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THE REVIEW OF LITIGATION

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State Refusal Triggers Constitutional Crisis: Past is Prologue on Energy and Infrastructure

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I. INTRODUCTION

What have Jefferson, Adams, and Franklin wrought with federalism? The Constitution establishes lines between what the federal government and the state governments can regulate, and how these regulations must be done. Recent and pending federal court decisions are etching an intense constitutional battle addressing various states' regulation of sustainable energy and climate change. Further, there is a now-cresting fundamental legal confrontation that this Article analyzes. Once promulgated, state laws, orders, and rules are presumed to be legally enforceable. Notwithstanding this presumption, state sustainable energy policies have endured ten recent significant legal challenges based on the Supremacy Clause of the Constitution:[1]

- In eight of the ten suits, states either settled in favor of challengers or lost.
- One suit was dismissed on procedural grounds without reaching the merits of the claim, and granted the challenger permission to re-file the complaint.
- One suit is still pending.

Separately, state sustainable energy policies have recently undergone thirteen significant legal challenges pursuant to the Dormant Commerce Clause of the Constitution[2]:

- In nine of the thirteen suits, states either settled in favor of challengers or lost.

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1. *See* Steven Ferrey, *The Double Helix of Supremacy and Commerce Clause Constitutional Restraints Encircling the New Energy Frontier*, 7 NW. INTERDISC. L. REV. 1 (2014).
2. *Id.*

- The remaining four suits were dismissed on procedural grounds without reaching the merits of the claim

While there are obvious merits of the transition to sustainable energy policies and a need for new transmission facilities to deliver renewable power,[3] this is not an enviable legal record for state governments. The latest dispute highlights a state versus federal legal fight over whether the federal government can control state decisions regarding competitive power transmission in the new electric economy.[4] While the Federal Energy Regulatory Commission (FERC) mandated competition,[5] several states elected to take a stand in defiance of these federal orders.[6] This legal battle over the energy future invokes both the Supremacy Clause under Article VIII of the Constitution and the Commerce Clause under Article I. The ultimate resolution of this battle will shape the future infrastructure of the country as well as the degree of competition in our economy regarding moving power.

Of note, moving power is everything! Since humankind first created the wheel and harnessed animals to do productive labor, energy has been the means to organize production and advance civilization.[7] Electricity is a unique form of energy—with no substitutes or alternatives to its use in the twenty-first century for

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3. *See* Steven Ferrey, UNLOCKING THE GLOBAL WARMING TOOLBOX 13–14 (2010) (sustainable energy reducing contributions to climate change, yet additional transmission required to deliver remote wind power project output to electricity demand areas).

4. S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41 (D.C. Cir. 2014) (challenging Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000), 76 Fed. Reg. 49,842 (Aug. 11, 2011)).

5. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21,540, 21,541-43 (May 10, 1996) (to be codified at 18 C.F.R. pt. 37); Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct, 61 Fed. Reg. 21,737, 21,740-41 (Apr. 24, 1996) (to be codified at 18 C.F.R. pt. 37); Owning and Operating Public Utilities, 76 Fed. Reg. 49,842 (Aug. 11, 2011); Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 77 Fed. Reg. 32,184 (May 31, 2012); Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 77 Fed. Reg. 64,890 (Oct. 24, 2012).

6. *See infra* Part II(C) (several states insisting on rights of first refusal as to who constructs transmission infrastructure).

7. STEVEN FERREY, THE LAW OF INDEPENDENT POWER §§ 2:1, 2:5–6 (36th ed. 2015).

operation of computers, the Internet, medical imaging, national defense and security, modern communication, building size, and climate control.[8] Electric energy is the fundamental technology essential to power the developed American economy.[9] As the Supreme Court noted, it is now "possible for a customer in Vermont [to] purchase electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma."[10] Further, since power is only usable when delivered to users over a copper wire network, this movement and transmission of power is *everything.*[11]

Today, there are new legal challenges regarding whether the states can regulate how they choose aspects of electric energy within state borders.[12] The answer is legally complex because the Federal Power Act[13] alters the legal treatment of electricity in ways which other commodities and services are treated under U.S. law, and the Constitution imposes significant limitations on the exercise of state jurisdiction. Enforcing the Federal Power Act, FERC has promoted competition in the operation of regulated energy markets for a quarter century.[14] Some states do not want competition with

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8. *See* FERREY, *supra* note 7 at § 2:1 (discussing properties of electricity).

9. CRO FORUM, POWER BLACKOUT RISKS: RISK MANAGEMENT OPTIONS 2 (2012), *available at* http://www.thecroforum.org/cro-forum-positioning-on-power-blackout-risks/.

10. New York v. FERC, 535 U.S. 1, 8 (2002) (internal quotation marks omitted).

11. See *infra* Part II(A) for a discussion of how transmission and the power network operate. Self-generated distributed power does not require connection to the integrated network, however this exception is not the subject of this article. *See also* Steven Ferrey, *Exit Strategy: State Legal Discretion to Environmentally Sculpt the Deregulating Electric Environment* 26 HARV. ENVTL. L. REV. 109 (2002) (discussing distributed generation options).

12. *E.g.*, S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41 (D.C. Cir. 2014); Ill. Commerce Comm'n v. FERC, 756 F.3d 556 (7th Cir. 2014).

13. 16 U.S.C. § 824a (2012).

14. FERC has for 25 years attempted to mitigate monopoly transmission power by requiring certain elements of more competitive open access transmission service as a condition of merger approval. Utah Power & Light Co., 45 FERC 61,095 (1988). Investment in the transmission grid has lagged dangerously for decades. *See* David Raskin, *Transmission Policy in Flux*, PUB. UTIL. FORT., May 2013, *available at* http://www.fortnightly.com/fortnightly/2013/05/transmission-policy-flux?utm_source=Fortnightly&utm_campaign=8175b463ff-NOW-1305-A-Active&utm_medium=email&utm_term=0_a9a54328de-8175b463ff-217300189. In the Energy Policy Act of 2005, Congress gave additional tools to FERC, which provided price incentives and these merchant transmission entitlements to promote more investment. FERC promulgated Order 679, providing transmission pricing

established in-state incumbent companies, even if limited only to the movement of new renewable wind and solar energy to consumers.[15] Several states are insisting on enforcing state rights of first refusal (ROFRs) for existing in-state monopolies to commandeer any competitive or out-of-state electric power transmission proposals.[16]

In this legal stand-off, multiple clauses of the Constitution occupy center stage: Do "field preemption" and "conflict preemption" through the Supremacy Clause of the Constitution provide the federal government the final legal determination on what is permissible for states to do?[17] Under either concept, does the Commerce Clause, as interpreted by the Supreme Court, prohibit states from discriminating against out-of-state competitors in order to favor traditional in-state energy businesses?[18] States are losing the majority of these challenges to decisions made within their borders.[19]

FERC's new Order 1000 became a continental divide between the East and the West, as well as a federal-state legal stand-off. Western utilities and regional transmission organizations (RTOs) stopped maintaining any ROFRs, and Midwest, Eastern, and Southeastern utilities and their RTOs attempted to retain ROFRs. This article analyzes this recently created ROFR legal maelstrom. First, in this section, we outline the scope of this current constitutional confrontation between the states and the federal government. Part II examines how ROFRs operate regarding electric power and assesses the dimensions of the constitutional confrontation created by several recent state refusals of the requirements under FERC Order 1000.[20] We examine copper wires and why electricity, both as an engineering phenomenon and legally,

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incentives in accordance with new Section 219 of the Federal Power Act. *Id.*; *see also* 16 U.S.C. § 824s (2012) (requiring incentive-based rate treatments for transmission to reduce transmission congestion to benefit electric system reliability for consumers).

15. *See infra* Part II(C) (state enactment of ROFRs for any new transmission investments in their jurisdictions).

16. *See infra* Part II(C) (state ROFRs).

17. *See infra* Part III(C)(1) (limitations on state authority over transmission terms and tariffs).

18. *See infra* Part III(D) (the dormant Commerce Clause applied to energy regulation).

19. Steven Ferrey, *Carbon Outlasts the Law: States Walk the Constitutional Line*, 41 B. C. ENVTL. AFF. L. REV. 309, 328–29 & nn.143–55 (2014).

20. *Infra* Part II(B).

is treated differently than everything else in the known universe[21]—power transmission is *everything.*

Part III analyzes this pending constitutional confrontation by examining the newest Supreme Court decision that reinterprets the sharp divide between state and federal jurisdiction over law and power in the United States.[22] After examining both Supremacy Clause precedent[23] and Commerce Clause jurisprudence[24] on power regulation, Part III highlights the newest federal appellate court decisions on energy, which create strict restrictions on state discretion to regulate power transmission.[25]

Context matters. In the absence of effective federal policy, most states have enacted sustainable and renewable energy policies at the state level: Net metering is employed in 85% of states,[26] renewable portfolio standards are employed in 65% of states,[27] renewable system benefit charges are employed in 33% of states,[28] carbon and global warming gas emission regulation is employed in 20% of the states,[29] and feed-in tariffs are employed in 10% of

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21. *Infra* Part II(A).

22. *Infra* Parts III(A)–(B).

23. *Infra* Part III(C).

24. *Infra* Part III(D)(1).

25. *Infra* Part III(D)(2).

26. Steven Ferrey, *Virtual 'Nets' & Law: Power Navigates The Supremacy Clause*, 24 GEO. INT'L ENVTL. L. REV. 267, 268 (2012); Steven Ferrey, *Net Zero: Distributed Generation and FERC's MidAmerican Decision*, ELECTRICITY J., Oct. 2004, at 33; Steven Ferrey, *Nothing But Net: Renewable Energy and the Environment, MidAmerican Legal Fictions, and Supremacy Doctrine*, 14 DUKE ENVTL. LAW & POL. FORUM 1, 1–2 (2003).

27. Steven Ferrey, *Threading the Constitutional Needle With Care: The Commerce Clause Threat to the New Infrastructure of Renewable Power*, 7 TEX. J. OIL, GAS, & ENERGY L. 59, 62 (2012) [hereinafter *Threading the Constitutional Needle*]; Steven Ferrey, *Renewable Orphans: Adopting Legal Renewable Standards at the State Level*, ELECTRICITY J., Mar. 2006, at 52; Steven Ferrey, *Sustainable Energy, Environmental Policy, and States' Rights: Discerning the Energy Future Through the Eye of the Dormant Commerce Clause*, 12 N.Y.U. ENVTL. L.J. 507, 602 (2004).

28. Steven Ferrey, *Follow the Money! Article I and Article VI Constitutional Barriers to Renewable Energy in the U.S. Future*, 17 VIRGINIA J.L. & TECH. 89 (2012) [hereinafter Ferrey, *Follow the Money!*]; Steven Ferrey, *Auctioning the Building Blocks of Life: Carbon Allowance Auction, the Law and Global Warming*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 317 (2009); Ferrey, *supra* note 11, at 150–56.

29. Steven Ferrey, *Goblets of Fire: State Programs on Global Warming and the Constitution*, 34 ECOLOGY L.Q. 835, 840 (2009); Steven Ferrey, *Carbon and the Constitution: State GHG Policies Confront Federal Roadblocks*, PUB. UTIL.

states.[30] Some states are asserting diametrically opposed regulatory positions to the federal government. Some of the states have already endured legal and constitutional challenges to their choices regarding energy policies.[31] Part IV examines, in detail, four ongoing energy regulatory disputes that raise constitutional Supremacy Clause and Commerce Clause concerns, which are the context behind and legal analogies for the ROFR confrontation now at issue between state control and federal competition.[32]

Part V concludes by analyzing how, strategically, states could lose the ROFR constitutional "battle" but still win the ROFR power transmission "war." "What's Past is Prologue"[33]—especially in applying the Constitution. The outcome of this dispute will shape U.S. sustainable energy policy into the future.

II. RIGHTS OF FIRST REFUSAL: WHAT? WHY? LEGAL?

There is a major constitutional law confrontation regarding the transmission of power from new sustainable energy sources. As we transmit new renewable energy sources to consumption load centers in concentrated populations on the coasts of the U.S., the transmission issue looms large. While renewable resources are distributed across the U.S. and the world, they are not evenly distributed. Nine states east of the Mississippi River do not have any sub-regions with very high wind resources.[34] Six states from Virginia to Massachusetts do not have any sub-regions with at least one-quarter billion metric tons of currently available biomass

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FORT., (Apr. 2009), *available at* www.fortnightly.com/fortnightly/2009/04/carbon-and-constitution.

30. Steven Ferrey, Chad Laurent & Cameron Ferrey, *Fire and Ice: World Renewable Energy and Carbon Control Mechanisms Confront Constitutional Barriers*, 20 DUKE ENVTL. L. & POL'Y J. 125, 126–27 (2010); Steven Ferrey, Chad Laurent & Cameron Ferrey, *FiT in the U.S.A.*, PUB. UTIL. FORT. (June 2010), available at www.fortnightly.com/fortnightly/2010/05/fit-usa.

31. *See infra* notes 254, 257–268 and accompanying text (discussing challenges to energy regulation in Minnesota and Oklahoma).

32. *See infra* Part IV (discussing Second, Third, and Fourth Circuit Courts of Appeals decisions regarding preemption of state authority over facility practices in their forum states).

33. WILLIAM SHAKESPEARE, THE TEMPEST act 2, sc. 1.

34. Charles F. Kutscher, *Overview and Summary of the Studies*, *in* TACKLING CLIMATE CHANGE IN THE U.S. 25 n.4 (C.F. Kutscher, ed., 2007).

annually.[35] An increase in use of renewable energy will require new transmission corridors and capacity to transport that power from the wind or solar generation site to the load centers.

A. Why Copper Matters

The high-voltage transmission network was recognized by engineers as the most important engineering feat of the twentieth century.[36] In terms of physical assets, the "grid" is composed not only of the approximately 4,800 interconnected power-generation resources in the U.S., but also of the cable to connect them with consumers, and the hardware to manage them in an energized instantaneous network.[37] The high-voltage transmission network at 230 kV and higher, accounts for 167,000 miles of line in America.[38] In the U.S., there is an eastern interconnection, a western interconnection, and a separate interconnection that includes most of Texas.[39] This East–West divide has become more than mere engineering, because it now defines the fight over ROFRs in the new constitutional conflict. The transmission system operates at fifteen different voltage levels,[40] with limited power transactions between these three major interconnections in the continental U.S.[41]

Recall that transmission is a key unique element with electric power: It is not the copper molecule electrons, but the movement of these electrons that creates and delivers electric power.[42] The charge

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35. Kutscher, *supra* note 34, at 20. These resources count agricultural residues, crops, animal manure, wood residues, municipal discarded materials, and methane from landfill, as well as dedicated crop biomass. With the exception of Florida, the eastern half of the United States is devoid of subregions capable of producing 6.0 kwh/m2/day with solar photovoltaic resources on south-facing structures and surfaces.

36. Mason Willrich, *Electricity Transmission Policy for America: Enabling a Smart Grid, End to End*, ELECTRICITY J., Dec. 2009, at 77.

37. *Glossary*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/tools/glossary/index.cfm?id=G (last visited Mar. 14, 2015).

38. STAN M. KAPLAN, CONG. RESEARCH SERV., R40511, ELECTRIC POWER TRANSMISSION: BACKGROUND & POLICY ISSUES, 1-5 & n. 3 (2009), *available at* http://fpc.state.gov/documents/organization/122949.pdf

39. *Id.* at 3 (containing a visual display of interconnections in figure 2).

40. Craig Cano, *Efficiency Should be Viewed as Key Part of Entire Delivery System, Wellinghoff says*, ELECTRIC UTIL. WK., Dec. 2010, at 18–19.

41 KAPLAN, *supra* note 38, at 3.

42. Steven Ferrey, *Inverting Choice of Law in the Wired Universe*, 45 WM. & MARY L. REV. 1839, 1911 (2004).

is never consumed nor created.[43] The charges and electrons are all there in the beginning and at the end.[44] The courts have determined that electrons in interstate commerce cannot be traced.[45] Therefore, the physical reality, rather than the legal fiction, is that this movement—the transmission—*is everything*. Copper facilitates transmission, which is the reality of what we experience as electric power.

Today, there are numerous dispersed wind, solar, and other distributed power sources interconnected to the grid.[46] Power generation can perform as its contribution to the grid as either base-load power or backup–peaking power.[47] New intermittent wind and solar renewable resources cannot supply reliable base-load power, as they demonstrate a relatively low availability factor in the 10%–40% range of hours during a week or month.[48] Correspondingly, intermittent renewable resources may not be used as reliable backup/peaking power resources because they more often than not are unavailable to fill a need or to supplement peak power demand at a precise time. The U.S. Department of Energy (DOE) calculated that approximately 20% of wind power—about the amount of back-up reserve margin in regional power systems—can be accommodated on the grid without requiring additional storage or other mechanisms to accommodate intermittency.[49]

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43. First Law of Thermodynamics: Energy is neither created nor destroyed. *First Law of Thermodynamics*, GA. ST. U., http://hyperphysics.phy-astr.gsu.edu/hbase/thermo/firlaw.html (last visited Aug. 15, 2015).

44. FERREY, *supra* note 7, at §§ 10:76–10:78; STEVEN FERREY, THE NEW RULES: A GUIDE TO ELECTRIC MARKET REGULATION 211–32 (2000).

45. New York v. FERC, 535 U.S. 1, 7 n.5 (2002) (discussing Fed. Power Comm'n v. Fla. Power & Light Co., 404 U.S. 453 (1972)).

46. *How Much of Our Electricity is Generated from Renewable Energy*?, U.S. ENERGY INFO. ADMIN. (Apr. 14, 2014), http://www.eia.gov/energy_in_brief/article/renewable_electricity.cfm.

47. *See* James F. Wilson, *Restructuring the Electric Power Industry: Past Problems, Future Directions*, 16 NAT. RES. & ENV'T 232, 235 (2002) (distinguishing base-load and peaking power).

48. *See* FERREY, *supra* note 7, at § 2:11 (noting inability of intermittent sources to serve as base-load resource).

49. J. DeCesaro, et al., *Wind Energy and Power system Operations: A Review of Wind Integration Studies to Date*, ELECTRICITY J., Dec. 2009, at 34. Wind, being at off-peak times in many locations, will tend to displace typical coal base-load power, while solar PV units will tend to displace typical on-peak gas-fired peaking generation units. *Id.*

Electricity and the legal stresses on the electric transmission system are unique. Unlike all other forms of energy, moving electrons cannot be efficiently stored as electricity for more than a second before the energy is lost as wasted heat.[50] Therefore, the supply of electricity must match the demand for electricity over the centralized utility grid on an instantaneous, constant, real-time, and ongoing basis. If not, the electric system shuts down or expensive equipment is damaged.[51] Either too much or too little power causes system instability on a second-by-second basis.[52] A loss of power would disrupt communication and transportation, heating and water supply, as well as hospitals and emergency rooms, depending on their amount of back-up generation.[53] A constant simultaneous balancing of supply and demand on the utility grid system is essential.[54]

According to Kirchhoff's Law,[55] power moves almost at the speed of light on this energized grid and people can tap into this energizing service, although they do not purchase what is a conventional commodity.[56] The electric power grid must constantly balance supply and demand to keep the grid operational.[57] If power supply does not respond and is deficient to instantaneous demand, the grid can shut down and black out large areas, as happened in the Northeast U.S. on August 14, 2003.[58] The 2003 blackout affected 50

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50. STEVEN FERREY, ENVIRONMENTAL LAW 568 (6th ed. 2013).

51. CRO FORUM, *supra* note 9, at 4; *see also* FERREY, *supra* note 4, at 149–50 (discussing how the supply must match the demand on an instantaneous basis)

52. CRO FORUM, *supra* note 9, at 3.1.2.

53. *Id.* at 4.1.

54. *See* STEVEN FERRY, UNLOCKING THE GLOBAL WARMING TOOLBOX: KEY CHOICES FOR CARBON RESTRICTION AND SEQUESTRATION 149 (2010) (discussing challenges of balancing supply and demand within energy grid).

55. This law is also called Kirchhoff's first law, Kirchhoff's point rule and Kirchhoff's junction rule. The principle of conservation of electric charge that at any point in an electrical circuit where charge density is not changing in time, the sum of currents flowing towards that point is equal to the sum of currents flowing away from that point. *See* Jon Pumplin, Kirchhoff's Laws, MICH. ST. UNIV., http://www.pa.msu.edu/courses/2000spring/phy232/lectures/kirchhoff/kirchhoff.html.

56. *See* Steven Ferrey, *Inverting Choice of Law in the Wired Universe: Thermodynamics, Mass and Energy*, 45 WM. & MARY L. REV. 1839, 1914 (2004) (discussing how ownership and movement of a particular electron cannot be physically traced).

57. FERREY, *supra* note 50, at 568.

58. Matthew L. Wald, Richard Perez-Pena, & Neela Banerjee, *The Blackout: What Went Wrong; Experts Asking Why Problems Spread so Far*, N.Y. TIMES,

million people and caused a loss of $6 billion.[59] This blackout caused the loss of power at approximately half of the Chrysler plants, loss of a Ford plant for a week of repairs to remedy dysfunction caused by loss of power, shutdown of oil refineries, closure of one chain of 237 drugstores in New York City, closure of major urban airports, cancellation of more than a thousand flights, and loss of frozen and perishable food.[60]

Transmission is expensive, especially to transport power from more geographically remote locations, such as where some wind-intermittent resources are most robust and developed at smaller scale than traditionally large and conventional power plants. In this case, the greater capital and operating costs associated with longer transmission lines are spread over fewer units of intermittent power to transmit, yielding a higher cost per Kwh (kilowatt-hour) transmitted. The Joint Coordinated System Plan, a study commissioned by several power pools and independent system operators of transmission capacity, predicted that a 5% wind generation component by 2024 would require the construction of roughly 10,000 miles of additional high-voltage transmission lines at an estimated cost of $50 billion. A more aggressive 20% wind penetration target would require the construction of 15,000 miles of additional high-voltage transmission lines at a cost of approximately $80 billion.[61] A study by the DOE forecasts that 39,000 miles of additional high-voltage transmission circuits will be constructed within the next decade.[62] Annual utility investment in transmission was $6 billion in 1980, declined to $3 billion annually in the late 1990s, and rose to about $8 billion by 2007.[63] New transmission to strengthen the grid and for renewable power deployment could cost $100 billion.[64] There are estimates that it may take as much as $1.5

Aug. 16, 2003, at A1 (examining the cause of the 2003 blackouts across northeastern United States).

59. CRO FORUM, *supra* note 10, at 3.2.1.

60. *Id.*

61. Wald, Perez-Pena, & Banerjee, *supra* note 58.

62. N. AM. ELEC. RELIABILITY COUNCIL, LONG-TERM RELIABILITY ASSESSMENT 23 (2010).

63. J.J. DOOLEY, ENERGY R&D IN THE UNITED STATES 5 (1999).

64. *See* Nuel Navarrete, *U.S. Grid Needs $100 Billion for Renewable Energy Capability*, ECOSEED: BRIDGING ENV'T & ECO. (Oct. 15, 2010) http://www.ecoseed.org/en/business-article-list/article/1-business/8218-u-s-grid-needs-$-100-billion-for-renewable-energy-capability.

trillion to update the grid by 2030.[65] By any measure, this is a large construction project at large cost.

There are significant limits to federal jurisdiction over the actual transmission hardware and facilities, if not over the cost and tariff issues. Section 216 of the Energy Policy Act of 2005 directs the DOE to study transmission congestion in consultation with the states and designate certain transmission-constrained areas as national interest electric transmission corridors (NIETCs).[66] Section 216 grants FERC the authority to issue permits to construct transmission facilities in these NIETCs under certain circumstances.[67] The federal push for NIETCs under the Energy Policy Act of 2005 confronted multiple suits for failure to adequately assess greenhouse gas impacts involving the National Environmental Policies Act,[68] and Endangered Species Act challenges regarding failure to assess greenhouse gas impacts could follow.[69] A federal appellate court blocked FERC from acting to "backstop" and granted a federal permit under Section 216 for a new transmission line when the state failed to act on the permit for twelve months.[70] As long as the state took some action, including a denial of the permit, FERC's

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65. U.S. DEPT. OF ENERGY, SMART GRID SYSTEM REPORT viii (2009) (citing MARC W. CHUPKA ET. AL., BRATTLE GRP., TRANSFORMING AMERICA'S POWER INDUSTRY vi (2008), *available at* http://assets.fiercemarkets.com/public/sites/energy/reports/transformingamericaspower.pdf.

66. Energy Policy Act of 2005, 16 U.S.C. §§ 824 et seq.

67. In 2006, FERC issued Order 689 that created a cumbersome, multi-year process for obtaining a federal permit to construct transmission within a NIETC. 71 Fed. Reg. 69,440 (Dec. 1, 2006).

68. Border Power Working Grp. v. U.S. Dept. of Energy, 260 F. Supp. 2d 997 (S.D. Cal 2003); Mid–States Coalitions for Progress v. Surface Transp. Bd., 345 F.3d 520 (8th Cir. 2003); Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172 (9th Cir. 2008).

69. *See* Pac. Coast Fed. of Fishermen's Ass'ns v. Gutierrez, 606 F. Supp. 2d 1122 (E.D. Cal. 2008) (concerning the federal government's failure to address climate change in a biological opinion on endangered salmonid species, as required); Natural Res. Def. Council. v. Kempthorne, 506 F.Supp. 2d 322 (E.D. Cal. 2007) (noting that a biological opinion by the United States Fish and Wildlife Service did not take into account data on climate change, which violated its duty under the Endangered Species Act).

70. Piedmont Envt'l Council v. FERC, 558 F.3d 304, 310 (4th Cir. 2009). In addition, in 2007, the PJM ISO approved the construction of the PATH transmission line to move power within the region through West Virginia, Virginia, and Maryland to constrained population centers along the Atlantic coast. None of the states cooperated. The economic crisis eased the need for the project and PJM rescinded its order.

Section 216 authority to intercede was not triggered.[71] In 2011, the Ninth Circuit ruled that the DOE failed to properly consult with affected states in preparing the Congestion Study, as required by Section 216, and further ruled that the DOE failed to consider the environmental effects of designating NIETCs under the National Environmental Protection Act for corridors in mid-Atlantic and Southwestern states.[72]

Moving beyond the hardware of transmission to its financial impacts discussed below: Can states require that additional transmission facilities proposed by a competitive entity be turned over and built by incumbent in-state businesses? Incumbents are typically the traditional utilities. In an era when FERC power has increased, the federal authority that promotes competition among independent transmission entities, does a state preference for traditional business impermissibly frustrate or veto federal direction? In the Midwest, the Seventh Circuit struck initially a FERC order that would require all regional transmission organization (RTO) members to equally share in the cost of building any large transmission lines, whether or not they benefited from the investment.[73] The court held that local utilities should not have to pay for transmission lines to transport power outside the region, which would widely distribute costs to all ratepayers, not just to those that benefited.[74] A state supreme court held that no transmission lines could be certified—nor any eminent domain for construction exercised—unless the primary beneficiaries of the line were in-state ratepayers.[75]

A new 2013 federal circuit court decision[76] in this same ongoing Midwest matter brings additional focus to this issue, which will be discussed in Part III(D). First, Part II(B), below, sets forth

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71. *Piedmont Envt'l Council*, 558 F.3d at 310.

72. Cal. Wilderness Coalition v. U.S. Dept. of Energy, 631 F.3d 1072, 1079 (9th Cir. 2011).

73. Ill. Commerce Comm'n v. FERC, 576 F.3d 470, 477–78 (7th Cir. 2009).

74. *Id.*

75. Miss. Power & Light Co. v. Conerly, 460 So.2d 107 (Miss. 1984). A court in the same state a few years earlier held that PURPA amendments to the Federal Power Act were an unconstitutional exercise of the Commerce Clause and a violation of the Act, which was later reversed by the Supreme Court. FERC v. Mississippi, 456 U.S. 742, 745 (1982).

76. *See infra* Part III(D)(2) (upholding the allocation of transmission costs to all members of the service territory).

the federal regulatory structure of the key FERC Order 1000 and its challenge.

B. Order 1000

FERC Order 1000 introduced competitive bidding into the construction process for transmission facilities.[77] Traditionally, monopoly utilities build transmission and distribution facilities.[78] FERC exclusively regulates transmission transactions and tariffs—the financial aspects of electric transmission services.[79] All transmission tariffs are exclusively within FERC jurisdiction rather than within state jurisdiction.[80] The Federal Power Act directs FERC to regulate all interstate electricity transmission and to ensure the national electricity grid's reliability.[81] Further, Sections 205 and 206[82] of the Federal Power Act empower FERC exclusively to regulate rates for the interstate transmission and sale of electricity.[83]

FERC case law exerts exclusive jurisdiction over the "transmission of electric energy in interstate commerce" and over "all facilities for such transmission or sale of electric energy."[84] The

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77. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. 49,842 (Aug. 11, 2011); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000-A)*, 77 Fed. Reg. 32,184 (May 17, 2012); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000-B)*, 77 Fed. Reg. 64,890 (Oct. 18, 2012).

78. FERREY, *supra* note 44, at 260; *The Electricity Grid: A History*, BURN, http://burnanenergyjournal.com/the-electricity-grid-a-history/ (last accessed Aug. 15, 2015) (noting that monopoly utilities build the vast majority of the existing transmission and distribution network for electricity).

79. *Id.* at 38–40.

80. *See Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 100)*, 76 Fed. Reg. 49,842, 49,860 (Aug. 11, 2011) (discussing how Section 206 authority is necessary to correct deficiencies in transmission planning and the allocation of costs and Order No 1000 will help ensure that Commission-jurisdictional services are provided at rates, terms and conditions that are just and reasonable and not unduly discriminatory).

81. Federal Power Act §§ 202, 209, 16 U.S.C. §§ 824a, 824a–2, 797 (2012).

82. 16 U.S.C. §§ 824d–e.

83. Public Utility District No. 1 v. FERC, 471 F.3d 1053, 1058 (9th Cir. 2006).

84. 16 USC § 824(b); *e.g.*, Penn. Power & Light Co., 23 FERC 61,006, 61,018, (1983); S. Co. Servs., Inc., 37 FERC 61,256, 61,652 (1986); Fla. Power & Light Co., 40 FERC 61,045, 61,120–21, (1987); Houlton Water Co., 60 FERC 61,141, 61,515 (1992); N. Ind. Pub. Serv. Company, 66 FERC 61,213, 61,488 (1994); Conn. Light and Power Co., 70 FERC 61,012, 61,030 (1995); Cent. Vt.

Supreme Court held that Congress meant to draw a "bright line easily ascertained" and not requiring case-by-case analysis, between state and federal jurisdiction.[85] When a transaction is subject to exclusive FERC jurisdiction and regulation, state regulation is preempted as a matter of federal law and the Supremacy Clause of the U.S. Constitution, according to a long-standing and consistent line of rulings by the Supreme Court.[86] However, FERC does not

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Pub. Serv. Corp., 84 FERC 61,194, 61,973–75 (1998); Progress Energy, Inc., 97 FERC 61,141, 61,628 (2001); Armstrong Energy Limited Partnership, 99 FERC 61,024, 61,104 (2002); Niagara Mohawk Power Corp., 100 FERC 61,019 61,017 (2002); Barton Village, Inc., 100 FERC 61,244, 61,864 (2002), *vacated in part sub nom.*, 106 Fed. Appx. 88 (2d Cir. 2004); Virginia Elec. & Power Co., 103 FERC 61,109, 61,342–43 (2003); S. Cal. Edison Co., 106 FERC 61,183, 61,639–40 (2004); Midwest Indep. Transmission Sys. Operator, Inc., 106 FERC 61,337, 62,311–12 (2004); Entergy Servs., Inc., 120 FERC 61,020, 61,028 (2007); Aquila Merch. Servs., Inc., 125 FERC 61,175, 61,927 (2008).

85. Federal Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215–16 (1964).

86. New Eng. Power Co. v. New Hampshire, 455 U.S. 331, 337 (1982). The Supreme Court overturned an order of the New Hampshire Public Utilities Commission that restrained within the state, for the financial advantage of in-state ratepayers, low-cost hydroelectric energy produced within the state. *Id.* at 338. The Court held this to be an impermissible violation of the dormant Commerce Clause of the U.S. Constitution, Article 1, Sec. 8, clause 3 and the Federal Power Act: "Our cases consistently have held that the Commerce Clause of the Constitution precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom." *Id.*; *see also* Montana–Dakota Co. v. Pub. Serv. Comm'n, 341 U.S. 246, 251–52 (1951) ("We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one."); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 968 (1986) ("There is only NCUC's assertion that Nantahala should have obtained more of the low-cost, FERC-regulated power than Nantahala is in fact entitled to claim under FERC's order. Such a rationale runs directly counter to FERC's order, and therefore cannot withstand the pre-emptive force of FERC's decision."); Miss. Power & Light Co. v. Miss. *ex rel.* Moore, 487 U.S. 354, 371 (1988) ("States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair. FERC-mandated allocations of power are binding on the States, and States must treat those allocations as fair and reasonable when determining retail rates."); Entergy Louisiana, Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39, 50 (2003) ("It matters not whether FERC has spoken to the precise classification of ERS units, but only whether the FERC tariff dictates how and by whom that classification should be

regulate the construction of transmission facilities themselves, only economic tariffs for transactions moving power over them.[87] FERC's Federal Power Act Section 206 authority includes power-transmission planning and eliminating transmission-owner discrimination in accessing those systems, notwithstanding traditional state authority over transmission siting.[88] This creates an important legal dichotomy.

There is a multi-year evolution of the federal regulatory history regarding greater competition in electric power transmission. In Order 888, the Commission established the foundation for the development of competitive bulk power markets: non-discriminatory open access transmission service by electric utilities.[89] In Order 2000,[90] the Commission encouraged the development of RTOs to form "competitive wholesale electric energy markets"[91] that had to incorporate non-discriminatory transmission service.[92] In Order

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made. The amended system agreement clearly does so, and therefore the LPSC's second-guessing of the classification of ERS units is pre-empted.").

87. 16 U.S.C. § 824(b) (expressly providing that FERC lacks jurisdiction over electricity generation facilities, among other things); *see Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. 49,842, 49,860 (Aug. 11, 2011) (explaining that there is no statutory limit on FERC's jurisdiction over transmission planning: "The transmission planning process itself does not create any obligations to interconnect or operate in a certain way"; "the Commission is no way mandating or otherwise impinging upon matters that [S]ection 202(a) leaves to the voluntary action of the public utility transmission providers"; and "[S]ection 202(a) refers to the coordinated operation of facilities"). This pertains only to Commission-jurisdictional tariffs or agreements and does not require removal of references to such state or local laws or regulations from Commission-approved tariffs or agreements. *See id.* at 49,885 n.231 (noting that ISOs reflect state policies, as long as they are not discriminatory ROFRs). FERC noted that Order 1000 does not address the prudence of investment decisions nor determine which particular entity should construct any particular transmission facility, but merely to allow more entities to be considered for potential construction responsibility. *Id.* at 49,891.

88. S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41, 48–49 (D.C. Cir. 2014).

89. *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities (Order 888)*, 61 Fed. Reg. 21,540 (Apr. 24, 1996).

90. *Regional Transmission Organizations*, 65 Fed. Reg. 810 (Dec. 20, 1999).

91. Me. Pub. Utils. Comm'n v. FERC, 454 F.3d 278, 280–81 (D.C. Cir. 2006).

92. *See* 18 C.F.R. § 35.34(k)(7) (explaining that RTOs will group and serve multiple utilities, creating a larger interstate network within which competitive transmission access can be provided).

890,[93] the Commission amended the Order 888 pro forma tariff to require transmission providers to plan for the needs of their customers on a comparable basis to planning for their own needs.[94]

FERC recently turned a corner and attempted to regulate *who* is permitted to build new transmission capacity on an equal plane with incumbent utility transmission providers, although FERC still does not regulate the transmission hardware itself. FERC approves the terms of service and their financial tariffs of all RTO and Independent System Operators (ISOs).[95] FERC Order 1000 creates obligations for transmission owners to engage in regional and interregional transmission planning.[96] FERC Order 1000 also requires incumbent transmission providers, utilities, and the RTOs which manage regional multi-state transmission access to the grid, to remove ROFSs from FERC-approved transmission tariffs.[97] Further, FERC Order 1000 addresses the difference between an obligation to build in one's transmission zone and a federal ROFR: "[W]e did not agree that [the] obligation [to build] is necessarily dependent on the incumbent transmission provider having a corresponding federal right of first refusal to prevent other entities from constructing and owning new transmission facilities located in that region."[98]

FERC found that Order 1000 reforms were required to reflect new industry developments and "to address remaining deficiencies in transmission planning and cost allocation processes so that the transmission grid can better support wholesale power markets."[99] These new industry developments included a U.S. DOE study finding that "the electricity industry faces a major long-term challenge in ensuring an adequate, affordable and environmentally sensitive energy supply and that an open, transparent, inclusive, and

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93. *Preventing Undue Discrimination and Preference in Transmission Service (Order 890)*, 72 Fed. Reg. 12,266 (Mar. 15, 2007).

94. N.Y. Reg'l Interconnect, Inc. v. FERC, 634 F.3d 581, 584 (D.C. Cir. 2011); *Preventing Undue Discrimination and Preference in Transmission Service*, 72 Fed. Reg. at 12,435.

95. FERREY, *supra* note 44 at 49–50.

96 *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. 49,842, 49,908 (Aug. 11, 2011).

97. *Id.* at 49,885. For an excellent treatment of this, please see, Rishi Garg, *EH*, NRRI, Briefing Paper No. 13–04 (Apr. 2013).

98. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. at 49,887.

99. *Id.* at 49,860.

collaborative process for transmission planning is essential to securing this energy supply";[100] the North American Electric Reliability Counsel concluded that an additional 39,000 circuit miles of new transmission capacity would need to be constructed during the next ten years to maintain long-term reliability of the grid and to integrate intermittent additional renewable power generation.[101]

In its Notice of Proposed Rulemaking prior to issuing Order 1000, FERC directed public utility transmission providers to "eliminate provisions in Commission-jurisdictional tariffs and agreements that grant federal rights of first refusal to incumbent transmission providers with respect to . . . transmission facilities selected in a regional transmission plan for purposes of cost allocation."[102] This was kept intact when the final FERC Order 1000 rule was promulgated,[103] and in the subsequent FERC Orders 1000-A and 1000-B.[104] Failure of RTOs and ISOs to consider and evaluate independent non-incumbent transmission projects could violate the FERC Order 890 planning principle of "openness" in transmission planning.[105]

FERC Order 1000, as modified, provides that public utility transmission providers in a transmission planning region must adopt a transparent and not unduly discriminatory evaluation process and must use the same process to evaluate a new transmission facility proposed by a non-incumbent transmission developer as it does for a transmission facility proposed by an incumbent transmission developer.[106] While stating a general principle of nondiscrimination,

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100. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. at 49,848.

101. N. AM. ELEC. RELIABILITY COUNCIL, LONG-TERM RELIABILITY ASSESSMENT 23 (2010).

102. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. at 49,890–91.

103. *Id.* at para. 313. Non-incumbent transmission developer rights must be "consistent with state or local laws." *Id.* at para. 317.

104. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000-A)*, 77 Fed. Reg. 32,184 (May 17, 2012); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000-B)*, 77 Fed. Reg. 64,890 (Oct. 18, 2012).

105. *See Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. at 49,868 (noting that the FERC Order had seven principles to encourage openness and competition).

106. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000-A)*, 77 Fed. Reg. at 32,255. This statement does not preclude public utility transmission providers in regional

FERC Order 1000 does not require removal from Commission-jurisdictional tariffs' or agreements' every reference to state or local laws or regulations in respect to construction of transmission facilities: "Nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities."[107] An incumbent transmission provider may have unique knowledge of its own transmission systems, familiarity with the communities they serve, economies of scale, experience in building and maintaining transmission facilities, and access to funds needed to maintain reliability.

Order 1000 recognized that state determination of transmission facility construction and a bar on incumbent in-state providers' ROFRs to construct could coexist.[108] Order 1000 does not require removal from Commission-jurisdictional tariffs' or agreements' references to state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities.[109] As an exception, Order 1000 does maintain a federal

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transmission planning processes from taking into consideration the particular strengths of either an incumbent transmission provider or a non-incumbent transmission developer during its evaluation. An incumbent transmission provider may have unique knowledge of its own transmission systems, familiarity with the communities they serve, economies of scale, experience in building and maintaining transmission facilities, and access to funds needed to maintain reliability. *See also id.* at 32,244.

107. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. at 49,885 n.231.

108. *See, e.g.*, *id.* at 49,861 ("We acknowledge that there is longstanding state authority over certain matters that are relevant to transmission planning and expansion, such as matters relevant to siting, permitting, and construction. However, nothing in this Final Rule involves an exercise of siting, permitting, and construction authority. . . [W]e see no reason why this Final Rule should create conflicts between state and federal requirements."); *id.* at 49,880 ("[W]e note that nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities."); *id.* at 49,885 n.231 ("This Final Rule does not require removal of references to such state or local laws or regulations from Commission-approved tariffs or agreements.").

109. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. at 49,885 n.231;

ROFR for local projects where the incumbent does not seek to share the costs of those projects, upgrades to existing assets, and projects on existing rights of way.[110]

If there were a state ROFR provision, the deck would effectively be stacked against non-incumbents, even if the opportunity to compete were theoretically open to them through an RTO-administered competitive project selection process. Yet, even without ROFRs, there are many ways, both in the FERC order itself and in practical elements, for states to favor incumbent transmission providers over new entrants:

- Order 1000 provides that in a competitive selection process, RTOs may take into consideration the strengths of an incumbent transmission developer, which "is free to highlight [such] strengths."[111]
- Order 1000 requires the RTOs to "establish a date by which state approvals to construct must have been achieved that is tied to when construction must begin to timely meet the need that the project is selected to address," which could favor incumbents.[112]
- States still control, under state authority and municipal land-use law, whether non-utilities have right to eminent domain power for transmission facilities, which can be essential for siting.[113]
- States control whether transmission facilities must be turned over to the incumbent utility after construction.

C. State Objection to Federal Policy: The New ROFRs

As a representative of state public utility commissions, the National Association of Regulatory Utility Commissions (NARUC) filed an opposition to the FERC Order 1000 ROFRs elimination

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Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000-A), 77 Fed. Reg. at 32,244.

110. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. at 49,888, 49,892.

111. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. at 49,887.

112. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000-A)*, 77 Fed. Reg. at 32,254.

113. For a discussion of eminent domain authority and takings law, see FERREY, *supra* note 8, at § 6:131.

provision.[114] NARUC and more than twenty parties filed suit in the D.C. Circuit, challenging FERC's Order 1000 authority to mandate transmission planning and eliminate ROFRs.[115] The plaintiffs claimed that FERC had exceeded its traditional state authority to determine which electric transmission facilities are built.[116]

The question arose as to whether the states would adhere to these additional requirements, and how the states would be reflected in required ISO filings with FERC. Notwithstanding this FERC prohibition, Minnesota, North Dakota, South Dakota, Indiana, and Oklahoma enacted state ROFR statutes.[117] Order 1000 became an East–West issue. Western utilities and RTOs did not maintain any ROFRs, while Midwestern, Eastern, and Southeastern utilities and RTOs retained ROFRs.

Five states enacted ROFRs and others have proposed them.[118] Minnesota enacted a ROFR statute which confers upon the incumbent transmission entities "the right to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan and connects to facilities owned by [the] incumbent electric

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114. NARUC quoted the FERC Notice of Proposed Rulemaking: "[T]hese proposed reforms would only affect a right of first refusal established in a transmission provider's OATT or agreements subject to Commission jurisdiction. This Proposed Rule does not address, purport to change, or seek to preempt any state or local laws or regulation." Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 75 Fed. Reg. 37,884, 37,897 (proposed June 17, 2010). NARUC raised concern that Order 1000 would infringe on state jurisdiction and existing planning processes and could actually stall transmission planning and cost allocation. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. at 49,872.

115. The decision lists more than two dozen challengers, including the Midcontinent ISO, New York ISO, Edison Electric Institute, Coalition of Fair Transmission Policy, Alabama Public Service Commission, and National Rural Electric Coop. Association. S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41 (D.C. Cir. 2014). Intervening were the Connecticut Public Utilities Regulatory Authority, Florida Public Service Commission, and NARUC. *Id.*

116. *Id.*

117. States with either enacted or proposed ROFR laws include: Minnesota, MINN. STAT. § 216B.246 (2012); New Mexico, H.R. 163, 51st Leg., 1st Sess. (N.M. 2013), and South Dakota, S.D. CODIFIED LAWS § 49-32-19 (2011).

118. For more on this, see the study by Rishi Garg. Garg, *supra* note 97.

transmission owner."[119] South Dakota created a ROFR,[120] and conferred to the incumbent transmission operator the right to construct, own, and maintain an electric transmission line that connects to facilities owned by the incumbent utility grid.[121] North Dakota conferred a ROFR to the incumbent transmission provider under a certificate of public convenience and necessity,[122] which cannot be issued to another if the existing public utility "is willing and able to construct and operate a similar electric transmission line."[123] Indiana[124] and Oklahoma[125] also enacted ROFR statutes.

Other states proposed statutes.[126] Except for North Dakota, each state's actual or proposed statute confers upon an in-state incumbent transmission company the right to construct a transmission facility. The transmission facilities were identified and approved for construction in a federally approved FERC plan, at the loss of a potential competitor, contrary to FERC's order. This regulatory issue raises two constitutional issues. First, there is a Supremacy Clause issue when states adopt ROFRs despite FERC prohibition of such provisions, which frustrates the federal plan when FERC has exclusive authority to oversee such transactions. Second, there is a Dormant Commerce Clause issue when states favor in-state incumbent providers of electric transmission service in lieu of other or out-of-state providers. This is both a constitutional issue and potentially contrary to the orders issued pursuant to FERC's federal authority under the Federal Power Act.[127]

Pursuant to FERC Order 1000, PJM ISO,[128] the largest FERC-supervised independent transmission operator, which includes

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119. *See* MINN. STAT, 216B.246, Subd. 2 (2012). The new Minnesota law, "Federally Approved Transmission Lines; Incumbent Transmission Lineowner Rights," declares that "[a]n incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan and connects to facilities owned by that incumbent electric transmission owner." *Id.*

120. S.D. CODIFIED LAWS § 49-32-19 (2011).

121. *Id.* § 49-32-20.

122. N.D. CENT. CODE § 49-03-01 (2013).

123. *Id.* at § 49-03-02.

124. IND. CODE §§ 8-1-38-1 to -11 (2015).

125. OKLA. STAT. tit. 17, §§ 291–93 (2015).

126. *See* Garg, *supra* note 97 (referencing New Mexico's proposed statute).

127. 16 U.S.C. § 824 (2012).

128. Amended and Restated Ne. ISO/RTO Planning Coordination Protocol on behalf of ISO New Eng., Inc., N.Y. Indep. Sys. Operator, Inc., & PJM

part or all of thirteen Eastern states and the District of Columbia, and Midcontinent Independent System Operator, Inc. (MISO),[129] the second-largest FERC-supervised independent transmission system operator, which includes most of the Midwest states together with their included utility transmission owners, filed required compliance tariffs with FERC. In their compliance filings to FERC, PJM and MISO both proposed to incorporate by reference state laws that would favor an incumbent transmission provider.

In fall 2012, MISO and a subset of the MISO member utility transmission owners made a compliance filing which contained references to compliance with state ROFRs that were applicable in states in which the utilities operated, as their compliance filings for FERC's Order Numbers 1000, 1000-A, and 1000-B.[130] In spring 2013, FERC declared that MISO's proposed new provision for state or local ROFRs must be removed from its tariff filing.[131] MISO's filing was determined to go beyond reference to state or local laws and regulations by creating a federal ROFR for in-state incumbent entities. Commissioner Clark dissented from the majority FERC opinion, stressing the need for speed in transmission facility siting, not wasting resources, and going with sure talents of reliable incumbent owners.[132] He warned of litigation that would follow, contesting the FERC's decision as arbitrary and capricious in not deferring to state and local laws that may limit who is and is not eligible to construct facilities within that state's borders.[133]

Interconnection, L.L.C., (July 10, 2013) (No. ER13-1934-0000), *available at* http://www.pjm.com/documents/ferc-manuals/ferc-filings.aspx.

129. Answer of the Midcontinent Indep. Sys. Operator, Inc., Indicated Load-Serving Entities v. Midcontinent Indep. Sys. Operator, Inc., (July 22, 2013), (No. EL13-75-000).

130. *See FERC Order 1000 Compliance Filings and Orders*, MISO, *available at* https://www.misoenergy.org/WhatWeDo/StrategicInitiatives/Pages/FERCOrder1000.aspx (last visited Oct. 27, 2015); *see also Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. 49,842, 49,871 (Aug. 11, 2011) (to be codified at 18 C.F.R. pt. 35).

131. Midwest Indep. Transmission Sys. Operator, Inc., et. al; 142 FERC 61,215, 56 (Mar. 22, 2013). FERC directed MISO to strike the following language: "Transmission Provider shall comply with any Applicable Laws and Regulations granting a right of first refusal to a Transmission Owner." *Id.*

132. *Id.* at 150 (Clark, Comm'r, dissenting).

133. *Id.* Commissioner Clark would have preserved a right of first refusal for projects determined by the regional planning coordinator as necessary to satisfy

PJM also filed and proposed, and FERC accepted, certain "time based" exceptions for immediate-need reliability projects and short-term projects, which applied in situations that system reliability and transmission needs were affected and time constraints made it impractical to conduct a competitive solicitation process; in these situations, PJM could reasonably assign the construction of the transmission project directly to the incumbent transmission owner without competition from independent entities, and the costs could be distributed to customers regionally outside the host state customers.[134] FERC also directed PJM to revise the provisions of its open access transmission tariff, which is the required fair access mechanism for any entity to utilize the electric transmission system on fair and nondiscriminatory terms, and agreements filed so as to excise any federal ROFRs for transmission projects that are selected in the regional transmission plan for purposes of cost allocation.[135] FERC held that nothing in the commission's regulations allows transmission owners to bar a non-incumbent transmission developer from cost-based recovery for its transmission facilities.[136] FERC held:

NERC reliability standards and located entirely within the transmission provider's franchised service territory. *Id.*

134. The costs of transmissions projects are generally allocated to ratepayers who are the customers of the system. The issue is whether these costs are allocated to just customers of the utility subsidiary in whose territory the facility is constructed, all customers in the state, or all customers in the multi-state ISO region. For discussion of general ratemaking principles, see FERREY, *supra* note 7, at §§ 5:8–5:14 and FERREY, *supra* note 50, at 579–84.

135. PJM Interconnection, L.L.C., 142 FERC 61,214, 60 (Mar. 22, 2013); Atlantic City Elec. Co. v. FERC, 295 F.3d 1 (D.C. Cir. 2002); Atlantic City Elec. Co. v. FERC (*Atlantic City II*), 329 F.3d 856 (D.C. Cir. 2003). PJM proposes certain "solutions-based" exceptions where it would designate transmission projects to the incumbent transmission owner in the zone in which transmission facilities are located when the transmission project is: (1) an upgrade to an incumbent transmission owner's own transmission facilities; (2) located solely within an incumbent transmission owner's zone and for which the costs are allocated solely to the incumbent; (3) located solely in the incumbent transmission owner's zone and not included in the RTEP for cost allocation purposes; (4) proposed to be located on the incumbent transmission owner's right of way and the transmission project would alter the incumbent's use and control of its existing right of way under state law. *PJM Interconnection, L.L.C.*, 142 FERC at 61. FERC had held that "PJM Transmission Owners are not required to construct economic facilities, so such a requirement does not apply to economic construction pursuant to section 1.5.7 [of Schedule 6] or the Operating Agreement." Primary Power LLC, 140 FERC 61,052, 16 (July 19, 2012).

136. 16 U.S.C. §§ 824, 824e (2012).

> PJM's [filing] goes beyond mere reference to state or local laws or regulations; it references state and local laws and then uses that reference to create a federal right of first refusal. Order No. 1000 does not permit a public utility transmission provider to add a federal right of first refusal for a new facility based on state law.[137]

Again, Commissioner Clark wrote a dissenting opinion.[138] After FERC's 2013 order, MISO member states asked for a clarification, arguing that the FERC Order 1000 was arbitrary and capricious, and effectively placed an RTO board's selection of a developer for a regional transmission project in potential conflict with a state's authority to autonomously regulate its public utilities.[139]

States raised concerns that by mandating a transmission requirement that did not recognize state law, FERC was interfering with the exercise of states' rights.[140] For both the PJM and MISO filings, the transmission owners argued that their federal ROFRs were protected by the *Mobile–Sierra* doctrine, and FERC could not demonstrate that such a removal of existing ROFRs complied with the heightened standard of review under the *Mobile–Sierra* doctrine.[141] FERC's order found that the ROFR provisions[142] in the

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137. *Midwest Indep.*, 142 FERC at 63. In the PJM compliance order, relying on its general directive that Federal Rights of First Refusal be eliminated from tariffs and agreements subject to the Commission's jurisdiction, FERC directed that PJM remove language from its tariff that proposed to designate an incumbent transmission owner as "the Designated Entity" for a transmission project "when required by state law, regulation or administrative agency order with regard to enhancements or expansions or portions of such enhancements or expansions located within that state." *Id.* at 63–64. FERC also directed SCEG to remove language pertaining to rights-of-way that proposed rights-of-way to be "located on a Transmission Owner's existing right of way" which "would alter the Transmission Owner's use and control of its existing rights of way under state law." *Id.*

138. *Midwest Indep.*, 142 FERC at 63 (Clark, J., dissenting).

