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TRIBUTE TO THE 50TH VOLUME OF THE CREIGHTON LAW REVIEW

I congratulate Creighton University School of Law and all the past and current members of the Creighton Law Review on its fiftieth anniversary. Without their contributions, the Creighton Law Review would not exist as the publication and organization it is today. Like so many others, I am honored to have been a small part of the Creighton Law Review’s fifty-year history and want to recognize the hard work contributed by so many. I had the pleasure of serving as the Editor in Chief of the 40th Edition of the Creighton Law Review, and the contributions of my fellow Board of Editors—Anna M. Yost; Kelsey A. (Evans) Bunkers; Kevin S. Tuininga; Amy Bonn; Chad M. Gallacher; Cody D. Katzer; and Paul A. Christensen—still come to mind ten years later. To this day, I remember and am grateful for the experiences and life lessons I learned during my time at the Creighton Law Review.

Law review is not for everyone. Much like the practice of law, it requires hours of tedious work, attention to detail, and critical thinking. Anyone who has participated in law review knows this. Likewise, anyone who has practiced law knows these skills are highly valued. As a practicing attorney in Omaha, I witness first-hand the benefits of being part of the Creighton Law Review daily, as I am fortunate to practice with two former Editors in Chief and numerous former members of the Creighton Law Review whose training at the law review undoubtedly helped shape their practices. Although the Creighton Law Review may not be the most often-cited law review, I know from my experience that it has had a lasting impact on my practice of law, and for that reason, as well as many others, I am indebted to the Creighton Law Review. I know that I join many in the Omaha legal community in expressing our gratitude to the Creighton Law Review for the impact it has had on our practices and wishing it continued success for another 50 years!

Brian J. Koenig
Creighton Law Review Editor in Chief
Volume 40: 2006-2007
TRIBUTE TO THE 50TH VOLUME OF THE CREIGHTON LAW REVIEW

Row, Row, Row

I can still remember sitting down to lunch with Professor Ronald Volkmer, the Faculty Advisor of the Creighton Law Review, before embarking on my third year of law school as Editor in Chief. Much of the first meeting was a blur, as the reality of the daunting task ahead started to settle in; however, one thing I took away from the meeting and still remember today is Professor Volkmer told me that I was the “Captain” of the ship and that I would need to lead my “crew.” This simple reference over lunch turned into the theme for our year and an inside joke amongst many of the crewmembers. Throughout the year, it was commonplace to hear “Row, Row, Row!” or “O Captain! My Captain!” emanating from the office.

As the year began, the Board of Editors decided that we wanted to set ourselves apart and expand the Law Review beyond the fine print contained in each edition and start the now Annual Law Review Symposium. Establishing the first symposium took a great deal of extra work and effort from each and every member of the Board, but whenever anyone was asked to step up and take on an additional task in order to make the event a success, the crewmembers always came through. Successfully hosting the first annual symposium was the highlight of my year as Editor in Chief and seeing the symposium continue on each year since its inception continues to impress me.

Although the symposium was the proudest moment I had as Editor in Chief, it would not have been possible without the support and hard work of each of the members of the Board. That being said, the greatest takeaway from my time with the Law Review is by far the lifelong friendships I developed and maintain today with the members of the Board. Law review is a commitment in and of itself, but taking on the challenge of being a member of the Board was a whole new level of commitment, and the support that my crewmembers provided throughout the year forged everlasting friendships. There are few people that appreciate and understand the challenges presented throughout the year of Law Review and can still laugh when I call and begin the conversation with “Row, Row, Row!”

Sara Gude Reznicek
Creighton Law Review Editor in Chief
Volume 41: 2007-2008
I. INTRODUCTION: A CHANGING SCENE

Admission to law practice and the provision of legal services are evolving rapidly in the 21st century as a result of new attitudes, new demands, new patterns in American society, and advances in technology. The following are a few examples of this changing scene:

° Legal education is less and less local. Every law school attracts students from different states, every law school offers a broad, national curriculum in keeping with the American Bar Association (“ABA”) requirements, and Juris Doctor (“J.D.”) graduates from every accredited law school have the freedom to sit for the bar exam in any state. At the same time, bar exams are becoming more standardized throughout the country. In most states the exam no longer serves as a barrier to students who have studied elsewhere.

1. This article expands upon the article, Stephen C. Sieberson et al., Law Practice in the 21st Century – Where Are We Heading?, 41 NEWSLETTER OMAHA BAR Ass’n, no. 3, Sept. 2016, at 1, 9, and is published with the permission of the Omaha Bar Association.

† Stephen C. Sieberson is a Professor of Law, Alex Fayad is a 2016 J.D. graduate, and Carola Cintrón-Arroyo is a 2017 J.D. graduate, all of the Creighton University School of Law.


Business, investing, personal affairs, disputes, and even criminal activity are increasingly multistate in character, and it is natural that clients would wish to have their attorneys provide services wherever needed.

For many segments of the United States population, the cost of traditional legal services is simply too high. There is a critical need for less expensive options.

There is increasing awareness that persons other than fully trained lawyers can offer competent legal advice and handle legal tasks. This trend is also seen in health care, where a variety of practitioners with different levels of education and licensure are supplementing and even competing with the services traditionally provided by medical doctors.

The complexity of modern life makes it increasingly difficult to separate legal services from other services such as financial advising, tax counseling, and accounting. Lawyers may find themselves com-

6. See Model Rules of Prof’l Conduct r. 5.5 cmt. 14 (explaining that while provisions (c)(3) and (c)(4) of the rule require that the services arise out of or be reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted, there are many situations in which the client’s activities or the legal issues involve multiple jurisdictions). An example of this situation is when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each.

7. Debra Cassens Weiss, Middle-Class Dilemma: Can’t Afford Lawyers, Can’t Qualify for Legal Aid, ABA J. (July 22, 2010, 1:36 PM), http://www.abajournal.com/news/article/middle-class_dilemma_cant_afford_lawyers_cant_qualify_for_legal_aid (explaining that lawyers are too expensive for the middle class, but many in the middle class are turned away from legal aid clinics because budget cuts force the organizations to turn away potential clients in order to serve clients that are at or below the poverty level). See also Legal Servs. Corp., Documenting the Justice Gap 5 (2009) (indicating that approximately one million cases a year are currently being rejected by Legal Service Corporation-funded legal aid programs because programs lack sufficient resources to handle them). The report notes that this number represents only a fraction of the low-income people with legal needs.

8. For example, the state of Washington has recently established a Limited Practice Board to certify certain lay persons as limited practice officers. Limited Practice Officers are authorized by Washington’s Admission to Practice Rule 12 to select, prepare, and complete documents in a form previously approved by the Limited Practice Board for use in closing a loan, extension of credit, or sale or other transfer of real or personal property. Wash. Admission to Prac. r. 12 (Wash. St. Cts. 2014).


10. Elijah D. Farrell, Accounting Firms and the Unauthorized Practice of Law: Who is the Bar Really Trying to Protect?, 33 Ind. L. Rev. 599 (2000). The author argues that the trend of accounting firms employing lawyers represents “a natural extension of services already being offered.” Id. at 599.
peting with other professionals, and attorneys must often coordinate their professional activities with those of non-lawyers.

Perhaps more significant than any of the above is the fact that technology has changed the way people find information, communicate, seek advice, and manage data. In law practice there are new ways to connect clients with attorneys and new ways for lawyers to carry out their work.\textsuperscript{11}

II. IMPACT ON THE LEGAL PROFESSION—HOW DO LAWYERS VIEW THE NEW WORLD?

During the spring of 2016 we studied how the above developments have been reflected in concrete changes in the legal profession. As our research proceeded, we focused on seven trends in legal education, licensing, and practice. These trends represent significant developments that lawyers might consider to be an opportunity, a threat, or simply another challenge in an already demanding career. We then created an informal survey to discern the attitudes of practicing lawyers toward these developments.

On April 8, 2016, we presented the survey to the annual Seminar on Ethics and Professionalism conducted in Omaha, Nebraska, sponsored by Creighton Law School and the Omaha Bar Association. Dr. Sieberson presented seven survey questions in PowerPoint format and provided a written handout, and we used the Survey Monkey application to allow audience members to vote by smart phone, tablet, or laptop immediately after each question was presented. In addition, we kept the survey open for four days after the seminar to allow responses by those individuals who were not prepared to answer during the presentation. Of an audience of more than 400 practicing attorneys, we received an average of 225 responses to each question.

III. QUESTIONS AND RESPONSES

Each question below is preceded by a brief description of the topic. For the live presentation, that description was presented orally and accompanied by bullet points on the PowerPoint slides.

For each survey question we tried to offer at least one response that reflects resistance to the trend, one that embraces the trend, and one or more that demonstrate some form of middle ground. The seven

questions, along with their response options and the results from our audience, are presented below. Percentages are rounded to the nearest tenth of a percent.

**Topic 1: A Single Bar Exam.** Traditionally, each state offered its own unique bar exam, largely made up of essay questions. Today, states have the option of using the Multistate Bar Exam (“MBE”), Multistate Essay Exam (“MEE”), and Multistate Performance Test (“MPT”). In 2011 the MBE, MEE, and MPT were first offered as a package called the Uniform Bar Exam (“UBE”). Twenty-six states and the District of Columbia have adopted the UBE. Others have adopted one or more of its components, supplemented by tests on local law.

**Question 1:** Which bar exam is desirable? (231 responses)

- No UBE at all—local exam only
  - 7 responses, 3.0%

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13. The Multistate Bar Exam (“MBE”) is a six-hour, multiple-choice exam. The Multistate Essay Examination (“MEE”) consists of six 30-minute questions in which the examinee demonstrates his or her ability to communicate effectively in writing. The Multistate Performance Test (“MPT”) is developed by the NCBE and consists of two 90-minute items designed to test an examinee’s ability to apply fundamental lawyering skills in a realistic situation. NAT’L CONF. OF BAR EXAMINERS, http://www.ncbex.org/exams/ube/ (last visited Jan. 17, 2017).

14. The Uniform Bar Exam (“UBE”) takes place over the course of two days and is uniformly administered, graded, and scored by user jurisdictions. UBE scores are portable and may be used to apply for admission in other UBE jurisdictions. Some UBE jurisdictions may require an additional jurisdiction-specific examination. NAT’L CONF. OF BAR EXAMINERS, http://www.ncbex.org/exams/ube/ (last visited Jan. 17, 2017).


Uniform Bar Exam à la carte—with one or more local components
  • 105 responses, 45.5%
Uniform Bar Exam identical in every state
  • 93 responses, 40.3%
No bar exam for J.D. graduates from accredited schools
  • 26 responses, 11.3%

Comment: The overwhelming majority of responders supported the current trend toward a uniform bar exam, with this group split evenly between those who favor a local component to the exam and those who do not. Very few responders would turn back the clock to unique exams in each state. A relatively small percentage of responders would eliminate the bar exam entirely (the Wisconsin model for graduates of in-state law schools), and this result may well reflect the fact that most people in the audience had already “paid their dues” by surviving a bar exam. We imagine that a poll of current law students would produce many more votes for the no-exam option.

Topic 2: Multistate Practice. Each state’s supreme court has authority over lawyers in its jurisdiction, and each court issues law licenses valid in that state only. Lawyers can hold multiple licenses, subject to paying fees and following all rules of practice in each state, which can vary. Admission in a different state may occur by transfer of UBE scores, waiving in based on similar bar exams, or “admission on motion” if a lawyer has practiced for several years. Rule 5.5 of the Model Rules of Professional Conduct prohibits the unlicensed practice of law, but allows a lawyer to provide temporary services in another jurisdiction. The range of such services is carefully limited.

Question 2: What type of license is desirable? (230 responses)

One state at a time, based on bar exam, no admission on motion
  • 2 responses, 0.9%

18. Id.
20. Model Rule of Professional Conduct 5.5 allows lawyers to provide services only on a temporary basis either undertaken in association with a lawyer who is admitted to practice in the jurisdiction, or if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice. Ellen J. Bennett, Elizabeth J. Cohen & Helen W. Gunnarsson, Am. Bar Ass’n, Annotated Model Rules of Prof’l Conduct 515 (8th ed. 2015).
One state at a time, with easily attainable admission on motion
• 134 responses, 58.3%

Multistate license with one state handling the administration
• 24 responses, 10.4%

Multistate license within a region, with regional administration
• 21 responses, 9.1%

National license, with national administration
• 49 responses, 21.3%

Comment: It is clear that very few responders wished to require lawyers to take a second or third bar exam, and ninety-nine percent preferred to facilitate multistate practice. Our suggestions (options three through five) for a true multistate license, whether administered by one state or a regional or national administration, are not, to our knowledge, under serious consideration anywhere, likely because state supreme courts have jealously guarded their control over the legal profession. Nevertheless, these rather novel options received 40.8 percent of the votes. A majority of 58.3 percent favored easy reciprocity, even if that means being subject to more than one set of rules and more than one governing authority.

Topic 3: Online Legal Assistance. It is now possible to purchase a number of legal services online, including preparation of a will, trust, incorporation documents, dissolution documents, and power of attorney documents. In the process, the client fills in an electronic form. The online service provider reviews the form, but disclaims any offering of legal advice. Rule 5.5 prohibits unlicensed law practice, but there have been longstanding accommodations for selling legal forms and for having real estate agencies and title companies prepare certain forms. The new online providers claim that they operate like these traditional services. The providers have settled challenges by bar associations, and there appears to be growing acceptance of the practice.

22. See, e.g., LEGALZOOM, https://www.legalzoom.com/disclaimer.html (last visited Sept. 15, 2016) (stating, “We are not a law firm or a substitute for an attorney or law firm. We cannot provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, selection of forms or strategies.”).
23. See MODEL RULES OF PROF’L CONDUCT 5.5, supra note 20.
25. Id.
26. Id.
Question 3: How may clients be assisted online? (227 responses)

° Only law firms, legal aid, or bar association should provide and fill out legal forms
  • 84 responses, 37.0%
° Allow non-lawyers to provide and fill out legal forms through a service company only if each matter is reviewed by a lawyer
  • 96 responses, 42.3%
° Allow non-lawyers to provide and fill out forms through a service company without lawyer review
  • 47 responses, 20.7%

Comment: Despite the increasing presence of online form-sellers, nearly eighty percent of our responders indicated that lawyers should handle or supervise the provision of legal documents. Whether those lawyers take any steps through their bar associations, and whether the courts respond in their favor, will be worth watching. Without active intervention, we should expect the online businesses to continue vigorously promoting their services.

Topic 4: Limited Law Licenses. The state of Washington has recently created two types of licensing for non-lawyers. First, a Limited Practice Officer (“LPO”), after passing an exam, may prepare documents for loans and real and personal property transactions. The documents must be based on approved forms. An LPO does not represent separate clients, but represents all parties to a transaction, and may not offer legal advice. An LPO may work independently.27 Second, a Limited License Legal Technician (“LLLT”) must study for one year and work for one to two years for a lawyer, and then the LLLT must pass an exam. An LLLT may work independently, represent clients, and offer legal advice in family law matters only, although the subject areas may expand in the future.28 An LLLT compares to a nurse practitioner.29

Question 4: Should there be limited practice licenses? (223 responses)

° There is no need to have limited-license law specialists
  • 71 responses, 31.8%

27. WASH. ADM. TO PRAC. R. 12 (WASH. ST. CTNS. 2014).
28. Id. at r. 28.
Limited-license law specialists should be required to work under lawyer supervision
• 107 responses, 48.0%
Limited-license law specialists should be allowed to work independently within specified limits
• 45 responses, 20.2%

Comment: The idea of limited license practitioners who can operate independently was favored by only 20.2 percent of our responders. Nearly half approved a new form of licensing, but only as long as the technicians work as paralegals and legal assistants currently do, i.e., under lawyer supervision. The Washington model will undoubtedly be monitored by lawyers and courts in other jurisdictions, and a key consideration should be whether the new types of practitioner will help fill the need for less expensive legal services.

Topic 5: Multi-Disciplinary Firms. A multi-disciplinary firm (“MDF”) is one that offers a variety of professional services. In the United States, Rule 5.4 of the Model Rules of Professional Conduct prohibits lawyers from fee-sharing with non-lawyers, and this has prevented lawyers from participating in MDFs in which non-lawyers are equity owners. MDFs are common in other countries. In the state of Washington, new Rule of Professional Conduct 5.9 allows Limited License Legal Technicians to own a share in a law firm as long as lawyers retain control.

Question 5: Should lawyers be allowed to practice in an MDF? (224 responses)

No, Rule 5.4 should be retained as is
• 67 responses, 29.9%
Yes, but only if lawyers retain control over the MDF
• 45 responses, 20.1%

30. The American Bar Association has described a multidisciplinary practice as a partnership, professional corporation, or other association or entity that includes lawyers and non-lawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing non-legal, as well as legal, services. ABA COMM. ON MULTIDISCIPLINARY PRACT., REP. TO THE HOUSE OF DELEGATES 1 (1999).
31. MODEL RULES OF PROF’L CONDUCT r. 5.4 (AM. BAR ASS’N 2016).
34. WASH. RULES OF PROF’L CONDUCT r. 5.9 (WASH. ST. CTS. 2015).
° Yes, if lawyers retain professional independence despite non-lawyer control over the MDF
  • 89 responses, 39.7%
° Lawyers should not be restricted from participating in an MDF, regardless of its control
  • 23 responses, 10.3%

Comment: Looking at options two through four, 70.1 percent of responders approved the concept of a multi-disciplinary firm that includes lawyers providing legal services. This is a rather significant rejection of Rule 5.4 as it has traditionally been interpreted. Nevertheless, very few of those in favor of the MDF selected option four, which would allow the lawyers in an MDF to be subject to control by non-lawyers without restriction.

Topic 6: Referral Fees. Rule 5.4 prohibits sharing fees with a non-lawyer. Rule 7.2 prohibits paying referral fees except to certain non-profit referral agencies, but it does permit a lawyer to pay for “advertising or communication.” A new for-profit online company refers clients to its list of lawyers, collects a fixed fee from the client up front for the legal services, and then pays the lawyer the full fee when the work is completed. However, the company then charges the lawyer a “marketing fee” of approximately 15-20% of the lawyer’s earned fee. The company claims that its marketing fee is consistent with the rules of ethics.

Question 6: Should lawyers be allowed to pay referral fees to “for-profit” companies? (225 responses)

35. M ODEL R ULES O F P ROFL C ONDUCT r. 5.4 (A M. B AR A SS’N 2016).
36. Id. at r. 7.2.
37. Attorney FAQ for Avvo Legal Services, AVVO, https://support.avvo.com/hc/en-us/articles/208459216-Services-FAQ-for-attorneys (last visited Feb. 20, 2017) (explaining, “This fee is withdrawn from the bank account you choose for withdrawals—this should be your operating account. The amount depends on the service, and ranges from a $10 marketing fee for a $39 service, to $40 marketing fee for a $149 service, up to a $400 marketing fee for a $2995 service. For example, if a client purchases a $149 document review service with you, you will be paid the full $149 client payment into your deposits account. As a separate transaction, you will be charged a $40 marketing fee from your withdrawals account.”).
38. Avvo defends its fees as follows: Fee splits are not inherently unethical. They only become a problem if the split creates a situation that may compromise a lawyer’s professional independence of judgment. We believe that Avvo Legal Services fees, if deducted like credit card fees, would involve the sort of technical fee split that would not create such a potential for compromise. Nonetheless, we have tried to keep things simple and clear by making the per-service marketing fee a separate charge from your operating account.

Id.
° No, such fees should be limited to a bar association or nonprofit referral agency
  • 110 responses, 48.9%
° Yes, but only if the fee has no relation to the number of referred cases or size of legal fees
  • 68 responses, 30.2%
° Yes, allow such a fee after the referral and based on the size of the legal fee
  • 28 responses, 12.4%
° Yes, there should be no restrictions on referral fees to anyone
  • 19 responses, 8.4%

Comment: The company referred to in this question is Avvo, although others may be using a similar business model. Option one would reject the new model and preserve the traditional system of lawyer referrals. Option two would allow a lawyer to pay a true marketing fee to a company, but that fee would have to be based on the marketing efforts and not the results. Only 20.6 percent of responders selected options three or four, which would approve the Avvo model or some other form of percentage-based referral fee to a for-profit company. A substantial majority selected options one or two, expressing a rejection of percentage-based fees being paid to a for-profit company.

Topic 7: Outsourcing Support Services. It is possible to retain an outside firm to provide support services such as document review, research, document drafting, and data management.39 Such “legal process outsourcing” providers may be local, but may also be located anywhere in the world—India, for example.40 Ethical issues in outsourcing implicate Rules 5.1 41 and 5.3 42 (a lawyer’s supervisory responsibilities), Rule 1.7 (conflict of interest—who else is the provider working for?),43 and Rule 1.6 (confidentiality/privilege).44

Question 7: Should there be limits on outsourcing? (223 responses)
° Outsourcing should not be allowed in any form
  • 61 responses, 27.4%

40. Id. See also Mary C. Daly & Carole Silver, Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services, 38 GEO. J. INT’L L. 401 (2007).
41. MODEL RULES OF PROF’L CONDUCT r. 5.1 (AM. BAR ASS’N 2016).
42. Id. at r. 5.3.
43. Id. at r. 1.7.
44. Id. at r. 1.6.
° Allow outsourcing only to firms with which the lawyer has ongoing face-to-face contact
  • 72 responses, 32.3%
° Allow outsourcing only to firms within the United States
  • 43 responses, 19.3%
° No geographical restrictions on outsourcing
  • 47 responses, 21.1%

Comment: Option one received more than a quarter of the vote, even though it is likely that every lawyer at one time or another has retained an outside service company for assistance in printing or managing data or technology. Therefore, we should interpret option one as rejecting only those support services that closely resemble legal work such as research, document review, and drafting. There was a fairly even split among the four options, although a clear majority of 59.7 percent of responders favored options one and two and would require careful lawyer control over all legal services, either by keeping them in-house or by demanding close supervision of the outsourced work. Still, it is significant that nearly three-quarters of responders (options two through four) approved of outsourcing, including nearly forty percent (options three and four) who would permit outsourcing to a remote service provider.

IV. LIMITATIONS OF THIS SURVEY

The limitations of this survey are several. First, our description of each of the seven trends was distilled into a format that could be explained, digested, and voted on in approximately five minutes. Thus, the questions and responses lacked the detail and nuance that they undoubtedly deserve. Second, to keep things manageable, for the response to each question we offered only a handful of alternatives, and we required the responder to select only one of them. Again, simplicity triumphed over subtlety. Third, although we did our best to present the material in a lucid and objective fashion, we did not test the survey in advance to determine whether our descriptions were clear to the audience or to uncover our own biases. Fourth, to keep our focus on the practice of law, we emphasized the practical aspects of each subject. Legal and ethical concerns were present in the entire exercise, but we did not emphasize the technical requirements of the applicable rules of professional conduct. Fifth, we did not ask for demographic information from responders, and thus we do not know how the responses might have reflected age, gender, ethnicity, years of practice, type of practice, or other factors.
V. FINAL OBSERVATIONS

We conclude by reminding ourselves and the bar that we cannot simply ignore these trends in how our profession is composed and in how legal services are being delivered to the public. We urge state and local bar associations and the courts to keep abreast of these developments and to address them thoughtfully, in order to preserve the professionalism of law practice, but more importantly, to ensure that quality legal services can be made available to all members of society.
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P.C., L.L.O. or its clients.
I. INTRODUCTION

Civil forfeiture1 is a powerful tool that allows law enforcement to seize property if there is probable cause that it is related to, or proceeds from, criminal activity, without regard for the guilt or innocence of the owner. This can be beneficial in some circumstances because it simultaneously deprives criminals of the tools they need to operate while providing law enforcement with resources to combat crime.2 However, concomitant with this power is the potential for abuse, especially in the context of shrinking budgets, since law enforcement agencies that seize assets are often allowed to keep and use them.3

Although forfeitures may be challenged, in many cases the cost is prohibitive compared to the value of the property seized.4 This often makes surrender the rational choice when compared to challenging, even in the case of wrongful seizures. Although forfeiture can be a valuable tool for law enforcement and the incidence of wrongful seizures is unclear because the vast majority go unchallenged, it is clear that abuses have occurred and continue to occur. Many familiar with the practice consider civil forfeiture abuse to be one of the largest social ills in the United States.5

Forfeiture reform has proved difficult because it implicates several important, and in many ways, opposing policy goals. Further-

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1. “Civil forfeiture” is sometimes shortened to “forfeiture.” “Criminal forfeiture” is always spelled out.
2. See infra note 27 and accompanying text.
more, the interaction of state and federal regimes limits the effectiveness of reforms at either level. For instance, state-level reforms accomplish little because federal forfeiture statutes can still be used by state agencies—even in cases where the underlying conduct is legal under the laws of that state.6 To make matters worse, significant changes to forfeiture would impact police budgets, and states would either have to accept that fact, or allocate other money to make up the difference.

This Article proposes a fundamentally different approach to curbing forfeiture abuse: using insurance to create a powerful repeat player opposite law enforcement in forfeiture proceedings.7 By adding coverage for the defense of civil forfeiture proceedings to common insurance products—either through a legislative mandate or through a voluntary insurance market—insurers could help protect people from wrongful asset seizures. This provides several advantages over existing reform efforts. First, and perhaps most importantly, it would allow law enforcement the flexibility to continue using forfeiture against criminals while simultaneously protecting the rights of innocent people. Second, although government action would likely be the most effective method for implementation, it is not required.8 Third, with strategic marketing, voluntary implementation might actually be profitable for insurers. Finally, it would produce large amounts of data, which would illuminate the nature and scope of the problem posed by civil forfeiture.9

This Article proceeds in three parts. Section II provides a brief history of civil forfeiture in the United States, describes its current operation, and explains the need for reform. Section III explains how insurance could be used to regulate civil forfeiture. Subsection III.A explains that the risk is indeed insurable, and describes the problems of moral hazard and adverse selection. Subsection III.B describes the advantages and disadvantages of two potential models for implantation: a legislative mandate or a voluntary market for forfeiture coverage. It then addresses moral hazard and pricing. Section IV attempts to predict how insuring against forfeiture would affect proceedings,

6. See infra notes 24-25 and accompanying text.
7. Some reform-minded individuals have proposed government-funded counsel as a way to balance the scales between claimants and government. However, this would have immediate upfront costs that make implementation less likely. The advantage of using insurance is that there would be no direct costs to states.
8. See infra notes 95-102 and accompanying text.
9. For instance, it might reveal that forfeiture abuse is so anomalous that further reform is unnecessary or undesirable. On the other hand, it might illuminate harmful patterns such as racial discrimination. The lack of data prevents the reconciliation of these differing viewpoints.
how police would respond to the changing financial incentives, and other potential impacts.

II. CIVIL FORFEITURE IN THE UNITED STATES

A. HISTORY

The idea that inanimate objects and other property can be guilty of a crime has a long history.10 In the United States, however, the practice was so offensive to American Colonists that it contributed to the Revolution and motivated the framers of the Constitution to include a provision explicitly banning forfeiture of estate.11 This constitutional provision did not stop the occasional use of statutory forfeiture, however, which was considered a legitimate enforcement and revenue-raising tool.12

Two centuries later, the opening salvos of the War on Drugs led to a dramatic expansion of civil forfeiture.13 The Comprehensive Drug Abuse Prevention and Control Act of 197014 permitted police to use forfeiture to combat drug trafficking.15 When combined with the Comprehensive Crime Control Act of 198416 ("CCCA")—which al-

10. Civil forfeiture—which is rooted in the idea that objects can be found guilty—dates back to Biblical times. See Exodus 21:28 ("When an ox gores a man or a woman to death, the ox shall be stoned, and its flesh shall not be eaten; but the owner of the ox shall not be liable."); see also van den Berg, supra note 4, at 873 (citing Alan Nicgorski, The Continuing Saga of Civil Forfeiture, the “War on Drugs,” and the Constitution: Determining the Constitutional Excessiveness of Civil Forfeitures, 91 Nw. U. L. Rev. 374, 378 (1996)) (explaining that the idea of a guilty object stems from Exodus). The concept expanded in England under various names as it began to generate revenue for the Crown, until it was eventually expunged from the common law in the early nineteenth century. See van den Berg, supra note 4, at 873.

11. The property of a person convicted of treason can be confiscated, but it remains inheritable to the person's descendants upon their death. See U.S. Const. art. III, § 3, cl. 2 ("[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.").

12. Forfeiture statutes were distinguished from common law forfeiture and upheld by the Supreme Court, because they proceeded in rem—as opposed to common law forfeiture, which proceeded in personam—directly against property, which was "here primarily considered as the offender . . . ." The Palmyra, 25 U.S. 1, 14 (1827). Initially, forfeiture statutes targeted smugglers and were limited to cases in admiralty, which blunted their impacts. See van den Berg, supra note 4, at 874. Over the next two centuries or so, civil forfeiture was used sparingly, with the exception of the Confiscation Acts during the Civil War and the National Prohibition Act in the early twentieth century. Id. at 875.


allowed police themselves to use forfeited funds—law enforcement use of forfeiture exploded. Concerns about the practice led to the passage of the Civil Asset Forfeiture Reform Act (“CAFRA”) in 2000; however, in many ways CAFRA did not go far enough, and forfeiture abuse remains problematic.

B. CURRENT OPERATION AND THE NEED FOR REFORM

Civil forfeiture is authorized by a variety of state and federal statutes. Depending on whether the alleged offense is a violation of state or federal law (or both), state or federal statutes (or both) might be triggered. The agent pursuing the forfeiture must belong to the branch of the statute being used. This would seem to limit the ability of state and local agencies to use federal forfeiture statutes; however, a practice called equitable sharing allows “United States Attorneys to share civil asset forfeiture proceeds with the local law enforcement that assisted in securing the forfeiture.” In practice, this empowers state and local law enforcement agencies to seize assets even if the underlying action leading to forfeiture was legal under state law. This occurs because local police can de jure initiate state forfeiture proceedings and de facto initiate federal forfeiture proceedings. The latter occurs when local police search for and find sufficient evidence of a violation of federal law. They then contact the [Assistant United States Attorney], who initiates the seizure and provides much of the forfeiture bounty to the local police department. By form, the federal government initiates the action, but by substance, local law enforcement drives it. The federal government benefits by co-opting local police forces to enforce federal goals and local police benefit by obtaining forfeiture proceeds.

19. See, e.g., Bennis v. Michigan, 516 U.S. 442 (1996) (holding that innocence was not a defense in a forfeiture action and denying recovery of a vehicle by an innocent co-owner spouse after her husband used their car to solicit prostitutes).
21. See infra notes 22-55 and accompanying text.
23. Id.
24. Id.
25. Id. at 554-55 (footnotes omitted).
Supporters of civil forfeiture argue that it is a necessary tool to combat crime and raise revenue.\(^{26}\) It makes it easier to target organized crime and drug trafficking because property does not receive the same level of protection as human defendants in the criminal justice system. It is also advantageous in that it deprives criminals of the resources they need to operate while simultaneously providing additional resources to law enforcement.\(^{27}\) Furthermore, supporters of the War on Drugs see equitable sharing as an important incentive for state and local police to participate in the enforcement of federal drug laws.\(^{28}\)

On the other side, critics argue that it is unfair to seize property with little or no evidence that the owner was involved in a crime.\(^{29}\) Some say that this should constitute a due process violation; however, courts have disagreed, holding instead that due process is satisfied by post-seizure proceedings where claimants can recover their property.\(^{30}\) Unfortunately, these proceedings are often difficult to navigate without an attorney, and hiring an attorney is often more expensive than the value of the property seized. Rational claimants whose property is worth less than it would cost to retrieve it are effectively afforded no process. There is also evidence that civil forfeiture

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26. See, e.g., Craig Gaumer, A Prosecutor’s Secret Weapon: Federal Civil Forfeiture Law, 55 Asset Forfeiture (EOUSA, Washington, D.C.), no. 6, 2007, at 59 (“Federal civil forfeiture law is a prosecutor’s secret weapon, a valuable tool used to guarantee that wrongdoers do not reap the financial benefits of criminal activity or continue to use the tools of their illegal trade.”).


28. The incentive structure is important because the federal government cannot compel state and local police to enforce federal laws. See id. at 572 (explaining the anti-commandeering principle articulated in New York v. United States, 505 U.S. 144 (1992)).

29. See Charles Doyle, Cong. Research Serv., 7-5700, Crime and Forfeiture 15 (2015) (“Civil forfeiture treats the property as the defendant, confiscating the interests of the innocent and guilty alike . . . .”), John L. Worrall, Asset Forfeiture, Problem-Oriented Guides for Police Response Guides Series (Center for Problem-Oriented Policing), no. 7, 2008, at 4 (“It is estimated that as many as 90 percent of civil forfeitures are not accompanied by criminal charges, either intentionally or due to insufficient evidence to support a criminal prosecution.” (footnote omitted)); see also Larry Salzman, Assault By Civil Forfeiture: Column, USA Today (Sept. 25, 2013, 6:10 PM), http://www.usatoday.com/story/opinion/2013/09/25/grocery-store-detroit-irs-column/2868797 (“Civil forfeiture is now one of the most serious assaults on individual rights in America.”).

30. See Catherine E. McCaw, Asset Forfeiture as a Form of Punishment: A Case for Integrating Asset Forfeiture into Criminal Sentencing, 38 Am. J. Crim. L. 181, 190 (2011) (noting that roughly 80% of forfeiture actions are uncontested and theorizing that litigation costs are a contributing factor when they exceed the value of the property).
is employed disproportionately against poor people and in minority communities, where people are less likely to challenge seizures.footnote{31}

Supporters of the War on Drugs may also have cause for concern, because allowing law enforcement to use the proceeds of civil forfeiture has caused “some agencies [to] become more interested in confiscating cash than drugs.”footnote{32} When illegal drugs are seized, they are held in evidence and eventually destroyed.footnote{33} When cash is seized, it may be added to the seizing agency’s budget. As a result, police have an incentive to allow illegal drugs to reach the streets, and intervene only after cash has been collected.footnote{34} This incentive structure is problematic because it has the potential to undermine the entire stated purpose of the War on Drugs, which is keeping illegal drugs off the streets.footnote{35} Finally, the current regime is problematic because the use of state and local agents to enforce federal laws creates major federalism concerns where the underlying conduct is legal under state law.footnote{36}

footnote{31} Civil Asset Forfeiture, ACLU (Mar. 2, 2015), http://www.leg.state.nv.us/Sess ion/78th2015/Exhibits/Senate/JUD/SJUD415E.pdf (“Asset forfeiture practices often go hand-in-hand with racial profiling and disproportionately impact low-income African-American or Hispanic people . . . .”); Chloe Cockburn, Easy Money: Civil Asset Forfeiture Abuse by Police, ACLU (Feb. 3, 2010, 1:16 PM), https://www.aclu.org/blog/easy-money-civil-asset-forfeiture-abuse-police (“[P]olice do not seize assets from all equally. Instead, they target those persons they associate with criminal behavior and drug trafficking. The result is a regime of racial profiling of black and Latino drivers on the highways, who are stopped and stripped of their money based on minimal or non-existent evidence.”).

footnote{32} Seized Drug Assets Pad Police Budgets, NAT’L PUB. RADIO, at 1:15 (June 16, 2008, 12:01 AM), http://npr.org/templates/story/story.php?storyId=91490480; see also Eric Blumenson & Eva S. Nilsen, Policing for Profit: The Drug War’s Hidden Economic Agenda, 65 U. Chi. L. Rev. 35, 67-68 (1998) (describing how some tactics—which are preferred by many agencies—to maximize police profits can actually result in more drugs reaching the streets, including the use of “reverse stings” or deferring sting operations of targeted dealers until the drugs had already been sold).


footnote{34} See Seized Drug Assets, supra note 32, at 5:37 (“If a cop stops a car going north with a trunk full of cocaine, that makes great press coverage, makes a great photo. Then they destroy the cocaine . . . . If they catch ‘em going south with a suitcase full of cash, the police department just paid for its budget for the year.”).

footnote{35} John Woolley & Gerhard Peters, Ronald Reagan: Remarks Announcing Federal Initiatives Against Drug Trafficking and Organized Crime, THE AM. PRESIDENCY PRO JECT (Oct. 14, 1982) (transcript available at http://www.presidency.ucsb.edu/ws/?pid=43127) (“For the sake of our children, for the sake of all the magnificent accomplishments of the American past, today I ask for your support and the support of our people in this effort to fight the drug menace . . . .”). Some may argue that police are strategically targeting cash and letting some drugs go in an effort to reduce overall drug imports. However, that does not explain why the number of forfeitures exploded following the passage of the CCCA in 1984. See supra note 18 and accompanying text. Furthermore, if seizing cash is a strategic decision designed to reduce the availability of illegal drugs, it is ineffective because decades later, illegal drugs are still readily available.

footnote{36} See Hunter, supra note 22, at 555 n.23.
Reforming forfeiture has proved difficult. Public sentiment favoring harsh drug laws and powerful police lobbies make it difficult to generate the political will to upend a system that generates substantial revenue.\textsuperscript{37} Even where such will exists, equitable sharing effectively places a floor on forfeiture: if a state makes it more difficult to pursue forfeiture under state law, state and local officials can work with federal prosecutors to pursue federal forfeiture.\textsuperscript{38} For example, North Carolina completely banned civil forfeiture in rem,\textsuperscript{39} but state and local law enforcement agencies still make extensive use of equitable sharing.\textsuperscript{40}

At the federal level, reforms have been limited. The only major federal legislative attempt was CAFRA, which was passed in 2000 and hailed as “the most comprehensive revision of the civil asset forfeiture laws . . . since the first forfeiture statutes were enacted in 1789.”\textsuperscript{41} It created the innocent-owner defense, which had been rejected by the Supreme Court in \textit{Bennis v. Michigan},\textsuperscript{42} and codified the proportional-

\textsuperscript{37} See \textit{id.} at 556.
\textsuperscript{38} Id. at 557-58; see also Michael J. Duffy, Note, \textit{A Drug War Funded with Drug Money: The Federal Civil Forfeiture Statute and Federalism}, 34 SUNYVOLK U. L. REV. 511, 537 (2001) (concluding that state legislatures have no choice but to participate in federal forfeiture programs); Dick M. Carpenter et al., \textit{Inequitable Justice: How Federal “Equitable Sharing” Encourages Local Police and Prosecutors to Evade State Civil Forfeiture Law for Financial Gain,} \textsc{Instr. For Just.} (Oct. 2011), https://www.ij.org/inequitablejustice (explaining how the practice of equitable sharing encourages state and local police to “circumvent the civil forfeiture laws of their states for financial gain.”).
\textsuperscript{39} Property can only be forfeited under North Carolina state law if the owner is convicted of a crime. N.C. GEN. STAT. ANN. §§ 90–112 (West 2013). Other states have also experimented with reform. See, e.g., Ilya Somin, \textit{Minnesota Adopts Law Curbing Asset Forfeiture Abuse}, \textsc{Wash. Post} (May 10, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/10/minnesota-adopts-law-curbing-asset-forfeiture-abuse (discussing Minnesota law SF 874, which prohibits civil forfeiture except where the owner has been convicted of, or pleaded guilty to, a crime).
\textsuperscript{40} \textit{Federal Equitable Sharing,} \textsc{Instr. For Just.}, https://www.ij.org/report/policing-for-profit/federal-equitable-sharing (last visited Feb. 12, 2017) (noting that although civil forfeiture does not exist under North Carolina law, state and local police “participate[ ] extensively in equitable sharing”). This is consistent with research indicating that in states where civil forfeiture “is more difficult and less rewarding, law-enforcement agencies take in more equitable-sharing payments. In other words, police and prosecutors use equitable sharing as an easier and more profitable way to secure forfeiture funds.” \textit{Asset Forfeiture Oversight: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security and Investigations of the H. Comm. on the Judiciary}, 114th Cong., 2015 WL 556180, at 8 (statement of Darpana M. Sheth, Attorney, Institute for Justice).
\textsuperscript{42} 516 U.S. 442, 453 (1996) (concluding that cases authorizing forfeiture of property owned by innocent individuals are “too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced”) (internal quotation omitted).
ity requirement introduced in United States v. Bajakajian.\(^43\) CAFRA also increased the government’s burden of proof in forfeiture proceedings to the preponderance standard\(^44\) and added a hardship provision, which (in some instances) allows the release of seized property to the claimant pending trial.\(^45\) However, these reforms apply only to forfeitures brought under CAFRA and they help only people who actually challenge seizures.\(^46\) Actions brought under other federal statutes are not subject to CAFRA’s reforms, including the innocent-owner defense.\(^47\)

In January 2015, then-Attorney General Eric Holder decided to limit a form of equitable sharing called adoption.\(^48\) This was praised by some as a great reform,\(^49\) but critics were quick to point out that it was limited in scope and did not affect the majority of equitable shar-

\(^{43}\) 524 U.S. 321 (1998) (determining that forfeiting the entire sum of $357,144 for violating customs reporting requirements violated the Eighth Amendment prohibition on excessive fines).


\(^{45}\) The hardship provision has limitations, and does not apply to most cash seizures. See Cassella, supra note 41, at 106-07.

\(^{46}\) CAFRA did provide that the government must pay attorney’s fees to successful claimants. 28 U.S.C. § 2465(b)(1)(A) (2012). However, this is a risky up-front investment that many cannot or do not wish to make, and others simply forego hiring an attorney because they are unaware of the provision. Eric Moores, Note, Reforming the Civil Asset Forfeiture Reform Act, 51 Ariz. L. Rev. 777, 798 (2009). Furthermore, the fee-shifting provision can be avoided entirely if the government voluntarily dismisses the case. See, e.g., United States v. 2007 BMW 335I Convertible, 648 F. Supp. 2d 944, 947 (N.D. Ohio 2009) (holding that claimants who recover their property as a result of the government’s voluntary dismissal have not “substantially prevailed” and are not entitled to recover attorney’s fees, even after significant litigation has already occurred). Thus the government is free to press its case until it appears unwinnable, and then voluntarily dismiss it to avoid paying attorney’s fees.

\(^{47}\) See, e.g., United States v. Davis, 648 F.3d 84, 94 (2d Cir. 2011) (noting that there is no innocent owner defense under customs forfeiture provisions).


Then, in December 2015, the Department of Justice suspended all equitable sharing payments to state law enforcement agencies. Once again, this was praised by some as an important reform; in reality it was merely a temporary shutdown due to budget constraints, and the program was restarted in March 2016. Even if equitable sharing was shut down at the federal level, forfeiture would continue unabated in states that have not taken steps to reform it.

Other proposed reforms are likely to fail for the same reasons. Fixing forfeiture requires a fundamentally different approach—one that recognizes and allows the advantages it brings in certain situations, while simultaneously making the process more transparent and reducing the potential for abuse.

50. See Radley Balko, How Much Civil Asset Forfeiture Will Holder’s New Policy Actually Prevent?, WASH. POST (Jan. 20, 2015), http://www.washingtonpost.com/news/the-watch/wp/2015/01/20/how-much-civil-asset-forfeiture-will-holders-new-policy-actually-prevent (noting that adoption accounts for less than 14% of equitable sharing); see also Jacob Sullum, Despite Holder’s Forfeiture Reform, Cops Still Have A License To Steal, FORBES (Jan. 22, 2015, 4:04 PM), http://www.forbes.com/sites/jacobsullum/2015/01/22/despite-holders-forfeiture-reform-cops-still-have-a-license-to-steal (explaining that 86% of seizures from 2008 to 2013 would not have been covered by Holder’s new policy according to Justice Department figures, and that state and local police can still use equitable sharing in investigations “assisted by or coordinated with ‘federal authorities’”); Jacob Sullum, How the Press Exaggerated Holder’s Forfeiture Reform, REASON: HRR & RUN BLOG (Jan. 19, 2015, 10:34 PM), http://reason.com/blog/2015/01/19/how-the-press-exaggerated-holders-forfei (noting that Justice Department numbers indicate the vast majority of equitable sharing will continue).


53. See Day, supra note 51 (“By deferring equitable sharing payments now, we preserve our ability to resume equitable sharing payments at a later date should the budget picture improve.”).


55. Current reform proposals include banning civil forfeiture in rem actions completely, ending all federal equitable sharing, and increasing government transaction costs through various procedural hoops. See, e.g., van den Berg, supra note 4, at 919-23; Moores, supra note 46, at 797-802; Scott Bullock, Foreword to the Second Edition of Dick M. Carpenter II et al., Policing for Profit: The Abuse of Civil Asset Forfeiture, INST. FOR JUST. (Nov. 10, 2015), https://www.ij.org/foreword-2.
III. USING INSURANCE TO REGULATE CIVIL FORFEITURE

Using insurance to regulate civil forfeiture would allow law enforcement to continue seizing assets from criminals while simultaneously protecting innocent owners at no direct cost to taxpayers. This could be accomplished in one of two ways. First, and most effectively, legislatures seeking to reform forfeiture could mandate a provision in common insurance policies (such as homeowner’s or auto) that would provide a defense against forfeiture actions. The second option would be somewhat less effective, but has the advantage that it could be pursued even in states that do not wish to curb forfeiture. This option would involve insurers making available a civil forfeiture rider to attach to common policies. Both options would improve the situation by increasing the number of questionable forfeitures that are challenged.

Law enforcement agencies that are unable to keep the proceeds of wrongful forfeitures due to successful challenges will still be able to seize assets from criminals, but will be less likely to abuse the practice. Even in states where successful claimants are repaid from general tax funds—thus allowing police to retain the financial benefit of wrongful seizures—insurance will have a positive impact, because the increased number of successfully challenged forfeitures will both (1) spread the cost of policing to the entire tax base, which is the appropriate population to fund police activity (as opposed to single individuals whose assets are wrongfully seized), and (2) draw increased taxpayer and legislative scrutiny to asset forfeiture programs.

This Section begins by examining whether the risk of having assets seized by police is of the sort that can be covered by insurance and describes the problems of moral hazard and adverse selection. After concluding that the risk is insurable, it discusses potential models for implementation: a legislative mandate or a voluntary market. It concludes that a legislative mandate would be the most effective option, but that a voluntary market might also be profitable, and is therefore worthy of consideration by insurers.

A. INSURABILITY

As a threshold matter, the risk of having assets seized must be insurable and there must be a way to ameliorate moral hazard and adverse selection. This subsection argues that forfeiture has the characteristics of an insurable risk under the traditional model of insurability. Furthermore, although moral hazard and adverse selection are problematic, insurers have a variety of tools at their disposal to prevent them from undermining the market for forfeiture insurance.
1. Characteristics of Insurable Risks

Insurable risks have traditionally been defined by five characteristics. First, the risk must present "a large, homogeneous group of exposure units." Second, the risk should be definite, so the insured cannot pretend to have suffered a covered loss. Third, the occurrence of the risk should be accidental or fortuitous. Fourth, "the loss must be big enough to produce hardship, but not so big as to be catastrophic." Finally, "the cost of the risk run must be calculable." Comparing the risk of wrongful forfeiture against these criteria reveals that it is insurable.

TABLE 1: INSURABILITY OF CIVIL FORFEITURE

<table>
<thead>
<tr>
<th>Insurability Criteria</th>
<th>Forfeiture Characteristic</th>
</tr>
</thead>
<tbody>
<tr>
<td>Large Number Exposed</td>
<td>Every property owner in the United States is at risk</td>
</tr>
<tr>
<td>Definite Risk</td>
<td>Claimants are given a receipt when a forfeiture occurs</td>
</tr>
<tr>
<td>Fortuitous</td>
<td>The loss is fortuitous from the perspective of the insured</td>
</tr>
<tr>
<td>Hardship, Not Catastrophe</td>
<td>The loss is sufficient to produce a hardship but is not</td>
</tr>
<tr>
<td></td>
<td>catastrophic</td>
</tr>
<tr>
<td>Calculable Loss</td>
<td>The value of the loss is easily calculated</td>
</tr>
</tbody>
</table>

First, there is a large homogeneous group of exposure units: every individual with property in the United States is at risk of having it wrongfully forfeited. For example, if a person has money in his or her pocket, it is likely that it is tainted with drug residue. Despite its

56. Thomas O. Farrish, “Diminished Value” in Automobile Insurance: The Controversy and Its Lessons, 12 CONN. INS. L.J. 39, 64 (2005) (describing the “conventional conception” of insurability as turning on five traits) (citations omitted). There is a trend toward expanding insurability, but that discussion is not germane here because forfeiture is insurable even under the traditional, narrower conception of insurability. See id. at 67.
57. Id. at 64 (“The accuracy of loss forecasts improves as the number of exposure units in the [group] increases.”) (emphasis in original).
58. Id.
59. If an insurer knows that a risk is certain to occur, the premium will always be greater than the cost of the risk, so insurance would provide no advantage. Id. at 64-65. The fortuity requirement also protects insurers from losses that are easily produced by the insured. Id. at 65.
60. See id. (explaining that insuring inconsequential risks is not profitable, and insuring catastrophic risks is too risky even for insurers) (emphasis in original).
61. See id. at 65-66 (noting that losses such as sentimental value cannot be expressed mathematically, which makes them difficult or impossible to insure).
62. United States v. $53,082.00 in United States Currency, 985 F.2d 245, 250 n.5 (6th Cir. 1993) (noting that as much as 96% of currency is tainted with drug residue); United States v. $80,760.00 in United States Currency, 781 F. Supp. 462, 475 (N.D. Tex. 1991) (stating the same); see also Mark Curriden, Courts Reject Drug-Tainted Evidence: Studies Find Cocaine-Soiled Cash So Prevalent That Even Janet Reno Had Some, 79 ABA J., Aug. 1993, at 22 (testing eleven bills held by prominent figures including Janet
ubiquity, if a police canine alerts on that drug residue, police may seize the money.\textsuperscript{63}

The second factor of definite risk is easily satisfied. When a seizure occurs, claimants are given a receipt for their property. Although one can imagine scenarios involving inaccurate receipts, fraud, or collusion, it seems unlikely given the process officers must go through to turn in seized property. If fraud was involved, it could be sorted out in the adjudication and the penalties would be severe. This coverage would not create an easy target for people looking to commit insurance fraud.

Third, the risk should be accidental or fortuitous. This is the only factor that invites in-depth consideration because some seizures are clearly the result of wrongful conduct and are therefore not fortuitous.\textsuperscript{64} At the outset, however, it is worth noting that many non-random risks are in fact insured today.\textsuperscript{65} It is also worth noting that although insurance companies generally do not indemnify losses that result from intentional wrongful acts, insurers can and do sell products that provide a legal defense for intentional wrongful acts.\textsuperscript{66} That some civil forfeiture actions will result from the wrongful conduct of the insured does not prevent the risk from being insurable,\textsuperscript{67} because clear policy language can reduce the negative impacts of moral hazard and risk classification can do the same for adverse selection.\textsuperscript{68} Furthermore, some seizures do seem to have a random component.\textsuperscript{69}


\textsuperscript{64} This factor addresses moral hazard and adverse selection. \textit{See infra} notes 79-91.


\textsuperscript{67} Because civil forfeiture is not technically a penalty imposed on an individual for his or her wrongful conduct, it may be the case that indemnification of even legitimate civil forfeitures is not per se illegal. Public policy favors requiring law enforcement to use criminal forfeiture statutes—thus affording claimants the procedural safeguards to which they are entitled when subjected to punishment by the state—when punishing wrongful conduct.

\textsuperscript{68} \textit{See infra} notes 96-103 and accompanying text.

\textsuperscript{69} \textit{See, e.g.}, Stillman, \textit{supra} note 5 (recounting several seemingly random seizures including, for example, one which began when officers pulled a vehicle over for driving in the left lane without passing for “more than half a mile” and ended with a seizure despite a complete lack of evidence of any wrongdoing).
There are clearly risk factors, such as living in a state with robust forfeiture laws or engaging in criminal activity, but often the individual whose property is seized has done nothing wrong. Becoming a target without doing anything wrong does have an element of fortuity from the perspective of the insured, and therefore, this factor is satisfied.

The fourth factor—that the harm produces a hardship but not be catastrophic—is also satisfied. Wrongful forfeiture is relatively unlikely to occur, but for claimants who sustain such a loss, it clearly produces a hardship. The risk is also far from catastrophic. Although the total dollar value of forfeitures under federal law is in the billions, the average forfeiture is quite small.

The final factor is also easily satisfied, because the loss is easily calculated. When cash is seized the amount will be listed on the receipt. It might be more complicated if seized objects have sentimental value, but in that case, the object itself can be returned if the claimant is successful.

70. See Worrall, supra note 29, at 4.
71. Seizures result from the intentional conduct of the police officers involved, but in the context of insurability, a fortuitous event is “an event which so far as the parties to the contract are aware, is dependent on chance.” Leo P. Martinez, A Unified Theory of Insurance Risk, 74 U. PITT. L. REV. 713, 740 (2013).
72. In 2010 for example, there were roughly eleven thousand noncriminal forfeiture cases. See Emshwiller & Fields, supra note 5. Although that is a problem from an individual rights perspective, from a statistical perspective the odds of being targeted are extremely low in a country of over three hundred million people.
73. See generally, Stillman, supra note 5.
74. “[C]atastrophes are infrequent events that cause severe loss, injury or property damage to a large population.” CATASTROPHE MGMT. WORK GRP., AM. ACAD. OF ACTUARIES, CATASTROPHE EXPOSURES AND INSURANCE INDUSTRY CATASTROPHE MANAGEMENT PRACTICES 1, 5 (2001), http://www.actuary.org/pdf/casualty/catastrophe_061001.pdf.
75. See Asset Forfeiture Oversight, supra note 40, at 6 (noting that annual deposits of forfeited cash and property regularly exceed $1 billion, and that “[i]n 2013, the most recent year with publicly reported data, that figure had swollen to $2 billion . . . .”). The actual figure is unknown because many states do not collect or report forfeiture data. See Scott Bullock, Executive Summary to Policing for Profit: The Abuse of Civil Asset Forfeiture, INST. FOR JUST. (Mar. 2010), http://ij.org/report/policing-for-profit-first-edition (noting that only twenty-nine states clearly require data to be collected and reported, and only nineteen of those states responded to freedom-of-information requests with usable data).
76. Bullock, supra note 75, at 34-35 (reporting the average and median value of vehicles seized at less than $6,000, and the average amount of a cash seizure in Maine and Virginia at between $600 and $2,500); Stillman, supra note 5, at 23-24 (reporting that in Georgia in 2011, more than half of items taken were worth less than $650).
77. See, e.g., TENN. CODE ANN. § 40-33-203 (West 2014) (requiring officers to give receipts for property being seized).
78. 28 U.S.C. § 2465(a)(1) (“Upon the entry of a judgment for the claimant . . . such property shall be returned forthwith . . . .”).
2. Threats to a Viable Insurance Pool

Selling insurance invites the risks of moral hazard and adverse selection.79 These risks are common, and creating safeguards against them is a familiar challenge for insurers. As with other forms of insurance, adverse selection can be ameliorated by a legislative mandate.80 Alternatively, companies wishing to sell forfeiture insurance in a voluntary market can overcome moral hazard and adverse selection by using, for example, deductibles, exclusions, thorough claim investigation, and good underwriting.

a. Moral Hazard

Moral hazard is the idea that people who do not fully experience a loss are less likely to take precautions to prevent it.81 It exists both before (ex ante) and after (ex post) a harm occurs.82 Ex ante moral hazard means that people who have insurance are more likely to behave carelessly because they will not bear the full cost of the insured’s harm.83 Ex post moral hazard refers to the insured’s lack of incentive to minimize the loss once the harm has occurred.84

b. Adverse Selection

“‘Adverse selection’ refers to the theoretical tendency for low risk individuals to avoid or drop out of insurance pools, with the result that, absent countervailing efforts by administrators, insurance pools can be expected to contain a disproportionate percentage of high risk individuals.”85 Techniques such as risk classification and binding risks can help minimize the impact of adverse selection on the insurance pool.86

Risk classification is achieved by pricing insurance—or in some cases even refusing to sell coverage—based on the characteristics of the potential insured.87 For example, a person who smokes pays

80. The most salient example of this in recent memory is the Patient Protection and Affordable Care Act, which mandates insurance coverage precisely to prevent adverse selection. See Ronen Avraham, The Economics of Insurance Law-A Primer, 19 CONN. INS. L.J. 29, 51-52 (2012).
82. Id.
83. Id.
84. Id.
85. Baker, supra note 79, at 373.
86. Id. at 376.
87. Id. at 376-78.
higher health insurance premiums than a person who does not, and a person with cancer might be unable to purchase life insurance, and thus would be completely excluded from the insurance pool. As Professor Baker explains, however, the problem is not so simple, because acting to prevent adverse selection on the consumer side of an insurance relationship can promote it on the insurer side, reducing the degree to which insurance spreads overall risk.88

Binding risks to the insurance pool through government intervention is an alternative for controlling adverse selection that targets both sides of the insurance relationship.89 It limits the ability of low-risk insureds to opt out of the insurance pool while simultaneously limiting the ability of insurers to deny insurance or charge different prices on the basis of risk.90 This can be accomplished simply by mandating universal insurance through a single insurer, by requiring everyone to purchase insurance while prohibiting insurers from charging prices or underwriting on the basis of risk, or by limiting risk-based pricing without requiring the purchase of insurance.91

B. POTENTIAL MODELS FOR IMPLEMENTATION

Having established that the risk of having assets seized by police is insurable, the next step is finding an effective model for implementation. The first and best option from an efficiency perspective would be for legislatures to mandate forfeiture insurance be bundled with auto and homeowner’s policies. This would help with adverse selection and significantly reduce premiums. The second option would be for insurance companies to offer a civil forfeiture rider to be sold with common policies. This option is only feasible if there is a large enough market, if there are mechanisms to control moral hazard and adverse selection, and if it is profitable when sold at a cost consumers find attractive.

1. Legislative Mandate

There are three main reasons for a mandatory plan.92 First, people—especially those who abide by the law—are likely to underestimate the risk of having their assets seized.93 Second, a legislative

88. Id. at 378-79.
89. Id. at 379.
90. Id. at 380.
91. Id.
93. Everyone with property in the United States is potentially at risk. See supra notes 62-63 and accompanying text. Despite that fact, consumers are likely to underes-
mandate would prevent adverse selection from increasing the cost of coverage beyond what consumers would be willing to pay. Finally, given that the problems associated with civil forfeiture were created by statute, and that the potential benefits and long history of forfeiture make its elimination unlikely, it makes sense to pursue a legislative solution that would allow law enforcement the flexibility to continue seizing assets from criminals while protecting innocent claimants from wrongful seizures.

2. Optional Purchase by Consumers

Giving consumers an option to purchase forfeiture insurance has the advantage of being voluntary. However, if insurers are to offer this product voluntarily, it must be profitable. To be profitable, there must first be a market of consumers who perceive a sufficient risk to justify the expenditure. Second, there must be a way to prevent moral hazard and adverse selection from ruining the insurance pool. Third, insurers must be able to offer the product at a price consumers are willing to pay.

This subsection contends that although marketing and adverse selection could be problematic, the idea is worthy of further examination by insurers because forfeiture insurance could indeed be profitable. First, the insurance could be marketed in communities that are at a higher risk of having assets seized. For example, insurers might find a market for forfeiture insurance in minority communities, where people have an increased risk of being stopped by police and having assets seized. Second, the problems of moral hazard and adverse selection can be controlled by, for example, deductibles, exclusions, thorough claim investigation, and good underwriting. Finally, although calculation of actual premiums is beyond the scope of this Article, some rough math demonstrates that insurers should be able to provide forfeiture insurance at an attractive price.


A legislative mandate has the clear advantage of eliminating the adverse selection problem. See supra notes 89-92 and accompanying text.

Another potential solution would be for the government to provide counsel to people whose assets are seized. This would bring about many of the benefits discussed here, but the upfront costs are unattractive to cash-strapped states. The legislative approach outlined here has the advantage that it imposes no direct cost on the government (although there may be an indirect cost in the need for increased police budgets).

See Civil Asset Forfeiture, supra note 31; Cockburn, supra note 31.

See infra notes 104-107 and accompanying text.
In the voluntary model, insurance companies would have to control adverse selection through risk classification. The classic problem may arise where the people who are most in need are uninsurable or unable to afford the higher premiums that come with their classification. If at-risk individuals are not insured against forfeiture, then the entire idea collapses because police will target those communities with even greater frequency, not less.

There are several reasons why this will not happen. First, the premiums for insuring against forfeiture will likely be extremely low. Second, instead of denying coverage completely or raising premiums for high-risk individuals, insurers will be able to combat adverse selection and keep costs down by carefully drafting policies and limiting up-front indemnification when claims are made. Third, insurer transaction costs in defending forfeiture actions will be relatively small, so providing a defense even to high-risk individuals will not significantly affect the insurance pool. Finally, insurers will have an incentive to provide a defense to as many claimants as possible because it will affect police behavior, reduce the number of seizures, and ultimately increase profits.

3. Controlling Moral Hazard

Insuring civil forfeiture under either model could give rise to both ex ante and ex post moral hazard. There is a risk of ex ante moral hazard because people might be more likely to engage in criminal activity if they think they will not bear the cost of having their property seized. This can be guarded against by carefully drafting coverage provisions and exclusions to ensure that only wrongful forfeitures are covered. For example, if there is a broad civil forfeiture coverage provision, there could be an exclusion restricting coverage to cases where the insured is not charged with a crime related to the seizure. This exclusion, coupled with thorough claims investigations, would prevent people from shifting the risk of their criminal activity to the larger insurance pool.

Insurers must also be wary of ex post moral hazard. If the insurer fully indemnifies the insured prior to challenging the seizure, the insured will have no incentive to assist the insurer in bringing the claim. There are several potential ways to deal with this problem.

98. See Baker, supra note 79, at 376-79.
99. In the context of civil forfeiture, that could mean people in poor and minority communities, people with prior criminal convictions, or people with prior civil forfeiture actions against them.
100. See infra notes 104-107 and accompanying text.
101. See infra notes 108-114 and accompanying text.
102. See infra notes 115-116 and accompanying text.
The policy might provide partial indemnification immediately, and fully indemnify the claimant only after he has fulfilled his duty to cooperate in bringing the claim. Or, the policy could partially indemnify the claimant immediately, and provide no further indemnification unless the claim is successful. Finally, the option that minimizes the risk of moral hazard is for the insurer to defend the claim but provide no indemnification. The only compensation for the insured would be the return of his or her property following a successful challenge. Not only is this the cheapest option, but it also virtually eliminates the possibility that an insured will be indemnified for an intentional wrongful act. Following a successful defense, the state would return the property directly to the insured. There is a danger that this option might create an incentive for insurers to refuse to defend covered claims to save money. However, given how expensive the consequences of such a refusal might be in a breach of contract action relative to the cost of simply defending the claims, insurers are likely to employ this tactic sparingly.

4. Pricing

Calculating premiums is beyond the scope of this Article. However, a brief comparison with auto insurance premiums illustrates that forfeiture insurance premiums should be low relative to the insurance products to which they might be attached.

**TABLE 2: 2012 AUTO INSURANCE AND FORFEITURE DATA**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Average Auto Premium</td>
<td>$815</td>
</tr>
<tr>
<td>Total Cost of Auto Accidents</td>
<td>$120,178,142,000</td>
</tr>
<tr>
<td>Total Federal Seizures</td>
<td>$4,200,000,000</td>
</tr>
</tbody>
</table>

**FIGURE 1: RATIO ESTIMATING FORFEITURE PREMIUM**

\[
\frac{\text{Average Auto Premium}}{\text{Total Cost of Accidents}} = \frac{\text{Average Forfeiture Premium}}{\text{Total Federal Seizures}}
\]

103. Although insurers can provide a legal defense even in the case of criminal prosecution, indemnification of intentional wrongful acts is disallowed for public policy reasons. It is unclear whether public policy would forbid indemnification for losses stemming from civil forfeiture. See supra notes 66-67 and accompanying text.


105. This Figure is not intended to be precise. Instead, it is meant to facilitate discussion by providing a rough estimate of what forfeiture premiums might look like.
Plugging the figures from Table 2 into the equation in Figure 1 and solving for Average Forfeiture Premium returns an estimate of $28 annually, or $2.33 per month. Actual premiums should be much lower because this estimate assumes that insurers will indemnify all claimants for all their losses, challenge every seizure, lose every challenge, and duplicate the administrative costs of selling auto insurance. In reality, insurers will only challenge wrongful seizures, and will win at least some of the time. Furthermore, full up-front indemnification of claimants is not required for this insurance to be successful. Administrative costs will not be duplicated because the insurance will be attached to policies that already exist. Finally, over time the number of seizures should decline, which will allow insurers to reduce premiums.

IV. CLAIMANTS GET A POWERFUL REPEAT PLAYER ON THEIR SIDE

A. MORE FORFEITURES WILL BE CONTESTED

Although the vast majority of forfeitures are not accompanied by criminal charges, eighty percent are uncontested. Some potential claimants probably decline to bring challenges because they fear losing; however, it is likely that many people who would probably prevail decline to mount challenges, because challenging a seizure can take years and cost thousands of dollars. Where the cost of bringing a challenge would exceed the value of the property, it is rational for claimants to capitulate, even when they are innocent.

One of the main advantages police and prosecutors have over claimants is that they are repeat players with procedures in place to maximize efficiency. For example, some departments use waivers to avoid adjudicating seizures in court. The use of drug dogs also

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106. The critical part of this proposal is the defense of claims. See infra notes 108-114 and accompanying text.
107. Once the profit motive for civil forfeiture has been reduced, the number of seizures should decline. See infra notes 115-116 and accompanying text.
108. Ninety percent of forfeitures are not accompanied by criminal charges. See Worrall, supra note 29, at 4. A lack of criminal charges does not necessarily mean a forfeiture action is unjustified, but it is a good indication that increased scrutiny is warranted.
109. See van den Berg, supra note 4, at 888 n.106.
111. See van den Berg, supra note 4, at 915-16.
112. Police can induce potential claimants to waive their rights by threatening to arrest them or take their children away. See Moores, supra note 46, at 795-97. Some
makes seizures faster and easier. Prosecutors are experts in the proceedings, and their salaries are paid by taxpayers, not by the seizing agencies that reap the benefits of forfeitures.

Unlike the government, most claimants only play the seizure game once. Some are coerced into signing waivers that preclude any challenge. Others are left in the unfamiliar and uneasy position of attempting to locate an attorney within their price range, which can be difficult for several reasons. Because few forfeitures are challenged, few private attorneys have the expertise required to navigate the proceedings quickly and efficiently, and every hour that an attorney spends learning is billable to the claimant. Furthermore, because the relationship is limited to a single transaction, attorneys have no incentive to reduce fees to attract repeat business from the claimant. Transaction costs for claimants are high because they are one-shot players with no opportunity to reduce costs by implementing efficient procedures.

All of that would change if people had forfeiture insurance. Unlike individual claimants, insurance companies would retain attorneys who would become experts in forfeiture proceedings. Instead of each claimant spending their time finding an attorney to go to court to challenge one seizure on their behalf, insurance companies could send one attorney to court to challenge all seizures currently facing their policyholders. The resulting gains in efficiency would drastically reduce claimant-side transaction costs, which would allow for lower premiums.

B. More Challenges, Fewer Wrongful Forfeitures, Lower Premiums

Sometimes the mere existence of insurance reduces the likelihood that a harm will occur. This kind of insurance is very inexpensive to
administer, because its very existence causes a reduction in potential payouts. For example, the Federal Deposit Insurance Company ("FDIC") was created to reduce the risk of bank runs. Bank runs are now a thing of the past because people are confident they will get their money back even if their bank becomes insolvent. The security provided by the existence of the FDIC has virtually eliminated the risk of bank runs, which significantly reduces the cost of insuring against them.

Similarly, forfeiture insurance will actually lead to fewer wrongful seizures. Once a sufficient number of people are insured against forfeiture,\textsuperscript{115} law enforcement behavior will change.\textsuperscript{116} Once the profit motive for wrongful forfeiture is gone—and in fact, seizing assets wrongfully will consistently become a net loss—law enforcement agencies will have incentives to change their behavior. Once the number of wrongful forfeitures declines, forfeiture insurance premiums can be reduced even further.

C. **Potential Impacts of Insuring Against Forfeiture**

1. **The Benefits of Data Collection**

   One of the problems with civil forfeiture is the absence of data. Although it is not possible to ascertain how many federal forfeitures are wrongful, at least we know the number and dollar value of assets seized. In contrast, reporting of forfeitures under state law varies drastically by state, with some states declining to track it at all.\textsuperscript{117} Even in states with tracking mechanisms, data is often incomplete and not easily available to the public.\textsuperscript{118}

   Insurance companies processing claims would collect a massive amount of data on forfeitures to more accurately price premiums. This could include the time, place, and circumstances of every seizure—including, among other things, the identities of the seizing officer and the targeted individual—as well as whether, and why, a challenge succeeded or failed.

\textsuperscript{115} Every individual need not be protected by forfeiture insurance to change law enforcement behavior. The effect will be similar to herd immunity in biology. For an explanation of herd immunity, see T. Jacob John & Reuben Samuel, *Herd Immunity and Herd Effect: New Insights and Definitions*, 16 Eur. J. of Epidemiology 601, 601 (2000) (describing herd immunity as "[t]he resistance of a group to attack by a disease because of the immunity of a large proportion of the members . . . ").

\textsuperscript{116} Forfeiture in general was much less common before legislatures made it profitable for law enforcement—and wrongful forfeitures were even rarer. By forcing the government to adjudicate more forfeitures and reducing the seized assets retained by law enforcement, forfeiture will once again become less profitable for police—just as it was before the CCCA.

\textsuperscript{117} Bullock, supra note 75, at 8.

\textsuperscript{118} Id.
Although this data would not be available to the public (unless an insurance company decides to release it), insurers would be able to conduct statistical analyses to determine, for example, whether minorities are being unfairly targeted. If they are, insurers could use the data to pressure agencies to change their policies, or to show a pattern of discrimination in civil rights litigation.

2. Potential Backlash?

Many police departments around the country rely heavily on forfeiture to fund operations. When this revenue stream is reduced, they will need to adapt or persuade legislatures to increase their budgets. While it is conceivable that legislatures could respond by banning the sale of this form of insurance, such a move is unlikely. Inaction by lawmakers in the face of forfeiture abuse is the status quo, and it is really only a problem for people who have taken the time to educate themselves on the issue. Affirmative steps by legislators to prevent people from protecting themselves against wrongful forfeitures, however, would be an entirely different matter from a political standpoint. Such an action would likely be extremely unpopular and trigger the kind of backlash most lawmakers would like to avoid.

V. CONCLUSION

Civil asset forfeiture is one of the most controversial social issues in the United States. The Comprehensive Crime Control Act of 1984 gave law enforcement a profit motive to seize more assets. Although ninety percent of individuals targeted by civil forfeiture are never charged with a crime, eighty percent do not mount a legal challenge to reclaim their property. A system has emerged where law enforcement can seize the property of innocent individuals and afford them essentially zero process if the value of that property is less than what it costs to challenge the seizure. Due to the relatively small number of individuals targeted by civil forfeiture, political action has been lacking. Efforts at reform have occasionally been made through legislatures and courts, but more work is needed to protect the property rights of innocent people. It is time for a fundamentally different approach.

That approach might be insurance. By adding civil forfeiture coverage to existing insurance products, people would be able to protect themselves from wrongful forfeitures. Insurers battling seizures in court would achieve the repeat-player efficiencies that are currently

119. See id. at 12 ("[N]early 40 percent of police agencies reported that civil forfeiture proceeds were a necessary budget supplement."); see also Hunter, supra note 22, at 556 ("In some cases, [police] became financially independent of state legislatures.").
enjoyed only by the government in seizure proceedings. With a powerful repeat player on their side, claimants would be able to get their property back without risking huge amounts of time and money. As more forfeitures are challenged, police would have an incentive to ensure that only criminals are targeted for forfeiture. Overall, this approach could prove to be a good middle ground, because it would allow police to continue the important work of keeping the public safe, while at the same time strengthening the private property rights of the law-abiding public.
STATE LAWMAKING ON FEDERAL CONSTITUTIONAL CHILDCARE PARENTS: MORE PRINCIPLED ALLOCATIONS OF POWERS AND MORE RATIONAL DISTINCTIONS

JEFFREY A. P ARNESS†

I. INTRODUCTION

Unlike other federal constitutional rightsholders, a parent with the right to exercise “care, custody, and control” over a child is defined by state lawmakers. While federal constitutional childcare parents may be defined by state constitutional law precedents, most often there are combinations of state statutes as well as common law precedents that may be tethered to state statutes. The balance of the General Assembly (or the state legislature) and untethered judicial authority over childcare parentage typically varies both interstate and intrastate depending upon how childcare parentage is established. At times, a childcare parent is defined by biological ties (real or imagined), by contracts, or by earlier histories of significant parental-like acts.

When determining whether to recognize untethered childcare parentage, state courts too frequently rule without considering key principles. Further, when applying state statutes defining federal childcare parents, state courts too frequently rule without recognizing equality issues involving unwarranted distinctions between those acting in parental-like ways. State cases on childcare parentage have proliferated in the last few decades due to both changes in human conduct (including increased marital dissolutions, openly acknowledged same sex couples, cohabiting couples who have children, and grandparents with primary—if not exclusive—childcare duties for the grandchildren) and in technology (including genetic testing related to biological parenthood and new methods, and increasing availability, of assisted reproduction).

This Article reviews how and why there is deference on federal constitutional childcare parentage to state lawmakers; how this deference has not yielded many state constitutional law precedents; the va-
ried state statutory and common law approaches to recognizing federal constitutional childcare parents; certain key principles which should guide state legislatures and courts in determining who within a state should define childcare parents; and how equality demands sometimes require courts to invalidate irrational approaches to childcare parentage.

The most important consideration regarding guiding principles is that state high courts generally need to defer to state legislators when state statutes clearly define parentage. When there are no such definitions, common lawmaking should reflect related prevailing public policies, like protecting developed and loving familial relationships.

Of course, deference to state legislators is not warranted where there are state constitutional demands on familial privacy, even if founded on imprecise constitutional provisions like due process. State judicial deference to explicit General Assembly definitions of childcare parents is also unwarranted where there exist irrational distinctions between those aspiring to attain parental childcare status. The “sheerest formalism” should not distinguish between would-be parents.1

State legislators need to respond quickly when nonconstitutional common law judicial precedents on childcare parents, whether or not tethered to statutes, fail to reflect public sentiments. Further, state legislators need to respond quickly when courts refrain from establishing nonconstitutional common law precedents on childcare parents where new statutes are needed to address voids in written laws. Additionally, legislators need to respond quickly when statutory childcare parentage distinctions are stricken.

