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ARTICLES

NOTES

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FOREWORD

PATRICK J. BORCHERS

What follows are two of the papers from academics who participated in the Association of American Law Schools' 2016 meeting of the Conflict of Laws section, which I chaired. I chose a topic on what effect conflicts (really more precisely choice-of-law) codifications should have on the just-begun project to draft a Third Restatement of the Conflict of Laws.

All conflicts restatements have been controversial. The first one, completed in 1934, was under immediate attack from the legal realists who argued that its relatively hard-and-fast rules reflected neither what judges should or actually do.

What followed was the so-called American Conflicts Revolution led by several academics, the most influential of whom was Brainerd Currie who propounded a theory he called interest analysis. The nub of Currie's theory was that courts should reckon the interests of the party (usually meaning that a state had an interest in protecting its domiciliaries) and apply law accordingly. His theory caught on and beginning in the 1960's, influential state courts moved away from the First Restatement to the more free-form analysis suggested by Currie and others.

In this maelstrom, the Second Restatement was drafted. In large part it was an effort to blend the various theories into a test that would result in the application of the law of the state with the "most significant relationship." Influential academics opposed the Second Restatement project, but it was approved by the American Law Institute by a narrow vote and went into effect in 1971. In one sense, the Second Restatement has been a success because a majority of U.S. courts follow it. But in practice, the way in which they apply it varies greatly from court to court.

In the meanwhile, much of the rest of the world has looked on with interest, but not envy. The plethora of U.S. theories and the difficulty of their application have made results less predictable. They also have led to forum-shopping as empirical research has shown that states that apply the modern theories are much more likely to apply forum law. In general, other nations follow conflicts codes, and two American states—Louisiana and Oregon—have adopted them.

To be sure, codes have not been a panacea. They are not always drafted with precision. In an effort to walk the tightrope between flexibility and the need for reasonable predictability they sometimes fall

to one side or the other. So the question becomes whether the Third Restatement should attempt to follow them, look more like the perhaps-too-flexible Second Restatement, or aim for something in between.

The panel consisted of five participants: the two whose papers follow (Professors Patrick Borchers of Creighton University School of Law and Mathias Reimann of University of Michigan School of Law), Professor Qingkin Xu of Shandong University, China. Professors Symeon Symeonides and Kermit Roosevelt—the latter the Reporter for the Third Restatement—acted as commentators. For reasons beyond our control, Professor Xu's article is being published in the American Journal of Comparative Law but can be read together with the two contributions that follow.

For those who wish to go into more depth, the entire 2016 program was podcast. It was a lively and entertaining session and will hopefully help produce a Third Restatement more successful than the prior two.

AN ESSAY ON PREDICTABILITY IN CHOICE-OF-LAW DOCTRINE AND IMPLICATIONS FOR A THIRD CONFLICTS RESTATEMENT

PATRICK J. BORCHERS

This essay is Erwin Griswold's fault. Griswold was Harvard's law dean and renowned conflicts scholar. As chance would have it, I eventually became a co-editor of a Conflicts casebook on which he had been one of the early editors.[1] As I began my academic career, following my Conflicts professor, the great comparativist Friedrich Juenger,[2] I was an unabashed substantivist, urging courts to apply the better rule of law.[3] Like Juenger, I thought (and still think) that Brainerd Currie's "interest analysis"[4] is mostly a circumlocution for applying forum law.[5]

Interest analysis, except to the extent that it influenced other approaches–notably the Second Restatement of Conflicts–has fizzled out among U.S. courts. Important state courts, notably the high courts of California, New York, and New Jersey, once adopted it. But New York went its own way with the creation and expansion of the so-called "*Neumeier* rules"[6] and now cites the Second Restatement.[7] New Jersey had long been held out as the last bastion of relatively pure interest analysis, but departed from it in favor of the Second Re-

1. PETER HAY, RUSSELL WEINTRAUB & PATRICK BORCHERS, CONFLICT OF LAWS: CASES AND MATERIALS (14th ed. 2013).

2. FRIEDRICK K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE (1993).

3. *See, e.g.*, Patrick J. Borchers, *Conflicts Pragmatism*, 56 ALB. L. REV. 883 (1993). Of course, I had plenty of company, most famously Robert Leflar, whose pioneering work clearly influenced Juenger, and Leflar's five-factor test is still nominally followed in some states. *See, e.g.*, Robert A. Leflar, *Choice-Influencing Considerations in Conflict Law*, 41 N.Y.U. L. REV. 267 (1966); *see also* Nodak Mut. Ins. Co. v. Am. Family Mut. Ins. Co., 604 N.W.2d 91, 96 (Minn. 2000) (nominally following Leflar but putting heavy emphasis on the locus of the accident, and noting that the Minnesota Supreme Court has not relied on the "better rule of law" consideration in over 20 years); State Farm Mut. Auto. Ins. Co. v. Gillette, 641 N.W.2d 662, 684 (Wis. 2002) (refusing to decide whether Wisconsin or Manitoba law on compensation for non-economic damages is better).

4. *See* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).

5. Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1 (1984).

6. *See, e.g.,* Edwards v. Erie Coach Lines Co., 952 N.E.2d 1033, 1037 (N.Y. 2011); Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 684 (N.Y. 1985); Neumeier v. Kuehner, 286 N.E.2d 454, 457-58 (N.Y. 1972) (explaining the origins of the *Neumeier* rules, and demonstrating the application and development of the *Neumeier* rules).

7. *See, e.g.*, Matter of Allstate Ins. Co. (Allstate Ins. Co. v. Stolarz), 613 N.E.2d 936, 940 (N.Y. 1993).

statement.[8] California still hangs onto the interest analysis vocabulary, but rejected a central tenet of Currie's theory, which is that in "true conflict" cases—those in which multiple states have interests—the forum state should apply its own law.[9] Instead, California adopted the "comparative impairment" solution—that is, applying the law of the state whose interests would be most impaired if it were not applied—for true conflicts.[10] A recent and thorough examination of the actual application of California's choice-of-law methodology reveals that it generates strikingly territorial results.[11]

None of this is to suggest that Currie did not have a giant effect on American conflicts law. He did. In Harold Korn's memorable observation, Currie seduced—with his brilliant writing—an entire generation of American lawyers into accepting as self-evident the proposition that states generally enact laws to benefit their residents, which in turn gives a state an interest in seeing its law applied to favor its residents.[12] That assumption washes through the Second Restatement's general sections and Robert A. Leflar's choice-influencing considerations, the former of which is widely applied and the latter of which is at least nominally followed by some state courts.[13] Moreover, almost everyone seems to agree that in tort "false conflict" cases, such as *Babcock v. Jackson*,[14] the law of the common domicile of the parties should apply, rather than the injury state as was commanded by the *lex loci delicti* rule.[15]

But let's return to Griswold. As a young academic I mailed out reprints of my articles. Griswold, then in his late 80's, was still listed in the Association of American Law Schools directory as teaching conflicts. I mailed him a reprint of one of my articles. I didn't expect him

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8. *See, e.g.*, P.V. ex rel. T.V. v. Camp Jaycee, 962 A.2d 453, 460 (N.J. 2008) (explaining that "New Jersey now adheres to the method of analysis set forth in" the Second Restatement).

9. BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 278-79 (1963).

10. Bernhard v. Harrah's Club, 546 P.2d 719, 723 (Cal. 1976), *cert. denied*, 429 U.S. 859 (1976).

11. Michael Hoffheimer, *California's Territorial Turn in Choice of Law*, 67 RUTGERS U. L. REV. 167, 170-71 (2015).

12. Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 812 (1983).

13. *See, e.g.*, *Nodak Mut. Ins. Co.*, 604 N.W.2d at 96 (nominally following Leflar but putting heavy emphasis on locus of the accident and noting that the Minnesota Supreme Court has not relied on the "better rule of law" consideration in over 20 years); *Gillette*, 641 N.W.2d at 684 (citing Leflar's five-factor test but refusing to decide whether Wisconsin or Manitoba law on compensation for non-economic damages is better).

14. 191 N.E.2d 279 (N.Y. 1963).

15. *See, e.g.*, Ala. Great S. R.R. v. Carroll, 11 So. 803, 804, 809 (Ala. 1892) (applying Mississippi law in Alabama court because the injury occurred in Mississippi).

to read my article, let alone reply, yet he did both. And his reply was not a perfunctory note; it was a long and thoughtful letter.

He said that he too was not much of a fan of interest analysis, but for different reasons than mine. He argued that while people like me were celebrating the reaching of more "just" results in cases such as *Babcock*, the systemic cost of a lack of predictability was high.[16] If, he continued, parties could not predict with reasonable certainty what law would be applied, it would be much more difficult to settle interstate cases and result in more appeals.

It does not require a deep knowledge of economics to see that he was right. Assuming the parties act rationally (and there is no fee shifting), a case will settle when each party's estimate of the value of the case converges to the point where the costs of continuing to litigate the case exceed the gap in valuation. So, for example, if the plaintiff believes that her case is worth $100,000 and it will take $30,000 more to litigate the case and the defendant believes the case is worth nothing and it will cost $30,000 to litigate the case, the case will not settle. The plaintiff will not accept anything less than $70,000 and the defendant will not offer more than $30,000. But if the plaintiff's estimate of the value of the case is reduced to $70,000 and the defendant's increases to $40,000 we now have what dispute resolution experts call a ZOPA—a zone of potential agreement.[17] On these facts, a rational plaintiff would take an offer over $40,000 and a rational defendant would be willing to pay up to $70,000. But if the parties are unsure as to the applicable law, that may keep the case from settling because it makes it harder for the parties' estimates to converge. Choice of law becomes, in Juenger's turn of phrase, the "joker in the deck."[18]

I once wrote on the issue of predictability in an article on Louisiana's codification of conflicts law.[19] In the period between Louisiana's adoption of interest analysis and the codification, the reversal rate of Louisiana's trial courts on conflicts issues was statistically indistinguishable from a coin flip, about 50%.[20] After the codification, the reversal rate dropped to about 20%.[21] The improvement in

16. Courts too have made that observation. *See, e.g.*, Paul v. Nat'l Life, 352 S.E.2d 550, 554-56 (W. Va. 1986) (discussing the various conflicts of law doctrines, but not discarding the *lex loci delicti* approach).

17. Jeremy Lack & Francois Bogacz, *The Neurophysiology of ADR and Process Design: A New Approach to Conflict Prevention and Resolution?*, 14 CARDOZO J. CONFLICT RESOL. 33, 63 (2012).

18. Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 169 (2001).

19. Patrick J. Borchers, *Louisiana's Conflicts Codification: Some Empirical Observations Regarding Decisional Predict*ability, 60 LA. L. REV. 1061 (2000) [hereinafter Borchers, *Louisiana's Conflicts Codification*].

20. Borchers, *Louisiana's Conflicts Codification*, *supra* note 19, at 1067.

21. *Id.*

predictability was not due to a return to hard-and-fast rules. The Louisiana codification adopts something like California's "comparative impairment" approach.[22] But it gives Louisiana courts and lawyers a common vocabulary on which to debate the issues, which is crucial to predictability.

It is true, of course, that choice of law was not entirely predictable in the pre-revolutionary era. Courts employed escape devices such as the public policy doctrine[23] and re-characterization of obviously substantive issues as procedural[24] to achieve results that could be explained best by either substantivism or interest analysis. But those cases, celebrated as they were,[25] were the exception and not the rule. Anyone who thinks that the revolution did not deliver a major blow to the predictability of choice of law is kidding herself.

Lately I have become a bigger fan of rules. Not inflexible rules, but at least rules that allow for application of a common terminology and reasonably clear direction as to the presumptive result. In what I thought would be an unnoticed article, I pointed out that the Second Restatement has a large number of presumptive rules, but that courts tend to ignore them in favor of citing the open-ended sections such as sections 6, 145, and 188, which purport to apply broadly the test of "the most significant relationship," the general formula adopted by the Second Restatement.[26]

Despite my modest expectations, the article got noticed. In particular it was noticed by the Illinois Supreme Court in *Townsend v. Sears Roebuck & Co*.[27] That case involved an allegedly defective lawn tractor sold to a Michigan consumer by an Illinois-based manufacturer. The injury occurred in Michigan but the plaintiff sued in Illinois, certainly because Illinois law was more favorable to him. Citing to my previously obscure article, the Illinois high court homed in on section 146, which creates a presumption that the injury state's law applies in personal injury cases.[28] The court saw nothing to overcome the presumption and thus applied Michigan law. Along the way, the court stated "[w]e agree with the concern that the bench and bar have over-

22. LA. CIV. CODE ANN. art. 3515 (2012).

23. Kilberg v. Ne. Airlines, Inc., 172 N.E.2d 526, 529 (N.Y. 1961).

24. Grant v. McAuliffe, 264 P.2d 944, 949 (Cal. 1953).

25. *See, e.g*., Roger J. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 670 n.35 (1959) (re-characterizing *Grant* in interest analysis terms).

26. Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1246 (1997) [hereinafter Borchers, *Courts and the Second Conflicts Restatement*].

27. 879 N.E.2d 893 (Ill. 2007).

28. Townsend v. Sears, Roebuck & Co., 879 N.E.2d 893, 900, 903 (Ill. 2007).

emphasized the general sections of the Second Restatement of Conflict of Laws and have undervalued the specific presumptive rules."[29]

Then the same thing happened in New Jersey. In *P.V. v. Camp Jaycee*,[30] New Jersey's high court eschewed applying the law of the (arguably) common residence of the parties in favor of applying that of the locus of the tort. In that case—reminiscent of New York's *Schultz v. Boy Scouts of America, Inc.*[31]—the defendant attempted to interpose New Jersey's charitable immunity statute in an action for sexual assault in Pennsylvania. Citing the same previously obscure article, the New Jersey high court applied Pennsylvania law because the tort had occurred there, and there were not sufficient reasons to displace the Second Restatement's presumption that the law of the place of the wrong should apply.[32] This time the result benefited the plaintiff, while in the Illinois case it benefited the defendant.

Admittedly, two cases a tidal wave not makes. But they are decisions from influential state courts that were early adopters of the break from the purely territorial system that ruled before 1963.[33] Something is amiss; it seems to be that courts want at least a presumptive rule. If they depart from the rule, they want to say so and give reasons for departing from it. Courts have begun to see that conflicts law must be judged by the same values as other areas of law. Courts (and commerce) would never accept a rule that contracts should only be enforced if "fair" or if a local party has an "interest" in having it bind the other party; courts are beginning to awaken to the concept that freeform notions of justice will not suffice in interstate cases. Gone are the days when judges and their clerks are likely to pore over long, technical, and footnote-laden articles on conflicts theory. I have noticed in my own work that the chance of it being cited by a court is inversely related to its length. Courts want a starting point that the "glass-bead games" of the conflicts revolution have not given them.[34]

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29. *Townsend*, 879 N.E.2d at 902.

30. 962 A.2d 453 (N.J. 2008).

31. 480 N.E.2d 679 (N.Y. 1985).

32. *Camp Jaycee*, 962 A.2d at 459, 468.

33. *See* Wartell v. Formusa, 213 N.E.2d 544, 545-46 (Ill. 1966) (abandoning the rule of *lex loci delicti* in a case involving a question of interspousal immunity); Mellk v. Sarahson, 229 A.2d 625, 629-30 (N.J. 1967) (abandoning the rule of *lex loci delicti* in favor the law of the common domicile of the parties in a guest statute case).

34. Friedrich K. Juenger, *Symposium on Interest Analysis in Conflict of Laws: An Inquiry into Fundamentals with a Side Glance at Products Liability: What Now?*, 46 OHIO ST. L.J. 509, 511 (1985).

Scholars and judges are beginning to declare, with some good reason, the conflicts revolution dead or dying.[35] One recent article declares that "[t]he total rejection of conceptual thinking destroyed the field it was supposed to save and frustrated the basic expectation of lawyers, judges, and the general public that law provide a minimal degree of certainty and predictability."[36] Judge Richard Posner declared the revolution to be a "legal reform [that] miscarried."[37] It has been over fifteen years since a U.S. court has openly rejected the formal rules that pre-dated the modern methodologies,[38] leaving at ten the number of state courts standing with their arms metaphorically folded and unwilling to cross the line to "modernity."[39]

Moreover, the conflicts revolution was fought on the battlegrounds of tort and contract law, leaving mostly untouched rules such as the *lex situs* in real property cases, applying the law of the decedent's last domicile in the distribution of personal property, and so on.[40] States on the modern side of the line have gravitated toward the Second Restatement, which is the most rule-based of modern approaches, assuming that one ventures beyond its general statements.[41]

So now perhaps is a good time to undertake a new Restatement. There is actually something to restate and clarify rather than engaging the difficult task the drafters of the Second Restatement had in trying to draft a "transitional"[42] document with the battle swirling around them.

Moreover, we have somewhere from which to start. The two U.S. codifications give us experience with codes, to say nothing of what can be learned from international codifications. The expanded *Neumeier* rules in New York teach lessons about judicially drafted rules. I made a modest effort to synthesize Nebraska[43] case law into soft rules.[44] For example, here is the rule that I drafted for tort conflicts:

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35. *See* Celia Wasserstein Fassberg, *Realism and Revolution in Conflict of Laws: In with a Bang and out with a Whimper*, 163 U. PA. L. REV. 1919, 1940 (2015) (discussing the dead end of the conflicts law revolution).

36. *Id.* at 1941.

37. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 429 (1990).

38. Symeon C. Symeonides, *Choice of Law in the American Courts in 2001: Fifteenth Annual Survey*, 50 AM. J. COMP. L. 1, 4 (2002).

39. Symeon C. Symeonides, *Choice of Law in American Courts in 2009: Twenty-Third Annual Survey*, 58 AM. J. COMP. L. 227, 231 (2010).

40. Fassberg, *supra* note 35, at 1939.

41. Symeonides, *supra* note 39, at 231.

42. Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 519 (1983).

43. A former student of mine did the same in Missouri. *See* Kevin Tuininga, *Toward Predictable Choice of Law in Missouri*, 65 J. MO. BAR 14 (2009) (synthesizing how Missouri has applied tort and contract rules).

> **Tort Rule: In tort cases in which the parties or events are connected with more than one State, the law of the State in which the plaintiff is injured governs.**
>
> **Tort Exception #1: If the laws of the connected States conflict as to an issue of loss distribution and each party contesting that issue is domiciled (or, in the case of a business entity has its principal place of business) in the same State and that State is not the injury State, the law of the State of the contesting parties' common domicile (or principal place of business) governs as to the contested issue. For purposes of Exception #1, "the same State" includes States that are distinct but have identical laws on the issue being contested.**
>
> **Tort Exception #2: If the injury and the conduct causing the injury occur in different States, and the laws of those States differ as to an issue of conduct regulation, the law of the State in which the conduct occurred governs.**[45]

Conflicts scholars might recognize this rule and its exceptions as a refinement and expansion of the *Neumeier* rules. In fact, the first version of my torts rule was an effort to restate the *Neumeier* rules.[46] To be sure, the rule is not completely inflexible. In particular, the line between conduct regulation and loss allocating rules is a fuzzy one.[47] But the rule accommodates the *Babcock* false conflict paradigm and extends it to the "three state" cases as lower New York courts have.[48] It then uses territorial connecting factors as the tiebreaker in split domicile cases instead of Currie's forum law preference.[49]

Codes take on this flavor. For example, Article 3544 of the Louisiana Civil Code[50] expressly adopts the common domicile solution in issues of loss allocation and extends it to circumstances in which the victim and the tortfeasor are domiciled in states that have "substantially identical" laws.[51] Although nuanced, in split domicile cases the Louisiana code generally defaults to the injury state.[52]

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44. Patrick J. Borchers, *Nebraska Choice of Law: A Synthesis*, 39 CREIGHTON L. REV. 1, 6-7 (2005) [hereinafter Borchers, *Nebraska Choice of Law*].

45. Borchers, *Nebraska Conflict of Laws*, *supra* note 44, at 6-7.

46. Patrick J. Borchers, *Conflict of Laws*, 49 SYRACUSE L. REV. 333, 347 (1999).

47. *See, e.g.*, Padula v. Lilarn Props. Corp., 644 N.E.2d 1001, 1003 (N.Y. 1994) (resolving split among lower New York courts as to whether New York's "scaffolding law"—which imposes strict liability on a landowner—is conduct regulating or loss allocating).

48. *See, e.g.*, Diehl v. Ogorewac, 836 F. Supp. 88, 93 (E.D.N.Y. 1993) (applying New York conflicts law in a diversity case).

49. *See* Borchers, *Nebraska Conflict of Laws*, *supra* note 44, at 7.

50. LA. CIV. CODE ANN. art. 3544.

51. LA. CIV. CODE ANN. art. 3544(1).

52. LA. CIV. CODE ANN. art. 3544(2).

Europe's Rome II Regulation goes in the same direction. Article 4(1) directs application of the injury state's law unless the parties have a common habitual residence outside the forum state.[53]

Of course predictability is not (and should not be) the only goal of conflicts law. A regime in which a state always applies its own law would be highly predictable. In fact, some states have asserted that they do so unless application of their own law is unconstitutional.[54] However, such a regime extracts a heavy price. Plaintiffs and defendants ought to be on equal footing. If one imagines a world of broad jurisdictional rules, and constant application of the *lex fori*, plaintiffs would have a distinct advantage. Although it is impossible to prove causation, one reason for the Supreme Court's campaign to roll back general jurisdiction to states where corporate defendants are "essentially at home"[55] may have been the heavy forum law bias of state conflicts law, and a desire to protect defendants against forum-shopping plaintiffs.

Lately, the United States has also shown no appetite for raw substantivism. Even among courts that nominally follow Leflar's approach, some have given up on applying the "better rule of law" criterion.[56] The efforts to incorporate the Rome II Regulation's mild consumer preference into the Uniform Commercial Code's choice-of-law provision were a flop.[57] With the lone exception of the Virgin Islands, every U.S. jurisdiction to adopt the revisions to Article 1 of the U.C.C. replaced the proposed new choice-of-law provision[58] with the old substance-blind choice-of-law provision,[59] causing the American Law Institute and the National Conference on the Creation of Uniform State Laws to withdraw the new provision.[60]

So what, if any, relevance does all of this have for a Third Restatement? It is relevant in several respects.

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53. Council Regulation (EC) No. 864/2007 of 11 July 2007 on the Law Applicable to Non-contractual Obligations (Rome II), Art. 4(1-2), 2007 O.J. (L 199) 40.

54. Symeonides, *supra* note 39, at 231 (noting how two states follow the *lex fori* approach).

55. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

56. *See, e.g.*, *Nodak Mut. Ins. Co.*, 604 N.W.2d at 96 (nominally following Leflar but putting heavy emphasis on locus of the accident and noting that the Minnesota Supreme Court has not relied on the "better rule of law" consideration in over 20 years); *Gillette*, 641 N.W.2d at 684 (refusing to decide whether Wisconsin or Manitoba law on compensation for non-economic damages is better).

57. HAY, WEINTRAUB & BORCHERS, *supra* note 1, at 528.

58. U.C.C. § 1-301 (AM. LAW INST. & NAT'L CONF. ON THE CREATION OF UNIF. ST. LAWS 2008).

59. U.C.C. § 1-105 (AM. LAW INST. & NAT'L CONF. ON THE CREATION OF UNIF. ST. LAWS 1999).

60. HAY, WEINTRAUB & BORCHERS, *supra* note 1, at 528.

Restatements are not written in the prescriptive terms of a code, though they can come pretty close. Some of the most successful sections of the Second Restatement create a very heavy presumption. So, for example, Section 187—on party autonomy in contractually choosing the applicable law—creates a strong presumption that the chosen law will be applied.[61] Section 193 creates a strong presumption that the law of the principal place of an insured risk will be applied in insurance disputes.[62] Section 196 creates a heavy presumption that disputes over personal services contracts will be governed by the state in which the services are to be performed.[63]

It is no coincidence that these sections are among the most widely and faithfully followed sections of the Second Restatement. Section 187 is essentially a declaration of universal law in the United States.[64]

The sections that have caused the greatest difficulty are the open-ended Sections 6, 145, and 188. Let's begin with Section 6. It is the laundry list to end all laundry lists. Its seven factors have no hierarchy, nor is it clear how, if at all, they are to be applied in various cases. The "protection of justified expectations" might be of enormous importance in some cases and of trivial importance in others. Any effort to create one overarching test—here "the most significant relationship"—is doomed to be so banal that it is of little use. To the extent it ever generated any consensus, it is because significance is in the eye of the beholder.

I suggest that the Third Restatement not make any effort to state any overarching verbal formula, or that if it does it should borrow from the Louisiana codification. Article 3515 of the Louisiana codification provides a residual rule that the "law of the state whose policies would be most seriously impaired if its law were not applied to that issue."[65] True enough, the next paragraph of the Article lists some of the factors listed in Section 6, but much of the rest of the codification is sufficiently definite to make resort to the general formula unnecessary in the vast majority of cases.

This brings me to what I believe to be the most pernicious section of the Second Restatement, which is Section 145. In Juenger's pithy phrase, "[a]lthough it is printed in black letters, section 145 is not

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61. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. LAW INST. 1971).

62. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193.

63. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 196.

64. *See* Patrick J. Borchers, *Choice of Law in the American Courts in 1992: Observations and Reflections*, 42 AM. J. COMP. L. 125, 136 (1994) (stating that Section 187 "appears to be a nearly universal principle in the United States.").

65. LA. CIV. CODE ANN. art. 3515.

much of a rule . . . ."[66] Anyone who has read many United States conflicts decisions has suffered through an endless parade of block quotations of Section 6 and then, noting that it is a tort case, block quotations of Section 145. Section 145 starts by reminding courts of Section 6 and then directs courts to consider "the place where the injury occurred," "the place where the conduct causing the injury occurred," "the domicil, residence, nationality, place of incorporation and place of business of the parties," "the place where the relationship, if any, between the parties is centered," and then adds unhelpfully, "[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue."[67]

The result is that courts are left looking at a slate of eleven factors (seven from Section 6 and four from Section 145) with little guidance as to how to apply them. It is a small wonder courts are often unwilling to venture past these open-ended sections as they fear more unhelpful lists.[68]

Section 188, the general section applicable to contracts, fares no better and has baffled even the most prestigious of courts. In *Matter of Allstate Insurance Co.*,[69] the New York Court of Appeals, faced with a choice-of-law issue involving an automobile insurance policy, attempted to reason the case from Sections 6 and 188, apparently unaware of Section 193, which covers insurance contracts, and that the Restatement includes an illustration mirroring the facts of the *Stolarz* case.[70]

One could blame poor lawyering, lazy law clerks, and a whole host of other culprits in applying the Second Restatement. But a good deal of the blame must go to the Second Restatement itself. Given the great number of torts and types of contracts covered by the more specific sections, I doubt we need anything like Sections 6, 145, and 188 in the Third Restatement. At a minimum, they should not be given the pride of place they now enjoy. Their placement at the front of the chapters signals that they are to be the principal guides for courts, when in fact they provide little guidance at all. If placed at the end of the chapters, with a notation to resort to the general formula only if no specific section covers the issue, reliance on them would likely drop dramatically.

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66. Friedrich K. Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 212 (1969).

67. RESTATEMENT (SECOND) CONFLICT OF LAWS § 145.

68. *See* Borchers, *Courts and the Second Conflicts Restatement*, *supra* note 26, at 1242-44 (explaining the frequency with which courts cite these sections of the Second Restatement).

69. 613 N.E.2d 936 (N.Y. 1993).

70. *Matter of Allstate Ins. Co.*, 613 N.E.2d at 940.

It is time to consolidate the gains of the revolution while admitting the reality that we no longer need be in a state of war against anything that looks like a rule. Predictable result patterns have begun to emerge and anything that can claim to be a Restatement must restate them so that courts need not start from first principles in every conflicts case. For example, there is wide agreement that in tort cases falling into the common domicile pattern, the law of the domicile applies. In split domicile cases, the law of the injury state usually emerges as the tiebreaker.[71] In multi-party cases courts have become comfortable with dépeçage rather than attempting to fashion a single solution for all parties.[72]

United States conflicts decisions are beginning to fall into patterns that might be called quasi or soft rules.[73] Sometimes the impetus for this has been judicial, sometimes legislative, and sometimes the result of the efforts of commentators to systematize decisions. A principal goal of the Third Restatement ought to be to catalog those result patterns to guide the bench and bar. It would do a great deal to improve predictability and restore the flagging reputation of our discipline.

71. PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 950-51 (5th ed. 2010).

72. *See, e.g.*, *Edwards*, 952 N.E.2d at 1042-44 (addressing conflict of laws issues in a multi-party tort case).

73. Patrick J. Borchers, *The Emergence of Quasi Rules in U.S. Conflicts Law*, 12 YBK. PRIV. INT'L L. 93 (2010).

CHOICE-OF-LAW CODIFICATION IN MODERN EUROPE: THE COSTS OF MULTI-LEVEL LAW-MAKING

MATHIAS REIMANN†

INTRODUCTION

For U.S.-American scholars (and perhaps even legislators) who consider the codification of conflicts law and are interested in foreign models, it comes almost naturally to look to continental Europe. To be sure, in recent decades there has been a much wider, almost global, trend towards codifying choice-of-law rules.[1] Yet, continental Europe remains the high citadel of codification and that is especially true for conflicts law: in the past 50 years, the region has seen more conflicts codifications than ever before, though some are more comprehensive than others.[2] The result is an ever starker contrast with the United States: on this side of the Atlantic, conflicts codification is still very much the exception, in Europe it has clearly become the rule.

It is tempting, therefore, to regard continental Europe as some kind of conflicts codification paradise—a world where the pertinent rules are comprehensively unified, logically coordinated, and systematically organized. Unfortunately, the reality is much more complicated. There is currently no comprehensive European code on private international law. Instead, there is a growing multitude of particular codifications and, in combination, these codifications have turned European conflicts law as a whole into something of a mess. This is so, mainly for two reasons. First, codification has occurred on several distinct levels—national, international, and supra-national—and the coordination between these levels is often wanting. Second, especially at the level of the European Union, codification has proceeded in a piecemeal fashion, and the pieces do not always fit together very well.

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1. For a comprehensive study, *see* SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD, (Oxford U. Press 2014).

2. The term "codification" can have different meanings. This essay uses it in the sense most common at least in continental Europe: a legislative act that covers a field of law in a comprehensive, systematically organized, and largely self-contained fashion. As we will see, however, European conflicts codifications differ significantly with regard to the size of the fields they cover. Some encompass all of conflicts law, others cover only choice-of-law or only jurisdiction and judgments recognition; some apply to (virtually) all of substantive private law; others, address only particular areas, such as contractual obligations, divorce, or succession.

Thus, European conflicts law as a whole has become frightfully complex as well as partially incoherent.[3]

This article has three main parts. The first part presents a short history of European conflicts codification and chronicles the emergence of the three levels on which it has occurred. The second part shows how the sources on the various levels interact and explains the complexities and problems of multi-level codification. The third part considers how the main problems—excessive complexity and occasional inconsistency—could be remedied but concludes that, at least in the near future, prospects for effective solutions are decidedly limited. The conclusion proffers some possible lessons for conflicts lawyers in the United States.

Three caveats are in order. First, the analysis is limited to choice-of-law as the core of the field; still, much of what follows is true, *mutatis mutandis*, for the procedural aspects of conflicts law (i.e., jurisdiction, judgments recognition, and judicial assistance) as well.[4] Second, the analysis focuses mainly on continental Europe as the cradle of codification; of course, the common law jurisdictions (the United Kingdom and Ireland) and the Scandinavian countries (except Norway) must also be considered when it comes to codification by the European Union, though, as we shall see, they have sometimes defected from the system. Third, even though the presentation and analysis will occasionally seem quite complicated, the picture presented here is heavily simplified for the sake of clarity and brevity; experts in European conflicts law may complain about the omission of many finer points, but outside observers should be thankful.

I. A SHORT HISTORY OF EUROPEAN CONFLICTS LAW: THE EMERGENCE OF THE MULTI-LEVEL SYSTEM

In order to understand the current state of conflicts codification in Europe, an American observer must, first of all, grasp its multi-level nature. In the United States, we take it for granted that choice-of-law

3. The European literature about European private international law is abundant, though most of it addresses particular aspects rather than the general picture. Recently, two German scholars, have published a thorough and thoughtful assessment of the situation as a whole. *See* Giesela Rühl & Jan von Hein, *Toward a European Code of Private International Law?*, 79 Rabels Zeitschrift fur ausländisches und internationales Privatrecht 701 (2015). Their study differs from the present essay in several regards. It is written from a European perspective and primarily for a European audience; it covers not only choice-of-law but procedural aspects, as well; its main goal is to explore options for reform; and it goes into much greater detail than most American readers would want. Still, for readers with a deeper interest in the process and problems of European conflicts codification, the article provides a plethora of valuable information, as well as much food for thought.

4. For a quick overview, *see* Rühl & von Hein, *supra* note 3, at 708-09.

is left almost entirely to the states. By contrast, in Europe, the subject has been codified not only by (nation) states but also in international conventions and, more recently, in the form of supra-national (i.e., European Union) law.

A. National Law: From Civil Codes to Freestanding Statutes

On a national level, codifying choice-of-law rules has a 200-year tradition in continental Europe. It has occurred in two major forms: originally within traditional civil codes and, more recently and increasingly, in freestanding conflicts statutes. Some countries have merged these approaches in one way or another.

Beginning with the French Code civil of 1804,[5] many of the nineteenth and earlier twentieth-century classical civil codes contained conflicts provisions in their introductory parts. At first, these rules were fairly rudimentary as in the Code civil, but when private international law as a discipline came into its own in the late nineteenth and early twentieth-centuries, the rules grew in coverage and detail.[6] Germany presented a somewhat special case because it codified its choice-of-law rules not directly in the Civil Code[7] (Bürgerliches Gesetzbuch, BGB) of 1900, but in an Introductory Act (Einführungsgesetz) to the Civil Code.[8] This semi-separate form of codification foreshadowed later developments.

Starting in the last third of the twentieth century, an increasing number of continental European countries undertook conflicts codification in separate statutes. These statutes were sometimes limited to choice-of-law, as in Poland (1965)[9] and Austria (1978);[10] but more often they also included jurisdiction, judgments, and other matters, as in Switzerland (1987)[11] and Italy (1995).[12] Today, more than a dozen continental European nations have freestanding conflicts codifications of one sort or another.[13] Yet, some countries undertaking modern and comprehensive choice-of-law codification incorporated it as a special

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5. Code civil [C. civ.] art. 3 (Fr. 1804).

6. *See* Code civil [C. civ.] [Civil Code] art. 3 (Fr. 1804); Allgemeines Bürgerliches Gesetzbuch [ABGB] [Civil Code] § 4 (Austria 1811); Art. I:2 para. 5 BW (Neth. 1838); Codice civile art. 17-31 (It. 1865); Codigo civl [Civil Code] tit. IV (Port. 1867).

7. Bürgerliches Gesetzbuch [BGB] [Civil Code] (Ger. 1900).

8. Reichsgestzblatt, *Einführungsgesetz zum Bürgerlichen Gesetzbuch* [*Introductory Act to the Civil Code*], 604, art. 3-38 (Ger. Aug. 18 1896).

9. 2011 Dziennik Ustaw [Dz. U] [Journal of Laws] no. 80, item 432 (replacing 1965 Dziennik Ustaw [Dz. U] [Journal of Laws] no. 46, item 290).

10. Legge 31 maggio 1995, n. 218, G.U. June 3, 1995, n. 128 (It.) (Law No. 218 of 31 May 1995 on the Reform of the Italian System of Private International Law).

11. Schweizerisches Zivil Gesetzbuch [ZGB], Code Civil [CC], Codice Civile [CC] [Civil Code] Dec. 18, 1987, SR 291, art.1-32 (Switz.).

12. L 31 maggio 1995, n. 218, G.U. June 3, 1995, n. 128 (It.).

13. *See* Symeonides, *supra* note 1, at 23-25 (providing an overview).

chapter into their civil codes, such as in the Netherlands[14] and Russia.[15]

If one takes these two forms together (parts of civil codes and separate statutes), by the end of the twentieth century, the national law of virtually all continental European countries contained codified choice-of-law provisions. They range from traditional (usually unilateral) and rudimentary rules to modern (usually multilateral) and comprehensive regimes. Today, it is fair to say that most continental European countries have used codification to put their choice-of-law rules in order.[16]

B. International Law: Conventions from The Hague to Rome

Towards the end of the nineteenth century, European conflicts scholars and lawmakers realized the problem created by codifying choice-of-law rules on the national level: the respective legislatures often enacted significantly different rules. As a result, in different jurisdictions the same case might be decided under different substantive laws, leading to different outcomes. In order to foster greater "decisional harmony," continental European countries began to strive for international unification of conflicts rules.

In 1893, they founded the Hague Conference on Private International Law, an intergovernmental body staffed by experts from the member states. Its main task has been to draft international conflicts conventions on particular topics. Their ratification by the member states would then lead these states to adopt the same rules, thus, unifying areas of private international law. Since its founding, the Hague Conference, whose membership eventually expanded far beyond Europe,[17] has adopted almost fifty conflicts conventions.[18] Many, though not all, contain choice-of-law rules in areas such as agency, sale of

14. Art. 10:1 - 10:17 BW (Neth.).

15. Grazhdanskii Kodeks Rossiiskoi Federatsii [GK RF][Civil Code] art. 1186-1224 (Russ.).

16. Listed below are the dates on which each country codified their choice-of-law provisions: Poland (1965, 2011), Portugal (1967, 2011), Spain (1974), German Democratic Republic (1957), Austria (1979), Hungary (1979), Germany (1986, 1999), Switzerland (1987), Finland (1988), Romania (1992), Latvia (1992), United Kingdom (1995), Italy (1995), Liechtenstein (1996), Slovenia (1999), Lithuania (2000), the Netherlands (2001, 2011), Russia (2002), Belgium (2004), Bulgaria (2005), Ukraine (2005), and the Czech Republic (2012). In 1997, a (bi-lingual) collection of the then existing European conflicts statutes was published, totaling over 400 pages. *See* Wolfgang Riering, Textausgabe in Originalsprachen mit deutschen Übersetzungen, IPR-Gesetze in Europa: [IPR Laws in Europe: Text output in original languages in German translations] (C.H. Beck 1997).

17. The United States became a member in 1964. The Hague Conference currently has eighty members from all over the world.

18. Many of the older, particularly pre-World War II, conventions have been superseded by newer ones. Currently, the Hague Conference's website lists about 40 conven-

goods, maintenance obligations, matrimonial property, and product liability. To be sure, the success of these unification efforts has remained limited; while some conventions were ratified by a large number of states, others have found few followers.

Towards the end of the twentieth century, the nine member states of the European Economic Community ("EEC"), the predecessor of the EU, decided to pursue more complete unification with regard to choice-of-law in contracts as an area of particular practical importance. In 1980, the EEC member states concluded the Rome Convention on the Law Applicable to Contractual Obligations.[19] Entering into force for all EEC member states in 1991, the Rome Convention provided a uniform and fairly comprehensive regime in the form of a regional treaty. This regime governed choice-of-law in contracts cases in the EEC, later the European Community ("EC"), and finally the EU for almost twenty years.[20]

Note that at this point, at the end of the twentieth century, the composition of continental European conflicts law had already become somewhat complex. For the most part, it consisted of national and largely codified rules of varying age, level of detail, and content. In some areas, however, it was also based on (uniform) international rules (i.e., conventions). The respective mix depended on the country and the subject matter, in particular on which conventions (if any) about which topics the forum state had adopted.[21] Still, as Europe entered the twenty-first century, even greater complexity was just around the corner.

C. Supranational Law: The European Union Gets Involved

In the new millennium, the European Union entered the field of conflicts law. In 1997 in the Treaty of Amsterdam, the EU acquired for the first time broad legislative competence in the area of private international law.[22] The EU has since made extensive use of its new

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tions as still active. *See* HCCH, *Conventions, Protocols, and Principles*, www.hcch.net/index_en.php?act=conventions.tex$cit=62 (last visited November 22, 2015).

19. 1980 O.J. (l 266) 1.

20. In 2009, it was superseded by an EU Regulation. *See infra* note 25 and accompanying text.

21. In some countries, it helped that the international rules had been incorporated into the national legislation so that lawyers could work with just one set of provisions. *See, e.g.*, Einführungsgesetzes zum Bürgerlichen Gesetzbuch [Introductory Act to the Civil Code], Sept. 21, 1994, BGBl. I at 719 (Ger.) [hereinafter Introductory Act to the Civil Code (Ger.)] (referencing the Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions of 1961).

22. The Treaty of Amsterdam (amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain related Acts, Oct. 2, 1997, 1997 O.J. (C340)1 (1999), added Articles 61(c) and 65(b), empowering the EU to "harmonize the rules applicable in the member states concerning the conflict of laws and of

powers, both with regard to the procedural aspects (jurisdiction and judgments, judicial assistance, etc.) and choice-of-law.[23] In the latter context, the EU has, so far, enacted six regulations which are directly applicable in the member states. Three of them deal with choice-of-law only; they contain the rules determining the law applicable to:

1) Contractual obligations (this Regulation is based on, and superseded by, the Rome Convention and is known as "Rome I");[24]
2) Non-contractual obligations, mainly torts ("Rome II");[25]
3) Divorce and legal separation ("Rome III").[26]

In addition, three regulations address both choice-of-law and procedural matters; they govern, inter alia, the law applicable to:

1) Insolvency proceedings;[27]
2) Maintenance obligations;[28]
3) Succession (inheritance).[29]

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jurisdiction[.]"). This power was subject to the limitation that such harmonization is "necessary for proper functioning of the internal market." *Id.* at Art. 65 (introductory paragraph). Continuing the insane practice of renumbering treaty articles in subsequent documents, the Treaty of Lisbon now lists these provisions (with slight modifications) as Article 81, sections 2 and 3(c). Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community art. 81, § 2 and 3, Dec. 13, 2007, 2007 O.J. (C306)1. In addition, Article 81 section 3 of the Lisbon Treaty now empowers the EU Council to take "measures concerning family law with cross-border implication . . . in accordance with special legislative procedure." The Treaty thus bifurcates legislative competence in the conflicts field; this has far-reaching consequences especially for the project of a comprehensive EU conflicts code. *See infra* note 50 and accompanying text.

23. *See generally* Michael Bogdan, *Concise Introduction to EU Private International Law* (2d ed. 2012).

24. Commission Regulation 593/2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6 [hereinafter Rome I].

25. Commission Regulation 860/2007 on the Law Applicable to Non-contractual Obligations (Rome II), 2007 O.J (L 199) 40 [hereinafter Rome II].

26. Council Regulation 1259/2010, Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation, 2010 O.J. (L 343) 10 [hereinafter Rome III].

27. Council Regulation 1346/2000 on Insolvency Proceedings, 2000 O.J. (L 160) 1. This regulation is soon to be superseded by a "recast" version. *See* 2000 O.J. (L 141) 19.

28. Council Regulation 4/2009 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations, 2008 O.J. (L 7) 1. This regulation is applicable via Regulation 1107/2009, art. 15, 2009 O.J (L 3069) 1, (EC).

29. Commission Regulation 650/2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions, Acceptance and Enforcement of Authentic Instruments in Matters of Succession, and the Creation of a European Certificate of Succession, 2012 O.J. (L 201) 107.

Further Regulations on marital property regimes and on the property consequences of registered partnerships have been proposed but not yet enacted.[30]

In short, there are now EU choice-of-law rules on contracts, torts (as well as unjust enrichment, negotiorum gestio, and culpa in contrahendo), divorce (and legal separation), insolvency, maintenance, and succession.[31]

Thus, a third layer of choice-of-law rules has been added to the mix; they are now codified on the national, international, and supranational levels. As a result, European conflicts law currently consists of a combination of national codes or special statues, Hague (and occasionally other) Conventions,[32] and EU regulations.

II. INTERACTION BETWEEN THE SOURCES: THE COMPLEXITIES AND COSTS OF MULTI-LEVEL CODIFICATION

Continental European jurists like codified rules. They expect codification to foster qualities they cherish in law: certainty, uniformity, order, and clarity. Can conflicts codification in Europe fulfill these expectations despite its multi-level make-up and its cacophony of sources? The answer depends on whether one looks to individual elements or to the system as a whole.

On the one hand, choice-of-law codification has indeed enhanced certainty, uniformity, and order *within individual fields* (i.e., within certain jurisdictions or subject matter areas). On a national level, many modern codifications provide comprehensive and uniform systems of carefully drafted and workable rules. In so far as Hague conventions have been widely ratified and implemented, they have

30. Commission Proposal for a Council Regulation on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions in Matters of Matrimonial Property Regimes, COM (2011) 126 final (Mar. 16, 2011); Commission Proposal for a Council Regulation on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions Regarding the Property Consequences of Registered Partnerships, COM (2011) 127 final (Mar. 16, 2011). The EU Commission has also begun to consider the drafting of choice-of-law rules applicable to companies (corporations). *See* Rühl & von Hein, *supra* note 3, at 725 (providing further references).

31. Specific choice-of-law rules are also scattered throughout various other sources, such as EU directives. *See, e.g.*, European Union Directive 2005/25, 2005 O.J. (L 142) 12 (EC); *see also* Rühl & von Hein, *supra* note 3, at n. 46 (discussing case law created by the Court of Justice of the European Union and derived directly from the EU treaties. This case law governs some areas not covered by any existing regulation; the most important such area is the status of transnational companies, especially when they are incorporated in one member state and operating in another).

32. *See, e.g.*, Cape Town Convention on International Interests in Mobile Equipment, art. 5, § 3, Nov. 16, 2001, S. TREATY DOC. NO. 108-10 (2003), 2307 U.N.T.S. 285. This convention has been in force since 2006 and contains some choice of law provisions, such as Article 5, section 3 cited above.

increased international uniformity and improved decisional harmony, albeit only in their specific areas and only among the ratifying states. Where an EU regulation applies, the member states now have a—by and large[33]—common, uniform, and well-organized set of choice-of-law rules for contracts, torts, and a few other areas. As a result, where an issue falls squarely and exclusively under any of these regimes, the respective codification has decidedly salutary effects: it constitutes a reliable textual basis, which contains many clear answers and provides a useful toolkit even in borderline cases.

On the other hand, the *overall system* has been rendered highly complex and in part incoherent. In Jürgen Basedow's words, European codifiers have "planted a multitude of trees which, however, do not add up to a forest."[34] In particular, the codified European choice-of-law universe is plagued by three problems. First, the coexistence of competing choice-of-law regimes on multiple levels requires constant maneuvering among them. Second, in many cases, codifications from several levels have to be applied side-by-side, which can be very difficult, especially if they are not sufficiently coordinated. Third, even the sources on the same level are not always fully synchronized, which can cause uncertainty and confusion.

A. The Problem of Multiple Levels: Conflicts Rules for Conflicts Rules

Choice-of-law rules about the same issue often exist on multiple (perhaps all three) levels. How does one know which set of provisions applies in a given case? In order to answer that question, we need meta-conflict rules for choosing between EU regulations and national codifications, EU regulations and international conventions, and international conventions and national codifications.

As far as the choice between EU regulations and national codifications is concerned, the basic rule is simple: because EU law takes precedence over national law,[35] EU regulations trump domestic conflicts legislation. Yet, the devil is, as usual, in the details: EU directives, of course, prevail only *if and insofar as* they apply. The problem is that sometimes they do, sometimes they don't. To begin with, EU regulations do not apply everywhere in Europe. Obviously, EU regulations have no force in non-EU countries, such as Norway and Switzerland.

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33. *But see infra* Section I, Subsection A.

34. Jürgen Basedow, *Kodifizierung des Europäischen Privatrechts?*, [Codification of European Private Law], 75 Rabels Zeitschrift 671 (2011) (Ger.).

35. *See* Case 6/64, Costa v. ENEL, 1964 E.C.R. 585 (showing that the supremacy doctrine is a creation of the European Court of Justice). It is generally accepted today even though there is, oddly enough, still no treaty clause requiring it. There is, however, a Declaration concerning primacy of December 13, 2007 (Nr. 17).

Less obviously, they do not even apply in all EU member states. There are several outliers. For reasons too complicated to explain here, none of the regulations mentioned above apply in Denmark, only the Rome I and Rome II Regulations apply in the United Kingdom, and the Regulation on Divorce and Legal Separation applies in only 16 (out of currently 28) member states. Furthermore, even in countries where they do apply, these regulations do not constitute a comprehensive choice-of-law regime. They leave a host of important areas entirely uncovered, such as agency, corporate law, the conclusion and effects of marriage, and trusts. Even in areas they do cover, their scope is restricted in various ways. For example, the Rome I and Rome II Regulations cover, respectively, contractual and non-contractual obligations, but according to Article 1 of Rome I and Article 1 of Rome II, they do not apply to obligations arising out of family relationships, nor to those emanating from negotiable instruments. If, at the end of the day, EU Regulations do not apply for one reason or another, national law continues to govern.

In principle, EU law would also trump international conventions where they have become part of national law (by direct effect or implementation). Yet, since that could put EU member states in breach of their international obligations, EU conflicts regulations expressly preserve the applicability of conventions existing at the time when the respective regulation entered into force. Unfortunately, even that solution is not as simple as it seems at first. The preservation of conventions is limited to the relationship between EU member states and non-member states.[36] In other words, among member states regulations win over conventions, but between member and non-member states conventions win over regulations.

Finally, the relationship between international conventions and national codifications depends on the domestic law of each country. In particular, it depends on whether treaties are considered self-executing (directly applicable in the domestic legal order) and, if so, how they rank compared to statutory law. Since European countries differ widely in both regards, there is no general rule. Fortunately, conventions have often been implemented in national legislation or even incorporated into national codifications; thereby avoiding potential conflict.

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36. *See, e.g.*, Rome I, *supra* note 25, at art. 25; Rome II, *supra* note 26, at art. 28; Rome III, *supra* note 27, at art. 19; Commission Regulation 650/2012, *supra* note 30, at art. 75; *see also* Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter Hague Protocol]. Article 15 of the Council Regulation 4/2009, *supra* note 29, avoids any conflict by simply incorporating the respective convention, the Hague Protocol, by reference.

At the end of the day, figuring out which set of codified provisions governs in a given situation requires not only a thorough understanding of these meta-conflicts rules, but also considerable diligence and effort; for the non-specialist, it is very easy to go completely wrong. Even if all goes according to plan, choice-of-law uniformity among European countries is compromised by the various provisions exempting certain countries or subjects or issues from various codifications under varying circumstances.

B. The Problem of Combined Application of Levels: Inherent Difficulty and the Risk of Vertical Inconsistency

Inevitably, in many situations, several sources from the various levels explained above will apply side by side. For example, if a EU Regulation applies in principle but excludes one of the issues in a case, the excluded issue is then governed by national law or an international convention applicable in the forum state. More specifically, a German court, hearing a divorce proceeding between spouses from different countries and determining their parental responsibilities, will have to apply the Rome III Regulation to certain aspects of the divorce. However, because Article 1 section 2(f) of the Rome III Regulation excludes parental responsibility, the judge must resort to domestic legislation while keeping in mind that Germany has ratified a Hague Convention containing choice-of-law rules on parental responsibility.[37] Fortunately, in this case, there is no conflict between the international and the domestic source: both provide that the law governing parental responsibility is that of the child's habitual residence.[38]

Unfortunately, however, the sources on the various levels are not always in perfect harmony. Instead, there are what may be called vertical inconsistencies. Consider the problem of renvoi. The Rome I, II, and III Regulations (supra-national level) categorically exclude it,[39] but most domestic codifications (national level) allow it.[40] In addition,

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37. *See* Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, 35 I.L.M. 1391, 2003 O.J (L 48) (prescribing the choice-of-law provisions dealing with parental rights).

38. *Id.* at Art. 16; EGBG Art. 21.

39. *See* Rome I, *supra* note 25, at art. 20; Rome II, *supra* note 26, at art. 24; Rome III, *supra* note 27, at art. 11.

40. *See, e.g.*, Introductory Act to the Civil Code (Ger.), *supra* note 22, at 4; Schweizerisches Zivil Gesetzbuch [ZGB], Code Civil [CC], Codice Civile [CC] [Civil Code] Dec. 18, 1987, SR 291, art. 14 (Switz.). Even on the national level, however, the picture is not uniform because sometimes, renvoi is excluded. *See e.g.*, Burgerlijk Wetbek [BW], Code Civil [C.Civ.] art. 16 (Belg.).

Hague conventions (international level) vary.[41] As a result, when an issue in a case is simultaneously governed by sources from different levels, renvoi will apply with regard to some choice-of-law rules but not others; even where it applies, it may be subject to varying modifications and restrictions.[42] Needless to say, determining the substantive rules applicable to the various elements of the case is tricky business. It is also far from clear that once properly determined these rules will ultimately all fit together.[43]

C. The Problem of Insufficient Harmony on Each Level: Horizontal Inconsistencies

To make matters worse, the codifications on each level are not completely in harmony with each other either. On the national level, this is to be expected as well as normal. Domestic legislatures may have different preferences and may thus codify different choice-of-law rules. Although, there has been considerable convergence among the various national conflicts codifications, differences remain, albeit rarely of a fundamental sort. Note that this is not a problem *within* any single jurisdiction because local courts will simply look to their own domestic codification, not to that of another state. The differences can, however, lead to potentially different outcomes in different jurisdictions; this raises the well-known fairness concerns, and it can invite forum-shopping.

On the international level, one might assume that the various Hague Conventions are consistent with one another since they are all products of the same institution. Yet, they sometimes reflect different approaches and contain different rules on the same issue. Again, look at their respective provisions about renvoi. The reason for multiple divergences is often that the conventions were drafted at different times (often decades apart) and, thus, at different stages of development and by different teams and generations of experts. At least with

41. Some conventions expressly allow renvoi. *See, e.g.*, Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons, art. 4, 28 I.L.M. 146, 150 (1989) [hereinafter Hague Convention]. Many others are silent on the matter.

42. *See, e.g.*, Rome III, *supra* note 27, at art. 11 (specifically mandating the exclusion of renovi); Introductory Act to the Civil Code (Ger.), *supra* note 22, at art. 4, § 1 (permitting renovi); Hague Convention, *supra* note 41, at art. 21 (providing qualified permission for renvoi).

43. In one particular instance, the EU managed to avoid a conflict between different levels and sources of law: the choice-of-law provision of the Rome III Regulation, dealing with maintenance obligations, simply incorporated the Hague Protocol on the law applicable to maintenance obligations of November 23, 2007. *See* Rome III, *supra* note 27, at art. 15; *see also* Hague Protocol on the Law Applicable to Maintenance Obligations, 2009 O.J. (L 331) 19 [hereinafter Hague 2007 Protocol on Maintenance Obligations].

regard to conventions, states have the option to avoid such inconsistencies by refusing to ratify some or any of these instruments.

The most disconcerting situation exists on the supra-national level. Since all EU regulations were created by the same government, drafted by largely the same bureaucracy, and put into force within a relatively short time period (less than 15 years so far), one should expect them to be fully synchronized. However, they are not. For example, one regulation could address a general issue that another leaves open; while other regulations are redundant or are simply incoherent.[44] Such lack of coordination is especially troublesome because uniformity within the EU is the very point of enacting such regulations.[45] These problems are very difficult for the member states to escape because regulations are imposed top-down as directly applicable supreme law.

III. COMPLEXITY AND INCOHERENCE: POSSIBLE REMEDIES AND THEIR PROSPECTS

As a result of codifying rules on three competing levels, often taking a piecemeal approach, and proceeding with insufficient attention to overall consistency, today European choice-of-law suffers from systemic complexity and disconcerting incoherence. The problem is not merely theoretical but eminently practical. Solving choice-of-law problems correctly often requires a degree of knowledge, an access to resources, and an amount of time that judges sitting on general (civil) courts, the majority of attorneys in private practice, and most corporate counsel do not have and cannot afford. A system that is indispensible to resolving transnational disputes, but mastered by at best a few hundred specialists in all of Europe, is in need of fixing. One can envisage a variety of remedies, but at least in the short- to medium-term, prospects for most of them are dubious. For present purposes, a brief outline of the major options, promises and problems must suffice.[46]

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44. For purposes of this essay, it is not necessary to go into the nitty-gritty. For a presentation and analysis of the details, *see* Rühl & von Hein, *supra* note 3, at 713-15 (explaining gaps); *id* at 717-18 (displaying redundancies); *id.* at 718-20 (demonstrating the incoherencies). Even concepts consistently used in the various regulations do not necessarily have the same meaning everywhere: while "habitual residence" is used in virtually every EU conflicts regulation, the European Court of Justice has pointed out in two landmark decisions that its authoritative interpretation of the concept must not be used in contexts other than those before the Court. *See* Case C-523/07, A, 2009 E.C.R. I-2805; Reference for a preliminary ruling from the Korkein hallinto-oikeus, 2009 E.C.R. 225 (Fin); Mercredi v. Chaffe Case C-497/10, 2010 E.C.R. I-14309.

45. We leave aside here the inconsistencies between the Regulations on choice-of-law and regulations on procedural matters. *See* Rühl & von Hein, *supra* note 3, at 704.

46. For a much more in-depth discussion, *see id.* at 721-38.

A. Going all the Way: A European Choice-of-Law Code?

The most effective solution would be a comprehensive codification of choice-of-law rules on the EU level–a European Code of Private International Law. Such a code would not only consolidate and synchronize the existing regulations, but would also cover the areas currently still left to national law and, where applicable, international conventions. It would then provide uniform and directly applicable choice-of-law rules for all member states in all important areas. This would greatly decrease the overall complexity of the system, improve its coherence, and thus render it more workable for practitioners. This option has been extensively discussed among academics in the last few years,[47] and the European parliament has expressed its hope that such a code will eventually become reality.[48]

Yet, at least under current conditions, such a comprehensive European codification is not a realistic option. The main problem is not even technical. To be sure, drafting a European conflicts code would be a challenging undertaking, even if it were limited to choice-of-law, but codes in several European countries show that it can be done. Of course, the job may well be more difficult for the whole EU, but the existing regulations prove that choice-of-law rules can be drafted on the supranational level as well. A bigger problem is that, currently, the EU lacks comprehensive lawmaking power in private international law. For reasons too complicated to explain here, the creation of a full-fledged European choice-of-law code would have to proceed under different treaty provisions entailing different legislative procedures, depending on the subject matter involved.[49] To make matters worse, not all EU member states have agreed to participate in all procedures and projects.[50] To overcome these hurdles requires amending EU treaty law, which is politically out of the question at the moment. This is particularly true since several states on Europe's geographic periphery, especially the common law jurisdictions and also the Scan-

47. *See id.* at 704-05 (providing an overview with ample further references to the literature); *see also* M. Fallon, P. Lagarde, S. Poillot-Peruzzetto, *Quelle architecture pour un code européen de droit international privé?* [What architecture for code of European private international law] (2011).

