the line of duty. When the number of homicides committed by law enforcement officers is compared to the number of officers feloniously killed between 2003 to 2009, it was the suspect who was killed 94%–97% of the time.[2] A similar analysis of data collected during 2015 also resulted in a finding that when an encounter between police officers and a suspect ended with the death of either the officer or the suspect, it was the suspect who was killed 97% of the time.[3]

The article concludes by arguing that the number of suspects killed by police officers is grossly disproportionate to the number of police officers who are killed by suspects, which suggests that law enforcement officers are using deadly force before any threat to their safety has materialized. This is a result, at least in some part, of the Supreme Court's failure to impose meaningful restrictions on the use of deadly force, which has encouraged law enforcement officers to prioritize their own safety over the safety of civilians.

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[1] *See* Saucier v. Katz, 533 U.S. 194, 204–05 (2001) (explaining that the test for whether officer acted reasonably in using force as one that "caution[s] against the '20/20 vision of hindsight' in favor of deference to the judgment of reasonable officers on the scene.") (quoting *Graham v. Connor*, 490 U.S. 386, 393 (1989)).

[2] *See* discussion *infra* Part IV.

[3] *See* discussion *infra* Part IV.

## II. THE LACK OF JUDICIAL OVERSIGHT OR CLEAR GUIDANCE ON THE USE OF FORCE BY LAW ENFORCEMENT

The United States Supreme Court seldom addresses the issue of police officer use of force; when the issue is addressed, legal justifications for the use of force, and the limitations on when the use of force is appropriate are not analyzed or discussed in any great detail.[4]

The first time the Court dealt with the use of force was in *Tennessee v. Garner*.[5] In *Garner,* a police officer used deadly force despite being "reasonably sure" that the suspect was an unarmed teenager "of slight build" who was running away from him.[6] In defending his actions, the officer relied on a Tennessee statute that authorized a police officer to "use all the necessary means to effect the arrest" of a suspect.[7] The Court held that the use of deadly force is subject to the Fourth Amendment's reasonableness requirement, and that the Tennessee statute was unconstitutional in so far as it authorized the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances.[8]

The Court noted in its reasoning that "[t]he intrusiveness of a seizure by means of deadly force is unmatched,"[9] and characterized use of deadly force as "frustrate[ing] the interests of the individual, and of society, in judicial determination of guilt and punishment."[10] The Court added that the use of deadly force is "self-defeating" since, if used successfully, "it guarantees that [the criminal justice mechanism] will not be set in motion."[11] The Court also based their decision, at least in part, on the fact that the policies of most police departments only authorize the use of deadly force in defense of human life or to protect the officer or another person from serious physical injury.[12] Beyond that baseline authorization, the Court also found that the Fourth Amendment allowed the use of deadly force against a fleeing suspect "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm."[13]

The mistake the Court made in *Garner* was to equate the use of deadly force with a "seizure" under the Fourth Amendment, thereby

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[4] *See* Rachael A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1122 (2008) (calling the Supreme Court's Fourth Amendment doctrine regulating the use of force by police officers "deeply impoverished" and "indeterminate and undertheorized").
[5] Tennessee v. Garner, 471 U.S. 1 (1985).
[6] *Id.* at 1.
[7] *Id.*
[8] *Id.* at 2.
[9] *Id.* at 9.
[10] *Id.* at 9.
[11] *Id.* at 10.
[12] *Id.* at 18.
[13] *Id.* at 11.

subjecting use of force situations to reasonableness analysis.[14] As the Court pointed out, the use of deadly force "frustrates the interests of the individual, and of society, in judicial determination of guilt and punishment."[15] But a normal search or seizure—even an unreasonable one—does not prevent a judicial determination of guilt. That is, while the search for evidence and the arrest of an individual are steps in the adjudication process, the use of deadly force actually prevents any adjudication process from happening altogether. Thus, the use of deadly force denies a suspect all of the other procedural rights that are designed to ensure the accuracy and reliability of the adjudication process as it places the officer who uses deadly force in the effective role of judge, jury, and executioner. The Fourth Amendment reasonableness requirement for searches and seizures is ill-suited to use of force analysis since the requirement that the use of deadly force be merely "reasonable" is inconsistent with the requirement that the state prove a defendant's guilt beyond a reasonable doubt.

Several years after *Garner*, the Court reiterated that the use of force by police officers is subject to the Fourth Amendment's reasonableness requirement in *Graham v. Connor*.[16] In *Graham*, the Court was called on to decide whether police officers had used excessive force during the course of an investigatory stop that did not ultimately lead to an arrest.[17] Upholding the officers' actions, the Court explained that the reasonableness of the level of force used by police "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[18] The fact that officers may ultimately be wrong about a suspect's guilt was ruled not to matter if, based on what the officers knew at the time, the amount of force used to detain a suspect was reasonable.[19] The Court added, in what has become an often quoted portion of the decision,[20] that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[21] Notably, the Court did not say that police officers should be shown some amount of deference in their decision making when the situation they are in *actually* is "tense, uncertain, and rapidly evolving," but simply because they are *often*

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[14] *Id.* at 7 ("While it is not always clear just when minimal police interference becomes a seizure . . . there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.") (citations omitted).
[15] *Id.* at 9.
[16] Graham v. Connor, 490 U.S. 386, 388–389 (1989).
[17] *Id.*
[18] *Id.* at 396.
[19] *Id.*
[20] Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 865 (2014) ("Since the Supreme Court first introduced that description in 1989, federal district and circuit courts have repeated it on more than 2,300 occasions.").
[21] *Graham*, 490 U.S. at 396–97.

placed in such situations.[22]

In *Saucier v. Katz*,[23] the Court reiterated factors set forth in *Graham* that should be used when evaluating a claim of excessive force, including "the severity of the crime, whether the suspect poses a threat to the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[24] But the Court went one step further, suggesting that police officers could use force if they thought that a suspect was *likely* to fight back: "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed."[25]

In *Scott v. Harris*,[26] the Court ruled that police officers are permitted to use force against a suspect who drives recklessly in an attempt to evade the police.[27] There, the Court found that an officer's decision to ram his push bumper into the back of a suspect's car in order to make the vehicle spin to a stop was reasonable under the circumstances, even though this act "posed a high likelihood of serious injury or death" to the suspect.[28] Though the decision in *Garner* seemed to have created a bright line rule regarding the use of deadly force against a fleeing suspect, the Court in *Harris* stated that "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'"[29] The Court rejected the idea of an "easy-to-apply legal test," concluding that "in the end we must still slosh our way through the factbound morass of 'reasonableness.'"[30]

The Court revisited the use of force during a high-speed car chase in *Plumhoff v. Rickard*,[31] where a suspect who had been pulled over because of a defective headlight refused to exit his vehicle and sped away. After leading police officers on a high-speed chase, the suspect's car spun out into a parking lot and collided with a police cruiser.[32] The suspect once again tried to escape in his car, but officers exited their vehicles and shot into the suspect's car fifteen times, killing the suspect.[33] Just as in *Scott*, the Court concluded that because the suspect's flight posed a grave risk to public safety "the police acted reasonably in using deadly force to end that risk."[34] The Court also considered whether the number of shots fired, fifteen, was unreasonable under the

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[22] *Id.* at 396.
[23] Saucier v. Katz, 533 U.S. 194 (2001).
[24] *Id.* at 195.
[25] *Id.*
[26] Scott v. Harris, 550 U.S. 372 (2007).
[27] *Id.* at 386.
[28] *Id.* at 384.
[29] *Id.* at 382.
[30] *Id.* at 383.
[31] Plumhoff v. Rickard, 134 S. Ct. 2012 (2014).
[32] *Id.* at 2017.
[33] *Id.* at 2018.
[34] *Id.* at 2022.

circumstances.[35] The Court reasoned that "if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended."[36]

In 2015, *Mullenix v. Luna*[37] presented the Court with another a high-speed chase. A police officer approached Israel Leija's vehicle and informed him that he was under arrest because of an outstanding warrant.[38] Leija sped off and "led the officers on an 18 minute chase at speeds between 85 and 110 miles per hour."[39] In an effort to end the pursuit, police officers set up spike strips at three different locations.[40] Instead of waiting for Leija's vehicle to reach the locations where the spike strips were deployed, Trooper Chadrin Mullenix decided to try and end the pursuit by "shooting at Leija's car in order to disable it."[41] Mullenix fired six shots at Leija's vehicle from his position on an overpass.[42] Instead of hitting the engine block of the vehicle—his intended target—he hit Leija four times in the upper body, killing him.[43]

The Supreme Court considered whether Mullenix was entitled to qualified immunity for his actions.[44] If Mullenix's conduct did not violate clearly established statutory or constitutional rights, then, as a police officer, he could not be subject to personal liability.[45] The Court was quick to point out that it had "never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity."[46] Arguing that the doctrine "protect[s] actions in the 'hazy border between excessive and acceptable force,'"[47] the Court concluded that Mullenix was entitled to qualified immunity because "excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted."[48]

The decisions in *Garner*, *Graham*, *Saucier*, *Scott, Plumhoff*, and *Mullenix* offer almost no guidance to law enforcement, judges, or juries as to what types of force are reasonable under a specific set of circumstances.[49] What guidance they do provide is contradictory because the Court condemns the use of deadly force to apprehend a fleeing burglary suspect in *Garner*, but then approves of an act likely to cause

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[35] *Id.*
[36] *Id.*
[37] Mullenix v. Luna 136 S. Ct. 305 (2015).
[38] *Id.* at 306.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 307.
[43] *Id.*
[44] *Id.* at 308. For discussion on civil rights litigation and qualified immunity in police use of force cases, see *infra* Part II.B.
[45] Anderson v. Creighton, 483 U.S. 635, 640 (1987) ("[O]ur cases establish that the right the official is alleged to have violated must have been 'clearly established' . . . .")
[46] *Mullenix*, 136 S. Ct. at 310.
[47] *Id.* at 312 (quoting Brosseau v. Haugen, 543 U.S. 194, 201 (2004)).
[48] *Id.* at 309.
[49] *See generally* Harmon, *When Is Police Violence Justified?*, *SUPRA* NOTE 5 (IDENTIFYING A LACK OF GUIDANCE PROVIDED BY SUPREME COURT JURISPRUDENCE ON USE OF FORCE).

serious injury or death to apprehend someone who was driving recklessly in *Scott*.[50] The decisions in *Plumhoff* and *Mullenix* highlight just how contradictory the Court's reasoning can be—in those cases, the Court found that shooting into a car in an effort to stop a fleeing suspect was a reasonable use of deadly force, despite the fact that the vast majority of law enforcement agencies instruct officers to never fire into a moving car.[51] The end result is a highly deferential standard by which to determine whether use of force is justified; the decision to use deadly force is left almost entirely up to the individual officer, and judges and juries are encouraged to give the officer the benefit of the doubt when deciding if use of deadly force was reasonable.[52]

## III. INACCURATE ASSUMPTIONS ABOUT LAW ENFORCEMENT

What accounts for this judicial deference toward police officers when it comes to the use of deadly force? In part, the Court has stated that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application."[53] Beyond the vagueness of the constitutional standard, the Court may also be reluctant "to require that police officers take unnecessary risks in the performance of their duties."[54] However, while those concerns may have an impact on the Court's decision making, ultimately, the Court's reluctance to regulate the use of force by police officers is based, in large part, on inaccurate assumptions regarding the nature of policing.

### A. Police Officers' Aggressive Use of Force

The Court assumes that police officers are regularly forced to make split-second decisions regarding the use of force, and that they typically

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[50] *See generally* Tennessee v. Garner, 471 U.S. 1 (1985); Scott v. Harris, 550 U.S. 372 (2007) (holding seemingly contradictory conclusions about the reasonableness of use of force against a fleeing suspect).

[51] Jon Swaine, Jamiles Lartey & Oliver Laughland, *Moving Targets*, THE GUARDIAN (Sept. 1, 2015, 9:42 AM), http://www.theguardian.com/us-news/2015/sep/01/moving-targets-police-shootings-vehicles-the-counted, https://perma.cc/5VTN-NLFJ ("The US Department of Justice, prominent international policing experts and most major police departments across the US agree: police officers should not fire their guns into moving cars. The shots are widely viewed as ineffective for stopping oncoming vehicles, and the risks to innocent parties are seen as overwhelming.").

[52] Harmon, *When Is Police Violence Justified?*, *supra* note 5, at 1123 (arguing that "the Supreme Court's few opinions fail to answer the basic questions of why, when and how much force officers can use, while at the same time permitting, if not encouraging, the use of irrelevant and prejudicial considerations in evaluating whether an officer acted reasonably.").

[53] Graham v. Connor, 490 U.S. 386, 396 (1989) (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).

[54] Terry v. Ohio, 392 U.S. 1, 23 (1968).

must use force for self-defense.[55] The opposite is actually true—police officers typically use force offensively rather than defensively and do so with at least some degree of premeditation.[56]

Police officers often regard noncompliance with their orders as a provocation that justifies the use of force.[57] For decades, police officers have seen themselves as fighting a "war on crime," and their training has reflected that mentality, emphasizing the use of firearms and defensive tactics, while virtually ignoring crisis intervention and de-escalation strategies.[58] The increased use of Special Weapons and Tactics (SWAT) teams,[59] as well as the militarization of police forces across the country, has transformed police officers from guardians into warriors.[60] With help from the Defense Department, local police forces have been equipped with body armor, assault rifles, grenade launchers, and armored vehicles.[61] The "President's Task Force on 21st Century Policing" recognized the need to change the culture of law enforcement and recommended that law enforcement officers "embrace a guardian—rather than a warrior—mindset" in order to build trust and legitimacy.[62]

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[55] *See Graham*, 490 U.S. at 396 ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.").

[56] Stoughton, *Policing Facts*, *supra* note 21, at 868 ("The vast majority of the time, then, officers use force aggressively, not defensively. That is, they act forcefully to establish control over a suspect rather than defend themselves, a third party, or the suspect from some imminent harm. . . . Considering that the vast majority of use-of-force incidents involve the use of aggressive force by police officers—typified by tactical preparation, a degree of premeditation, low levels of resistance, low levels of force, and a low probability of injury—the Court's description of 'split-second judgment' is simply wrong almost all the time.").

[57] Sunil Dutta, *I'm a Cop. If You Don't Want to Get Hurt, Don't Challenge Me.*, WASH. POST (Aug. 19, 2014), https://www.washingtonpost.com/posteverything/wp/2014/08/19/im-a-cop-if-you-dont-want-to-get-hurt-dont-challenge-me/, <https://perma.cc/6DRA-4RLG>.

[58] Matt Apuzzo, *Police Rethink Long Tradition on Using Force*, N.Y. TIMES (May 4, 2015), http://www.nytimes.com/2015/05/05/us/police-start-to-reconsider-longstanding-rules-on-using-force.html?_r=0, <https://perma.cc/N5KR-8HUA>.

[59] Clyde Haberman, *The Rise of the SWAT Team in Americana Policing*, N.Y. TIMES (Sept. 7, 2014), http://www.nytimes.com/2014/09/08/us/the-rise-of-the-swat-team-in-american-policing.html?_r=0, <https://perma.cc/7DQP-SWSW>.

[60] *See generally* RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES (2013) (describing the militarization of police forces in the United States).

[61] Matt Apuzzo, *What Military Gear Your Local Police Department Bought*, N.Y. TIMES (Aug. 19, 2014), http://www.nytimes.com/2014/08/20/upshot/data-on-transfer-of-military-gear-to-police-departments.html?module=Search&mabReward=relbias%3Ar%2C{%221%22%3A%22RI%3A9%22}&abt=0002&abg=0, <https://perma.cc/YL5R-9264>; Rachel A. Harmon, *FEDERAL PROGRAMS AND THE REAL COSTS OF POLICING*, 90 N.Y.U. L. REV. 870, 918–19 (2015) (noting that federal grant programs have encouraged an aggressive and militaristic style of policing and that police departments have used the Homeland Security Grant Program to purchase bomb-detection robots, Kevlar helmets, unmanned aerial vehicles and tactical armored vehicles).

[62] OFFICE OF CMTY. ORIENTED POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 1 (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf, <https://perma.cc/3F4K-TPHX>.

### B. The Absence of Effective Deterrents

The Court's also assumes that deterrents such as legislation and the threat of civil rights litigation operate to prevent excessive use of force by police. In *Atwater v. City of Lago Vista*,[63] the Court declined to limit the power of officers to make custodial arrests based on the assumption that "the good sense (and, failing that, the political accountability) of most local lawmakers and law enforcement officials" would prevent police officers from making unnecessary arrests.[64] In deciding that a violation of the "knock and announce" rule was not a sufficient justification for excluding incriminating evidence in *Hudson v. Michigan*,[65] the Court reasoned that the police had other incentives—the threat of civil rights litigation, the increasing professionalism of police forces, and internal discipline—to not violate a suspect's constitutional rights thus making the exclusion of evidence unnecessary as a deterrent.[66]

The Court's confidence in the "good sense" of law enforcement officers and lawmakers may be misplaced when it comes to the regulation of the use of deadly force. While there have been recent efforts to make police officers more accountable, including an increase in the use of body cameras and a ban on the use of grand juries in the investigation of officers when a suspect has been killed,[67] lawmakers tend to be highly deferential to law enforcement.[68] Even modest attempts to regulate police officers by local lawmakers, such as a New York City Council proposal to require officers to ask permission before making

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[63] Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

[64] *Id.* at 353.

[65] Hudson v. Michigan, 547 U.S. 586 (2008).

[66] *Id.* at 598 ("Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline.").

[67] Tracey Kaplan, *California Bans Grand Juries in Fatal Shootings by Police*, MERCURY NEWS (Aug. 11, 2015, 1:53 PM ) http://www.mercurynews.com/crime-courts/ci_28621966/gov-brown-oks-nations-1st-ban-grand-juries, <https://perma.cc/SY85-G26D>; Kate Mather, *LAPD's Long-Awaited Body Cameras Will Hit the Street on Monday*, L.A. TIMES (Aug. 26, 2015, 10:24 AM), http://www.latimes.com/local/lanow/la-me-ln-lapd-body-cameras-20150826-story.html, <https://perma.cc/Y3B4-Z5QR>; Reid Wilson, *Police Accountability Measures Flood State Legislatures after Ferguson, Staten Island*, WASH. POST (Feb. 4, 2015), http://www.washingtonpost.com/blogs/govbeat/wp/2015/02/04/police-accountability-measures-flood-state-legislatures-after-ferguson-staten-island/, <https://perma.cc/CYT4-LQQT>; *but see* Radley Balko, *80 Percent of Chicago PD Dash-Cam Videos Are Missing Audio Due to "Officer Error" or "Intentional Destruction"*, WASH. POST (Jan. 29, 2016), https://www.washingtonpost.com/news/the-watch/wp/2016/01/29/80-percent-of-chicago-pd-dash-cam-videos-are-missing-audio-due-to-officer-error-or-intentional-destruction/, <https://perma.cc/RBH5-4AJT>.

[68] *See* Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1352–53 (explaining that federal lawmakers have "never acted as 'the front line troops in combating . . . police abuse,'" instead using "cost-raising mechanisms" to address police misconduct that are "ill equipped to combat the organizational roots of police wrongdoing.") (quoting *Police Brutality: Hearing Before the H. Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary,* 102d Cong. 133 (1991) (statement of John R. Dunne, U.S. Dep't of Justice)).

certain warrantless searches and to provide minimal information to suspects by identifying themselves by name, rank, and command during a street stop, are opposed by law enforcement.[69] Lawmakers have actually taken affirmative steps to insulate officers from internal discipline by passing Law Enforcement Officer Bill of Rights Laws.[70] External discipline, in the form of criminal prosecution, is extremely rare.[71]

With respect to the Court's assumption that threat of civil litigation will curb police misconduct, their confidence is misplaced. Pursuant to 42 U.S.C. § 1983, the victims of excessive force can file a civil action against the officers responsible.[72] However, police officers are entitled to qualified immunity "so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[73] The Court has stated that the qualified immunity doctrine exists in order to "protect actions in the hazy border between excessive and acceptable force,"[74] and it protects "all but the plainly incompetent or those who knowingly violate the law."[75]

The Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality."[76] In the Court's opinion, the dispositive question is "whether the volatile nature of a *particular* conduct is clearly established."[77] The Court does not "require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."[78] The Court has also narrowly defined when a right has been clearly established, explaining that a clearly established right is one that is "sufficiently clear 'that every reasonable official would [have understood] that what he is doing

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[69] Mara Gay, *William Bratton Bucks City Council*, WALL ST. J. (June 29, 2015, 8:51 PM), http://www.wsj.com/articles/william-bratton-bucks-city-council-1435625376, <https://perma.cc/883C-B3E8> ("'I wish to say respectfully, but firmly, that these are the purview of the police commissioner and the police department, and not of legislative control,' Mr. Bratton testified at a City Council hearing on the package of bills.").

[70] Walter Olson, *Police Misconduct and "Law Enforcement Officers' Bill of Rights" Law*, CATO INSTITUTE, (Apr. 24, 2015, 1:34 PM), http://www.cato.org/blog/police-misconduct-law-enforcement-officers-bill-rights, <https://perma.cc/J2SP-6C4L>.

[71] Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/, <https://perma.cc/KTG6-N8VX>. *See also* Asit S. Panwala, *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 FORDHAM URB. L. J. 639, 641, 648 (2003) (arguing that abusive police officers are under-prosecuted by state prosecutors and that uncooperative police witnesses pose a significant obstacle to prosecution).

[72] 42 U.S.C. § 1983 (2012) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.").

[73] Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (citing Pearson v Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982))).

[74] *Id.* at 312 (quoting Brosseau v. Haugen, 543 U.S. 194, 201 (2004)).

[75] Malley v. Briggs, 475 U.S. 335, 341 (1986).

[76] Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011).

[77] *Mullenix*, 136 S. Ct. at 308 (emphasis in original) (quoting *al-Kidd*, 563 U.S. at 742).

[78] *al-Kidd*, 563 U.S. at 742.

violates that right.'"[79]

The result is that plaintiffs alleging a violation of § 1983 face an uphill battle.[80] It is not enough to prove that their constitutional rights were violated—in order to avoid summary judgment based on the doctrine of qualified immunity, they must also prove that every reasonable officer would have understood that the officer's actions violated those rights.[81] Even if they overcome that hurdle, the jury will ultimately be instructed that they should view the reasonableness of an officer's use of force from the perspective of a reasonable officer on the scene.[82] Thus, police officers are protected from liability by two levels of reasonableness—the reasonableness of an officer's understanding of a violation of a clearly established right, and the Fourth Amendment reasonableness requirement of the amount of force used—which effectively insulates them from liability.[83]

In addition, research about the effect that lawsuits have on the conduct of law enforcement shows that when law enforcement agencies gather and analyze data about lawsuits the data has been successfully used to reduce misconduct,[84] but most police departments rarely have the kind of information about lawsuits that is necessary in order to make reasoned policy decisions.[85] Some members of the Court have openly doubted whether the threat of civil rights lawsuits effectively deters police misconduct, although the assumption that it does continues to promote deference to law enforcement.[86]

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[79] Reichle v. Howards, 132 S. Ct. 2088, 2093 (2012).

[80] *See generally* Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633 (2012) (discussing developments in qualified immunity jurisprudence and concluding that qualified immunity doctrine poses a substantial obstacle to plaintiffs).

[81] *Id.* at 656.

[82] *See* Geoffrey P. Alpert & William C. Smith, *How Reasonable is the Reasonable Man?: Police and Excessive Force*, 85 J. CRIM. L. & CRIMINOLOGY 481, 486 (1994) (emphasizing the contradictory nature of the reasonableness assessment in excessive force cases by noting that the jury's duty is "to determine if the police actions were reasonable or unreasonable based upon subjective objectivity.").

[83] Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 117 (2009) (arguing that when qualified immunity is applied in a Fourth Amendment excessive force case, the defendant, typically a police officer, is protected from liability by two layers of reasonableness. "First, qualified immunity absolves an individual government agent from liability under 42 U.S.C. § 1983, notwithstanding his violation of a constitutional right, if his actions were 'objectively reasonable.' Second, the agent is likewise absolved from liability under the Fourth Amendment itself if the amount of force used was 'objectively reasonable.'"). *See* Blum, *Qualified Immunity Developments*, *supra* note 81, at 654–55 (2013) (discussing recent decisions making it more difficult for § 1983 plaintiffs to establish that the federal law was clearly established).

[84] Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1023 (2010).

[85] *Id.* at 1085. ("Most police departments lack sufficient information about past suits to draw any sensible lessons. Some police departments completely ignore information from lawsuits. Other departments try to gather information from suits, but their efforts are frustrated by technological problems, human error, and efforts to obfuscate relevant information."). *See also* Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 891 (2012) ("Despite widespread reluctance to pay attention to litigation data, law enforcement agencies can—and do—learn from lawsuits.").

[86] *See* Hudson v. Michigan, 547 U.S. 586, 611 (2008) (Breyer, J., dissenting) (criticizing the assumption that the threat of civil liability is an effective deterrent to police misconduct).

### C. A Lack of Professionalism and Internal Discipline

The Supreme Court's confidence in the professionalism of police forces is not shared by the members of Congress who passed 42 U.S.C. § 14141 as part of the Violent Crime Control and Law Enforcement Act of 1994.[87] The statute makes it unlawful for a police agency to engage in a pattern or practice that "deprives persons of rights, privileges, or immunities secured or protected by the Constitution."[88] It also grants the attorney general the authority to file a civil action demanding equitable and declaratory relief.[89] Within the last ten years, the Department of Justice has filed actions alleging patterns and practices of abuse against the Pittsburgh Police Department, the New Jersey State Police, the District of Columbia Metropolitan Police Department, the Los Angles Police Department, the Cincinnati Police Department, the Columbus Police Department, the Buffalo Police Department, the Detroit Police Department, the Orange County Sherriff's Office, the Seattle Police Department, and the New Orleans Police Department, among others.[90] One expert estimates that currently "nearly one in five Americans is served by a law enforcement agency that has been subject to a Department of Justice . . . investigation via § 14141."[91] In terms of the unreasonable use of force, "[a]lmost every single negotiated settlement signed by the DOJ pursuant to § 14141 addresses the policing agency's use of force."[92]

A trio of recent reports on large metropolitan police forces also calls into question the Court's reliance on "police professionalism." A United States Department of Justice (DOJ) investigation of the Albuquerque Police Department (APD) found that the APD engages in a pattern or practice of use of excessive force, including deadly force.[93] The DOJ concluded "that structural and systemic deficiencies—including insufficient oversight, inadequate training, and ineffective policies—contribute to the use of unreasonable force."[94] The DOJ also found that because of "the department's inadequate accountability systems, the department often endorses questionable and sometimes

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[87] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1796 (codified in scattered sections of 42 U.S.C.).
[88] 42 U.S.C. § 14141(a) (2012).
[89] *Id.* § 14141(b).
[90] Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3247 (2014).
[91] Rushin, *Structural Reform Litigation*, *supra* note 69, at 1347–48.
[92] *Id.* at 1378–79.
[93] LETTER FROM U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., TO RICHARD J. BERRY, MAYOR OF ALBUQUERQUE, N.M. (Apr. 10, 2014), http://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd_findings_4-10-14.pdf, <https://perma.cc/5YWS-KXTH>.
[94] *ID.*

unlawful conduct by officers."[95]

The DOJ came to similar conclusions following an investigation of the Cleveland Division of the Police (CDP).[96] The lack of supervision and guidance of CPD officers results in "policing that is sometimes chaotic and dangerous; interferes with CPD's ability to effectively fight crime; compromises officer safety; and frequently deprives individuals of their constitutional rights."[97] The DOJ also found that "CDP's pattern or practice of excessive force is both reflected by and stems from its failure to adequately review . . . allegations of misconduct; identify and respond to patterns of at-risk behavior; provide its officers with the support, training, supervision, and equipment needed to allow them to do their jobs safely and effectively; adopt and enforce appropriate policies; and implement effective community policing strategies."[98]

A DOJ-funded study on the use of deadly force by the Philadelphia Police Department (PPD) "uncovered policy, training, and operational deficiencies" and made ninety-one recommendations regarding the reform of the department's deadly force practices.[99] The report found that "PPD officers do not receive regular, consistent training on the department's deadly force policy"[100] and that "officers do not regularly receive in-service training on threat perception, decision making, and de-escalation."[101]

These three studies demonstrate that the Supreme Court overestimates the level of training and supervision that police officers receive in the use of deadly force. The fact that these reports found that the tactics used by these police departments actually created the need to use deadly force is especially troubling.

