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LETTER FROM THE EDITOR-IN-CHIEF

In the 63th year of the *Howard Law Journal*, Issue 1 of Volume 63 continues academic discussions surrounding social justice in areas suffered by marginalized groups. The first set of articles offer ways to improve our legal system, while the latter set of articles address discriminatory practices that still plague minority communities and cause hardships that negatively impact groups who historically have been targets of discrimination. Collectively, these articles remind us not only that justice can be achieved, but that our quest for justice and equality is not over. Our hope is that this issue will spark discussion in the legal community and serve as motivation to create change. In fact, after multiple events that have occurred in the past three years across the nation have threated the furtherance of civil rights and justice, there may be no better time than now to create awareness of issues that have plagued America, and continue to do so. Since 1869, the Howard University School of Law has produced such advocates, and since 1955, the *Howard Law Journal* has published their work. One-Hundred and Fifty years after this school's inception, Volume 63 continues in that great tradition.

This issue begins with Professor Kenneth Ferguson's Article titled, *Shadow, Light and Darkness: Bankruptcy's Business In-Fact and Business In-Law Justification Test Under § 363(b)1* where Professor Ferguson focuses on the alternative approach to reorganizing a business facing bankruptcy which is found in § 363(b) of the Bankruptcy Code. While this has become a popular approach, principal Code objectives have often been sidestepped, if not completely overlooked, by some courts in the name of speed and simplicity. Thus, in this Article, Professor Ferguson offers a two-part analytical approach that, when utilized by courts evaluating § 363(b) sales, will demonstrably lessen the likelihood of potential creditor and debtor abuses of this strategy while at the same time fostering sales that would command the highest values for the bankruptcy estate and bankruptcy constituencies. He concludes with a demonstration of the two-part *business in-fact* and *business in-law* analysis as seen in Chapter 11 proceedings.

Next, Professor Kenneth Swift, in his Article, *Take a (Cognitive) Load Off: Using Principles of Adult Education Theory to More Effectively Integrate a Drafting Unit into a First-Year Legal Writing Course and Ensure Student Success*, explores the intersection of curriculum reform and modern adult learning theory by looking at ways to effectively incorporate transactional drafting into a first-year Legal Writing course. After an in-depth overview of adult learning theory and a discussion of Professor Swift's own experiences with Legal Research and Writing course, the author uses Cognitive Load Theory to posit a process in which Cognitive Load Theory can be utilized to better pre-

pare students to read and understand case law effectively at the start of their law school careers.

In addition to the work by these scholars, we are very proud to include the work authored by a current member of Volume 63 of the *Howard Law Journal* and a past member of Volume 62. The first comment, *Justice for All: The Sixth Amendment Mandates Purging All Racial Prejudice from the Black Box*, is authored by R. Jannell Granger, *Howard Law Journal*'s Executive Notes & Comments Editor and member of the Class of 2020. Ms. Granger comments on the 2017 Supreme Court case, *Peña-Rodriguez v. Colorado*, holding that the Sixth Amendment requires a racial bias exception to the no-impeachment rule. She discusses how the decision failed to address the racial biases that aid the incarceration of minorities, specifically black people and how that has continued to enable the continued perpetuation of injustice and race-based incarceration of black people. Ms. Granger, then proposes a reversible error standard of review for all trial courts to follow and addresses the covert discrimination the Court failed to recognize in *Pena-Rodriguez.*

Lastly, we conclude Issue I with Fleur Oké's note, "*The Minority Report: How the Use of Data in Law Enforcement Breeds Privacy Concerns among African Americans.*" Fleur was the Executive Solicitations & Submissions Editor for Volume 62 of the *Howard Law Journal* and a member of the Class of 2019. Ms. Oke's note focuses on big data and how it has penetrated local law enforcement systems as a means of better preventing crimes. Her discussion continues with an overview of how big data can now predict any human behavior including future criminal behavior leading to discriminatory effects and increased surveillance of African Americans. She concludes by discussing solutions to cure the side effects inherent in predictive criminal justice.

On behalf of the *Howard Law Journal*, I thank you for your support and readership. It is our hope that the scholarship within this issue be thought provoking and that it will contribute to a deeper understanding of the complex issues we face today, inspire you to do your part in improving the community, and push forward the academic discourse around the topics discussed.