139. Re: Midwest Independent Transmission System Operator, FERC Docket Nos. ER13-187-000 to -001, Request for Clarification and Rehearing.

140. *Id.*

141. *Id.* at 7 ("FERC must presume that the rate set out in a freely negotiated wholesale-energy contract meets the just and reasonable requirement imposed by law. The presumption may be overcome only if FERC concludes that the contract

transmission owners' agreements did not qualify for *Mobile–Sierra* protection.[143] FERC agreed with the Illinois Commerce Commission that in this instance, each transmission owner's agreement formulates a rule that is a prescription of general applicability, rather than a negotiated rate provision which would therefore necessarily be entitled to a *Mobile–Sierra* presumption.[144] Appeal of FERC's decision to federal court ensued.

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seriously harms the public interest." (quoting NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n, 558 U.S. 165, 174 (2010)) (internal quotation marks omitted)); *see also* United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 341 (1956) ("The basic power of the Commission is that given it by [Section] 5(a) to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory, or preferential[.'] This is neither a 'rate-making' nor a 'rate-changing' procedure."); Fed. Power Comm'n v. Sierra Pacific Power Co., 350 U.S. 348, 353 (1956) ("The condition precedent to the Commission's exercise of its power under [Section] 206(a) is a finding that the existing rate is 'unjust, unreasonable, unduly discriminatory or preferential.'").

142. *Midwest Indep.*, 142 FERC at 14. FERC identified two missing characteristics that would indicate that *Mobile–Sierra* applied: Arm's length negotiation by sophisticated parties with equal bargaining power, and the interests of the contracting parties are not so aligned. *Id.* at 74. The Illinois Commerce Commission (ICC) asserted that a ROFR related to construction rights and obligations was not a "contractually negotiated rate" for purposes of the *Mobile–Sierra* doctrine, but was a term of general applicability not covered by *Mobile–Sierra*. NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n, 558 U.S. 165, 176 (2010).

143. *Midwest Indep.*, 142 FERC at 14. FERC clarified that all rates, terms and conditions in a bilateral power sales contracts freely negotiated at arm's length between sophisticated parties generally would establish contract rates and would come within the *Mobile–Sierra* presumption. *See* Midwest Indep. Transmission Sys. Operator, Inc., et. al (Second Compliance Order), 147 FERC 61,127 (May 15, 2014) (limiting *Mobile–Sierra* protection). On the other hand, where the terms of an agreement would, if approved, be incorporated into the service agreements of all present and future customers, those terms are properly classified as tariff rates and the *Mobile–Sierra* presumption would not apply. *Midwest Indep.*, 142 FERC at 14 (extending *Mobile–Sierra* protection).

144. FERC noted that the U.S. Supreme Court in its most recent statement on the *Mobile–Sierra* doctrine, acknowledged the potential distinction between "prescriptions of general applicability" and "contractually negotiated rates." *NRG Power Mktg.*, 558 U.S. at 176. FERC elaborated by stating that "Where the language of an agreement establishes rules that delimit, qualify, or restrict the ability of any other potential competitor to engage in the subject activity, that language creates generally applicable requirements." *Midwest Indep.*, 142 FERC at 50.

D. The Federal Circuit Court of Appeals Holding

In 2014, the D.C. Circuit Court of Appeals unanimously rejected challenges to FERC's Order 1000, finding the allegations that Order 1000 would harm system reliability were "unpersuasive."[145] The court declared that FERC properly addressed reliability concerns by maintaining ROFRs for projects that would be located entirely within a utility's service territory and thus would not be subject to regional cost allocation.[146] The court held that FERC had sufficient authority under the Federal Power Act to require removal of federal ROFR provisions from federally mandated transmission tariffs "upon determining they were unjust and unreasonable practices affecting rates."[147]

The challengers argued that FERC lacked authority to remove ROFRs under the Federal Power Act. Specifically, the challengers cited Section 206 of the Federal Power Act, which limits FERC's authority to practices "affecting" a rate.[148] The challengers argued that the relationship between the incumbent utilities' monopolies and resultant rates were tenuous—therefore, Order 1000 did not "affect" a rate.[149] The court, however, found the challengers' argument "unconvincing," concluding that Section 206 does not "unambiguously" limit FERC's authority.[150] The court wrote, "[W]e think that the Commission's reading of Section 206 is reasonable. Petitioners give us no persuasive reason to think otherwise . . . . [T]he challenged orders take great pains to avoid intrusion on the traditional role of the States."[151]

The challengers also argued that FERC's ROFR removal requirement violated the *Mobile–Sierra* doctrine, which presumes that freely negotiated wholesale energy contracts are "just and reasonable" unless found by FERC to seriously harm the public interest.[152] In response, the court cited FERC Order 890, which

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145. S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41, 48 (D.C. Cir. 2014).
146. *Id.*
147. *S.C. Pub. Serv. Auth.*, 762 F.3d. at 48–49.
148. *Id.* at 73.
149. *Id.*
150. *Id.* at 75.
151. *Id.* at 76.
152. *Id.* at 74–75 ("The relationship between rights of first refusal and rates is far more direct than the relationship between corporate governance and rates. Nothing suggests that replacing the members of a board will necessarily affect

requires the development of mandatory regional cost allocation rules by which the beneficiaries of transmission projects throughout the region are identified and required to pay for the cost of the expansion in a manner roughly commensurate with the benefits.[153] FERC justified Order 1000 on the "theoretical threat" that "the narrow focus of current planning requirements and shortcomings of current cost allocation practices create an environment that fails to promote the more efficient and cost-effective development of new transmission facilities."[154] The court found the commissioner's argument persuasive, stating:

> [FERC] reasonably determined that regional planning must include consideration of transmission needs driven by public-policy requirements . . . [and] reasonably relied upon the reciprocity condition to encourage non-public utility transmission providers to participate in a regional planning process . . . .
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> . . . .
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> . . . [E]ven in a naturally monopolistic market, the threat of competitive entry (e.g., through competitive bidding) will lead firms to lower their costs, which thereby generally lowers cost-based utility rates.[155]

In addition, the court concluded that FERC could require transmission providers to participate in regional planning that proportionately allocates costs of new transmission facilities based on forecasted benefits, and that there was "substantial evidence of a

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rates . . . . The challenged orders here provide what was lacking in *CAISO*: an economic principle that directly ties the practice the Commission sought to regulate to rates."). Petitioners argued that FERC unlawfully deprived them of their rights of first refusal without first making the finding required by law to rebut the *Mobile–Sierra* presumption. *Id.* at 71–72. The court did not agree and noted that FERC had committed to hearing the petitioners' *Mobile–Sierra* arguments when it reviews the actual tariffs which utilities must file to comply with Order 1000. *Id.*

153. *S.C. Pub. Serv. Auth.*, 762 F.3d. at 53.

154. *Id.* at 64.

155. *Id.* at 49, 69

theoretical threat to support adoption of the reforms" in Order 1000.[156]

Because Order 1000 was upheld by the D.C. Court of Appeals, state ROFR legislations could face strict scrutiny. Under strict scrutiny, legislations do not usually survive a Supremacy or Commerce Clause challenge. Because not all states are adhering to the D.C. court's ruling,[157] there continues to be an ongoing federalist conflict in energy regulation, pitting state against federal authority. The contours and context of the federalism conflict in energy regulation are sculpted by:

- A recent Supreme Court decision on the degree of *Chevron* deference for an independent federal utility regulatory agency determining its own authority.[158]
- A recent federal circuit court's decision on federal authority over electric transmission tariffs and restrictions on state jurisdiction.[159]
- Federal court decisions discussing the dual Supremacy Clause and Commerce Clause challenges to state energy regulations and federal cases discussing these constitutional issues with respect to:
    - Vermont's regulation of the operation and use of the output of existing power generation facilities;[160]
    - New Jersey's preference for new in-state sited power generation;[161]
    - Maryland's preference for new in-state sited power generation;
    - California's favoritism for in-state lower-carbon fuel sources.[162]

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156. *S.C. Pub. Serv. Auth.*, 707 F.3d at 48.

157. For ways for states to circumvent the ruling, see *infra* Part V(C).

158. *See infra* Part III(A) (discussing *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013)).

159. *See infra* Part III(B) (discussing analogies between court decisions and FERC authority).

160. *See infra* Part IV(A) (discussing federal adjudications in Vermont).

161. *See infra* Part IV(B) (discussing federal adjudications in New Jersey).

162. *See infra* Part V(C) (discussing federal adjudications in California).

Parts III and IV examine each bullet point. Part III examines the recent Supreme Court decision on the *Chevron* deference afforded to an independent federal utility regulatory authority, and examines federal authority over electric transmission tariffs and restrictions. Part IV examines the Supremacy Clause and Commerce Clause challenges to state regulations.

III. THE LAW, PROTAGONISTS, AND FEDERAL COURT INTERPRETATION

A. The Latest Supreme Court Determination on Federal Supremacy and Utility Regulation

In 2013, the Supreme Court faced the issue of whether the Federal Communications Commission (FCC) can broadly construe its own jurisdiction and whether the FCC is entitled to judicial *Chevron*[163] deference in this determination. In *Arlington v. FCC*, the Supreme Court held that the FCC can broadly construe its own jurisdiction and is entitled to deference in the determination of its authority.[164] While the FCC is not FERC, it is a federal utility regulatory agency; therefore, *Arlington v. FCC*'s relevance to the FERC energy issue is significant, as it could shed light on FERC's power to regulate energy.

In *Arlington v. FCC*, the Supreme Court held that *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* applies to an agency's interpretation of the scope of its own statutory jurisdiction. The Court wrote, "Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency."[165] For the Court, the deference afforded the agency between an agency's "jurisdictional" and "nonjurisdictional" interpretations is indistinguishable[166]—"If 'the agency's answer is

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163. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U. S. 837 (1984).

164. City of Arlington v. FCC, 133 S. Ct. 1863, 1885–86 (2013).

165. *Arlington*, 133 S. Ct. at 1868. Under *Chevron*, the court must first ask whether Congress directly spoke to the precise question at issue; if so, the court must give effect to Congress' unambiguously expressed intent. *Chevron*, 467 U.S. at 842–43. However, if "the statute is silent or ambiguous," the court must defer to the administering agency's construction of the statute so long as it is permissible. *Id.* at 843.

166. No "exception exists to the normal [deferential] standard of review" for "'jurisdictional or legal question[s] concerning the coverage'" of an Act. NLRB v.

based on a permissible construction of the statute,' that is the end of the matter."[167] As Justice Breyer, in his concurring opinion, noted, "a nearby saving clause says: 'Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.'"[168]

Under the Federal Telecommunications Act of 1996 (the FCC statute), the states and their subdivisions retain authority over construction of the physical (wireless phone) transmission facilities.[169] The parallels are clear between the FCC statute reservation of state authority and FERC's exercise of jurisdiction in Order 1000 over ISO transmission provisions, while reserving actual physical siting to the states. FERC emphasized in Order 1000 that it did not intend to limit, preempt, or otherwise affect state and local laws or regulations with respect to the construction of transmission facilities.[170] FERC emphasized that it did not intend to limit the states' authority over the siting or permitting of transmission facilities.[171]

City Disposal Sys., Inc., 465 U.S. 822, 829 n.7 (1984). There is no principled basis for carving out an arbitrary subset of "jurisdictional" questions from the *Chevron* framework. *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co., 534 U.S. 327, 333, 339 (2002) (noting that agencies' interpretations are given greater deference when "the subject matter . . . is technical, complex, and dynamic; and as a general rule, agencies have authority to fill gaps where the statutes are silent").

167. *Arlington*, 133 S. Ct. at 1874–75 (quoting *Chevron*, 467 U.S. at 842). The Supreme Court has afforded *Chevron* deference to agencies' constructions of the scope of their own jurisdiction. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 845 (1986) (upholding federal agency determination of scope of its authority); United States v. Eurodif S.A., 555 U.S. 305, 316 (2009) (noting that the Commerce Department's determination that something was the sale of goods, rather than services, is a permissible interpretation and application of 19 U.S.C. § 1673, which does not apply to the sale of services).

168. *Arlington*, 133 S. Ct. at 1877 (Breyer, J., concurring) (quoting Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(A)).

169. Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(A) (West 2014).

170. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. 49,842, 49,891 (Aug. 11, 2011).

171. *Id.*

To determine state and federal power to regulate, courts must determine whether the federal agency, in asserting its own broad authority, is acting ultra vires. The determination of the power to regulate is independent of the merits of a decision: A "court's power to decide a case is independent of whether its decision is correct, which is why even an erroneous judgment is entitled to res judicata effect. Put differently, a jurisdictionally proper but substantively incorrect judicial decision is not ultra vires."[172] Even though the determinations are different, the Supreme Court held that the judicial standard of review and the *Chevron* deference afforded to the agency are identical—"there is *no difference*, insofar as the validity of agency action is concerned, between an agency's exceeding the scope of its authority (its 'jurisdiction') and its exceeding authorized application of authority that it unquestionably has."[173]

According to its own determination, FERC enjoys an independent quasi-judicial regulatory position similar to that of the FCC—separate from the President's cabinet with independent appointed commissioners. Both FERC and the FCC regulate utility industries.

In *Arlington*, the dissent noted the excesses of federal agencies, writing that "[t]he collection of agencies housed outside the traditional executive departments, including the Federal Communications Commission, is routinely described as the 'headless fourth branch of government,' reflecting not only the scope of their authority but their practical independence."[174] The dissent would not supply deference to the agency on all matters—"A congressional grant of authority over some portion of a statute does not necessarily mean that Congress granted the agency interpretive authority over all its provisions."[175] Notwithstanding the dissent, however, the majority held that a general conferral of rulemaking authority validates rules for all the matters the agency is charged with administering.[176] The majority rejected the dissent's proposal that the federal agency's authority should be parsed step-by-step:

> [T]he dissent proposes that even when general rulemaking authority is clear, *every* agency rule must

172. *Arlington*, 133 S. Ct. at 1869 (majority opinion).
173. *Id.* at 1870.
174. *Arlington*, 133 S. Ct. at 1878 (Roberts, J., dissenting).
175. *Id.* at 1883 (Roberts, J., dissenting).
176. *Id.* at 1865.

> be subjected to a *de novo* judicial determination of whether *the particular issue* was committed to agency discretion. It offers no standards at all to guide this open-ended hunt for congressional intent . . . . It would simply punt that question back to the Court of Appeals, presumably for application of some sort of totality-of-the-circumstances test—which is really, of course, not a test at all but an invitation to make an ad hoc judgment regarding congressional intent. Thirteen Courts of Appeals applying a totality-of-the-circumstances test would render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*. The excessive agency power that the dissent fears would be replaced by chaos.[177]

However, *Chevron*'s nuances have been honed in other decisions. For example, *United States v. Mead Corp.*[178] requires that for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted.[179] In *Arlington*, however, the Court articulated that *Mead* was not applicable to the FCC because the agency had authority over the subject matter regulated.[180] The Court noted that no case had diverged from upholding a general delegation of congressional authority as sufficient to support *Chevron* deference on all decisions.[181] Indeed the Court wrote,

> But *Mead* denied *Chevron* deference to action, by an agency with rulemaking authority, that was not rulemaking. What the dissent needs, and fails to produce, is a single case in which a general conferral of rulemaking or adjudicative authority has been held

177. *Arlington*, 133 S. Ct. at 1874.

178. 533 U. S. 218 (2001).

179. *Id.* at 226–27 ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.").

180. *Arlington*, 133 S. Ct. at 1873.

181. *Id.* at 1881.

> insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field. There is no such case . . . .[182]

The unsuccessful respondents in *Arlington* asserted that there should be a higher standard and that *Chevron* deference should not be applied if the federal agency has "assert[ed] jurisdiction over matters of traditional state and local concern."[183] The majority opinion countered that the respondent's position was meritless, and that *Chevron* deference is appropriate where the statute explicitly supplants state authority, determining whether a federal agency or federal courts will draw the lines to which the states must conform.[184]

B. Analogies of the Supreme Court Decision to FERC Authority

There are no more analogous federal agencies than FERC and the FCC. Both the FCC and FERC are independent federal agencies (rather than cabinet agencies), part of the executive branch; regulators of private utilities in the United States, and operators under statutes principally enacted eighty years ago. Both commissions operate under similar federal statutes: The Federal Power Act[185] and the Communications Act of 1934.[186] The division between federal and state authority in both statutes is similar: Local authorities approve the siting and construction of cell phone towers and facilities, subject to federal limitations interpreted by FCC regulation.[187] In addition to regulating interstate, wholesale, and transmission transactions, FERC regulates certain electric and gas utilities.[188] The FCC regulates communication utilities.

Under both FCC and FERC regulations, states are reserved certain key transmission *construction* authority. Similar to Order 1000, the FCC Act provides that nothing in the order "shall limit or

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182. *Arlington*, 133 S. Ct. at 1874.

183. *Id.* at 1873 (alteration in original) (internal quotation marks omitted).

184. *Id.* at 1873.

185. 16 U.S.C. § 791a et seq. (2014).

186. 47 U.S.C. § 151 et seq. (2014).

187. *Arlington*, 133 S. Ct. at 1866; City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 115 (2005).

188. *See supra* Part II(B) (discussing FERC's regulatory power under the Federal Power Act and Order 1000).

affect the authority of a State or local government" decisions over siting wireless transmission towers.[189]

1. Exclusive Federal Jurisdiction over ISOs

Under the Federal Power Act, FERC has always exercised exclusive authority over all terms and tariffs filed to operate transmission facilities. Order 888 articulates a federal move towards greater competition in transmission services.[190] By providing that any party can file for FERC approval of a regulatory order regarding the operation of transmission services and that ISOs cannot sanction discrimination in the rights regarding who may file for transmission tariffs, Order 1000 is consistent with the federal move to more competition that was articulated in Order 888.[191] FERC does not dictate which entities are permitted to build the physical transmission facilities. Rather, FERC provides that ISO tariffs cannot institutionalize discrimination regarding who may file and be approved for transmission facilities.

Adopted in certain cases in the U.S., ISOs and RTOs are FERC-encouraged institutions. More importantly, ISOs and RTOs are created and authorized by FERC.[192] ISOs manage regional

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189. *Arlington*, 133 S. Ct. at 1866; Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(A) (West 2014).

190. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities (Order 888)*, 61 Fed. Reg. 21,540, 21,546 (Apr. 24, 1996); *see also* FERREY, *supra* note 44, at 41–42 (requiring all FERC-regulated transmission providers to allow any party, not just utilities, transmission access on similar financial and other terms).

191. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. 49,842, 49,892 (Aug. 11, 2011).

192. *See also Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities (Order 888)*, 61 Fed. Reg. 21,540 (Apr. 24, 1996); *Open Access Same-Time Information System and Standards of Conduct (Order 889)*, 61 Fed. Reg. 21,736 (Apr. 24, 1996); *Regional Transmission Organizations (Order 2000)*, 65 Fed. Reg. 809 (January 6, 2000). In the PJM ISO, which serves multiple Eastern states, there are two retail energy markets, a real-time (spot) and a day-ahead (forward) market. *PJM Markets*, PJM 1 (May 14, 2015), http://www.pjm.com/~/media/about-pjm/newsroom/fact-sheets/pjm-markets-fact-sheet.ashx. The basis of calculating the electricity price in either market is locational marginal pricing. *Id.* PJM's capacity-market model, the reliability pricing model, was implemented in 2007 as the successor to its capacity credit market design, as a series of auctions for a delivery year

power transmission entities pursuant to ISO-filed tariffs that exist only pursuant to FERC approval of their creation.[193] FERC's Order 1000 specifies that FERC will not sanction institutionalized discrimination by approving required ISO submissions that incorporate certain discriminatory provisions, such as state ROFRs.[194]

2. State Authority: Dividing Lines

Turning to state authority over retail power, every state except Nebraska has sanctioned, maintained, and regulated monopolies of private companies that distribute electric service. However, distribution of power is not the transmission of power: The former is exclusively regulated by the states, while the latter is exclusively regulated by FERC (pursuant to the Federal Power Act and court interpretation).[195] The "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States."[196] And states authorize the actual construction of transmission facilities, but not their terms of operation, which is an area exclusively within federal

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approximately three years in the future. *Id.* PJM's demand curve, the variable resources requirement, defines the price for a given capacity commitment relative to the applicable reliability requirement, defined for each constrained locational delivery area. *Id.* at 2.

193. Regional Transmission Organizations (RTOs) or Independent System Operators (ISOs) are FERC-approved and regulated entities that facilitate commercial electricity transfers, through a private corporation that functions as a tariff administrator. RTOs are responsible for managing both electrical and financial transactions, including scheduling transmission transactions, dispatching generation, and managing the entire accounting for the grid capacity and energy charges and transmission fees. *See* FERREY, *supra* note 7, at §§ 8:10, 10:87, 10:91 (operation and responsibilities of RTOs and ISOs); FERREY, *supra* note 44, at 49–50 (RTO function to promote competitive transmission access).

194. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. 49,842, 49,885 (Aug. 11, 2011).

195. FERREY, *supra* note 7, at § 5:10; FERREY, *supra* note 50, at 586; FERREY, *supra* note 44, at 23–24, 46–47 (distinguishing between transmission and distribution of the same power is now accorded to FERC or the states, respectively, based on the wholesale or retail purpose of the transactions).

196. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 205 (1983); *see also* Frost v. Corp. Comm'n, 278 U.S. 515, 534 (1929) (noting that "the Federal Constitution imposes no limits upon the State's discretion" in giving a franchise to operate a public utility).

authority. Ultimately, the issue is how these separate federal and state authorities overlap, preempt, and essentially integrate.

In Order 1000, FERC is not attempting to influence any power *distribution* tariffs or terms approved by the states. FERC is not deciding which entities can construct transmission facilities—construction is exclusively approved by the states.[197] Order 1000 affects only a ban on an institutionalized embodiment of discrimination against non-incumbents in FERC-approved ISO tariffs. Notwithstanding Order 1000, states remain free to deny actual construction permits to non-incumbent or non-native transmission entities.

Although FERC will not permit a formal ROFR in favor of incumbent entities, states can deny permits on a case-by-case basis to new entrants that seek to construct or own transmission facilities. In other words, the state acts under the framework set by FERC. In light of the split authority on electric energy matters, there lies a dual constitutional concern. First, if FERC did not ban such ROFRs in ISO tariffs and were to permit states or ISOs to discriminate against non-incumbent out-of-state applicants, it would immediately raise dormant Commerce Clause issues. Second, allowing a state to veto federal competitive access raises Supremacy Clause issues.

C. Supremacy Clause Interpretation

1. Supreme Court "Bright Lines"

A large majority of U.S. power now proceeds through a wholesale power sale prior to its ultimate retail disposition,[198] thereby fundamentally shifting the required legal analysis to

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197. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. 49,842, 49,858 (Aug. 11, 2011) (comments on legal authority for transmission planning reforms).

198. ELECTRIC ENERGY MARKET COMPETITION TASK FORCE, REPORT TO CONGRESS ON COMPETITION IN WHOLESALE AND RETAIL MARKETS FOR ELECTRIC ENERGY 10 (2007) ("In the 1970s, vertically integrated utility companies (investor-owned, municipal, or cooperative) controlled over 95 percent of the electric generation in the United States . . . . [B]y 2004 electric utilities owned less than 60 percent of electric generating capacity. Increasingly, decisions affecting retail customers and electricity rates are split among federal, state, and new private, regional entities."). *See also* Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393, 412 (2d Cir. 2013) (discussing the utility market structure).

determine what a state may constitutionally regulate.[199] State regulation is not allowed to stand as an obstacle to congressional objectives.[200] A state cannot create a conflict or obstacle to federal licensing of federally regulated energy generation facilities that are within the exclusive federal authority of a federal agency.[201] State law is not allowed to overrule or supplant federal determinations by adding requirements not consistent with those in federal law.[202]

Preemption under the Federal Power Act also expressly distinguishes wholesale from retail regulation.[203] The Supremacy Clause establishes preemption of federal law over state and local regulation, and it provides: "[T]he laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[204] Sections 205 and 206 of the Federal Power Act empower FERC to regulate rates and terms for all wholesale sales of electricity and any transmission of electricity in interstate commerce.[205]

The Supreme Court held that Congress meant to draw a "bright line" between state and federal jurisdiction over energy regulation.[206] The Federal Power Act creates this "bright line"[207] by stating that wholesale power sales fall affirmatively on the *federal*

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199. *See* FERREY, *supra* note 7, at §§ 5:22, 5:26–28 (noting that the independent generation of bulk power interjects a wholesale sale to the utility or other distributor as the first sale transaction, thereby supplanting traditional state regulation with federal FERC wholesale regulation); FERREY, *supra* note 50, at 587 (same).

200. *Pacific Gas*, 461 U.S. at 204, 212; Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

201. 42 U.S.C. § 2019 (2014); N. States Power Co. v. Minnesota, 447 F.2d 1143, 1146 (8th Cir. 1971).

202. Granite Rock Co. v. Cal. Coastal Comm'n, 768 F.2d 1077, 1082 (9th Cir. 1985); Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965, 969 (2012) (quoting The Federal Meat Inspection Act (FMIA), 21 U.S.C. § 678 (2012)) (deciding unanimously that federal law prohibits states from enforcing requirements regarding "premises, facilities and operations" that are "in addition to or different" from those in federal law).

203. *See infra* Part III (discussing the Supreme Court's determination on the federal supremacy in utility regulation).

204. U.S. CONST. art. VI, cl. 2.

205. 16 U.S.C. §§ 824d–e (2014).

206. Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215–16 (1964).

207. *Id.*

side of the line[208]—the rates, terms, and provisions of any wholesale sale or transmission of electricity in interstate commerce are exclusively within federal jurisdiction and control under the Federal Power Act.[209] "FERC has exclusive authority to determine the reasonableness of wholesale rates."[210] States, however, retain authority over retail electric sales because "FERC's jurisdiction over the sale of power has been specifically confined to the wholesale market."[211]

The Federal Power Act defines "sale of electric energy at wholesale" as any sale to any person for resale.[212] Wholesale sales can occur within state boundaries when an in-state generator sells power to another entity in the same state for ultimate resale in a retail transaction. The Supreme Court addressed that situation and found that "Congress meant to draw a bright line easily ascertained[] between state and federal jurisdiction" by granting FERC "plenary" federal jurisdiction over wholesale sales, making unnecessary a

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208. Pub. Util. Dist. No. 1 v. FERC, 471 F.3d 1053, 1066 (9th Cir. 2006), *aff'd in part, rev'd in part sub nom.*, Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527 (2008) (one of four Supreme Court opinions in the past three decades criticizing the reasoning of the Ninth Circuit's decision, but nonetheless upholding that FERC has exclusive authority and responsibility to review long-term power crises and wholesale market manipulation by a party to the power sale contract that would negate existing contract protections, and wholesale rates). The Supreme Court criticized the reasoning of the Ninth Circuit instituting a rate "zone of reasonableness" on FERC determinations, which would be "a reinstitution of cost-based rather than contract-based regulation." *Morgan Stanley*, 554 U.S. at 549–50. The Court did not want to impose this cost calculation burden on FERC regarding every market-based contract. *Id.* at 551. The 5–2 decision by Justice Scalia upheld the tougher "public interest" standard to only abrogate contracts in those "extraordinary circumstances where the public will be severely harmed," as articulated by the *Mobile–Sierra* doctrine, with a new affirmative twist for market manipulation; FERC was told to "amplify or clarify its findings." *Id.* at 551, 555. Market turmoil or chaos, even rendering a power market dysfunctional, alone are not sufficient to negate existing wholesale power contracts, which are designed, in part, to hedge against certain market risks. *Id.* at 547. For a discussion of the California and Western energy crisis that spawned this litigation, see generally Steven Ferrey, *Soft Paths, Hard Choices: Environmental Lessons in the Aftermath of California's Electric Deregulation Debacle*, 23 VA. ENVTL. L.J. 251 (2004).

209. New Eng. Power Co. v. New Hampshire, 455 U.S. 331, 340 (1982).

210. Miss. Power & Light Co. v. Miss. *ex rel* Moore, 487 U.S. 354, 371 (1988); *accord* Public Utility District No. 1, 471 F.3d at 1066.

211. New York v. FERC, 535 U.S. 1, 20 (2002) (emphasis omitted).

212. 16 U.S.C. § 824(d) (2014).

case-by-case analysis of the impact of state regulation on national interests.[213] If a utility or independent power producer is subject to FERC jurisdiction and regulation over its wholesale power sales, state regulation of the same operational aspects is preempted as a matter of federal law.[214]

To determine whether there was federal authority under the Commerce Clause, the Court looked at the statutory definition of the "transmission of electricity"—the term is defined by the Federal Powers Act as electricity transmitted from one state and consumed at any point outside the state.[215] Looking at the definition of "transmission," the Court had in a separate opinion concluded, "[t]he transmission of electric current from one state to another . . . is interstate commerce," and therefore the electric transmission is subject to the Commerce Clause.[216] FERC's jurisdiction is established when a generator's power is delivered to a transmission system that commingles power with other power moving over transmission facilities interconnected to other states, even though the generator and its customer are both within one state.[217] FERC has jurisdiction under the Federal Power Act over electricity transmissions "without regard to whether the transmissions are sold to a reseller or directly to a consumer."[218] When a transaction is subject to exclusive FERC jurisdiction and regulation, state regulation is preempted as a matter of federal law and the Constitution's Supremacy Clause, according to a long-standing and consistent line of rulings by the Supreme Court.[219] The Supreme

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213. Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215–16 (1964).

214. *See, e.g.*, Ark. Power & Light Co. v. Fed. Power Comm'n, 368 F.2d 376, 384 (8th Cir. 1966) (upholding FERC jurisdiction based on expert judgment and factual findings); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 970 (1986) (holding that the principles of the filed rate doctrine preclude state regulators from ignoring FERC's determinations affecting the cost of wholesale power when setting retail rates); *In re* New Eng. Power Co., 424 A.2d 807, 813–14 (N.H. 1980) (discussing federal preemption over wholesale power rates).

215. Jersey Cent. Power & Light Co. v. Fed. Power Comm'n, 319 U.S. 61, 71 n.9 (1943) (quoting Federal Power Act of 1935, § 201, 49 Stat. 847 (1935)).

216. Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 86 (1927), *abrogated on other grounds by* Quill Corp. v. North Dakota *ex rel.* Heitkamp, 504 U.S. 298 (1992).

217. Fed. Power Comm'n v. Fla. Power & Light Co., 404 U.S. 453, 463 (1972).

218. New York. v. FERC, 535 U.S. 1, 20 (2002).

219. *See* Entergy La., Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39, 47 (2003) (finding no state regulation over affiliate wholesale transactions); Miss.

Court in 2008 reiterated that the Federal Power Act creates a "'bright line' . . . between state and federal jurisdiction, with wholesale power . . . falling on the federal side of the line."[220]

Courts enforce this exclusive federal authority through the Filed Rate Doctrine.[221] The Filed Rate Doctrine establishes that state legislatures or regulatory agencies may not second-guess or overrule on any grounds a FERC determination or substitute their own determination of what would be appropriate terms or prices for a power sale agreement or tariff,[222] and thereby preempts any terms different than those authorized by FERC.[223] The Supreme Court in 1986,[224] 1988,[225] 2003,[226] and 2008,[227] reaffirmed and enforced the Filed Rate Doctrine when states attempted to assert jurisdiction inconsistent with FERC's exclusive authority, and also applied the Filed Rate Doctrine "to decisions of state courts."[228]

The Supreme Court has been equally clear, reiterating that in the past decade, the Filed Rate Doctrine precludes all discretionary and mandatory state interference with FERC-regulated wholesale power transactions: "In *Nantahala* and *MP & L*, this Court applied the doctrine to hold that FERC-mandated cost allocations could not be second-guessed by state regulators . . . [where] the state order

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Power & Light Co. v. Miss. *ex rel* Moore, 487 U.S. 354, 371 (1988) (providing that FERC tariff determinations are definitive and can not be changed by state regulation); *Nantahala*, 476 U.S. at 963 (holding that FERC rates are final and not subject to state alteration).

220. Pub. Util. Dist. No. 1 v. FERC, 471 F.3d 1053, 1066 (9th Cir. 2006), *aff'd in part, rev'd in part sub nom.*, Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527 (2008) (citing the separate Supreme Court opinions in *Nantahala*, 476 U.S. at 966; Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215(1964); and *Miss. Power & Light Co.*, 487 U.S. at 371).

221. *Entergy La., Inc.*, 539 U.S. at 47; *see* 16 U.S.C. § 824e (2014) (providing that it is a power of FERC to fix rates and charges and determine costs of production or transmission).

222. *Nantahala*, 476 U.S. at 970.

223. *See* Montana-Dakota Co. v. Pub. Serv. Comm'n, 341 U.S. 246, 251 (concluding only the Commission can determine reasonableness, not courts).

224. *Nantahala*, 476 U.S. at 963.

225. *Miss. Power & Light Co.*, 487 U.S. at 372.

226. *Entergy La., Inc.*, 539 U.S. at 49–50.

227. Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 531 (2008).

228. *Nantahala*, 476 U.S. at 963.

'trapped' a portion of the costs incurred by Nantahala in procuring its power." [229]

2. The 2013 Supreme Court Decision

When state law conflicts with federal authorities, the Supremacy Clause makes federal authority predominant. Does the law defer to or overturn FERC's determination of its own agency authority? As these Order 1000 disputes between states and FERC were progressing, the Supreme Court addressed this very issue,[230] and even cited a key Supreme Court precedent on FERC supremacy over state regulatory decisions as analogous to FCC authority over state regulation.[231]

If the principles under the Federal Power Act allowing a federal agency to determine the scope of its own statutory jurisdiction vis-à-vis inferior state jurisdiction are applicable to the FCC under the Communications Act of 1934, then the converse is also true: The principles allowing a federal agency to determine the scope of its own statutory jurisdiction vis-à-vis inferior state jurisdiction under the Communications Act, as articulated in the *Arlington* case, are applicable to ongoing interpretation of the Federal Power Act.[232]

As mentioned, the majority in *Arlington* held that in an agency's interpretation of the scope of its own statutory jurisdiction, "statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency."[233] Federal independent agencies, such as FERC and FCC, can determine the scope of their own authority vis-à-vis

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229. *Entergy La., Inc.*, 539 U.S. at 40.

230. City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013).

231. *See* Miss. Power & Light Co. v. Miss. *ex rel* Moore, 487 U.S. 354, 381 (1988) ("To exceed authorized application is to exceed authority. Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the 'authority.'") (Scalia, J., concurring); *Arlington*, 133 S. Ct. at 1870 (citing Justice Scalia in support of the same proposition).

232. *Arlington*, 133 S. Ct. at 1870.

233. *Id.* Under *Chevron*, the court must first ask whether Congress directly spoke to the precise question at issue; if so, the court must give effect to Congress' unambiguously expressed intent. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). However, if "the statute is silent or ambiguous," the court must defer to the administering agency's construction of the statute so long as it is permissible. *Id.* at 843.

countervailing state authority, subject to a high degree of deference.[234] The federal agency's determination of its own authority is independent of the merits of its decisions, and indeed, the Supreme Court wrote, a "court's power to decide a case is independent of whether its decision is correct, which is why even an erroneous judgment is entitled to res judicata effect. Put differently, a jurisdictionally proper but substantively incorrect judicial decision is not ultra vires."[235] Similarly, FERC has the initial power to decide the scope of its own authority over discriminatory provisions in ISO tariffs for new transmission facilities.

D. Commerce Clause Interpretation

1. Supreme Court Precedent

Geographically based restrictions on interstate commerce, whether discriminating for or against local commerce, raise Commerce Clause concerns.[236] The Commerce Clause provides that "Congress shall have the power to . . . regulate Commerce . . . among the several States."[237] The dormant Commerce Clause prohibits actions that are facially discriminatory against, or unduly burdensome to, interstate commerce.[238] The dormant Commerce Clause precedent is driven by concern about "'economic

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234. In determining authority, no "exception exists to the normal [deferential] standard of review" for "'jurisdictional or legal question[s] concerning the coverage'" of an Act. NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 830, n.7 (1984). In terms of exception, there is no basis for exempting a subset of "jurisdictional" questions from the *Chevron* framework. *See, e.g.*, Nat'l Cable & Telecomms. Assn., Inc. v. Gulf Power Co., 534 U. S. 327, 333, 339 (2002) (agency interpretations are given greater deference when "the subject matter . . . is technical, complex, and dynamic; and as a general rule, agencies have authority to fill gaps where the statutes are silent"). According to a recent decision of the Supreme Court: "If 'the agency's answer is based on a permissible construction of the statute,' that is the end of the matter." *Arlington*, 133 S. Ct. at 1874–75 (quoting *Chevron*, 467 U. S. at 842).

235. *Arlington*, 133 S. Ct. at 1869.

236. *See* FERREY, *supra* note 50, at 150–55 (noting that while the typical challenged matter is a state statute alleged to discriminate against out-of-state commerce, the dormant Commerce Clause applies to any geographically based ordinance, regardless of against whom it discriminates).

237. U.S. CONST. art. 1, § 8, cl. 3.

238. *See* Dep't of Revenue v. Davis, 553 U.S. 328, 338 (2008) (citing Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994)).

protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'"[239]

In applying this analysis, a court first determines whether a regulation or legislation is facially discriminatory against interstate commerce. If a court finds that the regulation or legislation is facially discriminatory, the court will only uphold the law if "a legitimate local purpose" can be identified.[240] Geographically discriminatory statutes against commerce are subject to judicial "strict scrutiny"; for such a statute or regulation to be upheld, the state must establish that there is a compelling state interest for which the statute is the least intrusive means to achieve that interest.[241] In *Dean Milk Co. v. Madison*, the Supreme Court noted that a governmental agency couldn't discriminate against interstate commerce "if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available."[242]

The scope of commerce among the states for purposes of a Dormant Commerce Clause analysis is broadly defined,[243] and all objects of interstate trade merit Commerce Clause protection, which includes the transmission of electric energy in interstate commerce.[244] The Supreme Court held, "[I]t is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility. No State relies solely on its own resources in

239. *Davis*, 553 U.S. at 337–38 (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988)).

240. *Id.* at 338 (quoting *Or. Waste Sys.*, 511 U.S. at 101).

241. Trevor D. Stiles, *Renewable Resources and the Dormant Commerce Clause*, 4 ENVTL. & ENERGY L. & POL'Y J. 33, 60–61 (2009) (outlining a history of the *Shumlin* Commerce Clause doctrine).

242. 340 U.S. 349, 354 (1951).

243. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 622 (1978) ("All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset.").

244. *See id.* (arguing that all objects of interstate trade fall in this Commerce Clause protection); *see also* New York v. FERC, 535 U.S. 1, 16 (2002) (stating that transmissions on the interconnected national grids constitute transmissions in interstate commerce).

this respect."[245] The Court has determined that electrons in interstate commerce cannot be traced.[246]

Courts have held that statutes found to discriminate against out-of-state interests based on their geography of origin or favoring local interests are per se invalid,[247] except when necessary to quarantine certain contaminated products. If the statute is geographically even-handed, the courts apply a balancing test to determine whether the state's interest justifies the incidental discriminatory effect of the regulatory mechanism as applied.[248]

Laws that attempt to regulate the conduct of out-of-state businesses also violate the Commerce Clause.[249] These laws assume the form of added taxes and charges on out-of-state goods.[250] The Supreme Court held that statutes that establish regional barriers (not necessarily just one-state isolation) and discriminate only against some states rather than all states violate the Commerce Clause.[251]

State and local laws are deemed unconstitutional under the Dormant Commerce Clause when a law differentiates between in-state and out-of-state economic interests in a manner that benefits the

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245. FERC v. Mississippi, 456 U.S. 742, 757 (1982) (citing Fed. Power Comm'n v. Fla. Power & Light Co., 404 U.S. 453 (1972)).

246. *See, e.g.*, New York v. FERC, 535 U.S. 1, 7 n.5 (2002); *Fla. Power & Light Co.*, 404 U.S. at 460.

247. *See* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997); *Philadelphia*, 437 U.S. at 624 (noting that if a statute is facially discriminatory, it is virtually per se invalid); Patrick R. Jacobi, *Renewable Portfolio Standard Generator Applicability Requirements: How States Can Stop Worrying and Learn to Love the Dormant Commerce Clause*, 30 VT. L. REV. 1079, 1102 (2006) (proposing that a court will likely strike down as unconstitutional any regulation that discriminates geographically or through point-of-origin); Stiles, *supra* note 241, at 60–61 (examining the per se test).

248. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (explaining the balancing test for when a statute "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental.").

249. *See, e.g.*, Healy v. Beer Inst., 491 U.S. 324, 326–27, 343 (1989) (striking down the requirement that the price of beer be not higher than that charged out-of-state).

250. *See, e.g.*, Chem. Waste Mgmt. Inc. v. Hunt, 504 U.S. 334, 336–37 (1992) (invalidating an Alabama law imposing an extra fee on imported hazardous waste).

251. *See id.* at 339–40 ("No state may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade.").

former and burdens the latter.[252] This has been an ongoing concern regarding state energy regulation. State limitations requiring the holding of low-cost power in state are unconstitutional.[253] Requirements to use indigenous fuel supplies to produce electricity were stricken under the Dormant Commerce Clause.[254] A state cannot give income tax credits to only in-state fuel additives producers.[255] States cannot mandate that in-state coal must be used by the state even if such a law were passed to satisfy the state's obligations under the federal Clean Air Act.[256]

2. The Recent Federal Trial Court Electricity Holding

In 2014, the Federal District Court for the District of Minnesota struck down Minnesota's carbon emissions statute, finding that the statute impermissibly regulated extraterritorial commerce of electricity in violation of the Dormant Commerce Clause.[257] Minnesota's Next Generation Energy Act sought to limit increases in "statewide power sector carbon dioxide emissions."[258]

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252. *See* Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994) (discussing the first step in analyzing any law under the negative Commerce Clause, which is to see whether the law regulates evenhandedly or discriminates).

253. *See* New Eng. Power Co. v. New Hampshire, 455 U.S. 331, 339 (1982) ("The order of the New Hampshire Commission, prohibiting New England Power from selling its hydroelectric energy outside the State of New Hampshire, is precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states.").

254. *See* Wyoming v. Oklahoma, 502 U.S. 437, 454–55 (1992) (holding an Oklahoma law requiring Oklahoma coal-fired electric generating plants to own a mixture of coal with at least 10% Oklahoma-mined coal unconstitutional); *see also* Alliance for Clean Coal v. Miller, 44 F.3d 591, 596–97 (7th Cir. 1995) (holding an Illinois law requiring the utilities and the Commerce Commission to take into account the need to use coal mined in Illinois to be unconstitutional).

255. *See* New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 271, 278–80 (1988) (holding an Ohio provision that awards a tax credit against the Ohio motor vehicle fuel sales tax only if the ethanol is produced in Ohio unconstitutionally).

256. *See Miller*, 44 F.3d at 596–97 (holding an Illinois law requiring the utilities to take into account the need to use Illinois coal unconstitutional despite compliance with the Clean Air Act).

257. North Dakota v. Heydinger, 15 F. Supp. 3d 891, 891 (D. Minn. 2014).

258. *See id.* at 897 (citing MINN. STAT. § 216H.03, subd. 2) (discussing the purpose of Minnesota's Next Generation Energy Act). "Statewide power sector carbon dioxide emissions" are defined as "the total annual emissions of carbon dioxide from the generation of electricity within the state and all emissions of

The Act prohibits any "person" from importing or committing to import power from a new large energy facility[259] or entering into a new long-term power purchase agreement that would contribute to statewide power sector carbon dioxide emissions.[260] The State of North Dakota, along with several coal-dependent utilities and power plants, brought a lawsuit against Minnesota, alleging the Act violated the Commerce Clause.[261]

"The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."[262] A statute's practical effect is evaluated by looking not only at its consequential effects, but also at how the statute would interact with the legitimate regulatory schemes of other states, and what the effect would be if many states adopted similar legislation.[263] Looking at the plain meaning of the Next Generation Energy Act, the court found that the Act violates the extraterritoriality doctrine because it "requires people or businesses to conduct their out-of-state commerce in a certain way" regardless of legislative intent or whether it has effects within the state, and is therefore per se invalid.[264]

The court also determined that the Act improperly required out-of-state merchants to seek regulatory approval before transacting with other non-Minnesota entities.[265] If multiple states were to adopt

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carbon dioxide from the generation of electricity imported from outside the state and consumed in Minnesota." *Id.*

259. MINN. STAT. § 216H.03, subd. 3(2) (2012).

260. *Id.* at subd. 3(3).

261. *Heydinger*, 15 F. Supp. 3d at 903. Plaintiffs also claimed the statute violates the Supremacy Clause of the U.S. Constitution because it is preempted by the Clean Air Act and the Federal Power Act, the Privileges and Immunities Clause of the U.S. Constitution, and the Due Process Clause of the Fourteenth Amendment. *Id.* The plaintiffs also sought declaratory judgment that the Federal Power Act preempts the statute. *Id.* In 2012, the court granted partial judgment on counts IV and VI in favor of the defendants. *Id.* In 2014, having found for the plaintiffs on Count I (the dormant Commerce Clause), the court denied the remaining counts as moot. *Id.* at 908.

262. *Heydinger*, 15 F. Supp. 3d at 911 (quoting Healy v. Beer Inst., 491 U.S. 324, 336 (1989)).

263. *Id.*

264. *Id.* (quoting Cotto Waxo Co. v. Williams, 46 F.3d 790, 793 (8th Cir. 1995). Because the Court found that the NGEA violates the extraterritoriality doctrine, it did not address whether the statute is discriminatory or undergo the *Pike* balancing test. *Id.*

265. *Id.* at 917.

similar legislation, entities involved in an interconnected multi-state system like Midwest Independent Service Operator could potentially be subject to several state laws regardless of whether they were transacting commerce in those states. As a result, "the current marketplace for electricity would come to a grinding halt."[266] The NGEA constitutes extraterritorial legislation and is per se invalid under the Dormant Commerce Clause.[267]

Comparing the recent Minnesota federal trial court opinion to the ROFR legal issues in the U.S. electric sector, as a general proposition, shows that the incumbent transmission providers are all in-state utilities or other in-state transmission entities.[268] By not allowing ISO tariffs filed with FERC to include a provision that allows states to turn every transmission proposal from independent non-incumbent entities over to the existing transmission providers in the state under a ROFR, it prevents institutionally favoring existing in-state entities. The Supreme Court held that extrinsic considerations do not justify an exception to Commerce Clause concerns.[269]

3. The Recent Federal Circuit Court of Appeals Electricity Holding

Speaking for the Seventh Circuit in a unanimous decision, Judge Richard Posner affirmed FERC's approval of the Midwest Independent Service Operator's[270] proportionate customer-utility allocation of transmission costs for high-voltage transmission lines to move renewable wind power to populated areas.[271] As authority for

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266. *Heydinger*, 15 F. Supp. 3d at 918.

267. *Id.* at 919.

268. Even if a utility operates in multiple states, it does so through separate in-state subsidiaries for purposes of isolating state public utility commission regulation to only the in-state operations.

269. West Lynn Creamery, Inc. v. Healey, 512 U.S. 186, 204 n.20 (1994) (noting that "even if environmental preservation were the central purpose of the [regulation], that would not be sufficient to uphold a [geographically] discriminatory regulation").

270. MISO's service area extends from the Canadian border, east to Michigan and parts of Indiana, south to northern Missouri, and west to eastern areas of Montana.

271. Ill. Commerce Comm'n v. FERC, 721 F.3d 764, 781 (7th Cir. 2013). MISO allocated the costs of the transmission projects among all of the utilities who draw power from the MISO grid in proportion to each utilities' overall

his holding on the respective jurisdiction of state and federal government to regulate electricity, Judge Posner relied on a law review article published in 2013 that discussed constitutional energy issues.[272] The Seventh Circuit declared that the state regulatory limit on state renewable portfolio standards to in-state generation violates the Commerce Clause by stating, "[it] trips over an insurmountable constitutional objection. Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy."[273] Justice Scalia previously noted in a similar case that "subsidies for in-state industry . . . would clearly be invalid under any formulation of the Court's guiding principle [for] 'dormant' Commerce Clause cases.[274]

The petitioning states raised six challenges to the ISO opinion,[275] each of which was rejected by the Seventh Circuit Court of Appeals. The court dismissed the Tenth Amendment challenge as "frivolous," noting that it was "a far cry from the federal government's conscripting a state government into federal service."[276] Petitioners unsuccessfully argued that the cost allocation would violate the Federal Power Act by unjustly requiring utilities to

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volume of usage; FERC approved MISO's rate design, which led some states to initiate court appeal. *Id.* at 772.

272. *Id.* at 776 (citing, in addition to case law, Ferrey, *Threading the Constitutional Needle*, *supra* note 27, at 106–07).

273. *Ill. Commerce Comm'n,* 721 F.3d at 776. Michigan actually initiated the issue of in-state electric power discrimination in its RPS program as a demonstration that out-of-state powered transmitted to it was not valued the same as in-state electricity; therefore, Michigan should not pay a share of power line tariffs transmitting power from out of state that did not have equal recognition and benefit. *Id.* Instead of supporting its position, this assertion caused Judge Posner to respond to this assertion, even though it was not the tariff issue before the Court. *Id.* at 775–76.

274. *West Lynn Creamery, Inc.*, 512 U.S. at 208 (Scalia, J., concurring).

275. The six challenges were: Does FERC's approval of the MISO transmission tariff violate the 10th Amendment to the Constitution by coercing states into approving all MVPs proposed within their borders? Are the benefits associated with the transmission projects proportional to the costs imposed? Did FERC have to conduct an administrative evidentiary hearing during its consideration of MISO's proposed financing mechanism? May MISO allocate the total costs of new transmission among the load of member utilities on the basis of their overall power consumption while allocating no costs to generation? Can MISO allocate costs associated with the transmission to non-member utilities which are members of PJM ISO? Can MISO allocate costs to utilities which are leaving MISO? *Ill. Commerce Comm'n*, 721 F.3d at 772–73.

276. *Id.* at 773.

bear costs disproportionate to the benefits that they would receive—the court deferred to the ISO's determination of cost allocation.[277]

IV. FLYING TOO CLOSE TO THE SUN? BURNED WINGS IN RECENT CONSTITUTIONAL CHALLENGES ON ENERGY REGULATION

There are three recognized circumstances in which federal law may preempt state law: federal laws that explicitly establish the lines for state preemption;[278] state laws that "regulate[] conduct in a field Congress intended the federal government to occupy exclusively . . . because the federal regulatory scheme is so pervasive that a court may infer Congress left no room for the States to supplement it";[279] or state laws that clearly conflict with federal law.[280]

Any of these preemptions can be triggered with regard to state energy regulation. Several recent federal adjudications in Vermont,[281] California,[282] New Jersey,[283] Maryland[284] serve as examples of cases in which state energy regulations were preempted under the Supremacy Clause. The Vermont and California matters also raise Dormant Commerce Clause issues pursuant to Article I.

A. Vermont Energy and Dual Constitutional Issues

A federal district court in Vermont found that the state's existing regulatory scheme violated the Dormant Commerce Clause and that its power to regulate energy matters was preempted;[285] the Second Circuit upheld the district court's findings.[286] As part of its

277. *Id.* at 774. Judge Posner noted that the petitioners failed to provide any estimates of costs and benefits associated with the new facilities to contradict MISO's estimated $297 million cost savings. *Id.*

278. *See* English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990) (discussing the three circumstances of preemption).

279. Entergy Nuclear Vt. Yankee, L.L.C. v. Shumlin (*Entergy Nuclear*), 838 F. Supp. 2d 183, 218 (D. Vt. 2012) (internal quotation marks omitted).

280. *Id.* at 218 (citing *English*, 496 U.S. at 79).

281. *See infra* Part IV(A) (discussing *Vermont Yankee*).

282. *See infra* Part V(C) (discussing California's adjudication).

283. *See infra* Part IV(B) (discussing New Jersey's adjudication).

284. *See infra* Part IV(B) (discussing Maryland's adjudication).