### D. Exaggerated Impression of the Danger of Policing

Finally, the Court's deferential attitude toward the use of force may also be influenced by the popular perception that law enforcement is extremely dangerous work and that police officers are under constant

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[95] *Id.* at 4; *see also* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 796–97 (2012) (arguing that civil service laws make it difficult for police departments to effectively discipline officers).

[96] LETTER FROM U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., TO FRANK G. JACKSON, MAYOR OF CLEVELAND, OHIO (Dec. 4, 2014), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf, <https://perma.cc/CQ2R-VCGG>.

[97] *ID.*

[98] *Id.* at 3–4.

[99] GEORGE FACHNER & STEVEN CARTER, COLLABORATIVE REFORM INITIATIVE: AN ASSESSMENT OF DEADLY FORCE IN THE PHILADELPHIA POLICE DEPARTMENT 9 (2015), http://ric-zai-inc.com/Publications/cops-w0753-pub.pdf, <https://perma.cc/8HKK-XGTT>.

[100] *Id.* at 4.

[101] *Id.* at 5.

threat of attack.[102] While law enforcement can be dangerous, those dangers have been greatly exaggerated.[103] The reality is that more police officers are killed accidentally by motor vehicles than are fatally shot.[104] Over a ten-year period from 2004 to 2013, 511 law enforcement officers were feloniously killed,[105] while 636 were accidentally killed while on the job.[106] Being a truck driver, construction worker, or a roofer is more dangerous than being a police officer.[107]

Traffic stops provide a noteworthy example of the overestimation of danger faced by police officers. Police officers typically characterize the routine traffic stop as highly dangerous and requiring the utmost vigilance.[108] In *Pennsylvania v. Mimms*[109] the Supreme Court seemed to agree, referencing "the inordinate risk confronting an officer as he approaches a person seated in an automobile" as it held that it was reasonable under the Fourth Amendment to order a driver to exit a vehicle during a stop, and "declin[ing] to accept the argument that traffic violations necessarily involve less danger to officers than other types of

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[102] *See, e.g.*, Matt Apuzzo, *Training Officers to Shoot First, and He Will Answer Questions Later*, N.Y. TIMES (Aug. 1, 2015), http://www.nytimes.com/2015/08/02/us/training-officers-to-shoot-first-and-he-will-answer-questions-later.html?_r=0, <https://perma.cc/K6HN-U6GD> (discussing the research of one expert witness that shows the high threat level under which police officers must act); Dean Scoville, *The Hazards of Traffic Stops: Pulling over a Motorist Can Result in a Citation or a Raging Gun Battle. You have to Be Prepared for Either One.*, POLICE MAG. (Oct. 19, 2010), http://www.policemag.com/channel/patrol/articles/2010/10/duty-dangers-traffic-stops.aspx, https://perma.cc/GC3L-FLPB (describing the traffic stop as "one of the most dangerous aspects of police work.").

[103] Radley Balko, *Once Again: Police Work Is NOT Getting More Dangerous*, WASH. POST (Oct. 2, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/10/02/once-again-police-work-is-not-getting-more-dangerous/, <https://perma.cc/CLQ8-64H5>; *see also* David Feige, *The Myth of the Hero Cop*, SLATE (May 25, 2015, 7:18 PM), http://www.slate.com/articles/news_and_politics/politics/2015/05/the_myth_of_the_hero_cop_police_unions_have_spread_a_dangerous_message_about.html, <https://perma.cc/9YRL-8L4N>.

[104] *See* FED. BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED REPORT FOR 2013, TABLE 35 (2014), https://www.fbi.gov/about-us/cjis/ucr/leoka/2013/tables/table_35_leos_fk_with_firearms_type_of_firearm_and_size_of_ammunition_2004-2013.xls, <https://perma.cc/K4GH-JBME> (showing that from 2004 through 2013, 345 law enforcement officers were killed with hand guns); FED. BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED REPORT FOR 2013, TABLE 61 (2014), https://www.fbi.gov/about-us/cjis/ucr/leoka/2013/tables/table_61_leos_ak_circumstance_at_scene_of_incident_2004-2013.xls, <https://perma.cc/FS6T-TWHR> (showing that from 2004 through 2013, 368 law enforcement officers were killed in auto accidents, 58 were killed in motorcycle accidents and another 101 were killed when they were struck by automobile vehicles).

[105] FED. BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED REPORT FOR 2013, Table 19 (2014), https://www.fbi.gov/about-us/cjis/ucr/leoka/2013/tables/table_19_leos_fk_circumstance_at_scene_of_incident_2004-2013.xls, <https://perma.cc/DBG2-UY6U>.

[106] FED. BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED REPORT FOR 2013, TABLE 61 (2014), https://www.fbi.gov/about-us/cjis/ucr/leoka/2013/tables/table_61_leos_ak_circumstance_at_scene_of_incident_2004-2013.xls, <https://perma.cc/FS6T-TWHR>.

[107] *See* BUREAU OF LABOR STATISTICS, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2014, CHART 2 (2015), http://www.bls.gov/news.release/pdf/cfoi.pdf, <https://perma.cc/G9D7-HKT8>.

[108] *See, e.g.*, Scoville, *The Hazards of Traffic Stops*, *supra* note 103.

[109] Pennsylvania v. Mimms, 434 U.S. 106 (1977).

confrontations."[110] The Court cited to a study that estimated 30% of police shootings occurred when an officer approached a suspect seated in an automobile to support the conclusion that traffic stops are just as dangerous as other types of confrontations.[111]

The problem with the Court's reasoning is it fails to take into consideration the number of times officers make traffic stops compared to the number of times they engage in other types of confrontations with suspects. In other words, if officers spend most of their time performing traffic stops, then the fact that 30% of officer deaths occur during traffic stops would suggest traffic stops are less dangerous than other types of confrontations.

The reality is that police officers spend most of their time performing traffic stops, which means that they are less dangerous than other types of confrontations. In 2011 police officers made over 26 million traffic stops[112] and just 11 officers were killed during those stops.[113] During the same year, police made just over 3 million arrests[114] and 23 police officers died in arrest situations.[115] In terms of relative dangerousness, police officers were eighteen times more likely to be killed during an arrest than during a traffic stop. The chance of an officer being killed in either situation is incredibly small: officers have a 0.00077% chance of being killed during an arrest and a 0.00004% chance of being killed during a traffic stop.

Police work has gotten safer over the years—police fatalities have fallen over time as measured per resident, per officer, and in absolute terms.[116] Available data suggests that 2015 was one of the safest years ever for law enforcement officers.[117] Despite this fact, the inherent hazard of policing is a central component of police training.[118] Officers

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[110] *Id.* at 110.

[111] *Id.*

[112] U.S. DEP'T OF JUSTICE, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, AT 15 (2013), http://www.bjs.gov/content/pub/pdf/pbtss11.pdf, https://perma.cc/2V95-GJL5.

[113] FED. BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED REPORT FOR 2011, Table 19 (2012), https://www.fbi.gov/about-us/cjis/ucr/leoka/2011/tables/table-19, <https://perma.cc/Y6AU-QWR9>.

[114] U.S. DEP'T OF JUSTICE, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, *SUPRA* NOTE 113, at 15.

[115] FED. BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED REPORT FOR 2011, Table 19, *supra* note 114.

[116] Daniel Bier, *It Has Never Been Safer to Be a Cop*, NEWSWEEK (Sept. 14, 2015, 3:27 PM), http://www.newsweek.com/it-has-never-been-safer-be-cop-372025, <https://perma.cc/3ZWU-GWJG>.

[117] *See id.* ("Fatalities and murders of police have been falling for decades—per resident, per officer and even in in absolute terms."); Mark J. Perry, *Is There Really a "War on Cops"? The Data Show That 2015 Will Likely Be One of the Safest Years in History for Police*, AM. ENTERPRISE INST. (Sept. 9, 2015, 2:58 PM), https://www.aei.org/publication/is-there-really-a-war-on-cops-the-data-show-that-2015-will-likely-be-one-of-the-safest-years-in-history-for-police/, <https://perma.cc/QMR4-WMES> (reporting that "2015 is on track to be the safest year for law enforcement in the US since 1887 (except for a slightly safer year in 2013)").

[118] *See generally* Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, THE ATLANTIC (Dec. 12, 2014), http://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/, <https://perma.cc/23B7-MV6V> (finding causation between police training and police use of force).

are taught the "first rule of law enforcement" is to go home at the end of their shift.[119] Since hesitation can be fatal, "officers are trained to shoot before a threat is fully realized, [and] to not wait until the last minute because the last minute may be too late."[120] This has led to what Justice Sotomayor has called a "shoot first, think later approach" to law enforcement.[121]

## IV. SLOSHING THROUGH THE "MORASS OF REASONABLENESS"

The lack of well-defined standards regarding the use of deadly force means that judges and juries have to slosh through the "morass of 'reasonableness'"[122] without any specific guidelines regarding what constitutes excessive force or how to determine if the use of deadly force was reasonable under the circumstances.[123] In order to support their defense that their use of force was reasonable "from the perspective of a reasonable officer on the scene,"[124] police officers often rely on expert testimony that overemphasizes the potential threat to officer safety.[125] This testimony serves to reinforce a juror's preconceived notion that law enforcement is extremely dangerous work and that police officers are under constant threat of attack.[126] In the absence of any specific instructions or guidance from the trial court on how to evaluate the reasonableness of force used by an officer, expert testimony from fellow officers is often the only reference point for jurors.[127]

Three recent cases illustrate just how malleable the concept of reasonableness is when it comes to the use of deadly force by police

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[119] *Id.*

[120] *Id.*

[121] Mullinex v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting).

[122] Scott v. Harris, 550 U.S. 372, 383 (2007).

[123] Harmon, *When Is Police Violence Justified?*, *supra* note 5, at 1144 (noting that the current "imprecise current legal framework" regarding the use of force influences juries because jury instructions are based on existing case law so they provide "exceptionally little help in shaping a determination about excessiveness.").

[124] *Graham*, 490 U.S. at 396.

[125] *See* Apuzzo, *Training Officers to Shoot First*, *supra* note 103 (describing an expert witness' research as having been "roundly criticized by [other] experts," including the Justice Department, which "denounced his findings as 'lacking in both foundation and reliability.'").

[126] James C. McKinley Jr. & Al Baker, *Grand Jury System, With Exceptions, Favors the Police in Fatalities*, N.Y. TIMES (Dec. 7, 2014), http://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html?_r=0, <https://perma.cc/PQ7T-DU6C> (pointing out that in grand jury proceedings for police shooting cases, "officers often testify that they perceived a deadly threat and acted in self-defense. This stance can inoculate them even if the threat later turns out to be false.").

[127] *See, e.g.*, Tom Jackman, *Defense Expert in John Geer Case Says Police Shooting Was Reasonable*, WASH. POST (Apr. 12, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/04/12/defense-expert-in-john-geer-case-says-police-shooting-was-reasonable/, <https://perma.cc/9HRT-F8SP> (reporting on the dispute about an expert witness' testimony in a police shooting case).

officers.[128] In each case, officers used deadly force against a suspect and were subsequently charged with a criminal offense.

### A. Police Officer Randall Kerrick

In September 2013, three police officers in Charlotte, North Carolina, responded to a 2:00 a.m. report of an attempted burglary.[129] Jonathan Ferrell, the suspected burglar, had been knocking on the doors of houses looking for help after he had been in a car accident.[130] Ferrell was walking toward the three Charlotte-Mecklenburg Police Department officers when one of the officers pointed a laser-sighted Taser at Mr. Ferrell's chest.[131] Ferrell then fled and Officer Randall Kerrick fired 12 rounds at him. Ferrell was hit ten times, eight while he was on the ground, killing him.[132]

At his trial on charges of voluntary manslaughter, the justification offered by Officer Kerrick for the use of deadly force was that he feared that *if* he had to get into a physical fight with Ferrell, that Ferrell *might* be able to gain control of his weapon and use it against him.[133] While that is a possibility, and weapon retention is a point of emphasis during police training, it is hardly a realistic fear since the Federal Bureau of Investigation (FBI) reports that between 2004 and 2013 there were 33 officers killed with their own weapon, an average of just over 3 a year.[134] Notably, there was no indication at the time he fired Officer Kerrick and Ferrell would be in a physical altercation, since Ferrell was fleeing. Further, Officer Kerrick was not alone; he had two other officers with him, one of whom had already drawn his weapon and aimed it at Ferrell.[135] Nevertheless, Officer Kerrick argued that it was reasonable for him to shoot a fleeing suspect based on the possibility that the suspect might decide to attack him and that, during the course of that attack, the

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[128] *See* Alpert, *How Reasonable is the Reasonable Man?*, *supra* note 83, at 486 (1994) (describing the objectivity assessment for police use of force as a "guided tour" with a different guide—the expert witness on use of force—for each tour).

[129] Christine Hauser, *Video Is Released from 2013 North Carolina Police Shooting of Jonathan Ferrell*, N.Y. TIMES (Aug. 6, 2015), http://www.nytimes.com/2015/08/07/us/dashboard-camera-video-is-released-from-2013-north-carolina-police-shooting.html, <https://perma.cc/PZR4-4GU6>.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] Jonathan M. Katz, *Shooting Unarmed Black Man Was Self-Defense, Officer's Lawyer Tells Charlotte Jury*, N.Y. TIMES (Aug. 18, 2015), http://www.nytimes.com/2015/08/19/us/charlotte-officer-argues-that-shooting-black-man-at-door-was-self-defense.html, <https://perma.cc/8Q4Z-VD39> ("Officer Kerrick, who was suspended without pay, testified that he had no choice but to shoot because he thought Mr. Ferrell might try to take his gun.").

[134] *See* FED. BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED REPORT FOR 2013, TABLE 14 (2014) https://www.fbi.gov/about-us/cjis/ucr/leoka/2013/tables/table_14_leos_fk_with_own_weapons_victim_officers_type_of_weapon_2004-2013.xls, <https://perma.cc/AEE4-KBJN> (noting that 33 victim officers were killed with their own weapons from 2004 through 2013).

[135] Hauser, *Video Is Released*, *supra* note 130.

suspect might be able to gain possession of his weapon and use it against him.[136] Officer Kerrick's argument would justify shooting any fleeing suspect who the officer reasonably thought might be able to overpower him or her physically *if* a physical altercation were to occur. The trial ended in a mistrial because the jury could not reach a unanimous verdict.[137]

### B. Police Officers Dominique Perez and Keith Sandy

In March of 2014, James Boyd was shot and killed by two police officers in Albuquerque, New Mexico, following a three-hour standoff with a team of tactical officers.[138] Boyd, who suffered from mental illness, was "illegally camping" when the officers attempted to take him into custody.[139] Boyd was holding a small knife in each of his hands when the officers claim he moved toward another "unarmed" officer, and that they fired to protect their fellow officer.[140] The "unarmed" officer was not carrying a firearm because he was a K-9 officer and was instead "armed" with a German Shepherd.[141]

Two of the officers involved in the shooting, Officer Dominique Perez and Officer Keith Sandy, were charged for an on-duty shooting, something which had not happened to a police officer in Albuquerque in over 50 years.[142] The officers argued during their preliminary hearing that it was reasonable for them to use deadly force to protect a fellow officer from a suspect wielding two small knives.[143] The officer's dog was not considered adequate protection, even though when executing search warrants, police officers routinely shoot and kill dogs because they believed that dogs can be considered threats to their safety.[144] While

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[136] Alex Johnson, *Officer in Jonathan Ferrell Killing: "He Kept Trying to Get My Gun"*, NBC (Aug. 13, 2015, 6:01 PM), http://www.nbcnews.com/news/us-news/officer-jonathan-ferrell-killing-he-kept-trying-get-my-gun-n409491, <https://perma.cc/L937-A5RJ>.

[137] *See* Abby Ohlheiser, *Mistrial Declared for Charlotte Police Officer Charged With Manslaughter*, WASH. POST (Aug. 21, 2015), http://www.washingtonpost.com/news/post-nation/wp/2015/08/19/a-jury-is-deliberating-the-fate-of-the-charlotte-police-officer-who-fatally-shot-jonathan-ferrell/, <https://perma.cc/VKU8-F227> ("The jury deliberated for three and a half days but failed to reach a unanimous decision.").

[138] Ryan Boetel, *APD Officer, Former Detective Will Stand Trial for Murder in Boyd Shooting*, ALBUQUERQUE J. (Aug. 18, 2015, 10:49 AM), http://www.abqjournal.com/630216/news/defense-closing-police-made-split-second-decision-in-fatal-shooting-of-boyd.html, <https://perma.cc/PP3Y-H8F8>.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *See id.* (explaining that lawyers for the police officers argued that they fired "because they thought the life of a K-9 officer approaching Boyd was in danger.").

[144] Radley Balko & J. L. Greene, *Cops Shoots Dog: Untrained Officers Commit "Puppycide"*, HUFFPOST POLITICS, (Apr. 27, 2012, 12:22 PM), http://www.huffingtonpost.com/2012/04/27/cop-shoots-dog-puppycide_n_1446841.html, <https://perma.cc/UM6Z-2G33> ("In drug raids, killing any dog in the house has become almost perfunctory."). *See generally* Conor Friedersdorf, *When Police Shoot Dogs*, THE ATLANTIC (Oct. 21, 2014),

a judge found that there was probable cause to try the two officers for murder, a jury will still have to apply the Supreme Court's vague reasonableness standard, which leaves the ultimate outcome of the case in doubt.[145]

### C. Police Officer Lisa Mearkle

In February of 2015, Police Officer Lisa Mearkle attempted to stop David Kassick because he was driving a car that had expired inspection and emission stickers.[146] Kassick attempted to flee from the officer.[147] After leading officers on a brief pursuit, Kassick pulled his car into a residential driveway and fled on foot.[148] Officer Mearkle then exited her car, pursued Kassick and was able to get close enough to him to use her Taser in an effort to subdue him. Kassick was struck by the darts fired from the Taser and fell to the ground.[149]

The rest of the incident was recorded by the camera attached to the officer's Taser.[150] The video shows Officer Mearkle repeatedly ordering Kassick to lie face down on the ground and show her his hands.[151] Over the course of a minute, she activates her Taser three times. Kassick remained face down on the ground, often writhing in pain.[152] At times he stretched out his hands so that she could see them, but at other times his left hand moved underneath his body, out of Officer Mearkle's view.[153] Officer Mearkle then fired two shots into Kassick's back while he was lying on the ground; he died shortly thereafter.[154]

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http://www.theatlantic.com/national/archive/2014/10/policeman-shoots-dog-video-contradicts-his-explanation/381651/, <https://perma.cc/TSZ7-ASNU> (discussing the frequency of police shooting dogs).

[145] Elizabeth Reed & Blair Miller, *APD Officers Will Stand Trial for Murder in Shooting of James Boyd*, KOB 4 (Aug. 18, 2015, 12:50 PM), http://www.kob.com/article/stories/s3882437.shtml#.Vx7ZW6MrKT8, <https://perma.cc/2WMR-RKD8>.

[146] *See* Megan Trimble, *Hummelstown Traffic Stop to Fatal Officer-Involved Shooting: Timeline of Events*, PENNLIVE (Mar. 24, 2015, 6:21 PM), http://www.pennlive.com/midstate/index.ssf/2015/03/kassick_mearkel_shooting_humme.html, <https://perma.cc/RF44-KDJP>.

[147] Sebastian Murdock, *Police Officer Who Killed Unarmed Motorist Cleared of All Charges*, HUFFINGTON POST (Nov. 6, 2015, 12:57 PM), http://www.huffingtonpost.com/entry/police-officer-lisa-mearkle_us_563cc556e4b0411d3070a9f4, <https://perma.cc/UCB4-QVPB>.

[148] Wesley Robinson, *Hummelstown Officer Shot Unarmed Man in the Back, District Attorney Says*, PENNLIVE (Mar. 24, 2015, 12:31 PM), http://www.pennlive.com/midstate/index.ssf/2015/03/video_from_taser_shows_unarmed.html, <https://perma.cc/SS6Y-YX28>.

[149] *Id.*

[150] *See* Dauphin County District Attorney's Office, VIDEO OF OFF. LISA MEARKLE/DAVID KASSICK, CRIMEWATCH (Nov. 5, 2015), https://dauphin.crimewatchpa.com/da/310/post/video-lisa-mearkle-david-kassick, <https://perma.cc/8BE6-KLQF>.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] Robinson, *Hummelstown Officer Shot Unarmed*, *supra* note 149

The video convinced prosecutors to charge her with murder, voluntary manslaughter, and involuntary manslaughter.[155] At her trial, Officer Mearkle called an expert on the use of force by police officers who "walked the jury through a number of police techniques, from 'the red zone'—an area around the torso where officers have known suspects to conceal weapons—to the 'reaction time principle,' or the three-quarters of a second an officer takes to perceive a movement or action and react."[156]

On cross-examination, the defense expert admitted that the guidelines relied upon by police officers for the use of deadly force had not been scientifically proven with control groups or peer reviewed, since "law enforcement journals are not scientific journals."[157] Despite the fact that Officer Mearkle admitted that she never saw any weapon in Kassick's possession and he never acted aggressively toward her, the jury acquitted Officer Mearkle of all the charges against her,[158] including the charge of involuntary manslaughter, which is defined as causing the death of another person by "doing of a lawful act in a reckless or grossly negligent manner."[159]

### D. The Reasonable Officer Standard

What makes these results possible is that juries are asked to view the situation through the eyes of a "reasonable officer."[160] Inherent in this definition is the idea that police officers see things differently than an average reasonable civilian. What might be an innocuous gesture to a civilian is seen as a "furtive gesture" by a well-trained police officer.[161] Since the trier of fact needs to understand how a trained police officer would view the situation, the "reasonable officer" standard opens the door to testimony regarding the training of police officers and

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[155] *See id.*

[156] Megan Trimble, *Officer Mearkle Followed Accepted Police Guidelines in Deciding to Use Force: Defense Expert*, PENNLIVE (Nov. 4, 2015, 1:24 PM), http://www.pennlive.com/news/2015/11/lisa_mearkle_murder_trial_davi.html#incart_river_index_topics, <https://perma.cc/KW7H-GCRU>.

[157] *Id.*

[158] Matt Miller, *Jury Acquits Hummelstown Police Officer Lisa Mearkle of All Charges*, PENNLIVE (Nov. 5, 2015, 2:42 PM), http://www.pennlive.com/midstate/index.ssf/2015/11/mearkle_verdict.html, <https://perma.cc/9ZJP-KQEV>.

[159] 18 PA.STAT. AND CONS. STAT. ANN. § 2504(a) (West 2016); Commonwealth v. Fabian, 60 A.3d 146, 151 (2013).

[160] Graham v. Connor, 490 U.S. 386, 396 (1989).

[161] *See* Kathryn R. Urbonya, *Dangerous Misperceptions: Protecting Police Officers, Society, and the Fourth Amendment Right to Personal Security*, 22 HASTINGS CONST. L.Q. 623, 661 (1995) ("Some courts have determined that a 'furtive gesture' by a suspect justifies an officer to reasonably believe the suspect was reaching for a weapon. To justify a shooting under the 'furtive gesture' doctrine, officers do not need to see a gun, knife, or even a glint of steel. . . Furtive gestures can create an inference of danger because experts believe that the suspect has time to kill the officer by the time a police officer sees a glint of steel.").

departmental policies on the use of force.[162] The quality of training the officer received and the soundness of department policies on the use of force are not important.[163] If an officer was trained to do something a certain way, then doing it that way is reasonable, even if the effectiveness of that technique has never been scientifically validated.[164]

The "21-Foot Rule" is an example of how police officers can rely on their training to justify their actions. The 21-Foot Rule was developed in 1983 by Lieutenant John Tueller, a firearms instructor in the Salt Lake City Police Department.[165] Tueller set up a drill where a "suspect" armed with a knife was placed a certain distance away from an officer with a holstered sidearm.[166] The goal of the drill was to determine at what distance an assailant armed with an edged weapon would reach an officer before the officer was able to draw the sidearm and accurately fire at the assailant.[167] Tueller came to the conclusion that a suspect who was within twenty-one feet of an officer could reach that officer and strike before the officer was able to draw a weapon.[168]

The 21-Foot Rule has been part of police training ever since it was developed, despite the fact that Tueller's findings have never been scientifically proven.[169] Even more troubling is that the 21-Foot Rule only applies to situations where an officer's gun is holstered.[170] One expert has written that while the 21-Foot Rule has become "informal doctrine within the law enforcement community, I have heard it misstated, misrepresented, and bastardized by use-of-force, firearms, and police practices experts from all sides."[171] Some departments are

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[162] *See, e.g.*, Radley Balko, *When the "Reasonable Police Officer" Standard Isn't Reasonable At All*, WASH. POST (Dec. 17, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/12/17/when-the-reasonable-police-officer-standard-isnt-reasonable-at-all/, <https://perma.cc/7L9B-APSK> (recounting the different emphasis placed by the prosecution and defense on Baltimore Police Department trainings and policies in the trial of an officer charged with the involuntary manslaughter of Freddie Gray).

[163] *See, e.g.*, *id.* (highlighting defense counsel's emphasis on police department written policy being "routinely ignored" in order to argue that officer did not act unreasonably).

[164] *See Graham*, 490 U.S. at 396 ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.").

[165] Ron Martinelli, *Revisiting the "21-Foot Rule"*, POLICE MAG. (Sept. 18, 2014), http://www.policemag.com/channel/weapons/articles/2014/09/revisiting-the-21-foot-rule.aspx, <https://perma.cc/V3ZG-RZTM>.

[166] Beth Schwartzapfel, *Will the "21 Foot" Defense Work for the Chicago Cop Who Shot Laquan McDonald?*, THE MARSHALL PROJECT (Nov. 25, 2015, 7:15 AM), https://www.themarshallproject.org/2015/11/25/will-the-21-foot-defense-work-for-the-chicago-cop-who-shot-laquan-mcdonald#.UbdqY6Z9C, <https://perma.cc/N6QR-P2PL>.