Patrick E. Smith
Editor-in-Chief
Volume 63

Shadow, Light and Darkness: Bankruptcy's *Business In-Fact* and *Business* In-Law Justification Test Under § 363(b)[1]

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I.   INTRODUCTION

When Congress enacted the Bankruptcy Reform Act of 1978, it envisioned a process, pursuant to Chapter 11, that would allow reorganization of a debtor's estate while ensuring maximization of the value of the debtor's estate.[2] Congress felt that achieving value maximization as a goal for a reorganization would enhance the prospect of debtor firms paying off their creditors while keeping the business alive.[3] It was Congress's principal intent that troubled businesses could use Chapter 11 to continue the debtor's business as a viable concern.[4] Historically, these reorganizations were pursued by means of a plan disclosed to and approved by the debtor's creditors pursuant to § 1123 of Chapter 11.[5]

1.   11 U.S.C. § 363(b) (2012) ("(1) [t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate. . . .").

2.   *See* H.R. REP. NO. 95–595, at 220 (1977).

3.   *See id.* ("[t]he premise of a business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap."); Chad P. Pugatch et al., *The Lost Art of Chapter 11 Reorganization*, 19 U. FLA. J.L. & PUB. POL'Y 39, 45 (2008) (discussing the Chandler Act's incorporation of Chapter XI in 1938 for the purpose of providing private businesses with a more advantageous course of action than liquidation).

4.   *See* H.R. REP. NO. 95–595, at 220 (1977).

5.   Pursuant to 11 U.S.C. § 1123(a)(5)(D), a company may implement a reorganization plan through the "sale of all or any part of the property of the estate." Significantly, because

If approved by the Bankruptcy Court, the continuation of an enterprise as a going concern is achieved by a Chapter 11 reorganization plan. Such plans permit a debtor to restructure its financial affairs and then exit bankruptcy with a new and more economically viable capital structure.[6] A House committee report at the time Congress enacted the 1978 Bankruptcy Code emphasized that "the purpose of a business reorganization case, unlike liquidation, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders."[7] The tandem of these objectives form the central policy intent for permitting the continued operations of a commercial debtor under Chapter 11, regardless of which sections of the Code are invoked by the debtor in possession (DIP)[8] or trustee.

The Code, however, offers a more streamlined approach to achieving the same goals while avoiding cumbersome § 1123(a)(D) procedures. That alternative approach is found in § 363(b) of the Code and is the focus of this article. Transactions pursued under § 363(b) permit the sale of debtor assets, free and clear of creditor claims upon a simple motion of the DIP or the trustee. In recent years this abbreviated mechanism has become increasingly popular with bankruptcy debtors, creditors, as well as with bankruptcy courts and judges because of its procedural efficiency compared to post petition reorganizations.[9]

That popularity, however, has exposed fault lines in the overall protections that Congress intended be afforded to all bankruptcy constituencies.[10] Such fault lines exist and have on occasion been

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§ 1123 asset sales must be completed within the bounds of a reorganization plan, these sales are subject to Chapter 11's comprehensive procedural requirements, which serve to balance the interests of the debtor as well as the DIP's creditors.

6. *See In re* Phila. Newspapers, LLC, 599 F.3d 298, 303 (3d Cir. 2010) (Chapter 11 strikes a balance between two principal interests: facilitating the reorganization and rehabilitation of the debtor as an economically viable entity, and protecting creditors' interests by maximizing the value of the bankruptcy estate); *In re* Exide Techs., 607 F.3d 957, 962 (3d Cir. 2010) ("The policy behind Chapter 11 of the Bankruptcy Code is the 'ultimate rehabilitation of the debtor.'").

7. Michelle M. Arnopol, *Why Have Chapter 11 Bankruptcies Failed So Miserably: A Reappraisal of Congressional Attempts to Protect a Corporation's Net Operating Losses After Bankruptcy*, 68 NOTRE DAME L. REV. 133, 134 (1992) (citing H.R. REP. NO. 95–595, at 220 (1977)).

8. Pursuant 11 U.S.C. § 1101 (1), the reorganizing entity under Chapter 11 is known as the "debtor in possession" hereinafter, the DIP.

9. *See* Daniel M. Glosband, *Pathology of Section 363 Sales: Not as Simple as They Look*, J. PRIV. EQUITY, Fall 2004, 60, 60; Jack L. Smith & Erin L. Connor, *Sales Free and Clear— Will The Expansion Continue?*, 21 BANKR. STRATEGIST 1, 1 (Jan. 2004).