II. DEFERENCE TO STATE LAW DEFINITIONS OF FEDERAL CONSTITUTIONAL CHILDCARE PARENTS

State constitutional, statutory, and common law rights are subject to federal constitutional (and other federal) law supremacy, as federal laws are “the supreme Law of the Land,” binding upon “Judges in every State.”2 Per the United States Constitution, any federal constitutional rightsholders, the substance of the rights, and rights enforcement are subject to both federal judicial and legislative authority, with variations in the balance sometimes recognized expressly in constitutional text.

Within the federal constitutional Bill of Rights, for enumerated rights like speech, press, and religion, there is nothing expressly said

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2. U.S. Const. art. VI.
about affirmative Congressional authority (though it constrains that authority).\textsuperscript{3} For the civil rights amendments on involuntary servitude,\textsuperscript{4} equal protection,\textsuperscript{5} due process,\textsuperscript{6} and voting,\textsuperscript{7} the federal Constitution provides that Congress has the power “to enforce by appropriate legislation.”\textsuperscript{8}

Whether or not Congress has any say on enforcement, United States Supreme Court precedents largely determine both federal constitutional rightsholders and the nature of the rights they hold, be they enumerated or unenumerated. As to rightsholders, the Court is occasionally given some direction by the Constitution itself, as certain rights are held by “the people,”\textsuperscript{9} while others are held by “citizens”\textsuperscript{10} or by “person[s].”\textsuperscript{11} At other times, including when rights spring from limits on governmental authority (such as no abridgement of free speech or religious practice),\textsuperscript{12} there is no explicit direction.\textsuperscript{13} United States Supreme Court precedents on federal constitutional rightsholders sometimes surprise, as when free speech rights were accorded to corporations.\textsuperscript{14}

For federal constitutional rights generally, the rightsholders, the rights held, and the enforcement avenues do not vary much interstate. So, there are few differences between the states on the federal constitutional rights of those “accused” criminally,\textsuperscript{15} those contesting illegal

\begin{itemize}
\item[3.] U.S. Const. amend. I.
\item[4.] U.S. Const. amend. XIII, § 1.
\item[5.] U.S. Const. amend. XIV, § 1.
\item[6.] Id.
\item[7.] U.S. Const. amend. XV, § 1.
\item[8.] U.S. Const. amend. XIII, § 2; U.S. Const. amend. XIV, § 2; U.S. Const. amend. XV, § 2.
\item[9.] See, e.g., U.S. Const. amend. IV (noting unreasonable search and seizure).
\item[10.] See, e.g., U.S. Const. amend. XV, § 1 (referring to the right to vote); U.S. Const. amend. XIX, § 1 (referring to the right of women to vote).
\item[11.] See, e.g., U.S. Const. amend. V (referencing double jeopardy, self-incrimination, and due process rights, among others).
\item[12.] U.S. Const. amend. I.
\item[13.] For a review of the varying federal constitutional approaches to constitutional rightsholders, see Zoë Robinson, Constitutional Personhood, 84 Geo. Wash. L. Rev. 605, 605 (2016) (outlining a suggested unified approach).
\item[15.] U.S. Const. amend. VI as read in Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (“Because we believe that trial by jury in criminal cases is fundamental . . . we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal
searches, and those with family-related privacy interests in abortion and marriage. Yet for one federal constitutional right, the rightsholders—though neither the protections afforded nor their enforcement—dramatically differ interstate. The relatively uniform federal constitutional approaches to the substantive and enforcement attributes of parental childcare rights contrast sharply with the deference to state lawmaking in defining the parents with such rights.

Broad state lawmakers discretion on defining federal constitutional childcare parents emanates, in particular, from three major United States Supreme Court precedents. One is Lehr v. Robertson, where an unwed biological father of a child born of sex to an unwed mother sought to participate in (and have an opportunity to veto) that child’s later adoption proceeding pursued by the mother’s new husband. There, the Court recognized that state lawmakers could vary their norms on denying such a father any participation rights. While the Court recognized that the “intangible fibers that connect parent and child” via biology “are sufficiently vital to merit constitutional

cases which—were they to be tried in a federal court—would come within the Sixth Amendment’s guarantee.”

16. U.S. CONST. amend. IV as read in Rakas v. Illinois, 439 U.S. 128, 148-49 (1978) (stating that passengers had no legitimate expectation of privacy in a searched automobile when they did not have ownership interests in the automobile or in property seized from the automobile; Fourth Amendment rights are personal and enforceable only by those whose rights were infringed). See also New Jersey v. T.L.O., 469 U.S. 325, 338-43 (1985) (distinguishing prisoners who “retain no legitimate expectations of privacy in their cells,” per Ingraham v. Wright, 430 U.S. 651, 669 (1977), and finding school children have some such expectations, to be defined by the court via a “reasonableness standard” that applies nationwide).

17. U.S. CONST. amend XIV, as read in Roe v. Wade, 410 U.S. 113 (1973) (protecting pregnant women generally), though some pregnant women are distinguished from state to state, as with 750 ILL. COMP. STAT. 70/15 (West 2015) (requiring notice to parents of non-emancipated minor desiring abortion) and Miss. CODE ANN. § 41-41-3 (West 2010) (requiring consent of both parents of non-emancipated minor seeking abortion). See also Glenn Harlan Reynolds, Abortion Amendment 1, and the Future of Procreational Rights Under the Tennessee Constitution, 83 TENN. L. REV. 69, 69 (2015) (citing Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 25 (Tenn. 2000)) (reviewing how the expansive constitutional abortion right recognized in Planned Parenthood of Middle Tennessee v. Sundquist was undone by constitutional amendment and considering what the future holds for independent Tennessee state constitutional procreational rights).


protection in appropriate cases,” the Court concluded that in “the vast majority of cases, state law determines the final outcome” when resolving “the legal problems arising from the parent-child relationship.” Before and since Lehr, American states have varied widely on the participation rights of unwed biological fathers in formal adoption proceedings.

Another precedent is Michael H. v. Gerald D., where an unwed biological father of a child born of sex to a married woman sought to undo a state law marital paternity presumption favoring the husband. The Court effectively ruled that California could deny, as it then wished, the biological father any opportunity interest in establishing childcare parentage, at least where the state desired to promote the married couple’s wish to remain an intact nuclear family. While California public policy has since changed, in Pennsylvania a comparable biological father can be thwarted in pursuing legal parentage by an intact nuclear family. Both before and since Michael H., American states have varied widely on establishing and disestablishing marital parentage presumptions.

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23. Lehr, 463 U.S. at 256 (citing United States v. Yazell, 382 U.S. 341, 351-53 (1966)) (stating that “[r]ules governing . . . child custody are generally specified in statutory enactments that vary from State to State.”). In Yazell, where no federal constitutional protections were asserted, the court found “no need for uniformity” and that “solicitude for state interests, particularly in the field of family . . . should be overridden by the federal courts only where clear and substantial interests of the National Government . . . will suffer major damage if the state law is applied.” Yazell, 382 U.S. at 352, 357.


27. Michael H., 491 U.S. at 129 (plurality opinion). The ruling was applied to a biological father who had “an established parental relationship.” Id. at 123.

28. CAL. FAM. CODE § 7541(a) (West 2006) (allowing rebuttal with “evidence based on blood tests”).


30. See, e.g., June Carbone & Naomi Cahn, Marriage, Parentage, and Child Support, 45 Fam. L.Q. 219 (2011) [hereinafter Marriage, Parentage, and Child Support], and Gartner v. Iowa Dep’t of Pub. Health, 830 N.W.2d 335, 346 n.1 (Iowa 2013) (organizing state statutes governing presumptions of parentage into three categories). Recently, marital parentage presumptions in childcare settings have been applied by some courts to lesbian spouses of birth mothers, even where the statutes speak of husbands and presumed biological ties. See, e.g., In re D.S., 143 Cal. Rptr. 3d 918, 924 (Cal. Ct. App. 2012) (discussing the rebuttable presumption of maternity regarding same-sex couples), and Henderson v. Adams, No. 1:15-cv-00220-TWP-MJD, 2016 WL 3548645
The third United States Supreme Court precedent is *Troxel v. Granville*, where the attributes of parental childcare rights were at issue, not the norms for attaining parental childcare rights. Here, grandparents sought a court order on grandparent-grandchild visits over parental objections. In limiting judicial opportunity to override parental desires, a few opinions of a splintered court recognized broad state lawmakers' discretion on defining parentage and establishing parental-like classes. There was mention of child visitation laws benefiting third parties (i.e., nonparents) via “gradations,” as well as of possible “de facto” parenthood, a parentage establishment norm involving neither biological ties nor formal adoption. Before and since *Troxel*, American state de facto (and comparable) statutory and common law parentage have varied widely in defining who can become federal constitutional childcare parents.

While state lawmakers have broad leeway, their discretion to define federal childcare parents is not boundless. A few United States Supreme Court precedents limit state definitional authority. Thus, at birth all women who bear children as a result of sex have federally-protected childcare rights. However, all men who, via sex, impregnate women who later bear children are not such parents. Men who impregnate unmarried women have only a federally-protected opportunity interest in establishing parenthood in order to be heard later on.

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32. *Troxel*, 530 U.S. at 60. An earlier United States Supreme Court precedent in a case involving a childcare dispute between a parent and a grandparent had suggested there could be no federal law on establishing parental rights. *Ex parte Burrus*, 136 U.S. 586, 594 (1890). The Court noted, “[A]s to the right to the control and possession of this child, as it is contested by its father and its grandfather, it is one in regard to which neither the congress of the United States, nor any authority of the United States, has any special jurisdiction.” *Burrus*, 136 U.S. at 594.
34. *Id.* at 93 (Scalia, J., dissenting).
35. *Id.* at 101 (Kennedy, J., dissenting). Justice Scalia, in his dissent, also recognized de facto parents as a possible but ill-advised “judicially crafted definition” of a federal constitutional childcare parent. *Id.* at 92-93.
36. See, e.g., D.C. Code Ann. § 16-831.01(1) (West 2001) (noting a single parent’s “agreement” and residency in same household), and D.C. Code Ann. tit. 13 § 8-201(c) (West 2007) (noting the exercise of “parental responsibility” with “support and consent of the child’s parent”).
childcare,39 with the establishment requisites largely left to state lawmakers.40 The requirements for seizing such childcare parenthood opportunities vary significantly interstate.41

The broad leeway afforded to state lawmakers by the United States Supreme Court on defining federal constitutional childcare parents has resulted in significant interstate variations in both parentage establishment and parentage disestablishment norms relevant to federal constitutional parental childcare.42 Parentage establishment norms go by varying terms, including not only de facto parent, but also equitable adoption, presumed parent, and parent by estoppel.43 The major requisites for establishment vary widely interstate. Similarly, state lawmakers use different terms for parentage disestablishment, including rebuttal and rescission, usually depending on how parentage was established.44 Again, there are widespread and significant interstate variations.

While states have quite distinct state law norms on establishing and disestablishing legal parentage relevant to federal constitutional parental childcare, as noted, other federal constitutional rightsholders are generally uniform across state borders. The criminally accused, whose rights include effective assistance of counsel, jury trial, and speedy trial,45 do not vary widely interstate,46 and neither do religious practitioners47 or those subject only to reasonable searches.48

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39. Lehr, 463 U.S. at 256 (stating that in most cases state laws determine child custody issues).
40. See id. ("Rules governing . . . child custody . . . vary from State to State.").
42. A critique of United States Supreme Court deference to state lawmakers, particularly on the subject of who are federal constitutional childcare parents, appears in Jeffrey A. Parness, Federal Constitutional Childcare Parents, 90 St. John's L. Rev. 965 (2017).
43. See, e.g., Parentage Law (R)Evolution, supra note 37, at 752-63.
44. Marital paternity presumptions are often subject to rebuttal, as in Illinois via 750 Ill. Comp. Stat. 46/205(a) (West 2015), while voluntary paternity acknowledgments are subject to rescission (before 60 days) and challenge (after 60 days), as driven by federal welfare subsidy policies found in 42 U.S.C. § 666(a)(5)(D) (2012), employed in Illinois via 750 Ill. Comp. Stat. 46/307 (West 2015) and 750 Ill. Comp. Stat. 46/308 (West 2015).
45. U.S. Const. amend. VI.
47. U.S. Const. amend. I, as read in Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (stating that states, like Congress, may not enact laws prohibiting the free exercise of religion).
The United States Supreme Court can craft definitions of federal constitutional childcare parents. With state terminations of existing parental childcare interests, the court has been quite active in setting uniform federal constitutional norms. It cannot be that federal constitutional childcare rightsholders necessarily must be left to state law definitions (for example, per the Tenth Amendment reservation of rights) since other personal, familial privacy rightsholders, as with the abortion, contraception, sexual conduct, and marriage, have been substantially federalized by United States Supreme Court precedents.

Nevertheless, for now federal constitutional childcare parenthood is left to state legislators and common law judges. This could spur very different approaches to who, within state government, should define childcare parents. Differences in definitional authority, however, would be mitigated if there were similar state constitutional allocations of definitional authority on childcare parentage. Yet, there are no such similarities.

III. VARIED APPROACHES TO LEGISLATIVE AND JUDICIAL DEFINITIONS OF STATE CONSTITUTIONAL RIGHTSHOLDERS

Authority to define childcare parents could be addressed in state constitutions. Similar state constitutional approaches could lessen interstate differences in the allocations of definitional authority. Yet a review of the state constitutions reveals a variety of approaches to authority allocation.

In the United States, neither federal nor state constitutional rights are always formulated exclusively by judges, even when the rights are quite general, as with liberty or property, rather than specific, as with free speech or the self-incrimination privilege. At times,

49. On how the United States Supreme Court generally should approach issues of federal constitutional personhood in the individual rights arena, see Zoë Robinson, Constitutional Personhood, 84 Geo. Wash. L. Rev. 605 (2016).
51. See generally Roe, 410 U.S. at 113.
54. See generally Obergefell, 135 S. Ct. at 2584.
55. Granted, not all federal constitutional childcare rightsholders have been explicitly deemed subject to state law definitions. To date, the United States Supreme Court has not directly addressed childcare rights when children are born of assisted reproduction. See, e.g., Kimberly M. Mutcherson, Procreative Pluralism, 30 Berkeley J. Gender L. & Just. 22 (2015) (arguing for federal constitutional protections of assisted reproduction, though distinguishing non-coital procreation between those wishing to procreate and parent, and those wishing to procreate for profit).
elected legislators are delegated definitional tasks via express constitutional direction, as illustrated by a review of Illinois constitutional rights.

Illinois voters in 2014 approved constitutional amendments altering crime victim rights in criminal cases. Some of the changes appear below (new words are underlined).

Crime victims, as defined by law, shall have the following rights as provided by law:

The right to be treated with fairness and respect for their dignity and privacy and to be free from harassment, intimidation, and abuse throughout the criminal justice process . . . .

The victim has standing to assert the rights enumerated in subsection (a) in any court exercising jurisdiction . . . . The court shall promptly rule on a victim’s request. The victim does not have party status . . . . Nothing in this Section shall be construed to alter the powers, duties, and responsibilities of the prosecuting attorney The General Assembly may provide by law for the enforcement of this Section.

These changes illustrate varied approaches to allocating governmental authority over the holders, the substance, and the enforcement of state constitutional rights. While these amendments left the definition of “crime victims” who possess the enumerated constitutional rights to the General Assembly, they removed the General Assembly’s authority to define the rights and to provide for their enforcement.

Elsewhere in the Illinois Bill of Rights, differing approaches to General Assembly authority over defining constitutional right-holders, establishing constitutional rights, and fashioning constitutional rights enforcement exist. For example, the Bill has three separate explicit anti-discrimination provisions beyond the general equal protection provision. Section eighteen simply forbids “the State or its units of local government and school districts” from denying or abridging equal protection “on account of sex.” Seemingly, the courts are left with broad interpretive powers regarding who might be victimized, what constitutes equality denials, and how to pursue enforcement. Comparably, section nineteen frees “[a]ll persons with a physical or mental handicap” from discrimination in both property sales and rentals and in any employer’s “hiring and promotion practices.” By contrast, while section seventeen protects “[a]ll persons” from discrimination based on “race, color, creed, national ancestry and sex” in both property and employment settings, it also makes these

rights subject to “reasonable exemptions” and “additional remedies” established by the General Assembly.\(^{59}\)

The provisions of the Illinois Bill of Rights on religious freedom,\(^{60}\) speech,\(^{61}\) assembly,\(^{62}\) and individual dignity\(^{63}\) make no reference, directly or implicitly, to General Assembly authority. But the provision on eminent domain requires “just compensation as provided by law.”\(^{64}\) Further, the provision on the right of the individual citizen to keep and bear arms explicitly recognizes that it is “[s]ubject” to “the police power” of the State.\(^{65}\)

Outside of Illinois, the bills of rights within American state constitutions similarly vary on recognizing General Assembly authority to define rightsholders, establish rights, and facilitate enforcement. Exemplary are other crime victim restitution provisions. Some, but not all, crime victim restitution rights invite legislation to speak to victimhood, to what constitutes restitution, and to how to secure restitution. In Arizona, for example, “a victim of crime” has a right to “receive prompt restitution” from one “convicted of the criminal conduct” causing harm.\(^{66}\) While the state constitution defines victims, the legislature has “authority to enact substantive and procedural laws to define, implement, preserve and protect” the right.\(^{67}\) In Connecticut, a victim, defined by law, has a “right to restitution” subject to “enforce[ment]” by the legislature.\(^{68}\) Idaho has a “self-enacting” provision on crime victim restitution, with both the victim and the right subject to General Assembly definition.\(^{69}\) In Michigan, crime victims, as defined by law, have restitution rights as defined by law, with those rights also subject to legislative provisions on enforcement.\(^{70}\) In North Carolina, “victims of crime, as prescribed by law,” have a “right as prescribed by law to receive restitution.”\(^{71}\) In Oregon, crime victims have a right “to receive prompt restitution,”\(^{72}\) though this right is not “intended to create any cause of action for compensation or damages.”\(^{73}\)

\(^{59}\) Ill. Const. art. I, § 17.

\(^{60}\) Ill. Const. art. I, § 3.


\(^{62}\) Ill. Const. art. I, § 5.

\(^{63}\) Ill. Const. art. I, § 20.

\(^{64}\) Ill. Const. art. I, § 15.

\(^{65}\) Ill. Const. art. I, § 22.


\(^{67}\) Ariz. Const. art. II, § 2.1(D).

\(^{68}\) Conn. Const. art. XXIX(b)(9).

\(^{69}\) Idaho Const. art. I, § 22(7).


\(^{71}\) N.C. Const. art. I, § 37(1)(e).

\(^{72}\) Or. Const. art. I, § 42(1)(d).

\(^{73}\) Or. Const. art. I, § 42(2).
American state constitutions could speak directly to the legislative and judicial roles in defining childcare parents, as they sometimes do regarding crime victims in restitution settings. But they do not, leaving the balance between legislative and judicial definitional authority unclear.

IV. STATE CONSTITUTIONAL CHILDCARE PARENTS

American state childcare parents do not chiefly depend upon federal constitutional parentage definitions. Nor do they depend upon state constitutional definitions. For whatever reasons, state constitutional lawmakers generally have not utilized their powers to define childcare parentage, or even to allocate definitional authority. This reflects somewhat the so-called “lockstep doctrine,” whereby state high courts interpreting state constitutional provisions presumptively borrow the analyses within the United States Constitution itself and within United States Supreme Court decisions interpreting comparable federal constitutional provisions. The doctrine continues, even though it is criticized by many as being too deferential to the federal approaches since it stifles the independent thinking contemplated by the federal constitutional reservation of powers to state governments.74

Lockstepping within state judicial opinions is especially problematic when state constitutional provisions contain language quite different from their federal constitutional counterparts. In the parentage arena, however, independent state constitutional interpretation is generally not specially invited by explicit state constitutional parentage provisions. Like the federal Constitution, American state constitutions generally fail to speak directly about family matters. Occasionally, however, there are explicit state constitutional provisions, with no federal constitutional counterparts, that could prompt unique approaches to parental childcare. Some state constitutional provisions address equalities between men and women, including fathers and mothers. For example, Article I of the Declaration of Rights of the Massachusetts Constitution, as amended by Article 106, says “[e]quality under the law shall not be denied or abridged because of sex.” In Massachusetts, this means gender classifications are subject to “strict scrutiny,” even though they are subject to the lesser “inter-

74. While there is no reverse lockstep doctrine, whereby federal constitutional drafters and interpreters follow closely state constitutional analyses, some have urged federal courts to consider, at times, using state precedents as persuasive in federal constitutional cases. See, e.g., the Honorable Bruce D. Black & Kara L. Kapp, State Constitutional Law as a Basis for Federal Constitutional Interpretation: The Lessons of the Second Amendment, 46 N.M. L. Rev. 240 (2016).
mediate scrutiny” under federal constitutional law. Thus, there may need to be “strict scrutiny” of any Massachusetts parentage laws differentiating between biological mothers and fathers.

Elsewhere there are explicit state constitutional privacy protections that could prompt courts to define childcare parents. Thus in Louisiana and South Carolina, there are guarantees against unreasonable “invasions of privacy.” And in Illinois, “every person shall find a certain remedy in the laws for all injuries and wrongs” relating to the person’s “privacy.”

Generally, however, there are few explicit state constitutional provisions directly or indirectly addressing childcare parentage. In some American states, though, there are general state constitutional provisions and accompanying case precedents on parenthood that do limit governmental officials in special ways. Thus, some state courts recognize, under their state constitutions, parental or other family interests that go unrecognized elsewhere. There is no lockstepping here. These local law variations are worthy of note as they illustrate the possible use of state constitutional law to define childcare parents. The following Iowa rulings are exemplary.

In Michael H. v. Gerald D., the United States Supreme Court rejected an unwed biological father's federal constitutional challenge to a California statute conclusively presuming, in the absence of impotency or sterility, that a child born into an intact marriage is “a child of the marriage” even where the unwed biological father had “an established parental relationship.” In a plurality opinion, Justice Scalia relied heavily on tradition in rejecting the unwed biological father's argument, deeming the presumption of the legitimacy of a child a “fundamental principle of the common law” that usually could only be rebutted by “proof that a husband was incapable of procreation or

79. On how any explicit provisions might be read, see Campaign for Quality Educ. v. California, 209 Cal. Rptr. 3d 888 (Cal. Ct. App. 2016) (finding the two explicit state constitutional provisions on public schooling do not guarantee an education of “some quality”).
had no access to his wife during the relevant period. Yet, Justice Scalia did not rule out the possibility that American traditions would recognize parental rights for an unwed biological father where the marital parents do not raise the child “as their own.” Nor did Justice Scalia rule out the possibility that the California law on “categorical” preference could be changed. Further, in our national scheme of shared federal and state governmental lawmaking, Justice Scalia also could not rule out the possibility that traditions in a single state could result in state constitutional interests for unwed fathers who sought to intrude upon intact families even though similar men in other states could not. In fact, since Michael H., California laws have loosened for challenges to paternity presumptions.

Elsewhere, categorical preferences are generally available, at least when desired by a married couple, with most state laws originating in statutes. But in Iowa in 1999, the Iowa Supreme Court ruled in a case factually similar to Michael H. In Callender v. Skiles, the court found that while Rebecca and Rick Skiles were married, they had separated for some time in 1994. During their separation, Rebecca had sex with a co-worker, Charles Callender. Later, Rebecca and Rick reconciled. In June 1995, Rebecca bore a child conceived during the separation. Rebecca and Rick named the child Samantha and began to raise her as part of their family. Emotional upheaval, however, soon followed. Six months after Samantha’s birth, Charles sought to establish his paternity of Samantha, as well as custody or visitation and child support orders. Blood tests revealed Charles to be the biological father. Upon obtaining limited visitation at a neutral location, Charles asked the trial court to terminate Rick’s parental rights. Rick did not stop parenting, arguing Charles had no standing to sue in paternity. The trial court agreed with Rick.

On appeal, Charles urged that he was entitled to litigate his claim as an “interested person” under one Iowa Code section, or as the “established father” under another Iowa Code section. Otherwise, he argued that the Iowa statutes would deprive him of his state constitutional due process and equal protection interests. The Iowa Supreme Court ruled that Charles had no standing under the cited Code

83. Michael H., 491 U.S. at 124.
84. Id. at 163 n.7.
85. See, e.g., CAL. FAM. CODE §§ 7611, 7612, 7541 (West 2004) (stating the marital presumption is rebuttable, but only within two years of child’s birth).
86. On American state statutes on marital parentage presumptions, see Parentage Law (R)Evolution, supra note 37, at 753-58.
87. 591 N.W.2d 182 (Iowa 1991).
88. Callender v. Skiles, 591 N.W.2d 184 (Iowa 1991) [hereinafter Callender I].
89. Callender I, 591 N.W.2d at 184.
The high court recognized, however, Charles had an Iowa constitutional due process “liberty” interest, though there was no comparable federal constitutional interest. It reasoned that there was “a strong history of providing protection” to parentage based on biological ties, that Charles possessed “a liberty interest in challenging paternity,” and that Charles may have a fundamental right to maintain a relationship with his biological daughter. There was no lockstepping here. Whether Charles “would ultimately have this right, and under what circumstances,” were left for another day.

In allowing an unwed father the chance to disrupt the integrity of an intact family, the Iowa high court said it chose to “recognize the truth and discourage deceit.” It also noted the importance of recognizing “the decline of the stigma of illegitimacy,” “the reliability of DNA testing,” the harm to the Skiles family integrity “at the time of the extramarital affair,” the “societal goal of encouraging fathers to take responsibility for their children,” and the comparable setting wherein children “live with a stepfather and still maintain a relationship with the biological father.”

The Iowa high court further said its approach “prevents the mother from exclusively determining the child’s best interests, defining the family, and defining the scope of the putative father’s rights.” Existing law already permitted the mother the chance to challenge the paternity of her husband, though Iowa laws did not require her to tell her husband of his possible or actual nonpaternity.

The court concluded that an unwed biological father may lose his right to seek paternity “by waiver,” as when there was no “serious and timely expression of a meaningful desire to establish parenting responsibility.” Even without waiver, the court said that Charles may still not prevail if any court-ordered parent-child relationship would run against the “best interest” of the child. This sounds like the approach taken by Justice Stevens in the Michael H. case.

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90. Id. at 186.
91. Id. at 187.
92. Id. at 190.
93. Id. at 193 n.5.
94. Id. at 191.
95. Id.
96. Id.
97. Id. at 192.
98. Id. at 191-92.
99. Michael H., 491 U.S. at 135 (stating that “under the circumstances of the case,” there is no need for further hearing on the request for a childcare order, as the lower court had determined such an order could not be in child’s best interests).
While not inevitable, in 2001 the Iowa Supreme Court affirmed an order setting an immediate visitation schedule for Charles and his four year old offspring. Interestingly, while Rebecca had appealed the lower court visitation order, Rick had not appealed "the disestablishment of his relationship with Samantha."  

In reviewing the visitation order in 2001, the Iowa Supreme Court analyzed several factors in determining what was in Samantha's best interest, including her age, her preexisting relationship with Charles, and her relationships with "the other three children" (whose parentage and homes were not revealed, though they were probably living in the Skiles home). It also noted the inapplicability of the presumption of "maximum contact" for parents that operates for childcare issues in marriage dissolution proceedings. The statute on custody decisions when there are marital breakups said:

> The court, insofar as it is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents . . . .

Here there was no marital breakup. In the end, the Iowa high court affirmed a visitation order for Charles that did not "follow a more usual blueprint," but that had a "somewhat lesser schedule." It also left Rebecca as "the sole custodial parent," as well as left to Rebecca the decision on "when Samantha should be told of her parentage."  

The Callender rulings demonstrate how state constitutional law—whether by an express provision or by judicial interpretation of an ambiguous provision, like due process—might guide definitions of federal constitutional childcare parents. Yet Callender-type rulings are rare. Explicit state constitutional authorizations of judicial au-
tory to define parenthood are absent, as are significant employ-
ments by state courts of vague constitutional interests like liberty or
equality in definitional disputes. 108

So, neither federal nor state constitutional judicial precedents
chiefly drive American state laws defining federal constitutional child-
care parents. The Callender decisions illustrate how state constitu-
tional precedents could do for parentage definitions locally what the
Roe v. Wade 109 and Lawrence v. Texas 110 decisions by the United
States Supreme Court did for the substance of abortion and sexual
conduct interests nationally. 111 For the most part, though, childcare
parents are defined by state legislators whose statutes are read and
applied by state judges, as well as by state judges whose nonstatutory
decisions establish common law precedents, which are typically sub-
ject to statutory override.

108. Justice Brennan recognized such employments are generally easier for state
courts than for federal courts since state constitutions “are often relatively easy to
amend.” William J. Brennan, Jr., The Bill of Rights and the States: The Revival of State
the frequency and breadth of state constitutional amendments (state average is 150)
compared to federal constitutional amendments (27), see John Dinan, State Constitu-
tional Amendments and American Constitutionalism, 41 OKLA. CITY U. L. REV. 27
(2016).


111. Unfortunately, federal court precedents can provide little guidance on when
unenumerated constitutional rights should be recognized, as opposed to leaving any
such rights to Congress, as the congressional role in defining individual rights is limited
by Article I constraints, though Congress can act to enforce individual federal constitu-
tional rights, per Section 5 of Amendment XIV. U.S. CONST. art. I, amend. XIV, § 5.
Federal precedents, as well, are not particularly helpful to state courts on when new
unenumerated constitutional rights should or should not be judicially recognized, as
demonstrated by the Due Process analysis in the same sex marriage case. Obergefell v.
Hodges, 135 S. Ct. 2584, 2595, 2605 (2015) (“notwithstanding the more general value of
democratic decision making,” courts must assure “fundamental rights” are not abridged,
to be guided by the recognition that rights must reflect “developments in law and soci-
ety”); Obergefell, 135 S. Ct. at 2612, 2616 (Roberts, C.J., dissenting) (“social policy” mat-
ters should be resolved by the “people acting through their elected representatives,” and
not by “lawyers who happen to hold commissions authorizing them to resolve legal dis-
putes according to law.”).
V. INTERSTATE VARIATIONS IN STATUTORY AND COMMON LAW CHILDCARE PARENTS

With the limited role of both federal and state constitutional law, as well as the somewhat limited role Congress plays,112 American state legislators and judges chiefly define federal constitutional childcare parents. Domestic relations matters have, however, generally been viewed as outside of broad judicial common law responsibilities, especially as there are usually neither federal nor state constitutional jury trial rights prompting exercises of inherent judicial powers protective of constitutionally-assigned adjudicatory authority. Elected legislators are generally recognized as having primary authority over both parentage establishment and disestablishment norms. These norms are usually addressed in statutes containing special statutory causes, including marriage dissolution, probate law, and juvenile law.113

Characterizations of certain cases or proceedings as statutory confuse some people since many common law causes can also be dependent upon statutes. Yet because special statutory causes, as compared to general common law causes, do not prompt jury rights, they prompt less inherent judicial authority. With statutory causes, it is often said that justiciable matters, that is, civil claims or proceedings that may be pursued in trial courts, are substantially dependent on General Assembly initiatives. Here, courts usually yield to legislative wishes as to the merits and as to the appropriate dispute resolution processes. Perhaps this explains why “common sense” judicial rulings happen less frequently in some aspects of statutory wrongful death and probate causes, which are deemed special statutory causes. Put another way, there is generally less room for judicial innovations, and greater responsibilities for state legislators, regarding parentage matters than, for example, regarding tort and contract law matters, which

112. Congressional authority to define federal constitutional rightsholders is limited. See U.S. Const., amend. XIV, § 5 (describing congressional enforcement authority). There is seemingly little that Commerce Clause authority can do. Federal welfare programs have yielded Congressional mandates (should federal financial assistance be sought) on voluntary parentage acknowledgments, but these mandates extend per federal law only to parents in the welfare system.

113. See, e.g., Strukoff v. Strukoff, 389 N.E.2d 1170, 1172-73 (Ill. 1979) (stating that statutory procedures for particular kinds of civil actions significantly govern, including marriage dissolution, adoption, eminent domain, and taxpayer disputes) and N.M. Code R. § 1-001 (LexisNexis 2011) (describing in the committee commentary special cases and proceedings as including election contests, probate, workers compensation, zoning, arbitration, adoption, and condemnation). See also Lebron v. Gottlieb Mem. Hosp., 930 N.E.2d 895, 906, 912 (Ill. 2010) (stating the legislature may limit certain types of damages, such as damages recoverable in statutory causes of action, but separation of powers principles limit state legislators in cases involving “inherent” judicial powers).
carry with them histories of significant common law precedents prompted by constitutional jury trial rights wholly implemented by judges.\(^{114}\)

Of course, where statutory causes are ambiguous or indefinite, courts will effectively create law when applying the statutes. Family relations laws have long been regarded as chiefly governed by statutory causes. Yet family law matters require some common lawmaking by courts, as where state legislators have difficulty writing rigid, definitive, bright line guidelines. As the New York high court observed in overruling precedent denying any childcare standing to non-biological, non-adoptive partners of biological parents:

The “bright-line” rule of Alison D. promotes the laudable goals of certainty and predictability in the wake of domestic disruption . . . But bright lines cast a harsh light on any injustice and . . . there is little doubt by whom that injustice has been most finely felt and most finely perceived . . . We will no longer engage in the “deft legal maneuvering” necessary to read fairness into an overly-restrictive definition of “parent” that sets too high a bar for reaching a child’s best interest and does not take into account equitable principles.\(^{115}\)

While many state parentage definitions originate in statutes, courts sometimes do recognize additional parentage guidelines untethered to statutes when state legislatures have not spoken, as with children born of assisted reproduction. Changes in technology and human conduct have left many courts pondering whether to establish new nonstatutory parentage doctrines since these social changes have prompted great uncertainties. Consider the Wisconsin Supreme Court’s 2013 observation when establishing a precedent to guide gestational surrogacy in the absence of statute:

We respectfully urge the legislature to consider enacting legislation regarding surrogacy. Surrogacy is currently a reality in our Wisconsin court system. Legislation could “address surrogacy agreements to ensure that when the surrogacy pro-

\(^{114}\) A particularly controversial exercise of such common law authority occurs when courts strike statutory damage caps for claims heard by juries because they are intrusive on inherent judicial authority over jury trial process. See, e.g., Jeffrey A. Parness, State Damage Caps and Separation of Powers, 116 Penn St. L. Rev. 145 (2011) (critiquing Lebron, 930 N.E.2d at 895).

\(^{115}\) In re Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 500 (N.Y. 2016) (overruling Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991), which ruled there could be no childcare parentage without a biological or adoptive relation to a child due to the Domestic Relations Law).
cess is used, the courts and the parties understand the expectations and limitations under Wisconsin law.” 116

Fifteen years earlier, a California appellate court said this when examining another gestational surrogacy contract:

Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction. No matter what one thinks of artificial insemination, traditional and gestational surrogacy (in all of its permutations) and—as now appears in the not-too-distant future, cloning and even gene splicing—courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored. Even if all the means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts would still be called upon to decide who the lawful parents are and who—other than the taxpayers—is obligated to provide maintenance and support for the child. These cases will not go away.

Courts can continue to make decisions on an ad hoc basis without necessarily imposing some grand scheme. Or, the Legislature can act to impose a broader order which, even though it might not be perfect on a case-by-case basis, would bring some predictability to those who seek to make use of artificial reproductive techniques. 117

Certainly, a state General Assembly’s failure to address gestational carrier contracts does not mean such pacts are not undertaken in that state. More importantly, it does not mean that such pacts necessarily have no legal significance. In a 2014 case, there was a surrogacy contract between one New York male spouse and a gestational carrier in India. That spouse’s sperm was united with an anonymous donor’s egg. The contract was deemed “against public policy, and void and unenforceable” in the male spouse’s home state of New York. Nevertheless, the spouse’s New York male partner was not barred in New York from adopting the twins born to the gestational carrier in India. 118

Occasionally, legislatures recognize their own failures to address certain legal parentage issues and expressly invite judicial prece-

116. In re Paternity of F.T.R., 833 N.W.2d 634, 653 (Wis. 2013) (concluding it would enforce a parentage agreement between two couples involving surrogacy, with a woman in one couple who was the birth mother and whose egg was used and with sperm from the man in the second couple who were the intended parents, as long as the child’s best interests were served; but, the agreement on parental rights termination was not enforceable).
dents. In the New Mexico Uniform Parentage Act, the legislators say:

A. The New Mexico Uniform Parentage Act does not authorize or prohibit an agreement between a woman and the intended parents:

(1) in which the woman relinquishes all rights as the parent of a child to be conceived by means of assisted reproduction;

(2) that provides that the intended parents become the parents of the child.

B. If a birth results pursuant to a gestational agreement pursuant to Subsection A of this section and the agreement is unenforceable under other law of New Mexico, the parent-child relationship shall be determined pursuant to Article [two] of the New Mexico Uniform Parentage Act.

On occasion, courts might read general statutory recognitions of equity jurisdiction to enable nonconstitutional common lawmaking on parentage matters.

Judicial pleas for General Assembly action on parentage are not limited to children born of assisted reproduction. In a parentage dispute over a child born of sex to an unwed mother, the Maine Supreme Court said this in 2014:

Parenthood is meant to be defined by the Legislature, steeped as it is in matters of policy requiring the weighing of multiple viewpoints . . . . Although we have been discussing de facto parenthood for almost thirteen years, there is currently no Maine statutory reference to de facto parenthood. We take this opportunity to again emphasize that, given the evolving compositions of families and the need for a careful approach, this issue would be best addressed by the Legislature.

In the absence of Legislative action in such an important and unsettled area, however, we must provide some guidance to trial courts faced with de facto parenthood petitions.

Effective July 2016, there was a new Maine Parentage Act, which is said to “update” family law and which includes new presumed and de facto parent provisions.

121. See, e.g., Partanen v. Gallagher, 59 N.E.3d 1133, 1143 n.2 (Mass. 2016) (declining to rule on a request for a declaration of parenthood under the equitable jurisdiction statute, MASS. GEN. LAWS ch. 215, § 6 (West 2005)); In re Brooke S.B., 61 N.E.3d at 497 (debating the scope of “equitable powers to ensure that matters of custody, visitation and support were resolved in a manner that served the best interests of the child”).
122. Pitts v. Moore, 90 A.3d 1169, 1176-77 (Me. 2014) (plurality opinion).
In the 2014 case Moreau v. Sylvester,125 by contrast, the Vermont Supreme Court declined the opportunity to formulate a broad nonstatutory de facto parent doctrine.126 The majority reaffirmed that “the Legislature is better equipped” while noting that some other state courts have declined to fill the “perceived vacuum.”127 One concurring justice indicated that his patience with General Assembly inaction was wearing thin. He commented:

I admit that I find it more difficult to favor legislative action over judicial action in the face of years of legislative inaction. I can think of no subject that is in greater need of legislative action than this one—defining who may be considered a parent for purposes of determining parental rights and responsibilities and parent-child contact. While I am voting with the majority in this case, our responsibility to protect the best interests of the child will become only more challenging as the changing nature of families presents circumstances that are well outside the contemplation of our now archaic and inadequate statutes. I recognize that there may come a tipping point where judicial action to define rights and responsibilities beyond those of biological parents and marital partners becomes unavoidable. I would rather that the Legislature act before we see that day.128

While court sentiments often reflect that the legislative branch is far better suited to declare public policy in the domestic relations field due to its superior investigative and fact-finding facilities, as declaring public policy requires evaluation of sociological data and alterna-
tives, 129 “the tipping point” prompting “unavoidable” judicial action varies interstate. 130

For awhile, New York courts, and families, awaited statutory childcare parentage initiatives outside of biology or adoption due to a judicial “bright-line rule” that promoted “certainty in the wake of domestic breakups otherwise fraught with the risk of ‘disruptive battles’ over parentage.” 131 Yet in 2016, the New York high court 132 deemed it could no longer wait, declaring “an overly-restrictive definition of ‘parent’ . . . sets too high a bar for reaching a child’s best interest.” 133

So, while preferring General Assembly action on childcare parentage outside of biological ties and formal adoptions, courts do not always cede all parentage lawmaking authority to legislators. As a result, there are uncertainties regarding the division of lawmaking responsibilities on parentage between legislators and judges in different settings, in and outside of childcare.

In 2015, upon a romantic breakup, the Illinois Supreme Court rejected a mother’s boyfriend’s plea to be deemed, as to her child, either a de facto parent or a nonparent with standing to seek a childcare order, each over the mother’s objection. 134 In doing so, the high court agreed with the appeals court on the need for “a comprehensive legislative solution,” 135 concluding: “Legal change in this complex area must be the product of a policy debate that is sensitive not only to the evolving reality of ‘non-traditional’ families and their needs, but also to parents’ fundamental liberty interest embodied in the superior rights doctrine.” 136

Despite these declarations, the Illinois high court seemingly left open doors to at least some nonstatutory and nonconstitutional precedents on childcare parentage. Thus, it distinguished one appellate court decision where a biological mother was held bound to a court order reflecting “a joint parenting agreement” with her former husband, a former stepfather. 137 Further, it distinguished precedents which would enforce contracts with single parents as to future parent-
age, though noting the “decisions expressly limited their holdings to cases involving children born by means of artificial insemination.”\textsuperscript{138} While these precedents involved contracts not addressed by the General Assembly, as to the boyfriend’s contract with the adoptive mother in the 2015 case, the high court held that to “hold these claims are valid would allow” the boyfriend “to circumvent the statutory standing requirements.”\textsuperscript{139} So, only some parental childcare statutes can be circumvented.

Outside the childcare setting, the Illinois Supreme Court has also recognized some nonstatutory parents. Thus, it deemed the “equitable adoption” doctrine applicable to probate proceedings involving the estate of an intestate decedent, who was deemed to be the parent of a child whom he had never adopted, where biological ties were lacking.\textsuperscript{140} The court, as it recognized in some childcare settings, focused on contractual intentions (contract to adopt in a probate setting, like a parenting agreement within a judgment and a childcare parenting agreement in anticipation of a child born of assisted reproduction).

Where states have incomplete statutes, gaps are particularly challenging for courts. When legislation fails to account for all human conduct that could lead to parentage, courts are in a quandary. Legislators often fail to include explicit statutory directives, as with language indicating that these and only these acts should lead (or not lead) to legal parentage. If the legislative history also provides few or no indications of legislative intent, courts could refuse to act, perhaps urging General Assembly action. Or, courts could act, perhaps indicating that when they do, their guidance will be short-term if legislators later fill the gaps. Courts thus sometimes must determine if statutory gaps and ambiguities were intentional, so as to require judicial initiatives in case-by-case settings; were unintentional, as when legislators never considered that gaps and ambiguities inhered in their written laws; or were intentional, as where legislators wanted no

\textsuperscript{138} Id. at 794-95.

\textsuperscript{139} Id. at 794 (finding the child support case \textit{In re Parentage of M.J.}, 787 N.E.2d 144 (Ill. 2003), to be inapplicable). \textit{See also In re T.P.S.}, 978 N.E.2d 1070 (Ill. App. Ct. 2012).

\textsuperscript{140} \textit{Scarlett Z.-D.}, 28 N.E.3d at 785 (recognizing there is common law equitable adoption in probate per \textit{DeHart v. DeHart}, 986 N.E.2d 85 (Ill. 2013)). \textit{But see In re Estate of Hannifin}, 311 P.3d 1016 (Utah 2013) (rejecting common law equitable adoption in probate setting as there is preemption by the Probate Code). \textit{See also Blumenthal}, 69 N.E.3d at 851-52 (deferring to General Assembly failure to sanction common law marriage, yet recognizing that property distribution disputes between unmarried cohabitants whose relationships end can be resolved by “valid contracts . . . for which sexual relations do not form part of consideration and do not closely resemble those arising from conventional marriages”).
further parents under law beyond those expressly recognized by statutes.\textsuperscript{141}

Without explicit statutory directives, courts should act pursuant to the public policies underlying related statutes, which provide strong evidence of General Assembly desires. Thus, in Nevada in 2013,\textsuperscript{142} the Supreme Court enforced a co-parenting agreement between a birth mother and her female partner whose egg (with an anonymous donor’s sperm) prompted the pregnancy. The court recognized the Nevada Parentage Act,\textsuperscript{143} “although . . . not encompassing every possibility,” including this case, had within it public policies supporting enforcement.\textsuperscript{144} The legislature had expressly addressed parentage for same sex registered domestic partners as well as for intended parents who contract with gestational carriers who are not intended parents.\textsuperscript{145} The court reasoned: “In Nevada, as in other states, the best interest of the child is the paramount concern in determining the custody and care of children.”\textsuperscript{146}

In Montana, one assisted reproduction statute operates outside of gestational surrogacy. It speaks directly only to a “wife . . . with the consent of [her] husband” who is artificially inseminated “under the supervision of a licensed physician . . . with semen donated by a person who is not the husband.”\textsuperscript{147} Under the Montana statute, the husband is “treated in law” automatically as the “natural father.”\textsuperscript{148} The gaps are obvious. What if assisted reproduction is employed by a woman within a same sex relationship? A woman living with her boyfriend who is the semen donor? A woman who procures semen from a friend who she promises not to pursue for child support and who himself promises not to pursue a childcare order over the woman’s objection?\textsuperscript{149} Or, a husband whose semen is used to prompt a birth to his wife without a licensed physician’s supervision?

\textsuperscript{141} See, e.g., Blumenthal, 69 N.E.3d at 857 (stating that the “legislature knows how to alter family-related statutes and does not hesitate to do so when and if it believes public policy so requires” and here, there have been numerous statutory changes, but none addressed the override of the barrier to a common law marriage, so a court will not recognize such a marriage when former cohabitants dispute property division).

\textsuperscript{142} St. Mary v. Damon, 309 P.3d 1027 (Nev. 2013).


\textsuperscript{144} Id. at 1032.

\textsuperscript{145} Id. at 1032.

\textsuperscript{146} St. Mary, 309 P.3d at 1027.


\textsuperscript{148} Id.

\textsuperscript{149} See, e.g., Bruce v. Boardwine, 770 S.E.2d 774 (Va. Ct. App. 2015) (holding the “turkey baster” child’s father is the sperm donor, even though the donor had earlier promised that the birth mother would be the sole parent, because he was not covered by assisted reproduction statute).
Further, in Colorado there is a marital presumption of paternity in the husband whose wife bears a child “during the marriage.”150 Again, there are obvious gaps. What if a woman is married to another woman who bears a child born of sex while so married? The United States Supreme Court has required states to allow same sex marriages. Further, what if a wife is pregnant during her marriage to her husband, though the child was not “born” during the marriage?151 Equal protection may dictate that the first scenario demands similar treatment of opposite sex and same sex female couples though only in the former setting may each spouse have biological ties. But would equality principles also dictate similar treatment for spouses married during a pregnancy, but unmarried at birth, and for spouses married at the time of birth?

Incidentally, there are also statutory gaps in the parentage-related area of so-called third-party childcare where one, usually with a developed relationship with a child or with blood ties to a child, can seek a childcare order over parental objection. Thus, in Rhode Island in 2000 the “Family Court’s jurisdiction to permit rights of visitation to persons other than the biological or adoptive parents of a minor child specifically” had been “limited to grandparents and siblings of the minor child.”152 In Rhode Island, two of five high court justices found that absent “legislative authority” for visitation by former same-sex partners with children they helped to raise, there was no judicial authority to rule on such visitation requests.153 For them, but not the majority, the General Assembly’s failure to recognize trial court jurisdictional authority meant there was no judicial lawmaking authority.154

So, there are interstate variations in the roles played by state courts in defining childcare parents outside of state constitutional law.

153. Rubano, 759 A.2d at 988 (Boucier, J., dissenting). See also In re Custody of H.S.H.-K., 533 N.W.2d 419, 432 (majority opinion); In re Custody of H.S.H.-K., 533 N.W.2d at 450 (Wilcox, J., concurring and dissenting) (stating the majority is “usurping the proper functioning of the legislature” by recognizing third-party visitation standing for former lesbian partner per equitable power).
154. Comparably, even where there can be no parental objection to third-party childcare, as when biological parents relinquish a child for adoption, a biological grandparent with a developed familial relationship with the child sometimes cannot halt an adoption by a non-biological would-be parent where there is no statutory recognition of grandparent standing, even where the grandparent “stood in loco parentis.” Navarrete v. Creech, 501 S.W.3d 871, 874 (Ark. Ct. App. 2016).
Statutory gaps and ambiguities are particularly challenging for the judges who find more comfort in applying statutes than in themselves writing laws on childcare parentage. Some judges, however comfortable, sometimes do define parents for child “care, custody and control” purposes; do establish the parameters of parental childcare interests; and, do facilitate the enforcement opportunities for parents with recognized childcare interests. They are driven by the new realities of family structure prompted by changes in both technology and human conduct.

VI. MORE PRINCIPLED ALLOCATIONS OF POWERS TO DEFINE CHILDCARE PARENTS

As the United States Supreme Court will likely continue to rely on American state lawmakers to chiefly define federal constitutional childcare parents, certain principles should guide state courts when they assess judicial and legislative powers to define childcare parents unrecognized by state constitutional precedents. Such assessments are especially needed due to the continuing changes in family structures and in human reproductive technologies rendering obsolete the earlier (overwhelming) reliance on biological ties, marriage, and formal adoption for defining childcare parents.

Of course, state courts need not assess state judicial and legislative definitional powers where federal laws define federal constitutional childcare parents. But such federal laws are rather limited. And, state court assessments must insure that the (somewhat limited) federal constitutional law constraints on state childcare parentage definitions are met. Thus, state legislators and judges must abide by the Lehr v. Robertson court demands regarding the childcare opportunities of certain unwed biological fathers of children born of sex (at least in adoptions), as well as the implicit Troxel v. Granville court limits on state parentage law definitions unduly infringing upon the childcare interests of existing parents.

Beyond Lehr and Troxel, there are federal and state constitutional equality demands that could impact the current, quite varied, state statutory and common norms on childcare parentage. Thus in 2016, one federal district court expanded the childcare parentage presumption favoring the husband of a new birth mother to the wife of a new birth mother, where births arise from assisted reproduction and

155. Guidance on such principles will not be found in Article III federal court precedents, as federal nonconstitutional common lawmaking is not undertaken with respect to parental childcare (or marriage or abortion) interests.
where neither presumed parent was biologically tied to his or her child.\footnote{158} As to the equality interests of the nonmarital, nonbiological, and nonadoptive childcaretakers, how constitutional precedents “will speak to burgeoning inequalities between marital and nonmarital families [and between differing nonmarital families] in this new age of marriage equality remains to be seen.”\footnote{159} Yet there is little reason to think the United States Supreme Court will elaborate much on federal constitutional interstate equality. There remains \textit{Lehr}, which maintains that in “the vast majority of cases, state law determines the final outcome” when resolving “the legal problems arising from the parent-child relationship,”\footnote{160} even where interstate outcomes differ.

Further, state courts need not balance statutory and nonconstitutional common lawmaking where state constitutions speak to childcare parents, even if obliquely. There is little reason, however, to expect an increase soon in state constitutional lawmaking. Lockstepping will likely continue. There are longstanding traditions within American states that family law matters are to be significantly regulated by state legislators, as they often implicate issues outside of the common law and thus outside of the significant inherent state judicial authority and jury trial processes.

So state courts will be challenged to have to decide whether to define childcare parentage on their own, of course within constitutional and any express statutory limits. And, state legislatures will be challenged to have to decide whether to undo any common law precedents; to remain silent should parentage common lawmaking emerge; and, to invite—perhaps quite directly—courts to define (perhaps only some) childcare parents via precedents.

In deciding whether to define childcare parents within constitutional and statutory constraints, state courts should be especially guided by the nature and extent of any recent General Assembly expansions of or inquiries into childcare parentage. In 2014, the Wyoming Supreme Court declined to recognize either a common law de facto parentage or a parentage by estoppel doctrine.\footnote{161} It noted that the legislature had enacted a Parentage Act in 2003 that recognized presumed childcare parentage in a man who resided in the same

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160. \textit{Lehr} v. Robertson, 463 U.S. 248, 256 (1983). \textit{See also} United States v. Yazell, 382 U.S. 341, 352, 357 (1966) (stating there is a need for “solicitude for state interests, particularly in the field of family” and also “no need for uniformity” in child custody laws).
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household and held out a child as his own for the child's first two years, where the statute followed cases elsewhere on in loco parentis and psychological parentage, as well as the 2000 American Law Institute's "Principles of the Law of Family Dissolution," first published in 2002. It concluded that legislators in Wyoming had defined childcare parents "advisedly," acting "extensively" and left little room for the courts to "fill [in the] interstices" not covered by the statutes.

Judicial reluctance to extend childcare parentage due to earlier General Assembly enactments, or failures to act, should vary depending upon the circumstances leading to pregnancy and birth. In the just noted Wyoming case, the child seemingly was born of consensual sex where the alleged male parent was not the biological father, but was present when the child was born and lived with the mother and child for between eighteen and twenty-two months. The relevant statute required a two-year residence from the time of birth to establish presumed male parentage. But what if the child was born of assisted reproduction, with or without the alleged legal father's sperm, or was born of assisted reproduction involving a surrogate? Here, if there were no statutes, or if state legislators had not acted "extensively," leaving significant "interstices" not covered by their laws, the Wyoming court may have recognized enhanced common law-making authority.

In deciding whether to define childcare parents within constitutional and statutory constraints, courts should also be guided by how parentage definitions in nonchildcare settings have emerged. Thus, they should consider whether parent and child definitions for probate, wrongful death, or other nonchildcare claims originate wholly in statutes. If significant earlier judicial precedents untethered to particular statutes exist in probate, for example, common law childcare parentage rulings should be more available, though they need not be consistent in policy, especially when they address the effects of new

162. LP, 338 P.3d at 918-19.
163. Id. at 918 (distinguishing In re Parentage of L.B., 122 P.3d 161 (Wash. 2005)).
164. Id. at 910 (relating how the mother said he lived with them for about 18 months, while the alleged father said it was 21 or 22 months).
165. Id. at 914 (referencing WYO. STAT. ANN. § 14-2-504(a)(v)).
166. See, e.g., Conover v. Conover, 146 A.3d 433, 452 (Md. 2016) (recognizing a new common law de facto childcare parent doctrine [while overruling a "clearly wrong" eight year old precedent], and distinguishing other state precedents deferring to the legislature since in Maryland the "statutory scheme in the area of family law is not as comprehensive"). See also People v. Pieters, 802 P.2d 420, 423 (Cal. 1991) (stating the court "does not construe statutes in isolation, but rather read[s] every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.'" (quoting Clean Air Constituency v. Cal. State Air Res. Bd., 523 P.2d 617 (Cal. 1974))).
human reproductive technologies and the explosion in nontraditional families.

Guidance should also emanate from how nonparental childcare interests have evolved in a state. Equitable or common law developments untethered to statutes indicate a judicial willingness to go beyond General Assembly directives to serve the best interests of children or on the caretaking interests of adults. These developments are relevant in parental childcare settings, of course within the Troxel limits. The distinctions, if any, made here, as between those blood-related (i.e., grandparents) and those not blood-related (i.e., stepparents) seeking nonparental childcare orders over parental objection(s) are relevant in assessing the childcare interests of blood-related and nonblood-related individuals seeking parental status.

As well, courts should be guided by whether new parent childcare statutes are then, or have recently been, under serious General Assembly consideration. Current or recent significant legislative interest should cause courts to hesitate to act on their own. Such an interest may be found, for example, where a special advisory General Assembly committee is then contemplating, or recently contemplated, comprehensive legislation, or where comprehensive reforms, while not yet enacted, have recently been subject to significant General Assembly debate and public discourse that is likely to continue. By contrast, where parent childcare statutes have been amended with no mention of (and thus with no clear intent to limit) earlier equitable, i.e. nonstatutory, precedents on childcare, courts should be less hesitant to act further.

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167. These limits in nonparental childcare settings are subject to some dispute, as recognized by the Committee of the National Conference of Commissioners on Uniform State Laws that was considering in 2016 a new model act on nonparental custody and visitation. NON-PARENTAL CHILD CUSTODY AND VISITATION ACT (UNIF. L.COMM’N, Discussion Draft 2016).

168. In overruling an eight-year-old precedent denying de facto parentage, the Maryland high court acted even though the legislature had at least twice considered the doctrine in the very recent past. Conover, 141 A.3d at 54-55 (Watts, J., concurring).

169. For example, for about ten years in Illinois, ending with legislation in 2015, the General Assembly first commissioned an independent study on possible amendments to the major Parentage Act and then enacted a new Parentage Act. See, e.g., Parentage Law (R)Evolution, supra note 37, at 753-57 (reviewing proposed parentage changes in Illinois by a special study committee, including amendments to the Parentage Act of 1984 and the Marriage and Dissolution of Marriage Act). During the Illinois inquiry, some judges failed to pursue, for example, de facto parentage theories in deference to the legislative initiative. See, e.g., In re Marriage of Mancine & Gansner, 9 N.E.3d 550, 576 (Ill. App. Ct. 2014) (Mason, J., specially concurring). A review of the 2006 commissioned inquiry into reforming Oregon parentage laws appears in Leslie Joan Harris, A New Paternity Law for the Twenty-First Century: Of Biology, Social Function, Children’s Interests and Betrayal, 44 WILLAMETTE L. REV. 297 (2007).

170. See, e.g., In re Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 497-98 (N.Y. 2016) (stating that a domestic relations statute “evolved in harmony with . . . equitable
Where recent General Assembly consideration presents no bar to new nonconstitutional common law parentage norms, non-enacted legislative proposals can be employed to guide judicial policymaking. In concurring in the Maryland high court’s 2016 recognition of de facto parenthood, two justices utilized “withdrawn” General Assembly proposals to formulate their views on a new de facto childcare parent doctrine.\textsuperscript{171}

As to the allocation of state governmental powers to define childcare parents by defining the rebuttal, rescission, or other forms of parentage disestablishment, courts should first take a hard look at the laws that initially prompted parentage. When state legislators fail to speak explicitly on disestablishment, some legislative intent may be found in the policies underlying the relevant parentage statutes. For example, a statute recognizing presumed paternity in a husband whose wife conceives a child during a marriage, or who bears a child while married, may—in the absence of any legislation on a presumption rebuttal—nevertheless direct, via its underlying public policy, how attempted rebuttals of the presumption should be handled. Did the legislators base their marital presumption on the import of biological ties, or on the import of maintaining intact families?

The requisites for a form of parentage establishment and for the disestablishment of that form of parentage need not always be determined by the same lawmaker. It may be that a legislature desires a hard-and-fast rule on a certain form of parentage, as with parentage arising from marriage to the birth mother, but judicial flexibility, including quite broad judicial discretion, on when that parentage form might be undone. Or, it may be that legislators determine that a child’s best interests are not to be considered when parentage is first established by a voluntary acknowledgment via strict statutory guidelines largely objective in nature, but that a child’s best interests are to be considered when a challenge to such an acknowledgment is sought, meaning there is a fact-laden subjective judicial inquiry.

Should state courts and legislatures conclude that certain current caretakers are undeserving of, or not now recognized as having, federal constitutional parental childcare interests, they are not precluded from recognizing for those caretakers nonparental (sometimes labeled, third party) childcare interests, which could include childcare visitation orders over the objections of any current childcare parent. While state courts have recently recognized significant new forms of nonconstitutional childcare parentage, like de facto parentage, that

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\item\textsuperscript{171} Conover, 141 A.3d at 53-54 (Watts, J., concurring, joined by Battaglia, J.).
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are untethered to statutes, they have not comparably recognized nonconstitutional and nonstatutory nonparental childcare interests. Perhaps they await a new uniform law (now in the works).172 Perhaps there are fewer “interstices” and quite extensive General Assembly action. But such common law developments are possible, and may some day be deemed necessary to serve the best interests of children, which for now typically are largely irrelevant in nonconstitutional parental childcare settings (as the focus is on parental and nonparental interests).

VII. MORE RATIONAL DISTINCTIONS BETWEEN CHILDCARE PARENTS

Whether or not state courts, in the absence of statutes, themselves define childcare parents or await (if not invite) General Assembly action, they should address any irrational statutory or common law distinctions by utilizing federal or state constitutional equality or substantive due process.173

One current distinction worthy of broadened interpretation, not invalidation, involves statutory and common law differences between male and female spouses of mothers who bear children born of sex, if not of assisted reproduction or of unknown acts,174 during marriage. In Louisiana, the statute on presumed parentage states, “the husband...
of the mother is presumed to be the father of the child born during the marriage or within three hundred days from the date of the termination of the marriage."\textsuperscript{175} By contrast, in Illinois "[a] person is presumed to be a parent of a child if . . . the person and the mother of the child have entered into a marriage, civil union, or substantially similar legal relationship, and the child is born to the mother during the marriage, civil union, or substantially similar legal relationship . . . or within 300 days after the marriage, civil union, or substantially similar legal relationship is terminated."\textsuperscript{176} There is no sensible reason to differentiate in-state, as in Louisiana, between male and female spouses of birth mothers who bear children from adulterous sexual relationships.\textsuperscript{177} Thus, "husbands" in marital parentage presumption statutes should be read to include "wives" of spouses who bear children,\textsuperscript{178} until the language is changed to gender-neutral terms.

Comparably worthy of broadened interpretation, not invalidation, are statutes and common law precedents that unreasonably favor different-sex unmarried couples over same-sex unmarried couples where all couples comparably act to prompt children born of assisted human reproduction. Consider couples who intend to be childcare parents without surrogacy.\textsuperscript{179} As the Florida Supreme Court ruled in 2013,


\textsuperscript{176} \textit{750 Ill. Comp. Stat. Ann.} 46/204(a). \textit{See also D.C. Code Ann.} § 16-909(a-1)(2) (West 2001) (stating a woman is presumed to be "the mother of a child if she and the child's mother are or have been married, or in a domestic partnership, at the time of either conception or birth, or between conception or birth"); \textit{Iowa Code Ann.} § 598.31 (West 2008) (stating that "[c]hildren born to the parties, or to the wife in a marriage relationship . . . shall be legitimate as to both parties").

\textsuperscript{177} State statutes sometimes dictate equality between all state-sanctioned marital and marital-like relationships, as in Vermont where there was an equal protection provision in the civil union statute. Moreau v. Sylvester, 95 A.3d 416, 421-22 (Vt. 2014).

\textsuperscript{178} McLaughlin, 382 P.3d at 719. \textit{See also Torres v. Seeemeyer}, No. 15-cv-288-bbc, 2016 WL 4919978, at *9 (W.D. Wis. Sept. 14, 2016) (ordering that in the birth certificate statute should be construed to mean "spouse") so that same-sex and different-sex married couples would be similarly treated).

\textsuperscript{179} \textit{See, e.g., Tex. Fam. Code Ann.} § 160.7031 (West 2013) (stating that if "an unmarried man, with the intent to be the father . . . provides sperm . . . for assisted reproduction by an unmarried woman," then he is "the father of a resulting child"). \textit{But see Cal. Fam. Code} §§ 7613(a), 7613(c) (West 2004) (stating that "[i]f a woman conceives through assisted reproduction with . . . ova . . . donated by a donor not her spouse," another person can be an "intended parent" if there is proper consent, whereas that "donor of ova for use in assisted reproduction" is not a parent if she did not intend "to be a parent"). Some laws on conduct by unwed different-sex and same-sex couples recognize equality for all couples, as when statutes or precedents require the nonbirth parent to have contributed genetic material. While both different-sex and same-sex couples can comply, such limits arguably exclude unreasonably couples desirous of co-parenting
such a Florida statute “lacks a rational basis.”\footnote{180} This statutory differentiation, however, remains on the books in Florida, if not in practice.\footnote{181} Comparably problematic are nonsurrogacy assisted reproduction laws that distinguish between married heterosexual couples and other couples,\footnote{182} and perhaps laws differentiating coupled and single individuals\footnote{183} and those in two-party and three-party romantic or familial relationships.\footnote{184}

Further, broadened interpretation, not invalidation, should be considered for statutes or common law precedents that differentiate between married couples and both unmarried couples and single individuals who wish to raise children born to surrogates.\footnote{185}

who contribute no eggs or sperm (and may also be vulnerable as unduly burdensome on procreational rights, especially for those incapable of contribution). \textit{Compare}, e.g., \textit{Tex. Fam. Code Ann. § 160.7031} (stating an unmarried man is the father of a resulting child if he provides sperm with the intent to be the child’s parent), \textit{with N.M. Stat. Ann. § 40-11A-703} (West 2011) (stating that “[a] person who provides eggs, sperm or embryos for or consents to assisted reproduction,” per section 40-11A-704 (which speaks to “intended parent or parents”) “with the intent to be the parent of a child” is a parent).\footnote{180} \textit{D.M.T. v. T.M.H.}, 129 So.3d 320, 344 (Fla. 2013).


\textit{See, e.g.}, \textit{Ohio Rev. Code Ann. § 3111.89} (West 2010) (addressing “non-spousal artificial insemination for the purpose of impregnating a woman so that she can bear a child that she intends to raise as her child”); \textit{Ark. Code Ann. § 9-10-201} (West 2006) (stating that an unwed birth mother is the legal mother, with no mention of a possible intended father as parent); \textit{Cal. Fam. Code § 7613.5} (providing that nonsurrogacy assisted reproduction is available to both couples and single women).\footnote{184}

\textit{Compare 750 Ill. Comp. Stat. Ann. 46/204(a)(1)-(2), (b) (providing that for the birth mother of a child born of sex, only one of two of her spouses during the pregnancy can be a presumed childcare parent), with Cal. Fam. Code. §§ 7611, 7612(c) (stating that with the birth mother, there can also be two presumed parents).}

\textit{Compare Tex. Fam. Code Ann. § 160.754(b)} (providing that an authorized gestational agreement must include “intended parents . . . married to each other”); \textit{with Ark. Code Ann. § 9-10-201(c)(1)(B)} (providing that an unwed biological father is a parent of a child born to a surrogate, with no mention of a second intended parent), \textit{Ark. Code Ann. § 9-10-201 (c)(1)(C)} (stating that a woman intended to be the mother is the parent, but only when “an anonymous donor’s sperm was utilized for artificial insemination”), \textit{Fla. Stat. Ann. § 742.13(2)} (stating that a “[c]ommissioning couple” in a “[g]estational surrogacy contract” (under section 742.15) means “the intended mother
State, if not federal, constitutional equality should be used today to invalidate unreasonable differences in adoption proceedings between a biological father of a child born of sex to an unwed mother who, before any adoption is finalized, registers with a putative father registry and a similar father who only files a paternity action or a similar proceeding before the adoption. While the United States Supreme Court has sanctioned such differences for now,\textsuperscript{186} state constitutional equality protections can go further, especially where state constitutions speak more explicitly of equality guarantees than does the United States Constitution.

Constitutional equality, be it federal or state, need not always be employed to strike a statute or common law precedent unreasonably treating comparably situated childcare parents. Courts can simply interpret the law to preclude senseless differentiations. Thus, while one state statute declared a biological father could only challenge an adoption petition when he both moved to contest the adoption in the adoption case and filed a paternity action, the state high court allowed a biological father to pursue a challenge when he had only filed a timely paternity action,\textsuperscript{187} validating adequate or effective—if not technical—compliance with the statute.

\section*{VIII. CONCLUSION}

Per United States Supreme Court precedents, federal constitutional childcare parents are chiefly defined today by state legislators and judges—and their definitions vary widely interstate. These definitions go by different names, like de facto parents; presumed marital and nonmarital parents; and equitable adoption parents. More importantly, state law definitions of childcare parents carry differing requisites, like maintaining a household residence; providing financial

\begin{itemize}
\item and father\textsuperscript{\textregistered} of a child conceived via assisted reproduction, but only if at least one of the intended parents donated “eggs or sperm”), \textit{Utah Code Ann.} §§ 78 B-15-801(3), (5) (West 2014) (stating that the “intended parents shall be married” with at least one being “a donor”), and \textit{N.H. Rev. Stat. Ann.} §§ 168-B:7, B:8 (2002) (stating that a “child conceived as a result of assisted reproduction and a gestational carrier agreement” is a child of the “intended parent or parents,” who are not expressly required to have donated their own genetic material).
\item \textsuperscript{186} \text{Lehr v. Robertson}, 463 U.S. 248, 264-65 (1983) (providing that parties interested in possible adoption proceedings must “adhere precisely to the procedural requirements” of the adoption statute). In \textit{Lehr}, the statutory requirements demanded notice be given in an adoption case to one who had filed an “unrevoked notice of intent to claim paternity,” but said nothing of one who had filed a paternity action. \textit{Lehr}, 463 U.S. at 250-51 nn.4-5.
\item \textsuperscript{187} \textit{In re B.W.}, 908 N.E.2d 586, 589, 594 (Ind. 2009) (noting how the father had not only sued in paternity within 30 days of receiving the adoption case notice, but he had also filed prebirth with the Putative Father Registry).
\end{itemize}
support; and holding out a child as one's own.\textsuperscript{188} State laws on childcare parentage disestablishment are similar, with differing terms like rebuttal and rescission, and with differing requisites, as with the absence of biological ties, laches, or estoppel.

Given the likely continuing (and dramatic) changes in family structures and in the availability and use of human reproductive technologies, as well as United States Supreme Court deference, state lawmakers will continue to define and redefine federal constitutional childcare parents. Such lawmaking requires more deliberate and principled state-by-state assessments of the allocations of legislative and judicial powers. Initially, there should be judicial explorations into the possible role of state constitutional laws. These exams will likely need to be followed by in-depth explorations of past and current state General Assembly and high court parentage law initiatives in and outside of childcare parentage.

To date, the intrastate allocations of legislative and judicial powers to define federal constitutional childcare parents have varied, as have the state laws defining and disestablishing such parents. These variations in lawmaking powers should continue as the separation of powers and the public policies on parental childcare are not uniform interstate. Yet, in balancing the divide, state legislatures and judges should act more principally by relying primarily on their own state's unique history of shared governance in childcare parentage and related matters. They must recognize the balances can even vary intrastate depending upon how children were born into the world and what purposes will be served by the parentage definitions, as between childcare and child support. Whatever balances are struck, however, state lawmakers must avoid irrational or noncompelling distinctions in childcare parent laws, especially now that same-sex, as well as unwed, human couples have been generally afforded certain familial protections once reserved for opposite sex couples.

\textsuperscript{188} For a review of the varying American state laws defining childcare parents, see \textit{Parentage Law (R)Evolution, supra} note 37, at 752-63.
EYEWITNESS MISIDENTIFICATION:
A MISTAKE THAT BLINDS
INVESTIGATIONS, SWAYS JURIES,
AND LOCKS INNOCENT PEOPLE
BEHIND BARS

CARLA STENZEL†

“God help us, if ever in this great country we turn our heads while
people who have not had fair trials are executed.”

I. INTRODUCTION

The very first exoneration in the United States took place on Au-
gust 14, 1989. On that day, DNA evidence freed Gary Dotson from
his wrongful rape conviction. Since then, exonerations have become
somewhat common in the United States. Today, the leading cause of
wrongful convictions is eyewitness misidentification. In over seventy
percent of DNA-based exonerations, eyewitness misidentification
helped seal the innocent person’s conviction.

Eyewitness misidentification is most likely to occur when a stran-
ger commits a crime toward another. The two most common types of
crimes committed by a stranger are robbery and rape. In 2005,
eighty-eight percent of the defendants convicted of rape and later ex-
onerated had been wrongfully convicted based on a faulty identifica-
tion by the victim of the crime. In most of these exonerations, DNA
evidence cleared the defendant’s name. Due to a lack of DNA evi-
dence in robberies, many misidentified defendants may still be in

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Heider College of Business 2016; J.D., Creighton University School of Law 2016.
2. Samuel R. Gross et al., Exonerations in the United States 1989 Through 2003,
4. Id.
5. Id. at 542.
6. Eyewitness Misidentification, INNOCENCE PROJECT, http://www.innocencepro-
ject.org/causes-wrongful-conviction/eyewitness-misidentification (last visited Mar. 28,
2016).
7. Gross et al., supra note 2, at 530.
8. Id. Robbery related misidentifications likely outnumber rape related misidentif-
ications because there are more arrests for robberies than rapes. Id.
9. Id.
10. Id.
prison. Unfortunately, this means that eyewitness misidentification has likely sent many unaccounted for innocent people to prison. This Article will explore the measures our justice system and communities can take to avoid such wrongful convictions.

First, this Article will discuss three examples of wrongful rape convictions caused by eyewitness misidentification. These cases will display that eyewitness identification can have negative consequences, even when the witness feels that she had done everything in her power to make the correct identification. Then, this Article will explain how an eyewitness’s memory functions and why memory plays a role in eyewitness misidentification. Next, this Article will discuss current safeguards courts have taken to prevent convictions based on eyewitness misidentification. Thereafter, this Article will examine research on the best methods for identifying a perpetrator. Finally, this Article will conclude with ideas on reforms regarding eyewitness misidentification.

II. EXAMPLES OF EXONERATION CASES: EXACTLY HOW DOES EYEWITNESS MISIDENTIFICATION SEND AN INNOCENT PERSON TO PRISON?

Eyewitness misidentification occurred in seventy percent of over 300 exoneration cases where innocence was proven by DNA evidence. This Article will discuss three of these cases, all of which involved a rape. In the cases that follow, the eyewitnesses were sure that they had selected the correct person as their perpetrator. One of these individuals was so sure of her selection that even after DNA evidence proved the defendant was innocent, she had a difficult time believing the truth.
A. Ronald Cotton: A Witness Can be Completely Sure on Identifying The Perpetrator and Still be Incorrect

In 1984, a man forcefully entered Jennifer Thompson’s apartment, attacked, and raped her, while holding a knife to her throat. During her attack, she paid special attention to her attacker’s features in order to identify him later in court. She paid close attention to his voice, accent, and physical characteristics. After she was attacked for about a half an hour, she convinced the rapist to let her get him a drink and managed to escape out her back door.