48. European Parliament Resolution of 7 Sept. 2010 on the Implementation and Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2010 O.J. (C 308) E/36; *see also* Rühl & von Hein, *supra* note 3, n. 6.

49. *Compare* Consolidated Version of the Treaty on the Functioning of the European Union art. 81, §§ 1-2, 2008 O.J. (C 115) 47 (providing choice-of-law directions for general issues), *with id.* at art. 81, § 3 (establishing choice-of-law rules for family law matters).

50. The reasons are well-nigh incomprehensible to non EU-specialists and, in any event, far too complicated to explain here. *See* Rühl & von Hein, *supra* note 3, at 733-35.

dinavian countries, generally lack enthusiasm for comprehensive codification to begin with.

B. Closing Gaps: Further Piecemeal EU Legislation

A less ambitious—but also less effective—option is to continue with piecemeal legislation on the European level and, thus, at least to close the big gaps on the supra-national level. This could include both broadening the scope of existing regulations (i.e. getting rid of the many exclusions of subjects) and enacting new regulations covering the remaining terrain. It is indeed likely that, as time goes on, there will be further piecemeal EU choice-of-law codification.[51] Within the areas addressed, this will create more uniformity.

Such a piecemeal course is easier to pursue because it is not necessarily blocked either by the EU's split legislative competence or by the non-participation of certain member states. Yet, continuing the piecemeal approach will only at best alleviate, but not nearly eliminate, the problems inherent in a regime with multiple sources on multiple levels.

C. Overcoming Incoherence: A "Rome 0" Regulation?

An even narrower option is to tackle at least the current problems on the supra-national level, for example among the existing and planned EU regulations. In pursuit of that goal, scholars have proposed addressing all questions common to the various regulations, such as reference to multi-unit systems, renvoi, mandatory rules, and public policy—in single and separate codification. Such a "Rome 0" Regulation would codify the general principles applicable to all other regulations in a uniform fashion and, thus, eliminate redundancies, fill in gaps, and avoid incoherence.[52]

Again, however, a project of such general scope raises serious issues of legislative competence and member-state participation.[53] In addition, many general questions have traditionally been so hotly contested that creating a pan-European consensus would be difficult, to

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51. *See supra* note 31 and accompanying text.

52. Stefan Leible & Hannes Unberath, Brauchen wir eine Rom 0-Verordnung?: Überlegungen zu einem Allgemeinen Teil des europäischen IPR [Do we need a Rome 0 Regulation?: Reflections on a general part of the European IPR] (Stefan Leible & Hannes Unberath eds. 2013) (Ger.); *see also* Felix M. Wilke, Brauchen wir eine Rom 0-Verordnung?: eine Skizze anlässlich einer Bayreuther Tagung [Do we need a Rome 0 Regulation?: A sketch on the occasion of a conference on Bayreuth], 9 Zeitschrift für Gemeinschafsprivatrecht [GPR] [J. of Communities Priv. L.] 334 (2012) (Ger.); Stefan Leible & Michael Mueller, *A general part of European Private International Law? The idea of a "Rome 0 Regulation"*, 14 Y.B. of Priv. Int'l L. 137 (2012-2013) (providing a discussion in English).

53. *See* Symeonides, *supra* note 1.

put it mildly. This is true, for example, with regard to the sense or non-sense of renvoi. In any event, at least so far, the idea of such a "Rome 0" Regulation has remained an academic pursuit.[54] Whether it will ever find favor with the EU's legislative apparatus is far from clear.

In summary, there is no quick and easy way out of the current situation. Solving the problems of complexity and incoherence will probably require incremental steps, a combination of legislative measures and institutional reforms, and endurance.[55] In the meantime, European lawyers will have to contend with the multitude of competing conflicts codifications as best they can.

IV. LESSONS FOR THE UNITED STATES?

In conclusion, let me proffer three lessons for an U.S.-American audience. The first is addressed to the advocates and drafters of codifications; the second to legal practitioners; the third to both.

The lesson for U.S.-American advocates and drafters of codifications—including those engaged in the project of a Restatement (Third) of Conflicts—is straightforward: if you are looking for guidance from the European codification experience, look at the parts of the regime but stay clear of the whole. The individual conflicts codifications produced in Europe over the last half-century proffer valuable models not only on the national level, but also on the international and supranational levels. Most domestic legislation, Hague (and some other) conventions, and also most EU regulations are competently drafted. They provide rules that are easily ascertainable, reasonably clear, and, at least by and large, practically workable. U.S.-American conflicts lawyers drafting (quasi-) legislative provisions would be foolish not to consult them. Fortunately, there is little need for U.S.-American jurists to agonize over how these pieces fit, or do not fit, together.

The lesson for U.S.-American practitioners is even simpler: if you must handle disputes involving European conflicts law, be aware that you are entering extremely treacherous terrain. Never assume that the codification you look at applies simply because it was created by

54. It is no accident that the majority of proponents has consisted of German scholars whose legal training makes the concept of a "general part" seem almost natural. Such a "general part" is one of the characteristic features of the German civil code. A French contribution is the preliminary draft by Paul Lagarde, Embryon de Règlement portant Code européen de droit international privé: Titre I. - Partie générale [Embryonic Regulation on European Private International Law Code: Title I. - General Part], 75 Rabels Zeitschrift Fuer Ausländisches und Internationales Privatrecht [RabelsZ] [Rabel J. of Comp. & Priv. Int'l L.] 673 (2010) (Ger.). It covers not only basic choice-of-law principles but also jurisdiction and judgments recognition. *Id.*

55. A detailed step-by-step program is suggested by Rühl & von Hein, *supra* note 3, at 738-50.

the forum state or, for that matter, by the EU. In fact, never even assume that the average European lawyer can provide reliable advice on whether it applies—or not. Get help from a true expert in the field.

The lesson for all U.S.-American lawyers dealing with choice-of-law problems is actually cheerful: appreciate the relative simplicity of your domestic conflicts system! It is true, of course, that the U.S.-American system is messy with every state having its own regime; with few codified rules to provide firm guidance; and even the Second Restatement is often interpreted to mean very different things in different courts.[56] Yet, at least you do not have to struggle with the complexities and incoherencies of a multi-level system. In the United States, once you know the forum (i.e., once jurisdiction is settled), you deal with one set of choice-of-law rules. In Europe, that simplicity has now been lost.

56. Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232 (1997).

BEING DEPRIVED OF THE RIGHT TO EFFECTIVE COUNSEL IN REMOVAL PROCEEDINGS: WHY THE EIGHTH CIRCUIT'S DECISION IN *RAFIYEV* MUST BE OVERTURNED

CHARLES SHANE ELLISON†

I. INTRODUCTION

Mr. Utoc Garcia,[1] a native and citizen of Guatemala, came to the United States in 1992, fleeing the brutal civil war that had been raging in his country for several decades.[2] He was from a minority ethnic Mayan group heavily targeted by the Guatemalan government for its suspected ties to the guerilla movement.[3] In fact, reports have shown that the Guatemalan government engaged in systematic human rights violations to a degree approximating genocide in some locations.[4] He fled Guatemala and sought refuge in the United States. After his arrival, he immediately brought himself to the attention of U.S. authorities by filing for asylum in 1992.

However, similar to many other Guatemalan asylum seekers, Mr. Utoc was not given his first interview before the branch of the government that adjudicates asylum applications until 2007, fifteen years after having filed for asylum.[5] The Asylum Corps was plagued with

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1. Although the facts of this case have been changed to preserve confidentiality, the material aspects described are unchanged and representative of several clients I have represented in Nebraska.

2. *See generally* COMMISSION FOR HISTORICAL CLARIFICATION: GUATEMALA MEMORY OF SILENCE: REPORT OF THE COMMISSION FOR HISTORICAL CLARIFICATION CONCLUSIONS AND RECOMMENDATIONS (1994), *available at* http://www.aaas.org/sites/default/files/migrate/uploads/mos_en.pdf [hereinafter GUATEMALA MEMORY OF SILENCE]; STEPHEN SCHLESINGER, BITTER FRUIT: THE STORY OF THE AMERICAN COUP IN GUATEMALA (4th ed. 2001).

3. GUATEMALA MEMORY OF SILENCE, *supra* note 2.

4. *Id.* at 38-41.

5. *See, e.g.*, Cuadra v. Gonzales, 417 F.3d 947, 948 (8th Cir. 2005) (delaying an asylum seeker's initial interview by twelve years); Molina Jerez v. Holder, 625 F.3d

backlogs during this time and devoted frightfully insufficient resources to adjudicating these claims.[6]

When Mr. Utoc appeared for his asylum interview, the United States Citizenship and Immigration Service ("USCIS") denied his request for asylum because the civil war in Guatemala had ended during the fifteen-year period in which he waited to present his claim.[7] Asylum law does not consider the fact that in the time he waited for an interview, he purchased a home, started a business, and established a family with minor children born in the United States who knew nothing of Guatemala. Notwithstanding these substantial ties to the United States, USCIS placed Mr. Utoc in removal proceedings a month later.[8]

Fearful of returning to a country he had not seen in a decade and a half, Mr. Utoc sought the assistance of counsel. However, as he would later discover, he entered into an agreement with a group that engages in the unauthorized practice of law. Mr. Utoc paid this group, located in rural Nebraska, $6,000 to represent him in his immigration matter. To Mr. Utoc, non-attorney Juan Valdez[9] appeared to be the primary person handling his case. It was not until Mr. Utoc obtained new counsel that he learned that Valdez was not actually an attorney.

Mr. Utoc was statutorily eligible to apply for cancellation of removal for certain nonpermanent residents because he had resided in the United States for more than ten years, had four United States-citizen children, and had absolutely no criminal record.[10] However, he was never informed of the requirements to be granted this form of relief. In particular, Mr. Utoc was never informed that the most important requirement to prevail on such a claim is to establish that his

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1058, 1061 (8th Cir. 2010) (failing to make a final asylum determination for nearly two decades); *see also* Hernandez v. Napolitano, No. 8:13CV113, 2013 WL 6662861, *2-3 (D. Neb. Dec. 17, 2013) (stating that the government "delayed implementation of the [ABC] settlement for years, and what were once strong asylum claims became stale as conditions improved in El Salvador and Guatemala").

6. *See* Memorandum, Joseph E. Langlois, Asylum Division, Making *ABC* Registration Determinations, *Chaly-Garcia v. U.S.*, 508 F.3d 1201 (9th Cir. 2007) (Aug. 5, 2008), *available at* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2008/making_abc_registration_determinations_080508.pdf (developing procedure in 2008 to adjudicate hundreds of pending ABC asylum applications filed in or before 1991).

7. *Truth Commission: Guatemala*, UNITED STATES INSTITUTE OF PEACE (February 1, 1997), *available at* http://www.usip.org/publications/truth-commission-guatemala.

8. *See* INS v. Lopez, 468 U.S. 1032, 1038 (1984) (stating that removal proceedings, formally known as deportation proceedings, are civil proceedings to determine a noncitizen's eligibility to remain in the United States).

9. This is not the person's real name.

10. Immigration and Nationality Act § 240A(b), 8 U.S.C. § 1229b (2014); In re Gonzalez Recinas, 23 I. & N. Dec. 467, 468 (B.I.A. 2002).

United States-citizen children would suffer exceptional and extremely unusual hardship if he were deported back to Guatemala.[11]

While waiting for his final hearing, set for July of 2010, Mr. Utoc retrieved the documents Valdez instructed him to gather. Additionally, Mr. Utoc spoke with Valdez and informed him that his youngest son, Edward, suffered from developmental delays, significant language, learning, and psychological problems, and required speech therapy, psychiatric counseling, and special education. Mr. Utoc asked Valdez if this information should be included in his case. Valdez errantly told him that the information about his son's disabilities was not necessary to the case when in fact it likely would have made the difference between winning and losing.[12] Regretfully, Mr. Utoc relied on this bad advice from Valdez and did not bring it up again.

At the trial before the Omaha Immigration Court, an attorney who worked with Valdez represented Mr. Utoc. This attorney, Sue Jones,[13] had not been present at any of the meetings between Mr. Utoc and Valdez, and as far as he could tell, Jones was completely unprepared and knew nothing about his case. Jones did not speak Spanish and thus Mr. Utoc could not communicate with her. None of the information about Edward's disabilities was introduced at trial or considered by the Immigration Judge ("IJ").

At the conclusion of the hearing, the IJ denied Mr. Utoc's Application for Cancellation of Removal under section 240A(b) of the Immigration and Nationality Act ("INA") for the sole reason that he had failed to meet his burden of establishing exceptional and extremely unusual hardship.[14] Mr. Utoc, through Jones, filed a timely appeal of the IJ's decision to the Board of Immigration Appeals ("BIA" or "Board"); however, neither Jones nor Valdez included any information about Mr. Utoc's disabled son. Consequently, the Board denied the appeal for the same reasons given by the IJ.

Mr. Utoc retained new counsel[15] and discovered for the first time that Valdez was not even an attorney. He thus filed a complaint with

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11. *Gonzalez Recinas*, 23 I. & N. Dec. at 468.

12. *See, e.g.*, In re Monreal-Aguinaga, 23 I. &. N. Dec. 56, 63 (B.I.A. 2001) (noting that a "strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school.").

13. This is not the attorney's real name.

14. The IJ stated that there were "plenty of favorable discretionary factors" in the case. However, because the "sole hardship factor presented" related to Mr. Utoc's fourteen year old daughter who suffered from mild asthma, the IJ found that "the record [was] [in]sufficiently developed" to meet the hardship standard. Had the far more serious proof of hardship to Mr. Utoc's son been introduced, it is quite likely that Mr. Utoc's case would have been granted by the IJ.

15. The author of this Article.

the Nebraska Commission on the Unauthorized Practice of Law against Valdez. Likewise, Mr. Utoc filed a bar complaint with the Nebraska Counsel for Discipline against Jones for failing to introduce indispensable evidence relating to his son's disability. He also sought to reopen proceedings before the Board based upon the ineffective assistance of counsel he had received and the new evidence that had not been reviewed by the Board.[16]

Mr. Utoc's son, Edward, continued to suffer from his debilitating mental disability and required special education, weekly therapy, counseling, and psychiatric treatment. Although Edward was six years old, he remained largely unable to speak.

Edward's treating physician, Dr. Hong, indicated that Edward would not be able to receive the therapy he needed in Guatemala and numerous country conditions reports established that there was virtually no treatment for similarly disabled individuals in Guatemala.[17]

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16. *See* Ortiz-Puentes v. Holder, 662 F.3d 481, 485 n.2 (8th Cir. 2011) (explaining that the appropriate remedy is to reopen proceedings when there is a "reasonable probability that but for errors of counsel, the result in the case would have been different").

17. UNITED STATES BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES, GUATEMALA: THE SITUATION FACING THE DISABLED, PARTICULARLY PERSONS WITH SPEECH AND HEARING LOSS, (Jan. 25, 2000), *available at* http://www.refworld.org/docid/3ae6a6b53.html. A United States Bureau of Citizenship and Immigration Services ("USCIS") report indicated that "[i]n general, the Guatemalan State does not provide services for the disabled population [and] [a]s a result of this situation, it is common to witness persons with hearing and speech loss, . . . begging for money on the streets . . . ." *Id.* The report also indicated that "the potential for employment for the disabled is extremely limited" and those few jobs available for the disabled tend to be "at salaries below the established minimum wage." *Id.* Likewise, the "few social services that do exist in Guatemala" are very difficult to access "for the deaf-mute population" living outside of the capital. *Id.* Similarly, the report found that Guatemalan "health care is precarious" and that "even less can be expected for the special needs population." *Id.* In sum, because "resources available for those with physical disabilities are extremely scarce," most live in "a state of dependency" leaving them "vulnerable to discrimination and exploitation." *Id.* Another report found that "[m]ost children with disabilities in Guatemala do not attend school [and] fewer than 2% of adults with disabilities are" employed. EMERGE POVERTY FREE, *Who is helping people with disabilities in Guatemala?*, World Emergency Relief, November 11, 2010, http://emergepovertyfree.org/who-is-helping-people-with-disabilities-in-guatemala/ (last visited Feb. 1, 2015). A similar report found that because of the "lack of coordination between education and health-care systems to work with disabled children" in Guatemala, most "children with disabilities do not attend formal education." Jill Replogle, *Guatemala's disabled children face a lifetime of challenges*, THE LANCET, Vol. 365, Issue 9473 (May 2005), at p. 1757. In fact, one study indicated that "86% of students with disabilities in Guatemala are" receiving no education and "[t]here are virtually no special education programs." Need, Transitions Foundation of Guatemala, 2011. Of the disabled students who do complete high school, "51% are illiterate." *Id*. Indeed, the United States State Department's own Human Rights Report for Guatemala found that although the law states that persons with disabilities should not face discrimination, disabled people do "not enjoy these rights, and the government devoted few resources to addressing the problem." U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: GUATEMALA (2011), *available at* http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dlid=186518. The report

This evidence, along with proof regarding the ineffective assistance that Mr. Utoc received, was filed in a *Lozada* motion to reopen before the Board.[18] However, because the case arose in the jurisdiction of the United States Court of Appeals for the Eighth Circuit, the Board was required to apply the rule of that circuit.[19] Despite the truly compelling facts of this case, and Mr. Utoc's compliance with the requirements of a *Lozada* motion, a single member of the Board denied Mr. Utoc's action. Mr. Utoc appealed to the Eighth Circuit Court of Appeals, but settled his claim before a decision was rendered.

Although the facts of this case are unique, the situation for immigrants who have received frightfully defective assistance from their attorneys, or non-attorneys masquerading as attorneys, is all too common.[20] For the reasons discussed more fully below, immigrant victims are at particular risk in tribunals beneath the Eighth Circuit because of its aberrant precedent in the area of ineffective assistance of counsel in immigration proceedings.[21]

In this Article, I will first provide an overview of the procedure for making a claim for ineffective assistance of counsel in removal proceedings and give a brief history of this procedure as used since the Board's seminal decision in *Matter of Lozada*.[22] Second, I will discuss the Eighth Circuit's treatment of ineffective assistance of counsel in removal proceedings and how it compares with its sister circuits. Third, I will argue that the Eighth Circuit has erred in this area of the law and should join the vast majority of other circuits in the country by holding that there is a constitutional due process right to effective counsel in immigration proceedings. Finally, I will present a strategy that a future Eighth Circuit panel could use to overrule its previous decisions.

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also found that "[t]here were minimal educational resources for persons with special needs." *Id.*

18. *See* Matter of Lozada, 19 I. & N. Dec. 637, 638 (B.I.A. 1988) (explaining the administrative precedent relating to reopening a case to correct errors that result from the ineffective assistance of counsel).

19. In re Hector Ponce de Leon, 21 I. & N. Dec. 154, 159 (B.I.A. 1996).

20. *See* U.S. Dep't of Justice, *List of Currently Disciplined Practitioners*, http://www.justice.gov/eoir/list-of-currently-disciplined-practitioners, (last visited Jan. 5, 2015) (listing as of January 5, 2016, the 673 immigration practitioners who are suspended or disbarred by the BIA); *see generally* Anne E. Langford, *What's in a Name?: Notarios in the United States and the Exploitation of a Vulnerable Latino Immigrant Population,* 7 HARV. LATINO L. REV. 115 (2007).

21. *See generally* Rafiyev v. Mukasey, 536 F.3d 853 (8th Cir. 2008).

22. 19 I. & N. Dec. 637 (B.I.A. 1996).

II. LEGAL FRAMEWORK FOR MOTIONS TO REOPEN BASED UPON THE INEFFECTIVE ASSISTANCE OF COUNSEL IN REMOVAL PROCEEDINGS

A. REQUIREMENTS FOR A *MATTER OF LOZADA* MOTION TO REOPEN

The Board in *Matter of Lozada*[23] recognized the need for a procedural mechanism to correct errors that resulted from counsel's ineffective assistance.[24] Although the underlying reasons for *Lozada* have come under attack in several cases,[25] its framework has been adopted by every circuit in the country as controlling on motions to reopen based upon ineffective assistance of counsel in removal proceedings.[26]

In order to comply with *Lozada*, a motion to reopen[27] based upon ineffective assistance of counsel must meet the following three requirements:

> [1] [It must be] supported by an affidavit of the allegedly aggrieved respondent attesting to the relevant facts[,] . . . [2] [F]ormer counsel must be informed of the allegations and allowed the opportunity to respond[, and] . . . [3] Finally, if it is asserted that prior counsel's handling of the case involved a violation of ethical or legal responsibilities, the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not.[28]

As to the first requirement, the Board has explained that the affidavit should include a statement that sets forth in detail the agreement that was entered into with former counsel with respect to the actions to be taken and what counsel did or did not represent to the respondent in this regard.[29]

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23. 19 I. & N. Dec. 637 (B.I.A. 1996).

24. Matter of Lozada, 19 I. & N. Dec. 637, 639 (B.I.A. 1988); *see also* Ochoa v. Holder, 604 F.3d 546, 548 n.1 (8th Cir. 2010) (stating that the Eighth Circuit uses the Board's leading decision in *Matter of Lozada* as a "substantive and procedural compass" in evaluating these claims).

25. *See* In re Compean (*Compean I*), 24 I. & N. Dec. 710, 710 (Att'y Gen. 2009), *vacated by* 25 I. & N. Dec. 1 (Att'y Gen. 2009); Rafiyev v. Mukasey, 536 F.3d 853, 861 (8th Cir. 2008) (holding that noncitizens in removal proceedings have no constitutional right to effective counsel).

26. *See infra* note 109 and accompanying text; *see also* Ortiz-Puentes v. Holder, 662 F.3d 481, 485 (8th Cir. 2011) (stating, "When [a] motion [is] premised on claims of ineffective assistance of counsel, we use the Board's leading decision in [Lozada] as a 'substantive and procedural compass.'").

27. Motions to reopen based upon other considerations are beyond the scope of this Article.

28. *Lozada*, 19 I. & N. Dec. at 639.

29. *Id.*; *see also* In re Bozena Zmjewska, 24 I. & N. Dec. 87, 94-95 (B.I.A. 2007) (finding that the *Lozada* requirements may be likewise applied to non-attorney BIA accredited representatives); Hernandez-Moran v. Gonzales, 408 F.3d 496, 499 (8th Cir. 2005) (describing requirement for an affidavit detailing representation agreement).

The second two requirements are important to protect against meritless claims of ineffective assistance of counsel and they provide more information to the tribunal to evaluate the motion.[30]

One foundation for the procedures *Lozada* adopted is the "fifth amendment guarantee of due process."[31] The Board explained that "[i]neffective assistance of counsel in a deportation proceeding is a denial of due process" when it renders the "proceeding . . . so fundamentally unfair that the alien [is] prevented from reasonably presenting his case."[32] However, as discussed further below, this conclusion is not universally accepted.

B. The Requirement of Prejudice

In addition to complying with the three procedural requirements of *Matter of Lozada*[33] discussed in the previous section, one must also establish that such ineffective assistance resulted in prejudice.[34] To establish that former counsel's deficient performance resulted in prejudice, courts require the movant to make two showings: First, it must be shown that counsel failed to perform with sufficient competence.[35] Second, it must be shown that the client was prejudiced by his counsel's performance.[36] To do this, the noncitizen need only "show that he has *plausible* grounds for relief."[37] That is, the evidence submitted in a motion to reopen need not definitively prove eligibility for relief.[38]

The United States Court of Appeals for the Eighth Circuit has held that in order to establish "the requisite prejudice" for purposes of a motion to reopen based upon ineffective assistance of counsel, a peti-

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30. *See* In re Bassel Nabih Assaad, 23 I. & N. Dec. 553, 556 (B.I.A. 2003) (explaining that the policy reasons behind the complaint requirement is that it "increases our confidence in the validity of the particular claim, reduces the likelihood that an evidentiary hearing will be needed, and serves our long-term interests in monitoring the representation of aliens by the immigration bar.").

31. *Lozada*, 19 I. & N. Dec. at 638.

32. *Id.*

33. 19 I. & N. Dec. 637 (B.I.A. 1988).

34. Matter of Lozada, 19 I. & N. Dec. 637, 639 (B.I.A. 1988); Habchy v. Gonzales, 471 F.3d 858, 863-64 (8th Cir. 2006).

35. Mohammed v. Gonzales, 400 F.3d 785, 793 (9th Cir. 2005).

36. Ortiz-Puentes v. Holder, 662 F.3d 481, 485 (8th Cir. 2011).

37. Lin v. Ashcroft, 377 F.3d 1014, 1027 (9th Cir. 2004) (quoting United States v. Jimenez-Marmolejo, 104 F.3d 1083, 1086 (9th Cir. 1996)).

38. *See* Fadiga v. Attorney Gen., 488 F.3d 142, 157-63 (3d Cir. 2004) (reversing the BIA where the Board held that respondent had to prove a "clear probability" to reopen his case); *see also* Maravilla-Maravilla v. Ashcroft, 381 F.3d 855, 858-59 (9th Cir. 2004) (reversing the BIA denial of motion to reopen where the Board required Respondent show he would win his case, rather than that his claim may have been affected by counsel's ineffective assistance).

tioner must show that there is a "reasonable probability that but for errors of counsel, the result in the case would have been different."[39]

In other cases, the Eighth Circuit has explained "[a]ctual prejudice exists where defects in the deportation proceedings may well have resulted in a deportation that would not otherwise have occurred."[40] The United States Court of Appeals for the Ninth Circuit has defined "prejudice" as "an error that potentially . . . affects the outcome of the proceedings . . . ."[41]

Other circuits have made clear that the prejudice requirement does not mandate the movant to show that it is more likely than not that he would prevail if his case were reopened, but simply that there is a "reasonable probability" that the outcome would be different.[42]

In motions to reopen based upon new information, the Board has recognized that the evidence submitted need not definitively prove eligibility for relief; rather, it must only make out a *prima facie* case for eligibility.[43] In assessing whether a person has established prima facie eligibility in the asylum context, the Board has defined it as a "'realistic chance' that [the applicant] will be able to establish eligibility."[44]

In sum, if a movant complies with the procedural requirements of *Lozada* and establishes that the ineffective assistance of counsel resulted in prejudice to his case, the proceedings should be reopened.[45]

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39. *See Ortiz-Puentes*, 662 F.3d at 485 n.2 (citing Obleshchenko v. Ashcroft, 392 F.3d 970, 972 (8th Cir. 2004)).

40. Al Khouri v. Ashcroft, 362 F.3d 461, 466 (8th Cir. 2004) (citing United States v. Torres-Sanchez, 68 F.3d 227, 230 (8th Cir. 1995)).

41. *Al Khouri*, 362 F.3d at 466 (quoting Agyman v. INS, 296 F.3d 871, 884 (9th Cir. 2002)); Perez-Lastor v. INS, 208 F.3d 773, 780 (9th Cir. 2000); Ambati v. Reno, 233 F.3d 1054, 1061 (7th Cir. 2000) (quoting Kuciemba v. INS, 92 F.3d 496, 501 (7th Cir. 1996)).

42. *See Fadiga*, 488 F.3d at 157-63; *see also Maravilla-Maravilla*, 381 F.3d at 858-59.

43. *See* Matter of Coehlo, 20 I. & N. Dec. 464, 472 (B.I.A. 1992) (explaining a motion to reopen might be denied based on a failure to establish the prima facie case to reopen). Prima facie means "on the first appearance but subject to further evidence or information." *Prima facie*, BLACK'S LAW DICTIONARY (7th ed. 1999).

44. Matter of S-Y-G-, 24 I. & N. Dec. 247, 252 (B.I.A. 2007) (citing Poradisova v. Gonzales, 420 F.3d 70, 78 (2d Cir. 2005)).

45. The timing of a *Lozada* motion to reopen is another important consideration, but is beyond the scope of this Article. Additionally, while also beyond our scope here, it should be noted that United States Courts of Appeals always have jurisdiction to review the Board's denial of a motion to reopen based upon the ineffective assistance of counsel. The United States Supreme Court made that point clear during the last term. In *Mata v. Lynch,* 135 S. Ct. 2150 (2015), the Court, in an 8-1 decision, reversed the Fifth Circuit Court of Appeals' holding that it had no jurisdiction to review the Board's denial of an untimely motion to reopen removal proceedings based on a claim of ineffective assistance of counsel. The Court's decision in *Mata* held that "[w]henever the Board denies an alien's statutory motion to reopen a removal case, [circuit] courts have jurisdiction to review its decision." *Mata*, 135 S. Ct. at 2155. This decision implicitly overruled the Eighth Circuit's decisions in *Nativi-Gomez v. Ashcroft*, 344 F.3d 805, 809 (8th Cir.

C. Criticism of *Lozada*

Since the Board's decision in *Matter of Lozada*,[46] every circuit court in the country has adopted and used the case as a guidepost for analyzing ineffective assistance of counsel claims.[47] However, the underlying reasons for *Lozada* have been called into question by several tribunals and the extent to which the decision rests on constitutional footing has been the subject of some debate.

The most significant attack on *Lozada* and its progeny occurred in the 2008 decision *In re Compean* (*Compean I*)[48] when the Attorney General of the United States ("AG"), Michael Mukasey, overruled *Lozada*.[49] In his decision, the AG threw out *Lozada*'s well-established framework and laid in its place a structure designed to make this already difficult remedy even more unattainable for victims of unscrupulous attorneys.[50]

In overruling *Lozada* and creating a new substantive and procedural framework, the AG in *Compean I* stated that only in exceptional circumstances did the BIA retain the discretion to reopen removal proceedings based upon the ineffective assistance of counsel.[51] The new standard also clearly made the process of reopening proceedings more cumbersome for noncitizens negatively affected by defective counsel.[52]

Known as the "deficient performance of counsel" test, it required the noncitizen first establish that his or her retained counsel's errors were "egregious," not just that that counsel failed to perform with sufficient competence.[53] Additionally, the noncitizen had to show that he was prejudiced by his former attorney's error under a heightened

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2004), *Tamenut v. Mukasey*, 521 F.3d 1000, 1005 (8th Cir. 2008), and *Jamieson v. Gonzales*, 424 F.3d 765, 768 (8th Cir. 2005).

46. 19 I. & N. Dec. 637 (B.I.A. 1988).

47. *See infra* notes 109-116 and accompanying text.

48. 24 I. & N. Dec. 710 (Att'y Gen. 2009).

49. In re Compean (*Compean I*), 24 I. & N. Dec. 710, 712 (Att'y Gen. 2009), *vacated by* 25 I. & N. Dec. 1 (Att'y Gen. 2009).

50. *See Compean I*, 24 I. & N. Dec. at 726 (concluding there is no constitutional right to effective assistance of counsel in removal proceedings); *see also* American Immigration Council page regarding Ineffective Assistance of Counsel, *available at* http://www.legalactioncenter.org/litigation/ineffective-assistance-counsel.

51. *Compean I*, 24 I. & N. Dec. at 714.

52. *See id*. (stating that the AG created a new administrative framework for the Board to comply with in reopening removal proceedings).

53. *Id*. at 732; *compare id.* (stating that an "alien must show that his lawyer's failings were 'egregious'"), *with* Matter of Lozada, 19 I. & N. Dec. 637, 638 (B.I.A. 1988) (stating that the noncitizen must show he was prejudiced by counsel's deficient performance), *and* Matter of Assaad, 23 I. & N. Dec. 553, 556 (B.I.A. 2003) (reiterating *Lozada*'s standard); *see also* Mohammed v. Gonzales, 400 F.3d 785, 793-94 (9th Cir. 2005) (explaining that an alien does not have to establish counsel's deficient performance changed the outcome of the proceeding, but merely must show prejudice due to counsel's performance).

standard of prejudice.[54] Indeed, the AG explained that to establish prejudice under the new test, one had to show that "but for the deficient performance, it is *more likely than not* that the alien would have been entitled to the ultimate relief he was seeking[,]" a clear repudiation of the *reasonable probability* standard previously adopted by the BIA and several circuit courts.[55]

Most troubling perhaps is *Compean I*'s conclusion that a noncitizen's constitutional right to due process does not encompass a right to effective counsel in removal proceedings.[56] Rather, the AG explicitly held that "the Constitution [does not entitle] an alien who has been harmed by his lawyer's deficient performance in removal proceedings to redo those proceedings."[57]

The AG reasoned that "there is no constitutional right to effective assistance of counsel under the Due Process Clause . . . in . . . civil proceedings . . . [where] there is no constitutional right to counsel."[58] While the AG acknowledged "the Fifth Amendment's Due Process Clause applies in removal proceedings," he stated that "that Clause does not entitle an alien to effective assistance of counsel."[59]

The AG gave two reasons for his conclusion that there is no constitutional right to counsel in removal proceedings.[60] First, he relied on the Supreme Court's conclusions that removal proceedings are

54. *Compean I*, 24 I. & N. Dec. at 732.

55. *Compare id.* at 733-34 (establishing the deficient performance test) (emphasis added), *with* Ortiz-Puentes v. Holder, 662 F.3d 481, 485 n.2 (8th Cir. 2011) (applying the reasonable probability test) (citing Obleshchenko v. Ashcroft, 392 F.3d 970, 972 (8th Cir. 2004)); *see also* Agyeman v. INS, 296 F.3d 871, 884 (9th Cir. 2000) (stating that prejudice occurs when the violation "*potentially* . . . affects the outcome of the proceedings"); Ambati v. Reno, 233 F.3d 1054, 1061 (7th Cir. 2000) (requiring the alien to show that the due process violation had potential to affect the outcome); Kuciemba v. INS, 92 F.3d 496, 501 (7th Cir. 1996) (stating that the petitioner must produce evidence showing a procedural violation had the *potential* to affect the deportation proceeding's outcome).

56. *Compean I*, 24 I. & N. Dec. at 714.

57. *Id.* at 712.

58. *Id.* at 714.

59. *Id.* The AG explains that "[u]nlike the Sixth Amendment, the Due Process Clause of the Fifth Amendment, which provides that '[n]o person shall . . . be deprived of life, liberty, or property, without due process of law,' applies to civil" proceedings. *Id.* at 717. The AG also recognizes that due process applies to "all 'persons' within the United States, including aliens," and that "it is well established that the Fifth Amendment entitles all aliens who have entered the United States to due process of law in removal proceedings." *Id.* (citing Reno v. Flores, 507 U.S. 292, 306 (1993) and Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953)); *see also Shaughnessy*, 345 U.S. at 212 (declaring, "[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."); Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (noting that the Due Process Clause of the Fifth Amendment "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

60. *Compean I*, 24 I. & N. Dec. at 716.

civil—and not criminal—in nature;[61] therefore, the Sixth Amendment's right to counsel does not apply.[62] Second, he reasoned that the "Fifth Amendment's due process guarantee . . . applies only against the Government"[63] and thus "the actions of a private party, including a privately retained lawyer," cannot deprive a noncitizen his due process rights[64] unless there is a "'sufficiently close nexus' between the Federal Government . . . and the private party."[65]

It is significant that the AG precisely applied the Eighth Circuit's reasoning in *Rafiyev v. Mukasey*,[66] to *Compean I*.[67] We will come back to this point in the next section.

Less than a year after *Compean I* was decided, the newly appointed Attorney General Eric Holder vacated the decision in its entirety and reinstated the *Lozada* framework by issuing a new decision, *Matter of Compean*[68] ("*Compean II*").[69] In *Compean II*, Attorney General Holder laments *Compean I*'s impetuous decision to implement a "new, complex framework in place of a well-established and long-

61. *Id.* (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) and Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952)); *see also Lopez-Mendoza*, 468 U.S. at 1038 (stating, "[a] deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry."); *Shaughnessy*, 342 U.S. at 594 (declaring, "[d]eportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.").

62. *Compean I*, 24 I. & N. Dec. at 716 (citing Abel v. United States, 362 U.S. 217, 237 (1960), Tang v. Ashcroft, 354 F.3d 1192, 1196 (10th Cir. 2003), United States v. Loaisiga, 104 F.3d 484, 485 (1st Cir. 1997), Delgado-Corea v. INS, 804 F.2d 261, 262 (4th Cir. 1986), and United States v. Cerda-Pena, 799 F.2d 1374, 1376 n.2 (9th Cir. 1986)); *see also Abel*, 362 U.S. at 237 (noting, "deportation proceedings are not subject to the constitutional safeguards for criminal prosecutions").

63. *Compean I*, 24 I. & N. Dec. at 717 (citing Mathews v. Eldridge, 424 U.S. 319, 332 (1976)); *see also Mathews*, 424 U.S. at 332 ("stating that the Due Process Clause applies only to 'governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment'") (emphasis added).

64. *Compean I*, 24 I. & N. Dec. at 717 (citing S. F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 542-43 (1987)); *accord S.F. Arts & Athletics*, 483 U.S. at 542-43 ("stating that where a plaintiff alleges a violation of the Fifth Amendment, '[t]he fundamental inquiry is whether the [defendant] is a governmental actor to whom the prohibitions of the Constitution apply.'").

65. *Compean I*, 24 I. & N. Dec. at 720 (citing Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974)); *accord* Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982) ("stating that 'constitutional standards' may be invoked to challenge private action 'only when it can be said that the [Government] is responsible for the specific conduct of which the plaintiff complains'"); Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) ("emphasizing that the Due Process Clause applies to a private actor only if he may 'fairly be said to be a state actor.'").

66. 536 F.3d 853 (8th Cir. 2008).

67. *Compean I*, 24 I. & N. Dec. at 720-21 (citing Rafiyev v. Mukasey, 536 F.3d 853, 860-61 (8th Cir. 2008)).

68. 25 I. & N. Dec. 1 (B.I.A. 2009).

69. Matter of Compean (*Compean II*), 25 I. & N. Dec. 1, 1 (B.I.A. 2009).

standing practice that had been reaffirmed by the Board in 2003 after careful consideration."[70]

Today *Lozada* remains the seminal case used by every circuit court across the U.S. to analyze motions to reopen based upon ineffective assistance of counsel.[71] But, as we will see below, the constitutional foundation of *Lozada* has continued to come under attack.

III. THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT'S REJECTION OF A DUE PROCESS RIGHT TO EFFECTIVE COUNSEL IN REMOVAL PROCEEDINGS

A. An Assumed Right

The first case where the United States Court of Appeals for the Eighth Circuit addressed the question of ineffective assistance of counsel in the context of a *Lozada* motion to reopen is *Nativi-Gomez v. Ashcroft*,[72] in 2003.[73] There, the court recognized that noncitizens are "entitle[d] . . . to due process of law in deportation proceedings,"[74] and the court also indicated that "some courts have explained that the ineffective assistance of counsel can serve as the basis for a due process violation."[75] However, in a footnote, the court stated that "[o]ur Circuit has yet to recognize the validity of a due-process claim in a deportation proceeding based on the ineffective assistance of counsel."[76]

Obleshchenko v. Ashcroft,[77] was the next case to take up the issue. In *Obleshchenko*, the court again recognized that other circuits had found a due process right to effective assistance of counsel in removal proceedings[78] and "assume[d] without deciding" that the movant "had a right to have [his] counsel effectively represent" him.[79]

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70. *Compean II*, 25 I. & N. Dec. at 2.

71. *See infra* notes 109-116 and accompanying text.

72. 344 F.3d 805 (8th Cir. 2004).

73. Nativi-Gomez v. Ashcroft, 344 F.3d 805, 807 (8th Cir. 2004).

74. Reno v. Flores, 507 U.S. 292, 306 (1993).

75. *Nativi-Gomez*, 344 F.3d at 807 (citing Iavorski v. INS, 232 F.3d 124, 128 (2d Cir. 2000) and Henry v. INS, 8 F.3d 426, 440 (7th Cir. 1993)); *see also Iavorski*, 232 F.3d at 128 (expressing that the "statutory right to be represented by counsel [at one's] own expense . . . is 'an integral part of the procedural due process to which the alien is entitled.'").

76. *Nativi-Gomez*, 344 F.3d at 809 n.1. Instead, the court resolved the appeal on other grounds and concluded that when a noncitizen is seeking discretionary relief, he has no constitutionally protected liberty interest. *Id.* at 808. Thus, the court explained that adjustment of status, suspension of deportation, and motions to reopen, all of which are discretionary forms of relief, are too "speculative" to constitute a "constitutionally protected liberty interest." *Id.*

77. 392 F.3d 970 (8th Cir. 2004).

78. *See* Xu Yong Lu v. Ashcroft, 259 F.3d 127, 132 (3d Cir. 2001); Lozada v. INS, 857 F.2d 10, 13–14 (1st Cir. 1988).

79. Obleshchenko v. Ashcroft, 392 F.3d 970, 972 (8th Cir. 2004).

The court did, however, express "serious doubts" that any such constitutional right would exist in "civil [removal] proceedings."[80]

A year later, in *Etchu-Njang v. Gonzales*,[81] the court stated again that it had "yet to recognize the validity of a due-process claim in a deportation proceeding based upon the ineffective assistance of counsel," but resolved the case on other grounds and thus declined to reach the issue.[82]

By 2006, the court in *Habchy v. Gonzales*[83] moved further. The Eighth Circuit stated that it had squarely rejected "an absolute constitutional right to effective assistance of counsel with respect to asylum claims" while continuing to maintain that "the Fifth Amendment's due process clause mandates that removal hearings be fundamentally fair."[84] The court characterized *Obleshchenko* as standing for that proposition; however, in reality, *Obleshchenko* clearly stated that it assumed the right without deciding.[85] Aside from mischaracterizing *Obleshchenko*'s holding,[86] the court in *Habchy* did not offer any explanation for why it believed there was no constitutional right to effective assistance of counsel in removal proceedings.

Rather, it was not until 2008, in the case of *Rafiyev v. Mukasey*,[87] that the court finally offered an explanation for why it rejected the existence of a constitutional right to effective counsel in removal proceedings in *Habchy*.[88]

B. *Rafiyev* – The Court Rejects its Earlier Assumption

In *Rafiyev v. Mukasey*,[89] the court began by declaring that the United States Court of Appeals for the Eighth Circuit "has never rec-

80. Rafiyev v. Mukasey, 536 F.3d 853, 860 (8th Cir. 2008) ("[I]n *Obleshchenko v. Ashcroft,* 392 F.3d 970 (8th Cir. 2004), we expressed 'serious doubts . . . that a fifth amendment right to counsel exists in civil deportation proceedings,' because '[c]onstitutional rights are rights against the government,' and we found it 'difficult to see how an individual, such as [an alien's] attorney, who is not a state actor, can deprive anyone of due process rights.'").

81. 403 F.3d 577 (8th Cir. 2005).

82. Etchu-Njang v. Gonzales, 403 F.3d 577, 581-85 (8th Cir. 2005) (citing *Nativi-Gomez*, 344 F.3d at 808 n.1).

83. 471 F.3d 858 (8th Cir. 2006).

84. Habchy v. Gonzales, 471 F.3d 858, 866 (8th Cir. 2006) (citing Al Khouri v. Ashcroft, 362 F.3d 461, 464 (8th Cir. 2004)).

85. *Habchy*, 471 F.3d at 866.

86. It should be apparent that *Habchy*, decided in 2006, clearly misconstrued the holding of *Obleshchenko*, decided in 2004. The court recognized in 2005 that the Eighth Circuit "has yet to decide the issue" of whether there is a "Fifth Amendment Due Process" right in removal proceedings that includes a right to effective counsel. Jamieson v. Gonzales, 424 F.3d 765, 768 (8th Cir. 2005).

87. 536 F.3d 853 (8th Cir. 2008).

88. *Rafiyev*, 536 F.3d at 860; *Obleshchenko*, 392 F.3d at 972.

89. 536 F.3d 853 (8th Cir. 2008).

ognized a constitutional right to effective counsel in a removal proceedings."[90] The court relied upon the same two reasons that formed the basis of the Attorney General's decision in *Compean I*—the state actor doctrine and the criminal/civil distinction—to conclude that there is no constitutional right to effective counsel in removal proceedings.[91]

First, the Eighth Circuit reasoned that because constitutional rights are only rights against the government and a noncitizen's attorney is "not a state actor," he or she cannot "deprive anyone of due process rights."[92] Second, the court believed that the civil/criminal distinction militated against finding a constitutional right to counsel in removal proceedings, which have consistently been styled as civil proceedings.[93]

To the first point, the court so concluded because it did not feel that there was "a sufficient nexus between the federal government and counsel's ineffectiveness such that the latter may fairly be treated as a governmental action."[94] The court relied heavily upon its understanding of the United States Supreme Court's holding in *Coleman v. Thompson*[95] in reaching its conclusion.[96]

In *Coleman*, the Supreme Court determined that where there is no constitutional right to counsel in criminal proceedings, there can be no constitutional violation for ineffective assistance of counsel even if the attorney's error would have otherwise failed the *Strickland v. Washington*[97] test.[98] The *Coleman* court reasoned therefore that a criminal defendant must "bear the risk of attorney error" where there is no constitutional right to an attorney because it is the existence of a right to counsel that permits errors of counsel to be "imputed to the State."[99] In applying *Coleman*'s reasoning to immigration proceedings, the Eighth Circuit held that errors of "[a noncitizen's] attorney,

90. Rafiyev v. Mukasey, 536 F.3d 853, 860 (8th Cir. 2008).

91. *See Rafiyev*, 536 F.3d at 860-61; *see also supra* notes 60-65 and accompanying text.

92. *Rafiyev*, 536 F.3d at 860; *Obleshchenko*, 392 F.3d at 972.

93. *Rafiyev*, 536 F.3d at 860-61 (citing Paul v. INS, 521 F.2d 194 (5th Cir. 1975), Goonsuwan v. Ashcroft, 252 F.3d 383, 385 n.2 (5th Cir. 2001), and Magallanes-Damian v. INS, 783 F.2d 931, 933 (9th Cir. 1986)).

94. *Id.* (citing Alfanwi v. Mukasey, 526 F.3d 788, 799 (4th Cir. 2008)).

95. 501 U.S. 722 (1991).

96. *See Rafiyev*, 536 F.3d at 861 (citing Coleman v. Thompson, 501 U.S. 722, 752 (1991)).

97. 466 U.S. 668 (1984).

98. *Coleman*, 501 U.S. at 752-53.

99. *Id.* at 753-54. While the Supreme Court has subsequently moved away from its holding in *Coleman*, it does so for reasons that do not necessarily relate to our argument here. *See generally* Martinez v. Ryan, 132 S. Ct. 1309 (2012).

who is not a state actor," likewise cannot deprive that noncitizen of his due process rights.[100]

The second reason underlying the Eighth Circuit's decision in *Rafiyev* is the longstanding distinction made between criminal and civil proceedings.[101] As removal proceedings are not considered criminal proceedings, the Sixth Amendment right to counsel does not apply in that setting.[102] Accordingly, the court in *Rafiyev* rejected any Fifth Amendment right to effective counsel, and because it ruled out any Sixth Amendment right to counsel in non-criminal proceedings, it thus concluded that no constitutional right to counsel exists at all in civil immigration proceedings.

Once the court had concluded that "there is no constitutional right to an attorney" in removal proceedings, it then held that a noncitizen in those proceedings cannot claim "constitutionally ineffective assistance of counsel."[103] In other words, the Eighth Circuit clearly believed that a constitutional right to effective counsel rested squarely on the more basic question of whether the constitution provides a right to counsel at all in removal proceedings.

In deciding that no such right exists, the Eighth Circuit, like the Supreme Court in *Coleman*, held that "[t]o the extent [a noncitizen's] counsel [is] ineffective, the federal government [is] not accountable for [the] substandard performance;" rather such error must be "imputed to the [noncitizen]" in immigration proceedings.[104]

While the court refused to recognize a constitutional right to effective assistance of counsel in removal proceedings, it did find that under *Matter of Lozada*,[105] Rafiyev could raise a non-constitutional administrative claim that the BIA should exercise its discretionary authority to reopen his case.[106] However, as discussed further below, this administrative claim to reopen proceedings has proved to be of very little value for noncitizens aggrieved by defective counsel in the Eighth Circuit, as the court has only twice granted, in the last fifteen years, a petition for review raising the issue.[107]

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100. *Rafiyev*, 536 F.3d at 860-61.
101. *Id.*
102. *Id.*
103. *Id.* at 861 (citing *Coleman*, 501 U.S. at 752 and Wainright v. Torna, 455 U.S. 586, 587-588 (1982)).
104. *Rafiyev*, 536 F.3d at 861.
105. 19 I. & N. Dec. 637 (B.I.A. 1988).
106. *Rafiyev*, 536 F.3d at 861.
107. *See infra* note 166 and accompanying text. Indeed, the court in *Ochoa* went so far as to determine that it was without jurisdiction to even review the Board's denial of a motion to reopen removal proceedings based upon the ineffective assistance of counsel. Ochoa v. Holder, 604 F.3d 546, 548-50 (8th Cir. 2008) (citing Tamenut v. Mukasey, 521 F.3d 1000, 1005 (8th Cir. 2008)). *Ochoa* is no longer good law following the Supreme Court's decision in *Mata v. Lynch*, 135 S. Ct. 2150 (2015); however, *Ochoa* illus-

C. The United States Court of Appeals for the Eighth Circuit Stands Alone in its Conclusion

The United States Court of Appeals for the Eighth Circuit's holding in *Rafiyev v. Mukasey*[108]—that there is no constitutional right to effective counsel in removal proceedings—stands in stark contrast to nearly every other circuit in the country to have addressed this issue.[109] Indeed, the United States Courts of Appeals for the First, Second, Third, Sixth, Ninth, Tenth, and Eleventh Circuits have explicitly stated that because respondents in removal proceedings have a constitutional right to due process, which includes a fundamentally fair hearing, they necessarily have a constitutionally protected right to effective counsel insofar as it relates to the fairness of the proceedings.[110] The United States Court of Appeals for the Fifth Circuit has assumed that to be the case without specifically deciding it.[111] Similarly, the United States Court of Appeals for the Seventh Circuit has indicated that being denied effective counsel could implicate a respon-

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trates how far the Eighth Circuit has been willing to go to deny any review to noncitizens deprived of a fair hearing as a result of defective counsel.

108. 536 F.3d 853 (8th Cir. 2008).

109. *See* Zeru v. Gonzalez, 503 F.3d 59, 72 (1st Cir. 2007) (stating that "[i]neffective assistance of counsel in a deportation proceeding is a denial of due process . . . [where] the proceeding was so *fundamentally unfair* that the alien was prevented from reasonably presenting his case.") (emphasis added); United States v. Perez, 330 F.3d 97, 101 (2d Cir. 2003) (explaining that "an alien [can] prevail on a claim of ineffective assistance of counsel, [if] he . . . show[s] that his counsel's performance was so ineffective as to have impinged upon the *fundamental fairness* of the hearing in violation of . . . due process.") (emphasis added); Contreras v. Att'y Gen., 665 F.3d 578, 584 (3d Cir. 2012) (recognizing that "[a] claim of ineffective assistance of counsel in removal proceedings is cognizable under the Fifth Amendment . . . , as a violation of . . . due process" where it "undermine[s] the *fundamental fairness* of . . . proceedings.") (emphasis added); Denko v. INS, 351 F.3d 717, 723 (6th Cir. 2003) (stating that ineffective assistance of counsel in deportation proceedings violates due process if "the proceeding was so *fundamentally unfair* that the alien was prevented from reasonably presenting his case.") (emphasis added); Nehad v. Mukasey, 535 F.3d 962, 967-71 (9th Cir. 2008) (explaining that it is "particularly important in removal proceedings" that an alien's "due process right 'includes a right to competent representation"); Tang v. Ashcroft, 354 F.3d 1192, 1196 (10th Cir. 2003) (stating that "[t]his court has recognized that the Fifth Amendment guarantees aliens subject to deportation the right to a *fundamentally fair* deportation proceeding" and that one can "state a Fifth Amendment violation if he proves that retained counsel was ineffective and, as a result, [he] was denied a fundamentally fair proceeding.") (emphasis added); Dakane v. U.S. Att'y Gen., 399 F.3d 1269, 1273 (11th Cir. 2004) (explaining that "[an alien] . . . has the constitutional right under the Fifth Amendment . . . to a *fundamentally fair* hearing and to *effective* assistance of counsel") (emphasis added).

110. *See supra* note 109 and accompanying text (listing illustrative cases of circuit courts positions on a noncitizen's right to counsel in immigration proceedings).

111. *See* Mai v. Gonzalez, 473 F.3d 162, 165 (5th Cir. 2005) (noting that "this court has repeatedly assumed without deciding that an alien's claim of ineffective assistance may implicate due process concerns . . . .").

dent's right to due process, though in other cases it has expressed some doubts.[112]

Other than the Eighth Circuit, only the United States Court of Appeals for the Fourth Circuit has explicitly held that there is no constitutional right to effective counsel in removal proceedings.[113] The court did so in *Alfanwi v. Mukasey*,[114] for the same two reasons given by the Eighth Circuit.[115] However, *Alfanwi* was vacated[116] by the United States Supreme Court and thus the Eighth Circuit now stands alone in declaring that there is no constitutional right to effective counsel for immigrants in removal proceedings.

It is difficult to overstate the breathtaking implications of the court's holding in *Rafiyev*. The court believes that an attorney in civil removal proceedings can never be a state actor, and therefore, no matter how deficient the assistance, and no matter how damaging the result, it can never deprive a noncitizen in removal proceedings of his Fifth Amendment right to due process.

Thus, even if an attorney were to commit an egregious error that directly and unequivocally resulted in an unlawful deportation that caused the death of a client, the court would have to conclude that no constitutional deprivation occurred.[117] To put it another way, in the Eighth Circuit, a noncitizen in removal proceedings does not even have the constitutional right to not be killed as a result of his counsel's defective service. In an area of law, such as asylum, which so often deals with matters of life and death, the hypothetical is not a chimera.

IV. THE ARGUMENT THAT A CONSTITUTIONAL DUE PROCESS RIGHT TO FUNDAMENTAL FAIRNESS IN REMOVAL PROCEEDINGS NECESSITATES A RIGHT TO EFFECTIVE COUNSEL

The underlying reason for the availability to seek redress for counsel's errors in removal proceedings through a motion to reopen is imbedded in the Constitution. The Supreme Court has explained that

112. *See* Jezierski v. Mukasey, 543 F.3d 886, 890 (7th Cir. 2008) (stating that "[t]he complexity of the issues . . . in a particular removal proceeding might be so great that forcing the alien to proceed without the assistance of a competent lawyer would deny him due process of law . . . ."); *but see* Magala v. Gonzales, 434 F.3d 523, 525-26 (7th Cir. 2005) (explaining in dicta that because immigration proceedings are civil, there is no "constitutional ineffective-assistance" claim and thus the remedy is "damages for malpractice.") (citing Stroe v. INS, 256 F.3d 498 (7th Cir. 2001)).

113. Alfanwi v. Mukasey, 526 F.3d 788, 798 (4th Cir. 2008), *vacated*, 558 U.S. 801 (2009).

114. 526 F.3d 788 (4th Cir. 2008).

115. *Alfanwi*, 526 F.3d at 799.

116. Alfanwi v. Holder, 558 U.S. 801, 801 (2009).

117. *See supra* notes 103-104 and accompanying text.

"[i]t is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings."[118] Nearly every circuit court in the country has held that this right to due process in removal proceedings includes a right to effective counsel.[119] And the Board has also held that "[i]neffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the [noncitizen] was prevented from reasonably presenting his case."[120] Indeed, the right to a fundamentally fair hearing is virtually worthless if confined to a legal framework in which the fairness of the proceedings can never be affected by prejudicial errors of defective counsel.[121]

A. The Meaninglessness of a Right to a Fair Hearing That Does Not Encompass a Right to Effective Counsel

The Fifth Amendment of the United States Constitution provides that "[n]o *person* shall be . . . deprived of life, liberty, or property, without due process of law."[122] The United States Supreme Court has long maintained that the Fifth Amendment's due process clause applies to aliens in removal proceedings.[123] The Court has also held that the "touchstone" of due process is the requirement that proceedings be fundamentally fair, which includes the right to be heard.[124]

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118. Reno v. Flores, 507 U.S. 292, 306 (1993); Demore v. Kim, 538 U.S. 510, 523 (2003) (quoting *Flores*, 507 U.S. at 306); *see also* Mata v. Lynch, 135 S. Ct. 2150, 2153-54 (2015) (determining that the circuit court had jurisdiction over an appeal of the denial of an alien's otherwise untimely motion to reopen removal proceedings, when the motions untimeliness is due to the ineffective assistance of council).

119. *See supra* notes 109-117 and accompanying text.

120. Ortiz v. INS, 179 F.3d 1148, 1153 (9th Cir. 1999); *see also* Matter of Lozada, 19 I. & N. Dec. 637, 638 (B.I.A. 1988) (stating that "[i]neffective assistance of counsel in a deportation proceeding is a denial of due process only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case."); Matter of M-A-M-, 25 I. & N. Dec. 474, 479 (B.I.A. 2011) (stating that "[a] removal hearing must be conducted in a manner that satisfies principles of fundamental fairness.").

121. Nehad v. Mukasey, 535 F.3d 962, 967 (9th Cir. 2008).

122. U.S. Const. amend. V (emphasis added); *see also* Plyler v. Doe 457 U.S. 202, 210 (1982) (stating that, "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.").

123. Reno v. Flores, 507 U.S. 292, 306 (1993); Landon v. Plascenia, 459 U.S. 21, 32-33 (1982); Wing Wing v. United States, 163 U.S. 228, 238 (1896); *see also* Shaughnessey v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953) (stating that immigration proceedings must conform to traditional standards of fairness encompassed in due process).

124. Gangon v. Scarpelli, 411 U.S. 778, 790 (1973); *see also* Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (discussing the due process right to be heard); Yamataya v. Fisher, 189 U.S. 86, 101 (1903) (explaining in the context of deportation proceedings that "no person shall be deprived of his liberty without opportunity, at some time, to be heard").

In *Gideon v. Wainwright*,[125] the Supreme Court explained that the due process "right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel."[126] Although the court in *Gideon* addressed the right to be heard in criminal proceedings, the Supreme Court has held that a right to counsel can be required by the due process clause in civil proceedings as well.[127]

As explained above, nearly every circuit court in the country to address this issue has likewise concluded that the due process right to fundamental fairness in removal proceedings includes a right to be heard by counsel and is infringed when the ineffective assistance of counsel undermines the fairness of proceedings.[128]

That conclusion is aptly supported by *Matthews v. Eldridge*,[129] the Supreme Court's seminal procedural due process decision. There, the court articulated a three-prong test to determine the parameters of procedural due process.[130] One must weigh (1) the private interests affected by the official action, (2) the "risk of an erroneous deprivation of such interest through the procedures used," and (3) the government interests affected, including fiscal and administrative burdens that would result if the procedure were required.[131]

These factors, when weighed and balanced against each other, clearly tip in favor of holding that there is a constitutional right to effective counsel in removal proceedings under the due process clause.[132] It is my position that this conclusion constitutionally requires a procedure for reopening proceedings when ineffective counsel has rendered those proceedings fundamentally unfair.