10. *See* Elizabeth B. Rose, Comment, *Chocolate, Flowers, and § 363(B): The Opportunity for Sweetheart Deals Without Chapter 11 Protections*, 23 EMORY BANKR. DEV. J. 249, 256–57 (2006).

breached because § 363(b) sales transactions often cede the authority and responsibilities of the DIP to powerful creditors through asset sales or other transactions that could be fairly characterized as an "expedited" reorganization process.[11] However, the lack of disclosure and voting on plan approval by creditors in such expedited proceedings, in the eyes of some, has resulted in the loss or diminution of many of the protections the debtor and creditor class members are afforded by a traditional Chapter 11 plan confirmation process.[12] In short, the principal Code objectives of creditor payments and debtor responsibility have often been sidestepped, if not completely overlooked, by some courts in the name of speed and simplicity.[13] When congressionally mandated protections are lost or given short shrift, the policy objectives for Chapter 11 are unfairly and improperly diminished.[14]

For example, the most commonly charged breach of traditional reorganization protections is that § 363(b) pre-confirmation sales fail to adequately inform the parties in interest, be they the DIP or creditors.[15] Debtor's rights and creditors' protections, respecting the dispo-

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11. *See* George W. Kuney, *Let's Make It Official: Adding an Explicit Preplan Sale Process as an Alternative Exit from Bankruptcy*, 40 Hous. L. Rev. 1265, 1270 (2004) ("[T]he insolvency community has embraced the nonplan sale of substantially all the assets of a debtor's business as an efficient alternative to the costly and lengthy plan confirmation process") (internal citations omitted). Section 363(b) sales secure a price for a firm's assets and allow creditors to focus on achieving a plan to distribute assets. *See id.* Further, by reducing the assets of the estate to cash, a note secured by the assets sold, the stock of the purchaser, or some other similar form of fungible valuable consideration, the tasks and costs of post-sale management and administration of a debtor and its estate can be dramatically reduced. *Id.* at 1270–71. This will reduce monitoring cost as the creditors no longer must analyze market conditions or the managerial decisions of the debtor. *See id.* In turn, this allows for a reduction in the amount of a debtor's value that is redistributed from prepetition creditors to postpetition administrative claimants as a case drags on. It takes little in the way of a management team to preside over an estate comprised solely of liquid assets. *Id.* at 1271.

12. *See* Lynn M. LoPucki, Courting Failure: How Competition for Big Bankruptcy Cases Is Corrupting the Bankruptcy Courts 169 (The Univ. of Mich. Press 2005).

13. 11 U.S.C. §363(b) (2012) requires minimal information compared to 11 U.S.C. §1125(b) (2012)'s disclosure statement and plan summary. Additionally, the chapter 11 disclosure statement must be distributed to claim holders and approved by the court prior to soliciting any votes for confirmation. *Id.*

14. *See In re* Air Beds, Inc., 92 B.R. 419 (B.A.P. 9th Cir. 1988). There, the court held that "the bankruptcy court abused its discretion because the order allowing the distribution of sale proceeds allows the debtor to circumvent the provisions of the Bankruptcy Code for the administration of a case under Chapter 11." *Id.* at 422. The court noted that "the general rule is that a distribution on a prepetition debt in a Chapter 11 case should not take place except pursuant to a confirmed plan of reorganization, absent extraordinary circumstances." *Id.*; *see also In re* Swallen's, Inc., 269 B.R. 634 (B.A.P. 6th Cir. 2001) (denying motion to distribute funds in liquidating chapter 11 case where no plan or disclosure statement had been filed).

15. Compare 11 U.S.C. §1125 (2012) requirements for the disclosure statement, including "adequate information," with 11 U.S.C. §363(b) (2012)'s generic notice.

sition or sale of debtor assets in a Chapter 11 plan of reorganization, are quite different when a debtor seeks to dispose of all or substantially all estate assets free of creditor intrusions under a § 363(b) or "pre-plan" sale of debtor assets. While functionally similar, § 363(b) sales "short cut" many creditor protections embedded in a typical Chapter 11 asset disposition. The point is that when a DIP pursues the sale of all or substantially all of a bankruptcy debtor's assets, sold outside of the ordinary course of business (under § 363(b)), such sales can corrupt the carefully balanced debtor tools[16] and creditor protections[17] that advance the policy goals Congress intended through the negotiation process fostered under a traditional Chapter 11 reorganization. For many debtors, speed has been king.[18]

It is these competing policy objectives, i.e., getting the commercial debtor up and running again to foster greater economic security for owners and employees while maximizing distributional fairness among the DIP's creditors, that may be undermined during the § 363(b) sales process. Distributional fairness may also be undermined if shadowy disclosure and shadowy notice to parties, and incoherent and inconsistent approval mechanisms, persist under