285. Entergy Nuclear Vt. Yankee, L.L.C. v. Shumlin (*Entergy Nuclear*), 838 F. Supp. 2d 183, 190 (D. Vt. 2012).

286. Entergy Nuclear Vt. Yankee, L.L.C. v. Shumlin (*Shumlin*), 733 F.3d 393, 398 (2d Cir. 2013).

regulation, Vermont attempted to extract financial concessions from the private power project owners as a condition of a continued license to operate the generating facility in the state.[287] The fundamental issue before the court was whether Vermont could create regulations that favor in-state consumer interests without fundamentally violating the Supremacy Clause[288] or the Dormant Commerce Clause.[289]

After Vermont Yankee, a project owner, filed to extend its existing federal operating license in 2006, the Vermont legislature added Section 248 in Act No. 160[290] to require an additional, discretionary approval from the legislature as a condition for the extension of an existing state energy-generating facility-operating license.[291] Prior to these 2006 amendments, under the original Section 231 of the Vermont statute, only the Public Service Board—a quasi-judicial, semi-independent authority—had the authority to approve extensions of operating licenses.[292] In contrast to the discretion allocated to the legislature, the Public Service Board's adjudication process is tightly constrained. After 2006, Vermont

287. *Entergy Nuclear*, 838 F. Supp. 2d at 198–200.

288. U.S. CONST. art. VI, cl. 2.

289. *Id.* (citing U.S. CONST. art. I, § 8, cl. 3).

290. One week after Enertgy applied to the NRC for a license extension in 2006, the Vermont legislature began to consider changes in the law that would eventually become Act 160. *Shumlin*, 733 F.3d at 403.

291. The legislative vote required in Act 160 is an additional prerequisite: "[T]he board may commence proceedings under this section and under 10 V.S.A. chapter 157, relating to the storage of radioactive material, but may not issue a final order or certificate of public good until the general assembly determines that operation will promote the general welfare and grants approval for that operation." VT. STAT. ANN. tit. 30, § 248(e)(2) (2012); *see also Shumlin*, 733 F.3d at 403 (listing VT. STAT. ANN. tit. 30, § 248(e)(2) as one of the sections added by Act 160).

292. VT. STAT. ANN. tit. 30, §§ 11–12 (2008); *see also Entergy Nuclear*, 838 F. Supp. 2d at 192 (citing VT. STAT. ANN. tit. 30, §§ 11–12 (2008)) ("At the time the 2002 MOU was signed, the Public Service Board was the quasi-judicial entity bestowed with statutory authority to consider petitions and grant CPGs . . . [and] is required to 'make . . . findings of fact,' to 'state its rulings of law when they are excepted to,' and its decisions can be appealed to the Vermont Supreme Court, which is required to accord them deference."). Moreover, a history of determinations and orders creates a precedent for deciding what is the Board's public convenience. *See Current Public Service Board Rules and General Orders*, VERMONT.GOV, http://psb.vermont.gov/statutesrulesandguidelines/currentrules (last visited Mar. 14, 2015) (listing the Public Service Board's determinations and orders).

legislators required the owner of Vermont Yankee to provide discounts from the future market-based wholesale price of power to be sold to in-state incumbent utilities as a condition to the legislature's grant of a certificate of public good for future operation of Vermont Yankee as an existing wholesale power generation facility.[293] Hearings in Vermont at the Public Service Board[294] halted when the Vermont senate voted not to grant a new certificate of public good to Vermont Yankee.[295]

After being denied a certificate of public good, the facility owner for Vermont Yankee sought judicial relief.[296] The facility owner raised Supremacy Clause and dormant Commerce Clause claims.[297] In 2012, the court found that Vermont's energy regulations were federally preempted because they violated the dormant Commerce Clause.[298] On appeal, the Second Circuit held that the dormant Commerce Clause issue was not yet ripe for review until plaintiffs actually entered into such a forced below-market power purchase agreement with the state.[299] However, the Second

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293. *Entergy Nuclear*, 838 F. Supp. 2d at 191.

294. For discussion of administrative law adjudicatory proceedings, see generally FERREY, *supra* note 50, at 45–48. Proceedings before a state electric energy regulatory agency have the attributes of a trial to protect all participants. Formal legal rules govern the trial-like process. *Id.* at 47–48. There is formal presentation of sworn evidence, cross-examination by counsel, procedural motions, discovery of documents, briefs filed by the parties, and a decision that must be based on the formal transcribed record and based on the weight of substantial evidence. *Id.* Appeal is allowed to the courts based on either procedural issues or a decision not based on formal substantial evidence. *Id.* at 48. This is in contrast to a decision of a state legislature, which has no such formal legal protections.

295. *See Senate Votes to Close Vermont Yankee Nuclear Plant in 2012*, BURLINGTONFREEPRESS.COM (Feb. 24, 2010), http://www.burlingtonfreepress.com/viewart/20100224/NEWS02/100224050/Senate-votes-close-Vermont-Yankee-nuclear-plant-2012 (discussing the senate vote to close Vermont Yankee).

296. *Entergy Nuclear*, 838 F. Supp. 2d at 407.

297. *Id.*

298. *Id.* at 243.

299. *See* Entergy Nuclear Vt. Yankee, L.L.C. v. Shumlin (*Shumlin*), 733 F.3d 393, 430–31 (2d Cir. 2013) ("[A] factual record concerning incidental effects of such an agreement on interstate commerce . . . . This case therefore does not present a 'concrete dispute affecting cognizable current concerns of the parties within the meaning of Article III,' and is therefore not 'ripe within the constitutional sense' . . . . [N]o [PPA] agreement is before us. Accordingly, the analysis required under the dormant Commerce Clause may not be performed, and so Entergy's claim is unripe at this time." (citations omitted) (quoting Ehrenfeld v. Mahfouz, 489 F.3d 542, 546 (2d Cir. 2007))).

Circuit upheld Vermont Yankee's Supremacy Clause claim and indicated that it would find that the Vermont statute violates the dormant Commerce Clause when the issue became ripe for review, writing: "An agreement requiring Vermont Yankee to allot a certain percentage of it[s] output to satisfy local demand would also likely violate the dormant Commerce Clause."[300]

The trial court followed the Supreme Court's decision in *New England Power Co. v. New Hampshire*,[301] which overturned an order of the New Hampshire Public Utilities Commission that restrained the sale of low-cost, low-carbon energy produced within the state for the financial advantage of in-state ratepayers because it violated the Dormant Commerce Clause, and noted:

> [We] consistently have held that the Commerce Clause of the Constitution precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom . . . . [A] 'State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State.'[302]

B. New Jersey and Maryland Energy Regulation

Both Dormant Commerce Clause and Supremacy Clause issues are in play if states favor in-state incumbents through ROFRs when FERC has mandated competition, or if state ROFRs violate

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300. *Entergy Nuclear*, 733 F.3d at 431.

301. *Entergy Nuclear*, 838 F. Supp. 2d at 235–36 (citing *New England Power Co.*, 455 U.S. at 331).

302. *New Eng. Power Co.*, 455 U.S. at 338 (citation omitted) (quoting Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978)). The Second Circuit agreed that this issue was not yet ripe for decision, but did not disagree with the trial court's substantive decision. *Entergy Nuclear*, 733 F.3d 393, 433–34 (2d Cir. 2013) (addressing only the unripe procedural posture of this issue prior to execution of the contract). The Second Circuit thought that it was premature to apply Supreme Court precedent construing a statute to Vermont's stated intention. *Id.* at 430–31.

federal tariff requirements. In 2011, New Jersey enacted legislation to encourage utility companies to acquire the output of 2,000 megawatts (MW) of new in-state power projects.[303] "New Jersey imports a substantial amount of its electricity from other states, which requires paying more transmission charges to move the power to New Jersey consumers."[304] New Jersey enacted a long-term capacity agreement program—a subsidy program with contracts for differences.[305] Since the program began, 680 MW of additional generation has been placed in service in New Jersey, some of which came from the reactivation of existing non-operating generation facilities.[306]

Mid-Atlantic regional power generators filed a challenge to New Jersey's program, arguing that New Jersey's in-state energy facility location gives preference to new power generation. The plaintiffs argued that New Jersey's preference for new power generation would result in a change to FERC-approved regional independent system operator procedures of PJM, which controls all the wholesale power sales and transmission in the thirteen-state region.[307] Two plaintiffs asserted that, under the Supremacy Clause,

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303. Hannah Northey, *Utilities Challenge N.J. Law While Preparing to Reap Its Benefits*, N.Y. Times (Mar. 2, 2011), http://www.nytimes.com/gwire/2011/03/02/02greenwire-utilities-challenge-nj-law-while-preparing-to-r-1243.html.

304. Steven Ferrey, *Pentagon Preemption: The 5-Sided Loss of State Energy and Power*, 2014 U. ILL. J.L. TECH. & POL'Y 393, 415 (2014).

305. *Id.* After conducting a competitive bid process with public utilities, the BPU is directed to enter into standard offer capacity agreements ("SOCAs"), which are fifteen-year contracts that guarantee the state selected generating companies a fixed price for their capacity.

306. Of the 6,000 MW retired within the PJM grid since 2002, one-third of these deactivations of power generation facilities have been in New Jersey. LS Power Assocs., L.P., *Comments on New Jersey Electric Power and Capacity Needs*, ST. N.J. BOARD PUB. UTIL. (July 2, 2010), http://www.state.nj.us/bpu/pdf/energy/LSPower_comments.pdf.

307. *PJM Interconnection, L.L.C.*, 135 FERC 61022 (2011) (order accepting proposed tariff revisions). Power generators in the North Atlantic region filed a complaint at FERC alleging discrimination against New Jersey's statute ordering utilities to sign long-term contracts only with in-state generation facilities that bid to receive regional multi-state PJM ISO capacity payments. Mary Powers, *PJM Generators File Complaint with FERC Seeking Relief from NJ In-State Generation Law*, ELECTRIC UTIL. WK., Feb. 7, 2011, at 11, 13. In response, FERC in 2011 amended the PJM ISO rules to prevent New Jersey state law from attempting to encourage construction of in-state power generation by, in part, causing them to bid power into the PJM system at suppressed prices in order to win capacity auctions. Mary Powers, *Rebuffed by FERC Ruling, New Jersey BPU Plans to Look Again at How to Attract New Generation*, ELECTRIC UTIL. WK., May 23,

the New Jersey statute is preempted through field preemption and conflict preemption; a third plaintiff asserted that the New Jersey statute violated the Dormant Commerce Clause.[308] In response, New Jersey asserted that the statute is a mere planning measure, with only an incidental effect on FERC authority.[309]

The court agreed with the plaintiffs, holding that the New Jersey statute is preempted by field and conflict preemption.[310] The Third Circuit, in *NE Hub*, held that a state regulatory process was field preempted because of its effects.[311] In other words, for the New Jersey LCAPP, even if the state's authority to regulate power is not preempted, the result of such regulation—the out-of-market subsidy that distorts the auction of wholesale power—might be preempted.[312] The trial court denied cross motions for summary judgment on field preemption, reserving those questions of fact to be decided at trial.[313]

Even in the absence of field preemption, conflict preemption can still supersede state law if the state law interferes with a federal goal.[314] In the New Jersey matter, the plaintiffs contended that the

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2011, at 4, 6, *available at* http://www.electricdrive.org/sites/testing/index.php?ht=a/GetDocumentAction/i/22845 (noting that on April 12, 2011, FERC eliminated a PJM rule that allowed a prior exemption for projects to make minimum offer prices when tempered by state energy programs). Next, a pending lawsuit regarding New Jersey energy regulation by several existing independent power generators asserted that the New Jersey state law is in violation of the dormant Commerce Clause because it is predicated on in-state "favoritism," and the New Jersey act is a "blatant and explicit effort to promote the construction of new generation facilities in New Jersey." Northey, *supra* note 303 (internal quotation marks omitted).

308. PPL Energyplus, LLC v. Solomon, No. 11-745, 2011 WL 5007972, at *1 (D.N.J. Oct. 20, 2011). A large group of power generators sued New Jersey regarding LCAPP. *Id.*

309. *PPL Energyplus, LLC*, 2011 WL 5007972, at *1.

310. *Id.* at *5.

311. *See* NE Hub Partners, L.P. v. CNG Transmission Corp., 239 F.3d 333, 348 (3d Cir. 2001) ("Furthermore, if it is evident that the result of a process must lead to conflict preemption, it would defy logic to hold that the process itself cannot be preempted and that a complaint seeking that result would not raise a ripe issue.").

312. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 237 (1947) (discussing how regulation not currently preempted may be preempted based on conflicts with federal law that become apparent later).

313. *PPL Energyplus, LLC*, 2011 WL 5007972, at *5.

314. Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (holding that state law will be preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

statute is conflict preempted because New Jersey's guaranteed fixed price for select New Jersey generators allows these New Jersey generators to effectively undercut the competitive purpose of the PJM auction by guaranteeing a fixed price for certain New Jersey generators.[315] The plaintiffs alleged that selected New Jersey generators, with the state subsidy in hand, will bid lower and win the regional PJM auction—thereby guaranteeing New Jersey generators a substantial capacity payment every month.[316] The ultimate cost for the New Jersey law would be passed not just to New Jersey ratepayers but to all PJM ratepayers who reside in many of the thirteen PJM states and Washington, D.C.[317] In addition, the plaintiffs argued that the New Jersey Law would have the effect of driving down the clearing price at the PJM annual auction, resulting in lower clearing prices and capacity revenues to all participants than if such state-subsidized entrants had not be en permitted to bid under these circumstances.[318] The issue for the court was whether New Jersey's regulatory implementation of a long-term capacity agreement contract that subsidizes only certain in-state generators distorts and impedes the federal goal of maintaining a competitive capacity auction.[319] If the New Jersey law impedes the federal goals, it is conflict preempted. The federal district court and the Third Circuit both found that the Federal Power Act and the Supremacy Clause preempted the New Jersey statute.[320]

In a similar challenge to a statute in Maryland, in which Maryland paid the additional cost for a fixed-capacity payment in excess of what the PJM capacity market auction provided for private generation companies locating new projects in the immediate state region, the district court and the Fourth Circuit held that the statute was preempted by both field preemption and conflict preemption

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315. After the New Jersey BPU selects a generator program, they enter into a standard offer capacity agreement (SOCA) with the BPU, which obligates the generator to produce a fixed amount of electricity that is sold to New Jersey retail utilities in return for a fixed price for the power.

316. *PPL Energyplus, LLC*, 2011 WL 5007972, at *3.

317. *Who We Are*, PJM, http://www.pjm.com/about-pjm/who-we-are.aspx (last visited May 14, 2015).

318. *PPL Energyplus, LLC*, 2011 WL 5007972, at *3

319. *Id.* at *5.

320. PPL Energyplus, LLC v. Hanna, 977 F. Supp. 2d 372, 409 (D.N.J. 2013), *aff'd.*, PPL Energyplus, LLC, v. Solomon, 766 F.3d 241, 246 (3d Cir. 2014) (affirming field preemption on wholesale power prices and rates).

under the Supremacy Clause.[321] The Fourth Circuit concluded that the FERC-administered PJM market is "a finely wrought scheme" designed, in part, to sustain existing plants.[322] "The federal scheme is carefully calibrated to serve a host of competing interests. It represents a comprehensive program of regulation that is quite sensitive to external tampering."[323]

After a six-day bench trial the district court found that the state PUC order was field preempted.[324] The Fourth Circuit not only upheld the district court's finding of field preemption, but also noted that it did not need to reach the issue of conflict preemption: "[C]onflict preemption applies 'where under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[325] The Fourth Circuit proceeded to address the conflict preemption issue regarding electric power, which the district court found unnecessary to address: "Here, 'the impact of state regulation of production on matters within federal control is so extensive and disruptive of' the PJM markets that preemption is appropriate."[326]

The Fourth Circuit found conflict preemption when states indirectly or directly influence the wholesale market: "Maryland's initiative disrupts this scheme by substituting the state's preferred incentive structure for that approved by FERC."[327] Once a state energy statute is found preempted on either theory, it is stricken. So, when the Third Circuit upheld the claim of field preemption and did

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321. PPL Energyplus, LLC v. Nazarian, 974 F. Supp. 2d 790 (D. Md. 2013), *aff'd.*, 753 F.3d 467 (4th Cir. 2014) (holding that field preemption and conflict preemption applies on wholesale power prices). In the Maryland case, the federal trial court applied the *Pike* balancing test, and determined that because Maryland only provided incentives for the physical location of facilities in the state but did not restrict whether the output of those facilities was sold in-state or out-of-state, it did not burden interstate commerce. *Id.* at 855. The statute was found to restrict the location of power facilities but not to restrict either facially or in its practical effect their commercial activities or sales in commerce, and thus it is subject only to the *Pike* balancing test, *id.* at 851, which the defendants could sustain. *Id.* at 854.

322. *Nazarian*, 753 F.3d at 473.

323. *Nazarian*, 753 F.3d at 473.

324. *Id.* at 474.

325. *Id.* at 476, 478 (quoting Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000)).

326. *Id.* at 478 (quoting Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 495 (1989).

327. *Id.* at 479.

not need to go further to strike the state statute, the Fourth Circuit completed the inquiry and found both field preemption and conflict preemption in a very similar state energy regulation. Where the wholesale power market is committed exclusively to federal authority, even state action marginally affecting the wholesale electricity market is impermissible.

V. A PYRRHIC VICTORY FOR FERC AND COMPETITION?

A. Strict Scrutiny and Changing Precedent

There is a significant confrontation between federal and state jurisdiction over electric power regulation. States have not been particularly successful, to date, in staking a claim to state authority to regulate in areas of transmission tariffs[328] or incentives for renewable power generation and carbon control which discriminate directly or indirectly against interstate commerce in energy.[329] Once Order 1000 was upheld by the D.C. Circuit, Supremacy Clause and Commerce Clause objections to state ROFR legislations became subject to strict scrutiny review.[330]

However, administrative law precedent is changing. Does a court examine the actual record of legislative enactment or review only the legislation's officially stated purpose to determine the motivation and purpose of state energy legislation or regulation? This question is relevant to the ROFR dispute. The complaining states asserted that their purpose of enacting a state ROFR in favor of their incumbent utilities was energy system reliability—not incumbent favoritism.

Despite the Supreme Court's holding in *PG&E*[331] that a stated legislative purpose should be taken at face value, the federal trial court and Second Circuit refused to accept the stated legislative purpose without additional strict scrutiny.[332] In the three decades

328. *See* Ferrey, *supra* note 2, at 30–33,41–43 (discussing legal challenges to state sustainable energy policies).

329. *See supra* text accompanying note 3 (discussing dormant Commerce Clause challenges).

330. S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41, 54 (D.C. Cir. 2014).

331. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 216 (1983).

332. *See, e.g.*, Energy Nuclear Vt. Yankee, LLC v. Shumlin (*Shumlin*), 733 F.3d 393, 416 (2d Cir. 2013) (applying strict scrutiny).

after its issuance in 1983, the Supreme Court precedent in *PG&E* was cited 929 times by separate federal courts and agencies, comprised of 28 cases by the Supreme Court, 235 cases by federal circuit courts, 537 cases by federal district courts, and 12 administrative determinations by FERC.[333] However, the holding in the opinion deferring to stated legislative purpose has not been primarily cited or relied on by the federal judiciary. Of the 929 federal opinions citing the 1983 *PG&E* opinion, only 55—approximately 5%—have cited this particular holding in determining legislative purpose, including 3 subsequent cases by the Supreme Court, 21 cases by federal circuit courts, 31 cases by federal district courts, and no administrative determinations by FERC.[334] Of these 55 opinions, most cite this holding either in dicta or only as a very general reference to the mechanics of the preemption doctrine.[335]

Of the few remaining opinions citing *PG&E* that construe the Supreme Court's holding at any level of application, most strictly examine and construe facts behind the stated purpose in the preamble of the construed legislation[336] and assess whether the stated purpose is "merely a cover-up" for prohibited state actions.[337] Very few

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333. *See, e.g.*, English v. Gen. Elec. Co., 496 U.S. 72, 80 (1990) (discussing *PG&E*); Pennsylvania v. Lockheed Martin Corp., 684 F. Supp. 2d 564, 584 (M.D. Pa. 2010) (discussing *PG&E*).

334. *See, e.g.*, Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 105 (1992) (looking at true effect rather than stated purpose of the law); English v. Gen. Elec. Co., 496 U.S. 72, 73 (1990) (indirect and insubstantial impact of state tort law); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 249 (1984) (no preemption of state punitive damages for conduct related to radiation hazards); State of Nevada v. Watkins, 914 F.2d 1545, 1561 (9th Cir. 1990) (preemption due to frustrating Congress's intent, despite professed economic motivation); Drnek v. City of Chicago, 192 F. Supp. 2d 835, 844–45 (N.D. Ill. 2002) (distinguishing from *Pacific Gas* holding).

335. *See, e.g.*, Ishikawa v. Delta Airlines, Inc., 343 F.3d 1129, 1134 n.22 (9th Cir. 2003) (citing *PG&E*); Crystal Bay Marina v. Sweeden, 939 F. Supp. 839, 841 (N.D. Okla. 1996) (citing *PG&E*); Snow v. Bechtel Constr. Inc., 647 F. Supp. 1514, 1517, 1519 (C.D. Cal. 1986) (citing *PG&E*).

336. *See, e.g.*, Nevada v. Watkins, 914 F.2d 1545, 1561 (9th Cir. 1990) (concluding that a state legislative action was preempted by federal law because it had "the actual effect of frustrating Congress' intent" even though "the professed motivation" for the state's action was "the economic and environmental effects of nuclear waste disposal").

337. Drnek v. City of Chicago, 192 F. Supp. 2d 835, 844–45 (N.D. Ill. 2002) (distinguishing the applicability of the holding in *Pacific Gas* to the Atomic Energy Act with the Age Discrimination in Employment Act).

subsequent federal court decisions have invoked or followed the deference holding from *PG&E*.[338] While the Supreme Court cited this particular holding from its *PG&E* opinion three times in the next three decades, the Court took a contrary position and refused to rely solely on the stated purpose in legislation to determine whether a state action was preempted each time.[339]

States may lose the legal "battle," but they may prevail in the actual incumbent "war." While the federalist jurisdictional disputes are of critical importance on a range of sustainable energy issues going forward,[340] as a practical matter, even without ROFRs, states that do not want competition in transmission for their incumbent transmission providers still wield a variety of tools to control the outcome of transmission construction and operation. Even where there is competition in transmission applications to a state allowed under FERC Order 1000 to construct additional transmission infrastructure, states, as a practical matter, can effectively favor incumbent transmission providers over new competitive entrants. They can do this through the exercise of four types of regulatory discretion.

B. Exceptions to the Rule

First, FERC to date has permitted certain exceptions to removal of state ROFRs in Order 1000 compliance:

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338. *See, e.g.*, Norris v. Lumbermen's Mut. Cas. Co., 881 F.2d 1144, 1150 (1st Cir. 1989) (deferring to *PG&E*); Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 335 (4th Cir. 2001) (finding discriminatory purpose based on the legislative history of statute and statements of those involved).

339. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 105 (1992) ("In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law."); English v. Gen. Elec. Co., 496 U.S. 72, 73 (1990) (holding that field preemption did not apply to the state tort law at issue because that law was not motivated by safety concerns and the actual effect of the law on Congress' objectives was "not sufficiently direct and substantial"); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 249 (1984) (finding that the federal pre-emption of state regulation of the safety aspects of nuclear energy does not extend to a state-authorized award of punitive damages for conduct related to radiation hazards).

340. *See generally* Ferrey, *Threading the Constitutional Needle*, *supra* note 27, at 90–97 (discussing federalist jurisdictional disputes); Ferrey, *Follow the Money*, *supra* note 28, at 142 (discussing state litigation on payment of transmission centers).

- For local projects where the incumbent does not seek to share the costs of those projects, upgrades to existing assets, and projects on existing rights of way;[341]
- for projects in which the ISO could reasonably assign the construction of the transmission project directly to the incumbent transmission owner and the costs could not be distributed to customers regionally outside the host state customers;
- for certain "time based" exceptions to immediate-need reliability projects, in situations where system reliability made it impractical to conduct a competitive solicitation process;
- for certain "time based" exceptions to short-term projects, in situations where transmission needs were affected and time constraints made it impractical to conduct a competitive solicitation process.[342]

Order 1000 only applies to jurisdictional public utilities engaging in interstate commerce, which under the Federal Power Act includes only the investor-owned utilities, as well as the RTOs or ISOs that manage their interstate wholesale and transmission markets.[343] The Order's scope, in other words, covers less than 200 entities among the approximately 3,000 utilities in the U.S.[344] These approximately 200 affected utilities own about 25% of the transmission and distribution infrastructure, measured as distance of lines, in the U.S.[345] Excluded are all federal government power marketing administrations,[346] all rural electric and membership

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341. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. 49,842, 49,896–97 (Aug. 11, 2011).

342. The costs of transmissions projects are generally allocated to ratepayers who are the customers of the system. The issue is whether these costs are allocated to just customers of the utility subsidiary in whose territory the facility is constructed, all customers in the state, or all customers in the multi-state ISO region. For discussion of general ratemaking principles, see FERREY, *supra* note 7, at § 5:11.

343. FERC only has power under the Federal Power Act to regulate investor-owned utilities' transmission. *See* FERREY, *supra* note 7, at § 5:3.

344. FERREY, *supra* note 50, at 579.

345. *Id.*; FERREY, *supra* note 7, at § 5:3.

346. Federal Power Act § 201(f), 16 U.S.C. § 824(f) (2012).

utility cooperatives,[347] municipal utilities,[348] and all utilities not engaging in interstate commerce in Alaska, Hawaii, and the majority of Texas within the Electric Reliability Council of Texas zone, which does not interconnect with any other states and therefore, technically, does not engage in interstate commerce.[349] The transmission system within Texas is isolated from interstate commerce and therefore is not subject to Order 1000 requirements. Nonetheless, the Electric Reliability Council of Texas used competitive transmission system bids for new lines, which were won by both utilities and independent companies.[350]

Exceptions to Order 1000 also apply for upgrading existing transmission lines and using existing transmission and distribution rights of way across the U.S.[351] Furthermore, Order 1000 only applies where the RTO is going to allocate costs among all members regionally.[352] These are very large exceptions. Given that not every state gives non-incumbents an eminent domain power to acquire new rights of way and the legal costs and time of making such acquisitions, using existing corridors, when they exist, will be a significant logical preference.[353] In promulgating Order 1000, FERC was attempting to eliminate undue discrimination[354] and apply competitive pressures to the sourcing of new transmission infrastructure to reduce transmission costs.[355] Competition and discrimination are different, if sometimes related, issues: The former is a policy choice for market design and operation, the latter is a legal prohibition under current FERC competition regulations.

Second, commenters have proposed additional exceptions where ISOs will not allocate ROFR project costs to all ISO

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347. Federal Power Act § 201(f), 16 U.S.C. § 824(b)(1) (2012).

348. *Id.*

349. *Id.*

350. *Id.* Several thousand miles of new transmission lines were needed to deliver more than 18,000 MW of energy capacity; line rights were won by ten local and independent utilities.

351. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. 49,842, 49,896 (Aug. 11, 2011).

352. *Id.* at 49,928 (Cost Allocation Method for Regional Transmission Facilities); *id.* at 49,930 (Cost Allocation Method for Interregional Transmission Facilities).

353. *Id.* at 49,896 & n.299.

354. *Id.* at 49,846.

355. *Id.* at 49,888, 49,890 (quoting Wis. Gas Co. v. FERC, 770 F.2d 1144, 1158 (D.C. Cir. 1985)).

customers, but only to in-state customers.[356] The National Association of Regulatory Utility Commissions argued that the exceptions need to be broader.[357] Order 1000 only applies when the RTO plans to allocate costs among all members regionally.[358] To ensure that efficient and cost effective projects will be undertaken and costs throughout the RTO region will be just and reasonable, the Illinois Commerce Commission proposed that FERC eliminate regional cost-sharing from the cost-allocation mechanism approved for a project chosen pursuant to a state ROFR, in order to isolate project costs within a state which wishes to maintain a policy favoring state incumbents.[359] The Illinois Commerce Commission proposal would provide states an option to discriminate in favor of incumbent transmission owners if they bear the cost within the state instead of allocating it to a larger multi-state region. While this proposal solves one issue of cost, the proposal does not address the federal incentive for competition or the legal issue of discrimination. Only time will tell whether this proposal is acceptable as part of the FERC rule.

Third, even the regulatory sands could shift under Order 1000. Of note, the implementation of Order 1000 on ROFRs was only joined by a bare majority of the five FERC commissioners, with two commissioners dissenting on both the Midcontinent Independent System Operator (MISO) and PJM Independent System Operator filing determinations that they must remove any recognition of state ROFRs.[360] This majority could change as FERC commissioners rotate off the Commission at the end of their terms.

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356. Ill. Commerce Comm'n v. FERC, 721 F.3d 764, 777–78 (7th Cir. 2013); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. at 49,903.

357. *See* Robert Varela, *NARUC Challenges FERC on Transmission Planning and Cost Allocation*, TRANSMISSION & DISTRIBUTION WORLD (July 31, 2013), http://tdworld.com/energizing/naruc-challenges-ferc-transmission-planning-and-cost-allocation (discussing NAROC challenges to FERC).

358. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. at 49,842, 49,888, 49,892.

359. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. at 49,903.

360. Midwest Indep. Transmission Sys. Operator, Inc., 142 FERC 61,215 (2013) (Clark, Comm'r, dissenting); *id.* (Moeller, Comm'r, dissenting); PJM Interconnection, L.L.C., 142 FERC 61,214 (2013) (Clark, Comm'r, dissenting); *id.* (Moeller, Comm'r, dissenting).

Fourth, Order 1000 does not require removal from Commission-jurisdictional tariffs or agreements references to state or local laws or regulations with respect to construction of transmission facilities, including, but not limited to, authority over siting or permitting of transmission facilities.[361] On the ground, despite many competitors making proposals, the state rather than FERC, retains the ultimate decision to permit a specific application for transmission facility construction. In regard to decisions involving competitors:

- Order 1000 provides that in a competitive selection process, RTOs may take into consideration "the particular strengths" of an incumbent transmission developer which "is free to highlight its strengths."[362]
- An incumbent transmission provider may have unique knowledge of its own transmission systems, familiarity with the communities they serve, economies of scale, experience in building and maintaining transmission facilities, and access to funds needed to maintain reliability.[363]
- Order 1000 requires the RTOs to "establish a date by which state approvals to construct must have been achieved that is tied to when construction must begin to timely meet the need that the project is selected to address" which could favor incumbents.[364]

Incumbent utilities will maintain an advantage in bidding to absorb most projects in their service territories because of their long-term and ongoing relationships with regulators before whom they constantly appear, existing transmission rights of way on which new conduits are often best suited to run, economies of scale by owning the existing base of transmission infrastructure, and host knowledge of technical and other aspects.

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361. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. at 49,885 n.231; *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000-A)*, 77 Fed. Reg. 32,184, 32,244 (May 17, 2012).

362. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. at 49,887.

363. *Id.*

364. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000-A)*, 77 Fed. Reg. at 32,254.

Fifth, Order 1000 addresses only the RTO and ISO process and tariff for transmission; the actual physical transmission construction decision is made by the states. States[365] and their localities[366] also control a host of necessary land-use, eminent domain, and permit authorizations. Under such direct and indirect state control: "Nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to the construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities."[367] And some states are attempting to manipulate the aspects of Order 1000 that cause ISO incorporation of state policies as part of regional planning by using state law to balance the transmission, construction, and ownership in favor of incumbent utilities. States do this by codifying ROFR statutes, which limit competition when such competition would increase costs or impair reliability.[368]

States still exercise critical decisions on new transmission infrastructure within their borders. Additionally, states still control, under state authority and municipal land-use law, whether non-utilities have the right to eminent domain power for transmission facilities, which can be essential for siting.[369] Also, states control whether transmission facilities that are not part of public utilities (municipal, rural electric, etc.) must be turned over to the incumbent utility for operation after construction by deciding whether or not to require or allow the utility to own the transmission

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365. For discussion of state transmission siting powers, see FERREY, *supra* note 7, at §§ 6:135.20, 6:140.

366. For discussion of local transmission siting powers, see *id.* at §§ 6:124–6:131; for a discussion of eminent domain authority and takings law, see *id.* at § 6:131.

367. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (Order 1000)*, 76 Fed. Reg. at 49,891.

368. *FERC Order 1000 Changes Competitive Landscape of Transmission Owners*, ELEC. LIGHT & POWER/POWERGRID INT'L (Sept. 3, 2014), http://www.elp.com/articles/2014/09/ferc-order-1000-changes-competitive-landscape-of-transmission-owners.html. Minnesota, North Dakota and South Dakota are codifying state law to elevate ROFRs to state statute with exclusive rights to build transmission. Linda L. Walsh & Noelle J. Coates, *Walking the Fuzzy Bright Line: The Legality of State ROFR Laws Under FERC Order 1000*, PUB. UTIL. FORTNIGHTLY 40, 43 (Sept. 2013).

369. For a discussion of eminent domain authority and takings, see FERREY, *supra* note 50, at 517–21.

infrastructure.[370] State supreme courts have held that no transmission lines could be certified nor any eminent domain for construction exercised unless the primary beneficiaries of the line were in-state ratepayers.[371]

To date, there are two examples in which competitive bids for transmission contracts resulted in the incumbent utility being chosen over the independent bidder, even though the incumbent's bid was not the lowest. In California, the incumbent utility was chosen not because it offered the lowest cost, but because the California ISO determined that there were experiential, siting, and permitting advantages with the incumbent's legal team.[372] On the East Coast, in PJM, the largest U.S. ISO, among various bidders, the incumbent utility was chosen because it owned the existing rights-of-way to be used in the development of the transmission line, even though its bid was more than double the lowest bid.[373]

C. Change in the Legal Structure

The structure of the electric market has changed, although the Federal Power Act and the U.S. Constitution impose set principles of regulatory jurisdiction; this change is critical to the ROFR

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370. FERREY, *supra* note 7, at 5:35.

371. Miss. Power & Light Co. v. Conerly, 460 So. 2d 107 (Miss. 1984). Courts in the same state a few years earlier had held that PURPA amendments to the Federal Power Act were an unconstitutional exercise of the Commerce Clause and a violation of the Act. FERC v. Miss., 456 U.S. 742, 769–70 (1982) (Mississippi originally held PURPA unconstitutional as a violation of state rights over retail rates, but was subsequently overturned by the U.S. Supreme Court in this latter decision).

372. *FERC Order 1000 Changes Competitive Landscape*, *supra* note 368. The California Independent System Operator put a 59-mile, 230 kV Gates-Gregg transmission line up for competitive bid in 2013. Among bidders, the ISO selected the incumbent joint venture between Pacific Gas & Electric Co. and MidAmerican Transmission because of significant experience developing and operating transmission projects as well as knowledge of the siting and permitting requirements in California, as well as having the rights-of-way. *Id.*

373. *Id.* In the 2012 Artificial Island request for proposal, there were 26 proposals submitted by eight different transmission developers, including incumbent and non-incumbent utilities as well as independent investment groups. The selected winner was a joint venture between Dominion Resources and incumbent Public Service Electric and Gas Company, which at nearly $250 million far exceeded the low bid of $100 million. The incumbent held the existing rights-of-way to be used in the development of the transmission line. After criticism of favoritism, PJM temporarily suspended the process.

transmission issue. Until fifteen years ago, virtually all electric generating facilities were owned by vertically integrated monopoly utilities that both operated generating facilities and distributed the output from those facilities directly to their own retail customers.[374] Restructuring and deregulating the retail electric power sector, which commenced at the state level in approximately 1997, dramatically changed the regulatory paradigm.[375] About 40% of the states restructured prior to the electric sector problems in California in 2000–2001; the other 60% of the states retained traditionally structured retail electric sectors.[376]

The amount of power wholesaled before it is sold at retail, has shifted from only 8% in the 1960s to over 50% today.[377] As noted by the federal courts and affirmed by the Supreme Court, these independent market participants are the new competitive reality in power and energy markets[378]:

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374. *See* FERREY, *supra* note 44, at xiii, 269 (discussing how beginning in 1997 in Massachusetts, one-quarter of the states thereafter ordered their utilities to divest their power generation assets to the highest competitive bidders in an effort to promote competition in the generation and supply of power in the state).

375. *Id.* at 149–50.

376. *See* Steven Ferrey, *Sale of Electricity*, *in* THE LAW OF CLEAN ENERGY: EFFICIENCY AND RENEWABLES 218–19 (Michael B. Gerrard ed., 2011). Vermont is the one state in New England that did not engage in electric sector restructuring or creating an RPS system. However, ten years after the 1997–1998 restructuring began in New England, Vermont had one of the cleanest portfolios of power and the lowest electricity rates in New England. Power came from the large Vermont Yankee Nuclear Power Plant owned by Entergy and importation of power from Canada. *See* 1 VT. DEP'T OF PUB. SERV., VERMONT COMPREHENSIVE ENERGY PLAN 2 (2011), *available at* http://www.vtenergyplan.vermont.gov (noting that hydroelectric power typically is the least expensive source of power, and nuclear power also has been relatively competitive in price to generate).

377. *See* FERREY, *supra* note 44, at 10–11 (noting that because of divestiture of electric utility generating plants and the prevalence of independent power development, the majority of power is now generated by other entities than the utility which sells it to retail customers); FERREY, *supra* note 50, at 587 (detailing that wholesale power is not subject to state regulation, so the states have ceded regulatory authority over the cost of primary power acquired by their retail utilities).

378. *See* FERREY, *supra* note 44, at 269–70 (discussing how more than half of all power added every year is from independent power producers, which now enjoy nondiscriminatory access to the interstate transmission system to deliver their power output).

> When combined with federal preemption law, one crucial result of these energy market regulatory reforms has been 'a massive shift in regulatory jurisdiction from the states to the FERC. . . .
>
> The upshot of these federal and state innovations in electricity regulation is that state regulators, despite their continued authority over rates charged directly to consumers, have much less actual authority over those rates than they did [earlier]. Local utilities now obtain power largely through wholesale contracts subject to FERC's exclusive regulation, rather than through self-generated and self-transmitted power. . . .
>
> Although state regulators formerly took an extremely active role so as to ensure the just and reasonable retail power rates, FERC has exclusive jurisdiction over the wholesale rates that now drive the electric power market and, as a practical matter, largely determine the rates ultimately charged to the public.[379]

As the Supreme Court noted, it is now "possible for a customer in Vermont [to] purchase electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma."[380] As a result, much of the traditional state responsibility for regulating power has now shifted to FERC through its exclusive regulatory authority over the rates, terms, and conditions of wholesale sales and transmission of power,[381] and to the competitive power market in approximately one-

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379. Pub. Util. Dist. No. 1 Snohomish Cnty. Wash. v. FERC, 471 F.3d 1053, 1066–67 (9th Cir. 2006), *aff'd in part and rev'd in part sub nom.* Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527 (2008); *see also* Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393, 412–23 (2d Cir. 2013) (explaining that after Vermont had its regulated utility divest its nuclear power generation facility to an independent entity, it could not limit that new independent owner entity from placing that power output in interstate commerce at FERC-regulated wholesale prices, which are not subject to state regulation or control).

380. New York v. FERC, 535 U.S. 1, 8 (2002) (internal quotation marks omitted).

381. 16 U.S.C. § 824a-3 (2012); *see also* FERREY, *supra* note 50, at 586–87 (noting FERC has exclusive authority over the wholesale and interstate sale of power; states have no authority over wholesale sales).

third of the states.[382] The Supreme Court has repeatedly held that states are preempted by the Supremacy Clause[383] from directly or indirectly interfering with federal power regulation.[384] When applied to electric power issues, the Supremacy Clause[385] is embodied in the Filed Rate Doctrine,[386] which establishes an absolute line that the states may not cross when regulating electric power.[387] The court held that the Federal Power Act invests FERC with the "'exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce.'"[388]

There is an ongoing conflict between state and federal legal interpretation on power transmission within the states.[389] The no-ROFR rule in Order 1000 by the D.C. Circuit is the latest significant constitutional holding on state versus federal energy regulation. It is surrounded by recent decisions of the Second, Third, Fourth, and Seventh Circuits restraining state power over energy decisions within states. These become the legal structure as we enter a new, necessary sustainable energy transition. Past may be prologue.

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382. *See* FERREY, *supra* note 50, at 594 (noting that one-third of states have deregulated retail sales in their states to promote competition among power generation).

383. U.S. CONST. art. VI, cl. 2.

384. FERC v. Mississippi, 456 U.S. 742, 760–61 (1982), *see supra* Part III(C)(1) (discussing interpretations of the Supremacy Clause).

385. U.S. CONST. art. VI.

386. *See supra* Part III(C)(1) (discussing the Filed Rate Doctrine, which requires states to accept and incorporate FERC orders, tariffs, or determinations regarding power which is in the state).

387. Entergy La., Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39, 49–50 (2003); Miss. Power & Light Co. v. Miss. *ex rel* Moore, 487 U.S. 354, 371 (1988); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 964 (1986).

388. Entergy Nuclear Vt. Yankee, LLC v. Shumlin (*Entergy Nuclear*), 838 F. Supp. 2d 183, 233 (D. Vt. 2012) (quoting New Eng. Power Co. v. New Hampshire, 455 U.S. 331, 340 (1982)); *see also* 16 U.S.C. § 824(b)(1) (2012) (mandating that a public utility must secure FERC authorization to sell, lease, or otherwise dispose of facilities with a value in excess of $10,000,000; merge or consolidate such facilities; purchase or acquire any security with a value in excess of $10,000,000 of any other public utility; or purchase or lease an existing generation facility used in interstate commerce with a value in excess of $10,000,000). The state withholding a Certificate of Public Good until Vermont Yankee entered a below-market power purchase agreement with state entities crossed this "bright line" separating federal and state authority pursuant to the Supremacy Clause. *Entergy Nuclear*, 838 F. Supp. 2d at 233.

389. *E.g.*, S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41 (D.C. Cir. 2014).

Apologize First; Mediate Second; Litigate . . . Never?

Jeffrey I. H. Soffer*

I. INTRODUCTION

In 1982, the band Chicago reached number one on the U.S. Billboard Hot 100 Chart with its rock ballad, "Hard to Say I'm Sorry."[1] While some may argue it was the group's major key tonality, acoustic rhythm piano, and subtle use of vocal harmony[2] that propelled the track to the top spot, others might suggest that the song became a hit because people identified with the difficulties inherent in offering a sincere apology. This is especially true in the area of medical malpractice, where a heartfelt "I'm sorry" is what patients and their families want most from those they hold responsible for a bad outcome, yet what those responsible are perhaps most reluctant to provide.

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1. *Chicago*, LET'S SING IT, http://artists.letssingit.com/chicago-54hf4/overview (last visited Jan. 25, 2015).

2. About Chicago, PANDORA, http://www.pandora.com/Chicago (last visited Jan. 25, 2015).

Even though patients may file medical malpractice lawsuits with the *objective* of receiving compensation for an adverse event that resulted from a healthcare provider's severe negligence, inadequate care, or perhaps plain bad luck, the *reason* patients sue is more closely related to their dissatisfaction with the physician's bedside manner, lack of communication, and absence of interpersonal skills, than it is based on financial gain.[3] Patients are significantly less likely to file suit if they receive an explanation of what happened, why it happened, how the problem will be corrected to prevent future errors, and of course, an apology.[4]

This Article investigates the role of apologies within the realm of medical malpractice lawsuits—not only the role they play in and of themselves, but also how they facilitate open and honest conversations between patients and doctors, and lead to the resolution of claims through mediation instead of litigation. Part I of the Article discusses the inability of tort reform to reduce the number of medical malpractice claims and how the typical denial of wrongdoing by physicians and hospitals escalates conflicts with patients' and leads to more, rather than less, litigation. Part II discusses the power of apologies to defuse the conflicts that often lead to malpractice litigation, and examines two hospital systems that have implemented mediation programs which show that the future of medical malpractice is not in highly-publicized, drama-filled courtroom battles, but in quiet hospital conference rooms, where a timely explanation, a genuine apology, and appropriate compensation helps give patients the closure they need to move on. Part III discusses how hospitals could construct a system of alternative dispute resolution for malpractice claims by harnessing the power of apologies, the possible difficulties in implementing such a system, and recent developments suggesting that some medical providers are taking steps in the right direction.

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3. David M. Studdert, Michelle M. Mello & Troyen A. Brennan, *Medical Malpractice*, 350 NEW ENG. J. MED. 283, 287 (2004).

4. Thomas H. Gallagher et al., *Choosing Your Words Carefully: How Physicians Would Disclose Harmful Medical Errors to Patients*, 166 ARCHIVES INTERNAL MED. 1585, 1585–93 (2006).

II. INADEQUATE SOLUTIONS TO THE PROBLEM OF REDUCING MEDICAL MALPRACTICE LITIGATION

The power of apologies in de-escalating conflicts that lead to medical malpractice litigation is considerable and demonstrable, but the traditional solutions offered by those who want to reduce the volume of these claims (using a "deny and defend" approach in the hospital and courthouse and campaigning for tort reform in the statehouse) fail to bring this insight to bear. Instead, these solutions are either ineffective (in the case of tort reform), or actively counterproductive (in the case of "deny and defend").

A. Tort Reform: The Right Answer for the Wrong Problem

A common belief among physicians is that multi-million dollar verdicts and an ever-increasing number of medical malpractice filings have caused insurance premiums to skyrocket. As a result, the medical community has lobbied for damage caps, limitations on joint and several liability, caps on attorneys' fees, and limits on collateral source rules to make claims more difficult to file and less profitable for plaintiffs and their attorneys.[5] Interestingly, even though joint and several liability reform keeps insurance premiums in check, such changes have no significant effect on claim payouts or physician supply.[6] Further, as politically appealing as caps on attorneys' fees may be, they do not have a significant effect on the amount of damages awarded, nor do collateral source offsets.[7]

Damage caps, the most popular tort reform measure, have had some impact on the industry, but not as much as one might expect. First, damage caps have reduced the average award size since, as their name suggests, they literally cap damages. While

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5. Richard C. Boothman et al., *A Better Approach to Medical Malpractice Claims? The University of Michigan Experience*, 2 J. HEALTH & LIFE SCI. L. 125, 133–34 (2009).

6. MICHELLE M. MELLO, RESEARCH SYNTHESIS REPORT NO. 10: MEDICAL MALPRACTICE: IMPACT OF THE CRISIS AND EFFECT OF STATE TORT REFORMS 9 (2006), *available at* http://www.rwjf.org/content/dam/supplementary-assets/2006/05/15168.medmalpracticeimpact.report.pdf

7. *See id.* (stating that existing data does not allow a conclusion that caps on fees or collateral source offsets lead to lower amounts of damages being awarded).

damage caps reduce the *size* of the average award by 20%–30%, there is no evidence that these caps decrease the *frequency* of claims.[8] Caps do, however, correlate with a small, but statistically significant, increase in physician supply.[9] States are able to entice physicians by providing protection against severe malpractice judgments, thereby saving physicians from higher insurance premiums.[10] That said, these studies are limited and cannot control other characteristics that might affect premiums.[11] Even the United States Government Accountability Office has concluded that interest rates, natural disasters, and stock market fluctuations affect insurance premiums much more directly than changes to malpractice litigation.[12]

While these reforms make for good political debate, the evidence reveals that they are not the most meaningful mechanism for impacting medical malpractice claims. The central reason for this is that these reforms do not provide an explanation to an injured patient, safeguard future patients, or ensure that the negligent parties will be held responsible—the actual reasons why patients sue.[13]

B. Apologies as a Shield

"People are reasonable. They . . . will forgive an honest mistake. They will not forgive a dishonest cover-up."[14] Despite this, physicians are reluctant to apologize and instead adopt a "deny and defend" approach, fearing that acknowledging fault would spur litigation. To the contrary, patients file malpractice claims because of anger, confusion regarding what happened, desire for revenge, and other subjective factors.[15] While there is a fine line between an

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8. MELLO, *supra* note 6, at 11.
9. *Id.*
10. *Id.*
11. *Id.* at 12.
12. Boothman et al., *supra* note 5, at 130.
13. *Id.* at 133–34.
14. Peter S. Goodman, *In Case of Emergency: What Not to Do,* N.Y. TIMES, Aug. 22, 2010, at BU1, *available at* http://www.nytimes.com/2010/08/22/business/22crisis.html?pagewanted=all&_r=0 (quoting a former Merrill Lynch media relations executive).
15. Thomas Metzloff et al., *Empirical Perspectives on Mediation and Malpractice,* 60 LAW & CONTEMP. PROBS. 107, 108 (Winter 1997); *see also* Carol B. Liebman & Chris S. Hyman, *A Mediation Skills Model to Manage Disclosure of*

apology and an admission of guilt, if carried out appropriately, a physician can apologize without expressing wrongdoing.[16] Apologies express regret and remorse about an undesirable result—they do not admit fault. "I'm sorry" is not the same as "I'm at fault"; saying "I'm sorry" is polite and human. Not saying "I'm sorry" is rude and arrogant. And in everyday speech, "I'm sorry" often simply means "I'm sorry we find ourselves in this current situation."[17]

Still, physicians believe that to apologize is to admit fault, and is thus akin to handing plaintiffs a verdict on a silver platter. A 2008 study found that physicians were very concerned about the legal discoverability and confidentiality of the information they reported regarding medical errors.[18] Their concerns were not without merit, "given the malpractice system's focus on identifying provider fault and the limited availability of affordable malpractice insurance."[19]

Accordingly, instead of apologizing immediately after an adverse event, physicians remain tight-lipped to delay trial indefinitely.[20] Defense attorneys and malpractice insurers drag their feet to make it as expensive and time-consuming as possible for

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Errors and Adverse Events to Patients, 23 HEALTH AFF. 22, 24 (2004), *available at* http://content.healthaffairs.org/content/23/4/22.full.html ("The important factors leading people to sue physicians include families' perception that the physician was not completely honest; the inability of family members to get anyone to tell them what happened; the sense among family members that the physician would not listen; and their being told by someone, often a health care professional but rarely a lawyer, that they should sue."); Frank Sloan et al., SUING FOR MEDICAL MALPRACTICE (1993) (finding that, of respondants to an empirical interview, 24% filed claims because they felt they were misled, 20% filed claims because of poor communication, and 19% filed claims because they desired revenge); Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 THE LANCET 1609, 1609 (1994) ("The decision to take legal action was determined not only by the original injury, but also by insensitive handling and poor communication after the original incident.").

16. Sidney Kanazawa, *Strategic Options for Every Litigator: Apologies and Lunch*, FOR THE DEFENSE, Jul. 2004.

17. *Id.*

18. Jane Garbutt et al., *Lost Opportunities: How Physicians Communicate About Medical Errors*, 27 HEALTH AFFAIRS 246, 252 (2008).

19. *Id.*

20. *See id.* (discussing how physicians may not report errors for fear of litigation).

plaintiffs to see the inside of a courtroom.[21] They then encourage physicians to do the same by urging secrecy, disputing liability, and deflecting responsibility.[22]

These tactics produce several detrimental results. First, claims for the most serious injuries—the only ones for which litigation is a feasible option—take upwards of five years to resolve.[23] Second, patients are refused information about the cause of their injuries for extended periods of time and are denied financial compensation when it is most crucial.[24] Finally, it turns asking for forgiveness into a "vague, clumsy, and sometimes spiteful ritual."[25] Instead of bringing people together (as they were meant to do), apologies push legal combatants apart, having become the product of adversarial procedures oriented toward economic outcomes.[26] Yet these strong-arming techniques cause defendants hardship as well: The costs of denying a malpractice allegation and defending it to the bitter end have become so exorbitant that for every dollar spent on compensation, fifty-four cents goes to administrative expenses, including fees for lawyers, experts, and courts.[27]

III. APOLOGIES AS A SWORD

Even though doctors are reluctant to apologize because they take being sued personally and have a difficult time admitting their mistakes, they are learning to swallow their pride as they discover how much patients value an apology. Indeed, although patients view physician error as an "inexcusable failure[] of their implied promise of perfection,"[28] patients are willing to forgive a doctor who

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21. William M. Sage, *The Forgotten Third: Liability Insurance and the Medical Malpractice Crisis*, 23 HEALTH AFFAIRS 10, 11 (2004).

22. *Id.*

23. *Id.*

24. *Id.*

25. Nick Smith, *Just Apologies: An Overview of the Philosophical Issues*, 13 PEPP. DISP. RESOL. L.J. 35, 37 (2013).

26. *Id.* at 38.