While she was recovering in the hospital, a police detective interviewed her and drew a composite sketch of her attacker. This sketch was broadcast to the public and the police began receiving tips about the crime, one of which was about Ronald Cotton. Unfortunately for Cotton, he worked at a restaurant located by Thompson’s apartment, he had a previous breaking and entering conviction, and he had a sexual assault charge in his juvenile record. Just three days after the rape had occurred, the detective put together a photo lineup that included Cotton’s picture. After five minutes of examining the photographs, Thompson selected Cotton’s photo as depicting the man who raped her. Later on, Thompson picked Cotton from a live line up and was told that she chose the same man from the photo lineup. After hearing this news, she thought, “Bingo! I did it right; I did it right.” She once again identified Cotton during his trial; thereafter, Cotton was convicted and sentenced to “life in prison plus fifty years.”

While Cotton was serving his time in prison, he met a man that looked very similar to himself, Bobby Poole. Another inmate told Cotton that Poole had actually confessed to raping Thompson and, because of this information, Cotton was given a new trial. During this new trial, Thompson was asked to identify Poole; however, she failed

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24. Tegoseak, 221 P.3d at 352.
25. Id. Jennifer forced herself to stay focused and studied this man carefully. Id.
26. Id.
27. Id. This interaction occurred within three days of the rape. Id.
28. Id.
29. Id.
30. Id. The photo lineup included six photos. Id.
31. Id. at 352-53.
32. Id. at 353.
33. Id.
34. Id.
35. Id. Even the prison stewards would mistake the two for each other. Id.
36. Id.
to recognize him. At this point, Thompson was very angry with Cotton and his attorneys for questioning her previous identification because she felt that she would never be able to forget her rapist’s face.

At the conclusion of this trial, Cotton was again convicted of the rape, but this time received two life sentences.

After seven years, Cotton learned about DNA evidence by watching the O.J. Simpson trial. At that point, he convinced his lawyer to look into the possibility of viable DNA evidence. Although this was ten years after the initial rape, the police department still had Thompson’s rape kit, which contained testable sperm. The results of the DNA test proved that Poole was the actual rapist and that Cotton was innocent.

Even after hearing of this news, Thompson had trouble believing it and even remembered the event in the same way she had before, by visualizing Cotton as her attacker. She would even have dreams about the rape and see Cotton’s face. This case shows that a witness can accurately describe his or her perpetrator prior to a lineup, select another person from a photo lineup and, as a result, be incorrect about the identity of his or her perpetrator. To determine that a pre-lineup description is accurate, based only on the fact that the witness described her attacker with similar physical characteristics to the defendant on trial, is assuming to be true what actually needs to be proven.

B. MARVIN ANDERSON: EYEWITNESS MISIDENTIFICATION ALONE PUTS AN INNOCENT MAN BEHIND BARS

In 1982, a young female was raped by an African-American male that she did not know. While the woman was being raped, the perpetrator told her that he had a “white girl.” Unfortunately for Mar-

37. Id. During this trial, Jennifer never experienced any uncertainty as to who had raped her. Id. at 354.

38. Id. at 353. She remembers thinking: “How dare you question me? How dare you [suggest that I] could possibly have forgotten what my rapist looked like? . . . The one person [I] would never forget?” Id.

39. Id.

40. Id.

41. Id.

42. Id.

43. Id. Jennifer reacted to this news by thinking, “No, that can’t be true; it’s not possible . . . I know Ronald Cotton raped me. There’s no question in my mind.” Id. at 354.

44. Id.

45. Id.

46. Id. at 357.

47. Id.


49. Id.
vin Anderson, he was the only black man who resided with a white woman that the investigating officer could identify; thus, Anderson became a suspect. The officer obtained a color photo of Anderson from Anderson’s employer and used the photo in a lineup with only black and white photos. An hour after choosing Anderson’s photo from the lineup, the victim was presented with a live lineup and chose Anderson again; Anderson was the only person who was included in both lineups.

In the meantime, people in the community had become aware that another man, John Otis Lincoln, most likely committed the crime. A stolen bicycle was widely believed to be used by whoever committed the crime. The owner of that bicycle identified Lincoln as the person who stole the bicycle just a half an hour before the rape took place. Even though Anderson asked his attorneys to call Lincoln and the bicycle owner as witnesses, his attorneys declined.

During the trial, the victim identified Anderson once again as her rapist. Even with an alibi, the eyewitness misidentification was sufficient to convict Anderson of abduction, rape, robbery, and sodomy by an all-white jury. Consequently, Anderson was sentenced to prison for 210 years.

Six years after Anderson’s conviction, Lincoln came forward and confessed that he was the person who had committed the rape. At a state hearing, Lincoln testified that he was the assailant, but the same judge who sentenced Anderson to prison refused to reverse Anderson’s conviction. Years later, DNA evidence became popular and although the court, police, and prosecutor all told Anderson that the rape kit from the crime had been destroyed, he proceeded to contact the Innocence Project for help in 1994, which he received at that time.

50. Id.
51. Id.
52. Id. The live lineup took place within an hour of the photo lineup. Id.
53. Id.
54. Id.
55. Id.
56. Id. Marvin’s attorney had represented Lincoln in prior criminal proceedings and refused to interview or investigate Lincoln. Panel 2 Q & A with Marvin Anderson, Juvenile Exoneree, 18 CARDOZO J.L. & GENDER 601, 601 (2012).
57. Panel 2 Q & A with Marvin Anderson, Juvenile Exoneree, supra note 56, at 611.
58. Id. at 601.
59. Id.
60. Marvin Anderson, supra note 20.
61. Id.
62. Id.; Panel 2 Q & A with Marvin Anderson, Juvenile Exoneree, supra note 56, at 601.
Seven years later, Dr. Paul Ferrara from the center that tested the evidence for the first trial informed the Innocence Project that DNA evidence had been located in a notebook that the original technologist used when he performed the testing for the trial.63 Luckily for Anderson, the technologist did not follow protocol and failed to return the DNA evidence to the rape kit that was subsequently destroyed.64 After DNA testing was first denied, the Innocence Project continued to pursue the testing and eventually won the right to go forward with it.65 The DNA evidence appeared to match Lincoln and not Anderson.66 After fifteen years in prison and four years on parole, DNA evidence proved that Anderson was innocent and he received a full pardon.67

C. STEVEN AVERY: THE TALE OF TWO WITNESSES

In 1985, Penny Beerntsen was jogging on a beach by Lake Michigan when she was attacked and raped by a man.68 During the attack, Beerntsen took notice of the features of her attacker.69 After her attack, she gave the Manitowoc County Sheriff’s Department a detailed description of her assailant and the sheriff immediately suspected Steven Avery because the sheriff felt that the description matched Steven Avery’s features.70 Within just a few hours, a photo lineup, which included Steven Avery’s photo, was presented to Beerntsen while she was told that “there was a chance that the suspect might be in there.”71 Beerntsen selected Steven Avery from the photo lineup and just three days later, she instantly identified Steven Avery in a live lineup after being told “the man whose photograph she had selected had been arrested.”72

Within days of arresting Steven Avery, the district attorney and sheriff received information connecting Gregory Allen to the rape.73 Gregory Allen was a sex predator with a lengthy record.74 However, the sheriff and district attorney did not seem to even bat an eye at this new information and chose to continue to pursue the charges against

64. Id.
65. Id.
66. Id.
68. Collins, supra note 14, at 10; Griesbach, supra note 20, at 7.
69. Collins, supra note 14, at 10. She remembered thinking, “I have to stay calm and get a good look at this guy.” Id.
70. Id.
71. Id.
72. Id.
73. Griesbach, supra note 20, at 7.
74. Id.
Steven Avery.75 Despite having an alibi witness, Steven Avery was convicted and sentenced to thirty-two years in prison after Beerntsen testified at his trial that there was no question in her mind that Steven Avery was her attacker.76 Eight years after Steven Avery’s conviction, Gregory Allen raped another woman in the woman’s home and was convicted of burglary, kidnapping, and second-degree sexual assault.77 Finally, he was sent to prison for sixty years.78

After attempting to appeal his case for a suggestive photo lineup, Steven Avery attempted a second appeal after learning that DNA testing proved fingernail scrapings from the victim belonged to a third party.79 With the help of the Innocence Project, Steven Avery invoked a two and a half year old law to obtain the DNA testing necessary to free him.80 The DNA evidence proved that Gregory Allen was the perpetrator and, as a result, Steven Avery was freed after having served eighteen years in prison.81

III. EYEWITNESS MEMORY: NOT AS RELIABLE AS ONE WOULD HOPE

One might ask, what causes eyewitness misidentification to occur? Eyewitness misidentification occurs because the eyewitness’s memory is dynamic and prone to error.82 When a person remembers something, he or she does so unconsciously.83 This process occurs in three stages: (1) encoding or acquisition; (2) retention; and (3) retrieval or recall.84 At each one of these stages, many psychological and physical elements can influence whether a person will accurately remember an event.85 However, these are not the only elements that can influence memory; suggestive identification procedures can also play a role in incorrectly remembering an event.86

These elements can further be divided into two types of factors: estimator and system variables.87 An estimator variable “is a factor that is not under the control of the government, such as lighting condi-

75. Id.
77. Griesbach, supra note 20, at 7.
78. Id.
79. Collins, supra note 14, at 10; Avery, 570 N.W.2d at 575.
81. Id.; Griesbach, supra note 20, at 7.
83. Id.
84. Id.
85. Id.
86. Id. at 30-31.
87. Id. at 31.
tions at the time of the witnessed event or the race of the witness and the suspect." A system variable “is a factor affecting the reliability of an identification that is or could be within the control of the criminal justice system,” and such factors include witness instructions prior to the lineup, the structure of the lineup presentation, and the fillers chosen for the lineup. This Article will focus on estimator variables that can aid eyewitness misidentification.

IV. EYEWITNESS IDENTIFICATION AND COURTS: COURTS HAVE ALREADY ACKNOWLEDGED EYEWITNESS MISIDENTIFICATION AND HAVE TAKEN SAFEGUARDS TO PREVENT RESULTING WRONGFUL CONVICTIONS

With the many factors that can affect eyewitness identification, courts have acknowledged that eyewitness misidentification exists and certain factors play a role in such misidentification. These factors include:

(1) a weak correlation between a witness’s confidence in his or her identification and its accuracy;
(2) the reliability of an identification can be diminished by a witness’s focus on a weapon;
(3) high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events;
(4) cross-racial identifications are considerably less accurate than same-race identifications;
(5) a person’s memory diminishes rapidly over a period of hours rather than days or weeks;
(6) identifications are likely to be less reliable in the absence of a double-blind, sequential identification procedure;
(7) witnesses are prone to develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information about the event or the identification; and
(8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another.

After accepting the existence of eyewitness misidentification, courts put safeguards into place to protect against such misidentifica-

88. See id.
89. Id.
90. Savage & Devendorf, supra note 82, at 30; State v. Guilbert, 49 A.3d 705, 721-23 (Conn. 2012).
91. Guilbert, 49 A.3d at 721-23.
tions.92 These safeguards include: excluding the results of impermissibly suggestive identifications, jury instructions regarding identification evidence, and allowing expert testimony regarding the reliability of eyewitness identification.93 Although these safeguards are currently in place, it is not enough to prevent eyewitness misidentification. This Article will next discuss the elements that aid in eyewitness misidentification and what further measures the court system should take.

V. IDENTIFYING A PERPETRATOR: STUDIES SHOW THAT FACIAL FEATURES, DISTANCE, LENGTH OF TIME VIEWED, AGE, AND REHEARSAL CAN HAVE A POSITIVE IMPACT ON MEMORY AND IDENTIFICATION

Several experiments have been done in the field of eyewitness identification. These experiments exposed factors that prevent witnesses from making accurate identifications. These experiments also revealed the factors that contribute to making positive eyewitness identifications. This Article will next explore several different factors that contribute to making an accurate identification.94 These factors include: facial features, distance, the length of time the perpetrator was viewed, the age of the witness, and whether the witness rehearsed after viewing the event.95 Finally, the studies showed that the level of confidence the witness displays after making his or her very first identification is a good indication that he or she actually made an accurate identification.96

A. FACIAL FEATURES: FACIAL AREA, TIMING, AND UNUSUAL FEATURES CAN MAKE ALL THE DIFFERENCE

J. Kirkland Reynolds and Kathy Pezdek conducted two different experiments to determine whether two separate witnesses would remember two perpetrators' faces differently if one of the perpetrators covered his chin, nose, and mouth with a bandana while the other perpetrator wore a hat and dark glasses.97 The first experiment tested whether the duration of time the participant viewed the perpetrator aided memory and the second experiment tested whether giving certain instructions to participants aided memory; the results of both experiments indicated that eyewitnesses did in fact find more success

92. Savage & Devendorf, supra note 82, at 30.
93. Id.; Guilbert, 49 A.3d at 730.
94. See infra notes 97-141 and accompanying text.
95. See infra notes 97-141 and accompanying text.
96. Wixted et al., supra note 19, at 524.
recognizing certain features over others.\textsuperscript{98} In both of these experiments, the people who participated viewed slides that contained faces and were later tested on their ability to recognize the faces in the slides.\textsuperscript{99} Each time the same face was shown in a different slide, a feature of the face was modified, such as the mouth, chin, eyes, nose, and hair.\textsuperscript{100} The results of the first experiment revealed that it was easier for the participant to identify upper-facial features, such as eyes and hair, as opposed to lower-facial features, such as the mouth, chin, and nose.\textsuperscript{101}

In the second experiment, the participants were given either one of two sets of instructions before the slides were presented to them.\textsuperscript{102} One of the sets of instructions stated, “Look at each face carefully and judge the AGE of the person in the slide by using whatever criteria you want. For those people judged older than 30, circle older below, and for those judged younger than 30, circle younger below.” (“Age Instructions”).\textsuperscript{103} The other set of given instructions stated:

As you look at each face, look at all of the features (chin, eyes, mouth, nose, and hair) and decide if this set of features includes relatively typical features or relatively unusual features compared to people you see every day. After scanning the features of each face, check on the response sheet in front of you either “typical” or “unusual” corresponding to your judgment for that face. (“Feature Instructions”).\textsuperscript{104}

The results of the second experiment showed that when the Feature Instructions were given the participant was able to remember the faces considerably better than a participant who was given the Age Instructions.\textsuperscript{105}

These experiments revealed that a witness should focus on the perpetrator’s upper facial features, but also look for unusual features.\textsuperscript{106} It is difficult to say whether Jennifer Thompson focused on Bobby Poole’s upper or lower facial features while he attacked her; however, science tells us that we have the best chance of remembering a face when we focus on the upper features as opposed to the lower features.\textsuperscript{107}

\begin{itemize}
  \item[98.] Id. at 279, 283, 287.
  \item[99.] Id. at 279.
  \item[100.] Id.
  \item[101.] Id. at 287.
  \item[102.] Id.
  \item[103.] Id. at 287-88. (emphasis in the original).
  \item[104.] Id. at 288.
  \item[105.] Id. at 279.
  \item[106.] Id.
  \item[107.] Id.
\end{itemize}
B. DURATION: THE LONGER A WITNESS SEES A PERPETRATOR THE BETTER

In the United Kingdom, police officers are required to record several key factors they are taking a statement from a witness (“United Kingdom Study”). These factors include distance, prior familiarity with the perpetrator, and exposure duration. The statements are taken very shortly after someone has reported a crime, but before a line up is presented. The results of this information showed that the length of time a witness viewed a perpetrator correlated with the likelihood of the witness accurately identifying the perpetrator. Accordingly, when a witness viewed a perpetrator for a long period of time, there was a higher likelihood that the witness would accurately identify the perpetrator as opposed to a witness who had viewed the perpetrator for a shorter period of time. Further, when the witness saw the perpetrator for less than sixty seconds, there was a high likelihood that the witness was not able to identify the perpetrator. Thus, the longer the witness was exposed to the perpetrator the stronger the witness’s memory of the perpetrator’s face became.

The first experiment conducted by J. Kirkland Reynolds and Kathy Pezdek, discussed above, supports this theory. During one session of the experiment where faces were modified in each slide, a person was exposed to a face within a slide for twenty seconds; while in another session, a person was exposed to a face within a slide for three seconds. When the results of these two experiments were studied, it was discovered that the person was able to identify all five features of a face considerably better when he or she was exposed to the face for twenty seconds as opposed to three seconds, thus showing that a few seconds can make a tremendous difference in whether an eyewitness will be able to accurately identify a perpetrator. Not surprisingly, the eyewitness should try to look at the perpetrator’s face for at least twenty seconds in order to have a greater chance of accurately remembering the perpetrator’s face.

109. Id.
110. Id.
111. Id. at 102.
112. Id.
113. Id. at 103.
114. Id. at 102-03.
115. Reynolds & Pezdek, supra note 97, at 279. Interestingly, the amount of time the participant was able to examine the perpetrator did not have an effect on the mental process the participant took to examine the perpetrator’s face. Id. at 287.
116. Id. at 279.
117. Id.
C. **Timing and Rehearsal: Surprisingly the Best Practice is to Wait Rather Than Immediately Attempt to Recall a Perpetrator’s Appearance**

J. Don Read asked the question, “[I]f an eyewitness rehearses the people and details observed in a brief event, would such rehearsal have benefits upon identification of those people and recall of the event’s details?” 118 Therefore, he conducted two experiments: one of the experiments involved a staged classroom event while the other involved a video scenario. 119 The experiments’ outcomes proved that when a person rehearsed directly after an event he or she was more likely to correctly identify a facial target than a person who did not rehearse directly after the event. 120 However, this increase only occurred when the facial target never changed its appearance as opposed to when the facial target even slightly changed its appearance during the identification procedures. 121

When he conducted an experiment where the person was asked not to rehearse for ten minutes after the event, the person’s ability to accurately identify the facial target actually improved, even when the facial target changed its appearance. 122 These experiments actually proved that when a person immediately rehearses after an event, the person’s ability to accurately identify a perpetrator is reduced. 123 Thus, it is best to wait at least ten minutes before attempting to recall a perpetrator’s appearance. 124

D. **Distance: The Five Meter Rule**

When a witness observes criminal activity there is a chance that the witness is standing a great distance from the actual event. 125 A witness is best able to identify a perpetrator while using his or her low and high spatial frequency bands. 126 When a witness is a great distance away from a perpetrator, the size of the retina’s visual image decreases. 127 When the size of the retina’s visual image decreases, this causes the witness to mostly rely on his or her lower spatial fre-

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119. Id.
120. Id.
121. Id.
122. Id. “Immediate rehearsal, in contrast, led to a reduction in identification performance.” Id.
123. Id.
124. Id.
126. Id.
127. Id.
quences to identify a perpetrator since his or her high spatial frequency bands are no longer fully functional.128

James Michael Lampinen conducted an experiment to study the effect distance has on a person’s ability to recognize the face of a perpetrator.129 In his experiment, a person was asked to view eight other people.130 Each of the eight people viewed in the experiment were placed outdoors at one of six distances, which ranged from five to forty yards.131 The person was then asked to match the eight people he or she viewed to an array of photographs.132 The photograph array included sixteen photos, eight of which were the actual targets while the other eight were fillers.133 The results of the experiment showed that the further away the perpetrator was from the witness, the less likely the witness was able to identify the perpetrator.134

Further findings that back up this conclusion were found in the United Kingdom Study discussed above. In the United Kingdom Study, the results showed the effect distance had on eyewitness identification.135 The likelihood of a witness correctly identifying a perpetrator was reduced when the witness saw the perpetrator at a greater distance than five meters as opposed to when the witness saw the perpetrators at a distance of less than five meters or when the witness was face-to-face with the perpetrator.136 Thus, a witness is in the best position to remember his or her perpetrator’s face when he or she sees the perpetrator at a distance of less than five meters.137

E. **AGE: CHILDREN HAVE A LOWER RELIABILITY RATE THAN YOUNG ADULTS**

The United Kingdom Study was helpful for more than just two categories. The study also revealed information related to the age of the witness.138 The results of the study demonstrated the effect the age of a witness has on eyewitness identification.139 According to the results, people sixteen- to twenty-years-old were more likely to correctly identify a suspect than a child witness.140 However, the author

128. Id.
129. Id. at 1490.
130. Id.
131. Id.
132. Id. at 1491.
133. Id.
134. Id.
135. Horry et al., supra note 108, at 102-03.
136. Id. at 103.
137. Id.
138. Id.
139. Id.
140. Id. For purposes of this experiment, a child witness is a person under the age of 16. Id.
concluded that age did not play a significant role with nonidentifications and suspect identifications. 141

F. EYEWITNESS CONFIDENCE LEVEL: THE WITNESS’S LEVEL OF CONFIDENCE AT THE TIME OF THE INITIAL IDENTIFICATION HOLDS THE MOST VALUE

Studies show that there is a poor relationship between an eyewitness’s identification accuracy and an eyewitness’s level of confidence, unless the eyewitness reveals his or her level of confidence early on in the investigation. 142 Confidence levels taken during the initial eyewitness identification are indicative of whether the witness made an accurate identification; however, because people are capable of being misled into remembering events contrary to the actual circumstances, any confidence statement taken thereafter may be contaminated, and thus, not indicative of whether the witness has made an accurate identification. 143 Jennifer Thompson’s comment after her second misidentification of Ronald Cotton, “Bingo! I did it right; I did it right,” and her contaminated dreams of Ronald Cotton attacking her, even after she was told he was not her attacker, further support this contention. 144

Consequently, when an eyewitness gives a confidence statement during a trial, which is generally a very long time after the first identification event, that confidence statement should be at least discounted if not completely disregarded. 145 Stephen Avery is a perfect example of a person who fell victim to a confidence statement given by a witness during a trial, as he was convicted after the eyewitness told the jury that she had no question in her mind that he was her attacker. 146

To support the idea of disregarding confidence statements during a trial, John Wixted completed research to determine whether witnesses who gave confidence statements during the first lineup identification experienced memory contamination. 147 The results of his research showed that during the initial identification, the witness’s confidence level was highly indicative of whether the witness made an

141. Id. at 102.
142. Wixted et al., supra note 19, at 515.
143. Id. A confidence statement is a statement given by an eyewitness that expresses how confident he or she is about his or her identification. Id.
145. Wixted et al., supra note 19, at 515-16. Unfortunately, “[d]espite the unreliability of eyewitness memory, research has shown that jurors find high-confidence eyewitness IDs to be particularly compelling evidence of guilt.” Id.
147. Wixted et al., supra note 19, at 515.
accurate identification. Thus, the witness’s confidence level is most reliable during the initial identification and this confidence level will set a standard to detect whether the witness has lost or gained any confidence over time.\textsuperscript{149} So, if during the initial identification the witness displays a low level of confidence, then there is a high likelihood that the witness did not identify the perpetrator accurately.\textsuperscript{150} On the other hand, if the witness displays a high level of confidence during the initial identification, then there is a high likelihood that the witness accurately identified the perpetrator.\textsuperscript{151} Wixted stressed that expressions of confidence, as well as statements of confidence, should be included when assessing the confidence level of the witness.\textsuperscript{152}

VI. CONCLUSION

Eyewitness misidentification is a large problem within the court system. Eyewitness identification has been presented at a trial as the only piece of evidence supporting the contention that the defendant actually committed the crime, and that single piece of evidence has put a defendant in prison for many years, even when the defendant has an alibi, such as the cases of Marvin Anderson and Steven Avery.\textsuperscript{153} Thus, there is no doubt that such eyewitness identification plays a major role for a jury during discussions and deliberations regarding the fate of the defendant.

Yet, whether jury instructions regarding the reliability of an eyewitness’s identification are given or whether the jury will even hear factors that affect the accuracy of eyewitness identification depends on the jurisdiction of the court.\textsuperscript{154} Some courts will only allow eyewitness identification instruction if there is reason to doubt the witness.\textsuperscript{155} Worse, some courts will not allow any jury instructions specific to eyewitness identification.\textsuperscript{156} However, research shows that there are certain factors that a jury should take into consideration

\begin{itemize}
  \item \textsuperscript{148} Id. at 524-25.
  \item \textsuperscript{149} Id. at 523-24.
  \item \textsuperscript{150} Id. at 524-25.
  \item \textsuperscript{151} Id.
  \item \textsuperscript{152} Id. at 525.
  \item \textsuperscript{153} Collins, supra note 14, at 10; State v. Avery, 570 N.W.2d 573, 575 (Wis. Ct. App. 1997), holding modified by State v. Armstrong, 700 N.W.2d 98 (Wis. 2005); Panel 2 Q & A with Marvin Anderson, Juvenile Exoneree, supra note 56, at 601.
  \item \textsuperscript{154} Vitauts M. Gaulbis, Annotation, Necessity of, and Prejudicial Effect of Omitting, Cautionary Instruction to Jury as to Reliability of, or Factors to be Considered in Evaluating, Eyewitness Identification Testimony—State Cases, 23 A.L.R. 4th 1089 (1983).
  \item \textsuperscript{155} Id.
  \item \textsuperscript{156} Id.
\end{itemize}
when determining the validity of an eyewitness’s identification. As a result, when an eyewitness gives testimony about the identity of a perpetrator, the court should give jury instructions regarding factors that affect the reliability of eyewitness identification.

Further, an expert witness should always testify about the reliability of an eyewitness’s identification. Undoubtedly, jurors take eyewitness identifications seriously during deliberations. If a juror only views eyewitness identification testimony without hearing from an expert rebutting such testimony and without hearing jury instructions regarding factors that affect the credibility of such eyewitness testimony, it is highly likely that the eyewitness’s testimony will play a large part in the jurors’ decision to convict the defendant. Therefore, it is important that an expert rebut an eyewitness’s testimony identifying the defendant as the perpetrator.

The issues that the jury instructions and experts should address are the certain factors that affect the reliability of eyewitness identification. The following factors can affect whether an eyewitness will accurately identify a perpetrator: facial features, distance, the length of time the perpetrator was viewed, the age of the witness, and whether the witness rehearsed after viewing the event. Regarding the amount of time the witness saw the perpetrator, there is a higher likelihood that a witness will make a correct identification if he or she saw the perpetrator for longer than sixty seconds as opposed to if the witness saw the perpetrator for less than sixty seconds. If the witness saw the perpetrator at a distance of less than five meters, there is a higher likelihood that the witness’s identification is correct than if the witness saw the perpetrator at a distance farther than five me-

157. Horry et al., supra note 108, at 102-03; Lampinen et al., supra note 125, at 1491; Read et al., supra note 118, at 295; Reynolds & Pezdek, supra note 97, at 279; Wixted et al., supra 19, at 524-25.

158. See Collins, supra note 14, at 10 (explaining that a jury convicted Eugene Glenn of armed robbery after the victim testified “that she ‘recognized his face immediately.’”); Avery, 570 N.W.2d at 575 (revealing that a jury convicted Steven Avery after Penny Beerntsen identified him as her perpetrator, even though an alibi witness testified on Steven Avery’s behalf); Panel 2 Q & A with Marvin Anderson, Juvenile Exoneree, supra note 56, at 601, 611 (discussing how a jury convicted Marvin Anderson after the victim of the crime identified him).

159. See Panel 2 Q & A with Marvin Anderson, Juvenile Exoneree, supra note 56, at 601 (describing how an all-white jury convicted Marvin Anderson of “forcible sodomy, robbery, rape, and abduction” after the victim of the crimes identified him as her perpetrator); Avery, 570 N.W.2d at 575 (showing that a jury chose to convict Steven Avery even after two witnesses gave conflicting testimony, one identifying him as her attacker and one providing him an alibi).

160. Horry et al., supra note 108, at 102-03; Lampinen et al., supra note 125, at 1491; Read et al., supra note 118, at 295; Reynolds & Pezdek, supra note 97, at 279.

161. Reynolds & Pezdek, supra note 97, at 279; Horry et al., supra note 108, at 102-03.
Finally, research on the age of the witness revealed that a child witness is less reliable than a witness who is sixteen to twenty years old. As these factors are not common knowledge, such factors should be presented to the jury through both an expert witness and jury instructions.

In addition, studies show that after a witness has made his or her first identification, the confidence level of such witness is a strong indication of whether the identification was correct. This represents another issue that a jury might take into consideration: the confidence level of the witness while making his or her identification in the courtroom. Research shows that such a confidence statement at that time actually gives little insight to whether the identification was correct. Jurors should be informed by an expert during the trial and through jury instructions to disregard such a confidence statement and to only focus on the initial confidence statement given by the eyewitness after making his or her first identification. Further, a judge should consider whether to even allow an eyewitness to give a confidence statement during a trial. At that point, considerable time has probably passed since the actual crime, and thus, such a confidence statement is irrelevant. Therefore, a jury should be informed, through both expert testimony and jury instructions, about the reliability of confidence statements taken after each identification.

Additionally, it is important that research regarding factors that affect eyewitness reliability is shared with the public. Research can help people who are put in unfortunate situations, such as a robbery or a rape, find and convict their assailant. I recommend that research be shared with the general public regarding factors that aid in giving accurate identification, possibly through free seminars or even simple brochures. Potential witnesses to a crime should know what to focus on during an attack. Such focus should be on the upper facial features of the attacker, such as the eyes and hair. Additionally, the potential victims should be told to look for odd facial features rather than focusing on the age of the perpetrator. Further, the potential witnesses should be told to rehearse the features of the attacker, but to

162. Lampinen et al., supra note 125, at 1491.
163. Horry et al., supra note 108, at 102.
164. Wixted et al., supra note 19, at 524-25.
165. Id.
166. See id. at 525 (explaining that if testimony had “been focused . . . on confidence in the initial ID, many of the eyewitnesses involved in the DNA exoneration cases may not have persuaded jurors that guilt was established beyond a reasonable doubt . . . . [C]onfidence statements at the time of an initial lineup may be a big part of the solution to false convictions based on eyewitness misidentifications.”).
167. Reynolds & Pezdek, supra note 97, at 279.
168. Id.
wait ten minutes after the attack to do so.\textsuperscript{169} If potential victims are
given this information, the accuracy of eyewitness identification may be improved to allow a guilty person to go to prison and to prevent an
innocent person from going to such a place.

Hopefully with the amount of research that is out there, combined with the new research to come, researchers will be able to create a fool-proof process for accurate eyewitness identification. Currently, courts have recognized the issues with eyewitness identification and have created safeguards to block future wrongful convictions, but more safeguards are needed. While we are waiting on a fool-proof identification process, certain reforms, such as required expert testimony, better jury instructions, and eyewitness training, can help in the quest to remove eyewitness misidentification from our justice system.

\textsuperscript{169} Read et al., \textit{supra} note 118, at 295.
UNITED STATES V. HUGHES: FOR PURPOSES OF THE LACEY ACT CIRCUIT SPLIT, THE EIGHTH CIRCUIT HUNTS DOWN THE PROPER DEFINITION OF MARKET VALUE

I. INTRODUCTION

Enacted in 1900, the Lacey Act\(^1\) enlarged the powers of the Department of Agriculture by prohibiting the sale or receipt of wild game killed in violation of any law and subsequently transported through interstate commerce.\(^2\) In 1984, the United States Court of Appeals for the Fifth Circuit extended the reach of the Lacey Act and recognized the mere sale of hunting guide services as the virtual sale of the wild game itself.\(^3\) However, in 1986, the United States Court of Appeals for the Ninth Circuit directly disagreed with the Fifth Circuit and held that the sale of hunting guide services does not equate to the sale of wild game for purposes of the Lacey Act.\(^4\) Congress responded in 1988 by adding language to the Lacey Act and made it unequivocally clear that the sale of hunting guide services for consideration was the sale of wild game.\(^5\) With one aspect of the Lacey Act resolved by Congress, a circuit split still persists regarding how to interpret the term market value found in the Lacey Act, which is impactful because the market value of the wild game determines the difference between a felony and a misdemeanor violation under the Lacey Act.\(^6\)

Under the Lacey Act, if the pertinent wild game has a market value in excess of $350 the violation is a felony, and if the market

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3. See United States v. Todd, 735 F.2d 146, 152 (5th Cir. 1984) (deciding that “[a] commercial arrangement whereby a professional guide offers his services to obtain wildlife illegally is an offer to sell wildlife.”).
4. See United States v. Stenberg, 803 F.2d 422, 437 (9th Cir. 1986) (holding that “the provision of guiding services or a hunting permit does not constitute the sale of wildlife for purposes of the Lacey Act.”).
5. See 16 U.S.C. § 3372(c) (dictating that the sale of hunting guide services is the same as selling wild game under the Lacey Act).
6. See Todd, 735 F.2d at 152 (surmising that “[t]he best indication of the value of the game 'sold' in this manner is the price of the hunt.”; see also United States v. Hughes, 795 F.3d 800, 806 (8th Cir. 2015) (reasoning that “it was error to permit the jury to treat the price of the hunt as the same as the market value of the wildlife . . . .") (emphasis in original); see also 16 U.S.C. § 3373(d) (2012) (dictating that felony and misdemeanor violations will be determined by the market value of the wild game).
value of the wild game is $350 or less, the violation is a misdemeanor. The Fifth and Ninth Circuits concluded that the price of the hunt or hunting guide services is the best indication of the wild game’s market value. However, the United States Court of Appeals for the Eighth Circuit found that the price of the hunting guide services is not a direct substitute for the wild game’s market value. In *United States v. Hughes*, the Eighth Circuit remanded Hughes’s case for a new trial after determining that the jury instruction given erroneously allowed the jury to establish the market value of the wild game based on the price of the hunting guide services without taking into account what a willing buyer would pay a willing seller for the wild game. The *Hughes* court reasoned that the price of the hunting guide services for a guided hunt includes many things like transportation, lodging, arms, ammunition, and other accommodations that are distinct from the wild game’s market value. The Eighth Circuit determined that because the price of hunting guide services varies so greatly based on the included accommodations, while the market value of the wild game stays the same, the price of the hunt cannot be a direct substitute for the market value of the wild game.

This Note will first discuss the facts and holding of the Eighth Circuit’s decision in *Hughes*. Second, this Note will discuss the background of the Lacey Act and its relevant amendments while examining how circuit courts have applied the Lacey Act prior to the instant case. Third, this Note will argue that the Eighth Circuit’s decision in *Hughes* is the correct interpretation of the term market value under the Lacey Act, which rejects the substitution of the price of hunting guide services for the market value of the wild game, and instead, adheres to the ordinary meaning of market value. Finally, this Note will discuss how the jury should determine the market value

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7. See 16 U.S.C. § 3373(d) (estabishing a fine of up to $20,000, five years imprisonment, or both for a felony violation and establishing a fine of up to $10,000, one year imprisonment, or both for a misdemeanor violation).

8. See *Todd*, 735 F.2d at 152 (stating that “[t]he best indication of the value of the game ‘sold’ in this manner is the price of the hunt.”); see also United States v. Atkinson, 966 F.2d 1270, 1273 (9th Cir. 1992) (agreeing with the Fifth Circuit and stating that “we conclude that *Todd* sets forth the proper method for valuing game taken on a guided hunt.”).

9. See *Hughes*, 795 F.3d at 804-05 (reasoning that “[t]he ordinary meaning of ‘market value’ is the value set by the market . . . [which is] the price that a seller is willing to accept and a buyer is willing to pay on the open market . . . ”).

10. 795 F.3d 800 (8th Cir. 2015).

11. *Hughes*, 795 F.3d at 807.

12. *Id.* at 805.

13. *Id.*

14. See infra notes 18-55 and accompanying text.

15. See infra notes 56-144 and accompanying text.

16. See infra notes 145-198 and accompanying text.
of the wild game in Hughes’s remanded trial, considering the price of hunting guide services as a contributing factor but not as a substitution for the market value of the wild game, and also discuss the future of this circuit split.17

II. FACTS AND HOLDING

Rodney Eugene Hughes was initially convicted on eleven counts of Lacey Act violations.18 The Lacey Act, or 16 U.S.C. section 3372, prohibits the sale, receipt, or transfer of wild game taken in violation of any state, federal, or foreign law, which travels through interstate commerce, or helping someone to do the same.19 Hughes guided hunts commercially through his business called Midwest USA Outfitters.20 Due to previous hunting violations, the Iowa Department of Natural Resources (“DNR”) decided to investigate Hughes’s business.21 Two undercover agents from the DNR successfully hunted with Hughes in Jefferson County, Iowa and harvested a male turkey, which led to a second hunting trip to Missouri.22 Before the hunting trip to Missouri, one of the undercover officers asked Hughes about obtaining the proper licensing to harvest another turkey and Hughes informed the agents that a nonresident turkey license would cost them $175.23 Hughes further advised the agents that it would be better to purchase the appropriate turkey license only if they successfully harvested another turkey, and offered the agents an improper license under the name of a different hunter, which violated local hunting laws.24

On the day of the hunting trip in Missouri, Hughes illegally supplied the officers with resident hunting licenses under the names of other hunters who were friends of Hughes, as well as a shotgun and shotgun shells.25 Hughes told the undercover officers not to park in public areas while hunting in order to avoid running into the game warden.26 Though the undercover officers were unsuccessful while hunting in Missouri, they returned to Iowa with Hughes where they harvested a second turkey.27 Hughes instructed the undercover of-

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17. See infra notes 199-205 and accompanying text.
21. Id.
22. Id. at *2.
23. Id.
24. Id.
25. Id. at *2-3.
26. Id. at *3.
27. Id. at *3-4.
ficers to falsely record where they had harvested their turkeys, and thus again, they violated local hunting laws. 28

During the officers’ undercover operation, they discovered information regarding other illegal hunts led by Hughes, which led to an indictment of sixteen counts of violating the Lacey Act. 29 Following his indictment, the United States District Court for the Southern District of Iowa held a jury trial where Hughes was found guilty of thirteen of the sixteen counts, but two of these counts were dropped after successful post-trial motions by Hughes, resulting in eleven counts of Lacey Act violations. 30

The jury was instructed that it may, but was not required to, value the wild game based upon: (1) what a willing buyer would pay a willing seller; (2) the price that a hunter would pay for the opportunity to take part in such a hunt; or (3) Iowa’s liquidated damages statute. 31

A special interrogatory was given to the jurors that asked them which of the three criteria they had used to value the wild game. 32 The results of the special interrogatory revealed that the jurors convicted Hughes based on the price that a hunter would pay for the opportunity to take part in such a hunt and Iowa’s liquidated damages statute without using the other criterion: what a willing buyer would pay a willing seller. 33 Iowa’s liquidated damages statute uses antler size to categorize illegally harvested deer, and illegally harvesting even the smallest of deer warrants a fine of over $1,000. 34 Further, an agent from Iowa gave testimony at trial that the value of the deer stipulated in Iowa’s liquidated damages statute had little to do with the market value of the deer. 35

After Hughes was found guilty of several Lacey Act violations, he appealed his case to the United States Court of Appeals for the Eighth Circuit. 36 The Eighth Circuit had not yet decided a case that required it to answer the question of how to determine wild game’s market value taken in violation of the Lacey Act, so it first looked to the plain language of the statute and then looked to other circuits’ decisions for

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28. See id. at *4 (indicating that Hughes illegally advised the officers to report their kills outside of the counties where they were actually harvested).


30. Hughes, 795 F.3d at 802-03.

31. Id. at 803.

32. Id.

33. Id.

34. Iowa Code Ann. § 481A.130 (West 2008).


36. Hughes, 795 F.3d at 803.
guidance.\textsuperscript{37} The Hughes court reviewed the interpretation of the Lacey Act de novo.\textsuperscript{38} Hughes’s charges were based on the illegal acts of selling wild game through interstate commerce where that wild game was taken in violation of state laws and also false reporting regarding the wildlife taken.\textsuperscript{39} All counts resulted in either felonies or misdemeanors based on the court’s determination of the wild game’s market value.\textsuperscript{40}

Based on the findings of the special interrogatory given to the jury, Hughes challenged the jury instruction on appeal, arguing that it was clearly erroneous and resulted in prejudicial error.\textsuperscript{41} Hughes further argued that the market value of the wild game is determined by what a willing buyer would pay a willing seller for the animal’s parts, and not Iowa’s liquidated damages statute, nor the price of the hunting guide services.\textsuperscript{42}

The Eighth Circuit vacated the felony charges against Hughes and remanded the case with instructions for retrial.\textsuperscript{43} The court reasoned that market value means the value determined by the market, or the price that a seller and buyer would agree upon if they were to take part in a willful negotiation.\textsuperscript{44} The Eighth Circuit agreed with a portion of the government’s argument, that the sale of hunting guide services is also the sale of the wildlife itself, but the court was careful to distinguish between the sale prong of the Lacey Act and the market value prong.\textsuperscript{45} First, the court reasoned that there was a sale element, and second, that there was a market value element.\textsuperscript{46} For a felony violation, it must first be established that there was a sale, transport, or purchase of wild game in interstate commerce, and second, the market value of the wild game must be in excess of $350.\textsuperscript{47} The court found that the hunting guide services were deemed to be a sale of wild game, but the market value of the wild game required an

\textsuperscript{37} See id. at 804-07 (noting the plain meaning of market value, indicating the definition of market value should be used where the Lacey Act makes no mention of any special definition, and considering the determinations of market value by the Fifth Circuit in \textit{United States v. Todd} and the Ninth Circuit in \textit{United States v. Atkinson}).

\textsuperscript{38} Id. at 803.

\textsuperscript{39} Id. at 802.

\textsuperscript{40} Id.

\textsuperscript{41} Id. at 802.

\textsuperscript{42} Id. at 803.

\textsuperscript{43} Id. at 807.

\textsuperscript{44} See id. at 804 (citing \textit{Market Value}, \textit{BLACK'S LAW DICTIONARY} (10th ed. 2014)).

\textsuperscript{45} Hughes, 795 F.3d at 805.

\textsuperscript{46} Id.

\textsuperscript{47} Id. at 802. “A violation of the Lacey Act can be either a misdemeanor or a felony, depending on whether the market value of the wildlife in question exceeds $350.” Id.
additional determination.\textsuperscript{48} The Eighth Circuit acknowledged that this holding was in conflict with the statutory interpretation of the Fifth and Ninth circuits, but maintained that its holding was in accord with the plain meaning of the statute.\textsuperscript{49}

The Eighth Circuit further elaborated upon its reasoning by explaining that the value of the hunting guide services does not accurately reflect the market value of the wildlife itself because the price of the hunting guide services depends significantly upon several different services that may or may not be included with the hunt.\textsuperscript{50} The court gave several examples of optional services that may change the price of the hunting guide services such as: lodging, transportation, cleaning, length of hunt, arms, ammunition, and other amenities.\textsuperscript{51} The Hughes court posited that all of these factors change the value of the hunting guide services without changing the market value of the wild game itself.\textsuperscript{52} The Eighth Circuit illustrated that the Lacey Act differentiates felonies from misdemeanors based on the market value of the wild game and not the market value of the hunting guide services.\textsuperscript{53} It is this reasoning that led the court to decide that the jury may consider the value of the hunting guide services along with other factors in order to establish the market value of the wildlife but may not substitute the price of the hunt for the market value of the wild game.\textsuperscript{54} Therefore, the Eighth Circuit remanded the case with in-

\textsuperscript{48} See Hughes, 795 F.3d at 806 (discussing that the price of a guided hunt may be relevant to the market value of the wild game but disagreeing with the notion that the price of the guided hunt conclusively establishes the value of the wild game, and disagreeing that the price of the guide services is the best indication of the wild game).

\textsuperscript{49} See id. at 806 (suggesting that the jury should only consider the price of the hunting guide services as one of many factors when valuing the wild game); but see United States v. Todd, 735 F.2d 146, 152 (5th Cir. 1984) (finding that the price of the hunting guide services was the best indication of the value of the wild game); United States v. Atkinson, 966 F.2d 1270, 1273 (9th Cir. 1992) (adopting the Todd court’s view of using the price of the hunting guide services to establish the value of the wild game).

\textsuperscript{50} See Hughes, 795 F.3d at 805 (listing other factors such as: air transportation, accommodations, meals, cleaning services, and other services as factors that would greatly affect the price of the guide’s services without affecting the market value of the wild game).

\textsuperscript{51} Id. at 805.

\textsuperscript{52} See id. (identifying the difference between a felony and misdemeanor violation could very well depend on varying accommodations such as transportation or lodging under the Todd court’s interpretation as opposed to a felony or misdemeanor being determined by the actual market value of the wild game itself).

\textsuperscript{53} Id.

\textsuperscript{54} See Hughes, 795 F.3d at 806 (stating that the price of the hunting guide services is a relevant fact for the jury to consider even though it alone does not establish the value of the wild game).
III. BACKGROUND

A. AN OVERVIEW OF THE LACEY ACT: ITS OBJECT, PURPOSE, AND AMENDMENTS

The Lacey Act was enacted on May 25, 1900, by the fifty-sixth Congress in order to enlarge the powers of the Department of Agriculture and to prohibit illegally harvested game from being transported through interstate or foreign commerce. A pioneer in the protection of wildlife and conservation of resources, the initial aim of the Lacey Act was to preserve and restore native species and simultaneously restrict the import of invasive animal species to the United States. The early version of the Lacey Act also set guidelines for the packaging requirements of all wildlife so the contents of such packaging could be readily ascertained. Though the aim of the Lacey Act seemed to cater to the preservation of bird populations, it governed the taking and transfer of all game species.

In 1981, the ninety-seventh Congress amended the Lacey Act in order to provide definitions of the terms fish and wildlife, Indian tribal law, persons, plants, Secretary, and State, as well as increase fines and punishment for violations of the Lacey Act. In 1986, in United States v. Stenberg, the United States Court of Appeals for the Ninth Circuit held that the offer of hunting guide services was not an offer to sell wildlife, and thus, there could be no violation of the Lacey Act where a person only offered or sold hunting guide services. In response to Stenberg, in 1988 Congress amended the Lacey Act in a way that unequivocally made the offer or sale of hunting guide services the sale of the wild game itself. In subsequent cases interpreting the language of the Lacey Act, the United States Courts of Appeals for the Fifth Circuit and the Ninth Circuit determined the market value of the wild game based on the price of the hunting guide services that

55. Id. at 807. See also E-mail from F. Montgomery Brown, Attorney, F.M. Montgomery Law Firm, P.L.L.C., to Paul Blazek, Student, Creighton University School of Law (Mar. 15, 2017, 5:18 PM CST) (on file with author).
58. 16 U.S.C. § 3372(b).
60. See 16 U.S.C. § 3371 (clarifying the ambiguities in the Lacey Act).
61. 803 F.2d 422 (9th Cir. 1986).
62. United States v. Hughes, 795 F.3d 800, 804 (8th Cir. 2015).
63. 16 U.S.C. § 3372(c).
were either offered or sold.\textsuperscript{64} The Fifth, Eighth, Ninth, and Tenth Circuits agree that the Lacey Act treats hunting guide services as the sale of wild game after the 1988 amendment, but those circuit courts grapple with whether the price of the hunting guide services conclusively establishes the market value of the wild game itself.\textsuperscript{65} This revamping in 1981 and 1988 provides the pertinent part of the Lacey Act’s current framework, and crucially, the amendments of 1981 bifurcated violations into either misdemeanors or felonies based on the market value of the wild game that was taken.\textsuperscript{66} Further, the 1981 amendments included a new element of knowledge: the violator of the Lacey Act must know that he is taking wild game in violation of a law.\textsuperscript{67} This does not mean that the violator needs knowledge of the Lacey Act, but only that he knows he is harvesting wild game in violation of a local, tribal, federal, or foreign law.\textsuperscript{68} These 1981 amendments that dictate a felony violation for illegally harvesting wild game with a market value in excess of $350, and a misdemeanor for illegally harvesting wild game with a market value at $350 or less, generated the differing interpretations by the federal appellate courts on how to determine the market value of the illegally harvested wild game.\textsuperscript{69}

\textsuperscript{64} See United States v. Todd, 735 F.2d 146, 152 (5th Cir. 1984) (referencing the Lacey Act in deciding that the price of the hunting guide services is the best indicator of market value); see also United States v. Atkinson, 966 F.2d 1270, 1273 (9th Cir. 1992) (concurring with the Todd court that the price of the guide services is the best indicator of market value).

\textsuperscript{65} See Hughes, 795 F.3d at 805 (suggesting that the jury should only consider the price of the hunting guide services as one of many factors when valuing the wild game); see also Todd, 735 F.2d at 152 (finding that the price of the hunting guide services was the best indication of the value of the wild game); see also Atkinson, 966 F.2d at 1273 (using the price of the hunting guide services to establish the value of the wild game).

\textsuperscript{66} See 16 U.S.C § 3373(d)(3) (providing “Any person who knowingly violates subsection (d) or (f) of section 3372 of this title shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both, if the offense involves (i) the importation or exportation of fish or wildlife or plants; or (ii) the sale or purchase, offer of sale or purchase, or commission of an act with intent to sell or purchase fish or wildlife or plants with a market value greater than $350; and (B) shall be fined under title 18, United States Code, or imprisoned for not more than 1 year, or both, if the offense does not involve conduct described in subparagraph (A).”).

\textsuperscript{67} 16 U.S.C. § 3372.

\textsuperscript{68} Id.

\textsuperscript{69} See Hughes, 795 F.3d at 805 (stating that the price of hunting guide services is one of several factors for the jury to consider when valuing wild game); see also Todd, 735 F.2d at 152 (stating that the price of hunting guide services alone is the best indication of the value of the wild game).
B. UNITED STATES V. STENBERG: THE NINTH CIRCUIT HELD THAT THE OFFER OF HUNTING GUIDE SERVICES IS NOT THE SALE OF WILD GAME, LEADING TO THE LACEY ACT AMENDMENTS OF 1988

In United States v. Stenberg,70 the United States Court of Appeals for the Ninth Circuit reversed Stenberg’s felony conviction of violating the Lacey Act and held that the offer or sale of a hunting permit or of hunting guide services did not constitute the sale of wild game for purposes of the Lacey Act.71 In Stenberg, Stenberg was indicted on one felony count of violating the Lacey Act but this count was vacated on appeal.72 Stenberg’s case was consolidated with two other similarly situated defendants after United States Fish and Wildlife Service (“FWS”) agents investigated the three men.73 Stenberg, accompanied by one of his co-defendants, took an FWS agent on an illegal elk hunt in Montana, provided the agent with a hunting permit, and then proceeded to take the agent to a no-hunting zone where the agent killed an elk.74 Stenberg received $150 for the hunting permit he provided to the FWS agent, and his co-defendant received over $600 for guiding the hunt.75 Because the Lacey Act confers liability upon an individual who helps another to violate the Lacey Act, Stenberg was indicted on a felony violation for helping his co-defendant violate the Lacey Act, as the co-defendant received over $350 for the sale of wild game.76 Stenberg argued to the Ninth Circuit that the sale of a hunting permit is not the sale of wild game.77 The Ninth Circuit agreed with Stenberg and reasoned that criminal statutes should be interpreted strictly and the court may not add to the language of the statute.78 Further, the court determined that if Stenberg sold a hunting permit but no wild game was illegally harvested, then Stenberg should not be liable for a Lacey Act violation.79 Because the Lacey Act did not specifically state that the sale of a hunting permit or the sale of hunting guide services was the same as the sale of wild game, Stenberg was not on notice that his actions were in violation of the Lacey Act.80 The court reversed Stenberg’s conviction and specifically held that the sale

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70. 803 F.2d 422 (9th Cir. 1986).
71. United States v. Stenberg, 803 F.2d 422, 437 (9th Cir. 1986).
72. Stenberg, 803 F.2d at 424.
73. Id.
74. Id. at 428.
75. Id.
76. 16 U.S.C. § 3372; see also Stenberg, 803 F.2d at 437 (holding that the sale of hunting guide services is not the sale of wildlife under the Lacey Act, therefore Stenberg’s convictions were reversed).
77. Stenberg, 803 F.2d at 428.
78. Id. at 435.
79. Id.
80. See id. (indicating that a statute must define the conduct that it aims to criminalize).
This holding was the catalyst for the 1988 amendment of the Lacey Act, which clearly added language to treat the sale of a hunting permit or the sale of hunting guide services the same as the sale of the wild game itself. However, while the amendment made the sale of a permit and the sale of hunting guide services the same as the sale of wild game, the amendment was silent as to whether the market value of the wild game should be ascertained by the price of the permit or hunting guide services.

C. United States v. Todd: The Fifth Circuit Opined that the Value of the Hunting Guide Services Is the Best Indication of the Market Value of the Wild Game

In United States v. Todd, the United States Court of Appeals for the Fifth Circuit reversed James Short’s felony conviction of violating the Lacey Act because the government failed to establish the requisite market value of the wild game taken, and the Fifth Circuit also determined that the best indication of the wild game’s market value is the price of the hunt. In Todd, Larry Todd was indicted for conspiracy to violate the Lacey Act and he was tried before the United States District Court for the Western District of Texas. Todd’s case was consolidated with James Short, who was charged with conspiracy to violate the Lacey Act, a felony violation of the Lacey Act, and a violation of the Bald Eagle Protection Act, after Todd and Short guided illegal airborne hunts and killed an eagle and a barbado sheep. The United States District Court for the Western District of Texas found Todd and Short guilty of the above charges. Concerning the substantive felony violation of the Lacey Act, the district court reasoned that the market value of the wild game exceeded $350 because the price Todd and Short quoted for the hunt ranged from $1,000-$5,000 and therefore constituted a felony.

81. Id. at 437.
82. See United States v. Hughes, 795 F.3d 800, 804 (8th Cir. 2015) (indicating that the ruling in the Stenberg case prompted an amendment to the Lacey Act); see also 16 U.S.C. § 3372 (establishing the offer or sale of hunting guide services to constitute a sale of wildlife).
83. See 16 U.S.C. § 3372 (leaving out any special definition for the term market value).
84. 735 F.2d 146 (5th Cir. 1984).
85. United States v. Todd, 735 F.2d 146, 152 (5th Cir. 1984).
86. Todd, 735 F.2d at 146.
87. Id. at 148.
88. Id. at 146.
89. See id. at 151 (establishing that the price of the hunting guide services is the best indication of the value of the wild game which was above $350 in this case).
The Fifth Circuit affirmed the charges for conspiracy to violate the Lacey Act but reversed Short’s felony conviction for violating the Lacey Act. The co-conspirators were in contact with clients through phone call conversations and quoted a client $2,000 for a hunting package, which included taxidermy services, a guide, transportation by helicopter, a gun, and the guarantee of a trophy-size animal. The district court’s rationale was that the market value of the wild game taken was exactly what Short and Todd quoted to their clients, but the Fifth Circuit slightly disagreed and instead used the amount that the hunters actually paid their guides to determine the market value of the wild game. For instance, even though Short and Todd quoted clients above $350, which could constitute a felony violation of the Lacey Act under the district court’s analytical approach, the government could not conclusively establish that the market value of the wild game illegally taken was in excess of $350 because the clients actually paid less. First, a client went on an illegal airborne hunt where a barbado sheep was shot and killed, but a barbado sheep was not classified as wild game, so this illegal hunt was not a violation of the Lacey Act. Second, another client went on an illegal airborne hunt where the client shot a juvenile eagle, but no wild game was trophy-size as the hunting package guaranteed, so the client only paid $250 in expenses constituting a misdemeanor violation. In Todd, the evidence was insufficient to support Short’s felony Lacey Act violation, but the court established a method for juries attempting to find the market value of the wild game illegally harvested. The Todd decision reiterated that a guided hunt selling the opportunity to harvest wild game is selling the wild game itself. Additionally, the court determined that the best indicator of the wild game’s market

90. See id. at 148 (noting that the two co-conspirators appealed to the Fifth Circuit arguing that the market value of the wild game necessary for a felony conviction was not established).
91. Id. at 152.
92. Id. at 148.
93. See Todd, 735 F.2d at 152 (reasoning that the lower court’s decision in determining that the price quoted by Todd and Short established the market value was incorrect and the market value of the wild game was only established by what a hunter actually paid for killing the wildlife).
94. Id. (emphasis added).
95. See id. at 151-52 (reasoning that even though a hunter paid $600, which is over the felony amount, this could not be a felony because he killed a barbado sheep, which is not wildlife under Texas law).
96. Id. at 151.
97. See id. at 152 (identifying the price of the hunt as the best indicator of market value).
98. Id.
value is the price the hunter pays for the hunt. These two determinations by the Todd court laid the groundwork for the Ninth Circuit’s rationale involving Lacey Act violations.


In *United States v. Atkinson*, the United States Court of Appeals for the Ninth Circuit affirmed Atkinson’s convictions regarding his twenty-one counts of Lacey Act violations. In doing so, the court reasoned that the commodity sold in this case was the opportunity to hunt wild game, and therefore, the price of the hunting guide service was the best indicator of the market value of the wild game. Because Atkinson charged fees for guided hunts that ranged from $1,500-$3,000, the market value of the wild game was in excess of $350 and constituted felony violations under the Lacey Act. The United States District Court for the District of Montana initially heard the case and allowed the jury to substitute the market value of the wildlife for the price of the hunting services. After Atkinson was convicted of the felony Lacey Act violations, Atkinson appealed his case to the United States Court of Appeals for the Ninth Circuit, which affirmed his convictions.

Through Atkinson’s appeal, he argued that the jury should not decide the value of the wild game based on what he charged for the hunting guide services because that fee was not directly representative of the market value of the actual parts of the animal. Atkinson argued that his fee for the hunting guide services included many things such as: meals, lodging, and a valid state hunting license, which affect the fee charged for the services but not the actual market value of the wild game itself. On appeal, the court noted that Atkinson guided several hunts where he illegally assisted hunters when

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99. *Id.*
100. *See generally United States v. Atkinson, 966 F.2d 1270, 1273 (9th Cir. 1992)* (following the analysis of the Todd decision by applying the price of a guided hunt as a representative of the wild game’s market value).
101. 966 F.2d 1270 (9th Cir. 1992).
102. *United States v. Atkinson, 966 F.2d 1270, 1277 (9th Cir. 1992).*
103. *Atkinson, 966 F.2d at 1273.*
104. *Id. at 1271.*
105. *Id. at 1270.*
106. *Id. at 1277.*
107. *Id. at 1271-73.*
108. *See id. at 1273-74* (discussing whether other services provided by a hunting guide should affect the market value).
they hunted without the required state licensing, hunted at night with spotlights, and improperly tagged the deer that they killed.\textsuperscript{109} Most of these hunts were also followed by Atkinson shipping the deer meat to Florida or Georgia where his clients resided.\textsuperscript{110} Atkinson’s acts met the two necessary elements of violating the Lacey Act: (a) the sale or receipt of wild game in interstate commerce; and (b) the game was taken in violation of any United States, tribal, or foreign law.\textsuperscript{111} Because Atkinson’s partners and clients testified against him in district court, Atkinson’s last-ditch defense on appeal was to challenge the jury’s valuation of the wild game and attempt to classify his violations as misdemeanors instead of felonies.\textsuperscript{112} Atkinson’s appeal hinged on what the jury was able to consider when determining the market value of the wild game.\textsuperscript{113} Under the Lacey Act, the sale of hunting guide services constitutes the sale of wildlife itself, providing that when a hunting guide sells his or her services he or she is selling wildlife.\textsuperscript{114} Thus, the sale of hunting guide services qualifies as the sale element of the wildlife, but the market value of the wild game is not yet determined.\textsuperscript{115} Faced with this slight ambiguity, the court looked to other circuits and dissected United States v. Todd,\textsuperscript{116} which discussed how to determine the market value of illegally harvested wildlife, and agreed with Todd that the price of the guided hunt is the best indicator of the wild game’s market value.\textsuperscript{117} The court reasoned that the sale of the hunting guide services was selling the opportunity to hunt wildlife; if the jury only valued the parts of the wildlife, it would ignore the cost of the actual hunt, and the price of the hunt was a factor that affected the market value of the wild game.\textsuperscript{118} Thus, the Ninth Circuit decided that a factor the jury should consider when determining the market value of the wild game is the price a person

\begin{itemize}
\item \textsuperscript{109} Id. at 1272.
\item \textsuperscript{110} Id.
\item \textsuperscript{111} See 16 U.S.C. § 3372(c) (identifying the two prongs of the Lacey Act violation).
\item \textsuperscript{112} See Atkinson, 966 F.2d at 1272-73 (noting that Atkinson’s clients and partners testified against him at the district level and then identifying that Atkinson’s price of hunting guide services was the best representation of the market value of the wild game as opposed to Atkinson’s argument that Montana’s liquidated damages statute was a better indicator of the wild game’s market value).
\item \textsuperscript{113} Id. at 1273.
\item \textsuperscript{114} 16 U.S.C. § 3372(c).
\item \textsuperscript{115} See 16 U.S.C. § 3373(d) (establishing that the sale of hunting guide services is the sale of wild game but leaving market value undefined, which suggests market value should receive its plain meaning).
\item \textsuperscript{116} 735 F.2d 146 (5th Cir. 1984).
\item \textsuperscript{117} See Atkinson, 966 F.2d at 1273 (stating that Todd sets forth the proper method for valuing game taken on a guided hunt and that the price of the hunt is the best indicator of the wild game’s market value).
\item \textsuperscript{118} Id. at 1273-74.
\end{itemize}
would pay for the opportunity to hunt the wild game. Atkinson also argued that the market value of the wild game could be conclusively established by the $300 fine that the state of Montana imposes on an individual for illegally harvesting deer, but the court disagreed that this fine resembled the market value of a deer, and elected to follow a similar valuation assessment as the Todd court.

E. **United States v. Butler: The Tenth Circuit Creates a Circuit Split by Concluding that the Market Value of the Wild Game Must Reflect the Animal’s Actual Value**

In *United States v. Butler*, the United States Court of Appeals for the Tenth Circuit vacated the Butler brothers’ sentences, remanded for resentencing, and held that the market value of the wild game must be reflective of the relevant animal’s actual value. The Tenth Circuit pointed out that the Lacey Act does not define the term market value, but an application note in the sentencing guidelines dictates that the fair-market retail price shall be the basis for the wild game’s market value. After being charged in the United States District Court for the District of Kansas for violating the Lacey Act, the Butler brothers pled guilty. After the Butler brothers pled guilty, a jury in the district court decided that the market value was established by the price of the guided hunt, and the market value was in excess of $350. The Butler brothers were sentenced in accordance with felony violations of the Lacey Act. The Butler brothers appealed their sentences to the Tenth Circuit, and argued that the district court utilized a flawed methodology to establish the market value and erred by substituting the price of the guided hunt for the market value of the wild game.

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119. *Id.*
120. *See id.* (indicating that the price of hunting guide services is a better representation of market value than what Montana charges a normal hunter for illegally harvesting wild game).
121. 694 F.3d 1177 (10th Cir. 2012).
123. *Butler*, 694 F.3d at 1180-81; *see* 16 U.S.C. § 3373(d) (differentiating between felonies and misdemeanors based on market value but leaving the term undefined); *see also* U.S. Sentencing Guidelines Manual § 2Q2.1 app. n.4 (U.S. Sentencing Comm’n 2015) (establishing that “*market value* . . . shall be based on the fair-market retail price.”) (emphasis added).
126. *Id.*
127. *Butler*, 694 F.3d at 1178-79.
In Butler, the Butler brothers guided deer hunts for their out-of-state clients. In addition to the hunting guide services, they also provided their clients with lodging, transportation, and meals. The Butlers charged their clients anywhere from $3,500-$5,000 depending on what type of weapon the client used. It was common for the Butlers to advise their clients to forgo obtaining a valid license, harvest more bucks than permitted, use illegal equipment, and fail to tag their game, all of which violated local hunting laws. After federal agents investigated the brothers' hunting operations, the brothers were charged with violating the Lacey Act, conspiring to violate the Lacey Act, and one brother was charged with obstruction of justice.

On appeal, the Tenth Circuit began its analysis of the wild game’s market value by first indicating that neither the Lacey Act nor the sentencing guidelines supply a special definition for the term. However, the court pointed out an authoritative sentencing guideline application note, which stipulates that the fair-market retail price shall be the basis of the wild game’s market value when such information is reasonably available. This application note also indicated that a court may only estimate the market value of the wild game when such information is difficult to ascertain. The court determined that this application note was authoritative unless it violated a federal statute, the Constitution, or was inconsistent with the sentencing guidelines. Abiding by the application note, the Tenth Circuit launched into a two-part inquiry: first, determine whether information is reasonably available in order to assess the fair-market retail price of the wild game, and second, if—and only if—there is no such information reasonably available, determine what reliable information should be used to establish the fair-market retail price.

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128. Id. at 1178.
129. Id. at 1178-79.
130. Id. at 1179.
131. Id.
132. Id.
133. Id. at 1180.
134. Id. at 1181; see also U.S. Sentencing Guidelines Manual § 2Q2.1 app. n.4 (U.S. Sentencing Comm’n 2015) (dictating that “[w]hen information is reasonably available, ‘market value’ shall be based on . . . the fair-market retail price.”) (emphasis added).
135. U.S. Sentencing Guidelines Manual § 2Q2.1 app. n.4 (U.S. Sentencing Comm’n 2015) (stating that “[w]here the fair-market retail price is difficult to ascertain, the court may make a reasonable estimate using any reliable information . . . .”).
136. See Butler, 694 F.3d at 1181 (deciding that “[w]e must treat this commentary as ‘authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.’” (quoting Stinson v. United States, 508 U.S. 36, 38 (1993))).
137. Butler, 694 F.3d at 1181.
Continuing its analysis, the Tenth Circuit proffered that the ordinary meaning of fair-market retail price is what a willing buyer would pay a willing seller.\textsuperscript{138} The court reasoned that the price of the hunting guide services does not reflect an animal’s fair-market retail price because the price of the hunting guide services is greatly affected by an array of varying accommodations.\textsuperscript{139} The government attempted to persuade the court to follow the holding in \textit{United States v. Atkinson},\textsuperscript{140} where the \textit{Atkinson} court determined that the price of the guided hunt could be used to conclusively establish the wild game’s market value.\textsuperscript{141} However, the Tenth Circuit rejected this argument and held that the fair-market retail price is established by the wild game’s actual value and not the price of the hunt.\textsuperscript{142} Ultimately, the court vacated and remanded for resentencing and determined that the district court caused prejudicial error when it allowed the jury to conflate the price of the hunt with the wild game’s market value.\textsuperscript{143} The Tenth Circuit, determining that the commonsensical definition of market value is what a willing buyer would pay a willing seller, and holding that the market value must be reflective of the wild game’s actual value, created a circuit split regarding the analysis of Lacey Act violations.\textsuperscript{144}

IV. ANALYSIS

In \textit{United States v. Hughes},\textsuperscript{145} the United States Court of Appeals for the Eighth Circuit correctly reversed and remanded Hughes’s felony Lacey Act violations because the jury instruction allowed the jury to convict Hughes based on the price of his hunting guide services instead of the wild game’s market value, which contravened the wording of the statute.\textsuperscript{146} In Hughes, the government charged Hughes with

\begin{itemize}
  \item \textsuperscript{138} \textit{Id.}
  \item \textsuperscript{139} \textit{Id.} (explaining “[t]hat a deer was shot on a luxury hunting expedition rather than a more rustic outing is of no import to a buyer of venison.”).
  \item \textsuperscript{140} 966 F.2d 1270 (9th Cir. 1992).
  \item \textsuperscript{141} See \textit{United States v. Atkinson}, 966 F.2d 1270, 1273 (9th Cir. 1992) (determining that the price of the guided hunt is the best indicator of the wild game’s market value); see also \textit{Butler}, 694 F.3d at 1182 (declining to follow \textit{Atkinson} and stating “to the extent that \textit{Atkinson} holds that the entire cost of a hunt constitutes the ‘fair-market retail price’ of a targeted animal for purposes of § 2Q2.1 application note 4, we respectfully disagree with its conclusion.”).
  \item \textsuperscript{142} \textit{Butler}, 694 F.3d at 1182 (stating “[w]e hold that the ‘fair-market retail price’ must be the price of the animal itself, not the price of an expedition to hunt the animal.”).
  \item \textsuperscript{143} \textit{Id.} at 1179, 1185.
  \item \textsuperscript{144} \textit{Id.} at 1181-82.
  \item \textsuperscript{145} 795 F.3d 800 (8th Cir. 2015).
  \item \textsuperscript{146} Compare \textit{United States v. Hughes}, 795 F.3d 800, 807 (8th Cir. 2015) (applying the ordinary meaning of market value—“what a willing buyer would pay a willing seller on the open market”—for the animal’s parts, and reasoning that when a jury conflates
\end{itemize}
felony violations of the Lacey Act when he guided undercover officers on illegal hunts that resulted in the sale of wild game through interstate commerce.147 After the United States District Court for the Southern District of Iowa heard the case, the jury found Hughes guilty of the felony charges, and Hughes appealed his convictions to the Eighth Circuit.148 The Eighth Circuit reversed and remanded Hughes’s convictions based on its determination that the district court’s jury instructions regarding the market value of the wild game in question resulted in prejudicial error.149 The district court’s jury instruction allowed the jury to determine the market value of the wild game based on either: (1) what a willing buyer would pay a willing seller on the open market for the wild game; (2) the price of the hunting guide services; or (3) what the state of Iowa fines an individual for illegally harvesting the wild game.150 The Eighth Circuit reasoned that because the jury was allowed to substitute the price of Hughes’s hunting guide services for the market value of the wild game, this was prejudicial for Hughes because the price of the hunting guide services is not necessarily reflective of the wild game’s market value, and the statute does not explicitly authorize such a substitution.151

First, this Analysis will argue that while the 1988 amendments to the Lacey Act made the sale of hunting guide services equivalent to the sale of wild game, the amendment made no mention of supplanting the ordinary meaning of market value with the price of the hunting guide services.152 Second, this Analysis will argue that the

147. Hughes, 795 F.3d at 803.
148. See id. at 802 (identifying Hughes’s convictions from the district court for violating the Lacey Act and discussing his appeal, which argued that the jury was improperly allowed to convict Hughes for felony violations based on the price of the hunting guide services instead of the wild game’s market value).
149. Id. at 807.
150. Id. at 806.
151. See id. at 806-07 (explaining that a jury instruction that allows the jury to directly swap the price of the hunt for the market value of the wild game is prejudicial error because the price of the hunt does not necessarily reflect the ordinary meaning of the wild game’s market value: what a buyer would pay a seller on the open market, and the ordinary meaning of market value must be applied because the Lacey Act indicates no special definition for the term).
152. See infra notes 156-169 and accompanying text.
market value of wild game is established by what a willing buyer would pay a willing seller on the open market for the wild game, and is not established by the price of hunting guide services, nor by what a state fines an individual for illegally harvesting the wild game.153 Lastly, this Analysis will conclude that the Eighth Circuit correctly reversed and remanded Hughes's convictions because his felony convictions depend on the market value of the wild game and the market value of the wild game is determined by what a willing buyer would pay a willing seller.154 Therefore, Hughes’s felony convictions depended on what a willing buyer would pay a willing seller for the wild game and not the price Hughes charged for his hunting guide services.155

A. THE 1988 AMENDMENTS TO THE LACEY ACT MADE NO INDICATION THAT THE PRICE OF HUNTING GUIDE SERVICES SUFFICED AS THE MARKET VALUE OF THE WILD GAME

The court in United States v. Stenberg156 held that the sale of a hunting permit and the sale of hunting guide services did not constitute the sale of wild game itself.157 The holding in Stenberg was the leading reason for the Lacey Act amendments in 1988, when the Lacey Act was amended to make the sale of a hunting permit or the sale of hunting guide services an actual sale of the wild game itself.158 The controversy that the Stenberg court contemplated was whether the sale of a hunting permit or the sale of hunting guide services constituted the sale of wild game.159 The court's logic highlighted that a court may not add to the language of a criminal statute and Congress would have indicated that the sale of a hunting permit or the sale of hunting guide services was to be the same as the sale of wild game if that was the intent of Congress.160 Responding to this holding, Congress did in fact add this language to the Lacey Act when it amended

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153. See infra notes 170-198 and accompanying text.
154. See infra notes 170-198 and accompanying text.
155. See infra notes 199-205 and accompanying text.
156. 803 F.2d 422 (9th Cir. 1986).
157. United States v. Stenberg, 803 F.2d 422, 437 (9th Cir. 1986).
158. See United States v. Hughes, 795 F.3d 800, 804 (8th Cir. 2015) (stating that Congress amended the Lacey Act in direct response to the holding in Stenberg); see also 16 U.S.C. § 3372(c) (dictating that the sale of a hunting permit or hunting guide services is now the sale of wild game).
159. See Stenberg, 803 F.2d at 428 (determining whether the Lacey Act could be read to include the selling of hunting guide services and the selling of permits as the equivalent of selling wild game).
160. See id. at 436 (deciding that the court must strictly construe a criminal statute and not add to the language of a criminal statute where Congress makes no mention of the sale of hunting guide services in relation to the sale of wild game under the Lacey Act).
the law in 1988, two years after Stenberg. Following the same logic applied by the Stenberg court, courts may not add to the language of a criminal statute, and if Congress intended the price of hunting guide services to establish the market value of the wild game, then Congress would have included that in the language of the Lacey Act. The language of the Lacey Act only says that the sale of hunting guide services constitutes the sale of wild game itself and says nothing about the definition of market value in regard to the wild game. The sale, purchase, or transport of wild game in interstate commerce is simply an element of a Lacey Act violation, which is also referred to as the sale element. The market value of the wild game that was sold, purchased, or transported in interstate commerce is the tool used to differentiate between misdemeanor offenses and felony offenses. Accordingly, it is first necessary to determine whether illegally harvested wild game was sold, purchased, or transported in interstate commerce, and second, separately determine what that wild game’s market value is. The legislative history of the Lacey Act and its amendments supports the notion that Congress aimed to reach commercial hunting guides by making the sale of hunting guide services a sufficient sale of wild game for purposes of the Lacey Act. How-

161. *See* 16 U.S.C. § 3372(c) (amending the Lacey Act to include hunting guide services as a sale of wildlife); *see also* Stenberg, 803 F.2d at 422 (deciding that the sale of hunting guide services is not the same as the sale of wildlife because Congress did not explicitly indicate this in the Lacey Act).

162. *Compare* Stenberg, 803 F.2d at 436 (reasoning that the court should apply the exact language that Congress put in the statute), *with* United States v. Todd, 735 F.2d 146, 152 (5th Cir. 1984) (using the overall implicit intent of the Lacey Act, which is to prevent the sale of illegally harvested wild game, to surmise that the sale of professional hunting guide services should amount to the sale of wildlife).

163. *See* 16 U.S.C. § 3372(c) (identifying that the sale of hunting guide services or a hunting permit is the sale of wild game, but making no indication that the price of the hunting guide services or permit is indicative of the wild game’s market value); *see also* 16 U.S.C. § 3373(d) (indicating that the difference between a felony and a misdemeanor violation of the Lacey Act is the market value of the wild game, but establishing no special definition for market value).