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16. *See* Rose, *supra* note 10, at 254–56 (debtor tools include (1) the debtor-in-possession doctrine); *See* Michelle M. Harner, Final Report of the ABI Commission to Study the Reform of Chapter 11, at 21 (2014), http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1096&context=books (last visited May 28, 2015) [hereinafter Final ABI Commission Report]; (2) the exclusivity requirement, 11 U.S.C § 1121(b) (2010); (3) the debtor's right to designate classes of claims and interests, 11 U.S.C § 1123(a)(1) (2012); and (4) the debtor's ability to cramdown its plan of reorganization if all designated classes of claims and interests do not accept the plan, 11 U.S.C § 1129(b)(1) (2012). *See also* Jason A. Pill, *Until the Footnote was Written: The Effect of Till v. SCS Credit Corporation on 11 U.S.C. § 1129(B)(2)*, 26 Emory Bankr. Dev. J. 267, 272 (2010) (explaining that "[t]he debtor comes to the table with the power of the automatic stay, the exclusivity period to propose a plan, and the prospect of cramdown.").

17. Rose*, supra* note 10, at 256–58. Creditor protections include (1) prohibition against solicitation of confirmation of the reorganization plan prior to court approval of a written disclosure statement, 11 U.S.C § 1125(b) (2012); (2) right of creditors to vote on the plan of reorganization is spelled out in 11 U.S.C § 1126(c) (2012) which provides: "[a] class of claims has accepted a plan if such plan has been accepted by creditors . . . that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors. . . ."; (3) satisfaction of the requirement that the plan of reorganization is "proposed in good faith", 11 U.S.C § 1129(a)(3) (2016); (4) the requirement that the plan of reorganization not be proposed "by any means forbidden by law", *id.*; (5) the prohibition against the plan being unfairly discriminatory and being "fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan," 11 U.S.C. § 1129(b)(1) (2016); and (6) the requirement that the DIP's plan of reorganization not violate the absolute priority rule. The "absolute priority rule" finds expression in the language of 11 U.S.C. § 1129(b)(B)(ii) (2016).

18. *See In re* Gulf Coast Oil Corp., 404 B.R. 410, 420 (Bankr. S.D. Tex. 2009) (recognizing the beneficial speed of the process under § 363, under which sales are typically completed within two to three months).

§ 363(b).[19] A respectful offering of a cure for these compromises of law and public policy is the essential focus of this article.[20]

The author enunciates in the article a two-part analytical approach that, when utilized by courts evaluating § 363(b) sales, will demonstrably lessen the likelihood of potential creditor and debtor abuses of this strategy, while at the same time fostering sales that would command the highest values for the bankruptcy estate and bankruptcy constituencies.[21] If rigorously applied, this analytic construct would protect creditors' due process rights while ensuring the good faith conduct of the purchaser and other proponents of the sale.

Under the two-part *business in-fact* and *business in-law* analysis, the Bankruptcy Court would, after first determining whether the proponents of the § 363(b) transaction had advanced a legitimate *business in-fact* justification,[22] (assuming it did so affirmatively) take a second step and determine whether or not the proffered business justification did so without ignoring or undermining the legal authority allowing such transactions to occur in the first place.

The second prong of this analytical construct represents a needed adjunct to the traditional sale approval test. The author proposes that courts, sua sponte, determine whether the *business in-fact* justification

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19. *See* Josef S. Athanas, *Section 363 Bankruptcy Sales Attacked by Judges and Commentators Just as Economic Conditions Make Them More Important than Ever*, *in* BANKRUPTCY AND RESTRUCTURING CHAPTER 11 STRATEGIES 2009, at 39, 56 (2009).

20. The author is not the first to put forth alternatives to current jurisprudence to address and correct the unintended (for the most part) consequences of many § 363 approval orders. *See* George W. Kuney, *Let's Make It Official: Adding an Explicit Preplan Sale Process as an Alternative Exit from Bankruptcy*, 40 HOUS. L. REV. 1265, 1287 (2004) (proposing that the Code be amended to "implement a nationally uniform and comprehensive process for § 363(b) and (f) sales. Providing explicit statutory authority for these sales will remove whatever objections may be made based upon the lack of such provisions under the existing statute."). *See also* Bryant P. Lee, Note, *Chapter 18? Imagining Future Uses of 11 U.S.C. § 363 to Accomplish Chapter 7 Liquidation Goals in Chapter 11 Reorganizations*, 2009 COLUM. BUS. L. REV. 520, 530 (2009).