27. David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2031 (2006).

28. Michael J. Warshauer, Mediation of a Medical Negligence Case from the Plaintiff's Perspective (Mar. 2012) (Warshauer Law Group, unpublished

apologizes because they realize that doctors are human and make mistakes.[29]

Knowing that "I'm sorry" is often translated to "I messed up," state legislatures have actively begun passing "Apology Laws." As of September 2014, thirty-six states have enacted laws[30] that make physicians' apologies or statements of sympathy inadmissible to prove negligence.[31] However, these jurisdictions differ on the details of what is and what is not admissible. For example, in Colorado, statements made by a healthcare provider expressing apology, fault, or sympathy to victims or victims' families are inadmissible.[32] By contrast, in Texas, statements concerning negligence or fault are admissible to prove liability, and only statements conveying a "general sense of benevolence are inadmissible."[33]

For an apology to be authentic, physicians must admit fault for breaking a rule, express genuine regret for the harm it caused, make an offer of restitution, and promise reform.[34] Apologies that include an acceptance of responsibility "can be a powerful way to defuse anger and create trust, a crucial commodity when building a settlement agreement."[35] In this way, an apology acts as a sword to fight off lawsuits. Plaintiffs' attorneys have trouble filing lawsuits when the defendants have admitted their errors and apologized to the

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paper) *available at* http://www.warlawgroup.com/wp-content/uploads/2014/05/24.MediationMedNeglCase.pdf.

29. Interview with Melodie Krane, Section Manager of the Health Law Section of the Office of General Counsel, Univ. of Tex. Sys., in Austin, TX (Apr. 16, 2012).

30. Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Indiana, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming. Nicole Saitta & Samuel D. Hodge, Jr., *Efficacy of a Physician's Words of Empathy: An Overview of State Apology Laws*, 112 J. OF THE AM. OSTEOPATHIC ASS'N 302, 305 (2012).

31. *Apology Laws*, SORRY WORKS!, http://www.sorryworks.net/apology-laws-cms-143 (last visited Jan. 25, 2015).

32. Boothman et al., *supra* note 5, at 132 n.24.

33. *Id.* at 132 n.25.

34. Leonard Berlin, *Will Saying "I'm Sorry" Prevent a Malpractice Lawsuit?*, 187 AM. J. ROENTGENOLOGY 10, 13 (2006)

35. Liebman & Hyman, *supra* note 15, at 30.

injured parties because without conflict, there is no story and no debate, and that does not play well to a jury.[36]

For some plaintiffs' attorneys, these frustrations rise to the level of cynicism. Those attorneys believe that hospitals offer well-timed apologies to take advantage of families when they are most vulnerable so the families will not hire a lawyer and sue.[37] One attorney stated that apologies lead to settlement offers that are insulting at worst, and inequitable at best: "I've yet to know anyone who got a fair offer without filing a lawsuit."[38]

His suspicions are not without merit. One of the earlier studies conducted on this topic found that patients only hire an attorney when their questions have gone unanswered, they feel no one has taken responsibility for the harm, and they are concerned the same thing could happen to someone else.[39] In fact, 37% of respondents said that they never would have brought suit had they received an explanation and an apology.[40] When hospitals don't take responsibility, it upsets patients and their families, who just want the hospital to acknowledge the mistake and ensure the same mistake will not happen to someone else.[41] One plaintiffs' lawyer recalled that his clients often told him that they would not have come to him if the hospital had merely accepted responsibility or acknowledged its mistake.[42]

As it turns out, if patients have an experience that matches their expectations, meets their need for information, and gives them reason to believe that the system will improve as a result of their

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36. Berlin, *supra* note 34, at 13 (quoting Rachel Zimmerman, *Doctors' New Tool to Fight Lawsuits: Saying "I'm Sorry,"* WALL ST. J., May 18, 2004, at A1, *available at* http://www.wsj.com/articles/SB108482777884713711 (last visited Jan. 25, 2015)).

37. *Id.* at 13.

38. *Id.*

39. Vincent et al., *supra* note 15, at 1609.

40. *Id.*

41. Telephone Interview with Tim McDonald, Professor of Anesthesiology and Pediatrics, Univ. of Ill. at Chi.; Chief Safety and Risk Officer for Health Affairs (Apr. 14, 2012).

42. Bhavani S. Reddy, *Apology and Medical Error Full Disclosure Programs: Is Saying "I'm Sorry" the Answer to Reducing Hospital Legal Costs?*, U. HOUS. L. CENTER HEALTH L. PERSP. (Mar. 2006), http://www.law.uh.edu/healthlaw/perspectives/2006\(BR) ApologiesFinal.pdf.

ordeal, the likelihood that they will sue decreases significantly.[43] When an apology is offered and the details of a medical error are immediately disclosed, the likelihood that a patient will file suit decreases by 50%.[44] If the physician apologizes and accepts responsibility, the likelihood that a patient will accept a settlement offer increases by 53%.[45]

Healthcare providers have finally begun to appreciate the value of a physician's apology. Accordingly, they are taking steps to increasingly incorporate doctors into post-incident conversations with patients and families. Over the past twenty years, these conversations have grown into meaningful dialogues and finally evolved into fruitful mediations that have generated positive outcomes for all parties involved.

A. The "Disclosure-and-Offer" Approach

A recent study showed that only 40% of adverse events were disclosed to acute care patients in Massachusetts's hospitals.[46] Hospitals were more likely to disclose adverse events when the events were unpreventable and the damage caused by the adverse events could be remedied.[47] In other words, when an adverse event resulted from negligence and produced an outcome that could not be corrected, hospitals were less likely to disclose the event to the patient.

This is unfortunate, considering that patients rate the quality of their treatment higher when physicians are truthful and disclose adverse events.[48] As chief counsel of Drexel University College of

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43. Boothman et al., *supra* note 5, at 136.

44. MICHAEL WOODS, HEALING WORDS: THE POWER OF APOLOGY IN MEDICINE 52–53 (Center for Physician Leadership 2007).

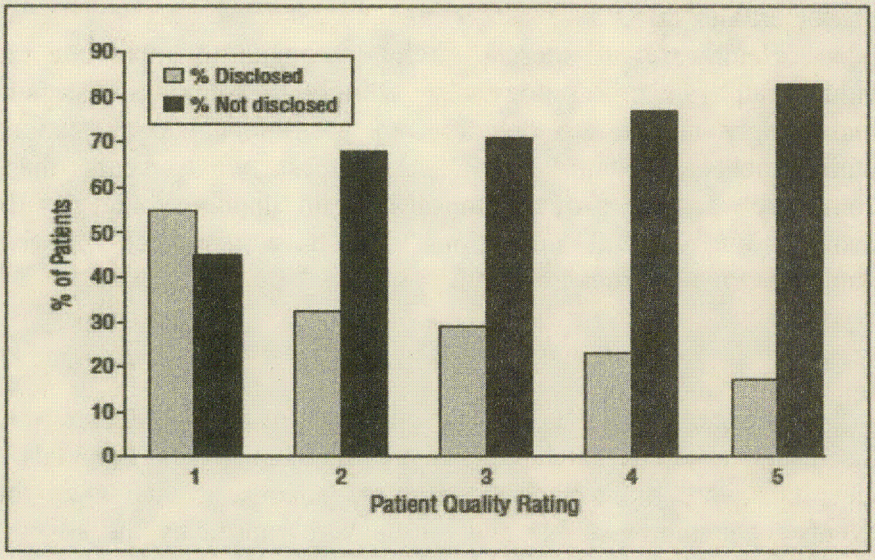
45. *See generally* Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 359 (2008) ("In some of the cases, the defense offered an apology, while in other cases no apology was offered. Interestingly, 91% (10 of 11 cases) of the cases in which the defense offered an apology settled as compared to only 38% (3 of 8 cases) when no apology was offered.").

46. Lenny Lopez et al., *Disclosure of Hospital Adverse Events and Its Association with Patients' Ratings of the Quality of Care*, ARCHIVES OF INTERNAL MED., Nov. 9, 2009, at 1890.

47. *Id.* at 1892.

48. *Id.*

Medicine noted a decade ago, "Families told us they just wanted information about what happened to their loved one."[49] The chart below displays how patients rated the quality of their healthcare, based on whether adverse events were revealed to them.



(1 = Excellent; 2 = Very Good; 3 = Good; 4 =Fair; 5 = Poor)[50]

Accordingly, patients involved in medical malpractice claims have grown receptive to a process known as the "disclosure-and-offer" approach.[51] This method is just what it sounds like: After a medical error or adverse event occurs, physicians sit down with patients and their families to explain what happened, admit mistakes, apologize, and offer appropriate compensation.[52] Contrary to what

49. Christopher Guadagnino, *Malpractice Mediation Poised to Expand*, PHYSICIANS NEWS DIGEST (2004), http://www.physiciansnews.com/2004/04/23/malpractice-mediation-poised-to-expand/.

50. Lopez et al., *supra* note 46, at 1891.

51. Michelle M. Mello & Thomas H. Gallagher, *Malpractice Reform—Opportunities for Leadership by Health Care Institutions and Liability Insurers*, 362 NEW ENG. J. MED. 1353, 1353 (2010).

52. *Id.* at 1354.

healthcare providers and their attorneys have historically feared, liability costs actually tend to decrease with this approach.[53]

The disclosure-and-offer approach originated from an experiment at the Veterans Affairs (VA) hospital in Lexington, Kentucky in 1987, when the hospital began offering formal apologies and fully disclosing medical errors.[54] The program has been a huge success; in the subsequent twenty years, the hospital has significantly lowered legal costs, only appeared in court three times, and had an average settlement of $16,000—a figure that is considerably lower than the nationwide average of $98,000 for comparable hospitals.[55] Although each hospital that has adopted the disclosure-and-offer method has incorporated the method in its own way, three general variations on the approach have emerged.[56]

The first variation is commonly known as the "reimbursement model."[57] In this model, the hospital offers to reimburse the patient for certain out-of-pocket costs and lost time caused by the injury.[58] Since patients who accept compensation do not waive their right to sue, the process is typically used when patients' injuries are less severe and are not the result of substandard care.[59]

The second variation, called the "early-settlement model," has no preset limits on compensation, and compensation is not offered until the institution determines that the care was unacceptable.[60] This approach may be applied to all types of injuries, and compensation may include any damages that might be recoverable in a tort case.[61] However, patients that accept an offer agree that it constitutes a final settlement, and thereby waive their right to sue.[62] The early-settlement model was pioneered by the

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53. *See* Liebman & Hyman, *supra* note 15, at 5 (suggesting that the success of disclosure-and-offer in one hospital suggests that it makes patients less likely to sue).

54. Reddy, *supra* note 42, at 2.

55. *Id.*

56. Mello & Gallagher, *supra* note 51, at 1354.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Mello & Gallagher, *supra* note 51, at 1354.

University of Michigan Health System, which will be discussed in greater detail below.

The third and final variation of the disclosure-and-offer approach evaluates patients' claims based on an "avoidability" standard. In this variation, a panel of experts determines whether the injury was likely to occur if the care had been provided by the leading specialist or in a top-notch healthcare system.[63] If the panel concludes that the injury should not have occurred, the institution offers compensation for both economic and non-economic losses, which is predetermined based on the severity of the injury.[64]

B. Mediation Experiments and the University of Michigan Health System Breakthrough

In 1991, North Carolina pioneered a court-ordered mediation program for cases valued at $10,000 or more;[65] upon a court order, these cases were submitted to neutral mediators who would encourage and facilitate a resolution.[66] The mediators employed techniques such as exploring the risks of litigation with the parties (especially the patient), explaining the strength of the other side's case, describing how a jury might respond to certain facts, and discussing worst-case scenarios.[67] The mediators educated patients on the realistic probability of physicians prevailing at trial despite the popular perception that juries frequently return verdicts for sympathetic plaintiffs.[68]

Attorneys who participated in these court-ordered mediations were asked their thoughts on the process. Seventy-five percent of attorneys believed that malpractice cases should be routinely referred to mediation, even though the process was successful less than half of the time.[69] When polled about the qualities they looked for in mediators, the attorneys valued medical malpractice expertise above

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63. Mello & Gallagher, *supra* note 51, at 1355.

64. *Id.*

65. Metzloff et al., *supra* note 15, at 110.

66. N.C. GEN. STAT. § 7A-38 (1995).

67. Metzloff et al., *supra* note 15, at 122.

68. Thomas B. Metzloff, *Alternative Dispute Resolution Strategies in Medical Malpractice*, 9 ALASKA L. REV. 429, 434 (1992).

69. Metzloff et al., *supra* note 15, at 141–42.

all-purpose characteristics like perseverance, objectivity, and fairness.[70]

Rush Presbyterian-St. Luke's Medical Center in Chicago implemented a voluntary mediation program in 1995.[71] The program is unique because cases are handled by *two* mediators—one medical malpractice attorney who represents patients and one medical malpractice attorney who represents physicians—that the claimants select from a panel.[72] An advantage of this system is the mediators' ability to use their experiences to give substantive evaluations of the merits of the case.[73] Typically, one out of three malpractice suits goes into the Rush mediation program annually, of which 90% settle.[74] Most of the mediations take place within one year of filing the lawsuit and are typically concluded in one day—cutting the hospital's yearly defense costs in half, and saving the hospital 40%–60% on settlement costs.[75]

In 2001, the University of Michigan Health System (UMHS) piloted a program that would reshape the medical malpractice landscape.[76] The program was created in response to an internal study that discovered that nearly a quarter of patients filed suit only because their physicians "failed to be completely honest with them about what happened, allowed them to believe things that were not true, or intentionally misled them."[77]

The central goal of the program is for patients to gain a "thorough understanding of what happened before misconceptions and bogus information drive them to the courthouse."[78] So, instead of employing the outdated "deny and defend" method and withholding details of adverse events from patients and their families, UMHS now conducts internal investigations about what

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70. Metzloff et al., *supra* note 15, at 145–46.

71. Guadagnino, *supra* note 49.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. Boothman et al., *supra* note 5, at 144, 146 (discussing the success of the UMHS program since 2001).

77. *Id.* at 133 (quoting Gerald B. Hickson et al., *Factors That Prompted Families to File Medical Malpractice Claims Following Prenatal Injuries*, 267 J. AM. MED. ASS'N 1359, 1361 (1992)) (internal quotation marks omitted).

78. *Id.* at 142.

occurred, shares its findings with the families, and, if appropriate, offers an apology and compensation.[79] UMHS does not wait until a patient is injured before communicating all information related to the patient's care; instead, UMHS prides itself on keeping its patients fully informed from the moment they walk through its doors.[80]

UMHS teaches its staff to establish realistic expectations with patients regarding upcoming treatment.[81] In order to create a risk management department that could investigate incidents and determine the reasonableness of care, the hospital completely overhauled the existing risk management department and hired experienced nurses who understand both the medical issues and the realities of caregiving.[82] The hospital's reasoning for making the department was that a conclusion reached by a committee of caregivers would be more credible to the nurses and doctors whose care was at issue than conclusions reached by insurance companies or juries.[83] These committee members are better equipped than non-caregivers when it comes to understanding the circumstances in which care was rendered, recognizing the challenges of rendering care, and fairly determining the reasonableness of care under the circumstances.[84]

Committee members at UMHS represent almost twenty specialties, which "helps keep specialties in check by preventing any member from improperly exonerating or unduly criticizing his or her direct colleague."[85] Reviews by experts in different specialties help guard against the experts' instinct to protect their own because the highest praise or the most probing critique often comes from members outside the specialty under review.[86]

Although UMHS had to expand its budget on the front end to pay the higher salaries of experienced caregivers, the savings it experienced on the back end—not to mention the injuries it avoided—have made renovating the risk management department a

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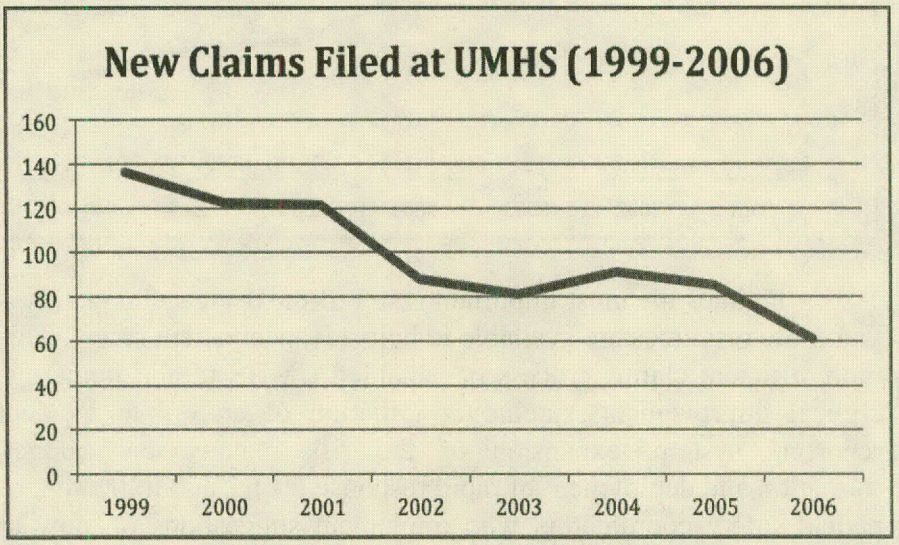
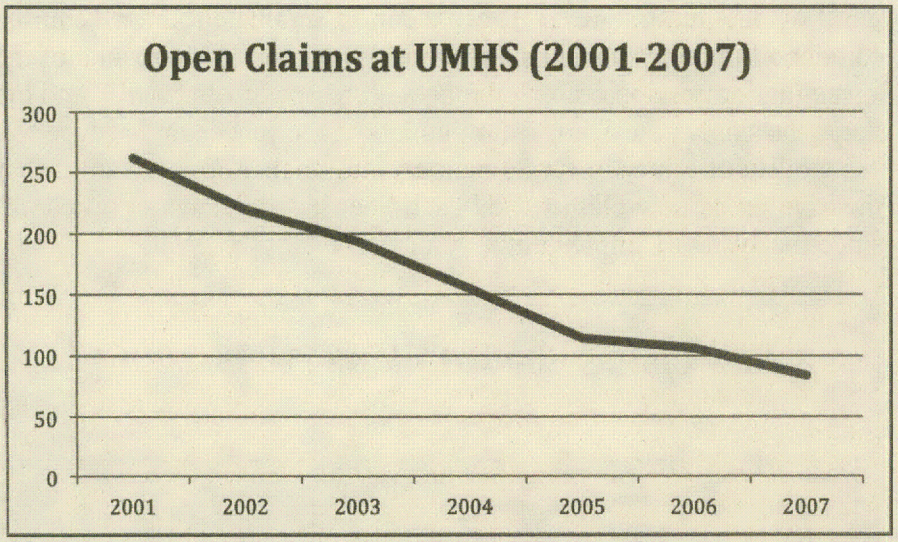
79. Boothman et al., *supra* note 5, at 125.
80. *Id.* at 145–46.
81. *Id.* at 135.
82. *Id.* at 139.
83. *Id.*
84. *Id.* at 140.
85. *Id.*
86. *Id.*

worthwhile investment.[87] The execution of this program requires early, honest reviews of hospital staff and faculty in order to prevent "grudging admissions of error following years of litigation."[88] This helps the hospital to learn from patients' experiences and reduce the probability of injury to future patients.[89] The chart below shows that the number of new claims filed each year has declined significantly since the system's implementation in 2001.[90]



UMHS's new program also allows the hospital to process claims much more quickly than before. The chart below depicts the number of open claims at UMHS between 2001 and 2007.[91]

87. Boothman et al., *supra* note 5, at 140.
88. *Id.*
89. *Id.* at 139.
90. *Id.* at 143.
91. *Id.* at 144.



Perhaps the most important result of the decrease in claims is that more resources are available to help advance patient safety. This more efficient claims process has enabled UMHS to add numerous clinical improvements, including initiation of an online incident reporting system, expansion of the risk management budget, formation and deployment of rapid response teams, and utilization of patient safety coordinators who implement suggestions on how to correct problems.[92]

UMHS has also fostered a sense of institutional appreciation for the early detection of unexpected outcomes.[93] An essential element of this is distinguishing between an adverse outcome caused by negligence and one that occurred despite the caregiver's reasonable actions. UMHS has designed a process in which expert reviews are a mandatory part of the follow up to a patient's injury.[94] If an unexpected outcome occurs, healthcare providers are taught to immediately approach patients and their families, provide them with answers, and apologize if the outcome is due to a medical error.[95] In

92. Boothman et al., *supra* note 5, at 145.

93. *Id.* at 135.

94. *Id.* at 137.

95. *See id.* at 136–37 ("The University of Michigan employs the more time-honored and (we believe) common-sense term used in most jurisdictions: a medical error occurs when a patient is injured as a result of medical care that was *unreasonable* under the circumstances.").

case of the latter, the medical error is evaluated to reduce the likelihood that the same error will happen again.[96] The results of the investigation are shared with the patient, the patient's family, and the patient's legal counsel, if any.

The decrease in claims, institutional improvements, and positive feedback makes UMHS confident that the program works: 98% of the medical staff surveyed noticed, and approved of, the difference in the UMHS approach to malpractice claims after 2001.[97] Additionally, 87% said that the threat of litigation adversely impacted the satisfaction they derived from practicing medicine, and 55% revealed that the new approach was a "significant factor" in their decision to stay at UMHS.[98]

All twenty-six members of the plaintiff's bar in southeastern Michigan who responded to the survey rated UMHS as "the best" or "among the best" health systems for transparency.[99] While 81% stated that their legal costs were lower and they had changed their approach to malpractice suits in response to the new program, 86% said that the transparency allowed them to better decide which claims to pursue.[100] Additionally, 71% of attorneys admitted that they settled cases for less than they anticipated, and 57% confessed that they pursued fewer cases than before the claims system changed.[101]

C. The Proof Is in the Pew Project

In 2002, the year after UMHS began its program for handling malpractice claims, Carol B. Liebman and Chris Stern Hyman conducted the Pew Charitable Trusts' Project on Medical Liability in Pennsylvania (the Pew Project), in which they studied disclosure of medical errors and mediation skills in the context of medical malpractice litigation.[102] Two wrongful death cases out of the same

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96. Boothman et al., *supra* note 5, at 135.
97. *Id.* at 145–46.
98. *Id.* at 146.
99. *Id.*
100. *Id.* at 146.
101. *Id.*
102. CAROL B. LIEBMAN & CHRIS STERN HYMAN, MEDICAL ERROR DISCLOSURE, MEDIATION SKILLS, AND MALPRACTICE LITIGATION: A DEMONSTRATION PROJECT IN PENNSYLVANIA (2005), *available at*

hospital were mediated through the Pew Project: the first involved a patient with end-stage pulmonary disease who died after a physician nicked the patient's lung while inserting an IV below the patient's collarbone, and the second involved an elderly man on blood thinners who died from internal bleeding that was misdiagnosed as an infection.[103]

At the first case's mediation, the patient's widow told the hospital representatives that after the doctor relayed news of her husband's death, she was standing alone in the hall outside her husband's room but no one explained to her what had happened.[104] The chief of medicine, who participated in the mediation, was disappointed with the treatment the widow received.[105] He apologized for the outcome and explained that her husband's death had not been due to negligence, but was a calculated risk of the procedure.[106] In settling the case with the widow, not only did the hospital provide her financial compensation and represent that it would train the medical staff on how to properly address grieving family members when a loved one died, but the chief of medicine also implemented a new procedure for placement of IVs.[107]

In the second case, the hospital violated its own policy by prohibiting the patient's wife from being with her husband during his final hours.[108] The chief of medicine listened to the widow's story, acknowledged the hospital's responsibility for misdiagnosing her husband, and explained what treatments the hospital administered to her husband.[109] As the mediation progressed, the widow's rage transformed into sadness and she expressed gratitude for the apology.[110] As in the first case, the hospital instituted a new policy; the hospital now requires trauma surgeons to treat any patient who

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http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/medical_liability/LiebmanReportpdf.pdf.

103. LIEBMAN & HYMAN, *supra* note 102, at 36–37, 64–65.

104. *Id.* at 38, 68.

105. *Id.* at 68.

106. *Id.*

107. *Id.* at 64.

108. *Id.* at 64–65.

109. *Id.* at 65.

110. *Id.*

takes blood thinners and is admitted to the emergency room as the result of a fall.[111]

The Pew Project led Liebman and Hyman to believe that the more apologetic and dedicated to improvement the hospital was, the more willing the patient would be to settle the case.[112] To test their hypothesis, Liebman and Hyman conducted two subsequent studies to evaluate interest-based mediation and its effectiveness in resolving medical malpractice cases.[113]

The first study involved twenty-nine lawsuits that were filed against municipal hospitals within New York City's Health and Hospitals Corporation (HHC study), of which nineteen cases were actually mediated.[114] Thirteen of the nineteen cases settled through mediation, and the attorneys estimated that they spent about one-tenth as much time preparing for mediation as they did for litigation.[115] The second study was entitled "Mediating Suits against Hospitals" (MeSH), and mediated thirty-one malpractice cases that occurred between 1997 and 2006 at private, non-profit hospitals in New York City.[116] The allegations in these cases included eight failures to diagnose, seven surgical errors, six failures to treat, five inadequate care claims, four improper treatments, and one medication error claim.[117] The sole objective of this study was to measure party satisfaction with mediation.

The MeSH mediators adopted an interest-based, facilitative–transformative mediation style, in which they focused on the patients' noneconomic needs (e.g., information, apology, and preventing future harm to others) as opposed to the amount of money

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111. LIEBMAN & HYMAN, *supra* note 102, at 65.

112. *Id.* at 65 (describing how a plaintiff responded to a "full apology" and expressed gratitude).

113. *Id.* at 61. Mediation services in these studies were provided free of charge. Chris S. Hyman et al., *Interest-Based Mediation of Medical Malpractice Lawsuits: A Route to Improved Patient Safety?*, 35 J. HEALTH POL. POL'Y & L. 797, 813 (2010).

114. Chris Stern Hyman & Clyde B. Schecter, *Mediating Medical Malpractice Suits Against Hospitals: New York City's Pilot Project*, 25 HEALTH AFF. 1394, 1395 (2006).

115. *Id.* at 1395–96.

116. Hyman et al., *supra* note 113, at 798.

117. *Id.* at 803.

required to settle the case.[118] Sixteen of the thirty-one cases settled at mediation, five settled after mediation, and ten did not settle.[119]

Attorneys on both sides spent approximately six hours preparing for mediation, far less than the one hundred hours they estimated they would have spent preparing for trial.[120] The average time spent in mediation was 3.7 hours (standard deviation = 1.8), and the monetary settlements ranged from $35,000 to $1.7 million, with a median settlement of $250,000.[121]

The participants rated their satisfaction in various categories on a scale of 1 (very satisfied) to 5 (very dissatisfied).[122] For example, patients were asked to rate "satisfaction with the process," "got a better understanding of the hospital's position," and "mediators tried to help reach a fair settlement."[123] The mean score was 1.98 (standard deviation = 0.62), which signifies a clear satisfaction with mediation.[124] Relatives of patients also participated in the interviews and provided favorable feedback.[125]

Even the attorneys had favorable outlooks on the process and gave an overall score of 1.9 (standard deviation = 0.7) on similar questions about their experiences.[126] Importantly, there was no significant statistical difference between plaintiff and defendant attorneys' satisfaction with the process.[127] Hospital representatives and insurance representatives, who attended twenty of the mediations, gave an average rating of 2.5, with no statistically significant difference between hospital and insurance representatives.[128] The chart below displays the level of participant satisfaction with mediation.[129]

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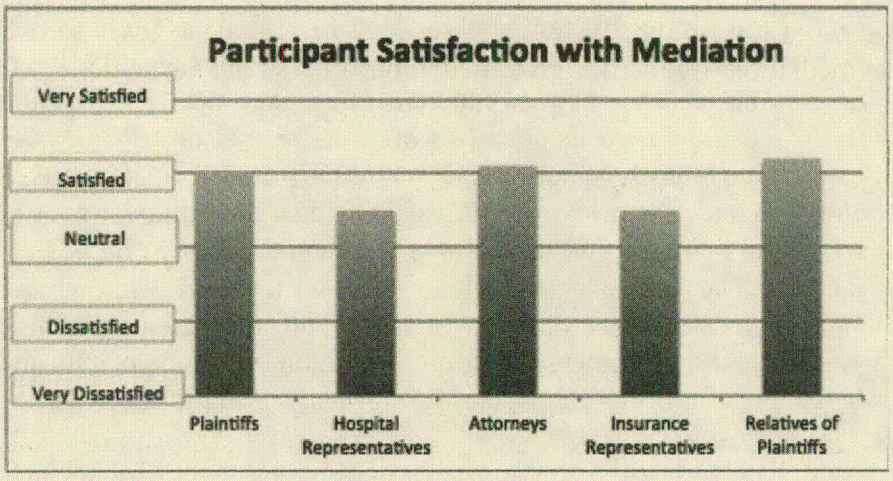
118. Hyman et al., *supra* note 113, at 818.
119. *Id.* at 807.
120. *Id.* at 809.
121. *Id.* at 807.
122. *Id.* at 803.
123. *Id.* at 808.
124. *Id.*
125. *Id.* at 809.
126. *Id.* at 809.
127. *Id.*
128. *Id.*
129. *Id.* at 808–10.



Liebman and Hyman found that early mediation has numerous benefits for all parties.[130] Not only does it allow patients and their families to receive compensation almost immediately after an adverse event, it also saves them an arduous and emotionally taxing discovery process and provides them an opportunity to tell their story in a professional setting. Furthermore, when the period of time between the adverse event and the mediation is short, information that might help hospitals reform their procedures is more likely to be identified and used to effect change.[131] In short, the HHC and MeSH studies demonstrated that mediation saves money, gives patients an opportunity to be heard, and enables hospitals to obtain information that can help them improve the quality of care they provide.[132]

Liebman and Hyman's conclusions are further validated by the data Tamara Relis gathered for her 2009 book, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties*.[133] For her book, Relis interviewed, observed, and questioned 131 participants in sixty-four medical malpractice cases in Canada.[134] Even though the Canadian healthcare and tort systems

130. Hyman et al., *supra* note 113, at 810–12.

131. *Id.* at 813.

132. Carol B. Liebman, *Medical Malpractice Mediation: Benefits Gained, Opportunities Lost*, 74 L. AND CONTEMP. PROB. 135, 140 (Summer 2011).

133. TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES 26 (2009).

134. *Id.*

differ from those of the United States,[135] Relis's findings are inherently valuable. Relis observed that 90% of physicians' lawyers thought that money was a patient's only goal, while only 10% recognized the desire to obtain answers as an objective.[136] When Relis asked the hospitals' and plaintiffs' attorneys what they believed a patient's primary goal was in filing a lawsuit, over 65% of each group believed that money was a patient's number one goal.[137] That said, the hospitals' and plaintiffs' attorneys did acknowledge that patients had other reasons for filing suit, including: obtaining answers, acknowledgment of harm, vindication or justice, blame, and prevention of reoccurrence—but did not believe that these were the top priorities.[138]

Unsurprisingly, the attorneys were wrong—59% of patients stated that admission of fault was their primary goal in filing suit, and 59% listed making sure the harm does not occur again as a top priority.[139] Among their chief objectives, 53% of patients listed getting answers, 41% listed retribution, and 41% sought an apology.[140] Even though 35% of patients listed money as their *secondary* goal, only 18% said money was their primary goal in filing suit, and a mere 6% stated that money was their only goal.[141] What about the other 41% of patients? They did not mention money as a goal at all.[142]

IV. SHAPING A SUCCESSFUL ALTERNATIVE DISPUTE RESOLUTION SYSTEM

In his 1992 article, *Alternative Dispute Resolution Strategies in Medical Malpractice*, Thomas Metzloff highlighted what he

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135. Liebman, *supra* note 132, at 142 n.47 (Canada subscribes to "a single payer healthcare system, court-imposed limits on some categories of damages, provincial government reimbursement of part of physicians' malpractice insurance payments, a single rate for insurance regardless of physician specialty, and an aggressive approach to defense of claims by the CMPA.").

136. RELIS, *supra* note 133, at 40.

137. *Id.*

138. *Id.* at 39.

139. *Id.* at 43.

140. *Id.*

141. *Id.*

142. *Id.*

thought should be the five central goals of a malpractice ADR system: (1) making a decision on the merits, (2) early identification of non-meritorious claims, (3) mediators skilled in understanding complex medical evidence, (4) consistency in damages awarded, and (5) reduction of litigation costs.[143] This is not to say that these goals are no longer sought today; however, instead of being the guiding light mediators use to conduct their discussions, these goals manifest themselves as advantageous byproducts of a system focused on physician apology and patient understanding.

There are three general types of mediation: evaluative, facilitative, and transformative.[144] Evaluative mediation, which is modeled off of settlement conferences held by judges, allows mediators to actively guide settlement discussions by pointing out the strengths and weaknesses in each side's case and predicting what a judge or jury would be likely to do.[145] Because of the nature of their role, evaluative mediators are expected to have substantive knowledge or legal expertise on the primary issues in the case. They offer suggestions based on legal concepts of fairness, which helps the parties make rational economic decisions.[146] They also conduct the majority of their discussions with the parties separately.[147]

In facilitative mediations, the meditator does not make recommendations, give advice, or predict an outcome; rather, the mediator asks questions, explores each party's point of view, and assists the parties in finding a mutually agreeable resolution based on understanding the topics that matter most to the parties.[148] To accomplish this, facilitative mediators chaperone joint sessions and encourage parties to do the majority of the talking (as opposed to their attorneys).[149] Additionally, they do not predict how the case will turn out at trial and only express an opinion on the value of the case later in the mediation.[150]

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143. Metzloff, *supra* note 68, at 447–48.

144. Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, MEDIATE.COM (Sept. 2000), www.mediate.com/articles/zumeta.cfm.

145. *Id.*

146. *Id.*

147. *Id.*

148. Hyman et al., *supra* note 113, at 798–99.

149. Zumeta, *supra* note 144.

150. Hyman et al., *supra* note 113, at 813.

Transformative mediation is the newest type of mediation, and is best understood as taking facilitative mediation a step further. This style of mediation is based on empowering the parties and inspiring them to recognize the other party's "needs, interests, values and points of view."[151] The parties, themselves, shape the mediation process and outcome—the mediator simply follows their lead.

Critics of facilitative and transformative mediation argue that these techniques are likely to bring about a resolution of the case that is unfair to the weaker party.[152] Yet, as mentioned before, medical malpractice plaintiffs seek answers, not monetary gain.[153] In the past three decades, a medical malpractice mediator's experience in the field and ability to find an objectively fair solution has been less important than the ability to help the parties understand the other side's needs and desires. Thus, one of the most sought after features in a mediator is a high degree of emotional intelligence.[154] Mediators need to be able to empathize, listen well, and gain the parties' trust.[155]

Mediations should take place soon after the event occurred. As time passes, claimants' negative feelings towards their physicians and nurses become more engrained in their minds. For physicians, when too much time goes by, what may once have been a significant tragedy for which they felt deeply sorry becomes an imperceptible occurrence that they do not remember or wish to accept blame for. Mediations should begin with a detailed explanation of the event, because mediation is often the patient's first chance to hear a clear account of what happened and ask questions.[156] Defendants also benefit from this process because they can gather information about which internal operations did not function properly.[157] When defendants later offer monetary compensation, they should also reassure plaintiffs that their suffering was not for naught by addressing the corrective measures the hospital will enact.[158]

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151. Zumeta, *supra* note 144.

152. *Id.*

153. *See* RELIS, *supra* note 133, at 43 (describing the motivations of malpractice plaintiffs).

154. Telephone Interview with Tim McDonald, *supra* note 41.

155. *Id.*

156. Liebman & Hyman, *supra* note 15, at 30.

157. *Id.*

158. *Id.* at 30–31.

The six health institutions in the University of Texas system rely on the UMHS model and use the same handful of mediators for all of their cases.[159] Some of these mediators are well versed in medicine, but all are excellent with claimants who are angry, upset, or distrusting.[160] Their talent lies in letting the patients feel like they are being heard and getting their day in court, even though they technically are not.[161] Many are former judges who can provide a reality check to both sides, and help the parties understand the weaknesses in their positions.

A. Credit Given for Participation

Of course, skilled mediators can only take mediation so far; the parties themselves must also be dedicated to reaching an amicable resolution. Mediation cannot succeed unless all participants believe that trial is a genuine possibility.[162] When a doctor refuses to attend mediation, not only does it signal to the patient that the doctor is not taking the claim seriously, it also makes emotional closure impossible and further infuriates the patient, motivating them to insist on a higher settlement.[163]

Non-participation of physicians leads to many lost opportunities: loss of the opportunity for patients and physicians to reconcile, for the physician to be forgiven by the patient or patient's family, for the parties to forgive themselves, for information sharing and gathering, and for institutions to consider changing their policies and practices.[164] When physicians are not included in the mediation, they are deprived of "voice, representation, and participation," which are essential to the process being perceived as fair.[165] Having a physician at mediation also sends the message that the hospital takes the issue seriously. Even if the physician who appears isn't the one who committed the error, patients place tremendous value on their

159. Interview with Melodie Krane, *supra* note 29.
160. *Id.*
161. *Id.*
162. Warshauer, *supra* note 28, at 4.
163. *Id.* at 11.
164. Liebman, *supra* note 132, at 140.
165. *Id.* at 141.

attendance because they feel that the physician speaks on behalf of the institution.[166]

Additionally, all hospital representatives who attend the mediation should demonstrate good listening skills. When something goes wrong, physicians like to talk and give clinical explanations, but listening allows them to identify patients' interests, summarize and reframe what has been said to show they understand what patients are saying, and defuse any hostility that may occur.[167] This gives hospital representatives and healthcare providers an opportunity to make internal improvements based on what they learn at mediation about information that was missed or procedures that were ignored.[168] The benefit of learning this information through mediation, as opposed to litigation, is that mediation does not raise the concern that modifying current practices might be viewed as an admission of liability.[169]

Chris Hyman, who currently mediates healthcare disputes and practices law in New York, explained why hospitals benefit so greatly from mediating malpractice claims: "Cases at the end of the spectrum where it's clear there was negligence are going to be settled, and sooner rather than later."[170] The reason is that plaintiffs are content to receive an amount that will appropriately compensate them for their injuries. Defendants who were clearly negligent would rather settle than get in front of a jury; accordingly, most of the medical malpractice cases that do go to trial result in a defense verdict because the defendants would have settled these cases if they thought they would lose at trial.[171] Additionally, since the number of hours required to prepare for mediation is a fraction of that required for trial, the parties realize significant cost savings by avoiding litigation.[172]

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166. Interview with Melodie Krane, *supra* note 29.

167. Telephone Interview with Chris Hyman, Founder, Med. Mediation Grp. LLC (Apr. 11, 2012).

168. Chris Stern Hyman, *Mediation and Medical Malpractice: Why Plaintiffs, Hospitals and Physicians Should Be at the Table*, 66 DISP. RESOL. J. 32, 34 (Aug.–Oct. 2011).

169. *Id.*

170. Telephone Interview with Chris Hyman, *supra* note 167.

171. *Id.*

172. Metzloff et al., *supra* note 15, at 126.

Tim McDonald, professor of anesthesiology and pediatrics at the University of Illinois at Chicago and chief safety and risk officer for health affairs for the University of Illinois Health System, agrees that there is inherent economic value in immediately mediating cases of clear negligence. "Not only are there savings on expert witnesses and other costs, but it's also much better for patients and their families."[173] These sentiments were echoed by Melodie Krane, the manager of the health law section for the University of Texas's Office of General Counsel, who said: "We are in the business of providing healthcare, not in the business of litigation."[174]

Of course, in a strictly economic sense, patients are behaving irrationally. If liability is clear, it might make more sense for patients to go to court, prove negligence, and receive a larger award of damages. However, as discussed, these cases do not go to court because patients are not after revenge; instead, patients just want to make sure that the hospital learned something from their suffering.

Victims of medical errors care deeply about ensuring that future patients do not have the same negative experiences that they did. For many, this is a greater priority than financial compensation. As McDonald explained:

> If you've been hurt or someone has died, you can't bring that person back. So, one goal of the grieving process is to learn and making something good out of something bad, to bring positive meaning to an event that would otherwise be negative. People generally want to be optimistic and not dwell on the horrible, bad stuff, and if they can turn it into a positive, it's a win-win-win. It's a win for future patients, a win for the psyche of the patient and family, and a win for the caregivers who have found a better way to do things.[175]

Krane agrees, and stated:

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173. Telephone Interview with Tim McDonald, *supra* note 41.
174. Interview with Melodie Krane, *supra* note 29.
175. Telephone Interview with Tim McDonald, *supra* note 41.

> Sometimes all the patients want is to know what happened, have their questions answered, and be assured that what happened to them won't happen to someone else. In the end, it's about people and how they work together, bringing a bad situation back around to a resolution that everyone can be okay with.[176]

Liebman identifies significant benefits from mediation: "[I]mproved patient safety, teamwork, relationship repair, and financial savings for physicians, hospitals, and patients."[177] For patient safety to improve, someone with technical clinical knowledge, appreciation for the institution's culture (someone who knows the power players, who makes decisions, and who has influence), and an understanding of policy and procedures, must be in the mediation. In many mediations when there are wrongful death allegations, family members blame themselves for not doing more—for example, for not asking more questions, not getting their loved one to the hospital sooner, or not spending more time at the bedside. The traditional adversarial defense only heightens their guilt and grief. Information and, when appropriate, assumption of responsibility by the medical team, can each provide release for family members and allow them to forgive themselves for failing to prevent the tragic outcome.[178]

V. OBSTACLES TO MEDIATION

Although hospitals across the country are beginning to implement disclosure policies and mediation programs, there are still numerous obstacles to mediation that they must overcome. First, this approach is a big change for doctors, who are accustomed to decades of advice from more experienced colleagues, risk managers, and insurers to "deny and defend" an adverse event or medical error.[179] Attorneys have conditioned physicians and hospitals to believe that it

176. Interview with Melodie Krane, *supra* note 29.
177. Liebman, *supra* note 132, at 136.
178. *Id.* at 145.
179. Hyman, *supra* note 168, at 4.

is in their best interest to say as little as possible, even though the research indicates that litigation is *more* likely when these health care providers remain tight-lipped.[180] Moreover, appropriately explaining what happened is not a skill that is acquired overnight. Training the physicians to communicate effectively in these difficult conversations is hard work. And, for most physicians, because this is an occurrence that happens so rarely, many of them feel ill-equipped to have a disclosure conversation and apologize.[181]

Indeed, changing the status quo is difficult. People are skeptical about the need for change and prefer to do things the old way. Plaintiffs' attorneys are open-minded to early mediation because settling cases quickly allows them to take on more clients while still receiving their contingency fee. However, defense attorneys, who bill by the hour, have less motivation to settle a case in mediation.[182] Additionally, when a case has already dragged on for an extended period of time, mediation can be its own worst enemy because the parties have dug in their heels, have strong feelings of animosity, and want their day in court—thus, mediation is not a viable option.[183]

Another significant impediment to early mediation is that all malpractice payments must be reported to the National Practitioner Data Bank (NPDB)—an "electronic repository of all payments made on behalf of physicians in connection with medical liability settlements or judgments as well as adverse peer review actions against licenses, clinical privileges, and professional society memberships of physicians and other healthcare practitioners."[184] The physician on whose behalf payment was made is listed on the NPDB entry.[185] The entry becomes a permanent fixture on the physician's record, which can be accessed any time the physician

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180. Gerald B. Hickson et al., *Factors That Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 J. AM. MED. ASS'N. 19 (1992).

181. *Id.*

182. *Id.*

183. Telephone Interview with Tim McDonald, *supra* note 41.

184. *National Practitioner Database*, OPENANESTHESIA, http://www.openanesthesia.org/aba_national_practitioner_database/ (last visited Aug. 7, 2015).

185. *Id.*

seeks clinical privileges or new employment.[186] McDonald notes that academic medical centers are quicker to adopt a mediation program than private hospitals, which he attributes to corporate shield practices and the issues of reporting to the NPDB and state licensing boards.[187]

So, when a malpractice case settles, insurance companies send the name of the negligent physician listed on the settlement agreement to the NPDB, which effectively triggers a review by the state licensing board.[188] Physicians can submit a detailed explanation of the event to accompany the report, but the report is still viewed as a blemish on the physician's record.[189] Accordingly, many physicians choose to take their chances at trial.[190]

However, what UMHS does—and what, according to McDonald, accounts for its program's widespread success—is ask the plaintiffs' attorneys to replace the doctor's name with the hospital's board of trustees (i.e., corporate shield).[191] Because this eliminates the reporting requirement, physicians at UMHS are much more inclined to engage in mediation than private doctors who do not have a corporate entity to protect them.[192] Since not all physicians operate under a system like that of UMHS, the NPDB should consider revising its policy for the benefit of malpractice claimants hoping to settle.

Insurance companies pose another problem. They view disputes as the cost of doing business and are not particularly interested in early resolution.[193] Insurers only worry about cases toward the end of the pipeline or on the eve of trial, which precludes the kind of analysis that would push them towards settling in mediation.[194] Insurance companies also worry that making a habit of resolving cases early sets a dangerous precedent that might open the

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186. John J. Fraser, *Technical Report: Alternative Dispute Resolution in Medical Malpractice*, AM. ACAD. PEDIATRICS, at 605 (Mar. 2001), http://pediatrics.aappublications.org/content/107/3/602.full.pdf

187. Telephone Interview with Tim McDonald, *supra* note 41.

188. *Id.*

189. *Id.*

190. Fraser, *supra* note 186, at 605.

191. Telephone Interview with Tim McDonald, *supra* note 41.

192. *Id.*

193. Hyman, *supra* note 168.

194. *Id.*

floodgates.[195] For that reason, many insurance carriers delay payment as long as possible to maximize the amount of money they have on hand.[196] Some carriers have wised up and have started to discover the advantages of mediation and have, accordingly, cooperated more often with the mediation process. Carriers see tremendous value in lowering costs and case loads, and realize that it is not only the right thing to do, but, in cases of clear error, the smart thing to do.[197]

VI. MOVING IN THE RIGHT DIRECTION

Noticing the successes of the programs at Rush and UMHS, Drexel University College of Medicine implemented a similar program in 2004.[198] The hospital discovered that half of its medical malpractice cases arose, in part, because physicians were not having candid conversations with their patients about adverse events.[199] Drexel responded by implementing a voluntary mediation program, in which patients are asked (but not required) to sign a form promising to refrain from legal action until both parties have tried to resolve the problem through mediation.[200]

Indeed, while a voluntary mediation program is certainly important, what hospitals really need to focus on is implementing a disclosure program in which the hospital's staff not only feels supported internally when something goes wrong, but also knows how to effectively communicate with patients and their families.[201] For example, Maimonides Hospital in New York has made a clear commitment to improving the communication skills of its staff.[202] As part of this endeavor, the hospital developed a "Code of Mutual

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195. Interview with Melodie Krane, *supra* note 29.

196. *Id.*

197. Telephone Interview with Tim McDonald, *supra* note 41.

198. Carl Oxholm III, *Med Mal Mediations in Philadelphia: Report on Drexel Med's First Year*, ARB. & MEDIATION, Winter 2005, at 2.

199. *Id.*

200. *Id.* at 1.

201. Hyman, *supra* note 168, at 34.

202. Rebecca Givan, *The Maimonides Medical Center Model: Conflict Resolution Through Mutual Respect and Conflict Resolution Through Mediation*, 65 DISP. RESOL. J. 11, 53–54 (2010).

Respect" to reduce conflict and insensitive behavior.[203] The Code is comprised of seven key principles: professionalism, respectful treatment, appropriate language, appropriate behavior, prompt feedback, confidentiality, and communication.[204] Honest disclosure must be the driving force behind these principles in order for them to have meaning. Even when there is an unexpected outcome, a candid dialogue and the promise to investigate what happened can work wonders in defusing hostility.

In 2005, Doug Wojcieszak (a disclosure training consultant who lost his oldest brother due to a medical error) founded Sorry Works!, an advocacy organization that promotes disclosure, apology, and compensation in the aftermath of an adverse medical event.[205] The group views medical malpractice cases as a "customer service crisis," not a legal problem.[206] The organization promotes reestablishing trust between patients and doctors through empathy, truthful conversations, and sharing what will be done to prevent similar errors in the future.[207]

In 2006, the University of Illinois at Chicago (UIC) implemented a process known as "Seven Pillars" to guide their staff after the occurrence of an adverse event.[208] The seven pillars are: reporting, investigating, immediately communicating, apologizing, learning for improvement, collecting data, and educating.[209] Anytime there is a harmful event that may be the result of negligence, UIC's risk management group notifies the legal claims department and evaluates the case.[210] If the risk management group determines care was inappropriate, the hospital positions itself to sit down with the family in order to reach a resolution as quickly as possible; if the risk management group determines care was proper, the hospital still explains what happened to the patient and their

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203. Givan, *supra* note 202, at 54.

204. *Id.*

205. *Founder*, SORRY WORKS!, http://sorryworkssite.bondwaresite.com/founder-cms-30 (last visited Jan. 25, 2015).

206. *Sorry Works! Making Disclosure a Reality for Healthcare Organizations*, SORRY WORKS!, http://sorryworkssite.bondwaresite.com/credo-cms-3 (last visited Jan. 25, 2015).

207. *Id.*

208. Telephone Interview with Tim McDonald, *supra* note 41.

209. *Id.*

210. Telephone Interview with Tim McDonald, *supra* note 41.

family, but also explains why the care was appropriate.[211] As McDonald clarified, "We will express empathy all of the time, even if our care was appropriate, and we will explain how this is a complication that happens because medicine is an art and not a science."[212]

Krane described the University of Texas's similar philosophy: "[I]f we've done something wrong, we disclose it and do what we can to make it right."[213] When a potential error occurs, UT immediately examines what happened, evaluates the situation, and keeps patients apprised of the investigation.[214] This keeps UT's doctors out of depositions and meetings with lawyers, allowing them to do their jobs. In the UT system, the health law department evaluates patients' complaints before they are sent to peer review committees, who look at the records and do a standard of care evaluation.[215] If it is clear that the hospital was at fault, UT will contact the patient (or the patient's attorney) before a lawsuit is filed.[216]

However, it is not just healthcare systems across the United States that have begun to implement these programs. In 2007, a Chinese city, Tianjin, adopted liability insurance and mediation organizations, which have garnered an 87.3% success rate for medical malpractice mediation since 2009.[217] In September 2010, the Hainan People's Medical Dispute Mediation Committee, an independent organization with no government affiliation, was created to help patients mediate disputes with hospitals.[218] As of April 2012, 270 hospitals across the island province of Hainan participated in the island-wide commercial medical malpractice

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211. Telephone Interview with Tim McDonald, *supra* note 41.

212. *Id.*

213. Interview with Melodie Krane, *supra* note 29.

214. *Id.*

215. *Id.*

216. *Id.*

217. Su Zhou, *Hospitals to Adopt Liability Insurance*, CHINA DAILY USA, (July 11, 2014), http://usa.chinadaily.com.cn/china/2014-07/11/content_17737246.htm.

218. *Hainan Innovative Third-Party Medical Dispute Mediation Mechanism to Promote "Safe Hospital" Building*, WANTINEWS.COM, (Feb. 23, 2014), http://www.wantinews.com/news-6429432-Hainan-innovative-third-party-medical-dispute-mediation-mechanism-to-promote-safe-hospital-building.html.

insurance policy that was introduced by the Committee.[219] In 2013 alone, the Committee mediated 355 cases and facilitated the recovery of 15.62 million CNY (approximately $2.5 million) for claimants.[220] Two hospitals in Beijing have gone one step further: Since January 2014, You'an Hospital and Anzhen Hospital have offered patients "surgical accident insurance."[221] If patients or their family members purchase surgical accidental insurance, they are immediately financially protected if the hospital's negligence causes death or complications during or after surgery.[222]

Whether the hospital is in Texas or Illinois, the United States or China, or anywhere in between, the ultimate goal is to create a successful outcome, whatever that may be. For instance, if internal investigations determine that care was appropriate, success might mean explaining why the outcome occurred to patients and their families. But if the internal investigations determine that care was inappropriate, success might mean reaching an agreement that the patients view as just, knowing that the hospital learned from the incident.

VII. CONCLUSION: LITIGATE (ALMOST) NEVER

For over three decades, Chicago has explained that it really is "Hard to Say I'm Sorry." Hospitals and physicians know that apologizing is a hard thing to do, but they need to understand that in the context of medical malpractice claims, it is the right thing to do. And, more often than not, it is precisely what they need to do. Litigation is not inevitable; patients and their families do not necessarily seek litigation. Instead, patients and their families want a meaningful explanation of what happened, a genuine apology, and fair compensation. They want assurance that safety improvements will be implemented so others will not suffer as they did. But, most

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219. Shan Juan in Haikou, *Mediators Cure Medical Disputes*, CHINA DAILY USA, (Apr. 10, 2012), http://www.usa.chinadaily.com.cn/epaper/2012-04/10/content_15012949.htm.

220. *Hainan*, supra note 218.

221. Wang Qingyun, *2 Beijing Hospitals Now Offer Surgical Insurance*, CHINA DAILY USA, (Apr. 9, 2014), http://www.usa.chinadaily.com.cn/china/2014-04/09/content_17416669.htm.

222. *Id.*

of all, they want a sense of closure that will allow them to put the unfortunate event behind them and get on with their lives.