164. 16 U.S.C. § 3372(a)(1). *See also* Hughes, 795 F.3d at 805 (identifying the Lacey Act’s sale, purchase, or transport element as the sale element).

165. 16 U.S.C. § 3373(d).

166. *Compare* Hughes, 795 F.3d at 805 (8th Cir. 2015) (determining first whether a sale, purchase, or transport of illegally harvested wild game occurred in interstate commerce, and then separately, determining what factors may establish the market value of the wild game while abiding by the ordinary meaning of market value: what a willing buyer would pay a willing seller), *with* Todd, 735 F.2d at 152 (forgoing separate analyses and deciding that the sale of hunting guide services and a permit amounted to the sale of illegally harvested wild game, and simultaneously using the price of those services as the best indication of the wild game’s market value without ever considering what a willing buyer would pay a willing seller for the wild game).

ever, even when going to the trouble of amending the Lacey Act and contemplating the Lacey Act in the context of commercial hunting guides, Congress never indicated that the price of hunting guide services should be directly representative of the wild game's market value, which Congress easily could have done if it so desired. Further, Congress deliberately used the term market value in the Lacey Act where it could have used other language or defined market value if it intended for market value to have a definition other than its ordinary meaning.

B. Because Market Value is Undefined in the Lacey Act, It Should be Given Its Ordinary Meaning: What a Willing Buyer Would Pay a Willing Seller on the Open Market

The Lacey Act bifurcated felony violations and misdemeanor violations based on whether the market value of the wild game is in excess of $350 or below it. However, the Lacey Act does not define the term market value. Unless terms in a statute are given a specific definition, they will receive their ordinary meaning. Courts generally agree, with some variation in the exact wording, that the ordinary meaning of market value is what a willing buyer would pay a willing seller on the open market. Therefore, the market value of the wild

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168. S. Rep. No. 97-123, at 12 (1981) (leaving the term market value in the Lacey Act, without any special definition or method for determination, while changing the language to read that the sale of hunting guide services is a sale of wildlife, which indicates that even wildlife sold through the sale of hunting guide services needs to be valued based on the same market value standard).

169. Compare 16 U.S.C. § 3373(d) (using the term market value for determining the value of the wild game), with 11 U.S.C. § 548 (2012) (defining the term value within a specific provision of the Bankruptcy Code as it is to be used in the specific context of bankruptcy proceedings).


171. See 16 U.S.C. § 3373(d) (differentiating felonies from misdemeanors based on the market value of the wild game but providing no definition for the term market value).

172. See United States v. Hughes, 795 F.3d 800, 805 (8th Cir. 2015) (reasoning that “[w]hen terms used in a statute are undefined, we give them their ordinary meaning.” (quoting Agrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995)); see also United States v. Butler, 694 F.3d 1177, 1181 (10th Cir. 2012) (stating that “an undefined term should be ‘guided by its ordinary, everyday meaning[,]’” (quoting United States v. Dobbs, 629 F.3d 1199, 1203 (10th Cir. 2011))).

173. See Hughes, 795 F.3d at 804 (indicating that the ordinary meaning of market value is “the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm’s-length transaction . . . .” (quoting Market Value, BLACK’S LAW DICTIONARY (10th ed. 2014)); see also Butler, 649 F.3d at 1181 (dictating that “[t]his court has previously interpreted the similar phrase ‘fair market value’ as ‘the price at which a willing buyer and willing seller with knowledge of all the relevant facts would agree . . . .’”); see generally Olson v. United States, 292 U.S. 246, 257 (1934) (defining market value as “the amount that in all probability would have been arrived
game depends on what a willing buyer would pay a willing seller for the wild game. 174

The government in United States v. Hughes 175 argued that because the Lacey Act amendments of 1988 interpret the sale of hunting guide services to constitute the sale of wild game, the price of the hunting guide services equals the market value of the wild game. 176 However, in 1988, Congress amended the Lacey Act’s sale element of the statute without amending the market value language. 177 Therefore, even though the sale of hunting guide services constitutes the sale of wild game, the market value of the wild game is not conclusively established by the price of the hunting guide services, and remains a question of fact for the jury. 178

The jury instructions laid out in Hughes led the jury away from determining the wild game’s market value and allowed the jury to substitute values and prices that extend beyond the mere market value of the wild game. 179 For instance, the Hughes court illustrated that the price of a guided hunt cannot be considered a mirror reflection of the wild game’s market value because the cost of the guided hunt included many variables such as lodging, transportation, and other accommodations, which all greatly affected the price of the guide services without altering the market value of the wild game. 180 Of

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174. See 16 U.S.C. § 3373(d) (dictating that the classification between a felony and a misdemeanor violation depends on the market value of the wild game but providing no definition for market value); see also Hughes, 795 F.3d at 804 (explaining that the ordinary meaning of market value is “the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm’s-length transaction . . . .”) (quoting Market Value, BLACK’S LAW DICTIONARY (10th ed. 2014)).

175. 795 F.3d 800 (8th Cir. 2015).


177. See 16 U.S.C. § 3372(c) (making the sale of hunting guide services the sale of wild game where the wild game is still valued by the market value standard); see also 16 U.S.C. § 3373(d) (amending the language of the Lacey Act but omitting to provide any special definition for market value).

178. Compare United States v. Todd, 735 F.2d 146, 150-52 (5th Cir. 1984) (assessing the market value of the wild game in tandem with the sale element and allowing the jury to treat the price of the hunt as a mirror image of the market value of the wild game), with Hughes, 795 F.3d at 804-05 (conducting an analysis of whether the Lacey Act’s sale element was fulfilled and conducting an independent analysis as to what factors the jury may consider in establishing the market value element).

179. See Hughes, 795 F.3d at 803 (identifying the price of hunting guide services and the Iowa liquidated damages statute as portions of the jury instruction that allowed the jury to substitute these values for the market value of the wild game).

180. See id. at 805 (pointing out that because the price of hunting guide services fluctuates greatly, while the market value of the wild game stays the same, if a jury substitutes the price of the hunt for the wild game’s market value it is no longer differentiating felonies from misdemeanors based on the market value of the wild game, which is required by the statute).
course, the market value of the wild game was a portion of the value of the hunting guide services, but the two are not mirror images. 181 Where a deer is harvested with the assistance of a guide who transports the hunter, lodges the hunter, provides a firearm, provides ammunition, cleans the deer, and charges $1,000, while another deer is harvested with the assistance of a guide who only provides hunting advice for $200, the market values of the two deer usually remain the same, whereas the prices of the hunting guide services vary greatly. 182 If a jury is allowed to substitute the price of the hunting guide services for the market value of the wild game, then the varying accommodations of a guided hunt—rather than the market value of the wild game—separate a felony from a misdemeanor, which contradicts the express language of the Lacey Act. 183 Allowing the jury to consider the price of the hunting guide services as an equivalent to the market value of the wild game produces a prejudicial error because this value can often make a misdemeanor violation of the Lacey Act rise to the level of a felony violation, or even vice-versa. 184 For these reasons, jury instructions that allow the jury to substitute the price of the hunt for the market value of the wild game are erroneous. 185

181. Compare id. at 802, 804 (dealing with hunting services that included transportation, meals, cleaning services, and other accommodations for $1,600-$2,600, while evidence at trial suggested the wild game’s market value was only a few hundred dollars depending on antler size), with Todd, 735 F.2d at 148, 152 (addressing guided hunts taking place in a helicopter for up to $5,000 where the market value of the wild game was considered much less than $5,000).

182. Compare Todd, 735 F.2d at 148 (analyzing guided hunts that ranged in value from $1,000 to $5,000 based on guarantee of trophy-size animal, transit by helicopter, use of an experienced guide, use of gun, and taxidermy services), with Hughes, 795 F.3d at 802-03 (analyzing guided hunts ranging in value from $1,600 to $2,600 based on hunting stands, meals, field dressing, animal-cleaning facilities, and shipment to client’s home).

183. Compare Hughes, 795 F.3d at 805 (discussing what a willing buyer would pay a willing seller for a deer’s antlers on the open market to determine the market value of the wild game, and abiding by the ordinary meaning of the undefined term market value), with Todd, 735 F.2d at 150-52 (substituting the price of the hunt, which ranged from $1,000 to $5,000, for the market value of a juvenile eagle without reference to what a willing buyer would have paid a willing seller for that eagle), and United States v. Atkinson, 966 F.2d 1270, 1273 (9th Cir. 1992) (allowing the jury to use the price of the hunt, which ranged from $1,500 to $3,000, as the market value of the wild game even though the market value of the deer was evidenced to be less than $150).

184. Compare Todd, 735 F.2d at 148 (establishing that a hunter paying $250 for a guided hunt where he shot an eagle suggested a misdemeanor violation even though the market value of the eagle may have been much more than $250), with Atkinson, 966 F.2d at 1271 (establishing that a hunting guide charging $1,500-$3,000 for deer hunts suggested a felony even though the market value of the deer might have been much lower).

185. Compare Hughes, 795 F.3d at 806-07 (remanding for a new trial because the jury was able to use valuations that were beyond the market value of the wild game, such as the price of the hunt, and this produced prejudicial error), with Atkinson, 966 F.2d at 1273 (agreeing with the use of a jury instruction that allowed the jury to treat
A state’s liquidated damages statute that stipulates a fine for illegally harvesting wild game fails to establish the market value of the wild game because such a statute is often punitive in nature and imposes a fine that does not claim to establish wild game’s true market value.\footnote{See \textit{Atkinson}, 966 F.2d at 1274 (reasoning that a state’s liquidated damages statute is not an attempt to establish the market value of the wild game). “Nor do the fines established under [the Montana] code section appear to bear any resemblance to the actual market values of the animals listed.” \textit{Id.} at 1274.} In \textit{United States v. Atkinson},\footnote{966 F.2d 1270 (9th Cir. 1992).} Atkinson argued that Montana’s state statute imposing a $300 fine on an individual who illegally harvested wild game was indicative of the market value of the wild game.\footnote{\textit{Atkinson}, 966 F.2d at 1274.} The court rejected this argument, stating that there was no evidence to support the contention that the state intended this fine to establish the market value of the wild game, and this fine did not resemble the market value of the wild game in question.\footnote{\textit{Id.}}

In \textit{Hughes}, the Iowa state statute that penalizes an individual for the illegal harvesting of wild game fines an individual much more than the Montana state statute in \textit{Atkinson}.\footnote{Compare \textit{Iowa Code Ann.} § 481A.130 (fining an individual $1,500 for even the smallest of illegally harvested deer), with \textit{Mont. Code Ann.} § 87-1-111 (repealed 2011) (fining an individual $300 for illegally harvesting non-antlered deer).} The applicable Iowa state statute fines an individual for the illegal taking of a large-antlered deer between $5,000 and $10,000 plus community service, or in lieu of such community service, between $10,000 and $20,000.\footnote{\textit{Iowa Code Ann.} § 481A.130.} For a small-antlered deer, the Iowa statute fines an individual between $2,000 and $5,000 plus community service, or in lieu of community service, between $4,000 and $10,000.\footnote{\textit{See id.} (imposing community service on an individual who illegally harvests wild game in Iowa, which serves as a testament to the statute’s punitive nature and bears no connection to the deer’s market value).} For each wild turkey, the Iowa statute fines an individual $200.\footnote{\textit{Id.}} Further, the government in \textit{Hughes} offered no evidence that suggested a deer had ever been sold on the open market for $5,000-$20,000.\footnote{See \textit{Hughes}, 795 F.3d at 807 (stating that the government does not seem to disagree with the notion that Iowa’s liquidated damages statute has only an attenuated connection to the wild game’s market value).} A state statute imposing a fine on an individual who illegally harvests wild game bears no resemblance to the wild game’s market value, as the \textit{Atkinson} court pointed out.\footnote{\textit{Atkinson}, 966 F.2d at 1274.}
For these reasons, a jury instruction cannot allow the jury to substitute the price of hunting guide services, or substitute the fine imposed by a state statute, with the market value of the wild game in question.\textsuperscript{196} Because a felony or misdemeanor violation of the Lacey Act depends on the market value of the wild game, and the ordinary meaning of market value is what a willing buyer would pay a willing seller on the open market, then a felony or misdemeanor violation of the Lacey Act depends on what a willing buyer would pay a willing seller on the open market for the wild game.\textsuperscript{197} A felony or misdemeanor violation of the Lacey Act does not depend on what a hunter paid for hunting guide services, or what a state statute fines an individual for illegally harvesting wild game; it depends on the actual market value of the wild game.\textsuperscript{198}

C. In Hughes’s Remanded Case, the Jury Should Value the Wild Game According to What a Willing Buyer Would Pay a Willing Seller on the Open Market

The market value of the wild game may be established by what a willing buyer would pay a willing seller for each of the animal’s parts, including the antlers, hide, and any other applicable factors.\textsuperscript{199} Evi-

\textsuperscript{196} Compare Hughes, 795 F.3d at 807 (remanding for new trial because the jury instruction that allowed the jury to use the price of hunting guide services as a substitute for the wild game’s market value was prejudicial error), with Todd, 735 F.2d at 152 (surmising that the price of the hunting guide services is the best indication of the wild game’s market value just because that is what a willing buyer would pay for the opportunity to hunt the wild game and that the jury may substitute the price of the hunting guide services as the market value of the wild game), and Atkinson, 966 F.2d at 1274 (rejecting Atkinson’s argument that Montana’s liquidated damages statute, which fines an individual $300 for illegally harvesting the relevant wild game, could be substituted for the wild game’s market value because the statute is not an attempt to establish the market value of the wild game).

\textsuperscript{197} See Hughes, 795 F.3d at 804 (following the precedent established in Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995) that courts are to use the ordinary meaning of terms where a statute does not define them).

\textsuperscript{198} Compare Hughes, 795 F.3d at 804 (deciding that where a statute does not define a term, the term receives its ordinary meaning, and the ordinary meaning of market value is determined by the price that a willing seller would receive from a willing buyer in a fair transaction), and 16 U.S.C. § 3373 (suggesting no special definition for the term market value), with Todd, 735 F.2d at 152 (establishing that the price of the hunt is the best representation of the market value of wild game because this is what a hunter would pay for the opportunity to hunt the wild game), and Atkinson, 966 F.2d at 1273-74 (allowing the jury to treat the price of the hunting guide services as a substitute for the market value of the wild game because the hunting guide is selling the opportunity to illegally hunt the wild game, even where the wild game has a very small market value in comparison to the price of the hunt).

\textsuperscript{199} See United States v. Hughes, 795 F.3d 800, 806-07 (8th Cir. 2015) (allowing the jury to determine the market value of the wild game based on a multitude of factors, but barring the jury from simply swapping the price of the hunt for the market value of the wild game); United States v. Butler, 694 F.3d 1177, 1182 (10th Cir. 2012) (explaining that it is the actual price of the wild game that should be used to determine its market
dence concerning the market value of deer antlers, animal hides, and other various animal parts on the open market can be readily ascertained.200 Because Hughes was convicted of eleven felony violations of the Lacey Act, including both deer and turkey hunts, some of Hughes's convictions may remain felony convictions while others are reduced to misdemeanors, depending on what a willing buyer would pay a willing seller for the specified wild game.201 In United States v. Hughes,202 the court pointed out that the market value of the wild game is still a question of fact for the jury to determine, and the jury may consider a multitude of factors, but the court must properly instruct the jury that it cannot simply swap the price of a guided hunt for the market value of the wild game.203 In Hughes, the Eighth Circuit refused to remand for entry of judgment of misdemeanor violations because the jury did not accurately determine the market value of the wild game, but the court did remand for a retrial in order for the jury to have an opportunity to determine the market value of the wild game based on a proper jury instruction.204 Based on this order for a new trial, Hughes's convictions may remain felonies while others drop to misdemeanors based on the size of each deer, the antler size of each deer, and the size of each turkey illegally harvested and transported in interstate commerce by Hughes, or all of the charges could drop to misdemeanors.205

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200. See Hughes, 795 F.3d at 806-07 (discussing Hughes's evidence that deer antlers would only bring less than $350 on the open market and also discussing what a deer hide would bring on the open market through experts in the field).

201. See id. at 807 (pointing out that a jury may find Hughes's convictions to be either felonies or misdemeanors when valuing the wild game with a proper jury instruction that does not allow the jury to substitute the price of hunting guide services for the wild game's market value).

202. 795 F.3d 800 (8th Cir. 2015).

203. See id. (deciding that a jury “may very well have acquitted Hughes of the felony charges based on this evidence . . . but because the jury was entitled to consider the government’s evidence regarding the price of the guide services and the valuation of the wildlife under Iowa law, it is also possible that a properly instructed jury might have found that the market value of the wildlife exceeded $350.”).

204. Id.

205. Compare Hughes, 795 F.3d at 807 (indicating that the determination of Hughes's convictions are still a question of fact for the jury), with United States v. Todd, 735 F.2d 140, 152 (5th Cir. 1984) (affirming all counts except for Todd's co-conspirators' felony violations of the Lacey Act because the government failed to establish that the market value exceeded $350).
V. CONCLUSION

In United States v. Hughes,206 the court remanded for a new trial because the jury instruction that allowed the jury to substitute the price of the hunting guide services for the market value of the wild game was erroneous.207 Given that a court is supposed to give the language of a criminal statute its ordinary meaning unless otherwise directed by the statute, this is the correct interpretation of the language of the Lacey Act.208 Though the Tenth Circuit and the Eighth Circuit take different paths, these circuits arrive at the most logical conclusion: because an undefined term in a criminal statute is given its ordinary meaning, they correctly determined that market value should be based on what a willing buyer would pay a willing seller on the open market, instead of substituting the price of the hunting guide services for the market value of the wild game.209 Unless—and until—Congress amends the Lacey Act to articulate that the price of hunting guide services can conclusively establish the market value of the wild game, courts must construe the current language of the Lacey Act strictly.210

Paul James Blazek—’18

206. 795 F.3d 800 (8th Cir. 2015).
207. United States v. Hughes, 795 F.3d 800, 807 (8th Cir. 2015).
208. See supra notes 145-169 and accompanying text.
209. See supra notes 170-198 and accompanying text.
210. See supra notes 152-205 and accompanying text.
NEBRASKA TRADE SECRET PROTECTION: 
THE FORUM SELECTION CONUNDRUM FACING 
TRADE SECRET OWNERS AFTER THE DEFEND 
TRADE SECRETS ACT OF 2016

I. INTRODUCTION

Courts and lawyers have struggled to figure out trade secret law for over a century.1 It remains in disagreement whether trade secrets are creatures of tort, property, contract, or even criminal law.2 However, there is a general consensus that the misappropriation of trade secrets is wrong, and the law should punish those who do so.3 Further, public policy demands trade secret owners be capable of protecting their trade secrets—to allow otherwise would discourage innovation and reflect poorly on standards of commercial ethics within our economy.4

Under the Defend Trade Secrets Act of 20165 (“DTSA”), victims of trade secret misappropriation may now file a private action in federal court to protect their trade secrets.6 Traditionally, victims who alleged trade secret misappropriation could only resort to state common and statutory law in order to find trade secret protection.7 Because the DTSA does not preempt state law, victims of misappropriation

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2. Lemley, supra note 1, at 316.
3. Id.
4. See Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 481 (1974) (acknowledging that maintaining standards for commercial ethics and encouraging invention and innovation are the public policy grounds for protecting trade secrets from misappropriation).
   In the United States, trade secret law developed through court decisions, primarily at the state level. Drawing guidance from the Restatement of Torts, each state constructed, on a case-by-case basis, its own body of trade secret law. Unlike the two other major methods of protecting proprietary information (patent and copyright law), trade secret law is not governed by a comprehensive federal statute. Congress could legislate under the Commerce Clause, but it has not yet chosen to do so, except in the limited area of governmental disclosures of trade secrets.
8. Id.
now face the dilemma of choosing between state and federal court to file an action for misappropriation of trade secrets.\(^8\)

The purpose of this Note is to examine the DTSA as well as Nebraska law in order to determine if a state or federal forum will be more favorable for Nebraska plaintiffs.\(^9\) This Note summarizes the DTSA, the Nebraska Trade Secrets Act,\(^10\) and Nebraska common law.\(^11\) This Note then analyzes the differences between Nebraska law and the DTSA and the likely effects on the outcome of a trade secret suit.\(^12\) This Note concludes that Nebraska plaintiffs should not hesitate to use the federal forum, as the DTSA contains a less restrictive definition of a trade secret, provides for more damages and remedies, and aligns with public policy favoring a uniform federal trade secret forum.\(^13\) This Note closes by encouraging victims of trade secret misappropriation to file suit in federal court under the DTSA, regardless of the fact the DTSA jurisprudence is recent and undeveloped.\(^14\)

II. THE DEFEND TRADE SECRETS ACT AND LEGISLATIVE HISTORY

President Barack Obama signed into law the Defend Trade Secrets Act (“DTSA”) on May 11, 2016.\(^15\) The DTSA received remarkable bipartisan support; it was unanimously passed in the Senate and ratified in the House of Representatives by a vote of 410-2.\(^16\) The DTSA amended the Economic Espionage Act of 1996\(^17\) (“EEA”), created a private civil right of action for victims of trade secret misappropriation, and federally codified the protections of the Uniform Trade Secrets Act, which was adopted in varying degrees by forty-seven states and the District of Columbia.\(^18\)

The DTSA allows a trade secret owner to bring a private civil action if that individual’s trade secret is related to a product or service intended for use in interstate commerce.\(^19\) The DTSA offers trade secret owners a variety of remedies, including injunctions, actual dam-

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11. See infra notes 15-161 and accompanying text.
12. See infra notes 162-207 and accompanying text.
13. See infra notes 208-215 and accompanying text.
14. See infra notes 208-215 and accompanying text.
ages, unjust enrichment, royalties, exemplary damages, and attorney’s fees.\textsuperscript{20} It also has an innovative solution to prevent the dissemination of trade secret information during litigation, which has been a recognized problem with trade secret litigation in the past.\textsuperscript{21} To address the aforementioned problem, the DTSA creates an opportunity for an ex parte civil seizure of property that is alleged by a plaintiff to be a trade secret.\textsuperscript{22} In extraordinary circumstances, the DTSA allows a plaintiff to petition the court for a seizure of any property necessary in order to prevent dissemination of a trade secret.\textsuperscript{23} Although this remedy seems particularly beneficial to plaintiffs, the statute limits itself by reserving ex parte seizure to the narrowest amount of property necessary to achieve its purpose: preventing the dissemination of a trade secret.\textsuperscript{24} A trade secret owner must make a prima facie case before a court will award any ex parte civil seizure of assets, making it difficult for plaintiffs to utilize the effectiveness of this provision.\textsuperscript{25} The ex parte seizure provision in trade secret litigation did not come without limits, as the DTSA ensures plaintiffs will not abuse the provision by providing a property holder whose property was wrongfully seized a civil right of action against an imprudent plaintiff in order to recover punitive damages, lost profits, cost of materials, loss of goodwill, and in some cases attorney’s fees.\textsuperscript{26}

\textsuperscript{20} 18 U.S.C. § 1836(b)(3).
\textsuperscript{21} 18 U.S.C. § 1836(b)(2); S. REP. NO. 114-220, at 3.
\textsuperscript{22} 18 U.S.C. § 1836(b)(2).
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} 18 U.S.C. § 1836(2)(b)(2)(a)(ii). The provision lays out eight requirements a plaintiff must meet before an ex parte civil seizure order will be issued, which are:
   (I) an order issued pursuant to Rule 65 of the Federal Rules of Civil Procedure or another form of equitable relief would be inadequate to achieve the purpose of this paragraph because the party to which the order would be issued would evade, avoid, or otherwise not comply with such an order; (II) an immediate and irreparable injury will occur if such seizure is not ordered; (III) the harm to the applicant of denying the application outweighs the harm to the legitimate interests of the person against whom seizure would be ordered of granting the application and substantially outweighs the harm to any third parties who may be harmed by such seizure; (IV) the applicant is likely to succeed in showing that— (aa) the information is a trade secret; and (bb) the person against whom seizure would be ordered has actual possession of— (aa) the trade secret; and (bb) any property to be seized; (V) the person against whom seizure would be ordered has actual possession of— (aa) the trade secret; and (bb) any property to be seized; (VI) the application describes with reasonable particularity the matter to be seized and, to the extent reasonable under the circumstances, identifies the location where the matter is to be seized; (VII) the person against whom seizure would be ordered, or persons acting in concert with such person, would destroy, move, hide, or otherwise make such matter inaccessible to the court, if the applicant were to proceed on notice to such person; and (VIII) the applicant has not publicized the requested seizure.
\textsuperscript{26} 18 U.S.C. § 1836(b)(2)(G). The DTSA provides the following remedy:
The DTSA also ensures that proprietary material and trade secrets, which are the subject matter of a misappropriation claim, will not be presented to the public as a result of litigation; it provides measures to protect confidentiality of court documents.\textsuperscript{27} Such protection measures include court appointment of a special master, bound by a non-disclosure agreement approved by the court, to locate and isolate all trade secret information and data, and an encryption motion to secure any seized material.\textsuperscript{28}

The DTSA retains most of the definitions of the EEA; however, the DTSA adds the definitions of the terms misappropriation and improper means.\textsuperscript{29} The DTSA also modifies the EEA's definition of trade secret.\textsuperscript{30} Misappropriation under the DTSA consists of any use or disclosure of a trade secret by a person who acquired the secret through an improper means and had reason to know that the trade secret was indeed a trade secret.\textsuperscript{31} Improper means includes any theft or breach

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A person who suffers damage by reason of a wrongful or excessive seizure under this paragraph has a cause of action against the applicant for the order under which such seizure was made, and shall be entitled to the same relief as provided under section 34(d)(11) of the Trademark Act of 1946.

\textit{Id.}

The Trademark Act of 1946 provides that:

A person who suffers damage by reason of a wrongful seizure . . . shall be entitled to recover such relief as may be appropriate, including damages for lost profits, cost of materials, loss of good will, and punitive damages in instances where the seizure was sought in bad faith, and, unless the court finds extenuating circumstances, to recover a reasonable attorney’s fee.


28. \textit{Id.; id. at § 1836(b)(2)(H).}

29. See 18 U.S.C. § 1836 (defining the terms misappropriation and improper means); but see 18 U.S.C. § 1831 (lacking a definition for the terms misappropriation and improper means).

30. Defend Trade Secrets Act of 2016 § 2. The DTSA modified 18 U.S.C. § 1836, or the EEA, by requiring that trade secret information derive value from not being known by "another person who can obtain economic value from the disclosure or use of the information" rather than simply "the public" at large. \textit{Id.}

31. 18 U.S.C. § 1839(5) (2012). Misappropriation is defined as:
 acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
disclosure or use of a trade secret of another without express or implied consent by a person who used improper means to acquire knowledge of the trade secret;
at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was derived from or through a person who had used improper means to acquire the trade secret;
acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or
derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret; or
before a material change of the position of the person, knew or had reason to know that the trade secret was a trade secret; and
of a duty to maintain a trade secret, and specifically excludes any reverse engineering or lawful means of acquisition of a trade secret, such as taking a device apart to see how it was made.\textsuperscript{32} The DTSA adopts the EEA’s expansive list of the categories of information that can be considered trade secrets, including financial information, codes, patterns, compilations, procedures, and more.\textsuperscript{33}

Whereas before trade secrets only consisted of secrets that derived independent economic value from not being generally known by the public, the DTSA modifies the definition of a trade secret to comprise of any information that can derive value independently from the fact it is not generally known to or readily ascertainable by a person who can obtain economic value from the disclosure or use of the information.\textsuperscript{34} Two circuit courts have recognized this relatively minor difference in the definition of trade secret as potentially meaningful.\textsuperscript{35}

The remedies available under the DTSA to an owner of a misappropriated trade secret closely resemble those remedies available under the Uniform Trade Secrets Act (“UTSA”).\textsuperscript{36} Provided that an order will not prevent an employee from accepting a job in restraint of trade, a court has the ability to enter an injunction to prevent any possible misappropriation.\textsuperscript{37} A court can also condition future use of a trade secret to be permissible only upon payment of a reasonable royalty.

\textsuperscript{32} 18 U.S.C. § 1839(6). The statute defines the term improper means as “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means” and excludes “reverse engineering, independent derivation, or any other lawful means of acquisition.” Id.

\textsuperscript{33} Defend Trade Secrets Act of 2016 § 2. The term “trade secret” means any form or type of “financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing . . . .” Id.

\textsuperscript{34} 18 U.S.C. §§ 1839(3)(A)-(B).

\textsuperscript{35} See United States v. Lange, 312 F.3d 263, 267 (7th Cir. 2002) (discussing the importance of the terms generally known to and readily ascertainable in the Uniform Trade Secrets Act); see United States v. Hsu, 155 F.3d 189, 196 (3d Cir. 2001) (iterating the restrictive nature of the defining phrases generally known to and readily ascertainable).

\textsuperscript{36} See 18 U.S.C. § 1836(b)(3) (providing the opportunity to receive damages, attorney’s fees, and injunctions). See also Unif. Trade Secrets Act With 1985 Amendments §§ 2-3 (Unif. Law Comm’n 1985). Because the UTSA and the DTSA operate upon the same nucleus of facts, a plaintiff can generally bring an action under the DTSA concurrently with a claim under a particular state’s adopted version of the UTSA. See VIA Techs., Inc. v. ASUS Comput. Int’l, 14-cv-03586-BLF, 2017 WL 491172, at *4 (N.D. Cal. Feb. 7, 2017) (granting the plaintiff’s motion for leave to amend its complaint to add a claim under the DTSA in addition to the California Uniform Trade Secrets Act).

The DTSA alternatively provides for an award of damages for actual loss and any unjust enrichment in lieu of a reasonable royalty. If a trade secret misappropriation was willful and malicious, the DTSA permits an award of exemplary damages, not to exceed twice the compensatory damages awarded. Last, if the misappropriation was done willfully and maliciously, attorney’s fees may also be recovered.

To recover damages or seek another available remedy under the DTSA, a plaintiff must plead with particularity that an act of misappropriation occurred after the date the DTSA became effective. The DTSA then imposes a three-year statute of limitations from the date of misappropriation. The date of misappropriation is considered the date of discovery or the date in which a reasonably prudent person should have discovered the misappropriation.

The DTSA provides criminal and civil immunity to any individual who discloses a trade secret to a federal, state, or local official in confidence, provided that the disclosure was made for the purpose of investigating suspected violations of law. The DTSA also protects employees from retaliation from their employers when the employees disclose trade secret information to government officials for the purpose of whistleblowing suspected violations of law.

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42. See Defend Trade Secrets Act of 2016 § 2(b) (stating that the DTSA shall apply to “any misappropriation of a trade secret” which “occurs on or after the date of the enactment of this Act.”). See also Adams Arms, LLC v. Unified Weapon Sys., Inc., 8:16-cv-1503-T-33AEP, 2016 WL 5391394, at *5-7 (M.D. Fla. Sept. 27, 2016) (rejecting the defendant’s argument that recovery was unavailable under the DTSA because of the DTSA’s statute of limitation provision stating that “a continuing misappropriation constitutes a single claim of misappropriation” and opining instead that so long as a plaintiff pleads with particularity that an “act” of misappropriation occurs after the effective date of the DTSA, a partial recovery under the DTSA is available to the plaintiff in regard to said act); but see Avago Techs. U.S. Inc. v. Nanoprecision Prods., Inc., 16-cv-03737-JCS, 2017 WL 412524, at *9 (N.D. Cal. Jan. 31, 2017) (noting that there is no authority suggesting a claim for partial relief may be made under the DTSA if information, disclosed before the DTSA’s effective date, is merely disclosed again after the effective date because the definition of disclosure “implies that information was previously secret.”).
43. 18 U.S.C. § 1836(d).
44. Id.
45. Defend Trade Secrets Act of 2016 § 7(b).
46. Id.
Trade secret law is the medium of protection for some of America’s most iconic inventions, including Coca-Cola and Colonel Sanders’s famous original recipe.47 Over the years, the unlawful acquisition of trade secrets has become a particularly economically damaging crime; it is estimated that the annual loss to the American economy attributable to trade secret theft is over $300 billion.48 It is reported that such theft of trade secrets leads to the loss of 2.1 million domestic jobs each year.49 This loss gives entrepreneurs less incentive to innovate, slows the development of our economy, and leads to a lesser quality of life for everyone.50

Due to technological advancements, protecting trade secrets has become increasingly difficult, trade secret thieves now have sophisticated methods to appropriate trade secrets, and trade secret misappropriation often ventures across state or national borders.51 Before the DTSA, the only federal law commanding trade secret protection was the EEA, which treats trade secret misappropriation as a criminal offense.52 It was clear that the EEA only criminalized a small portion of the actual trade secret theft occurring, as the EEA relied on the thinly stretched financial resources of the Department of Justice to seek out and prosecute trade secret misappropriation offenses.53 In the Congressional hearings, Senator Orrin Hatch of Utah emphasized how the Justice Department would only look into cases with more than $100,000 in damages.54 In addition, trade secret prosecutions were expensive and complex, as the litigation required a deep technological and scientific background.55

Trade secrets also never enjoyed the same federal protections as the other forms of intellectual property such as copyrights, trademarks, and patents.56 While the EEA made it a federal crime to steal trade secrets, there was no private right of action via federal court available to trade secret owners.57 Confidential trade secret information is capable of being protected for an unlimited amount of time; in

49. Id.
50. Id.
54. Id.
55. Id.
57. Id.
contrast, with a patent, an inventor discloses his invention to the world in exchange for exclusive access to the patent for twenty years.\textsuperscript{58} Because trade secret protection allows companies and innovators to keep their proprietary and economically valuable information a secret indefinitely, Congress found it especially important for the American economy to place safeguards on the unlawful and unfair acquisition of trade secrets.\textsuperscript{59}

With the DTSA, Congress set out to provide a federal cause of action against trade secret misappropriation that, for the most part, mirrors the UTSA.\textsuperscript{60} The narrowly drawn DTSA provides a single, national standard for trade secret misappropriation with clear rules and predictability for everyone involved.\textsuperscript{61} Trade secret owners are now able to move quickly to federal court with certainty of the rules, standards, and practices to stop trade secrets from winding up disseminated and losing their value.\textsuperscript{62}

III. BACKGROUND
A. COMMON LAW DEVELOPMENT OF TRADE SECRET PROTECTION IN NEBRASKA

Prior to the adoption of the Uniform Trade Secrets Act ("UTSA"), trade secrets received minimal protection under Nebraska common law.\textsuperscript{63} Nebraska only had a limited number of trade secret cases providing a legal right to relief to victims of trade secret misappropriation.\textsuperscript{64} Nebraska's trade secret jurisprudence began with the

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\item Representative Jackson Lee stated in her testimony before the Senate: When an inventor seeks patent protection, he or she agrees to disclose to the world their invention and how it works, furthering innovation and research, as well as securing a 20-year exclusive term of protection, and the right to prevent others from making, using, selling, importing, or distributing a patented invention without permission. However, in contrast by maintaining it as a trade secret, an inventor could theoretically keep their invention secret indefinitely (ex: formula for Coca-Cola; the KFC Colonel’s Secret Recipe); but, the downside is there is no protection if the trade secret is uncovered by others through reverse engineering or independent development.
\item See Gerald B. Buechler, Jr., Revealing Nebraska’s Trade Secrets Act, 23 Creighton L. Rev. 323, 328 (1989) (discussing that the rationale for deleting the common law displacement provision of the UTSA was because there was no existing Nebraska common law or statutory law in conflict with the provisions of the UTSA, thus the legislature found the addition of the provision unnecessary).
\item See Secs. Acceptance Corp. v. Brown, 106 N.W.2d 456, 464-65 (Neb. 1960) [hereinafter Securities I], decision clarified on denial of reh’g, 107 N.W.2d 540, 541-42 (Neb. 1961) [hereinafter Securities II] (recognizing there is an implied term in an employment contract that employee will not use an employer’s trade secret for his or her
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employee’s common law duty not to disclose confidential information entrusted with the employee by his employer.65

In Securities Acceptance Corp. v. Brown,66 a consumer loan and finance company, Securities Acceptance Corporation (“Securities”), sought to enjoin its prior employee, Brown, from breaching non-compete provisions in his employment contract.67 Brown accepted employment with another company, and Securities alleged that Brown would use his knowledge of Securities’s policies, procedures, and customers to Securities’s detriment.68 The Nebraska Supreme Court recognized, as an implied term of an employment contract, an employee’s duty to keep secret any confidential information or trade secrets he acquires in the course of employment.69 The court noted the existence of an implied obligation of the employee not to use information for his individual benefit or for the benefit of a rival, especially to the detriment of his former employer, as use of such information would give one person an unfair advantage over the other.70 In such cases, the court has held that an injunction would be available to the employer.71 In Securities, the court refused to grant an injunction, as there was no evidence Brown had breached his duty of secrecy, and the court would not presume wrongdoing just because there was an opportunity to do wrong.72

In Henkle & Joyce Hardware Co. v. Maco, Inc.,73 a seller of shotgun shell loaders (“Seller”) brought an action against one of its suppliers (“Supplier”) alleging trade secret misappropriation.74 Supplier manufactured parts for Seller’s shell loaders for ten years until the relationship between the two entities deteriorated, and Supplier began to manufacture and sell loaders that were identical to those of

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65. See Securities I, 106 N.W.2d at 464-65 (recognizing, in an action by a consumer loan company, that there is an implied term in an employment contract that an employee will not use an employer’s trade secrets for his own benefit or that of a rival).

66. See Securities I, 106 N.W.2d at 459.

67. Securities I, 106 N.W.2d at 464.

68. Securities II, 107 N.W.2d at 541-42.

69. Securities I, 106 N.W.2d at 464.

70. Securities II, 107 N.W.2d at 542.

71. Id.

72. Id.

73. 239 N.W.2d 772 (Neb. 1976).

Seller. Seller alleged that the drawings of the shotgun shell loader parts constituted trade secrets, claiming it sustained substantial damages in the form of loss of sales due to Supplier's improper use of its trade secrets to manufacture competing shell loaders. The trial court dismissed the case, opining that no trade secrets existed as the shell loaders were the result of joint efforts by the parties.

In Henkle, the Nebraska Supreme Court adopted the Restatement of Torts definition of a trade secret, which states that a trade secret consists of any compilation of information, pattern, device, or formula used by an individual in his business that gives him a competitive advantage over all those who do not know or use it. The court stated that a trade secret must be a device or process for continuous use by a business, not just for a single event such as a bid for a contract, and trade secrets generally relate to the production or sale of goods. The court clarified that matters of public knowledge in an industry are not trade secrets capable of being misappropriated, and trade secrets can be disclosed so long as they are disclosed with a substantial element of secrecy. Although the court seemed to define a trade secret, it strayed away from an express definition, laying out several factors to

75. Henkle, 239 N.W.2d at 774-75.
76. Id.
77. Id. at 775.
78. Id. at 775-76 (citing Restatement (First) of Torts § 757 (Am. Law. Inst. 1939)). Comment (b) of § 757 of the Restatement (First) of Torts defines a trade secret as:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business ... in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in the operation of the business ... .

Secrecy. The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. Matters which are completely disclosed by the goods which one markets cannot be his secret. Substantially, a trade secret is known only in the particular business in which it is used. It is not requisite that only the proprietor of the business know it. He may, without losing his protection, communicate it to employees involved in its use. He may likewise communicate it to others pledged to secrecy. Others may also know of it independently, as, for example, when they have discovered the process or formula by independent invention and are keeping it secret. Nevertheless, a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information ... .

Restatement (First) of Torts § 757 (Am. Law. Inst. 1939).
79. Henkle, 239 N.W.2d at 776.
80. Id.
be taken into consideration when determining whether information is a trade secret, including the extent to which measures were taken by one to guard the secrecy of information, the value of the information, and the difficulty with which the information could be acquired through proper means or duplicated by others.81

The court noted that an action for damages because of unlawful use of a trade secret was an action at law, as opposed to an action in equity, subject to a clearly erroneous standard of review.82 Affirming the ruling of the trial court and dismissing Seller's claim, the court ruled that no confidential relationship existed between the parties because they never entered into a written agreement.83 Because the parties had the opportunity to enter into a restrictive agreement, and the negotiations failed, the court determined there was no implied duty of confidentiality intended between the parties and thus no misappropriation of trade secrets.84

In Garner Tool & Die v. Laux,85 Garner Tool was in the business of designing tools and tool-making processes.86 Garner Tool employed the defendants, one of whom was Laux, as tool and die makers, and the defendants left Garner Tool to start their own tool-making business.87 The defendants used the processes they learned at Garner Tool to sharpen knives and punch stretch bands; they were awarded a bid from Goodyear who had previously been on contract with Garner Tool.88 Garner Tool alleged in a cause of action that the defendants breached the common law duty not to disclose a prior employer’s trade secrets.89 The issue before the Nebraska Supreme Court was whether the processes of sharpening knives and punching holes in rubber stretch bands were valid trade secrets.90 The court recognized that an action for both an injunction and damages for misappropriation of

81. Id. The court laid out several factors to consider in determining whether information qualifies as a trade secret:
   (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

82. Id. at 774; see also Home Pride Foods, Inc. v. Johnson, 634 N.W.2d 774, 780-81 (Neb. 2001) (affirming the standard of review in an action for damages).

83. Henkle, 239 N.W.2d at 779.

84. Id.


86. Garner Tool, 285 N.W.2d at 220.

87. Id. at 220-21.

88. Id. at 221.

89. Id.

90. Id.
trade secrets was in equity and subject to a de novo standard of review.\textsuperscript{91} Affirming the trial court, the court determined that the processes of sharpening knives and punching holes were matters of general knowledge to the tool and die making craft, thus no protectable trade secrets were misappropriated.\textsuperscript{92}

In \textit{Garner Tool}, the court identified the common law elements for trade secret misappropriation.\textsuperscript{93} The court stated that in the absence of some agreement with the former employer, an employee’s right to compete in business with the former employer is no different than that of a stranger to the employment contract—subject to the limitation that a former employee is prohibited from using trade secrets acquired in the course of his employment for his own advantage and to the detriment of his former employer.\textsuperscript{94} Aside from the aforementioned limitation, once an employee terminates his employment contract, he may seek out his former employer’s customers and use what he learned in the course of his former employment.\textsuperscript{95}

In \textit{Selection Research, Inc. v. Murman},\textsuperscript{96} Selection Research engaged in the business of performing the hiring process for other businesses.\textsuperscript{97} Selection Research used a structured interview composed of questions asked in a certain order and compared the answers with themes common to the answers of a focus group of successful persons.\textsuperscript{98} Selection Research alleged that its structured interview instrument was unique to the company, although the structured interview technique was widely known across practitioners in the field.\textsuperscript{99} After a dispute, Murman left Selection Research and went to work for a prior client where he continued interviewing potential new hires and used the structured interview techniques he learned at his employment with Selection Research.\textsuperscript{100} Selection Research brought

\textsuperscript{91} Id. at 220.
\textsuperscript{92} Id. at 222-23.
\textsuperscript{93} Id. at 221. The court stated the elements for a misappropriation of trade secrets cause of action are:

(1) the existence of a trade secret; (2) the value and importance of the trade secret to the employer in the conduct of his business; (3) the employer’s right by reason of discovery or ownership to the use and enjoyment of the trade secret; and (4) the communication of the trade secret to the employee while he was employed in a position of trust and confidence and under circumstances making it inequitable and unjust for him to disclose it to others or use it to the employer’s prejudice.

\textsuperscript{94} Id. at 223.
\textsuperscript{95} Id.
\textsuperscript{96} 433 N.W.2d 526 (Neb. 1989).
\textsuperscript{97} Selection Research, Inc. v. Murman, 433 N.W.2d 526, 528 (Neb. 1989).
\textsuperscript{98} Selection Research, 433 N.W.2d at 528.
\textsuperscript{99} Id.
\textsuperscript{100} Id. at 530.
suit against Murman to enjoin his use of the structured interview technique, and the trial court permanently enjoined Murman from using or disclosing the certain interview procedures.\footnote{101}

In Selection Research, the court, in its opinion vacating the trial court’s order enjoining the defendant’s use of the structured interview, emphasized the common law concept that matters of general knowledge in an industry cannot be appropriated and are not actionable as trade secrets.\footnote{102} Personnel selection devices were too widely known and publicly documented of a process for Selection Research to successfully assert that its instrument was a trade secret.\footnote{103} Also, there were only superficial similarities between the instruments that Selection Research used and the instrument that Murman used.\footnote{104} The court dismissed the claim, as the interview questions that were alleged to be trade secrets were not sufficiently unique to qualify as trade secrets.\footnote{105}

\section*{B. Nebraska Adopts the Uniform Trade Secrets Act}

As common law trade secret protection continued to develop unevenly and confusingly across jurisdictions, industries under economic and technological pressures demanded uniform trade secret jurisprudence.\footnote{106} The American Bar Association’s Special Committee on the Uniform Trade Secrets Protection Act recognized that although there were a substantial number of reported trade secret decisions in commercial centers, agricultural jurisdictions and less populous areas had failed to develop a satisfactory jurisprudence.\footnote{107} Also, even in those jurisdictions where the jurisprudence had developed, there was uncertainty in the boundaries of trade secret protection and the available remedies for misappropriation of a trade secret.\footnote{108} After over seven years of work, the National Conference of Commissioners on Uniform State Laws approved the 1979 Uniform Trade Secrets Act

\begin{itemize}
\item \footnote{101}{Id. at 527.}
\item \footnote{102}{Id. at 532.}
\item \footnote{103}{Id.}
\item \footnote{104}{Id.}
\item \footnote{105}{Id. at 533.}
\item \footnote{106}{UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS, Prefatory Note (UNIF. LAW COMM’N 1985).}
\item \footnote{107}{UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS, Prefatory Note (UNIF. LAW COMM’N 1985). The Commissioners’ prefatory note stated: Notwithstanding the commercial importance of state trade secret law to inter-state business, this law has not developed satisfactorily. In the first place, its development is uneven. Although there typically are a substantial number of reported decisions in states that are commercial centers, this is not the case in less populous and more agricultural jurisdictions.}
\item \footnote{108}{Id.}
\end{itemize}
The purpose of the UTSA is to codify the common law principles of trade secret protection and provide uniform trade secret jurisprudence across the jurisdictions that adopt the measure. On July 9, 1988, the Nebraska unicameral legislature signed the Nebraska Trade Secret Act ("NTSA") into law, which was a piece of legislation codifying the UTSA. The legislature enacted the NTSA with the principal objective in mind of clarifying and strengthening trade secret protection in Nebraska. The NTSA provides remedies for misappropriation of a trade secret, which include actual damages, an injunction, as well as the award of a reasonable royalty for misappropriation. The NTSA adopted a statute of limitation of four years for a trade secret misappropriation claim, which runs once the misappropriation is discovered or should have been discovered by the exercise of reasonable diligence.

As is the case with most uniform acts, the NTSA was adopted with several minor deviations from the UTSA. Nebraska inserted language into the NTSA that provides for protective orders of court documents instead of in-camera proceedings in an attempt to retain Nebraska’s public policy of maintaining public access to court proceedings. The Nebraska legislature also altered the UTSA’s definition of a trade secret by deleting the words generally and readily ascertainable, and instead stating more broadly that a trade secret must not be known or ascertainable by the public by any means, which raised the standard for the definition of a trade secret. Lastly, the NTSA de-

109. Id.
110. Id.
111. Buechler, supra note 63, at 327-28.
112. Buechler, supra note 63, at 326-27.
115. See Buechler, supra note 63, at 325-29 (discussing the discrepancies between the UTSA and the NTSA as adopted by the Nebraska legislature).
116. Buechler, supra note 63, at 327.
117. See Unif. Trade Secrets Act With 1985 Amendments § 1 (Unif. Law Comm’n 1985) (providing: (4) “Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”). But see Neb. Rev. Stat. Ann. § 87-502 (providing: “(4) Trade secret shall mean information, including, but not limited to, a drawing, formula, pattern, compilation, program, device, method, technique, code, or process that: (a) Derives independent economic value, actual or potential, from not being known to, and not being ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”).
leted a provision from the UTSA providing for the displacement of the common law, as Nebraska had not developed a common law trade secret jurisprudence to the point that it conflicted with the provisions of the UTSA, and thus, the displacement provision was not seen as necessary by the legislature.118

The basic principles underlying the NTSA are a valuable contribution to Nebraska’s trade secret jurisprudence because at the time of its enactment the decisional law in the area had not yet fully developed.119 In addition, the NTSA advanced several important public policy objectives of trade secret law, including the establishment of standards for commercial ethics as well as the encouragement of invention.120 Although the NTSA’s implementation furthered the UTSA’s goal of achieving trade secret uniformity across jurisdictions, the NTSA’s variances from the UTSA would not go unnoticed for long.121

C. The Nebraska Supreme Court’s Interpretations of the NTSA

In Richdale Development Co. v. McNeil Co., Inc.,122 a developer brought an action for misappropriation of trade secrets against a competitor, alleging that the competitor misappropriated architectural plans with the intent to use the plans for his own benefit.123 The competitor snagged a set of architectural plans from an apartment complex while it was in the construction process by the developer.124 The competitor removed all the names from the plans, photocopied the plans, and sent the plans out to subcontractors to solicit bids for a new

118. Buechler, supra note 63, at 328-29.
119. Buechler, supra note 63, at 346-47; see UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS, Prefatory Note (UNIF. LAW. COMM’N 1985) (stating that notwithstanding the importance of trade secret law to business, the law of trade secrets has not developed satisfactorily). See also Cudahy Co. v. Am. Labs., Inc., 313 F. Supp. 1339, 1342 (Neb. 1970) (stating Nebraska’s highest court had yet to rule on the issue of whether information is a trade secret).
120. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 481 (1974) (stating that “the maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law.”).
121. See Buechler, supra note 63, at 344 (contending that the NTSA’s variances from the UTSA run counter to the UTSA’s purpose of establishing uniformity as the variances encourage the development of two inconsistent and separate bodies of law). See also First Express Servs. Grp., Inc. v. Easter, 840 N.W.2d 465, 474 (Neb. 2013) (recognizing that the NTSA’s omission of the words generally and readily significantly restrict what information may qualify as a valid trade secret).
122. 508 N.W.2d 853 (Neb. 1993), opinion modified on denial of reh’g, 510 N.W.2d 312 (Neb. 1994).
124. Richdale, 508 N.W.2d at 855-56.
When the competitor heard he was being sued, he rounded up all the plans and destroyed them.\textsuperscript{126}

The developer contended that the creation of the plans, which were allegedly a very successful design, cost the developer around $250,000.\textsuperscript{127} The Nebraska Supreme Court noted that the City of Omaha only issued construction permits upon the public filing of construction plans, but the developer stated that it did not intend to release its plans into the public domain as it had numbered each version of the plans and required deposits for the return of the plans from subcontractors.\textsuperscript{128}

Reversing the trial court’s grant of injunctive relief, the court emphasized that under the NTSA, the existence of an employer-employee relationship was no longer a required element for misappropriation of trade secrets.\textsuperscript{129} Thus, the developer had a valid claim for misappropriation, granted it could prove both that the misappropriated information could derive independent economic value from not being known by the public and the developer took reasonable efforts to maintain the information’s secrecy.\textsuperscript{130} However, the court found that architectural plans were not capable of trade secret protection, as knowledge of architectural concepts such as balconies and even room sizes can be gained by general observation.\textsuperscript{131} The court reversed the trial court’s order enjoining the competitor from using the plans.\textsuperscript{132}

In \textit{Home Pride Foods, Inc. v. Johnson},\textsuperscript{133} a food service company, Home Pride, brought an action under the NTSA against a competitor that acquired Home Pride’s customer list.\textsuperscript{134} Home Pride’s customer list contained the contact information of its customers as well as the amount of food each customer ordered in the past.\textsuperscript{135} The Nebraska Supreme Court held for the first time that a customer list could be included in the definition of a trade secret under the NTSA, and that in this case the list qualified as a protectable trade secret.\textsuperscript{136}

A trade secret misappropriation occurred in \textit{Home Pride Foods} when the competitor paid $800 for a stolen copy of Home Pride’s customer list that contained information about its customers including

\begin{thebibliography}{99}
\bibitem{125} \textit{Id.} at 856.
\bibitem{126} \textit{Id.}
\bibitem{127} \textit{Id.}
\bibitem{128} \textit{Id.}
\bibitem{129} \textit{Id.} at 859.
\bibitem{130} \textit{Id.} at 859-60.
\bibitem{131} \textit{Id.} at 860.
\bibitem{132} \textit{Id.} at 861.
\bibitem{133} \textit{634 N.W.2d 774} (Neb. 2001).
\bibitem{135} \textit{Home Pride Foods}, \textit{634 N.W.2d at 781, 782}.
\bibitem{136} \textit{Id.} at 784.
\end{thebibliography}
their names, telephone numbers, addresses, food ordered, and number of reorders.\textsuperscript{137} Home Pride had the customer list stored on its computers protected behind three passwords and safeguarded the paper files.\textsuperscript{138} The president of Home Pride, his secretary, and the sales manager were the only employees who had access to the list; each sales representative signed an agreement not to compete or discuss trade secrets, including customer lists.\textsuperscript{139}

The issue before the court asked whether a customer list was entitled to protection as a trade secret under the NTSA.\textsuperscript{140} The court held that the definition of a trade secret is a question of law, and that the appellate court shall review the conclusion of the trial court, which ruled in favor of Home Pride, de novo.\textsuperscript{141} The court also specified that whether the information sought to be protected is a trade secret is a question of fact; thus, the bench trial verdict would not be set aside unless clearly erroneous, similar to a jury verdict.\textsuperscript{142}

While the court acknowledged that the customer list was clearly misappropriated, as the competitor paid $800 for a stolen list, it also noted how other courts are hesitant to recognize customer lists as trade secrets because the lists contain public information that is readily ascertainable, except to the extent that time and effort had been expended to prepare a list to target customers with particular characteristics or needs.\textsuperscript{143} In this case, however, the list contained information about the amount of food each customer ordered previously.\textsuperscript{144} The court opined that such information provided the competitor with a way to undercut the company’s pricing.\textsuperscript{145} The court determined that the trial court was not clearly wrong in finding that the list was not capable of being ascertained through proper means, as the list contained information that was not available from publicly available lists: the number of orders each customer placed and the amount of such orders.\textsuperscript{146} Circumstantial evidence proved that the competitor used Home Pride’s list.\textsuperscript{147} As for damages, the court opined that the trial court erred in awarding lost profits when there was no evidence of net profits, only gross profits.\textsuperscript{148} The court further held that damages

\begin{footnotesize}
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\item 137. \textit{Id.} at 777.
\item 138. \textit{Id.} at 778.
\item 139. \textit{Id.}
\item 140. \textit{Id.} at 781.
\item 141. \textit{Id.}
\item 142. \textit{Id.} at 780-81.
\item 143. \textit{Id.} at 782.
\item 144. \textit{Id.}
\item 145. \textit{Id.}
\item 146. \textit{Id.}
\item 147. \textit{Id.} Many customers were contacted by the competitor without reaching out to the competitor and received discounts on their orders. \textit{Id.}
\item 148. \textit{Id.} at 784.
\end{itemize}
\end{footnotesize}
could not be awarded for a reasonable royalty for future use when a permanent injunction had been issued, as the two remedies essentially contradict each other.149

In First Express Services Group, Inc. v. Easter,150 a crop insurance saleswoman resigned from her crop insurance agency to work for her son, who owned a competing agency.151 The saleswoman took with her a customer list and transferred to the competing agency many customers from her prior agency.152 The crop insurance agency sued for misappropriation of trade secrets and unjust enrichment, and the jury found for the crop insurance agency on all claims.153 The Nebraska Supreme Court bypassed the Nebraska Court of Appeals to review the case, reversing the trial court’s ruling as to the proper identification of a customer list as a trade secret.154

The court recognized that the NTSA differs significantly from the UTSA, emphasizing the Nebraska legislature’s deletions of the restrictive adverbs generally and readily in the statutory definition of a trade secret.155 The court accepted the opinion of one commentator, who noted that under the liberal terms of the statute, any information that is ascertainable at all via any means that are not improper would technically be excluded from protection by the NTSA.156 The court gave the statutory text its plain and ordinary meaning, and found that the crop insurance customer list was not a protectable trade secret as it was technically ascertainable by proper means.157 If someone wanted the information, he or she could gather it through a public search of the Internet or simple telephone calls.158 The court attempted to reconcile this holding with its holding in Home Pride Foods by pointing out that in Home Pride Foods, the list had information which was not available through public sources.159 The court noted that Home Pride expended time and effort to compile its customers’ information and prior order amounts, and thus its list contained information unobtainable from publicly available lists.160 Contrastingly, the insurance agency’s list in First Express contained locations and

149. Id.
150. 840 N.W.2d 465 (Neb. 2013).
152. First Express, 840 N.W.2d at 467.
153. Id.
154. Id. at 471, 478.
155. Id. at 474.
156. Id. (citing Buechler, supra note 63, at 339).
157. Id.
158. Id. at 475.
159. Id.
160. Id.
identities of customers, obtainable from public databases, which any person could use to identify potential customers.161

IV. ANALYSIS

The Defend Trade Secrets Act of 2016 (“DTSA”) provides a uniform federal civil remedy for victims of trade secret misappropriation without expressly preempts any state law.162 Innovators no longer need to rely on inconsistent state laws to protect their intellectual property and confidential information because trade secrets have protection similar to patents and trademarks, which account for the other forms of intellectual property.163 The DTSA grants federal courts the power to issue orders to seize property, preserve evidence, and prevent the dissemination of a trade secret.164 The DTSA also gives victims of trade secret misappropriation several remedies, most closely resembling those available under the Uniform Trade Secrets Act (“UTSA”).165 Such remedies include: equitable relief; payment of a reasonable royalty for future misappropriation; compensatory damages for actual loss and unjust enrichment caused by misappropriation; exemplary damages, if the trade secret is maliciously and willfully misappropriated; and an award of attorney’s fees to the prevailing party if a claim or an opposition to a claim was made in bad faith or there was willful and malicious misappropriation.166

First, this Analysis will argue that victims of trade secret misappropriation in Nebraska will find the federal forum under the DTSA favorable as the DTSA has a less restrictive definition of a trade secret than the Nebraska Trade Secrets Act (“NTSA”).167 Next, this Analy-

161. Id.
162. 18 U.S.C. §§ 1836, 1838 (2012). The DTSA states that “[a]n owner of a trade secret that is misappropriated may bring a civil action under this subsection if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce,” 18 U.S.C. § 1836(b)(1). Further, the DTSA states “[t]he district courts of the United States shall have original jurisdiction of civil actions brought under this section.” Id. at § 1836(c). Section 1838 states that the DTSA “shall not be construed to preempt or displace any other remedies, whether civil or criminal, provided by United States Federal, State, commonwealth, possession, or territory law for the misappropriation of trade secret . . . .” 18 U.S.C. § 1838.
165. See id. (providing for remedies of damages, injunctions, and the imposition of a reasonable royalty). See also UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS § 2-3 (UNIF. LAW COMM’N 1985) (availing the remedies of monetary damages, an injunction, and the imposition of a reasonable royalty).
166. 18 U.S.C. § 1836.
167. See infra notes 171-179 and accompanying text.
sis will argue that victims should take advantage of the federal forum as the DTSA’s ex parte civil seizure provision provides victims with valuable protection from dissemination of their trade secrets.168 Then, this Analysis will argue that the provisions of the DTSA providing for exemplary damages and the recovery of reasonable attorney’s fees are particularly favorable for victims whose trade secrets have been stolen.169 Finally, this Analysis will argue that victims should bring suit in the federal forum because public policy favors uniform trade secret jurisprudence.170

A. NEBRASKA PLAINTIFFS WILL FIND THE DTSA’S DEFINITION OF A TRADE SECRET LESS RESTRICTIVE THAN THE DEFINITION UNDER THE NTSA

A major problem victims of trade secret misappropriation in Nebraska face is qualifying the information they seek to protect as a valid trade secret under Nebraska law.171 Generally, under the federal DTSA, a trade secret owner must take reasonable measures to keep the information secret, and the information must derive independent economic value from not being generally known to, and not being readily ascertainable by, another person.172 The Nebraska legislature’s omission of the words generally and readily from the definition of a trade secret imposes an additional burden on victims of trade secret misappropriation in Nebraska.173 The Nebraska Supreme Court

168. See infra notes 180-190 and accompanying text.
169. See infra notes 191-199 and accompanying text.
170. See infra notes 200-207 and accompanying text.
171. See Richdale Dev. Co. v. McNeil Co., Inc., 508 N.W.2d 853, 860-61 (Neb. 1993) (opining that architectural plans did not meet the definition of a trade secret as the plans were known to and ascertainable by other people due to the fact that anyone could look at an apartment building and take note of the open concepts). See also First Express Servs. Grp., Inc. v. Easter, 840 N.W.2d 465, 475-76 (Neb. 2013) (concluding that an insurance customer list containing names, phone numbers, and the insurance policies of crop farmers did not meet the definition of a trade secret as a person exercising a diligent search on the Internet or through a phone book could ascertain all of the information). But see Home Pride Foods, Inc. v. Johnson, 634 N.W.2d 774, 782 (Neb. 2001) (finding a customer list met the definition of a trade secret as it contained information only the company could possibly obtain—namely, the amount of food each customer had ordered).
172. 18 U.S.C. § 1839 (stating that a trade secret constitutes a certain type of information which “(A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.”).
173. Compare Nebr. Rev. Stat. Ann. § 87-502 (stating a trade secret derives its value from “not being known to, and not being ascertainable by proper means”), and First Express, 840 N.W.2d at 474 (noting that the omission of the words “generally” and “readily” narrowed what constitutes a trade secret), with Unif. Trade Secrets Act With 1985 Amendments § 1 (Unif. Law Comm’n 1985) (qualifying “known to” and “as-
noted the significance of omitting the terms, and the burden imposed by Nebraska’s definition has proven detrimental to plaintiffs. The DTSA, on the other hand, retains the qualifying adjectives generally and readily. With the DTSA’s retention of generally and readily, the architectural plans that failed to satisfy the state law trade secret definition in *Richdale Development Co. v. McNeil Co., Inc.* would pass muster as protectable trade secrets under federal law, as the plans—although capable of being known, ascertained, and circumscribed by someone with the input of a considerable amount of effort—were not generally known or readily ascertainable through proper means by that someone. Thus, the DTSA is more favorable to plaintiffs. As a result, plaintiffs whose trade secrets have been misappropriated should pursue an action in federal court because the DTSA contains a broader definition of a trade secret.

_174. See First Express, 840 N.W.2d at 474 (recognizing that the omission of the words generally and readily eliminated any qualification of the words known or ascertainable, thus if information is capable of being known or ascertained by any means, it does not meet the definition of a trade secret, and noting that a simple phone call made the information ascertainable). See also Richdale, 508 N.W.2d at 860 (opining that knowledge of open concepts and observing the apartment complex made architectural plans ascertainable)._

_175. 18 U.S.C. § 1839(3)(B)._

_176. 508 N.W.2d 853 (Neb. 1993), opinion modified on denial of reh’g, 510 N.W.2d 312 (Neb. 1994)._

_177. Compare Richdale, 508 N.W.2d at 860 (stating that apartment complex architectural plans do not qualify as a trade secret as a person can observe an apartment complex with his or her eyes, thus he or she can theoretically ascertain its architectural plans), with United States v. Hsu, 155 F.3d 189, 196 (3d Cir. 2001) (iterating that the EEA, due to its retention of the qualifying adjectives “generally” and “readily” in its definition of a trade secret, broadens the scope of what qualifies as a trade secret as compared to the UTSA), and 18 U.S.C. § 1839 (stating that a trade secret must derive economic value from “not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.”)._

_178. Compare First Express, 840 N.W.2d at 474 (recognizing that the NTSA’s omission of the qualifying adjectives generally and readily restricts the definition of a trade secret, and dismissing the plaintiff’s claim for misappropriation of its trade secret as its customer list was technically ascertainable through a search of public databases), with 18 U.S.C. § 1839(3)(B) (retaining the qualifying adjectives “generally” and “readily” in the definition of a trade secret)._

_179. Compare Neb. Rev. Stat. Ann. § 87-502 (defining a trade secret as certain information that is not known to or ascertainable through any means), with 18 U.S.C. § 1839(3)(B) (defining a trade secret as certain information which is not generally known to or readily ascertainable through any means) (emphasis added).
B. THE EX PARTE CIVIL SEIZURE PROVISION WILL PROVIDE
   PLAINTIFFS WITH VALUABLE PROTECTION FROM DESTRUCTION OF
   EVIDENCE IN TRADE SECRET LITIGATION

   Once a plaintiff in Nebraska files a lawsuit for misappropriation
   of trade secrets, a defendant could attempt to protect itself and de-
   стroy all discoverable evidence of the trade secret misappropriation.180
   In Nebraska, a victim of trade secret misappropriation may obtain a
   protective order to stop a person or entity from using alleged trade
   secrets.181 The NTSA does not provide any ex parte procedure to pro-
   tect against trade secret dissemination.182 Further, the Nebraska Su-
   preme Court refuses to issue an order that will restrict an employee’s
   right to work and earn a living, even though it may allow the contin-
   ued dissemination of a trade secret.183

   In contrast to Nebraska law, the DTSA allows a plaintiff to peti-
   tion the court for a seizure of any property necessary at the forefront
   of a lawsuit to prevent dissemination of a trade secret.184 The DTSA
   ex parte civil seizure provision provides the opportunity to contain the
   theft of trade secrets before secrets are disseminated and their value
   is depleted.185 Plaintiffs in Nebraska will find the federal ex parte
   civil seizure provision favorable as it will reduce the burden of going
   through discovery to find out what information a defendant has mis-
   appropriated, and additionally, it will prevent economic loss on the
   plaintiff’s behalf as the trade secret will not lose its value and the
   plaintiff will not have to go to great lengths to ascertain damages.186

   (noting that when the defendant learned he was being sued, he destroyed all of the
   plans he had stolen).
   provision).
   (refusing to restrain an employee’s right to work for a new employer due to the fact that
   he may inevitably disclose trade secrets because the court will not presume wrongdoing
   by the employee).
   184. See 18 U.S.C. § 1836(b)(2)(A)(i) (stating that the court may issue an order “pro-
   viding for the seizure of property necessary to prevent the propagation or dissemina-
   tion of the trade secret that is the subject of the action.”).
   (stating that the DTSA creates practices that will stop the dissemination of trade
   secrets and prevent trade secrets from losing their value). See also 18 U.S.C.
   § 1836(b)(2)(A)(i) (providing for an ex parte order seizing property necessary to prevent
   the dissemination of a trade secret).
   186. See 18 U.S.C. § 1836(b)(2) (providing an avenue for trade secret owners to
   quickly and efficiently prevent the dissemination of their trade secrets through an ex
   parte application). See also Home Pride Foods, Inc. v. Johnson, 634 N.W.2d 774, 784
   (Neb. 2001) (noting, in an action where the ex parte seizure provision was not available,
   the trade secret owner had difficulty calculating damages as it could not ascertain
   which customers had been contacted and solicited for orders by the defendant).
Further, while Nebraska law states that an injunction must end once a trade secret ceases to exist, the DTSA contains no such provision, providing victims of trade secret misappropriation with endless protection from competitors.  

The ex parte civil seizure provision greatly limits itself, as a plaintiff must meet several demanding requirements and make a prima facie showing of entitlement to relief before an ex parte order will be issued under extraordinary circumstances. Further, in the event that an ex parte order is sought by a plaintiff in bad faith, the plaintiff may be subject to penalties and attorney’s fees. However, the aforementioned limits should not deter plaintiffs from using the federal forum because the extraordinary circumstances language included in the statute was inserted to acknowledge general disfavor of ex parte procedures, not to impose an additional burden on trade secret owners.

C. Victims of Misappropriation Have the Opportunity to Recover More Damages Under the DTSA Compared to the NTSA

The DTSA and the NTSA provide remedies distinct enough to make the federal forum beneficial to plaintiffs. The DTSA gives victims of trade secret misappropriation the opportunity to be awarded exemplary damages in the case that a trade secret is mali-

187. Compare NEB. REV. STAT. ANN. § 87-503(1) (stating that “[u]pon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.”), with 18 U.S.C. § 1836 (containing no provision that limits the duration of an injunction enjoining the use of a trade secret).

188. See 18 U.S.C. § 1836(b)(2)(A)(i) (stating the court may “upon ex parte application but only in extraordinary circumstances, issue an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action.”). To issue an ex parte civil seizure order, the court must find: (1) another form of relief is inadequate, (2) threat of an irreparable and immediate injury, (3) harm to the trade secret owner outweighs harm to the competitor, (4) the trade secret owner is likely to succeed in the action, (5) the defendant actually possesses the trade secret, (6) the application is reasonably particular regarding property to be seized and its location, (7) the defendant would destroy the property, and (8) the trade secret owner has not made the request public. Id.


190. See 162 CONG. REC. S1,634 (iterating that “the ‘extraordinary circumstances’ language was not added to add an additional requirement to obtaining an ex parte seizure, but to acknowledge the Judiciary’s general disfavor of ex parte procedures and to reinforce that particular circumstances are required to utilize the seizure provisions, but still provide a much needed avenue for ex parte seizures when necessary.”)

191. Compare 18 U.S.C. § 1836 (providing an opportunity for attorney’s fees and exemplary damages in cases where a trade secret is maliciously and willfully misappropriated), with NEB. REV. STAT. ANN. § 87-501–87-507 (containing no provision awarding exemplary damages or attorney’s fees).
ciously and willfully misappropriated. In contrast to compensatory damages, which are designed to restore the status quo before a misappropriation occurred, the function of exemplary damages is to punish a wrongdoer for his actions, to force him to atone for his conduct, to deter society and the wrongdoer from repeating said conduct, and to vindicate a plaintiff’s sense of entitlement from the wrongdoer. The DTSA permits a jury to award such exemplary damages, and it caps the award available at two times the sum of the actual loss sustained by the plaintiff and any unjust enrichment awarded to the plaintiff. The jury’s imposition of such an award serves yet another function: to reflect the public’s indignation of the defendant’s conduct. Further, the DTSA allows a victim to recover reasonable attorney’s fees in the case that a misappropriation occurs willfully or maliciously. In contrast to the DTSA, the NTSA does not provide for exemplary damages or attorney’s fees, and Nebraska has prohibited punitive damages or the award of attorney’s fees unless expressly granted by a statute. Thus, in a federal cause of action under the DTSA, a plaintiff could recover twice the amount of damages than in an action under Nebraska law. Because trade secret litigation is expensive and time consuming, victims of trade secret misappropriation in Nebraska will find the federal forum favorable, if they are successful with their claim, as the DTSA presents the opportunity to receive an award of a greater amount of damages.

193. See Harv. L. Rev. Assoc., Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517, 522 (1957) (outlining the historical purposes of exemplary damages, often also referred to as vindictive or punitive damages).
195. See Harv. L. Rev. Assoc., supra note 193, at 522 (stating that exemplary damages “constitute a kind of public revenge by reflecting the jury’s indignation at the defendant’s conduct.”).
197. See Neb. Rev. Stat. Ann. § 87-504 (failing to provide for the award of attorney’s fees or exemplary damages). See also Abel v. Conover, 104 N.W.2d 684, 688 (Neb. 1960) (emphasizing the fundamental rule in Nebraska that punitive damages are unconstitutional, thus damage awards may only be compensatory in nature).
198. Compare 18 U.S.C. § 1836 (providing for the award of exemplary damages, not to exceed twice the sum of the amount of the plaintiff’s calculated actual loss and defendant’s unjust enrichment, in cases where a trade secret is maliciously and willfully misappropriated), with Neb. Rev. Stat. Ann. § 87-501–87-507 (containing no provision awarding exemplary damages and only allowing a recovery for actual loss sustained and unjust enrichment).
In the modern globalized economy, trade secret misappropriation rarely stays within one state’s borders, and a uniform national standard is necessary as unlawful acquisition of trade secrets is a particularly economically damaging crime.\textsuperscript{200} The economic loss attributable to trade secret misappropriation, which is estimated to be over $300 billion a year, gives entrepreneurs less incentive to innovate.\textsuperscript{201} Trade secret owners need certainty in order to feel confident in investing in the research and development of new trade secrets; inconsistent state law does not provide this certainty.\textsuperscript{202} The DTSA provides a single, uniform national trade secret jurisprudence with clear rules and predictability for all parties involved.\textsuperscript{203} Further, the DTSA gives trade secret owners more protection from the public eye than does the NTSA, it puts the litigation in the hands of federal judges who historically handle intellectual property disputes, and it grants trade secret owners the expansive jurisdictional reach of the federal courts.\textsuperscript{204}

Uniformity of trade secret policy is of international importance also: on May 27, 2016, the European Council adopted a directive that harmonized across the European Union (“EU”) the definition of a trade secret, the protection afforded to trade secrets, and the remedies available to a plaintiff in the event a misappropriation occurs.\textsuperscript{205}
DTSA by the United States, clearly indicates an international consensus that inconsistent trade secret protection across jurisdictions is detrimental to the global economy.\textsuperscript{206} Thus, as both national and international public policy favor uniform trade secret jurisprudence, and the DTSA contemplates a uniform trade secret jurisprudence, victims of trade secret misappropriation in Nebraska should bring their suits in the federal forum under the DTSA.\textsuperscript{207}

V. CONCLUSION

The Defend Trade Secrets Act of 2016 ("DTSA") creates a federal civil private right of action for victims whose trade secrets have been misappropriated.\textsuperscript{208} The DTSA was modeled after the Uniform Trade Secrets Act ("UTSA") and offers trade secret owners a variety of remedies, including injunctions, actual damages, unjust enrichment, royalties, exemplary damages, and attorney's fees.\textsuperscript{209} It also has an innovative solution to prevent the dissemination of trade secret information during litigation, known as the ex parte civil seizure provision, which allows for immediate seizure of any information that is alleged to be misappropriated.\textsuperscript{210}

With the federal forum now open for trade secret litigation, victims of trade secret misappropriation face the conundrum of deciding whether to file suit in federal or state court.\textsuperscript{211} Although claims made under state common and statutory law may have predictable results, the federal forum will be favorable to victims of trade secret misappropriation as the DTSA's definition of a trade secret is broader.\textsuperscript{212} Further, the DTSA's ex parte civil seizure provision provides necessary protection against the dissemination and demise of a trade secret during litigation.\textsuperscript{213} It is also clear that the federal forum is favorable due to the fact that a victim of trade secret misappropriation may recover exemplary damages exceeding those available under Nebraska law.