21. Highest value may be measured—not necessarily by the amount received in the sale—by whether under market conditions (in a recession for example) the relative value is greater than the risk of value that would be lost if the DIP pursued a Chapter 11 plan of reorganization. *See* Jared A. Wilkerson, *Defending the Current State of Section 363 Sales*, 86 AM. BANKR. L.J. 591, 599 (2012) (contending that comparing sale through reorganization and § 36(b) reflect two different populations, one whose value may be maximized by asset sale under §363(b) and not under a reorganization plan); *See also* Anne M. Anderson & Yung-Yu Ma, *Acquisitions in Bankruptcy: 363 Sales Versus Plan Sales and the Existence of Fire Sales*, 22 AM. BANKR. INST. L. REV. 1, 3 (2014) (which study found that although § 363(b) sales produce appreciably lower sales prices, the study could not find evidence that 363 sales aggravate industry discounts in distressed industries).

22. This standard for sale approval has existed for many decades. Semantics aside, the *business in-fact* justification is conceptually similar to the good business judgment or sound business reason analysis currently employed by courts. *See infra* discussion at notes 37–42 and accompanying text.

advanced for the § 363(b) is also *a legally sufficient justification* for the sale.[23] The *business in-law* justification would compel a court to initially determine whether the transaction undermines the distributional fairness scheme[24] implemented by Chapter 11. It would also assess whether the transaction was being pursued for reasons impermissible under the law (fraud, collusion, etc.,). The court would ensure that the proposed transaction would not go forward if it deprived parties in interest of constitutionally mandated procedural due process protections.[25] Finally, the *business in-law* component would make it obligatory for the court to make a substantive determination that the debtor and its cohorts were "acting in good faith" (with attendant evidentiary findings) rather than being content with a "feel good" assertion of "good faith" backed by little more than artful pleadings.[26] The author contends that each of these determinations invoke basic legal principles that underlie both Chapter 11 and the Code in general and that bankruptcy judges are obligated to respect them.

The author's proposed framework for approval evaluation of § 363(b) differs from and improves upon traditional jurisprudence because the author's two-prong test recognizes that in enacting §363(b), Congress must have realized that while there are factual circumstances under which estate value will be more readily realized through the streamlined § 363(b) process, these fact-based rationales must not be allowed to undermine the legal principles that Congress imbued in Chapter 11 and the Code altogether. Clearly, there are circumstances, for example, when market conditions call for immediate realization of value rather than taking the greater risk of loss that may occur if reorganization under Chapter 11 is pursued (*business in-fact* justification).[27] In such cases, so the argument goes, a more expedited

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23. *In re* Gen. Motors Corp., 407 B.R. 463, 493–94 (Bankr. S.D.N.Y. 2009). According to the court, after being satisfied the sound business justification exist for the § 363(b) sale,

> the inquiry turns to whether the routine requirements for any section 363 sale, and appropriate exercise of the business judgment rule, have been satisfied. The court must be satisfied that (i) notice has been given to all creditors and interested parties; (ii) the sale contemplates a fair and reasonable price; and (iii) the purchaser is proceeding in good faith.

Id.

24. *See infra* discussion at notes 61–76 and accompanying text.

25. *See infra* discussion at notes 74–92 and accompanying text.

26. *See infra* discussion at notes 93–119 and accompanying text.

27. *See In re* Lehman Bros. Holdings, Inc., 415 B.R. 77, 80–81 (Bankr. S.D.N.Y. 2009). The court's approval of the debtor's sale motion pivoted on the claim that the sale would avoid potential losses in the hundreds of billions of dollars. Post-trial Mem. of Law and Fact of Barclays Capital Inc. at 20, *In re* Lehman Bros. Holdings, Inc. Chap. 11 Case No. 08-13555 (JMP) (Jointly Administered) (2010) (No. 08-01420 (JMP)).

approach is warranted and courts should not be required to make the streamlined § 363(b) process a mini Chapter 11 plan confirmation proceeding.[28] However, a rational balancing of overarching Code interests may be achieved if the reviewing court ensures that the *business in-fact* justification is also legally sufficient. The author's proposed *business in-law* analysis would not transform the Court's § 363(b) analysis into an abbreviated Chapter 11 plan confirmation process, but instead would implement the Court's inherent authority to constrain sales antithetical to basic Code principles without awaiting statutorily prescribed legal sufficiency objections of sale opponents.