Avoidable adverse events in U.S. hospitals waste approximately $52.2 billion each year.[223] Healthcare systems across the country can lower these costs by prioritizing early mediation of potential claims. Risk managers and attorneys should remember that the time and money expended to adequately prepare for settlement negotiations is nominal compared to what is required to prepare for trial.[224] Not to mention, mediation spares patients and physicians a "brutal and emotionally draining discovery process."[225]

Of course, as wonderful as it may sound, early mediation is not always the answer. Sometimes the long-term consequences of an injury will not manifest immediately, or physicians and hospitals will stand by the care they provided, in which case the litigation process will have to run its course.[226] Nevertheless, as various facts come to light and each side learns the other's perspective, opportunities abound for giving plaintiffs a forum to be heard and defendants a chance to explain. Certainly, mediation exists because it offers immediate compensation to patients and tremendous cost savings to defendants, but mediation *works* because patients do not care about taking hospitals for all they are worth.

This is consistent with procedural-justice research, which finds that patients have more interests than monetary compensation.[227] Instead, patients evaluate their experiences in the courts in terms of criteria such as "vindication, attention, accountability, information, accuracy, comfort, respect, recognition, dignity, efficacy, empowerment, and justice."[228]

It is imperative that hospitals understand patients' underlying motives in bringing malpractice actions. Even more vital is that

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223. Robert Kelley, *Where Can $700 Billion in Waste Be Cut Annually from the U.S. Healthcare System?*, *in* WHITE PAPER ON HEALTHCARE WASTE (2009), http://www.ncrponline.org/PDFs/2009/Thomson_Reuters_White_Paper_on_Healthcare_Waste.pdf.

224. Hyman et al., *supra* note 113, at 809.

225. *Id.* at 811.

226. Liebman, *supra* note 132, at 140.

227. Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 482 (2010).

228. *Id.*

doctors need to realize how important it is for them to be fully prepared and ready to have a sincere conversations at mediations. Failure to do so deprives patients of a much-needed opportunity for "healing, understanding, forgiveness, and repair of broken relationships."[229] Hospitals that have already implemented such programs should be applauded, not only for reshaping the culture of their institutions, but also because they have published articles sharing their experiences. This provides other healthcare systems a foundation upon which to develop their own mediation programs, and instills in them confidence that the process works.

229. Hyman et al., *supra* note 113, at 825.

The Jury: Modern Day Investigation and Consultation

Katherine Allen*

I. INTRODUCTION

Every lawyer or budding law student has heard the phrase: "A case is won or lost on jury selection." The truth of this proposition is questionable, to say the least. In fact, case studies have shown that trials are mostly won or lost on the strength of evidence.[1] While focusing on evidentiary strength is less sensational than claiming that a well-picked jury amounts to a homerun, the case studies suggest that the jury—a pillar of the American justice system—is operating as it should.[2] The Constitution is replete with language guaranteeing an accused's right to a jury trial.[3] If it were

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1. JEFFREY ABRAMSON, WE, THE JURY 171 (1994)
2. *Id.*
3. *See* U.S. CONST. amends. V, VI, VII (offering various protections for a defendant's right to a jury trial).

easy to win a case by stacking the jury in favor of one party, we would question our use of the jury system altogether, or at the very least, our use of peremptory challenges.

Regardless, every litigant knows jury selection is extremely important. An entire industry—jury consultation and investigation—is geared toward helping attorneys pick a jury. Certain law school classes focus entirely on teaching students the art of jury selection. The Supreme Court and state courts have spilled copious amounts of ink tinkering with the jury laws. If the strength of the evidence is truly what affects the outcome of a case, why have lawmakers bothered amending the jury selection laws? Perhaps the answer is that our intuitions are correct—the evidence simply cannot trump everything that happens in the jury box. The reality is that twelve people hear the evidence in a courtroom, and return to the jury room to deliberate with different opinions on the correct verdict. People process information differently. All jurors have different sets of experiences, beliefs, and emotions that impact decisions in the jury box. Essentially, while the justice system requires impartial juries,[4] impartial jurors do not exist. There is a gap between the evidence and the verdict that jurors color in with their individual experiences and prejudices. This gap is the lifeblood of the trial consultation and juror investigation industry.

Many assume that juror consultants and investigators strive to help rich defendants turn what should be an impartial jury into a very partial one. But that is both a generalization and far from the truth in many situations. While these services certainly have drawbacks,[5] one of which can be disparity between rich and poor litigants, the services have many, often overlooked, benefits. For example, investigations can weed out biased jurors, uncover dishonest jurors, and bring to light juror and attorney misconduct that could jeopardize the sanctity of jury deliberation. Further, the Internet and

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4. Courts have held that one means of ensuring jury impartiality is to end race and gender discrimination in jury service. *See* Strauder v. West Virginia, 100 U.S. 303, 309–11 (1879) (holding that excluding individuals from a jury based on the color of their skin is unconstitutional); Taylor v. Louisiana, 419 U.S. 522, 537 (1975) (holding that the exclusion of women from juries is unconstitutional).

5. Such as invasion of privacy, disparate access for rich clients only, creepy, stalking behavior, or trying to turn a jury partial.

social media have launched juror investigation into a world where all litigants can investigate a jury without the added high-dollar cost of investigation fees. Moreover, with the online footprint of most Americans today, the Internet can often reveal far more than a highly paid consultant. This reality has helped to balance the playing field between rich and poor parties as well as between a defendant and a well-equipped prosecutorial arsenal in high-stakes criminal trials. Additionally, traditional consultation can eliminate bias through the use of social scientists trained in detecting dishonest jurors. Consultation can also steer attorneys away from a reliance on hunches and intuition that could be based on race and gender, which would help attorneys follow constitutional mandates articulated by the Supreme Court.

Part I of this Note examines the historical practices of jury investigation, the rise of jury consultation, and the practices in modern times. Part II considers the effects of the Internet and social media on consultation and investigation prior to jury selection and deliberation. Part III explores the benefits of jury consultation and investigation, and considers the negative implications and ethical boundaries of those practices. Part IV considers whether certain criminal defendants—namely capital defendants—should have a right to a jury consultant under certain circumstances.

II. INVESTIGATION AND CONSULTATION HISTORICALLY

A. Investigation

The practice of juror investigation traces back to the 1700s, and first appeared in the English Treason Act.[6] The Act stated: "[W]hen any person is indicted for high treason . . . a list . . . of the jury mentioning the names[,] professions[,] and place of abode of the . . . jurors [shall] be also given at the same time that the copy of the indictment is delivered to the party indicted."[7] The early American judicial system adopted the English practice of providing defendants

6. Treason Act, 1708, 7 Ann., c. 21 (Eng.).
7. Treason Act, 1708, 7 Ann., c. 21, § 14 (Eng.).

access to jury information.[8] In 1790, Congress passed the Public Acts of the First Congress, which gave defendants facing capital charges the right to investigate the jury venire before trial.[9]

As the practice grew in the 1900s, defendants and prosecutors began using private detectives to investigate prospective jurors' habits, reputations, and standings in the community.[10] Renowned trial attorney Clarence Darrow stressed the importance of juror investigation.[11] In 1907, during the murder trial of Bill Haywood, both Darrow and the prosecution claimed to have "precise intelligence" on the jury.[12] The prosecution and defense sent "small armies of scouts into the countryside posing as insurance men, encyclopedia salesmen, and other itinerants" in order to reveal the jurors' secrets, preferences, and affiliations.[13] During the early 1900s, the goal was to unlock potential jurors' political and religious affiliations, marital statuses, community reputations, drinking habits, employment statuses, and criminal histories.[14]

In more recent times, investigators have dug even deeper. In addition to standard trial research, investigators drive by jurors' neighborhoods, talk with jurors' neighbors, and follow jurors throughout the day.[15] Neighborhood visits, for example, reveal information about jurors' general lifestyles.[16] One litigator quipped that an attorney "can learn a lot about [potential] juror[s] by driving by their house[s] and checking out their home environment[: A]re

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8. *See* Commonwealth v. Long, 922 A.2d 892, 901–02 (Pa. 2007) (explaining that jurors' names and addresses were public knowledge in early American trials).

9. The statute, which also applied to treason charges, aimed to provide information about the jury to the defense for purposes of investigations, but also sought to level the playing field between the government and defendant's resources. *See* Stewart v. United States, 211 F. 41, 46 (9th Cir. 1917) ("Its evident purpose is to put the defendant on an even plane with the government . . . .").

10. Thaddeus Hoffmeister, *Investigating Jurors in the Digital Age: One Click at a Time*, 60 U. KAN. L. REV. 611, 616 (2012).

11. *Id.* at 617.

12. *Id.*

13. *Id.*

14. *Id.* at 617–18.

15. *Id.* at 618.

16. *Id.*

there children's toys in the yard? How many cars [are] in the driveway? What make and model?"[17]

The Supreme Court has criticized overly intrusive juror investigations. In *Sinclair v. United States,* the Court held that following jurors obstructed the honest and fair administration of justice, stating:

> The jury is an essential instrumentality—an appendage—of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law. The most exemplary resent having their footsteps dogged by private detectives. All know that men who accept such employment commonly lack fine scruples, often willfully misrepresent innocent conduct and manufacture charges. The mere suspicion that he, his family, and friends are being subjected to surveillance by such persons is enough to destroy the equilibrium of the average juror and render impossible the exercise of calm judgment upon patient consideration. If those fit for juries understand that they may be freely subjected to treatment like that here disclosed, they will either shun the burdens of the service or perform it with disquiet and disgust. Trial by capable juries, in important cases, probably would become an impossibility.[18]

Further, the Court held that investigators do not need to directly contact jurors in order for the investigation to rise to the level of misconduct.[19] In addition, investigations can result in contact with a juror, even if by accident.[20] In *United States v. White*,

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17. Hoffmeister, *supra* note 10, at 618 (alterations in original) (quoting Paula L. Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedure*, 85 JUDICATURE 18, 22 (2001)) (internal quotation marks omitted).

18. Sinclair v. United States, 279 U.S. 749, 765 (1929).

19. *Id.*

20. United States v. White, 78 F. Supp. 2d 1025, 1025–26 (D.S.D. 1999).

an investigator accidentally made contact with a juror while speaking with the juror's neighbors; the court struck the entire jury panel because this contact threatened juror impartiality.[21]

However, the stability of the *Sinclair* holding is not clear in the modern era. Despite *Sinclair*, jury investigation is still allowed by the courts. For example, in *Commonwealth v. Allen*, a Massachusetts appellate court held that the investigation of jurors was permissible in trial, despite the trial judge commenting that the procedure was "extraordinarily dangerous" and "highly unethical."[22]

While these opinions, with the exception of *Sinclair*, are recent, they are largely outdated. Technology, namely the Internet, has catapulted juror investigation into a world where attorneys or investigators can gather more in-depth information, and investigations can be relatively inexpensive, if not free. This is because jurors' entire lives are often online. About 73% of adults use social media regularly; that number jumps to 90% for adults under the age of 30.[23] Investigators or attorneys can consult both personal and professional networking sites for information about jurors. Facebook, Twitter, Instagram, and MySpace—all of which are considered personal networking sites—can reveal jurors' pictures; conversations; preferences; as well as the places they have traveled; their relationship statuses; who they are friends with; their favorite books, movies, and hobbies; and sometimes their current locations. Further, attorneys can sometimes watch videos on jurors' blogs and read digital memoirs of prospective jurors before ever laying eyes on them during voir dire.

As of 2014, there are about 1.4 billion Facebook users,[24] over 288 million active Twitter users,[25] and over 347 million LinkedIn members.[26] Two Houston-based attorneys noted that they treasure

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21. *White*, 78 F. Supp. 2d at 1025–26.

22. Commonwealth v. Allen, 400 N.E. 2d 229, 233 (Mass. 1980).

23. *Social Networking Fact* Sheet, PEW RES. CENTER, http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/ (last visited Feb. 1, 2015).

24. *Company Info.*, FACEBOOK NEWSROOM, http://newsroom.fb.com/company-info/ (last visited Apr. 2, 2015).

25. *Company*, ABOUT TWITTER, https://about.twitter.com/company (last visited Apr. 2, 2015).

26. *About Us*, LINKEDIN NEWSROOM, https://press.linkedin.com/about-linkedin (last visited Apr. 2, 2015).

these social networking websites because jurors are more frank in their communications on their personal pages than they are on typical jury questionnaires.[27] In fact, online juror investigations have become so popular that in-person investigations have fallen out of favor.[28] This transition to digital investigations means attorneys no longer have to fret over large bills from professional investigators when researching jurors. Although digital investigation raises privacy concerns, it can help level the playing field for criminal defendants and financially disadvantaged litigants.[29]

Not surprisingly, theorists and courts have expressed concern over the amount of unbridled juror information that is available online.[30] Oftentimes, courts and theorists alike try to balance a juror's right to privacy and an accused's constitutional right to a fair trial when examining jury investigation.[31] This balance exposes one of the main tensions (and arguably one of the biggest problems) in the practice. That is: to what extent should jurors have their lives intruded upon in order to ensure an impartial jury? The ethical bounds of the practices and this question specifically will be further considered in Part III. For now, it suffices to say that juror privacy can be a real concern; however, the information that even a minor investigation yields can help to uncover biases, prejudices, and

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27. Chip Babcock & Luke Gilman, *Use of Social Media in Voir Dire*, 60 ADVOC. (TEXAS) 44, 48 (2012) (citing a University of Michigan study examining juror truthfulness during voir dire).

28. Erika Oliver, *Research Jurors on the Internet: The Ills of Putting the Jurors on Trial and the Need to Shift Back to the Defendant*, 34 U. LA VERNE L. REV. 251, 268 (2013).

29. Babcock & Gilman, *supra* note 27, at 48 (noting the benefits of permitting access to jurors' public posts).

30. *E.g.*, *see* United States v. Kilpatrick, 2012 WL 3237147, at *4 (E.D. Mich. 2012) (prohibiting counsel from investigating jurors over fear it would chill juror participation in the future); *see also* Johnson v. McCullough, 306 S.W.3d 551, 558–59 (Mo. 2010) (en banc) (per curiam) (highlighting the modern-day ease of researching jurors due to technology).

31. *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3 (2013) (requiring an attorney to represent clients diligently, which many argue includes the use of the Internet to research jurors), *with* Press-Enter. Co. v. Superior Court, 464 U.S. 501, 511 (1984) ("The jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain.").

misconduct—all of which must be identified in order to form an impartial jury.

B. Consultation

While consultants can often carry out the investigations explained in the previous section, a trial consultant's services extend far beyond typical investigatory practices. Jury consultants claim that they can take the guesswork out of voir dire with extremely high accuracy rates.[32] Consultants typically specialize in fields of sociology, psychology, communication, or marketing.[33] Of course, some lawyers (who claim to have mastered the art of jury selection) are also trial consultants.[34] On average, trial consultants charge over $200 per hour, a fee that often leaves less wealthy defendants and indigent defendants out of the loop of trial consultation.[35] This is particularly true of criminal defendants when you consider that a court-appointed attorney represents 80% of defendants charged with felonies in large state courts.[36] Although consultants assist trial lawyers at nearly every stage of trial, much of their efforts are focused on employing psychological theories and statistical analyses to select favorable juries and predict how a jury will receive and respond to evidence in a particular case.[37]

Jury consultation first appeared in 1970 during a trial that is now known as the "Harrisburg-Seven."[38] The Harrisburg-Seven litigation began when two priests, Philip and Daniel Berrigan, known

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32. At one time, leading consultation firm Litigation Sciences Inc., claimed a 96% accuracy rate in predicting the outcome of a case and that 80% of their clients receive a favorable verdict. Maureen E. Lane, *Twelve Carefully Selected Not So Angry Men: Are Jury Consultants Destroying the American Legal System?*, 32 SUFFOLK U. L. REV. 463, 477 (2002).

33. Diana G. Ratcliff, *Using Trial Consultants: What Practitioners Need to Know*, 4 J. LEGAL ADVOC. & PRAC. 32, 34 (2002).

34. *Id.*

35. Jeremy W. Barber, *The Jury is Still Out: The Role of Jury Science in the Modern American Courtroom*, 31 AM. CRIM. L. REV. 1225, 1234 (1994).

36. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES, NCJ 179023 (2000), *available at* http://www.bjs.gov/content/pub/pdf/dccc.pdf.

37. Barber, *supra* note 35, at 1234.

38. *Id.* at 1233.

for their antiwar sentiment, were indicted along with five others for conspiring to blow up heating tunnels in Washington, D.C. and various other crimes.[39] The Government was strategic in its choice of venue: there were several proper venues, but the Government chose to bring the case in the politically conservative area of Harrisburg, Pennsylvania.[40] It appeared the Government was trying its best to stack the deck.

Jay Schulman, a sociologist, grew concerned that the accused would not get a fair trial considering the extensive pre-trial publicity, the hostile choice of venue, and attempts to discredit anti-war activism.[41] To combat this, Schulman radically suggested mixing the social sciences and law.[42] Schulman interviewed over 800 people who resided in the federal district that encompassed Harrisburg about their religious, educational, literary, governmental, and military views.[43] Schulman's findings indicated that most college-educated people in Harrisburg were politically conservative and most college-educated liberals tended to leave Harrisburg.[44] Armed with this theory, among others, the defense ranked jurors on a scale from 1 to 5, with a score of 5 indicating the "worst" juror to have in the box.[45] Any individual ranked as a 5 was struck, and any individual ranked as a 1 would hopefully become a jury member.[46] Ultimately, the jury hung on the most serious charges.[47] After the Harrisburg-Seven trial, scientific jury consultation exploded and was heavily used in highly publicized political trials throughout the 1970s.[48]

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39. Barber, *supra* note 35, at 1232.
40. *Id.*
41. *Id.* at 1233.
42. *Id.*
43. *Id.*
44. *Id.* at 1233, 1233 n.44.
45. *Id.* at 1233.
46. *Id.*
47. *Id.*
48. *Id.* at 1234. For example, jury consultation was utilized in the Angela Davis trial in 1972, as well as the Daniel Ellsberg and Anthony Russo trials that same year. Scientific jury selection was employed in the Watergate trials of Maurice Stans, John Mitchell, and Robert Vesco. John Guinther. Schulman continued his work as a jury consultant. He eventually founded National Jury Project, a non-profit organization that assisted defendants such as Indian militants

Jury consultation techniques have developed over the years. Today's trial consultants use a variety of techniques, most of which are geared toward the initial selection of a jury. In addition to the traditional ranking scale used in the Harrisburg-Seven trial, consultants use attitudinal surveys, in-court assessments of non-verbal juror communications, group dynamic analyses, mock trials, shadow juries, and focus groups.[49]

Today, over 800 trial consultation firms exist in America.[50] Trial consultation bills can run from $10,000–$250,000 per trial; meaning that consultants work mainly in high-stakes civil litigation and high-publicity criminal trials, such as those of O.J. Simpson and Scott Peterson.[51] In many ways Schulman anticipated and feared that methods that he created to level the playing field between a prosecution team and defense team in trials for political activists would eventually be used to benefit wealthy defendants:

> The second ethical question concerns who will benefit from our procedures in the long run. We depended upon energetic volunteers. In less celebrated cases, most defendants would lack the organization and money required to apply social research to jury selection.[52]

Despite Schulman's fears, consultants often appear only in cases with high dollar stakes.[53] Prosecutors also employ consultants, but less frequently than civil defense attorneys.[54] As a whole, prosecutors have more resources, manpower, and information

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of Wounded Knee, the Attica prison rioters, radical feminist Susan Saxe, and Joan Little, an African-American woman who was accused of murdering a white prison guard who entered her cell in an all-women's section of a jail in order to rape her. *See also* ABRAMSON, *supra* note 1, at 148–49 (detailing the evolution of scientific jury selection).

49. Barber, *supra* note 35, at 1235–37.
50. Ratcliff, *supra* note 33, at 33.
51. Lane, *supra* note 32, at 476.
52. Barber, *supra* note 35, at 1233–34.
53. Barber, *supra* note 35, at 1234.
54. *Id.* at 1234 n.52.

available to tip the scales in their favor from the beginning.[55] As the following section will explain, jury science's effectiveness, or "stacking the deck," is debatable. Therefore, the fact that consultants do most of their work for civil litigants is not as troubling as it sounds—it is even less troubling when paired with juror investigation, which can be done nowadays for relatively no cost.

III. DO CONSULTATION AND INVESTIGATION WORK?

In a few words: there is no conclusive evidence that scientific jury selection—such as that used in the Harrisburg-Seven trial—works.[56] However, that is not to say that a consultant is not effective with regard to certain aspects of trial. Consultants can work to improve the impartiality of the jury, which should be the ultimate goal. For example, consultants trained to detect deception can help attorneys weed out biased jurors who lie about their biases in voir dire. Further, the information gathered by an investigator could assist an attorney not only in selecting a jury, but also in tweaking arguments in a way that influence specific jurors—this is especially true with regard to information available online and through social media. Additionally, shadow juries—individuals hired by consultants to sit and watch the trial from the perspective of the jury—give an attorney immediate feedback before a verdict is rendered. This type of feedback can be used to fine-tune a legal argument for closing or to emphasize certain facts that the shadow jury found persuasive.

A. Jury Science

Modern day jury consultants who rely on jury science use the following method: they first conduct public opinion polls and then trace correlations between a potential jurors' traits (race, sex, religion) and their attitudes toward certain subject matters, such as authority or equity.[57] Based on these statistical averages, attorneys

55. Hoffmeister, *supra* note 10, at 622.
56. ABRAMSON, *supra* note 1, at 145.
57. *Id.* at 148.

try to select the best jurors during voir dire.[58] However, whether or not the statistical average plays out in a particular case is a gamble. Authors have analogized to a pinch-hitter in baseball: "[S]tatistical averages are helpful but they fall short of forecasting any one trip to the plate or any one juror's verdict in any one case."[59] Additionally, scientific jury selection cannot account for other dynamics that influence a jury. For instance, a particular juror that was pegged as being vocal and sympathetic may not personify those traits due to the characteristics of other jurors.[60] Likewise, jurors are fallible. A juror who would typically agree with a particular legal argument may have had a fight with their spouse the morning before trial or may have dozed off during particularly relevant testimony. If that is the case, a consultant's entire plan may be compromised.

Studies have shown that while most consultants tout the success of scientific jury selection, the consultants often underestimate the force of the evidence in that particular case.[61] For example, the Government in the Harrisburg-Seven trial presented weak evidence with regard to the conspiracy charges.[62] If it were not for two jurors, one of whom was quoted to have said he was doing "God's work," the jury likely would have not hung, but acquitted, which indicates that the Government's case was incredibly weak.[63] Further, jury consultants often cite the case of Joan Little as a victory for scientific jury consultation.[64] Little killed her jailer after he entered the cell to rape her.[65] The jailer had semen on his leg and his pants and shoes were found outside her cell door.[66] The presiding

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58. ABRAMSON, *supra* note 1, at 148.

59. *Id.* at 172. *But see* Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703, 719–20 (1991) (describing two statistical analyses that revealed that jury consultants' scientific selection methods produce "slightly" better results than attorneys' reliance on gut-instincts).

60. ABRAMSON, *supra* note 1, at 171.

61. Barber, *supra* note 35, at 1241 (citing sociologist Michael Saks's conclusion that evidence plays a more significant role in verdicts than jurors' characteristics).

62. ABRAMSON, *supra* note 1, at 157.

63. *Id.* at 158.

64. *Id.* at 162.

65. *Id.* at 160.

66. *Id.* at 162.

judge said that it was one of the weakest cases he had ever seen in twenty years on the bench.[67]

Despite these examples, scientific jury consultants claim to have overwhelming success in predicting the outcome of cases.[68] Some claim up to a 96% prediction rate.[69] Nonetheless critics have compared scientific jury consultation to reading tealeaves.[70] Others have said that it does not take "fancy number-crunching" to understand that jurors occupy different places in our society and will have different opinions on cases.[71] For example, it is often said that women are favorable jurors for the prosecution in rape cases and African Americans are good jurors for defense in capital punishment cases.[72] However, a juror has many different traits. Race, for example, is only a single factor that may influence a juror's decision. Therefore, it is difficult to make empirical conclusions about the impact race and gender have on a juror's decision; but, if a correlation does exist, it does not take an expert to point it out. It seems to be common sense that women are more impassioned in rape trials because they are statistically more likely to have experienced sexual assault than men.[73] Likewise, African American jurors are statistically more likely to have certain experiences with the criminal justice system.[74] For example, black jurors are more likely than white jurors to have experienced police brutality or racial profiling.[75] Additionally, black defendants who kill white victims

67. ABRAMSON, *supra* note 1, at 162.

68. Lane, *supra* note 32, at 476–77 (explaining that no data exists showing that these methods are effective).

69. Lane, *supra* note 32, at 477.

70. Barber, *supra* note 35, at 1239–40.

71. ABRAMSON, *supra* note 1, at 167.

72. Hoffmeister, *supra* note 10, at 641.

73. According to Rape, Abuse & Incest National Network (RAINN), nine out of every ten rape victims were juveniles in 2003. *Who Are the Victims*, RAINN (Apr. 14, 2015), *available at* https://www.rainn.org/getinformation/statistics/sexual-assault-victims

74. According to the 2014 investigation by ProPublica, young, black males are twenty-one times more likely to be shot by police than their white counterparts. Ryan Gabrielson, Ryann Grochowski, and Eric Sagara, *Deadly Force, in Black and White,* PROPUBLICA, (Oct. 10, 2014) *available at* www.propublica.org/article/deadly-force-in-black-and-white.

75. *Id.*

disproportionately receive capital punishment historically—a reality that could affect how a black juror would view the legitimacy of the death penalty.[76]

B. Investigation

While critics of scientific jury selection could be right that statistics do not work—or only work sometimes—what they have not considered is the effect the Internet has or can have on jury selection when it comes to juror investigation. Real-time jury investigation through Google, Facebook, Twitter, and the like, allows attorneys to follow a juror's online presence in order to learn intimate details about a juror's life. Furthermore, online investigations allow attorneys to more easily catch jurors who lie about their impartiality during voir dire. In 2010, a judge in Michigan dismissed a juror from the jury midway through the prosecution's case because the juror posted on Facebook: "[E]xcited for jury duty tomorrow. [I]t's gonna be fun to tell the defendant they're [sic] GUILTY."[77] Commentators noted that allowing citizens like the Michigan juror to remain on the jury "does little to facilitate the search for truth" and threatens the impartiality of the jury when a juror proves she is unwilling to listen to the evidence of a trial and that she has already made up her mind as to the defendant's guilt.[78] Arguably this juror would not have told (and in fact did not) tell the defense attorney during voir dire that she was ready to convict the defendant without hearing the evidence. However, the attorney's investigation of the juror's Facebook page uncovered her deeply rooted bias.

Researchers note that jurors are more candid in their responses to a jury questionnaire than they are in verbal responses to voir dire questions.[79] Social media takes this a step further in that it allows jurors to speak freely to their friends, and not attorneys, on

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76. *See* McCleskey v. Kemp, 481 U.S. 279 (1987) (detailing the historical disparity between black and white defendants who receive the death sentence).

77. Jameson Cook, *Facebook Post Is Trouble for Juror*, MACOMB DAILY (Aug. 28, 2010, 12:01 AM), http://www.macombdaily.com/20100828/facebook-post-is-trouble-for-juror.

78. Hoffmeister, *supra* note 10, at 643.

79. Babcock & Gilman, *supra* note 27, at 44.

their social media pages. Further, social media reveals jurors' attitudes over a longer time period than an attorney could ever uncover during voir dire. Altogether, the Internet's compilation of potential jurors' candor and years worth of information, helps attorneys to better assess jurors' experiences and biases.[80]

The trial of Jose Padilla, who became known as the "dirty bomber" after he was arrested in 2002 for plotting a radiological bomb attack, also involved an online investigation that led to striking a potential juror.[81] The defense ran an online search of a juror on Padilla's jury venire and found that she had lied and misled the defense during voir dire.[82] After the defendant's attorneys discovered the inaccuracy and brought it to the court's attention, the court quickly struck the juror from the panel. Again, absent the investigation, a potentially biased juror could have sat on the jury.

Social networking sites have become "treasure troves" for unveiling a juror's bias.[83] Marshall Hennington, a psychologist and jury consultant, said the Internet has allowed him to find skeletons in the closet of jurors who were once inscrutable.[84] While consulting for a recent murder case, Hennington discovered (through Facebook) that two potential jurors who denied knowing each other were actually cousins.[85] The judge dismissed one of the potential jurors.[86]

Online investigations encompass a lot more than researching a juror's Facebook, Twitter, and digital paper trail; some jurors even have blogs or websites that are a treasure-trove of information and potential biases. For example, one trial consultant explained how the Internet was useful when picking a jury for an intellectual property

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80. Babcock & Gilman, *supra* note 27, at 44–45.

81. *See generally* United States v. Hassoun, No. 04-60001-CR, 2007 WL 4180847 (S.D. Fla. Nov. 20, 2007) (noting that the judge granted a generous voir dire period); Hoffmeister, *supra* note 10, at 641.

82. Hoffmeister, *supra* note 10, at 641.

83. *See* Julie Kay, *Vetting Jurors via MySpace*, NAT. L. J., Aug. 11, 2008 (discussing the views of attorneys on the use of the Internet to investigate prospective jurors); Julie Kay, *Social Networking Sites Help Vet Jurors*, NAT. L. J., Aug. 13, 2008, *available at* http://www.juryconsulting.com/interviews-social-networking.htm.

84. Carol J. Williams, *Jury Duty? May Want to Edit Online Profile*, L.A. TIMES (Sept. 29, 2008), http://articles.latimes.com/2008/sep/29/nation/na-jury29.

85. Williams, *supra* note 84.

86. *Id.*

dispute.[87] At first nothing appeared interesting about a potential juror who ran a beauty supply business.[88] However, when the consultant visited the juror's personal webpage he discovered that the juror used to make and sell sequined beauty pageant gowns.[89] On voir dire, when the attorneys asked about the sequin creations, the juror commented that other designers would make knock-off gowns all the time[90]—a prominent theme in intellectual property disputes.[91] The consultant admitted that the juror sided with his client, as he expected she would, proving how effective an online investigation can be.[92]

Online investigations also give attorneys an opportunity to appeal to their jurors' interests, attitudes, beliefs, and values that have evolved from the jurors' life experiences.[93] Experts note that jurors' life experiences play an important role in their decision-making process.[94] However, it can be difficult for an attorney to isolate which belief or value will be salient in a particular case. Through pre-trial investigation, attorneys can attempt to isolate the salient beliefs that the jurors may rely upon when analyzing the unique facts of a particular case.[95] As one litigator said, "'[A] well-placed metaphor in [a] closing argument tailored to a juror's interest or social views as described on Facebook or Twitter' can be quite effective."[96]

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87. Williams, *supra* note 84.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92 *Id.*

93. *See* Richard C. Waites & David A. Giles, *Are Jurors Equipped to Decide the Outcomes of Complex Cases?*, 29 AM. J. TRIAL ADVOC. 19, 35 (2006); *see* Kay, *supra* note 83. Kay notes that attorneys can make use of social media to tailor their opening statements and closing arguments. For example, if a juror's Facebook page reveals that the person "likes" a certain political group or is an avid animal lover, a smart lawyer might be able to use analogies or anecdotes to gain sympathy for a client.

94. Waites & Giles, *supra* note 93, at 35.

95. Waites & Giles, *supra* note 93, at 35.

96. Hoffmeister, *supra* note 10, at 633 (second alteration in original) (quoting Denise Zamore, *Can Social Media Be Banned from Playing a Role in Our Judicial*

C. *Using Shadow Juries*

After the parties select the official jury, trial consultants can create a shadow jury.[97] A shadow jury is a handpicked "second jury" that mirrors the actual jury.[98] Consultants focus on the jurors thought to be key in deliberation in order to ensure that there is a similar power dynamic on the shadow jury.[99] Therefore, the goal is not to have a one-to-one match for each juror, but to have a match for the jurors that will likely wield power during the deliberation.[100] The shadow jurors are selected through a similar voir dire process.[101] Ultimately, the shadow jurors share the same ethnicities, ages, occupations, education levels, and social standings as the dominant jurors.[102] The shadow jury then sits in on the trial just like a regular jury and debriefs attorneys intermittently.[103]

A good shadow jury mimics a real jury. Shadow jurors leave the courtroom whenever the jury is dismissed.[104] The consultant instructs the shadow jurors not to listen to the news or discuss the case with anyone other than the hiring consultant.[105] Robert Hirschhorn said it is also important that the shadow jurors not know which party hired them.[106] As for feedback, one consultant explained that attorneys are looking for the shadow juror's impression with regard to every aspect of the trial:

System?, MINORITY TRIAL L., Spring 2010, *available at* http://americanbar.org/litigation/litigationnews/practice_areas/minority-jury-social-media.html).

97. Robert Hirschhorn & Macy Jaggers, *Winning with a Shadow Jury*, 31 THE ADVOCATE (TEXAS) 23, 24 (2005).

98. *Id.* at 23.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 24.

103. *Id.*

104. *Id.* at 25.

105. *Id.*

106. Hirschhorn & Jaggers, *supra* note 97, at 25. This is achieved by having an attorney or consultant separate from the advocates in court meet with the jurors to get their feedback. To ensure that the real jury does not suspect that the attorneys have hired a shadow jury, consultants will instruct shadow jurors to not sit together.

> I ask shadow juries not simply about their reaction to the evidence that was presented that day but I also want to know how they felt about the witnesses, the attorneys, the visual aids, everything. I provide the shadow jurors with new evaluation forms every day. These forms generally ask about exhibits, witnesses, and visual aids. I ask the jurors to discuss their reactions in terms of what was effective or ineffective, and what kinds of questions they were still left with after having seen the exhibits and testimony. I also ask them for a daily critique of the attorneys and all members of their teams. I tell them to feel free to comment on their demeanor, appearance, tone of voice, anything that effects their perception of that person.[107]

After soliciting feedback from the shadow jury, consultants prepare a report that details which arguments, themes, visual aids, and witnesses were the most and least effective.[108]

Using shadow juries is different from other forms of trial consultation because shadow juries give real-time feedback to attorneys as the case unfolds. With other forms of scientific jury selection, there is nothing an attorney can do but wait to see if his intuition, investigation, or number crunching has paid off. If a shadow jury is well selected and truly represents the real jury, it can help attorneys gain insight to how the actual jury is interpreting the evidence.

But, this rests on the assumption that all people who share the same age, occupation, and community status decide things similarly. Attorneys using shadow juries have to make huge generalizations. Regardless, having a fresh set of ears and eyes to observe the case and give feedback allows the attorneys to understand how laypeople approach the case and helps the attorneys avoid becoming buried in their own arguments and opinions about the case. Thus, if a shadow jury agreed that a key witness's testimony was unclear or a certain

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107. Hirschhorn & Jaggers, *supra* note 97, at 24–25.

108. *Id.* at 25.

theme was not persuasive, an attorney could change strategies during trial while there is still a chance to influence the jury.

D. Non-Verbal Communication

Federal and state appellate courts have made it clear that it is constitutional for attorneys to strike potential jurors based on race-neutral physical appearances.[109] At least 50% of the information communicated from a speaker to a listener is from non-verbal cues.[110] Almost any attorney is adept at picking up on basic non-verbal cues—it doesn't take a professional to tell an attorney to strike a juror who is inattentive, irritated, or overly hesitant. However, through the use of psychological theories, trial consultants are able to help attorneys strike jurors who exhibit subtle signs of deception during voir dire.[111] Jurors often lack candor during voir dire—not because they are liars per se—but because they want to conform to social norms.[112] Jurors want to be perceived in a socially acceptable way, even if their views aren't socially acceptable. Thus, the less socially acceptable a view may be (for example, a racial bias), the harder a juror may work to cover up his bias. A jury consultant trained in detecting deception can help uncover this type of behavior in ways attorneys may not.

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109. Purkett v. Elem, 514 U.S. 765, 769 (1995) (holding that striking a juror for having "long, unkempt hair, a mustache, and a beard" was acceptable); *see also* United States v. Diaz, 26 F.3d 1533, 1543 (11th Cir. 1994) (approving the striking of an inattentive juror); United States v. Hendrieth, 922 F.2d 748, 749 (11th Cir. 1991) (juror who was "rubbing and rolling her eyes" was properly excluded); People v. Hernandez, 552 N.E.2d 621, 624 (1990) (hesitancy in answering questions held to be sufficient basis for exercise of peremptory challenge); State v. Porter, 391 S.E.2d 144 (1990) (legitimate "hunches," when considered with other circumstances, may be sufficient). *But see* McClain v. Prunty, 217 F.3d 1209, 1223 (9th Cir. 2000) (finding it "patently frivolous" for the prosecutor to strike a juror because she had her elbow on her chair).

110. Jim Goodwin, *Articulating the Inarticulable: Relying on Non-Verbal Behavioral Cues to Deception to Strike Jurors During Voir Dire*, 38 ARIZ. L. REV. 739, 751 n.122 (1996).

111. *Id.* at 751 (experts can detect "leakage" cues).

112. *Id.* at 750.

Social scientists note that jurors hide biases in their verbal responses and fool many lawyers.[113] A lawyer may often fall back on hunches or intuition, even when trying to use strategies based on non-verbal communication.[114] However, social scientists and psychologists point out that this approach is flawed.[115] Lawyers who think a juror with his arms crossed means the juror is hostile can often be wrong; having crossed arms can communicate hostility, but it can also communicate boredom.[116] However, because the art of deception is taxing, it physically manifests in deception "leakage cues," which a trained professional can recognize.[117] Monitoring recognized indicia of deception can help reveal leakage cues.[118] Consultants can help attorneys monitor these signs of deception during a fast-paced voir dire.[119] Additionally, consultants can coach attorneys to use effective questioning techniques that help to quickly reveal leaking cues.[120]

In conclusion, the use of certain aspects of jury consultation and investigation can be effective. Overall, attorneys and academics often point out the flaws in jury science and question its validity. But, juror investigation can be especially effective in weeding out deceptive and biased jurors through the Internet. Additionally, the practice of using shadow juries allows an attorney to solicit feedback

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113. Goodwin, *supra* note 110, at 751.

114. *Id.*

115. *See id.* at 754. ("[R]esearch does not demonstrate that these behaviors [by jurors which lawyers have been counseled to avoid] are reliable indices of deception.").

116. Ted A. Donner & Richard K. Gabriel, JURY SELECTION STRATEGY AND SCIENCE § 21:2 (3d ed. 2013).

117. Goodwin, *supra* note 110, at 752.

118. *See generally id.* at 754–58 (applying monitoring of indicia of deception to jury selection). Recognized signs of deception include "'(1) pupil dilation, (2) speech errors, (3) increased vocal pitch, (4) increased use of adaptors, (5) decreased smiling in general and [felt/genuine] . . . smiles in particular, (6) increased use of masking smiles, (7) increased speech hesitations/response latencies, (8) decreased use of illustrators, (9) heightened arousal, (10) negative affect displays, (11) increased pauses, and (12) decreased message duration.'" *Id.* at 754 (quoting Jim C. Goodwin, Veracity Judgments in the Field: Police Officers' Beliefs about Lie Detection 10–11 (Mar. 7, 1994) (unpublished M.A. thesis, Colorado State University, on file with the ARIZONA LAW REVIEW)).

119. *Id.* at 755–56.

120. Goodwin, *supra* note 110, at 755; Barber, *supra* note 35, at 1235.

from laypeople who observe the actual trial. Social scientists have something to offer attorneys as well–if jurors lie as much as social scientists predict, having experts who can detect deception could keep jurors with harmful biases off juries. Lastly, jury consultation has grown steadily over time, which indicates its effectiveness, or at least attorneys' perception of its effectiveness.[121]

IV. ETHICALLY: THE GOOD, THE BAD, AND THE UGLY

It is hard to know how much the practice of jury consultation should be regulated because it is hard to know just how effective jury consultation is.[122] Whether jury investigation and trial consultation work, it is undeniable that attorneys employ these methods and the methods have real consequences, both good and bad.

A. Balancing the Playing Field and Juror Privacy

Jay Schulman, often referred to as the father of scientific jury selection, originally predicted that the practice of jury consultation would only be available for the rich; this prediction, in many ways, has come true.[123] Because of the price tag for jury consultation, it is typically reserved for high-dollar civil trials and wealthy criminal defendants.[124] Often the defendants who are most in need of trial consultation are unable to afford it.[125] For example, in a criminal case with extensive media coverage, jurors may show up with an added layer of prejudice and be biased from what they have seen and heard in the media. Yet indigent defendants in those cases often cannot afford to hire a consultant to help pinpoint deceptive jurors during voir dire. In that sense, the gap between justice for the rich and justice for the poor continues to grow.

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121. Lane, *supra* note 32, at 476.
122. Barber, *supra* note 35, at 1240.
123. Hoffmeister, *supra* note 10, at 622.
124. *Id.* at 623–24.
125. Barber, *supra* note 35, at 1241.

Traditionally, governmental resources outweigh those of even the richest defendants.[126] Prosecutors rely heavily on law enforcement officials when investigating jurors. For example, the neighbors and friends of jurors are more likely to trust and speak with law enforcement officials than private trial investigators.[127] Defendants, on the other hand, must gather juror information through private investigators, an expensive service. Additionally, the prosecution has fewer barriers to obtaining information than private investigators.[128] For example, the government has access to police databases and tax returns, which are unavailable to the general public, including private investigators.[129] Lastly, prosecutors' offices may compile data about potential jurors for widespread use by the prosecuting attorneys.[130] For example, many prosecutors across the country maintain so-called "juror books" or "bad juror lists," which contain background information on individuals who have previously served on juries.[131] The information on these lists can range from the verdict in previous cases to whether the juror has a criminal record.[132]

However, modern technology allows attorneys to investigate for relatively no or very little cost due to the availability of information on the Internet.[133] As previously discussed, the amount of juror information found online is unparalleled to what was available when investigations first began—there are 1.39 billion Facebook users, 974 million Twitters users, and 259 million LinkedIn users.[134] The chance that most jurors have a presence on

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126. *See* Walter Pavlo, *The High Cost of Mounting a White-Collar Criminal Defense*, FORBES (May 30, 2013), http://www.forbes.com/sites/walterpavlo/2013/05/30/the-high-cost-of-mounting-a-white-collar-criminal-defense/ (explaining that Raja Rajaratham spent $40 million dollars on his defense); JAYSON REEVES, CORPORATE MERGERS TRANSITIONING THE AMERICAN ECONOMY 148 (2012). (noting that the Government spent $60 million to prosecute Rajaratham).

127. Hoffmeister, *supra* note 10, at 623–24.

128. *Id.*

129. *Id.*

130. *Id.* at 623–24.

131. *Id.*

132. *Id.*

133. Hoffmeister, *supra* note 10, at 631.

134. *See supra* Part II (noting the number of members on various social networking sites).

social media is high. Neighborhood visits and interviews of neighbors only reveal certain aspects of a juror's life; now, an attorney can browse a potential juror's Facebook, Twitter, or LinkedIn page and discover far more than what a high-dollar private investigator ever could before the advent of social media. This alone has helped level the playing field between rich and poor parties, as well as between the state and criminal defendants.

Conversely, the amount of information about potential jurors available online has led to concerns for juror privacy. Judge Posner on the Seventh Circuit recently stated: "Most people dread jury duty—partly because of privacy concerns."[135] Judge Rossi of the Eleventh Circuit said jurors will stop responding to jury summons if they feel like they are being watched too closely.[136] Commentators report that jurors frequently complain about their privacy being invaded during jury service.[137] Further, even if jurors do not stop responding to summons, they can become less trusting of the justice system if they feel like they are the ones on trial instead of the defendant. However, it could be said that the Internet is public information, thus they control their right to privacy. Likewise, it seems an argument can be made that ensuring an impartial jury is worth the price of delving into a juror's life, which they voluntarily posted online.

Nevertheless, the Supreme Court held that the right to privacy is the right to be "let alone" and is the "right most valued by civilized men."[138] As a district court in Texas stated: "The search for an impartial juror is a balancing effort by the court between the competing parties, the public, and the potential juror. Without proper consideration of the rights of each of these interests, the jury will not be the solid cornerstone of our trial system that it must

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135. *See* United States v. Blagojevich, 614 F.3d 287, 293 (7th Cir. 2010) (commenting on the privacy concerns for jurors in releasing their names).

136. Hon. Raymond Rossi, *Researching Jurors Online: Voir Dire in the Digital Age*, 101 ILL. B.J. 514, 516 (2013); *see also* Kay, *supra* note 83 ("You are taking people who are doing their civic duty and didn't sign up to have their whole life probed . . . . It scares people. They wonder: 'Are they going to hack into our e-mails next?'").

137. *Id.*

138. Olmstead v. United States, 277 U.S. 438, 478 (1928), *overruled on other grounds by* Katz v. United States, 389 U.S. 347 (1967).

be."[139] Courts have responded by not releasing jurors' names as early, or banning the release of jury lists altogether.[140] Other theorists have suggested amendments to professional responsibility codes to limit what attorneys can research online.[141] However, it's not entirely clear how these types of regulations would be monitored and to what extent that would be followed.

Attorneys can also invade the jurors' privacy in other ways. Recently, an associate at a large Texas firm was found snooping around a venire assembly room before the attorneys were allowed in the room, presumably trying to learn about the potential jury.[142] The judge struck the entire panel.[143] Jurors could perceive this type of conduct as delegitimizing the jury system. For most jurors, an opportunity to serve on a jury is the only time they will be able to participate in the justice system, and they should not be deterred from participating in jury service—a civic duty enshrined in our constitution—because they fear invasions of their privacy or perceive the system as corrupt.

But it is important to balance an accused's right to a trial against the concern of a juror's right to privacy. Part of the right to a fair trial is having an attorney tirelessly research and scour potential jurors for biases that could harm the client. Most courts recognize the importance of diligent advocacy and encourage online investigation of jurors.[144] Further, professional organizations

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139. Brandborg v. Lucas, 891 F. Supp. 352, 356 (E.D. Tex. 1995).

140. United States v. Kilpatrick, 2012 WL 3237147, at *4 (E.D. Mich. 2012); *see* Wagner v. United States, 264 F.2d 524, 528 (9th Cir. 1959) (holding there is no right to a jury list); *see also* Hamer v. United States, 259 F.2d 274, 278–79 (9th Cir. 1958) (discussing Congress's implied decision to withhold juror lists in some cases).

141. Hoffmeister, *supra* note 10, at 642.

142. Jeremy Heallen, *Thompson & Knight Attorney Accused of Spying on Jurors*, L. 360 (Feb. 10, 2014) http://www.law360.com/articles/507879/thompson-knight-atty-accused-of-spying-on-jurors.

143. *Id.*

144. *See* Johnson v. McCullough, 306 S.W.3d 551, 559 (Mo. 2010) (encouraging the use of online investigation and placing a burden on parties to bring matters discovered in online investigation to the court's attention); *see also* Carino v. Muenzen, No. L-0028-07, 2010 WL 3448071, at *10 (N.J. Super. Ct. App. Div. Aug. 30, 2010) (per curiam) (holding it was permissible to research jurors).

encourage the practice.[145] For example, the New York County Lawyer Association stated that juror investigation is not only encouraged, but is ethically sound.[146] In fact, one jury consultant said: "[a]nyone who [does not] make use of [Internet searches] is bordering on malpractice."[147]

B. Discovering Misconduct

Jury consultation and investigation can uncover misconduct on the part of attorneys and jurors. As mentioned in Part III, judges have struck potential and actual jurors for comments they put on social media or for lacking candor during voir dire.[148] Indeed, in-depth juror investigation helps sift out deceptive jurors. Further, social scientists have pointed out that jurors often lie during voir dire in order to protect their reputation.[149] In other cases, jurors can become biased through pretrial publicity.[150] Consultants insist that the use of psychological detection principles can weed out these truly biased jurors.[151]

Further, the justice system has not figured out how to combat a juror's use of social media and the Internet. The case history is rife with examples: jurors searching the defendant's name on Google;[152] a juror, unsatisfied with a doctor's testimony, looking up medical information online to try to figure it out for himself;[153] jurors looking

145. Hoffmeister, *supra* note 10, at 629.

146. *Id.*

147. *Id.* at 612 (quoting Williams, *supra* note 84 (third alteration in original) (internal quotation marks omitted)).

148. *See supra* Part III (discussing how jury consultation and investigation can weed out biased jurors).

149. Goodwin, *supra* note 110, at 749.

150. Kate Early, *The Impact of Pretrial Publicity on an Indigent Capital Defendant's Due Process Right to a Jury Consultant*, 16 ROGER WILLIAMS U. L. REV. 687, 697 (2011).

151. *Id.* at 718.

152. Rucker v. Patrick, 2008 WL 4104230, at *2 (S.D. Cal. 2008); United States v. Sabir, 628 F.Supp.2d 414, 421 (S.D.N.Y. 2007).

153. State v. Boling, 127 P.3d 740, 741 (Wash. Ct. App. 2006).

up legal terminology online;[154] and jurors posting to social media pages.[155] In one case, a juror even posted photos of the murder weapon and spoke critically about the court staff.[156] The defense attorney discovered the juror's blog and brought it to the court's attention, which held the juror in contempt of court.[157]

The Supreme Court has expressed concern with what happens when juror deliberations that should be private become available to the public. Justice Cardozo once wrote: "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."[158] One solution to help ensure that deliberations remain private and jurors do not leak private information on social media is to have attorneys and investigators carefully monitor what jurors do and say on the Internet. Obviously, this would not correct the problem of a juror's access to extrajudicial information through the Internet, but it would help protect the sanctity of jury deliberations.

On the other hand, investigation and consultation can create misconduct. In 2003, a Texas appellate court examined the effect of a conversation between a shadow juror and an actual juror.[159] In *Mercado*, while on a break, a shadow juror asked an actual juror for a cigarette.[160] The juror said he believed the man to be a shadow juror, though he did not know definitely with which party the shadow juror was affiliated.[161] The juror suspected that the shadow juror was affiliated with the plaintiff because the shadow juror sat on the plaintiff's side in the courtroom.[162] While the court ultimately

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154. *See generally* Caren Meyers Morrison, *Can the Jury Trial Survive Google?*, CRIM. JUST., Winter 2011, at 5 (discussing the growing trend of jurors supplementing trial information with their own research).

155. *Id.*

156. Hoffmeister, *supra* note 10, at 626.

157. Raul B. Hernandez, *Juror Held in Contempt for Blog Post of Murder Trial*, Ventura County Star News, available at http://www.vcstar.com/news/juror-held-in-contempt-for-blog-of-murder-trial.

158. Clark v. United States, 289 U.S. 1, 13 (1933).

159. Mercado v. Warner-Lambert Co., 106 S.W.3d 393, 396 (Tex. App.—Houston [1st Dist.] 2003).

160. *Warner-Lambert Co.*, 106 S.W. at 395.

161. *Id.* at 397.

162. *Id.*

determined that no misconduct occurred because there was insufficient evidence to show that the juror knew that the shadow juror was affiliated with the plaintiff, this example demonstrates the risk of shadow jurors conversing with real jurors.[163]

C. Avoiding Impermissible Strikes and Public Perception

Trial consultants could help reduce an attorney's improper reliance on racial or gender prejudices. Ultimately, eliminating strikes based on race and gender would bring an attorney in line with the constitutional requirements of *Batson* and *J.E.B.* challenges.[164] Modern cases rarely have a smoking gun in a *Batson* or *J.E.B.* challenge.[165] However, experts argue that racism and sexism operate on an subconscious level that is never truly divorced from an attorney's selection of a jury.[166] Oftentimes, attorneys may not even know when they are being racist or sexist because of the subconscious nature of such prejudice.

The use of trial consultants and in-depth juror investigations could lessen the effect of subconscious prejudices and result in attorneys making more constitutionally sound preemptory strikes. An attorney loaded with information from background checks, social media, and statistical breakdowns of each juror's likely tendencies would move away from intuitions and hunches based on racial and sexual stereotypes.[167] However, this practice risks giving attorneys

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163. *Warner-Lambert Co.*, 106 S.W. at 396.

164. *See generally* Batson v. Kentucky, 476 U.S. 79 (1985) (prohibiting peremptory strikes based solely on race); J.E.B. v. Alabama ex. rel. T.B., 511 U.S. 127 (1994) (prohibiting peremptory strikes based solely on gender).

165. *See* United States v. Stavroulakis, No. 91-1289, 1992 WL 12609887 (2d Cir. Jan. 3, 1992) ("Because a peremptory challenge initially requires no explanation, no 'smoking gun' will usually be present. . . .").

166. *See generally* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) (noting that even courts recognize unconscious discriminations).