\textsuperscript{206} Id. at 473 (indicating it is clear the United States and European regions "have recognized the substantial value of trade secrets to the global economy and have decided to take analogous stances on the basics of trade secret law . . . .").

\textsuperscript{207} 18 U.S.C. § 1836; 162 CONG. REC. S1,634 (daily ed. Apr. 4, 2016) (statement of Sen. Grassley) (emphasizing how the United States needs a uniform, national standard for trade secret jurisprudence as the state law is inconsistent across jurisdictions and trade secret misappropriation is a national economically damaging crime); Patel, Pade, Cundiff & Newman, supra note 204, at 474-75 (iterating how the EU recently saw it fit to enact uniform trade secret jurisprudence closely resembling the DTSA).

\textsuperscript{208} 18 U.S.C. § 1836.


\textsuperscript{211} See supra notes 1-8 and accompanying text.

\textsuperscript{212} See supra notes 171-179 and accompanying text.

\textsuperscript{213} See supra notes 180-190 and accompanying text.
Finally, due to the fact that trade secrets are a form of intellectual property and the way that trade secret jurisprudence has inconsistently developed across the states, victims should use the federal forum as public policy favors uniform national and international trade secret standards.215

Nebraska trade secret owners should not hesitate to use the federal trade secret forum under the DTSA. Victims of trade secret misappropriation in Nebraska should file suit under the DTSA with confidence. The broad definition of a trade secret under the DTSA makes it easier for victims to qualify their information as a protectable trade secret. Further, not only will the DTSA provide greater trade secret protection than Nebraska law, but it also supports public policy to encourage the development of a uniform trade secret jurisprudence within the federal forum.

Brennan R. Block—’18

214. See supra notes 191-199 and accompanying text.
215. See supra notes 200-207 and accompanying text.
STATE V. MATTHEWS: THE NEBRASKA SUPREME COURT INCORRECTLY OBSERVES A VICTIM’S CHARACTER AS AN ESSENTIAL ELEMENT OF SELF-DEFENSE FOR THE ADMISSION OF SPECIFIC CHARACTER EVIDENCE UNDER RULE 405

I. INTRODUCTION

Under Nebraska Rule of Evidence 404 (“Rule 404”), the general rule regarding character evidence provides that evidence of a person’s character or a trait of his character is inadmissible to show the person acted in conformity with his character on a particular occasion. However, in a criminal trial, Rule 404 also provides exceptions to the general character evidence rule. The accused in a criminal trial may introduce evidence of a pertinent trait of his character under Rule 404(1)(a), and the accused may introduce evidence of the victim’s character under Rule 404(1)(b). If character evidence is introduced by the accused pursuant to Rule 404(1)(a) or Rule 404(1)(b), the prosecution may then introduce character evidence to rebut such evidence presented by the accused.

If character evidence is admissible pursuant to Rule 404, Nebraska Rule of Evidence 405 (“Rule 405”) prescribes the permissible method of proving character. In any case where character evidence is admissible, Rule 405(1) dictates that proof of such character may be made by reputation or opinion testimony. Once the proponent in-
introduces character evidence by reputation or opinion testimony, the adverse party is then permitted to cross-examine on specific instances of conduct to rebut the reputation or opinion testimony.9 While Rule 405(1) allows admission of specific prior conduct only if the proponent opens the door by introducing reputation or opinion testimony on character, Rule 405(2) sets forth narrow circumstances where specific acts proving character are admissible without the door-opening framework.10 Such narrow circumstances occur only when a person’s character or a trait of a person’s character is an essential element of a charge, claim, or defense.11

In State v. Matthews,12 the Nebraska Supreme Court analyzed the presentation of character evidence in a criminal trial where the accused claimed he acted in self-defense.13 The Nebraska Supreme Court observed the victim’s character was an essential element of a criminal defendant’s claim that he acted in self-defense.14 Further, the court in Matthews prescribed that a criminal defendant claiming he acted in self-defense may introduce character evidence of the victim’s specific prior instances of aggressive or violent conduct.15

This Note will first review the facts and holding of Matthews.16 This Note will then discuss the Nebraska Rules of Evidence concerning the admissibility of character evidence as well as Nebraska cases defining the essential elements of a charge, claim, or defense.17 This Note will next illustrate Nebraska’s prima facie elements of a self-defense claim and provide case law from jurisdictions other than Ne-

reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.” Id.

9. Neb. Rev. Stat. Ann. § 27-405; see also Michelson v. United States, 335 U.S. 469, 483-87 (1948) (establishing that after the criminal defendant’s character witness testified to the defendant’s reputation for honesty and truthfulness on direct examination, it was proper on cross-examination for the prosecution to impeach the character witness with evidence that the defendant was previously convicted of a misdemeanor crime).

10. Neb. Rev. Stat. Ann. § 27-405. “(2) In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.” Id.


14. Matthews, 854 N.W.2d at 582. “We have previously observed that a determination of whether the victim was the first aggressor is an essential element of a self-defense claim. And evidence of a victim’s violent character is probative of the victim’s violent propensities and is relevant to the proof of a self-defense claim.” Id. (citing State v. Kinser, 609 N.W.2d 322 (2000); State v. Lewchuk, 539 N.W.2d 847 (1995)).

15. See id. at 584 (stating that evidence of the victim’s aggressiveness and violent character while under the influence of drugs and alcohol was relevant to the defendant’s self-defense claim and properly admissible).

16. See infra notes 22-53 and accompanying text.

17. See infra notes 54-114 and accompanying text.
braskas that have analyzed the evidentiary issues presented in *Matthews*. This Note will argue the Nebraska Supreme Court in *Matthews* incorrectly observed that a victim’s character is an essential element of an accused’s self-defense claim and erred in prescribing that an accused claiming self-defense may introduce character evidence of a victim’s prior specific instances of aggressive or violent conduct. This Note will also demonstrate the Nebraska Supreme Court’s opinion in *Matthews* compels Nebraska trial court judges to violate their jurisprudential duty to control witness interrogation and presentation of evidence at trial. Finally, this Note will conclude that Nebraska law should adopt the positions taken by the United States Court of Appeals for the Eighth Circuit and numerous state courts sitting in the Eighth Circuit, which have specified that an accused claiming self-defense may only prove a victim’s character for aggressiveness or violence by reputation or opinion testimony.

II. FACTS AND HOLDING

In *State v. Matthews*, the state of Nebraska brought felony charges against the defendant, William Matthews, for attempted first degree murder and for use of a deadly weapon in the commission of a felony with respect to the victim, Kevin Guzman. The case revolved around an April 21, 2011 confrontation that took place in Grand Island, Nebraska. The confrontation involved two feuding groups—one group included the victim, Guzman, and the other group included the defendant, Matthews—which concluded when Matthews fired gun shots. Guzman also had a gun during the confrontation and was the first to show his gun, but he did not fire it at any time. Matthews

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18. *See infra* notes 115-150 and accompanying text.
19. *See infra* notes 151-199 and accompanying text.
20. *See infra* notes 200-217 and accompanying text.
22. 854 N.W.2d 576 (Neb. 2014).
23. *State v. Matthews*, 854 N.W.2d 576, 581 (Neb. 2014). Matthews was also charged with two counts of terroristic threats and two counts of use of a deadly weapon to commit a felony with respect to two other, separate victims. *Matthews*, 854 N.W.2d at 581.
25. *State v. Matthews*, 844 N.W.2d 824, 830-31 (Neb. Ct. App. 2014) [hereinafter *Matthews I*]. The victim Guzman’s group included his girlfriend, Mariel Betancourt, and Betancourt’s cousin, Maira Sanchez. *Matthews I*, 844 N.W.2d at 831-32. In addition to the charges against Matthews with respect to the victim Guzman, Matthews was also charged with two felonies involving the victim Betancourt and two felonies involving the victim Sanchez. *Id.* at 830.
26. *Id.* at 832.
claimed he fired his gun in self-defense after seeing Guzman show a semiautomatic pistol from his waistband.27

A jury trial for the charges brought against Matthews began on August 28, 2012 in the District Court of Hall County, Nebraska.28 The victim, Guzman, was called to testify against Matthews during the State’s case-in-chief.29 On cross-examination of Guzman, he admitted that he had trouble remembering the events on April 21, 2011 because on that day he was either intoxicated from alcohol or high on drugs.30 During the same cross-examination, counsel for Matthews sought to elicit testimony from Guzman that he had a character of aggressiveness and violence while drunk or high.31 The State objected to this questioning on the basis of improper character evidence, relevance, and unfair prejudice.32 The district court sustained the State’s objection.33 In response, counsel for Matthews called for a sidebar, and the district court adjourned for the day.34 A motion in limine was heard the next morning regarding Guzman’s testimony to his character of aggressiveness and violence.35 The district court reiterated its decision from the previous day that no specific character evidence of Guzman’s aggressiveness and violence would be admitted.36 Counsel for Matthews then made an offer of proof wherein Guzman testified to specific character evidence that consuming alcohol and drugs made him aggressive and violent.37 The State objected to the offer of proof again, on the basis of improper character evidence, relevance, and unfair prejudice, and the district court sustained the objection.38 At the conclusion of trial, the jury returned a unanimous verdict finding Matthews guilty of attempted first degree murder of Guzman and guilty of

27. Id. at 833. An eyewitness testified at trial he saw the shooter, Matthews, hold the gun chest high and sideways and that more than one shot was fired. Brief of Appellant at 4, Matthews I, 844 N.W.2d 824 (No. A-12-001052). An investigator from the Grand Island, Nebraska police department testified he found neither bullets nor bullet holes near the scene, but he did find three bullet casings in the middle of Eddy Street. Matthews I, 844 N.W.2d at 833.


29. Brief of Appellee at 4, Matthews I, 844 N.W.2d 824 (No. A-12-1052).


31. Id. Specifically, Matthews’s counsel asked: “‘[y]ou were constantly under the influence of alcohol and drugs in April of 2011. Am I correct?’ [Guzman:] ‘Yes.’ [Matthews’s counsel:] ‘In your opinion, did that state of affairs in April of 2011 make you aggressive?’” Matthews I, 844 N.W.2d at 834.

32. Id.

33. Id.


35. Brief of Appellant at 8, Matthews I, 844 N.W.2d 824 (No. A-12-001052).

36. Id.

37. Id.

38. Id.
using a deadly weapon to commit a felony with respect to the victim Guzman.\textsuperscript{39}

Matthews appealed his convictions to the Nebraska Court of Appeals on the ground that the trial court erred in not allowing the victim, Guzman, to testify about his character of aggressiveness and violence.\textsuperscript{40} The court of appeals noted that for a criminal defendant to successfully claim self-defense as justification for his use of force, the defendant must have had a reasonable and good faith belief in the necessity for such force, and the force used must be justified and must be immediately necessary under the circumstances.\textsuperscript{41} Further, prior Nebraska case law interpreting subsection two of Nebraska Rule of Evidence 405 ("Rule 405") prescribes that determining whether the victim was the initial aggressor is an essential element to a self-defense claim.\textsuperscript{42} Matthews relied on the precedent set by the Nebraska Supreme Court in \textit{State v. Sims}\textsuperscript{43} to support his argument that specific character evidence of the victim’s violent and aggressive tendencies is admissible in a self-defense case.\textsuperscript{44} The court of appeals agreed with Matthews and explained that under Rule 405(2), Guzman’s prior acts of aggressiveness and violence are an essential element of Matthews’s self-defense claim.\textsuperscript{45} Therefore, the appellate court ruled the trial court erred in refusing to admit Guzman’s testimony about his prior aggressive and violent acts when under the influence of drugs and alcohol.\textsuperscript{46} Ultimately, the court of appeals expounded that the

\footnotesize{39. \textit{Matthews I}, 844 N.W.2d at 833. Matthews was also found guilty by a unanimous verdict of terrorist threats and use of a deadly weapon to commit a felony with respect to Sanchez. \textit{Id.}

40. \textit{Id.} at 833-34. Matthews also assigned that the trial court erred in failing to include an element of self-defense within the jury instructions on the charges of terrorist threats. \textit{Id.}

41. \textit{Id.} at 834 (citing \textit{State v. Goynes}, 768 N.W.2d 458 (Neb. 2009)).

42. \textit{Matthews I}, 844 N.W.2d at 834-35. \textit{See also State v. Lewchuck}, 539 N.W.2d 847, 853, 855 (Neb. Ct. App. 1995) (providing the determination of whether the victim was the first aggressor is an essential element of a self-defense claim; thus, specific character evidence that the victim shoved and tried to start a fight with other bar patrons prior to the assault was admissible); \textit{State v. Sims}, 331 N.W.2d 255, 258-59 (Neb. 1983) (explaining specific acts that indicate the victim's propensity for violence are admissible to prove the victim was the first aggressor).

43. 331 N.W.2d 255 (Neb. 1983).

44. \textit{Matthews I}, 844 N.W.2d at 834; Brief of Appellant at 20, \textit{Matthews I}, 844 N.W.2d 824 (No. A-12-001052). In \textit{Sims}, the Nebraska Supreme Court set forth in a self-defense case that specific character evidence of a previous and unrelated matter where the victim threatened to beat his female acquaintances “like a dog” if they reported him to police was admissible pursuant to Nebraska Rule of Evidence 405(2) to show the victim’s propensity for violence. \textit{Sims}, 331 N.W.2d at 258. The court in \textit{Sims} reasoned that specific character evidence of a victim’s propensity for violence provides circumstantial evidence the victim was the first aggressor. \textit{Id.} at 259.

45. \textit{Matthews I}, 844 N.W.2d at 834-35.

46. \textit{Id.}
trial court’s error constituted reversible error, vacated Matthews’s convictions, and remanded for a new trial.\textsuperscript{47}

The State appealed to the Nebraska Supreme Court.\textsuperscript{48} The Nebraska Supreme Court agreed with the Nebraska Court of Appeals that the trial court erred in refusing to admit Guzman’s testimony regarding his prior violent acts when under the influence of alcohol and drugs.\textsuperscript{49} The Nebraska Supreme Court prescribed that when a criminal defendant claims self-defense, evidence of a victim’s prior aggressive and violent acts is admissible pursuant to Rule 405(2) to show the victim was the first aggressor.\textsuperscript{50} Additionally, the Nebraska Supreme Court in \textit{Matthews} observed that a victim’s prior aggressive and violent acts are an essential element of a self-defense claim pursuant to Rule 405(2).\textsuperscript{51} Although the Nebraska Supreme Court reasoned that the trial court erred in excluding evidence of Guzman’s specific prior bad acts, it determined such evidence was cumulative to other evidence admitted at trial.\textsuperscript{52} Thus, the court determined the error by the trial court was a harmless error, and the Nebraska Supreme Court reinstated Matthews’s convictions.\textsuperscript{53}

III. BACKGROUND

A. Nebraska Rules of Evidence 404 and 405: The Admissibility of Character Evidence

The general rule regarding character evidence under Nebraska Rule of Evidence 404 (“Rule 404”) is that evidence of an individual’s character offered to show he acted in conformity with his character on a particular occasion is inadmissible.\textsuperscript{54} However, the accused in a criminal trial may introduce evidence of a pertinent trait of his char-

\begin{itemize}
  \item \textsuperscript{47} \textit{Id.} at 841.
  \item \textsuperscript{48} \textit{Matthews}, 854 N.W.2d at 579.
  \item \textsuperscript{49} \textit{Id.} at 582-83.
  \item \textsuperscript{50} \textit{Id.}
  \item \textsuperscript{51} \textit{Id.} See also Neb. Rev. Stat. Ann. § 27-405 (stating that character evidence of specific prior conduct is admissible when the person's character is an essential element of a charge, claim, or defense). The court's opinion in \textit{Matthews} did not specifically resolve whether the proffered testimony of Guzman constituted specific prior acts evidence rather than general reputation testimony; however, such a distinction is moot because the court prescribed specific prior acts evidence admissible in this case pursuant to Rule 405(2). \textit{Matthews}, 854 N.W.2d at 582-84. \textit{See also Neb. Rev. Stat. Ann.} § 27-405 (prescribing that character may be proven by general reputation or opinion testimony in all cases in which character evidence is admissible, but character evidence of specific instances of conduct is admissible in cases where a person's character is an essential element of a charge, claim, or defense).
  \item \textsuperscript{52} \textit{Matthews}, 854 N.W.2d at 583.
  \item \textsuperscript{53} \textit{Id.} at 583-84.
  \item \textsuperscript{54} Neb. Rev. Stat. Ann. § 27-404. “(1) Evidence of a person’s character or a trait of his or her character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion . . . .” \textit{Id.} 
\end{itemize}
character under Rule 404(1)(a), and the accused may introduce evidence of a pertinent trait of the victim’s character under Rule 404(1)(b). If the accused introduces character evidence pursuant to Rule 404(1)(a) or Rule 404(1)(b), the prosecution may then introduce character evidence to rebut such evidence presented by the accused.

If Rule 404 deems character evidence admissible, Nebraska Rule of Evidence 405 (“Rule 405”) dictates the permissible method of proving character. In any case where character evidence is admissible, proof of such character may be made by reputation or opinion testimony under Rule 405(1). Once the proponent opens the door by introducing reputation or opinion testimony of character, the adverse party may then cross-examine on specific instances of conduct to rebut the reputation or opinion testimony. Additionally, Rule 405(2) provides narrow circumstances where specific acts are admissible regardless of whether the opposing party opens the door to specific character evidence. These narrow circumstances occur only when a person’s character or a character trait is an essential element of a charge, claim, or defense. The Federal Rule of Evidence 405 is identical to Rule 405.

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55. *Id.* Rule 404 provides exceptions to the general character evidence rule for:
   (a) Evidence of a pertinent trait of his or her character offered by an accused, or by the prosecution to rebut the same; (b) Evidence of a pertinent trait of character of the victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

56. *Id.*


58. *Neb. Rev. Stat. Ann.* § 27-405. “(1) In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.” *Id.*

59. *Id.* See also *Michelson v. United States*, 335 U.S. 469, 483-87 (1948) (explaining that after the criminal defendant’s character witness testified to the defendant’s reputation for honesty and truthfulness on direct examination, it was proper on cross-examination for the prosecution to impeach the character witness with evidence the defendant was previously convicted of a misdemeanor crime).

60. *Neb. Rev. Stat. Ann.* § 27-405. “(2) In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.” *Id.*

61. *Id.*


63. See *R. Collin Mangrum, Mangrum on Nebraska Evidence* 272 (2015 ed. 2015) (stating “Nebraska Rule of Evidence 405 essentially adopts Federal Rule of Evidence 405, and no variations are anticipated.”).
Another consideration in any evidentiary analysis arises under Nebraska Rule of Evidence 611 ("Rule 611"), which sets forth the judge’s control of witness interrogation and presentation of evidence. Pursuant to Rule 611(1), the presiding judge shall reasonably control the mode and order of witness interrogation and presentation of evidence to: (1) make such interrogation and presentation effective to ascertain the truth; (2) avoid meritless consumption of time; and (3) protect witnesses from being harassed or unduly embarrassed. Further, the Federal Rule of Evidence 611 is identical to the Nebraska Rule of Evidence 611.

The Nebraska Supreme Court analyzed the Rule 611(1) standards in State v. Pangborn, after the defendant, Matthew Pangborn, appealed his convictions and claimed the trial court erred in allowing the jury to use the prosecution’s demonstrative exhibit during jury deliberations. At trial, the prosecution used an exhibit admitted only for demonstrative purposes for arguments and during direct and cross-examinations of witnesses. At the close of the presentation of evidence, the trial court ruled the jury could use the prosecution’s demonstrative exhibit during deliberations, and Pangborn objected. Pangborn’s objection was overruled by the trial court, and when instructing the jury prior to deliberations, the trial court failed to explain to the jurors that the prosecution’s exhibit was admitted for the narrow purpose of a demonstrative exhibit rather than as substantive evidence.

On appeal, the Nebraska Supreme Court considered how the federal circuits have treated demonstrative exhibits during jury deliberations in determining whether the trial court complied with the

65. Neb. Rev. Stat. Ann. § 27-611. "(1) The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (a) make the interrogation and presentation effective for the ascertainment of the truth, (b) avoid needless consumption of time, and (c) protect witnesses from harassment or undue embarrassment." Id.
66. Id.
69. 836 N.W.2d 790 (Neb. 2013).
70. State v. Pangborn, 836 N.W.2d 790, 794, 799-804 (Neb. 2013). “[The demonstrative exhibit] was a one-page chart that the State described as providing a ‘road map’ that it would use during the course of the trial for clarification purposes only. It consisted of five columns labeled ‘COUNT,’ ‘VICTIM,’ ‘WITNESS,’ ‘LOCATION,’ and ‘INJURY.’” Pangborn, 836 N.W.2d at 795.
71. Id. at 796. At the start of trial, the trial court permitted the exhibit to be used for demonstrative purposes, but noted it would consider the issue of whether the exhibit could be used for jury deliberations at a later time. Id. at 795.
72. Id. at 796.
73. Id.
standards set forth in Rule 611(1). The court explained that the use of demonstrative exhibits during jury deliberations may distract the jury from reviewing all of the evidence presented, and if not instructed on the exhibit’s limited demonstrative purpose, the jury may interpret the information contained in the exhibit as proof and neglect its duty to determine the accuracy and truth of the admitted evidence. The court noted that the most common practice by the federal circuits to cure the prejudicial effect of demonstrative exhibits in jury deliberations is the use of a limiting instruction to the jury on the demonstrative purpose of the exhibit. The Nebraska Supreme Court concluded that the trial court abused its discretion over the mode and order of the presentation of evidence in allowing the jury to use the demonstrative exhibit during deliberations without issuing a limiting instruction and reversed Pangborn’s convictions.

B. NEBRASKA LAW DEFINING AN ESSENTIAL ELEMENT OF A CHARGE, CLAIM, OR DEFENSE

1. An Essential Element is an Element a Party Must Prove to Satisfy his Prima Facie Case

In Lackman v. Rousselle, the Nebraska Court of Appeals explained that a plaintiff seeking to impose joint liability on two defendants pursuant to the joint enterprise doctrine must satisfy four essential elements. This case revolved around a collision involving two pickups: one driven by Jack Lackman whose son, Clinten Lackman, was riding in the passenger seat, and the other driven by Roger Rousselle. Although Roger Rousselle was driving alone at the

74. Id. at 799-800. “[F]ederal rule 611(a) remains substantively identical to § 27–611(1) . . . . We thus begin by looking to the federal courts for guidance on the use of demonstrative exhibits during jury deliberations.” Id.

75. Id. at 802.

76. Id. at 803. “As noted earlier, the limiting instruction is the most prevalent safeguard used by the circuit courts. Moreover, several circuits have held that limiting instructions can limit or even eliminate the harms posed by demonstrative exhibits.” Id.

77. Id. at 804-05. “That is not to say that a limiting instruction is always required; however, except in the rare case where other safeguards combine to make the limited purpose of the demonstrative exhibit abundantly clear to the jury, an appropriate limiting instruction will be necessary to avoid unfair prejudice.” Id. at 804.


79. Lackman v. Rousselle, 585 N.W.2d 469, 476 (Neb. Ct. App. 1998). The four essential elements of the joint enterprise doctrine are:
(1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

Lackman, 585 N.W.2d at 476.

80. Id. at 474.
time of the collision, he jointly-owned the pickup with his wife, Virginia Rousselle.81

In Clinten Lackman’s negligence claim, he sought to impose Roger Rousselle’s negligence on Virginia Rousselle under the theory they were engaged in a joint enterprise when Roger Rousselle drove the jointly-owned truck.82 At the conclusion of the trial, the jury returned a verdict imposing joint liability on Roger Rousselle and Virginia Rousselle for Clinten Lackman’s damages resulting from the collision.83 The Rousselles appealed after their motions for a directed verdict and for a new trial were denied.84

On appeal, the Nebraska Court of Appeals set forth four essential elements of a joint enterprise: (1) an express or implied agreement among the group’s members; (2) a common purpose of the entire group; (3) a common pecuniary interest among the group’s members; and (4) an equal right of control among each of the group’s members.85 The plaintiff must prove each of the four essential elements to show multiple defendants acted in a joint enterprise.86 The court in Lackman reasoned there was no express or implied agreement between the Rousselles with respect to Roger Rousselle driving the pickup, and the Rousselles did not have equal control of the vehicle at the time of the accident.87 Ultimately, the Nebraska Court of Appeals articulated that the trial court erred in failing to grant the motion for directed verdict with respect to Virginia Rousselle because there was inadequate proof to impose Roger Rousselle’s negligence on her since the first and fourth elements of the joint enterprise doctrine were not met.88

In State v. Armagost,89 the Nebraska Supreme Court determined that an attempt to arrest or issue a citation was not an essential element of the crime of recklessly operating a vehicle to avoid arrest, and that it was proper for the trial court to look to the statutory language of an offense when instructing the jury on the essential elements of a crime.90 The defendant, Jacob Armagost, appealed after the jury trial

81. Id.
82. Id. at 475.
83. Id. The jury verdict imputed Roger's negligence to Virginia under the joint enterprise doctrine, and the judge found them jointly liable for Clinten Lackman's medical related damages amounting to $175,000. Id.
84. Id.
85. Id. at 476 (citing RESTATEMENT (SECOND) OF TORTS § 491 cmt. c (AM. LAW INST. 1965)).
86. Id.
87. Lackman, 585 N.W.2d at 478. “We find no evidence in the record to support the first and fourth elements of the test for joint enterprise.” Id.
88. Id. at 478-79.
89. 864 N.W.2d 417 (Neb. 2015).
resulted in his conviction of recklessly operating a motor vehicle to avoid arrest. Armagost argued that the trial court erred in failing to instruct the jury on the element of an attempt by law enforcement to arrest or issue a citation, which he asserted was an essential element of the crime.

On appeal, the Nebraska Supreme Court surmised that the Nebraska statute for the crime of which Armagost was convicted does not contain an element of an attempt to arrest or issue a citation. Further, the court explained that it is proper for trial courts to look to the language of the pertinent statute when instructing the jury on the essential elements of a crime—the elements which must be proven beyond a reasonable doubt for the defendant to be convicted of the crime. Since the criminal statute did not contain an element of an attempt to arrest or issue a citation, the Nebraska Supreme Court reasoned that the trial court’s instructions to the jury were adequate and thus affirmed Armagost’s conviction.

2. Nebraska Law Permits Evidence of Specific Prior Bad Acts in Negligent Entrustment Cases and Child Custody Disputes where Character is an Essential Element of the Charge, Claim, or Defense

In Deck v. Sherlock, the Nebraska Supreme Court looked at specific examples of character evidence of a driver’s history of drinking alcohol and driving recklessly in order to determine whether the owner negligently entrusted the car to the driver. Robert Hull drove Richard Sherlock’s car at the time of the accident after Sherlock agreed to let Hull drive to a downtown bar in Ogallala, Nebraska.

91. Armagost, 864 N.W.2d at 419.
92. Id. at 420.
93. Id. The Nebraska statute for the crime of operating a motor vehicle in a willful reckless manner to avoid arrest provides:
   (1) Any person who operates any motor vehicle to flee in such vehicle in an effort to avoid arrest or citation commits the offense of operation of a motor vehicle to avoid arrest . . . . (3)(a) [any person who violates subsection (1) of this section shall be guilty of a Class IV felony if, in addition to the violation of subsection (1) of this section, one or more of the following also applies . . . (iii) The flight to avoid arrest includes the willful reckless operation of the motor vehicle.

94. Armagost, 864 N.W.2d at 421. The principle that a trial court looks to the statutory language of the crime simplifies the preparation of jury instructions, and “[i]t provides certainty for trial courts concerning the question whether the essential elements of the offense have been given to the jury.” Id.
95. Id. at 422-23.
96. 75 N.W.2d 99 (Neb. 1956).
98. Deck, 75 N.W.2d at 101.
After leaving the bar, the car driven by Hull collided with another car at a highway junction causing injury to a passenger in the other car—the plaintiff, Lee Deck.99 A state patrolman arrived at the scene of the accident shortly thereafter, and the patrolman observed that Hull was very drunk at that time.100 Deck brought a claim against Sherlock for negligently entrusting his car to Hull.101 The trial court granted a motion for directed verdict in favor of the defendant, Sherlock, on the negligent entrustment claim, which Deck appealed.102

On appeal, the Nebraska Supreme Court set forth the prima facie case a plaintiff must prove in a claim of negligent entrustment: (1) that the owner entrusted or permitted his automobile to be operated by a person who has a character trait as an inexperienced, incompetent, or reckless driver; and (2) that the owner knew of the person’s character for driving in such a manner when the owner entrusted or permitted the automobile to be operated.103 In reviewing the record, the court looked at evidence of Hull’s specific prior bad acts that Sherlock and Hull were drinking alcohol together earlier in the day although they were sober at the time Hull took the car, that Sherlock knew Hull’s driver’s license was revoked from a prior citation for driving under the influence of alcohol, and that Sherlock knew Hull was addicted to drinking alcohol.104 Further, the court noted that people with a character trait for drinking alcohol tend to act in conformity with such character when engaging with their friends.105 Thus, the Nebraska Supreme Court reversed the trial court’s directed verdict with respect to the negligent entrustment claim against Sherlock and reasoned that the evidence was sufficient to raise a genuine issue of fact to be decided by a jury.106

99. Id. at 102. Some evidence was admitted that prior to Hull leaving the Vets Club bar, he and three friends intended to race Sherlock’s car against a vehicle owned by one of Hull’s friends. Id. at 101.
100. Id. at 102.
101. Id. at 100-02.
102. Id. at 102.
103. Id.

The controlling rule is as follows: The law requires that an owner use care in allowing others to assume control over and operate his automobile, and holds him liable if he entrusts it to, and permits it to be operated by, a person whom he knows or should know to be an inexperienced, incompetent, or reckless driver, to be intoxicated or addicted to intoxication, or otherwise incapable of properly operating an automobile without endangering others.

Id. (citing Williamson v. Eclipse Motor Lines, Inc., 62 N.E.2d 339 (Ohio 1945)).
104. Id. at 102-03.
105. Id. at 103. “The tendency of those who engage in drinking to continue to do so and to seek others to join them in their conviviality is well known.” Id.
106. Id.
In Dunne v. Dunne, the Nebraska Supreme Court looked to specific examples of character evidence in determining which parent should receive custody to meet the children’s best interests. The case arose from Thomas Dunne’s petition to modify custody five years after a dissolution of marriage decree granted Martha Dunne, his former spouse, physical custody of the parties’ two children. After a two-day trial, the District Court of Loup County, Nebraska awarded physical custody of the children to Thomas Dunne, and Martha Dunne appealed the custody modification.

Factors a court may consider in resolving child custody disputes are: (1) the environment the child is subjected to in the home of a parent; (2) the character of a parent; (3) legal or sexual misconduct by a parent; (4) the desires and wishes of the children; and (5) the relationship between the children, their parents, and their siblings, as well as any effect of disrupting a current relationship. Considering these factors, the court analyzed specific character evidence adduced at trial that Martha Dunne kept her home in a filthy manner, that she was in an intimate relationship and residing with a man to whom she was unwed, and that she and her cohabitant, Rick Thorman, each had a history of alcohol-related problems. The court also looked to character evidence of Thomas Dunne that he received a five-year no-drinking pin from the local chapter of Alcoholics Anonymous and that he was considered a stable businessman with a good reputation in the community. Nevertheless, the Nebraska Supreme Court reasoned it did not justify a change in the custody of the children and reversed the trial court’s custody modification.

C. NEBRASKA’S PRIMA FACIE ELEMENTS OF A SELF-DEFENSE CLAIM

In Nebraska, a criminal defendant’s claim that he acted in self-defense is codified under Nebraska Revised Statute section 28-
1409,\textsuperscript{115} which sets forth the prima facie case for such a claim.\textsuperscript{116} In \textit{State v. Kinser},\textsuperscript{117} the Nebraska Supreme Court analyzed the Nebraska self-defense statute in determining whether it was necessary for the trial court to have submitted a self-defense instruction to the jury.\textsuperscript{118} The defendant was charged with first degree assault, second degree assault, and use of a weapon in the commission of a felony after striking the victim with a drinking glass.\textsuperscript{119} The case involved a confrontation between the defendant and the victim that took place in an Alliance, Nebraska tavern after each of them had been drinking alcohol.\textsuperscript{120} The victim testified at trial that the defendant approached him aggressively and, unprovoked, the defendant smashed a glass over the victim’s head when the victim turned his back to the defendant.\textsuperscript{121} Contrastingly, an eyewitness to the confrontation testified at trial the victim violently shoved a beer bottle to the defendant’s neck, which provoked the defendant to strike the victim with his hand.\textsuperscript{122} The eyewitness further testified the defendant punched the victim with a drinking glass in his hand, but the drinking glass did not actually hit the victim.\textsuperscript{123} A jury convicted the defendant of all three charges and the defendant appealed, asserting the trial court erred in refusing to issue a tendered instruction on self-defense to the jury.\textsuperscript{124} On appeal, the Nebraska Supreme Court laid out the prima facie elements for a criminal defendant to prove he acted in self-defense under section 28-1409: (1) a reasonable belief in the need for using force; (2) a good faith belief in the need for using force; (3) the force used was immediately necessary under the circumstances; and (4) the force used was justified under the circumstances.\textsuperscript{125} The court explained that if a jury found the eyewitness’s testimony to be an accu-

\textsuperscript{116} Neb. Rev. Stat. Ann. § 28-1409. “The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.” Id.
\textsuperscript{117} 567 N.W.2d 287 (Neb. 1997).
\textsuperscript{118} State v. Kinser, 567 N.W.2d 287, 290-91 (Neb. 1997).
\textsuperscript{119} Kinser, 567 N.W.2d at 289-90.
\textsuperscript{120} Id. at 289.
\textsuperscript{121} Id. at 290. The victim suffered severe cuts to his nose and lip from the glass.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 291 (citing State v. White, 543 N.W.2d 725 (Neb. 1996); State v. Graham, 450 N.W.2d 673 (Neb. 1990)). See also State v. Miller, 798 N.W.2d 827, 831 (Neb. 2011) (“We have consistently stated that to successfully assert the claim of self-defense, a defendant must have a reasonable and good faith belief in the necessity of using force. Further, the force used must be immediately necessary and must be justified under the circumstances.”).
rate account of the confrontation between the victim and the defendant, the jury could find that the defendant met each element of a self-defense claim. Therefore, the Nebraska Supreme Court expounded that the trial court committed a reversible error in refusing to instruct the jury on self-defense, reversed the defendant’s convictions, and remanded for a new trial.

D. JURISCICTIONS OTHER THAN NEBRASKA HAVE PROVIDED THAT A VICTIM’S CHARACTER IS NOT AN ESSENTIAL ELEMENT OF A SELF-DEFENSE CLAIM, AND THEREFORE, CHARACTER EVIDENCE OF THE VICTIM’S SPECIFIC PRIOR ACTS OF VIOLENCE IS NOT ADMISSIBLE

In *United States v. Gregg*, the United States Court of Appeals for the Eighth Circuit set forth that a victim’s character is not an essential element of a criminal defendant’s self-defense claim, and thus, character evidence of the victim’s prior specific instances of violent conduct is not admissible. The defendant in *Gregg* appealed his convictions of second degree murder and discharging a firearm during a violent crime after the United States District Court for the District of South Dakota prevented the defendant from presenting character evidence of the victim’s specific prior acts of violence. On appeal, the Eighth Circuit affirmed the district court’s decision. The Eighth Circuit reasoned that a victim’s character is not an essential element of the defendant’s claim that he acted in self-defense; thus, proof of the victim’s violent character may only be made by general reputation testimony—such proof may not be made by evidence of prior specific acts of violence.

Additionally, the Iowa Supreme Court prescribed, in *State v. Jacoby*, that when a criminal defendant claims self-defense, a jury may not consider evidence of the victim’s specific prior acts of violence when determining whether the victim was the first aggressor. For the determination of whether the victim was the first aggressor, the defendant requested an instruction that the jury may consider evi-

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126. *Id.* at 293. The Nebraska Supreme Court further explained that a trial court is required to instruct the jury on self-defense if there is any evidence presented to support a “legally cognizable” self-defense theory. *Id.* at 292.
127. *Id.* at 294.
128. *Gregg*, 451 F.3d 930 (8th Cir. 2006).
129. *United States v. Gregg, 451 F.3d 930, 933-35 (8th Cir. 2006).*
130. *Gregg*, 451 F.3d at 933.
131. *Id.* at 935.
132. *Id.* at 934 (quoting United States v. Talamante, 981 F.2d 1153, 1156 (10th Cir. 1992)). “When character evidence is used circumstantially to create an inference that a person acted in conformity with his or her character, Rule 405 allows proof of character only by reputation and opinion.” *Id.*
133. 260 N.W.2d 828 (Iowa 1977).
dence that the victim previously participated in a gang rape of an adolescent girl and that the victim assaulted his former spouse. The defendant appealed her conviction of manslaughter after the trial court rejected the requested instruction. On appeal, the Iowa Supreme Court affirmed the trial court’s rejection of the requested instruction and set forth that a victim’s character may be proven only by general reputation or trait of character evidence; thus, the victim’s character may not be proven by evidence of specific acts. The Iowa Supreme Court went on to explain the policy reasons for refusing to admit specific character evidence of the victim in a self-defense case: (1) a single act may be unusual or exceptional and does not necessarily establish the victim’s general character; (2) allowing such evidence prejudices the prosecutor because he cannot reasonably prepare to rebut every single instance of the victim’s violent conduct; (3) permitting specific acts evidence unnecessarily prolongs the trial; and (4) such evidence of specific acts raises collateral issues and distracts jurors’ attention from the real issues of the case.

In State v. Bland, the Minnesota Supreme Court determined a victim’s character is not an element of a criminal defendant’s self-defense claim and that character evidence of a victim’s prior specific violent acts is inadmissible to show the victim acted in conformity therewith on a particular occasion. In Bland, the defendant—who claimed he acted in self-defense—appealed his conviction of second degree assault and argued the trial court erred in refusing to admit specific character evidence that the victim previously committed an act of property damage and possessed an illegal firearm. On appeal, the Minnesota Supreme Court disagreed with the defendant and affirmed the trial court’s refusal to admit the specific character evidence. The Minnesota Supreme Court elaborated that the victim’s character is not an element of a defendant’s claim of self-defense; thus, character evidence of specific instances when the victim acted violently is not admissible.

136. *Id.* at 831.
137. *Id.* at 837-38. “It is the rule in Iowa and the majority of jurisdictions that the quarrelsome, violent, aggressive or turbulent character of a homicide victim cannot be established by proof of specific acts.” *Id.* at 838.
138. *Id.* (citing Henderson v. State, 218 S.E.2d 612, 615 (Ga. 1975); State v. Johnson, 219 N.W.2d 690, 695 (Iowa 1974)).
139. 337 N.W.2d 378 (Minn. 1983).
141. *Bland*, 337 N.W.2d at 383-84.
142. *Id.* at 384.
143. *Id.* at 383.
144. *Id.* at 383.
In *State v. Cottier*, the South Dakota Supreme Court reviewed the presentation of evidence in a self-defense case and explained that specific character evidence of a victim's previous acts of violence is inadmissible to show the victim conformed with such character on a certain occasion. In *Cottier*, the trial court prevented the defendant from presenting specific character testimony regarding the victim's prison record. The defendant appealed his first degree manslaughter conviction on the ground that the trial court erred in refusing to admit specific character evidence of the victim. The defendant argued the excluded specific character evidence of the victim's prison record would have illuminated the victim's threatening and aggressive nature, and the evidence would have demonstrated that the defendant reasonably acted in self-defense. On appeal, the court reasoned that character evidence of a victim's prior specific acts of violence is inadmissible to show that the victim acted in conformity with such behavior on a particular occasion, unless the prior violent acts were known to the defendant at the time of the incident. Accordingly, the South Dakota Supreme Court affirmed the trial court's refusal to admit specific character evidence of the victim and upheld the defendant's conviction.

IV. ANALYSIS

In *State v. Matthews*, the Nebraska Supreme Court incorrectly observed the victim's character was an essential element of a criminal defendant's self-defense claim as contemplated by Nebraska Rule of Evidence 405 (“Rule 405”). Rule 405(b) allows evidence of specific instances only where these amount to an ‘element of a charge, claim, or defense’: It is clear that specific instances of the victim’s past conduct do not amount to such an element in cases of homicide or criminal assault—they amount at most to circumstantial evidence that the victim was the first aggressor, and it is this latter fact which amounts to an element of the defense of self defense.

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144. 755 N.W.2d 120 (S.D. 2008).
146. *Cottier*, 755 N.W.2d at 132.
147. *Id.*
148. *Id.*
149. *Id.* at 133. The court also noted the defendant failed to demonstrate at trial that he was aware of the victim’s prison record at the time of the confrontation between the victim and defendant. *Id.*
150. *Id.* at 133-34.
151. 854 N.W.2d 576 (Neb. 2014).
152. Compare *State v. Matthews*, 854 N.W.2d 576, 582 (Neb. 2014) (stating that “we have previously observed that a determination of whether the victim was the first aggressor is an essential element of a self-defense claim. And evidence of a victim’s violent character is probative of the victim’s violent propensities and is relevant to the proof of a self-defense claim.”), with *Lackman v. Rousselle*, 585 N.W.2d 469, 476 (Neb. 2004).
mistakenly noted that character evidence of a victim’s prior specific acts of aggressiveness and violence was admissible when a criminal defendant claims he acted in self-defense. The general rule regarding character evidence under Nebraska Rule of Evidence 404 (“Rule 404”) is that evidence of a person’s character or character trait is inadmissible to prove the person acted in conformity with such character on a particular occasion. However, an exception to the general rule is provided under Rule 405(2), which deems character evidence admissible when a person’s character is an essential element of a claim, charge, or defense. When a person’s character is an essential element of the case, evidence of prior specific instances of the person’s conduct is admissible to prove such character. The Nebraska Supreme Court in Matthews incorrectly determined that a victim’s violent character is an essential element of a criminal defendant’s claim of self-defense pursuant to Rule 405(2), and therefore erroneously prescribed that character evidence of the victim’s specific instances of violent conduct is admissible to prove the defendant acted in self-defense.

First, this Analysis will argue that the Nebraska Supreme Court in Matthews incorrectly observed a victim’s character is an essential element of a criminal defendant’s self-defense claim as contemplated by Rule 405(2). Next, this Analysis will argue the court in Matthews erred in prescribing character evidence of specific prior instances of the victim’s aggressive or violent conduct admissible when

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153. Compare Matthews, 854 N.W.2d at 584 (setting forth the victim’s excluded testimony to his character of aggressiveness and violence while under the influence of drugs and alcohol was relevant to the defendant’s self-defense claim and was properly admissible character evidence), with Neb. Rev. Stat. Ann. § 27-405 (prescribing specific character evidence is admissible in cases where a person’s character is an essential element of a claim, charge, or defense).


156. Id. In cases where character evidence is admissible but a person’s character is not an essential element of a claim, charge, or defense, as contemplated by Rule 405(2), the proponent of the character evidence is limited to proving such character only by reputation or opinion testimony pursuant to Rule 405(1). Id.

157. Compare Matthews, 854 N.W.2d at 582, 584 (observing that a victim’s character for violence is an essential element of a self-defense claim, thus, specific character evidence is admissible to prove the victim’s character), with Lackman, 585 N.W.2d at 476 (illustrating the essential elements of a claim refer to the prima facie elements a claimant must prove), and Kinser, 567 N.W.2d at 291 (setting forth the prima facie elements of a defendant’s self-defense claim does not include an element of the victim’s character for aggressiveness or violence).

158. See infra notes 161-191 and accompanying text.
the criminal defendant claims he acted in self-defense. Finally, this Analysis will argue the Nebraska Supreme Court’s opinion in Matthews compels trial judges to violate their jurisprudential duty under Nebraska Rule of Evidence 611 (“Rule 611”) by admitting character evidence of the victim’s specific prior instances of aggressiveness or violence when the criminal defendant claims self-defense.

**A. *State v. Matthews*: The Nebraska Supreme Court Incorrectly Observed That a Victim’s Character Is an “Essential Element” of a Criminal Defendant’s Self-Defense Claim and Erred in Prescribing That Evidence of the Victim’s Prior Specific Acts of Aggressiveness or Violence Is Admissible**

In State v. Matthews, the Nebraska Supreme Court observed, pursuant to Rule 405(2), a victim’s character is an essential element of a criminal defendant’s claim that he acted in self-defense. The defendant, William Matthews, claimed he acted in self-defense after he was charged with terroristic threats and use of a deadly weapon to commit a felony with respect to the victim, Kevin Guzman. At the conclusion of Matthews’s jury trial in the District Court of Hall County, Nebraska, the jury returned a guilty verdict on each charge against Matthews. Matthews appealed the convictions, arguing the trial court erred in refusing to permit Guzman to testify about his prior specific acts of violence and aggressiveness when under the influence of drugs. On appeal, the Nebraska Supreme Court explained that the trial court erred by not admitting the character evidence of Guzman’s acts of violence and aggressiveness because the victim’s character was an essential element of a criminal defendant’s self-defense claim as contemplated by Rule 405(2). As a corollary, the court in Matthews set forth character evidence of a victim’s specific

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159. See infra notes 192-199 and accompanying text.
160. See infra notes 200-217 and accompanying text.
161. 854 N.W.2d 576 (Neb. 2014).
163. Matthews, 854 N.W.2d at 581.
164. Id.
165. Id.
166. Id. at 582. “We have previously observed that a determination of whether the victim was the first aggressor is an essential element of a self-defense claim. And evidence of a victim’s violent character is probative of the victim’s violent propensities and is relevant to the proof of a self-defense claim.” Id. (citing State v. Kinser, 609 N.W.2d 322 (2000); State v. Lewchuk, 539 N.W.2d 847 (1995)). However, the Nebraska Supreme Court reasoned that the excluded character evidence did not prejudice the defendant because it was cumulative to the evidence admitted at trial; thus, the court deduced that the error was harmless and upheld Matthews’s convictions. Matthews, 854 N.W.2d at 583-84.
prior acts of aggressiveness and violence was admissible to prove a criminal defendant's claim that he acted in self-defense. 167

Under Nebraska law, an essential element of a claim is an element a party must prove to satisfy his prima facie case. 168 In *Lackman v. Rousselle*, 169 the Nebraska Court of Appeals prescribed that a plaintiff claiming two or more defendants engaged in a joint enterprise must satisfy four essential elements. 170 Further, in *State v. Armagost*, 171 the Nebraska Supreme Court observed an attempt to arrest or issue a citation is not an essential element of the crime of recklessly operating a vehicle to avoid arrest. 172 The court in *Armagost* explained it is proper for trial courts to look to the language of the statute when instructing the jury on the essential elements of a crime—the elements which must be proven for the defendant to be convicted of the crime. 173 In illustrating that the statute for the crime of recklessly operating a vehicle to avoid arrest did not include an element of an attempt to arrest or issue a citation, the Nebraska Supreme Court articulated that an attempt to arrest or issue a citation is not an essential element of the crime for purposes of jury instructions. 174

Nebraska law permits character evidence of specific prior acts in matters where an individual's character is an essential element of the charge, claim, or defense, such as negligent entrustment cases and child custody disputes. 175 In *Deck v. Sherlock*, 176 the Nebraska Supreme Court looked to a driver's specific acts of drinking alcohol and

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167. *Id.* at 582-84.
168. *See* Lackman v. Rousselle, 585 N.W.2d 469, 476 (Neb. Ct. App. 1998) (explaining that there are four essential elements of the joint enterprise doctrine which a plaintiff must prove in order to satisfy his prima facie case); State v. Armagost, 864 N.W.2d 417, 421-23 (Neb. 2015) (observing proper jury instructions for the crime of recklessly operating a vehicle to avoid arrest do not contain an element of an attempt to arrest or issue a citation because the relevant criminal statute does not contain an essential element of an attempt to arrest or issue a citation).
170. *Lackman*, 585 N.W.2d at 476.
171. 864 N.W.2d 417 (Neb. 2015).
172. *Armagost*, 864 N.W.2d at 421-22.
173. *Id.* at 421.
174. *Id.* at 422-23.
175. *See* Deck v. Sherlock, 75 N.W.2d 99, 101-02 (Neb. 1956) (looking to specific character evidence of a driver's history of drinking alcohol and driving recklessly to determine whether the owner negligently entrusted the car to the driver, because the driver's character for inexperienced, incompetent, or reckless driving is a prima facie element of a negligent entrustment claim); Dunne v. Dunne, 319 N.W.2d 741, 742-44 (Neb. 1982) (considering specific character evidence of parents in determining which parent should receive custody of the children to meet the children's best interests because the character of the parent is a factor the court considers in determining which custody arrangement suits a child's best interests).
176. 75 N.W.2d 99 (Neb. 1956).
driving recklessly prior to an automobile accident in determining whether the owner negligently entrusted the car to the driver.\textsuperscript{177} The court in \textit{Deck} laid out the prima facie elements of a plaintiff's negligent entrustment claim: (1) the owner entrusted his automobile to a person who has a character trait as an incompetent, inexperienced, or reckless driver, or is incapable of properly operating the vehicle; and (2) the owner knew of the person's character for driving in such a manner when the owner entrusted the automobile to be operated.\textsuperscript{178} Likewise, in \textit{Dunne v. Dunne},\textsuperscript{179} the Nebraska Supreme Court considered specific character evidence of the parties in determining which parent should receive custody of their two children.\textsuperscript{180} In evaluating a party's claim to receive custody of a child, Nebraska courts consider the following factors: (1) the environment the child is subjected to in the home of the parent; (2) the character of the parent; (3) legal or sexual misconduct by a parent; (4) the desires and wishes of the children; and (5) the relationship between the children, their parents, and their siblings, or any effect of disrupting a current relationship.\textsuperscript{181} The \textit{Deck} and \textit{Dunne} cases illustrate that Nebraska law admits character evidence of prior specific conduct when a party must prove, or a court must consider, a person's character as a factor or prima facie element of a claim, charge, or defense.\textsuperscript{182}

A criminal defendant's self-defense claim is codified under Nebraska Revised Statute section 28-1409 (“Section 28-1409”), which lays out the prima facie elements for such a defense.\textsuperscript{183} In \textit{State v. Kinser},\textsuperscript{184} the Nebraska Supreme Court analyzed the self-defense

\begin{footnotesize}
\begin{enumerate}
\item[177.] \textit{Deck}, 75 N.W.2d at 101-02.
\item[178.] \textit{Id}. at 102.
\item[179.] 319 N.W.2d 741 (Neb. 1982).
\item[180.] \textit{Dunne}, 319 N.W.2d at 742-44. The court in \textit{Dunne} looked to specific character evidence of the mother keeping her home in a filthy manner, the mother having a history of alcohol related problems, and the father receiving a five-year no-drinking pin from the local chapter of Alcoholics Anonymous, because the parents' character is a factor the court considers in resolving child custody disputes. \textit{Id}. at 745 (citing Ahlman v. Ahlman, 267 N.W.2d 521 (Neb. 1978)); see Moninger v. Moninger, 276 N.W.2d 100, 102 (Neb. 1979) (setting forth that the parents' moral fitness, the character and stability of each parent, and the capacity to furnish the child's needs are factors to be considered in making child custody determinations).
\item[181.] \textit{Id}. at 745 (citing Ahlman v. Ahlman, 267 N.W.2d 521 (Neb. 1978)); see Moninger v. Moninger, 276 N.W.2d 100, 102 (Neb. 1979) (setting forth that the parents' moral fitness, the character and stability of each parent, and the capacity to furnish the child's needs are factors to be considered in making child custody determinations).
\item[182.] \textit{See Deck}, 75 N.W.2d at 101-02 (considering a driver's specific prior instances of drunk and reckless driving when the driver's character for inexperienced, incompetent, or reckless driving is a prima facie element of a negligent entrustment claim); \textit{Dunne}, 319 N.W.2d at 742-44 (reviewing specific character evidence of parents because the character of a parent is a factor the court must consider in a child custody determination).
\item[183.] Neb. Rev. Stat. Ann. § 28-1409. “[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.” \textit{Id}. at 745.
\item[184.] 567 N.W.2d 287 (Neb. 1997).
\end{enumerate}
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statute in reviewing the trial court’s refusal to issue a jury instruction on the defendant’s self-defense claim.185 The court in Kinser laid out the prima facie elements for an accused to prove he acted in self-defense under Nebraska law: (1) the accused had a reasonable belief in the necessity of using force; (2) the accused had a good faith belief in the necessity of using force; (3) the force used was immediately necessary under the circumstances; and (4) the force used was justified under the circumstances.186 Thus, unlike other areas of the law such as negligent entrustment or child custody disputes, the prima facie case for an accused claiming he acted in self-defense does not require the accused to prove the victim’s character of aggressiveness or violence.187

Pursuant to Rule 405(2), character evidence of prior specific instances of conduct is admissible when a person’s character or character trait is an essential element of a claim, charge, or defense.188 An essential element of a claim, charge, or defense is an element which a party must prove in order to satisfy his prima facie case.189 The victim’s character for violence and aggressiveness is not a prima facie

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186. Kinser, 567 N.W.2d at 291 (citing State v. White, 543 N.W.2d 725 (Neb. 1996); State v. Graham, 450 N.W.2d 673 (Neb. 1990). See also State v. Miller, 798 N.W.2d 827, 831 (Neb. 2011) (explaining “[w]e have consistently stated that to successfully assert the claim of self-defense, a defendant must have a reasonable and good faith belief in the necessity of using force. Further, the force used must be immediately necessary and must be justified under the circumstances.”).
187. Compare Kinser, 567 N.W.2d at 291 (laying out the elements of a self-defense claim, which do not include an element of the victim’s character of aggressiveness or violence), with Deck, 75 N.W.2d at 101-02 (considering specific character evidence of a driver’s history of driving recklessly and drunk driving when the driver’s character for inexperienced, incompetent, or reckless driving is a prima facie element of a negligent entrustment claim), and Dunne, 319 N.W.2d at 742-44 (articulating specific instances of parents’ prior conduct in a child custody determination, where a parent’s character is a factor courts consider in making such decisions).
188. Neb. Rev. Stat. Ann. § 27-405. “(2) In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.” Id.
189. Compare Lackman, 585 N.W.2d at 476 (prescribing that a plaintiff must prove four essential elements in order to impose joint liability on multiple defendants pursuant to the joint enterprise doctrine), and Armagost, 864 N.W.2d at 421-23 (observing an attempt to arrest or issue a citation is not an essential element of the crime of recklessly operating a vehicle to avoid arrest because it is not included in the pertinent statute which lays out the essential elements of the crime), with Deck, 75 N.W.2d at 101-02 (considering character evidence of the driver’s specific prior instances of drinking alcohol and driving recklessly because the driver’s character for inexperienced, incompetent, or reckless driving is a prima facie element of a plaintiff’s negligent entrustment claim), and Dunne, 319 N.W.2d at 742-44 (reviewing specific character evidence of the mother keeping her home in a filthy manner, the mother having a history of alcohol-related problems, and the father receiving a five-year no-drinking pin from the local chapter of Alcoholics Anonymous because the character of a parent is a factor the court considers in resolving child custody disputes).
element a criminal defendant must prove when claiming he acted in self-defense. Therefore, the Nebraska Supreme Court in Matthews erred in observing a victim’s character for violence and aggressiveness is an essential element of a criminal defendant’s self-defense claim.

As noted above, the general rule under Nebraska law is that character evidence is inadmissible to show a person’s conforming behavior. However, the accused in a criminal trial may introduce evidence of a pertinent trait of his character under Rule 404(1)(a), and the accused may introduce evidence of a pertinent trait of the victim’s character under Rule 404(1)(b). In all cases where character evidence is admissible, proof of character may be made by reputation or opinion testimony under Rule 405(1). While Rule 405(1) permits admission of specific prior conduct only after the proponent opens the door with reputation or opinion testimony, Rule 405(2) prescribes narrow circumstances where character evidence of specific instances of

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190. See Kinser, 567 N.W.2d at 291 (explaining the prima facie elements for an accused to prove he acted in self-defense are: (1) that the defendant had a reasonable belief in the necessity of using force; (2) that the defendant had a good faith belief in the necessity of using force; (3) the force used was immediately necessary under the circumstances; and (4) the force used was justified under the circumstances).

191. Compare Matthews, 854 N.W.2d at 582 (observing a victim’s character for aggressiveness or violence is an essential element of an accused’s self-defense claim), with Kinser, 567 N.W.2d at 291 (setting forth the prima facie elements for an accused’s claim that he acted in self-defense, which do not include an element of the victim’s character for aggressiveness or violence), Lockman, 585 N.W.2d at 476 (prescribing a plaintiff must prove four essential elements to impose joint liability on multiple defendants pursuant to the joint enterprise doctrine), Armagost, 864 N.W.2d at 421-23 (explaining an attempt to arrest or issue a citation is not an essential element of the crime of recklessly operating a vehicle to avoid arrest because it is not included in the pertinent statute which lays out the essential elements of the crime), Deck, 75 N.W.2d at 101-02 (considering character evidence of the driver’s specific prior instances of drinking alcohol and driving recklessly because the driver’s character for inexperienced, incompetent, or reckless driving is a prima facie element of a plaintiff’s negligent entrustment claim), and Dunne, 319 N.W.2d at 742-44 (reviewing specific character evidence of the mother keeping her home in a filthy manner, the mother having a history of alcohol-related problems, and the father receiving a five-year no-drinking pin from the local chapter of Alcoholics Anonymous because the character of a parent is a factor the court considers in resolving child custody disputes).


(a) Evidence of a pertinent trait of his or her character offered by an accused, or by the prosecution to rebut the same; or
(b) Evidence of a pertinent trait of character of the victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

Id.

194. Neb. Rev. Stat. Ann. § 27-405. “(1) In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.” Id.
conduct is admissible.\textsuperscript{195} In particular, when a person’s character or character trait is an essential element of a claim, charge, or defense, specific instances going to character evidence are admissible.\textsuperscript{196}

The victim’s character is not an essential element of a criminal defendant’s claim that he acted in self-defense.\textsuperscript{197} Therefore, the Nebraska Supreme Court in \textit{Matthews} erred in prescribing that a criminal defendant claiming self-defense may introduce character evidence of the victim’s prior specific instances of aggressive or violent conduct pursuant to Rule 405(2).\textsuperscript{198} The court in \textit{Matthews} should have reasoned that a criminal defendant claiming self-defense may prove the victim’s character for aggressiveness or violence only by general reputation or opinion testimony, as such method is set forth in Rule 405(1), by putting the victim’s character at issue pursuant to Rule 404(1)(b).\textsuperscript{199}

\textsuperscript{195} \textit{NEB. REV. STAT. ANN.} § 27-405. \textit{See also} Michelson v. United States, 335 U.S. 469, 483-87 (1948) (prescribing that after the criminal defendant’s character witness testified to the defendant’s reputation for honesty and truthfulness on direct examination, it was proper on cross-examination for the prosecution to impeach the character witness with evidence the defendant was previously convicted of a misdemeanor crime).

\textsuperscript{196} \textit{NEB. REV. STAT. ANN.} § 27-405. “(2) In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.” \textit{Id.}

\textsuperscript{197} \textit{Compare Kinser}, 567 N.W.2d at 291 (setting forth the prima facie elements for an accused’s claim that he acted in self-defense, which do not include an element of the victim’s character of aggressiveness or violence), \textit{with Lockman}, 585 N.W.2d at 476 (laying out four essential elements a plaintiff must prove to impose joint liability on multiple defendants pursuant to the joint enterprise doctrine), \textit{and Armacost}, 864 N.W.2d at 421-23 (explaining that an attempt to arrest or issue a citation is not an essential element of the crime of recklessly operating a vehicle to avoid arrest because it is not included in the pertinent statute which lays out the essential elements of the crime).

\textsuperscript{198} \textit{Compare Matthews}, 854 N.W.2d at 582 (prescribing that a criminal defendant claiming self-defense may introduce character evidence of the victim’s prior specific instances of aggressive or violent conduct), \textit{and Kinser}, 567 N.W.2d at 291 (laying out the elements for a criminal defendant’s claim that he acted in self-defense), \textit{with NEB. REV. STAT. ANN.} § 27-405 (explaining character evidence of a person’s specific prior acts is admissible when the person’s character is an essential element of a charge, claim, or defense).

\textsuperscript{199} \textit{Compare Matthews}, 854 N.W.2d at 582 (prescribing that an accused who claims he acted in self-defense may prove the victim’s character for aggressiveness or violence by introducing character evidence of the victim’s prior specific acts), \textit{with NEB. REV. STAT. ANN.} § 27-405 (stating in all cases where character evidence is admissible, but a person’s character is not an essential element of a charge, claim, or defense, a person’s character may be proven by general reputation or opinion testimony), \textit{and NEB. REV. STAT. ANN.} § 27-404 (permitting a defendant in a criminal case to introduce evidence of a pertinent character trait of the victim).
B. **State v. Matthews:** The Nebraska Supreme Court’s Opinion in Matthews Compels Trial Judges to Violate Their Jurisprudential Duty Under Nebraska Rule of Evidence 611

Under Rule 611(1), the presiding judge has a duty to control witness interrogation and the presentation of evidence at trial.200 Rule 611(1) commands that the presiding judge shall reasonably control the mode and order of witness interrogation and presentation of evidence to: (1) make interrogation and presentation effective to ascertain the truth; (2) avoid the meritless consumption of time; and (3) protect witnesses from being harassed or unduly embarrassed.201

In *State v. Pangborn*,202 the Nebraska Supreme Court considered whether a trial judge’s decision to allow the jury to review a demonstrative exhibit during deliberations complied with the standards for the mode and order of presenting evidence and witness interrogation set forth in Rule 611(1).203 The Nebraska Supreme Court explained that without a limiting instruction on the exhibit’s limited demonstrative purpose, the jury might interpret the information contained in the demonstrative exhibit as proof and neglect its duty to determine the accuracy and truth of the admitted evidence.204 Further, the court reasoned the use of demonstrative exhibits during jury deliberations may cause jurors to consider specifically what is referenced in such exhibits and could distract them from reviewing all of the substantive evidence presented.205 In weighing the standards of Rule 611(1) and the prejudicial effects of using demonstrative exhibits during jury deliberations, the court in *Pangborn* determined the trial court abused its discretion over the mode and order of the presentation of evidence in allowing the jury to use the demonstrative exhibit during deliberations without issuing a limiting instruction.206

Numerous jurisdictions, other than Nebraska, have reasoned that a criminal defendant claiming self-defense may not introduce character evidence of the victim’s prior specific instances of conduct, and that the criminal defendant may prove the victim’s character only by gen-

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200. *Neb. Rev. Stat. Ann.* § 27-611. “(1) The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (a) make the interrogation and presentation effective for the ascertainment of the truth, (b) avoid needless consumption of time, and (c) protect witnesses from harassment or undue embarrassment.” *Id.*
201. *Id.*
204. *Pangborn*, 836 N.W.2d at 802.
205. *Id.*
206. *Id.* at 804.
eral reputation or opinion testimony. Further, each of the cited jurisdictions have adopted evidentiary rules identical to the Nebraska Rule of Evidence 405(2). In United States v. Gregg, the United States Court of Appeals for the Eighth Circuit explained that since the victim's violent character is not an essential element of a self-defense claim pursuant to Federal Rule of Evidence 405, a criminal defendant is permitted to prove such character only by reputation and opinion. In State v. Jacoby, the Iowa Supreme Court detailed the policy rationale for refusing to admit specific character evidence of the victim in a self-defense case: (1) a single act may be exceptional or unusual and does not necessarily establish the victim's general character; (2) allowing such evidence prejudices the prosecutor because he cannot reasonably prepare to rebut every single instance of the victim's violent conduct; (3) permitting specific acts evidence unnecessarily prolongs the trial; and (4) such evidence of specific acts raises questions of reliability and relevance.

207. See United States v. Gregg, 451 F.3d 930, 934 (8th Cir. 2006) (observing a victim's character is not an essential element of a defendant's self-defense claim, thus proof of the victim's violent character may only be made by general reputation testimony); State v. Cottier, 755 N.W.2d 120, 133 (S.D. 2008) (prescribing character evidence of the victim's prior specific acts of violence is inadmissible to prove the victim acted in conformity therewith on a particular occasion, unless it is shown the prior violent acts were known by the defendant at the time of the incident); State v. Bland, 337 N.W.2d 378, 383 (Minn. 1983) (providing a victim's character is not an essential element of a criminal defendant's self-defense claim, and that character evidence of a victim's prior specific violent acts is inadmissible to show the victim acted in conformity therewith on a particular occasion); State v. Jacoby, 260 N.W.2d 828, 837-38 (Iowa 1977) (explaining when the defendant claims he acted in self-defense, the victim's quarrelsome, violent, aggressive, or turbulent character cannot be established by the defendant presenting evidence of specific acts).

208. Compare NEB. REV. STAT. ANN. § 27-405 (stating that "(2) in cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct."). with FED. R. EVID. 405 (2011) (explaining "(b) [b]y Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct."). IOWA CODE ANN. § 5.405 (West 2008) (providing "b. [s]pecific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct."). MINN. STAT. ANN. § 50.405 (West 2012) (setting forth "(b) [s]pecific instances of conduct. In cases in which character or trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.")., and S.D. CODIFIED LAWS § 19-19-405 (2012) (stating "(b) [b]y specific instances of conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.").

209. Gregg, 451 F.3d at 934. "When character evidence is used circumstantially to create an inference that a person acted in conformity with his or her character, Rule 405 allows proof of character only by reputation and opinion." Id. (quoting United States v. Talamante, 981 F.2d 1153, 1156 (10th Cir. 1992)).

210. Gregg, 451 F.3d at 934. "When character evidence is used circumstantially to create an inference that a person acted in conformity with his or her character, Rule 405 allows proof of character only by reputation and opinion." Id. (quoting United States v. Talamante, 981 F.2d 1153, 1156 (10th Cir. 1992)).

211. 260 N.W.2d 828 (Iowa 1977).
collateral issues and diverts jurors’ attention from the real issues of the case.212

Nebraska law imposes a jurisprudential duty upon trial court judges in their control of the mode and order of witness interrogation and presentation of evidence.213 The effect of admitting a victim’s prior specific acts in a self-defense case results in a violation of the standards set forth in the jurisprudential duty imposed under Nebraska law regarding witness interrogation and presentation of evidence.214 Therefore, the Nebraska Supreme Court’s opinion in State v. Matthews,215 which incorrectly provides that a criminal defendant claiming self-defense may introduce character evidence of the victim’s prior specific acts of aggressiveness or violence, compels Nebraska trial judges to violate their jurisprudential duty imposed under Rule 611 by admitting such evidence.216 Going forward, Nebraska courts should take a similar approach to the one taken in Pangborn, and trial

212. Jacoby, 260 N.W.2d at 838 (citing Henderson v. State, 218 S.E.2d 612, 615 (Ga. 1975); State v. Johnson, 219 N.W.2d 690, 695 (Iowa 1974)).

213. See Neb. Rev. Stat. Ann. § 27-611 (setting forth that trial court judges shall make interrogation of witnesses and presentation of evidence effective to ascertain the truth, avoid meritless consumption of time, and protect witnesses from being unduly harassed or embarrassed); Pangborn, 836 N.W.2d at 804 (concluding the trial court abused its discretion by permitting the jury to use a demonstrative exhibit during deliberations).

214. Compare Neb. Rev. Stat. Ann. § 27-611 (imposing a jurisprudential duty upon trial court judges to make interrogation of witnesses and presentation of evidence effective for ascertainment of the truth, avoidance of meritless consumption of time, and protection of witnesses from undue embarrassment or harassment), with Jacoby, 260 N.W.2d at 838 (citing Henderson, 218 S.E.2d at 615; Johnson, 219 N.W.2d at 695) (setting forth the rationale for refusing to admit character evidence of the victim’s prior specific acts in a self-defense case is: (1) a single action by the victim could be unusual or exceptional and does not necessarily establish the victim’s character generally; (2) permitting specific character evidence of the victim diverts jurors’ attention from the actual issues being tried, and unnecessarily prolongs the trial; and (3) allowing character evidence of prior specific acts prejudices the prosecutor because he cannot reasonably prepare to rebut every instance of the victim’s conduct).


216. Compare State v. Matthews, 854 N.W.2d 576, 582 (Neb. 2014) (noting “[w]e have previously observed that whether the victim was the first aggressor is an essential element of a self-defense claim. And evidence of a victim’s violent character is probative of the victim’s violent propensities and is relevant to the proof of a self-defense claim.” (citing State v. Kinser, 609 N.W.2d 322 (2000); State v. Lewchuk, 539 N.W.2d 847 (1995))), with Neb. Rev. Stat. Ann. § 27-611 (stating the presiding judge at trial has a duty to make interrogation of witnesses and presentation of evidence effective to ascertain the truth, to avoid meritless consumption of time, and to protect witnesses from being unduly harassed or embarrassed), Jacoby, 260 N.W.2d at 838 (detailing the policy reasons for refusing to admit specific character evidence of a victim’s propensity for aggressiveness or violence when a defendant claims self-defense are that a single act is not representative of the person’s general character, that such specific character evidence raises collateral issues to confuse jurors, and that permitting character evidence of specific acts unnecessarily prolongs the trial), and Pangborn, 836 N.W.2d at 804 (prescribing it is an abuse of discretion under Rule 611 for a trial judge to allow the jury to use a demonstrative exhibit during deliberations without providing an
court judges should attempt to cure the jury prejudice resultant from specific character evidence of the victim by limiting the criminal defendant to prove the victim’s character only by general reputation or opinion testimony.\(^{217}\)

V. CONCLUSION

In *State v. Matthews*,\(^ {218}\) the Nebraska Supreme Court deduced that an essential element of an accused’s self-defense claim is determining whether the victim was the first aggressor, and character evidence of the victim’s prior specific instances of aggressive or violent conduct is relevant and admissible.\(^ {219}\) However, the threshold pursuant to Nebraska Rule of Evidence 405(2) for allowing character evidence to be proven by specific prior conduct is not merely relevance; the standard is that the person’s character itself must be an essential element of a claim, charge, or defense.\(^ {220}\) The Nebraska Supreme Court in *Matthews* should have reasoned that the accused may put the victim’s character at issue pursuant to Nebraska Rule of Evidence 404, but the accused may prove the victim’s character only by general reputation or opinion testimony.\(^ {221}\)

\(^{217}\) Compare Jacoby, 260 N.W.2d at 838 (explaining that admission of specific character evidence of a victim’s aggressiveness or violence causes jury prejudice because a single act does not represent character generally, such evidence raises collateral issues to confuse jurors, and presenting such evidence unnecessarily prolongs trial), Pangborn, 836 N.W.2d at 804 (reasoning that an appropriate limiting instruction may be necessary to cure unfair prejudice when the jury is permitted to review demonstrative exhibits during deliberations), Neb. Rev. Stat. Ann. § 27-404 (setting forth that in a criminal case, the accused may introduce evidence of the victim’s character), and Neb. Rev. Stat. Ann. § 27-405 (articulating that character may be proven by general reputation or opinion testimony in all cases in which character evidence is admissible, but in narrow instances where a person’s character is an essential element of a claim, charge, or defense, character may be proven by prior specific acts), with Neb. Rev. Stat. Ann. § 27-611 (commanding that the trial judge shall make interrogation and presentation of evidence effective to ascertain the truth, avoid meritless consumption of time, and protect witnesses from undue harassment or embarrassment).

\(^{218}\) 854 N.W.2d 576 (Neb. 2014).

\(^{219}\) See *State v. Matthews*, 854 N.W.2d 576, 582 (Neb. 2014) (reasoning “[w]e have previously observed that a determination of whether the victim was the first aggressor is an essential element of a self-defense claim. And evidence of a victim’s violent character is probative of the victim’s violent propensities and is relevant to the proof of a self-defense claim.”). The court in *Matthews* went on to explain that evidence of a victim’s prior specific instances of acting aggressively and violently is properly admissible. *Matthews*, 854 N.W.2d at 584.

\(^{220}\) See Neb. Rev. Stat. Ann. § 27-405 (“In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.”).

The Nebraska Supreme Court’s opinion in Matthews departs from decisions rendered by the United States Court of Appeals for the Eighth Circuit and a number of state courts within the Eighth Circuit addressing this issue. In those cases, jurisdictions other than Nebraska have determined a victim’s character is not an essential element of an accused’s self-defense claim, and the victim’s character for aggressiveness or violence can only be proven by general reputation or opinion testimony. In taking such a broad approach to the standard for an essential element of a claim, charge, or defense to prove character evidence by specific conduct, the opinion in Matthews sets a precedent that character may be proven by specific conduct in any type of case where character evidence is admissible, so long as a person’s character is deemed relevant to an issue being tried. Going forward, Nebraska courts should adopt the positions taken by the aforementioned neighboring jurisdictions and apply the essential element standard more strictly in the presentation of character evidence. The victim’s character is not an essential element the accused must prove to show he acted in self-defense, and thus, the accused should be permitted to prove the victim’s character for violence or aggressiveness only by general reputation or opinion testimony.

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but a person’s character is not an essential element of a charge, claim, or defense, a person’s character may be proven by general reputation or opinion testimony.

222. Compare Matthews, 854 N.W.2d at 582 (setting forth a victim’s character for aggressiveness or violence is an essential element of a self-defense claim and character evidence of the victim’s prior specific acts is admissible), with United States v. Gregg, 451 F.3d 930, 934 (8th Cir. 2006) (observing a victim’s character is not an essential element of a defendant’s self-defense claim, thus proof of the victim’s violent character may only be made by general reputation testimony), State v. Jacoby, 260 N.W.2d 828, 837-38 (Iowa 1977) (explaining when the defendant claims he acted in self-defense, the victim’s quarrelsome, violent, aggressive, or turbulent character cannot be established by the defendant presenting evidence of specific acts), State v. Bland, 337 N.W.2d 378, 383 (Minn. 1983) (providing a victim’s character is not an essential element of a criminal defendant’s self-defense claim, and that character evidence of a victim’s prior specific violent acts is inadmissible to show the victim acted in conformity therewith on a particular occasion), and State v. Cottier, 755 N.W.2d 120, 133 (S.D. 2008) (prescribing character evidence of the victim’s prior specific acts of violence is inadmissible to prove to the victim acted in conformity therewith on a particular occasion, unless it is shown the prior violent acts were known by the defendant at the time of the incident at issue).