[167] *See* John Carlin, *The 21-Foot Rule*, WSLS10 (Mar. 2, 2016, 5:15 PM), http://wsls.com/2016/03/02/the-21-foot-rule/, <https://perma.cc/77ZG-NVJE> (describing officer training drills based on the 21-foot rule).

[168] Schwartzapfel, *Will the "21 Foot" Defense Work*, *supra* note 167.

[169] *See* Martinelli, *Revisiting the "21-Foot Rule"*, *supra* note 166 ("No forensic testing, examination, reconciliation of data, or scientific oversight of a research model was ever conducted" to test the 21-Foot Rule).

[170] Schwartzapfel, *Will the "21 Foot" Defense Work*, *supra* note 167.

[171] Martinelli, *Revisiting the "21-Foot Rule"*, *supra* note 166; *see also* Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, THE ATLANTIC (Dec. 12, 2014), http://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-

considering no longer teaching officers the 21-Foot Rule since it "is often interpreted by officers to mean they are justified in shooting any suspect with a knife or edged weapon who comes within 21 feet of them."[172]

Judges and juries are obliged to "slosh [] through the factbound morass of 'reasonableness'" without clear legal standards and under the influence of popular misconceptions about the dangerousness of law enforcement and the need for officers to use deadly force.[173] The end result is that almost any use of deadly force can appear to be reasonable.

## V. UNRECOGNIZED BUT PERVASIVE PATTERNS OF EXCESSIVE FORCE

Case-specific determinations regarding the reasonableness of use of deadly force by police officers can obscure patterns of excessive force. Compounding the problem is the lack of reliable data regarding the use of force by police officers.[174] The Department of Justice has acknowledged that current systems in place for reporting the use of force by police officers are inadequate.[175]

While the FBI collects data on the number of police officers killed and assaulted every year, there has not been an equivalent effort to collect information on the number of civilians killed or assaulted by police officers.[176] However, the Bureau of Justice Statistics (BJS) was

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ferguson/383681/, <https://perma.cc/23B7-MV6V> (describing being taught at the police academy "that a knife-carrying suspect standing 20 feet away can run up to an officer and start stabbing before the officer can get their gun out of the holster.").

[172] Wesley Lowery, *Police Chiefs Consider Dramatic Reforms Officer Tactics, Training to Prevent So Many Shootings*, WASH. POST (Jan. 29, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/01/29/police-chiefs-consider-dramatic-reforms-to-officer-tactics-training-to-prevent-so-many-shootings/, <https://perma.cc/X7ZG-T4ZS>.

[173] Scott v. Harris, 550 U.S. 372, 383 (2007).

[174] *See* Naomi Shavin, *Our Government Has No Idea How Often Police Get Violent With Civilians*, NEW REPUBLIC (Aug. 25, 2015), http://www.newrepublic.com/article/119192/police-use-force-stats-us-are-incomplete-and-unreliable, <https://perma.cc/F5VM-7H6G> ("[N]o federal authority comprehensively and reliably documents the use of force by police officers across the country."); *see also* Matt Apuzso & Sarah Cohen, *Data on Use of Force By Police Across the U.S. Proves Almost Useless*, N.Y. TIMES (Aug. 11, 2015), http://www.nytimes.com/2015/08/12/us/data-on-use-of-force-by-police-across-us-proves-almost-useless.html, <https://perma.cc/P37C-VW53> (describing a Justice Department survey revealing that police departments nationwide "kept track of their shootings, but in accounting for all uses of force, the figures varied widely."); *see generally* Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119 (2013) (identifying factors contributing to a lack of data on policing).

[175] U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL HOLDER URGES IMPROVED DATA REPORTING ON BOTH SHOOTINGS OF POLICE OFFICERS AND USE OF FORCE BY THE POLICE (2015), http://www.justice.gov/opa/pr/attorney-general-holder-urges-improved-data-reporting-both-shootings-police-officers-and-use, <https://perma.cc/XNE9-C53Q> ("'The troubling reality is that we lack the ability right now to comprehensively track the number of incidents of *either* uses of force directed at police officers *or* uses of force by police,' the Attorney General said in his remarks.") (emphasis in original).

[176] *But see How the Washington Post Is Examining Police Shootings in the U.S.*, WASH. POST (June 30, 2015), http://www.washingtonpost.com/national/how-the-washington-post-is-examining-police-

charged with collecting data on the number of homicides committed by law enforcement from 2003 to 2009.[177] The number of "officers feloniously killed" during that time was 359[178] and the number of homicides by law enforcement reported to the BJS was 2,931.[179]

Any analysis of the use of deadly force by police officers needs to take into account the number of police officers feloniously killed and the number of homicides committed by police officers. While comparing these numbers does not provide specific information on whether the use of deadly force by police officers was justified in any particular case, knowing the percentage of suspects who are killed relative to the number of police officers who are killed illustrates how often police officers are using deadly force compared to how many times they are victims of deadly force. It stands to reason that the more likely officers are to be killed by suspects, the more reasonable it is for them to use deadly force in order to protect themselves.

Using the numbers above, when an encounter between police officers and a suspect ends with the death of either the officer or the suspect, it is the suspect who is killed 89% of the time. However, the data collected by BJS on the number of homicides committed by law enforcement was incomplete: BJS noted in 2015 that there were "concerns about definitions, data quality, and undercoverage error" in its data on homicide by law enforcement.[180] They ultimately concluded that the Arrest-Related Death Program (ARDP) captured at best 49% and at worst 36% of the homicides committed by law enforcement.[181]

If we assume the ARDP only captured 49% of the homicides committed by law enforcement, then the number of homicides by law enforcement over this period increases to 5,979, and when an encounter between police officers and a suspect ended with the death of either the officer or the suspect, the suspect was killed 94% of the time.[182] If we assume that the ARDP only captured 36% of the homicides committed by law enforcement then the number of homicides by law enforcement over this period increases to 8,118 and, when an encounter between

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shootings-in-the-us/2015/06/29/f42c10b2-151b-11e5-9518-f9e0a8959f32_story.html, <https://perma.cc/8CVF-BP72> (explaining the Washington Post's database compilation of "every fatal shooting in the United States by a police officer in the line of duty in 2015.").

[177] ANDREA M. BURCH, BUREAU OF JUSTICE STATISTICS, ARREST RELATED DEATHS, 2003–2009 STATISTICAL TABLES (2011), http://www.bjs.gov/content/pub/pdf/ard0309st.pdf, https://perma.cc/GRD2-WSBL [hereinafter ARREST RELATED DEATHS, 2003–2009 STATISTICAL TABLES].

[178] *See* FED. BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED REPORT FOR 2009, TABLE 1 (2010), https://www.fbi.gov/about-us/cjis/ucr/leoka/2009, <https://perma.cc/A6DH-J5K3> (showing number of victim officers for each year from 2000 to 2009).

[179] ARREST RELATED DEATHS, 2003–2009 STATISTICAL TABLES, *SUPRA* note 178, at 4.

[180] BUREAU OF JUSTICE STATISTICS, ARREST RELATED DEATHS PROGRAM: DATA QUALITY PROFILE 1 (2015), http://www.bjs.gov/content/pub/pdf/ardpdqp.pdf, <https://perma.cc/4Q6U-DEEX>.

[181] *ID.*

[182] For the raw data from which these numbers are calculated, see ARREST RELATED DEATHS, 2003–2009 STATISTICAL TABLES, *SUPRA* note 178.

police officers and a suspect ended with the death of either the officer or the suspect, it was the suspect who was killed 96% of the time.[183]

Another factor to consider is the number of police officers who were feloniously killed in an "ambush" over this period. From 2003 to 2009, seventy-nine officers were killed by ambush,[184] the threat of which could increase the likelihood that officers would use deadly force when encountering suspects. Presumably these officers had no opportunity to use deadly force in their own defense. If we no longer factor these deaths into the total number of officers feloniously killed and we assume the ARDP captured 49% of the homicides committed by law enforcement, it is the suspect who was killed 95% of the time.[185] If we no longer factor these deaths into the total number of officers feloniously killed and we assume the ARDP captured 36% of the homicides committed by law enforcement, it was the suspect who was killed 97% of the time.[186]

During 2015, The Washington Post collected data on the number of civilians shot and killed by police officers.[187] The Washington Post identified 965 civilians shot by officers in 2015.[188] The FBI has not released the number of police officers "feloniously assaulted" in 2015, but the nonprofit "Officer Down Memorial Page" and the "Preliminary 2015 Law Enforcement Officer Fatalities Report" from the National Law Enforcement Officers Memorial Fund can be relied upon for a rough estimate.[189]

The "Officer Down Memorial Page" identifies thirty-nine police officers who were killed by gunfire in 2015.[190] However, that figure is over-inclusive since it includes four police officers who were shot in Puerto Rico and four police dogs.[191] In addition, six of the officers are identified as having been killed in "ambush" situations.[192] That leaves twenty-five police officers killed in the line of duty by gunfire in 2015. Using The Washington Post and "Officer Down Memorial Page" estimates for 2015, when an encounter between police officers and a suspect ended with the death of either the officer or the suspect, it was

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[183] *Id.*

[184] FED. BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED REPORT FOR 2009, TABLE 19 (2010), https://www.fbi.gov/about-us/cjis/ucr/leoka/2009, <https://perma.cc/A6DH-J5K3>.

[185] *See id.*; ARREST RELATED DEATHS, 2003–2009 STATISTICAL TABLES, ***SUPRA*** note 178.

[186] *Id.*

[187] *See A Year of Reckoning: Police Shoot Nearly 1,000*, WASH. POST (Dec. 26, 2015), http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/, <https://perma.cc/RKG8-KADV> (describing findings in its report on police killings in the United States).

[188] *Id.*

[189] *Honoring Officers Killed in 2015*, OFFICER DOWN MEM'L PAGE (2015), https://www.odmp.org/search/year?year=2015, <https://perma.cc/U463-GQAZ>; NAT'L LAW ENFORCEMENT OFFICERS MEM'L FUND, *Preliminary 2015 Law Enforcement Officer Fatalities Report* 1 (2015), http://www.nleomf.org/assets/pdfs/reports/2015-EOY-Officer-Fatalities-Report.pdf, <https://perma.cc/9M6Q-BRTQ>.

[190] OFFICER DOWN MEM'L PAGE, *HONORING Officers Killed in 2015*, *supra* note 190.

[191] *Id.*

[192] *Id.*

the suspect who was killed 97% of the time.

According to the "Preliminary 2015 Law Enforcement Officer Fatalities Report" from the National Law Enforcement Officers Memorial Fund, fifty-two police officers were feloniously killed in 2015 and forty-two of them were killed by gunfire.[193] Of the forty-two officers killed by gunfire, six of them were killed in ambush situations.[194] That leaves thirty-six police officers killed in the line of duty by gunfire in 2015. Using The Washington Post and the "Preliminary 2015 Law Enforcement Officer Fatalities Report" estimates for 2015, when an encounter between police officers and a suspect ended with the death of either the officer or the suspect, it was the suspect who was killed 96% of the time.

Those numbers should raise serious concerns about the use of deadly force by police officers. As a matter of public policy, we would not want to see more police officers killed by suspects than suspects killed by police officers. However, we would also expect police officers to only use deadly force as a last resort and to delay the use of deadly force until a threat materializes. That would create the possibility that the officer would be killed before having the opportunity to use deadly force against a suspect. With all that in mind, if deadly encounters between police officers and suspects are ending with the death of the suspect 94%–97% of the time, then police officers may be using deadly force before an objectively reasonable threat to their safety has materialized.

Another concern is that the percentage of suspects killed relative to law enforcement officers killed appears to have remained relatively constant since 2003.[195] Whatever deterrent effect internal discipline, criminal prosecution, and civil rights litigation may have on the use of deadly force, it does not appear to be increasing over time. In contrast, the violent crime rate over the last decade has fallen significantly.[196] From 2004 to 2013, the FBI estimates that violent crime dropped by approximately 20%.[197]

The lack of clear guidance to law enforcement on when it is appropriate to use deadly force, along with aggressive police tactics, inadequate training, the lack of internal review and discipline for officers who use excessive force, the lack of effective legal means to punish officers who use excessive force, and an overestimation of the potential dangers facing law enforcement may all contribute to excessive use of deadly force by police officers.

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[193] NAT'L LAW ENFORCEMENT OFFICERS MEM'L FUND, *Preliminary 2015 Law Enforcement Officer Fatalities Report*, *supra* note 190, at 1.

[194] *Id.* at 2.

[195] ARREST RELATED DEATHS, 2003–2009 STATISTICAL TABLES, ***SUPRA*** note 178.

[196] *See* FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2013, TABLE 1A (2014), https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/1tabledatadecoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1994-2013.xls, <https://perma.cc/F3VV-8DFK> (depicting crime statistics in the United States from 1994 to 2013).

[197] *See id.* (depicting crime statistics in the United States from 1994 to 2013).

## VI. CONCLUSION: WHOSE LIFE MATTERS MORE?

At a recent forum entitled "Taking Policing to a Higher Standard," hundreds of the nation's most prominent police chiefs, Department of Justice officials, and police training experts convened in Washington, D.C. to discuss new training methods and departmental policies that could lead to a decrease in the number of fatal shootings each year.[198] At that meeting, Tom Manger, the Chief of Police of Montgomery County, Maryland, identified a troubling predominant attitude among police officers: "It almost gets to the point that officers are thinking 'my safety is more important that the safety of anyone else's.'. . . We've got to change the culture of American policing. . . . Our goal should be to have everyone go home safely at the end of the day."[199]

Ultimately, in order to fashion rules regarding the use of deadly force by police officers, we need to decide if the life of a police officer is more valuable than that of another citizen. Using deadly force against someone who *might* have a weapon is only reasonable if we value the safety of the officer more than that of the suspect. Debates over restrictions on the use of force by police officers often begin and end with the argument that imposing restrictions on the use of deadly force will result in the death of more police officers.[200] Even assuming that is true, the counterargument is that not imposing those restrictions will just as surely lead to the death of more suspects who are unarmed, guilty of minor, nonviolent offenses or—even worse— innocent.

If everyone is entitled to equal justice under the law, then we should not tolerate a criminal justice system that values the lives of police officers more than the lives of suspects. The current law regarding the use of deadly force by police officers results in an Orwellian criminal justice system where all are equal but some are more equal than others. If we value all lives equally, we should require officers to actually see a gun before they decide to use deadly force. Academics and activists alike have expressed support for policies and laws that reflect the idea that a threat should be "imminent" before police resort to the use of deadly force.[201] Police departments and policymaking bodies should support efforts to collect reliable data about the use of force and when it is needed, and implement changes in training, tactics, and culture among

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[198] Lowery, *Police Chiefs Consider Dramatic Reforms*, *supra* note 173.

[199] *Id.*

[200] *See, e.g.*, Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, THE ATLANTIC (Dec. 12, 2014), http://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/, <https://perma.cc/23B7-MV6V> (noting that a common phrase among officers discussing use of force is: "Better to be judged by twelve than carried by six.").

[201] *See generally* Harmon, *When Is Police Violence Justified?*, *supra* note 5 (arguing that a threat must be imminent before force can be used by police officers); *Limit Use of Force*, CAMPAIGN ZERO, http://www.joincampaignzero.org/solutions/#solutionsoverview, <https://perma.cc/9VQK-ULY2> (calling for a revised use of force policies that authorize the use of force only when there is an imminent threat).

law enforcement organizations to ensure that instances of unwarranted and excessive use of force are diminished. In turn, the judicial branch should revise its police officer use of force analysis to incorporate a realistic view of the dangerousness of police work and the deterrents operating to limit use of force, in order to provide meaningful guidance to legislatures and law enforcement bodies about protecting civilian's constitutional rights.

# Judicial Neutrality Awash with Ideology: Justice Scalia, Sexual Orientation, and Rhetorical Personae

Carlo A. Pedrioli*



> It is hard to admit that one's political opponents are not monsters . . . .[1]

## I. INTRODUCTION

Issues related to sexual orientation have generated great controversy in both the public and legal spheres[2] in the United States,[3]

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[1] United States v. Windsor, 133 S. Ct. 2675, 2711 (2013) (Scalia, J., dissenting).

[2] The legal sphere is a type of technical sphere. For a discussion of the public and technical spheres,

and the U.S. Supreme Court has not managed to avoid such controversy.[4] Indeed, the Supreme Court has been at the center of some of the controversy.[5] Since 1986, the Court has heard and decided several major cases related to sexual orientation and the Fifth and Fourteenth Amendments.[6] Despite restricting sexual minority rights in *Bowers v. Hardwick*,[7] the Court expanded such rights in the more recent cases *Romer v. Evans*,[8] *Lawrence v. Texas*,[9] *United States v. Windsor*,[10] and *Obergefell v. Hodges*.[11]

One member of the Court who did not agree with the Court's development of constitutional rights for sexual minorities was Justice Antonin Scalia, an appointee of President Ronald Reagan[12] and an

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see G. Thomas Goodnight, *The Personal, Technical, and Public Spheres of Argument: A Speculative Inquiry into the Art of Public Deliberation*, 18 J. AM. FORENSIC ASS'N 214 (1982).

[3] This phenomenon is not new. *See generally* DAVID K. JOHNSON, THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT (2004) (unpacking the controversy over sexual minorities in the federal government that became public during the 1950s).

[4] *See, e.g.*, Jess Bravin, *Historic Win for Gay Marriage: High Court Rulings Lift Bans on Federal Same-Sex Benefits, Weddings in California*, WALL ST. J. (June 26, 2013), http://www.wsj.com/articles/SB10001424127887324520904578553500028771488, <https://perma.cc/5882-MNDQ>; Bill Chappell, *Supreme Court Declares Same-Sex Marriage Legal in All 50 States*, NPR (June 26, 2015), http://www.npr.org/sections/thetwo-way/2015/06/26/417717613/supreme-court-rules-all-states-must-allow-same-sex-marriages, <https://perma.cc/5AST-EV6Z>.

[5] *See, e.g.*, Bravin, *supra* note 4; Chappell, *supra* note 4.

[6] In the 1970s, the Court "dismissed for want of a substantial federal question" an appeal from the Minnesota Supreme Court regarding a denial of a civil marriage license to a gay couple. Baker v. Nelson, 409 U.S. 810 (1972). The opinion contained only one complete sentence. *Id.*; *see also* Baker v. Nelson, 291 Minn. 310 (1971) (holding that Minnesota law did not provide for same-sex marriage and that such law did not offend the U.S. Constitution).

Sexual orientation-related issues that the Court has heard have not been limited to those under the Fifth and Fourteenth Amendments. *See, e.g.*, Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) (considering First Amendment right of the Veterans Council, a private group that organized its own St. Patrick's Day parade in Boston each year, to expressive association and not forcing the Veterans Council to allow the Irish-American Gay, Lesbian, and Bisexual Group to participate in the parade); Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (considering the First Amendment right of the Boy Scouts to expressive association, which involved not having gay members).

[7] 478 U.S. 186 (1986). In the 1970s, the Supreme Court had affirmed, without opinion, a district court's upholding of a sodomy statute in Virginia. Doe v. Commonwealth's Attorney for City of Richmond, 425 U.S. 901 (1976). *See also* Doe v. Commonwealth's Attorney for City of Richmond, 403 F. Supp. 1199 (E.D. Va. 1975).

[8] 517 U.S. 620 (1996).

[9] 539 U.S. 558 (2003).

[10] 133 S. Ct. 2675 (2013). On the same day that it decided *Windsor*, the Supreme Court decided *Hollingsworth v. Perry*, which addressed the constitutionality of a California proposition, Proposition 8, that had changed the state constitution to ban same-sex marriage. 133 S. Ct. 2652 (2013). However, because the Court decided that the petitioners in the case, proponents of Proposition 8, lacked standing, the Court did not reach a decision on the merits.

[11] 135 S. Ct. 2584 (2015).

[12] Harold J. Spaeth, *Scalia, Antonin*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 882 (Kermit L. Hall ed., 2d ed. 2005). Before Reagan nominated Scalia to U.S. Supreme Court, Scalia served on the U.S. Court of Appeals for the District of Columbia, also as a Reagan appointee. *Id.* at 883. Before becoming a judge, Scalia had been a law professor and had worked in both the Nixon Administration and the Ford Administration. *Id.* Scalia remained on the Supreme Court for almost thirty years until his sudden death in mid-February 2016. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html, <https://perma.cc/6R78-

outspoken formalist jurist.[13] Although not on the Court until shortly after it issued the decision in *Bowers*, Scalia was a supporter of the spirit of *Bowers* and a consistent critic of the Court's move toward constitutional rights for sexual minorities. Indeed, Scalia penned several sharp dissents in the sexual orientation cases that the Court has decided.

In light of Scalia's dissenting from the Court's trajectory in sexual orientation cases decided under the Fifth and Fourteenth Amendments, this Article, drawing upon rhetorical theory, considers Scalia's rhetoric of sexual orientation. In his dissents in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*, Scalia performed and constructed various rhetorical personae, or roles, including the first, second, and third personae, that produced rhetorical hypocrisy grounded in a heteronormative ideology.[14] The first persona, or speaker of the dissents,[15] that Scalia performed was that of a neutral justice. The second persona, or the audience implied in the dissents,[16] that Scalia constructed would receive appeals to tradition and majoritarian rule favorably and, ignoring the possibility of change in tradition and likewise ignoring minority rights, be susceptible to the alleged political threat of sexual minorities. The third persona, or the marginalized party in the dissents,[17] that Scalia constructed consisted of the sexual minority as a criminal or other individual not thought highly of, such as a person with a drug addiction, a polygamist, or a prostitute. Although Scalia's performance of a neutral justice was skillful, his construction of the second and third personae undermined his performance of the first persona. Essentially, a justice who claimed neutrality was appealing to an implied audience that ignored minority rights and irrationally feared a small minority group. Meanwhile, the justice constructed sexual minorities as criminals or other poorly regarded individuals.

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MAUY>; Nina Totenberg, *Justice Antonin Scalia, Known for Biting Dissents, Dies at 79*, NPR (Feb. 15, 2016), http://www.npr.org/2016/02/13/140647230/justice-antonin-scalia-known-for-biting-dissents-dies-at-79, <https://perma.cc/DJ8Z-KPK9>.

[13] R. Randall Kelso & Charles Kelso, *How the Supreme Court Is Dealing with Precedents in Constitutional Cases*, 62 BROOK. L. REV. 973, 977–78 (1996). For an overview of four major judicial philosophies, including formalism, Holmesianism, instrumentalism, and natural law, see *id.* at 976–83.

[14] The term *heteronormativity* references "the institutions, structures of understanding, and practical orientations that make heterosexuality seem not only coherent—that is, organized as a sexuality—but also privileged." Lauren Berland & Michael Warner, *Sex in Public*, 24 CRITICAL INQUIRY 547, 548 n.2 (1998). The "coherence [of heteronormativity] is always provisional, and its privilege can take several (sometimes contradictory) forms: unmarked, as the basic idiom of the personal and the social; or marked as a natural state; or projected as an ideal or moral accomplishment." *Id.* Heteronormativity "consists less of norms that could be summarized as a body of doctrine than of a sense of rightness produced in contradictory manifestations—often unconscious, immanent to practice or to institutions." *Id.* Moreover, heteronormativity is different from heterosexuality in that, unlike the latter, the former does not have a parallel or opposite. *Id.* Homosexuality functions as the parallel or opposite of heterosexuality. *Id.*

[15] Paaige K. Turner & Patricia Ryden, *How George Bush Silenced Anita Hill: A Derridian View of the Third Persona in Public Argument*, 37 ARGUMENTATION & ADVOC. 86, 88 (2000).

[16] Edwin Black, *The Second Persona*, 56 Q.J. SPEECH 109, 112 (1970).

[17] Philip Wander, *The Third Persona: An Ideological Turn in Rhetorical Theory*, 35 CENT. STATES SPEECH J. 197, 209 (1984).

To advance this argument about rhetorical hypocrisy grounded in heteronormative ideology, the Article will begin by providing some background on *Romer*, *Lawrence*, *Windsor*, and *Obergefell*. Then the Article will discuss persona theory, with particular focus on the first, second, and third personae. Because of its consideration of those who are marginalized in discourse, third persona analysis is especially appropriate for judicial rhetoric regarding sexual minorities, who have experienced historical and continuing discrimination.[18] Finally, the Article will offer a persona analysis of Scalia's dissents in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*. The analysis should contribute toward a deeper understanding of both the anatomy of marginalizing legal discourse, discourse in this case ultimately damaging to the dignity of sexual minorities, and also the credibility[19] problem that incongruence among personae in one's rhetoric can cause.

## II. BACKGROUND ON *ROMER*, *LAWRENCE*, *WINDSOR*, AND *OBERGEFELL*

This section of the Article offers some background information on *Romer*, *Lawrence*, *Windsor*, and *Obergefell*. Discussion of each case will include the basic facts of the case, the Court's reasoning, and Scalia's reasoning. Reference is made to the occasional other non-majority opinion, but the section does not review all concurrences and dissents.

In 1996, the Supreme Court decided *Romer v. Evans*.[20] The case concerned Amendment 2, a statewide constitutional referendum that the people of Colorado had passed in 1992.[21] Voters had passed Amendment 2 in response to ordinances in cities such as Aspen, Boulder, and Denver that had provided protection from sexual-orientation-based discrimination in areas like "housing, employment, education, public accommodations, and health and welfare services."[22] Amendment 2 read as follows:

"No Protected Status Based on Homosexual, Lesbian or

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[18] As of this writing, the U.S. Congress had not added sexual orientation to the list of protected classes under key federal civil rights statutes. *See* 1964 Civil Rights Act, 42 U.S.C. § 2000e-2 (2015) (employment discrimination); 1968 Fair Housing Act, 42 U.S.C. § 3604 (2015) (housing discrimination). Thus, outside of a state or local municipality with a law against discrimination based on sexual orientation, an employer could fire someone based on the employee's sexual orientation, and a prospective seller could fail to sell a house to someone based on the prospective buyer's sexual orientation.

[19] One way to think of credibility is as "the image of the source [of a message] in the minds of receivers." James C. McCroskey & Jason J. Teven, *Goodwill: A Reexamination of the Construct and Its Measurement*, 66 COMM. MONOGRAPHS 90, 90 (1999). The study of credibility dates back to classical times, and the concept has been of great rhetorical importance ever since. *Id.*

[20] 517 U.S. 620 (1996).

[21] *Id.* at 623.

[22] *Id.* at 623–24.

> Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing."[23]

Justice Anthony Kennedy delivered the opinion of the Court that struck down Amendment 2, and Justices John Paul Stevens, Sandra Day O'Connor, David Souter, Ruth Bader Ginsburg, and Stephen Breyer joined Kennedy's opinion.[24] While Colorado claimed that Amendment 2 put sexual minorities "in the same position as all other persons,"[25] Kennedy noted that Amendment 2 "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect the named class."[26] Indeed, Amendment 2 withdrew from sexual minorities, and no other groups, legal protection from discrimination.[27] Kennedy even pointed out that a fair reading of Amendment 2 was that the provision deprived sexual minorities of the protection of general laws against arbitrary discrimination.[28] With such "a special disability" imposed upon them, sexual minorities faced majoritarian "animosity."[29] Given the lack of rationality that Kennedy described, Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment.[30]

Justice Scalia, joined by Chief Justice William Rehnquist and Justice Clarence Thomas, dissented.[31] Scalia read Amendment 2 as denying sexual minorities only "*preferential* treatment."[32] He cited *Bowers v. Hardwick*[33] for the principle that a state could criminalize same-sex sexual conduct and argued that, if a state could criminalize such conduct, the state could "merely prohibit[ ] all levels of state government from bestowing *special protections* upon homosexual conduct."[34] As Scalia read the case, Amendment 2 merely involved

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[23] *Id.* at 624 (citation omitted).