167. *See* Barber *supra* note 35, at 1235 n.55 ("One of the benefits of the introduction of jury science is its attempt to move away from these sorts of gross generalizations and stereotypes."); *see also* THE OXFORD BOOK OF LEGAL ANECDOTES 101 (Michael Gilbert ed., 1986) (quoting Clarence Darrow) ("Never take a German; they are bullheaded. Rarely take a Swede; they are stubborn.

the ability to strike jurors for racial and gender reasons and then allows an attorney to justify their strikes as race and gender neutral to comply with constitutional standards. Essentially, an attorney could strike a juror for a racist or sexist reason and then point to a statistical analysis or investigation as a legitimate reason to back up the decision.[168]

Lastly, critics of jury or trial consultation argue that consultation and investigation damage public perception of the jury system. Essentially, they argue that even if consultants give a plaintiff or defendant no ascertainable benefits, the fact that consultants claim to be so effective could lead to an overall distrust of the jury system.[169] When concerns about the invasion of jurors' privacy are factored in, distrust of the system becomes a real possibility. Jurors can lose trust in their justice system if they feel like the invasion of their privacy is putting them, instead of the defendant, on trial. Nevertheless, there could be certain situations in which these concerns are outweighed. For example, privacy concerns and speculation about public confidence in the jury system caused by investigation and consultation should give way in high profile trials in which a defendant faces the death penalty.

V. CAPITAL PUNISHMENT: A RIGHT TO A JURY CONSULTANT

Courts have overwhelmingly held that trial consultants are not constitutionally required in order for a defendant to receive a fair trial.[170] However, some courts have appointed trial consultants for

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Always take an Irishman or a Jew; they are the easiest to move to emotional sympathy. Old men are generally more charitable and kindly disposed than young men; they have seen more of the world and understand it.").

168. ABRAMSON, *supra* note 1, at 175.

169. Sarah A. Zawada, *Prohibiting Jurors from Working as Trial Consultants in retrials: A Careful Balancing Act Between the First and Sixth Amendments*, 89 MARQ.L.REV. 179, 185 (2005).

170. *See, e.g.*, Moore v. Johnson, 225 F.3d 495, 503 (5th Cir. 2000) (holding that petitioner was not entitled to state-funded expert assistance in jury selection); Frazier v. Mitchell, 188 F. Supp. 2d 798, 850 (N.D. Ohio 2001) (denying a jury consultant because it is not a constitutional right and it would place a substantial burden on the state); Jackson v. Anderson, 141 F. Supp. 2d 811, 854 (N.D. Ohio 2001) (finding that the defendant was not precluded from a fair trial because he

criminal defendants.[171] For example, the California Supreme Court held that it was not an abuse of discretion for a trial court to appoint a jury selection expert.[172] The California Supreme Court agreed with the trial court that excessive pretrial publicity in a murder case "demands the assistance of an expert."[173] Additionally, in the aftermath of the L.A. Riots, a Los Angeles trial judge appointed a well known trial consultant to assist Reginald Denny's defense team.[174] At the time, theorists championed the appointment as a possible change in the tide for trial consultation.[175] Advocates of court appointed consultants pointed out that trial consultation was invented during the trial of anti-Vietnam War protesters in order to level the playing field between the prosecution and defendant, and

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was not provided with a jury consultant); MacEwan v. State, 701 So. 2d 66, 70 (Ala. Crim. App. 1997) (denying a jury consultant because defendant failed to show that there was a reasonable probability that a jury selection expert would have been of assistance to her defense, or that the denial of a consultant deprived her of a fair trial); People v. Shannon, No. E029170, 2002 WL 973198, at *6 (Cal. Ct. App. May 13, 2002) (denying the request for a jury consultant on the grounds that it would merely be convenient for the defense and not necessary); State v. Ashley, No. 9605003410, 1998 WL 109903, at *1 (Del. Super. Ct. Feb. 12, 1998) (recognizing that the court is not required to appoint a jury consultant because a defendant representing himself is unfamiliar with the voir dire process); Grayson v. State, 806 So.2d 241, 255 (Miss. 2001) (asserting that an indigent defendant's right to a court-appointed psychiatrist does not also include the right to a jury consultant); State v. Williams, 565 S.E.2d 609, 634–35 (N. C. 2002) (denying the defendant access to a jury consultant because he failed to demonstrate that he was denied a fair trial, or that there was a reasonable likelihood that the expert would have been able to materially assist the defendant in the preparation of his case); State v. Smith, 993 S.W.2d 6, 28 (Tenn. 1999) (deciding that no constitutional violation exists where a defendant's request for a jury consultant is denied absent a showing of particularized need); Busby v. State, 990 S.W.2d 263, 271 (Tex. Crim. App. 1999) (finding jury consultant expertise unnecessary).

171. *E.g.*, Corenevsky v. Superior Court, 36 Cal. 3d 307, 368 (1984) (en banc); Barber, *supra* note 35, at 1234.

172. Corenevsky v. Superior Court, 36 Cal. 3d 307, 368 (1984) (en banc).

173. *Id.*

174. *See* Barber, *supra* note 35, at 1234.

175. *See, e.g.*, Barber, *supra* note 35, at 1234 ("Whatever one thinks about the utility or danger of jury science, Judge Ouderkirk's appointment of Dimitrius in the Reginald Denny trial signals a potential return to Schulman's initial goal of leveling the legal playing field.").

this was a way of holding true to those roots.[176] There are examples of other courts in the 1990s also appointing jury experts.[177]

Though most courts hold that a consultant is not a constitutionally guaranteed right, some capital defendants should have such a right. In recent years, the Supreme Court has placed an emphasis on the importance of the jury in capital cases. In *Ring v. Arizona*, the Court held that a jury, not a judge, must find any aggravating circumstance under the statute that required sentencing a defendant to death, essentially undoing decades worth of precedent.[178] In his concurrence in *Ring*, Justice Breyer detailed the problems rampant in capital punishment law: its arbitrary application; its irreversibility; the inadequacy of representation; the United States' political isolation on as the only western county still using the practice, and the unjustifiably long period of time inmates spend on death row before being executed.[179] Justice Breyer wrote that a jury should always make the ultimate decision considering the problems in administering the death penalty.[180] This way, society is not insulated from the responsibility of sentencing somebody to death.

Given the emphasis on the importance of the jury in capital trials, proponents argue that the right to expert assistance could be extended to trial consultants as it has other specialty fields.[181] In *Ake*

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176. Barber, *supra* note 35, at 1232–34.

177. *See* Lawrence Buser, *Indigents' Plea for Experts Stirs Issues of Cost, Fairness*, COM. APPEAL (Memphis, Tenn.), Feb. 4, 1996, at A1 (reporting trial judges increasingly granting defense requests for court appointed jury consultants); June D. Bell, *Defendant Allowed Jury Expert*, FLA. TIMES-UNION, Dec. 16, 1996, at A1 (noting that for first time judges in three Florida counties appointed jury consultants for indigent defendant).

178. Ring v. Arizona, 536 U.S. 584, 609 ("Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty.").

179. *Id.* at 617–18 (Breyer, J., concurring).

180. *See id.* at 618 ("For these reasons, the danger of unwarranted imposition of the penalty cannot be avoided unless 'the decision to impose the death penalty is made by a jury rather than by a single governmental official.'").

181. *See generally* Ake v. Oklahoma, 470 U.S. 68 (1985); *see also* Steven Serio, *A Process Right Due? Examining Whether a Capital Defendant Has a Due Process Right to a Jury Selection Expert*, 53 AM. U. L. REV. 1143, 1173 (noting that courts have extended this right to DNA experts, a fingerprint examiner, a

v. Oklahoma, the Supreme Court held that when examining whether a indigent defendant has a right to an expert, a court must consider three factors: (1) the private interest affected by the action of the state; (2) the governmental interest affected by implementation of the safeguard; and (3) the probable value of the safeguards and the risk of erroneous deprivation of the affected interest if the safeguards are not provided.[182] In addition, the issue in need of expertise must be a "significant factor" at trial.[183]

A capital defendant easily meets the first and second prongs of *Ake*. First, life is a "uniquely compelling" interest in light of the Court's "death is different" precedents.[184] Second, because death is so different, it should outweigh any financial burden that the government would incur in appointing a jury expert.

As for the third factor—improving validity of the verdict—several considerations are at work. First, juries play a key role (or in *Ake*'s terms, the jury is a "substantial factor") in deciding the ultimate question of life or death; therefore, it is pertinent that jurors are not biased. Biases flood into capital punishment trials due to high publicity.[185] Potential jurors often lie during voir dire, which allows undetected biases to creep into the jury box—and this could be even more true of highly publicized trials.[186] Further, attorneys

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hypnosis expert, a blood splatter expert, a pathologist, an intoxication expert, and medical examiner in order to ensure defendants have meaningful access to justice and basic tools to an adequate defense).

182. *Ake*, 470 U.S. at 77.

183. *Id.* at 83.

184. *See generally* Simmons v. South Carolina, 512 U.S. 154 (1994) (holding that capital jury must be informed that defendant was ineligible for parole under state law); Eddings v. Oklahoma, 455 U.S. 104 (1982) (vacating a death sentence imposed on a sixteen year old when the state court refused to consider her unhappy upbringing as a mitigating factor); Lockett v. Ohio, 438 U.S. 586 (1978) (holding that Ohio death penalty statute did not permit the type of individualized consideration of mitigating factors required by the Eighth and Fourteenth Amendments); Woodson v. North Carolina, 428 U.S. 280 (1976) (holding that North Carolina's mandatory death sentence for first degree murder violated the Eighth and Fourteenth Amendments); Gardner v. Florida, 430 U.S. 349 (1976) (holding that the death sentence could not be imposed on the basis of confidential information that was in the presentence report, but not disclosed to the defendant).

185. Early, *supra* note 150, at 696.

186. Goodwin, *supra* note 110, at 750.

and courts have historically criticized capital punishment for its arbitrary application due to a system fraught with prejudice and bias especially in regard to race injustice.[187] Additionally, the Supreme Court held that a jury must get an opportunity to give "full effect" to mitigating evidence in order to have an individualized sentencing phase for the defendant to satisfy Supreme Court precedent.[188] This individualization gives the jury discretion in deciding between a life sentence of the death penalty. This kind of discretion can open deliberations up to juror biases and prejudices. Additionally, the Supreme Court requires that a jury actually consider the evidence, not merely accept its existence. If prejudiced jurors have deceptively fallen through the cracks in voir dire, it is not clear that they will ever truly consider the mitigating evidence. Lastly, the so-called "death qualification" process of a jury is a much more extensive process than that a trial where the prosecution is not seeking the death penalty; therefore, a capital defendant could greatly benefit from the skills of a jury consultant and investigator.[189]

A jury consultant could mitigate the above concerns in order to level the playing field when a defendant's life is in jeopardy, which would lead to more accurate verdicts and result in "fundamental fairness" to satisfy *Ake*'s final prong. For example, psychologists who are trained to detect deception could eliminate jurors who attempt to hide their prejudices during voir dire, and investigators can run background checks and scour social media for potential biases. Further, voir dire experts could help an attorney navigate the complex water of jury selection in a death penalty case. After all, the right to an attorney means the right to an effective

187. *See* McCleskey v. Kemp, 481 U.S. 279, 308–11 (1987) (discussing the Baldus study, which found that capital punishment fell disproportionately on black defendants who kill white victims).

188. Penry v. Johnson, 532 U.S. 782, 797 (2001) (requiring that a jury review all mitigating evidence when deciding if a sentence less than death is appropriate).

189. *See* Lockhart v. McCree, 479 U.S. 162 (1986) (finding that "death qualification" does not violate the constitutional right to an impartial jury); Batson v. Kentucky, 476 U.S. 79 (1986); Wainwright v. Witt, 469 U.S. 412 (1984); Witherspoon v. Illinois, 391 U.S. 510 (1968).

attorney.[190] All of this highlights the Supreme Court's underlying policy concern:

> [W]hen a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake[191]

Poverty should not be the reason a defendant is sentenced to death.

VI. CONCLUSION

Theoretically, the practice of jury investigation and consultation is based on the idea that defendants have a constitutional right to a fair trial and therefore consultants and investigators can help assure that the jury is free of prejudiced and biased jurors. The earliest investigators sought to weed out jurors who could not be impartial, and the early consultants worked as volunteers in the anti-war trials of the 1970s. Though consultation was born with noble roots, many consultants have become a vice for unfair trials when they assist rich defendants trying to find a partial jury. However, with technological innovations, juror investigation is stronger and less expensive than ever. Juror investigations can reveal biases and misconduct, which could revert jury investigation back to its roots: leveling the playing field in hopes of a fair trial. Likewise, consultants can help detect dishonest jurors who lie during voir dire, and move attorneys away from utilizing preemptory strikes founded on "hunches" and "intuition" that could potentially be a

190. Strickland v. Washington, 466 U.S. 668, 688 (1984).
191. Ake v. Oklahoma, 470 U.S. 68, 76 (1985).

hotbed for racial and gender bias. However, investigation and consultation have drawbacks. Critics worry about the erosion of juror privacy and its potential to taint public confidence in the jury system. While these are legitimate concerns, it would seem that investigation and consultation could provide crucial services to ensure a more fair trial free of jury misconduct, biased jurors, and improper peremptory strikes along racial and gender lines. At the very least, it would seem that the potential drawbacks of jury consultation and investigation must give way in capital trials in order to ensure that a capital defendant receives a fair trial before being sentenced to death.

The Poventud Population: Why § 1983 Plaintiffs Who Plead or Are Reconvicted After a Constitutionally Deficient Conviction is Vacated Should Not Be Barred by *Heck*

Claire Mueller*

I. INTRODUCTION

After nearly nine years in prison, Marcos Poventud had his conviction vacated due to violations of his constitutional rights at trial. As the State prepared to appeal, it convinced a court that

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Poventud should be denied bail. Instead of waiting for a new trial in prison, Poventud accepted the State's offer to plead guilty to a lesser charge in exchange for his immediate release. In some circuits, Poventud would be precluded from pursuing a civil remedy for the violations of his constitutional rights that led an unconstitutional conviction and nine years in prison. However, the Second Circuit has rightfully interpreted the web of § 1983, habeas corpus, and the *Heck* doctrine to find that criminal defendants who suffered constitutional violations at trial, eventually had their convictions vacated, and either pled guilty to a lesser charge to secure immediate release or were nonetheless convicted on retrial, are permitted to bring a civil action for the constitutional violations that occurred in their original trials.

Poventud found himself in jail because in May 1997, a taxi driver was robbed by two men and suffered a gunshot wound to the head.[1] At the scene of the crime, an NYPD detective discovered a wallet—a wallet that contained the identification of Francisco Poventud.[2] Francisco was incarcerated at the time the crime was committed; his brother, Marcos Poventud, was not.[3]

In 1998, Marcos Poventud—who looks nothing like his brother—was sentenced up to twenty years in prison for the crimes committed against the victim, Younis Duopo, including attempted murder, attempted robbery, and assault.[4] However, during the retrial of his alleged accomplice, Robert Maldonado, Poventud learned that the investigators in his case failed to disclose information as required by the constitutional doctrine set forth in *Brady v. Maryland*.[5] Unbeknownst to Poventud, the police purposely concealed the fact

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1. Poventud v. City of New York, 750 F.3d 121, 125 (2d Cir. 2014) (en banc) (hereinafter *Poventud En Banc*).

2. *Id.*

3. *Id.*

4. *Id.*

5. 373 U.S. 83 (1963). *Brady* protects a criminal defendant's due process right to a fair trial by requiring disclosure of all exculpatory and impeaching evidence. There are three elements to a Brady claim: the withheld evidence must be favorable to the accused, the state must have willfully or inadvertently suppressed the evidence, and the defendant must have suffered prejudice. *Poventud En Banc*, 750 F.3d at 133 (quoting United States v. Rivas, 377 F.3d 195, 199 (2d Cir. 2004) (internal quotation marks omitted)). Prejudice is proven by materiality: that the evidence would have created a reasonable possibility of a different result in the original trial. *Id.* at 133 (quoting Leka v. Portuondo, 257 F.3d 89, 104 (2d Cir. 2001)) (internal quotation marks omitted).

that Duopo initially identified Francisco Poventud as the assailant and was only able to identify Marcos Poventud after seeing Marcos's photograph in four different lineups.[6] The investigators did not record the identification of Francisco, nor did they inform the prosecution or defense counsel of the identification problems or preserve the photo arrays.[7]

After seven years in prison, Poventud successfully moved to vacate his conviction on the grounds that the prosecution had withheld exculpatory evidence.[8] The prosecution appealed the order, secured a denial of bail, and offered Poventud immediate release if he pled guilty to a non-violent, attempted robbery charge.[9] If he agreed, the prosecution would recommend a sentence of one-year time served for the charge.[10] It was an enticing offer, considering,

> [B]y this time, Poventud had been incarcerated for nearly nine years. Poventud testifie[d] that during his imprisonment he endured gruesome and repetitive physical and sexual abuse; that he attempted suicide; and that he suffered from depression and post-traumatic stress disorder. In January 2006, Poventud accepted the terms of the plea bargain and went home.[11]

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6. *Poventud En Banc*, 750 F.3d at 125-26. Indeed, Duopo at first unequivocally identified *Francisco* Poventud as his shooter. One week after the crime, on consecutive days, the NYPD showed Duopo other photo arrays, it was only on the fourth viewing that Duopo identified Marcos Poventud. When the prosecution asked the police about stray photos in the file, the police did not to inform the state that they had performed a separate photo array in which Duopo identified Francisco as the assailant. *Id.*

7. Poventud v. City of New York, 715 F.3d 57, 59 (2d Cir. 2013) (hereinafter *Poventud*)

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.; see also Poventud En Banc*, 750 F.3d at 141 (Lynch, J., concurring) ("In effect, if he accepted the plea bargain, he would be released from prison. Poventud thus faced a stark choice: he could continue to fight, risking the possibility that his sentence of up to twenty years in prison would be restored against the hope of a complete acquittal. Or, he could accept the offer, plead guilty, *and go free immediately*. Poventud accepted the offer: he pled guilty to attempted robbery in the third degree, was sentenced to a fraction of the time he had already spent in prison, and walked out of the courthouse a free man.").

After his release, Poventud brought a § 1983 suit against the City of New York and various police officers seeking remedies for the violations of his constitutional rights—the same violations that invalidated his conviction. However, Poventud found his claims barred by *Heck v. Humphrey*.[12] The *Heck* doctrine prohibits suit under Section 1983 by current or former criminal defendants for constitutional violations that led to their confinement, unless they can prove that the related criminal conviction has been reversed, vacated, or subject to some similar favorable termination.[13] The *Heck* court directed courts to consider whether judgment for a prisoner in a § 1983 suit would "necessarily imply the invalidity of his conviction or sentence."[14] If so, the prisoner's § 1983 claim is barred.[15] Undertaking this analysis for Poventud's § 1983 claims, the trial court found that his subsequent plea to attempted robbery was functionally equivalent to a conviction, and that success in this § 1983 suit would necessarily call into question that conviction—thereby triggering *Heck*'s bar.[16]

On appeal to the Second Circuit, both the first panel and the en banc panel correctly reversed the lower court.[17] The first appellate decision, *Poventud*, based its reversal on the unavailability of habeas corpus relief for Poventud, since his release from prison after accepting the plea made him unable to satisfy the requirement that a habeas petitioner be in custody.[18] That particular line of reasoning is beyond the scope of this Note. Importantly, however, the *Poventud* court noted that even if habeas relief were available to Poventud, the *Heck* doctrine did not bar his claims under § 1983.[19]

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12. *Poventud En Banc*, 750 F.3d at 127; *see also* Heck v. Humphrey, 512 U.S. 477, 486–87 (1994) (holding that "a § 1983 plaintiff must prove that the conviction or sentence has been reversed"). *See infra* Part IIB and accompanying notes (outlining Heck's requirement that Section 1983 plaintiffs prove favorable termination of their conviction).

13. *Heck*, 512 U.S. at 486–87.

14. *Id.* at 487.

15. *Id.*

16. Poventud v. City of New York, No. 07 Civ. 3998 (DAB), 2012 WL 727802, at *3 (S.D.N.Y. Mar. 6, 2012) (hereinafter *Poventud SDNY*).

17. *See Poventud*, 715 F.3d at 58 (vacating the District court's decision granting summary judgment and remanding); *see also Poventud En Banc*, 750 F.3d at 125 (same).

18. *Poventud*, 715 F.3d at 62; *see also* 28 U.S.C. § 2254(a) (2012) (outlining the requirement that a person be in custody to petition for habeas corpus relief)

19. *Poventud*, 715 F.3d at 61–62 n.2.

Poventud's § 1983 claims only sought relief for the constitutional violations in the original trial and did not challenge the legality of the conviction resulting from his plea deal.[20]

On rehearing en banc, the Second Circuit expanded on the notion that the validity of Poventud's second conviction was not challenged by his § 1983 claim. Agreeing that the district court improperly granted summary judgment for City of New York and its police officers, the en banc panel determined that Poventud's § 1983 suit did not necessarily imply the invalidity of his conviction pursuant to his plea—releasing Poventud's claims from *Heck*'s bar.[21]

Poventud's procedural scenario, which is messy but not unique,[22] highlights an interesting subsection of the § 1983 plaintiff population—the "Poventud Population." The Poventud Population is made up of criminal defendants who suffered constitutional violations in their convicting trials, eventually had their convictions or sentences terminated favorably,[23] and pled to a lesser charge in order to secure immediate release or were nonetheless convicted on retrial.

If other Circuits do not follow the example of the Second Circuit, Poventud Plaintiffs[24] will be precluded from seeking a remedy under § 1983, despite having already proven constitutional violations occurred at their trials. Because § 1983 claims by the Poventud Population do not implicate the legal concerns expressed in *Heck*, and because normative concerns weigh in favor of allowing access to § 1983, this Note argues that courts should follow the

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20. *Poventud*, 715 F.3d at 61–62 n.2.

21. *Poventud En Banc*, 750 F.3d at 128.

22. *See* Jackson v. Barnes, 749 F.3d 755 (9th Cir. 2014) (involving a defendant convicted of murder bringing suit under § 1983); *see also infra* Part III (noting that *Jackson v. Barnes* arose from a situation similar to Poventud's).

23. Favorable termination means "that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983." *Heck*, 512 U.S. at 486–87 (internal citations omitted).

24. A Poventud Plaintiff is a plaintiff who has a criminal conviction vacated or otherwise overturned due to constitutional violations at trial, but who either is reconvicted upon retrial (without the constitutional deficiencies present at the first trial) or accepts a plea bargain. With a subsequent criminal conviction that is related to the first, constitutionally-deficient conviction, Poventud Plaintiffs run the risk of the *Heck* doctrine barring their § 1983 claims.

Second Circuit's decision that *Heck* does not bar access to § 1983 to the Poventud Population. Doing so would merely sanction a vehicle for vindicating constitutional rights to due process of law and a fair trial—rights Poventud Plaintiffs have already proven were violated, and rights they possess regardless of guilt or innocence.

Part II outlines the web of statutes and doctrines—§ 1983, habeas, and *Heck*—that bind the Poventud Plaintiffs. Part III explains who comprises the Poventud Population. Part IV explores the *Poventud* decisions—specifically the en banc panel's opinion. Part V details the risks of applying the *Heck* doctrine in these circumstances. Finally, Part VI explains the incentives at play for the Poventud Plaintiffs and argues that, apart from being legally sound, the interests of justice urge a clear and widespread adoption of the reasoning expressed in *Poventud En Banc*.

II. THE WEB SURROUNDING THE POVENTUD PLAINTIFFS—§ 1983, HABEAS, AND *HECK*

In order to appreciate the risks posed to the Poventud Population, it is necessary to understand the web of statutes and doctrines—namely § 1983, habeas corpus, and *Heck*—that can constrain plaintiffs like Poventud, preventing them from seeking civil remedies for the proven constitutional violations that led to their confinement. These elements combine to form the web in which the Poventud Population resides.

A. Statutory Tension—§ 1983 and Habeas Corpus

Although habeas corpus and § 1983 are both common mechanisms for vindicating constitutional rights, they vary in scope and operation.[25] The significant differences include deeming different violations cognizable, requiring different antecedent procedures, and offering different remedies.[26]

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25. *Heck*, 512 U.S. at 480.

26. *Compare* 42 U.S.C. § 1983 (2012) (functioning as a mechanism for the enforcement of constitutional rights against local and state authorities, people acting under color of state law or, occasionally, private individuals, not requiring exhaustion of state or administrative procedures, and providing for monetary awards), *with* 28 U.S.C. §§ 2241–2254 (2012) (allowing those in custody to seek relief for the unconstitutionality of their confinement, requiring exhaustion of state

For example, habeas corpus relief requires that the petitioner is in custody and has procedurally exhausted all state court claims;[27] however, § 1983 requires neither.[28] Additionally, the habeas corpus statutes address specific constitutional violations during confinement or custody, while § 1983 "addresses a broader spectrum of constitutional deprivations."[29] Habeas corpus statutes and § 1983 also provide different remedies: habeas can secure release or a change in confinement; § 1983 rectifies constitutional wrongs through monetary damages.[30] Lastly, these "fertile sources of federal-court prisoner litigation"[31] protect different interests: habeas corpus protects an individual's right to constitutional confinement;[32] § 1983 protects an individual from "constitutional violations under color of state law."[33]

The Supreme Court stated that "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody."[34] Section 1983, on the other hand, "authorizes individuals to enforce their constitutional rights against state and local officials and municipalities" through the imposition of

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remedies, as well as imposing various other procedural hurdles, and authorizing a specific performance remedy).

27. *Heck*, 512 U.S. at 480; 22 U.S.C. § 2254(b) (2012).

28. *Heck,* 512 U.S. at 480 (citing Patsy v. Bd. of Regents, 457 U.S. 496, 501, 509 (1982)); *see also* Preiser v. Rodriguez, 411 U.S. 475, 490 (1973) (citing Fay v. Noia, 372 U.S. 391, 419–20 (1963)) ("[T]he reason why only habeas corpus can be used to challenge a state prisoner's underlying conviction is the strong policy requiring exhaustion of state remedies in that situation—to avoid the unnecessary friction between the federal and state court systems that would result if a lower federal court upset a state court conviction without first giving the state court system an opportunity to correct its own constitutional errors.").

29. Melissa L. Koehn, *The New American Caste System: The Supreme Court and Discrimination Among Civil Rights Plaintiffs*, 32 U. MICH. J.L. REFORM 49, 89 (1998).

30. *Id.* at 90; *see also Preiser*, 411 U.S. at 494 ("In the case of a damages claim, habeas corpus is not an appropriate or available federal remedy").

31. *Heck*, 512 U.S. at 480.

32. *See* 28 U.S.C. § 2254(a) (2012) (directing district courts to only entertain applications for a writ of habeas corpus on the ground that the applicant's custody is in violation of the Constitution or U.S. laws and treaties).

33. Martin Schwartz, *The Supreme Court's Unfortunate Narrowing of The Section 1983 Remedy for* Brady *Violations*, CHAMPION, May 2013, at 58.

34. *Preiser*, 411 U.S. at 484.

compensatory and punitive damages.[35] "Section 1983 is designed to provide . . . state employees with a deterrent against violating those rights." [36] Knowing that federal resources are limited, Congress designed § 1983 to "give[] the 'man on the street' the ability to enforce his or her own constitutional rights in court."[37]

Despite these differences, habeas corpus and § 1983 overlap. Indeed, their interaction has been the basis of Supreme Court precedent. *Preiser v. Rodriguez*,[38] which laid the groundwork for *Heck*, dealt with the overlap of habeas corpus and § 1983 when prisoners sought restoration of good-time credits. The restoration of those credits would have resulted in their release from prison.[39] Rejecting the prisoners' § 1983 claims, the Court determined that habeas corpus is the sole federal remedy for prisoners challenging the validity or duration of their confinement.[40] *Prieser* demonstrates that the overlap between these two federal causes of action has created circumstances in which the Court has decided that one must yield to the other.[41] For better or worse, "[t]he Supreme Court in *Preiser* and *Heck* has effectively subordinated the § 1983 remedy to the writ of habeas corpus when the remedies would overlap (and to some extent, even when they do not)."[42]

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35. Schwartz, *supra* note 33, at 58.

36. *See* Koehn, *supra* note 29, at54; *see also* F. Frankfurter & J. Landis, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 65 (1928) (The federal courts are the "primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.").

37. *Id.* (internal quotation omitted).

38. 411 U.S. 475 (1973).

39. *Id.* at 476. *Preiser* arose from three consolidated cases, each with a New York prisoner claiming violations of their constitutional rights under Section 1983 for disciplinary action that deprived them of good-conduct credits. *Id.* at 476. The district courts had ordered immediate release of the three plaintiffs, whose recuperation of good-conduct credits meant they would have already been released if not for the unconstitutional deprivation of those credits. *Id.* at 480–81.

40. *Id.* at 500.

41. *See Heck*, 512 U.S. at 490–91 (Thomas, J., concurring) (arguing that the Court has interpreted both Section 1983 and the habeas statute too broadly, and that the Court is therefore responsible for the collision between these two statutes).

42. *Poventud En Banc*, 750 F.3d at 128 (quoting RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM 966 (6th ed. 2009) (internal citations omitted)).

B. The Heck Doctrine and its Antecedents

Indeed, the Supreme Court's interpretation of the interplay between the two causes of action could completely block access to § 1983 for the Poventud Population. The origin of this danger is the Court's decision in *Preiser*. When the *Preiser* Court decided that habeas corpus was the only meachanism to challenge the length or validity of confinement, it was seriously concerned with comity.[43] The Court pointed to the statutory requirement of exhaustion of state remedies before proceeding in a federal habeas corpus action.[44] Fearing the existence of a loophole that would allow a prisoner to bypass the exhaustion requirement, the Court wrote:

> In amending the habeas corpus laws in 1948, Congress clearly required exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief under those laws. It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings.[45]

While the prisoners in *Preiser* were seeking restoration of good time credits, and thus an effective release from prison, the Court recognized the possibility that a prisoner would only seek damages under § 1983, and thereby not challenge the validity or length of the conviction.[46] Therefore, the Court limited its holding to claims for equitable relief, like the restoration of good-conduct credits. In dicta, the Court stated:

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43. *Preiser*, 411 U.S. at 490–91. The Court stated that the exhaustion protects the interests of comity by "avoid[ing] the unnecessary friction between the federal and state court systems that would result if a lower federal court upset a state court conviction without first giving the state court system an opportunity to correct its own constitutional errors." *Id.* at 490.

44. *Id.* at 490-91.

45. *Id.* at 489–90.

46. Later jurisprudence developed this theme and allowed for bifurcation when both equitable and compensatory relief is sought. *See* Koehn, *supra* note 29, at 90 ("[The Supreme Court held] that a prisoner seeking *both* damages and restoration of good time credits could bifurcate his claims and proceed simultaneously under both statutes.").

> If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy [sic] release—the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is *not* an appropriate or available federal remedy. Accordingly, . . . a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies.[47]

However, this dicta was spurned by the Court in *Heck*,[48] which involved a § 1983 plaintiff's claim to monetary damages for violations during the investigation and trial that lead to his conviction and confinement. The *Heck* Court focused on the interaction between the plaintiff's underlying conviction and any possible relief afforded by § 1983.[49] The Court held that in order to recover damages for harm caused by actions "whose unlawfulness would render a conviction or sentence invalid,"[50] a § 1983 plaintiff must prove a favorable termination of the conviction or sentence.

Roy Heck was convicted in an Indiana state court for the voluntary manslaughter of his wife and was sentenced to fifteen years in prison.[51] While his direct appeal was pending, Heck filed a § 1983 suit, which alleged that the prosecutors and one of the investigators engaged in arbitrary investigation, destroyed evidence, and caused an unlawful voice identification procedure to be used at trial.[52] The complaint sought, among other things, compensatory and punitive damages; but it did not seek injunctive relief or Heck's release from custody.[53] The district court dismissed the suit, reasoning that the § 1983 claims directly implicated the legality of Heck's confinement.[54] The Seventh Circuit affirmed the dismissal of Heck's § 1983 suit, finding it to contain claims that challenged the

47. *Preiser*, 411 U.S. at 494.
48. 512 U.S. 477 (1994).
49. *Id.* at 480-81.
50. *Id.* at 486.
51. *Heck*, 512 U.S. at 478.
52. *Id.* at 479.
53. *Id.*
54. *Id.*

legality of Heck's conviction, and were therefore required to proceed under habeas and satisfy the requirement of exhaustion [55] Subsequently, Heck's conviction was upheld in the state courts, his first application for federal habeas corpus was dismissed for failure to exhaust state remedies, and his second application was denied—leaving habeas corpus relief essentially unavailable to Heck.[56]

While recognizing that *Heck*, like *Preiser*, involved the intersection of federal habeas and § 1983, the Supreme Court quickly dismissed the idea that *Prieser* controlled.[57] Heck was not seeking quicker or immediate release; instead, Heck sought "monetary damages, as to which he could not 'have sought and obtained fully effective relief through federal habeas corpus proceedings.'"[58] This observation required that the *Heck* Court directly address the dicta in *Preiser*, which had declared that actions for damages were cognizable under § 1983.[59]

The *Heck* Court disapproved of the *Preiser* dicta that prisoners seeking damages are "attacking something other than the fact or length of . . . confinement, and . . . something other than immediate or more speedy release."[60] The *Heck* Court explained that statement might not be true

> when establishing the basis for the damages claim necessarily demonstrates the invalidity of the conviction. In that situation, the claimant *can* be said to be "attacking . . . the fact or length of . . . confinement," bringing the suit within the other dictum of *Preiser*: "Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983."[61]

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55. *Heck*, 512 U.S. at 479–80 (quoting Heck v. Humphrey, 997 F.2d 355, 357 (7th Cir. 1993)).
56. *Id.* at 479.
57. *Id.* at 480–81.
58. *Id.* at 481 (quoting *Preiser*, 411 U.S. at 488).
59. *Preiser*, 411 U.S. at 494.
60. *Heck*, 512 U.S. at 481 (quoting *Preiser*, 411 U.S. at 494).
61. *Heck*, 512 U.S. at 481–82 (quoting *Preiser*, 411 U.S. at 490).

The Court made a point to distance itself from the *Preiser* dicta, finding the dicta "to be an unreliable, if not an unintelligible, guide: that opinion had no cause to address, and did not carefully consider, the damages question before us today."[62]

Confronting the open question posed by § 1983 damages claims that challenge the lawfulness of a conviction or confinement, the Court concluded that the heart of the issue rested not with exhaustion, but with cognizance.[63] The *Heck* Court held that claims which implicate the legality of a conviction or confinement do not accrue under § 1983 *unless* the conviction or sentence "has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus."[64] The Court also clarified the inquiry courts must make in order to determine if dismissal is appropriate: "[T]he district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated."[65]

To arrive at this standard, the Court analogized Heck's claims (which included issues of arbitrary investigation and destruction of evidence) to the common law tort of malicious prosecution.[66] The tort of malicious prosecution requires favorable termination of the underlying conviction. The Court explained the policy behind the favorable termination requirement of malicious prosecution, stating:

> This requirement avoids parallel litigation over the issues of probable cause and guilt . . . and it precludes the possibility of the claimant [sic] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a

62. *Heck,* 512 U.S. at 482.

63. *Id.* at 483, 486–87.

64. *Id.* (internal citations omitted).

65. *Heck,* 512 U.S. at 487.

66. *Id.* at 483. The Court noted that "§ 1983 creates a species of tort liability" and that the rules developed around the common law of torts, which "defin[e] the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well." *Id.* (quoting Carey v. Piphus, 435 U.S. 247, 257-58 (1978)).

> strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction. Furthermore, to permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit.[67]

The Court concluded that the policy behind the favorable termination requirement was equally important in the context of § 1983 damages actions "that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement."[68] The *Heck* Court thus held that § 1983 plaintiffs seeking damages for "allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid" must prove that their conviction has been terminated favorably.[69]

Importantly, the *Heck* Court noted the limitations of its holding. The Court explained that if the plaintiff's action does not challenge the validity of any outstanding criminal judgment against the plaintiff, the § 1983 action should be allowed to proceed.[70] In a footnote, the Court provided an example of a § 1983 action that would not be barred by *Heck*:

> [A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery and especially harmless error, such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful.[71]

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67. *Heck*, 512 U.S. at 484 (quoting 8 STUART SPEISER, CHARLES F. KRAUSE, & ALFRED W. GANS, AMERICAN LAW OF TORTS § 28:5, at 24 (1991)) (internal quotation marks omitted).

68. *Id.* at 486.

69. *Heck,* 512 U.S. at 486.

70. *Id.* at 487.

71. *Heck*, 512 U.S. at 487, n.7 (citing Murray v. United States, 487 U.S. 533, 539 (1988) and Arizona v. Fulminante, 499 U.S. 279, 307–08 (1991)) (internal

The *Heck* decision complicated the web that *Prieser* previously confronted. *Prieser* left open the questions of whether a court should look to the nature of the claim or the type of remedy sought to determine cognizance, and whether relief could be simultaneously available under both § 1983 and habeas corpus.[72] Another remaining question is whether § 1983 is available to a plaintiff who no longer has access to the habeas remedy.[73] While doing little to answer these questions, *Heck* created additional conundrums, including what exactly qualifies as a "favorable termination,"[74] and the reach of *Heck*'s bar.[75] Additionally, the

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citations omitted) (emphasis in original). The Court expounded on the possibility of relief for § 1983 damages claims that do not necessarily imply the invalidity of a conviction or sentence, requiring that a plaintiff "must prove not only that the search was unlawful, but that it caused him actual, compensable injury, which, we hold today, does not encompass the 'injury' of being convicted and imprisoned (until his conviction has been overturned)." *Id.* at 487, n.7 (citing Memphis Cnty. Sch. Dist. v. Stachura, 477 U.S. 299, 308 (1986)) (internal citation omitted).

72. Martin A. Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between The Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DEPAUL L. REV. 85, 123–28 (1988).

73. Schwartz, *supra* note 72, at 126. *Compare* Cohen v. Longshore, 621 F.3d 1311, 1317 (10th Cir. 2010) (holding that a *Heck* favorable termination requirement does not apply to those who cannot invalidate their conviction or sentence), *with* Entzi v. Redmann, 485 F.3d 998 1003 (8th Cir. 2007) (requiring the *Heck* favorable determination threshold to exist even when habeas is unavailable because to do otherwise would imply plaintiff's conviction was invalidated). The Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits agree that § 1983 should be available in the absence of habeas, where the Fifth and First Circuits join the Eighth on the other side of the split. *See* Aaron M. Gallardo, *Recent Development: Civil Rights:* Cohen v. Longshore: *Determining Whether the Heck Favorable-Determination Requirement Applies to Plaintiffs Lacking Habeas Relief Under 42 U.S.C. § 1983*, 34 AM. J. TRIAL ADVOC. 725, 730 (2011). A discussion of this circuit split is beyond the scope of this paper, but any inquiry into the split should start with Spencer v. Kemna, 523 U.S. 1 (1998) (decided on mootness grounds, but discussing the possibility of § 1983 availability in the absence of habeas access and demonstrating possible support for such availability). The unavailability of habeas corpus relief was also the driving force behind the Second Circuit's original decision in *Poventud*. 715 F.3d at 62.

74. *See e.g.,* Morris v. McAllester, 702 F.3d 187 (5th Cir. 2012) (holding that a termination of community supervision after the defendant's completion of a third of the sentence, along with a dismissal of the proceedings and a discharge from any penalties or disabilities resulting from the offense, did not qualify as a favorable termination under *Heck*).

application of *Heck* to § 1983 plaintiffs who have had their convictions terminated favorably but who subsequently accept a plea deal or are convicted upon retrial, is unclear. In *Poventud* and *Poventud En Banc,* the Second Circuit correctly determined that *Heck* does not bar suits challenging an already invalidated conviction, even if the prisoner has a subsequent conviction related to the same conduct.[76]

The Second Circuit's decision in *Poventud En Banc* is all the more important in light of the fact that *Heck*'s bar is but one limitation to recovery under § 1983. Section 1983 contains broad language and was created "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."[77] However, subsequent developments in § 1983 jurisprudence have significantly limited the likelihood of obtaining relief under § 1983.[78] Nonetheless, the rights at stake in the Poventud Population are the

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75. *See e.g.*, Beets v. Cnty. of L.A., 669 F.3d 1038 (9th Cir. 2012) (*Heck*'s bar applied to block § 1983 excessive-force litigation by family members of a man shot and killed by police; *Heck* application was premised on accomplice liability (conviction of accomplice for aiding and abetting in the assault on a peace officer with a deadly weapon) (holding limited to the facts.)); *see also* Stoddard–Nunez v. City of Hayward, No. 3:13-CV-4490 KAW, 2013 WL 6776189 (N.D. Cal. Dec. 23, 2013) (§ 1983 suit by decedent's family barred due to potential to undermine "provocative act" theory of murder in criminal proceedings against accomplice charged with felony murder for the officer's shooting of decedent).

76. *Poventud En Banc*, 750 F.3d at 127.

77. Monroe v. Pape, 365 U.S. 167, 180 (1961), *overruled on other grounds by* Monell v. Dep't of Social Servs., 436 U.S. 658 (1978) (discussing the statutory predecessor to § 1983).

78. *See* Koehn, *supra* note 29, at 56 (listing the Eleventh Amendment, qualified immunity, the intricacies of municipal liability, the overlap with habeas, and *Heck* as some of the barriers that have been erected within the realm of § 1983). Likewise, habeas relief has been drastically limited by the Court's jurisprudence and statutory enactment. Specifically, the 1996 enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA), which was focused on capital post-conviction procedures but has affected all writs, strengthened the procedural barriers to demonstrating cognizance on federal habeas. See *id.* at 97, 100 (noting AEDPA's strict limitations on the number and timing of habeas petitions).

exact rights the remedial structure of § 1983 was meant to protect,[79] and as such, in the face of already dire chances of recovery, courts should follow the lead of the Second Circuit in *Poventud En Banc* and declare that *Heck* does not bar § 1983 suits regarding constitutional violations that contributed to an already invalidated conviction.

III. THE POVENTUD POPULATION

Marcos Poventud was caught in the web created by the overlay of habeas corpus, § 1983, plea deals, unconstitutional police and prosecutorial misconduct, the *Heck* doctrine, and the right to a fair trial. It is a specific web, but Poventud is not alone in it. For example, a recent Ninth Circuit case, *Jackson v. Barnes*, arose from a similar situation and implicates similar concerns as those in *Poventud*.[80]

Characterizing the issue as "refreshingly simple," the Ninth Circuit held that the police violated Fredrick Lee Jackson's *Miranda* rights during a murder investigation that eventually resulted in Jackson's conviction.[81] Because the *Miranda* violation should have rendered one of Jackson's incriminating statements inadmissible, the Ninth Circuit vacated his conviction for murder.[82] On retrial, the jury was shielded from the inadmissible testimony, but Jackson was again convicted of first-degree murder and sentenced to twenty-six years in prison.[83] Before the retrial,[84] Jackson filed a pro se § 1983

79. *See infra* Part IIA (noting § 1983 is designed to deter state employees from violating constitutional rights).

80. *Jackson*, 749 F.3d 755 (9th Cir. 2014).

81. Jackson v. Giurbino, 364 F.3d 1002, 1008–12 (9th Cir. 2004) (federal habeas proceeding finding a Miranda violation and vacating Jackson's conviction for murder).

82. *Id.*

83. *Jackson*, 749 F.3d at 759.

84. It appears that Jackson remained in custody between his two trials, although technically for the sentence imposed for his separate rape conviction. *See Jackson*, 364 F.3d at 1011–12 (granting Jackson's habeas corpus petition, writing that "[t]he state appellate court suspended Jackson's six-year sentence for rape because Jackson's sentence of life in prison without the possibility of parole included punishment for the rape as a special circumstance of the murder. Because we have now vacated the murder conviction, the State may revoke the suspension of Jackson's independent rape sentence.").

complaint concerning the *Miranda* violation that led to the vacatur of his original murder conviction.[85] The trial court dismissed one of Jackson's § 1983 claims on the ground that *Heck* barred it,[86] just as the district court dismissed Poventud's § 1983 claims. But just like the Second Circuit, the Ninth Circuit reversed the district court's decision, reasoning that a § 1983 claim challenging Jackson's original—and unconstitutional—conviction had no bearing on his subsequent reconviction.[87]

While the nature of the constitutional violations differed in Jackson and Poventud's cases, as did their ultimate ability to garner release from prison, they both were threatened by the complicated web that encompasses the Poventud Population. This web could prevent access to § 1983 relief for similarly situated plaintiffs, including innocent men and women.

Scholarly research has observed that innocent people, for a variety of reasons, do in fact take pleas offers. In their exploration of factually innocent criminal defendants pleading guilty, Professors John Blume and Rebecca Helm identified categories of innocent people who plead guilty.[88] One category comprises wrongfully convicted defendants who "have their conviction vacated on direct appeal or in post-conviction review proceedings, [but] plead guilty to

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85. *Jackson*, 749 F.3d at 759.

86. *Id.*

87. *Id.* at 760. The Court stated:

> In this case it is Jackson's second conviction for first degree murder that is outstanding. It is undisputed that the second conviction *was* insulated from the inculpatory statements that are the subject of Jackson's § 1983 suit against Barnes. The first conviction is the case in which the Fifth Amendment violation occurred. Therefore a judgment in Jackson's favor would—far from 'necessarily imply[ing]' the invalidity of his second conviction—not have any bearing on it. The only conviction a judgment in Jackson's favor would bear on is his first conviction, which was 'called into question by a federal court's issuance of a writ of habeas corpus.' In fact, more than 'called into question,' it was reversed. Thus, Jackson's § 1983 claim against Barnes for the Fifth Amendment violation is not barred by *Heck*.

Id. (internal citations omitted). For the discussion of the courts' correct legal reasoning in *Poventud En Banc*, *see infra* Parts IVB, IVC.

88. John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty* 22 (Cornell Law Faculty Working Papers, Paper No. 113, 2014), *available at* http://scholarship.law.cornell.edu/clsops_papers/113.

receive a sentence of time served and obtain their immediate (or at least imminent) freedom."[89] The Poventud Population resides in this category and demonstrates the pragmatism that is often involved in accepting a plea.

Blume and Helm identify forces that lead people to plead guilty to crimes they did not commit, even after their original convictions are overturned. First, state "hostility" to post-conviction claims of innocence often leads the prosecution to "attempt to bargain with the defendants in order to secure a guilty plea and maintain the conviction."[90] Second, Blume and Helm considered the mindset of the wrongfully convicted:

> They have been to trial and, despite knowing they were innocent, the jury found them guilty. Having seen the criminal justice system in operation, "up close and personal" so to speak, it is not hard to imagine that such a defendant would be reluctant to "roll the dice" at a retrial.[91]

Kerry Max Cook was likely burdened by this mindset when, on the eve of his fourth retrial, he decided to plead no contest to a murder he did not commit.[92] In 1978, at twenty-two years old, Cook

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89. Blume & Helm, *supra* note 88, at 21–22. The two other categories of factually innocent defendants who plead guilty identified by Blume and Helm are "innocent persons charged with relatively minor offenses [who] often plead guilty in order to get out of jail, to avoid the hassle of having criminal charges hanging over their heads, or to avoid being punished for exercising their right to trial" and "innocent defendants [who] plead guilty due to the fear of a harsh alternative punishment, e.g., the death penalty." *Id.*

90. *Id.* at 24–25.

91. *Id.* at 24. The professors also identify three other factors that contribute to the innocent pleading guilty at an original criminal proceeding, writing "[T]he modern American criminal justice system has three features that create the hydraulic pressure which increases the risk of innocent defendants pleading guilty: (1) the system's need (or at least perceived need) for the overwhelming majority of defendants to plead guilty; (2) draconian sentences for many offenses and offenders; and, (3) an almost complete lack of judicial regulation of the plea bargaining process. These three factors combine to create a system in which innocent defendants can be coerced to plead guilty." *Id.* at 6–7. These factors apply equally in the context of a possible retrial.

92. Diane Fanning, *2 Decades On Death Row, 15 Years In Limbo: Kerry Max Cook's Struggle For Justice*, FORBES, (May 21, 2012, 7:04 AM),

was convicted of capital murder.[93] Falsified expert and eyewitness testimonies, a completely fabricated jailhouse confession, and investigators' willful neglect of other possible suspects tainted Cook's original trial.[94] Sentenced to death, Cook was stabbed, repeatedly raped, and beaten while housed on death row.[95] Because of this abuse and the threat of execution, Cook attempted to commit suicide by slitting his throat.[96]

Eight years after his first trial and eleven days before his scheduled execution,[97] and only after the Supreme Court granted a stay, Cook's original conviction was overturned due to the constitutional violations at his first trial.[98] Shortly thereafter, the Supreme Court ordered the Texas Court of Criminal Appeals to reconsider whether Cook's rights had been violated during the

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http://www.forbes.com/sites/crime/2012/05/21/two-decades-on-death-row-15-years-in-limbo-kerry-max-cooks-struggle-for-justice/.

93. Fanning, *supra* note 92.

94. *Id.* The article details numerous violations in Cook's original trial, including the state's claim, in order to secure the capital conviction, that Cook stole a sock from the victim—a sock that was later found inside the victim's jeans. Other violations included: a forensic expert falsely testifying that Cook's fingerprint on the victim's door (which was from days before the murder) was only hours old at the time—where the technology to measure the age of fingerprints *still* does not exist; the medical examiner changing the time of death to conform with the prosecution's theory of the crime; an eyewitness, who had originally stated the assailant had silver hair over his ears, was coached to say the murderer was Cook, who had shoulder length brown hair at the time of the murder; the jailhouse snitch who was shown crime scene photos to bolster his false claim that Cook had confessed the crime; and forensic evidence—a drop of blood—that was not tested because, according to law enforcement: "It was the same color as the rest of the blood." *See id.* (detailing violations in Cook's original trial); *see also* Mark Donald, *Innocence Lost Part 1*, DALLAS OBSERVER, July 15, 1999 (detailing more of the bias that occurred in Cook's original trial: in the conservative and religious community of Tyler, Texas, the prosecution made Cook's homosexuality a central theme of their theory of the crime; the court allowed the prosecution to "present a 3 1/2-hour slide show of 66 gruesome, larger-than-life color photographs [of the particularly gruesome crime scene] projected across the wall of the courtroom;" the defense was never notified of the prior inconsistent statements of witnesses; and the police ignored persuasive evidence that the victim's lover was the real culprit).

95. Fanning, *supra* note 92.

96. Mark Donald, *Innocence Lost Part 2*, DALLAS OBSERVER, July 22, 1999.

97. *Id.*

98. *Id.*

investigation or trial,[99] but some of the tainted evidence was again ruled admissible at Cook's retrial.[100] After the second trial resulted in a mistrial, the third jury to hear the case convicted Cook and sentenced him to death, again.[101] In 1996, however, the Texas Court of Criminal Appeals overturned Cook's conviction and urged the State not to prosecute again.[102] Rather than taking the court's advice, the State prepared to put Cook on trial for the fourth time.[103]

Just before the fourth trial began, the prosecutors offered Cook a deal: if he pleaded no contest and accepted a sentence equal to the time he already served, he would be released.[104] Cook, then forty-four years old, turned down their offer because "[h]e would not admit to a crime he did not commit."[105] On the morning of jury selection, the prosecution made another offer—one that Cook could not refuse.[106] He agreed to plead no contest to the charges in exchange for their dismissal and his release.[107] But "[i]f he insisted on going to trial, the state would once again pursue the death penalty."[108] Cook would not be required to admit guilt with a no contest plea, but it would leave him with a conviction.[109] Two months after Cook accepted the plea, and twenty-two years after the murder, the DNA analysis from a semen stain on the victim's underwear, which was discovered prior to the scheduled date of the fourth trial, revealed that Cook's DNA did not match.[110] Cook's case, which terminated with Cook's conviction for murder, illustrates some of the egregious constitutional violations that can occur in our

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99. Donald, *supra* note 96. Specifically, the Supreme Court ordered the Texas high court to reconsider whether Cook's rights were violated when he was not warned that his statements in an interview conducted by a psychiatrist, who called Cook a sociopath beyond the reach of rehabilitation, could be used against him at trial. *Id.*

100. Fanning, *supra* note 92.

101. *Id.*

102. *Id.*

103. *Id.*

104. Fanning, *supra* note 92.

105. *Id.*

106. *Id*

107. *Id.*

108. Fanning, *supra* note 92.

109. Mark Donald, *Innocence Lost Part 1*, DALLAS OBSERVER, July 15, 1999.

110. *Four Stories—Kerry Max Cook—Frontline*, PBS.ORG (June 17, 2004), http://www.pbs.org/wgbh/pages/frontline/shows/plea/four/cook.html.

criminal justice system. Cook's case also serves as a reminder of the post-release difficulties that await those with criminal convictions.[111]

Additionally, Kerry Cook's situation is much like the plaintiffs that comprise the Poventud Population. After a series of unethical and illegal maneuvers leading to his conviction, and four attempts to sentence him to death, Cook took a plea. Although widely considered innocent,[112] Cook is still a convicted murderer—a fact that could easily trigger the *Heck* bar and ultimately defeat a civil rights suit. Even though Cook does not appear to have attempted a § 1983 suit against the officials who conducted the original investigations and prosecutions, there is the risk that Cook, and plaintiffs in his shoes, would be barred access to § 1983 if a court followed the example of the district courts in Poventud and Jackson's cases.[113]

The possibility that a plea to a lesser offense and the *Heck* bar would preclude men like Cook from vindicating their constitutional rights and receiving compensation for the violations thereof is unsettling.[114] The exclusion of innocent people from § 1983 is

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111. Fanning, *supra* note 92 ("Life outside of prison has proven problematic for Cook since he still has a criminal conviction for murder. He can't get a job. He can't sign a lease. He's been forced to move multiple times. And he still feels ostracized for a crime he did not commit.").