The author suggests that regardless of whether a party in interest objects or withdraws an objection to the § 363(b) sales transaction, the court should *sua sponte*[29] determine[30] whether the § 363(b) transaction satisfied constitutionally mandated due process requirements, whether the transaction was entered into in good faith, whether there are procedural defects, and whether the purchaser acted in good faith.[31] These are issues of law, not fact. For example, a reviewing court's assessment of a failure of a sale proponent to obtain the consent of a creditor whose interest the sale would be free and clear of,[32] amounts to an assessment of whether the sale would unfairly undermine the distribution scheme implemented by Chapter 11.[33] That is clearly a matter of legal principle and not economic exigency.

The article concludes by demonstrating that the two-part *business in-fact* and *business in-law* analysis can easily adhere to the interest-

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28. *See, e.g.*, *In re* Gulf Coast Oil, 404 B.R. 407, 415 (Bankr. S.D. Tex. 2009) (citing *In re* Braniff Airways, Inc., 700 F.2d 935, 940 (5th Cir. 1983) (stating that judges should protect the "carefully crafted scheme" of Chapter 11).

29. *In re* Encore Healthcare Assocs., 312 B.R. 52, 53–54 (Bankr. E.D.Pa. 2004). The court *sua sponte* raised "a question regarding the permissibility of the contemplated sale. . . ." Later in the court's opinion it noted:

> [a]s noted above, at the hearing on the Motion, the Court raised with the Debtor's counsel the propriety of a § 363 sale, the sole purpose of which was to liquidate assets for the benefit of the secured creditor. In response to my questioning, the Debtor acknowledges its intention to convert this Chapter 11 case to one under Chapter 7 following the approval of the sale. Thus, this sale is not in furtherance of a plan of reorganization or liquidation.

Id. at 54.

30. *Id.* at 53 n.2 ("No evidence was presented. However, I shall take judicial notice of the docket entries in this case. FED. R. EVID. 201, incorporated in these proceedings by FED. R. BANKR. P. 9017. . . . Moreover, factual assertions in pleadings, which have not been superseded by amended pleadings, are judicial admissions against the party that made them") (citation omitted).

31. *In re* Gen. Motors Corp., 407 B.R. 463, 494 (Bankr. S.D.N.Y. 2009).

32. *In re* Roberts, 249 B.R. 152 (Bankr. W.D. Mich. 2000).

33. *See infra* discussion at notes 44–76 and accompanying text.

balancing principles Congress intended to achieve through Chapter 11 proceedings while avoiding the sometimes convoluted and eclectic array of factors some courts have relied upon to decide whether the § 363(b) sales transaction should be approved.[34]

II. A MORE FAIR AND BANKRUPTCY CODE COMPLIANT APPROACH TO JUDICIAL EVALUATION OF § 363(b) ASSET SALE MOTIONS.

Established bankruptcy jurisprudential principles continue to guide judicial decision making when a DIP seeks to use the *preplan confirmation* process to reorganize. When a court is asked to approve a sale, use, or lease of property of the estate outside of the ordinary course of business, the court must determine three things: (1) whether the transaction before the court represents a "use, sale, or lease of property of the estate;"[35] (2) whether the *business in-fact* (sound business judgment) justification propounded for the transaction merits the court's authorization to continue with the transaction; and, by suggestion of the author; and (3) whether the *business in-fact* rationale for the proposed sale is legally sufficient (*business in-law* justification).

In applying what the author terms the "*business in-law* justification" the court must, *sua sponte* determine whether the transaction appears to undermine the distribution scheme implemented by Chapter 11[36], whether the transaction was entered for reasons impermissible under the law, whether the proposed transaction deprives parties in interest of substantive procedural due process rights, or whether the transaction details imply that the DIP and purchaser are not acting in good faith.[37]

A. The First Prong: A "Business In-Fact" Analysis.

The Second Circuit's decision in *In re Lionel Corp.*[38] is recognized as establishing the prevailing standard for the bankruptcy court's authority to approve *preplan confirmation* sales of all or substantially all of the Chapter 11 debtor's assets outside of the ordinary

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34. *See infra* discussion at notes 77–119 and accompanying text.
35. Inst. Creditors of Cont'l Air Lines, Inc. v. Continental Air Lines, Inc., 780 F.2d 1223, 1226–27 (5th Cir. 1986) [hereinafter *In re* Cont'l Air Lines, Inc.].
36. *Id.*
37. *See infra* discussion at notes 76–119 and accompanying text.
38. Comm. of Equity Sec. Holders v. Lionel Corp., 722 F.2d 1063 (2d Cir. 1983) [hereinafter *In re* Lionel Corp.].