[24] *Id.* at 621. *Romer* was the first opinion from the U.S. Supreme Court that defended the civil rights of sexual minorities. MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 70 (2013).

[25] *Romer*, 517 U.S. at 626.

[26] *Id.* at 624.

[27] *Id.* at 627.

[28] *Id.* at 630.

[29] *Id.* at 631, 634.

[30] *Id.* at 631, 635–36.

[31] *Id.* at 621.

[32] *Id.* at 638–39 (Scalia, J., dissenting) (emphasis in original).

[33] 478 U.S. 186 (1986).

[34] *Romer*, 517 U.S. at 641 (Scalia, J., dissenting) (emphasis in original).

majoritarian protection of sexual morality.[35] Accordingly, he found that the Amendment had a rational basis.[36]

In 2003, seven years after deciding *Romer*, the Supreme Court decided *Lawrence v. Texas*.[37] The case concerned a police response in Houston, Texas, to a report of a weapons disturbance.[38] The exact facts of what happened on the night in question remained somewhat unclear.[39] As the police told the story, upon entering the apartment of John Geddes Lawrence, they had seen Lawrence and Tyron Garner engaged in what the Court later described as "a sexual act."[40] Whether Lawrence and Garner were engaged in sexual conduct with each other was later disputed.[41] Regardless, the Court claimed that apparently no one had questioned the right of the police to enter the apartment.[42] Authorities charged Lawrence and Garner under the Texas Penal Code, which provided as follows: "'A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.'"[43] The Penal Code defined "'[d]eviate sexual intercourse'" as the following: "'(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.'"[44]

The facts of *Lawrence*, as the Court understood them, were remarkably similar to those in *Bowers v. Hardwick*,[45] which the Court had decided seventeen years earlier. In *Bowers*, Michael Hardwick and another man had been charged with sodomy that had occurred in Hardwick's bedroom.[46] Apparently, the arresting officer had gone to Hardwick's home with an expired warrant and, according to Hardwick, claimed he could enter Hardwick's home since the officer "was acting under good faith."[47] The Georgia law had provided that "'[a] person

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[35] *Id.* at 648.

[36] *Id.* at 640.

[37] Lawrence v. Texas, 539 U.S. 558 (2003).

[38] *Id.* at 562.

[39] *See* Dale Carpenter, *The Unknown Past of* Lawrence v. Texas, 102 MICH. L. REV. 1464, 1475–514 (2004) (discussing and analyzing conflicting narratives of the case).

[40] *Lawrence*, 539 U.S. at 562–63. The particulars of *Lawrence* may not have presented the best example of a committed romantic relationship. One commentator noted that Kennedy did "a thorough job of domesticating John Lawrence and Tyron Garner—Lawrence an older white man, Garner a younger black man, who for all we know from the opinion, might have just been tricking with each other." Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1408 (2004). Indeed, the nature of the relationship may have been "quite fleeting, lasting only one night and lacking any semblance of permanence or exclusivity." Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1904 (2004).

[41] Carpenter, *supra* note 39, at 1489–90.

[42] *Lawrence*, 539 U.S. at 563.

[43] *Id.*

[44] *Id.*

[45] Bowers v. Hardwick, 478 U.S. 186 (1986).

[46] *Id.* at 187–88.

[47] Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1438–40 (1992). The expired warrant was for a $50 fine that Hardwick already had paid. *Id.* at 1438. Hardwick claimed that the officer previously had been harassing him because of his sexual orientation and that three of

commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.'"[48] Eventually, the district attorney had opted not to present the case to the grand jury, but Hardwick had sued the government in federal court on constitutional grounds.[49]

Justice Byron White had delivered the opinion of the Court, joined by Chief Justice Warren Burger and Justices Lewis Powell, Rehnquist, and O'Connor.[50] Powell had been the deciding vote.[51] White had framed the legal issue as "whether the Federal Constitution confer[red] a fundamental right upon homosexuals to engage in sodomy."[52] Commenting that proscriptions against sodomy had "ancient roots,"[53] he had provided what had seemed to be exhaustive lists of state sodomy laws in effect when the Bill of Rights and the Fourteenth Amendment had been ratified in 1791 and 1868.[54] With no support from his historical account for protection of the conduct in question, White had declined to find a new right under the Due Process Clause.[55] He also had accepted as a rational basis for the statute what he assumed was a belief of the majority of Georgia residents "that homosexual sodomy [was] immoral and unacceptable."[56]

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the officer's associates had beaten up Hardwick outside of his home. *Id.* at 1437–39. When arresting Hardwick, the officer had refused to leave the bedroom or even turn his back while Hardwick and the other man dressed. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1425 (2d ed. 1988).

[48] *Bowers*, 478 U.S. at 200 (Blackmun, J., dissenting).

[49] *Id.* at 188.

[50] *Id.* at 187.

[51] *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 525 (1994). At conference, Powell had voted to strike down the Georgia sodomy statute. KLARMAN, *supra* note 24, at 36. However, the idea of a fundamental right to intimate same-sex conduct bothered him. *Id.* at 37. Powell had a hard time understanding the concept of homosexuality, and, in the course of discussing the case with one of his law clerks, Powell stated that he did not know anyone who was gay. JEFFRIES, *supra*, at 521. The clerk attempted to explain the concept to Powell. *Id.* at 521–22. Although not out, the clerk with whom Powell shared his comment was gay and delivered "a 'very emotional' speech urging Powell to support sexual freedom as a fundamental right." *Id.*

Despite eventually voting to uphold the Georgia law, Powell admitted in 1990 that he had made a mistake with his vote in *Bowers*. *Id.* at 530. Powell noted that when he had re-read the opinions several months after the Court issued *Bowers*, he had thought that the dissenting perspective was better than that of the Court. *Id.*

[52] *Bowers*, 478 U.S. at 190. Hardwick had never claimed a fundamental right to same-sex sodomy. Tribe, *supra* note 40, at 1953.

[53] *Bowers*, 478 U.S. at 192. The "ancient roots" claim has come into question as being incomplete and misleading. For instance, in at least some of the city-states of classical Greece, same-sex relationships were not illegal; rather, the culture expected free male citizens to have same-sex relationships with younger males. William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1444 (1993). Although not formally marriages, the transgenerational same-sex relationships may have been the "functional equivalents" of marriages. *Id.* In classical Rome, long-term same-sex relationships and, at least prior to the third century A.D., marriages existed. JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY 70–71, 82 (1980). The emperor Nero himself was involved in more than one same-sex marriage. *Id.* at 82. Because virtually all Roman authors were men, most accounts of same-sex relationships in classical Rome are of men, but some accounts of same-sex relationships that involved women do exist. *Id.* at 82–84.

[54] *Bowers*, 478 U.S. at 192 n.5, 193 n.6.

[55] *Id.* at 195.

[56] *Id.* at 196.

Burger had offered a brief concurring opinion that added to the majority opinion.[57] In it, he had maintained that condemnation of the conduct in question was "firmly rooted in the Judeao-Christian moral and ethical standards."[58] Moreover, Burger had claimed, the Romans had considered the conduct "a capital crime."[59] In terms of how same-sex relations had been considered under English common law, Burger had quoted William Blackstone regarding the "'the infamous *crime against nature*,'" whose mention had been "'a disgrace to human nature'" and "'a crime not fit to be named.'"[60] With such precedents, Burger had maintained, holding "that the act of homosexual sodomy [was] somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[61]

Two dissents had challenged the reasoning of the *Bowers* Court vigorously. Justice Harry Blackmun had filed one such dissent, joined by Justices William Brennan, Thurgood Marshall, and Stevens.[62] In his dissent, Blackmun had moved away from tradition, quoting Justice Oliver Wendell Holmes for the idea "that '[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.'"[63] As Blackmun noted in his opinion, Holmes had continued, "'It is still more revolting if the grounds upon which [the rule of law] was laid down have vanished long since, and the rule simply persists from blind imitation of the past.'"[64] Instead of tradition, Blackmun had focused on a right to privacy,[65] noting that the conduct in question had taken place in Hardwick's home, to which the Fourth Amendment had given "special significance."[66] Majoritarian offense at private behavior would not be sufficient to justify the law.[67]

Stevens, joined by Brennan and Marshall, had filed the other

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[57] *Id.* at 187. At conference, Burger had "led off with a tirade." JEFFRIES, *supra* note 51, at 522. If the Court declared sodomy a fundamental right, the chief justice feared, then "incest, prostitution, and the like would surely follow." *Id.*

[58] *Bowers*, 478 U.S. at 196 (Burger, C.J., concurring). The story of Sodom and Gomorrah in *Genesis* frequently has been used to justify these standards; the assumption has been that same-sex relations explained why God destroyed the cities. JOHN J. MCNEILL, THE CHURCH AND THE HOMOSEXUAL 42 (1993). *See Genesis* 18:16–19:29. However, disagreement regarding the nature of the sin of Sodom and Gomorrah exists, and an alternative perspective has suggested that the sin was lack of hospitality to strangers. MCNEILL, *supra*, at 42–50. From such a perspective, Christianity, having missed a lesson in hospitality found in one of its own sacred texts, eventually failed to extend hospitality to sexual minorities. *Id.* at 50.

[59] *Bowers*, 478 U.S. at 196 (Burger, C.J., concurring). Burger presumably had not been referencing an era of ancient Rome prior to the third century A.D., when same-sex marriage had been legal. *See* BOSWELL, *supra* note 53, at 70–71.

[60] *Bowers*, 478 U.S. at 197 (Burger, C.J., concurring) (emphasis in original).

[61] *Id.*

[62] *Id.* at 187.

[63] *Id.* at 199 (Blackmun, J., dissenting) (quoting Oliver Wendell Homes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

[64] *Id.*

[65] *Id.* at 203.

[66] *Id.* at 206.

[67] *Id.* at 213 (noting that "the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest").

dissent.[68] Stevens had observed that the statute on its face applied to both heterosexuals and sexual minorities, and he had found a liberty interest that the law threatened.[69] Stevens had been unable to find a valid reason why the state could enforce the statute selectively against sexual minorities.[70] Given this reading of the case, Hardwick had possessed a constitutional claim.[71]

With *Bowers* as the key Supreme Court precedent that hung over the Court in *Lawrence*, Kennedy once again delivered the opinion of the Court, this time joined by Stevens, Souter, Ginsburg, and Breyer.[72] O'Connor concurred in the judgment.[73] Kennedy noted that the foundations of *Bowers* were not as solid as the *Bowers* Court had made them seem.[74] He observed that sodomy laws originally had applied both to sexual minorities and heterosexuals, not just to sexual minorities, and that laws against only same-sex sodomy had not developed until the last third of the twentieth century.[75]

Kennedy also noted recent trends away from the thinking in *Bowers*. For instance, many of the anti-sodomy laws that the *Bowers* Court had cited were not enforced, which Powell had pointed out in 1986.[76] In 1986, anti-sodomy laws had been in effect in twenty-five states, but the number shrank to thirteen by 2003.[77] Additionally, Supreme Court case law was moving away from *Bowers*. For instance, *Romer* had recognized that discrimination "'born of animosity toward the class of persons affected'" was a violation of the Equal Protection Clause.[78] Kennedy believed that *Bowers* as precedent "demean[ed] the lives of homosexual persons."[79]

Drawing on the liberty interest under the Due Process Clause of the Fourteenth Amendment, as Stevens had in his *Bowers* dissent, Kennedy said that the view of Stevens should have controlled in *Bowers*.[80] Accordingly, Kennedy overruled *Bowers*, noting that the case had been

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[68] *Id.* at 187.

[69] *Id.* at 214, 217–18 (Stevens, J., dissenting). While the law facially applied to both heterosexuals and sexual minorities, because of the nature of intimate sexual conduct as a function of one's sexual orientation, the ban had a much greater impact on sexual minorities. *See* Peter Odell Campbell, *The Procedural Queer: Substantive Due Process,* Lawrence v. Texas*, and Queer Rhetorical Futures*, 98 Q.J. SPEECH 203, 217 (2012).

[70] *Bowers*, 478 U.S. at 218–20.

[71] *Id.* at 220.

[72] Lawrence v. Texas, 539 U.S. 558, 561 (2003).

[73] *Id.* Although voting with the majority, O'Connor disagreed with Kennedy on the reasoning. She would not have overruled *Bowers*, whose majority she had joined. *Id.* at 579 (O'Connor, J., concurring). However, she found that the statute in *Lawrence* was a violation of the Equal Protection Clause of the Fourteenth Amendment because the statute discriminated against sexual minorities. *Id.* at 579, 582.

[74] *Id.* at 571.

[75] *Id.* at 568, 570.

[76] *Id.* at 572.

[77] *Id.* at 573.

[78] *Id.* at 574.

[79] *Id.* at 575.

[80] *Id.* at 577–78.

wrong when the Court had issued it.[81] Of note, Kennedy did not articulate a standard of review for the due process analysis.[82]

Scalia, again joined by Rehnquist and Thomas, dissented.[83] Scalia believed that U.S. society had relied on *Bowers* and that the Court should not overrule the precedent.[84] In terms of history, sodomy, whether involving an opposite-sex or same-sex couple, was illegal, so banning some type of sodomy had a historical basis.[85] Seeing no tradition of protection for same-sex relations, Scalia found no protection for a fundamental right, so rational basis review would apply to the Texas statute.[86] Majoritarian sentiment "that certain forms of sexual behavior are 'immoral and unacceptable'" provided a rational basis for the law.[87]

In 2013, a decade after *Lawrence*, the Court decided *United States v. Windsor*.[88] In this case, Edith Windsor and Thea Spyer, who were lesbian, had known each other since 1963.[89] Both residents of New York State, they registered as domestic partners with that state in 1993, and they married lawfully in Ontario, Canada, in 2007.[90] New York recognized the Canadian marriage.[91] At her death in 2009, Spyer left all of her estate to Windsor, who claimed an estate tax exemption for herself as a surviving spouse.[92] However, federal law, specifically what Congress had called the Defense of Marriage Act (DOMA) when the law had been passed in 1996, barred Windsor's claim.[93] Although Windsor paid the tax of $363,053, she then sued the federal government on constitutional grounds.[94]

Section 3 of DOMA provided the following:

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[81] *Id.* at 578. Before he joined the Supreme Court, Kennedy had shown signs that he would be open to the overturning of *Bowers*. Tribe, *supra* note 40, at 1954.

[82] Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1578 (2004).

[83] *Lawrence*, 539 U.S. at 561.

[84] *Id.* at 589–92 (Scalia, J., dissenting).

[85] *Id.* at 595–96.

[86] *Id.* at 598–99.

[87] *Id.* at 599. In response to O'Connor's equal protection argument, Scalia maintained that the law banned everyone, whether heterosexual or not, from engaging in same-sex sodomy, so no equal protection violation resulted. *Id.* at 599–600.

[88] United States v. Windsor, 133 S. Ct. 2675 (2013).

[89] *Id.* at 2682–83.

[90] *Id.* at 2683.

[91] *Id.*

[92] *Id.* at 2682.

[93] *Id.* at 2682–83. DOMA had come into existence during the politically charged atmosphere of an election year. In 1996, Republican presidential candidate Senator Bob Dole had courted religious conservatives in his party by co-sponsoring the bill that became DOMA. KLARMAN, *supra* note 24, at 60–61. Dole had dared Democrat President Bill Clinton to sign the bill if Clinton really were opposed to same-sex marriage, as Clinton had claimed to be during the 1992 presidential election. *Id.* at 46, 62. Congressional debate on the bill had involved attacks on sexual minorities. *Id.* at 61. The bill had passed the House by a vote of 342 to 67 in July of 1996 and the Senate by a vote of 85 to 14 that September. *Id.* at 63. Despite supposedly having been the most pro-sexual minority president to his time, Clinton had signed the bill. *Id.* at 46, 63. Of note, when Clinton had signed the bill in September 1996, he had done so after midnight and without any ceremony. *Id.* at 63.

[94] *Windsor*, 133 S. Ct. at 2682–83 (citation omitted).

> "'In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.'"[95]

The provision of the statute implicated over 1,000 federal laws that involved marital status.[96]

During the litigation, the Department of Justice, at the direction of President Barack Obama, announced that it would not defend Section 3 of DOMA because of doubts about the provision's constitutionality.[97] Still, the Executive Branch expressed an intent to continue to enforce Section 3.[98] Based on the Executive's decision, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives intervened in the case to defend Section 3.[99]

Kennedy again delivered the opinion of the Court, joined by Ginsburg and Breyer, as well as Justices Sonia Sotomayor and Elena Kagan.[100] Although procedural issues complicated the case, the majority found them surmountable. Despite its lack of interest in defending Section 3 of DOMA, the Executive met the requirements of Article III standing before the Court because the district court had ordered a refund of Windsor's money, which was a real injury to the Executive.[101] Moreover, BLAG offered "substantial argument" in favor of Section 3's constitutionality to satisfy prudential concerns regarding adversity over Section 3.[102]

In terms of the substance of the case, Section 3 violated the Due Process Clause of the Fifth Amendment, including the equal protection principles found therein.[103] Section 3, Kennedy argued, sought to injure a class of people, sexual minorities, that New York wished to protect.[104] The provision "impose[d] a disadvantage, a separate status, and so a stigma upon all who [sought to] enter into same-sex marriages made

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[95] *Id.* at 2683. National argument over same-sex marriage had begun after the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (vacating a trial court decision that had dismissed a constitutional challenge to Hawaii's heterosexual-only marriage statute and remanding the case so that the government could have an opportunity to provide a compelling state interest for discriminating against same-sex couples). Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861, 869–70 (2006).

[96] *Windsor*, 133 S. Ct. at 2683.

[97] *Id.* at 2683–84.

[98] *Id.* at 2684.

[99] *Id.*

[100] *Id.* at 2681.

[101] *Id.* at 2686.

[102] *Id.* at 2687–88.

[103] *Id.* at 2695.

[104] *Id.* at 2695–96.

lawful by the unquestioned authority of the States."[105] Moreover, a House report contemporaneous with DOMA showed that such an effect was not an accident. The report noted "that DOMA express[ed] 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comport[ed] with traditional (especially Judeo-Christian) morality.'"[106] Burdens that Section 3 placed on same-sex couples included loss of government healthcare benefits, certain bankruptcy protection, and a right to joint burial in veterans' cemeteries, as well as having additional complications with joint filing of state and federal taxes.[107] Of note, Kennedy did not articulate a standard of review for his due process/equal protection analysis.[108]

Scalia dissented, joined in full by Thomas and on the procedural matter by Chief Justice John Roberts.[109] On that procedural matter, Scalia saw no controversy between Windsor and the Executive because the latter felt the lower court's decision should be affirmed.[110] Despite seeing no controversy, Scalia offered his view on the merits of the case, and he reviewed Section 3 for rationality.[111] The government could meet rational basis review through having attempted "to enforce traditional moral and sexual norms," avoid complicated choice-of-law issues, or promote stability in federal law, he argued.[112]

In 2015, just two years after deciding *Windsor*, the Court decided *Obergefell v. Hodges*.[113] *Obergefell* was the leading case among four cases that came from Michigan, Kentucky, Ohio, and Tennessee.[114] In these cases, fourteen same-sex couples and two men whose same-sex partners had died challenged their respective states' restricting of civil marriage to only opposite-sex couples.[115] By the time *Obergefell* arrived at the Supreme Court, numerous lawsuits that sought marriage for same-sex couples had worked their way through the federal district and appellate courts.[116]

Kennedy yet again delivered the opinion of the Court, joined once more by Ginsburg, Breyer, Sotomayor, and Kagan.[117] Kennedy noted

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[105] *Id.* at 2693.

[106] *Id.*

[107] *Id.* at 2694.

[108] Robert C. Farrell, *Justice Kennedy's Idiosyncratic Understanding of Equal Protection and Due Process, and Its Costs*, 32 QUINNIPIAC L. REV. 439, 483 (2014). At least for the equal protection component of due process, because of the history of discrimination against sexual minorities, heightened scrutiny may have been appropriate. *See* Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 7 (2004) (noting under what circumstances the Court has adopted heightened scrutiny for equal protection analysis).

[109] *Windsor*, 133 S. Ct. at 2681, 2697.

[110] *Id.* at 2699 (Scalia, J., dissenting).

[111] *Id.* at 2706.

[112] *Id.* at 2707, 2708.

[113] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[114] *Id.* at 2593.

[115] *Id.*

[116] *Id.* at 2597.

[117] *Id.* at 2591.

that, for decades, the Court had held that the right to civil marriage was a fundamental right under the Due Process Clause of the Fourteenth Amendment.[118] The justice then elaborated upon "four principles and traditions" that explained why marriage was a fundamental right for opposite-sex couples and why marriage should be a fundamental right for same-sex couples.[119] First, the right to choice about marriage was inherent in individual autonomy.[120] Second, marriage was "a two-person union unlike any other in its importance to the committed individuals."[121] Third, marriage afforded families legal protections and facilitated meaning and significance among family members.[122] Fourth, marriage was "a keystone of our social order."[123] Here, Kennedy listed various "rights, benefits, and responsibilities" associated with marriage such as those regarding taxation, inheritance, property, hospital access, medical decision-making, adoption, health insurance, child custody, and other important matters.[124] Kennedy pointed out that restricting the fundamental right[125] of marriage for same-sex couples imposed "stigma and injury" on same-sex couples.[126]

In addition to considering restrictions on marriage to same-sex couples under the Due Process Clause, Kennedy remained within the Fourteenth Amendment and also considered restrictions on marriage under the Equal Protection Clause. Previously, the Court had upheld the right to marriage for opposite-sex couples under the Equal Protection Clause as well as under the Due Process Clause.[127] In limiting marriage to opposite-sex couples, states were denying same-sex couples, whose relationships long had received social disapproval, the benefits of marriage available to opposite-sex couples.[128] This type of classification based on sexual orientation "serve[d] to disrespect and subordinate" sexual minorities.[129] Nonetheless, Kennedy did not identify sexual minorities as members of a suspect class that would warrant a heightened level of judicial review for purposes of equal protection analysis.[130]

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[118] *Id.* at 2598–99.

[119] *Id.* at 2599.

[120] *Id.*

[121] *Id.*

[122] *Id.* at 2600.

[123] *Id.* at 2601.

[124] *Id.*

[125] Although Kennedy did not say so in his *Obergefell* opinion, when a fundamental right is at issue, the government generally must show a compelling state interest for restricting the right and that the means used for promoting the state interest are necessary for achieving that interest. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 831 (2015). In barely considering state interests and the associated means used to promote the interests, Kennedy failed to offer an example of careful strict scrutiny analysis regarding the abridgement of the right to marriage for same-sex couples.

[126] *Obergefell*, 135 S. Ct. at 2602.

[127] *Id.* at 2603 (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)).

[128] *Id.* at 2604.

[129] *Id.*

[130] After *Windsor*, some clarification was needed regarding whether sexual orientation constituted a suspect class. *See generally* Stacey L. Sobel, *When* Windsor *Isn't Enough: Why the Court Must*

Based on violations of both the Due Process Clause and the Equal Protection Clause, Kennedy held that same-sex couples had the right to civil marriage in all states and that each state had to recognize same-sex marriages performed in other states.[131] To do otherwise, Kennedy determined, would violate the dignity of sexual minorities.[132]

Scalia dissented, joined by Thomas.[133] In his dissent, Scalia warned against what he called the "Court's threat to American democracy."[134] He observed that the Supreme Court had put an end to the public debate on same-sex marriage.[135] Despite the Court's action, no provision of the Constitution prohibited state restrictions on marriage, especially since states long had regulated domestic relations.[136] Regardless, the Court, an elite body unrepresentative of the U.S. public, had forced its view of same-sex marriage on the people.[137] As Scalia saw it, the Court's course of action was really a case of hubris.[138]

## III. PERSONA THEORY

Persona theory addresses the roles, or *personae*, that communicators, or *rhetors*, perform or create through discourse.[139] At least four types of personae, including the first, second, third, and fourth personae, can be present in discourse. Such personae can be present in the same discourse.[140] Since they are directly relevant to the present study, this section of the Article will focus on the first, second, and third personae, but, for theoretical completeness, the section also will address the fourth persona.[141]

The first persona is "the constructed speaker/writer or 'I' of discourse."[142] Such a persona is "'the created personality put forth in the

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*Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J.L. & PUB. POL'Y 493 (2015). However, Kennedy declined to provide such clarification in *Obergefell*.

[131] *Obergefell*, 135 S. Ct. at 2607–08.

[132] *Id.* at 2608.

[133] *Id.* at 2591.

[134] *Id.* at 2626 (Scalia, J., dissenting).

[135] *Id.* at 2627.

[136] *Id.* at 2627–28.

[137] *Id.* at 2628–29.

[138] *Id.* at 2629–30.

[139] Turner & Ryden, *supra* note 15, at 88.

[140] *See generally* Brenden E. Kendall, *Personae and Natural Capitalism: Negotiating Politics and Constituencies in a Rhetoric of Sustainability*, 2 ENVTL. COMM. 59 (2008) (analyzing the second and third personae in PAUL HAWKEN, AMORY LOVINS & L. HUNTER LOVINS, NATURAL CAPITALISM: CREATING THE NEXT INDUSTRIAL REVOLUTION (1999)).

[141] The discussion of the first persona in this section of the Article is an abridged version of a discussion of the first persona that initially appeared in Carlo A. Pedrioli, *Professor Kingsfield in Conflict: Rhetorical Constructions of the U.S. Law Professor Persona(e)*, 38 OHIO N.U. L. REV. 701, 704–06 (2012). The author of that article has retained copyright to the article.

[142] Turner & Ryden, *supra* note 15, at 88.

act of communicating'"[143] and allows the rhetor to identify with the audience.[144] In literature, the first persona is the speaker or character a writer creates in the course of crafting writing like poetry or fiction.[145] In a way, a first persona is a rhetorical mask that the rhetor chooses to wear as he or she performs rhetorically,[146] and because the persona at issue is a mask, the persona is not necessarily the rhetor himself or herself.[147]

Several examples of first personae that rhetors have adopted will help illustrate these principles. For instance, in 1916, Marcus Garvey, the then-unknown leader of the new Universal Negro Improvement Association, faced the problem of leading members of an outsider racial group against social injustice.[148] In part, Garvey met the challenge by assuming a Black Moses persona.[149] In his rhetoric, Garvey relied upon subjects like election, captivity, and liberation, calling to mind Moses and the Jewish experiences from the Old Testament.[150] While Garvey was not actually Moses, he did assume the Moses persona. A more recent rhetor who adopted the Moses persona, among other personae, was Louis Farrakhan. In his Million Man March speech, delivered on October 16, 1995, in Washington, D.C., Farrakhan attempted to enhance his credibility, or *ethos*,[151] which had suffered due to Farrakhan's prior inflammatory racial rhetoric, by assuming a prophetic persona, specifically that of Moses.[152] In a related example, Martin Luther King, Jr. assumed in his rhetoric against civil rights violations the general persona of a prophet, although despite his skillful rhetoric, King was not necessarily an actual prophet.[153]

Regardless of which first persona or personae a rhetor assumes, the notion of the first persona comes from Greek and Roman theater and in Latin suggests the idea of a "mask" or a "false face."[154] In this theatrical context, the actor would put on a mask and assume the persona of the mask.[155] Such a historical understanding gives rise to the notion that the persona is pre-existing and that the actor only needs to assume the

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[143] Paul Newell Campbell, *The* Personae *of Scientific Discourse*, 61 Q.J. SPEECH 391, 394 (1975) (quoting WALKER GIBSON, PERSONA: A STYLE STUDY FOR READERS AND WRITERS xi (1969)).