112. Cook has become a public advocate for the wrongly accused. His book about his wrongful imprisonment was the basis of the Off-Broadway show "The Exonerated." *See* Michael Hall, *Released from Prison, But Never Exonerated, a Man Fights for True Freedom*, N.Y. TIMES, March 31, 2012, at A25B.

113. *See Poventud SDNY*, No. 07 Civ. 3998 (DAB), 2012 WL 727802, at *3 (S.D.N.Y. Mar. 6, 2012). and *Jackson*, No. CV04-08017 RSWL (RZ), 2009 WL 1096276, at *1 (C.D. Cal. Apr. 21, 2009) aff'd in part, rev'd in part and remanded, 749 F.3d 755 (9th Cir. 2014) (both dismissing § 1983 claims because the courts interpreted the possible success on those claims as risking invalidation of Poventud's plea and Jackson's reconviction).

114. Cook is hardly the only innocent man who has been wrongfully convicted:

> It is impossible to know how many innocent people are currently imprisoned in this country, yet the wave of exonerations stemming from DNA testing in the last decade suggests the number is not insignificant. Even more, these exonerations likely comprise only the tip of the iceberg. The vast majority of criminal cases lack biological evidence suitable for DNA testing and these matters presumably contain the same proportion of flaws—erroneous eyewitness identifications, false confessions, ineffective assistance of counsel, and so forth—that led to the wrongful convictions in the cases later reversed through DNA tests. Notably, non-

admittedly more compelling than the exclusion of other individuals in the Poventud Population who may actually be guilty. However, while innocence provides a strong incentive to allow relief in these circumstances, is not essential to justify access to § 1983. Indeed, as the *Poventud* court reasoned, to read *Heck* as requiring innocence in order to escape its grasp is to misread the law.[115]

IV. *POVENTUD*—LOOSENING THE WEB

After his conviction was vacated, Poventud accepted a plea deal to a lesser charge and a sentence of time served—securing immediate release from prison—rather than await a new trial in custody.[116] When Poventud initiated suit under § 1983, his procedural posture provoked the question of whether the conviction pursuant to the plea following Poventud's vacatur triggered the *Heck* bar to remedies under § 1983.

A. Poventud—The District Court Decision

In 2007, Poventud brought a § 1983 action against the officials who conducted his original investigation, alleging *Brady* violations for the failure to disclose details of the victim's problematic identification of Poventud.[117] The trial court granted summary judgment for the City, first pointing to circuit precedent that held a conviction is necessarily undermined by the nondisclosure of evidence helpful to an alibi defense.[118] Second, the court reasoned that Poventud's subsequent guilty plea to attempted

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> DNA cases are much harder for defendants to overturn through post-conviction proceedings because of the absence of a method to prove innocence to a scientific certainty.

Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 131–32 (2004).

115. *See Poventud En Banc.* 750 F.3d at 134 (stating that the district court incorrectly "concluded that [Poventud's] recovery for a *Brady* claim would call his plea into question. That view misunderstands *Brady* and its correlation to § 1983 claims asserting only violations of the right to due process.").

116. *Poventud*, 715 F.3d at 58.

117. *Id.*

118. *Poventud SDNY*, 2012 WL 727802, at *3.

robbery meant he could not satisfy the favorable termination requirement of *Heck*.[119] Specifically,

> [Poventud's] guilty plea, which resulted in his second conviction and sentence, was to conduct which necessarily required his presence at the scene of the crime. To succeed on a § 1983 claim based on an alleged failure to reveal evidence supporting his claim to have been elsewhere when the crime to which he pleaded guilty occurred would thus call into question the validity of his conviction by guilty plea; indeed, success would logically imply the invalidity of his conviction.[120]

Finding this inconsistency to be fatal, the district court held that Poventud's claims were barred by the *Heck* doctrine and dismissed them.

B. Poventud—The Original Second Circuit Panel

Reversing the district court's grant of summary judgment for the defendants,[121] the first panel of the Second Circuit to hear Poventud's claims observed that claims of constitutional violations in Poventud's first conviction in no way undermined the subsequent

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119. *Poventud SDNY*, 2012 WL 727802, at *3. "Although plaintiff's [original] conviction was eventually vacated, he subsequently pled guilty to [attempted robbery] in order to avoid being retried. Since a guilty plea is the equivalent of a conviction, his claims under § 1983 must fail." *Id.* (quoting McNeill v. New York, 2006 WL 3050867, at *3 (E.D.N.Y. Oct. 24, 2006)).

120. *Poventud SDNY*, 2012 WL 727802, at *3.

121. The district court had held that "Poventud could survive summary judgment under *Heck* only by showing 'that the challenged conviction has been reversed, expunged, invalidated, or called into question.' Poventud could do none of this, the court concluded, either as to his first conviction or to his guilty plea. Moreover, Poventud's 'decision not to pursue in the state court an available remedy by which he could invalidate his [guilty plea] does not relieve him of his obligation to demonstrate its invalidity if he is to avoid the bar established in *Heck*.'" *Poventud*, 715 F.3d at 59 (quoting the district court, *Poventud SDNY*, 2012 WL 727802, at *4).

plea to attempted robbery.[122] *Heck*, therefore, did not bar Poventud's claims under § 1983.[123]

The very fact that Poventud's conviction had been vacated indicated that a *Brady* claim regarding that conviction would *not* necessarily implicate the validity of a remaining criminal conviction—whether resulting from a plea or a retrial:[124]

> To give a dramatic example: suppose a defendant is tortured viciously, confesses, and is convicted on the basis of that confession. Under *Heck*, he cannot, while in jail on that conviction, bring a § 1983 action for being tortured because that would undercut the conviction. But once his conviction is quashed (through habeas or in other ways), he is free to assert that he was tortured and seek a § 1983 remedy. Does the dissent really believe that this becomes less true if that defendant later freely confesses, even to the same crime? At that point, the claim for damages for torture in no way undercuts the second, and only existing, conviction and hence is in no way barred by *Heck*.[125]

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122. *Poventud*, 715 F.3d at 61 n.2, 65-66. The Poventud court based its holding on the unavailability of habeas relief. That line of reasoning is beyond the scope of this Note. However, in explaining the basis of its holding, the court stated, "[b]ecause Poventud is no longer in custody, and therefore can no longer bring a federal habeas suit, Heck's narrow exception to § 1983's otherwise broad coverage does not apply. Poventud may bring suit under § 1983 regardless of any defenses which might arise based on his subsequent guilty plea to the lesser charge." *Id.* at 58.

123. *Id.* at 61 n.2.

124. *See id.* ("Although we think it unnecessary to reach the issue in light of our conclusion that *Heck*'s bar does not apply to a § 1983 plaintiff who is not in custody, even if *Heck* did apply, we are doubtful that success on Poventud's § 1983 suit would 'necessarily imply the invalidity' of his subsequent guilty plea. The alleged *Brady* violation resulted in a conviction that was later vacated. Because that conviction was vacated—regardless of whether Poventud then pled guilty or was retried—victory in his § 1983 suit would no longer implicate the validity of an outstanding criminal judgment. Moreover, Poventud's § 1983 suit cannot call into question the validity of his guilty plea, inasmuch as it is undisputed that at the time he pled guilty Poventud was aware of the Brady violation on which his present lawsuit is based." (internal citations omitted)).

125. *Poventud*, 715 F.3d at 65.

The Second Circuit panel correctly characterized this type of procedural posture as falling outside the grasp of *Heck*.[126] Section 1983 claims cannot invalidate guilty pleas or convictions that occur after the first, officially unconstitutional, conviction is vacated. The § 1983 claims attack only an original, constitutionally deficient conviction; any subsequent plea or reconviction is distinct. The procedural posture of the Poventud Population implicates neither the comity interests that drove the *Preiser* Court nor the cognizance problems that were persuasive to the *Heck* Court.

The conclusion that the Poventud Population is not barred by *Heck* is not only coherent within Supreme Court precedent, it is also necessary to provide remedial measures to populations who are already weighed down by various legal, procedural, and normative barriers.[127] This was also the conclusion expanded on by the Second Circuit in *Poventud En Banc*.

C. Poventud—The En Banc Decision

Resting its decision on the interaction between *Heck* and *Brady*, the Second Circuit sitting en banc correctly determined that Poventud's § 1983 action was not barred by *Heck*.[128] Indeed, the court observed that not all § 1983 claims are barred by *Heck* because

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126. *See Poventud*, 715 F.3d at 64-65 (stating that Poventud's § 1983 action does not call his second conviction into question and noting that "[u]nder *Heck*, this [*Brady* claim] could not have been brought up prior to the quashing of his *first* conviction because a finding of a *Brady* violation would undercut that conviction. But once *that* conviction was quashed, the *Brady* violation—if one were established , and if it injured Poventud—would constitute an independent infringement of Poventud's constitutional rights, regardless of his *subsequent* conviction." *Id.* at 65 (emphasis in original)).

127. *See* Koehn, *supra* note 29, at 90.

128. "We . . . find that *Heck* does not bar Poventud's § 1983 suit because his claim does not necessarily imply the invalidity of his outstanding conviction." *Poventud En Banc*, 750 F.3d at 127; *see id.* at 132. ("This Court has emphatically and properly confirmed that *Brady*-based § 1983 claims necessarily imply the invalidity of the challenged conviction in the trial (or plea) *in which the Brady violation occurred.* That should come as no surprise; the remedy for a *Brady* violation is *vacatur* of the judgment of conviction and a new trial in which the defendant now has the *Brady* material available to her." (citing Amaker v. Weiner, 179 F.3d 48, 51–52 (2d Cir. 1999))).

not all claims call into question the validity of criminal convictions:[129]

> Unlike malicious prosecutions, many violations of constitutional rights, even during the criminal process, may be remedied without impugning the validity of a conviction. For example, when a suspect sues his arresting officer for excessive force, a § 1983 suit may proceed even if the suspect is ultimately convicted of resisting arrest.[130] When a plaintiff is unlawfully arrested without probable cause, his § 1983 claim accrues before any conviction.[131] Even *Heck* acknowledges that many unreasonable searches could lead to § 1983 actions that exist independent of the termination of the criminal proceedings.[132]

Upon this observation, the en banc panel objected to the district court's analysis of the interaction between Poventud's *Brady* claims and his outstanding plea.[133] The district court had determined that recovery for his *Brady* claim would call Poventud's guilty plea into question, since his guilty plea was at odds with his trial defense.[134] However, the district court incorrectly presumed that the state could only violate Poventud's *Brady* rights if he were innocent; "[t]hat view misunderstands *Brady* and its correlation to [Section] 1983 claims asserting only violations of the right to due process. . . .

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129. *See Poventud En Banc*, 750 F.3d at 132 ("Not every § 1983 claim that arises out of a criminal case requires that the underlying criminal process reach a favorable termination. Contrary to the district court's view in this case, *Heck* does not automatically bar a § 1983 claim simply because the processes of the criminal justice system did not end up in the plaintiff's favor. A plaintiff need not prove that any conviction stemming from an incident with the police has been invalidated, only a conviction that could not be reconciled with the claims of his civil action." *Id.* (quoting VanGilder v. Baker, 435 F.3d 689, 692 (7th Cir. 2006) (internal quotation marks omitted)).

130. *Poventud En Banc*, 750 F.3d at 132 (citing *VanGilder*, 435 F.3d at 692).

131. *Poventud En Banc*, 750 F.3d at 132 (citing Wallace v. Kato, 549 U.S. 384, 397 (2007), Morris v. Noe, 672 F.3d 1185, 1193–94 n.2 (10th Cir. 2012)).

132. *Id.* (citing *Heck*, 512 U.S. at 487 n.7).

133. *Id.*

134. *Id.* at 134.

even '[a] guilty man is entitled to a fair trial."[135] The court explained that the requirement of materiality to prove a *Brady* violation "does not depend on factual innocence, but rather what would have been proven absent the violation."[136] The court thus rejected the notion that allowing Poventud's § 1983 claims would invalidate his plea.[137]

Additionally, the en banc panel reasoned that *Heck* is not triggered when the underlying convictions have been invalidated, and that any subsequent § 1983 suit cannot impeach a new trial's result.[138]

> A court invalidate[s] the final judgment in [a] state criminal trial when [it] vacate[s] [a] conviction. From that moment on, a § 1983 suit would not demonstrate the invalidity of the vacated conviction. It also would not impugn a retrial, which on its face could not replicate the constitutional violations at issue (since the defendant must, by definition, have been made aware of the *Brady* material before *vacatur*).[139]

In Poventud's case, the court easily concluded that "Poventud's complaint allege[d] deficiencies in his 1998 trial that are entirely independent of the proceedings related to his 2006 plea."[140] Prior to his 2006 plea, Poventud had become aware of the information unconstitutionally withheld during his trial, so "his plea could not have implicated the constitutional violations at issue in his trial."[141] The 2006 plea "is a 'clean' conviction, untainted by the *Brady* violation associated with the 1998 conviction."[142]

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135. *Poventud En Banc*, 750 F.3d at 134, 137.

136. *Id.* at 134.

137. *Id.* at 137–38; "Poventud's allocution acknowledged his presence at the scene of the crime, which was inconsistent with his alibi defense at trial. However, this does not defeat the viability of his Brady claim. . . . Brady does not require actual innocence, and even '[a] guilty man is entitled to a fair trial.'" *Id.* at 137. (quoting People v. Buchalter, 289 N.Y. 181, 225 (N.Y. 1942) (Lehman, C.J., concurring)).

138. *Id.* at 134, 137–38.

139. *Poventud En Banc*, 750 F.3d at 134 (quoting and citing Smith v. Gonzalez, 222 F.3d 1220, 1222 (10th Cir. 2000) (citations omitted) (internal quotation marks omitted)).

140. *Poventud En Banc*, 750 F.3d at 136.

141. *Id.*

142. *Id.*

Poventud followed the command of *Heck*: he sought and received a favorable termination of his conviction by convincing a state court that his due process rights had been violated.[143] Were a Poventud Plaintiff to prevail on his or her § 1983 claims, it "would mean only that [the prior conviction] was the product of a constitutional violation."[144] In Poventud's case, and in § 1983 actions by the Poventud Population, a state court "has *already* reached this determination and vacated the conviction as a result."[145]

V. THE RIGHTS AT STAKE

Poventud and Jackson represent those whose criminal proceedings were plagued with constitutional violations and whose convictions were eventually terminated favorably. But Poventud and Jackson also represent those who were reconvicted on retrial or those who, in the interest of expediency, entered a guilty plea to a lesser charge. If courts allow *Heck* to bar these plaintiffs from access to § 1983, they will do so in the face of both sound legal reasoning as expressed in *Poventud En Banc* and *Jackson*, and various normative interests, like deterring constitutional violations at criminal trials and disincentivizing prosecutorial abuse of the *Heck* doctrine. Underlying the legal and normative reasons to allow the Poventud Population access to § 1983 are key principles: no subsequent criminal conviction a plaintiff endures should have the power to nullify the fact that the plaintiff suffered a constitutional injury; the courts should not let the plaintiff's status as a criminal defendant poison the right to be compensated for the violations perpetrated under color of law.[146]

A Olsen v. Correiro: Demonstrating the Risks Posed to the Poventud Population

In *Olsen v. Correiro*,[147] a particularly illustrative example of the potential losses awaiting plaintiffs from the Poventud Population, the First Circuit denied § 1983 relief to Olsen, who was in almost the

143. *Poventud En Banc,* 750 F.3d at 127.
144. *Id.* at 138.
145. *Id.*
146. *See* Koehn, *supra* note 29, at 56–97.
147. 189 F.3d 52 (1st Cir. 1999).

exact same procedural posture as Poventud.[148] Five years after Olsen's original 1986 conviction for first-degree murder, a Massachusetts court overturned the conviction and ordered a new trial because the investigating police officers failed to disclose an interview with the State's key witness.[149] In Olsen's subsequent § 1983 suit, the First Circuit explored Olsen's actions after his conviction was overturned:

> rather than go through another murder trial, Olsen pled nolo contendere to a charge of manslaughter and was convicted of that crime. The prosecution agreed to recommend a sentence of time served. . . . Olsen was sentenced to the time he had already served for the original conviction, the balance of the ten to fifteen-year manslaughter sentence was suspended, and he was placed on probation for five years.[150]

Olsen sued under § 1983 for damages arising from constitutional violations during the murder investigation and conviction.[151] The suit proceeded to trial, and a jury awarded Olsen $1.5 million in compensatory damages.[152] The defendants then filed motions for judgment as a matter of law.[153] Persuaded by the defendants' argument that Olsen's *nolo contendere* plea triggered the *Heck* bar,[154] the trial court granted the motion and entered an award of $300 in nominal damages for Olsen.[155]

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148. *Olsen*, 189 F.3d at 55.

149. *Id.*

150. *Olsen*, 189 F.3d at 55 (internal citations omitted).

151. *Id.*

152. *Id.* at 55–56.

153. *Id.* at 56.

154. The district court stated that a *nolo contendere* plea was no different from a guilty plea and held that pursuant to the mandates of *Heck*: "Requiring the defendants to compensate Olsen for his confinement, however, would necessarily do just that. Olsen's manslaughter sentence to time served has not been reversed, expunged, declared invalid, or called into question by any entity or court with the authority to impugn its lawfulness. Under *Heck,* Olsen's claim for damages based on an imprisonment imposed pursuant to a lawful conviction and sentence is not cognizable under § 1983." Olsen v. Correiro, Civ. A. No. 92-10961-PBS, 1994 WL 548111, at *4 (D. Mass. Sept. 26, 1994).

155. *Olsen*, 189 F.3d at 71.

Affirming the district court, the First Circuit denied Olsen the benefits of his § 1983 action.[156] The court held that various doctrines, including the practical benefits of pleas and the strong policy of enforcing them, required a holding that Olsen's action for damages was barred.[157] Speaking specifically of pleas, the court wrote:

> Allowing the incarceration-related damages Olsen seeks would undermine the availability of nolo pleas. Although nolo pleas represent a compromise on the question of guilt, society accepts them because they produce convictions and sentences that are final. Faced with the prospect of continuing litigation and a possible damages award, prosecutors will not agree to nolo pleas, making such pleas less available to defendants. As is demonstrated in this case, nolo pleas are of benefit to defendants: Olsen avoided a trial, a possible conviction, and the potential for additional imprisonment. Ensuring the continuing availability of nolo pleas requires that we not allow Olsen to avoid the full force and effect of his plea.[158]

This statement by the *Olsen* court demonstrates the risk that courts will incorrectly, although reasonably, favor the finality of pleas over the need to provide remedies for constitutional violations. Indeed, holdings such as *Olsen*, which counter the reasoning expressed in *Poventud* and *Jackson*, could create incentives for prosecutors to stall release and purposefully seek pleas from criminal defendants who had their convictions invalidated in some way, and thus shield the state from suit under § 1983.

156. *Olsen,* 189 F.3d at 66.
157. *Id.*
158. *Olsen*, 189 F.3d at 69.

B. Brady v. Maryland: Important Rights Worth Protecting

While the Constitution does not explicitly guarantee the right to a "fair trial,"[159] trials fraught with constitutional violations violate the Fifth and Fourteenth Amendments' guarantee of due process of law:[160]

> As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.[161]

Therefore, bias on the part of the judge, public hostility toward a defendant that intimidates the jury, and the fairness of a particular rule of procedure can be the basis for due process claims.[162] But one of the most common violations is the state's lack of cooperation with the commands of *Brady v. Maryland*.[163]

A *Brady* violation also amounts to a constitutional violation that can infect the fairness of a trial; Poventud's conviction was vacated due to this type of violation.[164] *Brady* violations are far from rare,[165] which is further reason to allow the Poventud Population

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159. The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

160. *See* DAVID RUDOVSKY & KAREN BLUM, POLICE MISCONDUCT: LAW AND LITIGATION 3d § 2:30 (2013–2014 ed.) (discussing various types of misconduct held to be violations of due process).

161. Lisenba v. California, 314 U.S. 219, 238 (1941).

162. *Fair Trial*, JUSTIA US LAW, http://law.justia.com/constitution/us/amendment-14/57-fair-trial.html (collecting cases).

163. *See infra* notes 172-178. A *Brady* violation occurs when the exculpatory and impeaching evidence is not disclosed to the defendant.

164. *See Poventud En Banc*, 750 F.3d. at 126.

165. *See infra* notes 172–178.

access to § 1983 in order to alleviate the violations of their due process rights.

Brady requires the prosecution to disclose all exculpatory evidence in its possession, which includes any information that is favorable to the defendant or to a defense.[166]

> *Brady* broke new ground in holding that a prosecutor also violates a defendant's due process rights merely by failing to disclose material evidence in his possession that is favorable to the defendant, irrespective of the good or bad faith of the prosecutor. As a result, *Brady* is 'sometimes referred to as imposing a no-fault disclosure obligation' on prosecutors.[167]

The Supreme Court later clarified that *Brady* also requires the state to disclose evidence known only to law enforcement, though unknown to prosecutors.[168]

Despite the seemingly broad duty to disclose, "[t]he optimism felt by criminal defendants in the aftermath of *Brady* has been tempered by the application of this doctrine in practice."[169] In spite of the honest efforts of many prosecutors,

> *Brady* violations take place with regularity. Studies have pinpointed the suppression of exculpatory evidence as a factor in many documented wrongful convictions later overturned by post-conviction DNA testing. In some of those cases, prosecutors simply

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166. "Evidence is favorable to a defendant if it is either exculpatory or impeaching in nature. Evidence is material if there is a reasonable probability that, had it been disclosed, the result of the proceeding would have been different. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. Thus, a reasonable probability exists when the withholding of evidence undermines confidence in the outcome of the trial." Drumgold v. Callahan, 707 F.3d 28, 38–39 (1st Cir. 2013) (internal citations and quotation marks omitted).

167. *Drumgold*, 707 F.3d at 38 (citing Brady v. Maryland, 373 U.S. 83, 87 (1963); Haley v. City of Boston, 657 F.3d 39, 48 (2011)).

168. *Id.* at 38.

169. Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1539 (2010).

> deemed the evidence not to be important. In others, prosecutors eager to secure convictions willfully bypassed the disclosure rules. Analyses of wrongful convictions lacking DNA evidence further suggest that *Brady* violations frequently contribute to the conviction of the innocent. Worst of all, proven *Brady* errors hint at a larger problem because the vast majority of suspect disclosure choices occur in the inner sanctuaries of prosecutorial offices and never see the light of day.[170]

For example, one study by the *Pittsburgh Post-Gazette* examined 1,500 cases and determined that while the rate of nondisclosure was high, the appellate courts found reversible error in only a handful of cases.[171] Another study found that of all the cases alleging *Brady* violations in 2004, the reversal rate was less than 12%.[172] In the context of the death penalty, constitutional violations of *Brady* are also rampant. One study found that "sixty-eight percent of all death verdicts imposed and fully reviewed during the 1973-1995 study period were reversed by courts due to serious error."[173]

> In that study, prosecutorial misconduct, primarily the suppression of evidence, accounted for the second highest incidence of serious error. The evidence suppressed in those cases established either the innocence of the defendant or the fact that he did "not deserve the death penalty."[174]

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170. Medwed, *supra* note 169, at 1539–40.

171. *Id.* at 1543–44.

172. *Id.* at 1543–44. *See also* Bill Moushey, *Win at All Costs: Out of Control*, Pittsburgh Post-Gazette, Nov. 22 1998, at A-1 (discussing the low rate of reversals in the face of high rates of non-disclosure in violation of *Brady*).

173. Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 U. D. C. L. REV. 275, 279 (2004) (citing JAMES S. LIEBMAN ET. AL., A BROKEN SYSTEM PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES AND WHAT CAN BE DONE ABOUT IT (2002), *available at* http://www2.law.columbia.edu/brokensystem2/index2.html (detailing the results of wrongful conviction studies in the United States)).

174. *Id.*

Prosecutors who violate *Brady* are rarely held accountable within their own offices or by disciplinary boards.[175] For example:

> In addition to the exoneration cases, other studies confirm the longstanding phenomenon of lack of any consequences for prosecutors who engage in misconduct. The Center for Public Integrity, in an analysis of prosecutorial misconduct, studied post-1970 appellate decisions in each state. Its New York study revealed 1,283 state cases in which defendants alleged prosecutorial error or misconduct. In 277 cases, judges ruled that a prosecutor's conduct prejudiced the defendant and reversed or remanded the conviction or dismissed the indictment. In forty-four other cases, a dissenting judge or judges thought the prosecutor's conduct prejudiced the defendant. Out of all the defendants who alleged misconduct, ten later proved their innocence. There is no indication that any prosecutor in those cases was subject to discipline.[176]

All of this is to say that unconstitutional trials are happening often and mostly without redress. Many in the Poventud Population suffered constitutional violations at their trials that led to the favorable termination demanded by *Heck*. Allowing a subsequent plea or reconviction—distinct and separate from the constitutional violations that occurred during the original trial—to trigger *Heck*'s bar *protects* prosecutors and undermines the deterrent goals of § 1983. Moreover, the *Heck* bar denies plaintiffs the chance to seek compensation for the constitutional violations present in their original case. Plaintiffs would likely not have trouble proving these violations again in a § 1983 action since they were proved for the earlier favorable termination. For these reasons and others discussed below, the Poventud Population should not be barred from § 1983 remedies.

The *Poventud En Banc* court correctly decided the issue of whether § 1983 relief should be available to those plaintiffs who

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175. Yaroshefsky, *supra* note 173, at 279. (collecting various studies regarding disciplinary action against prosecutors).

176. *Id.* at 280.

either accepted a plea bargain or were reconvicted after a vacatur of their constitutionally deficient convictions. Additionally, the rights protected by the *Brady* doctrine encourage disavowing the *Heck* bar for the Poventud Population. However, it is unclear whether other circuits will follow the reasoning in *Poventud En Banc* or the contrary reasoning in *Olsen*. The normative interests in deterring constitutional violations through § 1983, as well as providing compensation for those violations, urge a universal holding that § 1983 remedies should be available for the Poventud Population. If § 1983 remedies are not available for the Poventud Population, a worthy class of plaintiffs (including some innocent plaintiffs) will be excluded from any federal remedy, and the unconstitutional denial of the right to a fair trial—one of our most treasured rights—effectively sanctioned.

VI. IN NEED OF PROTECTION—WHY *HECK* SHOULD NOT BAR THE POVENTUD POPULATION

There are various reasons why the Poventud Population should be free to pursue remedies under § 1983. First, by virtue of their unique procedural circumstances whereby a § 1983 suit does not implicate a subsequent plea or conviction, the Poventud Population does not create the same finality and comity concerns as *Heck* did and thus fall outside that case's holding. Second, § 1983's goal of deterring constitutional violations calls for the Poventud Population to have access to its remedies.[177] Raising the *Heck* bar for this group of plaintiffs not only undermines the possibility of deterring more constitutional violations but also incentivizes prosecutors to commit further constitutional violations. Third, while there are arguments that damages in these types of cases might be minimal and allowing these suits would undermine the finality of pleas, the normative force of allowing access to § 1983 for the Poventud Population outweighs those practical concerns. Underlying the decision to erect the *Heck* bar is the suspicious possibility that courts are allowing the status of plaintiffs as convicted criminals to impact their ability to gain redress.[178] Even

177. *See supra* Part IIA (discussing the aims of § 1983).

178. *See* Koehn, *supra* note 29, at 50–51 ("The Supreme Court appears to be creating a hierarchy both of constitutional rights and of plaintiffs: free speech and

the appearance that courts prejudicially view plaintiffs because they are convicts is worth avoiding—another reason courts should hold that the *Heck* doctrine does not bar the Poventud Population from § 1983 claims.

A. The Poventud Population Does Not Implicate the Heck Concerns

Heck should not bar plaintiffs with pleas or convictions subsequent to a favorable termination.[179] The argument is simple: a § 1983 suit alleging constitutional violations at a trial that led to a conviction which has since been vacated only undermines the original conviction, but does not implicate the finality of a subsequent plea or conviction. Nor are the comity concerns that the Supreme Court highlighted in *Preiser* present.

For the Poventud Population, the favorable termination has undermined the original, unconstitutional proceeding, leaving only a subsequent conviction pursuant to a plea or retrial. As the Second Circuit explained:

> The district court [erroneously] treated Poventud's case as though it were a malicious prosecution claim. It measured his admission in the subsequent plea agreement against his claims in his *Brady* submission. Because his 2006 plea was at odds with his alibi defense at his 1998 trial, [the court] concluded that his recovery for a *Brady* claim would call his plea into question. That view misunderstands *Brady* and its correlation to § 1983 claims asserting only violations of the right to due process.[180]

Indeed, § 1983 claims regarding unconstitutional procedural violations at a trial do not undermine any later, and distinct, plea or conviction. Specifically, *Heck*'s core concern of finality would not be undercut by the success of a Poventud Plaintiff in a § 1983

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takings claims are favored at the top of the heap, while prisoner civil rights actions and suits against police officers are disfavored at the bottom of the heap. . . . [T]he Court has created the hierarchy by manipulating the procedural barriers that must be overcome before the courts can reach the merits of plaintiffs' claims.").

179. *Poventud*, 715 F.3d at 61 n.2; *Jackson*, 749 F.3d 755.

180. *Poventud En Banc*, 750 F.3d at 134.

trial.[181] Because the Poventud Population's § 1983 claims are premised on their favorable termination—an "unchallenged finding made in state court"[182]—the finality of the original conviction has already been undercut. Additionally, the finality of a subsequent conviction is not undercut by a § 1983 action that challenges violations in a separate proceeding.[183] The Second Circuit explained this principle as it applied to Poventud: "[His] success at trial would mean only that his 1998 conviction was the product of a constitutional violation; in this case, a New York State court has *already* reached this determination and vacated the conviction as a result."[184] The *Jackson* court based its decision on the same logic:

> In this case it is Jackson's second conviction for first degree murder that is outstanding. It is undisputed that the second conviction was insulated from the inculpatory statements that are the subject of Jackson's § 1983 suit against Barnes. The first conviction is the case in which the Fifth Amendment violation occurred. Therefore a judgment in Jackson's favor would—far from "necessarily imply[ing]" the invalidity of his second conviction—not have any bearing on it. The only conviction a judgment in Jackson's favor would bear on is his first conviction, which was 'called into question by a federal court's issuance of a writ of habeas corpus.' In fact, more than 'called into question,' it was reversed. Thus, Jackson's § 1983 claim against Barnes for the Fifth Amendment violation is not barred by Heck.[185]

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181. *See Poventud En Banc*, 750 F.3d at 138 (speaking of *Poventud* specifically). *See also* McCain v. District of Colombia, 70 F. Supp. 3d 525, 533 (D.D.C. 2014) (denying dismissal of a § 1983 claim where the criminal defendant's convictions for driving under the influence and related charges were based on an improperly calibrated breathalyzer machine but who had subsequently been convicted of one DUI charge; observing that even the state conceded her second conviction was for a charge that required proof of different evidence from her first, invalid, conviction).

182. *Poventud En Banc*, 750 F.3d at 138.

183. *Id.*

184. *Poventud En Banc*, 750 F.3d at 138.

185. *Jackson*, 749 F.3d at 760 (internal citations omitted).

The Poventud Population will all have had a court determine that their convictions were a product of a constitutional violation. The existence of this prior state court decision nullifies the Supreme Court's concern with comity when deciding between habeas corpus and § 1983 relief. In *Prieser*, the Court stated that the exhaustion protects the interests of comity by "avoid[ing] the unnecessary friction between the federal and state court systems that would result if a lower federal court upset a state court conviction without first giving the state court system an opportunity to correct its own constitutional errors."[186] However, in the case of the Poventud Population, the state will necessarily have taken advantage of that very opportunity. Because the Poventud Population does not implicate the finality or comity concerns protected by Supreme Court precedent, the *Heck* bar should not restrict their access to § 1983.

B. Encouraging Deterrence

Section 1983 plaintiffs in procedural postures similar to those in *Poventud SDNY* and *Jackson* are at risk of being denied the remedies properly due to them. This risk runs counter to the strong policy interests in compensating those criminal defendants who have suffered serious constitutional violations. Perhaps the most important of these interests is deterrence.

In theory, though rarely in practice,[187] a variety of sanctions deter police and prosecutors from suppressing exculpatory evidence or presenting false evidence.[188] For example, "[t]he later discovery of the misconduct might result in a reversal of the convictions. The prosecutor could be sanctioned by a contempt citation, criminal prosecution, or removal from office. Because these latter sanctions are rarely, if ever, applied to *Brady*-type misconduct, however, they have little deterrent value."[189] It is clear that internal regulation and

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186. *Preiser*, 411 U.S. at 490.

187. *See supra* Part VB (discussing how rarely prosecutors are held accountable for Brady violations). The very fact that discipline for *Brady* violations is rare supports the notion that courts should be open to allowing vindication for the Poventud Population though § 1983.

188. *See generally* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 703-08 (1987) (discussing methods available to punish prosecutorial misconduct).

189. *Id.* at 703.

oversight is not enough to deter constitutional violations of the sort that took place in *Poventud*.[190] Nonetheless, because "[p]rosecutorial suppression and falsification of evidence strikes at the very heart of our criminal justices system," it is not only "misconduct by the representative of the state, but it also calls into question the accuracy of the mechanism by which our society deprives individuals of their freedom and their lives."[191] Therefore, enforcing an effective deterrent is critical.[192] As discussed above, constitutional violations, such as a failure to follow the mandate of *Brady*, are common, but discipline is rare—indeed, deterrence is currently ineffective.[193] However, ensuring the availability of § 1983 for the Poventud Population, and the knowledge that state officials could be liable for damages for the withholding of exculpatory evidence, would help to increase deterrence.

Additionally, holdings that any subsequent plea or conviction bars § 1983 suits for the constitutional violations in the original

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190. When the court limited the use of § 1983 against public prosecutors in Imbler v. Pachtman, 424 U.S. 409 (1976), it did so on the assumption "that the immunity of prosecutors from liability . . . under § 1983 does not leave the public powerless to deter misconduct or punish that which occurs because a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies That Prove That Assumption Wrong*, 80 FORDHAM L. REV. 537, 537 (2011) (internal quotations marks omitted).

191. Rosen, *supra* note 188, at 731.

192. This is especially true when the most typical form of deterrence of *Brady* claims is the possibility of a reversal, a possibility that has been diminished. *See id.* at 705 ("Unfortunately, the deterrent effect of a potential reversal has been undermined by the Supreme Court's development of strict materiality requirements in *Brady* cases. Materiality has a special meaning in the *Brady* due process context, for to be material in a *Brady* case false or suppressed evidence must be of sufficient importance that, when viewed in light of all of the evidence in the case, its presence or absence would affect the outcome of the case. In this sense the concept of materiality in a *Brady* case is equivalent to the concepts of prejudice or harmless error courts employ in other areas of criminal law. Only if sufficient prejudice or harm to the defense arises from the absence of the undisclosed evidence or from the presence of the false evidence will the suppressed or false evidence be considered material and the conviction reversed.").

193. *See supra* Part VB (discussing the lack of enforcement of sanctions for *Brady* violations).

conviction[194] have the potential to create improper incentives for prosecutors; namely, to insist on pleas to lesser charges or retrials every time criminal defendants secure favorable terminations. Prosecutors could effectively insulate police from suit by always demanding a plea to a lesser charge or re-trying the criminal defendant. This incentive would exist in situations where a significant amount of time has passed, where retrial would be costly and risky, or where the "right thing" to do would be to dismiss the charges. The incentive would even exist when a defendant is exonerated completely but, like Cook, took a plea to avoid the risk of the death penalty[195] or secure release.[196]

When constitutional violations have occurred against criminal defendants, who are typically disadvantaged already, we should insist on procedures that expedite their relief or compensation. Following the reasoning of *Poventud En Banc* would do just that.

C. The Benefits Outweigh the Risks

The Poventud Population may be small, but there are important benefits to allowing the population to bypass the *Heck* bar. In addition to the deterrent effect of allowing § 1983 access to the Poventud Population, it will also encourage attorneys to take on such cases. One reason there are not many reported cases dealing with the issues presented in *Poventud* and *Jackson* is the fact that attorneys may be hesitant to take cases that *Heck* may immediately extinguish. If the other circuits were to adopt the reasoning of *Poventud* and *Jackson*, however, attorneys would receive the signal that Poventud Plaintiffs are not barred by *Heck*. Encouraging attorneys to take these § 1983 cases would also aid in the deterrent force of these actions under § 1983. Additionally, allowing the Poventud Population to access § 1983, and thereby encouraging attorneys to take on such cases, would be in accordance with Congressional intent:

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194. *See, e.g.*, *Olsen*, 189 F.3d at 55 (holding that incarceration based damages are barred when defendant pled nolo contendere to lesser charge rather than face a new trial).

195. *See supra* Part III (discussing the state's various attempts to sentence Cook to the death penalty).

196. *See supra* Part I (describing Marcos Poventud's decision to take a plea in order to gain his freedom).

> To further enable persons seeking to protect federal rights to bring actions, Congress enacted 42 U.S.C. § 1988 in 1976. Section 1988 allows certain "prevailing parties" (including those who filed suit under section 1983) to recover attorneys' fees as part of their costs. . . . The intent, obviously, is to encourage attorneys to pursue civil rights cases and to make it easier for indigents to find attorneys to enforce and defend their rights. Section 1988 reinforces the seriousness of Congress' intent to protect the constitutional rights of all persons within the borders of the United States. Congress did *not* want a subclass of poor citizens to develop. The Constitution protects all citizens, not just those with enough money to fight in court. Section 1988 [allowing attorneys' fees] is a means to achieve that goal.[197]

Despite the importance of deterrence and allowing vindication of the constitutional violations, there are various concerns about allowing the Poventud Population access to § 1983. First, there is a concern that a Poventud Plaintiff's damages would be minimal. While some damage awards are in the millions,[198] others may be significantly less, especially for plaintiffs whose time spent in prison is not significantly different than the sentence imposed pursuant to the post-vacatur plea or conviction.

However, concerns about the quantity of damages are outweighed by the justice inherent in allowing Poventud Plaintiffs the *chance* to be compensated for the wrongs committed against them. Justifying a bar to § 1983 because of potentially small damage awards does not pass muster when compared to the interests that urge access to the remedy.

Second, there is a valid concern that some members of the Poventud Population *are guilty*, and therefore are not entitled to damages for the violations that led to the same substantive result as would have occurred absent those violations. But the focus of such a concern is misguided. The guilt or innocence of a Poventud Plaintiff is irrelevant. Allowing these individuals to sue under § 1983 is

197. Koehn, *supra* note 29, at 54.
198. *Olsen*, 189 F.3d at 55–56.

merely a vehicle for vindicating their constitutional rights to due process of law and a fair trial—rights they possess regardless of guilt or innocence.

Judge Lynch of the Second Circuit cogently responded to the argument that allowing § 1983 relief for defendants like Poventud would reward a defendant who has subsequently "admitted" his guilt through a plea.[199] Judge Lynch described the argument by writing, "Poventud has now admitted, under oath (albeit under deeply questionable circumstances) that he was indeed involved in the robbery. Are we to award damages, in effect, for the fact that Poventud lost the opportunity to be acquitted of a crime that he may very well have committed . . . ?"[200] The judge's answer was clear:

> I believe that we must. As a matter of law, in order to prevent the horror of convicting an innocent person, we insist that someone charged with a crime may only be convicted and punished if the state can prove his or her guilt by a very demanding standard of proof, beyond a reasonable doubt. If a defendant cannot be thus proven guilty—if the evidence, however *suggestive* of guilt it may be, does not rise to a sufficient level of strength, that defendant must be declared not legally guilty of the crime charged. And certainly, if a defendant is found legally guilty by a jury that has been deprived of the full story by government misconduct, that conviction is void.[201]

Accordingly, allowing redress for the violations that led to an invalid conviction has very little to do with the Poventud Plaintiff's guilt or innocence. It has everything to do with the due process guarantees of our criminal justice system. In honor of those guarantees, courts should allow the Poventud Population to pursue § 1983 claims.

Lastly, there is a concern that allowing the Poventud Population access to § 1983 will risk upsetting the finality of pleas. If we allow Poventud Plaintiffs to pursue § 1983 actions, despite their subsequent pleas, it could be argued that the plea has been

199. *Poventud En Banc*, 750 F.3d at 143 (Lynch, J. concurring).
200. *Poventud En Banc*, 750 F.3d at 143 (Lynch, J. concurring).
201. *Id.*

undermined. However, as the *Poventud* and *Jackson* courts made clear,[202] a § 1983 action alleging violations during a proceeding that led to a conviction already undermined by a *Heck* favorable termination has no reflection on the validity of a subsequent plea. Importantly, those pleas are often taken for more pragmatic reasons, such as to secure release from prison.[203] And recognizing that pleas carry practicalities with them is not enough to undermine the entire system of plea bargaining, at least not in a Poventud situation, where the § 1983 action is not even challenging the validity of that plea, but simply seeking redress for constitutional violations that were suffered beforehand.

Perhaps the most troubling aspect of the focus on a Poventud Plaintiff's subsequent conviction is the risk that courts may decide that only innocent plaintiffs should have access to § 1983. As the Second Circuit explained:

> The district court's view incorrectly presumes that, on the facts of this case, the State could violate Poventud's *Brady* rights only if Poventud is an innocent man. This last restriction has no basis in the *Brady* case law; materiality does not depend on factual innocence, but rather what would have been proven absent the violation.[204]

In his concurrence Judge Lynch did not doubt the legality of Poventud's guilty plea,[205] but disagreed with weight placed on that plea by the dissenters, saying:

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202. *See supra* Part III and accompanying notes.

203. *See Poventud En Banc*, 750 F.3d at 141 (Lynch, J., concurring) ("Poventud thus faced a stark choice: he could continue to fight, risking the possibility that his sentence of up to twenty years in prison would be restored against the hope of a complete acquittal. Or, he could accept the offer, plead guilty, *and go free immediately*. Poventud accepted the offer: he pled guilty to attempted robbery in the third degree, was sentenced to a fraction of the time he had already spent in prison, and walked out of the courthouse a free man.").

204. *Id.* at 134.

205. "I understand, and agree with the dissenters, that a defendant cannot disavow legal guilt for an offense to which he has lawfully pled guilty, no matter how much he might claim, and whether or not an impartial observer might believe, that his choice to plead guilty was made under circumstances under which an innocent person might well enter such a plea. Poventud, as I have noted and as the

> [T]he dissenters appear to insist that [Poventud's] guilty plea represents not just a legal truth, but an existential one. According to the dissenters, Poventud's plea requires us to treat him not only as if he were guilty of the lesser offense of which he is *legally* guilty, and justly subjected to the relatively short sentence that he accepted, but also as if he had been fairly convicted of the far more serious crimes, and fairly subjected to the drastically more stringent sentence, that resulted when the authorities cheated and suppressed evidence that might have led to his acquittal. That version of "the truth," however, has no basis in law: Poventud never pled guilty to those more serious offenses, and he was found guilty of them only after a deliberately and tortiously flawed process. Poventud seeks to sue the defendants because they distorted the search for the truth and obtained a conviction that cannot fairly stand.[206]

Lynch's persuasive reasoning not only supports the legal argument that § 1983 claims regarding a first invalidated conviction do not affect a subsequent plea or conviction, but also speaks to normative goals and interests of justice that urge courts to provide access to § 1983 remedies for the Poventud Population.

VII. CONCLUSION

The steps for releasing members of the Poventud Population from the web created by § 1983, habeas corpus, *Heck*, and constitutional violations should be clear. The Poventud Population should not be barred by *Heck* because § 1983 actions regarding a favorably terminated conviction do not implicate the finality or comity concerns the Court expressed in *Heck*.[207] Additionally, the justice in providing a mechanism to compensate for constitutionally

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Court concludes, must accept the consequences of that plea." *Poventud*, 750 F.3d at 145 (Lynch, J. concurring).

206. *Poventud En Banc*, 750 F.3d at 145–46 (Lynch, J. concurring).

207. *See supra* Part VIA (discussing *Heck*'s rationale and its inapplicability to the Poventud Population's concerns).

deficient proceedings, the normative goals of deterrence, and the risk of creating problematic incentives that allow prosecutors to effectively shield the state from suit under § 1983 provide all the rationale necessary for courts to adopt the reasoning expressed in *Poventud En Banc*. Indeed, courts should rule that the Poventud Population—individuals whose convictions are overturned for a constitutional violation, and either plead in order to secure immediate release or are retried and convicted again—should *not* be barred from asserting the right to a federal remedy under § 1983.

Tracing the Evolution of Food Fraud Litigation: Adopting an Ascertainability Standard that is "Natural"

Sarah Valenzuela*

I. INTRODUCTION

"Hazed & Confused," "Peanut Butter Fudge," "Salted Caramel," and "That's My Jam" are the new "core" ice cream flavors that have recently garnered media attention for Ben & Jerry's. But, this new line of ice cream flavors is not the only thing bringing Ben & Jerry's media attention. Not long ago, Ben & Jerry's was undoubtedly "Hazed & Confused" itself when it was slapped with a lawsuit for its use of the word "natural" to describe its ice cream. Plaintiffs in a putative class action lawsuit alleged that they

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had been duped into thinking the products were "natural" when, in reality, the products contained "Dutch" cocoa, an ingredient the plaintiffs claimed was "synthetic" and "man-made."[1] The company ended up settling the claim for $5 million.[2] Ben & Jerry's is not alone in its recent legal plight over the use of the word "natural;" other companies have settled similar claims—including, Barbara's Bakery ($4 million), Cargill ($5 million), PepsiCo ($9 million), and Trader Joe's ($3.4 million).[3]

The Ben & Jerry's suit is representative of a new trend in food litigation in which plaintiffs bring consumer class actions against food manufacturers for falsely representing that their products are "natural," "all natural" or "100% natural" (among other representations), claiming violations of state consumer fraud statutes.[4] The Food and Drug Administration's (FDA) refusal to

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1. Astiana v. Ben & Jerry's Homemade, Inc., Nos. C 10–4387 PJH, C 10–4937 PJH, 2011 WL 2111796, at *1 (N.D. Cal. May 26, 2011).

2. Anastasia Killian, *"Natural" Selection: Survival of the Litigious*, FORBES (June 27, 2012, 4:54 PM), http://www.forbes.com/sites/wlf/2012/06/27/natural-selection-survival-of-the-litigious/.

3. Clare Leschin-Hoar, *The Surprising Reason Fewer Foods are Being Labeled "Natural,"* TAKEPART (last visited Nov. 12, 2013), http://www.takepart.com/article/2013/11/12/why-companies-are-removing-term-natural-products.

4. *See, e.g.*, Carrera v. Bayer Corp., 727 F.3d 300, 304 (3d Cir. 2013) (seeking certification of a class of Florida consumers under the Florida Deceptive and Unfair Trade Practices Act, alleging Bayer deceptively advertised its product "One-A-Day WeightSmart"); Ebin v. Kangadis Food Inc., 297 F.R.D. 561, 564 (S.D.N.Y. 2014) (class suing under New York and New Jersey common law and New Jersey's Consumer Fraud Act, alleging defendant sold "100% Pure Olive Oil" that contained an industrially processed substance); Sethavanish v. ZonePerfect Nutrition Co., No. 12–2907–SC, 2014 WL 580696, at *1–2 (N.D. Cal. Feb. 13, 2014) (class suing for common law fraud in addition to claims under California's Unfair Competition Law, False Advertising Law, and Consumers Legal Remedies Act, alleging the "all natural" label on defendant's ZonePerfect bars was misleading); Ries v. Ariz. Beverages USA LLC, 287 F.R.D. 523, 527 (N.D. Cal. 2012) (class suing under California's Unfair Competition Law, False Advertising Law, and Consumers Legal Remedies Act, alleging defendant misrepresented Arizona Iced Tea as "all natural" when it contains high fructose corn syrup); *Astiana*, 2011 WL 2111796, at *1–2 (class alleging defendants violated California's Business & Professions Code and Health & Safety Code by misrepresenting ice cream as "all natural"); Turek v. Gen. Mills, Inc., 754 F. Supp. 2d 956, 956 (N.D. Ill. 2010) (class alleging defendants violated the Illinois Consumer Fraud and Deceptive Practices Act in marketing and selling food

define the term "natural" is one of the primary causes of the uptick in litigation.[5] The FDA has only provided informal, non-binding guidance on the use of "natural"—leaving the landscape ripe for lawsuits. Plaintiffs allege that large food companies misuse the term to misrepresent their products as "all natural" when they are not.[6]

This influx of lawsuits against large food manufacturers has come in waves.[7] During the "first wave" of food-fraud litigation, defendants—for the most part unsuccessfully—argued that the plaintiffs' state law consumer claims were preempted by the Federal Drug and Cosmetics Act (the federal statute governing food labeling).[8] Indeed, much of the scholarship on food-fraud litigation has focused exclusively on issues of preemption,[9] and many scholars

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products); Lockwood v. Conagra Foods, Inc., 597 F. Supp. 2d 1028, 1029 (N.D. Cal 2009) (class alleging defendant violated California's Unfair Competition Law by advertising its "Healthy Choice" pasta as "all natural" when the pasta contained high fructose corn syrup); Ackerman v. Coca-Cola Co., No. CV–09–0395 (JG)(RML), 2010 WL 2925955, at *1 (E.D.N.Y. July 21, 2010) (including claims on behalf of three classes of plaintiffs brought under California, New York, and New Jersey consumer protection statutes).

5. Nicole E. Negowetti, *A National "Natural" Standard for Food Labeling*, 65 ME. L. REV. 581, 588 (2013) (quoting *What is the Meaning of "Natural" on the Label of Food*, FDA, http://www.fda.gov/AboutFDA/Transparency/Basics/ucm 214868.htm (last updated Apr. 4, 2012)).

6. *See supra* note 4 (collecting cases).

7. R. Trent Taylor, *United States: 2014 Food Industry Outlook—Food Labeling Litigation*, MONDAQ (Jan. 13, 2014), http://www.mondaq.com/united states/x/285746/food+drugs+law/2014+Food+Industry+Outlook+Food+Labeling+ Litigation; Anthony T. Pavel & Robert G. Hibbert, *Food Claims Litigation: Seller Beware*, RECENT DEVELOPMENTS IN FOOD AND DRUG LAW 135, 139 (2013 ed. 2012), *available at* 2012 WL 4971930, at *3 ("The Next Wave of Litigation").

8. *See* Pavel & Hibbert, *supra* note 7, at 139–40 (discussing this first wave of food-fraud litigation).

9. *See,* e.g., Taryn M. DeVeau, *Naturally Confusing Consumers: Express Federal Preemption of State Claims Regarding False and Misleading Food Product Labels*, 5 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 119, 121 (2012–2013) (analyzing preemption issues in the context of federal regulation of food product labeling); Adam C. Schlosser, Note, *A Healthy Diet of Preemption: The Power of the FDA and the Battle over Restricting High Fructose Corn Syrup from Food and Beverages Labeled "Natural,"* 5 J. FOOD L. & POL'Y 145, 149 (2009) (discussing preemption analysis and analyzing how the FDA should regulate the use of the term "natural" on food labels).

have called upon the FDA to provide a formal and binding definition of "natural."[10]

Recently, however, food-fraud litigation has gone in a different direction. Increasingly, defendants are challenging plaintiffs' class certification.[11] Because some defendants have been successful in defeating class certifications, challenging class certifications may be the potential "silver bullet" for large food companies defending these lawsuits.[12] Of particular interest to defense attorneys and scholars alike is the "ascertainability" requirement for class certification that courts have found implicit in Federal Rule of Civil Procedure 23.[13] The ascertainability requirement requires that the members of the class be identifiable and that the class be precise. Recently, in one food-fraud claim against Bayer, the Third Circuit imposed an extremely stringent ascertainability standard and held that the class should not have been certified.[14]

The ascertainability requirement has divided the federal district courts where plaintiffs are bringing food-fraud claims.[15] While most courts acknowledge the existence of the requirement, federal courts have applied varying standards for ascertainability.[16] Some courts, like the Third Circuit, have adopted an ascertainability

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10. *E.g.*, Negowetti, *supra* note 5.

11. *See* Taylor, *supra* note 7 ("We are now in the midst of the 'second wave' of labeling suits, which are exemplified by narrower claims . . . . [C]lass certification is quickly becoming the central battlefield in this litigation rather than motions to dismiss.").

12. Gienn G. Lammi, *Decertification Silver Bullet?: Ascertainability Concerns Spoil 'Natural' Food Labeling Suit*, FORBES (Feb. 21, 2014), http://www.forbes.com/sites/wlf/2014/02/21/decertification-silver-bullet-ascertainability-concerns-spoil-natural-food-labeling-suit/2/.