To the first prong in *Matthews*, in removal proceedings there is an elevated private liberty interest at stake for the individual facing deportation. Justice Brandeis observed many years ago that "[deportation] may result also in loss [of] . . . all that makes life worth living."[133]

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125. 372 U.S. 335 (1963).

126. Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (citing Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

127. *See* Lassiter v. Dep't of Soc. Serv., 452 U.S. 18, 25-26 (1981) (stating that, "it is [an] . . . interest in personal freedom, and not simply the Sixth . . . Amendment[ ] right to counsel in criminal cases, which triggers the right to appointed counsel . . . even though proceedings may be styled 'civil' and not 'criminal.'") (citing In re Gault, 387 U.S. 1, 41 (1967)); *Gault*, 387 U.S. at 41 (concluding there is a right to counsel in certain civil delinquency proceedings); Vitek v. Jones, 445 U.S. 480, 483-84, 497 (1980) (stating a plurality held that the due process clause could in some circumstances require a right to counsel in civil proceedings).

128. *See supra* notes 109-112 and accompanying text.

129. 424 U.S. 319 (1976).

130. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

131. *Mathews*, 424 U.S. at 334-35.

132. *Id.*

133. Ho v. White, 259 U.S. 276, 284 (1922).

And, the Court has indicated that deportation is a drastic measure, and at times "the equivalent of banishment or exile."[134] Indeed, the Court in *Padilla v. Kentucky*[135] stated that "[w]e have long recognized that deportation is a particularly severe 'penalty . . . .'"[136] As far back as 1903, the Court acknowledged that a noncitizen has a liberty interest in his "right to be and remain in the United States."[137] The private interest affected is, at a minimum, the ability to live and work in the United States, the ability to not be separated from home and family, and the ability to not be detained and ultimately exiled to a foreign land.

To the second prong in *Matthews*, the risk of an erroneous deprivation of these private liberty interests is high when a noncitizen in removal proceedings is deprived of effective counsel. It is now axiomatic that persons facing deprivation of a liberty interest are guaranteed a fundamentally fair hearing under the due process clause.[138] Yet when counsel is so deficient as to render those proceedings fundamentally unfair, a refusal to reopen removal proceedings would unquestionably result in "an erroneous deprivation" of the liberty interests referenced above.[139] As such, protection against an erroneous deprivation in removal proceedings necessitates a right to effective counsel that includes the ability to reopen proceedings when they have been rendered unfair by deficient counsel.

Comprehensive studies have shown that the single most important factor in one's chance at success in their immigration case is the presence or absence of counsel.[140] As such, it is inconceivable to assert that a hearing can be fair when a person has lost the ability to remain in the United States as a result of counsel's errors.[141] For ex-

134. Padilla v. Kentucky, 559 U.S. 356, 373 (2010).

135. 559 U.S. 356 (2010).

136. *Padilla*, 559 U.S. at 365 (citing Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)).

137. Yamataya v. Fisher 189 U.S. 86, 101 (1903); *see also* Bridges v. Wixon, 326 U.S. 135, 150-54 (1945) (explaining that the "rules are designed to protect the interest of the alien and afford him due process of law . . . safeguards against essentially unfair procedures . . . . Here the liberty of an individual is at stake").

138. *See* Reno v. Flores, 507 U.S. 292, 306-07 (1993) (examining the INS procedures for deportation); *see supra* notes 123-128 and accompanying text; *see generally* Ellison, *Extending Due Process Protection to Unadmitted Aliens Within the U.S. Through the Functional Approach of Boumediene*, 3 the crit: Critical Stud. J. 1 (2010).

139. *Mathews*, 424 U.S at 335.

140. *See* Jaya Ramji-Nogales, Andrew I. Schoenholtz, Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (Nov. 2007) (stating "[r]epresented asylum seekers were granted asylum at a rate of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel. The regression analyses confirmed that, with all other variables in the study held constant, represented asylum seekers were substantially more likely to win their case than those without representation.").

141. Nehad v. Mukasey, 535 F.3d 962, 967 (9th Cir. 2008).

ample, there have been instances in which a noncitizen's lawyer has failed to even file a brief on appeal, resulting in the automatic loss of the case.[142] When such clients have a meritorious claim to remain in the United States and are denied that right due to ineffective counsel, they unequivocally experience an erroneous deprivation of that right if denied the ability to reopen their proceedings.

The Supreme Court has explained that "recent changes in . . . immigration law" have "dramatically raised the stakes of a noncitizen's criminal conviction" such that "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants . . . ."[143] Numerous courts have recognized the importance of competent counsel to avoid an erroneous deprivation of that high personal interest at stake.[144]

In contrast, when considering the final prong of the *Matthews* analysis, the government's interests and burdens in this analysis are minimal. In the circuits that have held that there is a constitutional right to effective counsel in removal proceedings, which includes a right to file a motion to reopen, the government is not being forced to appoint counsel in immigration proceedings.[145]

Likewise, such motions to reopen do not subject the government to any financial or administrative burdens outside of having to rehear certain cases that were found to be fundamentally unfair due to counsel's errors. The Board of Immigration Appeals and the majority of circuit courts across the country already impose this rule on the government.[146] That the right has existed for nearly thirty years, and in so many circuits, establishes that the fiscal and administrative burdens are slight, particularly when weighed against the substantial liberty interest at stake.[147]

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142. *See, e.g.*, Correa-Rivera v. Holder, 706 F.3d 1128, 1133 (9th Cir. 2013); Xu Yong Lu v. Ashcroft, 259 F.3d 127, 129-30 (3d Cir. 2001); Iturribarria v. INS, 321 F.3d 889, 901 (9th Cir. 2003).

143. *Padilla*, 559 U.S. at 364-66.

144. *See id*. at 364; *see also Nehad*, 535 F.3d at 967 (explaining that "[r]epresentation by competent counsel is particularly important in removal proceedings because '[t]he proliferation of immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate.'"); *see also supra* note 109 and accompanying text.

145. Tang v. Ashcroft, 354 F.3d 1192, 1196 (10th Cir. 2003). This fact also distinguishes the instant case from *Murray v. Giarratano*, 492 U.S. 1, 109 (1989), which addresses the right to appointed counsel when seeking post-conviction relief.

146. Matter of Assaad, 23 I. & N. Dec. 553, 556-58 (2003); *see supra* notes 109-113 and accompanying text.

147. The Attorney General ("AG") has also recognized its interest in regulating who may practice before the BIA and Immigration Courts for the purpose of "the protection of the public, the preservation of the integrity of the immigration courts, and the maintenance of high professional standards." *Professional Conduct for Practitioners – Rules and Procedures*, 65 FR 39513-01, 39514 (June 27, 2000). The AG stated that these goals

In sum, the conclusion that a noncitizen in immigration proceedings has a Fifth Amendment due process right to effective counsel, which includes a procedure to correct errors of counsel, is well supported in the law and follows necessarily from the axiomatic conclusion that removal proceedings must be fundamentally fair. It borders on the absurd to say one has a right to a fair hearing, but that right does not extend to correcting prejudicial errors of defective counsel. Where a lawyer misses a deadline and permanently destroys all chances of prevailing in a case,[148] for one with a meritorious claim to relief, the right to a fundamentally fair hearing would be of no value at all if it does not encompass a right to correct prejudicial errors of defective counsel.[149] In such situations, the two rights are synonymous, coextensive, and meaningless if separated from one another.

B. The Congruence of a Due Process Right to Effective Counsel in Removal Proceedings with the State Actor Doctrine

As explained above, the Attorney General ("AG") in *Matter of Compean*[150] ("*Compean I*") and the United States Court of Appeals for the Eighth Circuit in *Rafiyev v. Mukasey*,[151] both held that because only state actors can deprive individuals of their constitutional rights, and because counsel in immigration proceedings is never a state actor, one can never claim a constitutional deprivation, even when the attorney commits egregious errors that result in manifest injustice.[152]

However, it is my opinion that the AG and the Eighth Circuit erred in *Rafiyev* and *Compean I* by circularly misapplying the state actor doctrine.[153] The United States Supreme Court has explained numerous times that where there is a constitutional right to counsel and an individual has been prejudiced by the ineffective assistance of even a privately retained, non-appointed attorney, the error is imputed to the state.[154]

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are "important public interest objectives." *Id.*; *see also* 8 C.F.R. § 292.1(a); 8 C.F.R. § 3.102(k) (providing that practitioners who engage in ineffective assistance can be sanctioned).

148. Iowa Supreme Court Attorney Disciplinary Bd. v. Said, 869 N.W.2d 185, 189 (Iowa 2015); Iowa Supreme Court Attorney Disciplinary Bd. v. Mendez, 855 N.W.2d 156, 162 (Iowa 2014).

149. *Nehad*, 535 F.3d at 967.

150. 24 I. & N. Dec. 710 (Att'y Gen. 2009).

151. 536 F.3d 853 (8th Cir. 2008).

152. Rafiyev v. Mukasey, 536 F.3d 853, 860 (8th Cir. 2008); Obleshchenko v. Ashcroft, 392 F.3d 970, 972 (8th Cir. 2004).

153. *See infra* notes 154-160 and accompanying text.

154. *See* Coleman v. Thompson, 501 U.S. 722, 753-54 (1991) (determining that when an attorney's error "constitutes a violation of petitioner's right to counsel, . . . the error must be seen as [being] imputed to the State.") (citing Evitts v. Lucey, 469 U.S. 387, 396

Indeed, the Supreme Court in *Cuyler v. Sullivan*[155] explained that a retained attorney whose error, of which state officials neither knew nor had reason to know, could provide inadequate representation such that would "render a trial so fundamentally unfair as to violate the Fourteenth Amendment['s]" due process clause.[156] In fact, the Court explicitly rejected the argument that there could be no constitutional violation because there was no state action.[157] Rather, the Court reasoned that where "proceedings [are] initiated and conducted by the State," and an unjust result is obtained by the State because of inadequate assistance of counsel, "it is the State that unconstitutionally deprives the defendant of his liberty."[158]

This reasoning, in the context of criminal proceedings, is equally applicable to civil removal proceedings. Indeed, the Court has never limited its holding regarding the right to counsel simply to criminal proceedings involving the Sixth Amendment.[159] Rather, the Supreme Court has held on several occasions that the right to even appointed counsel can be required by the due process clause in civil proceedings.[160]

Accordingly, there is no principled reason for finding state action where there has been a violation of one's right to counsel in criminal proceedings, while refusing to find state action where there has been a violation of a one's right to counsel in civil proceedings. The Supreme Court's reasoning regarding the right to counsel and state action is equally applicable in both contexts.

C. Practical Implications to Finding a Due Process Right to Effective Counsel in the Eighth Circuit

There are two practical implications at stake if the United States Court of Appeals for the Eighth Circuit reverses *Rafiyev v.*

(1985)); *see also Evitts*, 469 U.S. at 396 (declaring, "[t]he constitutional mandate guaranteeing effective assistance of counsel is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law."); Murray v. Carrier, 477 U.S. 478, 488 (1986) (stating that "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default is imputed to the State.") (citing Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)).

155. 446 U.S. 335 (1980).

156. *Cuyler*, 446 U.S. at 343-44.

157. *See id.* at 344-45 (stating "we see no basis for drawing a distinction between retained and appointed counsel.").

158. *Id.*

159. *See supra* note 127 and accompanying text.

160. *See* Lassiter v. Dep't of Soc. Servs. of Durham Cty., N.C., 452 U.S. 18, 33 (1981) (applying the Sixth Amendment right to counsel to proceedings outside the criminal context); In re Gault, 387 U.S. 1, 41 (1967); Vitek v. Jones, 445 U.S. 480, 483, 493 (1980) (concluding by plurality that the due process clause could require a right to counsel in civil proceedings).

Mukasey,[161] and finds there is a constitutional right to effective counsel in removal proceedings. First, a reversal should result in obtaining a better standard of review of denials by the BIA of motions to reopen based upon ineffective assistance of counsel. Second, it would represent an important preventative measure against future attempts to eliminate the BIA's *Lozada*[162] decision.

Because constitutional claims are given a *de novo* standard of review by a reviewing court,[163] if the Eighth Circuit were to explicitly hold that an alien has a due process right to effective counsel in removal proceedings, it should result in obtaining *de novo* review of the BIA's denials of motions to reopen on this basis, rather than the extraordinarily deferential level of review presently given to such decisions.[164] Indeed, at present, the court's deferential "abuse of discretion" standard is currently used to review such decisions.[165]

It should come as no surprise then that in the last fifteen years, the Eighth Circuit has only twice granted a petition for review of a denial by the BIA of a motion to reopen for ineffective assistance of counsel, out of twenty-five published decisions on the issue.[166]

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161. 536 F.3d 853 (8th Cir. 2008).

162. 19 I. & N. Dec. 637 (B.I.A. 1996).

163. Njorge v. Holder, 753 F.3d 809, 811 (8th Cir. 2014). In the context of reviewing a claim for denial of access to counsel, the court has stated that it "review[s] due process challenges de novo." *Njorge*, 755 F.3d at 811.

164. McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 493 (1991); Habchy v. Gonzales, 471 F.3d 858, 862 (8th Cir. 2006) (quoting Shoaira v. Ashcroft, 377 F.3d 837, 842 (8th Cir. 2004)); Contreras v. Att'y Gen. of U.S., 665 F.3d 578, 583 (3d Cir. 2012); Sing v. Lynch, 803 F.3d 988, 991 (8th Cir. 2015); *see also infra* note 165 and accompanying text.

165. Rafiyev v. Mukasey, 536 F.3d 853, 856-58 (8th Cir. 2008) (stating "[t]he BIA's discretionary decision . . . is conclusive unless 'manifestly contrary to the law and an abuse of discretion.'"); Ortiz-Puentes v. Holder, 662 F.3d 481, 484 (8th Cir. 2011) (noting that the Eighth Circuit "review[s] the BIA's decision to deny a timely motion to reopen under a deferential abuse-of-discretion standard."). Under the substantial evidence standard, factual findings are treated as "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *Singh*, 803 F.3d at 991 (citing Sandoval–Loffredo v. Gonzales, 414 F.3d 892, 895 (8th Cir. 2005)).

166. *Singh*, 803 F.3d at 994 (Denied); Lee v. Holder, 765 F.3d 851, 855 (8th Cir. 2014) (Denied); Salman v. Holder, 687 F.3d 991, 993 (8th Cir. 2012) (Denied); *Ortiz-Puentes*, 662 F.3d at 485 (Denied); Valencia v. Holder, 657 F.3d 745, 749 (8th Cir. 2011) (Denied); Ortega-Marroquin v. Holder, 640 F.3d 814, 820-21 (8th Cir. 2011) (Granted); Pafe v. Holder, 615 F.3d 967, 970 (8th Cir. 2010) (Denied); Ochoa v. Holder, 604 F.3d 546, 547 (8th Cir. 2010) (Denied); Ezeagwu v. Mukasey, 537 F.3d 836, 837 (8th Cir. 2008) (Denied); *Rafiyev*, 536 F.3d at 861 (Granted); Tamenut v. Mukasey, 521 F.3d 1000, 1005 (8th Cir. 2008) (Denied); Guled v. Mukasey 515 F.3d 872, 883 (8th Cir. 2008) (Denied); Lubale v. Gonzales, 484 F.3d 1078, 1081 (8th Cir. 2007) (Denied); *Habchy*, 471 F.3d at 868 (Denied); Haider v. Gonzales, 438 F.3d 902, 910 (8th Cir. 2006) (Denied); Dominguez-Capistran v. Gonzales, 413 F.3d 808 (8th Cir. 2005) (Denied) *rev'd en banc,* 438 F.3d 876 (8th Cir. 2006); Hernandez-Moran v. Gonzales, 408 F.3d 496, 500 (8th Cir. 2005) (Denied); Kanyi v. Gonzales, 406 F.3d 1087, 1091 (8th Cir. 2005) (Denied); Etchu-Njang v. Gonzales, 403 F.3d 577, 585 (8th Cir. 2005) (Denied); Guerra-Soto v. Ashcroft, 397 F.3d 637 (8th Cir. 2005) (Denied); Jamieson v. Gonzales, 424 F.3d 765, 768 (8th Cir. 2005) (Denied); Obleshchenko v. Ashcroft, 392 F.3d 970, 973 (8th Cir. 2004) (Denied); Al

And it has done so only once since the court issued its decision in *Rafiev*.[167]

If the Eighth Circuit abandons *Rafiev* and adopts its fellow circuit courts' holding that effective assistance of counsel is a constitutional right under the Fifth Amendment, the court should begin reviewing the Board's denials of such ineffective assistance of counsel claims *de novo*.[168] Such a move would give aggrieved noncitizens a much better chance at success before the Eighth Circuit.

Second, as shown above, *Lozada* is not immune from attack and may be reversed by the United States Attorney General. Just like AG Mukasey, a future AG has the authority to eradicate or alter the administrative structure of *Lozada* to make it dramatically more difficult for aliens negatively affected by deficient counsel to prevail in their motions to reopen.[169]

In the Eighth Circuit, the only reason such motions are presently reviewed is because it is the framework currently used by the Board.[170] Were the Board to cease accepting such motions (or dramatically limit them as occurred in *Compean I*[171]) in circuits where the right has been founded upon the due process clause, noncitizens would be able to continue to make such motions before the Board and seek review of any denials before the courts of appeals.[172] However, absent a constitutional basis for motions to reopen based upon ineffective assistance of counsel, were the AG to overrule *Lozada*, noncitizens would be without recourse in circuits such as the Eighth Circuit.

For these reasons, *Rafiyev*'s reversal represents an important safeguard and needed change for noncitizens suffering from deficient assistance of counsel in the Eighth Circuit, both now and into the future.

Khouri v. Ashcroft, 362 F.3d 466, 467 (8th Cir. 2004) (Granted); Nativi-Gomez v. Ashcroft, 344 F.3d 805, 809 (8th Cir. 2003) (Denied); Ismailov v. Reno, 263 F.3d 851, 855 (8th Cir. 2001) (Denied).

167. *See supra* note 166 and accompanying text.

168. *McNary*, 498 U.S. at 493; *Contreras*, 665 F. 3d at 583.

169. *See supra* notes 48-70 and accompanying text; *see also* Matter of Compean (*Compean I*), 24 I. & N. Dec. 710, 712 (Att'y Gen. 2009), *vacated by*, 25 I. & N. Dec. 1 (Att'y Gen. 2009); Matter of Compean (*Compean II*), 25 I. & N. Dec. 1, 1-2 (Att'y Gen. 2009).

170. Notwithstanding the Eighth Circuit's holding in *Ochoa*, the Supreme Court has held that the United States Courts of Appeals have the jurisdiction to review decisions by the Board's decision on this matter. Mata v. Lynch, 135 S.Ct. 2150, 2156-57 (2015); *cf.* Ochoa v. Holder, 604 F.3d 546, 548-50 (8th Cir. 2008).

171. 24 I. & N. Dec. 710 (Att'y Gen. 2009).

172. *See* In re Hector Ponce de Leon, 21 I. & N. Dec. 154, 159 (B.I.A. 1996) (stating that the Board is obligated to follow circuit law). However, courts afford agencies no deference in interpreting the Constitution. *See* U.S. W., Inc. v. FCC, 182 F.3d 1224, 1231 (10th Cir.1999) (citing Rust v. Sullivan, 500 U.S. 173, 190–91 (1991)).

V. STRATEGIES FOR ARGUING FOR THE REVERSAL OF *RAFIYEV* IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The United States Court of Appeals for the Eighth Circuit has already declared that it is bound by prior precedent on this issue in *Singh v. Lynch*;[173] however, it is not clear what arguments, if any, were placed before the court to reverse course in *Singh*. While one possible option for combating *Rafiyev v. Mukasey*[174] would be to seek review before the United States Supreme Court, in this section I present several possible strategies for requesting a future panel of the Eighth Circuit, or the full court sitting en banc, to reverse *Rafiyev*.[175]

The Eighth Circuit has explained that "it is well settled that a panel may depart from circuit precedent" if there is "an intervening opinion of the Supreme Court that undermines" or casts doubt on the prior panel's decision.[176] The panel reviewing the prior precedent in light of an intervening Supreme Court opinion is required to "explicitly identify the error or changed circumstances and explain why a different result is justified."[177] An error or changed circumstance includes cases in which the reasoning of the intervening Supreme Court opinion is inconsistent with the reasoning of past panel precedent.[178]

A. The Inconsistency Between the Supreme Court's Reasoning in *Padilla* and the Bright Line Rule Used by the Eight Circuit in *Rafiyev*

The reasoning behind the United States Court of Appeals for the Eighth Circuit's decision in *Rafiyev v. Mukasey*[179] rests squarely upon the outmoded distinction between criminal and civil proceedings to hold that "there is no constitutional right to an attorney" in removal proceedings, which are "civil."[180] However, the United States Su-

173. Singh v. Lynch, 803 F.3d 988, 993 (8th Cir. 2015) (rejecting Singh's request for the court to depart from *Rafiyev* and find a Fifth Amendment right to effective counsel in removal proceedings) (citing Mader v. United States, 654 F.3d 794, 800 (8th Cir. 2011) (en banc)).

174. 536 F.3d 853 (8th Cir. 2008).

175. Fed. R. App. P. 35 (2015).

176. Northport Health Serv. of Ark., LLC v. Rutherford, 605 F.3d 483, 489 (8th Cir. 2010) (citing Ark. Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A., 551 F.3d 812, 821 (8th Cir. 2009)); *see also* United States v. Williams, 537 F.3d 969, 975 (8th Cir. 2008) (discussing review of prior circuit decisions) (citing Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 838 (8th Cir. 1997)).

177. *Williams*, 537 F.3d at 975 (citing Jacobs v. Lockhart, 9 F.3d 36, 38 (8th Cir. 1993)).

178. *Id.*

179. 536 F.3d 853 (8th Cir. 2008).

180. Rafiyev v. Mukasey, 536 F.3d 853, 861 (8th Cir. 2008).

preme Court's decision in *Padilla v Kentucky*[181] has significantly eroded this distinction. While noting that the "particularly severe 'penalty'" of deportation "is not, in a strict sense, a criminal sanction," the Court "find[s] it 'most difficult' to divorce the penalty from the conviction in the deportation context."[182]

In recognizing that the weighty liberty interest in "preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence," the court holds that the Sixth Amendment and *Strickland v. Washington*[183] require competent counsel to advise noncitizens accused of crimes "whether his plea carries a risk of deportation."[184]

Although the context of *Padilla* is distinguishable from the issue at hand, as our discussion in this Article is confined to the right in removal proceedings, its reasoning is applicable. The punitive nature of deportation sets removal proceedings apart from other purely civil proceedings such that the ineffective assistance of counsel resulting in deportation can no longer be brushed aside as a purely civil consequence.[185]

In these respects, the Supreme Court's holding in *Padilla* "undermines" the Eighth Circuit's decision in *Rafiyev* insofar as the Eighth Circuit relies upon a strict distinction between civil and criminal proceedings.[186] Inconsistency between circuit law and Supreme Court precedent has been established in the Eighth Circuit as a justification for a current panel to depart from reliance on past panel precedent.[187] Therefore, the court should at least reexamine its holding in *Rafiyev* based upon the intervening Supreme Court precedent touching upon this issue.

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181. 559 U.S. 356 (2010).

182. Padilla v. Kentucky, 559 U.S. 356, 365-66 (2010).

183. 466 U.S. 668 (1984).

184. *Padilla*, 559 U.S. at 374.

185. *See id*. at 373-74 (discussing the severity in consequence of deportation proceedings). As Justice Alito points out in his concurring opinion, "criminal convictions can carry a wide variety of consequences . . . including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and the loss of business or professional licenses." *Id.* at 376 (Alito, J., concurring). However, he explains that although "those consequences are 'serious,' . . . this Court has never held that a criminal defense attorney's Sixth Amendment duties extend to providing advice about such matters." *Id*.

186. *Northport Health Serv.*, 605 F.3d at 489.

187. *Williams*, 537 F.3d at 975.

B. *Rafiyev*'s Misapplication of the State Actor Doctrine

Additionally, the United States Court of Appeals for the Eighth Circuit's reasoning in *Rafiyev v. Mukasey*[188] regarding the state actor doctrine is terribly flawed. As explained above, the court held that because counsel in immigration proceedings are not state actors and only state actors can deprive constitutional rights, a noncitizen in removal proceedings can never have his due process right infringed by defective counsel, irrespective of how catastrophic the damage.[189]

However, the court's reasoning in *Rafiyev* is utterly circular when the doctrine of state action is viewed in its proper light.[190] As explained above, the United States Supreme Court has long held that where there is a constitutional right to counsel and an individual has been prejudiced by defective counsel, the error is imputed to the state as a matter of law.[191]

Because it is the conclusion that one has a right to counsel that requires counsel's errors be imputed to the state,[192] it is circular to use the state action doctrine to resolve the question of whether there is a right to counsel. The Eighth Circuit's reasoning is incoherent to the extent that it bases its conclusion that there is no right to counsel on its earlier conclusion that private immigration attorneys are not state actors,[193] when the issue of state action in this context turns upon the more fundamental question of whether there is any right to counsel. In short, because the Eighth Circuit assumes there is no right to counsel, it finds there is no state action. However, given that the presence or absence of state action rests upon the more basic conclusion of whether there is a right to counsel,[194] it is nonsense to seek to use the state actor doctrine to resolve whether there is a right to counsel.

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188. 536 F.3d 853 (8th Cir. 2008).

189. Rafiyev v. Mukasey, 536 F.3d 853, 860 (8th Cir. 2008); Obleshchenko v. Ashcroft, 392 F.3d 970, 972 (8th Cir. 2004).

190. *See supra* notes 154-160 and accompanying text.

191. *See* Coleman v. Thompson, 501 U.S. 722, 755 (1991) (stating that when an attorney's error "constitutes a violation of petitioner's right to counsel, . . . the error must be seen as [being] imputed to the State.") (citing Evitts v. Lucey, 469 U.S. 387, 396 (1985) and Murray v. Carrier, 477 U.S. 478, 488 (1986)); *see also Evitts*, 469 U.S. at 396 (expressing that "[t]he constitutional mandate [guaranteeing effective assistance of counsel] is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law."); *Murray*, 477 U.S. at 488 (explaining that "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State.") (citing Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)).

192. *See Cuyler*, 446 U.S. at 343-45.

193. *Rafiyev*, 536 F.3d at 860.

194. *See Cuyler*, 446 U.S. at 343-45.

Instead, in order for the court to continue to find that there is no right to effective counsel in removal proceedings, it must be able to meaningfully explain how it is possible for a noncitizen to enjoy his right to a fundamentally fair hearing when defective counsel renders those proceedings unfair. If noncitizens are constitutionally without recourse in such cases, how could their proceedings possibly be fair? It is my position that the court has not and cannot answer that question.

C. The Eight Circuit's Decision in *Rafiyev* is at Odds with its Reasoning in Several Other Precedent Decisions

In addition to the errors in *Rafiyev v. Mukasey*'s[195] reasoning laid out above, the court's holding in *Rafiyev* is also inconsistent with prior and subsequent United States Court of Appeals for the Eight Circuit precedent. In *United States v. Torres-Sanchez*,[196] the Eighth Circuit recognized in 1995 that an alien has both a statutory and a constitutional right to counsel.[197] In *Torres-Sanchez*, the court held that "depriving an alien of the right to counsel" could constitute "a due process violation."[198] More recently, in 2004, the court in *Al Khouri v. Ashcroft*[199] reaffirmed a due process right to counsel in removal proceedings.[200] Indeed, the court explained that:

> It is well-settled that, while there is no Sixth Amendment right to counsel[,] . . . aliens have a statutory right to counsel at their own expense[,] . . . and are entitled to the Fifth Amendment's guarantee of due process of law in deportation proceedings. In certain circumstances, depriving an alien of the right to counsel may rise to the level of a due process violation.[201]

Thus, the court's claim in *Rafiyev*—that the Eighth Circuit has never held that a noncitizen in removal proceedings has a due process right to counsel—is not entirely true.

Likewise, the court's holding in *Rafiyev*—that an alien has no constitutional right to an attorney—conflicts with *Njorge v. Holder;*[202]

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195. 536 F.3d 583 (8th. Cir. 2008).
196. 68 F.3d 227 (8th Cir. 1995).
197. United States v. Torres-Sanchez, 68 F.3d 227, 230 (8th Cir. 1995).
198. *Torres-Sanchez*, 68 F.3d at 230-231 (citing United States v. Campos-Asencio, 822 F.2d 506, 509 (5th Cir. 1987)); *accord Campos-Asencio*, 822 F.2d at 509 (stating "an alien has a right to counsel if the absence of counsel would violate due process under the fifth amendment . . . . Aliens also have a statutory right to counsel, although not at Government expense.").
199. 362 F.3d 461 (8th Cir. 2004).
200. Al Khouri v. Ashcroft, 362 F.3d 461, 462 (8th Cir. 2004) (citing *Torres–Sanchez*, 68 F.3d at 230).
201. *Al Khouri*, 362 F.3d at 462 (citing 8 U.S.C. § 1229a(b)(4)(A) (2006); Reno v. Flores, 507 U.S. 292, 306 (1993); *Torres-Sanchez*, 68 F.3d at 230).
202. 753 F.3d 809 (8th Cir. 2014).

the court's own and more recent holding.[203] In 2014, the court in *Njorge* acknowledged that the right to counsel exists in removal proceedings to the extent that an alien is entitled to the Fifth Amendment's guarantee of due process of law.[204]

While the panels in *United States v. Torres-Sanchez*,[205] *Njorge*, and *Al Khouri* were not addressing the issue of ineffective assistance of counsel, but rather the right to have counsel at one's hearing, the reasoning in those decisions is irreconcilable with the court's reasoning in *Rafiyev*. Indeed, it makes no sense to say one has a constitutional right to have counsel present at removal proceedings, while asserting elsewhere that there is no right to effective counsel.[206]

Rather, it seems that in some circumstances—such as in the case of a missed filing deadline—having defective counsel may actually be worse than having no counsel at all. For this reason, it is my view that the court's holdings in *Torres-Sanchez*, *Al Khouri*, and *Njorge* could be used to lay the legal groundwork to overrule *Rafiyev*.

Contrary to *Rafiyev*'s holding, *Torres-Sanchez*, *Al Khouri*, and *Njorge* make it clear that a noncitizen has a constitutional right to counsel in circumstances when the absence of counsel would violate his Fifth Amendment due process rights.[207] Therefore, it follows that if a noncitizen has a recognized constitutional right to counsel in circumstances when having no counsel would be a violation of that right, then a noncitizen must also at least have a right to effective counsel whenever ineffective counsel would be as bad as having no counsel at all.

In sum, there are substantial legal errors related to the Eighth Circuit's state actor doctrine and heavy reliance upon a strict criminal/civil distinction in immigration matters, a dichotomy significantly eroded by the Supreme Court in *Padilla*. Additionally, there is inconsistency within the Eighth Circuit's jurisprudence on the issue of a due process right to counsel in removal proceedings. Moreover, it logically follows that if there is a right to a fair hearing in removal proceedings, that right is of little value if divorced from a right to effective counsel. Consequently, it is time for the court to revisit its decision in

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203. Njorge v. Holder, 753 F.3d 809, 811 (8th Cir. 2014).

204. *Njorge*, 753 F.3d at 811 (citing Uspango v. Ashcroft, 289 F.3d 226, 231 (3d Cir. 2002); *Flores*, 507 U.S. at 306; *Torres-Sanchez*, 68 F.3d at 230).

205. 68 F.3d 227 (8th Cir. 1995).

206. Indeed, even the court in *Rafiyev* appears to accept the conclusion that the right to counsel and the right to effective counsel are inextricably entwined. Rafiyev v. Mukasey, 536 F.3d 853, 861 (8th Cir. 2008).

207. *See Rafiyev*, 536 F.3d at 861 (denying that the Fifth Amendment grants the right to effective counsel in removal proceedings); *see also Torres-Sanchez,* 68 F.3d at 230 (stating that "in some circumstances, depriving an alien of the right to counsel may rise to a due process violation.").

Rafiyev and choose to adopt the rule shared by the vast majority of its sister circuits that there is a constitutional right to effective counsel in immigration proceedings under the Fifth Amendment.[208]

VI. CONCLUSION

The story of Mr. Utoc Garcia, with which we began this Article, is one all too common in the practice of immigration law.[209] Unscrupulous lawyers, and those masquerading as lawyers, too often take advantage of immigrants seeking to traverse the U.S. immigration system, one that has been aptly described as a "labyrinth that only a lawyer could navigate."[210] Indeed, cultural and linguistic barriers, unfamiliarity with our legal processes, and the timidity often accompanying an uncertain immigration status work together to prevent many noncitizens from knowing their rights, let alone seeking to enforce them.[211]

Indeed, one of the significant reasons immigration lawyers have some of the lowest malpractice insurance rates among all practice areas[212] is because when errors occur, it often results in the removal of the client from the country.[213] This outcome makes it exceedingly difficult for the client to seek redress in the form of a subsequent malpractice suit.

Moreover, while clients can and do occasionally win malpractice suits against former deficient counsel, the remedy is limited to monetary damages. This does not allow for the aggrieved and wrongfully deported client to return to his home or property in the United States. It cannot give him the ability to live and work in the United States.

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208. Contreras v. Att'y Gen., 665 F.3d 578, 584 (3d Cir. 2012); Nehad v. Mukasey, 535 F.3d 962, 967 (9th Cir. 2008); Zeru v. Gonzalez, 503 F.3d 59, 72-73 (1st Cir. 2007); Dakane v. U.S. Att'y Gen., 399 F.3d 1269, 1273 (11th Cir. 2004); United States v. Perez, 330 F.3d 97, 101 (2d Cir. 2003); Denko v. INS, 351 F.3d 717, 723-24 (6th Cir. 2003); Tang v. Ashcroft, 354 F.3d 1192, 1196 (10th Cir. 2003).

209. *See supra* note 20 and accompanying text; *see also Court Suspends Des Moines Immigration Lawyers License*, DES MOINES REGISTER, September 8, 2016, *available at* http://www.desmoinesregister.com/story/news/crime-and-courts/2015/09/08/court-suspends-des-moines-immigration-lawyers-license/71882090/?from=global&sessionKey=&autologin=.

210. *Nehad*, 535 F.3d at 967 (explaining that "[r]epresentation by competent counsel is particularly important in removal proceedings because '[t]he proliferation of immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate.'").

211. Aguilera-Cota v. INS, 914 F.2d 1375, 1382 (9th Cir. 1990) (noting that immigration forms "are frequently filled out by poor, illiterate people who do not speak English and are unable to retain counsel.").

212. Andrew Lavoott, *The Rare Immigration Legal Malpractice Case*, April 14, 2010, *available at* http://blog.bluestonelawfirm.com/2010/04/legal-malpractice-news/the-rare-immigration-legal-malpractice-case/.

213. *Id.*

And it cannot end the separation he experiences with his friends and family that remain in the United States. Indeed, it cannot make him whole after a loss of "all that makes life worth living."[214] This fact alone should silence those who would assert that the only remedy for noncitizens denied justice in removal proceedings is a malpractice suit against the deficient attorney.

The extreme penalty of deportation is what distinguishes civil immigration proceedings from other civil proceedings. Wherein most civil proceedings are simply about the allocation of monetary damages, immigration removal proceedings are about one's weighty liberty interests in being able to remain free from detention in one's home with one's family and friends. Thus, while in ordinary civil proceedings, a malpractice suit against one's former counsel can indeed make one whole in most instances; in removal proceedings, monetary damages cannot even come close. Thus, as alluded to by the Supreme Court in *Padilla v Kentucky*,[215] it is time to end the absurd legal fiction that immigration proceedings are purely civil proceedings.

In the nation that so eloquently declares at the foot of its monument to liberty, "[g]ive me your tired, your poor, [y]our huddled masses yearning to breathe free,"[216] it is a most perverse hypocrisy for us to deny those huddled masses justice in our courts as a result of the errors of defective counsel. The law in the Eighth Circuit is on the wrong side of justice and must be set right.

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214. Ho v. White, 259 U.S. 276, 284 (1922).

215. 559 U.S. 356 (2010).

216. Poet Emma Lazarus penned these words that now adorn the pedestal on which the Statute of Liberty stands. Her full poem reads as follows:

> Not like the brazen giant of Greek fame, With conquering limbs astride from land to land; Here at our sea-washed, sunset gates shall stand, A mighty woman with a torch, whose flame, Is the imprisoned lightning, and her name, Mother of Exiles. From her beacon-hand, Glows world-wide welcome; her mild eyes command, The air-bridged harbor that twin cities frame. "Keep ancient lands, your storied pomp!" cries she, With silent lips. "Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!"

JURY INSTRUCTIONS ON EYEWITNESS IDENTIFICATION EVIDENCE: A RE-EVALUATION

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Abstract: *The primary contribution of this paper is to challenge the accepted wisdom that jury instructions are an ineffective safeguard against wrongful conviction caused by mistaken eyewitness identification. It argues that such a conclusion is based on an erroneous interpretation of the available experimental evidence and that, in fact, there are grounds for optimism about the effectiveness of jury instructions in educating jurors about the risks posed by eyewitness identification evidence and sensitising them to the factors relevant to its evaluation. In order to play a useful role in safeguarding against wrongful conviction, however, instructions need to be easily comprehensible; to reflect the relevant scientific findings; and be provided to jurors in writing (or an alternative format for those who would find written instructions inaccessible). The paper also makes a secondary contribution, which is to warn of the dangers of accepting uncritically the findings of mock jury research as the basis for legal policy formation.*

I. INTRODUCTION

It can scarcely be debated these days that mistaken eyewitness identification evidence is one of the major causes—if not *the* major cause—of wrongful conviction.[1] Indeed, the debate has long moved on to focus on the merits of various safeguards that might be put in place to minimize the risk of wrongful conviction occurring. These have included measures targeting the police investigation and the conduct of suspect-identification procedures,[2] as well as measures aimed at regulating the use of eyewitness identification evidence at trial, such as

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1. *See infra* notes 8-27 and accompanying text.
2. *See infra* notes 50-51 and accompanying text.

exclusionary powers,[3] expert testimony,[4] and instructions that alert jurors to the risks associated with eyewitness identification evidence.[5]

It is the last of these that is the concern of this Article. Jury instructions have come to be dismissed by many commentators as an inadequate safeguard against wrongful conviction resulting from mistaken eyewitness identification. As Dufraimont puts it, "a level of scholarly consensus has developed around the notion that jury instructions on eyewitness identification are basically ineffective."[6] This Article re-evaluates that claim and argues that those who have dismissed jury instructions as an ineffective safeguard have done so too hastily, as the evidence available from the relevant studies does not lead to that conclusion at all. That is not to say that jury instructions provide a complete solution to the problem of wrongful conviction based on mistaken eyewitness identification evidence; clearly they do not.[7] The claim made in this Article is that, contrary to the accepted view, there are grounds for optimism about the effectiveness of instructions in helping jurors to evaluate eyewitness testimony appropriately. Indeed, there may even be grounds for some degree of confidence.

As such, the Article proceeds as follows. Part II establishes eyewitness misidentification evidence as a leading cause of wrongful conviction. Part III sets out exactly why it is such a problematic form of evidence. Part IV outlines the various safeguards that might be utilized to reduce the risk of wrongful conviction caused by mistaken eyewitness identification evidence. Part V considers in detail the available experimental evidence on the effectiveness of jury instructions. It concludes that the studies have generally been misinterpreted to suggest that jury instructions are an ineffective safeguard against wrongful conviction but that a careful reading of the studies does not support this conclusion at all. As such, jury instructions may have a more useful role to play than has hitherto been attributed to them. Part VI considers how the effectiveness of jury instructions on eyewitness identification evidence might be maximized. Part VII offers some concluding remarks.

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3. *See infra* note 53 and accompanying text.

4. *See infra* note 54 and accompanying text.

5. *See infra* note 55 and accompanying text.

6. Lisa D. Dufraimont, *Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?*, 33 QUEEN'S L.J. 261, 301 (2008); *See also infra* notes 65-69 and accompanying text.

7. It should be said at the outset that jury instructions can only act as a safeguard in trials involving a jury. The safeguards appropriate to bench trials lie beyond the scope of this Article.

II. EYEWITNESS IDENTIFICATION EVIDENCE AS A CAUSE OF WRONGFUL CONVICTION

It has long been recognized that mistaken eyewitness identification is one of the leading causes of wrongful conviction.[8] It was one of the causes identified by Borchard's pioneering study of wrongful conviction in 1932,[9] and has consistently been identified as the leading cause (or one of the leading causes) in studies ever since.[10] The most significant of these are the research projects based on the datasets held by the Innocence Project,[11] (founded in 1992 and based at Cardozo Law School[12]) and the National Registry of Exonerations (NRE)[13] (a joint project of the University of Michigan School of Law and the Center on Wrongful Convictions at Northwestern University School of Law), both of which are based primarily or exclusively on DNA-based exonerations.

The Innocence Project focuses *purely* on DNA-based exoneration and, at the time of writing, had identified 330 such cases.[14] Garrett analyzed the first 250 of these,[15] and found that eyewitness evidence

8. Wrongful conviction is used here to mean the conviction of those who are (in all likelihood) factually innocent. Convictions might be quashed for reasons other than a belief that the appellant is factually innocent, such as a procedural irregularity that casts doubt on the integrity of the criminal justice process. It should also be said that in many cases factual innocence is nearly impossible to establish with 100 percent certainty. *See generally* Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157 (2010-2011).

9. Edwin M. Borchard, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE, xx (Yale University Press 1932); *see generally* Marvin Zalman, WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE 329 (C. Ronald Huff & Martin Killias, eds., 2013).

10. *See, e.g.*, JEROME FRANK & BARBARA FRANK, NOT GUILTY, 132-48 (Victor Gollancz, 1st ed. 1957) (following a study of 36 cases of wrongful conviction); Edward D. Radin, THE INNOCENTS (Morrow, 1964) (who identified single eyewitness identification as a leading cause of 80 cases of wrongful conviction); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 56 tbl. 6 (1987) (who examined 350 cases of wrongful conviction spanning 1900-1985 and found mistaken eyewitness identification to be implicated in 56 of these); Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 L. & HUM. BEHAV. 283, 291 (1988) (noting that eyewitness misidentification was present in 100 cases in his study of 205 wrongful convictions).

11. THE INNOCENCE PROJECT, *http://www.innocenceproject.org/* (last visited Feb. 12, 2016).

12. *See* BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2001) (giving a detailed account of the history of the Innocence Project).

13. THE NATIONAL REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Feb. 12, 2016).

14. THE INNOCENCE PROJECT, http://www.innocenceproject.org/free-innocent/exonerating-the-innocent (last visited Oct. 6, 2015).

15. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011) [hereinafter GARRETT, CONVICTING THE INNOCENT]. A shorter summary of his findings can be found in Brandon L. Garrett, *Trial and Error*, *in* WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE 77 (C. Ronald Huff & Martin Killias, eds., 2013); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55

had supported conviction in seventy-six percent of cases,[16] making it the leading contributory factor to wrongful conviction by far.[17] The NRE is a wider dataset because it does not limit itself to DNA-based exoneration[18] and, at the time of writing, contained 1,671 cases.[19] A research project examining the causes of the first 873 exonerations (those registered from January 1989 to February 2012)[20] reported that mistaken eyewitness identification was a contributory factor in forty-three percent of these.[21] In fact, the figure is higher because, unlike Garrett, the researchers attempted to distinguish between genuine mistakes and deliberate misidentifications and classified the latter as perjury (which was a contributory factor in fifty-one percent of cases in the sample).[22] Including deliberate misidentifications in the figures adds a further twenty-seven percent of cases to the total.[23]

The Innocence Project and the NRE focus on exonerations in the United States, but these findings are not confined to the United States context. Mistaken eyewitness identification was "a major cause of wrongful conviction" identified by the leading study of wrongful conviction in England and Wales.[24] It has also been pinpointed as a lead-

(2008) (discussing the first 200 exonerations); *see, e.g.*, Rory K. Little, *Addressing the Evidentiary Sources of Wrongful Convictions: Categorical Exclusion of Evidence in Capital Statutes*, 37 SW. U. L. REV. 965 (2008) (providing additional analysis of the Innocence Project data). Brandon Garrett's study is by far the most extensive.

16. GARRETT, CONVICTING THE INNOCENT, *supra* note 15, at 279.

17. Although it should perhaps be noted that Garrett's analysis has been criticised in the respect that merely identifying that a particular type of evidence was led in a trial that resulted in a wrongful conviction does not tell us anything about the degree of influence that this evidence had on the outcome. *See* SIMON A. COLE & WILLIAM C. THOMPSON, WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE 111 (C. Ronald Huff & Martin Killias, eds., 2013).

18. SAMUEL R. GROSS & MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES, 1989-2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS, 8 (2012). This report encompasses cases where pardons were granted or where criminal charges were dismissed at the prosecutor's motion after new evidence of innocence emerged, acquittals at retrials, a small number of "certificates of innocence" issued by courts and some posthumous exonerations. *Id.*

19. THE NATIONAL REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Oct. 6, 2015).

20. GROSS & SHAFFER, *supra* note 18, at 1.

21. *Id*. at 40 tbl. 13.

22. *Id*. at 50.

23. *Id*. at 52 tbl. 14.

24. RUTH BRANDON & CHRISTIE DAVIES, WRONGFUL IMPRISONMENT: MISTAKEN CONVICTIONS AND THEIR CONSEQUENCES, 24 (1973).

ing cause of wrongful conviction in Canada,[25] New Zealand,[26] and in continental European jurisdictions.[27]

III. WHY IS EYEWITNESS IDENTIFICATION EVIDENCE SO PROBLEMATIC?

A vast amount of research into eyewitness memory has been undertaken by psychologists,[28] and its conclusions are encapsulated by Wells et al., who state that eyewitness testimony is "among the least reliable forms of evidence and yet is persuasive to juries."[29] Most research studies have involved simulations (which vary according to the degree to which they replicate reality),[30] which does need to be borne in mind when considering the validity of the findings.[31] However, eyewitness performance tends to deteriorate the more realistic the experimental conditions are.[32] So, if anything, simulations may underestimate the extent of the problem.[33]

The psychological literature tells us that mistaken witnesses are often confident when they give evidence at trial, but that such confidence is not correlated with accuracy.[34] This is worrying because (perhaps unsurprisingly) mock jury studies[35] have shown that jurors place great weight on the degree of confidence that an eyewitness re-

25. FTP HEADS OF PROSECUTIONS SUBCOMMITTEE ON THE PREVENTION OF WRONGFUL CONVICTIONS, THE PATH TO JUSTICE: PREVENTING WRONGFUL CONVICTIONS 1-3 (2011).

26. THOMAS THORP, MISCARRIAGES OF JUSTICE 53 (2005).

27. Chrisje Brants, *Tunnel Vision, Belief Perseverance and Bias Confirmation: Only Human?*, *in* WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE 165-71 (C. Ronald Huff & Martin Killias eds., 2013).

28. *See* BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY AND THE LAW (1995) (discussing factors that influence eyewitness accuracy such as perpetrator, event and post-event factors); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUM. BEHAV. 603, 627-36 (1998).

29. Wells et al., *supra* note 28, at 605.

30. Anne Maass, *Logic and Methodology of Experimental Research in* EYEWITNESS PSYCHOLOGY, PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION, 1996, at 279. A useful discussion of the various methods and their limitations can be found in Maass' article. *Id.*

31. ANDREAS KAPARDIS, PSYCHOLOGY AND THE LAW: A CRITICAL INTRODUCTION 34-38 (2014); CUTLER & PENROD, *supra* note 28, at 111-12.

32. CUTLER & PENROD, *supra* note 28, at 112.

33. *Id.*

34. Brian L. Cutler, Steven D. Penrod & Hedy Red Dexter, *Juror Sensitivity to Eyewitness Identification Evidence*, 14 L. & HUM. BEHAV. 190 (1990); *see also* CUTLER & PENROD, *supra* note 28, at 95 (reviewing relevant literature); Wells et al., *supra* note 28, at 620-23.

35. On the utility of mock jury studies: *see infra* notes 71-84 and accompanying text.

ports when giving his or her testimony.[36] In Garrett's sample of wrongful conviction caused by mistaken eyewitness testimony, the (mistaken) witnesses were all confident at trial and this is likely to have influenced the jury.[37] In ninety-two of his 161 cases of mistaken eyewitness identification (fifty-seven percent), however, the witnesses reported they had been uncertain at an earlier stage.[38] In thirty-four of the 161 cases (twenty-one percent), the witnesses even admitted at the trial that they had been uncertain earlier[39] but even this clearly did not persuade the juries concerned that the identification was mistaken. Worryingly, almost all of the cases in Garrett's sample involved defendants who looked unlike the person the witnesses first described as the perpetrator.[40]

There is research to suggest that extreme stress has a detrimental effect on the accuracy of eyewitness identification,[41] although this is still subject to some debate,[42] due in part to the obvious difficulties involved in research design.[43] Similarly, the "weapon focus effect" suggests that the presence of a weapon reduces the accuracy of identification.[44] The vast majority of the 190 mistaken eyewitness identification cases in Garrett's sample (eighty-four percent) were "stranger rapes" and he speculates that the "stress/weapon effect" might have been a factor.[45]

The psychological literature also indicates that cross-racial identifications are particularly problematic in terms of accuracy.[46] As such,

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36. Cutler, Penrod, & Dexter *supra* note 34; *see also* Kenneth A. Deffenbacher & Elizabeth F. Loftus, *Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?*, 6 L. & HUM. BEHAV. 15 (1982) (noting their findings in relation to question 7 of the questionnaire they distributed to study participants).

37. GARRETT, CONVICTING THE INNOCENT, *supra* note 15, at 64.

38. *Id.* at 49.

39. *Id.* at 64.

40. *Id.* at 49.

41. *See* C.A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to High Intense Stress*, 27 INT'L J. OF L. & PSYCHIATRY 265, 266 (2004) (describing extreme stress such as the stress that might be experienced by the victim of a violent attack); Tim Valentine & Jan Mesout, *Eyewitness Identification Under Stress in the London Dungeon*, 23 APP. COG. PSYCH. 151 (2009); *see also* CUTLER & PENROD, *supra* note 28, at 103.

42. Sven-Ake Christianson, *Emotional Stress and Eyewitness Memory: A Critical Review*, 112 PSYCHOL. BULL. 284 (1992); KAPARDIS, *supra* note 31, at 44-46.

43. Designing a realistic experiment that simulates the extreme stress of a violent attack is difficult to do in a way that meets ethical standards.

44. Elizabeth F. Loftus, Geoffrey R. Loftus & Jane Messo, *Some Facts About 'Weapon Focus'*, 11 L. & HUM. BEHAV. 55 (1987); Nancy M. Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 L. & HUM. BEHAV. 413 (1992); CUTLER & PENROD, *supra* note 28, at 101; KAPARDIS, *supra* note 31, at 48-49.

45. GARRETT, CONVICTING THE INNOCENT, *supra* note 15, at 51.

46. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3 (2001); Roderick Lindsay & Gary L. Wells, *What Do We Really Know About Cross-*

Garrett found that at least forty-nine percent of the exonerees misidentified by eyewitnesses involved a cross-racial identification.[47] Gross and Shaffer found that more than two-thirds of mistaken eyewitness identifications in sexual assault cases involved black defendants and, of these, seventy-two percent (sixty-nine out of ninety-six) involved an identification made by a white victim.[48]

IV. JURY INSTRUCTIONS AS A SAFEGUARD

The evidence presented in the preceding section leads to the conclusion that there is a need for at least some safeguards to operate within the criminal justice system to prevent wrongful conviction based on mistaken eyewitness identification. Various safeguards have been proposed, and they fall broadly into two categories: those that target the investigation and those that target the trial. During the investigation, it is important that suspect identification procedures are conducted in a manner that minimizes the risk of error; various guidelines have been developed in this respect.[49] It has also been suggested that individuals should not be subjected to a line-up identification procedure at all unless there is at least a reasonable suspicion (based on other evidence) that they committed the offense in question.[50] While not wishing to neglect the importance of measures targeted at the investigatory stage, the primary focus of this article is on measures that regulate the use of eyewitness identification at trial; there are essentially three main possibilities.[51] The first possibility is to utilize exclusionary powers to exclude entirely any eyewitness iden-

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Race Eyewitness Identification?, *in* EVALUATING WITNESS EVIDENCE (Sally M. Lloyd-Bostock & Brian R. Clifford eds., 1983); *see also* CUTLER & PENROD, *supra* note 28, at 104.

47. GARRETT, CONVICTING THE INNOCENT, *supra* note 15, at 73.

48. GROSS & SHAFFER, *supra* note 18, at 49.

49. *See, e.g.*, Wells et al., *supra* note 28, at 627-36 (setting out rules on who should conduct the line-up, the instructions that should be given on viewing, the structure of the line-up and obtaining confidence statements from witnesses); Andrew D. Rikard, *How and Why New York Should Enact Mandatory Statewide Eyewitness Identification Procedures*, 74 ALB. L. REV. 1525, 1549-50 (2010-2011) (making recommendations on the composure and conduct of line-ups); Richard A. Wise, Kirsten A. Dauphinais & Martin A. Safer, *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 856-65 (2007) (setting out ten guidelines for the conduct of identification procedures).

50. *See generally* Gary L. Wells, Yueran Yang & Laura Smalarz, *Eyewitness Identification: Bayesian Information Gain, Base-Rate Effect–Equivalency Curves, and Reasonable Suspicion*, 39 L. & HUM. BEHAV. 99 (2015) (discussing whether there should be reasonable-suspicion basis for beginning the identification procedure).

51. A fourth possibility is to require corroboration of identity in cases involving eyewitness identification. Sandra G. Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1541 (2008) (arguing for "the adoption of a corroboration rule in cases in which eyewitness identification testimony is offered.").

tification evidence that is particularly weak.[52] The second is to use expert testimony to educate the jury on the risks associated with eyewitness identification evidence and the factors that might affect the accuracy of such identifications.[53] The third is to achieve the same result but by way of an instruction given to the jury by the trial judge.[54]

At this point it might be questioned whether any such measures are necessary, especially if the applicable guidelines on pre-trial identification have been followed. It has sometimes been argued that jurors are capable of using their everyday knowledge and experience to evaluate eyewitness identification evidence in the same way as they evaluate any other testimony and need only be guided by a general instruction about witness credibility.[55] The difficulty here is that many of the findings of the scientific studies are counter-intuitive and are unlikely to be within the knowledge of the average juror (or indeed the average judge[56]). One might point in particular to the lack of any

52. *See, e.g.*, Angela Baxter, *Identification Evidence in Canada: Problems and a Potential Solution*, 52 CRIM. L.Q. 175, 176 (2007) (suggesting that the trial judge's discretion to exclude weak identification evidence could be a "more effective solution" to the problem of wrongful conviction caused by mistaken eyewitness identification evidence); Margery M. Koosed, *Reforming Eyewitness Identification Law and Practice to Protect the Innocent*, 42 CREIGHTON L. REV. 595, 629 (2009) (arguing for a wider exclusionary power for unreliable eyewitness identification evidence); Kent Roach, *Unreliable Evidence and Wrongful Convictions: The Case for Excluding Tainted Identification Evidence and Jailhouse and Coerced Confessions*, 52 CRIM. L.Q. 210, 216 (2007) (arguing that an exclusionary power "could do much valuable work in excluding evidence that the experience of wrongful convictions suggests can be highly prejudicial"); Eva G. Shell, *A Recipe for Mistaken Convictions: Why Federal Rules of Evidence Should be Used to Exclude Unreliable Eye-Witness Identification Evidence*, 46 SUFFOLK U.L. REV. 263, 285 (2013) (arguing for the use of exclusionary powers "in recognition of the potential for jurors to become unreasonably swayed by this evidence despite substantial unreliability").

53. *See, e.g.*, Koosed, *supra* note 52, at 619 (arguing that "[e]xpert testimony should be permitted in all cases where the perpetrator's identity is a central issue, and there is little or no other independent evidence of the defendant's guilt."); Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 PSYCHOL. PUB. POL'Y & L. 909, 924 (1995) (arguing that "eyewitness expert testimony is not only appropriate, but needed in certain circumstances to improve the likelihood of a valid jury decision."); Wise, Dauphinais & Safer, *supra* note 49, at 823 (arguing for the admissibility of expert testimony "when the primary or sole evidence against the defendant is eyewitness testimony.").

54. *See, e.g.*, Christian Sheehan, *Making the Jurors the Experts: The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. REV. 651, 683 (2011) (arguing for "a new model instruction to be given at the outset of criminal trials that involve eyewitness identifications."); Dufraimont, *supra* note 6, at 325 (arguing that jury instructions represent the best way to educate juries about the frailties of eyewitness identification evidence in the vast majority of cases).

55. *See, e.g.*, Nelson v. State, 362 So. 2d 1017, 1022 (Fla. Dist. Ct. App. 1978); Lenoir v. State, 72 S.W.3d 899, 903, 905 (Ark. Ct. App. 2002).

56. There is a growing body of evidence to suggest that judges hold incorrect beliefs about the factors affecting the accuracy of eyewitness testimony: *see* Richard A. Wise &

correlation between the degree of confidence expressed by eyewitnesses at trial and the accuracy of their identifications,[57] or to the detrimental effect of stress or the presence of a weapon on identification reliability.[58]

If it is accepted that there is a need to regulate the use of eyewitness identification evidence at trial, the next question is how this might best be achieved. A detailed evaluation of the relative merits of exclusionary powers, expert testimony, and jury instructions, lies beyond the scope of this Article. It should be said at the outset that these powers and procedures are not necessarily mutually exclusive. All three may have an important role to play, depending on the circumstances of the case.[59] The focus here, however, is on the last of the three possibilities—jury instructions.

Most United States courts allow some form of instruction to be given to the jury that warns of the dangers of eyewitness identification evidence.[60] Most commonly, the instruction given is based on *United States v. Telfaire*,[61] where the court stated that:

> In appraising the identification testimony of a witness, you should consider the following:
>
> (1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender? Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past . . . .
>
> (2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification and the circumstances under which the identification was made.