course of business.[39] The court in *In re Lionel* traced the evolving standards courts had applied in exercising authority to regulate *preplan confirmation* sales of all or substantially all of the DIP's assets to the Bankruptcy Act of 1867, which authorized such sales prior to final liquidation if the asset was perishable or if its value would rapidly deteriorate.[40]

The district court's approval of the § 363(b) sale in *In re Lionel* was reversed on appeal. The Second Circuit essentially codified prior § 363(b) jurisprudence laying down what it termed the "business judgment test."[41] The appellate court held that bankruptcy courts must "expressly find from the evidence presented . . . a good business reason to grant such an application."[42] The process of reaching that finding is the essence of the author's *business in-fact* justification prong. The "sound business" judgment test is settled law and has been so for over forty years. However, as the pace and magnitude of § 363(b) have increased (and dramatically so over the last decade), so too have the foundations of Chapter 11 been rattled with some commentators arguing that the "carefully crafted [scheme of] Chapter 11" was in its death throes.[43] The author does not believe Chapter 11 to be terminal nor that proponents of all § 363(b) transactions are unscrupulous bandits out to swindle every unsuspecting, unsecured creditor they can find. Instead, predictability, efficiency and judicial consistency are the anticipated end game.

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39. Barbara J. Houser et al., Section 363 Issues – Acquiring Troubled Companies and Assets 202 (May 14, 2009) (ALI-ABA unpublished manuscript), http://files.alicle.org/thumbs/data storage/skoobesruoc/pdf/CP015_chapter_06_thumb.pdf (citing *In re* Lionel, the Honorable Judge Houser stated, "[o]ne of the first circuit cases to examine section 363 transactions is also considered the seminal case on the sale of assets."). Jessica Uziel, *Section 363(b) Restructuring Meets the Sound Business Purpose Test with Bite: An Opportunity to Rebalance the Competing Interests of Bankruptcy Law*, 159 U. Pa. L. Rev. 1189, 1200–01 (2011).

40. *In re* Lionel Corp., 722 F.2d at 1066.

41. Houser, *supra* note 39, at 203 (contending that the *Lionel* court's business judgment analysis "simply engrafted traditional non-bankruptcy, corporate requirements onto a bankruptcy framework. Despite criticisms for so doing, . . . the approach has been widely adopted") (citation omitted).

42. *In re* Lionel Corp., 722 F.2d at 1071.

43. *See*, *e.g.,* Barry E. Adler, *Chapter 11 at the Crossroads: Does Reorganization Need Reform?: A Reassessment of Bankruptcy Reorganization after Chrysler and General Motors*, 18 Am. Bankr. Inst. L. Rev. 305 (2010); Ralph Brubaker & Charles Jordan Tabb, *Bankruptcy Reorganizations and the Troubling Legacy of Chrysler and GM*, 2010 U. Ill. L. Rev. 1375 (2010); Fred N. David, *Interpreting the Supreme Court's Treatment of the Chrysler Bankruptcy and Its Impact on Future Business Reorganizations*, 27 Emory Bankr. Dev. J. 25 (2010); Mark J. Roe & David Skeel, *Assessing the Chrysler Bankruptcy*, 108 Mich. L. Rev. 727, 737 (2010).

B.   The Second Prong: A "Business In-Law" Justification Analysis.

As just noted, using *In re Continental Airlines, Inc.*[44] as an example, the idea is that satisfying the *business in-fact* justification analysis (the traditional sound business reason analysis) alone should not be a sufficient basis for court approval of a sales transaction. A bankruptcy court, instead, should complete a legal sufficiency analysis (*business in-law* justification) of the business judgment case for approval of a sale motion.

Inquiry into whether the *business in-fact* justification for § 363(b) sales transactions is enough as a matter of law under the *business in-law* justification analysis is multi-faceted. In short, any *preplan confirmation* sale should be rejected if the court finds the transaction is incompatible with the provisions of Chapter 11 or other relevant law. This incompatibility may result, for example, because the § 363(b) sale would damage shareholders' interests.

For example, the *In re Lionel* court's decision can be interpreted as less a rejection of "sound business reason" for declining to sanction the transaction at hand, but instead applying a de facto *business in-law* test to reject § 363(b) sale scheme. The logic was that there was inherent unfairness embedded in the transaction to competing creditor classes seeking to benefit from the proposed asset sale. It was because the proponents of the sale "ignore[d] the equity interests [of shareholders] required to be weighed and considered under Chapter 11"[45] the court determined, and consummation of the sale would undermine those interests.[46] That assessment is a legal construct, not a business or economic one. So, it would seem that the legal sufficiency inquiry has existed but only in a subterranean and unacknowledged fashion. And that is the rub.