223. Compare Gregg, 451 F.3d at 934 (noting a victim’s character is not an essential element of the defendant’s self-defense claim), and Bland, 337 N.W.2d at 383 (explaining that a victim’s character is not an essential element of a defendant’s self-defense claim), with Jacoby, 260 N.W.2d at 837-38 (providing that the defendant, when claiming he acted in self-defense, cannot present evidence of specific acts to prove the victim’s character).
SYMPOSIUM INTRODUCTION

50 YEARS OF LOVING: SEEKING JUSTICE THROUGH LOVE AND RELATIONSHIPS

PALMA JOY STRAND†

Where the mind is without fear and the head is held high;
where knowledge is free;
where the world has not been broken up into fragments by narrow domestic walls;
where words come out from the depth of truth;
Where tireless striving stretches its arms towards perfection;
where the clear stream of reason has not lost its way into the dreary sand of dead habit;
where the mind is led forward by you into ever-widening thought and action–
Into that heaven of Freedom, my Father, let my country awake.

—Rabindranath Tagore

On March 23 and 24, 2017, the 2040 Initiative and the Werner Institute, both housed in the Creighton School of Law, hosted the symposium “50 Years of Loving: Seeking Justice Through Love and Relationships.” The 2040 Initiative explores the ways in which demographic shifts affect law and politics; it takes its name from the Census Bureau’s projection that by around the year 2040 the United States as a whole will be “majority-minority.” The Werner Institute helps people engage constructively with conflict at interpersonal, organizational, community, and larger scales; it brings a systems approach to understanding, resolving, and “staying with” conflict. Both

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the 2040 Initiative and the Werner Institute combine a strong academic foundation with a commitment to community engagement. Both are also grounded in Creighton University’s Jesuit tradition and Ignatian values, which call us to the continued struggle against the inequities of racism and race-based outcomes as scholars, teachers, and community members.

The Symposium, represented by this collection of articles, essays, and personal reflections, which were solicited to represent a variety of viewpoints and experiences, marked fifty years since the 1967 United States Supreme Court decision in *Loving v. Virginia*, forty-five years that have seen significant social effects from *Loving’s* legal declaration of the right to marry across racial lines. These effects reach far beyond the Lovings themselves and *Loving* couples who have married across racial lines. Our families, our neighborhoods, our institutions, and our communities are made up of social networks comprised of individuals in a web of relationships—some deep and intimate and others more casual. The *Loving* ripples have transformed these social networks and the social system of race that encompasses all of us in profound ways. Many extended families now embrace people of different races. Multiracial, mixed children, and adults—*Loving’s* second generation—have forged new identities that challenge the orthodoxy of race. A mere two years ago, *Loving* served as the foundation for United States Supreme Court affirmation of the right of same-sex couples to marry.

In alignment with the mission and vision of the 2040 Initiative and the Werner Institute, the 50 Years of *Loving* Symposium brought together people and perspectives across multiple dividing lines. The kickoff talk by Mat Johnson, author of the novel *Loving Day*, was open to the public and attended by Creighton Law faculty, staff, and students; other individuals from around the University (including attendees at a book discussion group the week before); and members of the broader Omaha community. At dinner after the talk, Symposium attendees—drawn from all of these groups—began a dialogue about difference and Othering.

The next day, the Symposium program started by reflecting on where we have come in the fifty years since *Loving*; took stock of where we are today; and looked forward both in identifying current issues, challenges, and opportunities and in developing practical skills

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for connecting through and across social differences. The Symposium brought law into the room with other academic disciplines, and it provided the opportunity for people of different ages, with varying racial experiences, and from a range of communities to hear each other’s perspectives.

The Symposium also juxtaposed scholarship with personal experience. We often think of law as formal and removed from our daily lives. Loving flips that script: Loving’s effects are as informal as an interracial couple watching television together in their living room and as immediate as a multiracial toddler, classmate, or colleague.

The 50 Years of Loving writings collected here in the Creighton Law Review reflect the texture and nuance of the Symposium itself. The initial reflections from Strand, Director of the 2040 Initiative, and Font-Guzmán, Director of the Werner Institute, frame the discussion with insights into interpersonal encounters with difference and Othering. Reflecting on the fifty years since Loving, the Daniel & Kelekay article provides a critical historical analysis of the progression of race in the United States over that time. Two personal Loving stories complement the academic perspective: Bracamontes Black Crow begins his story in 1967 and challenges the legal system from which Loving emerged; Sodeke’s contemporary narrative is more hopeful as it reveals how people grow and change.

The next three pieces consider the connection between individual lives and social shifts. Guidero highlights how the actions of ordinary people contribute to constitutional change. Mirkay reveals the interweaving of constitutional change and the lives of ordinary people, seen through the lens of the LGBT community and an individual gay man. Doherty criticizes the focus on individualized narrative of the recent movie Loving and the disconnection of the movie narrative from systemic injustice.

The final grouping moves beyond “first generation Loving” interracial relationships to “second generation Loving” multiracial mixed-race reality. Lucas provides insights into how multiracial identity interrogates identity-based movements and race discrimination jurisprudence. Escudero moves beyond Black and White and observes how mixed racial identities facilitate coalition building. Sylvester explores her own biracial identity and gestures toward a re-construction of racial identity in terms of ethnicity. Finally, Mayer offers both a civil rights and a conflict context for Loving and what has come from it.

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Together, these writings capture the rigor, honesty, and creativity of the Symposium itself.

Reflecting on the subtitle of the Symposium—“Seeking Justice Through Love and Relationships”—there is much in these writings that celebrates the ways in which we have moved toward justice along the “moral arc of the universe” over the past fifty years. Part of continuing to move toward justice is naming and acknowledging the practices of injustice that we reject. The White Supremacy that Loving explicitly rejected was built on the dehumanization of slavery, the terror of lynching, and the indignity of segregation. Physical and structural violence is integral to the injustice of White Supremacy, and that violence is today invoked each time a White person uses the word “nigger” in referring to a Black person. Several of the writers here use the word to reveal that violence. The Law Review and the Symposium organizers have respected their use of the word and include it here, concluding after discussion and consultation that what makes all of us flinch when we hear the word is being witness to the violence it represents. Facing that violence is part of working against it.

The 2040 Initiative and the Werner Institute thank all of the attendees and participants in the 50 Years of Loving Symposium. In addition to participants whose writing is included in this collection, our thanks go to Omaha community members Brenda Council, a Creighton Law School graduate with a long record of public service, and Emiliano Lerda, Executive Director of Justice For Our Neighbors, who added immeasurably to the Symposium discussion, as well as to Mat Johnson, who set a tone of thoughtful candor and authenticity at the outset. We also appreciate the contributions of panel facilitators Kathy Gonzales and Sally Waters, ACLU Nebraska Executive Director Danielle Conrad, and especially Mary Lee Brock. We thank the Creighton Law Review, especially our Symposium liaison Sean Nakamoto and Editor in Chief Claire Wilka, for partnering in publishing these pieces. Finally, the Symposium’s success owes much to the steadfast support of Dean Paul McGreal, the commitment of Patty Zieg to law and justice, and the co-sponsorship of Kutak Rock LLP.

LOVING AND LOVING: ERODING THE STANCE OF OTHER

PALMA JOY STRAND†

we were and by that
touched “I-ness” to “I-ness,”
inward, wombed inducement
arced into “us-ness,”
otherness, nothingness.
—Nathaniel Mackey

50 YEARS OF LOVING

Loving v. Virginia is more than a legal decision to me. Loving is my life. I met my husband when I was young. We married across Black-White racial lines. We have three biracial children. Without Loving, my life would have unfolded very differently. My Loving life has called me to explore race and racism, and it has called me to explore with my heart as well as my head.

Because of Loving and my Loving family, my life has been an extended immersion experience at and across America’s racial boundaries. Would I, a White woman, have read Invisible Man, Death and the King’s Horseman, Beloved, Americanah, and other classics of American and world literature exploring the experiences of Africans and members of the African diaspora? Perhaps. Would I have helped to create “Challenging Racism Through Stories and Conversation” discussion groups that provide an opportunity for people to talk about

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2. 388 U.S. 1 (1967).
and across race? 7 And would I have focused much of my academic energy on race and racism? 8 Unlikely. Would I have been called to organize this symposium on “50 Years of Loving: Seeking Justice Through Love and Relationships?” 9 Probably not.

In writing this essay in preparation for “50 Years of Loving,” I was drawn to explore the root of the social construction that we call race—a set of attitudes, norms, and yes laws—that have constructed our social interactions so as to abundantly advantage some of us and profoundly disadvantage others. Beneath those resource, status, and power differentials lies a foundation of psychological and ethical separation of human beings who live and work side by side. Loving destabilizes that foundation by eroding the stance of Other on which race is built.

THE DISRUPTIVE EFFECTS OF LOVING

For much of our nation’s history, cultural norms and formal law actively constructed barriers between people of different races—or funneled permissible relationships into channels with strong power-over currents. People were either separate or locked into patterns of racial hierarchy. Everyone knew the rules of engagement: how to act and how not to act. Richard and Mildred Loving disrupted these rules with a relationship in a different mode. White men and Black women together have a long history in this country—in Virginia and elsewhere. Think Thomas Jefferson and Sally Hemings. But a White man marrying a Black woman—that is a different story.

In the 50 years since Loving v. Virginia, 9 the right to marry someone of a different race has put down roots. “Nearly 15 percent, or one in seven, of all new marriages in 2008 were between people of different races or ethnicities.” 10 The effects of these interracial marriages extend out into our families. “[M]ore than a third of all adults surveyed reported having a family member whose spouse is of a different

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race or ethnicity—up from less than a quarter of respondents in 2005."\(^{11}\) We have moved beyond “Guess Who’s Coming to Dinner?” to many of us having folks of more than one race around our Thanksgiving table.

Along with different-race spouses and extended family members, there have been children. “The share of multiracial babies has risen from 1% in 1970 to 10% in 2013.”\(^{12}\) This baby boom has translated into a cohort of young multiracial Americans: “Among all multiracial Americans, the median age is 19, compared with 38 for single-race Americans.”\(^{13}\) Overall, in 2013, approximately nine million Americans—6.9% of the population—identified with more than one race, an option the United States Census Bureau first provided in 2000.\(^{14}\) When my husband and I filled out the 1990 census, we had to choose between “Black,” “White,” and “Other” for our two daughters born in 1987 and 1989. By the time we filled out the 2000 census, we could check both “Black” and “White” for them as well as for our son born in 1991.\(^{15}\)

These multiracial babies, children, and young adults have rewired the social equivalent of neural pathways with respect to race. Families of all races and ethnicities have embraced and loved “mixed” kids. Members of the broader community have been open and have made a place for them.

I am thinking here particularly of White families and of members of the broader White community. I am thinking of my father, who grew up in a small community of mostly Swedish ancestry in Iowa in the 1920s and 1930s and did not see a “colored” person until he was in high school. I am thinking of him holding my biracial children on his lap as he read to them, holding them just as he held my sisters and me when we were children. I am thinking of the woman at the National Park Service’s Claude Moore Colonial Farm who eventually welcomed one of my kids into their apprentice program in which children dress in colonial garb and become part of the living history working farm exhibit. Though she initially did not want to deal with the fact of race

\(^{11}\) Id.


in 1771, she overcame her reluctance and opened the Farm's free-ranging and barefoot world to my 20th-century daughter.

For White people, Black people have long been Other. *Loving* erodes that Otherness.

**RACE AS OTHERING**

In the United States Supreme Court’s *Loving v. Virginia* opinion, Chief Justice Earl Warren speaking for the unanimous Court revealed the wizard standing behind the curtain of Virginia’s antimiscegenation law: “The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justifications, as measures designed to maintain White Supremacy.”

Throughout our history, White advantage and Black disadvantage have both contributed to the racially skewed distribution of resources. White Supremacy and Racial Othering underlie the racial power gradient that privileges and normalizes White while suppressing and marginalizing Black—and other designations deemed non-White.

A generation ago, historian Edmund Morgan traced a sinister connection between Black slavery and the aspirations of equality articulated at the beginning of the nation, especially by the Virginia patriots. White men of property felt comfortable declaring that “all men are created equal” because slavery ensured that a substantial proportion of the population would remain in perpetuity at the bottom of the social and economic pyramid. Because poor Whites could be “equal” racially, they accepted economic inequality. African-Americans were unequal on both fronts.

Writing just a few years later, legal historian and future judge Leon Higginbotham, Jr., transposed this observation from the political to the legal sphere: “[W]hen the legal process establishes a right of one particular person, group, or institution, it simultaneously imposes a restraint on those whose preferences impinge on the right established. Ultimately, the legal process has always acted as an expression of social control.” Higginbotham exposed how the juxtaposition of the American ideals of liberty and equality with the American reality of slavery created a dissonance in our political psyche. White colonists

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18. EDMUND MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM (1975).
condemned rule without representation by King George III as “slavery” while excluding Black slavery from their protests.20

Yet the Declaration of Independence declared not that “all white men” but that “all men are created equal.” By its very language, the Declaration of Independence introduced to the nation, from its inception, the problem of a “moral overstrain,” a burden from which it has ever since suffered in varying degrees—that “tension caused between high ideals and low achievement, between the American creed including equalitarian individualism and the historical reality of unjust, unequal and class treatment for blacks.”21

The bifurcation of rhetoric and reality was not accidental. Historian Robert Parkinson has traced in detail how the founding fathers actively constructed revolutionary unity against Britain by tying Britain to Black slave insurrections in the South and Native resistance on the Western frontier.22 Political support for independence coalesced around fears of Black revolts against slavery and Native American actions to protect traditional lands. White colonists and settlers banded together in significant part because patriot newspapers highlighted threats of violence from disfavored groups within or on the colonies’ borders and emphasized alliances between those groups and the British. In the face of these intimidating enemies, the colonies drew together and the causes of revolution and independence flourished.23 The unity of the White patriots was forged in opposition to fear and exclusion of Blacks and Natives.

When Thomas Jefferson, slaveholder and patriot, wrote “We hold these truths to be self-evident” in the Declaration of Independence, the “We” included neither Black persons who were enslaved nor Native Americans resisting the Western colonial expansion. Linda Bolton, professor of American Literature, views the Declaration and other texts of our national founding through the lens of the ethics of Emmanuel Levinas.24 Levinas’s work centers around the responsibility every person has to the Other, not to confine them by “know”ing but to embrace their unknowable difference or “alterity.”25 Referring to Jefferson, Bolton frames race in terms of Levinas’s Other: “Here, at the dawn of the American experiment, is the presence of the Other human whose rights to freedom are categorically denied through the laws of

20. Id. at 375-76.
21. Id. at 384 (citation omitted).
25. Id. at 2-15.
enslavement. This Other is already deprived of the Declaration’s explicit promises of freedom."26

Bolton views the Levinasian perspective as challenging the asserted individual freedoms of the Declaration and pointing toward an ethics of justice.

If the covenant of the republic is sealed in the name of freedom and not in the prior responsibility and obligation that the possibility of justice entails, it runs the risk of becoming a linguistic promise that permits and, at its worst, sanctions the persecution and death of the Other.27

Descriptively, the Declaration formed an essential part of a dominant (White) national identity that has consistently visited disadvantage, including persecution and death, on people who have been Othered through race.

The contemporary conclusion about race is that it is socially constructed. Biological and other criteria that have been advanced over time do not hold up to careful scrutiny of the evidence. But acknowledging that race is a social construction does not explain why it was socially constructed—what purpose race served and serves, what it was socially constructed to accomplish.

Looking at the broad brush of United States history, race has been the social construction that facilitated economic exploitation—first of people of African ancestry and then of Chinese and Mexican workers in the 19th and 20th centuries. Race has been the social construction that justified territorial expansion and dominion—over Native Americans beginning shortly after Europeans arrived on this continent and over Mexicans in the 19th century. By signifying Otherness, race marked off entire groups of people who were socially designated as objects to be used to further the social (White) Us.

White Supremacy, named by Chief Justice Warren in Loving, describes a social order in which racial Whiteness is the condition for membership in the Us. And an integral aspect of Whiteness is the Othing of all those who are not raced White. Fundamentally, Whiteness calls for members of the Us to look away from the personhood and humanity of those who are not-Us, those who are Other.

Peggy McIntosh, in her 1988 touchstone essay on White Privilege, identifies myriad important and trivial privileges of Whiteness.28 I have previously identified number sixteen as core to the phenomenon of White Privilege: “I can remain oblivious of the language and cust-

26. Id. at 1-2. See also Higginbotham, supra note 19, at 9-10.
27. Bolton, supra note 24, at 123.
terms of persons of color who constitute the world’s majority without feeling in my culture any penalty for such oblivion.” This quality of being oblivious to persons of color—to racial Others—is core to the phenomenon of White Privilege because it describes the essence of race. Race is Othering, and Othering is by definition objectifying people. The quintessence of Whiteness is willful or blithe or careless ignorance and a studied lack of curiosity to address that ignorance. Whiteness goes beyond individual failure to “see” other people as fellow human beings; Whiteness is constituted by the social demand for this failure. The price of being a member of the White Us is practicing the not-seeing of people who are not White.

FROM JOHN BROWN TO RICHARD AND MILDRED LOVING

John Brown is an uncomfortable character in our racial history: a White man who not only took up the abolitionist cause but killed and was killed for it. The ill-fated homicidal raid that he led on the United States armory at Harpers Ferry in 1859 and his subsequent trial and execution anticipated and perhaps helped to precipitate the Civil War. Do we today condemn him for his unapologetic violence or do we applaud him for the depth of his commitment to a just crusade?

Bolton brings Levinas’s ethics of the Other to the Brown story. Bolton puts to the side Brown’s prior bloody history in Kansas, where he murdered pro-slavery settlers; she also brackets accounts of his uncompromising and perhaps unbalanced religious beliefs and insanity. Focusing on the raid at Harpers Ferry and its consequences, she cuts to the core of the convictions that motivated Brown, convictions that he expressed in his answer at his trial for murder and treason to the question “How do you justify your acts?” Brown responded: “I think, my friend, you are guilty of a great wrong against God and humanity—I say it without wishing to be offensive—and it would be perfectly right for any one to interfere with you so far as to free those you willfully and wickedly hold in bondage.”

Bolton portrays John Brown as a free White man who sees the enslaved Black Other. Brown perceives the fundamental violence enacted by the state upon the Other. Acting in solidarity with the Other, he undertakes what might be considered an ethical act of violence

29. Strand, Racism 4.0, supra note 8, at 773.
32. Id. at 191-92.
33. Id. at 177-78.
34. Id. at 189.
directed at the state. Though his act is criminal, it is also ethically disruptive of the unjust laws of the state. In his final statement before sentencing, Brown said:

I believe that to have interfered as I have done in behalf of His despised poor, is no wrong, but right. Now, if it is deemed necessary that I should forfeit my life for the furtherance of the ends of justice, and mingle my blood with the blood of millions in this slave country whose rights are disregarded by wicked, cruel, and unjust enactments, I say let it be done.35

Bolton frames this declaration in Levinasian terms: “When the state is ‘evil,’ when the state emerges as the ‘executioner’ whose institutional violence persecutes ‘the third party,’ then justice demands my intervention . . . ”36

John Brown died in December 1859 at Charles Town, now in the State of West Virginia, but then in the Commonwealth of Virginia. Almost one hundred years later in June 1958, Richard Loving and Mildred Jeter, residents of Virginia, traveled to Washington, D.C. and got married. Brown was a crusader. The Lovings only reluctantly picked up the gauntlet of racial reform. Brown acted with violence. The Lovings acted with love.

And yet, ultimately, Bolton concludes, “The ethical meaning of John Brown stems from his unique willingness to stand against the state and to assert, with the full force of his person, the primacy of justice before the privilege of freedom.”37 Brown rejected the deal that was cut at the nation’s founding in which the freedom bought for some by the Declaration of Independence was “purchased at the cost of the Other’s persecution.”38

Bolton refers to the “hysteria”39 that surrounds John Brown in the American psyche. How, ultimately, are we to interpret the actions of a White man attempting to lead a (Black) slave revolt? Bolton responds, “[O]ne can argue that he ultimately performs what Derrida calls a ‘strategy of rupture,’ one designed to contest the ‘given order of the law’ (as well as its judicial authority) in order to open the way for the creation of a new and more just law.”40

Though the acts of John Brown and the acts of Richard and Mildred Loving are categorically opposite—John Brown’s violence con-

35. Id. at 183. In Bolton’s view, “Brown’s own words transformed him from a failed hero into America’s greatest criminal, into the guilty American. His redefinition of his own guilt—and his embrace of that guilt—turned his violent act from a historical side-light into a culturally significant moment.” Id. at 198.
36. Id. at 192.
37. Id. at 198.
38. Id. at 2.
39. Id. at 175.
40. Id. at 176.
trasts to the Lovings’ love—there are fundamental similarities in these two acts of resistance, 100 years apart. Both John Brown and the Lovings, in Bolton’s words, stood “against the state,” and both “asserted the primacy of justice.” And the wellspring of both acts of resistance was rejection and transcendence of the Othering that is race’s essential function.

The persistent defense in Loving v. Virginia by the Commonwealth of Virginia of its anti-miscegenation law all the way through the appeal to the United States Supreme Court communicates a conviction that the stakes were high. The Supreme Court named those stakes: the maintenance of White Supremacy. Interracial marriage is unlike interracial liaisons and interracial rape in the context of slavery or the culture of racial violence that persisted in the nation following slavery. It is unlike friendship or collegiality or even fellow citizenship across racial lines. Interracial marriage directly confronts and negates racial Othering.

Yet that confrontation is qualitatively different from John Brown’s direct attack on the racial Othering of slavery. The interracial marriage of the Lovings offers instead the possibility of transforming the meaning of Othering, of shifting the traditional social practices and norms of Othering.

THE LOVING TRANSFORMATION OF RACIAL OTHERING—“FIRST GENERATION”

One of my favorite novels is Bessie Head’s When Rain Clouds Gather. Set in 1960s Botswana, the book tells the story of Makhaya, a South African revolutionary on the run from apartheid who finds sanctuary in the small agricultural village of Golema Mmidi. Makhaya becomes involved in the efforts of European agriculturalist Gilbert to bring more effective farming methods to the village. Makhaya ends up in the middle of a conflict between the traditional tribal chief and the people of Golema Mmidi. And he falls in love with Paulina Sebeso, a leader of the women of the village who do the actual work of farming.

Over the arc of the story, Makhaya evolves from a man motivated by a cause to a man caught up in the web of everyday life and relationship. As the book ends, the omniscient narrator predicts that “Makhaya would find, in spite of himself, that he had to live and give

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41. Id. at 198.
42. 388 U.S. 1 (1967).
up his morbid speculations on oppressors and oppressed.\textsuperscript{44} Looking ahead,

the Good God cast one last look at Makhaya, whom he intended revenging almightily for his silent threat to knock him down. He would so much entangle this stupid young man with marriage and babies and children that he would always have to think, not twice but several hundred times, before he came to knocking anyone down.\textsuperscript{45}

Marriage, as Bessie Head wisely observes, consists not only of daily interactions with another person but of days of daily interactions. These interactions, which range from the mundane to the momentous, weave over time a tapestry of many threads. Marriage is entanglement. The repetition and variation involved in marriage create of one’s spouse not simply a three—but a four-dimensional person—a living, breathing human being encountered over time. Marriages, moreover, involve love and trust, relational qualities that grow out of vulnerability and generosity and trustworthiness.

The complex reality of everyday shared lives erodes the foundation for Othering not simply in the John Brown sense of standing with the Other but in the deeper sense of being interconnected with the Other. It is in this latter sense that a marriage such as the Lovings’ transforms not only one’s perceptions of and interactions with an Other but the very experience of Othering itself.

Professor of English Grant Jenkins explores the experience of encountering the Other through the writing of poets and other African and African-American artists and thinkers. According to Jenkins, the Western experience centers on the individual (White) subject, who exists in a long tradition in which Black persons are defined and viewed as the Other. The African and African-American experience rotates this perspective 180 degrees, viewing and understanding the world from a place of Otherness.

Drawing from renowned writers such as W.E.B. DuBois and Frantz Fanon and from less familiar poets such as mid-20th century American writer and educator Melvin Tolson\textsuperscript{46} and contemporary National Book Award winner (Poetry) Nathaniel Mackey,\textsuperscript{47} Jenkins pieces together a transfigured understanding and experience of Otherness that is grounded in perceptions of the world from the stance of the Othered. “Tolson rejects the position that to be the Other is

\textsuperscript{44} Id. at 184.
\textsuperscript{45} Id. at 184-85.
\textsuperscript{47} See Jenkins (Mackey), supra note 1.
anathema; instead he embraces the position of otherness (or alterity) as ethical and welcomes what is other . . . ."  
For Mackey, “[i]nstead of signifying only a negative and inferior position imposed upon a person from some hegemonic power, ‘Other’ . . . represents an unavoidable absence inherent in the very ‘texture of things’ . . . [which] demands a response, a responsibility, an ‘indebtedness,’” as evoked by the passage with which this essay began:  

we were and by that  
touched “I-ness” to “I-ness,”  
inward, wombed inducement  
arced into “us-ness,”  
otherness, nothingness.

Citing Senegalese poet and political figure Leopold Sedar Senghor, Jenkins affirms “that there is not just one kind of otherness . . . based on negativity.”  
While the European approach to the Other is “cannibalistic,” the “African . . . ‘discovers the Other . . . ’”  
Otherness and difference invite curiosity rather than conquest.  
“Mackey,” according to Jenkins, “finds in African sources an alternative way of being a subject in the world, a nonimperial, nonuniversalizing way, and he also finds an oppositional poetics that seeks, rather than rejects or assimilates, the Other.”  
The African word ubuntu captures a world view in which the individual and the community are intertwined: “I am because we are, and since we are, therefore I am.”  
Otherness is not only “excluding people from power . . . .”  
Otherness and Othering also offer a stance for a certain kind of disorder that can “disrupt the dominant political order.”

Jenkins grounds the posture of discovery toward Others in an African ethics that recognizes the connectedness of individual humans with the larger community. At the same time, Jenkins recognizes the existence of a European strain of relational ethics. Like Bolton, he highlights the work of Emmanuel Levinas. “[T]he Other takes on a positive valence in the work of these [African and African-American] writers, a valence that resembles Emmanuel Levinas’s ethical notion

48. Jenkins (Tolson), supra note 46.  
49. Jenkins (Mackey), supra note 1, at 39.  
50. Jenkins (Mackey), supra note 1, at 42. Jenkins quotes Nathaniel Mackey, School of Udhra (1993).  
51. Jenkins (Tolson), supra note 46.  
52. Jenkins (Tolson), supra note 46.  
53. Jenkins (Mackey), supra note 1, at 36.  
54. Id. at 40.  
55. Id. at 39.  
56. Id. at 40.
of the Other . . . [in which] the Other holds the moral high-ground and demands ethical response, responsibility, from the self.\textsuperscript{57}

This Black or African discovery approach to Others is accessible and workable. And it is, I venture to say, the general attitude toward an individual Other who shares one’s everyday life. But having adopted this attitude toward one racial Other, as happens in an interracial marriage, it is natural to extend that same attitude toward racial Others outside of the marriage. This, as the Commonwealth of Virginia and the United States Supreme Court both recognized in \textit{Loving v. Virginia},\textsuperscript{58} has the potential for destabilizing the foundation of Otherness on which White Supremacy is erected.

\textbf{THE LOVING TRANSFORMATION OF RACIAL OTHERING—
“SECOND GENERATION”}

While the story of Richard and Mildred Loving challenges the White Supremacist narrative of Othering people of color, it also falls within the structure of that narrative. White encounters Black (though Mildred self-identified as Native American\textsuperscript{59}). Despite the plot line and denouement departing from the standard template, the protagonists embody familiar identities of Us and racial Other.

\textit{Loving} children, however, create a new narrative. \textit{Loving} children are biracial, multiracial, mixed. People with mixed ancestry have existed since before the founding of the nation, but the logic of race required the creation of categories that separated even the mixtures. Quadroon, octoroon, mulatto, mestizo—these are just some of the pigeonholes that were created to hold distinct individuals who did not fit neatly into the paradigmatic racial constructions.

\textit{Loving} children, in contrast, have moved from being literally labeled “Other” in racial terms to being White and Black, Black and Asian, Asian and Native, Native and White—and more. In the 2010 census there were fifty-seven possible racial combinations along with six single racial categories\textsuperscript{60} The pre-\textit{Loving v. Virginia}\textsuperscript{61} pigeonholes of separation have given way to additive and overlapping collages.

Biracial, multiracial, mixed people may identify with one of the traditional solo racial categories. Historically, mixed individuals with

\begin{itemize}
\item\textsuperscript{57} Jenkins (Tolson), \textit{supra} note 46.
\item\textsuperscript{58} 388 U.S. 1 (1967).
\item\textsuperscript{61} 388 U.S. 1 (1967).
\end{itemize}
Black ancestry experienced life as Black. But many multiracial people feel comfortable with multiple racial identities. Loving children, for example, might identify with Black and with White while also identifying as biracial, which is a different racial experience today than either Black or White. Not surprisingly, multiracial people are more likely to cross racial boundaries than single-race people.62

The experience of growing up in a multi-racial family has many of the de-Othering effects of an interracial Loving marriage. More deeply, mixed racial identity at its core negates racial Othering. Instead of one of Us encountering an Other, one person inhabits both experiences. The straightjacket of a single racial identity opens up into the possibility of multiple racial selves.

People with multiracial identities are effective boundary-crossers, "function[ing] effectively within both minority and majority environments."63 People with multiple identities have a greater capacity to build coalitions with others so as to propel social movements forward.64 "[B]eing mixed makes it harder to fall back on the tribal identities that have guided so much of human history, and that are now resurgent. Your background pushes you to construct a worldview that transcends the tribal."65

In the United States, tribal is racial. Race continues to drive our politics today,66 which reminds us that racial Othering continues to have powerful effects within the nation.67 Over the next generation, however, the proportion of the United States population that is multi-racial is projected to more than double—from seven percent today to

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64. See, e.g., Edwina Barvosa-Carter, Multiple Identity and Coalition Building: How Identity Differences within Us Enable Radical Alliances among Us, in FORGING RADICAL ALLIANCES ACROSS DIFFERENCE: COALITION POLITICS FOR THE NEW MILLENNIUM 21 (Jill M. Byatydzieni & Steven P. Schacht eds., 2001) (stating multiple identities facilitate coalition-building, create synergies between identity formation and community building, and allow for flexibility within coalitions as various identity frames come to the fore or recede into the background).


about twenty percent in 2050.68 This demographic shift and its relational and identity effects offer the potential to diminish the potency of race as an Othering construct. Growing recognition of the value of difference and inclusivity beckon in this direction.69 Heterogeneous groups and diverse systems are less susceptible to groupthink and have greater potential for creativity than “all on the same page” collectives.70 At the same time, contemporary calls for suppressing “identity politics”71 echo discomfort with this evolving sense of a healthy social dynamic grounded in difference. We are at a national inflection point with respect to race.

THE NEXT 50 YEARS

The late philosopher-sociologist Zygmunt Bauman wrote of the social dismissal of people that tolerates “wasted lives”72 in the United States system of mass incarceration,73 which perpetuates the historical Othering of race,74 and of the globalizing economy that is less and less invested in the health and well-being of individual communities and the people within them. Pope Francis has invoked Bauman in calling for a “‘social economy’ that invests in people and opens access to ownership and opportunity by spreading work . . . [The Pope] wants a vigorous civil society that holds both state and market to account.”75 Othering legitimates wasted lives. Eroding the stance of Othering, in contrast, opens the door to social and economic transformation.

In 2008, on the 40th anniversary of Loving, Mildred Loving issued a statement in support of same-sex marriage:

I am still not a political person, but I am proud that Richard’s and my name is on a court case that can help reinforce the love, the commitment, the fairness, and the family that so many people, black or white, young or old, gay or straight

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68. Valasquez-Manoff, supra note 65.
seek in life. I support the freedom to marry for all. That’s what Loving, and loving, are all about.76

We usually think of politics as the affairs or business of government. But as its dictionary definition indicates, politics more broadly involves “the total complex of relations between people living in society.”77

In the latter sense, the Lovings were profoundly political people. As are we all. How we are with each other—that is politics. When we accept the social, legal, and institutional structures that perpetuate “wasted lives,” we accept a practice of Othering that releases Us from responsibility by denying the personhood of Others.

The Lovings and Loving v. Virginia78 opened up a path toward a different way of being with Others. We can create a politics of openness and commitment to Others. We can continue to move toward Othering in the Loving mode of discovering Others who are different through curiosity, attention, respect, and empathy.

If we choose.

78. 388 U.S. 1 (1967).
PERSONAL REFLECTION ON
50 YEARS OF LOVING:
CREATING SPACES OF DIFFERENCES BY
DEMANDING “THE RIGHT TO OPACITY”1

JACQUELINE N. FONT-GUZMÁN†

“Diversity, which is neither chaos nor sterility, means the human spirit’s striving for a cross-cultural relationship, without universalist transcendence. Diversity needs the presence of peoples, no longer as objects to be swallowed up, but with the intention of creating a new relationship. Sameness requires fixed Being, Diversity establishes Becoming . . . . As Sameness rises within the fascination with the individual, Diversity is spread through the dynamism of communities . . . . Sameness is sublimated difference; Diversity is accepted difference.”

—Édouard Glissant2

I am from the Caribbean, specifically Puerto Rico. Puerto Rico has the unfortunate distinction of being the oldest colony in the world and as part of that history I have learned to create spaces of existence that oscillate between “difference” and “Otherness.”3 While the Lovings in Loving v. Virginia4 experienced this oscillation in the context of interracial marriage between a white man and a black woman in Caroline County, Virginia, I have experienced these spaces from the perspective of a Puerto Rican woman. It is from this standpoint that I

1. ÉDOUARD GLISSANT, POETICS OF RELATION 189 (2010). Glissant was a prominent poet and philosopher from Martinique and considered to be amongst the most influential writers of the Caribbean. For Glissant “sameness” (i.e., Western Universalism) is at the root of Western imperialism.

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3. In this article, I define difference as an identity constructed through highlighting that which is different and Otherness as an identity that stems from difference as an effect of power that is historically produced. See JACQUELINE N. FONT-GUZMÁN, EXPERIENCING PUERTO RICAN CITIZENSHIP AND CULTURAL NATIONALISM 115-17 (2015); LAWRENCE GROSSBERG, IDENTITY AND CULTURAL STUDIES: IS THAT ALL THERE IS?, IN QUESTIONS OF CULTURAL IDENTITY 87, 87-107 (STUART HALL & PAUL DU GAY EDs., REPRINT 1996).

reflect on the benefits of inhabiting spaces of differences and Otherness.

Growing up in Puerto Rico in the 1960s and 1970s I remember playing with kids of all colors and backgrounds. I had the privilege of being in a space that was similar to Caroline County, Virginia, where Mildred and Richard Loving lived and fell in love: a space where connecting through difference and Otherness was allowed. This does not mean that I grew up in a space that was free of discrimination or where all races were equally accepted. I am aware that I also had the privilege of being white and heterosexual. My black, gay, and lesbian friends had many challenges that I could not claim to understand, then or ever. However, as I reflect on my past, staying with ambiguity and not feeling the need to understand allowed me to take a non-reductionist approach in my relationship with those who were different. By refraining from fully understanding and staying with uncertainty, I could connect with those who were different without relating them to my norm and thus violently reducing them to objects in need of being understood. Without knowing it, I was constructing a space of difference and Otherness. In agreement with Édouard Glissant, I believe that to have a relationship between equals it is imperative that one demands “the right to opacity,” to not be understood. In my community, our opacity was based on neither opposition nor identification; it was based on invoking the right to difference.

While in the United States the narratives and counter narratives regarding the institutionalization and resistance to a lifetime of segregation and oppression against Blacks was taking place as part of the Civil Rights Movement, I was being taught in school that Puerto Ricans were a mixed race—we were a mix of the Indian, Spanish, and African races who were forced to come together and form a nation. Of course, race as a social construct means different things depending on the context and location. In the Puerto Rico of the 1960s and 1970s, contrary to the United States, islanders equated race with nationality, culture, or birthplace as opposed to exclusively skin color. Race in Puerto Rico was far more flexible and fluid than in the United States; skin color was not limited to black, or white, there were different shades of blackness and whiteness. As a result, I experienced connecting through difference at a young age. And in those occasions when racism struck (which unfortunately happened more often than

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5. Glissant, supra note 1, at 189-90.
7. See id. at 233.
most Puerto Ricans are willing to accept), I was reminded of my mixed origins through our culture of difference. For example, a popular phrase that is part of Puerto Rico’s vernacular culture is ¿Y tu agüela, aonde dónde ejtá? (And your grandmother, where is she?). The phrase comes from the title of a poem by Fortunato Vizcarrondo, black Puerto Rican, poet, and musician, which narrates the response of a black Puerto Rican who is being called nigger:8

Yesterday you called me nigger
And today I will respond to you:
My momma sits in the living room
And your grandmother, where is she?

My hair is kinky
Yours’ is pure silk
Your poppa has straight hair
And your grandmother, where is she?

You like dancing to the Foxrot
And I like the ‘Bruca Maniguá’
You like passing as white
And your grandmother, where is she? 9

The above excerpt clearly illustrates how the response to racism is a reminder that all Puerto Ricans are a result of interracial “mixing.” Even if the color of your skin is white or your hair is straight, being Puerto Rican means being “mixed.” You cannot hide from your blackness, even if it is not visible. In my case, family and friends were a constant reminder of the “mixed” racial spaces that I was constantly entering and exiting. While Loving disrupted pre-existing social systems of racial separation in the United States by legalizing interracial marriage, in Puerto Rico the disruption was within and foundational in the formation of our cultural nation.

8. The word nigger in the United States is a derogatory social construct that carries with it centuries of oppression. It frames a difference in skin color into a rationalization for dehumanizing individuals. However, the use of euphemisms is not the answer. Euphemisms are the most common and dangerous types of racism. It is common because it “softens” racism, it is dangerous because it fails to name differences so that they can be discussed in a respectful manner; it denies the right to opacity as defined by Glissant and used in this reflection. Oppressive social constructs must be named if we are to disrupt them and create safe spaces of difference. The excerpt of the poem shared in this reflection—¿Y tu agüela, aonde dónde ejtá?—disrupts oppressive social structures through naming difference and reclaims blackness as a difference to be proud of. It is in this spirit that I use the word nigger.

My Otherness also constantly manifested itself through unequal power relationships that have been (and continue to be) historically produced in over 500 years of colonialism. Living in Puerto Rico I had my own Jim Crow relationship with the United States. In 1901 *Downes v. Bidwell*\footnote{11} framed Puerto Ricans’ Otherness—Puerto Rico was a “territory appurtenant and belonging to the United States, but not a part of the United States.” In spite of colonization, or maybe because of it, in Puerto Rico I learned to live in a community that connects through Otherness, difference, and diversity as opposed to sameness. I learned the importance of inhabiting spaces of difference and Otherness because my ontological and epistemological survival depended upon it. Glissant eloquently captured these survival needs: While for the colonizer, insularism means confinement, for us in the Caribbean it means a route toward liberation from being smothered;\footnote{12} while the colonizer privileges sameness, in the Caribbean we privilege difference.\footnote{13}

Typical of those who become into being through colonial oppression, I have also been in a flux between the Other (USA) and the We (Puerto Rico). I have “migrated” twice from Puerto Rico to the United States. As I came and went back and forth between two ports, I experienced how my differences (e.g., my accent) were not a connector; I did not fit into “their” similarity. While some see Otherness as disempowering,\footnote{14} Glissant saw it as an opportunity for resistance and connection. Throughout this symposium, we had the opportunity to co-create and inhabit spaces of difference and opacity. My hope is that just as *Loving* had (and continues to have) ripple effects in dismantling systemic racism and narratives of oppression, participants in this symposium are able to advance social justice in their communities by creating spaces of differences in which oppressive narratives are disrupted.

\begin{footnotes}
\footnotetext[10]{For an in-depth study of how over 500 years of colonialism has shaped how a group of Puerto Ricans experience their citizenship and cultural nationalism see Font Guzmán, supra note 3.}
\footnotetext[11]{182 U.S. 244, 287 (1901).}
\footnotetext[12]{GLISSANT, supra note 2, at 139.}
\footnotetext[13]{See id. at 97-98.}
\footnotetext[14]{See Gayatari Chakravorty, Can the Subaltern Speak?, in *Colonial Discourse And Post-Colonial Theory: A Reader* 66-111 (Patrick William & Laura Chrisman eds., 1994) (explaining how through the process of “understanding” the oppressed, the oppressor reduces the oppressed to their norm and system and the oppressed become an object of knowledge).}
\end{footnotes}
I. INTRODUCTION

The year 2017 marks the fiftieth anniversary of the 1967 United States Supreme Court decision in *Loving v. Virginia*, which declared anti-miscegenation laws to be unconstitutional. For many, the *Loving* decision represents a symbolic turning point in the history of United States racial politics. Some even celebrate the *Loving* decision and the argued subsequent “biracial baby boom” as the beginning of a post-racial United States. Indeed, statistics indicating that fifteen percent of all new marriages are interracial and polls suggesting that a majority of Americans today approve of interracial marriage are cited as evidence of the erosion of racial boundaries and tensions. For many, the 2008 election of Barack Hussein Obama, the offspring of an Afri
can father and European American mother, as the forty-fourth President—and the first Black President—of the United States similarly marked a symbolic victory affirming that racism has finally been overcome and the United States is a truly post-racial society. However, the year 2017 also marks the end of Obama’s presidency and—importantly—the inauguration of Donald J. Trump as President of the United States. Consequently, we are not only forced to examine this critical juncture in the history of United States racial politics, but are also required to critically examine the past fifty years and ask the following question: to what extent have the symbolic victories of Loving and the election of Obama been imbued with aspirations that have yet to be fully actualized? Loving and the election of President Obama are undoubtedly important milestones in the history of United States jurisprudence and racial politics. Yet a careful analysis of interracial marriage trends, the politics of mixed race identity, and the waves of backlash against Obama’s presidency—which range from contesting his legitimacy and opposing his political efforts to explicitly racist rhetoric and the recent election of Donald Trump as President—suggest that the post-racial potential promised by Loving has remained more aspirational than actualized. Accordingly, in order to understand the legacy of Loving, we must think critically about interracial intimacy and contemporary United States race relations, taking into account the persistent inequities imbedded in the United States racial order and the continued relevance of anti-Blackness in the struggles for a more egalitarian society.

II. HYPODESCENT AND THE MONORACIAL IMPERATIVE

The rule of hypodescent is a social code designating racial group membership of first-generation offspring of unions between White Americans and Americans of color exclusively based on their background of color. Successive generations of individuals who have White American ancestry combined with a background of color have more flexibility in terms of self-identification. The one-drop rule of hypodescent designates as Black everyone with any African ancestry (“one-drop of blood”). It precludes any choice in self-identification and ensures that all future offspring of African American ancestry are socially designated and self-identified as Black.3 Beginning in the late sixteenth century, the dominant Whites began enforcing rules of hypodescent as part of anti-miscegenation statutes aimed at punishing and eventually prohibiting interracial intimacy, as well as defining

multiracial offspring as Black in an attempt to preserve White racial “purity” and privilege. By the middle of the eighteenth century, interracial marriages in the Southern and some Northern colonies (and eventually states) in Anglo-North America were proscribed and stigmatized where they were not legally prohibited.4

During the early seventeenth century, African Americans were comparatively small in numbers and the social distinction between the White indentured servant and the Black slave was less precise than the legal distinction between bonded and free. There were no laws against miscegenation despite strong prejudice against interracial intimacy.5 Consequently, a small, but not insignificant, number of indentured Europeans and enslaved Africans intermarried or formed common-law unions. They had legitimate offspring, alongside more widespread clandestine and fleeting liaisons involving births outside of wedlock. Most of the latter were between White masters and indentured or enslaved women of African descent and involved coercive sexual relations as in extended concubinage or rape. The offspring of these unions were considered slaves contingent upon the slave status of the mother, not the rule of hypodescent. Accordingly, the rule did not increase the numbers of slaves, but rather, the number of Blacks whether enslaved or free. Still the rule of hypodescent conveniently functioned to exempt White landowners (particularly slaveholders) from the legal obligation of passing on inheritance and other benefits of paternity to their multiracial progeny.6

The ancestral quanta defining legal Blackness have varied over time and according to locale. Informal social perceptions and practices of hypodescent were normative long before they were formalized in law. Statutes and court decisions were inevitably more precise than social custom.7 The one-drop rule gained currency as the informal or


6. Davis, supra note 3, at 9, 15 n.8.

“commonsense” definition of Blackness between the seventeenth and nineteenth centuries, but did not become a customary part of the legal apparatus until the early twentieth century (circa 1915). The rule of hypodescent has supported legal and informal barriers to racial equality in most aspects of social life. At the turn of the twentieth century, in *Plessy v. Ferguson*, these restrictions culminated with the institutionalization of Jim Crow segregation.

Beginning in the mid-1950s, those proscriptions began to be dismantled. They were accompanied by the passage of historic civil rights legislation in the 1960s, including the landmark 1967 *Loving v. Virginia* decision, which removed the last laws prohibiting interracial marriage. In the aftermath of *Loving*, notions of racial purity that supported the ideology of White supremacy were increasingly repudiated. Rules of hypodescent have since been removed from all state statutes. European Americans, nevertheless, maintain identities and privileges based on White racial exclusivity originating in hypodescent. According to Lipsitz, European Americans continue to uphold a “possessive investment in Whiteness.” This manifests itself by means of a matrix of practices that leads to significantly different life chances along racial lines. These outcomes are not merely the byproducts of benign neglect. They are also the cumulation of the purposeful designs of Whites that assign people of different racial groups to different social spaces. This, in turn, results in grossly inequitable access to education, employment, transportation, and housing.

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9. DANIEL, supra note 3, at 34-42; DANIEL, supra note 4 at viii-ix; DAVIS, supra note 3, at 9-11, 55-58.
10. 163 U.S. 537 (1896).
13. There were several judicial antecedents, if not precedents, to *Loving*. The legal antecedents included *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948), which removed anti-miscegenation statutes in California, and *McLaughlin v. Florida*, 379 U.S. 184 (1964), in which the United States Supreme Court unanimously ruled against the constitutionality of Florida’s cohabitation statute, which prohibited habitual cohabitation between two unmarried individuals of the opposite sex if one was Black, and the other, White. The decision overturned *Pace v. Alabama*, 106 U.S. 583 (1883), which had declared such statutes constitutional. The *McLaughlin* decision did not, however, overturn the other part of Florida’s anti-miscegenation law prohibiting racial intermarriage between Whites and Blacks. Such statutes were only declared unconstitutional in *Loving v. Virginia*. RACHEL MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 79-81, 92-96 (2001).
15. GEORGE LIPSITZ, HOW RACISM TAKES PLACE 6 (2011).
Hypodescent also had unintended consequences for groups of color, especially Blacks. By drawing boundaries that excluded Blacks from having contact as equals with Whites, it legitimated and forged group identities among the former. Consequently, Blacks hold on tenaciously to the one-drop rule. It is considered a necessary, if originally oppressive, means of maintaining the integrity of the Black community and mobilizing in the continuing struggle against racial inequality. Yet, an African American identity is not a mindless embrace of “the Blackness that Whiteness created,” and thus an indication that individuals have been duped by hypodescent. Rather, African Americans rearticulate, rather than reproduce, rules of hypodescent. This involves repetition of hypodescent with a difference in support of racial difference without hierarchy, that is, difference based on equality.16

III. RESISTING HYPODESCENT AND THE MONORACIAL IMPERATIVE

The rule of hypodescent has become so accepted in the United States that its oppressive origins are largely obscured and its logic never questioned. Individuals reinforce, if only unwittingly, racial designations as if they were mutually exclusive and singular (monoracial), if not hierarchical categories of experience, as well as objective phenomena with an independent existence of their own. Hypodescent is also the basis of associated advantages that accrue to Whites as well as groups of color (“monoracial privilege”).17 Consequently, monoraciality has been internalized as the normative pattern of identification, which deems a multiracial identity as illegitimate.18 Since the late 1960s, however, growing numbers of people have challenged hypodescent and its proscriptions. This is related to the dismantling of Jim Crow segregation and implementation of civil rights legislation during the 1950s and 1960s.

More specifically, it is attributable to the 1967 Loving v. Virginia19 decision, which overturned statutes in the remaining sixteen states prohibiting racial intermarriage. Previously, the racial state regarded interracial intimacy as a private rather than public matter. This was part of the state’s tactic of deflecting attention away from the

contradictions between its espousal of freedom and justice and the empirical realities of Jim Crow segregation, including anti-miscegenation statutes. Interracial intimacy thus became central to the debate on the relationship of private matters to the public sphere of civil rights activism. Many activists wanted interracial intimacy to be considered a public matter as part of the promotion of equal rights and social justice, particularly in terms of Black-White relations. They endeavored to achieve this primarily through popular culture, but also through litigation. Activists hoped to expose the pervasive racism in the legal system of a nation that trumpeted itself as the arsenal of democracy to the rest of the world.20

The Loving decision did not, however, derive from the civil rights movement itself, although the changing climate engendered by the movement paved the way. It originated in a lawsuit filed by an interracial couple, Richard Loving, who was European American, and his wife Mildred Jeter, who was an African-descent American. They took their case all the way to the Supreme Court, which ruled that antimiscegenation laws violated the Equal Protection Clause of the Fourteenth Amendment and were thus unconstitutional.21 This process began with the Brown v. Board of Education22 decision in 1954, which reversed the 1896 case of Plessy v. Ferguson23 that legalized Jim Crow segregation.24 It culminated in the passage of the Civil Rights Act of 196425 and the Voting Rights Act of 1965,26 as well as the Immigration and Nationality Act (or Hart-Celler Act),27 which removed legal restrictions on immigration. Along with the Fair Housing Act of 1968,28 Loving was part of the dismantling of segregation in the private sphere and followed the elimination of all other forms of legalized racial discrimination and segregation in the public sphere.

23. 163 U.S. 537 (1896).
24. Roberts, supra note 20, at 175.
Importantly, however, *Loving* was most relevant in the Southern states where anti-miscegenation laws primarily targeted interracial marriages between Blacks and Whites, which have historically been the most taboo relationships. Yet Black-White intermarriages have composed a relatively small percentage of the nation’s interracially married couples. Consequently, the *Loving* decision did not result in a significant growth in intermarriages. According to census data, in 1960 there were 51,000 Black-White marriages of the nation’s 157,000 interracial marriages; in 1970 there were 65,000 Black-White marriages out of a national total of 321,000 interracial marriages. By 1980, the number of interracial couples approached one million, including 599,000 White-other race unions and some 167,000 Black-White unions. The number of interracial couples continued to increase steadily until by 1990 there were 1.5 million interracial unions, of which 883,000 were White-other race unions and 246,000 Black-White unions. Notwithstanding *Loving*’s limited significance in terms of increased racial intermarriage, it was a symbolic victory that removed the legal sanction against interracial marriage and some of

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29. This has particularly been true historically of marriages between Black men and White women although Black men are more likely to outmarry than Black women. See Hodes, supra note 5, at 44-46; Jeffrey S. Passel, Wendy Wang & Paul Taylor, *Marrying Out: One-in-Seven New U.S. Marriages is Interracial or Interethnic*, Pew Res. Ctr. (June 4, 2010), http://www.pewsocialtrends.org/2010/06/04/marrying-out/ [hereinafter *Marrying Out*].

30. The 1965 Immigration and Nationality Act was more important in this regard given that it increased immigration of populations from Latin America as well as Asia, which have a higher percentage of interracial marriages. In terms of the latter, the missionary history, commerce, militarization, and United States wars in Asia and the Pacific have also played a significant role.


33. Tim Bovee, *Interracial Couples Have Doubled in 12 Years*, Buffalo News, Feb. 12, 1993, at A2; Gigi Kaeser & Peggy Gillespie, *Of Many Colors: Portraits of Multiracial Families* xi (1997); Root, supra note 31, at 179; *MS-3, supra note 32; Table 1, supra note 32.*
the negative social stigma associated with these unions, thus legitimizing marriages that had previously been proscribed.\textsuperscript{34}

Since the late 1980s, discussions on race in the United States have increasingly included references to a multiracial identity, which is an additional interrogation of the one-drop rule. The resistance to the rule of hypodescent as indicated by increased racial intermarriage in the post-	extit{Loving} era was not, however, accompanied by any notable equivalent resistance to the one-drop rule, and hypodescent more generally, in terms of identity formation of the offspring of these unions. Increasing numbers, however, embrace more than one racial background.\textsuperscript{35} This multiracial identity manifests itself “betwixt and between” the boundaries of traditional United States racial groups.\textsuperscript{36} It extends outward from this liminal location depending upon individuals’ orientation toward the groups that compose their background.\textsuperscript{37} Despite myriad backgrounds, experiences, and identities, the shared liminality based on identification with more than one racial background becomes an integral part of the self-conception of multiracial-identified individuals, and a defining component of the multiracial experience.\textsuperscript{38} This identity interrogates the “either/or” monoracial imperative that underpins United States racial formation and seeks to shift to a “both/neither” mindset.\textsuperscript{39}

\textsuperscript{34} This has particularly been true historically of marriages between Black men and White women although Black men are more likely to outmarry than Black women. See Hodes, supra note 5, at 44-46; Marrying Out, supra note 29; Kevin Noble Maillard, \textit{The Multiracial Epiphany of Loving}, 76 FORDHAM L. REV. 2709, 2709-13 (2008).


It was not until the late 1970s that increased mobilization emerged around a multiracial identity.40 By the 1980s, a nascent multiracial movement composed of a growing number of local support groups for interracial families and multiracially-identified people lobbied for changes in official data collection in the 1990 census. The goal was to make possible a multiracial identification. In the 1990s, this racial project expanded to include more than fifty support groups and educational organizations, including two national organizations, the Association of Multi Ethnic Americans and Project RACE (Reclassify All Children Equally). This led to a full-scale social movement whose constituents, along with other supporters, began pressuring for changes in the collecting of data on race, particularly on the decennial census, so that multiracial individuals could be enumerated.41

While activists were unsuccessful in bringing about changes on the 1990 census, their efforts intensified in the wake of the census. Their success at marshaling various advocacy groups and supporters was instrumental in prompting federal officials to convene the Congressional Hearings on Racial Census Categories (1993–1997) to discuss any potential changes on the 2000 census. By the 2000 census, this movement succeeded in making it possible for individuals to express a multiracial identity by checking more than one box in the race question.42 Consequently, many scholars argue that the rule of hypodescent, and specifically the one-drop rule, today has less impact on identity formation of multiracials of partial African descent. Others contend it still influences identity formation through external imposition as well as self-ascription.43


IV. THE OBAMA PHENOMENON AND THE POST-RACIAL IDEAL

Although Barack Obama does not identify as multiracial, the immediacy of his interracial parentage as the son of a White mother from Kansas, in the heartland of the United States, and Black father from Kenya, in the African homeland of humanity, as well as his rearing outside the continental United States, in Hawai’i and Indonesia, by his White mother and her relatives, along with his Indonesian stepfather,44 has imbued his consciousness with a broader vision and wider ranging sympathies in forming an identity. This enhanced his image as the physical embodiment of the principles of inclusiveness and equity. Yet in 1961, when Barack Obama was born, twenty-one states still maintained anti-miscegenation laws, largely targeting marriages involving Blacks, particularly Black-White unions, the majority of Whites disapproved of racial intermarriage (96% according to survey research), and individuals who dared cross the racial divide were considered deviants.45 Moreover, Obama grew up in an era when a multiracial identity was not an option. Indeed, he has never said he identifies as multiracial. 46 This was underscored when Obama checked only the “Black, African American, or Negro” box on the 2010 census race question even though, since 2000, respondents have been allowed to check more than one box.47 For all his hybridity, Obama’s identity is situated in the Black community and extends outward from that location.48

That said, Obama’s public success, a loving extended interracial family, and comfort as an African American who acknowledges his multiracial background indicates how much things have changed since he was born.49 In his first news conference as President-elect, Obama conveyed this comfort with the throwaway response “mutts like me”50 when asked by reporters what types of puppies he would consider getting for his daughters. This was a more personalized reference to Obama’s multiracial background than his typically more oblique reference to it by mentioning his parents.

In the media, Obama has generally been referred to as Black or African American, less frequently as multiracial or biracial. Yet people have displayed varying responses in terms of how he is viewed racially. Data on these attitudes were collected for Mark Williams by Zogby International in a November 2006 Internet poll of 2,155 people. People were told Obama’s parents’ background, and then were asked to identify Obama’s race. Obama was identified as Black by 66% of African Americans, 9% of Latinas/os, 8% of Whites, and 8% of Asian Americans. He was designated with multiracial-identifiers by 88% of Latinas/os, 80% of Whites, 77% of Asian Americans, and 34% of African Americans.

Young people of all racial groups born roughly between 1982 and 2003—the “Millennial generation”51—have been among Obama’s most ardent supporters. This population is the most racially diverse cohort in United States history and has been exposed to a comparatively more racially diverse society than any previous generation. According to figures from the 2008 Current Population Survey, slightly more than half of Millennials—56%—are European American. The remaining 44% are Latina/o (20%), African American (15%), Asian American (5%), multiracial (3%), and Native American (1%), with a significantly larger share of Blacks and multiracials than previous generations.52 If Obama has significance for Blacks, he has special meaning for the growing population of multiracial-identified individu-

49. Dedman, supra note 45.
Multiracials totaled seven million on the 2000 census. Based on 2010 census data, their numbers increased to 9 million—or 2.9 percent of the population. Although they still make up only a fraction of the total population, this is a growth rate of about 32% since 2000, when multiracials composed 2.4% of the population.

Obama’s multiracial background allowed a wide range of people to feel comfortable with him, which was instrumental in building an impressive voter coalition in 2008. According to election polls, this included 95% of Blacks and a two-to-one advantage among all other communities of color. In addition, Obama carried every age group other than those sixty-five and older. That said, Senator John McCain led Obama by twelve points among White voters. Obama won decisively in the electoral vote (Obama 365, McCain 173). The popular vote was considerably closer (Obama 66,882,230, McCain, 58,343,671). Obama garnered 53% and McCain 46% of the popular vote. In the 2012 election, Obama’s showing of 93% among Blacks, who turned out in record numbers, was all but guaranteed. The true game changer involved garnering 73% of the Asian American vote and 71% of the Latina/o vote. Asian Americans in particular have remained an elusive voter bloc. Support from these communities is attributable in part to massive organizing in response to voter suppression efforts in more than a dozen states. Republicans passed restrictions aimed at reducing the turnout of Obama’s “coalition of the ascendant”—young voters, African Americans, and Latinas/os. According to 2012 exit polls, nationally Romney won 60% of the White vote; Obama garnered 40%. However, 60% of Obama’s supporters were eighteen to twenty-nine years of age, and 54% of females voted

for him. A voter poll found that feminists, not simply women in general, were critical to Obama’s 2012 re-election.

Although Obama sought to be defined by policy positions instead of race, the media repeatedly referred to his candidacy and election as a milestone in the nation’s racial history. Yet, Obama’s ability to draw on his racial Whiteness enhanced his ability to bridge the racial divide. Throughout the 2008 campaign, commentators emphasized the racial, not to mention cultural, capital Obama possessed due to his White mother, lighter skin, and Ivy League credentials. Obama frequently reminded us of his White mother and grandparents who raised him, as well as his White uncle, a World War II veteran. The image of Obama’s White relatives sitting in support of him at the 2008 Democratic National Convention was a remarkable moment underscoring his historic significance.

Moreover, the number of Blacks holding public office has increased dramatically over the years. Blacks are included in the economic mainstream in ways that were unheard of half a century ago. Absolute gains in years of formal education are significant. Yet darker-skinned Blacks generally have lower socioeconomic status, educational attainment, and overall diminished prestige. Indeed, survey research indicates that educational attainment, occupational opportunities, and family income among Blacks increases considerably with lighter skin. Other research indicates further that darker-skinned Blacks have more punitive relationships with law enforcement.

64. Dedman, supra note 45.
65. DANIEL, supra note 3, at 162-63; TAYLOR, supra note 58, at 4.
Whites, even if only unconsciously, often favor individuals of color who more closely approximate them in physical appearance, believing they are making impartial decisions based on competence or other criteria.

If the Post-Civil Rights era has provided increased opportunities for some Blacks and other individuals of color to take advantage of the more inclusive social relations, it is also marked by continuing and deep patterns of race-based exclusion and inequality. Yet the belief that the United States has transcended racism, along with the color-blind and more recent post-racial ideology, became the cornerstone of United States race relations beginning in the last two decades of the twentieth century. This colorblind ideology has obscured the selective and inequitable nature of integration in the Post-Civil Rights era where some individuals of color—particularly the more socioeconomically advantaged—have been able to gain increased access to wealth, power, privilege, and prestige. Accordingly, pervasive formal exclusion and coercion have been replaced with more informal dynamics, which are increasingly juxtaposed with patterns of selective inclusion (or inegalitarian integration).

The increase of inegalitarian integration does not preclude the existence of more egalitarian patterns of integration. However, it follows that integration (inclusiveness) would continue to be deeply marked by more inegalitarian dynamics given that the larger social order is still underpinned by racial hierarchy. In terms of Blacks, this has been accompanied by a decrease in the rigid ascription of the one-drop rule in determining their social location. Skin color, along with other phenotypical features, such as hair texture, eye color, and nose and lip shape, etc., working in combination with attitudinal, behavioral, and socioeconomic attributes, has increased as a form of “racial capital.”

Gramsci, Omi, and Winant encapsulate the selective nature of this form of integration (or assimilation) with the term “hegemony,” which creates the illusion of equality while effectively allowing dominant groups to maintain power, control, and hierarchy. This also dis-

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69. DANIEL, supra note 3, at 155-57; MARGARET HUNTER, RACE, GEN- DER, AND THE POLITICS OF SKIN TONE 5, 8, 10, 46 (2005); Margaret Hunter, Buying Racial Capital: Skin-Bleaching and Cosmetic Surgery in a Globalized World, 4 J. PAN AFR. STUD. 142 (2011); Jones, supra note 42, at 1524, 1526.
guises the fact that United States society is still racist to the core.\textsuperscript{70} In 2013, this was evinced in the June 24 and June 25 Supreme Court decisions that undermine, respectively, the enforcement of affirmative action initiatives\textsuperscript{71} and sections of the 1965 Voting Rights Act. The latter required federal preapproval for any changes in election procedures and were intended to prevent certain jurisdictions, primarily among the Southern (and some Western) states, from enforcing historical practices (e.g., poll taxes, literacy tests, grandfather clauses, etc.) designed to disenfranchise “racial minorities,” particularly Blacks. Those provisions also targeted contemporary discriminatory practices, including voter identification laws and gerrymandering (or voter redistricting) aimed at minimizing the voter strength of communities of color who tend to be Democrats.\textsuperscript{72} Several states have already enacted new voter identification laws and redistricting since the Supreme Court decision.

V. WHITE ANXIETY, WHITE RESENTMENT, AND WHITE RAGE

Obama is an iconic figure who embodies and at the same time has sought to transcend race and speak to the nation’s common destiny.\textsuperscript{73} He endeavored to navigate the treacherous waters of the United States racial divide and transform it into a metaphoric bridge that

\begin{itemize}
\item \textsuperscript{70} Antonio Gramsci, \textit{Selections from the Prison Notebooks} 263 (Quentin Hoare & Geoffrey N. Smith eds., 1971); Omi & Winant, \textit{supra} note 8, at 66-69, 84, 115, 148.
\item \textsuperscript{73} Deborah W. Post, \textit{Cultural Inversion and the One-Drop Rule: An Essay on Biology, Racial Classification, and the Rhetoric of Racial Transcendence}, 72 ALB. L. REV. 909 (2010).
\end{itemize}
redefined the nation’s civic culture and social contract in more inclusive terms.\textsuperscript{74} Notwithstanding Obama’s race-neutrality, his campaign and election engendered a sea of White anxiety and in the extreme, White resentment and rage, whether implicitly or explicitly expressed in racial terms.\textsuperscript{75} Stephens-Davidowitz found that a racially charged Google search was a robust negative predictor of Obama’s vote share in the 2008 election, estimating that such sentiments cost Obama three to five percentage points of the popular vote. Obama also gained some votes because of race but this effect was comparatively minor. The majority of voters for whom Obama’s race was a positive factor were liberals who would have voted for any Democratic presidential candidate. Increased support from Blacks added only about one percentage point to Obama’s totals.\textsuperscript{76} However, Obama would not have won the 2008 election without support from Black voters and other voters of color.\textsuperscript{77}

During the 2008 election, similar sentiments were expressed in the foiled plot by White supremacists to assassinate Obama, an Obama monkey doll, Obama waffles that parody Aunt Jemima at the Christian Right Voter Summit, and an effigy of Obama hanging from trees at the University of Kentucky and George Fox University in Oregon.\textsuperscript{78} During the 2012 election, a bumper sticker displayed a racist play on words: “Don’t Re-Nig in 2012. Stop repeat offenders. Don’t re-elect Obama!”\textsuperscript{79} Former Chief Judge Richard Cebull of the United States District Court for the District of Montana even received and forwarded an email comparing Obama’s conception to sex with a dog. The email read: “A little boy said to his mother, ‘Mommy, how come I’m black and you’re white?’ His mother replied, ‘Don’t even go there’.”

\textsuperscript{74} Dedman, supra note 45.  
\textsuperscript{75} Christopher Parker & Matt A. Barreto, Change They Can’t Believe In: The Tea Party and Reactionary Politics in America 1-19, 191-217 (2013); Cynthia Tucker, Tea Partiers React with Fury to World They Can’t Control, NAT'L MEMO (Oct. 12, 2013 12:00 AM), http://www.nationalmemo.com/tea-partiers-react-with-fury-to-world-they-can’t-control/2/.  
\textsuperscript{77} Feagin, supra note 76, at 165.  
Barack! From what I can remember about that party, you’re lucky you don’t bark!”80 The Kansas-based Patriot Freedom Alliance posted on its website a picture describing Obama as a skunk. The photo included the caption: “The skunk has replaced the eagle as the new symbol for the president. It is half Black, it is half White, and almost everything it does, stinks.”81

These sentiments were also embodied in the Tea Party movement. A key motivation of its agenda, as well as that of conservative Republicans, was an adamant fear of, and contempt for, Obama with the goal of making certain he was not re-elected.82 These views were generally framed in supposedly race-neutral protests assailing big government, corporate taxation, and so on, as well as infringements on individual freedom and “traditional values.”83 So-called “birthers” claimed Obama was ineligible to be President because there is no proof he was born in the United States. Yet birthers were either ignorant of, or conveniently ignored, United States constitutional law, which automatically makes Obama a United States citizen, even if he was born outside the United States because his mother was a United States citizen. Hawai‘i’s health director said in 2008 and 2009 she had seen and verified Obama’s original vital records, and birth notices in two Honolulu newspapers were published within days of Obama’s birth at Kapiolani Maternity and Gynecological Hospital in Honolulu. She confirmed that Obama’s name is in its alphabetical list of names of people born in Hawai‘i, maintained in bound copies available for public view. At Obama’s request, state officials eventually made an exception to a 2001 policy that prohibited anyone from getting a photocopy of an original birth certificate. They usually hand out computer-generated versions.84 That said, birthers were less concerned

83. Ostroy, supra note 82; PARKER & BARRETO, supra note 75, at 102-89; Tucker, supra note 75.
with the legality of Obama’s citizenship than with discursively calling his citizenship into question as a means of delegitimizing his presidency because he is Black.

These occurrences were largely reflective of extremist, fringe elements. After the 2008 election, however, authorities noticed increased hate group membership, as well as more threatening writings, Internet postings, and other activity directed at Obama than with any previous President. Moreover, this White racial hysteria is illustrative of the lack of civility and partisanship endemic to United States society, particularly in the political arena. Notwithstanding Obama’s keynote address at the 2004 Democratic National Convention, in which he stated there is only one America, the 2008, 2012, and 2016 national conventions provided striking portraits of what were clearly two Americas. The Democratic conventions were noticeably more racially diverse. The Republican conventions were largely a sea of White faces. Democrats hold advantages in party identification among Blacks, Asian Americans, and Latinas/os. Republicans have leads among Whites—particularly White men. Moreover, Tesler argues that since Obama’s presidency there has been a renewed alignment between political preference and “old fashioned racism” long thought to have disappeared from United States politics.


Yet beginning with his 2008 election campaign, Obama and his advisers carefully avoided engaging in racial concerns, much less making allegations of racism against Obama, to silence charges he was “playing the race card.” As has been the tradition in other presidential campaigns, Obama’s team deployed surrogates to mediate contentious discussions dealing with racial issues. Yet in David Remnick’s January 27, 2014 article in the New Yorker, Obama displayed a surprising and seeming about-face, at least in terms of his public statements, on the topic of race. Obama said he believed race had an impact on his political standing since the beginning of his presidency. Moreover, he contended that racial tensions may have weakened his popularity among White voters during his second administration. Obama stated: “There’s no doubt that there’s some folks who just really dislike me because they don’t like the idea of a Black president.” Conversely, Obama stated: “Now, the flip side of it is there are some Black folks and maybe some White folks who really like me and give me the benefit of the doubt precisely because I’m a Black president.”

Obama’s initial cautious response to the July 13, 2013 not-guilty verdict in the George Zimmerman trial for the February 26, 2012 shooting death of Trayvon Martin was criticized by some commentators as yet another example of his failure to give voice to African American grievances. He acknowledged the tragedy that Trayon’s death meant for the Martin family and the nation, as well as the strong passions his death and the Zimmerman verdict elicited. But Obama stated that “we are a nation of laws, and a jury has spoken.” He called for a widening of the “circle of compassion and understanding” in the nation’s communities and for national reflection on gun


93. Martin, an unarmed seventeen-year-old African American, was fatally shot by George Zimmerman, a neighborhood watch coordinator. Zimmerman’s father, a retired Magistrate Judge, is a White. His mother, a former deputy court clerk, is a Peruvian, who describes herself as African-descended (or Afro-Peruvian). Zimmerman was identified as “White” in the initial police report. Later it was learned he identifies as “Hispanic.”
violence. Many argued Obama’s response was pitched perfectly in terms of content and tone, given the necessity of making a public statement yet also honoring the constraints of his delicate and complicated role as a President who also happens to be Black.

On July 19, in response to public criticism by commentators and urging from some of his supporters, Obama gave a more forceful and unusually personal, if measured, reply to Zimmerman’s acquittal at an impromptu appearance at a White House press briefing. He stated, “[y]ou know, when Trayvon Martin was first shot, I said that this could have been my son. Another way of saying that is, Trayvon Martin could have been me [thirty-five] years ago.” Obama mentioned further that there are few Blacks, including himself, “who haven’t had the experience of being followed when they were shopping in a department store.” Obama also addressed the perils associated with being a Black male in the United States in this regard. He affirmed:

[t]here are very few African-American men who haven’t had the experience of walking across the street and hearing the locks click on the doors of cars . . . or getting on an elevator and a woman clutching her purse nervously and holding her breath until she had a chance to get off.

Moreover, Obama said, “[there] is a history of racial disparities in the application of our criminal laws . . . . A lot of African-American boys are painted with a broad brush . . . . If a White male teen was involved in the same kind of scenario . . . both the outcome and the aftermath might have been different.”

Obama’s press briefing elicited praise from many, including Senator John McCain (R-AZ). Others crit-
icized his briefing as race-baiting; still others criticized it for not being forceful enough in denouncing White racism.

VI. POSTSCRIPT TO THE POST-RACIAL IDEAL

In the 2016 presidential election, Donald Trump was able to take advantage of White anxiety, rage, and resentment to help secure his victory over Hillary Clinton, the nation’s first woman presidential nominee from a major party. Trump received a majority of the White vote (58%), which put him 21 percentage points over Clinton (37%). Meanwhile, 88% of Blacks voted for Clinton compared to 8% for Trump. Similarly, 65% of Latinas/os voted for Clinton and 29% voted for Trump. The National Exit Poll, sponsored by major media outlets, reported that 65% of Asian Americans voted for Clinton, 29% for Trump. However, the Asian American National Election Eve Poll concluded that 75% of Asian Americans voted for Clinton, while only 19% voted for Trump.

105. Clinton's decisive popular vote win of 65,853,516 (48.5%) compared to Trump's 62,984,825 (46.4%) votes outpaced Trump by 2,864,974 votes. However, Trump won the electoral count (and thus the presidency) where he garnered 59.9% or 306 of the 538 available electoral votes compared to Clinton's 232 or 48.5%. And Trump's electoral college win was built in large part on his ability to perform well, if only by a narrow margin of 79,316, in the popular vote—particularly among the White electorate—in several previously Democratic Rust Belt states like Pennsylvania, Michigan, and Wisconsin. Tina Nguyen, You Could Fit All the Voters Who Cost Clinton the Election in a Medium-Sized Football Stadium, VANITY FAIR (Dec. 1, 2016 4:16 PM), http://www.vanityfair.com/news/2016/12/hillary-clinton-margin-loss-votes; Presidential Results, CNN Poll. (Feb. 16, 2017), http://www.cnn.com/election/results/president.
Clinton won 54% of the female vote against Trump, who also lost the female vote by a wide margin among minority voters. According to exit poll data, 94% of Black women voted for Clinton, as did 68% of Latinas. But nearly twice as many White women without college degrees voted for Trump than for Clinton, and among college-educated White women Clinton won by only a narrow margin—51% supported Clinton—compared to 45% who supported Trump. Overall, 53% of White women and 58% of White men voted for Trump.\(^\text{108}\)

Trump’s appeal to White voters has taken various forms. Among other things, Trump’s “Make America Great Again” slogan, although typically framed in populist terms, was a dog whistle or code word for “Make America White Again.”\(^\text{109}\) He stated that “illegal immigrants” from Mexico come to the United States ostensibly to rape and kill Americans, meaning White people.\(^\text{110}\) Trump promised to build a wall to protect the United States from these foreign “invaders.”\(^\text{111}\) During the first two months of his administration, Trump issued an executive order that vastly expanded who is considered a priority for deportation in keeping with his stated goal of deporting millions. Of course, more individuals were deported under Obama than any previous administration, although the State tended to focus on those convicted of violent crimes. Many fear the Trump administration’s raid practices may become more draconian.\(^\text{112}\) Trump also maintained that a judge of Mexican American descent was inherently incapable of treating him


\[^{109}\text{This basically taps into a nostalgia for an imagined vanishing world where there was an assumed and unquestioned acceptance of White domination, White male domination in particular, and its associated privileges. Ian Haney López, Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class ix, 3-5 (2014); Omi & Winant, supra note 8, at 119.}^{111}\]

\[^{110}\text{Nicholas Confessore, For Whites Sensing Decline, Donald Trump Unleashes Words of Resistance, N.Y. Times (July 13, 2016), http://nyti.ms/29WCu5l.}^{111}\]

\[^{111}\text{Chauncey DeVega, A white nationalist fantasy: Donald Trump’s America is not ‘made for you and me,’ Salon (Feb. 12, 2017 1:00 PM), http://www.salon.com/2017/02/12/a-white-nationalist-fantasy-donald-trumps-america-is-not-made-for-you-and-me/.}^{112}\]

fairely because of the judge’s ancestry. On January 27, 2017, Trump issued an executive order attempting to ban admission to the United States of citizens from seven Muslim-majority nations—Iran, Libya, Somalia, Sudan, Syria, Yemen, and Iraq—for 120 days and to suspend entry of all refugees indefinitely (a revised executive order released on March 6, 2017, removed Iraq from the list of banned countries and lifted the indefinite refugee ban for Syrians).