Martin A. Safer, *What US Judges Know and Believe About Eyewitness Testimony*, 18 APPLIED COGNITIVE PSYCHOL. 427, 432 (2004); Svein Magnussen et al., *What Judges Know About Eyewitness Testimony: A Comparison of Norwegian and US Judges*, 14 PSYCHOLOGY, CRIME & L. 177, 181 (2008); Richard A. Wise et al., *A Comparison of Chinese Judges' and US Judges' Knowledge and Beliefs About Eyewitness Testimony*, 16 PSYCHOL., CRIME & L. 695, 708 (2010).

57. *See supra* notes 33-37 and accompanying text.

58. *See supra* notes 45-46 and accompanying text.

59. *See* Koosed, *supra* note 52, at 616-17.

60. *See* Sheehan, *supra* note 54, at 670-73 (surveying different state practices with regards to jury instructions); Michael Bromby et al., *An Examination of Criminal Jury Directions in Relation to Eyewitness Identification in Commonwealth Jurisdictions*, 36 COMMON L. WORLD REV. 303 (2007) (surveying the approach of other common law jurisdictions).

61. 469 F.2d 552, (D.C. Cir. 1972).

> If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see the defendant, as a factor bearing on the reliability of the identification . . . .
>
> . . . .
>
> [(3)] Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether the witness is truthful, and consider whether the witness had the capacity and opportunity to make a reliable observation of the matter covered in his testimony.
>
> I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which [the defendant] stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.[62]

The *Telfaire* instruction is not without its flaws. It has been criticised on the basis that while it lists some of the factors that might contribute to misidentification, it is vague as to the factors' relevance, does not explain the way in which the factors can affect reliability, and appears (erroneously) to associate confidence with identification accuracy.[63] As such, some courts have developed more detailed instructions, occasionally going so far as to specifically alert jurors to the risk of a wrongful conviction associated with mistaken eyewitness identification evidence.[64]

In the scholarly literature, a majority view has developed that jury instructions about eyewitness identification evidence are an ineffective safeguard against wrongful conviction. Some have gone as far as to describe this view as a "consensus."[65] This is perhaps to overstate the case, but it is, at the very least, a widely held belief.[66] So, for

62. United States v. Telfaire, 469 F.2d 552, 558-60 (D.C. Cir. 1972).

63. *See, e.g.*, Dufraimont, *supra* note 6, at 306; Sheehan, *supra* note 54, at 680-81.

64. *See, e.g.*, State v. Henderson 27 A.3d 872, 915 (N.J.S.C. 2011); United States v. Burrous, 934 F. Supp. 525, 526 (E.D.N.Y 1996); Evan C. Miller, *Impermissible Instructions: State v Henderson and the Ebbing Utility of Eyewitness Evidence*, 66 RUTGERS L. REV. 803, 832-35 (2014).

65. *See, e.g.*, Dufraimont, *supra* note 6, at 301.

66. Two prominent dissenters are Dufraimont herself, and Sheehan. *See supra* note 55 and accompanying text.

example, in a review of the available evidence undertaken in 1995, Cutler and Penrod state that "we are forced to conclude that the judges' instructions do not serve as an effective safeguard against mistaken identifications and convictions."[67] Roach suggests that jury warnings place "enormous faith in the ability of juries to follow such instructions, despite the fact that social science and common sense suggest that warnings may not always have their desired effect."[68] In one of the most comprehensive reviews of safeguards against wrongful conviction based on eyewitness misidentification, Wise et al. reach a similar conclusion to Roach, but argue instead for expert testimony as a more effective alternative.[69]

Those who consider jury instructions ineffective tend to base their conclusions on a body of experimental evidence gained from psychological studies undertaken with mock jurors.[70] A superficial reading of the relevant studies might well give the impression that jury instructions are an ineffective safeguard. It will be argued here, however, that closer examination of the studies reveals otherwise, and it is to this that the Article now turns.

V. THE EXPERIMENTAL EVIDENCE ON THE EFFECTIVENESS OF JURY INSTRUCTIONS

In this section of the Article, the experimental evidence on the effectiveness of jury instructions about eyewitness identification evidence will be evaluated. Before embarking on a survey of the research, it is necessary to say something about the methods typically used in the studies, all of which involve mock jurors. The Article will then go on to discuss the studies on eyewitness identification instructions before also considering the findings of studies in closely related areas.

A. Mock Jury Studies and Their Limitations

Mock jury studies can have a number of limitations that potentially affect their "external validity:" the extent to which their findings

67. Cutler & Penrod, *supra* note 28, at 264.

68. Roach, *supra* note 52, at 213-14.

69. Wise, Dauphinais & Safer, *supra* note 49, at 830-33 (quoting Brian L. Cutler & Steven D. Penrod, Mistaken Identification: The Eyewitness, Psychology and the Law 254 (1995)); *see also* Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 Am. Crim. L. Rev. 1271, 1276 n.20 (2005) (discussing those who consider jury instructions an ineffective safeguard against wrongful conviction); Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 Am. Crim. L. Rev. 1013, 1062 (1995); Thompson, *supra* note 51, at 1517; Baxter, *supra* note 52, at 182.

70. The relevant studies are discussed in Part V. *infra*.

are generalizable beyond the experimental setting.[71] These include inadequate sampling (especially the use of college students as 'jurors'); inadequate trial simulation (such as a reliance on a transcript or study pack rather than a video or trial re-enactment); an absence of jury deliberation in the research design; the use of data collection techniques that do not reflect the reality of the juror's task at trial (such as asking jurors to rate the probability of guilt on a scale); and participants' awareness that they are role playing and that their decision has no real life consequences.[72]

The extent to which each of these affects generalizability is contested by psychologists. In a meta-analysis that is unfailingly cited by those using the research methods in question,[73] Bornstein argued that the use of student jurors and/or trial transcripts makes very little difference to research results.[74] Others have questioned his conclusions, suggesting that this depends on the issue being researched.[75]

There is a broader consensus over the lack of deliberation.[76] As Shaffer and Wheatman put it, "perhaps the greatest limitation of mock-trial simulations is that the vast majority of them attempt to draw inferences from decisions rendered by nondeliberating mock *jurors* rather than deliberating mock *juries*" and the researchers go on to discuss some of the reasons why this might be the case.[77] The deliberation process, they suggest, potentially irons out any misunderstandings that might be held by individual jurors, and jurors who hold prejudices (or who are disinclined to follow instructions) might not act in this way in a group situation where they have to articulate their reasoning to others. There is also a vast body of social psychological

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71. *See generally* Wayne Weiten and Shari S. Diamond, *A Critical Review of the Jury Simulation Paradigm: The Case of Defendant Characteristics*, 3 L. & HUM. BEHAV. 71 (1979) (displaying the classic exposition of these limitations); Shari S. Diamond, *Illuminations and Shadows from Jury Simulations*, 21 L. & HUM. BEHAV. 561 (1997) (providing an overview of the methodological issues).

72. Weiten & Diamond, *supra* note 71, at 78-81.

73. *See, e.g.*, Helen M. Paterson, David W.M. Anderson & Richard I. Kemp, *Cautioning Jurors Regarding Co-Witness Discussion: The Impact of Judicial Warnings*, 3 PSYCHOL., CRIME & L. 287, 301 (2013).

74. Brian H. Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?*, 23 L. & HUM. BEHAV. 75, 78-84 (1999).

75. *See, e.g.*, Richard L. Wiener, Daniel A. Krauss & Joel D. Lieberman, *Mock Jury Research: Where Do We Go From Here?*, 29 BEHAV. SCIS. & THE L. 467, 472 (2011).

76. *See, e.g.*, Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying & Jennifer Pryce, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 625 (2001); Narina Nuñez, Sean M. McCrea & Scott E. Culhane, *Jury Decision Making Research: Are Researchers Focusing on the Mouse and not the Elephant in the Room?*, 29 BEHAV. SCIS. & THE L. 439, 443 (2011).

77. David R. Shaffer & Shannon R. Wheatman, *Does Personality Influence Reactions to Judicial Instructions? Some Preliminary Findings and Possible Implications*, 6 PSYCHOL. PUB. POL'Y & L. 655, 657-58 (2000).

literature indicating that group decisions differ from individual decisions[78] and research with real jurors has shown that deliberation does affect the verdict reached in a small but significant proportion of cases.[79]

Not all mock jury studies suffer equally from the limitations identified above, but as this Article will go on to demonstrate, the concerns noted loom large in the jury instruction studies that are the focus here. Indeed, the majority of them have methodological flaws so serious that little reliance can be placed on them.

B. THE JURY INSTRUCTION STUDIES

An extensive search of legal and psychological databases identified five studies in peer reviewed journals that have assessed the effectiveness of jury instructions about eyewitness identification evidence.[80] Any evaluation of these studies needs to keep in mind that the desired result of a jury instruction on eyewitness identification evidence is to induce what has been termed "juror sensitivity" and not "juror skepticism," the latter being a general mistrust of eyewitness identification evidence even when this is not merited.[81] As such, any experimental design that does not vary the strength of the eyewitness identification is unlikely to yield any valuable results.[82] The usefulness of the study is also dependent on the quality of the jury instruction utilized. If a particular instruction is difficult to comprehend and/or inaccurate, this does not necessarily mean that all jury instructions are ineffective. It is worth noting the majority of studies used the *Telfaire* instruction, which has been criticized for being vague and potentially misleading.[83] Finally, it is worth repeating the point, studies vary in the extent to which the experimental design rep-

78. Nuñez, McCrea & Culhane, *supra* note 76, at 443-46.

79. Maria Sandys & Ronald C. Dillehay, *First-Ballot Votes, Predeliberation Dispositions, and Final Verdicts in Jury Trials*, 19 L. & HUM. BEHAV. 175, 176 (1995); HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY (1966). Kalven and Zeisel, in what was then a ground-breaking study, recorded the verdicts of juries in a sample of criminal trials in the 1950s. They found that the verdict preferred by the majority of jurors on the first ballot was *not* the eventual verdict in approximately ten percent of cases.

80. *See* Brian H. Bornstein & Joseph A. Hamm, *Jury Instructions on Witness Identification*, 48 COURT REVIEW 48 (2012), *available at* http://aja.ncsc.dni.us/publications/courtrv/cr48-1-2/CR48-1-2Bornstein.pdf (discussing the effectiveness of jury instructions in eyewitness identification, however, this study was not published in a peer reviewed journal and it contains such limited details of its research methods that its generalizability is impossible to evaluate.).

81. Kirsty A. Martire & Richard I. Kemp, *Can Experts Help Jurors to Evaluate Eyewitness Evidence? A Review of Eyewitness Expert Effects*, 16 LEGAL & CRIMINOLOGICAL PSYCHOL. 24, 25-26 (2011) [hereinafter Martire & Kemp, *Review of Eyewitness Expert Effects*].

82. *Id*. at 26.

83. *See supra* note 63 and accompanying text.

licated the real life trial setting, and studies that do not include an element of jury deliberation must be regarded with particular caution.

The earliest of the five studies is that of Katzev and Wishart, who asked 108 mock jurors (forming thirty mock juries) to watch a forty-minute mock burglary trial.[84] The juries were divided into three groups: the first group received only the standard jury instructions with no summary of the evidence in the case or special instructions relating to eyewitness identification evidence; the second group received, in addition to this, a judicial summary of the evidence; the third group received the standard instructions, the judicial summary of the evidence, and a short judicial instruction on eyewitness identification evidence.[85] Jurors were asked to make a pre-deliberation decision about the guilt or innocence of the defendant, before deliberating in their jury groups and recording a post-deliberation group verdict.[86] The authors found that providing a judicial instruction on eyewitness identification resulted in a significant increase in not-guilty verdicts pre-deliberation.[87] Post-deliberation, the number of not-guilty verdicts was also slightly higher among those juries receiving the instruction on eyewitness identification evidence, although the finding was not statistically significant.[88] There were, however, numerous weaknesses in the experimental design: college student subjects were used; there was no variation of the strength of the identification evidence; and the overall evidence against the accused was very weak, as evidenced by the fact that, post-deliberation, twenty-seven of the thirty juries returned not-guilty verdicts.[89] As such, little can be usefully taken from the findings.

The next relevant study was carried out by Cutler et al., in which mock jurors were given a *Telfaire* instruction after a videotaped mock robbery trial in which a witness identified the defendant as the perpetrator.[90] There were two versions of the experiment, in which the ex-

84. Richard D. Katzev & Scott S. Wishart, *The Impact of Judicial Commentary Concerning Eyewitness Identifications on Jury Decision Making*, 76 J. CRIM. L. & CRIMINOLOGY 733, 736 (1985).

85. *Id*. at 737-38; *see also id.* at 737 n.18 (providing instructions for the jury).

86. *Id*. at 739.

87. *Id*.

88. *Id*. at 740-41. It should be noted that table 1 of their paper (at 739) erroneously omits the word "not" from "not guilty" and is therefore a misleading representation of their results.

89. *Id.* at 736, 740; *see also id.* at 737 n.18 (summarizing the evidence given in the judge's charge).

90. Brian L. Cutler, Hedy R. Dexter and Steven D. Penrod, *Nonadversarial Methods for Improving Juror Sensitivity to Eyewitness Evidence*, 20 J. APPLIED SOC. PSYCHOL. 1197 (1990). The study also compared the effectiveness of jury instructions to that of testimony from a court appointed expert and its findings in this respect are discussed below. *See infra* notes 159-161 and accompanying text.

perimenters varied the strength of the identification evidence.[91] In the first version, the defendant wore a hat, while brandishing a handgun, and the eyewitness identified him as the perpetrator fourteen days after the robbery. In the second version, the robber wore no disguise and kept his handgun hidden, and the identification took place two days after the robbery.[92] The study found some evidence of increased juror sensitivity (as measured by the proportion of guilty verdicts returned) from hearing the instruction, although the effect was small and not statistically significant.[93] Once again, however, the research methods used by the study cast a shadow over the usefulness of its findings. The 144 mock jurors were all college students, the experiment did not involve deliberation, and as Cutler, Dexter and Penrod themselves acknowledge, the poor quality of the *Telfaire* instruction may have been to blame for inducing unjustified skepticism in some participants.[94]

A further study was undertaken by Ramirez et al., who conducted two separate experiments, both involving college student subjects watching a video of a mock trial.[95] The first—the robbery of a liquor store by a lone gunman—used very similar methods to Cutler, Dexter and Penrod, and found that the *Telfaire* instruction caused a significant skepticism effect.[96] Jurors hearing the instruction were less likely to convict in both the "good" and the "poor" identification conditions.[97] The second compared the effectiveness of the *Telfaire* instruction with a re-written instruction in which the language was simplified and the content revised to reflect more accurately the relevant experimental research.[98] They found that there was little difference between the effectiveness of the *Telfaire* instruction and their rewritten instruction in terms of the proportion of guilty verdicts returned.[99] However, this finding must be regarded with caution. Like Cutler, Dexter and Pendrod, the mock jurors were college students, the experiment did not involve deliberation, and the evidence against the accused was very weak overall.[100] Even in the "good identification conditions" version of the experiment, the only evidence against the defendant was that of a single eyewitness who viewed him for approxi-

91. Cutler, Penrod & Dexter, *supra* note 34, at 1199.
92. *Id*.
93. *Id*. at 1202.
94. *Id.* at 1205.
95. Gabriella Ramirez, Dennis Zemba & R. Edward Geiselman, *Judge's Cautionary Instructions on Eyewitness Testimony*, 14 AM. J. FORENSIC PSYCHOL. 31, 38 (1996).
96. *Id.* at 41.
97. *Id*.
98. *Id*. at 47. The re-written instruction is re-produced in Appendix B of the paper.
99. *Id.* at 56.
100. *Id.* at 47, 50.

mately twenty seconds while experiencing a traumatic event (the burglary of her house).[101] Evidence was also presented at the trial that the defendant had an alibi; a friend testified that at the time of the burglary the two of them were together doing plumbing work in the friend's kitchen.[102] This does suggest that skepticism might, in fact, have been the most appropriate attitude in both the "good" and "poor" identification conditions, bearing in mind that the jurors were given the standard direction that they should convict only if they were convinced beyond reasonable doubt of the defendant's guilt.[103] It is also worth noting that the revised instruction did result in a significant improvement in recall of the instruction's content and a "modest" increase in juror knowledge about the relevant issues.[104]

An improvement in the realism of the experimental conditions can be found in the two experiments undertaken by Edith Greene.[105] Her first experiment involved a videotaped assault trial that was shown to college student "jurors" in which a person drinking in a bar was accused of throwing a bottle that hit and blinded another customer.[106] No one actually saw the defendant throw the bottle, but one of the bar staff testified that the defendant "might have done so."[107] There was no other evidence against the defendant. The strength of the identification evidence given by the witness was varied: in the "strong" version she had an unobstructed view and the bar was well lit; in the "weak" version the bar was dimly lit and her view was partially obstructed. The jurors were given a *Telfaire* instruction and were allowed thirty minutes of deliberation before reaching a verdict.[108] In the second experiment, the conditions were identical, save for the facts that Greene, like Ramirez et al.: used a revised instruction which was rewritten to make it linguistically more comprehensible and to reflect more accurately the findings of relevant

101. This was distinguished from the "poor" identification conditions version by the fact that the perpetrator was viewed for 20 seconds (rather than five), from five feet (rather than 15 feet), in good lighting conditions, and had no gun (as opposed to having a visible gun). The defendant was also identified two hours after the event (as opposed to two weeks) and he was picked out in both a photo ID and a lineup (as opposed to only in the lineup). *Id.* at 49.

102. *Id*. at 48.

103. *Id*.

104. *Id*. at 57.

105. Edith Greene, *Judge's Instruction on Eyewitness Testimony: Evaluation and Revision*, 18 J. APPLIED SOC. PSYCHOL. 252 (1998).

106. *Id.* at 256.

107. *Id*.

108. *Id*. at 257.

psychological research; and used a shadow jury rather than college student subjects.[109]

Greene found that the *Telfaire* instruction, when it was given, caused a significant skepticism effect—the conviction rate decreased from 42 percent to 6.5 percent—even for the strong identification evidence version of the experiment.[110] It had no effect when the weak identification evidence was used, where the conviction rate was three percent regardless of whether the jury had been given the instruction, but as Cutler and Penrod point out, this was probably because the weak evidence was so weak that it would have been perverse to convict on it.[111] In Greene's second experiment, the revised instruction also induced skepticism rather than sensitivity, which resulted in a higher proportion of acquittals in the weak identification evidence condition.[112] However, it also resulted in a higher proportion of acquittals in the strong identification evidence condition.[113]

Greene's second experiment is without question the study that has used the most realistic experimental conditions, and comprehensible and accurate jury instruction, and yet this still induced skepticism rather than sensitivity. This might imply that jury instructions on eyewitness identification evidence are of limited usefulness. However, her research design still had important limitations. It was a single experiment involving only 139 jurors where deliberation was limited to thirty minutes, after which jurors were asked to vote individually (rather than reach a collective decision). Most problematically, the eyewitness identification evidence was actually very weak, even in the "strong" version of the experiment, as noted above.[114] The only evidence against the defendant was the testimony of a single eyewitness, who, when asked if the defendant was the person who threw the bottle, said only that the defendant "*might* have done so."[115] As such, skepticism was entirely appropriate.[116] It is worth noting that Greene's rewritten instruction was extremely effective in improving juror *understanding* of the factors affecting the accuracy of eyewitness

109. *Id.* at 263-64. A shadow jury involves the use of real life jurors who have been summoned to court but not ultimately selected for trial.

110. *Id*. at 258.

111. *Id.* at 258; *see also* CUTLER & PENROD *supra* note 28, at 260 (describing the "floor effect").

112. Greene, *supra* note 105, at 266. Table 4 shows seventy-three percent where a revised instruction was given, compared to forty-two percent where no instruction was given, and forty-one percent where a *Telfaire* instruction was given. *Id.*

113. *Id.* Table 4 shows seventy-five percent where a revised instruction was given, compared to twenty-two percent for no instruction, and thirty-five percent for the *Telfaire* instruction. *Id.*

114. *Id.* at 266.

115. *Id*. at 256 (emphasis added).

116. *Id*. at 264.

identifications.[117] Jurors who were given the rewritten instruction scored significantly better on this measure than jurors who were given no instruction or the *Telfaire* instruction.[118]

Finally, a rather different research method was used in a study undertaken by Martire and Kemp.[119] They used what they called a "real eyewitness design" where a first set of study participants acted as "witnesses" who were asked to view a video reconstruction of a robbery and then identify the perpetrator from a line-up.[120] They then "gave evidence" and a second set of study participants acting as "jurors" were asked whether or not they believed them.[121] This could then be compared to the true accuracy of the identifications. The jurors in the experiment were college students and were divided into six groups where the experimental conditions were varied so that they watched either a "correct" or a "mistaken" witness give evidence and they received either a jury instruction,[122] a video of expert testimony on eyewitness identification, or no assistance at all. The researchers found that jurors were correct in their assessments 63.6 percent of the time, but that there was no significant difference between the jury instruction group, the expert testimony group, and the control group: "the objective accuracy of the judgments they made were not found to be significantly associated with the type of instruction they heard."[123]

But the usefulness of this study is questionable at best. The number of mock jurors who witnessed each of the six possible scenarios was very small and the study design did not include any element of deliberation. In addition, the "witnesses" watched a video reconstruction rather than experiencing a real life event where environmental conditions and stress would most likely have played a part in the accuracy of their identification. Most importantly, the conditions in which the witnesses saw the perpetrator were not varied and therefore the only variables the jurors had to go on in determining accuracy were the witnesses' reported confidence levels and their demeanour at trial. As such, little can be usefully concluded about the effectiveness of jury instructions on eyewitness identification evidence.

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117. *Id.* at 267.

118. *Id*. at 259-60.

119. Kirsty A. Martire & Richard I. Kemp, *The Impact of Eyewitness Expert Evidence and Judicial Instruction on Juror Ability to Evaluate Eyewitness Testimony*, 33 L. & HUM. BEHAV. 225 (2009) [hereinafter Martire & Kemp, *Impact of Eyewitness Expert Evidence and Judicial Instruction*].

120. *Id*. at 227.

121. *Id.* at 230.

122. *Id*.

123. Martire & Kemp, *Impact of Eyewitness Expert Evidence and Judicial Instruction*, *supra* note 119, at 231-33.

To summarise, all that can really be said on the basis of the experimental studies on the effectiveness of jury instructions about eyewitness identification evidence is that they are inconclusive. The studies are, as Dufraimont puts it, "few in number . . . plagued with methodological problems and focus predominantly on the *Telfaire* instruction, which lacks the kind of informational content necessary to educate jurors about the frailties of eyewitness identification."[124] The two studies that evaluated the effect of a revised instruction (Greene's experiment, Ramirez et al.'s experiment) were, frustratingly, both hampered by the fact that the evidence against the defendant was weak even in the version of the experiment where it was supposed to be strong. Thus, while both reported a skepticism effect, *skepticism was an entirely appropriate attitude*. It is worth reiterating that both studies found that rewritten instructions improved juror comprehension of the relevant issues when compared to no instruction at all, or the *Telfaire* instruction.

c. Studies in Closely Related Areas

Given the limited number of studies of jury instructions about eyewitness identification evidence, it is worth turning to some of the experimental evidence in closely related areas. Studies on the effectiveness of jury instructions in helping jurors to evaluate particular types of evidence other than eyewitness identification evidence are few and far between, most likely because few other types of evidence are so inherently problematic. Nonetheless, there are a few studies where the issues being investigated are sufficiently similar, and thus, worth considering.

The first of these is a study by Paterson et al. that examined eyewitness evidence but in a different context.[125] The researchers examined the impact of a jury instruction about the effect of post-event discussion among eyewitnesses in a dangerous driving case. Mock jurors were given a transcript of a dangerous driving trial where eyewitness evidence was given by two witnesses.[126] One gave evidence to the effect that she had seen the defendant using a cell phone. She did not mention this to the police in the statement she made to them immediately after the incident, but told them about it later after she had spoken to another witness to the event. The other witness mentioned the mobile phone in both her initial statement and in a later inter-

124. Dufraimont, *supra* note 6, at 306.

125. *See* Paterson, Anderson & Kemp, *supra* note 73, at 301 (contrasting the study with others before it).

126. *Id*. at 292.

view.[127] Half of the participants were given a jury instruction that explained that "eyewitness evidence can be unreliable and that reliability might be affected by the circumstances in which the witness observed the event."[128] The other half were given the same general warning, but were also given a specific warning about "the possible effect of co-witness discussion on memory."[129]

In Paterson et al.'s experiment, the specific warning did not induce general skepticism, but instead resulted in a marked sensitivity effect: there was a significant reduction in belief of the testimony of the inconsistent witness when the specific warning was given, compared to the general warning condition.[130] Such a reduction did not occur in relation to the consistent witness.[131] This did not translate into a change in beliefs about the guilt or innocence of the defendant, but as the researchers suggest, this could be for any multitude of reasons, including the strength of the rest of the evidence in the case.[132] That said, the findings must be still regarded with some caution. This was not the most realistic of experiments: the mock jurors were 80 college students; it involved a transcript rather than a video reconstruction; and there was no deliberation.

Aside from this single experiment that has focused on eyewitness evidence in a different context, one might also look to studies that have evaluated the effect of jury instructions on other types of witness testimony. Two mock jury studies in particular are worth noting. The first study was undertaken by Bollingmo et al., who evaluated the effectiveness of an instruction aimed at correcting the misconception that the extent to which a witness displays emotion provides a reliable cue to her credibility.[133] Participants watched a five-minute video of a mock police interview in which a woman gave an account of a rape.[134] Experimental conditions were varied, so that: (a) the witness displayed varying degrees of emotion when giving her statement; and (b) the participants were either given an instruction warning of the danger of equating emotional condition with truthfulness or were not.[135] The instruction was found to be highly effective at correcting any misconceptions held by participants in this respect, with the groups who were given the instruction reporting that they had given less weight to

127. *Id*. at 293.
128. *Id.*
129. *Id*.
130. *Id*. at 297.
131. *Id*. at 299.
132. *Id*. at 300.
133. Guri Bollingmo et al., *The Effect of Biased and Non-biased Information on Judgments of Witness Credibility*, 15 PSYCHOL., CRIME AND L. 61 (2009).
134. *Id*. at 63.
135. *Id.* at 64.

non-verbal cues and delivering higher credibility ratings of the witness than the group who were not.[136] Notwithstanding, it does have to be said that the research methods used were not the most realistic in terms of simulating the trial experience: the 334 subjects were college students; there was no deliberation built into the experiment; and the jury instruction was delivered verbally by the experimenter after the conclusion of the video.[137] Given that the effect of the jury instruction was positive even in unrealistic conditions, these concerns might be seen as less pressing than in the eyewitness identification evidence experiments, where the less than realistic experimental conditions might well have been the reason why a positive effect was *not* produced.[138] It does have to be said, though, that the experimental conditions were vastly simplified compared to a real life trial where jurors would be subject to a far greater volume and complexity of information than they were here, so it cannot simply be assumed that any positive effect would be replicated in the real life setting.

The other experiment worth noting was undertaken by Goodman-Delahunty et al., who examined the effectiveness of jury instructions in correcting common misconceptions about child memory of and responses to sexual abuse.[139] The study participants were asked to read a transcript of evidence given by a child reporting sexual abuse.[140] In the first experimental condition, the transcript included a case summation by the trial judge but no information specifically relating to child witnesses.[141] In the second experimental condition, the transcript also contained an instruction setting out the key scientific findings about children's reactions to sexual abuse, their ability to recall experienced events and various other relevant matters.[142] The study concluded that jury instructions significantly increased juror knowledge of the key scientific findings and resulted in an increased likelihood of a guilty verdict.[143] Here too, as the researchers themselves acknowledge, the research methods used were less than realistic: their subjects were 118 college psychology students; they relied on transcripts, rather than a trial simulation; and there was no deliberation

136. *Id*. at 67.

137. *Id*. at 64.

138. *See supra* notes 91-132 and accompanying text.

139. Jane Goodman-Delahunty, Anne Cossins & Kate O'Brien, *A Comparison of Expert Evidence and Judicial Instructions to Counter Misconceptions in Child Sexual Abuse Trials*, 44 AUSTRALIAN & NEW ZEALAND J. CRIMINOLOGY 196, 208 (2011).

140. *Id*. at 204.

141. *Id*. at 204.

142. *Id*. at 206. There was also a third version of the experiment where the instructions were delivered by an expert witness. *Id*. at 205; *see infra* note 162 and accompanying text.

143. *Id*. at 208, 211.

built into the experiment.[144] The effect of the instruction here was positive, and so the less than realistic conditions cannot be blamed for failing to produce an effect, but as with Bollingmo et al.'s study, it is impossible to know whether the same effect would have been produced in the more complex setting of a real life trial.

The other body of literature to which one might turn is the studies that have evaluated the effectiveness of expert testimony on eyewitness identification evidence. These have vastly outnumbered the studies of jury instructions in this context, as indicated by the fact that there exist several meta-analyses of the latter but none of the former.[145] Martire and Kemp's meta-analysis identified twenty-four experiments reported in peer-reviewed journals, some of which found that expert testimony induced a general skepticism effect, but some of which found that it improved juror sensitivity.[146] This might be seen as a cause for optimism, as the fact that expert testimony is capable of inducing sensitivity (albeit in experimental conditions with all the generalizability caveats that this implies) suggests that appropriate jury instructions might do likewise. This especially, as many of the expert testimony experiments used "court appointed experts" who were not cross-examined, was not dissimilar to that of a jury instruction.[147]

This does, of course, raise the question of whether *expert testimony* might be more effective than jury instructions as a safeguard against wrongful conviction based on eyewitness identification evidence. A detailed discussion of the relative merits of these two safeguards lies beyond the scope of this Article.[148] The claim being made here is not that expert testimony is *ineffective* in this context, but that jury instructions *are* effective. Although it should be said that if confidence can be placed in the effectiveness of jury instructions, there are many reasons to prefer them over expert testimony, not least of which is cost, both in terms of time and money.[149] Two experiments have directly compared the effectiveness of jury instructions and expert tes-

144. *Id*. at 204, 213.

145. *See, e.g.*, Martire & Kemp, *Review of Eyewitness Expert Effects*, *supra* note 81; Leippe, *supra* note 53.

146. Martire & Kemp, *Review of Eyewitness Expert Effects*, *supra* note 81, at 25, 30. The findings of the studies are summarised in their paper in tabular form in Table 1. *Id.* at 30.

147. *See* Leippe, *supra* note 53, at 934-39 (describing the impact of expert testimony in various studies). It should perhaps be said that an expert by virtue of his or her qualifications, might be regarded by jurors as more persuasive than a trial judge.

148. *See* Sheehan, *supra* note 54, at 674-78 (providing an excellent discussion of the relative merits of expert testimony and jury instruction).

149. Derek Simmonsen, *Teach Your Jurors Well: Using Jury Instructions to Educate Jurors About Factors Affecting the Accuracy of Eyewitness Testimony,* 70 MD. L. REV. 1044, 1078-85 (2011); *cf.* Miller, *supra* note 64, at 839.

timony in the context of eyewitness identification evidence, both of which were described above in the context of their findings on jury instructions.[150] Neither found any evidence that expert testimony was a superior method of inducing sensitivity, although as both studies suffered from methodological flaws, this finding does have to be regarded with some caution.[151] A comparison of expert testimony and jury instructions in a different context, the study of child witness testimony in sexual abuse trials discussed above, also found both to be equally effective in correcting misconceptions.[152]

D. A Summary so Far

As the discussion thus far has indicated, the experimental studies that have examined the effectiveness of jury instructions about eyewitness testimony are inconclusive. The limited number of studies that have been undertaken have mostly shown that jury instructions tend to result in increased skepticism towards all eyewitness identification evidence, regardless of its strength. This conclusion, however, has to be tempered by the fact that every single study—even the most realistic—suffered from serious methodological problems. Support for the effectiveness of jury instructions can be drawn from the expert testimony studies, some of which have been found to induce sensitivity, and from an experiment that examined eyewitness testimony and witness contamination. Finally, there is some cause for optimism in the fact that at least two studies (Greene's experiment and Ramirez et al.'s experiment) have shown that a well-constructed instruction can improve juror *appreciation* of the factors affecting the reliability of eyewitness identification evidence. Furthermore, jury instructions on witness credibility in other contexts (namely the effect of emotion on credibility and the factors affecting the credibility of child sexual abuse complaints) have been effective in improving appreciation of the relevant issues. There are, in summary, grounds for cautious optimism that jury instructions on eyewitness identification can work, a conclusion far removed from the accepted scholarly wisdom that they are entirely ineffective.

Their effectiveness is, however, likely to depend on their content and on the manner in which they are presented. As such, it is worth turning to the broader body of research that has examined the factors that can improve the effectiveness of jury instructions.

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150. Cutler, Penrod & Dexter, *supra* note 34; Martire & Kemp, *Impact of Eyewitness Expert Evidence and Judicial Instruction*, *supra* note 119.

151. Cutler, Penrod & Dexter, *supra* note 34, at 1202; Martire & Kemp, *Impact of Eyewitness Expert Evidence and Judicial Instruction*, *supra* note 119, at 231; *see supra* notes 100-105 and accompanying text; *supra* notes 129-132 and accompanying text.

152. Goodman-Delahunty, Cossins & O'Brien, *supra* note 139, at 208, 211.

VI. WHAT CAN BE DONE TO IMPROVE THE EFFECTIVENESS OF JURY INSTRUCTIONS?

What then can be done to maximize the effectiveness of jury instructions about eyewitness identification? Once again it is worth turning to the relevant experimental evidence. Three factors in particular stand out: simplification of language; ensuring that the instructions accurately reflect the relevant considerations; and providing instructions in writing. Each will be examined in turn.

A. Simplification of Language

If jury instructions are to be effective, they need to convey information in a way that jurors can understand and utilize.[153] Over-complex jury instructions are likely to be ineffective at best and counterproductive at worst.[154] A vast body of experimental research exists that has assessed the extent to which juries comprehend the instructions they are given by trial judges and, as Comiskey puts it, these "have almost unanimously concluded that a jury's ability to comprehend legal instructions is poor and that there is room for considerable improvement."[155]

To give some examples, Haney and Lynch, in a study of death penalty instructions in California, found that jurors were unable to apply them because they did not know what "mitigating" or "aggravating" meant.[156] Rose and Ogloff tested Canadian mock jurors' comprehension of an instruction on conspiracy and concluded that it was "abysmally poor."[157] In research undertaken with forty-eight real life criminal juries for the New Zealand Law Commission, Young et al. asked jurors about the instructions they had received (which included instructions on the ingredients of the offence, the meaning of intent and the meaning of beyond reasonable doubt). They concluded that, "there were widespread misunderstandings about aspects of the law which persisted through to, and significantly influenced, jury deliber-

153. Dufraimont, *supra* note 6, at 297; Sheehan, *supra* note 54, at 687; Queensland Law Reform Commission, A Review of Jury Directions, ¶ 8.25 (2009).

154. New South Wales Law Reform Commission, Jury Directions, ¶ 1.68 (2012).

155. Marie Comiskey, *Initiating Dialogue About Jury Comprehension of Legal Concepts: Can the 'Stagnant Pool' Be Revitalised?*, 35 Queen's L.J. 625, 629 (2010); *see, e.g.*, V. Gordon Rose & James R. Ogloff, *The Comprehension of Judicial Instructions,* in Psychology and the Law: An Empirical Perspective 407 (Neil Brewer & Kipling D. Williams eds., 2005); Nancy S. Marder, *Bringing Jury Instructions Into the Twenty-First Century*, 81 Notre Dame L. Rev. 449 (2006).

156. Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 L. & Hum. Behav. 411 (1994).

157. V. Gordon Rose & James R. Ogloff, *Evaluating the Comprehensibility of Jury Instructions: A Method and an Example*, 25 L. & Hum. Behav. 409, 429 (2001).

ations. Indeed, there were only thirteen of the forty-eight trials in which fairly fundamental misunderstandings of the law at the deliberation stage did not emerge."[158]

In the UK, Thomas was granted access in three English Crown Courts to jurors who had not been selected to sit on a trial.[159] The jurors observed a simulated trial and were given instructions from a practicing trial judge. In one court, jurors were tested on their understanding of an instruction they had received on the law of self-defense. While sixty-eight percent of jurors claimed that they had understood the instruction, when assessed objectively, only thirty-one percent actually had.[160]

It has been suggested that there is no reason to be concerned about findings such as these because any difficulty individual jurors have in understanding instructions will be resolved during the deliberation process.[161] Deliberation can undoubtedly affect trial outcomes, as noted earlier, and the studies that have examined the effect of deliberation on juror comprehension provide some support for its effectiveness in correcting mistakes.[162] Its curative power should not, however, be over-stated.[163] Deliberation will be effective in this respect only if, as Diamond puts it, "a significant proportion of the jurors begin deliberations with correct information; otherwise, deliberation may simply reinforce the inaccuracies of the majority."[164] In Rose and Ogloff's study of the comprehension of the conspiracy instruction, deliberation made no difference and the inherent complexity of the instruction was the most likely reason why.[165]

It might be questioned at this point how much of the preceding discussion is relevant to instructions on eyewitness identification evidence, which are relatively straightforward compared to some of the instructions that have been the subject of research. Juror comprehension levels have been shown to vary depending on the type of instruc-

158. WARREN YOUNG, NEIL CAMERON & YVETTE TINSLEY, JURIES IN CRIMINAL TRIALS PART TWO: A SUMMARY OF THE RESEARCH FINDINGS, ¶ 7.12 (1999); Yvette Tinsely, *Juror Decision-Making; A Look Inside The Jury Room*, 4 BRITISH SOCIETY OF CRIMINOLOGY (2001).

159. CHERYL THOMAS, ARE JURIES FAIR?, 8-9 (2010).

160. *Id*. at 36.

161. *See, e.g.*, YOUNG, CAMERON & TINSLEY, *supra* note 158, at ¶ 7.25.

162. *See supra* notes 83-87 and accompanying text; Diamond, *supra* note 71, at 565; Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & L. 788, 806 (2000).

163. Comiskey, *supra* note 155, at 641.

164. Diamond, *supra* note 71, at 565.

165. Rose & Ogloff, *supra* note 157, at 426.

tion, with instructions about procedural law generally being better understood than those about substantive law.[166]

Even if this is the case, there is nonetheless no harm in ensuring that jury instructions about eyewitness identification evidence are made as linguistically straightforward as possible, while of course also retaining their legal integrity.[167] This has been recognised in other jurisdictions—the New Zealand Institute of Judicial Studies, for example, has employed editors with expertise in writing plain English in the preparation of the Criminal Jury Trials Bench Book.[168] Indeed, experimental research has demonstrated that comprehension can be substantially improved by the use of simple language and straightforward syntax.[169] Charrow and Charrow, for example, found that juror comprehension improved by between thirty-five and forty-one percent (depending on the measure of comprehension used) when they re-wrote fourteen United States civil jury instructions in simpler language.[170] In the criminal context, other studies have achieved similar results.[171] The re-written instructions in all of these studies were approved by trial judges, who checked that the re-write was legally acceptable.

B. The Content of the Warning

If jury instructions are to be effective, they need to convey accurate information about, for example, the factors that have been shown

166. Comiskey, *supra* note 155, at 642; Alan Reifman, Spencer M. Gusick & Phoebe C. Ellsworth, *Real Jurors' Understanding of the Law in Real Cases*, 16 L. & Hum. Behav. 539, 546-50 (1992).

167. *See* Simmonsen, *supra* note 149, at 1086 (stating that a jury instruction should resemble a professor lecturing to students).

168. New South Wales Law Reform Commission, *supra* note 154, at ¶ 3.25.

169. *See, e.g.*, Rose & Ogloff, *supra* note 157, at 427-29 (providing that a simple, streamlined technique of giving jury instructions is ideal); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 Psychol. Pub. Pol'y & L. 589, 626-27 (1997).

170. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colom. L. Rev. 1306, 1331 (1979). The instructions were on issues including causation, witness credibility, expert evidence, and negligence. *Id.* The authors set out a method for improving comprehension, which includes measures such as removing nominalizations, prepositional phrases, technical words, multiple negatives, and embedded phrases. *Id.* at 1321-29.

171. *See, e.g.*, Laurence J. Severance, Edith Greene & Elizabeth F. Loftus, *Toward Criminal Jury Instructions That Jurors Can Understand*, 75 J. Crim. L. & Criminology 198 (1984) (testing comprehension of instructions on the standard and burden of proof, intent, and the use of prior convictions and achieving significant improvements in comprehension following their re-write); Amiram Elwork, James J. Alfini & Bruce Sales, *Towards Understandable Jury Instructions*, 65 Judicature 432 (1982) (finding that comprehension improved significantly when they re-wrote standard pattern instructions on a variety of issues including the meaning of beyond reasonable doubt, the definition of murder, the definition of insanity and the permitted use of expert evidence).

to influence the accuracy of eyewitness identification.[172] Instructions in some jurisdictions have been criticized on the basis that they either omit important information or are actively misleading (for example by suggesting that the degree of confidence reported by the eyewitness at the time of the trial is an indication of accuracy).[173]

Experimental research has also suggested that juries are more likely to follow instructions if it is explained to them why they are being given.[174] In the present context, this implies that a jury instruction on eyewitness identification evidence ought to explain to the jury that people have been wrongly convicted on the basis of flawed evidence of this nature, or that errors in identification have occurred in the past. However, this type of instruction would have to be carefully drafted so as not to induce undue skepticism.[175]

c. Providing Written Jury Instructions

A final consideration is whether jury instructions should be provided in writing, something that has been advocated by numerous law reform bodies[176] and researchers[177] worldwide. In New Zealand, the jury research project undertaken in 2001 resulted in the extensive use

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172. Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 Ga. L. Rev. 723, 773 (2013); David Ormerod, *Sounds Familiar? Voice Identification Evidence*, Crim. L. Rev. 595, 620 (2001) (emphasising the point specifically in relation to voice identification).

173. Sheehan, *supra* note 54, at 679 (citing Commonwealth v. Santoli, 680 N.E.2d 1116, 1121 (Mass. 1997)).

174. Nancy K. Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 L. & Hum. Behav. 469, 486 (2006); Ellsworth & Reifman, *supra* note 162, at 805; Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 Personality & Soc. Psychol. Bull. 1046, 1046 (1997).

175. United States v. Burrous, 934 F. Supp. 525, 530-33 (E.D.N.Y 1996). The full instruction is attached as an appendix to the case report and states *inter alia*:

> I want to caution you, first, that the kind of identification testimony you heard in this case must be scrutinized carefully. Scientific studies have amply demonstrated the dangers of mistake in human perception and identification. Of course, this does not mean that the identification in this case is incorrect. I merely tell you this so that you understand the importance of carefully evaluating the evidence here.

Burrous, 934 F. Supp. at 530-33.

176. *See, e.g.*, Lord Justice Auld, Review of the Criminal Courts of England and Wales 533 (2001); New South Wales Law Reform Commission, *supra* note 154, at ¶ 6.121; New Zealand Law Commission, Juries in Criminal Trials ¶ 314 (2001); Victorian Law Reform Commission, Jury Directions (2009) (recommendations 43 and 44 at ¶¶ 6.46-6.60).

177. *See* Robert F. Forston, *Sense and Non-sense: Jury Trial Communication*, 1975 B.Y.U. L. Rev. 601, 619 (1975) (stating, "the advantages of using written instructions are dramatic"); Comiskey, *supra* note 155, at 653; Devine, Clayton, Dunford, Seying & Pryce, *supra* note 77, at 712; B. Michael Dann, *Learning Lessons and Speaking Rights: Creating Educated and Democratic Juries*, 68 Ind. L.J. 1229, 1259 (1993).

of written instructions in that jurisdiction[178] and they are increasingly used in Canada[179] and in some United States jurisdictions.[180]

It has been argued that written instructions can lead to a number of benefits: improvements in memory;[181] improvements in comprehension;[182] better quality deliberations (where more time is spent applying the law);[183] reduced deliberation time (as juries spend less time trying to recall the instructions and any disputes about their content are quickly and easily resolved);[184] and improvements in juror confidence and satisfaction.[185] In relation to the first of these, Semmler and Brewer make the point that we are asking an awful lot of jurors to retain the information provided by the trial judge—even the simplest charge is likely to run to several pages of instructions—and it may be that at least some barriers to increased comprehension may simply stem from limitations in working memory.[186] Some possible objections to written instructions include: the fear that they might increase deliberation time (because jurors become involved in time consuming arguments over how to interpret them);[187] that they might be time consuming and burdensome for trial judges to produce;[188] or that they assume a level of juror literacy that might not be borne out in practice.[189]

The available research suggests that all (or, at worst, most) of the advantages are borne out in practice and that none of the disadvan-

178. William Young, *Summing-Up to Juries in Criminal Cases – What Jury Research Says About Current Rules and Practice*, CRIM. L. REV. 665, 669 (2003); Nic Madge, *Summing Up: A Judge's Perspective*, CRIM. L. REV. 817, 820 (2006). Written instructions were commonly used even prior to the research. *See* NEW ZEALAND LAW COMMISSION, *supra* note 176, at ¶ 314.

179. Madge, *supra* note 178, at 820.

180. *Id*. at 820; Marder, *supra* note 155, at 451.

181. Marder, *supra* note 155, at 452; Young, *supra* note 178, at 684; Larry Heuer & Steven D. Penrod, *Instructing Jurors: A Field Experiment With Written and Preliminary Instructions*, 13 L. & HUM. BEHAV. 409, 411 (1989); NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 176, at ¶ 6.119.

182. NEW SOUTH WALES LAW REFORM COMMISSION, JURY DIRECTIONS, ¶ 10.13 (2008); Young, *supra* note 178, at 684.

183. Forston, *supra* note 177, at 619.

184. NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 176, at ¶ 10.14; Heuer & Penrod, *supra* note 181, at 411.

185. Forston, *supra* note 177, at 620; Heuer and Penrod, *supra* note 181, at 411; NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 176, at ¶ 10.16.

186. Carolyn Semmler & Neil Brewer, *Using a Flow-Chart To Improve Comprehension of Jury Instructions*, 9 PSYCHIATRY, PSYCHOL. & L. 262, 267 (2002).

187. NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 154, at ¶ 6.115; William W. Schwarzer, *Communicating With Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 756 (1981); Lieberman & Sales, *supra* note 169, at 626.

188. NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 154, at ¶ 6.115; Heuer & Penrod, *supra* note 181, at 412.

189. NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 154, at ¶ 6.115; Forston, *supra* note 177, at 620.

tages transpire. In England and Wales, a trial judge on the criminal circuit adopted the practice of giving written instructions to jurors in all cases for a period of several months. He concluded that this "seems to have almost eliminated requests from juries for reminders or further guidance on the law. Juries also seem to be reaching verdicts more quickly."[190] Marder notes that a United States judge who has given each juror a written copy of her instructions for more than a decade, described the innovation as "wildly successful" and as "an inexpensive, effective way to virtually guarantee juror understanding of the law."[191] Admittedly these studies are anecdotal, unscientific, and small scale,[192] but their findings are supported by surveys of real life jurors. These have found that jurors who were not provided with written instructions thought that written instructions would have assisted them in their task[193] and that jurors who did receive written instructions found them useful.[194]

The anecdotal evidence is also supported by the findings of experimental research,[195] the most extensive being that of Heuer and Penrod.[196] In their study, twenty-nine judges in Wisconsin randomly assigned their trials so that some juries received written instructions and some did not. After the trial was over, the jurors were asked to complete questionnaires aimed at testing their understanding of the instructions they received.[197] The jurors were also asked a number of questions about their experience of jury service.[198] The researchers also canvassed the views of the judges involved. They found no evidence of any of the potential drawbacks of written instructions. Writ-

190. Madge, *supra* note 178, at 821.

191. Marder, *supra* note 155, at 500 (citing Hon. Jacqueline A. Connor, *Jurors Need to Have Their Own Copies of Instructions*, L.A. DAILY JOURNAL, February 25 2004, at 7).

192. As Madge himself accepts, *see* Madge, *supra* note 178, at 822.

193. Brian L. Cutler & Donna M. Hughes, *Judging Jury Service: Results of the North Carolina Administrative Office of the Courts Jurors Survey*, 19 BEHAV. SCI. & THE L. 305, 313 (2001) (surveying 1478 people who had served as jurors); YOUNG, CAMERON & TINSLEY, *supra* note 158, at ¶ 7.60 (explaining that only twenty-four percent of their sample of serving jurors did not think that written instructions would have been helpful; 62.2 percent thought that they would have been helpful and 13.8 percent gave no response).

194. YOUNG, CAMERON & TINSLEY, *supra* note 158, at ¶ 7.59 (where the jury received written instructions "they were almost invariably appreciative").

195. *See* Comiskey, *supra* note 155, at 653-56 (providing an overview of the studies); Ellsworth & Reifman, *supra* note 162, at 803-04; Lieberman & Sales, *supra* note 169, at 626-27.

196. Heuer & Penrod, *supra* note 181, at 409.

197. *Id.* at 417. Specifically, those relating to the standard and burden of proof, the presumption of innocence, the evaluation of testimony and exhibits, and procedural issues such as the allocation of responsibility for findings of law and fact. *Id.*

198. *Id*.

ten instructions made no significant difference to deliberation time,[199] and the judges involved reported that providing them was not burdensome or disruptive.[200] In terms of the possible advantages, jurors reported that the written instructions were very helpful in settling any disputes that did arise.[201] The researchers did not, however, find that the written instructions led to any improvement in the comprehension of legal concepts.[202] Despite this, the researchers concluded that their results presented "a compelling case" for written instructions and that while they might not have all the advantages claimed, they did have some clear benefits and they had no harmful consequences.[203]

Heuer and Penrod are not alone in finding that written instructions did not lead to improvements in comprehension,[204] but other studies *have* reported improvements. Kramer and Koenig, for example, found that jurors who received written instructions did score better on "true/false" tests aimed at measuring comprehension of a wide range of criminal jury instructions.[205] Thomas' research in England and Wales found that the proportion of jurors who were able to answer correctly two questions aimed at testing understanding of a self-defense instruction rose from thirty-one percent to forty-eight percent when a written instruction was provided.[206] These findings suggest that at least some of the incorrect answers were due to failures of memory and not of comprehension.

In fact, a research design that failed to distinguish between memory and understanding may well account for Heuer and Penrod's finding that written instructions did not improve comprehension. In their study, the jurors completed comprehension questionnaires some time

199. *Id.* at 421. The mean reported deliberation time was 2.6 hours for written instructions and 2.7 hours for oral instructions. *Id.*

200. *See id*. at 423 (stating that judges do not think that written instructions hurt the jury's ability to perform their duty.); *see also* Madge, *supra* note 178, at 822; Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423, 453-56 (1985) (discussing the effectiveness of written instructions for juries).

201. Heuer & Penrod, *supra* note 181, at 421.

202. *Id.* at 420. Jurors were asked six multiple choice questions aimed at testing their comprehension and the mean correct scores were 6.7 for the written instructions and 6.8 for the oral instructions. *Id.*

203. *Id*. at 429.

204. *See* Reifman, Gusick & Ellsworth, *supra* note 166, at 549 (noting that written instructions did not improve the number of procedural or substantive law questions asked by jurors).

205. Geoffrey P. Kramer & Dorean M. Koening, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J. L. REFORM 401, 428 (1990); *see also* Irene G. Prager, Gerard Deckelbaum & Brian Cutler, *Improving Juror Understanding for Intervening Causation Instructions*, 3 FORENSIC REPORTS 187 (1989). Prager, Deckelbaum & Cutlers' article was cited by Lieberman & Sales, *supra* note 169, at 627.

206. THOMAS, *supra* note 159, at 38.

after the trial concluded,[207] a limitation the researchers themselves acknowledge.[208] Compare this to Kramer and Koenig's research, where jurors were surveyed immediately after the conclusion of the trial (and where improvements in comprehension *were* reported). That said, the role that written instructions might play in improving comprehension should not be over-stated. Putting instructions in writing cannot compensate for instructions that are inherently unclear.[209] As Lieberman and Sales put it, "presenting participants with written versions of unintelligible instructions cannot be expected to be beneficial. If a person does not speak a foreign language, it will not matter if they are given written or verbal instructions in that foreign tongue."[210]

There are some practical issues. A copy of the written instructions should be given to each individual juror, otherwise there is a danger that the person with the written instructions dominates the discussion.[211] There is the question of whether they should be provided before the oral instructions are given, or afterwards. In favor of the former, this enables jurors to follow them as the charge is being given.[212] In favor of the latter, there is the danger that the jury will not focus sufficiently on what is being said if they are distracted by the written copy.[213] There is also the issue of juror literacy. It cannot be assumed that all jurors will have levels of literacy that would enable them to read a written text, so provision needs to be made in this respect by, for example, the use of recorded verbal or video instructions.

VII. CONCLUSION

The danger of wrongful conviction posed by mistaken eyewitness identification is a very real one, with such evidence being identified as the leading cause of wrongful conviction in the two major studies based on DNA exoneration cases. The need for measures to safeguard against wrongful convictions caused by mistaken eyewitness identification can scarcely be debated. Where there lies more disagreement, however, is in the most appropriate method of doing so.

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207. Heuer & Penrod, *supra* note 181, at 417. The questionnaires were sent out by post after the conclusion of the trial. *Id.*

208. *Id*. at 423. To this might be added the issue that the survey was by way of a postal questionnaire to which the response rate was only sixty-nine percent. *Id.* at 418.

209. *See* Rose & Ogloff, *supra* note 157, at 427 (describing a conspiracy instruction where there was no difference in comprehension between those jurors given the oral and the written version).

210. Lieberman & Sales, *supra* note 169, at 628.

211. Forston, *supra* note 177, at 620.

212. Marder, *supra* note 155, at 499; NEW ZEALAND LAW COMMISSION, *supra* note 176, at ¶ 314.

213. Madge, *supra* note 178, at 821.

Jury instructions warning jurors of the risks of misidentification and alerting them to the factors relevant to evaluating eyewitness testimony have often been dismissed as ineffective. It has been demonstrated here, however, that this conclusion is based on a misreading of the relevant experimental evidence. While all of the studies in this area might purport to demonstrate ineffectiveness, they all have methodological flaws. A more informed reading of the studies (and the evidence from related areas) suggests that jury instructions can be effective in educating jurors about the risks associated with eyewitness identification evidence and in evaluating such evidence sensitively. In order to do so, however, they need: to be expressed in language that jurors can understand; to accurately reflect the relevant scientific evidence; to indicate to jurors why they are being given; and to be provided in writing (or in a suitable alterative form to those who have literacy difficulties).

Two further concluding remarks are in order. First, while the focus here has been specifically on the role of jury instructions, the conclusions reached in this regard should not be taken to suggest that they are the only effective methods of protecting against wrongful conviction caused by mistaken eyewitness identification. The important role played during the initial investigation in ensuring that identification procedures are conducted according to best practice guidelines should not be neglected.[214] Likewise, in addition to jury instructions, there may also be an important role to be played at trial by exclusionary powers and expert testimony. These three measures should be seen as complementary, not as alternatives.[215] Exclusion may be appropriate where identification evidence is so weak that no reasonable jury could find it credible.[216] Allowing expert testimony (whether via a court appointed expert or by allowing both parties to lead their own expert witnesses) may be appropriate to deal with special circumstances (for example where an eyewitness is a child or has a learning disability) or where the findings of experimental research are contested (for example in relation to the effect of stress on the accuracy of identification).

Second, this analysis serves as a warning of the dangers of relying on lawyers' understanding of psychological research as a basis for policy formation. There is a danger that the findings of mock jury research are accepted uncritically and without due consideration of what can *actually* be drawn from them, given the research methodol-

214. *See supra* note 52 and accompanying text.

215. Dufraimont, *supra* note 6, at 325; Koosed, *supra* note 52, at 617.

216. Baxter, *supra* note 52, at 176.

ogy concerned. With some notable exceptions,[217] the community of legal scholars (and indeed some psychologists) has essentially coalesced around a view about the ineffectiveness of jury instructions that was not supported by a proper reading of the studies. There are lessons for lawyers and psychologists here. While there is undoubtedly much value to be learned about the design of legal processes from experimental psychology, lawyers need to be informed about the potential limitations of mock jury research and to evaluate critically the external validity of studies before relying on them as the basis for policy decisions. At the same time, if psychologists wish to exert an influence outside their own discipline, there is a need to design experiments that reflect legal reality as far as possible and to be sensitive to what their findings imply for real trial processes.

217. *See supra* note 59 and accompanying text.

YOU *MIGHT* HAVE THE RIGHT TO REMAIN SILENT: AN EROSION OF THE FIFTH AMENDMENT WITH THE USE OF PRE-ARREST SILENCE

I. INTRODUCTION

You have the right to remain silent. Anything you say—and, in some states, anything you do not say—can and will be used against you in a court of law. Although the United States Supreme Court has clearly held that an individual has a right to remain silent after arrest, the Court has avoided determining whether the Fifth Amendment to the United States Constitution[1] also protects an individual's pre-arrest silence from being utilized as evidence of guilt.[2] Currently across the United States, courts are increasingly divided regarding whether it is constitutional to admit an individual's pre-arrest silence as substantive evidence of guilt.[3] Specifically, eight of the United

1. U.S. CONST. amend. V.

2. *See* Miranda v. Arizona, 384 U.S. 436, 460 (1966) (stating that the right against self-incrimination, explicitly protected by the Fifth Amendment, is fulfilled only when an individual is guaranteed the right to remain silent) (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)); *see also* Salinas v. Texas, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., concurring) (stating that the United States Supreme Court granted certiorari for the purpose of deciding whether the Fifth Amendment protection against compulsory self-incrimination prohibits the use of pre-arrest silence as substantive evidence of guilt and recognizing that the Court never addressed the question but instead decided the case on different grounds).