[144] Walter G. Kirkpatrick, *Bolingbroke and the Opposition to Sir Robert Walpole: The Role of a Fictitious Persona in Creating an Audience*, 32 CENT. STATES SPEECH J. 12, 12 (1981).

[145] Emory B. Elliott, Jr., Persona *and Parody in Donne's* The Anniversaries, 58 Q.J. SPEECH 48, 49 (1972); Campbell, *supra* note 143, at 391.

[146] Thomas O. Sloan, *The Persona As Rhetor: An Interpretation of Donne's* Satyre III, 51 Q.J. SPEECH 14, 14 (1965).

[147] *Id.* at 26.

[148] B. L. Ware & Wil A. Linkugel, *The Rhetorical Persona: Marcus Garvey As Black Moses*, 49 COMM. MONOGRAPHS 50, 52–53 (1982).

[149] *Id.* at 61.

[150] *Id.* at 56–61.

[151] *Ethos* is Aristotle's term for credibility. McCroskey & Teven, *supra* note 19, at 90. Aristotle believed that credibility was the strongest means of persuading. *Id.*

[152] John L. Pauley II, *Reshaping Public Persona and the Prophetic Ethos: Louis Farrakhan at the Million Man March*, 62 W.J. COMM. 512, 522–23 (1998).

[153] Campbell, *supra* note 143, at 394.

[154] Ware & Linkugel, *supra* note 148, at 50.

[155] *Id.*

role.[156] Much of the existing scholarship on persona theory takes for granted that an advocate assumes a role from a selection of cultural archetypes, or original models or prototypes.[157]

In addition to helping to explain the personae advocates can adopt for themselves, persona theory also addresses the roles, as the rhetor constitutes them, that audiences play in the communication process.[158] These roles that audiences play are the second, third, and fourth personae; respectively, the personae are idealized, marginalized, and collusive in nature.

Discussion of audience-based personae begins with the second persona. In discourse, critics can identify ideological appeals and in turn locate an "implied auditor," who is supposed to respond to the given appeals.[159] In this sense, *ideology* refers to "the network of interconnected convictions that functions in a [person] epistemically and that shapes his [or her] identity by determining how he [or she] views the world."[160] This implied auditor is the "'you' of a discourse who is ideologically positioned."[161] Thus, by identifying the ideological appeals of the rhetor, critics "can see in the auditor implied by a discourse a model of what the rhetor would have his [or her] real auditor become."[162] This manner of reading discourse can make moral judgment of the discourse feasible.[163]

An example illustrates how the second persona can play out in discourse. One reading of some of Governor Ronald Reagan's 1980 presidential election speeches suggests that at times Reagan's rhetoric was unethical. For instance, Reagan spoke at Stone Mountain, Georgia, where the Ku Klux Klan historically had burned crosses, and declared that Jefferson Davis was one of his heroes.[164] Also, Reagan spoke in Philadelphia, Mississippi, where three civil rights workers had been killed in 1964, and expressed his belief in states' rights.[165] In this case, the ideological appeals, implicit as well as explicit, of segregation, the Confederacy, and states' rights would sit well with certain demographics in the South that were hostile to civil rights. Hence, an analysis of the

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[156] *Id.*

[157] *Id. But see* Carlo A. Pedrioli, *Constructing Modern-Day U.S. Legal Education with Rhetoric: Langdell, Ames, and the Scholar Model of the Law Professor Persona*, 66 RUTGERS L.J. 55, 79–80 (2013) (noting that communicators can construct first personae as opposed to simply adopting pre-existing first personae).

[158] Turner & Ryden, *supra* note 15, at 88–89; Charles E. Morris, *Pink Herring & The Fourth Persona: J. Edgar Hoover's Sex Crime Panic*, 88 Q.J. SPEECH 228, 230 (2002) [hereinafter *Pink Herring*].

[159] Black, *supra* note 16, at 112.

[160] *Id.*

[161] Turner & Ryden, *supra* note 15, at 89.

[162] Black, *supra* note 16, at 113.

[163] *Id.*

[164] *Historians Discuss Reagan's Legacy*, PBS NEWSHOUR (June 7, 2004), http://www.pbs.org/newshour/bb/remember-jan-june04-historians_06-07/, <http://perma.cc/FCA4-ZUAG> (comments of Roger Wilkins).

[165] *Id.*

artifacts, including the symbolic contexts of the remarks,[166] would reveal an ugly ideology and an ugly implied audience, which would indicate that the discourse itself was unethical.

Such discourse can have material consequences. The second persona "may be an invitation turned down; it may even be an offensive invitation; but it is an invitation which can be heard and responded to here and now."[167] The second persona is "an invitation to act," and when the actual audience of the discourse assumes the second persona, consequences may result. For instance, voting for a candidate with a subtly racist ideology can help lead to racially insensitive government policies.

In addition to the second persona, another potential aspect of the rhetor's view of the audience upon which persona theory can shed light is the third persona. The third persona is the audience that is absent, rejected, or negated in a particular communication.[168] While the first persona is the assumed "I" and the second persona is the assumed "you," the third persona is "the 'it' that is not present, that is objectified in a way 'you' and 'I' are not."[169] This persona reflects the marginalization of members of groups based on race, sex, sexual orientation, class, religion, or similar categories.[170] What is said and what is not said are both relevant to understanding the third persona.[171]

The creation of the U.S. Constitution in the summer of 1787 offers several such examples. The fifty-five individuals who met in Philadelphia and framed the document were prosperous men.[172] The majority of the Framers had enjoyed training in the law and accordingly held a great degree of social privilege.[173] The Framers were able to voice their own perspectives in the creation of the Constitution, but no women or racial minorities were present to voice their own perspectives. Also, men without property lacked voice. This marginalization became part of the Constitution, which, for example, originally did not allow women or Blacks to vote.[174] In creating the Constitution, then, the Framers crafted a host of third personae: women, racial minorities like Blacks and Native Americans, and men from the lower classes.

A more recent example of the third persona comes from President George H. W. Bush's handling of his controversial 1991 U.S. Supreme Court nomination of Clarence Thomas, in which Bush framed Professor

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[166] Jeffrey B. Kurtz, *Condemning Webster: Judgment and Audience in Emerson's "Fugitive Slave Law,"* 87 Q.J. SPEECH 278, 280 (2001).

[167] Wander, *supra* note 17, at 209.

[168] *Id.*

[169] *Id.*

[170] *Id.* at 216.

[171] *Id.* at 210.

[172] LINDA R. MONK, THE WORDS WE LIVE BY: YOUR ANNOTATED GUIDE TO THE CONSTITUTION 10, 12 (2003); Leonard W. Levy, *Introduction: The Making of the Constitution, 1776–1789*, *in* ESSAYS ON THE MAKING OF THE CONSTITUTION xxxiv (Leonard W. Levy ed., 1987).

[173] CLINTON ROSSITER, 1787: THE GRAND CONVENTION 147 (1966).

[174] MONK, *supra* note 172, at 12–13.

Anita Hill as a third persona. During the confirmation hearings in the Senate, Hill, who was Black as well as female, accused Thomas of having sexually harassed her in the workplace.[175] In his press conferences on the controversy, Bush employed several tactics to support his nominee: opting to discuss Thomas and his virtues rather than Hill and her charges, marginalizing Hill's supporters, and focusing on the allegedly inappropriate nature of the charges instead of the sexual harassment nature of the charges.[176] In doing so, Bush constructed a role for Hill that was "irrelevant, unimportant, [and] incredible," but Bush never explicitly said anything bad about Hill herself.[177] In this rhetorical situation,[178] Bush discursively crafted Hill into the third persona.

To date, the final audience-related persona is the fourth persona, which prior scholarship has considered in the study of sexual minority communication, particularly with regard to passing.[179] Although this persona will not play a role in the analysis section of the present Article, this section of the Article offers some background on the fourth persona for theoretical completeness. The fourth persona is "a collusive audience constituted by the textual wink."[180] Like the second persona, the fourth persona is an implied auditor of a given ideological position, but a key distinction between these two personae is that the discourse that creates the fourth persona operates at two levels: the level of those in the know, or the clairvoyants, and the level of those who do not understand the double entendre, or the dupes.[181] Like the third persona, the fourth persona is partially constituted by silence, but the fourth persona's silence works in a constructive manner rather than a marginalizing manner.[182]

The fourth persona has been used in studying the performance of F.B.I. Director J. Edgar Hoover during the 1930s, including his close relationship with Clyde Tolson, another bachelor, which lent itself to a gay reading.[183] This reading maintained that Hoover, having felt the pressures of heteronormativity from a society that feared and even persecuted sexual minorities, used the pink herring of persecuting sexual minorities to distract the public from his arguably gay performances.[184] This pink herring, which in sexual minority communication functions

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[175] Turner & Ryden, *supra* note 15, at 86, 94.

[176] *Id.* at 95.

[177] *Id.*

[178] *See* Lloyd F. Bitzer, *The Rhetorical Situation*, 1 PHIL. & RHETORIC 1 (1968). *But see* Richard E. Vatz, *The Myth of the Rhetorical Situation*, 6 PHIL. & RHETORIC 154 (1973).

[179] *See generally* Morris, *Pink Herring*, *supra* note 158, at 228.

[180] *Id.* at 230.

[181] *Id.* Although the "epistemological scaffolding" of a passing performance may be convincing to a straight audience, a sexual minority audience often realizes that such scaffolding is nothing more than "a queer house of cards." Charles E. Morris, *Richard Halliburton's Bearded Tales*, 95 Q.J. SPEECH 123, 126 (2009) [hereinafter *Bearded Tales*].

[182] Morris, *Pink Herring*, *supra* note 158, at 230. Silence is often found in the study of sexual minority history. Charles E. Morris, *Archival Queer*, 9 RHETORIC & PUB. AFF. 145, 147 (2006).

[183] Morris, *Pink Herring*, *supra* note 158, at 231.

[184] *Id.* at 231, 234–35.

like the better known red herring in traditional argumentation, allowed Hoover the opportunity to avoid detection by the public.[185] Nonetheless, the fourth persona constituted in Hoover's discourse would have been able to read between the lines of the famous F.B.I. director's rhetoric.[186] In Hoover's case, the fourth persona proved menacing rather than comforting.[187]

As this section of the Article has noted, a rhetor can perform and construct various personae in his or her discourse. Specifically, a rhetor can perform a first persona and construct second, third, and fourth personae. This study will focus on the first, second, and third personae in Scalia's dissents on issues related to sexual orientation.

## IV. A PERSONA ANALYSIS OF SCALIA'S DISSENTS IN *ROMER*, *LAWRENCE*, *WINDSOR*, AND *OBERGEFELL*

With the above theoretical material as a guide, this section of the Article presents a persona analysis[188] of Scalia's dissents. Respectively, the section considers the first, second, and third personae that Scalia performed or constructed through his dissents. As noted above, the analysis will show that second and third personae in the discourse undermined a skillful first persona performance and resulted in rhetorical hypocrisy grounded in a heteronormative ideology.

### A. The First Persona

In his dissents, Scalia performed the first persona of a neutral justice who simply would apply the law in an evenhanded manner. This neutral justice was the "mask" or "false face" that he adopted.[189]

In *Romer*, Scalia performed a first persona free of bias against sexual minorities. Scalia stated, "Of course it is our moral heritage that one should not hate any human being or class of human beings."[190] To that he added, "I do not mean to be critical of these legislative successes [of sexual minorities]; homosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as is the rest of society."[191] After referencing an 1885 Supreme Court opinion on voting

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[185] *Id.* at 235, 241.
[186] *Id.* at 231, 241.
[187] *Id.* at 241.
[188] Craig R. Smith, *The Persona of Jesus in the Gospel According to St. Matthew*, 14 J. COMM. & RELIGION 57, 64 (1991); Turner & Ryden, *supra* note 15, at 90.
[189] Ware & Linkugel, *supra* note 148, at 50.
[190] Romer v. Evans, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting).
[191] *Id.* at 646.

rights and polygamy in the U.S. territories, which extolled the virtues of heterosexual marriage, Scalia claimed, "I would not myself indulge in such official praise for heterosexual monogamy, because I think it no business of the courts (as opposed to the political branches) to take sides in this culture war."[192] In other words, Scalia's persona would be fair to everyone, including the socially less-favored minority group in the case at hand.

Scalia continued this performance in *Lawrence*, attempting to demonstrate his evenhandedness toward sexual minorities. "Let me be clear," he stated, "that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means."[193] Scalia suggested that everyone, regardless of sexual orientation, should have a chance to persuade others of his or her views.

In *Windsor*, Scalia again performed a neutral jurist first persona. He noted the importance of procedural democracy, "a system of government that permits us to rule *ourselves*."[194] He observed that, since the start of the controversy over same-sex marriage, citizens of various views had earned victories and suffered defeats.[195] The way for the public argument to unfold was for it to continue through "plebiscites, legislation, persuasion, and loud voices—in other words, democracy."[196] Scalia, of course, would not impose his personal views on the public debate, as he played the neutral jurist who merely observed procedural democracy in action.

Scalia's performance of the neutral jurist first persona continued in *Obergefell*. In the second paragraph of his opinion, Scalia stated, "The substance of today's decree is not of immense personal importance to me."[197] He added, "So it is not of special importance to me what the law says about marriage."[198]

While performing the first persona of a neutral justice, Scalia, in all four dissents, critiqued Kennedy's majorities for bias, which implied neutrality for Scalia's first persona. In *Romer*, the Court had "take[n] sides in the culture wars," commented the dissenting justice.[199] Indeed, the Court had "verbally disparag[ed] as bigotry adherence to traditional attitudes."[200] Scalia then pointed to the elite standing of the Court's members and their apparent interest in pleasing the elites who operated the Association of American Law Schools, which had promulgated an

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[192] *Id.* at 651–52 (citing Murphy v. Ramsey, 114 U.S. 15, 45 (1885)).

[193] Lawrence v. Texas, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting).

[194] United States v. Windsor, 133 S. Ct. 2675, 2710 (2013) (Scalia, J., dissenting) (emphasis in original). Procedural democracy reflects the preferences of the voting majority. FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY 34–38 (1999). In contrast, substantive democracy comes with particular rights guaranteed against majoritarian voting preferences. *Id.* at 16–18.

[195] *Windsor*, 133 S. Ct. at 2710–11.

[196] *Id.* at 2710.

[197] Obergefell v. Hodges, 135 S. Ct. 2584, 2626 (2015) (Scalia, J., dissenting).

[198] *Id.* at 2627.

[199] Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting).

[200] *Id.*

anti-discrimination policy that included sexual orientation.[201]

In *Lawrence*, Scalia vigorously critiqued the bias of Kennedy's majority. With great flourish, he proclaimed the following:

> Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.[202]

Apparently, the temptation of the sexual minority rhetoric was too great for the majority to resist. Not done yet, Scalia continued in this manner:

> It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.[203]

Rather than from "a governing caste that knows best," change should come from the people.[204]

In *Windsor*, Scalia likewise focused on what he viewed as the bias of Kennedy's majority and, by implied comparison, suggested his own evenhandedness. In the first few lines of his dissent, Scalia observed, "This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former."[205] He added, "The Court is eager—*hungry*—to tell everyone its view of the legal question at the heart of this case."[206] In Scalia's rhetoric, Kennedy's majority was on a mission to explain why DOMA was morally wrong.

Scalia proceeded in *Windsor* to critique the Court additionally for grabbing power not allocated to it under the Constitution so that the Court could further its bias. He described "a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere 'primary' in its role."[207]

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[201] *Id.* at 652–53.

[202] Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

[203] *Id.*

[204] *Id.* at 603–04.

[205] United States v. Windsor, 133 S. Ct. 2675, 2697 (2013) (Scalia, J., dissenting).

[206] *Id.* at 2698 (emphasis in original).

[207] *Id.*

Such an "image of the Court would have been unrecognizable to those who wrote and ratified our national charter."[208]

However unappealing limits on the Court's ability to hear cases might be, particularly in a case in which the Court allegedly wanted to pronounce DOMA unconstitutional, one such limit included the need for a live controversy in a given case. Scalia did not see such a controversy between Windsor and the executive branch.[209] Reaching back to the early years of the Court, Scalia pointed out, "That is why, in 1793, we politely declined the Washington Administration's request to 'say what the law is' on a particular treaty matter that was not the subject of a concrete legal controversy."[210] Poking fun at the *Windsor* majority, Scalia suggested, "The majority must have in mind one of the foreign constitutions that pronounces such primacy for its constitutional court and allows that primacy to be exercised in contexts other than a lawsuit."[211]

Not only critiquing the *Windsor* majority for overextending its power to resolve the case in a biased manner, Scalia also critiqued the Court for a lack of honesty about furthering its bias. Referring to *Lawrence*, he observed, "When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with 'whether the government must give formal recognition to any relationship that homosexual persons seek to enter.'"[212] However, by striking down DOMA, the Court in *Windsor* had backed away from that promise, Scalia observed. Likewise, when parties to a same-sex marriage case from one of the states had the appropriate standing, the Court's reaching a conclusion in favor of proponents of same-sex marriage would be easy.[213] "As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe," Scalia predicted.[214] The jurist claimed, "I promise you this: The only thing that will 'confine' the Court's holding is its sense of what it can get away with."[215]

In *Obergefell*, Scalia again focused on what he viewed as the bias of Kennedy's majority and, by implied comparison, again suggested his own evenhandedness. By deciding the case, the Court had stopped public debate on same-sex marriage, thus interfering with "American democracy at its best."[216] The members of the majority were not "functioning as *judges*, answering the legal question whether the American people had ever ratified a constitutional provision that was

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[208] *Id.*
[209] *Id.* at 2701.
[210] *Windsor*, 133 S. Ct. at 2699.
[211] *Id.* at 2698–99 (citing Basic L. Fed. Republic Ger. art. XCIII).
[212] *Id.* at 2709.
[213] *Id.*
[214] *Id.* at 2710.
[215] *Windsor*, 133 S. Ct. at 2709.
[216] Obergefell v. Hodges, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting).

understood to proscribe the traditional definition of marriage."[217] Instead, regardless of the people's understanding of liberty, the majority felt entitled to define liberty from its own viewpoint.[218] Indeed, the Court was using rhetoric to promote "those freedoms and entitlements that th[e] Court *really* like[d]" while restricting law that "th[e] Court really dislike[d]."[219] Overall, this approach that Scalia outlined was "judge-empowering."[220]

In his performance of a neutral justice first persona, Scalia presented a speaker who wanted to allow the democratic process to play out so that all groups could have their say in the public controversy over sexual minority issues. In contrast, he took the Court to task for what he saw as its bias and dishonesty. Overall, this was a skillful rhetorical strategy that built up the persona of the dissenting justice, yet Scalia's construction of the second and third personae would compromise such a strategy.

### B. The Second Persona

Scalia's rhetoric in his dissenting opinions suggested a particular audience, or "implied auditor,"[221] that would be receptive to the ideology ultimately expressed. Such a second persona was one that would be responsive to traditional views on sexual culture, in particular mainstream heterosexual culture, and receptive to majoritarian appeals. The implied audience would not be particularly interested in the possibility of change in tradition or consideration of minority rights. Also, this second persona would be likely to fear a perceived sexual minority threat. As such, Scalia's construction of this heteronormative second persona undermined his performance of a neutral justice first persona.

Scalia's appeals to tradition and majoritarian preferences were particularly prominent, and the lack of any serious consideration of change in tradition or the importance of minority rights was notable. In *Romer*, Scalia asserted that Colorado's Amendment 2 stood for "moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*."[222] Having made another favorable reference to *Bowers v. Hardwick*,[223] Scalia stated that if intimate same-sex conduct were a

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[217] *Id.* at 2629 (emphasis in original).
[218] *Id.* at 2628.
[219] *Id.* at 2630 (emphasis in original).
[220] *Id.* at 2628.
[221] Black, *supra* note 16, at 112.
[222] Romer v. Evans, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting).
[223] 478 U.S. 186 (1986).

crime, a state could pass other laws that disfavored such conduct.[224] Appealing to mainstream tradition, Scalia offered, "Coloradans are . . . *entitled* to be hostile toward homosexual conduct . . . ."[225] As such, "Amendment 2 [was] designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans . . . ."[226]

In *Lawrence*, Scalia's rhetoric continued to imply an auditor that would be receptive to an appeal to traditional majoritarian sexuality. The dissenting justice observed, "Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation."[227] Intimate same-sex conduct was such behavior. "The Texas statute," Scalia stated, "undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are 'immoral and unacceptable,' . . . the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity."[228]

Scalia further constructed the second persona in *Lawrence* by critiquing the majority of the Court for being out of touch with majoritarian values. In a long passage, he asserted the following:

> So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream"; that in most States what the Court calls "discrimination" against those who engage in homosexual acts is perfectly legal; that proposals to ban such "discrimination" under Title VII have repeatedly been rejected by Congress . . . ; that in some cases such "discrimination" is *mandated* by federal statute, see 10 U.S.C. § 654(b)(1) (mandating discharge from the Armed Forces of any service member who engages in or intends to engage in homosexual acts); and that in some cases such "discrimination" is a constitutional right, see *Boy Scouts of America v. Dale* . . . .[229]

In addition to congressional action, ironically even the Supreme Court's precedent in *Boy Scouts of America v. Dale*,[230] decided only three years prior to *Lawrence*, recognized such tradition. Without majoritarian support, the minority could not do away with tradition, as the Court apparently was trying to do. Scalia concluded in an assuring manner, "[P]ersuading one's fellow citizens is one thing, [but] imposing

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[224] *Romer*, 517 U.S. at 640–41 (Scalia, J., dissenting).
[225] *Id.* at 644 (emphasis in original).
[226] *Id.* at 653.
[227] Lawrence v. Texas, 539 U.S. 558, 589 (2003) (Scalia, J., dissenting).
[228] *Id.* at 599.
[229] *Id.* at 602–03 (emphasis in original).
[230] 530 U.S. 640 (2000).

one's views in absence of democratic majority will is something else."[231]

Scalia offered a warning that the second persona of his dissents would appreciate. Based on then-recent Canadian history, Scalia expressed concern over "judicial imposition of homosexual marriage."[232] Although the Court had counseled against any concern, Scalia advised, "Do not believe it."[233] He continued with the following:

> Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct; and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring[ ]" . . . ; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution[ ]" . . . ?[234]

In *Windsor*, Scalia continued the construction of a similar second persona that would favor tradition, although without his appeals to majoritarian sentiment, perhaps because, by 2013, his majority was disappearing.[235] Specifically, Scalia took note of the "traditional moral disapproval of same-sex marriage (or indeed same-sex sex)" in U.S. culture.[236] Consequently, the Court majority could "not argue that same-sex marriage [was] 'deeply rooted in this Nation's history and tradition[]' . . . , a claim that would of course be quite absurd."[237] Calling upon his dissent in *Lawrence*, Scalia stated, "As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. . . . I will not swell the U.S. Reports with restatements of that point."[238] DOMA was "an Act that did no more than

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[231] *Lawrence*, 539 U.S. at 603 (Scalia, J., dissenting).

[232] *Id.* at 604.

[233] *Id.* Scalia was correct that, although not the main issue in *Lawrence*, same-sex marriage was an underlying issue in the case. Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1458–59 (2004). In offering its assurances about not addressing same-sex marriage, the Court may have been aware that, at that time, two-thirds of people in the United States disapproved of same-sex marriage. Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 450 (2005). Public opinion can be relevant in the determination of whether a constitutional right exists. Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 MICH. L. REV. 1578, 1585 (1997) (reviewing WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996)).

[234] *Lawrence*, 539 U.S. at 604–05 (citations omitted).

[235] Laurie M. Phillips, *Libelous Language Post* Lawrence*: Accusations of Homosexuality as Defamation*, 46 FREE SPEECH Y.B. 55, 58–59 (2012) (reviewing various polls that reflected changing public opinions about sexual minorities and their rights).

[236] United States v. Windsor, 133 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting).

[237] *Id.* at 2706–07.

[238] *Id.* at 2707.

codify an aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually all of human history."[239] In Scalia's apparent view, whether a majority now appreciated that tradition no longer mattered; tradition should have prevailed.

In *Obergefell*, Scalia yet again continued the construction of a second persona that would favor tradition. For instance, he observed that, "'through our history,'" regulating domestic relations had been left to the states.[240] At the time of the ratification of the Fourteenth Amendment in 1868, all states had restricted civil marriage to a man and a woman.[241] Indeed, marriage as an opposite-sex institution bore "the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification."[242] Moreover, such marriage was "an institution as old as government itself" and, until fifteen years earlier, had reflected "the unanimous judgment of all generations and all societies."[243]

Scalia pointed out how, over the years, virtually no one had recognized in the Fourteenth Amendment a right to same-sex marriage. "[E]very person alive at the time of ratification [of the Amendment], and almost everyone else in the time since" had failed to see such a right.[244] Scalia became more specific, noting that famous jurists such as "Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly" had not seen a right to same-sex marriage in the Fourteenth Amendment.[245] Again, tradition should control.

Beyond the appeals to tradition and majority values, which failed to address seriously the possibility of change in tradition or the importance of minority rights, another aspect of the construction of the second persona was fear of sexual minorities. Scalia appealed to this fear in his *Romer* dissent. As Scalia observed the situation, sexual minorities constituted "a politically powerful minority."[246] The dissenting justice was so adamant about this observation that he repeated it several pages later.[247] Additionally, he observed that sexual minorities had "high disposable income" and political power "much greater than their

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[239] *Id.* at 2709.

[240] Obergefell v. Hodges, 135 S. Ct. 2584, 2628 (2015) (Scalia, J., dissenting).

[241] *Id.*

[242] *Id.* Scalia's history of marriage as a heterosexual-only institution that enjoyed "unchallenged use" in the United States was problematic. Rather, challenges, both in and out of court, to heterosexual-only marriage emerged during the 1970s. JASON PIERCESON, SAME-SEX MARRIAGE IN THE UNITED STATES: THE ROAD TO THE SUPREME COURT 27-37 (2013).

[243] Obergefell, 135 S. Ct. at 2630 (Scalia, J., dissenting). Regarding Scalia's history of "the unanimous judgment" in favor of heterosexual-only marriage, see *supra* note 53, particularly with regard to classical Rome before the third century A.D.

[244] Obergefell, 135 S. Ct. at 2629 (Scalia, J., dissenting).

[245] *Id.*

[246] Romer v. Evans, 517 U.S. 602, 636 (1996) (Scalia, J., dissenting).