Trump has publicly disassociated himself from overt White supremacist support, yet during his campaign and early in his administration, his response can be characterized more as a tepid rebuke than a direct and impassioned condemnation as has been the case with other concerns such as widespread voter fraud and fake news. Moreover, Trump’s rhetoric and agenda, including some of his cabinet appointments and senior advisers, as well as the nomination of other key officials in his administration, has emboldened the White supremacist (and far right) base, which views Trump as emblematic of many of its aspirations. Indeed, Trump has ordered that federal resources be diverted away from tracking White supremacist organizations.

According to the Southern Poverty Law Center (“SPLC”), in 2016 the number of hate groups in the United States rose for a second year in a row as the radical right was energized by the candidacy and election of Donald Trump. This has brought racism out of the shadows in a manner not seen in over half a century. The forces of White anxi-

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113. William Saletan, Donald Trump’s Statement About the “Mexican” Judge Is More Damning Than He Realizes, Slate: Slatest (June 7, 2016 7:30 PM), http://www.slate.com/blogs/the_slatest/2016/06/07/donald_trump_s_statement_about_the_mexican_judge_is_more_damning_than_he.html.


115. Chauncey DeVega, Profile in cowardice: Donald Trump will take no responsibility for the wave of hate crimes he has inspired, Salon (Feb. 28, 2017 11:00 AM CST), http://www.salon.com/2017/02/28/profile-in-cowardice-donald-trump-will-take-no-responsibility-for-the-wave-of-hate-crimes-he-has-inspired/; Confessore, supra note 110.


117. Steven Rosenfeld, A United States of Hate Has Exploded Under Trump, Alternet (Feb. 15, 2017), http://www.alternet.org/election-2016/united-states-hate-has-exploded-under-trump; Hate groups increase for second consecutive year as Trump electrifies radical right, S. Poverty L. Ctr. (Feb. 15, 2017), https://www.splcenter.org/news/2017/02/15/hate-groups-increase-second-consecutive-year-trump-electrifies-radical-
ety, rage, and resentment have not only gained momentum but also should signal the deathknell to any lingering notions of the post-racial ideal that the candidacy and election of Obama supposedly symbolized as the beginning of a new era in United States race relations.

For example, since January 2017, the number of bomb threats to Jewish community centers and synagogues across the nation has increased significantly. Two mosques were burned to the ground. The one in Victoria, Texas burned just hours after the Trump administration announced the so-called Muslim ban. Muslims have voiced their support of the Jewish community after the vandalism of cemeteries in St. Louis; many Jewish people have donated funds to help repair a mosque in Tampa. In February 2017, and only after coming under considerable pressure, Trump made a belated denunciation of racism and anti-Semitism at the National Museum of African American History and Culture. He also made similar comments in his February 28, 2017 address to a joint session of Congress. Some critics maintained Trump’s response was welcome but too little too late. Moreover, Trump earlier cast doubt on these incidents by seeming to suggest that the bomb threats targeting Jewish institutions, along with the recent vandalism of Jewish cemeteries, were done to harm his image or that of his supporters rather than perpetrated by the latter.

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118. Adrienne Mahsa Varkiani, *Hours after Trump signs Muslim ban, Texas mosque goes up in flames*, ThinkProgress (Jan. 28, 2017), https://thinkprogress.org/islamic-center-of-victoria-fire-8a683f632a7a#.molixd7;

March 4, 2017, however, supporters at a pro-Trump rally in Phoenix called for the genocide of liberals and deportation of Jewish people.120

Notwithstanding these disturbing developments, in the Post-Civil Rights era, Blacks have become more integrated into both the public and private spheres of society. Moreover, the greater frequency of Whites and Blacks living in the same neighborhoods, working in the same offices, and attending the same educational institutions has led to increased friendships, dating, and intermarriage across traditional racial boundaries since the Loving v. Virginia121 decision.122 Public attitudes toward interracial marriages, including those involving African Americans, symbolize more receptivity to these marriages, and the numbers of these unions continue to increase.

The 1980–2000 United States censuses, the American Community Survey of 2008–2010, as well as Pew Research Center’s 2009 nationwide telephone surveys exploring public attitudes toward intermarriage, capture these developments. In 2008, 14.6% of all new marriages were interracial, more than double the percentage in 1980 (6.7%). More than a third of adults (35%) said they have a family member who is married to someone from a different racial group. Furthermore, 43% of Americans said the increasing number of interracial marriages has had a positive influence on society, whereas 11% said it has had a negative influence, and 44% said it has made no difference.123

In 1980, 3.2% of currently married adults had a spouse from a different racial group. By 2010, these marriages reached a record 9.5% or 5.4 million of a total of 56,510,377 marriages.124 Whites continued to be the least likely to marry interracially (about 4.7%).125 However, in absolute terms they were involved in interracial mar-

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121. 388 U.S. 1 (1967).
122. Davis, supra note 3, at 68-73; Robert E.T. Roberts, Black-White Intermarriage in the United States, in INSIDE THE M IXED M ARRIAGE: A CCOUNTS OF  C HANGING A TTI-
riages more than any other racial group given their demographic majority. Consequently, the overwhelming majority of interracial marriages involve a White American and a person of color.\textsuperscript{126} For all Blacks who were currently married in 2010, 8.9\% were interracially married. This included Black-White unions that totaled 7.9\%, which has tripled over the last decades.\textsuperscript{127}

That said, interracial marriages involving the currently married population of African Americans have remained small in numbers compared to those of other groups such as Latinas/os or Asian Americans. The percentage of interracially married individuals was roughly 30 percent for both groups.\textsuperscript{128} The share of intermarriages among all currently married Latinas/os was 17.4\%. For all Asians who were currently married the share of intermarriages was approximately 16\%.\textsuperscript{129} If, however, intermarriages reached an all-time high of 9.5\% in 2010, these marriages are miniscule in terms of numbers. The overwhelming majority of Americans (90.5\%) still married someone of the same racial group. Furthermore, while multiracials of White and Native American or White and Asian American ancestry, for example, overwhelmingly tended to marry White spouses, this effect was not present for White and Black multiracials. This further complicates notions that decreased barriers to interracial relationships can be generalized across populations of color. It also further highlights the continued social distance between White and Black Americans, as well as the continued significance of hypodescent for people with Black ancestry.\textsuperscript{130}

Furthermore, the comparatively more egalitarian gains in the private sphere do not necessarily translate into greater equality in the public sphere. Blacks continue to be disproportionately retained at the bottom of society in terms of occupation and income. Blacks overall have higher rates of unemployment, poverty, and incarceration, fewer years of education, shorter life expectancy, and overall lesser wealth and quality of life.\textsuperscript{131} Consequently, Obama's significance as the first African American elected to the nation's highest office cannot be underestimated. It symbolically demonstrates the considerable gains some Blacks have made in the Post-Civil Rights era. Obama's

\begin{thebibliography}{99}
\bibitem{126} Frey, \textit{supra} note 125, at 195, 196.
\bibitem{127} \textit{Marrying Out}, \textit{supra} note 29.
\bibitem{128} Frey, \textit{supra} note 125, at 195, 197.
\bibitem{129} \textit{Marrying Out}, \textit{supra} note 29.
\end{thebibliography}
election transformed the aesthetic of the nation’s political landscape and instilled a sense of pride and optimism in African Americans while inspiring more Black youth to realize their potential for advancement.\footnote{Taylor, supra note 58, at 140-41.}

Moreover, the increased public attention to ancestry and racial composition was directly attributable to Obama’s open discussion of his own multiracial background.\footnote{Dedman, supra note 45.} That openness, along with heightened interest among lay and professional genealogists, coupled with the ease and increased sophistication of DNA testing—which now makes it possible to verify the centuries of extensive racial intermingling—has provided the United States with an opportunity to embrace itself as a more complex and interconnected racial terrain.\footnote{If Obama’s biography has suggested his background does not include slave ancestors, genealogists of Ancestry.com have discovered marriage and property records, which, along with DNA evidence, challenge that assumption. Their findings indicate Obama’s maternal lineage may include an individual of African slave descent in colonial Virginia named John Punch. Sheryl Gay Stolberg, Obama Has Ties to Slavery Not by His Father but His Mother, Research Suggests, N.Y. Times (July 30, 2012), http://www.nytimes.com/2012/07/30/us/obamas-mother-had-african-forebear-study-suggests.html?pagewanted=all; Dedman, supra note 45.} Obama’s interracial parentage is thus symbolically important in terms of Loving’s promise. Yet that promise remains more aspirational than actualized in terms of progress toward a more inclusive and egalitarian society.\footnote{Maillard & Villazor, supra note 21, at 4.} In fact, the collateral impact of Obama’s multiracial background, along with his hopeful campaign promises, generated unrealistic expectations among voters. Many imbued him with an almost messianic ability to cleanse the nation of its racial sins. Yet racialized patterns in housing and education have made real egalitarianism all but unattainable, despite the grand illusion that egalitarian racial integration was imminent.

Indeed, the United States is integrated only to the extent that White and Black Americans come into contact with each other more frequently in public places and, significantly less often, in the private sphere. If their lives intersect more than previously, most White and Black Americans still tend to live in separate, mistrustful, unequal, and sometimes mutually downright hostile worlds.\footnote{Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal ix (1992); Leonard Steinborn & Barbara Diggs-Brown, By the Color of Our Skin: The Illusion of Integration and the Reality of Race 3-28 (1999).} Although the relationship between race and opportunity has changed, the status accorded race remains essentially unchanged. For White Americans—regardless of gender, culture, and class—race locates wealth, power, privilege, and prestige; for Black Americans—irrespective of gender,
color, culture, or class—race identifies disadvantages and constraints, however informal, subtle, or elusive they may be. This does not preclude the achievement of a more racially egalitarian society. Yet Steinhorn and Diggs-Brown point out that this requires hard work, risk, sacrifice, and a willingness to take collective responsibility for the necessary “social engineering, constant vigilance, government authority, [and] official attention to racial behavior” for the greater national good.137 It also requires a more honest assessment of the factors that continue to keep African Americans in a disadvantaged position, not to mention a more accurate rendering of the historical and cultural forces that put them there in the first place.

137. STEINHORN & DIGGS-BROWN, supra note 136, at 222-23.
50 YEARS OF **LOVING**: ESSAY

**ROBERT BRACAMONTES BLACK CROW†**

Our input into how society is structured and functions is often discarded, because the colonized are not supposed to analyze the slave master’s authority or blessings.

In 1967, I was thirteen years old and fell in love with a girl named Pat, and today, we have been married for almost forty years. We walked holding hands as we passed my family’s home. After several weeks my mother asked who was the Chinese girl. It was the very first time in my life that I realized that Pat was different.

Many might say we were lucky that *Loving v. Virginia* helped make this marriage possible. But what did it actually allow? It gave us permission to become part of the societal experience reserved for those in control of a white supremacist society. It was a road to assimilation.

As we grew older I asked, “Pat, did you know I was Mexica Indigenous?” She said yes, and I explained that I never saw her as Chinese when we first met. It was those watching that pointed it out. It is society, not formal law, that still stigmatizes us about being different. But no matter what happened as a result of *Loving v. Virginia*, society does not change as simply as the stroke of a pen or writing a new law.

Fast forward to the mid-nineteen nineties, when we are reminded about the strong hold of white supremacy and racist thoughts as we walked along the beach. We walked with our five children on the north side of the Santa Monica pier. I was recovering from a back injury. Several young white men and women are staring at us as we walk in proximity. They scream out the clearest words I have ever heard, “Hey, you Niggers don’t belong on this side of the pier.” They made it clear that we had created a mud race, hapa race, which meant our children were incomplete.

*Loving v. Virginia* made it clear that race could not interfere with the marriages between races, but it did little to curb the reality of racism and white supremacy.

According to Judge Leon Bazile:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And, but

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1. 388 U.S. 1 (1967).
for the interference with his arrangement, there would be no cause for such marriage. The fact that he separated the races shows that he did not intend for the races to mix.²

Marriage is but an illusion of something loving. It is in fact a maze of legal obligations established to gain property and perhaps receive public approval of a union between two people. My love and affection for my wife remains the same from the time I met her, when we were both thirteen years old, to this day. It has nothing to do with marriage, even interracial marriage like ours.

Laws in America are often bent on punishing the slave, those of us that have never been seen as equal to the white master. And equal and freedom are different for us. To be equal is to be the same as one's slave master. To be free is to have the choice to live with dignity outside the system of white supremacy. And not engage in the perpetuation of a dominance accepted.

So, did Loving v. Virginia change the world? No. Did it change a law? Yes. And now interracial couples can encase themselves in a prison of legal obligations that have nothing to do with love.

Yes I live in that scenario of the colonized mind. We are still married, but how are we received away from the letter of the law? The law was changed for my wife and I, so we could live happily ever after.

Do civil rights laws impact the deep seeded white racism that exists in the fabric of society? Is interracial marriage truly accepted?

If we add the symmetry of Emma Goldman's views on marriage, then add race, we have a harsh reality to consider. In 1914 Emma Goldman said, “Marriage and love have nothing in common; they are as far apart as the poles; are, in fact antagonistic to each other.”³

After the passage of Loving v. Virginia, all people of color were now given permission to marry white people. How gracious is the law of white supremacy? Those that were previously thought of as too inferior to be married to whites are given permission by the occupation forces, the settlers.

When I first saw her, she was as beautiful as a million sunrises, a million sunsets. I knew I wanted to spend the rest of my life with her. Oh and race never entered my mind. Love is void of race. It does not need patriarchal institutions to exalt love.

Race judgment is the creation of white supremacy. The Europeans brought it with them during the American Holocaust, the Geno-


³. EMMA GOLDMAN, Marriage and Love, in Anarchism and Other Essays 233 (1914).
cide of ninety-five percent of my Ancestors. It includes us and excludes us as it sees fit to maintain supremacy. To exclude us from marriage with whites seems unreasonable, but to give permission to marry a white person is equally arrogant and racist. The Supreme Court did not have to rule on how beautiful or how completely in love I was with her. Love has nothing to do with marriage or race. Marriage is an institutional conundrum designed for the dominants in this society.

My Ancestors’ society was filled with women who were doctors, teachers, leader warriors, and worked side by side with men as equals. During the same period women in Europe were being burned at the stake for wanting to learn to read.

It is not a great honor to be part of an institution that engages women and belittles Indigenous people into a patriarchal racist system. We cannot let anyone dictate how to love, when to love, and what love is. Each group of people is different with all of their beautiful cultures and those cultures need to remain intact. Absent of preconceived ideas of what is a happy legal life according to colonial standards.

Robert (Bob) Bracamontes
Yu-va’-tal ‘A’lla-mal (Black Crow)
Acjachemen Nation, Juaneno Tribe
Mni Wiconi
50 YEARS OF LOVING: WHAT’S WRONG WITH BEING COLORBLIND?

JESSICA HARTLEY SODEKE†

When I was a little girl, as far as I was concerned everybody looked like me. Jesus was white, so was Santa and every single one of my classmates. My mom was white, so was my dad, so was my whole family and anyone I saw in our tiny, rural Missouri town. Our exposure to other races was on television and most of the time I was not allowed to watch any of that programming—specifically what my dad referred to as “thugs” on the news or the late night comedy show, In Living Color. Even the closest stores did not carry ethnic baby dolls and my books were filled with white faces. I was completely colorblind at that point in time. Closed off from exploring not only other races, but also cultures that were different than rural, white America.

That changed on a shopping trip to the big city (Kansas City) when I was four years old. My parents made this hour and a half trip to the JCPenney outlet mall a couple of times each year. While mom and dad hunted for bargains, my sister and I would weave in, out, and under the clothing racks until our mother called us over to stretch a shirt across our bellies to measure.

It was during that shopping trip that I remember very clearly my first experience interacting with a black person. And it did not go well.

A young, black man with his white partner by his side pushed a stroller with their beautiful biracial baby around the jewelry counter. They stopped to browse and my sister and I, perched under a clothing rack, watched them. I noticed he was different than everyone and pointed it out to my sister. She was a year older than I and a bit of a know-it-all so she told me “they like to be called niggers.” Armed with a fancy new term and excited to use it, I wiggled out from under the rack and walked up to the family. “Hi nigger,” I said, as politely as I could.

Things did not go how I had planned. I thought they would be impressed that I knew this fancy new word. Instead, the situation

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quickly became chaotic and scary. As my dad dragged me toward the exit I watched my mother. Her back was pressed against a wall of jeans, and the tall, now scary black man pointed his finger toward her face.

Dad and I sat in the car while mom fended for herself in the outlet mall. I tried to piece together what had happened and what would still happen as best as my four-year-old mind could. All I really knew was that I was in trouble because I used a word that was not nice. It was a swear word.

I do not know where my sister picked up on the bad bit of terminology, especially because the “n word” was not used in our household. Growing up in a town full of ignorant racists I am not surprised that is what she thought. I do not blame her either. But we still had much to learn. For us, it was a good first lesson in diversity.

My mother probably would not agree. It is not a memory we really share over dinner with houseguests. It was a shameful experience. The man came up behind her with a mouth full of dirty words and completely caught her off guard. She apologized profusely and instead of feeling fearful, she felt compassion for him. She too had very little experience with black people so she explained as best she could that we lived far in the country and never interacted with black people. In fact, that was probably the closest I had ever been to a black person. Her cheeks burned as she tried to explain we really are not horrible people who burn wooden crosses and dangle nooses from tree limbs. She assured him that she does not even use that kind of language and certainly did not teach it to me; she did not even know we knew it.

I am thirty-two years old now and I will never forget that day. As we pulled away from the outlet mall, I stared out the car window, trying to swallow the lump in my throat. I did not mean to use a nasty word or to hurt that poor man’s feelings or to put my mom in that situation. I was not scared that he was different; I wanted to be nice and accepting. I just did not know the right way. From that day on, “nigger” became one of those words I tucked away in my mind never to be used in front of my parents again. Now when I heard it, I recognized it. I started piecing instances together when I heard a family member or a schoolmate say it. It was a bad name for a black person. I did not know where it came from. I did not know why black people hated to hear it from white people. In fact, I knew black people called each other it so, to me, it was just a confusing term.

Throughout school we never really learned about all of black history. We discussed slavery, and if we talked about the Civil Rights movement I do not really remember it. I did not care. I was white,
after all. It did not have a lot to do with my friends or me, and our teachers (many of whom grew up in the same or similar surrounding communities) did not make the effort to help us relate to someone being persecuted because of his or her skin color. We talked about agriculture and science, math and WWII, we would talk about God before we discussed racism.

In junior high school, we had one biracial student move to town. I spent time with him, along with just a handful of my friends. He was a lot like us on the inside, but on the outside he was clearly different. I remember we would ask him about his skin color and what it was like to be black and what his family was like. It was as if we truly believed he would be different because his skin had a bit more melanin. I was completely enamored by his uniqueness. Not everyone was. Within weeks he found a noose dangling in his locker and his family moved away. We never had another “different” person attend our school, except for a half filipine, half white family that had deep family roots in the community, and out of all the sports teams we played, there was one black athlete. The only steady exposure to African American culture in my life was through music—Color Me Badd, Boys II Men, and All-4-One—to name a few.

It was not until college that I found myself interacting with many cultures. People of all races were in my classes, in the cafeteria, in my study groups, on the sports teams, in the bars, everywhere.

A year or so into college I took a job at Dairy Queen. It was there that I met KeOnna. To be honest, I was very nervous to work with her. I was under the impression that all black women were loud, mouthy, and angry. I kept my distance but as a manager, she was often tasked with teaching me how to do things (like perfecting the famous Dairy Queen cone curl). The longer I worked with KeOnna the closer we became. Before I knew it, KeOnna was more than a co-worker, she was a friend. A really good friend. We swapped secrets, talked about boys, crashed at each other’s apartments, and she took the time to answer my silly questions about African American culture. Then one time she asked me to come home with her and meet her family.

I do not want to admit what I expected and the reality was nothing like I had imagined. Her mom is kind and funny and welcoming. Sure, she made the best mac and cheese and collard greens I had ever had, but that was the only time during that visit that they fit the stereotype I had been taught. Her family was “normal.” Her mom not only had a full-time job, she also owned a motorcycle club. No one was in jail. There were not drugs and guns everywhere. And it was for the most part, a lot like my family. There were pictures on the wall full of
black faces and even her mom’s knick-knack collections were black figurines. I did not even know these types of things existed. I loved her family. Sure, I felt a little out of place as a very white, very uncultured girl from the middle of nowhere, but they welcomed me. We broke bread. We talked, laughed, and we were just people.

It was this experience that changed my perspective. I remember taking time after that to open my eyes and my mind. I was more aware of the black people I saw on television and in our community. There were very successful black politicians, wealthy black families, and black entrepreneurs and inventors. It sounds a little silly now but I never took the time to truly see successful black people.

It saddens me that it took more than twenty years to realize we are all the same. Before that, “nigger” was just a bad word, black people could not keep a job, and because I was white, I just assumed I was destined to do greater things than people who were not white. Boy was I wrong.

In 2012, KeOnna graduated from Creighton University with a Clinical Doctorate Degree in Occupational Therapy. She became the first in her family to graduate college, added a doctorate, and now works in an Omaha hospital as an occupational therapist.

I think part of the reason KeOnna and I got along so well is because we had similar taste in men. I had for many years been attracted to black men and she was my safe zone. I could be myself around her and ask her lots of questions with no judgment. Questions like: What does this slang term mean? Why do you put grease in your hair? If I say this, does that sound racist?

I dated black men quietly. I did not know how my family would react or my friends back home so I did not say anything until I needed to. The only family member I felt comfortable enough to expose my secret to was my sister (yes, that same one!).

She had her own stories of intermingling with other cultures in college and by this time we had both relocated to Lincoln. While Lincoln is not a thriving metropolis, it is no stranger to diversity. After I had dated a series of black men and brought them along to dinner, she was used to it. The time finally came to open up to the rest of the family when I met Sam.

I really liked Sam and so did my sister. He was unlike any man I had ever met. He was polite, well educated, and very thoughtful. I was able to build trust with him and before long we were ready to get married.

The fact that he is black was not a complete surprise to my parents. I had been dropping subtle hints for several years that I had a preference for black men. But, at that time, a mixed marriage was not
something they really wanted for me and there was some resistance. My parents were not racist. They were ignorant and still living in that same tiny, predominantly white town where they had limited exposure to other cultures.

Getting married for us was not nearly the struggle it was for reluctant Civil Rights heroes Richard and Mildred Loving. The Lovings were a 1960’s interracial couple whose love defied all odds when they fought the legal system for the right to be married. At that time, there were still twenty-four states where interracial marriage was illegal. With the backing of the American Civil Liberties Union, the Lovings were able to convince the United States Supreme Court to strike down any remaining segregation laws, including their freedom to be married. While we did not have to make a case to the United States Supreme Court, we did have some obstacles.

My husband is Nigerian and we decided to get married eight months after we met. As if navigating the sea of immigration paperwork was not difficult enough, the biggest battle was gaining acceptance from my family. It was heartbreaking but my parents did not attend our ceremony. Regardless, it was a beautiful, intimate event. I had my sister and brother-in-law by my side, he had his brother and uncle by his side, and though it was not the wedding I had dreamed about, it has become one of my favorite memories. On Loving Day, June 12, 2012, we were married. I chose Loving Day because it represented how far we have come as a nation and that I could choose to marry this man, whatever his color, wherever I wanted, whenever I wanted; and “wherever” happened to be the former Federal Courtroom at the Grand Manse in Lincoln, Nebraska.

My parents have since changed their mind and my family loves Sam. I would not say our union was a courageous act—my dad might call it rebellious—but whatever it was, marrying who I wanted was worth the risk and it was the experience my parents, family, and some friends needed to open their eyes to a whole new world.

Now family dinners include a mix of American and Nigerian dishes. The faces in the pictures on my wall are pink, chocolate, and cinnamon and books in our library are about many different cultures and people.

Hearing the story of the Lovings, as well as the stories of other Civil Rights activists, and meeting “different” people has profoundly impacted my life and helps us “outsiders” to understand what it is like to be viewed as less for something you cannot control. In my experience, so many of those stories were not shared with me until I took it upon myself to try to relate and put myself into the shoes of those who were persecuted for something so silly as skin color.
I have now stood in the shadows of Martin Luther King, Jr.: where he was born, where he preached, in his home that was bombed in Montgomery, where he was murdered, and where his body rests. I visited the site where Rosa Parks was arrested for refusing to give up her seat. I talked to a man outside Brown Chapel in Selma who marched to the Edmund Pettus Bridge along with 600 other people to quietly protest racial injustice in 1965. I met Rev. Robert Graetz and his wife Jean, a white couple who were sent from the west coast to the south in 1955 to pastor an all black church. Graetz was appalled by the extreme racist behaviors in the south and became a friend of and activist for Martin Luther King, Jr. and Rosa Parks. I have seen the home of white Judge Seybourn Lane, who voted against special seating for white bus riders and helped to end the Montgomery Bus Boycott. I have walked through Kelly Ingram Park (across from the Birmingham Civil Rights Institute and the Sixteenth Street Baptist Church) where many African American lives were lost at the hands of ignorant, racist people.

Each experience opened my eyes and touched my heart and the more I learned and saw, the easier it was for me to empathize. These stories need to be shared with not just the black people who relate to them, but especially to other races and cultures in our nation who cannot: White people who hate black people; White people who do not understand black history; even people from other countries who do not share our history. Despite the color of my husband’s skin, our black history is not his black history. He grew up in a world where most people looked like him. When my husband and I walk by an old white man with lips pursed to say something nasty or we see a woman clutch her bag extra tight when we pass, he is nearly oblivious. And, in today’s world, that is dangerous. As a black man living and working in America he needs to know and understand and not be naive. Naive like I was and like so many still are.

I believe it is important to teach America to NOT be colorblind. Instead, we should see all colors. To embrace each race for the history and culture that has formed the world we live in. To have friends and family who are different so that when they are hated for it, we can empathize and educate and stand up to the ignorant, the racist, and the hateful and try to help them see that we are all really just people.

When I share our wedding story and the significance of Loving Day, one of the first reactions is, “Wow, I didn’t know that.” Many cannot even fathom that there was a time, 50 years ago, that two people could not get married because they did not look the same.
Loving v. Virginia\(^1\) serves as a landmark in the journey for Civil Rights that many in our country are too ashamed to own up to. Much of what happens in the shadows is now being exposed. Our nation is experiencing a revival of sorts—a rude awakening that there is still a clear divide in accepting people who are different.

Sam has made me a better person. He has taught me patience, how to be caring, and how to relax. He has shown me love like no other and he listens like I aspire to. But most importantly, he has been a blessing to my entire family. He has changed the way we all see different cultures, especially black people. In August 2017, Sam and I will welcome our first child and my parents are ecstatic. They are excited to see our family grow, excited to love and nurture another beautiful child, and especially excited because they are confident Sam will be a wonderful father, black skin or not. He has crushed the stereotype of what a “black man” represented to them. He is now a son-in-law, a brother, a grandson, a nephew, my partner, our future, a hard worker, funny, Godly, and a provider. He is finally just one of us.

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1. 388 U.S. 1 (1967).
THE RADICAL ACT OF LOVING: 
HOW THE ORDINARY BECOMES 
EXTRAORDINARY

AMANDA GUIDERO, PH.D.†

It has been nearly fifty years since the United States Supreme Court handed down the Loving v. Virginia decision, which banned state anti-miscegenation laws. With this important anniversary comes increased focus on the couple behind the decision, Richard and Mildred Loving. While many have struggled with the way the couple has been represented, not as civil rights crusaders, but as simple hard working people who wanted to live close to their families, I argue it was exactly their commitment to each other and their family that led to constitutional change. In this essay, I reflect on the ordinary actions that people have taken over time that have resulted in drastic changes altering the fabric of our society. I end with a reflection on how we can continue to challenge systems of injustice through everyday actions.

It has been nearly fifty years since the United States Supreme Court released its opinion on Loving v. Virginia effectively redefining marriage in the remaining sixteen states that had anti-miscegenation laws at the time of the decision. Not only would this decision allow the Loving family to live in Virginia, but it enabled countless others to live openly (even where resistance to the decision remained strong) and gave rights to the children of these marriages. In the current political and cultural climate, the Loving v. Virginia decision seems particularly relevant and as June 12, or Loving Day, draws nearer, I find myself reflecting on the Loving legacy and what it means for those working toward social justice, equality, diversity, and inclusion. For me, the Lovings are inspiring not because they achieved a major victory in the Civil Rights Movement (although that must be celebrated as well), but because they offer an example of how we can interact with the people around us in a way that normalizes inclusion and celebrates difference.

As audience members of the film Loving might have observed, Richard and Mildred Loving did not set out to be Civil Rights champions. Indeed, to the surprise or irritation of some, the Lovings are por-

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1. 388 U.S. 1 (1967).
trayed as simple people trying to get back to Virginia to be closer to their families. However, real life accounts of the Lovings support this portrayal. In an article in *Life Magazine*, the Lovings described the motivation behind the case as “purely personal.”

In the same article, Richard stated, “We have thought about the other people, but we are not doing this just because somebody had to do it and we wanted to be the ones. We are doing it for us, because we want to live here.”

On the 40th anniversary of the *Loving v. Virginia* decision, Mildred released a statement that both acknowledged the importance of the decision, but also reaffirmed the personal motivation behind the case.

When my late husband, Richard, and I got married in Washington, D.C. in 1958, it was not to make a political statement or start a fight. We were in love, and we wanted to be married. Not a day goes by that I don’t think of Richard and our love, and how much it meant to me to have that freedom to marry the person precious to me, even if others thought he was the “wrong kind of person” for me to marry. I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry. I am proud that Richard’s and my name are on a court case that can help reinforce the love, the commitment, the fairness, and the family that so many people, black or white, young or old, gay or straight, seek in life. I support the freedom to marry for all. That’s what *Loving*, and loving, are all about.

This continued hesitancy to situate themselves in the larger Civil Rights Movement might be surprising, but for me it makes the *Loving* decision that much more compelling—and powerful. The Lovings’ commitment to each other and their families led to the infamous United States Supreme Court decision, resulting in extraordinary social change and paving the way for future generations of couples and their children to be visible in United States society. This is not to downplay the important role that leaders such as Rev. Dr. Martin Luther King, Jr. played in ushering social change, but rather the acknowledgement that the simplest actions can also have extraordinary ramifications.

The true legacy of the Lovings is shared by the countless others that have engaged in ordinary actions that led to extraordinary results. While not all reach the level of notoriety as the Lovings have in the United States, their stories are as poignant. In perhaps the most

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globally recognized case, Malala Yousafzai risked her life to pursue her education in Pakistan after a Taliban order barred women and girls from education. On October 9, 2012 Malala followed her usual routine and boarded a bus to go home after school, but instead of arriving safely to her destination, she was shot in the head. Not only did Malala survive, but she has since become a global leader advocating for freedom of speech and education, earning a Nobel Peace Prize along the way. In post-dictatorship Argentina, after a dirty war that led to the disappearance of up to 30,000 people, one grandmother’s search for her missing grandson resulted in the establishment of Abuelas de Plaza de Mayo (Grandmothers of the Plaza de Mayo). The group has identified over 100 children of those who went missing during the war and driven scientific advancements in DNA identification.4 Closer to home, United States public support of marriage equality emerged after dozens of individual couples pursued the same legal rights as heterosexual couples, culminating in the dismantling of the Defense of Marriage Act and the military policy of “Don’t Ask, Don’t Tell,” and leading to the Obergefell v. Hodges5 decision. Some of the couples, including Jim Obergefell and John Arthur, John Baker and James McConnell, and Karen Thompson and Sharon Kowalsi, pursued their cases in court and, like the Lovings, had to cope with difficult legal circumstances prior to the landmark Supreme Court decision. One final example may be found in Father Flanagan, who aimed to help young boys so that they could grow into productive citizens by opening a home that eventually became the widely acclaimed Boys Town in Omaha, Nebraska.

These stories represent an array of actions that any person would or could undertake in similar circumstances. They share the common theme of individuals pursuing something deeply personal and in their quest, inspiring something much greater. The legacy of the Lovings lives on today, not only because of the legal precedent established by the Loving v. Virginia decision, but because the Lovings themselves were people who just wanted to live the way those around them lived, in their own home with their children, and close to family and friends. They normalized what at the time was considered by some to be anything but normal, and in so doing, paved the way for all sorts of relationships to follow. For me, Loving Day is so much more than a celebration of the United States Supreme Court decision; it is a validation of relationships that cross socially constructed barriers, including ethnicity, gender, religion, sexual identity, and so on. It is about nor-
malizing and celebrating that we are all individuals, and that surface level identity is only one piece of the kaleidoscope that makes up a person.
50 YEARS OF LOVING: A REFLECTION ON SEEKING JUSTICE THROUGH LOVE AND RELATIONSHIPS

NICHOLAS A. MIRKAY†

If an openly gay man or woman was asked twenty-five years ago (1992) if the country would sanction same-sex marriage, the response would likely have been one of utter incredulity. At that time, the AIDS crisis was in its second decade and those infected with the HIV virus were still facing a high probability of death.1 The first combination drug therapies, often referred to as “cocktails,” that significantly improved the life expectancy for those infected with the HIV virus, were not introduced until 1996.2 The Lesbian, Gay, Bisexual, and Transgender (“LGBT”)3 community was almost singularly focused on combatting the AIDS epidemic, which included fighting for increased funding and research as well as caring for the affected members in their communities. I “came out” around that time, eventually meeting my life partner in 1998. Like most gay men at the time, we were not “out” at work nor with our primary physicians, utilizing anonymous HIV testing at the city health clinic. Being open about your same-sex orientation in a Midwestern city was a freedom few of us exercised, or if we did, we did so with extreme caution. Accordingly, this part of my identity was placed in a box kept separate from professional and certain personal segments of my life. Although my life partner and I participated in a non-legally-binding commitment ceremony in 2000, we had no expectation that our commitment would be legally recognized until we were old and gray at best. I came from a strong Sicilian, Roman Catholic heritage where marriage was sacrosanct, so I was satisfied in not reconciling my committed relationship with that sa-

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2. Id.
3. Although the term “LGBT” (Lesbian, Gay, Bisexual, Transgender) is used generally throughout this reflection to refer to the movement for equality for those who identify as other than heterosexual, the focus of this reflection is on same-sex marriage rights and thus is primarily addressing sexual orientation (i.e., lesbian, gay, and bisexual).
cred view of marriage. Instead, my partner and I were gratified to have the acceptance of our families and friends and to continue to work on education and awareness of LGBT issues through local and national organizations. Without the statutory protections afforded legally-recognized marriages, we necessarily utilized trusts and other estate planning documents to ensure our wishes of providing for each other at death were honored.

The significance of the fiftieth anniversary of the United States Supreme Court’s decision in Loving v. Virginia\(^4\) can be neither underestimated nor underappreciated by the members of the lesbian and gay community presently in, or aspiring to be in, legally-recognized marriages. The thematic overlaps between Loving and the Supreme Court’s more recent decision in Obergefell v. Hodges\(^5\) are inescapable.\(^6\) Both cases involve the marital rights of two individuals who society viewed as non-traditional and, thus, inappropriate marital partners. In both cases, the court system and a segment of society, in varying degrees, evolved to accept the marital rights of interracial and same-sex couples, contrary to another segment of society that did not condone and protested the conferral of such rights. Mildred Loving, one of the plaintiffs in Loving, clearly saw the connection between her and her husband’s fight for racial equality in marriage and the struggle for same-sex marriage recognition. She endorsed equal marriage for all couples, regardless of their race, sex, or sexual orientation in a statement entitled “Loving for All,” issued for the fortieth anniversary of the landmark decision:\(^7\)

My generation was bitterly divided over something that should have been so clear and right. The majority believed that what the judge said, that it was God’s plan to keep peo-

\(4\). 388 U.S. 1 (1967).
\(7\). Public Statement, Mildred Loving, Loving for All (June 12, 2007), http://archive-freedomtomarry.org/pdfs/mildred_loving-statement.pdf. It is important to note that although there are definite thematic overlaps between Loving and the same-sex marriage cases, the petitioners in Loving were charged with a felony and suffered the criminal sanction of confinement for marrying in Washington, D.C. and returning to live in Virginia. See Loving v. Virginia, 388 U.S. 1, 3-4 (1967). In contrast, individuals that were married in a state that sanctioned same-sex marriage (e.g., Massachusetts) and returned to a state that did not recognize that marriage prior to Obergefell (e.g., Nebraska) were not charged with a felony and subject to criminal penalties. This was due in part to the Supreme Court’s decision in Lawrence v. Texas, 539 U.S. 558, 578 (2003), rev’g Bowers v. Hardwick, 478 U.S. 186 (1986). Lawrence struck down Texas’s “homosexual conduct” law, which criminalized sexual intimacy by same-sex couples, and by implication, struck down similar sodomy laws still on the books in twelve other states. Lawrence, 539 U.S. at 573.
ple apart, and that government should discriminate against people in love. But I have lived long enough now to see big changes. The older generation’s fears and prejudices have given way, and today’s young people realize that if someone loves someone they have a right to marry.

Surrounded as I am now by wonderful children and grandchildren, not a day goes by that I do not think of Richard and our love, our right to marry, and how much it meant to me to have that freedom to marry the person precious to me, even if others thought he was the “wrong kind of person” for me to marry. I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry. Government has no business imposing some people’s religious beliefs over others. Especially if it denies people’s civil rights.

I am still not a political person, but I am proud that Richard’s and my name is on a court case that can help reinforce the love, the commitment, the fairness, and the family that so many people, black or white, young or old, gay or straight seek in life. I support the freedom to marry for all. That’s what Loving, and loving, are all about.8

Notwithstanding Mildred Loving’s poignant statement, the comparison of the two landmark decisions in Loving and Obergefell also yields some stark differences in the comparative struggles for racial and sexual orientation equality. One of the greatest differences is the American public’s opposition to, or approval of, granting marital rights. When Loving was decided in 1967, approximately seventy-two percent of Americans remained opposed to interracial marriage, with sixteen states still sustaining anti-miscegenation laws.9 The Supreme Court struck down those laws, effectively superseding public opinion at the time. In contrast, at the time of Obergefell, approximately fifty-eight percent of Americans supported marriage rights for same-sex couples; such support essentially doubling from 1996 when only twenty-seven percent approved.10 In addition, thirty-seven states already conferred marital rights to same-sex couples at the time of the Supreme Court’s decision.11

So, from a public opinion viewpoint, the Supreme Court was on more solid footing when it ordered the remain-

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8. Public Statement from Mildred Loving, supra note 7.
ing thirteen states to confer marriage rights to same-sex couples than when it outlawed the remaining states’ bans on interracial marriage. Nevertheless, Justice Anthony Kennedy, who wrote the majority opinion in *Obergefell*, acknowledged numerous times the “urgency” and “continuing harm” to the petitioners, thus imposing a duty on the Court to address the marital rights issue. His explanation applied as much to the petitioners in *Loving* as it did to those aggrieved in *Obergefell*:

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution “was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”

Another primary difference between the two marriage rulings was the timing of the ruling in the overall history of the respective equality movement. As one commentator explained: “Whereas *Loving* marked the endpoint of an era of the institutionalization of formal racial equality norms in constitutional Equal Protection doctrine and in federal statutory law, *Obergefell* stands much closer to the beginning of such a process.” At the time of the *Loving* decision, federal laws protecting against racial discrimination, thereby establishing formal racial equality, had been enacted. Eradicating the remaining bans on interracial marriage was the culmination of a racial equality movement that reached its zenith in the 1960s. In contrast, although the LGBT community has been extremely successful in shifting public sentiment in a relatively short period of time, federal statutory and case law to date lacks any “explicit guarantees of formal equality,” thus permitting gays and lesbians to marry but still be fired in the

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workplace based on their sexual orientation. Furthermore, state-
wide employment laws that protect individuals from discrimination 
based on their sexual orientation are still lacking in a majority of states,
although protection in varying degrees is afforded by local 
ordinances. Accordingly, from a federal law perspective, it raises 
the question of whether the Supreme Court merely missed or inten-
tionally declined an opportunity in Obergefell to go beyond marital 
rights and more broadly ban discrimination based on sexual 
orientation.

Notwithstanding the differences discussed above, the Loving and 
Obergefell decisions share one significant result— their impact of legit-
imizing families by granting marital rights to interracial and same-
sex couples. To provide a brief background, the Obergefell decision 
was issued two years after the other two contemporary cases involving 
gay marriage rights were delivered by the Supreme Court on the same 
day: Hollingsworth v. Perry and United States v. Windsor. Hollingsworth 
addressed and ultimately overturned California’s Proposition Eight, which amended the state constitution to include a ban on 
same-sex marriages. Windsor primarily addressed the constitution-
ality of the Defense of Marriage Act (“DOMA”), which defined “mar-
rriage” and “spouse” for federal law purposes. The Supreme Court 
determined in Windsor that DOMA violated Fifth Amendment due 
process and equal protection restraints on actions of the Federal Gov-
ernment. What began in Windsor and Hollingsworth and continued 
in Obergefell was a focus on the family unit—same-sex parents and 
their children—and the notion of their entitlement to dignity and

17. Keith Cunningham-Parmenter, Marriage Equality, Workplace Inequality: The 
Next Gay Rights Battle, 67 FLA. L. REV. 1099, 1100-01 (2015) (stating Title VII employ-
ment protections do not apply to persons “based on their sexual preferences” (citing 
Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000))).
18. Anthony C. Infanti, Victims of Our Own Success: The Perils of 
20. Amar Khoday, The United States Supreme Court and Same-Sex Marriages: Did 
The Court Miss An Opportunity for Something Greater?, POX. ANIMAL, http://politi-
24. Id. at 417; Defense of Marriage Act, Pub. L. No. 104-19, 110 Stat. 2419 (enacted 
defined “marriage” as “only a legal union between one woman and one man as husband 
and wife,” and “spouse” as “only to a person of the opposite sex who is a husband or a 
25. Nicholas A. Mirkay, Equality or Dysfunction? State Tax Law in a Post-Windsor 
equal treatment under the law. 26 The Supreme Court opined in Windsor that DOMA equated same-sex marriages to “second-class marriages” and such differing treatment not only “demeans the couple” but also “humiliates tens of thousands of children now being raised by same-sex couples.” 27 As noted by one commentator, Justice Anthony Kennedy, who wrote for the majority in Windsor, addressed “children” nine times, despite the fact that the lesbian plaintiffs did not have any children. 28

In Obergefell, the Supreme Court explicitly stated that protecting children and families of same-sex couples was a key rationale in its determination that the right to marry is fundamental under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. 29 The Court explained that granting marital rights to same-sex couples permits their children “to understand the integrity and close-ness of their own family and its concord with other families in their community and in their daily lives.” 30 The Court acknowledged the “loving and nurturing homes” provided to children of same-sex couples and that “[w]ithout the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” 31

At the time of the Obergefell decision, my life partner and I had been together for almost seventeen years. We considered ourselves spiritually, even if not legally, married because of our 2000 commitment ceremony, and our family and friends considered us married as well. Accordingly, we did not feel a great compulsion to get married in any of the states that had legally sanctioned same-sex marriage prior to the Obergefell decision. As a tax attorney, I consistently communicated to my life partner that only when our marriage was legally recognized in all the states would such a decision truly make sense from a tax perspective. After Windsor, the complications of being married in one state with federal recognition, yet living in another state with nonrecognition, caused more dysfunction and complexities from a tax perspective than true equality. 32 The Supreme Court likewise acknowledged in Obergefell that “[b]eing married in one State but having that valid marriage denied in another is one of ‘the most perplexing and distressing complication[s]’ in the law of domestic rela-

27. Windsor, 133 S. Ct. at 2693-94 (citing Lawrence v. Texas, 539 U.S. 558 (2003)).
28. Johnson, supra note 12, at 421 (noting that the count also includes derivatives of “children”—e.g., “child”). Justice Kennedy likewise referenced “dignity” twelve times in the opinion, which was duplicated in Obergefell. Id.
29. Obergefell, 135 S. Ct. at 2600.
30. Id. (citing Windsor, 133 S. Ct. at 2694-95).
31. Obergefell, 135 S. Ct. at 2600.
tions,” promoting “instability and uncertainty.”33 Reminiscent of Loving, since we were domiciled in Nebraska, a pre-Obergefell Delaware marriage certificate would have been “no good here.”34

But one consideration eclipsed all those federal and state legal complexities—our son. Since he was several years old, he comprehended his difference as an adopted child of same-sex parents. As the states began allowing same-sex marriage, he often would mention that “we” should go back to Delaware, where we used to live, or nearby Pennsylvania and get married. Upon receiving clarification that only his two dads could marry, he would offer the perennial kid response of “I know.” But his use of the word “we” signified to my partner and I that he saw the worth in our marriage in that it legitimized his “different” family. Even though he always viewed his immediate family positively and proudly, which was reinforced by all the extended family and friends around him, our marriage would clearly allow him to appreciate “the integrity and closeness of [his] own family and its concord with other families in [his] community and in [his] daily life.”35

Once Obergefell was handed down by the Supreme Court we knew that the time for our marriage to be legally recognized had finally come.

Another consideration that was part of our decision to legally marry was the recognition and honoring of those before us who had fought for LGBT rights. Beginning in the late 1960s and all the way up to the Obergefell decision in 2015, countless men and women had valiantly fought legal and social battles for equality in society and in the workplace. At the core of this fight has been the right to love the person we choose, not who the state determines is appropriate. This theme of love and dignity is similarly present in Loving, where one of the A.C.L.U. attorneys involved in the case remembered Mr. Loving instructing him to “tell the court I love my wife, and it is just unfair that I can’t live with her in Virginia.”36 Mr. Loving’s statement was poignantly simple and powerful. Upon hearing that statement when watching both the documentary and the film on the Lovings’ battle for lawful interracial marriage, it immediately struck a chord with me. It reminded me of a core feeling I had retained since acknowledging my sexual orientation—let me live my life truthfully and without interference.

35. Obergefell, 135 S. Ct. at 2600 (citing Windsor, 133 S. Ct. at 2694-95).
36. Martin, supra note 34.
In determining the Constitution does not deprive same-sex couples of the liberty and personal autonomy associated with marriage—a connection on which the Loving decision was similarly based—\textsuperscript{37} the Court concluded its Obergefell decision with an eloquent declaration:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.\textsuperscript{38}

When my life partner and I renewed our 2000 commitment vows, and were “legally married” in October 2015, a slideshow documenting our life together ended with the first two sentences of the above declaration. In the words of Mildred Loving, I am now proud in my life and marriage to “reinforce the love, the commitment, the fairness, and the family that so many people... seek.”\textsuperscript{39} And as the Lovings so aptly demonstrated in their legal struggle and life journey, that is what loving is all about.

\textsuperscript{37} Obergefell, 135 S. Ct. at 2599.
\textsuperscript{38} Id. at 2608.
\textsuperscript{39} See Public Statement from Mildred Loving, supra note 7.
FILMIC CONTRIBUTIONS TO THE LONG ARC OF THE LAW: LOVING AND THE NARRATIVE INDIVIDUALIZATION OF SYSTEMIC INJUSTICE OR, PERFECT PLAINTIFFS IN AN IMPERFECT NARRATIVE: PERFECTLY OPTIMISTIC FOR AN IMPERFECT POST-ELECTION WORLD?

ALANNA DOHERTY†

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I. INTRODUCTION

“And the thing that really struck me with Loving was: You can legislate as much as you like, but you can’t legislate people’s opinions.”

The release of Jeff Nichols’s film Loving,2 on the eve of the fiftieth anniversary of the eponymous case it takes as its subject matter, Loving v. Virginia,3 provides an opportunity to examine the contributions a mainstream Hollywood film can make to the larger cultural dialogue, particularly following the election of President Donald Trump.

This Article posits that Loving presents a predetermined legal narrative as its filmic narrative, and in doing so repackages the Lovings’ historic civil rights struggle against wider systemic oppression as a personal victory won by triumphant individuals through the power of love. First, this Article will examine the ideological connection between film and law, as enabled through film’s affective realism and their similar use of narrative and ability to influence what society deems normative.4 Second, this Article will address how Loving narratively individualizes what was and is a shared struggle against institutionalized oppression as it tells the story of the Loving plaintiffs.5 Next, this Article will critically consider Loving as a civil rights nostalgia film, and examine its relationship to current manifestations of the same implicit racism.6 Finally, this Article considers a more optimistic reading of Loving specific to the post-election context in which it was released.7

II. NARRATIVE IDEOLOGY IN FILM AND LAW

There is a strong dialectic that exists between the law and popular culture. Inasmuch as “the law” is a concrete, determinative institution—a set of rules that produces outcomes for individuals—it is not

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1. Stephen Galloway, How Interracial Romance ‘Loving’ Became the Most Relevant Movie This Election Season, THE HOLLYWOOD REPORTER (Oct. 19, 2016, 6:00 AM PDT), http://www.hollywoodreporter.com/features/loving-relevant-movie-election-season-939253. This quote is by Joel Edgerton, the Australian actor who plays Richard Loving. Id.
2. LOVING (Random Films 2016).
4. See infra notes 8-23 and accompanying text.
5. See infra notes 24-51 and accompanying text.
6. See infra notes 52-73 and accompanying text.
7. See infra notes 74-78 and accompanying text.
static. The law is its own narrative body, gradually shifting with each case distinguished or overruled; each issue revisited anew through the eyes of a different judge; each new litigant and accompanying set of facts demanding creative interpretation and expanded application of precedent. In this sense, law is a continuing reinterpretation from within.

But the law is likewise subject to change through its continued reinterpretation from without. To the extent that lawmakers respond to the interests of their constituents, and that judges make choices with an awareness of contemporary ethos, there is an ongoing conversation between law and popular culture.

Indeed, the law is continually re-envisioned in a culture’s noetic space, a distinctive imaginative space maintained for questioning canonical institutions. Anthony Amsterdam and Jerome Bruner propose the concept of “noetic space” to describe the functional power of the collective imagination of a society. Noetic space is the distinctive imaginative space maintained for questioning a culture’s canonical institutions, like the law; for envisioning other ways to be, and therefore testing the limits of the possible. The dominant culture tolerates these disruptive possibilities in noetic space, where they are “nurtured by such ‘marginal’ institutions as theater, novels, dissenting political movements, styles of gossip and fantasy.”

But “some of them come in time to gain more solid support; and a few may eventually co-opt or replace institutions at the core of society’s cannon.” But “some of them come in time to gain more solid support; and a few may eventually co-opt or replace institutions at the core of society’s cannon.”

The imagining therein is thus not merely abstract, ontological rumination. Because noetic space is “specialized for testing the limits of the possible,” it is pragmatic and requires a verisimilitude that is not only truthful, but lifelike; the stories within it “must honor the limits of lifelikeness—the limits beyond which [it] cannot go without losing the imaginative engagement of the audience.” Thus, the connection to reality is its power: for to re-envision society in a way that is plausible and realistic is to overcome one of the most significant obstacles in implementing social change.

10. Marie-Claire Belleau & Rebecca Johnson, I Beg to Differ: Interdisciplinary Questions about Law, Language and Dissent, in LAW, MYSTERY, AND THE HUMANITIES: COLLECTED ESSAYS 145 (Logan Atkinson & Diana Majury eds., 2008). Cognizant of the pragmatic foundation to Amsterdam and Bruner’s concept, Belleau and Johnson offer “the dissent” as a component of noetic space. Inasmuch as a majority opinion is a definitive ruling in our American legal system, the dissent is the space within it that allows pushback against the enforceable outcome by accommodating an articulation of unenforceable reasoning. And often, the dissent has done just that: put forth an idea into the realm of possibility, which may not have been widely accepted in a particular cultural climate, but which was considered over time; and later, in a different social context, latched on to and used to upend previously good law—the precedent that was its source or origin for the legal imaginary. Clearly then, the process of the law itself recognizes the potential of considering alternatives. But to the extent that the dissent is inherently part of the hegemonic structure of law making, it is inescapably burdened by constraints of formalism such that its noetic potential is accordingly limited. Belleau and Johnson recognize this limitation, noting that the most “successful work in the noetic draws deeply on the tools of persuasion, attempting to convince its listeners on both the rational and the visceral levels” by dealing heavily in the realm of emotion: beliefs, desires, feelings, hopes, intention. Id. at 152. As such, it becomes necessary to consider
that serve as tools of narrative problem-solving, and seem to have a lot
do with orienting a culture’s views on what constitutes normativity
(ideology) and excellence (utopia) and how to foster the dialectic be-
tween them.\textsuperscript{11} Film\textsuperscript{12} is a particularly effective agent to this end
because of its ability to create realistic emotional depictions\textsuperscript{13} and
because it has the benefit of being highly accessible to mainstream

Moreover, much of the artifice in film is hidden under the guise of
realism, where intervention of the camera is easily forgotten when a
story becomes captivating.\textsuperscript{15} But the camera is never neutral or pas-
sive despite its perception as such. Indeed, the ideological potency of
film is derived from its ability to invoke its medium to powerfully ob-
scure the distinction between, say, history as it “objectively” hap-
pened, and its recreation of that history as narrative. While a film
may appear highly realistic, implicit are ideological decisions that in-
struct viewers on what to value, how to interpret socio-political
messages presented, and how, in light of these lessons, to act as indi-
viduals within those systems.

Because movies can be so seemingly realistic and so widely re-
ceived, they are often problematic conduits of information. To retell
history in narrative form is necessarily a reinterpretation that allows

other forms of commentary and critique more suited to emotion as capable of having a
profound impact on cultural conceptions, and therefore on law.

\begin{itemize}
\item \textsuperscript{11} The Educ. Psychology Series, The Pursuit of Excellence Through Educa-
tion 209 (Michael Ferrari ed., 2002).
\item \textsuperscript{12} I use the terms film and movies interchangeably; and reference to television is
also included, to the extent that it is an extremely similar—if not, at times, identical—
form, and one that is becoming increasingly cinematic.
\item \textsuperscript{13} See generally Roland Barthes, Camera Lucida: Reflections on Photograph-
phy (Richard Howard trans., reprint 2010) (1981). That it is people the viewer watches
onscreen inherently makes their subjective positions more relatable. See generally
Gilles Deleuze & Felix Guattari, What is Philosophy? (Hugh Tomlinson & Graham
Burchell trans., 1996); Brian Massumi, Parables for the Virtual: Movement, Af-
fact, Sensation (2002). Distinct from the affect produced by other forms, movies and
television foster a connection to reality through their use of physical human bodies,
around which stories unfold over the course of time like all people experience.
\item \textsuperscript{14} Blockbuster movies serve as cultural touchstones that allow people to share
stories, collectively relate to ideas, and make sense of widely held emotions; they subli-
mate cultural anxieties induced by institutions of power and repackage narrative
problems and solutions as implicit ideological messages. Enmeshed in the fabric of soci-
ety, mainstream movies give viewers a comfortable language through which to ingest
and discuss cultural ideology handed down to them, often without having to explicitly
confront distressing real-life implications.
\item \textsuperscript{15} By “the camera,” I refer not only to the device but to it as a creative phenome-
on—the power of the director and others involved in production to determine: what to
shoot, how to frame it, and thereby what to exclude; what is worthy of attention and
what is not; how people, images, or scenes deemed important enough to be included are
sequenced to produce meaning; how diegetic problems are framed and narrative trajec-
tories are crafted to solve them, and ultimately what those solutions entail ideologically.
\end{itemize}
for those with creative control to decide what to emphasize or exclude, and in doing so, to choose either to reinforce or challenge dominant power structures. This influence is of noted importance in films explicitly taking as their subject matter the law and those affected by it, like *Loving*.

Films that present legal history are particularly impactful within noetic imaginary because there is significant ideological exchange between the narratives used in litigation and in film. Presentation of plaintiff narratives determines how cases get litigated and decided, creating a paradigm of what types of plaintiffs are acceptable under the law. On a larger scale, this process informs what kind of people or ways of living become normalized. And interestingly, for a film like *Loving*, which takes as its filmic trajectory the plaintiff narrative in a case that has already been decided, the entire remaining ideological function inheres in the way the story is integrated into mainstream culture by the film’s narrative; or, how the fictionalization of the real interracial couple is normalized as it is revisited by the 2016 film.

Crafting acceptable legal narratives is especially important when dealing with “taboo” subjects like race and sexuality, as seen recently in United States Supreme Court cases involving same-sex marriage leading up to the *Obergefell v. Hodges* decision. As Cynthia Godsoe details in her article “Perfect Plaintiffs,” “[c]areful plaintiff selection undoubtedly played a key role in the ascent of marriage equality, particularly for a Court that has been acutely aware of public opinion and concerned about its historic legacy.” Godsoe notes qualities that made the *Obergefell* plaintiffs generally appealing: “they are all-American; they seem to be asexual; many have children; and all are (purportedly) non-political.” Aware of the rhetorical function of non-

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20. *Id.* at 138.
threatening plaintiffs in litigious success, she acknowledges, “[t]his schema reveals some deep-rooted assumptions about what a family should look like and what is an appropriate path to social change. It also reinscribes these norms and obscures the ways in which many families do not and have never fit this model.” To find success in court is then largely about presenting a narrative that is ideologically acceptable to that court. And as a greater range of narratives is culturally disseminated through mainstream film, the category of what might be acceptable to a court is gradually widening.

Plaintiff narratives that become retold in movies like Loving affect cultural conceptions of what the law values and should value going forward. Because Loving relates the narrative of a now-famous Supreme Court ruling, it has the ability to reiterate the reasoning of the 1967 Court, or deliberately return to that history more critically.

III. LOVING REPACKAGES THE LOVINGS’ HISTORIC CIVIL RIGHTS STRUGGLE AGAINST WIDER SYSTEMIC OPPRESSION AS A PERSONAL VICTORY WON BY TRIUMPHANT INDIVIDUALS THROUGH THE POWER OF LOVE

Loving has been hailed for making a political story personal, humanizing the couple at the heart of the historic legal moment. But what does Loving really add to the national discussion on race or sexual relationships recognized in marriage, in the context of the recent election and the accompanying “rise” of racial hate? Presented in Loving, the couple deserves to have their marriage recognized by the state because they are good, hardworking people who keep to themselves and only want to be able to quietly love each other, conforming to Godsoe’s description of the perfect plaintiffs. The Lovings desire marriage to legitimize their sexual union, and their interracial sexual-

21. Id. at 140.
24. See, e.g., Galloway, supra note 1; Anne Thompson, Joel Edgerton Reveals How ‘Loving’ Can Change the Conversation About Racism in America, INDIAN WIRE (Sept. 16, 2016, 12:49 PM), http://www.indiewire.com/2016/09/loving-joel-edgerton-interview-awards-oscar-vide-
ity exists only in relation the legitimate goal of building a family. They are not looking to cause trouble or hoping for systemic disruption; they are ordinary Americans who wish to be afforded basic dignity. Much like a white family, the film frames them as willing to uphold institutionalized racism and heterosexual norms so long as they may be offered a small space to personally exist within that regime. The dominant narrative surrounding acceptable interracial sexuality is ultimately reinforced while it so “boldly” or “generously” makes room to include their marriage.

Nichols presents the Lovings as perfect plaintiffs, and in doing so reinforces hegemonic notions of race and sexuality. His deliberate decision to cast the Lovings in a sanitized light implies a specific narrative interpretation that is made more salient by the earlier release of a documentary called The Loving Story. Both the documentary and the Hollywood film present the backstory of the Loving plaintiffs, but their different narrative choices result in starkly different ideological outcomes.

Loving recasts the history of hard-won, incremental change within an overwhelming system of oppression as one in which love trumps all. While constructing an uplifting ending for viewers, this decision also enacts a clear message. By presenting the Lovings as mostly apolitical and otherwise distilling racist forces into individual characters and actions, the film obfuscates their interplay with larger social issues. Instead, it offers a distinct “Americanizing” of structural problems that shifts blame to individual agents for just not working

26. Moreover, they are not overly threatening to the racial hierarchy, and certainly not as threatening as would be a black man and a white woman. “The pair also obscured the racial biases at issue. Mildred was very light-skinned, with features and a hairstyle that were not obviously ‘black.’ Moreover, sexual intimacy between white men and black women had long been overlooked, even condoned, in the South, in contrast to the opposite pairing—still a social taboo for some.” Godsee, supra note 18, at 140-41. During slavery, and later under legal segregation, many black women were sexually coerced and raped by white men who faced no legal repercussions. See generally Joe R. Feagin, Racist America: Roots, Current Realities, Future Reparations (2001); Philip Dray, At the Hands of Persons Unknown: The Lynching of Black America (2003); Leon Higgenbotham, Jr. & Barbara K. Kopytoff, Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia, 77 GEO L.J. 1967 (1989).

(or loving) hard enough, or for being individually hateful—putting the onus for change on individual agents, and absolving both the state and mainstream culture of their complicity in racial and sexual oppression.

A. Loving's Narrative Focus on "the Family" as Reason to Allow Interracial Marriage Resembles Virginia's Litigation Strategy of Focusing on "the Children" to Prohibit It

Nichols’s emphasis on preservation of "the family" within his film as a narrative justification for the ultimately favorable outcome of the United States Supreme Court striking down anti-miscegenation statutes rhetorically functions similarly to the state of Virginia’s strategic focus on "the children" as a justification for maintaining racial purity and therefore for upholding its anti-miscegenation statute.28 Both arguments distract and detract from the actual ideological culprit—institutionalized racism—by foregrounding the family/children, therefore absolving white supremacy of the blame needed to further discussion about its existence in a modern context that may ultimately be a catalyst for legal change.

Loving “humanizes” its characters by presenting them as ordinary, apolitical people whose heroic legal victory is only the product of their desire to live a quiet married life. From the first line of its opening scene—"I'm pregnant"—the film frames the couple's marriage as necessary to their goal of building a family; it is not suggested as a political statement, or even something they might have pursued had she not become pregnant.29 Once married, the couple is arrested for cohabitating; they stoically accept their punishment30 and move to Washington, D.C., where their children are born. Years later, Mildred is historically stirred by the March on Washington to write a letter to Bobby Kennedy. But the film palatably frames her primary motiva-


[i]nasmuch as we have already noted the higher rate of divorce among the intermarried, it is not proper to ask, 'Shall we then add to the number of children who become the victims of their intermarried parents?' If there is any possibility that this is likely to occur—and the evidence certainly points in that direction—it would seem that our obligation to children should tend to reduce the number of such marriages.

Id.

29. The film also makes no mention of Mildred’s age, despite the fact that she was only 18 at the time she became pregnant. See Douglas Martin, Mildred Loving, Who Battled Ban on Mix-Race Marriage, Dies at 68, N.Y. Times (May 6, 2008), http://www.nytimes.com/2008/05/06/us/06loving.html.

30. Loving v. Virginia, 388 U.S. 1, 3 (1967). Their punishment was the inability to return to the state of Virginia together for 25 years. Loving, 388 U.S. at 3.
tion to return to rural Virginia as concern for her children’s safety, after one son is injured playing in the city streets. From this realization she is shown to draw the strength to advance into an extended legal battle.

While the Lovings’ concern for their family is historically accurate, the film’s singular focus on it, apart from other political concerns, results from a narrative style that humanizes its characters to the point of separating them from the systemic discrimination of the Civil Rights Era. By limiting dialogue and fast-paced action to “monotonously amplify mood,” the film frames the Lovings as noble sufferers and “pristine symbols of a struggle rather than ordinary people facing extraordinarily cruel laws and forced into an extraordinary historical role that they didn’t seek.”31 Focusing on the couple as steeled and self-sufficient removes them from a more explicit affective depiction that conveys the powerlessness and frustration experienced by people fighting for basic recognition, and thus limits the potential for the viewer to emotionally relate to and conceptualize the struggle against systemic injustice. Instead, the Lovings are presented as Americans empowered to make their own destiny.

The failure of Loving to directly address systemic oppression as a component of the Lovings’ personal story is underscored by the candor with which the documentary recognizes the notion of “protecting the children”32 as being about maintaining racial purity to uphold white supremacy. Quite differently, The Loving Story repeatedly refers to the state’s argument as an outright lie founded in racism, including substantial commentary about racial classification laws and their function within maintaining a structure of (perceived) “whiteness” as power.33

B. SEMIOTIC DIFFERENCES IN ORAL ARGUMENT SEQUENCES IN LOVING AND THE LOVING STORY

The Hollywood movie and documentary both end with audio excerpts from the Supreme Court hearing. However, the series of images the films pair with the arguments presented to the Court illuminate their different narrative approaches: Loving’s ending depicts the triumph of love and family, while The Loving Story places this triumphant family inescapably within the context of the authority under which it exists.

32. See Brief of the N.Y. State Dist. Attorney’s Ass’n, supra note 28.
33. The Loving Story, supra note 27.
The argument sequence in the documentary begins by overlaying portions of the audio on images of the empty, intimidating courtroom: the camera pans the seats of the justices as Philip Hirschkop argues bluntly that “these laws rob the Negro race of their dignity . . . and that’s what they’re meant to do, to hold the Negro class in a lower position, lower social position, lower economic position.” The recording progresses over a shot of all nine white male justices; followed by close-ups of their faces, held in deliberation or talking inaudibly, their contemplation of Hirschkop’s words rendered visible.

As race and the statute’s connection to slavery are explicitly referenced in the oral argument, the documentary’s images of white men in power visualize the systemic injustice at play. While it still ultimately delivers a positive outcome in presenting the historical truth of the Court’s decision, The Loving Story situates this victory in its troubling context. By pairing hard questions (“What is the danger to the State of Virginia of interracial marriage?”) with lingering close-ups of the justices looking confused and uncomfortable, the scene produces an affective result that allows the viewer to feel them being confronted with their overwhelming white power and sitting, at least for the duration of this argument, somewhat uneasily within it.

Next, the State’s opposing argument is juxtaposed with warm images of the Lovings—Mildred and Richard in love; their happy children—as the State’s attorney recites the supposed dangers to them: “children of intermarried parents are referred to . . . as the victims of intermarried parents, and as the martyrs of intermarried parents.” Here, the reasoning of the state is completely discredited by the accompanying representation of a thriving, loving family.

The documentary then includes interview commentary from Hirschkop, reflecting on the litigation and condemning the State’s “false argument” as “immoral” because “they knew that the whole purpose of the statute was to preserve racial integrity” rather than to protect children.

34. Attorney Philip Hirschkop Discusses the Landmark Loving v. Virginia Case, Am. Civ. Liberties Union, https://www.aclu.org/podcast/attorney-philip-hirschkop-discusses-landmark-loving-v-virginia-case. Philip Hirschkop and Bernard Cohen were co-counsel for Richard and Mildred Loving. Along with ACLU volunteer attorneys, the two represented the Lovings in appeals to both district and appellate courts. After losing both appeals, they took the case to the Supreme Court.

35. The Loving Story, supra note 27; Loving v. Virginia, 388 U.S. 1 (1967).

36. The Loving Story, supra note 27.

37. Id. As shown in the documentary, Philip Hirschkop said in an interview: I think what the Attorney General did was immoral. In the way this case was prosecuted, I think that the argument they made was immoral, that children from mixed marriages suffer, because they knew that the whole purpose of the statute was to preserve racial integrity. And [the State’s attorney] had an alter-
After his candid admission, the recording resumes along with images of the Lovings, as Bernard Cohen describes the rights that will be denied to the couple and their family should their marriage be undermined. This documentary sequence perceptively shows the Lovings as an ordinary family wanting to live a private domestic life despite existing within a structure that spurns them, leaving viewers to contemplate systemic problems and their impact on individuals simultaneously.

In contrast, Loving uses a similar montage style to present the historic oral arguments, but limits its visual representation to the family—prioritizing bucolic scenes of their isolated home and images of the Loving children, happy and comfortable. The effect is to overlay the Court’s rule of law specifically on the perfect plaintiffs who rendered it so. In comparison to the documentary, when the whiteness and maleness of the justices is foregrounded onscreen as the line “What is the danger to the State of Virginia of interracial marriage?” is read, Loving pairs it with Mildred setting the table alongside the rest of the family preparing for dinner; “What is the state of the danger to the people of interracial marriage?” is heard as Richard serves vegetables; “Marriage is a fundamental right,” as the couple lovingly gaze across the table. This juxtaposition suggests as ludicrous the idea that they could pose a danger to the state or the people, precisely because they are so nonthreatening. The effect is very different, positioning the legal outcome as directly related to this family’s happiness and love: such that their right to marriage is derived from their normalcy, and their individual problem ultimately solved.

In the Hollywood dramatization, love insulates them from the systemic oppression made explicit in the documentary. The result is primarily emotional, as the viewer effectively experiences their familial bond and interprets the successful legal outcome as the triumph of love, without being challenged to situate it as the decision of a racist authority.

As such, Loving’s narrative inclination to frame the right to marry as a right only about love is to simplify and erase the nation’s

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39. See Am. Civ. Liberties Union, supra note 34. Bernard Cohen was co-counsel for the Lovings alongside Philip Hirschkop. Id.
40. Loving, supra note 2; Loving, 388 U.S. at 1.
41. Id.
42. Id.

native to say I can’t argue this case, I believe it is improper, immoral, not accurate. He presented a false argument to the United States Supreme Court . . . knowing that was not what this statute was about. Id.
legal history of devaluing nonwhite lives. By presenting the case as being about the law’s inability to accept this family, the problem becomes solvable by the film’s end. The oppressive legal structures that continued to disregard and exclude people after this ruling are omitted from narrative consideration, and the ending leaves the audience without acknowledgement that such systems still exist.

While marriage recognition is for many an element of security in forming a family, so too is it a right to be gained for the dignity that comes with equal treatment under the law. But for Nichols’s Lovings, it is a practical step toward the ability to raise their children in their home state, with limited exploration of what that means to them on a political level. As the documentary makes clear, however, race and sex—discussed in the heteronormative context of marriage—are inherently linked in the law as it functions to uphold white supremacy. Precisely because interracial sex and therefore interracial people disrupt the visual signifier of skin as race, these rules provided the recognition of whiteness as a legal category, more than just a social construct.

To the extent that miscegenation undermines the visibility of race, it undermines white supremacy, therein producing the cultural anxiety that results in the creation and proliferation of dehumanizing stereotypes. This cultural anxiety manifests as ambivalence, which

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43. The film fails to mention that Virginia’s prohibition on interracial marriage—in the form of the Racial Integrity Act, which was the subject of the Lovings’ case—stood only to prevent marriages between white people and non-white people. As the Court made clear, the “central features of this Act, and current Virginia law, are the absolute prohibition of a ‘white person’ marrying other than another ‘white person[,]’” Loving, 388 U.S. at 6. Neither the Racial Integrity Act nor any other Virginia statute prohibited interracial marriages between people of different races if both were non-white. See, e.g., Arica L. Coleman, What You Didn’t Know About Loving v. Virginia, TIME (June 10, 2016), http://time.com/4362508/loving-v-virginia-personas/.

44. An absolutist construction of race was notoriously adjudicated in Plessy v. Ferguson, where the “one drop” rule prevailed to exclude a white-passing man with one-eight African-American ancestry from riding in a “white” railroad car. Plessy v. Ferguson, 163 U.S. 537 (1896). This was similarly at issue in Loving v. Virginia as the Racial Integrity Act of 1924 expanded the scope of Virginia’s anti-miscegenation statute to criminalize all marriages between white people and nonwhite people. Loving, 388 U.S. at 1. That the statute did not criminalize interracial marriages that did not include a white person further supports the notion that the legal recognition of racial difference was purely to preserve whiteness as a separate race and therefore to sustain white superiority. Further, that Loving fails to include this key legal distinction demonstrates the extent to which it ignores anti-miscegenation laws as the direct result of a white supremacist power structure.

45. As Richard Dyer writes, in “a culture which gives a primacy to the visible as a source of knowledge, control and contact with the world—social groups must be visibly recognizable and representable, since this is a major currency of communication and power.” Richard Dyer, Coloured White, not coloured, in White: Essays on Race and Culture 41, 44 (1997).

46. Homi Bhabha, The Other Question, 24 Screen 18, 18-36 (1983).
functions as “one of the most significant discursive and psychical strategies of discriminatory power”\footnote{Id. at 18.} by enabling production of stereotypes that contain a paradox of fixity and repetition: fixity of the ideological construction of racial “otherness” as something distinctly different from whiteness; but yet which paradoxically must be anxiously repeated as the stereotype in order to reassure the white person of its supposed truth. If the stereotype were truly stable, it would not require constant repetition; but precisely because race is a social construct and not an absolute categorization, it falls neatly into this pattern. So indeed, that the depiction in Loving of a white person and a black person in an interracial relationship successfully “humanizes” their story—as it has received so much praise for doing—is on some level to say that it presents them as individuals who transcend racial stereotypes.

However, to the extent that Nichols clings to the idea that racial struggle under the law is grounded in the individual and redeemed through love, he only removes the anxious racial displacement of the stereotype to a more meta-narrative level. Incessant focus on the personal and the accompanying implication of the eventual historic legal victory is indicative of a world in which love does indeed trump all forms of the repetition that attempt to affix the solution for systemic oppression to the agency of the individual—rather than an actual up-ending of those oppressive structures. Loving is still ultimately about “managing cultural anxiety about the (dis)integrity of white identity[,,]”\footnote{Ummni Khan, A Woman’s Right to be Spanked: Testing the Limits of Tolerance of SM in the Socio-Legal Imaginary, 18 LAW & SEXUALITY 79, 96 (2009).} so its slightly different narrative message still has its ideological corollary in conceptualizing how legal change may be achieved: by continuing to ground its potential for progress in perfect plaintiffs like the Lovings, who are deserving of a more inclusive, expansive law.