3. *Compare* People v. Welsh, 80 P.3d 296, 299, 311 (Colo. 2003) (recognizing that the Colorado Court of Appeals ruled that pre-arrest silence was inadmissible but not reaching the issue itself after having granted certiorari), State v. Fencl, 325 N.W.2d 703, 711-12 (Wis. 1982) (noting the admission of pre-arrest silence of substantive evidence of guilt was a constitutional error, but determining the reference was too brief to warrant a new trial), State v. Lovejoy, 89 A.3d 1066, 1073 (Me. 2014) (concluding that people are endowed with constitutional protections from compelled self-incrimination both pre- and post-arrest), State v. Cassavaugh, 12 A.3d 1277, 1286 (N.H. 2010) (noting that it is well-established law in the state that if an individual does not testify, prosecutorial use of the individual's pre-arrest silence as part of the state's case-in-chief violates the constitution while citing the United States Court of Appeals for the First Circuit for guidance) (citing Coppola v. Powell, 878 F.2d 1562 (1st Cir. 1989)), State v. Boston, 663 S.E.2d 886, 895-96 (N.C. Ct. App. 2008) (agreeing with the United States Courts of Appeals for the First, Sixth, Seventh, and Tenth Circuits, thus holding that the Fifth Amendment privilege against self-incrimination protects individuals' silence extends beyond the realm of custodial interrogation to both before and after arrest), Weitzel v. State, 863 A.2d 999, 1002 (Md. 2004) (adopting the stance that evidence of pre-arrest silence "is too ambiguous to be probative" when the silence is in the presence of a police officer but doing so under Maryland's evidence laws as opposed to the United States' Constitution), State v. Leach, 807 N.E.2d 335, 342 (Ohio 2004) (concluding the use of pre-arrest, pre-Miranda silence as substantive evidence of guilt undermines and violates the Fifth Amendment privilege against self-incrimination), Commonwealth v. Thompson, 725 N.E.2d 556, 565 (Mass. 2000) (stating that the lower court erred in ad-

States Courts of Appeals have addressed this issue, which resulted in an even split.[4] Because a constitutional right hangs in the balance and often an individual's liberty or even life is at risk in these criminal

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mitting evidence that Thompson had remained silent, staring at the floor when informed of his wife's death as substantive evidence of consciousness of guilt), State v. Moore, 965 P.2d 174, 180 (Idaho 1998) (adopting the position that the Fifth Amendment protects against the use of an individual's pre-arrest silence against them in a court proceeding), Taylor v. Commonwealth, 495 S.E.2d 522, 529 (Va. Ct. App. 1998) (finding that burden imposed upon the privilege against self-incrimination substantially outweighs any prosecutorial interest in utilizing pre-arrest silence to police officers' questions as substantive evidence of guilt), State v. Easter, 922 P.2d 1285, 1286 (Wash. 1996) (holding that the government violated the Fifth Amendment right to remain silent), Tortolito v. State, 901 P.2d 387, 388, 391 (Wyo. 1995) (reversing the conviction on the grounds that the prosecutor impermissibly commented on Tortolito's pre-arrest silence to indicate substantive evidence of guilt), State v. Palmer, 860 P.2d 339, 349-50 (Utah Ct. App. 1993) (concluding that the lower court erred in admitting of evidence regarding Palmer's choice pre-Miranda to remain silent to demonstrate consciousness of guilt), *and* State v. Rowland, 452 N.W.2d 758, 763 (Neb. 1990) (stating that the trial court erred in admitting evidence regarding Rowland's pre-arrest silence) (citing United States ex rel. Savory v. Lane, 832 F.2d 1011, 1017-18 (7th Cir. 1965)), *with* State v. Lopez, 279 P.3d 640, 645 (Ariz. Ct. App. 2012) (finding that the United States Courts of Appeals for the Fifth, Ninth, and Eleventh Circuits were most persuasive, agreeing that the Fifth Amendment does not prohibit prosecutorial comment on an individual's pre-arrest silence), State v. Borg, 806 N.W.2d 535, 543 (Minn. 2011) (agreeing with Justice Steven's concurring opinion in *Jenkins v. Anderson*, 447 U.S. 231, 241-45 (1980), and holding that the Fifth Amendment does not protect an individual's silence if it is not compelled, indicating that it believes pre-arrest silence is not compelled), State v. LaCourse, 716 A.2d 14, 16 (Vt. 1998) (stating that the lower court did not error because nothing in the record indicated LaCourse was under arrest or in custody), People v. Schollaert, 486 N.W.2d 312, 316 (Mich. Ct. App. 1992) (concluding that the state did not violate Schallaert's constitutional rights when it introduced, and the court admitted, evidence regarding his silence to indicate guilt), Waldo v. State, 746 S.W.2d 750, 755 (Tex. Crim. App. 1988) (stating the prosecution could inquiry into Waldo's pre-arrest silence without impermissibly encroaching on his constitutional rights), *and* State v. Helgeson, 303 N.W.2d 342, 348 (N.D. 1981) (adopting Justice Steven's rationale from his concurring opinion in *Jenkins*, 447 U.S. at 241-45, and concluding the lower court did not err in its admission of Helgeson's pre-arrest silence).

4. *Compare* United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (finding that the Fifth Amendment does not prohibit substantive evidentiary use of pre-arrest silence), United States v. York, 830 F.2d 885, 896 (8th Cir. 1987) (concluding prosecutorial comment on pre-arrest silence to indicate substantive evidence of guilt is not erroneous), United States v. Oplinger, 150 F.3d 1061, 1067 (9th Cir. 1998) (holding that the admission of testimony and evidence regarding the accused's pre-arrest silence did not violate the accused's right against self-incrimination), *and* United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991) (determining that the prosecutor may comment on an accused's silence if the silence occurred pre-arrest or post-arrest, but pre-*Miranda* warning), *with Coppola*, 878 F.2d at 1567 (finding that an accused's refusal to talk to the police invoked the privilege against self-incrimination, even though a statement may be made pre-*Miranda* warning), Combs v. Coyle, 205 F.3d 269, 283 (6th Cir. 2000) (holding that the use of pre-arrest silence as substantive evidence of guilt unconstitutionally infringes upon Fifth Amendment right against self-incrimination), *Savory*, 832 F.2d at 1018 (finding the admission of pre-arrest silence as evidence of guilt constitutes a constitutional error), *and* United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991) (concluding that the admission of testimony regarding a person's pre-arrest silence constitutes a clear error).

proceedings, the United States Supreme Court must resolve this split.[5]

This Topic Article will demonstrate that the use of pre-arrest silence as substantive evidence of guilt is unconstitutional.[6] First, this Article will provide a background of the Fifth Amendment, an overview of fundamental United State Supreme Court decisions addressing or failing to address the issue, and a survey of the circuit split across the United States Courts of Appeals.[7] Next, this Article will advocate that the United States Supreme Court should address this issue because of the rights involved and the magnitude of the division between the courts.[8] This Article will then contend that the First, Sixth, Seventh, and Tenth Circuits properly held that the use of pre-arrest silence as substantive evidence of guilt is unconstitutional.[9] Subsequently, this Article will note the main objection, as provided by the Fifth and Ninth Circuits, to the inadmissibility of pre-arrest silence as evidence of guilt.[10] Finally, this Article will rebut the main objection by exposing an improper assumption made by courts in their analysis.[11]

II. BACKGROUND

A. Silence Within the Fifth Amendment: An Implied Right to Remain Silent

The Fifth Amendment of the United States Constitution provides several protections for individuals facing criminal charges and actions.[12] One specific protection provided to all people is the privilege against self-incrimination.[13] As the United States Supreme Court clarified in *United States v. Wade*,[14] this privilege only protects an in-

5. *See infra* notes 220-228 and accompanying text.
6. *See infra* notes 196-283 and accompanying text.
7. *See infra* notes 12-195 and accompanying text.
8. *See infra* notes 206-214 and accompanying text.
9. *See infra* notes 215-249 and accompanying text.
10. *See infra* notes 250-263 and accompanying text.
11. *See infra* notes 264-283 and accompanying text.
12. *See* U.S. Const. amend. V (stating, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").
13. *See id.* (providing that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself").
14. 388 U.S. 218 (1967).

dividual from being compelled to testify or otherwise provide evidence in a communicative manner against himself or herself.[15]

The privilege against self-incrimination protects against compulsion by state and federal officials.[16] In *Malloy v. Hogan*,[17] the United States Supreme Court held that the protection from self-incrimination by compulsion as codified by the Fifth Amendment is also provided by the Fourteenth Amendment to ensure the privilege is not abridged by the states.[18]

Although the phrase *the right to remain silent* cannot be found within the Fifth Amendment or any other part of the United States Constitution, the Supreme Court has recognized the privilege.[19] In *Malloy*, the Court determined that both the Fifth and the Fourteenth Amendments guarantee protection against infringement of the right to freely choose to remain silent without suffering a penalty for such silence.[20] Since *Malloy*, the Supreme Court has clarified how this right exists if it cannot be found within the Constitution: the right to remain silent is implied from the privilege against self-incrimination.[21]

B. *Jenkins v. Anderson*: The Supreme Court Speaks on Use of Pre-Arrest Silence for Purposes of Impeachment

In *Jenkins v. Anderson*,[22] the United States Supreme Court concluded that the use of pre-arrest silence to impeach a defendant's testimony is not an impermissible restraint upon a person's right to exercise the Fifth Amendment right to remain silent.[23] Michigan officials tried Dennis Jenkins for the first-degree murder of Doyle Redding.[24] At trial, Jenkins claimed that after being accused of turning Redding into the police for the robbery of Jenkins' sister and her boyfriend, Redding attacked him with a knife.[25] Jenkins described how

15. United States v. Wade, 388 U.S. 218, 221 (1967) (citation omitted).

16. *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964) (explaining the scope of the protection against self-incrimination provided by United States Constitution).

17. 378 U.S. 1 (1964).

18. *Malloy*, 378 U.S. at 6.

19. *See generally* U.S. Const. amend. V (lacking any explicit indication of a right to remain silent); *but see, e.g.*, *Malloy*, 379 U.S. at 7 (recognizing the right of the accused to "freely [choose] to admit, to deny, or *to refuse to answer*.") (quoting Lisenba v. California, 314 U.S. 219, 241 (1941)); Miranda v. Arizona, 384 U.S. 436, 445 (1966) (mandating that a "person must be warned that he has a *right to remain silent* . . . .") (emphasis added).

20. *Malloy*, 378 U.S. at 8.

21. *See Miranda*, 384 U.S. at 460 (explaining that the right against self-incrimination is fulfilled only when an individual is guaranteed the right to choose to remain silent) (quoting *Malloy,* 378 U.S. at 8).

22. 447 U.S. 231 (1980).

23. Jenkins v. Anderson, 447 U.S. 231, 238 (1980).

24. *Jenkins*, 447 U.S. at 232.

25. *Id.* at 232-33.

the two scuffled, and in self-defense, Jenkins stabbed Redding.[26] During cross-examination, the prosecutor attempted to impeach the credibility of Jenkins' self-defense claim by questioning Jenkins on how long it took him to tell anyone of the scuffle or go to the police.[27] In closing arguments, the prosecutor again referred to Jenkins' pre-arrest silence, indicating if it were really self-defense Jenkins would not have waited two weeks to come forward.[28] Convicted of manslaughter, the court sentenced Jenkins to ten to fifteen years in state prison.[29]

After being convicted, Jenkins sought a writ of habeas corpus first in federal district court, and then in the United States Court of Appeals for the Sixth Circuit, arguing that the prosecutor's questioning infringed upon his constitutional rights.[30] Specifically, Jenkins argued that the prosecutor's comments on his failure to come forward regarding his self-defense claim violated his Fifth and Fourteenth Amendment rights because this silence constituted an exercise of his right against self-incrimination.[31] Although it did not offer any rationale for its ruling, the Sixth Circuit affirmed the district court's decision to deny relief.[32]

Jenkins appealed the decision to the United States Supreme Court, which granted certiorari.[33] Jenkins again argued that the prosecutor's conduct had violated Jenkins' Fifth Amendment rights as incorporated into the Fourteenth Amendment.[34] The only case that could be interpreted to support Jenkins' claim was *Doyle v. Ohio*,[35] in which the Supreme Court clarified that the use of a defendant's post-arrest silence for impeachment purposes violates the Due Process Clause of the Fourteenth Amendment.[36] The Supreme Court affirmed the lower courts' denial of Jenkins' petition for a writ of habeas corpus and distinguished Jenkins' case from *Doyle* because the prosecutor did not question Jenkins regarding his post-arrest silence for the purposes of impeachment.[37] In explaining the reason for the different treatment of post-arrest and pre-arrest silence, the Court stated that post-arrest silence can be attributed to the implicit guarantee found in *Mi-*

26. *Id*. at 233.
27. *Id.* at 233, 235.
28. *Id.* at 234-35.
29. *Id.* at 234.
30. *Id*. Jenkins failed to get a reversal on appeal, and the Michigan Supreme Court denied certiorari. *Id*.
31. *Id.*
32. Jenkins v. Anderson, 599 F.2d 1055, 1055 (6th Cir. 1979).
33. *Jenkins,* 447 U.S. at 234.
34. *Id.* at 235.
35. 426 U.S. 610 (1976).
36. *Jenkins*, 447 U.S. at 239-40 (citing Doyle v. Ohio, 426 U.S. 610, 619 (1976)).
37. *Id.* at 239-40 (distinguishing post-arrest silence from pre-arrest silence).

randa warnings that silence will not be penalized.[38] The Court recognized that the Fifth Amendment guarantees the privilege of an accused to remain silent during his trial without comment by the prosecutor on the accused's exercise of this privilege.[39] However, the Court found that Jenkins did not remain silent during the trail, but instead took the stand for his own defense.[40] A defendant who testifies as a part of his defense can be impeached by his prior silence.[41]

The Court recognized the argument that people facing arrest will not feel free to remain silent if their failure to speak can later be used to impeach them.[42] However, the Court reiterated the rule that the Constitution does not forbid all government-imposed choices that have an effect of discouraging the accused from exercising their constitutional rights.[43] The test to determine whether the restriction is permissible evaluates whether compelling the choice impairs to an appreciable extent the policies that are the foundation of the right involved.[44] The Court emphasized that the privilege to refuse to testify cannot be construed to encompass the right to commit perjury.[45] Once a criminal defendant takes the stand, the prosecution may utilize the traditional truth-testing devices available in the criminal justice system.[46] After concluding that pre-arrest silence may be utilized to impeach a defendant, the Court added that each jurisdiction may create its own rules of evidence for determining whether the reference to prior silence is probative for purposes of contrasting that silence with current statements.[47]

In *Jenkins*, Justice Stevens concurred, stating that a defendant's claim of privilege against self-incrimination is irrelevant to a person's decision to remain silent when the person is not under official compul-

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38. *Id.*

39. *Id.* at 235 (citing Griffin v. California, 380 U.S. 609, 614 (1965)).

40. *Id.*

41. *Id*. (citing Raffel v. United States, 271 U.S. 494 (1926)). In *Raffel*, the defendant was tried twice. *Jenkins*, 447 U.S. at 235. During the first trial, the defendant exercised his right to remain silent. *Id*. During the second trial, the defendant took the stand in his own defense. *Id*. On cross-examination, the prosecutor commented on the defendant's failure to testify in the first trial. *Id.* The Court held that the comment was proper because the defendant had waived his right to remain silent by offering himself as a witness. *Id*. When on the stand, the defendant is treated as any other witness, susceptible to cross-examination. *Id.* Therefore, the defendant's credibility could be impeached just like any other witness. *Id*. at 235-36 (citing Grunewald v. United States, 353 U.S 391, 420 (1957)).

42. *Id.* at 236.

43. *Id.* (citing Chaffin v. Stynchcombe, 412 U.S. 17, 30 (1973); Corbitt v. New Jersey, 439 U.S. 212, 218 n.8 (1978)).

44. *Jenkins*, 447 U.S. at 236 (citing *Chaffin*, 412 U.S. at 32).

45. *Id.* at 237-38 (quoting Harris v. New York, 401 U.S. 222, 225 (1971)).

46. *Id.*

47. *Id.* at 238-39.

sion to speak.[48] Justice Stevens explained that when determining whether the right to remain silent is applicable, the test is whether the defendant's testimony could be compelled in that situation and whether the defendant asserted the privilege.[49] Instead of deeming it a constitutional issue, Justice Stevens classified the question of whether comment may be made on the defendant's pre-arrest silence as a routine evidentiary question, whose answer depends upon the evidence's probative value.[50]

Justice Marshall, joined by Justice Brennan, dissented, opining that the decision in *Jenkins* undercut the two major rights that form the foundation of the United States constitutional system: the right against self-incrimination and the right to a defense.[51] In this dissent, the justices pointed out three fatal defects in the majority's holding.[52] First, the mere presence of pre-arrest silence is so unlikely to be probative regarding the truth or lack thereof in the defendant's trial testimony that its use for impeachment contradicts the Due Process Clause of the Fourteen Amendment.[53] Second, the adverse inference drawn from the silence, which is a failure to volunteer incriminating information, impermissibly infringes upon the right to avoid self-incrimination.[54] Third, the possibility of a negative inference drawn from the silence impermissibly burdens the choice to exercise the constitutional right to testify as a part of one's defense.[55] The dissent argued that due to the absolute right to testify as a part of one's own defense and an absolute right to avoid self-incrimination, the government cannot force a defendant to choose to exercise only one of those fundamental rights.[56]

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48. *Id*. at 241 (Stevens, J., concurring).

49. *Id*. at 243-44 (Stevens, J., concurring) (explaining that the test is whether a defendant "was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent.").

50. *Id*. at 244.

51. *Id*. at 246 (Marshall, J., dissenting).

52. *See id*. (clarifying that these "fatal" defects are Justice Stevens' and Justice Brennan's own view).

53. *Id*. The justices recognized other possible explanations for silence, such as the fear of retaliation or the belief that if a person did not commit a crime, that person has no need to go to the police to explain herself. *Id.* at 248.

54. *Id*. at 246.

55. *Id.*

56. *Id*. at 251.

C. *Salinas v. Texas*: The Supreme Court Remains Silent on the Use of Pre-Arrest Silence as Substantive Evidence of Guilt

In *Salinas v. Texas*,[57] the United States Supreme Court avoided addressing the question of whether the use of pre-arrest silence as substantive evidence of guilt is constitutional.[58] Instead, the Supreme Court focused on whether the defendant, Genovevo Salinas, properly invoked the privilege against self-incrimination to receive its protections.[59] Before ever being arrested or read *Miranda* warnings, Salinas handed over his gun and answered questions from police conducting a double homicide investigation.[60] Salinas answered most of the police officer's questions, but when the officer asked whether his gun would match the shells found at the crime scene, Salinas became silent.[61] Police testified that in response to the question, Salinas looked to the floor and began shuffling his feet, biting his lip, and clenching his hands.[62] Salinas did, however, answer other questions once the officer moved on.[63]

When Texas officials tried him for those murders, Salinas chose not to testify.[64] During the trial, the prosecutor introduced Salinas' physical reaction and verbal silence to the officer's question as substantive evidence of guilt.[65] The jury convicted Salinas of murder.[66]

Salinas appealed to the Court of Appeals of Texas, claiming his Fifth Amendment right against self-incrimination had been violated.[67] The court of appeals affirmed the jury's verdict, reasoning that the Texas officials did not compel Salinas' silence pre-arrest nor pre-*Miranda*, which rendered the Fifth Amendment privilege against self-incrimination inapplicable.[68] Salinas then petitioned for discre-

57. 133 S. Ct. 2174 (2013).

58. Salinas v. Texas, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., concurring) (noting the case was resolved on other grounds and recognizing that the plurality opinion avoided addressing the question posed to it: whether the Fifth Amendment right against compulsory self-incrimination is violated by the use of a defendant's pre-arrest silence as evidence of substantive guilt).

59. *Salinas*, 133 S. Ct. at 2184.

60. *Id.* at 2178.

61. *See id*. (continuing to refuse to answer the question and sitting silent for several moments).

62. *See id*. (characterizing him as beginning to "tighten up").

63. *Id*.

64. *Id*.

65. *Id*.

66. *See id*. (sentencing him to twenty years in prison).

67. *Id.* at 2177-78.

68. *Id*. at 2178.

tionary review to the Texas Court of Criminal Appeals.[69] The Texas Court of Criminal Appeals affirmed the lower court's decision.[70]

Salinas appealed to the United States Supreme Court, which granted certiorari due to the split in authority regarding the admissibility of a defendant's exercise of the privilege against self-incrimination during pre-arrest interviews with police.[71] The Supreme Court stated that the prosecutor did not violate Salinas' Fifth Amendment right against self-incrimination by commenting on his pre-arrest silence because Salinas did not explicitly invoke the right in response to the officer's questions.[72] The privilege must be claimed as it is not effective immediately.[73] This requirement puts the government on notice to enable the prosecution to prove the testimony will not be self-incriminating or fix any potential self-incrimination.[74]

In a concurring opinion, Justice Thomas noted that although the Court granted certiorari to address the split authority on whether utilizing pre-arrest silence violated the Fifth Amendment protection against compulsory self-incrimination, the plurality decided the case on other grounds.[75] Justice Thomas, however, proceeded to address the question, determining that individuals could not seek protection under the Fifth Amendment pre-arrest because the prosecutor's comments about the pre-arrest silence did not compel Salinas to make additional statements.[76] Therefore, although he agreed that Salinas' claim should fail, Justice Thomas believed resolving the case upon this ground simplified the opinion.[77]

Justice Breyer wrote the dissenting opinion, which also addressed the question, and determined that the Fifth Amendment prohibits comment on an accused's silence in response to police questioning.[78] The dissent reasoned that silence is an attempt to avoid serving as a witness against oneself, citing *Miranda v. Arizona*[79] to emphasize the impermissibility of penalizing a person for invoking their Fifth

69. *Id*. at 2179.
70. *Id*.
71. *See id*. (deeming pre-arrest police interviews "noncustodial").
72. *Id*. at 2179, 2184.
73. *See id*. at 2178 (recognizing that this is a well-established rule) (citing Minnesota v. Murphy, 465 U.S. 420, 425, 427 (1984)).
74. *See id*. at 2179 (allowing the government to prove the evidence would not be self-incriminating and enabling the state to cure potential self-incrimination by granting immunity) (citing Hoffman v. United States, 341 U.S. 479, 486 (1951) and Kastigar v. United States, 406 U.S. 441, 448 (1972)).
75. *Id*. at 2184 (Thomas, J., concurring).
76. *Id.*
77. *Id*.
78. *Id*. at 2185 (Breyer, J., dissenting). The dissent was joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan. *Id.*
79. 384 U.S. 436 (1966).

Amendment right when in police custody.[80] The dissent explained that if the state could comment on the accused's silence, any option the accused chose would provide the state with assistance in proving its case: to answer could give the state prejudicial information, to remain silent would make the accused a witness against himself, and to take the stand to explain speech or silence would give the state an opportunity to impeach the accused.[81] No matter the choice regarding speech or silence, the accused would be put in an impossible situation.[82]

D. You *Might* Have A Right to Remain Silent (Depending Upon What Circuit you are in): The Circuit Split on the Use of Pre-Arrest Silence as Substantive Evidence of Guilt

1. The Fifth, Eighth, Ninth, and Eleventh Circuits Decide the Use of Pre-Arrest Silence is Admissible as Substantive Evidence of Guilt

a. The Ninth Circuit: *United States v. Oplinger*

In *United States v. Oplinger*,[83] the United States Court of Appeals for the Ninth Circuit held the admission of testimony and evidence regarding the accused's pre-arrest silence did not violate the accused's right against self-incrimination.[84] William Oplinger was employed as a supply coordinator at a bank.[85] In dealing with the vendors with which the bank had a cash purchase agreement, Oplinger would purchase unneeded supplies, return the extra supplies, and then pocket the cash.[86] When the bank's officers questioned him after discovering the stolen money, Oplinger stated he did not know anything, reiterating this response to each question.[87]

During his first trial in the United States District Court for the Western District of Washington for twenty-one counts of bank fraud, Oplinger took the stand.[88] The judge, however, declared a mistrial

80. *Id*. at 2185 (citing Miranda v. Arizona, 384 U.S. 436, 468 (1966)).
81. *Id*. at 2186.
82. *Id*.
83. 150 F.3d 1061 (9th Cir. 1998). This case has since been overruled in part regarding the Court's interpretation of U.S. Sentencing Guidelines Manual § 3B1.3 on the abuse of positions of trust or use of special skill. It has not affected the court's holding on the use of pre-arrest silence. *See* United States v. Contreras, 593 F.3d 1135, 1136 (9th Cir. 2010) (stating that the court of appeals overruled any of its cases to the extent the cases conflict with its interpretation of U.S. Sentencing Guidelines Manual § 3B1.3).
84. United States v. Oplinger, 150 F.3d 1061, 1067 (9th Cir. 1998).
85. *Oplinger*, 150 F.3d at 1063.
86. *Id*. at 1064.
87. *Id*.
88. *See id*. (failing to offer any evidence of these subsequent purchases).

because the jury could not reach a verdict.[89] During his second trial, Oplinger did not testify.[90] The prosecutor presented evidence that the subsequent purchases would not have been made with cash, contradicting Oplinger's claims from the first trial, because almost all the other vendors had a credit system with the bank.[91] This time the district court convicted Oplinger.[92]

Oplinger appealed to the United States Court of Appeals for the Ninth Circuit, claiming the district court erred in admitting testimony and prosecutorial comment in closing arguments on Oplinger's meeting with the bank's managers.[93] Oplinger argued that as soon as he realized the meeting was an informal hearing before termination and that his responses would be reported to police officials, he consciously remained silent.[94] Oplinger claimed this was an impermissible reference to his pre-arrest silence, which was protected by the Fifth Amendment privilege against self-incrimination.[95]

The United States Court of Appeals for the Ninth Circuit held that because the prosecutor's comment on Oplinger's pre-arrest silence was not impermissible, Oplinger did not suffer a violation of his Fifth Amendment privilege against self-incrimination.[96] Recognizing the Supreme Court had yet to address the split in authority on the constitutionality of admitting pre-arrest silence as evidence of guilt, the Ninth Circuit looked toward Justice Stevens' concurring opinion in *Jenkins v. Anderson*[97] as support for its holding.[98] The Ninth Circuit agreed with Justice Stevens that one's right to remain silent is irrelevant before the individual has contact with state officials because the individual is not officially compelled to speak.[99]

Surveying the circuits that had examined issue, the Ninth Circuit chose to join the United States Courts of Appeals for the Fifth and Eleventh Circuits.[100] The Ninth Circuit reasoned that the right against self-incrimination protected by the Fifth Amendment does not

89. *Id*.
90. *Id.*
91. *Id*. The bank had a credit agreement established with Office Depot, which Oplinger claimed was the primary place he made subsequent purchases with the cash from the refunds. *Id.*
92. *Id*.
93. *Id*. at 1065-66.
94. *Id*. at 1066.
95. *See id*. (arguing it was a "pretermination hearing").
96. *Id*. at 1067.
97. 447 U.S. 231 (1980).
98. *Id*. at 1066 (citing Jenkins v. Anderson, 447 U.S. 231, 241 (1980) (Stevens, J., concurring)).
99. *Oplinger*, 150 F.3d at 1066.
100. *See id*. at 1067 (examining the United States Courts of Appeals for the First, Fifth, Seventh, Tenth, and Eleventh Circuits).

prohibit proper evidentiary use of all communication or silence by the accused that may lead to incriminating inferences about the accused.[101] Instead, it only prevents evidentiary use of silence when one is compelled to speak.[102] The court disagreed with the United States Courts of Appeal for the First, Seventh, and Tenth Circuits, reasoning that based upon the unambiguous language of the Fifth Amendment, a person must be compelled to speak before the right against self-incrimination is applicable.[103]

b. The Eleventh Circuit: *United States v. Rivera*

In *United States v. Rivera*,[104] the United States Court of Appeals for the Eleventh Circuit determined that the prosecutor may comment on an accused's silence if the silence occurred pre-arrest or post-arrest but pre-*Miranda* warning.[105] In *Rivera*, Johnny Rivera and Elena Vila were charged with conspiracy to import cocaine, importation of cocaine, and possession with the intent to distribute cocaine.[106] Before their arrest, Rivera and Vila were confronted at an airport after being noticed for acting suspiciously.[107] When the customs inspector searched their bags, Rivera and Vila said nothing and had expressionless faces, even as cocaine was discovered.[108] The two had not yet been arrested or read their *Miranda* rights.[109]

During the trial in the United States District Court for the Southern District of Florida, the customs inspector testified about the group's lack of reaction.[110] In closing arguments, the prosecutor pointed out that the group had remained expressionless, asking the jury to infer the reactions were planned in the event of discovery.[111] A jury convicted the two on all charges.[112]

On appeal to the United States Court of Appeals for the Eleventh Circuit, Vila argued the district court erred in admitting the testimony and prosecutorial comment regarding the group's silence before

101. *Id*. (citing United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996)).
102. *See id*. at 1066 (agreeing with Justice Stevens' position, which requires compulsion of speech for the privilege to offer protection) (quoting *Jenkins*, 447 U.S. at 241 (Stevens, J., concurring)).
103. *See id*. at 1067 (emphasizing that "no person shall be *compelled*") (quoting U.S. CONST. amend. V).
104. 944 F.2d 1563 (11th Cir. 1991).
105. United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991).
106. *Rivera*, 944 F.2d at 1565.
107. *See id*. (noting the suspicion was based on age, speaking without accents, arriving from Colombia, and having passports issued so closely to the date of travel).
108. *Id*. at 1565.
109. *Id*. at 1565-66.
110. *Id*. at 1567.
111. *Id*.
112. *Id*. at 1565.

being arrested and read their *Miranda* warnings.[113] The Eleventh Circuit affirmed the convictions, stating the government may comment on an accused's silence as long as the *Miranda* warning has not yet been read.[114] The court reasoned that once *Miranda* is read, individuals are assured their silence is protected and cannot be used to penalize or incriminate the defendant.[115] The Eleventh Circuit noted that to penalize individuals after assuring them they had the right to remain silent would violate fundamental fairness.[116] However, before the *Miranda* warning is read, there are no issues of fundamental fairness or constitutional infringements.[117]

c. The Fifth Circuit: *United States v. Zanabria*

In *United States v. Zanabria*,[118] the United States Court of Appeals for the Fifth Circuit found the Fifth Amendment does not prohibit evidentiary use of pre-arrest silence.[119] In *Zanabria*, the United States District Court for the Southern District of Texas tried Miguel Zanabria on charges of possession with the intent to distribute cocaine and unlawful importation.[120] Zanabria presented duress as a defense, claiming that a creditor threatened the life of his daughter and these threats forced him to transport drugs to pay back the money in order to protect her.[121] At trial, the arresting officer testified that Zanabria had neither mentioned the death threats against his daughter nor indicated he was in danger or needed the officer's help.[122] In closing arguments, relying on the officer's testimony to undercut the duress defense, the prosecutor noted that the death threats were never reported in the United States or Colombia, where the child lived.[123] A jury convicted Zanabria on both counts.[124]

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113. *Id*. at 1567.

114. *See id*. at 1564, 1568 (explaining the government may comment on pre-arrest silence, as well as *post*-arrest silence *before* a Miranda warning has been read to the accused).

115. *See id*. at 1567 (stating that the Miranda warning carries the implicit guarantee that a person's silence will not carry a penalty) (quoting Wainwright v. Greenfield, 474 U.S. 284, 290 (1986)).

116. *Id*.

117. *Id*. at 1568.

118. 74 F.3d 590 (5th Cir. 1996).

119. United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996).

120. *Zanabria*, 74 F.3d at 591.

121. *Id*. at 592. His wife supported this claim by testifying that an unidentified third party made death threats against the couple's eight-year-old daughter attributed to unpaid debts. *Id.*

122. *Id*. at 593. This officer was the customs officer at the Houston Intercontinental Airport, finding the drugs during a customs search. *Id*. at 592-93.

123. *Id.* at 593.

124. *Id*. at 591-92. In its judgment, the district court inadvertently stated that Zanabria had been convicted of "conspiracy to possess cocaine" rather than the proper

Zanabria then appealed to the United States Court of Appeals for the Fifth Circuit, claiming the district court erred in admitting evidence of his pre-arrest silence, which had violated his Fifth Amendment right against self-incrimination.[125] The Fifth Circuit found that this testimony of pre-arrest silence was admissible as substantive evidence of guilt.[126] The court noted the government agent did not compel the silence in question.[127] The Fifth Circuit determined the Fifth Amendment provides protection against compelled self-incrimination, but it does not prevent appropriate evidentiary use and prosecutorial comment on all of the accused's communications or silences that could lead to incriminating inferences.[128]

d. The Eighth Circuit: *United States v. York*

In *United States v. York*,[129] the United States Court of Appeals for the Eighth Circuit concluded the prosecutorial comment on pre-arrest silence to indicate substantive evidence of guilt is not erroneous.[130] In *York*, Perry York was convicted in the United States District Court for the District of Minnesota for armed robbery.[131] Although York's attorney conceded that York participated in the robbery, the attorney presented a defense of entrapment during trial because one of York's co-defendants was a paid FBI informant.[132] York chose not to take the stand.[133] During closing arguments, the prosecutor commented on York's silence, pointing out that never once did York go the police or FBI to report the terrible things York claimed the informant committed to cause the alleged entrapment.[134]

York appealed to the United States Court of Appeals for the Eighth Circuit, claiming the district court erred in allowing the prosecutor to make an impermissible statement regarding York's post-ar-

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conviction of "possession with intent to distribute cocaine." *Id*. This error was later cured on remand. *Id*. at 593.

125. *See id*. at 592-93 (stating procedural history and noting Zanabria's claim of error).

126. *Id*. at 593.

127. *Id.*

128. *See id*. (stating the rule which encompasses "communication or lack there of") (emphasis omitted).

129. 830 F.2d 885 (8th Cir. 1987).

130. United States v. York, 830 F.2d 885, 896 (8th Cir. 1987).

131. *See York*, 830 F.2d at 888 (enhancing the crime for the use of a fire arm during the commission of a crime and sentencing York to fifteen year and five year consecutive sentences).

132. *Id*. at 888-89.

133. *Id*. at 888.

134. *Id*. at 895.

rest, post-*Miranda* warning silence.[135] Although York recognized the prosecutor's assertion that its closing argument was a comment on York's pre-arrest silence of failing to go to the police, York argued that by pointing out York's pre-arrest silence it impermissibly implicated his post-arrest silence.[136] The Eighth Circuit concluded no constitutional error was committed by commenting on York's pre-arrest silence.[137]

2. The First, Sixth, Seventh, and Tenth Circuits Determined the Use of Pre-Arrest Silence is Inadmissible as Substantive Evidence of Guilt

a. The First Circuit: *Coppola v. Powell*

In *Coppola v. Powell*,[138] the United States Court of Appeals for the First Circuit found that the accused's statement of refusal to talk to the police without a lawyer invoked the privilege against self-incrimination, even though the statement was made before the *Miranda* rights were read.[139] Before charging Vincent Coppola with burglary and aggravated felonious sexual assault, police officers approached Coppola on two separate occasions with questions regarding the crimes.[140] On the second occasion, Coppola told the police officers he was not ignorant and repeatedly stated he would not confess to them.[141] The New Hampshire state court admitted testimony on Coppola's statement and tone of voice to the officers, reasoning the pre-arrest statement was not an invocation of the right to remain silent.[142] A jury found Coppola guilty, and the New Hampshire Supreme Court affirmed the convictions.[143]

Coppola petitioned the United States District Court for the District of New Hampshire for a writ of habeas corpus, but the district court denied the petition.[144] Coppola then appealed to the United

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135. *Id.* at 895. The prosecutor said, "And never, never once did [York] tell the police or the FBI about this terrible thing that [the informant] had done to him . . . ." *Id*. (clarification added to identify parties).

136. *Id*. (citing Doyle v. Ohio, 426 U.S 610 (1976)).

137. *Id*. at 896. The court also clarified that any chance of error that the jury would think the prosecutor's comments were about York's failure to take the stand during trail was cured by the district court's admonition. *Id.*

138. 878 F.2d 1562 (1st Cir. 1989).

139. Coppola v. Powell, 878 F.2d 1562, 1567 (1st Cir. 1989).

140. *See Coppola*, 878 F.2d at 1563 (describing how the victim gave a detailed description of her attacker and his license plate, which was tracked to Coppola's residence where he was approached by officers and questioned on two separate occasions).

141. *Id*.

142. *See id*. at 1564 (reporting Coppola made his statement in a "bragging tone of voice").

143. *Id.* at 1563.

144. *See id*. (agreeing with New Hampshire Supreme Court's reasoning).

States Court of Appeals for the First Circuit, claiming the use of Coppola's statement to the police was an infringement upon Coppola's Fifth Amendment right against self-incrimination.[145]

The United States Court of Appeals for the First Circuit issued the writ of habeas corpus.[146] The First Circuit explained that a suspect questioned during a criminal investigation had the right to remain silent because, unlike the right to counsel, the right to remain silent attaches before the formal adversary proceedings begin.[147] The First Circuit noted that an individual could assert the right to remain silent in any type of proceeding.[148]

The First Circuit stated that whether the right had attached to enable the defendant to exercise the privilege depended upon whether answering the question could lead to a harmful disclosure.[149] The First Circuit recognized that Coppola had verbally stated his refusal rather than indicating refusal through actual silence.[150] The court declined to interpret a verbal exercise of the right to remain silent as a wavier of the privilege because such interpretation would contradict the principle that a claim of the privilege need not be a formulaic combination of words.[151] The court noted that the purpose of the right against self-incrimination is to protect both the innocent and guilty, and, thus, the right requires a liberal application.[152]

b. The Sixth Circuit: *Combs v. Coyle*

In *Combs v. Coyle*,[153] the United States Court of Appeals for the Sixth Circuit held that the use of pre-arrest silence as substantive evidence of guilt unconstitutionally infringed upon the Fifth Amendment right against self-incrimination.[154] An Ohio state court convicted Ronald Combs of two counts of murder.[155] During the commission of the crime, an off-duty police officer saw Combs shoot two women and subsequently shot Combs six times after he refused to drop his

145. *Id*. at 1564.
146. *Id*. at 1571.
147. *Id*. at 1565 (quoting United States ex rel. Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987)).
148. *See id*. (stating that the privilege can be asserted in any proceeding, including "civil or criminal, administrative or judicial, investigatory or adjudicatory . . . .") (quoting Kastigar v. United States, 406 U.S. 441, 444 (1972)).
149. *Id*. (citing Hoffman v. United States, 341 U.S. 479, 486-87 (1951)).
150. *Id*.
151. *Id*. at 1566.
152. *Id*. (citing Maffie v. United States, 209 F.2d 225, 227 (1st Cir. 1957) and *Hoffman*, 341 U.S. at 486).
153. 205 F.3d 269 (6th Cir. 2000).
154. Combs v. Coyle, 205 F.3d 269, 283 (6th Cir. 2000).
155. *Combs*, 205 F.3d at 272.

weapon and made an aggressive movement.[156] As soon as another officer arrived on the scene, he asked Combs what had happened, and Combs informed him that the off-duty officer had shot him.[157] The second time the officer asked the question, Combs referred the officer to his lawyer.[158] During trial, the on-duty police officer testified about Combs' answers to his questions.[159] The trial judge instructed the jury that although they could not draw any inferences against or for Combs based on either his request for counsel or his subsequent silence, the jury could consider the evidence as it related to the purpose, motive, and design of the offense.[160]

After exhausting appeals at the state and federal level, Combs petitioned for a writ of habeas corpus to the United States Court of Appeals for the Sixth Circuit, claiming the district court erred in admitting the officer's testimony and in instructing the jury.[161] The Sixth Circuit concluded that the prosecutor's use of Combs' pre-arrest silence was not a legitimate government practice because it violated Combs' Fifth Amendment right against self-incrimination.[162] The court distinguished this case from the *Doyle* line of cases, which rests on the theory that *Miranda* warnings implicitly guarantee that silence will not be penalized and post-*Miranda* silence is protected by due process.[163] Although the *Doyle* cases indicate that comment on pre-*Miranda* silence does not necessarily violate due process, the court noted that right against self-incrimination could still be violated.[164]

Recognizing the split among numerous circuit courts which have weighed in on the use of pre-arrest silence as substantive evidence of guilt, the Sixth Circuit surveyed the reasoning behind each position.[165] The Sixth Circuit agreed with the reasoning of the First, Seventh, and Tenth Circuits and held that the use of pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination.[166] The Sixth Circuit stated that people could exercise the privilege against self-incrimination when ques-

156. *Id*. at 273.
157. *See id*. at 278-79 (saying, "[T]he guy shot me.").
158. *Id*.
159. *Id*. at 279.
160. *Id*.
161. *Id*. at 274, 278. Combs specifically petitioned for a writ of habeas corpus to the United States District Court for the Southern District of Ohio. *Id.* at 274. The district court denied this petition, finding all of Combs' claims barred or meritless. *Id*.
162. *Id*. at 285-86.
163. *Id*. 280.
164. *See id*. (distinguishing because Combs' silence was pre-arrest, pre-Miranda warnings).
165. *See id*. at 282-83 (describing the split and the reasoning of each court, indicating with which courts the Sixth Circuit agreed).
166. *Id*. at 283.

tioned as suspects during an investigation.[167] Citing the United States Supreme Court in *Hoffman v. United States*,[168] the Sixth Circuit recognized that the privilege was confined only to instances where a witness had cause to fear danger of incrimination arising from the witness's response.[169] As additional support for its holding, the Sixth Circuit noted that even under Justice Stevens' logic in his concurrence in *Jenkins,* the Fifth Amendment could apply in certain situations to protect an individual's right to remain silent pre-arrest, specifically when that person's testimony could be compelled.[170]

c. The Tenth Circuit: *United States v. Burson*

In *United States v. Burson*,[171] the United States Court of Appeals for the Tenth Circuit concluded that the admission of testimony regarding a person's pre-arrest silence constituted a clear error.[172] The United States District Court for the District of New Mexico convicted Cecil Burson of tax evasion.[173] During the trial, the prosecution called two Internal Revenue Service investigators to the stand that had attempted to question Burson as a part of their investigation.[174] The investigators testified that on the day of the scheduled interview, they arrived to find Burson wielding a tape recorder, attempting to interrogate them instead.[175] Burson refused to answer any of the investigators' questions, which the prosecutor later emphasized at trial.[176]

Burson appealed to the United States Court of Appeals for the Tenth Circuit, arguing that the prosecution had presented the pre-arrest silence as substantive evidence of guilt, which violated his Fifth

167. *Id*. (quoting Coppola v. Powell, 878 F.2d 1562, 1565 (1st Cir. 1989)).
168. 341 U.S. 479 (1951).
169. *Combs*, 205 F.3d at 283 (quoting Hoffman v. United States, 341 U.S. 479, 486-87 (1951)).
170. *See id*. at 283-84 (applying Justice Stevens' reasoning to defendant Combs' situation and finding that one can be compelled when one reasonably believes there is a restraint on the freedom of movement or formal arrest and citing other Supreme Court cases to define what constitutes custody) (quoting Stansbury v. California, 511 U.S. 318, 322 (1994) and Berkemer v. McCarty, 468 U.S. 420, 442 (1984)). Custody is a set of circumstances surrounding interrogation in which there is a formal arrest or a restriction on freedom of movement generally associated with formal arrest. *Stansbury*, 511 U.S. at 322. A relevant factor in determining whether one is in custody is assessing how a reasonable person would have comprehended the situation. *Berkemer*, 468 U.S. at 442.
171. 952 F.2d 1196 (10th Cir. 1991).
172. United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991).
173. *Burson*, 952 F.2d at 1198.
174. *Id*. at 1200.
175. *Id*. at 1198, 1200. The investigators were seeking information about the activities of a separate taxpayer, which turned out to be a fake identity created by Burson to carry out the tax evasion. *Id.* at 1199.
176. *Id*. at 1200.

Amendment privilege against self-incrimination.[177] The Tenth Circuit concluded the admission did in fact violate Burson's Fifth Amendment privilege against self-incrimination.[178] The Tenth Circuit stated it was clear from the investigators' testimony that they met with Burson with the intention of questioning him about his financial status, pursuant to a criminal investigation.[179] The court also concluded it was quite clear that Burson invoked his right to remain silent to avoid self-incrimination while not in police custody.[180] Once a person invokes his right to remain silent, the Fifth Amendment applies, prohibiting prosecutorial comment on the invocation of that right.[181]

d. The Seventh Circuit: *United States ex rel. Savory v. Lane*

In *United States ex rel. Savory v. Lane*,[182] the United States Court of Appeals for the Seventh Circuit found that admission of pre-arrest silence as evidence of guilt constituted a constitutional error.[183] An Illinois state court convicted Johnnie Savory of two counts of murder.[184] During the trial, the prosecutor emphasized that Savory told the police he did not want to speak with them or make a statement regarding the murders.[185] Although the Illinois Appellate Court held that the prosecutorial comment and witness testimony about Savory's statement violated state law, it deemed this error harmless.[186] The United States District Court for the Northern District of Illinois denied Savory's petition for a writ of habeas corpus in which he claimed the errors noted by the state appellate court were not harmless.[187]

Savory then appealed to the United States Court of Appeals for the Seventh Circuit.[188] The Seventh Circuit found the state could not use Savory's silence as evidence of guilt.[189] The court reasoned that

177. *Id.*

178. *Id*. at 1201. Although the court concluded it was a constitutional error, violating one of Burson's rights, the Tenth Circuit proceeded to analyze whether the error was harmless beyond a reasonable doubt. *Id*. at 1201-02.

179. *Id*. at 1200.

180. *Id*.

181. *See id.* at 1201 (noting the exception to the general rule, which is that pre-arrest silence may be used for impeachment purposes) (citing Griffin v. California, 380 U.S. 609, 615 (1965)).

182. 832 F.2d 1011 (7th Cir. 1987).

183. United States ex rel. Savory v. Lane, 832 F.2d 1011, 1018 (7th Cir. 1987).

184. *Savory*, 832 F.2d at 1012.

185. *Id*. at 1015.

186. *See id*. at 1016 (indicating the standard for reversal is whether the error was "harmless beyond a reasonable doubt").

187. *Id*. at 1012.

188. *Id*.

189. *Id*. at 1017 (citing Griffin v. California*,* 380 U.S. 609 (1965)). In *Griffin*, the Supreme Court held that a prosecutor or court cannot ask the jury to infer guilt from an accused's decision not to take the stand. *Id*. Although *Griffin* addresses comment on an

unlike the Sixth Amendment right to counsel, the right to remain silent does not require formal or adversarial proceedings for the right to attach.[190] In coming to this opinion, the court cited the United States Supreme Court's reasoning in *United States v. Gouveia*[191] to support its own reasoning.[192] In *Gouveia*, the Supreme Court stated that the Sixth Amendment right to counsel does not apply until a defendant becomes an accused, as the term is used within the amendment.[193] The Seventh Circuit compared this Supreme Court explanation with the language used to codify the Fifth Amendment privilege against self-incrimination, specifically noting that the amendment used the word *person* as opposed to *accused*.[194] Therefore, using the same logic the United States Supreme Court had previously utilized, the Seventh Circuit found error in the lower court's admission of Savory's pre-arrest silence to imply guilt.[195]

III. ANALYSIS

The United States Courts of Appeals for the First, Sixth, Seventh, and Tenth Circuits correctly found the use of pre-arrest silence as substantive evidence of guilt is unconstitutional.[196] Although these circuits reached the same conclusion regarding the admissibility of the pre-arrest silence, they do not uniformly refer to the right allegedly violated by the use of pre-arrest silence as the right to remain silent.[197] Instead, many of the circuits, including those which deter-

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accused's silence during trial, rather than pre-arrest silence, the Seventh Circuit stated that this does not make a difference. *Id*.

190. *See id*. (comparing United States v. Gouveia, 467 U.S. 180, 188 (1984), noting the Sixth Amendment right to counsel does not "attach until the defendant becomes 'an accused' within the meaning of the amendment.", with U.S. CONST. amend. V, quoting the language of the amendment that "No *person* shall . . . be compelled in any criminal case to be a witness against himself . . . .").

191. 467 U.S. 180 (1984).

192. *Savory*, 832 F.2d at 1017 (citing United States v. Gouveia, 467 U.S. 180, 188 (1984)).

193. *Savory*, 832 F.2d at 1017 (citing *Gouveia*, 467 U.S. at 188).

194. *Id.* (quoting U.S. CONST. amend. V).

195. *Id.* at 1018.

196. *See infra* notes 216-283 and accompanying text.

197. *Compare* Coppola v. Powell, 878 F.2d 1562, 1564-65 (1st Cir. 1989) (explaining the three basic legal principles of the right against self-incrimination, which the court used as the basis for finding pre-arrest silence is inadmissible as substantive evidence of guilt), *and* Combs v. Coyle, 205 F.3d 269, 283 (6th Cir. 2000) (surveying the split and joining the First, Seventh, and Tenth Circuits' position, holding the use of pre-arrest silence violates the privilege against self-incrimination), *with* United States ex. rel. Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987) (focusing on when the right to remain silent attaches, even though the right against self-incrimination is mentioned), *and* United States v. Burson, 952 F.2d 1196, 1200-01 (10th Cir. 1991) (noting that while Burson claimed the prosecutor violated his "*right against self-incrimination*," the Tenth Circuit concluded that lower court's admission of the evidence was a plain error because "once a defendant invokes *his right to remain silent*, it is impermissible for the prosecu-

mined pre-arrest silence is admissible as substantive evidence of guilt, focus their analysis on what they deemed as the right or privilege against compelled self-incrimination.[198] Regardless of the right being identified as the right to remain silent or the right against self-incrimination, the Fifth Amendment of the United States Constitution is violated when evidence of pre-arrest silence is admitted into evidence as an indication of guilt.[199]

First, this Analysis will demonstrate the significance of the split that exists across state and federal courts regarding the use of pre-arrest silence as evidence of guilt, as well as the need for the United States Supreme Court to resolve this constitutional issue.[200] Second, this Analysis will explain how the Fifth Amendment protects the right to remain silent.[201] Next, this Analysis will argue Fifth Amendment rights attach before one is arrested or before formal charges have been brought, resulting in the Fifth Amendment protecting pre-arrest silence.[202] Subsequently, this Analysis will demonstrate how the Fifth Amendment prohibits admission of pre-arrest silence as substantive evidence of guilt in a criminal proceeding.[203] Then, this Analysis will identify and examine a likely objection to the underlying arguments of this Analysis.[204] Finally, this Analysis will rebut that objection by exposing an improper assumption utilized by the United States Courts of Appeals for the Fifth and Ninth Circuits regarding the necessity of

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tion to refer to any Fifth Amendment rights which defendant exercised") (emphasis added).

198. *Compare Savory*, 832 F.2d at 1017 (focusing on when the right to remain silent attaches, although the right against self-incrimination is mentioned), United States v. York, 830 F.2d 885, 895-96 (8th Cir. 1987) (concluding prosecutorial comment on York's pre-arrest silence did not violate the exercise of "*the right to remain silent*") (emphasis added), *and Burson*, 952 F.2d at 1200-01 (generally using the phrase the right to remain silent, but mentioning that "[w]hether Mr. Burson was advised of *his privilege against self-incrimination* is immaterial.") (emphasis added), *with Coppola*, 878 F.2d at 1564-65 (explaining the three basic legal principles of the privilege against self-incrimination), United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (addressing Zanabria's complaint that the lower court violated his Fifth Amendment right against self-incrimination by admitting evidence of his pre-arrest silence), *Combs*, 205 F.3d at 283 (surveying the split and joining the First, Seventh, and Tenth Circuits' positions, claiming use of pre-arrest silence violates the privilege against self-incrimination), *and* United States v. Oplinger, 150 F.3d 1061, 1066-67 (9th Cir. 1998) (analyzing the right against self-incrimination to hold no impermissible restraint upon its exercise); *but see* United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991) (using neither the phrase "the right to remain silent" nor "privilege against self-incrimination," instead noting there was no "constitutionally problematic" situation due to the comment on pre-arrest silence).

199. *See infra* notes 206-283 and accompanying text.

200. *See infra* notes 206-214 and accompanying text.

201. *See infra* notes 215-226 and accompanying text.

202. *See infra* notes 227-243 and accompanying text.

203. *See infra* notes 244-249 and accompanying text.

204. *See infra* notes 250-263 and accompanying text.

compulsion preventing protection of pre-arrest silence through the Fifth Amendment.[205]

A. Seeking an End to the Supreme Court's Silence: A Call for the Court to Resolve the Growing Divide on the Right to Remain Silent

Although the United States Supreme Court avoided resolving whether the use of pre-arrest silence as substantive evidence of guilt is constitutional, the growing split in federal and state courts has become too large and too significant for the Court to ignore any longer.[206] Currently, eight United States Courts of Appeals have addressed the issue, creating an even split for over the past sixteen years on whether the admission of pre-arrest silence as substantive evidence of guilt is constitutional.[207] Twenty state appellate courts and courts of last resort have weighed in on the issue as well, fourteen considering the evidence inadmissible and six allowing the use of pre-arrest silence as substantive evidence of guilt.[208]

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205. *See infra* notes 264-283 and accompanying text.

206. *See* Salinas v. Texas, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., concurring) (stating that the Court granted certiorari for the purpose of deciding whether the Fifth Amendment protection against compulsory self-incrimination prohibits the use of pre-arrest silence as evidence of guilt and recognizing that the Court never addressed the question but instead utilized different grounds for deciding the case).

207. *Compare* United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (finding that the Fifth Amendment does not prohibit substantive evidentiary use of pre-arrest silence), United States v. York, 830 F.2d 885, 896 (8th Cir. 1987) (concluding prosecutorial comment on pre-arrest silence to indicate substantive evidence of guilt is not erroneous), United States v. Oplinger, 150 F.3d 1061, 1067 (9th Cir. 1998) (holding that the admission of testimony and evidence regarding the accused's pre-arrest silence did not violate the accused's right against self-incrimination), *and* United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991) (determining that the prosecutor may comment on an accused's silence if the silence occurred pre-arrest or post-arrest but pre-*Miranda* warning), *with* Coppola v. Powell, 878 F.2d 1562, 1567 (1st Cir. 1989) (finding that an accused's refusal to talk to the police invoked the privilege against self-incrimination, even though a statement may be made pre-*Miranda* warning), Combs v. Coyle, 205 F.3d 269, 283 (6th Cir. 2000) (holding that the use of pre-arrest silence as substantive evidence of guilt unconstitutionally infringes upon Fifth Amendment right against self-incrimination), United States ex rel. Savory v. Lane, 832 F.2d 1011, 1018 (7th Cir. 1965) (finding the admission of pre-arrest silence as evidence of guilt constitutes a constitutional error), *and* United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991) (concluding that the admission of testimony regarding a person's pre-arrest silence constitutes a clear error).

208. *Compare* People v. Welsh, 80 P.3d 296, 299, 311 (Colo. 2003) (recognizing that the Colorado Court of Appeals ruled that pre-arrest silence was inadmissible but not reaching the issue itself after having granted certiorari), State v. Fencl, 325 N.W.2d 703, 711-12 (Wis. 1982) (noting the admission of pre-arrest silence of substantive evidence of guilt was a constitutional error, but determining the reference was too brief to warrant a new trial), State v. Lovejoy, 89 A.3d 1066, 1073 (Me. 2014) (concluding that people are endowed with constitutional protections compelled self-incrimination pre- and post-arrest), State v. Cassavaugh, 12 A.3d 1277, 1286 (N.H. 2010) (noting that it is well-established law in the state that if an individual does not testify, prosecutorial use

Beyond the sheer number of courts addressing and expanding the split on the issue, the United States' Constitution protects the right at the heart of the issue, meaning the courts are dealing with potential violations of a constitutional magnitude by the use of pre-arrest silence as evidence of guilt.[209] Because the United States Supreme

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of the individual's pre-arrest silence as part of the state's case-in-chief violates the constitution while citing the United States Court of Appeals for the First Circuit for guidance) (citing *Coppola*, 878 F.2d at 1562), State v. Boston, 663 S.E.2d 886, 895-96 (N.C. Ct. App. 2008) (agreeing with the United States Courts of Appeals for the First, Sixth, Seventh, and Tenth Circuits and, thus, holding that the Fifth Amendment privilege against self-incrimination protects individuals' silence extends beyond the realm of custodial interrogation to both before and after arrest), Weitzel v. State, 863 A.2d 999, 1002 (Md. 2004) (adopting the stance that evidence of pre-arrest silence "is too ambiguous to be probative" when the silence is in the presence of a police officer but doing so under Maryland's evidence laws as opposed to the United States' Constitution), State v. Leach, 807 N.E.2d 335, 342 (Ohio 2004) (concluding the use of pre-arrest, pre-Miranda silence as substantive evidence of guilt undermines and violates the Fifth Amendment privilege against self-incrimination), Commonwealth v. Thompson, 725 N.E.2d 556, 565 (Mass. 2000) (stating that the lower court erred in admitting evidence that Thompson had remained silent, staring at the floor when informed of his wife's death as substantive evidence of consciousness of guilt), State v. Moore, 965 P.2d 174, 180 (Idaho 1998) (adopting the position that the Fifth Amendment protects against the use of an individual's pre-arrest silence against them in a court proceeding), Taylor v. Commonwealth, 495 S.E.2d 522, 529 (Va. Ct. App. 1998) (finding that burden imposed upon the privilege against self-incrimination substantially outweighs any prosecutorial interest in utilizing pre-arrest silence to police officers' questions as substantive evidence of guilt), State v. Easter, 922 P.2d 1285, 1286 (Wash. 1996) (holding that the government violated the Fifth Amendment right to remain silent), Tortolito v. State, 901 P.2d 387, 388, 391 (Wyo. 1995) (reversing the conviction on the grounds that the prosecutor impermissibly commented on Tortolito's pre-arrest silence to indicate substantive evidence of guilt), State v. Palmer, 860 P.2d 339, 349-50 (Utah Ct. App. 1993) (concluding that the lower court erred in admitting of evidence regarding Palmer's choice pre-Miranda to remain silent to demonstrate consciousness of guilt), *and* State v. Rowland, 452 N.W.2d 758, 763 (Neb. 1990) (stating that the trial court erred in admitting evidence regarding Rowland's pre-arrest silence) (citing *Savory*, 832 F.2d at 1017-18), *with* State v. Lopez, 279 P.3d 640, 645 (Ariz. Ct. App. 2012) (finding that the United States Courts of Appeals for the Fifth, Ninth, and Eleventh Circuits were most persuasive, agreeing that the Fifth Amendment does not prohibit prosecutorial comment on an individual's silence pre-arrest), State v. Borg, 806 N.W.2d 535, 543 (Minn. 2011) (agreeing with Justice Steven's concurring opinion in *Jenkins v. Anderson* and holding that the Fifth Amendment does not protect an individual's silence if it is not compelled, indicating that it believes pre-arrest silence is not compelled), State v. LaCourse, 716 A.2d 14, 16 (Vt. 1998) (stating that the lower court did not err because nothing in the record indicated LaCourse was under arrest or in custody), People v. Schollaert, 486 N.W.2d 312, 316 (Mich. Ct. App. 1992) (concluding that state did not violate Schallaert's constitutional rights when it introduced and the court admitted evidence regarding his silence to indicate guilt), Waldo v. State, 746 S.W.2d 750, 755 (Tex. Crim. App. 1988) (stating the prosecution could inquire into Waldo's pre-arrest silence without impermissibly encroaching on his constitutional rights), *and* State v. Helgeson, 303 N.W.2d 342, 348 (N.D. 1981) (adopting Justice Steven's rationale and concluding the lower court did not err in its admission of Helgeson's pre-arrest silence).