13. *See* Jason Steed, *On "Ascertainability" as a Bar to Class Certification*, 23 APP. ADVOC. 626, 628 (2011) (discussing, in depth, the manner in which most circuits have acknowledged the ascertainability requirement).

14. *See* Carrera v. Bayer Corp., 727 F.3d 300, 312 (3d Cir. 2013) (vacating and remanding the certification of a class based on plaintiffs' failure to meet the ascertainability requirement).

15. *See infra* Part IV (discussing how courts have interpreted the ascertainability requirement).

16. *See* 1 MCLAUGHLIN ON CLASS ACTIONS § 4:2 (10th ed. 2013) (discussing various standards for the ascertainability requirement applied by different courts).

standard that would preclude most, if not all, plaintiffs from bringing food-fraud claims.

This Note argues that courts should not impose a demanding ascertainability standard that defeats plaintiffs' food-fraud claims. Specifically, this Note argues that class actions serve as a regulatory check on large food manufacturers who misuse undefined and unregulated terms, such as "all natural," to describe their products. This Note also seeks to trace the evolution of food-fraud litigation, examining in depth the ascertainability standard for class certification, as well as the manner in which courts have applied the ascertainability standard in food-fraud cases.

Part II examines the FDA's current system for regulating food claims—specifically the FDA's lack of regulation on the use of terms such as "all natural" or "natural"—and describes the "first wave" of food-fraud litigation. Part III provides a general overview of class actions and discusses the purpose that class actions serve with respect to small consumer claims, such as those brought in food-fraud cases. Part IV discusses the ascertainability requirement that courts have read into Rule 23 and the manner in which courts have applied this requirement in the context of food-fraud litigation. Finally, Part V argues that courts should not apply a stringent ascertainability standard to class certification in food-fraud cases.

II. FDA'S CURRENT REGULATION OF FOOD CLAIMS AND THE "FIRST WAVE" OF LITIGATION

A. Introduction: Prohibition of Misbranded Food

Two federal agencies regulate product claims made by food companies: the Food and Drug Administration (FDA) and the Federal Trade Commission (FTC).[17] This Note will focus solely on the FDA's regulation of claims companies make about their food products. The federal Food, Drug, and Cosmetic Act (FDCA) authorizes the FDA to promulgate standards regulating food

17. *See* FEDERAL TRADE COMMISSION, ENFORCEMENT POLICY STATEMENT ON FOOD ADVERTISING (1994), *available at* http://www.ftc.gov/enforcement-policy-statement-on-food-advertising (introducing the legal framework of food regulation).

labeling.[18] The FDCA states that the purpose of the FDA is to "protect the public health by ensuring that . . . foods are safe, wholesome, sanitary, and properly labeled."[19]

The FDCA prohibits the misbranding of food and the sale or manufacturing of food that is misbranded.[20] Food is misbranded under the FDCA if "its labeling is false or misleading in any particular [way]."[21] Under the FDCA, "labeling" includes "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article";[22] and "label" is defined as "a display of written, printed, or graphic matter upon the immediate container of any article."[23] Even claims on the Internet about a food product can be considered a "label," bringing such claims under the purview of the FDCA.[24] But, as some critics have noted, the FDA has not established the evidentiary burden to prove a claim is "false or misleading."[25] Nor does the FDCA provide individuals a private cause of action for claims arising from the purchase of "misbranded" food products.[26]

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18. *See* 21 U.S.C. § 393(b)(2)(A) (2012) (establishing the FDA and providing that it "shall . . . protect the public health by ensuring that . . . foods are safe, wholesome, sanitary, and properly labeled").

19. *Id.*

20. *See id.* § 331(a)–(c) (prohibiting "[t]he introduction or delivery for introduction into interstate commerce of any food . . . that is . . . misbranded"; "[t]he adulteration or misbranding of any food"; and "[t]he receipt in interstate commerce of any food . . . that is adulterated or misbranded").

21. *Id.* at § 343(a).

22. *Id.* at § 321(m).

23. *Id.* at § 321(k).

24. BARBARA O. SCHNEEMAN, FOOD AND DRUG ADMINISTRATION, GUIDANCE FOR INDUSTRY AND FDA: DEAR MANUFACTURER LETTER REGARDING FOOD LABELING (2007), *available at* http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm053425.htm.

25. Leah A. Satine, *Is My Yogurt Lying? Developing and Applying a Framework for Determining Whether Wellness Claims on Probiotic Yogurts Mislead*, 63 FOOD & DRUG L.J. 537, 540 (2008). See generally *id.* for more in-depth discussion of the FDA and FTC regulation of different types of food claims.

26. *See* 21 U.S.C. § 337(a) ("[A]ll such proceedings for the enforcement, or to restrain violations, of this chapter shall be by and in the name of the United States.").

B. The Nutrition Labeling and Education Act

The Nutrition Labeling and Education Act (NLEA), enacted in 1990, amended the FDCA. The purpose of the NLEA was "to clarify and to strengthen the Food and Drug Administration's legal authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about nutrients in foods."[27] However, even after the enactment of the NLEA, which includes several substantial changes that strengthen the regulation of food labeling,[28] the FDCA still falls short of its primary purpose: providing consumers clear information on the contents of food products.[29] Additionally, the NLEA failed to implement a definition for important terms such as "natural" and "healthy."[30]

Most important to the discussion in this Note, the NLEA amendments added an express preemption provision to the FDCA:

> [N]o State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce . . . any requirement respecting any claim of the type described in section 343(r)(1) of this title [i.e., nutrition levels and health-related claims], made in the label or labeling of food that is not identical to the requirement of section 343(r) of this title . . . .[31]

As discussed in Section D below, the FDCA's express preemption provision was at the center of the lawsuits in the first wave of food-fraud litigation.

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27. H.R. REP. NO. 101-538, at 7 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3336, 3337.

28. Ackerman v. Coca-Cola Co., No. CV–09–0395(JG)(RML), 2010 WL 2925955, at *3 (E.D.N.Y. July 21, 2010) ("The NLEA amended the FDCA in several significant respects: it expanded the coverage of nutrition labeling requirements; it changed the form and substance of ingredient labeling on packages; it imposed limitations on health claims; it standardized the definitions of all nutrient content claims; and it required more uniform serving sizes.").

29. *See infra* Part IIC (discussing the FDA's "all natural" saga).

30 . *See* 21 U.S.C. § 321.

31. *Ackerman*, 2010 WL 2925955, at *3 (quoting 21 U.S.C. § 343–1(a)(5)).

C. *The FDA's "All Natural" Saga*

Although there may be value in labeling food as "natural," the label has caused many lawsuits.[32] This section will explore the FDA's regulation of the word "natural."[33] Increasingly, consumers equate "natural" with healthy products and prefer products that are "natural" over those that are "organic."[34] The market is substantial: food products labeled "natural" brought in over $40 billion of revenue in 2013.[35] Considering the monetary value of "natural" products, it is not surprising that many companies use the term to describe their products.

Despite the frequency with which the term "natural" is used to describe food products, the FDA has only issued informal guidance on the word's meaning, stating: "[T]he agency has considered 'natural' to mean that nothing artificial or synthetic (including colors regardless of source) is included in, or has been added to, the product that would not normally be expected to be

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32. *See supra* note 4 (providing examples of litigation concerning use of the word "natural").

33. It is important to note that the FDA has a different, formalized policy with regards to "naturally *flavored*" claims than any other type of natural claim. The use of the phrase "naturally flavored" is governed by 21 C.F.R. § 101.22(i)(1) which provides that "a product may contain a 'natural flavor' label even if the product contains artificial, non-flavoring coloring preservatives, as long as the 'characterizing flavor' is, in fact natural." Ivie v. Kraft Foods Global, Inc., No. C–12–02554–RMW, 2013 WL 685372, at *9 (N.D. Cal. Feb. 25, 2013) (quoting 21 CFR § 101.22(i)(1)).

34. *See* Mary Avant, *Consumers Care More About Natural Foods than Organic*, QSR (Aug. 22, 2013), http://www.qsrmagazine.com/news/consumers-care-more-about-natural-foods-organic (discussing a survey conducted for the Organic and Natural Report indicating that consumers prefer "organic" foods less and suggesting that the new popular preference among health-conscious consumers is "natural" foods); *see also* Josh Ashley, Note, *A Bittersweet Deal for Consumers: The Unnatural Application of Preemption to High Fructose Corn Syrup Labeling Claims*, 6 J. FOOD L. & POL'Y 235, 236 (2010) (discussing a study conducted by the Shelton group that found that consumers prefer "natural" foods to "organic" foods by a wide margin) (citing John Laumer, *U.S. Consumers Prefer "100% Natural" Food Label*, TREEHUGGER (July 3, 2009), http://www.treehugger.com/green-food/us-consumers-prefer-100-natural-food-label.html).

35. Mike Esterl, *Some Food Companies Ditch "Natural" Label: Amid Lawsuits over the Claim, More Producers Drop the Word*, WALL ST. J. (Nov. 6, 2013, 12:07 AM), http://online.wsj.com/news/articles/SB10001424052702304470504579163933732367084.

there."[36] However, this is not a formal definition of the term; therefore, it is not binding on food manufacturers that wish to use the word on product labels.[37] Also, the informal guidance does not provide definitions for the terms "synthetic" or "artificial."[38] The FDA has stated that it is "difficult" to come up with a definition for "natural" because "the food has probably been processed and is no longer the product of the earth."[39]

The FDA has been directly asked to define the word "natural" several times, but has refused. The agency's stance on the matter has been well-documented and criticized.[40] In February 2006, the Sugar Association petitioned the FDA to define the term.[41] Specifically, it asked whether "natural" could be used to describe products containing high-fructose corn syrup (HFCS).[42] The Sugar Association asked the FDA to define "natural" the same way the United States Department of Agriculture's (USDA) policy recommendations define it.[43]

Despite the petition, the FDA refused to issue a general rule

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36. Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms, 56 Fed. Reg. 60421-01, 60466 (Nov. 27, 1991) (to be codified at 21 C.F.R. pts. 5, 101, 105).

37. *See* Negowetti, *supra* note 5, at 585 ("As the Third Circuit recently held, the FDA's definition of 'natural' does not have the force of law." (citing Holk v. Snapple Beverage Corp., 575 F.3d 329, 342 (3d Cir. 2009))).

38. *Id.*

39. *About FDA*, U.S. FOOD AND DRUG ADMIN., http://www.fda.gov/AboutFDA/Transparency/Basics/ucm214868.htm (last visited Apr. 9, 2014).

40. *See* Negowetti, *supra* note 5, at 603 (calling for the FDA to adopt a national standard for the term "natural").

41. *See* Nathan A. Beaver, *"Natural" Claims: The Current Legal and Regulatory Landscape*, RECENT DEV. FOOD & DRUG L. 191, 199 (Nov. 2012), *available at* 2012 WL 4971935, at *5 (discussing Letter from Andrew C. Briscoe, President & CEO at the Sugar Association to the FDA (Feb. 28, 2006), *available at* http://www.cspinet.org/new/pdf/sugar_fda_petition.pdf)).

42. *Id.*

43. *Id.* USDA policy, which has not been formalized either, provides that meat or poultry products can be labeled natural if two requirements are met: "(1) the product does not contain any artificial flavor or flavoring, coloring ingredient, or chemical preservatives . . . or any other artificial or synthetic ingredient" and "(2) the product and its ingredients are not more than minimally processed." USDA, FOOD STANDARDS & LABELING POL'Y BOOK (2005), *available at* http://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf. It also recommends that a brief statement accompany any "natural" claims explaining why the product is to be considered natural. *Id.*

for describing products with HFCS or to define the term. However, the FDA did note that companies could use "natural" to describe products containing HFCS in some circumstances.[44] Regardless, this informal guidance does not carry much legal weight.[45]

The FDA previously sought comments on the use of "natural," but formally abandoned its efforts to define the term in 1993.[46] However, the FDA admitted it "believed that if the term 'natural' [was] adequately defined, the ambiguity in the use of this term, which has resulted in misleading claims, could be abated."[47] The FDA ultimately concluded that "there [were] many facets of this issue that the agency [would] have to carefully consider," and "[b]ecause of resource limitations and other agency priorities," the agency would not be "undertaking rulemaking to establish a definition for 'natural' at this time."[48]

In the years since, the FDA has refused to define the term and has instead issued warning letters[49] on a case-by-case basis when it believes that a company's use of the term "natural" is misleading.[50]

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44. Letter from Geraldine A. June, Supervisor, FDA Product Evaluation Labeling Team, to Audrae Erickson, President, Corn Refiners Association (July 3, 2008), *available at* http://www.corn.org/wp-content/uploads/2008/07/FDAdecision 7-7-08.pdf.

45. *See* Holk v. Snapple Beverage Corp., 575 F.3d 329, 342 (3d Cir. 2009) ("[N]or [does] the FDA's letter indicating that some forms of HFCS may be classified as 'natural' have the force of law required to preempt conflicting state law.").

46. Pavel & Hibbert, *supra* note 7.

47. Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302-01, 2407 (Jan. 6, 1993) (emphasis added).

48. *Id.* at 2407.

49. U.S. FOOD & DRUG ADMIN., *WARNING LETTERS*, *in* REGULATORY PROCEDURES MANUAL § 4-1, *available at* http://www.fda.gov/ICECI/Compliance Manuals/RegulatoryProceduresManual/ucm176870.htm#SUB4-1. FDA warning letters are typically the FDA's first step before enforcement action. *Id.* The FDA states that "depending on the nature of the violation," it is the FDA's "practice to give individuals and firms an opportunity to take voluntary and prompt corrective action before it initiates an enforcement action." *Id.* "Warning letters are issued to achieve voluntary compliance and to establish prior notice. *Id.*

50. *E.g.*, Warning Letter from Michael W. Roosevelt, Acting Director, Office of Compliance, FDA, to Alex Dzieduski, CEO/President, Alexia Foods (Nov. 16, 2011), *available at* http://www.fda.gov/ICECI/EnforcementActions/Warning Letters/ucm281118.htm; Warning Letter from Roberta F. Wagner, Director, Office

Thus, the stage was set for litigation over the undefined term.

D. The "First Wave" of Litigation: Preemption Issues

In the "first wave" of food-fraud litigation, consumers disputed food manufacturers' use of "natural" by bringing suits under state consumer fraud statutes.[51] Arguably the most important case in the first wave of "all natural" litigation was *Holk v. Snapple Beverage Corp.*, which focused on the issue of preemption.[52] In *Holk*, the court held that the plaintiffs' state-law claims were not preempted by the NLEA.[53] Since *Holk*, many courts have followed suit.[54] Therefore, defendants are much less likely to raise preemption as a defense, focusing instead on class certification

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of Compliance, FDA, to John Stanger, Technical Manager, Waterwheel Premium Foods Pty Ltd. (July 26, 2013), *available at* http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2013/ucm364729.htm.

51. One scholar contextualized the first wave of food-fraud litigation:

> [T]here are presently nine cases involving the use of "natural" on products containing HFCS that are being litigated or have been recently decided. The products involved include granola bars, pasta sauce, iced tea, and juice drinks. The current hotbeds of this litigation are New Jersey and California. All of the decisions in cases on this issue were given in 2009 or 2010, save one, which was given in June 2008. This suggests that this field of litigation is in its infancy, and can be expected to grow.

Ashley, *supra* note 34, at 236–37.

52. 575 F.3d 329, 331 (3d Cir. 2009); *see also* Ashley, *supra* note 34, at 240 ("Preemption occurs when federal law bars the enforcement of state law requirements. The legal basis for preemption rests in the Supremacy Clause of Article VI of the Constitution, which provides that the laws of the United States 'shall be the supreme Law of the Land; anything in the Constitution or Laws of any State to the Contrary notwithstanding.'").

53. *Holk*, 575 F.3d at 342 ("[N]either the FDA policy statement regarding the use of the term 'natural' nor the FDA's letter indicating that some forms of HFCS may be classified as 'natural' have the force of law required to preempt conflicting state law.").

54. *E.g.*, Lockwood v. Conagra Foods Inc., 597 F. Supp. 2d 1028, 1031–34 (N.D. Cal. 2009); Van Koeing v. Snapple Beverage Corp., 713 F. Supp. 2d 1066, 1076 (E.D. Cal. 2010); Mason v. Coca-Cola Co., No. 09-0220-NLH-JS, 2010 WL 2674445, at *3–4 (D. N.J. June 30, 2010); *In re* Frito-Lay N. Am., Inc. All Natural, No. 12–MD–2413, slip op. at 9–10 (E.D.N.Y. Aug. 29, 2013).

issues in the "second wave" of litigation.[55]

In *Holk*, consumers brought state law claims against Snapple Beverage Corporation in New Jersey under the state's consumer fraud act alleging Snapple falsely represented that its products were "all natural."[56] The defendants argued that the plaintiffs' state law claims were preempted by the NLEA amendment to the FDCA.[57] As the court noted, "[u]nder the Supremacy Clause, federal law may be held to preempt state law where any of the three forms of preemption doctrine may be properly applied: express preemption, field preemption, and implied conflict preemption."[58]

Preemption analysis begins with "applying a presumption against preemption."[59] The court analyzed the doctrines of field preemption, which "occurs when state law occupies a 'field reserved for federal regulation,' leaving no room for state regulation," and implied conflict preemption, which occurs when it is "impossible for a private party to comply with both state and federal requirements."[60] The court found that the plaintiffs' claims were not preempted through either doctrine.[61]

With regard to field preemption, the court found no indication that Congress intended to occupy the entire field of food and beverage or labeling regulation, leaving room for the states to regulate.[62] The court also rejected the defendant's argument that the NLEA's express preemption provision manifested Congress's intent to solely occupy this area because the NLEA's express preemption provision only applies to state laws that conflict with very specific and enumerated regulations (e.g., regulations that require labels to contain the name and location of the manufacturer and the

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55. *See infra* Parts III and IV (discussing class certification for small consumer claims and the "ascertainability" requirement for class certification).

56. *Holk*, 575 F.3d at 332.

57. *Id.* at 333.

58. *Id.* at 334.

59. *Id.* ("In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest." (quoting Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005))).

60. *Id.* at 336–40.

61. *Id.* at 340.

62. *Holk*, 575 F.3d at 337.

percentage of fruit or vegetable juice contained in the beverage).[63]

With regard to implied conflict preemption, the court found that the FDA's informal guidance on the use of "natural" did not preempt the plaintiffs' claims.[64] The court also held that the response letter to the Sugar Association on the use of the term "natural" to define products containing HFCS did not have the "force of law" sufficient to find conflict preemption.[65] Therefore, the court held that "there is no conflict in this case because there is no FDA policy with which state law could conflict."[66]

The *Holk* case and the cases that followed *Holk*'s example are important because they struck down a defense that many food manufacturers raised in response to claims challenging their use of the term "natural."

III. CLASS ACTIONS AND THEIR PURPOSE IN SMALL CONSUMER CLAIMS

Class actions serve the important purpose of allowing individuals with small claims to bring suit against defendants when they might not otherwise have been able to. This section further elaborates on this function and introduces the basic requirements for class certification.

A. Rule 23's Class Certification Requirements

Federal Rule of Civil Procedure 23 governs the certification of class actions.[67] "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'"[68] The prerequisites for class certification include:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

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63. *Holk*, 575 F.3d at 338.
64. *Id.* at 341–42.
65. *Id.* at 342 n.6.
66. *Id.* at 342.
67. FED. R. CIV. P. 23.
68. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011).

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.[69]

These prerequisites are known as the requirements of (1) "numerosity," (2) "commonality," (3) "typicality," and (4) "adequacy."[70] Besides these prerequisites, the class action must also fall within one of Rule 23(b)'s three categories.[71] Rule 23(b) allows a class to be maintained if 23(a) is satisfied and (1) separate actions could risk establishing incompatible standards for defendants or could impair individual interests of other members not parties to the suits, (2) the party opposing the class is acting on grounds generally applicable to the class, or (3) the court finds a class action is superior for a fair and efficient adjudication of the controversy.[72]

Normally, class certification is a procedural matter that occurs before courts consider the merits of the plaintiffs' claims.[73] But, in *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court stated:

> Frequently [the] rigorous analysis [of whether the prerequisites of Rule 23(a) are met] will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. The class determination generally involves considerations that are enmeshed

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69. FED. R. CIV. P. 23(a)(1)–(4).

70. Robert H. Klonoff, *Reflections on the Future of Class Actions*, 44 LOY. U. CHI. L.J. 533, 534 n.11 (2012).

71. FED. R. CIV. P. 23(b).

72. *Id.*

73. *See* JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS: LAW AND PRACTICE § 3:12 (11th ed. 2014) [hereinafter *McLaughlin*] ("Class certification therefore is a procedural device that asks: 'who may sue together?' It is not a substantive rule designed to evaluate who is likely to prevail in that suit.").

> in the factual and legal issues comprising the plaintiff's cause of action.[74]

Therefore, at times it will be necessary for the court to consider the merits of plaintiffs' claims to determine whether class certification is proper under Rule 23, "but only to the extent . . . that [the merits] are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."[75] Courts are ordinarily not allowed to "engage in free-ranging merits inquiries at the certification stage."[76]

B. The Purpose of Class Certification: Allowing Smaller Consumer Claims

All of the plaintiffs who have sought to challenge food manufacturers' "natural" labels have brought their suits as putative class actions.[77] Practically speaking, the small potential recovery, compared to the financial burden of litigation, precludes plaintiffs from bringing suit individually in both food-fraud litigation and other small consumer claims. Therefore, class action litigation allows individuals to bring small consumer claims. Indeed, the Supreme Court noted that this is a central policy consideration behind class action litigation:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's . . . labor.[78]

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74. *Dukes*, 131 S. Ct. at 2551–52 (internal quotation marks omitted).

75. Amgen Inc. v. Conn. Ret. Plans and Trust Funds, 133 S. Ct. 1184, 1195 (2013).

76. *Id.* at 1194–95.

77. *See* Kilian, *supra* note 2 (discussing challenges to food manufacturers' "natural" labels).

78. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (internal quotation marks omitted).

Therefore, plaintiffs in food-fraud cases concerning the term "natural" are able to bring their claims through class actions.

IV. THE ASCERTAINABILITY REQUIREMENT: AN ANALYSIS OF COURTS' INTERPRETATIONS

In addition to the explicit requirements for class certification listed in Rule 23, courts have found an implicit "ascertainability" requirement for class certification.[79] While many courts now recognize the "ascertainability" requirement,[80] its origin and application are much less clear. The ascertainability doctrine jurisprudence is constantly developing. Of special importance, and the focus of this Note, is the development of the ascertainability requirement in relation to food-fraud litigation.

While Rule 23 does not explicitly contain the term "ascertainable" or "ascertainability," this has become the term that many courts, commentators, and scholars have used to describe the requirement that a class be identifiable and precise.[81] Moore's Federal Practice states: "It is axiomatic that in order for a class action to be certified, a class must exist. Although the text of Rule 23(a) is silent on the matter, a class must not only exist, the class must be susceptible of precise definition."[82] Thus, Rule 23 assumes that there is an identifiable or ascertainable class to certify in the first place. "There can be no class action if the proposed class is 'amorphous' or 'imprecise.'[83] This, in essence, is the ascertainability requirement."[84]

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79. MCLAUGHLIN, *supra* note 73, § 4:2.

80. 1 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 1:7 (Thomson Reuters 5th ed. 2013) (collecting cases).

81. Jermyn v. Best Buy Stores, L.P., 256 F.R.D. 418, 432 (S.D.N.Y. 2009) (quoting Fogarazzo v. Lehman Bros., Inc., 232 F.R.D. 176, 181 (S.D.N.Y. 2005)).

82. 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.21[1], 23–44 (3d ed. 1999) (citing Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981) (class must exist); FED. R. CIV. P. 23(a) (text is silent); FED. R. CIV. P. 23(c)(1)(B) (requiring the court's certification order to "define the class and the class claims, issues, or defenses")).

83. *Id.*

84. Jason Steed, *On "Ascertainability" as a Bar to Class Certification*, 23 APP. ADVOC. 626, 627 (2011).

In other words, the court must determine whether the class is sufficiently definite before proceeding to analyze the explicitly listed requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy.[85] Some courts and commentators maintain that the 2003 amendments to Rule 23(c)(1)(B) codified the ascertainability requirement. The amendments to Rule 23(c)(1)(B) explain that "an order . . .[certifying] a class action must define the class and the class claims, issues, or defenses."[86]

Ironically, the exact contours of the requirement that a class be definite and precise (thus, ascertainable) are not very precise or ascertainable themselves. Generally, however, the ascertainability requirement demands that "plaintiffs propose a class that is presently ascertainable based on objective criteria that do not require the court to delve into the merits of the claims."[87] Basically, as one court put it, the requirement includes: "(1) specifying a particular group that was harmed during a particular time frame, in a particular location, in a particular way; and (2) facilitating a court's ability to ascertain its membership in some [objective manner.]"[88] "In short, the class definition must be precise, objective, and presently ascertainable."[89] This section will examine what the courts have interpreted the ascertainability requirement to mean, specifically in the context of the recent uptick in food-fraud litigation.

A. The Rationale Behind the Ascertainability Requirement

The main policy rationales behind the ascertinability requirement for class action certification include: (1) it increases judicial efficiency; (2) it weeds out fraudulent claims; and (3) it clearly sets out who is bound by a judgment in a class action case for the purposes of res judicada, which protects the parties' due process

85. RUBENSTEIN ET. AL., *supra* note 80.

86. *See* MCLAUGHLIN, *supra* note 73, at § 4:2 ("The amendment thus codifies the prior practice that, at the class certification stage, plaintiffs must define and establish the existence of an aggrieved class that is ascertainable . . . .").

87. *Id.* (citing Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349 (3d Cir. 2013)).

88. *Id.* (quoting Hayes v. Wal-Mart, 281 F.R.D. 203, 210 (D.N.J. 2012)).

89. *Id.*

rights.[90] These policy concerns are fleshed out in many cases, including many food fraud suits that have examined the ascertainability requirement and found it unmet.

In *Carrera v. Bayer Corp.*,[91] the Third Circuit imposed a stringent ascertainability standard and became the first circuit to use the ascertainability requirement as an independent basis for denying class certification.[92] In *Carrera*, the plaintiffs brought a putative class action suit against Bayer under New Jersey's Consumer Fraud Act, claiming that Bayer produced false or misleading representations regarding its weight loss supplements.[93] The class consisted of Florida consumers who purchased the defendant's weight-loss supplements.[94] Holding that the ascertainability requirement entails a "rigorous analysis" because "[c]lass ascertainability is 'an essential prerequisite of a class action'"[95] the court vacated and remanded the class certification.[96]

The court explained that the ascertainability requirement serves three main purposes, which encompass the three main policy rationales of (1) promoting judicial efficiency; (2) protecting both parties' due process rights and (3) weeding out fraudulent claims described above:

> First . . . ascertainability and a clear class definition allow potential class members to identify themselves for purposes of opting out of a class. Second, it ensures that a defendant's rights are protected by the class action mechanism. Third, it ensures that parties can identify class members in a manner consistent with the efficiencies of a class action.[97]

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90. *See* RUBENSTEIN ET. AL., *supra* note 80, at § 3:1 (explaining the policy rationales of courts that use a definiteness test as an essential part of the class certification process without justification from the rule's text).

91. 727 F.3d 300 (3d Cir. 2013).

92. *See* Daniel Luks, Note, *Ascertainability in the Third Circuit: Name that Class Member*, 82 FORDHAM L. REV. 2359, 2359 (2014) ("The Third Circuit is the first circuit court to use ascertainability to create a bar to class certification.").

93. *Carrera*, 727 F.3d at 304.

94. *Id.* at 303.

95. *Id.* at 306.

96. *Id.* at 312.

97. *Carrera*, 727 F.3d at 307.

The court focused on the policy rationale of judicial efficiency and addressed the types of evidence plaintiffs could offer to demonstrate that the court would be able to ascertain which individuals are part of the class in an administratively feasible manner.[98] The court reasoned that ascertainability requires "[t]he method of determining whether someone [belongs] in the class [to] be 'administratively feasible.' A plaintiff does not satisfy the ascertainability requirement if individualized fact-finding or mini-trials will be required to prove class membership."[99]

The court provided one example of how plaintiffs could go about proving an "administratively feasible" and "reliable" way of identifying class members that defendants could challenge by deposition—retail records identifying the individuals that purchased the product.[100] Oddly enough, while the plaintiffs *did* propose to offer "retailer's records of sales and sales made with loyalty cards . . . and records of online sales" as a means of identifying the class, the court ultimately rejected this method.[101] The court determined that there was no evidence to support the plaintiffs' claim that consumers of the defendant's products could be identified using "records of customer membership cards or records of online sales," and found that there was "no evidence that retailers even have records for the relevant period."[102] The court also rejected affidavits of class members as an appropriate or reliable manner of determining putative class membership.[103]

The court's second policy rational was the concern that some members of the class would bring fraudulent claims, and the court concluded that both the defendant and absent class members had interests in screening out fraudulent claims.[104] Absent class members' fraudulent or inaccurate claims could dilute the other class members' potential recovery.[105] Dilution is concerning for defendants because it would allow class members to argue that they

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98. *See Carrera*, 727 F.3d at 307 (noting that a defendant must be able to test the reliability of the evidence submitted to prove class membership).

99. *Id.* at 307 (citations omitted).

100. *Id.* at 308.

101. *Id.* at 308–09.

102. *Id.* at 309.

103. *Id.*

104. *Id.* at 310.

105. *Carrera*, 727 F.3d at 310.

were not adequately represented—if successful, these members would not be bound by the judgment and could bring a subsequent action against the defendant.[106]

The plaintiffs offered the declaration of an individual who worked for a firm that administered class settlements who described the different screening methods that the firm used to ensure that fraudulent claims were not paid out:

> [The firm] has successfully utilized fraud prevention techniques where by [sic] the claim form offers claim options that do not reflect valid product descriptions, prices paid, geographic locations or combinations of such factors. By providing claims options such as very high pill count or significantly higher purchase price in this case, fraudulent claim filers would naturally be inclined to select options that they believe would increase their claim value. As such, techniques such as these can be used to effectively [eliminate] fraudulent claims.[107]

Still, the court held that the plaintiffs had not demonstrated that this would be an effective or reliable manner of detecting and weeding out fraudulent claims in the certification process as opposed to the settlement payment process.[108]

In the "all natural" litigation context, a federal district court in New York recently relied on *Carrera* to deny class certification.[109] In *Sethvansih v. ZonePerfect*, the plaintiff brought a putative class action suit against ZonePerfect for representing its nutrition bars as "All-Natural Nutrition Bars" when in reality, the bars contained calcium phosphates, glycerine, potassium carbonate (cocoa processed with alkali), and other synthetic ingredients.[110] The court

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106. *Carrera*, 727 F.3d at 310.

107. *Id.* at 311 (citations omitted) (internal quotation marks omitted).

108. *See id.* at 311 ("The Prutsman Declaration does not show the affidavits will be reliable. Nor does it propose a model for screening claims that is specific to this case. And even if Prutsman produced a model that is specific to this case, we doubt whether it could satisfy the ascertainability requirement.").

109. Sethavanish v. ZonePerfect Nutrition Co., No. 12–2907–SC, 2014 WL 580696, at *5–6 (N.D. Cal. Feb. 13, 2014).

110. *ZonePerfect*, 2014 WL 580696, at *1.

discussed the Third Circuit's stringent analysis of the ascertainability requirement in *Carrera* as well as other courts' use of a non-stringent ascertainability standard.[111] Ultimately, the court found the reasoning for a more stringent ascertainability requirement to be more persuasive.[112]

However, the court's analysis of the ascertainability requirement was extremely brief; it mainly described the reasonings of the Third Circuit in *Carrera* and the reasonings of other courts.[113] The court determined that, while courts adopting a more stringent ascertainability requirement might preclude class certification for some claims, it would not preclude certification for them all:

> [A stringent ascertainability requirement] may restrict the types of consumer classes that can be certified, they do not bar certification in consumer class actions altogether. For example, in some cases, retailer or banking records may make it economically and administratively feasible to determine who is in (and who is out) of a putative class.[114]

The court denied the plaintiff's motion for class certification in the interests of judicial efficiency and weeding out fraudulent claims.[115] The motion was denied without prejudice, allowing the plaintiffs to move for class certification again once they presented an "administratively feasible" method for determining class membership.[116]

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111. *See ZonePerfect*, 2014 WL 580696, at *5 (discussing *Carrera*, 727 F.3d at 308–10; Xavier v. Philip Morris USA Inc., 787 F. Supp. 2d 1075, 1078, 1089, 1090–91 (N.D. Cal. 2011); Ries v. Ariz. Beverages USA LLC, 287 F.R.D. 523, 535 (N.D. Cal. 2012)).

112. *ZonePerfect*, 2014 WL 580696, at *5.

113. *Id.*

114. *Id.* (citations omitted).

115. *Id.* at *6 ("In the instant action, Plaintiff has yet to present any method for determining class membership, let alone an administratively feasible method. It is unclear how Plaintiff intends to determine who purchased ZonePerfect bars during the proposed class period, or how many ZonePerfect bars each of these putative class members purchased. It is also unclear how Plaintiff intends to weed out inaccurate or fraudulent claims. Without more, the Court cannot find that the proposed class is ascertainable.").

116. *ZonePerfect*, 2014 WL 580696, at *4, *6.

Similarly, the court in *Weiner v. Snapple Beverage Corp.* analyzed the ascertainability requirement[117] and found it was not met.[118] In *Snapple*, the plaintiffs alleged that the defendant falsely represented its Snapple beverage as "all natural" but the drink contained HFCS.[119] The proposed class consisted of all individuals who purchased the Snapple beverages labeled as "all natural" in the State of New York.[120] The court ultimately found that the plaintiffs had not met another one of Rule 23's requirements, but nonetheless found that, the plaintiffs would not have succeeded at certification because the ascertainability requirement had not been met either.[121] The court found that the plaintiffs "failed to show how the potentially millions of putative class members could be ascertained using objective criteria that are administratively feasible."[122] The plaintiffs suggested that they could provide proof of purchase (such as receipts), product labels, or, as plaintiffs typically propose, sworn affidavits.[123] The court rejected these proposals, noting that it would be unrealistic to believe that the plaintiffs had kept their receipts or other proofs of purchase such as box tops or labels.[124]

In *Xavier v. Philip Morris*, the District Court for the Northern District of California discussed the ascertainability requirement in depth and denied the plaintiffs' motion for class certification because they failed to meet the ascertainability requirement.[125] In *Xavier*, cigarette consumers brought a punitive class action against a cigarette manufacturer under the California Consumer Legal Remedies Act (CLRA), among other causes of action.[126] The plaintiffs sought to certify a class that consisted of:

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117. Weiner v. Snapple Beverage Corp., No. 07 Civ. 8742(DLC), 2010 WL 3119452, at *38–40 (S.D.N.Y. Aug. 5, 2010).

118. *Id.* at *13.

119. *Id.* at *1. Interestingly, this case occurred during the "first wave" of natural litigation, and in that sense, was an outlier from the other cases filed in the first wave of "natural" litigation because it focused on class certification and ascertainability as opposed to preemption or other similar theories of dismissal.

120. *Id.* at *2.

121. *Id.* at *5.

122. *Id.* at *13.

123. *Id.*

124. *Id.*

125. *Xavier*, 787 F. Supp. 2d at 1089–91.

126. *Id.* at 1078–79.

> [a]ll residents of the State of California as of the date of the filing of the Initial Complaint . . . who:
>
> a) were fifty (50) years of age or older;
>
> b) had cigarette smoking histories of twenty pack-years or more using Marlboro cigarettes;
>
> c) smoked Marlboro cigarettes, or quit smoking Marlboro cigarettes within one (1) year of the date of the filing of the Initial Complaint in this action;
>
> d) had smoked Marlboro cigarettes within the State of California; and
>
> e) are not diagnosed as suffering from lung cancer . . . .[127]

In denying certification, the *Xavier* court relied heavily on the idea that ascertainability ensures that the preclusive effect of judgment is properly enforced against those who are bound by the judgment.[128] "The class definition must be clear in its applicability so that it will be clear later on whose rights are merged into the judgment, that is, who gets the benefit of any relief and who gets the burden of any loss."[129]

The court also relied heavily on the idea of judicial efficiency incorporated in the ascertainability requirement.[130] Ascertainability requires that plaintiffs propose an administratively feasible manner of identifying the members of a class action.[131] In this case, the court found that the class was not ascertainable because plaintiffs could not identify class members in an administratively feasible manner. Identification of the plaintiffs' class was not administratively feasible because plaintiffs fell into a category of class certifications that depend on "subjective" considerations of individuals' states of mind.[132] The extent of the plaintiffs' smoking

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127. *Xavier*, 787 F. Supp. 2d at 1088–89.
128. *Id.* at 1089.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*

habits depended on their "subjective" estimates of their smoking habits.[133] The court was concerned that subjective criteria is an "unreliable" manner of determining or "ascertaining" class membership.[134] The court noted that it is difficult to identify class members when "membership in the class depends on each individual's state of mind."[135] The court elaborated on the problems inherent in class certification that depends on each individual's state of mind, and determined that these types of class action certifications would be unworkably subjective.[136] Furthermore, the court pointed out that "[u]nlike in many cases, there [were] no defendant records on point to identify class members."[137] But the court did not give examples of the "many cases" where defendants had records that could identify class members.[138]

The court also held that "demographic data regarding the smoking population,"[139] the defendant's "own data respecting its customer base, such as the database of participants in the [defendant's] customer loyalty program,"[140] and affidavits were all insufficient means of ascertaining the class.[141] Ultimately the court determined that the proposed class of individuals in California that had a history as consumers of the defendant's cigarettes "could not be identified through any reliable, manageable means," and found

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133. *Xavier*, 787 F. Supp. 2d at 1089.

134. *Id.*

135. *Id.*

136. *Id.* at 1089 ("Without an objective, reliable way to ascertain class membership, the class quickly would become unmanageable, and the preclusive effect of final judgment would be easy to evade.").

137. *Id.*

138. *See id.* at 1089 (mentioning "many cases" but failing to provide any specific examples or citations).

139. *Id.* at 1090 ("This data is not helpful for determining which individual smokers are in the class and which are out.").

140. *Id.* at 1090 ("The databases [the defendant] maintains to administer its customer loyalty programs are incomplete for purposes of this action, because not all Marlboro smokers may be presumed to have participated in these programs.").

141. *Id.* at 1090 ("Such affidavits would be unreliable for several reasons, one of which is the subjective memory problem described above. Swearing 'I smoked 146,000 Marlboro cigarettes' is categorically different from swearing 'I have been to Paris, France,' or 'I am Jewish," or even 'I was within ten miles of the toxic explosion on the day it happened.' The memory problem is compounded by incentives individuals would have to associate with a successful class or disassociate from an unsuccessful one.").

that the putative class lacked ascertainability.[142] Furthermore, the court did not allow the plaintiffs to amend their claim to satisfy the ascertainability requirement but rather stated that "any revision of plaintiffs' proposed class definition . . . would be futile, because it necessarily would disrupt plaintiffs' theories of recovery."[143]

Finally, in *Randolph v. J.M. Smucker Co.*, consumers brought a putative class action against Smucker for representations that its Crisco oil was "all natural."[144] The federal court in Florida held that the plaintiffs' class was not ascertainable because (1) the plaintiffs would not be able to provide proof of purchase such as receipts and (2) the plaintiffs would not be able to accurately identify themselves as purchasers of the product because the product was a low-priced item that the regular consumer usually does not remember very well.[145] The second reason was especially problematic because the plaintiffs would be required to not only remember purchasing the product, but also the specific variety purchased, and the specific date on which it was purchased beyond just the year.[146]

While the court acknowledged that the first reason, alone, was not sufficient to defeat class certification, the court held that the two reasons, in conjunction, required denial of class certification.[147]

B. Problems with a Stringent Ascertainability Standard

Imposing such a stringent ascertainability standard makes class certification in small consumer class action claims, such as food fraud claims, practically impossible—a reality that contradicts one of the main policy rationales behind Rule 23: ensuring that small claims by many individuals can be brought together to effectively deter future wrongdoings.

In *Ebin v. Kangadis Food Inc.*, the court articulated the major concerns associated with an ascertainability standard so stringent as to require proof of purchase.[148] The plaintiffs in *Ebin* brought a class

142. *Xavier*, 787 F. Supp. 2d at 1091.

143. *Id.* at 1091 (denying plaintiffs' motion for class certification).

144. Randolph v. J.M. Smucker Co., No. 13-CIV-80581, 2014 WL 7330430, at *3–9 (S.D. Fla. Dec. 23, 2014).

145. *Id.*

146. *Id.*

147. *Id.*

148. Ebin v. Kangadis Food Inc., 297 F.R.D. 561, 567–68 (S.D.N.Y. 2014).

action in New York alleging fraud and misrepresentation after purchasing olive oil that was labeled "100% Pure Olive Oil".[149] The putative class consisted of individuals in the U.S. who purchased the defendant's olive oil before a certain date.[150] The plaintiffs proposed three different ways to identify class members: (1) receipts, (2) "submit[ting] the unique ID stamped on each tin," and (3) sworn affidavits by the individuals who purchased the product attesting to the "particulars of the purchase."[151] The court upheld the class certification despite the defendant's claims that the class was not ascertainable.[152]

The court in *Ebin* analyzed *Weiner v. Snapple Beverage Corp.*, and found that the court in *Snapple* stretched the ascertainability requirement too far and provided a standard that would "render class actions against producers almost impossible to bring."[153] The court also recognized the important role that class actions play in small consumer claim: "[T]he class action device, at its very core, is designed for cases like this where a large number of consumers have been defrauded but no one consumer has suffered an injury sufficiently large as to justify bringing an individual lawsuit."[154] Ultimately, the court recognized that a stringent ascertainability requirement that effectively precludes the type of litigation that class actions were intended to support should not be adopted.[155]

Likewise, two federal district courts in California recently upheld class certifications against ascertainability challenges.[156] In

149. *Kangadis Food Inc.*, 297 F.R.D. at 564.

150. *Id.*

151. *Id.* at 567.

152. *Id.* at 567–570.

153. *Kangadis Food Inc.*, 297 F.R.D. at 567 ("[T]he Court finds that, in the end, *Snapple* goes further than this Court is prepared to go . . . .").

154. *Id.* at 567 ("[T]he class action device, at its very core, is designed for cases like this where a large number of consumers have been defrauded but no one consumer has suffered an injury sufficiently large as to justify bringing an individual lawsuit.").

155. *See Kangadis Food Inc.*, 297 F.R.D. at 567 ("[T]he ascertainability difficulties, while formidable, should not be made into a device for defeating the action.").

156. Ries v. Ariz. Beverages USA LLC, 287 F.R.D. 523, 536, 542 (N.D. Cal. 2012); Lilly v. Jamba Juice Co., No. 13-CV-02998-JST, 2014 WL 4652283, at *2–6 (N.D. Cal. Sept. 18, 2014).

Ries v. Arizona Beverages, consumers brought a class action against the defendant under California's consumer protection statutes because it labeled its iced tea products as "all natural" even though the products contained high fructose corn syrup (HFCS).[157] The defendant argued that the class did not meet the ascertainability requirement because the class definition was "overbroad and not ascertainable."[158] The court restated the basic ascertainability requirement as most courts have come to know it: "The class definition must be sufficiently definite so that it is administratively feasible to determine whether a particular person is a class member."[159] Because the defendants did not demonstrate that the plaintiffs' proposed class was "vague or confusing," the court found that the plaintiffs' class had met the ascertainability requirement.[160]

Additionally, the defendants argued that satellite litigation would occur over who belonged in the class, which would seriously undercut the policy goal of judicial efficiency.[161] The court responded that "[t]his [was] simply not the case. If it were, there would be no such thing as a consumer class action."[162] While the court's analysis of the ascertainability requirement is not particularly extensive or helpful, it does highlight the extremely important policy rationale against imposing a stringent ascertainability standard that requires plaintiffs to provide proof of purchase—preventing the elimination of consumer class action claims.[163]

In *Lily v. Jamba Juice Co.*, consumers brought a class action against Jamba Juice for representations that their smoothie kits were "all natural."[164] The court upheld class certification, noting that adopting an ascertainability standard similar to that in *Carrera* would have "significant negative ramifications for the ability to obtain redress for consumer injuries."[165] The court acknowledged that it was unlikely that people would retain receipts for low-priced

157. *Ries*, 287 F.R.D. at 527.
158. *Id.* at 535.
159. *Id.* at 535 (quoting Wolph v. Acer Am. Corp., 272 F.R.D. 477, 482 (N.D. Cal. 2011)).
160. *Id.* at 535.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Lilly*, 2014 WL 4652283, at *1.
165. *Id.* at *4.

goods because they will rarely ever need to verify purchase for these items later.[166] Yet these are exactly the type of situations where the class action "provides one of [the] most important social benefits"—"where the injury to any individual consumer is small, but the cumulative injury to consumers as a group is substantial."[167]

The *Lily* court also addressed the *Carrera* court's argument that an unascertainable class could potentially dilute class recovery:

> This concern seems, at best, premature at this stage of the litigation. If the responses to class notice present the specter of diluting legitimate claims, the Court can address the issue at that point, especially (but not exclusively) if absent class members appear to object. But that speculative possibility is not a compelling reason to refuse to certify any class at all. If the problem is that some absent class members may get less relief than they are entitled to, it would be a strange solution to deprive absent class members of any relief at all.[168]

Therefore, the court held that the policy concern that the plaintiffs' claims might be diluted did not justify precluding the claims altogether.[169]

V. ADOPTING AN ASCERTAINABILITY REQUIREMENT THAT PRESERVES CONSUMER CLASS ACTIONS

There are valid policy concerns that support both a more stringent and a less stringent ascertainability requirement, making it difficult to determine what the correct standard should be—thus, courts are split on the issue.[170] On the one hand, the courts in *Carrera*, *Xavier*, and *Sethvanish* focused on the importance of providing notice to absent class members so they can opt out of the

166. *Lilly*, 2014 WL 4652283, at *4.

167. *Id.*

168. *Id.* at *6.

169. *Id.*

170. *See supra* Part IV (discussing the split among courts over the correct ascertainability standard).

class and be free to bring claims of their own. These courts were also concerned about the problems a non-ascertainable class presents for defendants, because defendants are bound by judgments against them in class actions and may be subjected to additional, separate claims from individuals who opted out of the class. This raises due process concerns for absent class members and defendants alike. Finally, without any way to weed out fraudulent claims, anyone can jump on the bandwagon and unjustly recover from defendants.

On the other hand, imposing a stringent ascertainability requirement that requires proof of purchase would place an impossible burden on plaintiffs, defeating all small consumer claims. Class action litigation is the only viable mechanism by which plaintiffs with small claims can litigate their small claims.

Ultimately, while the *Carrera* court's ascertainability concerns were valid, the court's ascertainability standard was too stringent. The plaintiffs in *Carrera* offered to produce retailer records to identify class members and provided detailed examples of ways to weed out inaccurate or fraudulent claims.[171] The court should have considered these methods for ascertaining whether the class was sufficient. Indeed, it is not clear what else the plaintiffs in *Carrera* could have done to satisfy the Third Circuit's ascertainability standard. The only manner of identifying class membership that would seem to satisfy the Third Circuit's standard would be proof of purchase from consumers. Yet, keeping a receipt for an iced tea is, as the *Snapple* court put it, unrealistic.[172] Therefore, plaintiffs are placed in a catch-22. On the one hand, the only type of proof that would satisfy the stringent ascertainability requirement is proof of purchase; on the other, courts have found that it is unrealistic to believe that plaintiffs still have these documents[173] or that these records are insufficient.[174]

Furthermore, the purpose of Rule 23—allowing cases in which a defendant has harmed a large number of individuals[175]—is a stronger policy concern than imposing an ascertainability standard

171. Carrera v. Bayer Corp., 727 F.3d 300, 304 (3d Cir. 2013).

172. Weiner v. Snapple Beverage Corp., No. 07 Civ. 8742(DLC), 2010 WL 3119452, at *13 (S.D.N.Y. Aug. 5, 2010).

173. *Weiner*, 2010 WL 3119452, at *13.

174. *Carrera*, 727 F.3d at 308–09.

175. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997).

that requires proof of purchase. These individuals each have small claims against defendants but would not be able to bring suit individually.[176] "The small claims of a dispersed group of consumers injured by a broad range of marketplace abuses were undoubtedly in the minds of the drafters who . . . helped shape Rule 23 of the Federal Rules of Civil Procedure . . . ."[177] Thus, courts should not impose an ascertainability requirement that precludes the very types of claims Rule 23 was designed to facilitate Finally, another important consideration is the deterrence aspect of class action litigation and how this purpose fits in with consumer tort claims: "The conventional understanding of the relationship between class action and optimal tort deterrence is that the need for aggregation . . . is justified when claims involve amounts of loss too 'small' to be marketable to plaintiffs' lawyers ('uneconomical' to prosecute) as separate actions."[178]

The FDA has refused to define the term "natural" or to enforce its informal guidance regarding this term.[179] Therefore, class action suits against companies that use this term in a deceptive manner provide an important mechanism of regulation through litigation.[180] In the absence of government or FDA regulation,

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176. Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 307 (2010) ("Thus, it should be fairly uncontroversial to observe that small-claims consumer cases are a—if not the—primary reason why class actions exist, and that without class actions many—if not most—of the wrongs perpetrated upon small-claims consumers would not be capable of redress. Against that backdrop, it might seem odd if the lower federal courts were to develop a set of doctrines under which the majority of small-claims consumer class actions were deemed ineligible for class treatment.").

177. *Id.* at 305.

178. David Rosenberg, *The Regulatory Advantage of Class Action*, *in* REGULATION THROUGH LITIGATION 244, 260 (W. Kip Viscusi ed., 2002).

179. *See supra* Part IIC (discussing the FDA's refusal to define "natural" and the lack of enforcement for its informal guidance).

180. *See supra* Part IIC (discussing, in depth, regulation through litigation); *see also* Joe Satran, *Trader Joe's Lawsuit over 'Evaporated Cane Juice' Part of Firm's Crusade Against Mislabeled Foods*, HUFFINGTON POST, (Mar. 31, 2013, 11:20 PM), http://www.huffingtonpost.com/2013/03/29/trader-joes-lawsuit-evaporated-cane-juice_n_2980706.html (describing the problem of food mislabeling and the purpose behind the litigation). The Huffington Post also reported that a consumer affairs attorney who filed nine food mislabeling suits in 2012 said, "'The labeling on packaged food is just a sea of lies.' . . . [He] said he

litigation regulates the deceptive use of the term "natural."[181] If the ascertainability requirement is so stringent that it precludes these claims, food manufacturers can continue to use phrases, such as "natural," in a deceptive manner without facing FDA-imposed consequences or consumer class action suits. Food companies will thus not be effectively or optimally deterred from making false misrepresentations.[182]

VI. CONCLUSION

Food fraud litigation over food manufacturers' use of the term "natural" has changed significantly within the past five years. Although manufacturers tried to assert that state consumer fraud statutes were preempted by FDA regulations, courts have largely denied this argument in the wake of *Holk*. Now, the availability of small consumer class actions is threatened by an impossible ascertainability standard that requires plaintiffs to provide proof of purchase—the standard the Third Circuit applied in *Carrera*. As a result of *Carrera*, consumers in jurisdictions that apply the same stringent ascertainability requirement are effectively precluded from bringing claims because who, after all, saves the receipt for a box of nutrition bars or an iced tea? While the policy justifications for enforcing an ascertainability requirement are valid, courts have taken this ascertainability requirement to an extreme that undermines one of the very purposes for which the Rule 23 class action was created.

Since the FDA has refused to enact formal and binding requirements on food manufacturers' use of the term "natural," class actions against these companies can be used as a form of regulating

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also quickly figured out that the FDA didn't have the resources to go after mislablers. 'We're trying to enforce laws for which there is no other enforcement mechanism.'" *Id.*

181. Pavel & Hibbert, *supra* note 7, at *5 ("For the last thirty-plus years, the food industry, as well as its lawyers, has largely focused on labeling in the context of the FDCA and the FTCA. Compliance, first and foremost, focused on ensuring that products were labeled in accordance with the FDA's regulation . . . . The food industry must reexamine its approach to labeling and marketing in light of this new wave of claims litigation. Firms must reconsider how they communicate with consumers as a part of this process.").

182. *See generally* Rosenburg, *supra* note 178 (providing more information and a background on regulation through litigation and economies of class actions).

false labeling and can deter companies from making false representations. However, if federal courts continue to adopt the Third Circuit's stringent ascertainability standard, this could put an end to small consumer fraud class action litigation as we know it. As a result, ascertainability's function as a regulation mechanism will be eviscerated. Thus, courts should not adopt an ascertainability requirement that would preclude consumers from bringing small consumer claim class actions merely because the consumers cannot provide a receipt.