[247] *Id.* at 648.

numbers."[248] Indeed, despite laws like those at issue in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*, sexual minorities enjoyed "enormous influence in American media and politics."[249]

Somehow, this apparently powerful minority group had threatened the majority in Colorado, which had needed to take action to protect itself. Voters had responded to the sexual minority "menace."[250] "That is where Amendment 2 came in," Scalia explained, offering reassurance to an audience likely to fear sexual minorities.[251] Amendment 2 "sought to counter both the geographic concentration and the disproportionate political power of homosexuals by (1) resolving the controversy at the statewide level, and (2) making the election a single-issue contest for both sides."[252]

This construction of a second persona that would fear the alleged political power of sexual minorities was ironic in light of Scalia's construction of sexual minorities as third personae. The discussion of the third persona that follows below shows that Scalia constructed sexual minorities as criminals and other poorly regarded individuals, including people with drug addictions, polygamists, and prostitutes. Such poorly regarded individuals were hardly likely to be politically threatening to anyone. However, construction of the second persona is not limited to logical appeals,[253] and Scalia employed an emotional appeal to majoritarian fear of sexual minorities.

Scalia's construction of a second persona that would be receptive to appeals to traditional sexuality and majoritarian rule, as well as one that would be likely to fear the thought of politically powerful sexual minorities as a menace to members of the sexual majority, undermined his artful performance of a neutral justice first persona. While tradition is often relevant to constitutional decision-making, tradition is not necessarily dispositive since it can change. Scalia did not discuss seriously how tradition may have changed. Moreover, consideration of

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[248] *Id.* at 645–46.

[249] *Id.* at 652.

[250] *See* Morris, *Pink Herring*, *supra* note 158, at 233–34. A panic can set in following a perceived sexual minority "menace." *Id.* In the United States, this occurred during the 1930s, beginning with the kidnapping of Charles Lindbergh's baby. *Id.* Likewise, another panic occurred during the 1950s. Senator Joseph McCarthy claimed that Communists and sexual minorities had infiltrated the U.S. State Department, and then, during a public appearance on Capitol Hill, Deputy Undersecretary for Administration John Peurifoy admitted that the State Department had removed ninety-one employees because of their sexual minority status. JOHNSON, *supra* note 3, at 15–19. *See also Employment of Homosexuals and Other Sex Perverts in the Government*, S. Interim Rep. No. 241, at 3 (1950) (maintaining that sexual minorities were "not proper persons to be employed in Government" because they were "generally unsuitable" and "constitute[d] security risks"); Exec. Order No. 10,450 § 8(a)(1)(iii), 3 C.F.R. 936, 938 (1949–1953) (document from President Dwight Eisenhower that instructed that "sexual perversion," among other matters, be considered in assessing whether employees of federal departments and agencies constituted threats to national security).

[251] *Romer*, 517 U.S. at 647. This was an appeal to an audience with "deep-seated homophobic anxiety." Charles E. Morris, *Passing by Proxy: Collusive and Convulsive Silence in the Trial of Leopold and Loeb*, 91 Q.J. SPEECH 264, 278 (2005) [hereinafter *Passing by Proxy*].

[252] *Romer*, 517 U.S. at 647.

[253] Celeste M. Condit, *Pathos in Criticism: Edwin Black's Communism-As-Cancer Metaphor*, 99 Q.J. SPEECH 1, 7–9, 12–16 (2013).

majoritarian interests without any consideration of minority rights in a constitutional case is problematic because, in addition to coming with procedural rights that generally benefit the majority, representative democracy comes with substantive rights that protect members of minority groups.[254] As Alexander Hamilton observed, one role of the courts is to protect members of minority groups from the "ill humors" of the majority.[255] Scalia did not discuss minority rights seriously. Even more to the point, he employed scare tactics regarding the supposed threat of sexual minorities in a country that is overwhelmingly heterosexual.[256] These appeals to the heteronormative auditor implied in Scalia's dissents compromised the neutrality of Scalia's neutral justice first persona.

### C. The Third Persona

In his dissents, Scalia constructed sexual minorities as third personae, or those negated,[257] in several ways. He did so with negative association, repeatedly comparing sexual minority romantic relationships or intimate same-sex conduct to individuals or acts that were dangerous, undesirable, unattractive, or simply trivial. Regardless of more recent social developments, he focused heavily on the tradition of same-sex sexual conduct as a crime. Moreover, without addressing sexual minority concerns, Scalia paid attention to the supposed inconvenience of overruling *Bowers v. Hardwick*,[258] a precedent he believed to be controlling, to people in government who allegedly had relied upon the case for administrative reasons. Additionally, he declined to recognize, or even consider, evidence of an ulterior legislative purpose against sexual minorities. Finally, in his last dissent that this Article considers, Scalia omitted references to sexual minorities as people and instead spoke merely about same-sex marriage as an abstract matter of public policy. This construction of sexual minorities as third personae seriously undermined Scalia's performance of a neutral justice first persona.

As noted above, Scalia repeatedly compared sexual minority romantic relationships or intimate same-sex conduct to individuals or

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[254] MICHELMAN, *supra* note 194, at 16–18, 34–38.

[255] THE FEDERALIST NO. 78, at 494–95 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

[256] In the past, sexual minority demographics in the United States had not been well understood, often because major federal surveys did not ask respondents about sexual orientation. *LGBTs Are 10% of US Population? Wrong, Says Demographer*, NPR (June 8, 2011), http://www.npr.org/2011/06/08/137057974/-institute-of-medicine-finds-lgbt-health-research-gaps-in-us, <http://perma.cc/X6ZE-N3L8> (comments of demographer Gary J. Gates). In more recent times, a major Gallup study indicated that 3.4% percent of the adult U.S. population self-identified as having sexual minority status. Gary J. Gates & Frank Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT*, GALLUP (Oct. 18, 2012), http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx, <http://perma.cc/9K4V-EV82>.

[257] Wander, *supra* note 17, at 210.

[258] 478 U.S. 186 (1986).

acts that were dangerous, undesirable, unattractive, or simply trivial, thereby dismissing sexual minorities. The dissenting justice began his comparisons in *Romer*. For instance, he said, "[O]ne could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even 'animus' toward such conduct."[259] Thus, sexual minorities, whose intimate conduct had been banned, were similar to murderers, polygamists, and individuals who were cruel to animals. Likewise, sexual minorities were similar to people with drug addictions,[260] and Scalia repeated the comparison with polygamists.[261] Also, if the state could bar the hiring of methadone users as transit employees, it could ban intimate same-sex conduct without the problem of an Equal Protection Clause violation.[262] Being a sexual minority was like taking a drug and apparently turned someone into one of the people with drug addictions previously noted. Moreover, just as the long-term roommate of a deceased straight person would not receive death benefits through the deceased, the long-term partner of a sexual minority would not receive death benefits through a partner.[263] As Scalia saw it, for a sexual minority, having a long-term significant other was like having the same university roommate for several years.

Scalia's use of the negative comparisons continued in *Lawrence*. Scalia associated same-sex romantic relationships with a parade of what he saw as horribles, including "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity," all of which states could ban in light of *Bowers*.[264] As Scalia viewed it, intimate conduct within a same-sex relationship was akin to buying or selling sex or having physical relations with other species. Scalia was quite taken by the prostitution analogy and returned to it later in his opinion. The government could restrain various liberties, he stated, including "prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery."[265] Thus, in addition to being like buying or selling sex or having a drug addiction, being in a same-sex romantic relationship was as important as making bread. If that analogy did not suffice, being in such a relationship was also like engaging in acts of public nudity.[266] The possibilities for analogies so abounded that one might have had a hard time picking one's favorite.

In *Windsor*, Scalia again relied upon negative association to construct sexual minorities as third personae. He compared same-sex

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[259] Romer v. Evans, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting). Scalia's reference to murderers was hardly the first time someone had compared sexual minorities with violent criminals. For instance, during the 1930s, sexual minorities were compared with rapists and other violent offenders. Morris, *Pink Herring*, *supra* note 158, at 234.

[260] *Romer*, 517 U.S. at 647.

[261] *Id.* at 648.

[262] *Id.* at 642.

[263] *Id.* at 638.

[264] Lawrence v. Texas, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

[265] *Id.* at 592.

[266] *Id.* at 601.

marriage with no-fault divorce, polygamy, and alcohol consumption.[267] While many people do believe in divorce, few seem to celebrate it the way people celebrate marriage. Moreover, polygamy can involve the exploitation of underage females.[268] Although alcohol consumption is enjoyable for many people, many people nonetheless experience problems with drinking too much alcohol, and negative legal consequences, such as losing one's driver's license, can follow the abuse of alcohol. As Scalia read it, the Constitution did not require or forbid no-fault divorce, polygamy, or alcohol consumption, and the same was true for same-sex marriage.[269] Much as before, being in a same-sex romantic relationship was like being a polygamist or abusing drugs, and this time it was also like no-fault divorce.

Of note, Scalia was somewhat more restrained in his use of negative association in *Windsor* than he had been in *Romer* and *Lawrence*. Perhaps he thought he had been detailed enough with analogies in his prior dissents. The issue of whether there was a live controversy to satisfy the requirements of Article III may have taken up a good portion of an opinion that otherwise would have been devoted to additional negative association.[270] Perhaps Scalia became more aware that demonizing sexual minorities was becoming less socially acceptable.[271] Regardless, he offered several negative associations in his *Windsor* dissent.

Building on negative association, Scalia relied in *Lawrence* upon the tradition of intimate same-sex conduct as a crime to construct sexual minorities as criminals. He noted that the *Bowers* Court had recognized

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[267] United States v. Windsor, 133 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting).

[268] Kiah Collier, *Polygamist Ex-Bishop Guilty of Officiating Underage Marriage*, REUTERS (Nov. 7, 2011), http://www.reuters.com/article/2011/11/07/us-polygamist-marriage-idUSTRE7A65MK20111107, <http://perma.cc/HDN6-TMS6>; Wade Goodwyn, *Texas Town Wary of Polygamist Sect's Arrival*, NPR (May 4, 2005), http://www.npr.org/2005/05/04/4629743/texas-town-wary-of-polygamist-sects-arrival, <http://perma.cc/EQ6U-7SUL>.

[269] *Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting).

[270] *See id.* at 2698–703.

[271] What one might have called the "closet culture" of the United States had been changing as more sexual minorities were open about their sexuality, and such openness became more socially acceptable. *See* Morris, *Passing by Proxy*, *supra* note 251, at 267 (observing that "sexual difference in a closet culture is a collusive, open secret"); Morris, *Bearded Tales*, *supra* note 181, at 139, 141 (noting that U.S. closet culture extended well back in time); Phillips, *supra* note 235, at 58–59 (reviewing various polls that reflected changing public opinions about sexual minorities and their rights).

Without doubt, the culture had changed from the early 1970s, when both the American Psychiatric Association and the American Psychological Association held that homosexuality was per se a mental disorder, and even from the mid-1980s, when, at the time of *Bowers*, public disapproval of homosexuality was strong. Fred E. Jandt, *Gay Liberation As Ideological Conflict*, 8 J. APPLIED COMM. RES. 128, 129 (1980); KLARMAN, *supra* note 24, at 39. In the early 2010s, polls were beginning to show that most people in the United States supported same-sex marriage. KLARMAN, *supra* note 24, at 196; PIERCESON, *supra* note 242, at 239. Of note, younger people were particularly supportive of same-sex marriage. PIERCESON, *supra* note 242, at 239.

One likely influence on shifting public opinion was the experience of personally knowing a sexual minority. KLARMAN, *supra* note 24, at 198. In 1985, only 25% of people in the U.S. reported that a relative, friend, or co-worker had come out to them. *Id.* at 197. In 2000, 75% of people in the U.S. reported knowing someone who was open about being a sexual minority. *Id.*

that sodomy was a crime at common law and forbidden in the original thirteen states.[272] This information so impressed Scalia that he repeated it two pages later.[273] He added that, when the Fourteenth Amendment had been ratified in 1868, thirty-two of thirty-seven states had banned sodomy.[274] Moreover, sodomy had been illegal in all fifty states until 1961.[275] Historically, sodomy had been banned for both straight people and sexual minorities, so apparently such a ban was not a matter of discrimination based on sexual orientation.[276]

Since "homosexual sodomy" historically had been a criminal act, there was no tradition of recognizing it as a fundamental right, Scalia maintained.[277] Indeed, he observed, the government had prosecuted individuals for sodomy. Records existed of twenty sodomy prosecutions and four executions during the colonial period.[278] From 1880 to 1995, 203 prosecutions for consensual, same-sex sodomy had taken place.[279] Scalia added, "States continue to prosecute all sorts of crimes by adults 'in matters pertaining to sex': prostitution, adult incest, adultery, obscenity, and child pornography."[280] The dissenting justice maintained that states could continue to do the same for sodomy.[281] Given the criminal status of the conduct, the conduct could not receive the protection due a fundamental right.[282]

In his *Lawrence* opinion, Scalia did not consider the implications of this historical reading. He did not ask whether the prosecutions had been appropriate. He did not ask whether four executions for sodomy in the colonial period had been justified. He also did not consider the modern trend away from sodomy prosecutions that Kennedy noted.[283] One limitation with looking at the past is that the past may not be a good guide for the present. Just as tradition can offer good counsel, tradition can offer poor counsel, particularly when culture has changed. By drawing upon a history of prosecution and even execution, and not considering whether this history made any sense in a contemporary world, or even in past worlds, Scalia constructed sexual minorities as criminals, some of the least in society, and thus as third personae.

Beyond using negative association and focusing on the criminal history of sodomy, Scalia employed other rhetorical strategies to construct sexual minorities as third personae. At one point in *Lawrence*, Scalia, without reference to sexual minority concerns, insisted that

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[272] *Lawrence v. Texas*, 539 U.S. 558, 594 (2003) (Scalia, J., dissenting).
[273] *Id.* at 596.
[274] *Id.*
[275] *Id.*
[276] *Id.*
[277] *Id.* at 586, 596.
[278] *Id.* at 597.
[279] *Id.* (referencing the West system and various official state reporters from that period of time).
[280] *Id.* at 598.
[281] *Id.*
[282] *Id.* at 597–98.
[283] *Id.* at 573.

government had relied on *Bowers* to such an extent that he counseled against overruling the case because of the inconvenience to some, presumably straight, individuals in government. He referenced case law that had upheld Alabama's prohibition on the sale of sex toys and a federal ban on those who engaged in "homosexual conduct" from participating in military service.[284] Also, Scalia referenced how *Bowers* had been used to uphold a police questionnaire that asked about applicants' "homosexual activity," as well as the Defense Department's conducting more thorough investigations into gay and lesbian applicants' backgrounds for certain security clearances.[285] To Scalia, that government officials had relied upon *Bowers* to discriminate against sexual minorities was a good reason for retaining the case as precedent, and changing the law might inconvenience government officials, such as those who did background checks. "What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails," Scalia lamented.[286] For him, attention to sexual minority concerns was unnecessary.

As a further way of constructing sexual minorities as third personae, Scalia also declined to recognize, or alternatively even consider, evidence of an ulterior legislative purpose against sexual minorities. Regardless of the wording of the statute in *Lawrence* that applied only to same-sex behavior, Scalia assured the reader that the purpose of the Texas Legislature that had passed the statute was pure, unlike the purpose of the Virginia Legislature that had passed a statute against interracial marriage, which the U.S. Supreme Court had found unconstitutional in *Loving v. Virginia*.[287] The purpose of the statute in *Loving* was to maintain White supremacy.[288] "No purpose to discriminate against men or women as a class can be gleaned from the Texas law,"

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[284] *Id.* at 589–90. The Alabama ban on the sale of sex toys generated a fair amount of litigation. Phillip Rawls, *High Court Lets Alabama Sex-Toy Ban Stand*, SEATTLE TIMES (Oct. 1, 2007), http://www.seattletimes.com/nation-world/high-court-lets-alabama-sex-toy-ban-stand/, <http://perma.cc/4LNZ-A4DG> (noting that, at that time, the U.S. Supreme Court refused to review a decision by the Eleventh Circuit that upheld the ban); Debra Cassens Weiss, *Love Stuff Loses Challenge to Sex-Toy Ban in Alabama Supreme Court*, ABA JOURNAL (Sept. 16, 2009), http://www.abajournal.com/news/article/love_stuff_loses_challenge_to_sex-toy_ban_in_alabama_supreme_court/, <http://perma.cc/8SMF-2KLM>. Federal appeals courts have issued conflicting rulings on the issue of regulation of sex toys. Weiss, *supra*. Meanwhile, the federal government ended the military policy of official discrimination against sexual minorities. *See Senate Votes to Repeal 'Don't Ask, Don't Tell,'* NPR (Dec. 18, 2010), http://www.npr.org/2010/12/18/132164172/-dont-ask-dont-tell-clears-vital-hurdle, <http://perma.cc/7N74-GM2G>; Elisabeth Bumiller, *Obama Ends 'Don't Ask, Don't Tell' Policy*, N.Y. TIMES (July 22, 2011), http://www.nytimes.com/2011/07/23/us/23military.html?_r=1, <http://perma.cc/2ZC3-9Z38>.

[285] *Lawrence*, 539 U.S. at 590 n.2 (Scalia, J., dissenting). The Defense Department's conducting more thorough investigations into gay and lesbian applicants' backgrounds for certain security clearances had echoes of the Lavender Scare of the 1950s, during which factions within the federal government maintained that sexual minorities posed a risk to national security interests. JOHNSON, *supra* note 3, at 7–10.

[286] *Lawrence*, 539 U.S. at 591 (Scalia, J., dissenting).

[287] *Id.* at 600 (citing Loving v. Virginia, 388 U.S. 1, 6, 8, 11 (1967)).

[288] *Id.*

Scalia asserted, "so rational-basis review applies."[289] Rational basis review is the most deferential form of judicial review of legislation.[290] Immoral sexual behavior was wrong, Scalia observed, noting, "This is the same justification that supports many other laws regulating sexual behavior that make a distinction based upon the identity of the partner—for example, laws against adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage."[291] With a return to various participants in his parade of horribles, Scalia avoided any attempt to address the fact that, unlike the statute in *Bowers*, the statute in *Lawrence* explicitly discriminated against sexual minorities because it only covered same-sex conduct.

In *Windsor*, rather than trying to suggest that the legislative purpose was pure, Scalia refused even to consider legislative purpose. "And more importantly," he observed, "[various rationales for DOMA] serve to make the contents of the legislators' hearts quite irrelevant: 'It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.'"[292] Rather than making a more complicated analysis of legislative purpose, Scalia was satisfied that Congress was interested in avoiding difficult choice of law issues or stabilizing federal law.[293] As those rationales were legitimate on their face, fear or persecution of a minority group apparently did not call for consideration.

Finally, in his *Obergefell* dissent, Scalia constructed sexual minorities as third personae through virtually complete omission. Scalia did not use the words *gay* and *lesbian*, or even the word *homosexual*, at all in this opinion. When Scalia once used the word *couple*, he was referring to heterosexual couples.[294] Although he used the term *same-sex marriage* four times, three of the uses were regarding a public policy debate,[295] and the other use was a historical reference to the Massachusetts Supreme Judicial Court's opinion in *Goodridge v. Department of Public Health*,[296] the first state supreme court opinion in the United States to legalize same-sex marriage within a particular state.[297] Scalia made no references to sexual minorities as people. Rather, he was simply discussing in an abstract manner a public policy matter, apparently one that in no way concretely impacted any individuals historically marginalized by heteronormative laws. He may as well have

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[289] *Id.*

[290] CHEMERINSKY, *supra* note 125, at 699–700.

[291] *Lawrence*, 539 U.S. at 600 (Scalia, J., dissenting).

[292] United States v. Windsor, 133 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting) (quoting United States v. O'Brien, 391 U.S. 367, 383 (1968)). Questions have lingered about illicit congressional motive regarding the Selective Service regulations at issue in *O'Brien*. TRIBE, *supra* note 47, at 824–25.

[293] *Windsor*, 133 S. Ct. at 2708.

[294] Obergefell v. Hodges, 135 S. Ct. 2584, 2628 (2015) (Scalia, J., dissenting).

[295] *Id.* at 2627–29.

[296] 440 Mass. 309 (2003).

[297] *Obergefell*, 135 S. Ct. at 2629.

been discussing a proposed tax on consumer goods that people bought with disposable income. Absence such as the absence in Scalia's *Obergefell* dissent is classically indicative of construction of third personae.[298]

In various ways, Scalia constructed sexual minorities as third personae throughout his dissents. He likened sexual minority romantic relationships and intimate same-sex conduct to individuals or acts that were dangerous, undesirable, unattractive, or simply trivial. Of particular note, Scalia argued that same-sex sexual conduct was historically a crime, and he ignored recent trends away from that position. The dissenting justice made much of the inconvenience of overruling *Bowers* to people in government who supposedly had relied upon the case for administrative reasons like doing background checks, and Scalia claimed that administrative convenience was more important than the impact upon sexual minorities of restrictions on private, intimate conduct. Scalia also declined to recognize, or alternatively even consider, evidence of an ulterior legislative purpose and, in doing so, turned a blind eye to claims of discrimination against sexual minorities. Finally, in his last dissent that this Article addresses, Scalia omitted references to sexual minorities as people and instead spoke only about same-sex marriage as an abstract public policy matter. As such, Scalia constructed sexual minorities as third personae. Given its frequent dismissive treatment of sexual minorities, this rhetoric seriously undermined Scalia's performance of a neutral justice first persona; a neutral adjudicator would not engage in rhetoric that marginalized a group to which litigants before the court belonged.

## V. CONCLUSION

By calling upon persona theory, this Article has argued that Justice Scalia's rhetoric of sexual orientation in *Romer v. Evans*, *Lawrence v. Texas*, *United States v. Windsor*, and *Obergefell v. Hodges* produced rhetorical hypocrisy grounded in a heteronormative ideology. While the first persona performed was one of a neutral justice, the second persona constructed would well receive appeals to tradition and majoritarian rule. Furthermore, this second persona, ignoring the possibility of change in tradition and likewise ignoring minority rights, would be wary of an alleged political threat of sexual minorities. Moreover, the third persona constructed consisted of the sexual minority as a criminal or other poorly regarded individual, such as a person with a drug addiction, a polygamist, or a prostitute. Although Scalia's performance of a neutral justice was a skillful one, the construction of the second and third personae compromised Scalia's performance of the first persona.

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[298] Wander, *supra* note 17, at 209.

Like any justice who heard the above cases, Scalia was entitled to read the U.S. Constitution how he felt most appropriate, whether, after balanced consideration of all aspects of the cases, that reading ultimately involved supporting minority rights or majoritarian concerns. However, Scalia did not offer balanced consideration of all aspects of the case, and making his arguments did not require marginalization of those who, from a heteronormative perspective, should have lost the cases. Scalia's own rhetoric undermined a supposedly neutral stance, and Scalia functioned as an ideological actor who used the power of law to further a particular social vision.[299] Other than perhaps for one's most devoted followers, hypocrisy generally fails rhetorically.[300] Hypocrisy undermines trustworthiness, one of the dimensions of credibility.[301] In addition to providing further insight into marginalizing judicial rhetoric, the above analysis of Scalia's dissents suggests the problems with incongruity among rhetorical personae in one's discourse.

Justice Oliver Wendell Holmes, writing in an opinion that reflected a significant change in his thinking about the First Amendment, observed, "[T]ime has upset many fighting faiths . . . ."[302] As Holmes suggested, society evolves, and so do some of its beliefs. Despite his generally caustic rhetoric, even Scalia seemed to understand this evolution at some level, briefly admitting in *Lawrence*, "Social perceptions of sexual and other morality change over time . . . ."[303] Still, Scalia ironically accused the *Windsor* majority of "declaring anyone opposed to same-sex marriage an enemy of human decency."[304] Scalia's rhetoric suggested that the justice himself may have been unable to deal with sexual difference through more civil rhetoric that, while advancing his position, also respected the dignity of others whose lives were less sexually privileged than his own. Fortunately for sexual minorities, the Supreme Court on several occasions chose another rhetorical path.

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[299] *See* John Louis Lucaites, *Between Rhetoric and "the Law": Power, Legitimacy, and Social Change*, 76 Q.J. SPEECH 435, 446–47 (1990) (reviewing MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Sanford Levinson & Steven Mailloux eds., 1988); and ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986)); Marouf Hasian, Jr., Celeste Michelle Condit & John Louis Lucaites, *The Rhetorical Boundaries of "the Law": A Consideration of the Rhetorical Culture of Legal Practice and the Case of the "Separate But Equal" Doctrine*, 82 Q.J. SPEECH 323, 327, 335 (1996).

[300] Larry Powell & Eduardo Neiva, *The Pharisee Effect: When Religious Appeals in Politics Go Too Far*, 29 J. COMM. & RELIGION 70, 85-86 (2006).

[301] Although the terminology has varied, one can identify the dimensions of credibility as competence, trustworthiness, and goodwill. McCroskey & Teven, *supra* note 19, at 90.

[302] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *But see* Schenck v. United States, 249 U.S. 47 (1919) (majority opinion also by Holmes). During the few months between the two opinions, Holmes received a copy of an article by Professor Zechariah Chafee of Harvard Law School that supported free speech during wartime, and the seventy-eight-year-old justice changed his mind on the topic. CHRISTOPHER M. FINAN, FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA 30, 32–34 (2007).

[303] Lawrence v. Texas, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting).

[304] United States v. Windsor, 133 S. Ct. 2675, 2710 (2013) (Scalia, J., dissenting).

# Note

# Confrontation at the Supreme Court

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## I. INTRODUCTION

Since 2004, the Supreme Court's docket has seen a great influx of cases relating to the Confrontation Clause, which provides: "[I]n all criminal prosecutions, the accused shall enjoy the right . . . to be

confronted with the witnesses against him."[1] Opening the door with the new test put forth in *Crawford v. Washington*,[2] the Court began with great consensus, but has since fragmented to the point of creating a muddle that is anything but predictable and clear. As the members of the Court change over time, it is natural that some old arguments fall away and new courses are plotted. But while the Court should seek to get constitutional questions "right," it must also endeavor to provide stability to the legal system. The great upheaval in the area of Confrontation Clause jurisprudence is problematic for the criminal justice system because the rules are unclear. Time and money are spent trying and retrying cases when errors are made, and each time the Court shifts its view of what is required by the Sixth Amendment it gets harder to determine what might be reversible error.

The decision in *Crawford* was a great shift in Confrontation Clause jurisprudence. The Court interpreted the confrontation right more expansively and allowed less room for out of court statements to go unconfronted.[3] Testimonial statements required an opportunity for cross-examination either at trial or before if the witness was unavailable at trial.[4] But in *Davis v. Washington*,[5] the attempt to create a test for police interrogations went awry. Allowing statements made primarily to address an "ongoing emergency"[6] to go unconfronted presented an unnecessary means of evading the Confrontation Clause's requirements. In *Michigan v. Bryant*, that is precisely what happened.[7] The primary purpose test was stretched by the *Bryant* Court.[8] Suddenly, statements that would have been inadmissible under *Crawford*'s straightforward test,in which statements made during police interrogations are testimonial, were not subject to the confrontation right and therefore admissible.