209. *See Combs*, 205 F.3d at 281-83 (discussing the constitutional impact of admitting pre-arrest silence as substantive evidence of guilt); *Burson*, 952 F.2d at 1200 (recognizing the issue was determining whether the prosecutor's comment on Burson's silence constituted a violation of his constitutional right to remain silent); *Zanabria*, 74

Court has yet to resolve this split, a person's pre-arrest silence is treated as protected by the federal constitution in some states and circuits but disregarded as an unprotected action with severe consequences in others.[210]

The need for the Supreme Court to address this issue becomes even more apparent when the consequences of these trials are considered.[211] The right to remain silent protects people from being forced to disclose information that could be used against them in a current or future criminal prosecution.[212] This privilege is so vital; courts have even extended its scope to apply beyond the rigid confines of criminal adjudicatory proceedings.[213] Thus, when courts debate whether the right to remain silent is applicable, the accused's liberty or even life hangs in the balance.[214]

F.3d at 593 (addressing Zanabria's complaint that the prosecutor violated his constitutional right against self-incrimination); *Rivera*, 944 F.2d at 1568-69 (discussing which prosecutorial comments on a person's silence are constitutionally problematic).

210. *See, e.g.*, *Coppola*, 878 F.2d at 1563, 1565 (stating that the prosecutor violated Coppola's Fifth Amendment right to remain silent when the prosecutor presented testimony that he had said "I grew up on the streets . . . if you think I'm going to confess to you, you're crazy" because that statement constituted Coppola exercising his right to remain silent); *but see, e.g.*, *Oplinger*, 150 F.3d at 1066-67 (stating that the Fifth Amendment did not protect a person who became silent after he recognized that his answers in a pre-termination would be reported to the FBI, meaning the prosecutor could indicate the silence evidenced guilt).

211. *See Rivera,* 944 F.2d at 1565, 1569 (affirming Rivera's multiple conspiracy and drug-related convictions); *Coppola,* 878 F.2d at 1563 (ruling on Coppola's conviction for burglary and aggravated felonious sexual assault); *Savory*, 832 F.2d at 1012 (determining whether to affirm Savory's convictions for two counts of murder).

212. *See* U.S. CONST. amend. V (stating that "[n]o person . . . shall be compelled in any *criminal case* to be a witness against himself . . . .") (emphasis added). The Supreme Court clarified that "[t]o sustain the privilege, it need only be evidence from the implications of the question, in the setting which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Hoffman v. United States, 341 U.S. 479, 486 (1951).

213. *See* Kastigar v. United States, 406 U.S. 441, 444-45 (1972) (illustrating that although on its face the Fifth Amendment may seem to indicate that the Fifth Amendment only provides protection in criminal cases or proceedings, yet the Supreme Court has interpreted the Fifth Amendment's language to mean that it protects the speaker "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.").

214. *Compare Miranda*, 384 U.S. at 457, 460-61 (describing the necessity of procedural safeguards "to protect precious Fifth Amendment rights"), *with* Sharon Finegan, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law*, 111 PENN ST. L. REV. 625, 631-32 (2007) (comparing civil and criminal law, and noting the procedural safeguards in the criminal process are necessary because of the penalties available for criminal actions, including imprisonment and execution).

B. The Right Against Self-Incrimination & the Right to Remain Silent: Understanding the Connection

The Fifth Amendment of the United States Constitution protects the right against compelled self-incrimination.[215] In *Miranda v. Arizona*,[216] the United States Supreme Court called the right a noble principle, a substantive right that has become a hallmark of this country's democracy, and a mainstay in the United States' adversarial legal system.[217] The Court noted that the underlying principle behind the right is the respect due to dignity and integrity of citizens by their government.[218] This respect requires the government, when seeking to punish an individual it believes to be guilty of a crime, to carry the entire burden of producing evidence through its own labor rather than compelling an admission from the individual simply for efficiency.[219]

To protect this fundamental right against incriminating oneself, an individual must be guaranteed the right to refuse to answer questions of law enforcement and prosecutors.[220] The Supreme Court has recognized that failure to protect the privilege against self-incrimination without penalty forces the accused to make the false choice between self-accusation, perjury, or contempt, all of which could lead to imprisonment.[221] This refusal to answer questions posed by law enforcement or prosecutors constitutes silence.[222] When an individual confidently chooses to remain silent without fear that this silence will be used in court as evidence of guilt, the privilege against self-incrimination is protected and fulfilled.[223]

The Fifth Amendment protects the right against self-incrimination, as indicated by the plain language and the consistent interpreta-

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215. *See* U.S. Const. amend. V (stating that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

216. 384 U.S. 436 (1966).

217. Miranda v. Arizona, 384 U.S. 436, 460 (1966).

218. *Miranda*, 384 U.S. at 460.

219. *Id*.

220. *See id*. (stating, "In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he [or she] chooses to speak in the unfettered exercise of his own will.'") (citing Malloy v. Hogan, 378 U.S. 1, 8 (1964)).

221. *See* Combs v. Coyle, 205 F.3d 269, 285 (6th Cir. 2000) (noting the Supreme Court recognized one of the "fundamental values and most noble aspirations" of the United States is "our unwillingness to subject those suspected of a crime to [this] cruel trilemma . . . .") (citing Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964)).

222. *See Combs*, 205 F.3d at 281 (stating the Fifth Amendment prohibits prosecutorial comment on the refusal to testify at trial) (citing Griffin v. California, 380 U.S. 609, 615 (1965)). In *Griffin*, the Supreme Court used the phrases "refusal to testify at trial" and "silence" interchangeably. *Griffin*, 380 U.S. at 615.

223. *See Miranda*, 384 U.S. at 460 (recognizing the necessity of allowing an individual to remain silent in order for him or her to exercise the fundamental privilege against self-incrimination).

tion by the Supreme Court.[224] To avoid incriminating oneself, an individual has the right to remain silent when incriminating answers to questions can be compelled by forcing verbal communication or inferring such answers from silence.[225] Therefore, the Fifth Amendment protects the right to remain silent.[226]

C. Determining When the Right to Remain Silent can Safely be Utilized

The Fifth Amendment protects the rights of all people.[227] The Fifth Amendment specifically uses the term *person*, rather than restricting the right to a *citizen*, a *soldier*, or an *accused* as utilized in other articles and amendments within the Constitution.[228] This word choice is significant because it indicates not only who may exercise this right but also when this right is applicable.[229]

In *United States ex rel. Savory v. Lane*,[230] the United States Court of Appeals for the Seventh Circuit emphasized the different terms utilized by the Fifth and Sixth Amendments to indicate to

224. *See* U.S. Const. amend. V (stating that no person "shall be compelled in any criminal case to be a witness against himself . . . ."); s*ee also Malloy*, 378 U.S. at 6 (holding that the Fifth Amendment prevents "compulsory self-incrimination" and it is incorporated into the Fourteenth Amendment, making it applicable to state criminal proceedings); *Miranda,* 384 U.S. at 439 (stating that the case before the Court involves the Fifth Amendment of the Constitution and the privilege it accords to not be compelled to incriminate oneself); Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013) (stating the defendant's Fifth Amendment claim fails because he did not invoke his "privilege against self-incrimination").

225. *See Miranda*, 384 U.S. at 460 (stating that to maintain a fair and just system, the government must produce "evidence against [the person] by its own independent labors, rather than . . . compelling it from his own mouth."); Jenkins v. Anderson, 447 U.S. 231, 246 (1980) (Marshall, J., dissenting) (noting the adverse inference drawn from the silence, which is a failure to volunteer incriminating information, impermissibly infringes upon the right to avoid self-incrimination).

226. *Compare* U.S. Const. amend. V (stating that no person "shall be compelled in any criminal case to be a witness against himself . . . ."), *and Malloy*, 378 U.S. at 6 (holding that the Fifth Amendment prevents "compulsory self-incrimination"), *with Miranda*, 384 U.S. at 460 (determining the privilege against self-incrimination is only protected when a person's right to remain silent is guaranteed, without fear that such silence will be used against him), *and Combs*, 205 F.3d at 285 (explaining the right to remain silent is protected when a person does not have to choose between self-accusation, perjury or contempt) (citing *Murphy*, 378 U.S. at 55).

227. *See* U.S. Const. amend. V (stating "No *person* shall . . . be compelled in any criminal case to be a witness against himself . . . .") (emphasis added).

228. *Compare* U.S. Const. amend V (stating "No *person* shall . . . .") (emphasis added), *with* U.S. Const. amend. III (stating "No *Soldier* shall . . . .") (emphasis added), *and* U.S. Const. amend. VI (stating "In all criminal prosecutions, the *accused* shall enjoy . . . .") (emphasis added), *and* U.S. Const. amend. XIX (stating "The right of *citizens* of the United States to vote shall . . . .") (emphasis added).

229. *See* United States ex rel. Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987) (discussing the significance of the different choice in words utilized within the Fifth and Sixth Amendments).

230. 832 F.2d 1011 (7th Cir. 1987).

whom the rights applied.[231] While the Fifth Amendment utilizes the term *person*, the Sixth Amendment applies to the *accused*.[232] The Sixth Amendment right to counsel is not applicable until an individual becomes an accused, which means an adversary judicial proceeding has commenced against that individual.[233] The policy behind tying the right to the advent of adversarial judicial proceedings is to ensure the individual has aid when he or she is faced with the intricacies of the law and the prosecutor's familiarity with those intricacies.[234]

Although it uses *person* rather than *accused*, the Fifth Amendment does use the limiting phrase *any criminal proceeding* when prohibiting compelled incrimination.[235] While this may seem to give the Fifth Amendment the same narrow scope as the Sixth Amendment, the United States Supreme Court has given the Fifth Amendment right against self-incrimination a broader scope.[236] The Court has determined that the Fifth Amendment right against self-incrimination can be exercised in any proceeding, including those in civil, criminal, judicial, administrative, adjudicatory, and investigatory settings.[237] The application is so broad because the right protects against any form of disclosure that a person reasonably believes may be used to criminally prosecute the person or expose other incriminating evidence.[238] The only restriction upon when the Fifth Amend-

231. *Savory*, 832 F.2d at 1017.

232. *See* U.S. CONST. amend. V (applying to all people); U.S. CONST. amend. VI (restricting its applicability to the accused).

233. *Savory*, 832 F.2d at 1017 (recognizing the Supreme Court, in *Gouveia*, determined the Sixth Amendment right to counsel does not attach until the individual becomes an accused) (citing United States v. Gouveia, 467 U.S. 180, 188 (1984)). In *Gouveia*, the Supreme Court clarified that a person becomes an accused when a formal adversary judicial proceeding is commenced against the individual, such as a "formal charge, preliminary hearing, indictment, information, or arraignment." *Gouveia*, 467 U.S. at 188.

234. *Id.* at 188-89 (noting "We have recognized that the 'core purpose' of the counsel guarantee is to assure aid at trial, 'when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.") (quoting United States v. Ash, 413 U.S. 300, 309 (1973)).

235. *See* U.S. CONST. amend. V (stating that "[n]o person shall . . . be compelled *in any criminal case* to be a witness against himself . . . .") (emphasis added).

236. *See* Combs v. Coyle, 205 F.3d 269, 283 (6th Cir. 2000) (noting that "the Supreme Court has given the privilege against self-incrimination a broad scope, explaining that 'it can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory, or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.'") (quoting Kastigar v. United States, 406 U.S. 441, 444-45 (1972)); *see also Combs*, 205 F.3d at 283 (providing additional Supreme Court cases that indicate the scope of the privilege against self-incrimination is broad) (quoting Hoffman v. United States, 342 U.S. 479, 486 (1951)).

237. *Id.* at 283 (quoting *Kastigar*, 406 U.S. at 444-45).

238. *Id*.

ment right may be exercised is that the person must be in reasonable fear of the injurious consequences arising from a direct answer.[239]

Due to the textual omission of the more specific term *accused*, the Fifth Amendment right against self-incrimination attaches to all people so long as those individuals have a reasonable fear that their response may be used for criminal prosecution or lead to evidence that could be used for subsequent prosecution.[240] An individual may have such fear when confronted with a state actor's questions prior to arrest.[241] Therefore, the Fifth Amendment privilege against self-incrimination may be exercised pre-arrest.[242] Because the privilege against self-incrimination may only be fulfilled when one has the right to refuse to answer questions, the Fifth Amendment protects the right to remain silent pre-arrest.[243]

D. Silencing the Prosecution from Commenting on a Person's Exercise of the Right to Remain Silent

In order to protect an individual's constitutional privilege against self-incrimination, the Fifth Amendment prohibits comment on its exercise.[244] In *Griffin v. California*,[245] the United States Supreme

239. *See id*. (laying out the requirements for the attachment of the Fifth Amendment right) (quoting *Hoffman*, 341 U.S. at 486-87).

240. *Compare* U.S. Const. amend. V (stating that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself . . . ."), *and Combs*, 205 F.3d at 283 (indicating that the scope of the right against self-incrimination is broad, encompassing situations in which the individual reasonably fears any response will lead to self-incrimination) (quoting *Kastigar*, 406 U.S. at 444-45), *with* U.S. Const. amend. VI (stating "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."), *and Savory*, 832 F.2d at 1017 (explaining the right to counsel does not attach until an individual becomes an accused at the commencement of formal adversarial proceedings) (citing *Gouveia*, 467 U.S. at 188).

241. *See Combs*, 205 F.3d at 283 (reasoning that an individual's comments, whether in a pre-arrest setting or post-arrest setting, could "provide damaging evidence that might be used in a criminal prosecution . . . .") (citing *Kastigar,* 406 U.S. at 444-45).

242. *Compare* U.S. Const. amend. V (stating that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself . . . ."), *with Kastigar*, 406 U.S. at 444-45 (determining the Fifth Amendment may be "asserted in any proceeding . . . and it protects against any disclosure that [a person] reasonably believes could be used in a criminal prosecution.").

243. *Compare* Miranda v. Arizona*,* 384 U.S. 436, 460 (1966) (explaining how "the privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will.") (internal quotations omitted) (citing Malloy v. Hogan 378 U.S.1, 8 (1964)), *with* U.S. Const. amend. V (stating that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself . . . ."), *and Kastigar*, 406 U.S. at 444-45 (determining that both pre-arrest and post-arrest comments could constitute damaging evidence).

244. *See* Coppola v. Powell*,* 878 F.2d 1562, 1568 (1st Cir. 1989) (holding the Fifth and Fourteenth Amendments prohibit "either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.") (citing Griffin v. California, 380 U.S. 609, 615 (1965)).

245. 380 U.S. 609 (1965).

Court noted that any other rule would allow the state to utilize a person's silence as substantive proof of guilt, penalizing the individual for exercising his privilege against self-incrimination.[246] Allowing references to the silence would make exercising the privilege too costly, completely undercutting its purpose.[247] As noted above, the Fifth Amendment protects an individual's right to remain silent pre-arrest.[248] Therefore, in order to avoid penalizing the exercise of the right to remain silent, the Fifth Amendment must prohibit prosecutorial comment or jury instructions regarding pre-arrest silence when it is admitted as evidence of substantive guilt.[249]

E. You Have the Right to Remain Silent—but only if you can be Compelled to Speak: Analyzing the Main Objection of the United States Courts of Appeals for the Fifth and Ninth Circuits

In the United States Courts of Appeals for the Fifth and Ninth Circuits,[250] one will find an argument emphasizing that the admission of pre-arrest silence as substantive evidence of guilt cannot vio-

246. Combs v. Coyle, 205 F.3d 269, 281 (6th Cir. 2000) (citing *Griffin*, 380 U.S. at 615); *Coppola*, 878 F.2d at 1568 (citing *Griffin*, 380 U.S. at 615).

247. *See Combs*, 203 F.3d at 281-82 (discussing the reasoning behind the prohibition on prosecutorial comment on a person's silence) (citing *Griffin*, 380 U.S. at 614); *see also Miranda*, 384 U.S. at 460 (stating that to ensure a "'fair state-individual balance,' to require the government 'to shoulder the entire load,' and 'to respect the inviolability of the human personality,' the government must produce 'by its own independent labors' evidence against the individual it accuses and seeks to punish, rather than 'by the cruel, simple expedient of compelling it from his own mouth.'") (citing Chambers v. Florida, 309 U.S. 227, 235-38 (1940)).

248. *See supra* note 226 and accompanying text.

249. *Compare Combs*, 203 F.3d at 281-82 (recognizing "[s]uch proffer of the defendant's refusal to testify as evidence of guilt would impermissibly penalize the exercise of the privilege against self-incrimination and would 'cut[ ] down on the privilege by making its assertion costly.'") (citing *Griffin*, 380 U.S. at 614), *and Coppola,* 878 F.2d at 1568 (citing *Griffin*, 380 U.S. at 615) (holding that the Fifth Amendment prohibits comment on silence to establish guilt), *with* Kastigar v. United, 406 U.S 441, 444-45 (1972) (explaining that the Fifth Amendment "protects against any disclosures that [a person] reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.").

250. The United States Courts of Appeals for the Eighth and Eleventh Circuits are not included in this portion of the Analysis due to their lack of analysis in resolving the issue of admissibility of pre-arrest silence as substantive evidence of guilt. The Eighth Circuit simply stated that the Fifth Amendment did not protect pre-arrest silence as a fact, without including a supporting citation or analysis. *See* United States v. York, 830 F.2d 885, 895-96 (8th Cir. 1987). The Eleventh Circuit cited *Jenkins v. Anderson*, interpreting the case as though the United States Supreme Court ruled that the government may permissibly comment on a person's pre-arrest silence, whether it is for the purposes of impeachment or substantive evidence of guilt. *See* United States v. Rivera, 944 F.2d 1563, 1568 n.10 (11th Cir. 1991) (citing Jenkins v. Anderson, 447 U.S. 231 (1980)). However, in *Jenkins*, the Supreme Court specifically limited its conclusion to the use of pre-arrest silence for impeachment. *Jenkins*, 447 U.S. at 238.

late the Fifth Amendment because it is not compelled self-incrimination.[251] This argument can be traced back to dicta in *Jenkins v. Anderson*,[252] specifically in Justice Stevens' concurring opinion.[253]

In *Jenkins*, while the majority opinion concluded that the Fifth Amendment was not violated by the use of pre-arrest silence for impeachment when an accused chose to take the stand, Justice Stevens argued that the United States Supreme Court failed to distinguish between pre-arrest silence and silence on the witness stand.[254] Justice Stevens believed the two to be fundamentally different because, according to him, at the pre-arrest stage, the individual is under no compulsion to speak or remain silent.[255] Justice Stevens reasoned that the threshold issue for the applicability of the privilege against self-incrimination was whether the testimony could have been compelled in that situation and then whether the individual actually asserted the privilege.[256] The question, in Justice Stevens' opinion, was not simply whether the individual remained silent.[257]

Without citing *Jenkins*, the United States Court of Appeals for the Fifth Circuit reasoned that pre-arrest silence could be used as substantive evidence of guilt because the silence was not induced by a government actor or a response to any government action.[258] The court went on to clarify that the Fifth Amendment only protects against compelled self-incrimination, not proper evidentiary use of pre-arrest silence that may allow for an incriminating inference.[259]

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251. *See* United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (finding no error in a prosecutor's comment on pre-arrest silence because the record clearly demonstrated that a government agent did not induce the silence so that the silence could be considered a forced response); *see also* United States v. Oplinger, 150 F.3d 1061, 1066 (9th Cir. 1998) (citing Jenkins v. Anderson, 447 U.S 231, 241 (1980) (Stevens, J., concurring)) (agreeing with Justice Stevens that one's right against compulsory self-incrimination cannot be violated when that person is under no official compulsion to speak).

252. 447 U.S. 231, 241-45 (1980).

253. *Jenkins*, 447 U.S. at 241-45 (Stevens, J., concurring).

254. *See id.* at 237-38 (majority opinion) (concluding "that the Fifth Amendment is not violated by the use of pre-arrest silence to impeach a criminal defendant's credibility."); *id.* at 241 (Stevens, J., concurring) (arguing that the Court improperly relied on *Raffel v. United States* because "such reliance incorrectly implies that a defendant's decision not to testify at his own trial is constitutionally indistinguishable from his silence in a pre-custody context.").

255. *Id.* at 243-44.

256. *See id*. at 244 (stating that a "different view ignores the clear words of the Fifth Amendment.").

257. *Id*.

258. *Zanabria*, 74 F.3d at 593.

259. *See id*. (finding "[t]he Fifth Amendment protects against compelled self-incrimination but does not, as [the defendant] suggests, preclude the proper evidentiary use and prosecutorial comment about every communication or lack thereof by the defendant which may give rise to an incriminating inference.") (emphasis omitted).

In contrast, the United States Court of Appeals for the Ninth Circuit quoted Justice Stevens' concurring opinion, agreeing with his reasoning.[260] In respectfully disagreeing with the United States Courts of Appeals for the First, Seventh, and Tenth Circuits, the Ninth Circuit viewed those courts as having endorsed a position contrary to the unambiguous words of the Fifth Amendment, emphasizing the word *compelled* in the text of the Fifth Amendment.[261] The Ninth Circuit noted that the purpose of the Fifth Amendment's self-incrimination clause was to limit the investigative techniques available to the government, not to provide an individual right against the world.[262] Therefore, whether or not the courts cited Justice Steven's concurring opinion in *Jenkins*, both the Fifth and the Ninth Circuits reached a conclusion similar to that of the Supreme Court Justice, all determining that pre-arrest silence was not protected by the Fifth Amendment because the silence is not compelled.[263]

F. The Fifth And Ninth Circuits' Silence on the Issue of Compulsion Outside of the Context of Arrest: Exposing an Improper Assumption

The United States Courts of Appeals that admit pre-arrest silence as substantive evidence of guilt improperly assume that to compel an individual, there must be an arrest.[264] However, arrest is not

260. United States v. Oplinger, 150 F.3d 1061, 1066 (9th Cir. 1998).

261. *Oplinger*, 150 F.3d at 1067 (reasoning the Fifth Amendment "plainly state[s]" that a person may not be "compelled in any criminal case to be a witness against himself.") (quoting U.S. Const. amend. V).

262. *Id.* at 1067 (quoting United States v. Gecas, 120 F.3d 1419, 1456 (11th Cir. 1997)).

263. *See Zanabria*, 74 F.3d at 593 (indicating that the Fifth Amendment does not protect against a prosecutor's use of pre-arrest silence, as alleged by Zanabria, because the Fifth Amendment protested against compelled self-incrimination, not proper evidentiary use of the silence by the prosecutor); *Oplinger*, 150 F.3d at 1067 (viewing the courts that have determined pre-arrest silence is inadmissible as substantive evidence of guilt as endorsing a position that is "simply contrary to the ambiguous text of the Fifth Amendment," emphasizing the requirement of compulsion); *Jenkins*, 447 U.S. at 243 (explaining that he does not find any reason why a voluntary decision to speak or not should raise a Fifth Amendment issue when a citizen is under no official compulsion).

264. *See* United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (noting that the police had not arrested the individual at the point he remained silent). Without deciding whether the Zanabria's pre-arrest silence was "within the reach of 'testimonial communications' protected by the Fifth Amendment," the Fifth Circuit determined that the silence was "neither induced by nor a response to any action by government agent," even though Zanabria's luggage was being searched by a customs officer when he chose to remain silent. *Zanabria*, 74 F.3d at 592-93; *see also* United States v. Oplinger, 150 F.3d 1061, 1066 (9th Cir. 1998) (noting that Oplinger remained silent during a pre-termination hearing). During a pre-termination hearing, the bank's management interrogated Oplinger about his allegedly fraudulent activities, and even though his answers

the only mechanism through which the state compels an individual.[265]

In *Miranda v. Arizona*,[266] the United States Supreme Court noted that the privilege against self-incrimination originated from protest against inquisitorial and unjust means of interrogation.[267] The Court further acknowledged the temptation of state actors to unduly pressure a witness into a timid state in order to entrap the person into a fatal contradiction.[268] Although the holding in *Miranda* specifically focused on custodial interrogation, the Court recognized that a fundamental feature of custodial interrogation is that it takes place in privacy, which poses a danger.[269] The Court cited law enforcement manuals, which explained that the most significant psychological factor leading to a successful interrogation is privacy between the interrogators and the person being interrogated.[270] This privacy fosters secrecy resulting in gaps in the knowledge of outsiders as to what in fact occurred.[271] During this private interrogation time, interrogators are even instructed by some of these manuals to obtain a confession through trickery.[272] The Court recognized that the setting prescribed by law enforcement manuals and practiced by those officials takes a heavy toll on liberty.[273]

The Supreme Court has since determined that the right to remain silent can be exercised in any proceeding, whether judicial, investigatory, civil, criminal, administrative, or adjudicatory.[274] The principal issue regarding the viability of the right is whether a harmful disclosure might result if the individual responds to a question posed.[275] A harmful disclosure, the Court explained, creates a reasonable probability of prosecution.[276] Therefore, the privilege is only limited

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were required to be reported to the FBI, the court held that this did not violate Oplinger's privilege against self-incrimination. *Oplinger*, 150 F.3d at 1066-67.

265. *See infra* notes 280-298 and accompanying notes.

266. 384 U.S. 436 (1966).

267. Miranda v. Arizona, 384 U.S. 436, 442 (1966).

268. *Miranda,* 384 U.S. at 442-43.

269. *Id*. at 448.

270. *Id*. at 449.

271. *Id*. at 448.

272. *See id.* at 453 (noting that "[a] valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past" and recognizing that these manuals tell officers "that the 'principal psychological factor contributing to a successful interrogation is *privacy*–being alone with the person under interrogation.'") (quoting INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS, 1 (1962)).

273. *Id*. at 455.

274. Coppola v. Powell, 878 F.2d 1562, 1565 (1st Cir. 1989) (citing Kastigar v. United States, 406 U.S. 441, 444 (1972)).

275. *Coppola*, 878 F.2d at 1565 (citing Hoffman v. United States, 341 U.S. 479, 486-87 (1951)).

276. *Id.* (quoting In re Kave, 760 F.2d 343, 354 (1st Cir. 1985)).

to settings in which the witness has reasonable belief to apprehend danger from directly answering a posed question.[277]

The Supreme Court has emphasized the necessity of ensuring that the Constitution's proclaimed rights are not treated as simply a form of words at the hands of the government.[278] More specifically, the Court has stated that the self-incrimination clause of the Fifth Amendment must be given liberal construction in favor of the privilege that the amendment was intended to secure.[279] Therefore, although the Court in *Miranda* limited its ruling to addressing individual's Fifth Amendment rights in custodial interrogation, pre-arrest questioning can manifest as compulsion because it can occur in settings in which an individual's answer or explanation of why the question cannot be answered could reasonably cause the individual to fear an injurious disclosure.[280]

Because a person can be compelled through pre-arrest questioning, a person may exercise the privilege against compelled self-incrimination during these types of interrogations.[281] If that individual has the privilege against self-incrimination, he or she has the right to remain silent.[282] Therefore, even under the reasoning of Justice Ste-

277. Combs v. Coyle*,* 205 F.3d 269, 283 (6th Cir. 2000) (quoting *Hoffman*, 341 U.S. at 486).

278. *See Miranda*, 384 U.S. at 444 (declaring "the meaning and vitality of the Constitution have developed against narrow and restrictive construction.").

279. *Hoffman*, 341 U.S. at 486 (citing Counselman v. Hitchcock, 142 U.S. 547, 562 (1892) and Arndstein v. McCarthy*,* 254 U.S. 71, 72-73 (1920)).

280. *See Miranda*, 384 U.S. at 444-46 (stating briefly the Court's holding that the prosecution may not use statements arising out of custodial interrogation of the accused unless procedural safeguards were utilized to secure the privilege against self-incrimination); *compare id.* at 443-44 (emphasizing the necessity of ensuring that the Constitutional privilege against self-incrimination, and thus, the right to remain silent, are not ephemeral rights) (quoting Weems v. United States, 217 U.S. 349, 373 (1910)), *and Hoffman,* 341 U.S. at 486 (asserting the Fifth Amendment's self-incrimination clause must be given "liberal construction in favor of the right it was intended to secure.") (citing *Counselman*, 142 U.S. at 562 and *Arndstein,* 254 U.S. at 72-73), *with Coppola,* 878 F.2d at 1565 (stating that the "viability of the privilege depends on whether a responsive answer to the question might result in harmful disclosure.") (citing *Hoffman*, 341 U.S. at 486-87), *and Combs*, 205 F.3d at 283 (recognizing "[the privilege] must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer" and noting "[t]o sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.") (quoting *Hoffman*, 341 U.S. at 486-87).

281. *See supra* note 295 and accompanying text; *contra* Jenkins v. Anderson, 447 U.S 231, 241-44 (1980) (Stevens, J., concurring) (distinguishing silence during trial with pre-arrest silence, arguing that compulsion cannot exist pre-arrest); *Zanabria,* 74 F.3d at 593 (emphasizing the Fifth Amendment only protects against compelled self-incrimination); *Oplinger*, 150 F.3d at 1066 (opining the Fifth Amendment "plainly states" that a person may not be "compelled in any criminal case to be a witness against himself.") (quoting U.S. CONST. amend. V).

282. *See supra* notes 206-214 and accompanying text.

vens and the United States Courts of Appeals for Fifth and Ninth Circuits that compulsion is required in order for the Fifth Amendment privilege to be applicable, an individual has the right to remain silent during pre-arrest interrogation.[283]

IV. CONCLUSION

The United States Courts of Appeals for the First, Sixth, Seventh, and Tenth Circuits properly held the Fifth Amendment is eroded when courts allow the unconstitutional use of pre-arrest silence as substantive evidence of guilt.[284] Because the privilege against compelled self-incrimination requires that an individual has the right to remain silent, the Fifth Amendment also impliedly protects the right to remain silent.[285] This protection extends to all individuals in situations in which they reasonably fear the answer to a posed question will lead to self-incrimination, regardless of whether there has been an arrest.[286] To avoid penalizing the exercise of the right to remain silent, the Fifth Amendment prohibits prosecutorial comment or jury instructions regarding pre-arrest silence when it is admitted as substantive evidence of guilt.[287]

Opponents to this view, such as Justice Stevens and the United States Courts of Appeals for the Fifth and Ninth Circuits, argue that pre-arrest silence is not constitutionally protected by the Fifth Amendment because it is not compelled.[288] However, this argument improperly assumes that arrest is the only means through which an individual may be compelled to incriminate oneself.[289]

Due to the number of courts that have weighed in on this issue, creating a nearly even split across state appellate courts, state courts of last resort, and United States Courts of Appeals, the United States Supreme Court should resolve whether admission of pre-arrest silence violates an individual's Fifth Amendment right against self-incrimination.[290] The severity in the split between the various courts contra-

283. *Compare Jenkins*, 447 U.S. at 244 (Stevens, J., concurring) (stating that a "different view ignores the clear words of the Fifth Amendment."), *and Zanabria,* 74 F.3d at 593 (basing the ruling upon the premise that the Fifth Amendment protects against compelled self-incrimination), *with Combs*, 205 F.3d at 283 (quoting *Hoffman*, 341 U.S. at 486-87) (confining the privilege against self-incrimination to situations in which an individual reasonably fears the repercussions of answering questions), *and Miranda*, 384 U.S. at 460 (asserting that the privilege against self-incrimination is only protected and meaningful when a person is guaranteed the "right to remain silent.").

284. *See supra* notes 206-249 and accompanying text.

285. *See supra* notes 206-214 and accompanying text.

286. *See supra* notes 227-243 and accompanying text.

287. *See supra* notes 244-249 and accompanying text.

288. *See supra* notes 250-263 and accompanying text.

289. *See supra* notes 264-283 and accompanying text.

290. *See supra* notes 206-208 and accompanying text.

dicts the well-established public policy in support of uniform protection under the Constitution.[291] This difference in interpretation of the Constitution becomes significantly more important and urgent when one recognizes that these are criminal proceedings and remembers what is on the line: an individual's life and liberty.[292]

Cameron Oakley—'17

291. *See supra* notes 209-210 and accompanying text.
292. *See supra* notes 211-214 and accompanying text.

IMMIGRANT ENTREPRENEURS, THE UNITED STATES VISA SYSTEM, AND THE STARTUP ACT

I. INTRODUCTION

A recent study indicated that five United States universities offer the top-ranked entrepreneurial graduate programs in the world.[1] As the country that provides the largest economy on the planet (in terms of nominal gross domestic product), this may not be much of a shock.[2] However, it is astonishing that between twenty-nine and fifty-three percent of each of the top-five schools' class profiles consist of international students.[3] Understanding that American universities produce outstanding entrepreneurial talent and realizing that a significant portion of these programs are filled with international students makes one wonder if United States immigration policies lend a hand towards the immigrant entrepreneur who is attempting to achieve the American dream.

This Note will begin by examining three of the possible visa categories that immigrant entrepreneurs might attempt to fit into in hopes of establishing a business in America.[4] The first category to be examined is the EB-5 visa category.[5] Next, this Note will analyze the EB-2 visa category.[6] Then, this Note will review the H-1B visa category.[7] After working through the visa categories, this Note will ex-

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1. Mark Marich, *US Schools Dominate Top MBA Programs for Entrepreneurship*, KAUFFMAN FOUNDATION (June 29, 2015), http://www.kauffman.org/blogs/policy-dialogue/2015/june/us-schools-dominate-top-mba-programs-for-entrepreneurship.

2. Prableen Bajpai, *The World's Top 10 Economies*, INVESTOPEDIA, Nov. 30, 2015, http://www.investopedia.com/articles/investing/022415/worlds-top-10-economies.asp.

3. *See* STANFORD GRADUATE SCHOOL OF BUSINESS, https://www.gsb.stanford.edu/programs/mba/admission/evaluation-criteria/class-profile (last updated Oct. 8, 2015) (stating that 40 percent of the Stanford School of Business class was from a foreign country); MIT SLOAN SCHOOL OF MANAGEMENT, http://mitsloan.mit.edu/mba/admissions/class-profile2/ (last visited Jan. 27, 2015) (noting that 38 percent of the MIT: Sloan class was from a foreign country); BLOOMBERG BUSINESS, *Profile Data from 2014,* http://www.sandiego.edu/business/programs/mba/admissions/class-profiles.php (last visited Jan. 27, 2016) (determining that 53 percent of the San Diego School of Business Administration was from a foreign country); UNIVERSITY OF SOUTHERN CALIFORNIA MARSHALL SCHOOL OF BUSINESS, https://www.marshall.usc.edu/mba/admissions/profile (last visited Jan. 27, 2016) (iterating that 29 percent of the University of Southern California: Marshall was from a foreign country); HARVARD BUSINESS SCHOOL, http://www.hbs.edu/mba/admissions/class-profile/Pages/default.aspx (last visited Jan. 27, 2016) (indicating that 34 percent of the Harvard School of Business was from a foreign country).

4. *See infra* notes 18-89 and accompanying text.

5. *See infra* notes 18-40 and accompanying text.

6. *See infra* notes 41-72 and accompanying text.

7. *See infra* notes 73-89 and accompanying text.

amine failed attempts with prior versions of the Startup Act.[8] Next, this Note will recognize that other foreign governments are taking legislative action to encourage foreign nationals to establish businesses in their respective countries.[9] Then, this Note will discuss the historical impact immigrants have had upon the American economy.[10] Finally, this Note will provide statistics which indicate that American schools produce the top entrepreneurial minds in the world and that a significant percentage of these individuals are foreign nationals.[11]

The Argument section of this Note will suggest that current immigration laws do not provide an adequate path for immigrant entrepreneurs to remain in the United States.[12] Next, this Note will argue that United States universities offer many of the highest-ranked entrepreneurship programs in the world, and international students flock to these universities; however, legislative action needs to be taken to address the large portion of highly-educated foreign nationals who attain a top-ranked education and then must leave the country.[13]

This Note will assert that the Startup Act must be passed.[14] This is of incredible importance because greater than forty percent of America's Fortune 500 companies in 2010 were founded either by immigrants or their children.[15] This Note recognizes that opponents of business immigration reform typically urge a message that a greater number of immigrants in the United States results in lower wages and less jobs for Americans.[16] However, this Note will conclude by expressing the positive impact immigrant workers have on the economy.[17]

II. BACKGROUND

A. Where can Immigrant Entrepreneurs Fit in the United States Visa System?

1. The EB-5 Immigrant Investor Visa

The Employment-Based fifth preference ("EB-5") visa program exists to promote the immigration of foreign citizens who can assist in creating jobs for workers in the United States through investment of

8. *See infra* notes 90-92 and accompanying text.
9. *See infra* notes 93-101 and accompanying text.
10. *See infra* notes 102-109 and accompanying text.
11. *See infra* notes 110-117 and accompanying text.
12. *See infra* notes 122-141 and accompanying text.
13. *See infra* notes 142-150 and accompanying text.
14. *See infra* notes 151-166 and accompanying text.
15. Partnership for a New American Economy, The "New American" Fortune 500 (June 2011), http://www.renewoureconomy.org/sites/all/themes/pnae/img/new-american-fortune-500-june-2011.pdf.
16. *See infra* notes 167-175 and accompanying text.
17. *See infra* notes 176-187 and accompanying text.

their capital into the economy.[18] Generally, immigrants who invest, or are actively in the process of investing, $1,000,000 into a new commercial enterprise and create at least ten new full-time positions for United States workers are qualified to receive an EB-5 visa.[19] Approximately 10,000 EB-5 visas are reserved each year for immigrant investors.[20] In Fiscal Year 2014, the government issued 8,773 EB-5 visas with natives of Mainland China receiving 7,616 of such visas.[21]

To qualify for an EB-5 visa it is necessary that the immigrant investor seeks to enter the country for the reason of engaging in some new commercial enterprise.[22] There are three methods by which an immigrant investor can engage in a new commercial enterprise: (1) creating an original business; (2) purchasing a business that already exists and subsequently reorganizing or restructuring said business, resulting in an entirely new commercial enterprise; or (3) expanding a business through investing so a substantial change in the number of employees or net worth actually results from the immigrant's investment.[23] There is also a minimum threshold for the amount of capital that the immigrant must invest into the new commercial enterprise.[24] The immigrant investor has an additional burden to present documentation that indicates the invested capital comes from a legitimate source.[25]

The immigrant investor's capital invested into the new commercial enterprise must create at least ten full-time positions.[26] These

18. U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0083, EB-5 ADJUDICATION POLICY (2013). "This program is known as EB-5 for the name of the employment-based fifth preference visa that participants receive." U.S. CITIZENSHIP & IMMIGRATION SERVS., EB-5 IMMIGRANT INVESTOR PROGRAM, https://www.uscis.gov/eb-5 (last visited Jan. 21, 2016).

19. 8 U.S.C. § 1153(b)(5) (2015).

20. *See id*. (stating that 7.1 percent of the worldwide level of employment-based immigrant visas will be made available to immigrants who enter the country for the reason of investing in a new commercial enterprise).

21. 2015 U.S. DEP'T OF ST. REPORT OF THE VISA OFFICE pt. 4, at tbl. VI.

22. 8 U.S.C. § 1153(b)(5).

23. *See* 8 C.F.R. § 204.6(h) (2012) (defining substantial change as "a 40 percent increase either in net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees.").

24. *See* 8 C.F.R. § 204.6(f) (determining that generally, a qualifying investment is $1,000,000, however, in a targeted employment area, a qualifying investment is $500,000).

25. In re Soffici, 22 I. & N. Dec. 158, 161 (B.I.A. 1998). The immigrant petition must be accompanied by evidence that identifies the source of the lawfully invested capital. *Soffici*, 22 I. & N. Dec. at 161. The court references examples including foreign business registration records, tax returns from a partnership, corporation, or an individual, or some evidence which identifies the source of the capital. *Id.*

26. 8 U.S.C. § 1153(b)(5)(A)(ii); *see also* 8 U.S.C. § 1153(b)(5)(D) (defining full-time employment as "employment in a position that requires at least 35 hours of service per week at any time . . . .").

positions must be filled by United States citizens or other immigrants who are lawfully admitted to live in the United States permanently.[27] Examples of qualifying employees include United States citizens, legal permanent residents, conditional residents, temporary residents, asylum seekers, and refugees.[28] However, the immigrant investor cannot include himself, or his immigrant spouse or child towards the employment count.[29] Furthermore, the immigrant investor must indicate that these ten full-time employment positions will be filled within the two-year period while the immigrant maintains conditional residency status.[30]

An immigrant investor has the option to invest $500,000, but only if the new commercial enterprise he or she invests in is located in a Targeted Employment Area ("TEA").[31] An area can qualify as a TEA in one of two scenarios: (1) if at the time of the investment the area where the immigrant invests his or her money is a rural area; or (2) if at the time of the investment the area where the immigrant invests his or her money is in an area which has seen unemployment rates of at least 150 percent of the national unemployment rate.[32] A rural area is defined as an area that is located outside of a metropolitan statistical area, or an area that is located outside of a town or city that has a population of more than 20,000 people, based on the most current United States census.[33] Alternatively, a state itself can make a designation concerning an area of high unemployment so long as the unemployment rate is at least 150 percent of the national unemployment rate.[34]

Another avenue an immigrant investor can choose to pursue, which simplifies the job creation requirement, is to invest in a new commercial enterprise located in a regional center.[35] A regional

27. 8 U.S.C. § 1153(b)(5)(A)(ii).

28. 8 C.F.R. § 204.6(e).

29. *Id*.

30. *See* 8 C.F.R. § 204.6(j)(4)(i)(b) (stating that the immigrant's business plan must show that "due to the nature and projected size of the commercial enterprise, the need for not fewer than ten (10) qualifying employees will result . . . ."); s*ee also* U.S. CITIZENSHIP & IMMIGRATION SERVS., *Conditional Permanent Residence*, https://www.uscis.gov/green-card/after-green-card-granted/conditional-permanent-residence (Jan. 14, 2011) (determining that an immigrant who receives conditional permanent residence maintains legal status for a two year period).

31. 8 C.F.R. § 204.6(f).

32. 8 C.F.R. § 204.6(e).

33. *See* 8 C.F.R. § 204.6(j)(6)(i) (expressing that the Office of Management and Budget designates which locations constitute metropolitan statistical areas).

34. *See* 8 C.F.R. § 204.6(j)(6)(i) (stating a state official may properly notify the Associate Commissioner for Examinations that the state is designating a particular geographical area as an area of high unemployment).

35. *See* 8 C.F.R. § 204.6(j)(4)(iii) (noting that under the Immigrant Investor Pilot Program, immigrants who invest in a new commercial enterprise that is located in a

center is any economic unit, private or public, involved in promoting *economic growth*.[36] The immigrant investor has the burden to produce supporting evidence indicating how the regional center will create jobs indirectly through increased exports.[37] These predictions regarding the regional center must be supported by statistically or economically valid forecasting tools, such as, feasibility studies, analyses of markets which will be purchasing the exported goods and services, and/or multiplier tables.[38]

After the immigrant investor compiles the initial supporting documentation, he or she must file an I-526, Immigrant Petition by Alien Entrepreneur.[39] The petition must include information regarding the new commercial enterprise, the capital being invested, how the immigrant investor gained the necessary capital through lawful means, how the immigrant investor plans on creating ten new full-time jobs, the petitioner's plan of being engaged in day-to-day operations or policy formation, and also, information regarding the TEA or regional center, if applicable.[40]

2. The EB-2 Advanced Degree, Exceptional Ability, and National Interest Waiver Categories

Immigrants who possess an advanced degree or have an exceptional ability in the arts, sciences, or business can qualify for the Employment-Based second preference ("EB-2") visa program.[41] To

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regional center must create at least ten full-time jobs directly or indirectly via revenues generated from increased exports from the Pilot Program.").

36. *See* 8 C.F.R. § 204.6(e) (stating that economic growth includes improved regional productivity, increased export sales, increased domestic capital investment, and job creation).

37. *See* 8 C.F.R. § 204.6(m)(3) (stating that the regional center which wishes to participate in the Immigrant Investor Pilot Program must submit, among other things, (1) a proposal which provides a description of the geographical region where the regional center will be located; (2) how the regional center will promote economic growth via increased export sales, increased regional productivity, increased amount of jobs, and increased regional capital investment; (3) a document which provides in detail how local jobs will be created indirectly because of these increased exports; (4) a detailed document which attests to the amount and source of the investment that has been committed to a regional center; and (5) a prediction regarding the regional center's positive impact on the economy as reflected by an increase in household earnings, increased demand for services, utilities, repair, and construction within the regional center).

38. 8 C.F.R. § 204.6(m)(3)(v).

39. *See* 8 C.F.R. § 204.6(a) (determining that the immigrant investor must file the correct petition, the petition must be coupled with the appropriate fee, and the petitioner must sign the petition).

40. 8 C.F.R. § 204.6(j).

41. 8 C.F.R. § 204.5(k) (2016); *see also* U.S. CITIZENSHIP & IMMIGRATION SERVS., EMPLOYMENT-BASED IMMIGRATION: SECOND PREFERENCE EB-2 (2015) http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-second-preference-eb-2 (stating that an Employment-Based second preference visa is known as an EB-2 visa).

receive an EB-2 visa, an immigrant must fit into one of three sub-categories: (1) advanced degree; (2) exceptional ability; or (3) National Interest Waiver ("NIW").[42] Depending upon which sub-category the immigrant seeks to fit into, there will likely be significant implications on the immigrant's ability to immediately start a business.[43] In order for an immigrant to receive labor certification, the Department of Labor must certify that: (1) there is an insufficient amount of workers who are willing, qualified, available, and able at the time the application is submitted, at the location where the immigrant wants to perform the skilled or unskilled labor; and (2) the immigrant's employment will not adversely affect working conditions and wages of United States workers employed in similar positions.[44] Labor certification also requires proving that the immigrant holds an advanced degree or exceptional ability, when such condition is a prerequisite for the offered position.[45]

a. Advanced Degree Sub-Category

In order for an immigrant to fit into the advanced degree sub-category, the job that he or she is applying for: (1) must necessitate an advanced degree and (2) the immigrant must have earned an advanced degree or its equivalent.[46] The equivalent of an advanced degree is a United States baccalaureate degree or a degree from a foreign country above that of baccalaureate.[47] Similarly, a national or foreign baccalaureate degree followed by five years or more of progressive experience in that particular specialty is considered equivalent to earning a master's degree.[48] The immigrant has the burden of producing documentation to prove attainment of an advanced degree.[49]

Upon being granted certification by the United States Department of Labor, an employer is permitted to petition on the immi-

42. *See* 8 C.F.R. § 204.5(k)(4)(ii) (explaining that a National Interest Waiver refers to applicants whom are exempted from the requirement of possessing a job offer).

43. *See* VISA PRO, *EB-2 National Interest Waiver (NIW): Green Card Through Self Petition*, http://www.visapro.com/Immigration-Articles/?a=1862&z=39 (last visited Feb. 4, 2016) (noting that generally, employment-based visas require a United States employer to petition on an international citizen's behalf and present the immigrant an offer of employment). The EB-2 NIW sub-category allows an immigrant to be exempt from possessing a job offer and from going through labor certification. *Id*. The NIW allows international citizens to self-petition, thus offering a significantly quicker avenue for persons seeking permanent residence in America. *Id*.

44. 8 U.S.C. § 1182(a)(5)(A) (2015).

45. 8 C.F.R. § 204.5(k)(4).

46. U.S. CITIZENSHIP & IMMIGRATION SERVS., EMPLOYMENT-BASED IMMIGRATION: SECOND PREFERENCE EB-2 (2015), http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-second-preference-eb-2.

47. 8 C.F.R. § 204.5(k)(2) (2009).

48. *Id*.

49. EMPLOYMENT-BASED IMMIGRATION: SECOND PREFERENCE EB-2, *supra* note 46.

grant's behalf using a Form I-140, Immigrant Petition for Alien Worker.[50] In the I-140 it is necessary for the employer to provide evidence that it has the ability to afford the immigrant worker's salary and the employer must produce documents which confirm the immigrant worker is actually qualified for the position that requires an advanced degree.[51] Thereafter, if the immigrant is already in the United States on a temporary visa, he or she must file an I-485, Application to Register Permanent Resident or Adjust Status.[52] The only application the immigrant is responsible for filing on his or her own behalf is the I-485; the employer must pay all costs associated with both the labor certification process and the I-140 application.[53] From start to finish, this entire process can take several years.[54]

b. Exceptional Ability Sub-Category

An immigrant can also fit into the EB-2 visa category if he or she has an exceptional ability in the arts, sciences, or business.[55] The immigrant has the burden to meet three of the following six requirements to show exceptional ability: (1) show an academic record indicating a degree, certificate, or similar award from a school, college, or university which relates to the exceptional ability; (2) provide letters from current or past employers showing a minimum of ten years of full-time work experience in the practice or industry which the immigrant is seeking work; (3) provide proof of a license to practice in the profession or occupation in which the immigrant is seeking work; (4) provide evidence that the immigrant has commanded a salary indicative of their exceptional ability; (5) provide evidence that the immigrant is a member in certain professional associations; or (6) provide evidence that the immigrant has been recognized for contributions or received achievements within the specified industry.[56] After the immigrant establishes exceptional ability, the remaining procedural steps are the same as those listed in the advanced degree subcategory.[57]

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50. U.S. DEP'T OF LABOR, http://www.foreignlaborcert.doleta.gov/perm.cfm (last visited Mar. 7, 2016).

51. NOLO LAW FOR ALL, http://www.nolo.com/legal-encyclopedia/timeline-sponsoring-immigrant-worker-green-card.html (last visited Jan. 24, 2016).

52. *Id*.

53. *Id*.

54. *Id*. "Due to the priority date backlog for nationals of India, China, Mexico, and the Philippines, these foreign workers often have to wait several years for USCIS to adjudicate and approve their petitions." *Id.*

55. 8 C.F.R. § 204.5(k)(3)(ii).

56. *Id*.

57. *See supra* notes 50-54 and accompanying text.

c. National Interest Waiver Sub-Category

The third and final sub-category provides a method for an immigrant to seek status without a job offer, so long as the immigrant's exceptional ability in the arts, business, or sciences would be in the interest of the United States.[58] In filling out the Form ETA-750B, Statement of Qualifications of Alien, the immigrant is able to seek an EB-2 visa without an employer petitioning on his or her behalf, and therefore is exempted from the otherwise necessary labor certification process.[59] Accordingly, immigrants under the NIW sub-category are able to self-petition.[60] When providing evidence that the immigrant is worthy of an NIW visa, he or she must satisfy three of the same six requirements established in the exceptional ability sub-category.[61]

One of the benchmark cases for NIW adjudication is *In re New York State Department of Transportation*,[62] in establishing that the standard for NIW exemption must be set significantly higher than that which is required to prove exceptional ability, where the immigrant is required to prove *prospective* national benefit.[63] In *In re New York*, the criteria for granting an NIW exemption was determined to be the following: (1) the immigrant must be seeking employment in a field of substantial intrinsic merit; (2) the benefit to the United States must be national in scope; and (3) forcing labor certification would adversely affect the national interest.[64] It is also established that having exceptional ability alone is an insufficient reason to grant the waiver.[65] Additionally, the court in *In re New York* established that an NIW cannot be granted to fulfill a local shortage.[66]

To understand that an immigrant can qualify under an NIW exemption, and therefore be self-employed, it is necessary to note the difficult process he or she must go through to attain this EB-2 visa,

58. 8 C.F.R. § 204.5(k)(4)(ii).

59. *Id*.

60. U.S. Citizenship & Immigration Servs., Employment Based Second Preference: EB-2 Visa-General Requirements, http://www.uscis.gov/eir/visa-guide/eb-2-employment-based-second-preference/employment-based-second-preference-eb-2-visa-general-requirements (last visited Jan. 24, 2016).

61. Employment-Based Immigration: Second Preference EB-2, *supra* note 46.

62. 22 I. & N. Dec. 215 (B.I.A. 1998).

63. In re N.Y. State Dep't of Transp., 22 I. & N. Dec. 215, 216-17 (B.I.A. 1998).

64. *In re New York*, 22 I. & N. Dec. at 217; *see also* U.S. Citizenship & Immigration Servs., National Interest Waiver (Jan. 30, 2016), http://www.uscis.gov/eir/visa-guide/eb-2-employment-based-second-preference/national-interest-waiver (asserting that in order to prove the immigrant's ability would benefit the United States on a national level, the immigrant must establish that the enterprise "will serve the national interest to a substantially greater degree than the work of others in the same field.").

65. *Id.* at 218.

66. *Id.*

which can take well over 1,000 hours of time to complete.[67] This process can take an extraordinary amount of time to properly complete, due to large amounts of evidence that must be submitted as support.[68] In one study spanning 2012 and 2013, it was found that 88.8 percent of immigrants who had an NIW exemption granted also held a Ph.D. degree.[69] Of the remaining immigrants who were granted an NIW exemption, 10.2 percent had a master's degree, and one percent had only a bachelor's degree.[70] Furthermore, on average, each immigrant who was granted an NIW exemption had written twelve journal articles, his or her work was cited 124 times, and he or she had submitted at least five letters of recommendation.[71]

3. The H-1B Temporary Specialty Occupation Visa

An H-1B visa is primarily used by an American employer seeking to hire an international student or professional to work in the United States for a period of time that cannot exceed six years.[72] To qualify for an H-1B visa, it is necessary that: (1) the immigrant has an employer-employee relationship with the employer petitioning on his or her behalf; (2) the job must qualify as a specialty occupation; (3) the specialty occupation must be related to the immigrant's field of study; (4) the immigrant must be paid the actual or prevailing wage for that particular occupation, whichever is greater; and (5) an H-1B visa must be available at the time the petition is filed, unless the petition is not subject to the numerical limits.[73]

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67. EB2 NAT'L INTEREST WAIVER (NIW), http://www.eb2niw.com/credentials-cases/our-eb2-niw-case-approved-2013/ (last visited Jan. 24, 2016).

68. *See id.* (stating that over 70 exhibits were submitted with the immigrant's petition).

69. EB2 NAT'L INTEREST WAIVER (NIW), http://www.eb2niw.com/credentials-cases/average-approved-niw-case-basic-credentials/ (last visited Jan. 24, 2016).

70. *Id*.

71. *Id*.

72. H1 BASE, *H1B Visa Program Overview*, http://www.h1base.com/visa/work/h1b%20visa%20overview/ref/1164/ (last visited Jan. 25, 2016); *but see* Patrick Thibodeau, *Anti-H-1B senator to head immigration panel*, COMPUTERWORLD.COM, Jan. 22, 2015, http://www.computerworld.com/article/2873670/anti-h-1b-senator-to-head-immigration-panel.html [hereinafter Thibodeau, *Anti-H-1B senator to head immigration panel*] (explaining that Sen. Sessions believes American information technology workers are replaced by immigrant workers under the H-1B program); Patrick Thibodeau, *Obama H-1B reform plan draws Grassley's ire*, COMPUTERWORLD.COM, Oct. 13, 2014, http://www.computerworld.com/article/2825254/obama-h-1b-reform-plan-draws-grassleys-ire.html [hereinafter Thibodeau, *Obama H-1B reform plan draws Grassley's ire*] (expressing that Sen. Grassley believes that businesses hiring H-1B workers should be required to verify that an immigrant is not replacing or displacing American workers).

73. U.S. CITIZENSHIP & IMMIGRATION SERVS., *Understanding H1-B Requirements*, http://www.uscis.gov/eir/visa-guide/h-1b-specialty-occupation/understanding-h-1b-requirements (last visited Jan. 25, 2016).

To prove that the immigrant has a valid employer-employee relationship, the employer must have the ability to hire, fire, pay, control, or supervise the work of the immigrant H-1B worker.[74] An immigrant entrepreneur can demonstrate that he or she has the necessary employer-employee relationship, even if he or she owns a company.[75] For the immigrant's job to qualify as a specialty occupation it is typical that the job must require a bachelor's degree or its equivalent, and the immigrant must prove his or her field of study is related to such a job by producing documents which indicate job duties and further indicate that the immigrant doesn't have the ability to hire, fire, and control work.[76] Determining the appropriate wage requires an examination of whether the actual wage or the prevailing wage is greater because the immigrant employees' wage must be the greater of the two.[77] The Foreign Labor Certification Data Center annually calculates prevailing wage rates by county.[78] USCIS is statutorily limited to issuing 65,000 H-1B visas per fiscal year, less the amount of free trade visas for citizens from Singapore and Chile, resulting in 58,200 H-1B visas per fiscal year.[79] However, an additional 20,000 immigrants who possess a master's degree or higher from a United States school are exempt from the cap.[80]

Unfortunately for H-1B petitioners, the demand for these temporary specialty occupation visas far exceeds the supply.[81] For example, the annual filing period begins each year on April 1, and in the first week of April 2014, 172,500 H-1B applications reached USCIS.[82] Then, a computer decided the fate of each individual's petition based on a computer-generated lottery system.[83] Those who were lucky

74. *Id*.

75. *Id.* "If an immigrant owns a company he or she might be able to satisfy the employer-employee relationship, so long as the work the immigrant completes is controlled by others." *Id*.

76. *Id*.

77. *See* 20 C.F.R. § 655.731(a) (2009) (stating the actual wage is the rate the employer pays to all other employees with similar qualifications and experience, while the prevailing wage is the wage for the occupational classification for the intended type of employment at the time the labor condition application ("LCA") is filed).

78. FOREIGN LABOR CERTIFICATION DATA CTR., http://www.flcdatacenter.com/ (last visited Mar. 7, 2016).

79. 8 U.S.C. §§ 1184(g)(1)(A), 1184(g)(8)(B)(ii) (2014).

80. 8 U.S.C. §§ 1184(g)(1)(A), 1184(g)(5)(C).

81. Kevin Casey, *H-1B Visa Program: 13 Notable Statistics*, INFORMATIONWEEK (Nov. 20, 2014), http://www.informationweek.com/strategic-cio/team-building-and-staffing/h-1b-visa-program-13-notable-statistics/d/d-id/1317609.

82. *Id*.; *see also* AM. IMMIGRATION COUNCIL, *The H-1B Visa Program: A Primer on the Program and its Impact on Jobs, Wages, and the Economy* (Apr. 1, 2015), http://www.immigrationpolicy.org/just-facts/h-1b-visa-program-primer-program-and-its-impact-jobs-wages-and-economy (explaining that by April 7, 2014, USCIS had exhausted all H-1B visas).