Like Virginia insisted its concern was for the children rather than upholding white supremacy, Nichols’s failure to escape the trap of emphasizing love of individuals over systemic change nearly fifty years later only demonstrates how badly needed cultural narratives that attribute blame to white supremacy still are—whether they take the form of critical Hollywood movies or imperfect plaintiffs.

C. Loving Both Downplays the Extent of Racist Vigilante Violence, and Attempts to Scapegoat State Violence by Depicting State Actors as Rogue Individuals

To the extent that Loving does include depictions of violence and discrimination faced by the family, it distills these racist forces into
the limited actions of seemingly rogue individuals, de-emphasizing the
degree to which racial intolerance is entrenched in fundamental cul-
tural structures. On one hand, *Loving* downplays the truly hateful
aspects of people taking it upon themselves to retaliate against their
 interracial sex by distorting narrative treatment of events that are
more transparently included in the documentary. On the other hand,
limiting depictions of violence to that of rogue individuals allows the
message of love trumps all to persist, functioning as a tool of deflection
from systemic accountability. In particular, this narrative tension is
demonstrated in the Lovings’ interactions with their hometown sher-
iff, as both a member of law enforcement and a surrogate for the insti-
tution as a whole, and in the way the story treats the community’s
response to the Lovings’ legal action.

The journey to Court begins with the couple’s initial interaction
with law enforcement: they are found asleep in the same bed, illegally
cohabiting. This event is one of *Loving*’s most violent moments, as the
sheriff and his deputies sneakily approach the home in the night. An
affectively powerful scene, the viewer experiences the violation of pri-
vacy and safety that is thrust upon the Lovings by the quiet film’s
sudden eruption into yelling and momentary chaos. But the film
omits an important detail that the documentary scrutinizes: that the
sheriff received no order to seek out the arrest, but planned the do-
monic invasion on his own initiative. Inclusion of this fact in the doc-
umentary demonstrates the extent to which authoritative forces like
the police can be co-opted by individuals with hateful politics—or in-
deed consist of many of those individuals—who then, precisely be-
cause of their authority and the force the law places behind them, face
no checks to their discriminatory power.

In *Loving*, however, it is not clear whether the sheriff is acting of
his own volition or in the chain of command. So while he is presented
in the film as a passionately racist character, to some degree the his-
torical truth of this sheriff’s viscous hatred of miscegenation is
avoided. Yet, as the singular face of law enforcement working against
the Lovings, he becomes another individualization of a systemic prob-
lem. To see only one individual act so cruelly leaves the audience to
imagine that things might be better if a different person held the ti-
tle—in effect, to isolate the problem of the sheriff’s racism as some-
thing distinct from the otherwise neutral entity of the police. Therefore, the critique of law enforcement *Loving* presents is limited
to showing that some people are wicked.

Somewhat similarly, *Loving* details only one of the retaliatory in-
cidents suffered by the Lovings and their extended family as their
public profile grew: after the release of the infamous *Life Magazine*
piece, Richard Loving finds the story wrapped around a brick in the seat of his car. By showing only Richard as affected by the reactions of others, the film minimizes the collateral damage that occurred in the wake of the litigation and eliminates from the narrative specific harms done to people of color, as is common in historical narratives. Much like the law is limited in its provision of remedies for harms that result from insidious racism, so too does the film discount those harms done to the people of color that inhabit its historical narrative, and instead chooses only to recognize a concrete harm done to a white man.

D. Loving’s Use of Title Cards Supports its Individualized Narrative as One Disconnected from Systemic Injustice

If any of this critique could be defended as creative choice or necessary storytelling, to draw viewers’ attention away from the Lovings would be to distract and detract from the film’s overall effect—still the title cards preceding the credits could be used to reference a connection to structural inequality. Instead, their scope is limited to Mildred and Richard as quiet individuals, effectively carrying through to the end of the film its apolitical theme and firmly solidifying its message: that in the face of systemic oppression, love trumps all.

Following the Court’s ruling and the immediate aftermath, the viewer sees only one scene depicting the Lovings’ new life back in Virginia. On the land Richard purchased for Mildred and where he originally proposed, he lays the first bricks for the foundation of their home, children running free in the background. The shot pans out on this joyful moment, widely framing the family’s newly earned freedom to live their peaceful, lawful rural life. Widely framed, the image emphasizes their smallness in relation to their natural surroundings—and symbolically, in relation to their country and its legal system—and the comfort they take in that setting.

The title cards then overlay their image: Loving v. Virginia made the prohibition of marriage based on race unconstitutional. The Supreme Court stated that marriage is an inherent right. Seven years after the Court’s decision, Richard Loving was killed by a drunk driver. Mildred never remarried and lived the rest of her life in the home Richard built for them. Though shy of press and ever reluctant to be called a hero, Mildred was interviewed shortly before her death in 2008. She spoke of Richard, saying, “I miss him. He took care of me.”

49. 833 U.S. 1 (1967).
50. Loving, supra note 2.
As the sad future that awaits them is foretold, their time together and familial love is rendered even more precious to the viewer. The progression from the sweeping, triumphant claim about the outcome of the case, to the unexpected news of Richard’s early death, to Mildred’s unwavering devotion to him, frames their love as something incredibly successful and precious. While a lovely sentiment, the film’s total disconnection from the larger legal system in its ending completes the individualization of its story.

In contrast, the closing title cards in the documentary celebrate the Lovings’ admirable devotion while explicitly mentioning how much political work is still needed to be done following the decision, and acknowledging the extent of racial discrimination by noting that the ruling resulted in the overturn of miscegenation bans in sixteen different states. They also inform the viewer that “many states resisted change,” and the last statute was only repealed in 2000, suggesting that what may seem like a great victory was just one step in a still racist society. Like Loving, the documentary’s title cards then resolve the personal story of the couple, but do so in a way that is factual and complete without becoming overly sentimentalized. As such, the documentary provides a satisfying ending but does not distract the viewer from its message: that change is slow and there is always more work to be done.

IV. Loving as a Civil Rights Nostalgia Film

Prone to sentimentality, Loving sticks to its guns as a story of “equality through superiority.” What Loving does so successfully in individualizing problems, and therefore solutions, is to create a racial

51. The title cards in The Loving Story read:
Loving v. Virginia overturned bans against interracial marriage in 16 states. / Despite the ruling, many states resisted change. Alabama was the last holdout, repealing its anti-miscegenation law in 2000. / Nine years after their exile from Virginia, Mildred and Richard Loving were finally home. / Eight years later, driving home on a Saturday night, Richard and Mildred were hit by a drunk driver. Richard Loving was killed. / Mildred Loving lived the rest of her life surrounded by family and friends in the home Richard built for her.

52. “Equality through superiority” is similarly the way superhuman Sidney Poitier functions in the 1967 film Guess Who’s Coming to Dinner, which coincidentally was released the same year that Loving v. Virginia was decided. Guess Who’s Coming to Dinner (Columbia Pictures 1967). The film is about the relationship between a handsome, intelligent, and successful black doctor (Sidney Poitier) and the white daughter of liberal parents. The story spans the course of a day, during which the interracial couple seeks approval for their engagement from both of their sets of parents. Inasmuch as the film’s narrative poses to viewers the question of whether these families can accept the protagonists’ interracial relationship, its easy answer of acceptance is similarly ensured because Poitier is a perfect gentleman doctor—the model minority who poses no sexual threat.
issue not about racism but about Americanized individualism, reinforcing the social order status quo. For if the solution to racist opposition to miscegenation lies within the individual, there is no need for structural change; this is its ideological work.

In examining similar dynamics, Ellen Scott endeavors “to make sense of cinematic narratives that touch on Black civil rights but where racial taboos have strangely chased race itself out of the text’s center.”\textsuperscript{53} She critiques representations of racism and accompanying non-normative sexuality in movies from the 1940s and 1950s as highly repressed, yet still often obliquely revelatory of systemic injustice, noting the idea of the oblique signifier—a “vague sense of racial ‘trouble’ with no definite links to race”—as a narrative technique employed to do this work.\textsuperscript{54} Much like the work perfect plaintiff narratives do both in law and film, “[b]y avoiding Black victimization and aggression, the mainstream movie industry largely sidestepped admitting the scope and depth of American racism and the history of Black resistance.”\textsuperscript{55} Instead, it “gave rise to cinematic modes seeking to [neatly] package, get over, and dismiss civil rights[,]” like the nostalgia films of the 1990s, which “helped to ensure that civil rights discourse would remain frozen in memoriam, enshrined with a warm sepia gloss that allowed audiences to celebrate how far we have come.”\textsuperscript{56}

For failing to more systematically account for the structures behind its racial fragments, \textit{Loving} is at its core a civil rights nostalgia film—one packaged convincingly in the inspirational shroud of sentimentality and the romantic triumph of oppression through individual agency. Precisely because \textit{Loving} is a mainstream Hollywood film about plaintiffs in a famous Supreme Court case, it expressly demonstrates “the interpenetration of law and film in the construction of social reality” and provides insight into the coordination of legal and cinematic discourse that determines what is culturally and legally acceptable\textsuperscript{57}—and therefore, who will be afforded the protection of the courts. As such, the film’s function of individualizing systemic racism is inextricably part of a larger cultural framework that has material consequences for those who live within it.

In foregrounding the legal triumph of interracial love, the film downplays the extent to which interracial marriages are still not fully accepted. Shifting blame away from forces that harm interracial

\textsuperscript{54} Id. at 188.
\textsuperscript{55} Id.
\textsuperscript{56} Id. at 191.
\textsuperscript{57} Khan, \textit{supra} note 48, at 82. See, e.g., Orit Kamir, \textit{Framed: Women in Law and Film} (2006).
couples does little progressive work for a society that is still racially intolerant, and does nothing to improve the acceptance of interracial marriages that still face resistance today. Although interracial relationships are on the rise, intolerant attitudes abound, and incite real fear for couples. While at best this cinematic depiction of the Lovings as a devoted and deserving couple may sway a few hearts and minds to acceptance, the implicit ideologies conveyed in the film are likely to perpetuate peoples’ unwillingness to examine the oppression that inheres in their own laws, and allow them to remain ignorant of their complicity.

Additionally, this ideological scapegoating keeps as marginal to mainstream representation—and therefore to legal response—the “most important civil rights issue of the twenty-first century: the pe-


60. In August 2016, a man stabbed an interracial couple outside of a bar in an unprovoked attack that he justified by his membership in a white supremacist group. Man accused of unprovoked attack on interracial couple in Washington State, CBS News (Aug. 22, 2016), http://www.cbsnews.com/news/man-accused-of-unprovoked-attack-on-interracial-couple-in-washington-state/. As recently as November 2016, an interracial couple in Alabama found “a gun target tacked to the front door of their restaurant with a pair of nooses hung on either side.” Cassie Miller & Alexandra Werner-Winslow, Ten Days After: Harassment and Intimidation in the Aftermath of the Election, S. Poverty L. Ctr. (Nov. 29, 2016), https://www.splcenter.org/20161129/ten-days-after-harassment-and-intimidation-aftermath-election. A white couple “with eleven adopted black children were the object of a letter that read, ‘You and yours need to stay separate – NOT EQUAL.’” Id. In fact, the Southern Poverty Law Center has gathered data on 867 hate incidents that occurred within the first ten days following the election, and it notes that “the incidents documented here almost certainly represent a small fraction of the actual number of election-related hate incidents that have occurred since November 8.” Id.
nal system’s colonization of Black lives. Cultural unwillingness to identify and dismantle racist structures displays itself constantly in the barrage of news stories about the unpunished murders of black males at the hands of the police. For Loving to present such a stylized, self-celebratory distancing of one moment in a hard-fought civil rights battle is to make invisible the links between the harsh racism of the past and the oppressions of the present.

V. INDIVIDUALIZATION AND AFFIRMATIVE ACTION JURISPRUDENCE

Similarly, narrative individualization has implications for modern Supreme Court jurisprudence regarding affirmative action law. If the impetus for affirmative action is redressing racial harms, contributions like Loving to a cultural narrative that removes blame from the system take an explicit political position in ideologically justifying the end of that action. That is, the question underlying affirmative action—how the nation today should treat people of color who were once so dehumanized and systematically disadvantaged as to be enslaved—necessarily depends on an evaluation of the extent to which discrimination still exists. But the great challenge here is in redressability, and in being able to prove social attitudes in a way that is permissible under the law, because the implicitness of (some) racism is exactly what opponents to affirmative action successfully seize upon in order to maintain power structures as they already exist. But

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61. SCOTT, supra note 53, at 194. Living “in an era where Law & Order is one of the most watched American television shows, films, too, have taken on a ‘law and order’ ethos that has largely defined Black criminalization as the fault of disobedient Black men rather than the civil rights movement’s unanswered cry for equality.” Id.

62. According to the Washington Post, as of the date of authorship, 922 people have been shot and killed by the police; 223 of those people were black. In addition to the 74 labeled as racially “unknown,” 413 of the 922 people killed are listed as non-white. Fatal Force, THE WASH. POST, https://www.washingtonpost.com/graphics/national/police-shootings-2016/ (last visited Dec. 19, 2016). Another organization states that police have killed at least 263 black people in the United States in 2016. MAPPING POLICE VIOLENCE, http://mappingpoliceviolence.org/ (last visited Dec. 19, 2016).

63. One need only look to the career of Jared Kushner, a white man whose wealthy parents reportedly bought his admission to Harvard with a substantial donation. See Daniel Golden, The Story Behind Jared Kushner’s Curious Acceptance into Harvard, PROPUBLICA (Nov. 18, 2016, 2:00 PM), https://www.propublica.org/article/the-story-behind-jared-kushners-curious-acceptance-into-harvard. Such donations are not an uncommon practice for highly affluent parents with unqualified children, including those that make up “the bipartisan array of powerful insiders in the executive branch, Congress, and the judiciary who sent their children to their old schools or are themselves legacies.” Daniel Golden, Jared Kushner Isn’t Alone: Universities Still Give Rich and Connected Applicants a Leg Up, Including Dartmouth, INDEPTH N.H. (Nov. 23, 2016), http://indepthnh.org/2016/11/23/jared-kushner-isnt-alone-universities-still-give-rich-and-connected-applicants-a-leg-up-including-dartmouth/. Kushner is now included in the President’s elite political inner circle through the offer of a white house job from his
this is also the point at which the influence of mainstream culture merges with legal consciousness ultimately enacted into law, for cultural attitudes certainly shape the extent to which it is acceptable to recognize implicit racism. But more specifically, culture joins the formation of law in this way because the narrative question to be contemplated in presenting a socio-economic problem as either embodied in an individualized narrative, as in *Loving*, or in using a story to relate that systemic problem to a larger group, as I suggest would be a more politically productive approach, is likewise a consideration in the way cases are litigated.

*Loving* is a closely drawn story of Richard and Mildred as normal people, mostly distinct from other non-white people affected by discriminatory laws and pervasive racism, and without a clear recognition of the extent to which the state is complicit in that racism. The narrative the Court issued in its decision, however, did not engage in this “humanizing” individualism. *Loving v. Virginia*[^64] instead reads like a typical measured equal protection case, focusing on a group categorically affected by a statutory provision, and subjecting that classification to the appropriate level of scrutiny. Unlike the film suggests, the Court did not decide to rule the anti-miscegenation law unconstitutional because the Lovings' emotional bond was so convincing, but because “[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”[^65] The disconnect between the Court’s calculated reasoning and *Loving’s* close emotional portrayal highlights the affective power of individualizing a controversial issue to convince those who may not agree—in this case, the ideological good done of emotionally convincing viewers who may still feel uncomfortable about interracial sexuality to be swayed from their opinion by a belief in love.

But proponents against affirmative action use the same affective individualization to an ideologically dangerous end precisely because emotional rhetoric stands to disrupt more distanced equal protection

[^64]: 388 U.S. 1 (1967).
reasoning. Whereas the Equal Protection Clause of the Constitution was drafted during Reconstruction to prohibit the use of racial classifications in order to help ensure the rights of Black Americans, it has become co-opted by those opposed to remedial programs like affirmative action and distorted into a particular notion of “colorblindness” that justifies ending those programs because of a belief that any treatment on the basis of race is opposed to its intent.

Of course, the position that racial classifications harm white people and people of color equally necessarily disavows the nation’s history of slavery and blatantly racist laws that preceded the introduction of the Fourteenth Amendment; so, the narrative to surmount such cognitive dissonance must necessarily be one of an emotional, personal story. Cue Abigail Fisher, perfect plaintiff of recent Supreme Court case Fisher v. University of Texas at Austin.

Fisher’s arguably compelling personal story for pursuing admission makes her the perfect plaintiff to individually narrativize the harm of “reverse discrimination” done by the University’s affirmative action program to white applicants denied admission. Fisher’s narrative is almost required to make such a point, because the argument lies in being excluded from the group who is categorically benefitted (here, non-white people), and therefore that individualized harm is what allows one to challenge the policy. Making such a legal argument necessarily entails a sublimation of the harm the Equal Protec-

66. See Richard Wormser, The Fourteenth Amendment Ratified (1868), PBS (December 2016), http://www.pbs.org/wnet/jimcrow/stories_events_14th.html (explaining that the “Fourteenth Amendment was one of three amendments to the Constitution adopted after the Civil War to guarantee black rights . . . . The amendment was designed to grant citizenship to and protect the civil liberties of recently freed slaves.”).

67. This belief was echoed by Chief Justice John Roberts when he wrote, “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007). Roberts’s opinion marks a substantial detour from the position Justice Harry Blackmun took only three decades earlier when he wrote in a separate opinion: “In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.” Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978). See also Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411, 2422 (2013) (Thomas, J., concurring) (stating that “a State’s use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.”).

68. 136 S. Ct. 2198 (2016).

69. One could almost imagine a compelling Hollywood story about Abigail Fisher, in the likes of Loving: a young woman whose life-long dream was to attend the University from which her father and sister graduated; who, despite her best efforts to succeed in school and make something of herself, fell just short of the competitive requirements to gain admission slightly skewed pursuant to the implementation of an affirmative action program. Nikole Hannah-Jones, What Abigail Fisher's Affirmative Action Case Was Really About, PROPUBLICA (June 23, 2016, 12:28 PM), https://www.propublica.org/article/a-colorblind-constitution-what-abigail-fishers-affirmative-action-case-is-r.
tion Clause was written to protect (vast racial oppression post-Civil War) into a specific, individualized harm done to one (white) person, thereby distorting the weight of the systemic, institutionalized component of discrimination that was the very impetus for the Fourteenth Amendment’s enabling of redressability. Therefore, to make such a claim around a story of an individual white person and the supposed racial harm she faced in being denied admission is necessarily to do so by effacing historical discrimination against non-white people as a group, and on a systemic level—which is directly a function of the legal narrative employed in bringing Fisher’s case.70

Both Loving (the film) and Fisher (the case) present their stories of individualized racial harm at the cost of avoiding meaningful recognition of systemic injustice. While in Loving this may seem positive due to the nature of the decision, and although in Fisher the court ultimately upheld the admissions policy, harmful ideological work is still being done to our socio-legal consciousness.71 In Fisher, the Court set injurious legal precedent in how it evaluates affirmative action programs—under intense scrutiny and with such little deference that fewer, if any, will pass constitutional muster.72 And because law is an embodiment of social practices interacting with cultural conceptions in noetic space, a trend in cinematic and legal narratives to shirk responsibility for holding oppressive institutions accountable only furthers a reciprocity with cultural ideology that moves the law away from helping those most vulnerable under it.73

70. Fisher was not denied solely because of her race; she lacked the academic qualifications to otherwise gain admission given the number of applicants and other university standards set forth that year. And furthermore, her case is bankrolled by Edward Blum and his nonprofit organization set up to arrange representation to fight race-based policies that were meant to address inadequacies. Hannah-Jones, supra note 69.

71. Likewise, “as the Supreme Court’s make-up has grown more conservative, it has taken up a steady stream of so-called reverse discrimination cases, in which white plaintiffs have argued that race-specific measures born of the civil rights movement discriminate against white Americans and violate the 14th Amendment.” Id.


73. Indeed, public opinion on race has changed alongside the growing resistance to affirmative action measures:

In the 1950s, surveys show, most white Americans believed that black Americans faced substantial discrimination but that they themselves experienced little. Today, despite gaping disparities between black and white Americans in income, education, health care, homeownership, employment and college admissions, a majority of white Americans now believe they are just as likely, or more likely, to face discrimination as black Americans.

VI. REDEEMING LOVING AS A MAINSTREAM FILM IN A POST-ELECTION CONTEXT

*Loving* has received generally positive feedback, and is at the very least an aesthetic and emotional success in its depiction of a supportive relationship. While it may be said that the critiques leveled against it leave little room for an intimate character narrative, other recent films have managed to strike this balance with greater success, remaining simultaneously engaging and engaged in maintaining cultural and legal accountability.

However, while criticisms of *Loving* may stand academically, in many ways the post-election climate has turned the film from a Hollywood blockbuster by another white male director into a much needed symbol of love and racial hope—an “antidote to contemporary political rancor.”

It seems absurd to disconnect the contemporary American viewer’s experience of the film from the “language, imagery, and emotion of the presidential election[,]” and there may be little point to try to do so. Had Hillary Clinton been elected, the slow arc of progress may have been seen to continue; and subjecting a feel-good, self-congratulatory civil rights nostalgia film like *Loving* to obvious critique may have been a logical next step, given the rise of the Black Lives Matter movement and the growing number of police murders of people of color, among endless other racial injustices.

But perhaps now, with a President brought to power on a wave of hateful rhetoric leaving many voters devastated, *Loving* cannot be read apart from the need for an optimistic story about how things once were bad but still managed to get better. And likewise, anyone criti-

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74. Perhaps another thing the film does well is demonstrate the importance of crafting a public image in making history, and “the turmoil in the lives of private and ordinary people, such as the Lovings, when the media come calling to make them celebrities.” Richard Brody, *Jeff Nichols’s “Loving”: an Airbrushed Portrait of the Interracial Couple Whose Struggle Changed History*, The New Yorker (Nov. 4, 2016), http://www.newyorker.com/culture/richard-brody/jeff-nicholls-loving-an-airbrushed-portrait-of-the-interracial-couple-whose-struggle-changed-history. This is an accomplishment drawn through the film’s narrative attention to the creation of the case, as opposed to focusing on the drama within the courtroom, as many “films about law” do. But it is somewhat ironic then that *Loving* appears not to recognize (or at least prioritize) its own role in crafting public opinion, as a narrative contribution to the legal imaginary.

75. One particularly excellent example is *Fruitvale Station*, which, as Ellen Scott describes, “announces that cinema still has an important role to play in dramatizing and affectively reinforcing contemporary civil rights struggles. And in light of the weight of the denial and reversal of civil rights gains in the contemporary era, such an activist cinematic stance is even more necessary.” Scott, supra note 53, at 195. See *Fruitvale Station* (Significant Productions 2013).


77. *Id.*
cally examining this film in the cultural moment of its release would be hard-pressed to overlook the fact that the demographic of people who are most inclined to see it are probably those who believe our country is in a state of emergency; while those who will actively choose not to see it are more likely of the mind that, masked in whatever way, resistance to white supremacy is part of what has gone wrong with our country. Perhaps there is even a group in the middle who stand to have their hearts and minds opened by a depiction of a devoted inter-racial couple and their happy family. Maybe Loving really will be an ideological success for some in its reductive and sentimentalized, yet impactful, love story.

In such a divided moment, where it feels like everything is at stake—not only the political priorities and policies gambled in any election, but the personal identities of so many people, and so many of them non-white—maybe there is a need for a film whose ideological function is simply as an optimistic reminder that when things were bad before, they were able to slowly get better. While focus on the individual couple can be readily critiqued for its detachment from systemic problems, their unwavering love may nevertheless demonstrate to its audience an ability to stand up and not be cowed by the law when it fails to protect you. With a presidential election that has left so many citizens disenchanted with the idea that the political-legal system reflects their interests in any way, perhaps the cultural and legal imagining that needs to be done in the noetic space of 2017 is one grounded in the inspiring recognition of triumphant small-scale love. Maybe what Loving truly contributes to such a tumultuous cultural moment is the notion that not only must we continue to commit to fights we should not have to fight, but that if we want to take care of each other even when the law fails us, we must decide to keep loving.

VII. CONCLUSION

Released on the cusp of the fiftieth anniversary of the Court’s decision in Loving v. Virginia\textsuperscript{78} and amid an uncertain political climate, Loving is a historical film charged with contemporary meaning for cultural and legal ideology. Whatever the intention of its creators, receipt of Loving at this moment comes with an academic responsibility to examine its work as a narrative within mainstream culture. Cases, especially Supreme Court cases, are litigated based on narrative; so legal narratives contribute to which claims are deemed redressable in the eyes of the law. Mainstream cultural narratives—especially those disseminated through film; and especially those, like Loving, which

\textsuperscript{78} 388 U.S. 1 (1967).
take as their filmic scope the underlying narrative of a case for which the legal outcome is already decided—help to determine what experiences and types of existences become normalized. In the long arc of social progress, a more expansive concept of normalcy broadens what narratives will be accepted by a court that slowly reflects shifting mores, and therefore broadens who the law stands to protect. *Loving*, as a narrative about narrative, with the power to impact the law, shoulders a heavy ideological burden in a time when racial hate is on the rise and where many Americans feel like their President cannot be trusted to represent them. So it is disappointing that a film, which could have included a more explicit call to action against systems of oppression, instead crafts a story in which an ongoing struggle for equality becomes simplified as it is embodied in the Lovings as individuals. However, that is not to say it is without ideological merit. Especially at a time when hopelessness pervades in the face of a new administration, to have a popular film remind viewers that love can help individual people survive and even find success against what may feel like insurmountable odds is at the very least helpful to maintaining progressive morale. We may now have to face cultural and legal fights that we thought were over, or that we feel we should not have to fight. But we are certainly not the first Americans to have had to do this, and it is certainly possible that a less oppressive society may still eventually be won.
REFLECTION: HOW MULTIRACIAL LIVES MATTER 50 YEARS AFTER LOVING

LAUREN SUDEALL LUCAS†

Black Lives Matter. All Lives Matter. These two statements are both true, but connote very different sentiments in our current political reality. To further complicate matters, in this short reflection piece, I query how multiracial lives matter in the context of this heated social and political discussion about race. As a multiracial person committed to racial justice and sympathetic both to those pushing for recognition of multiracial identity and to those who worry such recognition may undermine larger movements, these are questions I have long grappled with both professionally and personally. Of course, multiracial lives matter—but do they constitute a sub-agenda of the Black Lives Matter movement, or is there an independent agenda the moniker “Multiracial Lives Matter” might represent? If the latter, is there a danger that such an agenda might be co-opted by other forces and used to further unintended purposes, such as the advancement of colorblindness?1 To the extent that agenda demands unique recognition of multiracial identity, how can it co-exist with broader identity-based racial justice movements?

In the political realm, multiracial individuals have the potential to operate as chameleons—negotiating the divide between ever-more polarized views on race. This is not only because they may fall somewhere in the middle of the color spectrum, but because they are often forced to personally navigate this terrain throughout their lives. Many multiracial individuals know intimately what it means to be oppressed on the basis of race but also placed above others in the racial hierarchy.2 In a world where darkness often represents greater danger,3 many multiracial individuals are simply less threatening. Under this view, President Obama’s rise to power represents not the dawn-

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1. See Lauren Sudeall Lucas, Undoing Race? Reconciling Multiracial Identity with Equal Protection, 102 CALIF. L. REV. 1243, 1260-61 (2014) (describing the uneasy alliance between multiracial advocacy groups and conservative politicians, who believed creation of a multiracial category on the census would be a step toward the “elimination of racial and ethnic categories” (citation and internal quotation marks omitted)).

2. See, e.g., Lucas, supra note 1, at 1270 (describing study showing that multiracial students experience less discrimination than monoracial minority students, but more discrimination than white students).

The underlying fear of some racial justice advocates is that the brand of individualism typified by those pushing for a distinct multiracial identity will destroy any sense of collective identity, a critical element of many social movements. Individualism has played a strong role in the Supreme Court’s race jurisprudence—embodied by Justice O’Connor’s oft-cited declaration in *Adarand Constructors, Inc. v. Pena* that the equal protection guarantees of the Fifth and Fourteenth Amendments “protect persons, not groups.” Another domi-


5. *See Lucas, supra* note 1, at 1246 (“Through the lens of multiracial identity . . . race is a fluid and socially constructed concept, capable of changing over time and assuming many different forms.”); *id.* at 1263-64 (highlighting the “multiplicity” (manifesting in different ways) and “fluidity” (change over time) of multiracial identity).

6. *Id.* at 1263-71 (describing how multiracials conceive of their racial identity and of race more broadly, including the fact that they “are more likely to view race as a social construct” and less likely to perceive race-based discrimination or to express opposition to symbolic racism).

7. *Id.* at 1255-59 (noting changes in population demographics and the growing group of individuals who identify as mixed-race); *id.* at 1266 (noting that younger people are more likely to categorize themselves as multiracial).

8. *Id.* at 1270 (noting social science studies demonstrating that “mixed-race individuals tend to be more individualistic and disengaged with regard to issues of race”).


nant force in the Court’s recent racial discrimination cases is the anti-
classification approach toward equal protection, which mandates that
race-based distinctions should always be discouraged, regardless of
whether such distinctions are invidious or benign.11 Chief Justice
John Roberts's opinion in Parents Involved in Community Schools v.
Seattle School District No. 12 epitomizes this view. There, the Chief
Justice famously declared: “The way to stop discrimination on the ba-
sis of race is to stop discriminating on the basis of race.”13 In his opin-
ion, Chief Justice Roberts relied on the landmark case, Brown v.
Board of Education14 to declare unconstitutional two voluntary school
assignment plans adopted by Seattle and Louisville to maintain or in-
crease racial diversity among their schools.15 Many of the dissenting
justices viewed the majority opinion’s reasoning as a distortion of
Brown.16 Underlying their response is a decades-long debate about
whether to interpret cases like Brown—or Loving v. Virginia17 the
focus of this Symposium—to discourage any consideration of race
(often tied to notions of individualism18) or only those uses of race that
serve to subordinate or oppress certain racial groups. In my view, the
Supreme Court’s decision in Loving was not only about eliminating
distinctions based on race, but also those measures clearly designed to

11. Adarand Constructors, 515 U.S. at 222-27 (holding that the same level of scru-
tiny applies to both “invidious” and “benign” racial classifications).
(2007). In contrast, Justice Sonia Sotomayor used similar language in a more recent
case to offer a very different view of how the Court might most effectively address racial
discrimination. See Schuette v. Coalition to Defend Affirmative Action, Integration and
1623, 1676 (2014) (Sotomayor, J., dissenting) (“The way to stop discrimination on the
basis of race is to speak openly and candidly on the subject of race, and to apply the
Constitution with eyes open to the unfortunate effects of centuries of racial discrimina-
tion. As members of the judiciary tasked with intervening to carry out the guarantee of
equal protection, we ought not sit back and wish away, rather than confront, the racial
inequality that exists in our society. It is this view that works harm, by perpetuating
the facile notion that what makes race matter is acknowledging the simple truth that
race does matter.”).
15. See id. at 798-99 (Stevens, J., dissenting) (noting that there was a “cruel irony”
in the Chief Justice’s reliance on Brown and that the opinion “rewrites the history of one
of this Court’s most important decisions.”).
of Michigan’s affirmative action policy unconstitutional and emphasizing the impor-
tance of individualized consideration in the admissions process); Regents of Univ. of
of California at Davis Medical School based on its use of race and highlighting the
importance of treating “each applicant as an individual in the admissions process.”).
maintain racial hierarchy.19 Thus, we should understand Loving not as a harbinger of a colorblind society where race is irrelevant, but as a bulwark against uses of race that aim to disparage racial groups or maintain a specific racial order.

Race plays an important organizing function in society, and one over which we have little control as individuals; this can be difficult to reconcile with the self-determination many multiracial individuals possess to control their own racial identity and how it is perceived by others. While some are dismissive of that premise, instead favoring a racial solidarity approach that minimizes the relevance of subcategories, I have contended that it is important to allow multiracial individuals to define their own identity.20 This is a sentiment that has been echoed by Justice Kennedy’s language in several recent opinions discussing racial identity (if not addressing multiracial identity directly).21 Yet this sentiment need not necessarily be at odds with broader identity-based movements. An individual can remain free to define her own identity under the terms that she desires while simultaneously recognizing that society often does not operate under those same terms and will more likely than not group her with individuals who assume a different racial identity.

Before Loving, the very unions that might give rise to multiracial children were illegal.22 In declaring anti-miscegenation laws unconstitutional, the Supreme Court rejected the argument that such laws served legitimate state interests—including interests in “prevent[ing]
'the corruption of blood' [and] ‘a mongrel breed of citizens.’

23 Thus, in some sense, the gift Loving bestows upon multiracial individuals born of these now lawful interracial relationships is the very freedom of being. Yet we must be mindful of the fact that the freedom to define our own personal identity is rooted in a jurisprudence aimed at eliminating identity-based structural oppression and that identity remains an important tool in counteracting such oppression. While the law provides us with the freedom to define ourselves—to declare that multiracial lives also “matter”—we must not be blind to the ways in which other, more powerful forces continue to define us and the linked fate that exists between black and multiracial lives.

DUAL MINORITY MIXED RACE ACTIVISTS AND THE CULTIVATION OF CROSS-RACIAL/ETHNIC COALITIONS IN THE POST-LOVING ERA

KEVIN ESCUDERO†

In January 2013 I moved to Chicago where I conducted fieldwork with members of an undocumented immigrant youth-led organization. As part of this work, I hoped to learn about the strategies and tactics activists used in the fight for increased rights. The primary organization I worked with was led by undocumented youth, and centered the needs and desires of community members in its approach to activism.

Many of this organization’s meetings were held downtown at a central location to facilitate accessibility and attendance. Following one of our evening meetings, I headed to the train with two other members who had also recently become involved: Anna and James. Anna was born in the Philippines and moved with her family to one of the Pacific Islands prior to migrating to the suburbs of Chicago, where they eventually settled. She graduated from college with a double major in Asian American Studies and Political Science and was, at the time, working as an administrative office assistant in downtown Chicago. James, also a recent college graduate, majored in architecture and was searching for work after having been employed at a downtown architecture firm during the previous year. He migrated with his family from Mexico at the age of six and his family settled first on the west side of Chicago, then in the city’s suburbs.

As relatively new members of the organization, Anna, James, and I all came to know each other very well. Through our conversations on the train, before and after meetings, and during retreats we chatted and got to know one another’s reasons for participating in the movement as well as what we hoped to contribute through our activism. In particular, I appreciated the fact that Anna identified as Asian Ameri-

† This essay is based upon remarks made for the symposium, “50 Years of Loving: Seeking Justice Through Love and Relationships,” held at Creighton University School of Law on March 23 and 24, 2017. Kevin Escudero is a Presidential Diversity Postdoctoral Fellow and incoming Assistant Professor of American Studies and Ethnic Studies at Brown University. He received his Ph.D. in Ethnic Studies from the University of California, Berkeley and M.S.L. from Yale Law School. His book, Organizing While Undocumented, examines instances of racial and ethnic coalition building and use of the law as a tool for organizing by Asian and Latina/o undocumented immigrant activists in San Francisco, Chicago, and New York City.

1. To protect the identities of participants these names are pseudonyms.
can and James as Latino. Given my own background as a self-identified mixed race\textsuperscript{2} Asian/Latino individual whose mother came to the United States as a refugee from Vietnam and father who immigrated to the United States from Bolivia, I enjoyed the opportunity to organize alongside these two fellow activists. Growing up in a diverse, multiracial community in Southern California, just north of Los Angeles, being surrounded by people of different racial and ethnic backgrounds was something largely familiar to me. Yet, in Chicago, I was only beginning to learn about the different communities who lived in the city and about their respective neighborhoods.

That evening on the train, as Anna, James, and I sat together and headed toward the neighborhoods where we each lived, Anna tapped me on the shoulder and stated, “You know the strangest thing happened to me today. Something I completely didn’t expect.” “What do you mean?” I asked. “What was it?” “Well, so after the meeting when we were all talking and hanging out, someone asked me if you and I were related. I mean, just because we are both Asian they think we must be related. Then someone else asked me if you and I were dating.” “What? That’s so weird,” I answered. “Like dating your sibling?” I chuckled. “No, these were two different people,” Anna replied. “I think everyone is wondering about us since we both joined [organization name] at the same time.”

Reflecting on the role of this organization in cultivating a coalition space of Asian and Latina/o undocumented immigrant organizers consisting largely of recent college graduates or current undergraduate students, the ensuing discussion I had with Anna and James on the train made me wonder what role my identity as a mixed race person played in how I negotiated my participation in the organization and more broadly, the immigrant rights movement. Was being mixed race something positive? Was it a challenge? Or was it something that could be both a positive experience and a challenge? Also, how would my mixed racial identity impact my future involvement in activist organizations or was it just the unique context of this particular situation?

This essay argues that mixed race individuals' participation in social movement struggles has the potential to facilitate coalition building between groups that are often similarly affected by a given issue.

\textsuperscript{2} Throughout this essay I use the term “mixed race” to refer to individuals who self-identify with more than one racial/ethnic group. In this case, I do not make a distinction between race and ethnicity, but leave it to the discretion of the individual. In my own usage of the term, however, I use the term to refer to mixed race identity with an understanding that race refers to the socially and historically constructed racial categories of Asian, white, Black, and Native/Indigenous, adding Hispanic/Latina/o identity as a race alongside these other categories.
By virtue of their membership in two or more racial/ethnic groups, mixed race people negotiate simultaneous inclusion and exclusion. They are able to assert their identities as members of a given racial/ethnic community and to utilize their difference as people who also identify as members of another racial/ethnic group. As part of this process mixed race people push their “monoracial” counterparts to consider the relationship of their community’s issues to those of another similarly situated community. This experience is especially pronounced for “dual minority individuals,”3 or individuals who identify as mixed race of two non-white backgrounds.

To trace the development of this argument I begin by framing this argument within scholarship in the field of Critical Mixed Race Studies and its emerging sub-field, which focuses on the experiences of dual minority mixed race individuals. I then draw upon examples from my own involvement as a dual minority mixed race person in the contemporary immigrant rights movement, and conclude with some thoughts regarding the potential future directions of this research.

I. THE FIELD OF CRITICAL MIXED RACE STUDIES AND THEORIES OF DUAL MINORITY MIXED RACE IDENTITY

Prior to discussing examples from the contemporary immigrant rights movement, a social movement in which I have been involved for the past ten years, I will begin by providing an overview of the relevant literature, which informs the arguments I make in the latter portions of this essay. My approach to understanding mixed race identity and its potential as a catalyst for transformative social change begins with the Court’s decision in Loving v. Virginia,4 proceeds with legal scholars’ analysis of the categories of whiteness and interracial marriage laws, and then continues into an analysis of the complexity of mixed race identity, seeking to go “beyond” the color line’s white/non-white divide. I then introduce and draw upon scholarly discussions taking place within the rapidly growing and developing field of Critical Mixed Race Studies before ending with an explanation of the two primary interventions that this essay, through a focus on dual minority mixed race activists’ experiences, can provide.

3. The term “dual minority” refers to individuals who identify as having a background consisting of two or more non-white racial/ethnic identities. Put differently, the two primary aspects of a dual minority identity consisting of 1) not identifying as white and 2) also identifying as being of mixed race. For further explanation see Joanna L. Rondilla, Rudy P. Guevarra Jr., and Paul Spickard’s forthcoming book, Red and Yellow, Black and Brown: Decentering Whiteness in Mixed Race Studies from Rutgers University Press.

The United States Supreme Court’s landmark decision in *Loving v. Virginia* outlawed state bans on interracial marriages.5 The *Loving* case concerned a white husband, Richard Loving, and an African American and Native American wife, Mildred Loving. The couple married in the District of Columbia, but sought to reside in their home state of Virginia.6 Since Virginia law at the time outlawed interracial marriage, the Lovings were prosecuted under the law for violating the state’s anti-miscegenation statute.7 The Court’s decision in the case, which overturned Virginia and other states’ bans on interracial marriages, was framed largely in terms of Black and white identity and the issue of the color line. The color line demarcated white identity and privileged it relative to other racial or ethnic “categories”: these laws largely were meant to keep whites and non-whites separate, and to preserve and maintain white racial purity. Moreover, though this decision has predominantly been framed as pertaining to the experiences of interracial couples and their mixed race children, as legal scholar Dorothy Roberts has argued, the *Loving* decision can also be understood as a Civil Rights decision.8 Viewing the *Loving* decision as a Civil Rights decision helps to broaden our analytical lens to include the full scope and implications of the case.

In the period following the Court’s decision in *Loving*, as interracial couples and their mixed race children enjoyed greater social acceptability, mixed race children were raised in an environment where their parents’ relationships were seen with decreased stigma. This shift and the accompanying gradual cultural shift encouraged mixed race individuals, children of these interracial unions, to seek to learn more about the circumstances under which their parents and families were able to come together. Mixed race people’s desire to learn more about their legal rights then led to an increase of scholarly inquiry into the topic. Legal scholars and historians have since provided holistic and in-depth analyses of the *Loving* decision and its implications both in the historical and contemporary periods. Examples of some of this path-breaking scholarship on the *Loving* decision include Rachel Moran’s *Interracial Intimacy: The Regulation of Race and Romance*;9 Kevin Noble Maillard and Rose Cuison Villazor’s *Loving v. Virginia in a Post-Racial World: Rethinking Race, Sex and Marriage*;10 Randall

7. *Id.* at 3.
Kennedy’s *Interracial Intimacies: Sex, Marriage, Identity and Adoption*; and Ariela Gross’s *What Blood Won’t Tell: A History of Race on Trial in America.* In the past decade, scholars have also sought to nuance our understanding of the *Loving* decision by including the discussion of cases preceding *Loving* and their implications for the current political period such as Robin A. Lenhardt’s article, “Beyond Analogy: Perez v. Sharp, Antimiscegenation Law and the Fight for Same Sex Marriage.” Similarly, Angela Onwuachi-Willig’s book, *According to Our Hearts: Rhinelander v. Rhinelander and the Law of the Multiracial Family,* discusses the increasingly complex cases that centrally concern racial representation, and grapples with how such identities have found their way into the courtroom. Dean Kevin Johnson published the first of its kind edited volume on the legal treatment of interracial marriage and mixed race identity in 2003, *Mixed Race America and the Law: A Reader.*

The focus on the Court’s decision in *Loving* gave way in the early 1990s to a greater focus on the experiences of mixed race people, in particular the offspring of interracial marriages. These efforts also increased the visibility of mixed race activists within the movement to reform the United States census and to allow mixed race people to check more than one box. While much of the earlier literature concerned the Court’s decision in *Loving*, focusing on the state’s policing of access to whiteness, there was then a shift toward exploring the identities of what have been called “dual minority” mixed race people, or those individuals who do identify as mixed race, but not as white. Some key examples of this shift and the types of communities covered under this label—Punjabi-Mexican, Mexipino, Blaxican, and Chino-Latino—include Karen Leonard’s book *Making Ethnic Choices: California’s Punjabi Mexican Americans*; Rudy Guevarra’s book *Becoming Multiracial: Race, Education, and Identity in a Racially Complex Society*.
ing Mexipino: Multiethnic Communities in San Diego;18 Rebecca Romo’s article “Between Black and Brown: Blaxican (Black-Mexican) Multiracial Identity in California”,19 and the conclusion in Robert Chao Romero’s book The Chinese in Mexico, 1882-1940, which advocates for the consideration of a potential field of “Chino-Latino Studies.”20 These efforts to de-center whiteness as part of the mixed race studies project recently culminated in the forthcoming publication of the book, Red and Yellow, Black and Brown: Decentering Whiteness in Mixed Race Studies.21

This vibrant scholarly discussion of mixed race identity, however, did not take place in a vacuum, but led to the development of a professional association, the Critical Mixed Race Studies Association22 and its flagship journal, the Journal of Critical Mixed Race Studies. Describing the field and the purpose of the association, founding editors G. Reginald Daniel, Laura Kina, Wei Ming Dariotis, and Camilla Fojas explain that the view of research on mixed race identity as constituting its own field or area of inquiry is a recent phenomenon:

Studies of mixed race only recently have been thought of as encompassing a distinct field of study in the United States. Many individuals began describing works as being part of the field of mixed race or multiracial studies, particularly around 2004. At that point, the number of publications on the topic reached a critical mass, that is, they began to acquire a self-sustaining viability.23

The multi-disciplinary and trans-disciplinary scholarship comprising the field of Critical Mixed Race Studies, as the editors of the inaugural journal volume also explain, represent efforts to examine the topic with regard to the diverse array of communities whose experiences are encompassed by umbrella categories such as mixed race and multiracial. Conversations regarding whose experiences count as part of a mixed race identity is a topic that is increasingly relevant for members of the Loving and post-Loving generation.24

Situated within the field of Critical Mixed Race Studies, this essay seeks to make two primary interventions: 1) to examine not only

21. Spickard et al., supra note 3.
22. For more information about the Association see https://criticalmixedracestudies.wordpress.com/.
24. Id. at 17-18.
the social movement activism of mixed race people in the late 1990s and early 2000s around the revision of the United States census categories, but also across social movement contexts and 2) to expand upon the recent shift in Critical Mixed Race Studies literature focusing on “dual minority” mixed race identity to form cross-racial coalitions in an era of increased intersectional social movements.

II. EXAMPLES FROM A MIXED RACE INDIVIDUAL’S PARTICIPATION IN THE CONTEMPORARY IMMIGRANT RIGHTS MOVEMENT

Two examples from my participation in the contemporary immigrant rights movement illustrate the impact of my own dual minority mixed race identity on my participation in social movement activism and help illuminate the potential impact for such identities to be productively leveraged in activism more broadly. While these examples draw from personal experience and are situated within the context of Asian and Latina/o coalition building in the fight for undocumented immigrant rights, they point to possibilities that can potentially be applied in other contexts and begin a discussion that I plan to continue to examine in future research.

During my time in Chicago working with immigrant rights activist organizations, I attended a community meeting on the city’s northwest side, where we gathered to discuss strategies to combat immigration agents’ targeting of local community members for deportation. The meeting included monolingual Spanish speaking undocumented Latina/o elders and bi-lingual Latina/o undocumented young adults. The meeting was held in Spanish, rather than in English, acknowledging the needs of the elders in attendance, needs that even in organizing spaces are not necessarily privileged above those of other participants.

Anna, a self-identified Filipina undocumented immigrant organizer, was also present at the meeting and we both sat on the same side of the room, only a few spots over from one another. At the beginning of the meeting, Anna listened intently and looked actively engaged in the conversation. However, after half an hour had passed, Anna leaned over to me and asked for clarification regarding some of the words being used. Tagalog, Anna’s native language, shared some words with Spanish, partially the result of Spain’s colonization of the Philippines, and she had used this overlapping vocabulary to make sense of the early parts of the conversation. Yet, some of the words used did not overlap or translate as fluidly and so I began translating, sentence by sentence, the conversation for Anna. While translating, I made sure to whisper so as not to disturb the flow of the conversation.
Following twenty minutes of translating for Anna, feeling bad for making it so that I was not able to fully participate in the discussion myself, she changed her mind and told me that it was alright if I did not want to do it anymore.

Despite understanding what Anna meant by not wanting to inconvenience me with the translation of the conversation, I saw it as critical that she, as an undocumented immigrant organizer herself, was also able to participate in the conversation if that was what she desired. Language barriers were something that surfaced repeatedly in my own research on coalition building among undocumented Asian and Latina/o activists nationally. Being both Asian and Latina/o myself, and bilingual in English and Spanish, I saw my role as a mixed race ally in that space as helping when needed and called upon. The opportunity to translate for Anna was something I welcomed and actually enjoyed. At the same time, I felt her frustration of wanting to participate in the dialogue on her own; to be able to speak with and collaborate directly with her fellow undocumented community members without the assistance of a translator. The process of bridging two cultures—whether through language, cultural traditions, or histories of migration—was an important but also challenging aspect of movement organizing.

Moreover, as a bilingual and multiracial person, I had the cultural background and linguistic ability to help facilitate this conversation around undocumented immigrant activism and organizing that was taking place. I was also, however, very much aware of my own positionality as a United States citizen and someone who, while the child of immigrant and refugee parents, am also someone who is not directly affected by the issues around which organizing was taking place. Navigating this role of bridge-building as an ally illuminated for me the potential benefits of mixed race people’s participation in movement building efforts, but also the limitations of such participation. Respect for elders’ contributions and a shared bond as undocumented people were both ways that Anna as a Filipina undocumented immigrant could relate to others in the space without any assistance. Also, my assistance translating from Spanish to English was not necessarily tied to my identity as a Latina/o. But my identity as an Asian/Latino individual and ally of undocumented immigrant activists offered an important and unique opportunity to productively leverage my experience to come alongside these organizing efforts.

During another occasion during my time in Chicago I was assigned the position of “caretaker” for an action carried out at an immigrant detention center just outside the city. As part of this action, undocumented Asian and Latina/o organizers blocked the exit for
buses filled with individuals being brought to immigration court and later that afternoon, to Chicago-O’Hare airport to be deported from the United States. As one of the designated “caretakers” for the group, I was assigned to assist Anna. The caretaker role entailed communicating with the activist’s family after he or she was arrested for his or her participation in the civil disobedience. After their arrest and processing at the local jail, the expectation was that the organizers would be released, most likely later that afternoon. Yet just in case, we also made plans to notify families and significant others if the activists were to be held overnight or if there were any complications with people being released. At times, complications arose for individuals who had been arrested in similar acts of civil disobedience or who had an open immigration court case. Given that Anna had at this point not yet shared the news of her participation in undocumented immigrant-led organizing spaces with her parents, it was Anna’s sister who was listed as the contact person.

The morning of the action, Anna and I touched base about what she would want me to share with her sister if she were held overnight or if she were to be placed in deportation proceedings for her participation in this action. Though this ultimately did not occur, heeding the advice of the attorneys who advised the organization, we discussed a plan of what I would say if this were to happen. I knew that Anna’s reason for taking part in this action was to make a statement and to show that all undocumented individuals—Asian or Latina/o—deserve to be treated fairly and justly. In our conversations, however, my identity as a mixed race Asian/Latino person was invoked: Anna felt I would be well-situated to speak with her family and to break the news to them if there were greater issues that came into play as a result of the civil disobedience action. Being able to serve as an ally in this action and to participate in outreach to members of the Asian American community given my self-identification as an Asian/Latino person was empowering for me and demonstrated the relevance of my bi-cultural and mixed race identity. While scholarly attention has focused on cross-racial understanding and the convergence of efforts by communities who experience parallel and overlapping forms of marginalization, I have personally seen the impact of activists who, by virtue of their own lived experiences, identify as part of both communities. This example and the one previously point to the initial potential benefits of these efforts.

Later that morning during the action, a reporter approached Anna and me while I helped shield Anna from the sun and ended up wiping a tear off her cheek. Anna was crying because of the strong emotions she felt in that moment, but did not have access to her hands as she was tied, due to the use of a lock box device, to her fellow
protesters to make it more difficult for police to remove them from blocking the bus exit at the detention center. After photographing the image, the reporter asked me if Anna spoke Spanish and about her racial/ethnic background. I relayed the information to Anna, whispering the message in her ear amidst the chanting going on with the arrival of the local police and the crowd of reporters taking photographs of the action. She ended up doing a brief interview with the local Spanish news media with some translation assistance and I told the reporter that in fact she was Filipina, an undocumented Filipina protesting alongside her fellow undocumented peers. During the interview, Anna explained that she was protesting the mistreatment of immigrant peoples in detention and through the deportation process, which was separating families and unjustly criminalizing undocumented people for simply living their lives.

While we are in an increasingly restrictive political climate, the issue of immigrant rights is a concern for many groups including individuals from many different racial, class, and religious backgrounds. The movement’s push to represent points of view from both Asian and Latina/o immigrant perspectives points to the fact that there is a role for many mixed race people to play, including dual minority mixed race individuals like myself. Though it is important for mixed race individuals to take part in activism related to the experience of their unique racial heritage and mixture, such as the need for census representation or the need for bone marrow donors to help treat genetic diseases, exploring the potential for cross-racial coalition building is an important area of need and one in which mixed race activists can play a promising, productive role.

III. CONCLUSIONS AND FUTURE DIRECTIONS

Looking at the issues that have arisen and will most likely continue to surface in the coming decades, a multiracial coalitional approach to organizing is critical. More specifically, as the need to cultivate cross-racial and ethnic coalitions becomes ever more relevant, understanding the potential of mixed-race activists’ participation in social movement activism will be especially telling. Mixed race people, given their identities as both white-nonwhite or dual minority, are themselves people of color. Mixed race people’s interests flow across communities of color, at times including that of two or more communities of color. Therefore, their membership in multiple racial and ethnic groups, as this essay has argued, allows for their cultivations of a unique form of coalition and solidarity building.

As this essay discusses, the untapped potential of mixed race people’s participation in contemporary and future social movements en-
Courages a productive re-thinking of the possibilities for coalition building across various movement contexts. While earlier discussions of mixed race people’s identities focused largely on their impact of whiteness on their “non-white” identities, the utilization of a dual minority framework allows for a re-consideration of the role of whiteness and white racial privilege in the construction of a mixed race identity. Doing so makes way for a discussion of communities of color’s subjection to parallel forms of genocide, colonization, and state sanctioned violence. These overlapping forms of oppression have then led to situations in which multiple communities of color occupy similar social and political spheres, resulting in intermarriage and subsequently, the formation of interracial family units. Such bonds and family configurations assist in the development of a united community with a shared history. And while dual minority mixed race people may not identify as “partially white,” whiteness as a racial category remains an important feature of how the United States’s racial hierarchy is configured, affecting how communities of color are positioned within the hierarchy and in relationship to one another.

Bridge building and the blurring of racial and ethnic boundaries in the contemporary political moment have proven especially useful in combating state violence and hostile racial and xenophobic climates. In the Black Live Matter movements for instance, attention has been drawn to the experiences of Afro-Latina/o people and their experiences as phenotypically Black, but culturally Latina/o, and the impact this has on how people are viewed, as immigrants, or at times, mistaken for being African American. Within the movement to halt the construction of the Dakota Access Pipeline, #NoDAPL activists have similarly emphasized the sovereignty of Native land and communities, upon which the federal government is seeking to not only infringe upon Indigenous Nations’ sovereignty and territory, but also the artificial nature of national borders, which cut through Native communities’ tribal lands and territories. In the contemporary immigrant rights movement, activists in the #Not1More Deportation campaign have also worked to broaden their understanding of who is undocumented, pointing out the fact that undocumented status is an issue affecting Asian, Black, and Latina/o people as well as an issue that is closely linked to the increased criminalization of Muslim people in the United States and in the global context.
BELONGING: RACE OR CATEGORIES

ELAINE S. SYLVESTER†

As a biracial child growing up in Virginia in the late 20th and early 21st century, I was never sure where I belonged on a racial spectrum. I was born to a white woman from California and a black man from Louisiana, who raised my siblings and me with a sense of familial belonging; however, while always knowing that I belonged to a biracial family, outside of the family home, I did not have a sense of belonging to any racial community. This essay is an overview about my feelings of my experiences; of how I view belonging and racial communities in light of my experiences; and of how race is classified in relation to the United States Census and the implications of those classifications.

BELONGING

We are programmed to think that racial communities will shape our relationships, and to some extent that might be true. But I would propose that racial communities only shape our relationships in so far as these communities often are founded on shared experiences through which individuals find belonging.

When I say that I did not have a sense of belonging with any racial community outside my immediate family I am not saying that my parents did not try to give us a sense of an outside community. I remember attending community meetings for young African-American girls and going to Sunday school classes even though my parents were not active churchgoers when I was young. But the common elements that brought the members of these groups together did not apply to me: I had not been raised in all African-American communities like the girls in my heritage meetings (having grown up in a predominately white neighborhood and attending predominately white schools) and I myself was not religious. Belonging was not something that came easily to me.

“Passing” was not an option. For one, it would not have been an acceptable path in my family; my parents always stressed the importance of knowing and accepting our full family history. Secondly, I presented to the world as a light-skinned African-American. Even when I was trying to be involved in the African-American community

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at my prestigious, mostly white high school, my African-American peers called me “Oreo” (slang for white on the inside, black on the outside). Most of my African-American peers seemed to derive their sense of belonging from the racial group that they knew they belonged to, and they were quick to point out my failings as a black person, perhaps in attempt to solidify their understanding of their own identities. On the other hand, my white peers did not seem as focused on the idea of belonging to a certain racial community and were less likely to ostracize me for not fitting in to a specific racial role. Because of this, my only sense of racial belonging came in interactions with my siblings, who faced similar experiences to my own.

Growing up, I often felt that I was putting on a façade whenever I left the house for social events. This could explain why I was kind of an unsocial child. I often felt that to be accepted among my peers who formed relationships based on race that I had to act a certain way; to be what they were expecting racially even if it was not what I really was. I was afraid that people would discover that I was some sort of imposter that really did not belong in the social group to which I physically should belong. All through high school, I worried how I would fit into the racial categories that my classmates seemed to group themselves into because I did not technically fit into these perfect racial identity groups. It was not until college, when I started practicing occasionally with a recreational sports team that I began to understand that a sense of belonging had little to do with my skin color and more about a sense of connecting with other people.

For me, it is the shared experiences that create the connections that are at the heart of belonging. It maybe happens less often for me than it does with others (or maybe that it just does not seem to happen for me in groups defined by race), but it does happen. It can be as simple as talking to a peer about classes, lamenting over the workload, and recognizing that we are going through the same thing. It can be as intense as growing up with people who look similar to you and have faced the same biases growing up because of your shared appearances. This connection is belonging, and the more it happens, the more a person feels like he or she belongs. Belonging is about shared experiences, and for African-Americans this is understandably a strong bond since they often face experiences based on the prejudices of others.

The team that I practiced occasionally with in college was a wonderful mix of different identities, from racial minorities, to trans individuals, to queer individuals—all having grown up with different phenotypes and ancestries, but having found shared experiences of “otherness” that bound them together. This “otherness” was not nec-
essarily simply about being different, which by itself is noted in communities and often accepted. “Otherness” is manifest as a difference that is shunned and pushed out of the collective group. As someone who had felt ostracized growing up, I tried to empathize with their experiences. I never truly belonged to this amazing group of individuals because I only discovered them toward the end of my time at college, but they gave me the first true glimpse that belonging is really about the shared experiences.

Despite not understanding this sense of belonging until college, looking back on my diverse group of friends, I know that relationships, the manifestations of belonging, are grown in these simple and complicated shared experiences. My lifelong friendships are ones that grow out of shared experiences, and when the shared experiences no longer hold meaning, or fade, or are replaced by newer experiences, relationships fade.

That being said, not all multi-racial children have the same experience. Some children tend to identify more with one racial identity than another, while others tend to revel in the multi-culturalism that they represent. However, as racial identities and classifications evolve and change, there arises a conversation in our society about whether we should be “getting over race” or whether we should still be acknowledging race in order to address underlying social discrepancies.

RACIAL CLASSIFICATIONS

Race is a method of grouping of humans based on observable phenotypes (such as skin color) and ancestry. While this classification has a far-reaching history, it also has a history specific to the United States. Race has changed from the 1660s, when colonies in Virginia first adopted a “partus sequiter ventrem” rule, which dictated that children born were considered as being the same racial status as that of their mothers.

There has recently been a renewed academic discourse about the importance of racial classifications. These discussions are crucial now, especially with the rise of white identity politics. Many white Americans are finding a renewed importance in their shared identity and are beginning to parade their whiteness as an excuse for policy concerns and actions.

What these white Americans are failing to note, is that this shared identity is based on nothing more than skin of the same color. It is not necessarily based on shared ancestry, shared issues, or shared experience. Being proud of an Irish-American ancestry, and the experiences that are entailed as part of the Irish-American history
in America, is different than finding comfort in being a white American in a predominately white county.

In this way, race for African-Americans is different than race is for white Americans. While for many white Americans, cultural identity is rooted in their family's immigration to the United States, this is not the case for many African-Americans. Many African-Americans cannot trace their ancestry back as far as white Americans. Shared experiences of African-Americans are rooted in the shared history of slavery and incubated in Reconstruction and the Civil Rights Movement. For example, my family on my father's side cannot be traced back to our countries of origin in Africa, but on my mother's side our family is Swedish, English, and Irish. For my ancestry, it is most accurate to describe my father's family as black, but lacking to describe my mother's family as white. Furthermore, racial classifications have historically been used to designate outside people as “others,” with “white” often being the default classification.

RACE IN THE CENSUS

Some members of the American Psychological Association have suggested an ecological approach to defining human classifications:

With an ecological lens, psychologists can understand in more depth the multiple, embedded contexts in which all individuals exist and the reciprocal and dynamic interactions between individuals and these other systems. This model examines individual characteristics while also considering the macrosystem (global influences), exosystem (social and governmental institutions) and microsystem (family, community and peers), which interact as an open system[1] . . . . These interactions affect and influence all aspects of the person and daily life.2

Identities are formed through experiences. In turn, the environments that we occupy shape those experiences that we do and do not have. Race cannot define our identities because it cannot fully encompass our experiences.

In this vein, the American Anthropological Association has also recommended the elimination of race on the United States Census going forward. In 2013, the Census Bureau declared “that race and ethnicity are not quantifiable values. Rather, identity is a complex mix of one’s family and social environment, historical or socio-political constructs, personal experience, context, and many other immeasurable

The United States Bureau of the Census decided that race was a socio-political construct and not scientific or anthropological in nature.  

Racial classification has always been a topic for debate; however, there are two ways in which the discussion about the Census has varied from discussions in the past: 1) there is a new focus on self-identification versus assigned identity and 2) the shift away from “race” and “origins” on the Census to “categories.”

It was not until the 1960 Census that Census takers were first allowed to pick their own racial identities. While this may not seem like a huge step forward, for someone who has never really identified with other people’s perception of me, being able to self-identify allows some significant corrections of others’ perceptions.

Less than ten years later, Loving v. Virginia became important not only because it allowed for interracial marriages (and disallowed racial classifications to be used in statutes absent strict scrutiny), but also because it gave birth to a new generation of multiracial children. In 1997, thirty years after the Loving v. Virginia decision, the Office of Management and Budget (“OMB”), the office of the government in charge of Census administration, took the next step after self-identification due to the increasing number of interracial children; the office allowed Census takers to indicate one or more races on the 2000 Census.

For the 2020 Census, the OMB is considering a new way of asking questions about identity, but focusing on self-identified “categories” rather than on “race” or “origin.” While these categories are still under development, it seems as if the categories would include voluntary options of race and origin, which would not have to be selected if they did not coincide with the Census taker’s personal identity. Because of this proposed set-up, Census takers would not be required to indicate any racial affiliation if they did not identify with any. While it is seemingly insignificant, this shift displays the increasing number of diverse members in the American public and acknowledges the differences of ethnic groups and self-identification within technical racial

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classifications. It also opens up the Census format for a more malleable self-identification process which allows people to be grouped with people of similar experiences instead of solely on skin color.

This shift from depending solely on a person's racial composition to allowing an individual to group his or herself by several different types of categories shows a growing deference to shared experiences over shared DNA. As author Kati Marton describes in a recent opinion piece for the Washington Post, identity is best defined by our experiences and events in our individual lives rather than the genetic makeup we were born with.

This is not to say that experiences and racial Makeup are unrelated. In fact, as a person who presents as African-American, I am reminded daily that the experiences I have are tainted by my own genetic makeup. However, many of my experiences are not related to my race and have more to do with other factors of my upbringing, such as socio-economic status, gender, and education.

A categories test on the Census could not possibly group me with all the people who have had the same experiences as I have; I am certain there is no other person. But this test, rather than a test based on race, allows for the possibility, especially with those who are multiracial, to be grouped with those who come from similar life experience—people who have more similar stories—rather than with people who are the same race.

No two people are the same, but up until this point the Census has grouped together huge swaths of people only by genetic makeup. When we share experiences with other people, in conversation, in relationships, through social media, and in books, we are connecting to those primal things that are the building blocks to communities: those feelings of belonging. While grouping people by category only begins to cover the wide and beautiful diversity of human beings that we are, it does delve deeper into shared experiences rather than shared skin color.

CONCLUSION

To me this is what makes the story of Loving v. Virginia such a beautiful story. While the case is a decision that is often touted in the legal community, the real takeaway is the simple story of a couple. I

always knew about the Lovings’ case—being from a biracial family knowledge of Loving v. Virginia is probably required. But in high school I did a paper on anti-miscegenation laws and really learned about the Lovings themselves for the first time. What struck me was not their fight in the courts, but rather their love story: two people growing up in the same community, who therefore had similar experiences and shared connections, who found belonging in each other. A belonging that, even though these were not people who wanted to fight on a national stage, was worth fighting for. For them, it was not about race, it was all about belonging.

When asked about my identity, I usually answer with the easy classification of biracial. But when I truly stop to think about who I am, I think about where my roots are planted and the places where I seek food when hungry: my Creole grandmother who taught me how to cook crawfish etouffee or my DAR grandmother who taught me the proper way to roll out dough for apple pie. I think of my grandfather, the descendent of Swedish immigrants who spent his childhood on an Iowa farm, and my grandfather, who worked in a black barbershop in New Orleans. In other words, I think of the experiences that my family and I have had, not the colors of our skin. There are so many of my and my ancestors’ experiences that it is impossible to sum up our lives by a simple classification based on phenotypes and ancestry. Biracial is not what I am, it is just the current, and wholly inadequate, classification of my diverse experiences.

These discussions of the evolution of the Census give me hope. Every time I see a multiracial family with a multiracial child, I feel a bit more expectancy. As I have found my way to belonging, I understand that the racial labels (whether they fall under “race” or “origins”) are becoming a less applicable way of identification for more individuals. While for the foreseeable future multiracial children are likely to continue to be grouped into this catch-all-category of “One or More Races,” I know that as our numbers continue to grow, at some point this classification will no longer be sufficient for gathering and analyzing information. The debate about the Census shows that an evolution is already occurring.
REFLECTIONS ON THE LOVING CONFERENCE:
RACE, IDENTITY, COMMUNITY, AND CONFLICT

BERNARD MAYER, Ph.D.†

The Loving story is the American story. At heart it is about what we most value, how we view the American community, and how tolerant we are of our differences. This was the challenge that faced our nation when the Constitution was created and it is still at the core of our most enduring conflicts. As well, the decision in Loving v. Virginia marks a watershed in our understanding of the essential nature of the struggle for racial justice.

These themes were prevalent throughout the Loving Symposium. Participants raised questions about Loving and identity, Loving and the struggle for civil rights, Loving and our often conflicting views of community, and Loving and our tolerance for our differences. In this reflective essay, written immediately after the symposium, I focus on Loving, identity, community, and enduring conflict—themes that were interwoven throughout the discussions at the conference.

I. LOVING AND IDENTITY

When the Loving decision came out in 1967, I was an active participant in the civil rights movement. At the time, it seemed to me that the concept of race was fairly straightforward and that the nature of the struggle for justice was about finding justice for people of all races. Of course, there were competing ideas about how to accomplish this. The mainstream civil rights organizations fought for the right for full participation in all institutions of American society and saw integration and an end to discriminatory laws and policies as the key to achieving this goal. The Nation of Islam, most powerfully through the voice of Malcolm X, took a separatist approach arguing that African Americans should focus on self-empowerment.

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1. 388 U.S. 1 (1967).
2. Taylor Branch, Parting the Waters: America in the King Years 1954-63 (1998).
Our view of racial identity at the time was simplistic (essentially, one was Black, White, Hispanic, Asian, or Native American). Loving itself did not change this much—what it did do was to forbid laws that prevented people from marrying across these seemingly clear boundaries. Of course, we knew then that many, perhaps most, Americans descended from ancestors belonging to different racial groups. But the struggle for justice was, and for the most part still is, based on a concept of race in which the boundaries seem pretty clear. Someone who was partially descended from a less dominant or powerful racial group was most often viewed as a full member of that group and excluded from “membership” in the dominant (i.e., white) group. This “reading in” of a less powerful racial identity4 where there was any ambiguity was ensconced in social norms and legal restrictions.

Shortly after the Loving decision, the framing of the struggle for racial justice changed significantly. The rallying cry became “Black Power!” rather than “Black and White Together.” Kwame Ture (known then as Stokely Carmichael), at the time the Chair of the Student Non-Violent Coordinating Committee, raised this slogan, and it was most powerfully embodied in late 1960’s and early 1970’s by the Black Panthers. While not a new concept, in the years after Loving it came to dominate and redefine the movement. At the time, with the growing strength of movements emphasizing Black power and Black identity, Loving may have seemed to be the last gasp of a struggle focused on integration. But in retrospect, Loving seems to represent a bridge between an interest and identity based approach to civil rights.5

Roughly speaking, prior to 1967, the focus of the movement was on how to protect and expand the rights of African Americans and on how to secure better education, housing, employment, and more access to the political and legal process. After 1967, the focus shifted to embracing identity, asserting it, and demanding power. The underlying goals did not entirely change—better education, housing, health care, employment, and access to justice continued to be critical concerns as they are to this day, but the focus on identity completely reframed the issue, the dialogue, and the political discourse. Loving challenged the discrimination that went with the simplistic racial categorizations of the day, and asserted the right to choose one’s own identity in a partic-

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ularly powerful way—by insisting on the right of individuals to chose whom they love. *Loving* bridged and brought together the struggle to allow people of different races to interact in a free and unconstrained way and the importance of identity as an organizing principle for the struggle for social justice. Our most powerful current movements for justice—Black Lives Matter, Third Wave Feminism, and Lesbian, Gay, Bisexual, Transgender, and Queer (“LGBTQ”), to name a few, take place in the space created by *Loving*.

*Loving* opened the door for a much broader and more nuanced concept of race and identity. Legalizing and institutionalizing multi-racial parenting set the stage for breaking through the norms that established rigid racial categorizations. Our racial and other identities are increasingly seen as a matrix of affiliations and connections, some more predominant than others. At the *Loving* Symposium, speakers discussed the way in which this matrix of identities played out for them. They related the pressures they often experienced to choose one dominant racial identity and how this often conflicted with a more authentic understanding of themselves as multiracial. For many this posed an uncomfortable choice between being true to their sense of who they are and being loyal to the aspect of their identity that aligns them with an oppressed racial category.

But while identity may be complex and non-linear, racial oppression is much less so. Dominant groups oppress less dominant groups, and to do so, they demand simplistic definitions of who belongs to these groups and who does not. This is true of gender, sexuality, race, and religion. We resist recognizing Queer identities as a society in part because the increasing complexity of gender identities makes gender-based discrimination more complicated. And if the concept of race becomes too complex, then racial domination becomes more difficult. Some have argued that complicating the concept of race also makes the struggle for racial justice more challenging.

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II. LOVING AND COMMUNITY

The search for identity occurs at the intersection of the pulls toward autonomy and community.8 These are prevalent forces for us as individuals but also for the communities to which we belong.9 The struggle between Malcolm X and Dr. Martin Luther King’s beliefs about the path to justice can be viewed from this perspective. Each offered a fundamentally different view of community. King’s vision emphasized affiliation. The African American community could flourish best by breaking down the boundaries that kept it marginalized within the larger American community. Malcolm X advocated separation. Only by taking a militantly autonomous path would the African American community overcome the oppression it has endured. The tension between these visions continues to this day. Similar struggles exist in almost all movements for social change.

Much of our discussion at the Loving Symposium explored the different communities to which multiracial people belong, and the ways in which their paths were defined by their various affiliations and separations. Several participants in one form or another asserted that while they are “fully African-American” (or Latino, or Vietnamese), they also understand themselves as multiracial. Not only, they told us, is there no intrinsic contradiction between these identities, but they could not be fully one without being fully the other. Yet they did not always arrive at this integrated identity easily. Many reported pressure to identify unambiguously and totally with one community at the risk of being labeled a turncoat or of trying to “pass.”

The acceptance of multiracial identity has grown incrementally in the fifty years since the Loving decision, reflected by the growing number of organizations for people who identify as multiracial, by changes in how the United States Census categorizes people10 (a change in which participant G. Reginald Daniel played a major role11), and by the increasing acceptance by social justice activists of the validity of a multiracial identity. Loving helped set this in motion, but it has been a long and arduous process. Daniel described the belonging he felt when he first attended a meeting of people who identified themselves as multiracial. For him and others at the conference, accepting this affiliation allowed a fuller sense of personal autonomy.

11. See supra note 7.
but also allowed for a more authentic connection to the racial community in which they grew up or have been assigned to by social norms and policies.

III. LOVING AND ENDURING CONFLICT

*Loving v. Virginia* has been the law of the land for fifty years, and for some, at the time, it seemed to be a final nail in the coffin of the legal framework of discrimination. Surely, the decline of institutional and cultural racism would inevitably follow. From today’s perspective that seems very naive. Changing the law will not in itself change our consciousness or the social forces that flow from and reinforce this consciousness. Race is the iconic enduring conflict in American history. It has been there from the beginning and it will continue to define our national consciousness and social evolution. *Loving* was an important way station along the way. That is, it gave evidence to and encouraged a maturation of the issue, a transition from one phase of the conflict to a new one, from one narrative to a profoundly altered story of struggle and oppression, and it also marked a shift in the power dynamics surrounding racial conflict. From a struggle for rights it became a movement for power, from a conflict about separation versus integration, it became a story of multi-faceted identity, and from an effort to participate in an existing power structure, it became a challenge to the structure of power.

While *Loving* represented success in the arena of legal rights and access to social institutions (i.e., marriage), the demand for change in the way resources are allocated and power distributed among Americans of different races has in many ways stalled. Fifty years on, institutionalized racism is still an incredibly powerful force and there are no signs of significant change being made in the fundamentally disadvantaged position of most racial minorities.

The discussions and exchanges at the *Loving* Symposium illuminated the complexity of both individual identity and community, and the ways in which the relationship between these continues to evolve and take many different shapes. The question the conference leaves unanswered is whether our increasingly nuanced understanding of racial identity and community attacks the roots of our enduring conflict over race in America—in our institutions, in our culture, in our patterns of power, and in our individual and collective consciousness.

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