Even more concerning is the evolution of the Court's analysis in the area of forensic reports. While the Court started out viewing lab reports as a form of written testimony, by 2012 the Justices were split so dramatically that a majority opinion was impossible in *Williams v. Illinois*.[9] Indeed, the Court is teetering on the edge of allowing lab reports, including sworn statements written with full awareness that they would be available for subsequent prosecutions, to be admitted without the defendant having an opportunity to cross-examine the analyst who produced the report. The argument of the plurality in *Williams* was that lab reports are different and require a different set of rules.[10]

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[1] U.S. CONST. amend. VI.
[2] 541 U.S. 36 (2004).
[3] *Id.* at 67–68
[4] *Id.* 68–69.
[5] 547 U.S. 813 (2006).
[6] *Id.* at 822.
[7] 562 U.S. 344 (2011).
[8] *Id.* at 358–59.
[9] 132 S. Ct. 2221 (2012).
[10] *Id.* at 2227–28.

The Court is distancing itself from *Crawford* with each new case. This is unfortunate because *Crawford* provides the best baseline framework for analyzing the Confrontation Clause. *Crawford* provides the greatest degree of historically justifiable protection of the confrontation right based on the history that inspired the adoption of the Sixth Amendment and limited to the exceptions that were recognized at the time of its passage. The Court should apply the Confrontation Clause to any testimonial statement that is made under circumstances reasonably indicating that the statement will be available for use at a later trial.

## II. *CRAWFORD*: TOUCHSTONE OF THE MODERN CONFRONTATION CLAUSE (OR BACK WHEN WE ALL AGREED)

The Supreme Court's decision in *Crawford v. Washington*[11] sets the table for any discussion of modern Confrontation Clause jurisprudence. This is true for three reasons. First, and most importantly, the Court's decision delves deeply into the history of the confrontation right[12] and explicitly bases its interpretation of the Sixth Amendment text on that history.[13] Second, the Court abrogates the *Ohio v. Roberts*[14] rule that allowed trial judges to admit, upon a finding of reliability, unconfronted hearsay that is subject to the Confrontation Clause.[15] Third, and significantly for the purposes of this Note, the decision reflects the view of every Justice who still sits on the Court today.[16] We begin where the Court began its analysis—the history of the confrontation right. Then, we turn to the Court's holding and the two inferences underlying its analysis.

### A. Sir Walter Raleigh and the History of Confrontation

The Court looked to the legal practices that led to the adoption of the Sixth Amendment in order to determine who should be considered "witnesses against" a defendant according to the meaning of the Amendment's text.[17] Justice Scalia focused his review of history on the

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[11] 541 U.S. 36 (2004).

[12] *See id.* at 42–50 (describing how the confrontation right developed from the ancient Roman era, to English Common Law, to nineteenth-century American law).

[13] *Id.* at 50.

[14] 448 U.S. 56 (1980). The decision in *Crawford*, while highly critical of the *Roberts* rule, did not explicitly overrule it. *See id.* at 60. It was not until *Washington v. Davis* that Justice Scalia explicitly stated that *Crawford* overruled *Roberts*. 547 U.S. 813, 834 (2006).

[15] *See Crawford*, 541 U.S. at 60–69 (reasoning that *Roberts* did not provide an adequate basis for deciding the case at hand); *see also* Ohio v. Roberts, 448 U.S. 56 (1980) (describing the state of the confrontation clause before Crawford).

[16] Justice Scalia, who was joined by Justices Kennedy, Thomas, Ginsburg, and Breyer, authored the opinion. *Crawford*,.541 U.S. at 37.

[17] *Id.* at 42–43.

English legal traditions that most immediately informed the Founders' experiences and views.[18] English criminal law generally observed common-law procedures requiring live testimony subject to adversarial examination.[19] However, in some circumstances and during some periods of history, the English implemented civil-law practices for criminal trials.[20] Civil-law procedure allowed justices of the peace and other officials to conduct pretrial examinations of accused defendants and witnesses and then present the official's written records of those examinations as evidence at trial.[21] Application of civil-law process was condoned in the sixteenth century by the passage of two statutes—the "Marian statutes," which were so named because they were passed during Queen Mary's reign.[22] Even at this early date, defendants commonly demanded, albeit unsuccessfully, the right to face their accusers.[23]

According to the Court, "[t]he most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries."[24] Sir Walter Raleigh's trial in 1603 is a prime example that is repeatedly invoked in the Justices' opinions, both in *Crawford* and subsequent cases.[25] Indeed, Raleigh's trial is the "paradigmatic confrontation violation" the Sixth Amendment was meant to guard against.[26]

Raleigh was accused of treason; the charge was supported in part by statements made by Lord Cobham, Raleigh's purported accomplice.[27] Cobham made two statements that were introduced against Raleigh: one in a proceeding before another tribunal and the other in a letter.[28] The defense argued that Cobham implicated Raleigh to save himself from the death penalty.[29] The defense demanded that Cobham be called as a witness to make his accusation in person.[30] The judges applied the civil-law procedures of the time and refused to call Cobham but admitted his statements.[31] Raleigh was convicted and sentenced to death.[32] After the trial, one of Raleigh's judges regretted the proceeding as "degrad[ing]

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[18] *Id.* at 43.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 43.
[22] *See id.* at 43–44 (discussing the Marian bail and committal statutes which required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court).
[23] *Id.* at 43.
[24] *Id.* at 44.
[25] *Id.* at 44, 50, 52; Williams v. Illinois, 132 S. Ct. 2221, 2249 (2012); Bullcoming v. New Mexico, 564 U.S. 647, 680 (2011); and Michigan v. Bryant, 562 U.S. 344, 358 (2011).
[26] *Crawford*, 541 U.S. at 52.
[27] *Id.* at 44.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*

and injur[ing]" justice in England.[33]

To prevent similar abuses, English law was reformed during the seventeenth century, and the confrontation right of criminal defendants was recognized.[34] As part of these reforms, courts began requiring that witnesses be demonstrably unavailable to testify at trial before out of court statements could be admitted in evidence.[35] By 1696, this common-law requirement was augmented by the additional requirement that the defendant must have had a prior opportunity to cross-examine the witness before his out of court statement could be used at trial.[36] It was initially unclear whether the Marian statutes created an exception to the opportunity for cross-examination requirement in felony cases.[37] By the time Americans passed the Sixth Amendment, however, English courts were routinely implementing the cross-examination requirement in felony cases.[38]

American colonists meanwhile also endured the application of civil-law process in some criminal trials and protested against the denial of their confrontation rights.[39] During the American Revolution, eight states recognized the confrontation right in their declarations of rights,[40] but the Constitution did not.[41] The *Crawford* Court noted that both ratifiers of the Constitution and Antifederalists decried this omission as leaving open the possibility of allowing civil-law procedure in criminal trials and failing to reflect the importance of cross-examination in determining the truth at trial.[42] To address these and other concerns, the First Congress passed the Bill of Rights, which included the Confrontation Clause in the Sixth Amendment.[43] The Court places the Confrontation Clause in the context of the common law right as it existed in the nineteenth century by citing state court decisions recognizing that the confrontation right requires that the defendant have an opportunity to cross-examine any witness who provides evidence against him.[44] The Court also indicated that a minority of state courts would never admit prior testimony, even where the defendant had a prior opportunity to

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[33] *Id.* (quoting 1 D. JARDINE, CRIMINAL TRIALS 435, 520 (1832)).

[34] *See id.* at 44–45 (discussing how treason statures were developed that required witnesses to confront the accused "face to face" at his arraignment).

[35] *Id.* at 45.

[36] *Id.* at 45–46 (citing King v. Paine, 5 Mod. 163 (1696)).

[37] *Id.* at 46.

[38] *See id.* The English amended their statutes in 1848 to reflect the cross-examination requirement. English courts described the statutory amendment as reflecting what courts already construed the law to equitably require. *Id.* at 47.

[39] *See id.* at 47–48 (describing civil-law procedure in Stamp Act prosecutions and no less a revolutionary than John Adams decrying the use of civil-law examinations in a prominent admiralty case).

[40] *Id.* at 48.

[41] *Id.*

[42] *Id.* at 48–49.

[43] *Id.* at 49.

[44] *See id.* at 49–50 (noting that most state courts rejected the view that prior testimony is inadmissible in criminal cases even if the defendant had a prior opportunity for cross-examination).

cross-examine the witness.[45]

### B. The Rule

The holding in *Crawford* effectively overruled *Roberts*.[46] The rule in *Roberts* allowed trial courts to determine whether an out of court statement was reliable, and if it was, to bypass the cross-examination requirement.[47] The Court acknowledged that "the Clause's ultimate goal is to ensure reliability of evidence,"[48] but described it as a procedural right.[49] That is to say, the Confrontation Clause provides a constitutionally prescribed method for determining the reliability of evidence "by testing in the crucible of cross-examination."[50] Because the *Roberts* rule allowed some ex parte statements to be admitted without requiring the witness to testify at trial,[51] the *Crawford* Court established a new test.[52] The Court determined that not all hearsay implicates the Confrontation Clause[53] but held that testimonial out of court statements trigger the confrontation right, and therefore require witness unavailability and a prior opportunity for cross-examination.[54] The Court stated that the testimonial label applies at least to statements from "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations," but clearly reserved the right to add to this class of statements.[55] The Court firmly rooted its analysis and holding in the history of the confrontation right and made two inferences on the basis of that history.[56]

### C. The Two Inferences of the *Crawford* Court

The Court inferred that (1) the Confrontation Clause was intended to prevent the use of civil-law practices in criminal trials, particularly ex parte examinations; and (2) that at the time it was passed, the

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[45] *Id.* at 50.

[46] *Id.* at 68–69.

[47] *See id.* at 60–61. (noting that ex parte testimony can be admitted upon a finding of reliability).

[48] *Id.* at 61.

[49] *Id.*

[50] *Id.*

[51] *See id.* at 63–64 ("The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.")

[52] *Id.* at 69 (Rehnquist, J., concurring in the judgment).

[53] *See id.* at 51 ("Not all hearsay implicates the Sixth Amendment's core concerns.").

[54] *See id.* at 68 (explaining that unavailability and a prior opportunity for prior cross-examination are required for admissibility under both the Sixth Amendment and common law).

[55] *Id.*

[56] *Id.* at 50.

confrontation right was understood to bar admission of testimonial statements by a witness who did not appear at trial unless he was both unavailable and the defendant had a prior opportunity to cross-examine him.[57] The first inference is important for two reasons. First, the Court stated that the Clause applies to both in court and out of court testimony—meaning hearsay rules do not automatically trump the Confrontation Clause.[58] However, the Court also made clear as described above that not all hearsay statements trigger a "core concern" of the Clause.[59] These core concerns lead to the second important conclusion drawn from this inference. Because the Clause was enacted to prevent civil-law abuses of the kind seen in Raleigh's trial, the Court concluded that it is only effective against those core concerns, and therefore, a "specific type of out-of-court statement."[60] Looking to the text to determine the scope of the Clause's effect, the Court used dictionaries to determine who is a "witness" and what kind of statements a witness makes.[61] Witnesses "bear testimony," and testimony is usually "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[62]

This foundational definition of "testimonial" is at the heart of the *Crawford* decision.[63] It determines the scope of the Confrontation Clause and which out of court statements may be admitted.[64] If a statement is testimonial, it is subject to the Confrontation Clause; an out of court statement that is not testimonial does not require confrontation.[65] However, the Court did not decide that only testimonial statements are subject to the Confrontation Clause, and it did not provide an exhaustive list of which statements are testimonial because it was not necessary to decide the case.[66] In this way, *Crawford* is the first of a series of cases that must be read together to determine what the Confrontation Clause requires. *Crawford* provided the baseline: prior testimony at a preliminary hearing, grand jury, or former trial, and statements made

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[57] *Id.* at 50, 53–54.

[58] *See id.* at 50–51 ("We once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon the law of Evidence for the time being." (internal quotations omitted)).

[59] *Id.* at 51.

[60] *See id.* (noting the difference between an accuser making a formal statement to the police and a person making a casual remark to an acquaintance).

[61] *Id.*

[62] *Id.* (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 749 (1828)).

[63] *See id.* at 51–52 (discussing the meaning of "testimonial").

[64] *See id.* at 51–52 ("These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it."); *see also id.* at 68–69 ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.").

[65] *See id.* at 68. (noting that the admission of a testimonial statement alone is sufficient to violate the Sixth Amendment).

[66] *See id.* ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'") It was not until *Davis v. Washington*, that the Court held that only testimonial statements are subject to the confrontation right. 547 U.S. 813, 823–26 (2006).

during police interrogations are all testimonial.[67] The Court elaborated that testimonial statements are those that a person would "reasonably expect to be used prosecutorially" or are made in circumstances that would objectively indicate "that the statement would be available for use at a later trial."[68] The statement may be formalized as an affidavit or deposition, but "the absence of oath [is] not dispositive."[69] The Court cited Cobham's examinations used in Raleigh's trial as a "paradigmatic" example of an unsworn statement that is clearly testimonial.[70] This is the framework the *Crawford* Court provided for the scope of which testimonial statements implicate the Confrontation Clause.

The second inference regarded exceptions to the confrontation right. The Court held that an out of court statement may be admitted at trial only when the witness is unavailable and the defendant had a prior opportunity for cross-examination.[71] These requirements are rooted in the common law understanding of the confrontation right that existed in 1791 when the Amendment was passed.[72] The Court described the Sixth Amendment as without "any open-ended exceptions from the confrontation requirement."[73] The only way a court could admit testimonial hearsay without violating the Confrontation Clause was to have an unavailable witness with a prior opportunity to cross-examine that witness.[74] Moving to the next section, it is important to remember that *Crawford* reflects the views of every current Justice of the Court who was on the Court when it was decided: Justices Kennedy, Thomas, Ginsburg, and Breyer.[75]

## III. POLICE INTERROGATIONS AND TESTIMONIAL STATEMENTS

Given that *Crawford* did not fully explain which statements are testimonial, it is unsurprising that a case soon arose in which the Justices were forced to clarify the new rule. In 2006, the Court heard two cases involving statements made during interactions with police officials.[76] Significantly, Justice Thomas splintered from the other Justices, five of whom continue to serve on the Court today,[77] on the grounds that a

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[67] *Crawford*, 541 U.S. at 68.

[68] *See id.* at 51–52 (differentiating testimonial from nontestimonial statements).

[69] *Id.* at 52 (noting that statements can be testimonial even without taking the oath prior to the statement).

[70] *Id.*

[71] *Id.* at 54.

[72] *Id.* at 49–50, 53–54.

[73] *Id.* at 54.

[74] *Id.* at 54 (noting that the early state courts required unavailability of the witness and a prior opportunity for the defendant to cross-examine the witness).

[75] *Id.* at 37.

[76] Both cases were decided under "*Davis v. Washington*." 547 U.S. 813 (2006).

[77] Justice Scalia again wrote for the Court and was joined by Chief Justice Roberts, and Justices Kennedy, Ginsburg, Breyer, and Alito.

statement must meet a certain level of formality or solemnity to be considered testimonial for Confrontation Clause purposes.[78] This unique and solitary view of the requirements for a testimonial statement has significant ramifications of Confrontation Clause jurisprudence as discussed in later sections.[79] By 2011 when the Court revisited the Confrontation Clause in the context of interactions with police officers and also decided a case in the forensics area, the split was wider and much more convoluted. *Michigan v. Bryant*[80] exposes weaknesses in the *Davis* primary purpose test and may also indicate that Justice Sotomayor's view of the Confrontation Clause's scope differs based upon the context in which it is applied.[81]

### A. A Significant Splintering-Off

*Davis* solidified what the Court only had implied in *Crawford*—the Confrontation Clause applies only to testimonial hearsay.[82] In deciding the case, the Justices developed the primary purpose test to distinguish which types of interactions with police officials[83] create testimonial statements and which do not.[84] Under the test, a statement is nontestimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[85] If no ongoing emergency is objectively indicated by the circumstances, any statements made are testimonial based on the assumption that "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[86]

In *Davis*, a woman called 911 to report that a man was assaulting her in her home.[87] The 911 operator asked questions regarding the location of the attack, the perpetrator's name, and whether he was armed or intoxicated.[88] The companion case, *Hammon*, involved statements made by a woman who had recently been assaulted by her husband, but who was sitting alone and looking upset on her front porch when police

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[78] *See Davis*, 547 U.S. at 836 (Thomas, J., concurring in the judgment in part and dissenting in part).
[79] *Infra*, III-A, III-B, and IV-C.
[80] 562 U.S. 344 (2011).
[81] *See infra*, III-B (showing that statements are nontestimonial when the primary purpose is to address an ongoing emergency).
[82] *Davis*, 547 U.S. at 823.
[83] The Court included 911 operators in its use of the term "police," without holding that the operators are legally police officials. This paper follows that custom. *Id.* at 817–18, 819, 827.
[84] *See id.* at 822 ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.").
[85] *Id.*
[86] *Id.*
[87] *Id.* at 817–18.
[88] *Id.*

arrived.[89] The statements at issue in *Hammon* also described an assault, but were made while the woman was in a room alone with a police officer while another officer kept her husband at bay in another part of the home.[90]

The Court held that the primary purpose of the statements in *Davis* was to aid the police in responding to an ongoing emergency.[91] Therefore, the statements were nontestimonial and not subject to the Confrontation Clause.[92] The Court described four reasons why there was an ongoing emergency: the statements (1) described events as they were occurring, (2) were made while the perpetrator was still in the woman's home and a "bona fide physical threat" to her, (3) conveyed information that was necessary for police to resolve a present emergency as opposed to indicating what happened in the past, and (4) lacked the formal, calm, and safe environment that tends to mark testimonial statements.[93]

On the other hand, the statements in *Hammon* were held to have the primary purpose of helping police gather information about past events.[94] The Court found the circumstances of these statements bore a "striking resemblance" to the ex parte examinations allowed by civil-law procedures that are barred by the Sixth Amendment.[95] That is to say, the statements "do precisely *what a witness does* on direct examination" and are therefore testimonial.[96] The statements in *Hammon* responded to questions about what happened before officers arrived and bore a measure of formality because the interrogation was in a separate room, away from the perpetrator of the assault.[97]

Justice Thomas viewed both statements as insufficiently formal or solemn to be considered testimonial.[98] According to Justice Thomas's view, the Confrontation Clause reaches statements "in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[99] Justice Thomas explained that only when a police interrogation is formalized in some manner do the interrogations resemble the types of Marian proceedings the Clause was meant to prohibit.[100] The obvious concern raised by this reasoning is that officials may attempt to keep pretrial statements informal to preserve their admissibility. Justice Thomas would not apply the Confrontation Clause

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[89] *Id.* at 819–20.

[90] *Id.*

[91] *Id.* at 828.

[92] *Id.* at 828–29 (distinguishing English cases in which the statements were not made in an ongoing emergency). The Court noted, however, that there are situations where "a conversation which begins as an interrogation to determine the need for emergency assistance" . . . can "evolve into testimonial statements." *Id.* at 828.

[93] *Id.* at 827.

[94] *Id.* at 829–30.

[95] *Id.* at 830.

[96] *Id.* (emphasis in original).

[97] *Id.*

[98] *Id.* at 840 (Thomas, J., concurring in the judgment in part and dissenting in part).

[99] *Id.* at 836 (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (opinion of Thomas, J.)).

[100] *Id.* at 837.

to such statements;[101] however, he did not describe any method for determining when a statement is kept purposely informal in order to evade the Clause as opposed to just being informal without any evasion.[102] Justice Thomas also cast doubt on the primary purpose test because, in his view, police often operate at the same time to both address an emergency situation *and* gather information for a possible prosecution.[103]

No other Justice signed onto Thomas's absolute requirement of formality.[104] But the fact that some statements in subsequent cases are clearly formal while others are not so clearly formal means that formality continues to be an important issue. This is particularly true in the forensic report cases.[105]

### B. 2011, Take I: Justice Sotomayor Reconsiders Reliability?

Before we turn to the forensic reports, there is one more case in the area of police interrogations to discuss. In 2011, the first year Justice Sotomayor was on the Court to hear a Confrontation Clause case, two major cases were handed down: *Michigan v. Bryant*[106] and *Bullcoming v. New Mexico*.[107] In *Bryant*, the Court split 6–2, showing yet more signs of division.[108] Justice Sotomayor's effect on the Court's view of confrontation is particularly interesting. She created a new majority coalition with Chief Justice Roberts and Justices Kennedy, Breyer, and Alito.[109] Justice Thomas concurred in the judgment on the basis that the interrogation lacked sufficient formality to create testimonial statements.[110] Suddenly, Justice Scalia, heretofore the Court's author in chief on questions of the Confrontation Clause, was relegated to writing a dissent that no one joined,[111] although Justice Ginsburg wrote a separate dissent and agreed with his substantive points.[112]

The question in *Bryant* was whether the Confrontation Clause

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[101] *Id.* at 838.

[102] *Id.*

[103] *Id.* at 838–39.

[104] *Id.* at 834.

[105] *See* Williams v. Illinois, 132 S. Ct. 2221 (2012) (holding primary purpose of report from swab was not to accuse petitioner or create evidence, but rather to catch a dangerous rapist); Bullcoming v. New Mexico, 564 U.S. 647 (2011) (holding blood-alcohol analysis introduced at trial by an analyst who had not performed certification was testimonial); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) (holding certificates of analysis that were sworn by analysts at state laboratory were not removed from Confrontation Clause).

[106] 562 U.S. 344 (2011).

[107] 564 U.S. 647 (2011). *Bullcoming* relates to forensic reports and is discussed, *infra*, IV-B.

[108] *Bryant*, 562 U.S. 344.

[109] *Id.* at 347.

[110] *Id.* at 378 (Thomas, J., concurring in the judgment).

[111] *Id.* at 379 (Scalia, J., dissenting).

[112] *See id.* at 395 (Ginsburg, J., dissenting) (noting that it is the declarant's intent that counts in Confrontation Clause analysis).

barred admission of statements made by a mortally wounded man to police in which he identified his assailant.[113] The Court applied the primary purpose test to the facts and found that the statements were made to address an ongoing emergency and were therefore nontestimonial.[114] The police in *Bryant* responded to a report that a man had been shot and discovered the declarant lying on the ground outside his car at a gas station with a gunshot wound to his abdomen.[115] In total, five officers asked the declarant what had happened, who had shot him, and where the shooting had occurred.[116] The Court judged the primary purpose of the questioning to be an effort to contain an emergency situation; that is, a man had been shot, so whoever shot him might still have been in the area and a continuing danger to the public.[117] However, the Court also emphasized that whether there is an emergency is not the key question—whether the primary purpose of the interrogation is to enable the police to address an ongoing emergency.[118] Indeed, "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony."[119]

In assessing the primary purpose, the Court brought the hearsay rules back into play by calling them "relevant" to the determination.[120] Elaborating on this idea, the Court imputed to *Davis* the idea that statements given for the primary purpose of enabling police response to an emergency are less likely to be fabricated. [121] Justice Sotomayor then explicitly likened this to the rationale behind the excited utterance exception to hearsay.[122] Additionally, the Court viewed the determination of whether an emergency exists as a "highly context-dependent inquiry" that "may depend in part on the type of weapon employed."[123] Finally, the Court determined that the primary purpose test should be applied to both the questioner and the declarant because both sides of the interrogation provide evidence of the interrogation's purpose.[124]

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[113] *Id.* at 348 (majority opinion).

[114] *Id.*

[115] *Id.* at 349.

[116] *Id.* at 372.

[117] *Id.* at 375–78.

[118] *Id.* at 374.

[119] *Id.* at 358 (emphasis in original).

[120] *Id.* at 358–59.

[121] *Id.* at 361. Justice Scalia viewed this as a return to *Roberts*-type reliability analysis and reiterated that *Davis* (which he authored) was not asking whether the statements were reliable, but whether the declarant was acting as a witness. *See id.* at 390 (Scalia, J., dissenting).

[122] *Id.*at 361 (majority opinion).

[123] *Id.* at 363. Justice Scalia objected to this as well as the type of open-ended exception the Court in *Crawford* said was not allowed by the Sixth Amendment text. *See id.* at 392–93 (Scalia, J., dissenting).

[124] *Id.* at 367 (majority opinion). Justice Scalia also objected to this and anticipated that there will inevitably be conflicts between the purpose of the questioner and the declarant. He sardonically noted that the majority does not provide for this circumstance. He believed it is the declarant's purpose that matters because "[t]he hidden purpose of an interrogator cannot substitute for the declarant's intentional solemnity or his understanding of how his words may be used." *See id.* at 381

How much of a change *Bryant* actually brings to Confrontation Clause jurisprudence is yet to be seen. But, the newly emerging majority does have a very different view on how far the confrontation right extends. If the Court continues to move in the direction set by *Bryant*, it appears there will be much more room for finding a way to bypass the Confrontation Clause, such as: a context-dependent analysis that is required to determine when an emergency exists, a conflict between the purpose of the interrogator and the declarant, or the resurgent role of reliability *per se* as a factor in the analysis.

### C. Comments on the Police Interrogation Cases

The most significant concern *Bryant* presents is opening the door for reliability to be used as an end run around the Confrontation Clause. While the Justices may disagree about which modern circumstances most resemble the civil-law abuses leading to the passage of the Sixth Amendment,[125] the history described in *Crawford* is uncontroverted. The Confrontation Clause was enacted so that a witness's out of court statements could only be introduced at trial if the witness testified and was subject to cross-examination or was unavailable to testify and the defense had a prior opportunity for cross-examination.[126] Reliability was not the issue—the inability to confront one's accuser was the abuse being corrected.[127] *Crawford* created a framework based on witnesses providing testimonial statements that required confrontation. This is the framework the Court should continue to use as the foundation for subsequent Confrontation Clause jurisprudence.

The primary purpose test put forward in *Davis* clouded the determination of which statements are testimonial by introducing the ongoing emergency consideration.[128] It is exceedingly difficult for a court to determine whether a police officer is seeking information to address an emergency or for use in a prosecution. Indeed, the most common circumstance is that an officer will seek information to address an emergency, such as apprehending a suspect, and then use that same information to support prosecuting that suspect, as Justice Thomas suggested in *Davis*.[129]

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(Scalia, J., dissenting). Justice Ginsburg shared this view. *See id.* at 395 (Ginsburg, J., dissenting).

[125] *Compare* Crawford v. Washington, 541 U.S. 36, 42–56 (2004) (describing the history preceding the adoption of the Confrontation Clause), *with id.* at 69 (Rehnquist, C.J., concurring in judgment) ("I believe the Court's adoption of a new interpretation of the Confrontation Clause is not backed by sufficicently persuasive reasoning to overrule long-established precedent. . . . The Court's distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine.").

[126] *Id.* at 53–54 (majority opinion).

[127] *Id.* at 61.

[128] Davis v. Washington, 547 U.S. 813, 834 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part).

[129] *Id.* at 839.