83. *Id*.

enough to have their H-1B petition granted were permitted to begin working for their sponsor employer on October 1, 2014.[84]

One study issued in 2014 found that H-1B increases in science, technology, engineering, and mathematics ("STEM") workers actually lead to an increase in wages and salaries paid to college-educated native-born Americans in STEM jobs.[85] Another study indicated that H-1B visa holders earn a higher salary than comparable native-born workers.[86] Factors such as marital status, ethnicity, and gender prove to play a more significant role than immigration status or citizenship for salaries and wages in the finance and tech industries.[87] Ultimately, unemployment rates are lower than national unemployment rates for occupations that hire large numbers of H-1B visa holders.[88]

B. Why Must Congress Address the Issue of Immigrant Entrepreneurship as Soon as Possible?

1. Congress's Failed Attempts of Addressing This Issue

As of January 2015, Congress is taking a fourth stab at discussing the Startup Act, after they failed to act on other entrepreneurial legislation proposed in 2010, 2011, and 2013.[89] The Startup Act has a clear purpose, as Senator Moran (R-Kan.) explained, it is simply about creating jobs for United States citizens through the growth and creation of new businesses.[90] The Startup Act would create an entrepreneur's visa, which would allow foreign-born entrepreneurs to legally remain in the United States in order to establish businesses and create jobs, and would create a science, technology, engineering, and

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84. *Id*.

85. Giovanni Peri et al., *Foreign STEM Workers and Native Wages and Employment in U.S. Cities*, The National Bureau of Economic Research, (May 2014), http://www.nber.org/papers/w20093.

86. Jonathan Rothwell & Neil G. Ruiz, *H-1B Visas and the STEM Shortage*, Brookings (May 10, 2013), http://www.brookings.edu/research/papers/2013/05/10-h1b-visas-stem-rothwell-ruiz.

87. Nicole Kreisberg, *H-1B Visas: No Impact on Wages*, American Institute for Economic Research (Oct. 9, 2014), https://www.aier.org/research/h-1b-visas-no-impact-wages.

88. *See* U.S. Chamber of Commerce, *Help Wanted: The Role of Foreign Workers In the Innovation Economy*, Information Technology Industry Council 2, http://www.renewoureconomy.org/sites/all/themes/pnae/stem-report.pdf (last visited Jan. 31, 2016) ("While the current national unemployment rate hovers around 8 percent, the unemployment rate for US citizens with PhDs in STEM is just 3.5 percent, and 3.4 percent for those with master's degrees in STEM.").

89. Startup Act, S. Res. 181, 114th Cong. (2015); S. 3029, 111th Cong. (2010); S. 565, 112th Cong. (2012); S. 189, 113th Cong. (2014).

90. Jerry Moran U.S. Sen. for Kan. (Jan. 16, 2015), http://www.moran.senate.gov/public/index.cfm/news-releases?ContentRecord_id=ba8adcad-d189-4275-8195-872b3ca7a0b1.

math-related degree ("STEM") visa.[91] The Startup Act would also eliminate per-country caps for all employment-based visas, because the current caps hinder United States businesses from recruiting upper echelon employees. Additionally, the Startup Act would create a research and development tax credit used for startups in the initial stages of development, which would allow businesses to offset the burden of employee taxes, thereby freeing up capital to allow the company to expand and create jobs.[92]

2. Other Countries are Laying the Groundwork for Entrepreneurs to Enter Their Countries

Although the United States lacks an entrepreneur visa program, countries like Canada and New Zealand are quickly making use of the world's brightest minds to start businesses in their respective countries.[93] In 2013, Canada introduced its version of the Startup Act, promising immigrants permanent residency if they qualify under its entrepreneurial program.[94] So long as an immigrant entrepreneur who enters Canada secures an investment from a designated Canadian venture capital fund or angel investor, and has completed at least one year of post-secondary education, he or she has an opportunity for their application to be granted.[95] Canada offers a strong economic growth platform, especially considering *Forbes* magazine rated Canada as the top-ranked nation in the G-20 in which to do business.[96]

New Zealand has similarly announced the creation of a startup visa, which is friendly to immigrant entrepreneurs.[97] Under the New Zealand system, within six months immigrants are able to apply for residence under a residency program.[98] In the New Zealand visa program, immigrant investors must: (1) invest 100,000 New Zealand dollars; (2) have a clear business plan; (3) earn a certain amount of points from a system regarding the likely success of the enterprise; (4) have a

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91. *See generally Bill Information for S.181 - Startup Act*, CONGRESS.GOV (Apr. 9, 2016), https://www.congress.gov/bill/114th-congress/senate-bill/181/all-info (providing an overview of the provisions of the Startup Act, S. Res. 181).

92. MORAN, *supra* note 90.

93. EWING MARION KAUFFMAN FOUND., THE ECONOMIC CASE FOR WELCOMING IMMIGRANT ENTREPRENEURS (Mar. 27, 2014), http://www.kauffman.org/~/media/kauffman_org/research%20reports%20and%20covers/2014/03/entrepreneurship_policy_digest_march_2014.pdf.

94. CITIZENSHIP & IMMIGRATION CAN., *Canada wants entrepreneurs!* (last updated Oct. 16, 2015), http://www.cic.gc.ca/english/resources/publications/entrepreneurs.asp.

95. *Id*.

96. *Id*.

97. N.Z. IMMIGRATION, *Entrepreneur Visas* (last updated Aug. 12, 2015), https://www.newzealandnow.govt.nz/move-to-nz/new-zealand-visa/visas-to-invest/entrepreneur-visa.

98. *Id*.

clean history of fraud, business failure, and bankruptcy; and (5) satisfy certain English-speaking requirements.[99]

Canada and New Zealand each have their respective benefits they offer, but countries all around the world, aside from the United States, are stepping up and welcoming entrepreneurs into their borders, including: Australia, Chile, Denmark, France, Ireland, Italy, Netherlands, Singapore, Spain, and the United Kingdom.[100] Some countries do not require any minimum level of funding at all, while other countries allow the funding to come from anyone willing to support the startup, and still, numerous other countries allow an immigrant to apply for permanent residency after living in the country for two years.[101]

3. What is the Impact of Allowing Immigrants to Start Businesses in the United States?

To understand the impact immigrant entrepreneurs have on the United States, it is fitting to begin by examining California, where in 2011, 27 percent of the population was foreign-born, translating to more than ten million foreign-born people living in the state.[102] Additionally, from 2007 to 2011, California's immigrants founded roughly 45 percent of the state's new businesses.[103] Moreover, in 2010, new immigrant-founded businesses generated $34.3 billion in net income.[104] Lastly, 33 percent of business owners in California are immigrants.[105]

While California is indicative of what our economy can expect from immigrant entrepreneurs going forward, it is also imperative to look at this issue from a past perspective, which is exactly what the bipartisan group, Partnership for a New American Economy, did in

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99. *Id*.

100. Josephine Goube, *Entrepreneur Visas: A Comparison of the 12 Countries Where Entrepreneurs Are Welcomed*, MIGREAT BLOG, July 24, 2014, http://blog.migreat.com/2014/07/24/entrepreneur-visas-worldwide-a-comparison-of-the-7-countries-where-entrepreneurs-are-welcomedutm_sourceblogutm_mediumlinkutm_campaignaugustpush/.

101. *See id*. (expressing that Chile, France, the Netherlands, and Spain do not require any level of minimum funding; Ireland, Italy, the Netherlands, New Zealand, Singapore, and Spain all state that anyone can fund the startup; Chile, Ireland, Italy, the Netherlands, and Spain all allow immigrant entrepreneurs to apply for citizenship after living in the country for two years or less).

102. Hans Johnson, *Just the Facts: Immigrants in California*, PUB. POLICY INST. OF CAL. (May 2013), http://www.ppic.org/main/publication_show.asp?i=258.

103. AM. IMMIGRATION COUNCIL, *California: Immigrant Entrepreneurs, Innovation, and Welcoming Initiatives in the Golden State* (Jul. 24, 2013), http://www.immigrationpolicy.org/just-facts/california-immigrant-entrepreneurs-innovation-and-welcoming-initiatives-golden-state.

104. *Id*.

105. *Id*.

June 2011.[106] The study found that greater than 40 percent of the Fortune 500 companies in 2010 were founded either by immigrants or their children.[107] Of the Fortune 500 companies in 2010, an immigrant founded ninety of them, while the sons and daughters of immigrants founded 114 companies.[108] Seven of the ten most valuable global brands come from American businesses founded by immigrants: Apple, AT&T, General Electric, Google, IMB, Marlboro, and McDonald's.[109]

4. United States Schools are Educating the World's Brightest

According to a recent study, five United States universities offer the top MBA entrepreneurial graduate programs in the world.[110] A recent publication by the Financial Times described the following five schools as the top MBA programs in the world for entrepreneurship: (1) Stanford Graduate School of Business, (2) MIT: Sloan, (3) University of San Diego School of Business Administration, (4) University of Southern California: Marshall, and (5) Harvard Business School.[111] To calculate these rankings the study looked to: the percentage of MBA graduates from each program who had started a company; the percentage of entrepreneurs that raised all or a portion of their equity via non-family member investors; the percentage of businesses started in 2013 or earlier, and have continued to operate through 2014; and the extent to which their particular graduate program helped them start the company, among other factors.[112]

In the Stanford Graduate School of Business Class of 2017, 40 percent of the class hails from a foreign country, representing fifty-two other countries around the world.[113] For the 2017 entering class at MIT: Sloan, 38 percent of the entering class includes international students.[114] The University of San Diego School of Business Administration's most recent class profile is from 2014, where 53 percent of

106. P'SHIP FOR A NEW AM. ECON., *supra* note 15.

107. *Id*. at 2.

108. *Id*.

109. *Id*.

110. Marich, *supra* note 1.

111. Laurent Ortmans, *MBA by numbers: Top programmes for entrepreneurship* (June 28, 2015), http://im.ft-static.com/content/images/e676be3c-1b32-11e5-8201-cbdb03d71480.pdf.

112. *Top 10 MBA programmes for entrepreneur,* FINANCIAL TIMES, http://im.ft-static.com/content/images/e676be3c-1b32-11e5-8201-cbdb03d71480.pdf (last visited Jan. 27, 2016).

113. STANFORD GRADUATE SCHOOL OF BUSINESS, https://www.gsb.stanford.edu/programs/mba/admission/evaluation-criteria/class-profile (last updated Oct. 8, 2015).

114. MIT SLOAN SCHOOL OF MANAGEMENT, http://mitsloan.mit.edu/mba/admissions/class-profile2/ (last visited Jan. 27, 2015).

the full-time MBA students were international students.[115] At the University of Southern California: Marshall, 29 percent of the 2016 entering class was comprised of international students, representing thirty-one other countries.[116] Rounding out the top five, the Harvard Business School includes 34 percent of its 2017 class as international students.[117]

III. ARGUMENT

This Topic Note will now assert that current immigration laws hinder immigrant entrepreneurs from establishing business in the United States.[118] First, this Argument will describe how current immigration laws do not provide an adequate path for immigrant entrepreneurs to enter and remain in the United States.[119] Next, this Note will argue that United States universities offer many of the highest-ranked entrepreneurship programs in the world, and international students flock to these universities, but legislative action needs to be taken to address the large portion of highly-educated foreign nationals who attain a top-ranked education and then must leave the country.[120] Finally, this Argument will assert that Congress must take action to resolve this issue.[121]

A. Current Immigration Laws do not Provide a Reasonable Path for Immigrant Entrepreneurs to Remain in the United States

1. Immigrant Entrepreneurs do not fit in the Current Visa System

An immigrant entrepreneur attempting to pinpoint his or her path into the United States is often faced with incredible hurdles that must be overcome to obtain legal status, such as making an investment of at least $500,000.[122] Under the employment-based fifth pref-

115. Bloomberg Business, *Profile Data from 2014,* http://www.sandiego.edu/business/programs/mba/admissions/class-profiles.php (last visited Jan. 27, 2016).

116. University of Southern California Marshall School of Business, https://www.marshall.usc.edu/mba/admissions/profile (last visited Jan. 27, 2016).

117. Harvard Business School, http://www.hbs.edu/mba/admissions/class-profile/Pages/default.aspx (last visited Jan. 27, 2016); *see also* Claire Groden, *Dear International Students: Thanks For Your Tuition. Now Go Home. Love, Uncle Sam.*, New Republic, (Dec. 2, 2014), https://newrepublic.com/article/120463/immigration-law-discourages-international-students-working (asserting that American colleges "roll out the welcome mat for international student[s]" but United States immigration laws "usher[ ] [the international students] out soon after [graduation].").

118. *See infra* notes 120-167 and accompanying text.

119. *See infra* notes 123-142 and accompanying text.

120. *See infra* notes 143-151 and accompanying text.

121. *See infra* notes 152-167 and accompanying text.

122. 8 U.S.C. § 1153(b)(5); *see also* Peter Elkind & Marty Jones, *The dark, disturbing world of the visa-4-sale program* (July 24, 2014), http://fortune.com/2014/07/24/

erence ("EB-5") visa, which is also known as the immigrant investor visa, aspiring business owners are mandated to invest large amounts of money, and they are required to create at least ten full-time jobs for United States citizens or other authorized immigrant workers.[123] There are less than 10,000 EB-5 visas available in any given fiscal year, and in 2015, 87 percent of those visas were granted to citizens of Mainland China.[124] These stringent requirements benefit wealthy foreign internationals who would perhaps prefer to invest in a new commercial enterprise, or even invest in an existing enterprise, so long as the existing business is restructured or reorganized so a new commercial enterprise results.[125]

Another visa category an immigrant entrepreneur might attempt to fit into is the employment-based second preference ("EB-2") visa category, which typically requires that the immigrant has either an advanced degree or an exceptional ability.[126] However, two sub-categories of the EB-2 visas require an employer to petition on behalf of the immigrant, using a Form I-140.[127] Fortunately for foreign nationals, the third sub-category of the EB-2 visa allows an immigrant to obtain legal status if his or her exceptional ability benefits the national interest of the United States.[128] Under the national interest waiver sub-category ("NIW") an immigrant is not required to have a job offer in the United States and accordingly, may self-petition.[129] An immigrant may not self-petition based on the other two EB-2 sub-categories, because an alien may not self-petition based on employment.[130]

An immigrant faces an uphill battle when attempting to satisfy the NIW requirements because an immigrant has the burden to show that he or she is seeking employment in a field of substantial intrinsic merit and that the benefit he or she will provide to the United States

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immigration-eb-5-visa-for-sale/ (determining that it is becoming more difficult to become a United States citizen, unless an immigrant has $500,000 to "buy their way in" to the country).

123. *Id*.

124. *See* U.S. DEP'T OF STATE, *supra* note 21 (stating that 7,616 EB-5 visas were granted to citizens of Mainland China, while 8,773 total visas were issued in 2015).

125. 8 C.F.R. § 204.6(h); Alana Semuels, THE ATLANTIC, *Should Congress Let Wealthy Foreigners Buy Green Cards*, http://www.theatlantic.com/business/archive/2015/09/should-congress-let-wealthy-foreigners-buy-citizenship/406432/.

126. EMPLOYMENT-BASED IMMIGRATION: SECOND PREFERENCE EB-2, *supra* note 46.

127. *See* 8 C.F.R. § 204.5(k) (determining that if the alien holds an advanced degree or has an exceptional ability in the arts, sciences, or business then a United States employer may petition on behalf of the alien).

128. 8 C.F.R. § 204.5(k)(4)(ii).

129. U.S. CITIZENSHIP & IMMIGRATION SERVS., GREEN CARD THROUGH SELF PETITION, https://www.uscis.gov/green-card/green-card-through-job/green-card-through-self-petition (last updated Sep. 30, 2015).

130. *Id*.

is national in its scope.[131] Assuming the immigrant has the ability to satisfy these strenuous national-based requirements, he or she also faces the likelihood of spending up to 1,000 hours completing necessary paper work.[132] The immigrant must also be an extraordinary scholar just to have a chance at having his or her waiver request granted.[133] Nearly 90 percent of NIW applications that are granted involve immigrants who have earned a Ph.D. degree, while only 1 percent of those NIW applications that are granted involve immigrants who have earned only a bachelor's degree.[134] Additionally, on average, each immigrant who was granted an NIW exemption had written twelve journal articles, their work had been cited 124 times, and had submitted at least five letters of recommendation.[135]

Finally, an immigrant may find himself or herself navigating the H-1B visa category, where, like the EB-2 categories, each immigrant is required to have a job offer from a United States employer.[136] Among other requirements, the immigrant and the United States employer must have a valid employer-employee relationship.[137] The immigrant has the burden to prove the relationship exists, and he or she must prove that the employer has the ability to hire, fire, pay, control, or supervise his or her work.[138] Additionally, immigrants seeking an H-1B visa have to be fortunate in the luck-of-the-draw scenario where, in 2014, less than one half of the immigrants who applied for an H-1B visa were granted legal status.[139] Therefore, under the H-1B visa category, an immigrant who aspires to establish a new enterprise must also substantiate that he or she could be fired by the employer at any time.[140] Finally, under the H-1B visa, the immigrant must under-

131. In re N.Y. State Dep't of Transp., 22 I. & N. Dec. 215, 217 (B.I.A. 1998).

132. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., NATIONAL INTEREST WAIVER (JAN. 30, 2016), http://www.uscis.gov/eir/visa-guide/eb-2-employment-based-second-preference/national-interest-waiver (asserting that in order to prove the immigrant's ability would benefit the United States on a national level, the immigrant "must show that [he or she] serve the national interest to a substantially greater extent than the majority of [his or her] colleagues and that [he or she] ha[s] a degree of influence on [his or her] field that distinguishes [him or her] from [his or her] colleagues.").

133. *See* EB2 NAT'L INTEREST WAIVER (NIW), *supra* note 69 (stating that from 314 approved NIW petitions studied, 99 percent of applicants earned a Ph.D. or Master's degree).

134. *Id*.

135. *Id*.

136. H1 BASE, *supra* note 72.

137. *Understanding H1-B Requirements*, *supra* note 73.

138. *Id*.

139. *See* Casey, *supra* note 81 (stating that the demand for the H-1B visa far exceeds the low supply, as evidenced by the 172,500 applications that reached USCIS over a five-day business period in April 2014).

140. *Understanding H1-B Requirements*, *supra* note 73.

stand that he or she may only receive legal status for a six-year period.[141]

2. American Schools Produce the Top Entrepreneurial Talent in the World

United States citizens can proudly claim that the future of the global business landscape is being molded within walls of American universities, as the top five MBA programs for entrepreneurship in the world are located in the United States.[142] From coast to coast, future entrepreneurial minds are being molded to become the brightest and most cunning business owners in the world; this is evidenced by the fact that students can achieve world-class entrepreneurial education in California at the Stanford Graduate School of Business, the University of San Diego School of Business Administration, or the University of Southern California: Marshall, or if they prefer the east coast, they can seek this education from MIT: Sloan or Harvard Business School.[143] But, not surprisingly, as these United States universities are able to boast that they offer the top-level of entrepreneurial education, students from around the world are taking notice, such as at Stanford where the incoming class is represented by students from fifty-two other countries.[144]

Stanford's class is not unique among the top five entrepreneurship programs, which include MIT: Sloan, the University of San Diego School of Business Administration, University of Southern California: Marshall, and Harvard Business School.[145] Unfortunately for these international students graduating from American schools, current immigration laws usher the students out of the country soon after graduation.[146] The students who have the patience and pockets to navigate complex immigration laws might stand a chance at working in the

141. H1 BASE, *supra* note 72.

142. Marich, *supra* note 1.

143. *Id*.

144. STANDARD GRADUATE SCHOOL OF BUSINESS, *supra* note 113.

145. *See supra* notes 113-117 and accompanying text (stating that 40 percent of the Stanford School of Business class was from a foreign country, 38 percent of the MIT: Sloan class was from a foreign country, 53 percent of the San Diego School of Business Administration was from a foreign country, 29 percent of the University of Southern California: Marshall was from a foreign country, and 34 percent of the Harvard School of Business was from a foreign country).

146. *See* Claire Groden, *Dear International Students: Thanks For Your Tuition. Now Go Home. Love, Uncle Sam.*, NEW REPUBLIC, (Dec. 2, 2014), https://newrepublic.com/article/120463/immigration-law-discourages-international-students-working (determining that "while universities roll out the welcome mat for international students, U.S. immigration law ushers them out soon after they graduate.").

United States permanently, but nothing is guaranteed.[147] This uncertain post-graduation process is a product of the fact that no direct path for permanent residence exists after graduating from an American university.[148] Congress must address this situation because American-educated international students in developing countries are returning to their home countries in high demand.[149] Therefore, foreign students are attending top-ranked American schools, eventually earning a highly-respected graduate degree, only to be told that America has no room for them, and the students then return to their respective countries to compete with America in the global marketplace.[150]

B. The Fourth Version of the Startup Act must be Passed

The Startup Act was created for the purpose of jump-starting economic recovery through creation and growth of new businesses.[151] The Startup Act would modify the Immigration and Nationality Act, as amended, ("INA") and would authorize the Department of Homeland Security ("DHS") to grant conditional immigrant visas to 75,000 qualified immigrant entrepreneurs.[152] To qualify as an alien entrepreneur, an immigrant must be lawfully present in the United States and either a resident of a foreign country who is temporarily in the United States to perform a service or labor, or a resident of a foreign country who is temporarily in the United States for the sole purpose of pursuing an education at a university, college, seminary, high school, or elementary school.[153] Furthermore, within one year of the visa being granted, an immigrant entrepreneur must register at least one new business enterprise in the United States, employ a minimum of two full-time employees in the new business enterprise who have no relation to the immigrant entrepreneur, and invest or raise capital in-

147. *See id*. (noting that "[i]nternational students who want to work permanently in America after graduation have to navigate a . . . maze of immigration law that demands incredible amounts of money, time, and uncertainty.").

148. *Id*.

149. *Id*.

150. *Compare id*. (expressing that "foreign students keep on arriving, studying, and working hard—and then being turned away."), *with* Marich, *supra* note 1 (determining that the top five programs, and seven of the top ten programs, in the world, for entrepreneurship are located at American universities).

151. Startup Act, S. Res. 181, 114th Cong. (2015).

152. *Compare* Startup Act, S. Res. 181, 114th Cong. § 210A (stating that the Secretary of Homeland Security may issue up to 75,000 conditional immigrant visas to qualified alien entrepreneurs), *with* 8 U.S.C. § 1153(b)(5) (2015) (expressing that 10,000 visas must be made available to qualified immigrants who seek to enter the United States to engage in a new commercial enterprise).

153. *Compare* Startup Act, S. Res. 181, 114th Cong. § 210A (explaining the requirements which allow an immigrant to be a qualified alien entrepreneur), *with* 8 C.F.R. 204.6(f)(1) (2015) (determining that generally, the amount of capital which must be invested into a new commercial enterprise under the EB-5 program is $1,000,000).

vestment of at least $100,000 for the new business enterprise.[154] Finally, within the following three years after the initial year in which the business is established, the new business enterprise must employ an average of a minimum of five employees who have no relation to the immigrant entrepreneur.[155]

Congress made the following findings to substantiate the need to amend the INA to create an immigrant entrepreneur visa category: achieving economic recovery requires the establishment and growth of new businesses; between 1980 and 2005, businesses less than five years old constituted for almost all of the United States net job creation; new businesses in the United States generate an average of 3 million jobs annually; and to get Americans back in the work place, entrepreneurs ought to be free to create new companies, innovate, and hire new employees.[156]

The Startup Act would provide a plethora of other needed changes to current immigration policies, including the elimination of per country numerical limitations for employment-based visas, research credit for newly established companies, and a capital gains tax exemption for newly established companies.[157] For example, the Startup Act would address the supply and demand issues currently present with H-1B visas, by eliminating per country numerical limitations for employment-based visas.[158] Additionally, the creation of a research and development tax credit for businesses younger than five years old would allow the businesses to offset employee taxes and allow for expansion and creation of jobs.[159]

This proposed legislation has garnered support from many Republicans, Democrats, and entrepreneurial industry experts, such as Senator Moran who explained that the Startup Act would make certain the United States remains the land of opportunity for entrepreneurs and innovators from all around the world.[160] Senator Warner expounded that this legislation would ensure that the United States will be able to compete and win the global battle for talented

154. *Compare* Startup Act, S. Res. 181, 114th Cong. § 210A(e)(2)(B) (expressing the requirements which must be satisfied within one year of the date the immigrant is granted an entrepreneur visa), *with* 8 C.F.R. § 204.6(f)(1) (determining that under the EB-5 program, a qualifying investment is $1,000,000, and in limited circumstances, is $500,000).

155. Startup Act, S. 181, 114th Cong. § 210A.

156. *Id*. § 2.

157. *Id*. § 5.

158. *Compare id*. (determining that the Startup Act would eliminate per-country numerical caps on employment-based visa categories), *with* Casey, *supra* note 81 (noting that current H-1B applications far exceed the supply, as 172,5000 applications were submitted to USCIS in April 2014, but less than half of the applications were granted).

159. MORAN, *supra* note 90.

160. *Id*.

entrepreneurs and innovators.[161] Senator Klobuchar added that this bipartisan effort would help ensure that future generations of entrepreneurs and innovators can establish their businesses in the United States.[162]

A study was completed on a previous version of this bill, Startup Act 3.0, which is identical in many aspects to the Startup Act, and it was determined that the entrepreneur visa could generate nearly 1.6 million jobs over a ten-year period.[163] This study used United States Census Bureau data and figured a 49 percent survival rate of businesses to find a legislative baseline of nearly 500,000 jobs, which would be created by an entrepreneur visa.[164] Additionally, the study found an average United States company scenario, where typically, four-year old businesses from 2003 to 2010 employed 9.18 employees; accounting for survival rates, the study found that the entrepreneur visa could create just shy of 900,000 jobs.[165] Finally, taking into account the technology and engineering scenario, where these types of businesses hired an average of 21.37 people per business, the Kauffman Foundation found that an entrepreneur visa could create approximately 1.6 million jobs.[166]

C. Opponents of Business Immigration Reform

Critics of immigration reform, such as the Startup Act, typically argue that allowing immigrant workers to enter the United States would displace otherwise qualified Americans, driving up native-born unemployment and driving down salaries and wages.[167] Simple economics suggests that if millions of foreign-born people enter the American work force, then qualified Americans are forced to compete in a crowded work place for a finite number of employment opportunities.[168] These critics argue that because labor supply increases, then wages must fall, thereby affecting the economy.[169]

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161. *Id*.
162. *Id*.
163. *See* Ewing Marion Kauffman Found., *Employment Impact of an Entrepreneur Visa*, (Feb. 2013), http://www.moran.senate.gov/public/index.cfm/files/serve?File_id=d96346bc-2125-4439-99b3-23e7910114a5 (noting that "[a]mong technology and engineering companies founded between 2006 and 2012, one quarter were founded or cofounded by foreign-born individuals[; t]hese companies employed an average of 21.37 people per firm."). Thus, in this projection, a total of 1,592,842 jobs could be created if the entrepreneur visa were to exist. *Id*.
164. *Id*.
165. *Id*.
166. *Id*.
167. Timothy Kane, *Do Immigrants Drive Down Wages?*, Newsweek, Feb. 27, 2015, http://www.newsweek.com/do-immigrants-drive-down-wages-310100.
168. *Id*.
169. *Id*.

Opponents to currently existing visa programs, like the H-1B program, vehemently oppose temporary worker immigration programs, specifically claiming that American information technology workers are replaced by immigrant workers.[170] Senator Sessions has accused tech industry leaders of perpetuating a false claim that there is a shortage of qualified American technology workers.[171] Senator Sessions argues that this false claim has been driven by tech leaders' desire for young and cheap labor.[172] For instance, Senator Sessions attacked Microsoft's actions because it laid off 18,000 employees, yet it pushed for a wider use of H-1B visas.[173]

Senator Grassley echoed Senator Sessions' sentiments, stating that all employers should be required to extend a job offer to an American who is as qualified as the foreign national seeking a job in the United States.[174] Senator Grassley wants President Obama's administration to focus on protecting American workers, and he believes that businesses hiring H-1B workers should be required to verify the immigrant will not replace or displace American workers.[175]

D. Reality of the Immigrant Worker's Impact on the United States Economy

Senator Grassley and Senator Sessions address a wide variety of issues, but proponents of immigration reform look to statistics to prove that immigrant workers, like H-1B visa holders, positively impact the United States economy and employment opportunities for native-born workers.[176] Despite partisan rhetoric, statistics prove that jobs filled using the H-1B visa program do not drive down salaries and wages for native-born workers.[177] A study issued in 2014 found that H-1B increases in science, technology, engineering, and mathematics ("STEM") workers facilitated significant growth in wages and salaries paid to college educated native-born Americans.[178] This study found

170. Thibodeau, *Anti-H-1B senator to head immigration panel*, *supra* note 72.
171. *Id*.
172. *Id*.
173. *Id*.
174. Thibodeau, *Obama H-1B reform plan draws Grassley's ire*, *supra* note 72.
175. *Id*.
176. *Compare id.* (stating that Sen. Grassley claims that American workers suffer because American businesses are not required to offer an otherwise H-1B job to an American citizen before they offer that position abroad), *with* Am. Immigration Council, *The H-1B Visa Program: A Primer on the Program and its Impact on Jobs, Wages, and the Economy* (Apr. 1, 2015), http://www.immigrationpolicy.org/just-facts/h-1b-visa-program-primer-program-and-its-impact-jobs-wages-and-economy (providing statistics which indicate that H-1B workers positively impact the United States economy as well as employment opportunities for native-born workers).
177. *Id*.
178. Peri et al., *supra* note 85.

that as a result of foreign STEM workers, there was a significant increase in total productivity in the average United States city between 1990 and 2010.[179]

The often-heard argument that foreign STEM workers drive down wages was disproven when a Brookings study found that H-1B visa holders earn a higher salary than comparable native-born workers.[180] This study found that in 2010, H-1B workers with a bachelor's degree generally earned $76,356 compared to native-born workers with a bachelor's degree who earned $67,301.[181] This study further established that H-1B workers earn a higher salary than American workers in the same age cohort and occupation.[182] Furthermore, this study indicated that the H-1B visa program is alleviating acute shortages in multiple occupations throughout the United States.[183] In another study, it was determined that factors such as marital status, ethnicity, and gender play a more significant role than immigration status or citizenship for salaries and wages in the finance and tech industries.[184]

The American Immigration Council found that H-1B workers complement American workers, fill gaps in numerous STEM occupations, and increase job opportunities for native-born workers.[185] For example, unemployment rates are lower than the national unemployment rate for occupations that hire large numbers of H-1B visa holders.[186] Thus, H-1B workers provide short-term relief to the economy, earn a higher salary than native-born workers in similar occupations, and the national unemployment rate for native-born workers in such occupations continues to stay below the overall unemployment rate.[187]

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179. *Id*.
180. Rothwell & Ruiz, *supra* note 86.
181. *Id*.
182. *Id*.
183. *Id*.
184. Kreisberg, *supra* note 87.
185. AM. IMMIGRATION COUNCIL, *The H-1B Visa Program: A Primer on the Program and its Impact on Jobs, Wages, and the Economy* (Apr. 1, 2015), http://www.immigrationpolicy.org/just-facts/h-1b-visa-program-primer-program-and-its-impact-jobs-wages-and-economy.
186. *See* U.S. CHAMBER OF COMMERCE, *supra* note 88 (noting that "[w]hile the current national unemployment rate hovers around 8 percent, the unemployment rate for US citizens with PhDs in STEM is just 3.5 percent, and 3.4 percent for those with master's degrees in STEM.").
187. *Compare* Rothwell & Ruiz, *supra* note 86 (determining that "H-1B workers are paid more than U.S. native-born workers with a bachelor's degree generally ($76,356 versus $67,301 in 2010) and even within the same occupation and industry for workers with similar experience."), *and* U.S. CHAMBER OF COMMERCE, *supra* note 88 (finding that "the unemployment rate for US citizens with PhDs in STEM is just 3.15 percent and 3.4 percent for those with master's degrees in STEM[,]" and also that the unemployment rate is below 2 percent for petroleum engineers, computer network architects, nuclear

IV. CONCLUSION

Immigrant entrepreneurs have proven to be the bedrock of America's economy for decades. Of the Fortune 500 companies in 2010, an immigrant founded ninety of them and the sons and daughters of immigrants founded an additional 114 companies.[188] However, if an up-and-coming entrepreneur is interested in creating a business in America, he or she is forced to navigate a complex immigration system, which currently does not provide an entrepreneur visa. An immigrant may seek an Immigrant Investor visa, but he or she would need to invest $500,000 into a new commercial enterprise and create at least ten full-time positions for American workers within a two-year period.[189] He or she may apply under the National Interest Waiver program, which does not require a job offer from a United States employer, but his or her business would have to benefit America in a national sense.[190] Another possible avenue, often used by science, technology, engineering, and mathematics ("STEM") professionals, would allow an immigrant entrepreneur to get his or her foot in the door, but the H-1B visa only provides temporary residence.[191] These visa programs are extremely difficult for an immigrant entrepreneur to fit into.

American schools are producing the top entrepreneurial minds in the world.[192] Accordingly, international students are flocking to these top programs in hopes of attaining a premier education.[193] However, soon after the international students graduate from these programs, immigration laws usher them out of the country.[194] As of the time of this writing, no direct path to permanent residence exists after gradu-

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engineers, environmental scientists and geoscientists, database administrators, statisticians, engineering managers, and aerospace engineers), *with* Thibodeau, *Anti-H-1B senator to head immigration panel*, *supra* note 72 (explaining that Sen. Sessions accused technology industry leaders of promoting H-1B visas in part because of their "desire for cheap, young and immobile labor."), *and* Thibodeau, *Obama H-1B reform plan draws Grassley's ire*, *supra* note 72 (noting that Sen. Grassley believes that "[a]ll employers . . . should be required to offer the job to a U.S. worker who is equally or better qualified . . . .")

188. P'SHIP FOR A NEW AM. ECON, *supra* note 15.

189. *See supra* notes 18-40 and accompanying text.

190. *See supra* notes 58-72 and accompanying text.

191. *See supra* notes 73-89 and accompanying text.

192. Marich, *supra* note 1.

193. *See supra* notes 114-118 and accompanying text (stating that 40 percent of the Stanford School of Business class was from a foreign country, 38 percent of the MIT: Sloan class was from a foreign country, 53 percent of the San Diego School of Business Administration was from a foreign country, 29 percent of the University of Southern California: Marshall was from a foreign country, and 34 percent of the Harvard School of Business was from a foreign country).

194. Groden, *supra* note 146.

ating from an American university.[195] These American-educated students are returning to their home countries in high demand.[196] Essentially, American universities are teaching the rest of the world how to compete in the global market, while current immigration laws fail to recognize the benefit these immigrant entrepreneurs could have on the United States economy.

In order to stay competitive in the global market place, Congress must pass the Startup Act.[197] Passing the Startup Act would do much more than create an entrepreneur visa, as its passage would also: (1) create a new STEM visa; (2) eliminate per-country caps for all employment-based visas; and (3) create a research and development tax credit used for startups in the initial states of development.[198] Should no action be taken on this issue, at a minimum, a discussion needs to be had regarding college admission policies around the United States. No matter which side of the aisle an individual may like to call home, this issue can be solved from many angles, and Congress needs to react accordingly.

Tyler S. Seals—'17

195. *Id*.
196. *Id*.
197. *Compare* MORAN, *supra* note 90 (asserting that one of the core purposes of the Startup Act is to create an entrepreneur visa that would allow foreign-born entrepreneurs to remain in the United States in order to establish their businesses), *with* Goube, *supra* note 100 (indicating that 11 other countries around the world have created entrepreneur visas).
198. MORAN, *supra* note 90.

TIF IN NEBRASKA: IS THE COMMUNITY DEVELOPMENT LAW BROKEN OR ARE PROPONENTS OF REFORM MERELY PLAYING A BROKEN RECORD ON REPEAT?

I. INTRODUCTION

In 1978, Nebraska voters approved a constitutional amendment to allow the use of tax increment financing ("TIF") as a means to redevelop substandard and blighted areas.[1] In 1979, the Nebraska Legislature added supplemental provisions to the existing Community Development Law[2] (collectively, the "Statute") to grant local governments with the power and discretion to use TIF.[3] TIF is a financing tool that involves the property taxes that are collected as the result of an incremental increase in property value generated by a redevelopment project in an area that has been declared substandard and blighted.[4] The collected tax moneys from the incremental increase in property value are typically used to pay off a TIF bond, which is issued in order to provide up-front capital for public investments, such as public infrastructure, associated with the redevelopment project.[5] The governing body of a city must complete certain steps, including conducting a cost-benefit analysis, before approving a redevelopment project.[6] The governing body may approve a redevelopment project if it finds that the specific TIF project would not be economically feasible without TIF funds, the project would not occur in the substandard and blighted area without the use of TIF, and the costs and benefits of the

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1. NEB. CONST. art. VIII, § 12; Zach Pluhacek, *Cities, Developers Resist Increased Oversight of TIF,* LINCOLN JOURNAL STAR (Feb. 24, 2015), http://journalstar.com/business/local/cities-developers-resist-increased-oversight-of-tif/article_4353a592-e154-55eb-82df-3095863fc17f.html.

2. NEB. REV. STAT. § 18-2101 (2012).

3. NEB. REV. STAT. § 18-2153.

> The powers conferred by sections 18-2147 to 18-2153 shall be in addition and supplemental to the powers conferred by the Community Development Law . . . . The provisions of such sections and all grants of power, authority, rights, or discretion to a city or village and to an authority created under the Community Development Law shall be liberally construed, and all incidental powers necessary to carry into effect such sections are hereby expressly granted to an conferred upon a city or village or an authority created pursuant to the Community Development Law.

Id.

4. NEB. REV. STAT. §§ 18-2109, 18-2147.

5. Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65, 68 (2010). The result is a jumpstart in the development process. *Id.*

6. NEB. REV. STAT. § 18-2113(2).

project would be in the long-term best interest of the community.[7] This is known as the but-for test.[8]

In recent years, senators in the Nebraska Legislature introduced twelve legislative bills amending the Statute and four constitutional amendments pertaining to TIF.[9] Nebraska Legislative Bill 918 sought to place tighter limitations on cities' abilities to declare land as blighted.[10] If passed, Nebraska Legislative Resolution 376CA would have changed the Statute's blighted and substandard requirement and extended the period allowed to pay off TIF indebtedness.[11] Nebraska Legislative Bill 1132 would have permitted cities to develop vacant land outside of the city limits without the need to annex, provided the city obtained county approval.[12]

Nebraska Legislative Resolution 29CA aimed to change the Statute's blighted and substandard requirement and extended the payback period for TIF debt.[13] Nebraska Legislative Bill 529 would have limited the use of TIF based on the valuation of previous TIF projects.[14] Nebraska Legislative Bill 1095 and Nebraska Legislative Bill 596 sought to add further oversight at the local level while also creating power for a state-level agency to establish additional procedures for the use of TIF.[15] Nebraska Legislative Bill 238 would have narrowed the Statute's language with respect to expenditures stemming from TIF funds and tightened restrictions on TIF bond sales and interest rates.[16] If passed, Nebraska Legislative Bill 445 would have empowered the state to conduct audits of TIF projects and restricted the use of TIF by local governments that were not compliant with the Statute.[17] Nebraska Legislative Bill 539 provided state agencies the power to audit local entities established under the Statute.[18]

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7. *Id.* § 18-2116(1).

8. *See* Briffault, *supra* note 5, at 77 (discussing the but-for requirement as it relates to TIF).

9. L.B. 1102, 104th Leg., 2d Sess. (Neb. 2016); L.B. 1059, 104th Leg., 2d Sess. (Neb. 2016); L.B. 1042, 104th Leg., 2d Sess. (Neb. 2016); L.B. 719, 104th Leg., 2d Sess. (Neb. 2016); L.R. 399CA, 104th Leg., 2d Sess. (Neb. 2016); L.R. 394CA, 104th Leg., 2d Sess. (Neb. 2016); L.B. 596, 104th Leg., 1st Sess. (Neb. 2015); L.B. 539, 104th Leg., 1st Sess. (Neb. 2015); L.B. 445, 104th Leg., 1st Sess. (Neb. 2015); L.B. 238, 104th Leg., 1st Sess. (Neb. 2015); L.B. 1095, 103d Leg., 2d Sess. (Neb. 2014); L.B. 529, 103d Leg., 1st Sess. (Neb. 2013); L.R. 29CA, 103d Leg., 1st Sess. (Neb. 2013); L.B. 1132, 102d Leg., 2d Sess. (Neb. 2012); L.B. 918, 102d Leg., 2d Sess. (Neb. 2012); L.R. 376CA, 102d Leg., 2d Sess. (Neb. 2012).

10. Neb. L.B. 918.

11. Neb. L.R. 376CA.

12. Neb. L.B. 1132.

13. Neb. L.R. 29CA.

14. Neb. L.B. 529.

15. Neb. L.B. 596; Neb. L.B. 1095.

16. Neb. L.B. 238.

17. Neb. L.B. 445.

18. Neb. L.B. 539.

Nebraska Legislative Bill 719 was intended to prohibit the use of TIF funds for redevelopment projects on undeveloped vacant land.[19] Nebraska Legislative Resolution 394CA would have permitted a taxing jurisdiction that overlapped the redevelopment project to opt out of having its taxes diverted as a result of TIF.[20] Nebraska Legislative Resolution 399CA aimed to require cities to gain voter approval for TIF redevelopment projects.[21] Nebraska Legislative Bill 1042 sought to require cities to obtain approval for TIF redevelopment projects from the relevant county board of equalization.[22] Nebraska Legislative Bill 1059 would require redevelopers seeking TIF funds to disclose whether they intended to take advantage of the Nebraska Advantage Act[23] and in what capacity.[24] Nebraska Legislative Bill 1102 would have permitted performance audits of TIF redevelopment projects by the Legislative Performance Audit Committee.[25]

This Note will first discuss the procedural process of utilizing TIF as outlined in the Statute.[26] It will then provide an overview of TIF legislation introduced in the Nebraska Legislature since 2012 and present the arguments for and against such legislation raised during committee hearings on the bills.[27] Next, it will present academic research on the use of TIF and its effectiveness.[28] It will then focus on an example of a successful taxpayer challenge to the use of TIF in the Nebraska court system.[29] This Note will conclude by illustrating how recently presented legislative bills that create increased state oversight of local governments' use of TIF in Nebraska are unnecessary.[30] First, it will critique studies that are used to support arguments for TIF reform in Nebraska by questioning both the studies' conclusions pursuant to the language of the Statute and the studies' empirical findings.[31] Second, it will outline and provide examples of the use of existing avenues of accountability that provide taxpayers with the ability to challenge their local governments' use of TIF.[32]

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19. Neb. L.B. 719.
20. Neb. L.R. 394CA.
21. Neb. L.R. 399CA.
22. Neb. L.B. 1042.
23. NEB. REV. STAT. §§ 77-5701 to 77-5735 (2012).
24. Neb. L.B. 1059.
25. Neb. L.B. 1102.
26. *See infra* notes 33-53 and accompanying text.
27. *See infra* notes 54-144 and accompanying text.
28. *See infra* notes 145-185 and accompanying text.
29. *See infra* notes 186-197 and accompanying text.
30. *See infra* notes 198-260 and accompanying text.
31. *See infra* notes 207-226 and accompanying text.
32. *See infra* notes 227-260 and accompanying text.

II. COMMUNITY DEVELOPMENT LAW AND LEGISLATIVE HISTORY

A. Enactment and Procedure

California became the first state to pass tax increment financing ("TIF") legislation with the purpose of funding urban renewal in the 1950s.[33] In 1978, Nebraska voters followed suit and adopted a constitutional amendment to allow the use of TIF for the rejuvenation of substandard and blighted property.[34] The subsequent year, the State Legislature passed enabling legislation under the Community Development Law (collectively, the "Statute").[35] Now, forty-nine states and the District of Columbia have enacted TIF legislation.[36] TIF involves the capture of property tax revenues on the value of property that is increased as a result of a redevelopment project in an area that has been declared substandard and blighted.[37] The property tax revenues from that increased value are typically used to repay a TIF bond over a fifteen-year period that is issued, backed by the pledged future tax revenues, in order to provide the initial funding for public improvements required by the redevelopment project.[38]

1. Declaring an Area as Substandard and Blighted

Under the Statute, cities and villages are granted the power to create a community redevelopment authority (the "Redevelopment Authority") with the ability to enter into agreements for redevelopment plans.[39] Before the Redevelopment Authority may enter into such an agreement, the governing body must prepare a general plan for the city's development and request from the planning commission a recommendation of whether an area is substandard and blighted.[40] The definition of substandard involves a predominance of buildings or improvements in the area that facilitate risks and cause detriment to the general public.[41] To be declared blighted, an area must contain

33. Briffault, *supra* note 5, at 69.

34. Neb. Const. art. VIII, § 12; Pluhacek, *supra* note 1.

35. *See* Neb. Rev. Stat. § 18-2101 (guiding the use of TIF with respect to substandard and blighted areas).

36. Briffault, *supra* note 5, at 70 (noting Arizona is the only state that does not authorize the use of TIF).

37. Neb. Rev. Stat. §§ 18-2109, 18-2147.

38. *Id.* § 18-2147; Briffault, *supra* note 5, at 68. The fifteen-year period is the maximum allowed under the Statute, but bonds can be and are paid off over shorter periods of time. Neb. Rev. Stat. § 18-2147(1).

39. *Id.* §§ 18-2101.01, 18-2102.01, 18-2103(1).

40. *Id.* §§ 18-2109 to 18-2110.

41. *Id.* § 18-2103(10).

> Substandard areas means an area in which there is a predominance of buildings or improvements, whether nonresidential or residential in character,

the presence of one or a combination of factors, such as insanitary or unsafe conditions or deterioration of improvements.[42] Such factor(s) must substantially inhibit growth, limit housing accommodations, or present a social or economic liability and create a detriment to the general public.[43] In order to be declared blighted, an area must also include high levels of unemployment, residential or commercial units the average age of which is at least forty years, land the majority of which has not been improved over a forty-year period, below average per capita income, or a stable or decreasing population.[44] An additional limitation on substandard and blighted designations restricts the percentage of a city that may be declared blighted and substandard.[45] Finally, before making the substandard and blighted determination, the governing body must hold a public hearing with notice as prescribed in the Statute.[46]

2. Approval of a Redevelopment Plan

The redevelopment plan required for approval of a TIF project must include the contents set forth in the Statute, including a description of the current and future uses of the redevelopment project area in addition to proposed changes to the area.[47] Before making a recommendation of a redevelopment plan to the governing body, the Redevelopment Authority must consider whether the redevelopment project proposes to accomplish the promotion of the public purposes

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> which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime, (which cannot be remedied through construction of prisons), and is detrimental to the public health, safety, morals, or welfare.

Id.

42. *Id.* § 18-2103(11).

43. *Id.*

44. *Id.*

45. *Id.*

> In no event shall a city of the metropolitan, primary, or first class designate more than thirty-five percent of the city as blighted, a city of the second class shall not designate an area larger than fifty percent of the city as blighted, and a village shall not designate an area larger than one hundred percent of the village as blighted.

Id.

46. NEB. REV. STAT. § 18-2109. Proper notice under the Statute consists of publication once per week for a two-week period with the last publication being no less than ten days before the hearing. *Id.* § 18-2115(1). Actual notice is required to be given to each registered neighborhood association within a one-mile radius of the project as well as each "county, school district, community college, educational service unit, and natural resources district" that covers the redevelopment area. *Id.* § 18-2115(2).

47. *Id.* § 18-2111.

behind the Statute.[48] Moreover, the Statute also requires the Redevelopment Authority to conduct a cost-benefit analysis that analyzes factors including impacts on public service needs, local taxes, employers and employees within the community, and any other impacts the Redevelopment Authority deems relevant.[49]

Once a redevelopment plan is prepared, the Redevelopment Authority must submit the plan to the planning commission for the commission's recommendation on whether the plan is in conformity with the city's general plan for development.[50] After receiving the recommendation from the planning commission, the Redevelopment Authority submits the plan to the governing body, which holds a public hearing after giving required notice, to determine whether the particular plan should be approved.[51] The governing body may approve a plan if it finds that the plan conforms to the Statute and the city's general plan for development.[52] Additionally, the governing body must find that the specific TIF project would not be economically feasible without TIF funds, the project would not occur in the substandard and blighted area without the use of TIF, and the costs and benefits of the project would be in the long-term best interest of the community.[53]

B. TIF Under Fire in the Nebraska State Legislature

The use of TIF in Nebraska has surged throughout the years, with a twofold increase in the number of projects from 1997 to 2004, although that rate has decreased over the last decade.[54] This increase has been accompanied by the introduction of twelve bills and four constitutional amendments in the Nebraska Legislature since 2012, most of which would limit the use of TIF in Nebraska.[55] State senators who

48. *Id.* § 18-2113(1).
49. *Id.* § 18-2113(2).
50. *Id.* § 18-2112. If the planning commission holds a public hearing on the redevelopment plan, proper notice must be given. *Id.* § 18-2115(3).
51. *Id.* § 18-2115.
52. *Id.* § 18-2116(1).
53. *Id.* This is commonly known as the but-for test. *See supra* note 8 and accompanying text.
54. *See* Kenneth A. Kriz, Platte Inst. for Econ. Research, The Use of Tax Increment Financing in Nebraska 7 (2013) (noting the increase in number of TIF projects from 183 to 393); Neb. Dep't of Revenue, 2014 Community Redevelopment Tax Increment Financing Projects Report, 103d Leg., 1st Sess., at 322 (2014) [hereinafter 2014 TIF Report] (showing 716 active TIF projects in Nebraska for 2014).
55. L.B. 1102, 104th Leg., 2d Sess. (Neb. 2016); L.B. 1059, 104th Leg., 2d Sess. (Neb. 2016); L.B. 1042, 104th Leg., 2d Sess. (Neb. 2016); L.B. 719, 104th Leg., 2d Sess. (Neb. 2016); L.R. 399CA, 104th Leg., 2d Sess. (Neb. 2016); L.R. 394CA, 104th Leg., 2d Sess. (Neb. 2016); L.B. 596, 104th Leg., 1st Sess. (Neb. 2015); L.B. 539, 104th Leg., 1st Sess. (Neb. 2015); L.B. 445, 104th Leg., 1st Sess. (Neb. 2015); L.B. 238, 104th Leg., 1st Sess. (Neb. 2015); L.B. 1095, 103d Leg., 2d Sess. (Neb. 2014); L.B. 529, 103d Leg., 1st

support these restrictive proposals claim that TIF has run amok and is being outrageously abused.[56] These senators argue the use of TIF has strayed from its original purpose as an urban redevelopment tool and now serves as an all-purpose economic development tool with no oversight.[57]

1. 102nd Legislature: The Urban Affairs Committee Hears Calls for Change Regarding TIF

On January 10, 2012, Senator Abbie Cornett introduced Nebraska Legislative Bill 918, which was subsequently referred to the Urban Affairs Committee.[58] The bill would have removed language from the Statute that permits up to thirty-five percent of a metropolitan or first class city's land to be declared blighted.[59] That amendment then limited blight designations to seven percent of the value of property of a political subdivision covered by the proposed redevelopment project.[60] During the committee hearing, Senator Cornett maintained she did not intend to shut down the use of TIF, but she rather sought greater inclusivity in the TIF process for political subdivisions affected by the Statute.[61] On April 18, 2012, the bill was indefinitely postponed.[62]

On January 17, 2012, Senator Heath Mello introduced Nebraska Legislative Resolution 376CA, which was subsequently referred to the Urban Affairs Committee.[63] The proposed constitutional amendment would have replaced the terms *substandard and blighted* with *in need of rehabilitation or redevelopment*.[64] The proposed amendment also extended the fifteen-year period limitation on a TIF bond to twenty

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Sess. (Neb. 2013); L.R. 29CA, 103d Leg., 1st Sess. (Neb. 2013); L.B. 1132, 102d Leg., 2d Sess. (Neb. 2012); L.B. 918, 102d Leg., 2d Sess. (Neb. 2012); L.R. 376 CA, 102d Leg., 2d Sess. (Neb. 2012).

56. *Hearing on L.R. 599 Before the Comm. on Urban Affairs*, 103d Leg., 2d Sess. 3 (Neb. 2014) (statement of Sen. Al Davis); *Hearing on L.B. 1095 and L.B. 1014 Before the Comm. on Urban Affairs*, 103d Leg., 2d Sess. 3 (Neb. 2014) (statement of Sen. Al Davis); Mike Groene, *Local View: The Outrageous Abuse of TIF*, LINCOLN JOURNAL STAR (March 26, 2015, 11:57 PM), http://journalstar.com/news/opinion/editorial/columnists/local-view-the-outrageous-abuse-of-tif/article_85534e93-2843-5be7-9cbf-a99049cfbb3f.html

57. *Hearing on L.B. 1095*, *supra* note 56, at 14-15.

58. L.B. 918, 102d Leg., 2d Sess. (Neb. 2012).

59. Neb. L.B. 918 § 1; NEB. REV. STAT. § 18-2103(11)(v). Under the Statute, second class cities may blight up to 50% of their land, and villages are not limited in their blight designations. NEB. REV. STAT. § 18-2013(11)(v).

60. Neb. L.B. 918 § 1-2.

61. *Hearing on L.B. 918 Before the Comm. on Urban Affairs*, 102d Leg., 2d Sess. 3 (Neb. 2012) (statement of Sen. Abbie Cornett).

62. LEGIS. JOURNAL, 102d Leg., 2d Sess. 1562 (Neb. 2012).

63. L.R. 397CA, 102d Leg., 2d Sess. (Neb. 2012).

64. L.R. 397CA § 1.

years.[65] The proposed amendment would have permitted extending that period to thirty years if more than one-half of the property had been previously owned by the state and a twenty-year period would not have been reasonable.[66] On April 18, 2012, the bill was indefinitely postponed.[67]

On January 19, 2012, Senator Amanda McGill introduced Nebraska Legislative Bill 1132, which was subsequently referred to the Urban Affairs Committee.[68] The bill would have permitted cities to develop vacant land within a three-mile radius of the city without having to first annex the land, as is currently required by the Statute.[69] The proposed changes, however, would have required the county to approve of such projects.[70] On April 18, 2012, the bill was indefinitely postponed.[71]

2. 103rd Legislature: Nebraska State Senators Call for State Oversight of the Use of TIF

On January 18, 2013, Senator Greg Adams introduced Nebraska Legislative Resolution 29CA, which was subsequently referred to the Urban Affairs Committee.[72] The proposed constitutional amendment, just like L.R. 376CA proposed by Senator Mello in the previous session, sought to changed the *substandard and blighted* language of the Nebraska State Constitution to *in need of rehabilitation and redevelopment* and extended the fifteen-year limitation to twenty-years.[73] Unlike the previously proposed constitutional amendment, however, L.R. 29CA did not provide for a possible thirty-year period for a TIF project on property previously owned by the state.[74] On April 17, 2014, the proposed constitutional amendment was indefinitely postponed.[75]

On January 23, 2013, Senator Annette Dubas introduced Nebraska Legislative Bill 529, which was subsequently referred to the Urban Affairs Committee.[76] The bill restricted the use of TIF funds where the value of a redevelopment project, when added to the values of previously existing projects, would exceed 1.5 percent of the city's

65. *Id.*
66. *Id.*
67. LEGIS. JOURNAL, 102d Leg., 2d Sess. 1562 (Neb. 2012).
68. L.B. 1132, 102d Leg., 2d Sess. (Neb. 2012).
69. L.B. 1132 § 2; NEB. REV. STAT. § 18-21
70. L.B. 1132 § 2.
71. LEGIS. JOURNAL, 102d Leg., 2d Sess. 1562 (Neb. 2012).
72. L.R. 29CA, 103d Leg., 1st Sess. (Neb. 2013).
73. L.R. 29CA § 1; L.R. 376CA, 102d Leg., 2d Sess. (Neb. 2012).
74. Neb. L.R. 29CA; Neb. L.R. 376CA.
75. LEGIS. JOURNAL, 103d Leg., 2d Sess. 1631 (Neb. 2014).
76. L.B. 529, 103d Leg., 1st Sess. (Neb. 2013).

total taxable value.[77] Moreover, the bill restricted the use of TIF funds where the total value of property in a city that was funded using such funds, minus the excess value generated by redevelopment projects within the city, exceeded five percent of the city's total taxable value.[78] On April 17, 2014, the bill was indefinitely postponed.[79]

On January 22, 2014, Senator Al Davis introduced Nebraska Legislative Bill 1095, which was subsequently referred to the Urban Affairs Committee.[80] In its original form, the bill added a requirement that members of the Redevelopment Authority, appointed by the mayor (or other presiding officer of the governing body), consist of local stakeholders.[81] The bill further required a Redevelopment Authority to maintain a website displaying established metrics and performance thresholds for TIF projects.[82] Those metrics and performance thresholds would then be used to determine the effectiveness of such redevelopment projects.[83]

The bill also created the Tax Increment Financing Division of the Department of Economic Development (the "TIF Division").[84] The purpose of this new division would be to create state oversight of the use of TIF by establishing procedures that must be followed by local authorities.[85] Additionally, the bill tasked the TIF Division with establishing procedures for the required cost-benefit analysis, a power currently held by local authorities.[86] Moreover, a city that used TIF would be required to publish names of TIF recipients that were not in compliance with their TIF agreements on the city's website and to provide yearly reports to the TIF Division on the economic impact of redevelopment plans, subsequent year strategies and priorities for the use of TIF, and a summary of TIF's contribution to the local community.[87] The bill proposed to finance this new division by establishing a fee structure for projects that benefit from TIF.[88]

During the Urban Affairs Committee Hearing on February 11, 2014, Senator Davis discussed potential amendments to the original bill that placed the Tax Increment Financing Division under the au-

77. Neb. L.B. 529 § 1.
78. *Id.*
79. LEGIS. JOURNAL, 103d Leg., 2d Sess. 1631 (Neb. 2014).
80. L.B. 1095, 103d Leg., 2d Sess. (Neb. 2014).
81. Neb. L.B. 1095 § 1. Local stakeholders "may include city staff, members of the governing body, representatives of other taxing bodies that levy property taxes, experts in the area of economic development, and members of the public." *Id.*
82. *Id.*
83. *Id.*
84. *Id.* § 8.
85. *Id.* § 9.
86. *Id.* § 3.
87. *Id.* § 5.
88. *Id.* § 9.

thority of the Auditor of Public Accounts rather than the Department of Economic Development.[89] An amended version of the bill would have also contained a requirement that representatives from the local school district, county, or community college to be given a seat on the Redevelopment Authority.[90] Finally, Senator Davis discussed amending the bill to include a claw back provision for projects that failed to meet their TIF agreements and prorate the fee used to finance the division over the lifetime of the project.[91]

On March 26, 2014, after it became clear L.B. 1095 would not be enacted into law, Senator Davis introduced Nebraska Legislative Resolution 599.[92] The resolution tasked the Urban Affairs Committee with conducting an interim study into municipalities' use of TIF and its impact on their communities.[93] On April 17, 2014, the bill was indefinitely postponed.[94]

3. 104th Legislature: Attacks on the Use of TIF Pick Up Speed

On January 14, 2015, Senator Mike Groene introduced Nebraska Legislative Bill 238, which was subsequently referred to the Urban Affairs Committee.[95] The bill amended the Statute to provide a definition for public works.[96] This definition tightened restrictions on expenditures for which TIF bonds could be used.[97] Moreover, the bill placed restrictions on the sale of bonds as well as their interest rates.[98]

On January 20, 2015, Senator Groene introduced Nebraska Legislative Bill 445, which was subsequently referred to the Urban Affairs Committee.[99] The bill required the Department of Revenue to develop an audit plan for all TIF projects and to audit each project at least

89. *Hearing on L.B. 1095*, *supra* note 56, at 1 (statement of Sen. Al Davis).

90. *Id.*

91. *Id.*

92. Dick Clark, *Platte Chat: The Tiff over TIF in Nebraska*, PLATTE INST. FOR ECON. RES. 1 (Oct. 22, 2014), http://www.platteinstitute.org/Library/DocLib/PlatteChatTIF.pdf.

93. L.R. 599, 103d Leg., 2d Sess. (Neb. 2014).

94. LEGIS. JOURNAL, 103d Leg., 2d Sess. 1631 (Neb. 2014).

95. L.B. 238, 104th Leg., 1st Sess. (Neb. 2015).

96. *See* Neb. L.B. 238 § 1 (stating "[p]ublic works means streets, roads, public utilities, other public infrastructure, and other public facilities.").

97. *See id.* § 3 (stating "the funds received from the issuance of bonds or other indebtedness will only be used for expenditures by the city for land acquisition and site preparation and on public works."). The bill also required municipalities to certify that funds were only used for such expenditures. *Id.* § 4.

98. *See id.* § 5 (declaring that "bonds that are issued and paid for through the use of tax-increment financing shall not have an interest rate exceeding the prime rate . . . plus two percentage points.").

99. L.B. 445, 104th Leg., 1st Sess. (Neb. 2015).

once every two years.[100] If an audit uncovered that a project was not in compliance with the Statute, the bill prohibited the city in which that project was located from approving additional TIF projects until the Department of Revenue was satisfied that the requirements of the Statute were being met.[101]

On January 21, 2015, Senator Davis introduced Nebraska Legislative Bill 596, which also was subsequently referred to the Urban Affairs Committee.[102] The bill required the Redevelopment Authority to include representatives of the school district, county, and community college.[103] The bill also created the Tax Increment Financing Division of the Auditor of Public Accounts and established a claw back provision for projects that failed to meet their TIF agreements.[104]

On May 11, 2015, Senator Sue Crawford introduced Amendment 653 to Nebraska Legislative Bill 539.[105] Prior to the amendment, L.B. 539 empowered the Legislative Audit Office and Auditor of Public Accounts to require audited entities to submit to audit requests in a timely and responsibly manner.[106] The amendment provided the Auditor of Public Accounts the power to audit a Redevelopment Authority when deemed necessary by the auditor or when requested by the Redevelopment Authority.[107] Governor Pete Ricketts approved the bill on May 27, 2015.[108]

On January 6, 2016, Senator Mike Groene introduced Nebraska Legislative Bill 719, which was subsequently referred to the Urban Affairs Committee.[109] The bill would have prohibited TIF funds to be used for redevelopment projects on undeveloped vacant land.[110] The bill would have further prevented undeveloped vacant land from being declared blighted and substandard.[111] After Senator Groene requested a vote by the committee, the bill failed five to two.[112]

On January 11, 2016, Senator Dan Hughes introduced Nebraska Legislative Resolution 394CA, which was subsequently referred to the

100. Neb. L.B. 445 § 1.
101. *Id.*
102. L.B. 596, 104th Leg., 1st Sess. (Neb. 2015).
103. Neb. L.B. 596 § 2.
104. *Id.* §§ 3, 5.
105. LEGIS. JOURNAL, 104th Leg., 1st Sess. 792 (Neb. 2015).
106. *Hearing on L.B. 539 Before the Comm. on Urban Affairs*, 104th Leg., 1st Sess. 16 (Neb. 2015).
107. Amendment 653, 104th Leg., 1st Sess. § 1 (Neb. 2015).
108. LEGIS. JOURNAL, 104th Leg., 1st Sess. 1892 (Neb. 2015).
109. L.B. 719, 104th Leg., 2d Sess. (Neb. 2016).
110. Neb. L.B. 719 § 1.
111. *Id.*
112. Sen. Mike Groene, *TIF Bill Falters in Committee,* NORTH PLATTE TELEGRAPH (Feb. 18, 2016), http://www.nptelegraph.com/opinion/editorials/tif-bill-falters-in-committee/article_4995cc3a-d5d0-11e5-913d-533aaeb919ec.html.

Urban Affairs Committee.[113] The proposed constitutional amendment would have permitted a taxing entity to opt out of having its taxes diverted to fund a TIF redevelopment project.[114] On February 17, 2016, the proposed constitutional amendment was indefinitely postponed.[115]

On January 11, 2016, Senators Al Davis and Mike Groene introduced Nebraska Legislative Resolution 399CA, which was subsequently referred to the Urban Affairs Committee.[116] The proposed constitutional amendment would have required cities to submit the final decision regarding TIF funds to a vote by registered voters of the city, school district, and county covered by the redevelopment project.[117] Authorization would have required majority approval from such voters.[118] On February 17, 2016, the proposed constitutional amendment was indefinitely postponed.[119]

On January 20, 2016, Senator Curt Friesen introduced Nebraska Legislative Bill 1042, which was subsequently referred to the Urban Affairs Committee.[120] The bill would have required a city to obtain approval for a redevelopment project from the county board of equalization covering the redevelopment project area.[121] Under the bill, the board of equalization would have been permitted, but not required, to approve the redevelopment project if the board determined the project met the Statute's requirements.[122] The bill further would have required the county assessor to include in a school district's valuation the assessed value of a redevelopment project property rather than the base value of the property prior to the redevelopment project, as is currently the case under the Statute.[123] On February 17, 2016, the bill was indefinitely postponed.[124]

On January 20, 2016, Senator Sue Crawford introduced Nebraska Legislative Bill 1059, which was subsequently referred to the Urban Affairs Committee.[125] The bill would require an applicant for TIF funds to disclose whether the redeveloper has or intends to apply for tax incentives under the Nebraska Advantage Act, the amount of expected incentives from that application, and whether the application

113. L.R. 394CA, 104th Leg., 2d Sess. (Neb. 2016).
114. Neb. L.R. 394CA § 1.
115. LEGIS. JOURNAL, 104th Leg., 2d Sess. 597 (Neb. 2016).
116. L.R. 399CA, 104th Leg., 2d Sess. (Neb. 2016).
117. Neb. L.R. 399CA § 1.
118. *Id.*
119. LEGIS. JOURNAL, 104th Leg., 2d Sess. 597 (Neb. 2016).
120. L.B. 1042, 104th Leg., 2d Sess. (Neb. 2016).
121. Neb. L.B. 1042 § 1.
122. *Id.*
123. *Id.* § 2; NEB. REV. STAT. § 18-2103(21).
124. LEGIS. JOURNAL, 104th Leg., 2d Sess. 597 (Neb. 2016).
125. L.B. 1059, 104th Leg., 2d Sess. (Neb. 2016).

includes a refund of revenues from the city's local option sales tax.[126] The bill is currently up for final reading by the legislature.[127]

On January 20, 2016, Senators Al Davis and Bob Krist introduced Nebraska Legislative Bill 1102, which was subsequently referred to the Urban Affairs Committee.[128] The bill would have permitted the Legislative Performance Audit Committee to conduct performance audits of TIF redevelopment projects.[129]

4. Proponents of TIF Reform Face-Off Against Opponents During Public Legislative Hearings

Proponents of bills amending the Statute urged the Urban Affairs Committee that TIF use in Nebraska is fraught with abuse.[130] These claims were backed by numerous references to studies on TIF use in Nebraska conducted by the Progressive Research Institute and the Platte Institute for Economic Research.[131] One of the issues with TIF as it is currently used in Nebraska, according to proponents of reform, is the lack of oversight and subsequent lack of recourse available to citizens.[132] Moreover, proponents of the bills assert there are fundamental errors with the but-for test as it is applied in Nebraska.[133]

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126. Neb. L.B. 1059 § 1.

127. LEGIS. JOURNAL, 104th Leg., 2d Sess. 932 (Neb. 2016).

128. L.B. 1102, 104th Leg., 2d Sess. (Neb. 2016).

129. Neb. L.B. 1102 § 2. At the time of publication, L.B. 1102 was still pending before the legislature, but it had not been prioritized and was thus "unlikely to receive additional consideration." David C. Levy, *Urban Affairs Committee Considers Changes to Tax Increment Financing*, BAIRD HOLM: DIRT ALERT (Feb. 29, 2016), http://www.bairdholm.com/publications-feed/entry/urban-affairs-committee-considers-changes-to-tax-increment-financing.html.

130. *See Hearing on L.B. 238, L.B. 445, and L.B. 596 Before the Comm. on Urban Affairs*, 104th Leg., 1st Sess. 5 (Neb. 2015) (statement of Sen. Al Davis) (referring to the current state of the statutory tool as "a sloppily applied whitewash to any developer wanting something for nothing"); *Hearing on L.B. 238, L.B. 445, and L.B. 596 Before the Comm. on Urban Affairs*, 104th Leg., 1st Sess. 96-98 (Neb. 2015) (statement of Sen. Mike Groene) (equating models of funding a TIF project to extortion and bribery). One senator on the Committee voiced his agreement. *Hearing on L.B. 1095*, *supra* note 38, at 24 (statement of Sen. Russ Karpicek) ("I think it's been very much abused.").

131. *Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 12-13; *Hearing on L.R. 599*, *supra* note 56, at 6, 16; *Hearing on L.B. 1095*, *supra* note 56, at 3; KRIZ, *supra* note 54; JOHN J. DUNN, PROGRESSIVE RES. INST. OF NEB., WHAT IS TAX INCREMENT FINANCING (AND WHY SHOULD ANYONE CARE)? 6, 9 (2011).

132. *Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 13 (statement of Renee Fry) (stating she was unaware of any instance where there had been a remedy in the case where statutory requirements may not have been met); *Hearing on L.B. 1095*, *supra* note 56, at 16 (statement of Sen. Mike Groene) (referring to a letter from the Nebraska Attorney General and characterizing the response as, "[t]here's no oversight. If you think there's a problem, take your own money and hire a lawyer and have a civic action.").

133. *Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 61 (statement of Sen. Mike Groene) ("Most of the projects I know that have been given [TIF] are going to build anyway."); *Hearing on L.R. 599*, *supra* note 56, at 16 (statement of Dick Clark)

Supporters of amending the Statute argue that this flawed but-for test results in losses to communities across the state because of the subsequent increase in state aid in accordance with the Nebraska Tax Equity and Educational Opportunities Support Act ("TEEOSA") formula.[134]

Opponents of the proposed legislation counter that Nebraska is already among the strictest states when it comes to TIF.[135] Moreover, opponents argue that current notice requirements have been proven to offer concerned taxpayers a successful avenue for changing the way local governments use TIF.[136] Opponents contend that projects are often nixed before making it to the public hearing phase.[137] Projects have also been subject to audit in the past.[138] Opponents of amending the statute assert that taxpayers who are concerned with their local governments' use of TIF can implement change through the electoral

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(asserting that if the redevelopment area might be the location of any project of similar value, then the but-for test's requirements have not been met); *Hearing on L.B. 1095*, *supra* note 56, at 14 (statement of Sen. Mike Groene) ("Every TIF in North Platte was going to be built . . . anyway. Every one of them.").

134. *Hearing on L.R. 599*, *supra* note 56, at 3 (statement of Sen. Al Davis) (explaining that TIF projects are removed from "valuation purposes for the TEEOSA formula," which resulted in increased state aid to Nebraska schools by $22 million in 2012); *Hearing on L.R. 599*, *supra* note 56, at 7 (statement of Renee Fry) (stating the same and adding that increased aid is received by equalized school districts that contain TIF projects because the TEEOSA equation drops the project for valuation purposes while the districts' needs remain the same).

135. *Hearing on L.B. 1095*, *supra* note 56, at 41 (statement of Lynn Rex) ("[T]he state of Nebraska has one of the most restrictive tax increment financing laws in the country, not just the region, in the country."); *Hearing on L.B. 529 and L.R. 29CA Before the Comm. on Urban Affairs*, 103d Leg., 1st Sess. 38 (Neb. 2013) (statement of Sen. Lynn Rex) (noting that Nebraska is among only three states with a fifteen-year limitation on TIF while all others permit longer payback periods); *Hearing on L.B. 1132 and L.R. 376CA Before the Comm. on Urban Affairs*, 102d Leg., 2d Sess. 38 (Neb. 2012) (statement of Sen. Heath Mello) (discussing Nebraska's strict statutory limitations in comparison to other states' TIF statutes).

136. *Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 32 (statement of Ervin Portis) ("[I]n the three projects we've approved, we sent or published notice 64 times."); *see also Hearing on L.B. 1095*, *supra* note 56, at 38 (statement of Jack Cheloha) (describing the removal of a blighted and substandard designation in the Fairacres neighborhood in Omaha after the community spoke out against the designation).

137. *Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 44-45 (statement of Andrew Willis) (stating he has advised clients not to pursue a "fair number" of TIF projects, usually at the application level); *Hearing on L.R. 599*, *supra* note 56, at 25 (statement of David Landis) ("We require in the city of Lincoln a blighted, substandard survey done by a planning firm . . . . And those professionals who are not part of the city government provide that to us and on occasion they will say, no, this is not 'blightable.'").

138. *Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 105 (statement of Mike Bacon) (referencing the fact that 40 audits of TIF projects had occurred, two of which were his); *Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 104 (statement of David Landis) (noting secondhand knowledge that 40 audits of TIF projects had occurred).

process.[139] Additionally, TIF supporters argue that the process of funding a TIF project creates an inherent check on the types of projects that are ultimately awarded TIF funding.[140] With respect to the but-for test, opponents of the proposed legislation argue the mere possibility that a different project might occur in the redevelopment area does not mean such a project will ever come to fruition, especially when considering a developer's need to generate a worthwhile return on investment.[141] In addition, the increased state aid to equalized school districts that contain TIF projects produces the need to evaluate the TEEOSA formula, not create more state oversight of TIF.[142] According to one opponent, the proposed changes were recently cited by three companies as the reason for their decision to locate their companies outside of Nebraska.[143] At least one senator on the committee was vocal about his agreement with the opponents of the proposed legislation by directing the bills' introducers to fix TIF locally rather than telling the legislature to restrict economic development.[144]

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139. *Hearing on L.B. 1095*, *supra* note 56, at 19 (statement of Ervin Portis) ("There's no shortage of folks running for those local offices. We got three people running for mayor [in Plattsmouth] right now. All of those city council seats are contested elections. That's accountability at the local level."); *Hearing on L.B. 1095*, *supra* note 56, at 43 (statement of Lynn Rex) ("[Taxpayers] simply don't have to reelect . . . .").

140. *Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 75 (statement of Cassie Paben) (pointing to increased pressure from lenders on developers with respect to backing notes issued for TIF purposes "to ensure that the financial institution is able to get repaid"); *Hearing on L.B. 1095*, *supra* note 56, at 21-22 (statement of Ken Bunger) (explaining when a project is unsuccessful, "the bank and the developer who usually guarantees the loan is out of luck"); *Hearing on L.B. 1095*, *supra* note 56, at 41 (statement of Lynn Rex) ("Bond counsel has got to put their signature and the credibility of their law firm on the dotted line before bonds can be issued.").

141. *Hearing on L.R. 599*, *supra* note 56, at 30 (statement of David Landis) ("That there is a viable alternative that you can conceive of on paper doesn't mean there's a person willing to do it and pony up the money . . . . [T]he notion that an intellectually attractive alternative might exist doesn't mean that the kinds of buildings that existed and made our neighborhoods look bad are going to be torn down and replaced by new buildings."); *Hearing on L.R. 599*, *supra* note 56, at 65 (statement of Cassie Paben) ("I don't know a developer in their right mind that would truly develop a project with little or no return on their investment.").

142. *Hearing on L.R. 599*, *supra* note 56, at 33 (statement of David Landis) ("[T]he solution, I think, to the problem that Senator Davis has raised lies in the state aid formula . . . . It doesn't lie in creating a state oversight system, absolutely unprecedented in the nation . . . .").

143. *Hearing on L.B. 719, L.B. 1042, L.R. 394CA, and L.R. 399CA Before the Comm. on Urban Affairs*, 104th Leg., 2d Sess. 78 (Neb. 2016) (statement of Lynn Rex).

144. *Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 38 (statement of Sen. Bob Krist) ("If your TIF is broken in your local area, fix your TIF in your local area. Quit bringing bills here and telling us to restrict community development, economic development.").

III. BACKGROUND

A. Economic Analyses Yield Inconsistent Results on Impact of TIF

Tax Increment Financing ("TIF") is arguably the most popular economic development tool implemented by municipalities across the United States.[145] In light of this widespread use, TIF's effects vary significantly across urban and rural contexts.[146] While studies have shown TIF's effects on urban school district finances are minimal, rural school districts' finances experience a moderately positive effect where TIF is used.[147] Municipalities experiencing financial woes are more prone to adopt TIF.[148] In terms of effectiveness, TIF has been found to have its greatest impact in blighted areas.[149] Regarding the decision-making process, competition for business investment with other local municipalities plays a significant role.[150] Additionally, there is no indication that TIF adoption is the result of a desire to divert tax revenue away from an overlapping taxing jurisdiction.[151]

The academic world has been unable to come to agreement with respect to the impacts TIF use has on economic growth.[152] On the one hand, results suggest that TIF has a stimulative effect on residential property values within a TIF district as well as the surrounding community.[153] TIF also results in greater growth in prices of commercial

145. Rachel Weber et al., *The Effect of Tax Increment Financing on School District Revenues: Regional Variation and Interjurisdictional Competition*, 40 St. & Loc. Gov't Rev. 27, 27 (2008).

146. *See id.* at 37, 39 (highlighting inconsistent effects of TIF resulting from differences with respect to structural, political, and economical factors).

147. *Id.* at 39.

148. Paul F. Byrne, *Strategic Interaction and the Adoption of Tax Increment Financing*, 35 Regional Sci. & Urb. Econ. 279, 298 (2005).

149. Paul F. Byrne, *Determinants of Property Value Growth for Tax Increment Financing Districts*, 20 Econ. Dev. Q. 317, 318 (2006) (measuring blight using vacancy rates and median age of improvements); Brent C. Smith, *If You Promise to Build It, Will They Come? The Interaction Between Local Economic Development Policy and the Real Estate Market: Evidence from Tax Increment Finance Districts*, 37 Real Est. Econ. 209, 232 (2009).

150. Byrne, *supra* note 148, at 298.

151. *Id.*

152. Joan M. Youngman, *TIF at a Turning Point: Defining Debt Down*, Tax Analysts St. Tax Notes, May 2, 2011, at 323 ("That [lack of consensus] is unsurprising, given the enormous variety of circumstances, regions, and types of projects at issue."); Weber, *supra* note 145, at 29.

153. *See* Smith, *supra* note 149, at 231-32 (showing increase in prices in neighborhoods designated for TIF); Brent C. Smith, *The Impact of Tax Increment Finance Districts on Localized Real Estate: Evidence from Chicago's Multifamily Markets*, 15 J. of Housing Econ. 21, 35 (2006) (showing greater appreciation rates for multifamily housing within TIF districts when compared to areas not designated for TIF use, but admitting possibility of sample selection bias that could threaten validity of results); Joyce Man & Mark S. Rosentraub, *Tax Increment Financing: Municipal Adoption and Effects*

properties in TIF districts as opposed to areas not designated for TIF use.[154] Further, the argument that TIF use displaces commercial development in other parts of a community lacks statistical support.[155] On the other hand, some evidence illustrates cities that adopt TIF experience lower growth rates than those that do not.[156] With respect to commercial property, other research indicates that the use of TIF results in a reduction of commercial property value growth in parts of a municipality that do not use TIF; however, no such offset has been found with respect to industrial property.[157]

B. Omaha-Based Think Tanks Blast the Use of TIF in Nebraska

1. Progressive Research Institute of Nebraska

In 2011, the Progressive Research Institute of Nebraska issued a report focusing on the use of TIF funds to incentivize development by for-profit entities in Omaha and questioning whether the allocation of such funds served a private or public benefit.[158] Citing the Community Development Law's but-for requirement, the report noted that of the thirty-seven TIF projects approved in Omaha in 2008 and 2009, thirty lacked any evidence that the but-for test had been considered.[159] John Dunn, the author, characterized two of the seven that

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on Property Value Growth, 26 Pub. Fin. Rev. 523, 541 (1998) (measuring increase in "median owner-occupied housing value[s]").

154. Smith, *supra* note 149, at 231-32 ("TIF designation and the anticipated, or accompanying, public and private investment in TIF projects stimulates market interest" as shown by greater increase in price for commercial properties within a TIF district than those outside of a TIF district).

155. David F. Merriman et al., *Do Tax Increment Finance Districts Stimulate Growth in Real Estate Values*, 39 Real Est. Econ. 221, 241-43 (2011) ("We do not find any statistical support for the hypothesis that commercial development in TIF districts displaces commercial development elsewhere in the community. Rather, we find evidence of a substantial synergistic effect.").

156. Richard F. Dye & David F. Merriman, *The Effects of Tax Increment Financing on Economic Development*, 47 J. of Urb. Econ. 306, 324 (2000). Three years later, a subsequent study did not find "the earlier provocative result of a significantly negative impact of TIF adoption on growth, but we still find no positive impact of TIF adoption on the growth in citywide property values." Richard F. Dye & David F. Merriman, *The Effect of Tax Increment Financing on Land Use, in* The Property Tax, Land Use, and Land-use Regulation (Dick Netzer ed.).

157. Richard F. Dye & David F. Merriman, Lincoln Inst. of Land Pol'y, Tax Increment Financing: A Tool for Local Economic Development 2, 7 (2006).

158. Dunn, *supra* note 131, at 6, 9. The Progressive Research Institute of Nebraska has since changed its name to Policy Research and Innovation, which states its mission is to "conduct research and promote policies that advance opportunities and justice, expand and strengthen the middle class, and help all people achieve the American dream." *Hearing on L.R. 599*, *supra* note 56, at 22; *What We Do*, Policy Research & Innovation (May 14, 2015), http://www.prineb.org/Documents/PRI_Resume5-14-15.pdf.

159. Dunn, *supra* note 131, at 6. The but-for test asks whether a project would have been economically feasible and whether the project would have occurred in the redevel-

did contain a clause in reference to the but-for test as questionable and pointed out that those two projects would still have been profitable without the use of TIF.[160] Moreover, the report was critical of projects that were granted TIF funds where one company benefitting from TIF was a successful business venture and where another project was located near the University of Nebraska-Omaha's recent development.[161] With respect to TIF funds being allocated to for-profit TIF projects, the study found that just under $40 million in TIF funds had been approved during 2008 and 2009 combined, resulting in $2.6 million in diverted tax revenue when taking into account the fifteen-year lifespan of a TIF project.[162] The report, however, acknowledged the lack of opposition to TIF projects in city council and planning board meetings.[163] Determining that the required cost-benefit analyses for the TIF plans studied were inadequate, the report noted the city council's responsibility to reject redevelopment plans associated with those inadequate analyses.[164] Further, the report recommended that redevelopment plans be subjected to increased scrutiny so as to ensure TIF funds are allocated for public, rather than private, benefit.[165]

In 2012, the Progressive Research Institute of Nebraska issued a research update to the 2011 report.[166] The report expressed concern over the fact that a vast majority of TIF projects in Omaha are for commercial projects and market-rate housing.[167] Moreover, the report claimed that the City of Omaha lost $28.6 million in tax revenues in 2011 and $179.5 million combined over the fifteen years prior to the report.[168] Finally, the report argued the City of Omaha was obviously abusing the but-for test and suggested the City of Omaha was thumbing its nose at the statutory requirement.[169]

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opment area without the use of TIF. NEB. REV. STAT. § 18-2116(1). About half of the states that allow TIF have the but-for requirement, but "a simple assertion that the project would not proceed without the TIF suffices." DUNN, *supra* note 131, at 6.

160. DUNN, *supra* note 131, at 7. The report queried, "should the City be subsidizing projects beyond the break-even point?" *Id.*

161. *Id.* at 10 (referencing the Aksarben Village development's location in relation to the University of Nebraska-Omaha's extensive development).

162. *Id.* at 8-9. Dunn characterized these numbers as "tax expenditures" and money "lost to the City." *Id.* at 9.

163. *Id.* at 10.

164. *Id.* at 11.

165. *Id.* at 12.

166. JI-HYUNG PARK & KENNETH A. KRIZ, PROGRESSIVE RES. INST. OF NEB., RESEARCH UPDATE: WHAT IS TAX INCREMENT FINANCING (AND WHY SHOULD ANYONE CARE)? 2 (2012).

167. *Id.* at 7 ("Commercial projects and market-rate housing projects are less likely to promote long-term job gains than are industrial projects.").

168. *Id.* at 11.

169. *Id.* at 13, 15 (suggesting that city council members were not properly educated on or were willfully ignorant of the Statute's requirements).

2. Platte Institute for Economic Research

In July of 2013, the Platte Institute for Economic Research issued a policy study entitled *The Use of Tax Increment Financing in Nebraska*.[170] In a review of the academic literature on the use of TIF, the study asserted that socio-economic factors, such as historical growth patterns, fiscal structure, and community characteristics, should be afforded more credit than TIF projects on the economic development of a local economy.[171] That line of research was contrasted to studies that assert TIF projects lead to increased property values and gross income of residents, resulting in positive economic development.[172]

The study also criticized the commonly used but-for test as it is written in the Statute and, through case studies on three TIF projects in Nebraska, as it is applied throughout the state.[173] The use of TIF is often controversial because of the belief that TIF diverts funds from local authorities to which they otherwise would have been entitled.[174] Where a project might in fact occur after a certain period of time, the funds that are diverted for the completion of that project through the use of TIF result in lost revenue after the point at which the project would have occurred.[175] The author, Kenneth A. Kriz, asserts that the first issue with the but-for test is that it is most often applied as a question of whether the particular project in the redevelopment plan would occur without the use of TIF.[176] This is the wrong way to approach the interpretation of the requirement, according to Kriz, because if any project of similar value would have occurred without the use of TIF, then the above-mentioned loss of revenue will result.[177] The second issue with the but-for test is because of the potential that a project of similar value might occur without the use of TIF at a later

170. KRIZ, *supra* note 54, at 1. The Platte Institute's mission is to "[a]dvance public policy alternatives that foster limited government, personal responsibility and free enterprise in Nebraska." *Id.* at 24. At the time the policy study was published, Mike Groene sat on the organization's board of directors. *Id.* He has since become a state senator and has introduced legislative bills calling for more oversight on the use of TIF. L.B. 719, 104th Leg., 2d Sess. (Neb. 2016); L.B. 445, 104th Leg., 1st Sess. (Neb. 2015); L.B. 238, 104th Leg., 1st Sess. (Neb. 2015).

171. KRIZ, *supra* note 54, at 6. Citing a study he previously conducted on the use of TIF in Minnesota, Kriz also noted, "TIF adoption most likely has a negative effect on local finances but . . . under some specific circumstances . . . it could have a positive effect." *Id.* at 7.

172. *Id.* at 6-7.

173. *Id.* at 4-5, 10-15. The but-for test asks whether a project would have been economically feasible and whether the project would have occurred in the redevelopment area with the use of TIF. NEB. REV. STAT. § 18-2116(1).

174. KRIZ, *supra* note 54, at 4.

175. *Id.*

176. *Id.*

177. *Id.*

date, local decision makers are left with the dilemma of making predictions about potential development years into the future.[178] The third issue with the but-for test is that the existence of multiple interpretations of the vague statutory language setting forth the but-for requirement results in a race to the bottom approach by local governments.[179]

The study determined there is minimal evidence that TIF has a strong impact on local economies despite presenting data that showed positive return on investment and job growth for cities even in instances where the project absolutely would have developed without the assistance of TIF.[180] The study further found there are multiple systematic issues with the use of TIF in Nebraska because the case studies suggested the but-for test was not implemented correctly, the cost-benefit analysis was not documented, a conflict of interest may have been present in one case, and cities failed to monitor whether the projects reached the employment or investment targets.[181] Kriz also characterized blighted and substandard designations by municipalities as excessive, citing one case study city where almost one-third of the city's land had been declared blighted and substandard.[182] Based on these findings, the study recommended the state implement oversight on the use of TIF and examine the blighted and substandard designations by local governments.[183] The study further called for a review and change to the but-for test and cost-benefit analysis requirements.[184] Finally, the study recommended that the state require local governments to monitor whether TIF project goals are being met and to enact a claw back provision for instances where they are not.[185]

178. *Id.* at 5 (noting "only a probabilistic assessment can be made," because implementation of a parcel level model of development probabilities is "still years away").

179. *Id.*

180. *Id.* at 19-21 (analyzing data from one of the case study cities and concluding that "in a worst-case scenario the project would still break even for the city"). From the school district's perspective, the data showed a positive impact on school district finances where the probability that the project would have occurred without the use of TIF reached as high as 80%. *Id.* at 20-21.

181. *Id.* at 21. "The impression left on the researcher by the interviews is that the projects . . . were destined for approval and the process steps were just pro forma." *Id.*

182. *Id.* at 22 ("[M]unicipalities seemed to be using blighted and substandard designations strategically and in a manner which seems to be excessive—in one case study city almost 1/3 of the city land area was deemed to be blighted or substandard.").

183. *Id.*

184. *Id.*

185. *Id.*

C. *Fitzke v. City of Hastings*: Taxpayers Successfully Challenge the Use of TIF

In *Fitzke v. City of Hastings*,[186] the Nebraska Supreme Court held that land can only be added to a redevelopment area that is already in existence if (1) the added land is declared blighted and substandard in accordance with the Statute or (2) the addition of the land is reasonably necessary to successfully implement an existing redevelopment plan.[187] In *Fitzke*, Ronald and Delores Fitzke (the "Plaintiffs") sued the City of Hastings and the Community Redevelopment Authority of the City of Hastings (collectively, the "Defendants"), challenging the incorporation of undeveloped land into a redevelopment area that had previously been declared blighted and substandard.[188] The Nebraska District Court for Adams County determined that land cannot be incorporated into an existing redevelopment area unless that additional land is declared blighted and substandard.[189] The district court further provided that merely incorporating a piece of land into an existing redevelopment area, absent a showing that the incorporation is required to relieve blighted or substandard conditions, does not automatically result in a characterization of the land as blighted and substandard.[190]

The Defendants appealed to the Nebraska Court of Appeals, claiming the district court erred by misconstruing or misapplying provisions of the Statute, and the Nebraska Supreme Court removed the case to its own docket.[191] The Nebraska Supreme Court affirmed the ruling of the district court, but disagreed with the district court's reasoning.[192] Contrary to the district court, the Nebraska Supreme Court held that land added to an existing redevelopment area need not *necessarily* be declared blighted and substandard.[193] Rather, the court held that an alternative approach to adding land requires a showing that the addition of the land is reasonably necessary to the successful implementation of an existing redevelopment plan.[194] The Nebraska Supreme Court reasoned that simply revising an existing redevelopment plan to add a new project, and subsequently incorporating land for that project into the existing redevelopment area, is

186. 582 N.W.2d 301 (Neb. 1998).
187. Fitzke v. City of Hastings, 582 N.W.2d 301, 312 (Neb. 1998).
188. *Fitzke*, 582 N.W.2d. at 305-06. This incorporation was achieved by modifying an existing redevelopment plan, which had already been approved, to include the new project that consisted of the development of a campground. *Id.* at 305-06.
189. *Id.* at 306.
190. *Id.*
191. *Id.* at 306, 309.
192. *Id.* at 310, 312.
193. *Id.* at 312.
194. *Id.*

not a sufficient showing that the land was incorporated as a necessary part of the initial redevelopment plan.[195] As a result, the court ultimately determined the district court did not abuse its discretion in declaring that the TIF grant was invalid and void because the record contained no evidence that the incorporation of the undeveloped cornfield into the existing redevelopment area was necessary for the carrying out of the initial redevelopment plan.[196] With its holding in *Fitzke*, the Nebraska Supreme Court validated the judicial avenue for citizens to successfully challenge decisions made by redevelopment authorities where those decisions are illegal or not supported by the evidence.[197]

IV. ANALYSIS

The Community Development Law and supplemental provisions added in 1979 (collectively, the "Statute") provide guidance for local governments' use of tax increment financing ("TIF"), which was approved as a constitutional amendment by Nebraska voters in 1978 to redevelop substandard and blighted areas.[198] TIF involves the capture of property taxes from the increase in property value generated by a redevelopment project in an area that has been declared substandard and blighted.[199] The captured property taxes are typically used to pay off a TIF bond that is backed by the commitment of the captured tax revenues and issued in order to provide up-front capital for the project.[200] Redevelopment projects that use TIF funds may only begin after a redevelopment plan has been recommended by a community redevelopment authority ("Redevelopment Authority"), reviewed by a city or village's planning commission, and approved by the governing body.[201] Before recommending a redevelopment project, a Redevelopment Authority must conduct a cost-benefit analysis, considering factors such as impacts on public service needs, local taxes, and employers and employees within the community.[202] The governing body may approve a redevelopment project if it finds that the specific TIF project would not be economically feasible without

195. *Id.* at 311-12 ("If a private development project is ineligible for tax increment financing because it is located on land which is not blighted or substandard[,] . . . it logically follows that eligibility could not be created by simply incorporating the project site into an adjacent area which has been declared blighted or substandard and revising the redevelopment plan for that area to include the project.").
196. *Id.* at 312.
197. *Id.* at 309.
198. NEB. CONST. art. VIII, § 12; NEB. REV. STAT. § 18-2102.
199. NEB. REV. STAT. §§ 18-2109, 18-2147.
200. Briffault, *supra* note 5, at 68.
201. NEB. REV. STAT. §§ 18-2112, 18-2116.
202. NEB. REV. STAT. § 18-2113(2).

TIF funds, the project would not occur in the substandard and blighted area without the use of TIF, and the costs and benefits of the project would be in the long-term best interest of the community.[203]

This Analysis will illustrate how recent legislative bills that create increased state oversight of local governments' use of TIF in Nebraska are unnecessary.[204] First, it will critique studies that are used to support arguments for TIF reform in Nebraska and illustrate that those studies' conclusions are not only contradictory to their own findings but also to the Statute.[205] Second, it will outline and provide examples of the use of existing avenues of accountability, which show that taxpayers who wish to challenge their local governments' use of TIF already have extensive recourse options.[206]

A. Studies Relied upon by Proponents of Increased TIF Oversight Present an Incomplete Picture of the Use of TIF in Nebraska

Proponents of TIF-reform bills frequently cite studies published by the Progressive Research Institute and the Platte Institute for Economic Research.[207] John Dunn, author of the Progressive Research Institute study, questions the efficacy of approving TIF projects that would still be profitable without the use of TIF or that involve successful business ventures.[208] Dunn also takes issue with the TIF grant to develop Aksarben Village in Omaha because of its proximity to developments undertaken by the University of Nebraska at Omaha.[209] However, the Statute merely requires a showing that the project would not be economically feasible without TIF funds, not a showing that the project would not be profitable.[210] As a result, Dunn's impractical conclusion is off-base, because the Statute's requirements do not preclude successful businesses or otherwise profitable projects from being granted TIF funds.[211]

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203. Neb. Rev. Stat. § 18-2116(1). This test is commonly referred to as the but-for test. *See supra* note 8 and accompanying text.

204. *See infra* notes 207-260 and accompanying text.

205. *See infra* notes 207-226 and accompanying text.

206. *See infra* notes 227-260 and accompanying text.

207. *Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 12-14; *Hearing on L.R. 599*, *supra* note 56, at 6, 16-17; *Hearing on L.B. 1095*, *supra* note 56, at 3.

208. Dunn, *supra* note 131, at 7, 10.

209. *Id.* at 10.

210. Neb. Rev. Stat. § 18-2116(1).

211. *Compare id.* (referring to economic feasibility with no mention of profitability), *and Hearing on L.R. 599*, *supra* note 56, at 65 (statement of Cassie Paben) ("I don't know a developer in their right mind that would truly develop a project with little or no return on their investment."), *with* Dunn, *supra* note 131, at 7 ("[S]hould the City be subsidizing projects beyond the break-even point?").

Kenneth Kriz's Platte Institute for Economic Research's study argues for increased oversight at the state level by contending there is little evidence that TIF has a strong impact on local economies.[212] Using a statistical model to determine financial impact, Kriz claimed the project in his first of three case studies would have been financially burdensome in many cases to the school district overlapping the redevelopment project.[213] This assertion is directly contradictory to the study's analysis, which showed a positive impact on school district finances in all but a few scenarios.[214] Kriz also characterized municipalities' use of blighted and substandard designations as excessive, supporting his statement by referring to one case study city that had declared almost one-third of the land as blighted and substandard.[215] This characterization is in direct conflict with the Statute, which permits the largest cities in the state to designate up to 35% of their land as blighted while placing even less restrictive caps on smaller cities and villages.[216] Notwithstanding his conclusions, Kriz's case study of three TIF projects in Nebraska is not statistically representative of the whole considering the 716 active TIF projects in Nebraska in 2014.[217]

A common argument raised by proponents of reform is that both studies have found TIF projects which, according to the authors, did not comply with the Statute's requirements, such as conducting the cost-benefit analysis or meeting the but-for test.[218] Recent legislation was also presented to the legislature that would permit a county board of equalization to determine whether a redevelopment plan complies

212. KRIZ, *supra* note 54, at 21-22.

213. *Id.* at 22.

214. *Compare id.* at 19-21 (showing positive return on investment and job growth for cities even in instances where the project absolutely would have developed without the assistance of TIF and computing negative financial impact for school districts only in instances where the project was 80% or more likely to occur without the use of TIF), *with id.* at 22 ("[T]he project [in one of the case studies] was less advantageous financially to an overlapping school district and in many cases would produce a negative financial effect.").

215. KRIZ, *supra* note 54, at 22.

216. *Compare* NEB. REV. STAT. § 18-2103(11)(v) (limiting blight designation to not more than 35% of metropolitan and first class cities, 50% of second class cities, and 100% of villages), *with* KRIZ, *supra* note 54, at 22 ("[M]unicipalities seemed to be using blighted and substandard designations strategically and in a manner which seems to be excessive – in one case study city almost 1/3 of the city land area was deemed to be blighted or substandard.").

217. *Compare* 2014 TIF REPORT, *supra* note 54, at 322 (showing 716 active TIF projects in Nebraska for 2014), *with* KRIZ, *supra* note 54, at 10-15 (conducting a case study analysis of three TIF projects).

218. *Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 12-14 (testimony of Renee Fry); *Hearing on L.B. 1095*, *supra* note 56, at 3 (statement of Sen. Al Davis) (reading a letter from Kenneth Kriz to the Committee).

with the Statute.[219] Moreover, state senators have characterized the use of TIF in Nebraska as fraught with abuse, likening the approval process to extortion, bribery, and a sloppily applied whitewash.[220] All of these conclusions, however well-intentioned, are misleading to the public, and could result in severe damage to economic development in the state of Nebraska.[221]

Rather than relying on senators' and academics' personal interpretations of the Statute, those wishing to assert that the Statute's requirements have been violated should seek such a determination from an authority qualified to interpret the state's laws—the court.[222] This process proved effective for the taxpayers in *Fitzke v. City of Hastings*[223] wherein the court nullified a redevelopment contract.[224] As the Nebraska Supreme Court held in *Fitzke*, a district court may alter the decision of a redevelopment authority where the court determines that the redevelopment authority's decision was illegal or unsupported by the evidence.[225] As a result, rather than relying on studies that examine less than one-half of one percent of active TIF projects to support proposed bills restricting community development, senators should encourage taxpayers who are actually aggrieved by these alleged extensive violations of the Statute to seek justice from the system that was put in place to provide them just that.[226]

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219. L.B. 1042, 104th Leg., 2d Sess. (Neb. 2016).

220. *Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 5 (statement of Sen. Al Davis) (referring to the current state of TIF as "a sloppily applied whitewash to any developer wanting something for nothing"); *Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 96-98 (Neb. 2015) (statement of Sen. Mike Groene) (equating models of funding a TIF project to extortion and bribery).

221. *See Hearing on L.B. 719, L.B. 1042, L.R. 394CA, and L.R. 399CA*, *supra* note 143, (statement of Lynn Rex) (informing the legislature that three companies have cited pending legislation as their reason for choosing to locate in Iowa and Colorado over Nebraska).

222. *See* Fitzke v. City of Hastings, 582 N.W.2d 301, 309 (Neb. 1998) (considering whether the "district court misconstrued or misapplied provisions" of the Statute).

223. 582 N.W.2d 301 (Neb. 1998).

224. *Fitzke*, 582 N.W.2d at 312.

225. *Id.* at 309.

226. *Compare Hearing on L.B. 1095*, *supra* note 56, at 3 (statement of Sen. Al Davis) (reading a letter from Kenneth Kriz to the Committee), *and* KRIZ, *supra* note 54, at (basing recommendations on case study of three TIF projects), *with* 2014 TIF REPORT, *supra* note 54, at 322 (showing 716 active TIF projects in Nebraska for 2014), *and Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 38 (statement of Sen. Bob Krist) ("If your TIF is broken in your local area, fix your TIF in your local area. Quit bringing bills here and telling us to restrict community development, economic development.").

B. Existing Avenues Sufficiently Hold Local Governments Accountable on the Use of TIF

Before a TIF project can be approved, the city's governing body must prepare a general plan for the city's development.[227] The city must also request a recommendation from the planning commission as to whether an area is substandard and blighted.[228] Prior to making the substandard and blighted determination, the governing body must hold a public hearing.[229] Notice of this hearing is required by publication once per week for two weeks with the last publication being no less than ten days before the hearing.[230] The Statute further requires notice to be given to each registered neighborhood association within a one-mile radius of the project as well as each taxing jurisdiction that covers the redevelopment area.[231]

After an area is declared substandard and blighted, the community redevelopment authority may prepare a TIF redevelopment plan.[232] The redevelopment plan must include a description of the current and future uses of the redevelopment project area as well as any proposed changes to the area.[233] Before recommending a redevelopment plan to the governing body, the community redevelopment authority must conduct a cost-benefit analysis to determine the impacts of the redevelopment project.[234]

Once a redevelopment plan is prepared, the community redevelopment authority must submit the plan to the planning commission for the commission's recommendation on whether the redevelopment plan is in conformity with the city's general plan for development.[235] Moreover, if a planning commission holds a public hearing to consider the redevelopment plan, then notice as described below is mandated.[236]

After the planning commission's recommendation is received, the Statute then requires that the governing body to conduct a public hearing regarding the consideration of a redevelopment plan.[237] Notice by publication is required once per week for two weeks with the

227. Neb. Rev. Stat. § 18-2110
228. *Id.* § 18-2109; *see also id.* § 18-2103(10) to 18-2103(11) (defining substandard and blighted).
229. *Id.* § 18-2109.
230. *Id.* § 18-2115(1).
231. *See id.* § 18-2115(2) (requiring notice to be given to "each county, school district, community college, educational service unit, and natural resources district").
232. *Id.* § 18-2109.
233. *Id.* § 18-2111.
234. *Id.* § 18-2113(2).
235. *Id.* § 18-2112.
236. *Id.* § 18-2115(3).
237. *Id.* § 18-2115(1).

last publication being no less than ten days before the hearing.[238] The Statute further requires notice to be given to each registered neighborhood association within a one-mile radius of the project as well as each taxing jurisdiction that covers the redevelopment project area.[239] Any person wishing to express an opinion on the redevelopment plan at such public hearing must be afforded that opportunity.[240]

The governing body may only approve a redevelopment plan if it finds that the plan conforms to the Statute and the city's general plan for development.[241] Additionally, the governing body must find that the specific TIF project would not be economically feasible without TIF funds, the project would not occur in the substandard and blighted area without the use of TIF, and the costs and benefits of the project would be in the long-term best interest of the community.[242]

As an initial matter, the way in which a TIF bond is issued and financed presents an inherent check on a local government's decision to approve a TIF project due to the risks faced by certain involved parties, namely the developer, bank, and bond counsel.[243] Yet in the face of this arduous approval process, supporters of recent amendments to the Statute still contend that concerned citizens have no options when it comes to questioning their local governments' use of TIF.[244] To combat this alleged lack of recourse, recently proposed leg-

238. *Id.*

239. *Id.* § 18-2115(2) (requiring notice to be given to "each county, school district, community college, educational service unit, and natural resources district").

240. *Id.* § 18-2115(1).

241. *Id.* § 18-2116(1).

242. *Id.* This is commonly known as the but-for test. *See supra* note 8 and accompanying text.

243. *Compare Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 75 (statement of Cassie Paben) (pointing to increased pressure from lenders on developers with respect to backing notes issued for TIF purposes "to ensure that the financial institution is able to get repaid"), *Hearing on L.B. 1095*, *supra* note 56, at 21-22 (statement of Ken Bunger) (explaining that when a project is unsuccessful, "the bank and the developer who usually guarantees the loan is out of luck"), *and Hearing on L.B. 1095*, *supra* note 56, at 41 (statement of Lynn Rex) ("Bond counsel has got to put their signature and the credibility of their law firm on the dotted line before bonds can be issued. They don't do that with reckless disregard because there are liabilities that are attached to them. This is not a situation where cities are going out willy-nilly declaring things substandard and blighted."), *with Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 3 (statement of Sen. Al Davis) (claiming the use of TIF funds are held out as "a sloppily applied whitewash to any developer wanting something for nothing" and chastising "the blanket adoption of TIF financing for each and every project a developer wants to undertake"), *and* KRIZ, *supra* note 54, at 21 (opining that proposed projects "were destined for approval" with procedural steps merely serving as pro forma).

244. *See Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 13 (statement of Renee Fry) (stating she was unaware of any instance where there had been a successful challenge to a TIF project where the challenger believed the Statute's requirements had not been met); *Hearing on L.B. 1095*, *supra* note 56, at 16 (statement of Sen. Mike Groene) ("There's no oversight. If you think there's a problem, take your own money and hire a lawyer and have a civic action.").

islation would have required cities to obtain approval for a redevelopment project from the county board of equalization.[245] Another proposed constitutional amendment sought to require each TIF decision to be submitted to a vote by local registered voters.[246] Such proposed legislation ignores the fact that although dozens of notices are published or sent directly to these local registered voters, public disagreement throughout the TIF approval process is relatively nonexistent.[247] Moreover, where dissent arises in the public forum, the prescribed notice has proven to be an effective option in the past.[248]

It is true that a dissenting member of the public will not always be able to sway the governing body in its decision regarding a TIF project, as was the case in *Fitzke v. City of Hastings*[249] where the taxpayer's objections at the required city council meeting did not prevent the approval of the project.[250] Where the public forum is ineffective for the taxpayer, like in *Fitzke*, the Nebraska Supreme Court has determined that courts have the power to negate a community redevelopment authority's decision with respect to TIF.[251] Not only did the court in *Fitzke* rule that it had the power to impact a community redevelopment authority's decision, but it also ruled in favor of the taxpayers in that case.[252] *Fitzke* is thus a prime example of the judicial system providing a viable alternative route for aggrieved taxpayers to challenge the legality of their community leaders' actions concerning TIF even after a redevelopment plan has been approved.[253]

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245. L.R. 1042, 104th Leg., 2d Sess. (Neb. 2016).

246. L.R. 399CA, 104th Leg., 2d Sess. (Neb. 2016) (requiring approval by a majority of registered voters of the relevant city, school district, and county before utilizing TIF).

247. *Compare Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 32 (statement of Ervin Portis) ("[I]n the three projects we've approved, we sent or published notice 64 times."), *and* DUNN, *supra* note 131, at 10 ("[L]ittle opposition has surfaced to TIF plans before the Planning Board or the City Council."), *with* Neb. L.R. 399CA § 1 (amending the Nebraska Constitution add another step to the TIF approval process).

248. *Compare Hearing on L.B. 1095*, *supra* note 56, at 37 (statement of Jack Cheloha) (describing removal of blighted and substandard designation after neighborhood spoke out against the designation), *with* Fitzke v. City of Hastings, 582 N.W.2d 301, 308 (Neb. 1998) (noting the plaintiffs unsuccessfully objected to the modification of a redevelopment plan at a city council meeting).

249. 582 N.W.2d 301 (Neb. 1998).

250. *Fitzke*, 582 N.W.2d at 308.

251. *Id.* at 309, 312.

252. *Id.*

253. *Compare id.* at 312 (concluding the redevelopment contract that resulted from the unlawful incorporation of property into an existing redevelopment area was invalid and void ab initio), *with Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 95-96 (statement of Sen. Mike Groene) (criticizing the recourse option of hiring a private attorney to challenge local governments' use of TIF), *and Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 13 (statement of Renee Fry) (stating she was unaware of any instance where there had been a successful challenge to a TIF project where the challenger believed the Statute's requirements had not been met).

Proposed legislation has repeatedly called for direct state oversight of cities' TIF practices for ongoing projects that have already been approved.[254] Nebraska Legislative Bill 596 and Nebraska Legislative Bill 1095 would have created a new state oversight division to establish procedures on the use of TIF and determine whether cities were complying with the Statute.[255] Nebraska Legislative Bill 445 would have required the Department of Revenue to audit TIF projects every two years and sought to give the department the power to determine whether cities were complying with the Statute.[256] Nebraska Legislative Bill 539, approved by the governor in May 2015, was effective in providing the Auditor of Public Accounts with the power to conduct audits of community redevelopment authorities.[257] Finally, Nebraska Legislative Bill 1102 would have made redevelopment projects subject to performance audits.[258] Each of these bills is redundant and unnecessary, though, because TIF projects have already been subjected to audits in the past.[259] Moreover, such bills overlook the fact that elections present a consistent opportunity for citizens who are unhappy with their local governments' use of TIF to replace incumbents with new officials who may use TIF in a manner more in line with the citizens' desires.[260]

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254. *See* L.B. 1102, 104th Leg., 2d Sess. (Neb. 2016) (permitting performance audits of TIF projects); L.B. 596, 104th Leg., 1st Sess. (Neb. 2015) (creating a state oversight division for TIF projects); L.B. 445, 104th Leg., 1st Sess. (Neb. 2015) (requiring an audit to be completed once every two years); L.B. 539, 104th Leg., 1st. Sess. (Neb. 2015) (giving the Auditor of Public Accounts authority to audit TIF projects); L.B. 1095, 103d Leg., 2d Sess. (Neb. 2014) (creating a state oversight division of TIF projects).

255. Neb. L.B. 596 §§ 3, 5; Neb. L.B. 1095 §§ 3, 8-9.

256. Neb. L.B. 445 § 1.

257. Amendment 653, 104th Leg., 1st Sess. § 1 (Neb. 2015); LEGIS. JOURNAL, 104th Leg., 1st Sess. 1892 (Neb. 2015).

258. Neb. L.B. 1102 § 2.

259. *Compare Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 105 (statement of Mike Bacon) (referencing the fact that 40 audits of TIF projects had occurred, two of which were his), *and Hearing on L.B. 238, L.B. 445, and L.B. 596*, *supra* note 130, at 104 (statement of David Landis) (noting secondhand knowledge that 40 audits of TIF projects had occurred), *with* Neb. L.B. 1102 § 2 (subjecting redevelopment projects to performance audits), *and* Neb. L.B. 539 (giving audit power to the Auditor of Public Accounts), *and* Neb. L.B. 445 § 1 (requiring audits to be conducted once every two years).

260. *See Hearing on L.B. 1095*, *supra* note 56, at 19 (statement of Ervin Portis) ("There's no shortage of folks running for those local offices. We got three people running for mayor [in Plattsmouth] right now. All of those city council seats are contested elections. That's accountability at the local level."); *Hearing on L.B. 1095*, *supra* note 56, at 43 (statement of Lynn Rex) ("[Citizens] simply don't have to reelect people back on the local level.").

V. CONCLUSION

In 1978, Nebraska voters approved the use of tax increment financing ("TIF"), which provides a means to redevelop substandard and blighted areas, through the passage of a constitutional amendment.[261] In 1979, supplement provisions to the Community Development Law (collectively, the "Statute") were enacted, enabling the use of TIF by local governments.[262] TIF involves the capture of property taxes from the increase in property value generated by a redevelopment project in an area that has been declared substandard and blighted.[263] The captured property taxes from the increase in property value are often used by developers to pay off a TIF bond that is backed by the commitment of those captured tax revenues and issued in order to provide up-front capital for the redevelopment project.[264]

A total of twelve legislative bills and four constitutional amendments have been introduced in the Nebraska Legislature since 2012 with many calling for changes to the Statute that would provide more oversight at the state level and taking the power to control the use of TIF out of the hands of local governments.[265] If passed, Nebraska Legislative Bill 918 would have further limited a city's ability to declare land as blighted.[266] Nebraska Legislative Resolution 376CA would have changed the Statute's blighted and substandard requirement and extended the period allowed to pay off TIF indebtedness.[267] Nebraska Legislative Bill 1132 sought to permit cities to develop, without annexing, vacant land outside of the city limits but only if the city obtained county approval.[268]

Nebraska Legislative Resolution 29CA would have changed the Statute's blighted and substandard requirement and extended the payback period for TIF debt.[269] Nebraska Legislative Bill 529 aimed to limit the use of TIF based on the valuation of previous TIF

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261. NEB. CONST. art. VIII, § 12.
262. NEB. REV. STAT. § 18-2101.
263. *Id.* §§ 18-2109, 18-2147.
264. Briffault, *supra* note 5, at 68.
265. L.B. 1102, 104th Leg., 2d Sess. (Neb. 2016); L.B. 1059, 104th Leg., 2d Sess. (Neb. 2016); L.B. 1042, 104th Leg., 2d Sess. (Neb. 2016); L.B. 719, 104th Leg., 2d Sess. (Neb. 2016); L.R. 399CA, 104th Leg., 2d Sess. (Neb. 2016); L.R. 394CA, 104th Leg., 2d Sess. (Neb. 2016); L.B. 596, 104th Leg., 1st Sess. (Neb. 2015); L.B. 539, 104th Leg., 1st Sess. (Neb. 2015); L.B. 445, 104th Leg., 1st Sess. (Neb. 2015); L.B. 238, 104th Leg., 1st Sess. (Neb. 2015); L.B. 1095, 103d Leg., 2d Sess. (Neb. 2014); L.B. 529, 103d Leg., 1st Sess. (Neb. 2013); L.R. 29CA, 103d Leg., 1st Sess. (Neb. 2013); L.B. 1132, 102d Leg., 2d Sess. (Neb. 2012); L.B. 918, 102d Leg., 2d Sess. (Neb. 2012); L.R. 376CA, 102d Leg., 2d Sess. (Neb. 2012).
266. Neb. L.B. 918.
267. Neb. L.R. 376CA.
268. Neb. L.B. 1132.
269. Neb. L.R. 29CA.

projects.[270] Nebraska Legislative Bill 1095 and Nebraska Legislative Bill 596 sought to generate an oversight role from overlapping taxing jurisdictions and created power for a state-level agency to establish additional procedures for the use of TIF.[271] If passed, Nebraska Legislative Bill 238 would have narrowed the breadth of items on which TIF funds could be expended and increased limitations on TIF bond sales and interest rates.[272] Nebraska Legislative Bill 445 attempted to officially permit the state to audit TIF projects and restrict the use of TIF by local governments that were not complying with the Statute.[273] Nebraska Legislative Bill 539 authorized state agencies to conduct audits of community redevelopment authorities.[274]

Nebraska Legislative Bill 719 would have prohibited cities from pledging TIF funds toward redevelopment projects on undeveloped vacant land.[275] Nebraska Legislative Resolution 394CA would have permitted an overlapping taxing jurisdiction to opt out of having its taxes diverted as a result of TIF.[276] Nebraska Legislative Resolution 399CA aimed to require voter approval for TIF redevelopment projects.[277] Nebraska Legislative Bill 1042 sought to require cities to obtain approval for TIF redevelopment projects from the relevant county board of equalization.[278] Nebraska Legislative Bill 1059 would require redevelopers seeking TIF funds to disclose whether they planned to take advantage of the Nebraska Advantage Act.[279] Nebraska Legislative Bill 1102 would have permitted performance audits of TIF redevelopment projects.[280] Of all the proposed changes to the Statute since 2012, L.B. 539 was the only bill signed into law.[281]

Because studies often cited by proponents of the proposed legislation do not present an accurate picture of the use of TIF in Nebraska, they should not be used to provide the foundation for arguments in support of increased TIF oversight at the state level.[282] Moreover, because avenues for recourse currently in place have effectively been utilized to hold local governments accountable regarding their use of TIF, increasing state oversight by controlling the make-up of a community redevelopment authority or requiring a claw back provision is unnec-

270. Neb. L.B. 529.
271. Neb. L.B. 596; Neb. L.B. 1095.
272. Neb. L.B. 238.
273. Neb. L.B. 445.
274. Neb. L.B. 539.
275. Neb. L.B. 719.
276. Neb. L.R. 394CA.
277. Neb. L.R. 399CA.
278. Neb. L.B. 1042.
279. Neb. L.B. 1059.
280. Neb. L.B. 1102.
281. *Id.*
282. *See infra* notes 207-226 and accompanying text.

essarily redundant.[283] The use of TIF is without a doubt a controversial topic among academics, citizens, and state legislators, and it appears that this controversy is not destined to conclude any time soon. With newly imposed term limits in the Nebraska Legislature, this Article is a useful guide to state senators new to the TIF conversation. State senators, old and new, should bear in mind that local governments tasked with ensuring the successful development of their communities are given few tools, and arguably only one true tool known as TIF, to accomplish that endeavor. Exacerbating the issue, decisions regarding TIF projects made by urban communities will undoubtedly result from differing needs than those decisions made by communities in greater Nebraska. While increasing state oversight of the use of TIF may create more standardization in the area, legislators must continue to be mindful of the effect that such oversight would have on rural communities with decreasing populations.

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283. *See infra* notes 227-260 and accompanying text.