Unfortunately, the ongoing emergency condition was exploited to its fullest in *Bryant*, with a new majority coalition stretching emergency police interrogation to cover five officers' independent interviews with a dying man.[130] One would think the primary purpose of the first interview might be to gather emergency information, which presumably would be shared with other officers responding to the scene. However, subsequent interrogation was aimed at making sure the victim's story did not change and that he had shared all pertinent information with police.[131] This is especially likely to be true given that all five officers asked very similar questions.[132] The *Bryant* Court held that the statements were not subject to the Confrontation Clause and were therefore admissible.[133] But this is precisely the type of Marian procedure the Clause was meant to bar—the practice of justices of the peace, precursors to our professional police, examining a witness and then reporting the witness's statements at trial without the witness testifying.[134]

A more faithful application of the Confrontation Clause in the context of police interrogation would be to focus on the *Crawford* baseline for testimonial statements and the declarant's objective purpose in making the statements. The hybrid approach suggested by *Bryant*—to examine both the declarant's and the questioner's purposes—is unworkable and overly complicated.[135] It also leaves Justice Scalia's question of what to do in case of differing purposes unanswered.[136] The better approach is to consider the declarant's objective purpose. By considering the circumstances surrounding the statements, judges can determine whether the declarant's purpose was to provide a statement that could be used at a later trial. If so, the statement must be subject to confrontation.

Under this approach, the consolidated *Davis* cases would still come out the same way, but the statements in *Bryant* would be inadmissible. The more challenging question is what to do about statements made by young children. Some children are incapable of demonstrating objective intent to provide a testimonial statement.[137] The suggested test would always admit those types of statements. But this does not present the same danger to a criminal defendant as the Marian abuses in which officials presented out of court testimony the defense could not confront.

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[130] Michigan v. Bryant, 562 U.S. 344, 379–80 (2011) (Scalia, J., dissenting).

[131] *Id.* at 387.

[132] *Id.* at 384.

[133] *Id.* at 378 (majority opinion).

[134] *Id.* at 394 (Scalia, J., dissenting) ("It was judges' open-ended determination of what was reliable that violated the trial rights of Englishmen in the political trials of the 16th and 17th centuries. . . . The Framers placed the Confrontation Clause in the Bill of Rights to ensure that those abuses (and the abuses by the Admiralty courts in colonial America) would not be repeated in this country.").

[135] *Id.* at 381–82 ("A declarant-focused inquiry is also the only inquiry that would work in every fact pattern implicating the Confrontation Clause.").

[136] *Id.* at 383.

[137] Myrna Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 379–80 (2005).

Young children are a known quantity for judges and juries, and their statements are not likely to be seen as universally and unquestionably true because children are susceptible to pressure and coaching from authority figures before making a statement.[138] The defense can present evidence that the child was coached or has changed her story when speaking to other questioners. The very reason the statements do not require confrontation, the fact that they were made by children, also provides a basis for the defense to argue that the statements are unreliable.[139] Jury instructions—written in plain English—should supplement an oral explanation by the judge that the statements are admitted because the child could not be expected to know that his statements would be used at trial. In circumstances where a judge determines that the child did know his statements could be used at trial, the statements must be subject to cross-examination.

## IV. CONFRONTING FORENSIC REPORTS

Perhaps one reason to be concerned about what may come next in Confrontation Clause jurisprudence regarding police interrogations is what has already happened to Confrontation Clause jurisprudence regarding forensic reports. The Court decided three cases in this area in the last six years.[140] Rather like the police interrogation cases, the first two were of a piece with very similar lines of reasoning.[141] The last case in the series, *Williams v. Illinois*, however, resulted in a new plurality and a very different view of the confrontation right.[142] Given that the result in *Williams* is a 4–1–4 split, it is unclear what direction this area of law is taking.[143] We will proceed chronologically through the cases.

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[138] *Id.* at 375.

[139] Crawford v. Washington, 541 U.S. 36, 53–54.

[140] Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 564 U.S. 647 (2011); Williams v. Illinois, 132 S. Ct. 2221 (2012).

[141] *See Melendez-Diaz*, 557 U.S. at 310–11, 329 (2009) (holding that "certificates of analysis" reflecting lab testing of evidence are testimonial statements that cannot be introduced at trial without calling the analysts who performed the testing to testify or showing the analyst is unavailable and that defendant had a prior opportunity to cross-examine the analyst); *Bullcoming*, 564 U.S. at 652 (2011) (holding that the analyst who must be called to testify regarding a forensic report is the analyst who actually performed, participated in, or observed the testing unless it can be shown that such an analyst is unavailable and defendant had a prior opportunity to cross-examine).

[142] *See Williams*, 132 S. Ct. at 2227–28 (2012) (Chief Justice Roberts joined Justices Kennedy, Breyer, and Alito, who authored the opinion; Justice Thomas concurred in the judgment but "shared the dissent's view of the plurality's flawed analysis" (*Id.* at 2255 (Thomas, J., concurring in judgment)).

[143] *See id.* at 2227.

### A. Holding the *Crawford* Line, but the Dissenting Chorus Grows

Massachusetts's law required that analysts who performed forensic testing on evidence fill out "certificates of analysis" and then swear to those results in front of a notary public.[144] In *Melendez-Diaz*, the state court admitted a set of these certificates, over the defense's objections, in a drug trafficking case as prima facie evidence of the contents of plastic bags left by the defendant in a police car after his arrest.[145] The state did not call the analysts who performed the lab tests.[146] The question on appeal to the Supreme Court was whether the certificates were testimonial statements, making the analysts, therefore, witnesses.

In a fairly direct application of *Crawford*, the Court held that certificates are affidavits that fall within the core class of testimonial statements the Confrontation Clause regulates.[147] Furthermore, the certificates were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'"[148] The certificates were completed not just in circumstances that reasonably indicated they would be available for a later trial, but under a state law that required they be made for that very reason.[149] The Court fielded and rejected a handful of arguments made by Massachusetts intended to show that confrontation does not apply in this case: (1) the analysts were not "witnesses against" the defendant;[150] (2) the analysts were not witnesses in the mold of Cobham and so not the target of Sixth Amendment concerns;[151] (3) this was "neutral, scientific testing" and not susceptible to distortion or manipulation like other types of testimony;[152] (4) the certificates were like business records;[153] (5) the defendant could have subpoenaed the analysts;[154] and (6) pragmatic concerns about trial practice require an exception.[155]

The dissenters,[156] foreshadowing the holding in *Williams*, would have cabined off forensic reports as a special case, not subject to confrontation.[157] Justice Kennedy was also concerned about the number

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[144] *Melendez-Diaz*, 557 U.S. at 308.
[145] *Id.* at 308–09.
[146] *Id.*
[147] *Id.* at 310.
[148] *Id.* at 310–11 (quoting *Davis*, 547 U.S. at 830).
[149] *See id.* at 311 (invoking the reasoning of *Crawford*, 541 U.S. at 52).
[150] *Id.* at 313–14.
[151] *Id.* at 315–17.
[152] *Id.* at 317–18.
[153] *Id.* at 321–24.
[154] *Id.* at 324–25.
[155] *Id.* at 325–28.
[156] Justice Kennedy wrote the dissent, and was joined by Chief Justice Roberts and Justices Breyer and Alito. *Id.* at 330 (Kennedy, J. dissenting).
[157] *See id.* at 331 ("Because *Crawford* and *Davis* concerned typical witnesses, the Court should have done the sensible thing and limited its holding to witnesses as so defined").

of witnesses that may need to be called to testify since multiple analysts frequently participate in various aspects of the testing process.[158] However, there is a curious line in the dissent that seems to miss the rationale that underlies the Court's opinion in *Crawford*, *Davis*, and the instant case: "The Confrontation Clause is not designed, and does not serve, to detect errors in scientific tests."[159] But, surely, Justices Scalia and Ginsburg would be quick to point out that that is precisely what confrontation is about—through cross-examination, defense counsel can probe the reliability of the test, the analyst, and the lab's reputation and record of accuracy.[160] In fact, Justice Kennedy himself acknowledged that analysts are not infallible and that there are potential issues in establishing chain of custody.[161] It appears that, on this point at least, the Justices are not so much disagreeing as talking past each other.

Essentially, the dissent voiced a fundamental disagreement with the *Crawford* line of reasoning—because "testimonial" does not appear in the text of the Confrontation Clause, the dissenters viewed it as of little help in determining the proper reach of the Clause.[162] This is strange, however, because both Justices Kennedy (the author of this dissent) and Breyer were in the majority in *Crawford* (which suggested the testimonial category) and *Davis* (which solidified the testimonial-nontestimonial divide).[163] As the dissent elaborated on the shortcomings of the Court's approach in *Melendez-Diaz*, it suggested that the focus should remain on the type of witness making the statement.[164] Indeed, the dissent would go back to the paradigmatic case and focus on "conventional" witnesses of the type used against Raleigh—and exclude all others from the confrontation right.[165]

### B. 2011, Take II: Justice Sotomayor Back in the Fold, but Pushing *Bryant* and Boundaries

*Bullcoming* is the sister case to *Melendez-Diaz* and a logical extension of its reasoning.[166] The *Bullcoming* Court held that the analyst who must be called to testify with regard to a forensic laboratory report,

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[158] *See id.* at 332–35 (explaining the challenges of calling multiple analysts at trial).

[159] *Id.* at 337.

[160] *Id.* at 320–21 (majority opinion).

[161] *Id.* at 339 (Kennedy, J., dissenting).

[162] *See id.* at 343–47 ("The Court goes dangerously wrong when it bases its constitutional interpretation upon historical guesswork").

[163] *See id.* at 346 (explaining this apparent logical disconnect by describing the testimonial phrasing as a means to avoid awkward phrasing and pointing out that the testimonial framework was not part of the holding in either case).

[164] *See id.* at 344–45 ("The Framers were concerned with a typical witness—one who perceived an event that gave rise to a personal belief in some aspect of the defendant's guilt").

[165] *Id.*

[166] *Bullcoming* was in the appellate process when the Court decided *Melendez-Diaz*. 564 U.S. 647, 656 (2011).

as required by *Melendez-Diaz*, must be the analyst who actually conducted the testing reflected in the report or who participated in or observed that testing.[167] Since *Melendez-Diaz* identified forensic reports of this type as testimonial and the writers or affiants of those reports as witnesses,[168] it follows logically that the Sixth Amendment would require that the defendant be confronted with the actual witness who made the statement being used against him.[169] Justice Ginsburg's analysis on behalf of the Court elaborated on precisely why it is crucial that the analyst whose statements are reflected in the report must be the one to testify.[170]

When an analyst performs a forensic analysis on a piece of evidence, he does more than merely record a machine readout.[171] As Justice Ginsburg described, the analyst must ensure that the evidence is properly sealed and preserved before testing, the machines are properly calibrated, he observes the protocol required for the test, and he accurately records all data.[172] Calling a surrogate analyst who was not involved in the actual testing does not allow for effective cross-examination into the process used to test the evidence in question, which is the core purpose of the Confrontation Clause.[173] As Justice Ginsburg wrote, "when the State elected to introduce [the testing analyst's] certification, [the analyst] became a witness Bullcoming had the right to confront."[174]

Justice Sotomayor concurred in part and wrote separately to "highlight" that she viewed the report as testimonial based on its primary purpose and to "emphasize the limited reach of the Court's opinion."[175] Citing extensively to *Bryant* for her primary purpose analysis,[176] she concluded that the report is testimonial because its purpose was to create an extrajudicial substitute for testimony at trial.[177] She describes *Bullcoming* as "materially indistinguishable from" *Melendez-Diaz*.[178] In attempting to limit the holding, she named four fact patterns not decided in *Bullcoming*.[179] First, New Mexico did not present any alternative purpose for the report; Justice Sotomayor suggested some reports might

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[167] *Id.* at 652.

[168] *Melendez-Diaz*, 557 U.S. at 307, 310–11.

[169] *Bullcoming*, 564 U.S. at 652, 659–64.

[170] *See id.* at 652 (concluding that the analyst must be the one to testify).

[171] *See id.* at 660 (detailing the analysts considerable duties in performing the analysis).

[172] *Id.*

[173] *See id.* at 661 (explaining no level of an analyst's trustworthiness or responsibility will dispense with the Confrontation Clause's requirement). An interesting side note in this particular case is that the testing analyst was never declared unavailable by the state and had been put on unpaid leave for reasons unknown. The surrogate analyst who was called to testify did not have any information regarding the reasons for the testing analyst's placement on leave. *Id.* at 662.

[174] *Id.* at 663.

[175] *Id.* at 668 (Sotomayor, J., concurring in part).

[176] *See id.* at 669–72 (using *Bryant* as foundation for her primary-purpose analysis).

[177] *Id.* at 670

[178] *Id.* at 672.

[179] *Id.* at 672–74.

be generated for other reasons, including for medical treatment.[180] Second, the proposed surrogate witness was not a "supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue."[181] Third, *Bullcoming* did not implicate an expert witness's ability to testify regarding underlying facts from reports not introduced into evidence.[182] Fourth, the results in the report at issue were more than a mere machine readout.[183]

The dissent, authored by Justice Kennedy, described this case as a "new and serious misstep" and did not concede its similarity to *Melendez-Diaz*.[184] In brief, Justice Kennedy's view is that calling the testing analyst is a "hollow formality"[185] and that forensic reports of this type are "impartial" and therefore should not be subject to confrontation.[186]

### C. The *Williams* Muddle

Justice Thomas provided the crucial fifth vote in *Melendez-Diaz* and *Bullcoming*.[187] But in *Williams*, Justice Thomas took center stage—right in the middle of a 4–1–4 vote.[188] The question is, as Justice Kagan implied, just which side is Justice Thomas on?[189] Justice Thomas concurred in the judgment of Justice Alito's plurality opinion but explicitly rejected the analysis, stating at the beginning of his opinion, "I share the dissent's view of the plurality's flawed analysis."[190]

The question in *Williams* is whether *Crawford* prevents an expert from basing her testimony on facts not introduced into evidence.[191] Specifically, the state lab, where the expert worked, had a regular practice of sending evidence to an outside lab for DNA testing.[192] In this case, vaginal swabs from a sexual assault kit were sent out and returned to the state lab along with a DNA profile the outside lab represented as

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[180] *Id.* at 672. This is another example of Justice Sotomayor bringing the rules of evidence into play in Confrontation Clause jurisprudence; perhaps this is the type of application she intended when she wrote in *Bryant* that hearsay rules would be "relevant." 562 U.S. 344, 348–49 (2011).

[181] *Bullcoming*, 564 U.S. at 672–73 (Sotomayor, J., concurring in part).

[182] *Id.* at 673.

[183] *Id.* at 673–74.

[184] *Id.* at 674 (Kennedy, J., dissenting).

[185] *Id.* at 677.

[186] *Id.* at 681.

[187] *See id.* at 649 (majority opinion) (Thomas, J., concurred to all but Part IV and Footnote 6); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) (in which Justice Thomas both joined the opinion of the Court and filed a concurrence).

[188] Williams v. Illinois, 132 S. Ct. 2221, 2255 (2012) (Thomas, J., concurring in the judgment).

[189] *See id.* at 2265 (Kagan, J., dissenting) (calling the plurality opinion a dissent "in all except its disposition" and citing Justice Thomas's opinion concurring in the judgment but disavowing the entire analysis of the plurality's opinion).

[190] *Id.* at 2255 (Thomas, J., concurring in the judgment).

[191] *Id.* at 2227 (Alito, J., plurality opinion).

[192] *Id.* at 2229.

coming from semen found on the vaginal swabs.[193] As usual, the person reviewing the case at the state lab did not participate or observe the outside lab's work.[194] Separately, and years before, a DNA profile was created from a blood sample obtained from the defendant on a wholly unrelated matter; this profile was stored in the state crime lab computer system.[195] The expert witness ran a search on the state lab computer system, looking for a match for the outside lab's DNA profile.[196] The DNA profile from the defendant's blood sample matched the DNA profile created by the outside lab ostensibly from semen found on the vaginal swabs.[197] Based on this information, the police conducted a lineup including the defendant, and the sexual assault victim identified the defendant as her attacker.[198] The defendant was indicted and chose to have a bench trial.[199]

At trial, the expert testified to the types of testing used to create a DNA profile, handling procedures, and other matters.[200] Then the prosecutor asked her, "[w]as there a computer match generated of the male DNA *found in semen from the vaginal swabs of [the victim]* to a male DNA profile that had been identified as having originated from [the defendant]?" to which the expert answered affirmatively.[201] The italicized portion of the question is the crucial part because if the prosecutor were introducing evidence of the outside lab's report without calling the analyst who did the testing and wrote that report, she would be violating the Confrontation Clause. The expert witness could not testify to the DNA profile that is purportedly from semen found on the vaginal swabs because she had no personal knowledge of the testing as required by *Bullcoming*.[202] However, as an expert, she could testify to her opinion regarding underlying facts not introduced as evidence;[203] the outside lab report was never admitted as evidence, but served as "underlying" information for the expert's testimony according to the plurality.[204]

The plurality concluded that the prosecutor's question merely presented a premise, that an outside lab had produced a DNA profile, which was not offered for its independent truth, and was accepted as true by the witness in her answer.[205] The plurality also emphasized that this

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[193] *Id.*
[194] *Id.* at 2229–30 (describing the general state process of outsourcing DNA lab work).
[195] *Id.* at 2229.
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Id.* at 2229–30.
[201] *Id.* at 2236 (emphasis in original).
[202] *See id.* (reiterating that this would violate the Confrontation Clause because this would function as a lack of personal knowledge of the source of the DNA profile).
[203] *Id.* at 2228.
[204] *Id.* at 2240.
[205] *Id.* at 2236.

was a bench trial and that the judge was unlikely to be confused as to what was offered for its truth—the expert's opinion testimony—and what was not—the underlying outside lab report.[206] What application this decision has to a jury trial is left unaddressed.

As a second and independent basis for the plurality's view, Justice Alito wrote that, even if the outside lab report had been admitted into evidence, there would be no Confrontation Clause violation because it is wholly unlike the statements produced in the Marian examinations.[207] Furthermore, the plurality pointed out that the report was created before the suspect was identified and was "sought not for the purpose of obtaining evidence to be used against [the defendant] . . . but for the purpose of finding a rapist who was on the loose."[208] Finally, the plurality decided that the *Crawford* requirements are an impediment to prosecutors' ability to introduce DNA evidence because many analysts participate in DNA testing and may be required to testify under *Crawford*.[209]

Justice Breyer authored a concurring opinion to set forth his view about how the Confrontation Clause should apply to forensic reports generally.[210] Addressing the expert testimony question, Breyer cited the "well-established rule" allowing experts to rely on out of court statements that are not otherwise admissible to form their opinions.[211] Breyer described forensic reports as essentially "layer upon layer of technical statements . . . made by one expert and relied upon by another" and expressed concern that "[o]nce one abandons the traditional rule, there would seem to be no logical stopping point between requiring the prosecution to call" one analyst and every analyst who worked on the report.[212] Indeed, since the Confrontation Clause is meant to allow cross-examination to expose potential weaknesses in evidence against the defendant, Breyer was particularly concerned that applying the Clause to forensic reports would be overly burdensome and require calling every analyst involved in the testing process since an error could occur at any stage of the analysis.[213]

Accordingly, Breyer would hold forensic reports to be presumptively outside the Confrontation Clause's scope.[214] He described accredited analysts as "operating at a remove," and said that forensic work occurred "behind a veil of ignorance."[215] His conclusion, of course, is that analysts are essentially neutral scientists so "the need for cross-

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[206] *Id.* at 2237.

[207] *Id.* at 2228.

[208] *Id.* These justifications are very similar to those considered and rejected by the Court in *Melendez-Diaz* and *Bullcoming*. *See, supra*, IV-A and IV-B.

[209] *Williams*, 132 S. Ct. at 2228.

[210] *Id.* at 2244 (Breyer, J., concurring).

[211] *Id.* at 2246.

[212] *Id.*

[213] *Id.* at 2246–47.

[214] *Id.* at 2248, 2251.

[215] *Id.* at 2249–50.

examination is considerably diminished."[216]

As before, Justice Thomas's vote was based solely on whether the statements are sufficiently formal to be considered testimonial.[217] Here, the forensic report at issue was not sufficiently formal to implicate the Confrontation Clause.[218] However, as part of disagreeing with the plurality's "flawed analysis,"[219] Justice Thomas pushed back on the idea that the outside report was not introduced for its truth.[220] As he explains, even if the report was introduced solely so the fact finder can evaluate the expert's testimony, the fact finder must make a judgment about whether the underlying information is true before evaluating the expert's testimony.[221] He concludes "[t]here was no plausible reason for the introduction of [the outside lab's] statements other than to establish their truth."[222]

### D. Comments on the Forensic Reports Cases

The direction of the Court's reasoning in *Williams* is especially troubling. Certainly, it is a far cry from the *Crawford* baseline established just eight years before *Williams* was decided. The plurality's reasoning apparently rests on the notion that forensic reports are just different from other types of evidence. Justice Breyer in particular believes forensic reports require special treatment.[223] But the Confrontation Clause does not allow special treatment of different classes of witnesses. Forensic analysts may operate "at a remove" from investigators as Breyer suggests,[224] but then so do innocent bystanders who provide testimonial statements to police about a mugging they witnessed. The bystander on the corner may want nothing to do with the police and may have no connection to the victim or the suspect, but when he provides testimonial statements that the prosecution wishes to use against the defendant, he must be available for cross-examination. Forensic analysts are certainly more involved in the investigation than many such witnesses—they work for the state or have a contract with the state to provide evidence that will be used in criminal trials.[225] What is

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[216] *Id.*at 2249.

[217] *Id.* at 2255 (Thomas, J., concurring in the judgment).

[218] *Id.*

[219] *Id.*

[220] *See id.* at 2257 ("There is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing the statement for its truth.").

[221] *Id.*

[222] *Id.* at 2256.

[223] *Id.* at 2249–50. (Breyer, J., concurring).

[224] *Id.* at 2249.

[225] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, Forensic Science Technicians, http://www.bls.gov/ooh/life-physical-and-social-science/forensic-science-technicians.htm#tab-3, <https://perma.cc/ZTU2-WDWW>.

most important is that when they write a lab report detailing their findings, they are providing testimonial evidence against a defendant. This is at the heart of the Confrontation Clause.

While it may be true that several forensic analysts work to produce a report that is used at trial, this does not necessarily have to be overly burdensome to prosecutors. First, the lab can adapt its procedures to reduce the number of analysts who work on a given set of evidence. Second, *Bullcoming* allows for an analyst to testify regarding testing he observed or participated in.[226] That is, if three people work on a DNA profile and all three participated in the testing process then *Bullcoming* suggests only one of those analysts needs to be produced for cross-examination.[227] What is more, the confrontation right is a significant and important protection against prosecutorial abuses and should not be pushed aside because it creates a surmountable burden for prosecutors. The Marian procedures likely provided great economy of use in their time. But where a person's liberty and perhaps their life is at stake, it is reasonable to strictly adhere to the protections the Constitution grants criminal defendants to prevent prosecutorial abuses and wrongful convictions.

Indeed, the proposed implementation of the *Crawford* framework makes these forensic report cases fairly easy to decide. *Melendez-Diaz* and *Bullcoming* would come out the same way, but the outside lab report in *Williams* would be excluded. The report is testimonial because its objectively determined purpose was to serve as evidence that (1) there was semen on the vaginal swabs and (2) that semen corresponded to the reported DNA profile. Although the outside lab report is framed as mere underlying facts for an expert's testimony, the report should be excluded under the proposed application of *Crawford*. As Justices Kagan and Thomas agreed, there is no reason to introduce the lab report except for its truth,[228] and the phrasing of the question posed by the prosecutor assumes the validity of the outside lab report.

*Williams* is a good example of the fallacy of the overly burdensome argument: if the prosecutor had called the outside analyst who conducted the testing and wrote the outside lab report, there would have been no Confrontation issue. The burden here would be to call one more analyst. The outside lab analyst works in a different state, but the state crime lab chose to contract with that lab. The *Williams* plurality would say it is enough that the defendant could subpoena the outside analyst, but describes calling that same analyst as overly burdensome for the

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[226] *See* Bullcoming v. New Mexico, 564 U.S. 647, 673 (2011) (Sotomayor, J., concurring in part) ("It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results. We need not address what degree of involvement is sufficient . . .")

[227] *See id.* (suggesting the sufficiency of allowing a supervisor to testify regarding an analyst's test).

[228] *See Williams*, 132 S. Ct. at 2268 (Kagan, J., dissenting) (citing *id.* at 2256–59 (Thomas, J., concurrence) and noting agreement).

prosecution.[229] That logic does not withstand scrutiny. It is a bedrock principle of our criminal justice system that the prosecution bears the burden of proof, and the defendant does not have to put forward any evidence to avoid conviction. The plurality's view erodes that foundation by allowing prosecutors to skirt the Confrontation Clause with forensic evidence.

Moreover, forensic evidence is on the opposite end of the spectrum from a child's accusations. While children are generally known to be susceptible to pressure from adults and others to create a false story and are therefore potentially unreliable,[230] forensic reports are generally viewed as highly reliable evidence. Yet a forensic report is only as reliable as the analyst who performs the test and creates the report. Without cross-examination of the analyst, the defendant never has an opportunity to expose weaknesses or flaws in the evidence. Particularly when the evidence is likely to weigh heavily in the mind of the fact finder, the Confrontation Clause is an essential protection for criminal defendants.

## V. CONCLUSION

Precisely where the Court stands on the Confrontation Clause is unclear. The *Williams* decision in particular is an enigma. Studying the major Confrontation Clause cases in this Note demonstrates that most of the Justices are entrenched in their own view and are not shifting to create a new and predictable consensus. Indeed, it appears that Justices Breyer and Sotomayor are the only two who are developing new ideas and avenues of potential agreement. Justice Kagan's time on the Court hass been relatively short, and her voice has not yet registered in all aspects of Confrontation Clause jurisprudence, so she may yet provide a way forward. As Justice Breyer notes in *Williams*, there are pressing questions, particularly in the area of forensic evidence,[231] and those questions must be answered soon. If the Justices cannot find a way to a new majority view of the Confrontation Clause, the criminal justice system will suffer great damage. Uncertainty may beget miscarriages of justice and the costs—both economic and temporal—of lengthy appeals serves no one's interests.

Perhaps one of the simplest ways for the Court to reestablish clarity in this area is to return to *Crawford*. By applying the Confrontation Clause to any testimonial statement that is made under circumstances reasonably indicating that the statement will be available for use at a later trial, the Court would refocus its analysis on the historically significant

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[229] *Id.* at 2228 (Alito, J., plurality opinion).
[230] Raeder, *supra* note 137, at 375.
[231] *Williams*, 132 S. Ct. at 2244–45

concerns the Clause was meant to address—statements like those of Lord Cobham and the Marian procedural abuses. The proposed test is relatively easy to apply, even to the facts of cases that have divided the Justices so drastically. It also avoids the pitfall of the formality requirement becoming all-consuming and leaves the reliability of the statement completely out of the analysis. The test also applies equally well to statements made to police and in forensic reports. The test focuses on the witness's statement—just as *Crawford* initially proposed.[232] Given that the Confrontation Clause applies to "witnesses against" a defendant,[233] it follows that a textually faithful test would analyze whether the statement was (1) made by a "witness" (i.e., a testimonial statement) and (2) intended to be used "against" a defendant (i.e., made under circumstances reasonably indicating that the statement will be available for use at a later trial).

The suggested application of the *Crawford* baseline framework provides clarity, ease of application, and predictability of results while also protecting the core interests the framers hoped to safeguard. Sir Walter Raleigh would have been well served by such a test, and so would today's criminal justice system.

[232] Crawford v. Washington, 541 U.S. 36, 59 (2004).
[233] U.S. CONST. amend. VI.