Of course, there are several other "legal sufficiency" reasons a § 363(b) sales transaction might fail to pass muster under the author's *business in-law* justification analysis. These reasons include, for example, the contemplated transaction may so shift the negotiating balance between bankruptcy constituencies established under Chapter 11 that, although falling short of being considered a plan *sub rosa*, the transaction deprives those constituencies of appropriate disclosure and notice. Alternatively, the proposed transaction might involve elements

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44.   *In re* Cont'l Air Lines, Inc., 780 F.2d 1223, 1227 (5th Cir. 1986).
45.   *In re* Lionel Corp., 722 F.2d at 1071.
46.   *Id.*

of distributional unfairness, or display demonstrative evidence of bad faith. Analysis of a few examples of these all-too-common examples of § 363 (b) overreaching might better illustrate the contours of the *business in-law* justification analysis.

1. A § 363(b) motion is legally insufficient if it is a disguised plan of reorganization, a plan sub rosa.

Regardless of whether the author's *business in-fact* justification has been satisfied, approval of an applicant's motion to sell all or substantially all of the DIP's asset under § 363(b) may turn on whether the proposed sale constitutes a *sub rosa* plan that undermines Chapter 11. The Fifth Circuit in *In re Braniff Airways*[47] applied a *sub rosa* analysis in determining whether to authorize the sale of all or substantially all of the DIP's assets under § 363(b).

According to the Fifth Circuit, because "certain portions of the transaction [were] clearly outside the scope of § 363, the district court (or for that matter, the bankruptcy court in the first instance) was without power under that section to approve it."[48] After considering three examples of how the transaction justified its ruling that the transaction was *outside* the scope of § 363(b),[49] the court concluded a proposed sale, should it attempt to specify the terms of a reorganization plan, must "scale the hurdles erected in Chapter 11."[50] According to the court, "[t]he debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of plan *sub rosa*

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47. Pension Benefit Guar. Corp. v. Braniff Airways, Inc., 700 F.2d 935, 940 (5th Cir. 1983) [hereinafter *In re* Braniff Airways, Inc.] ("The debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for conformation of a reorganization play by establishing the terms of a plan *sub rosa* in connection with the sale of assets"); *See* Wilkerson, *supra* note 21 at 621 n.148 (characterizing a sub rosa plans as a "method[ ] not only of selling or assigning some asset but also of simultaneously reorganizing the debtor as a going concern - without the approval of creditors.").

48. *In re* Braniff Airways, Inc., 700 F.2d at 939.

49. *Id.* at 939–40 (stating that (1) according to the terms of the agreement, in exchange for $7.5 million which entitled the holders of the scrips to travel on the PSA, Braniff was required to pay $2.5 million to the PSA in exchange for $7.5 million of scrips entitling the holder to travel on the PSA. The scrips could only be used according to a future reorganization plan of Braniff, which would be dictated by the terms of the PSA transaction; (2) the PSA Agreement dictated how Braniff's secured creditor would vote their deficiency claims under the future reorganization plan. The deficiency claims were to vote according to the majority vote of unsecured creditors; and (3) the PSA Agreement provided for the release of claims claimants had against Braniff, its secured creditors, and Braniff's officers and directors).

50. *Id.* at 940.

in connection with a sale of assets."[51] Thus, the proposed sale would have failed the author's *business in-law* analysis at the bankruptcy court level as it, when conceived, clearly attempted to dictate the terms of a future reorganization plan.[52]

2. A § 363(b) motion is legally insufficient if it unfairly shifts the negotiating between bankruptcy constituencies to the § 363(b) sale Congress has intended for reorganization under a Chapter 11 plan.

In re Lionel illustrates a § 363(b) sale transaction that violated the *business in-law* justification analysis because the transaction modified the negotiation balance between creditors and equity holders Congress intended would operate during the plan reorganization process.[53] The DIP, Lionel's, most valuable asset was its 82% ownership in Dale Electronics, a corporation that manufactured electronic components. The Chief Executive Officer of Lionel testified that the motivation for the DIP's § 363(b) application to sell Dale Electronics was because of the "Creditors' Committee's insistence upon it."[54]

Had the *business in-fact* rationale for the sale been scrutinized under the author's *business in-law* justification, the sale motion would have failed. It was obvious that when the sale was initially proposed certain of Lionel's creditors recognized it as a "cash grab" of an asset that would have left another set of creditors deprived of nearly seventy million dollars that might have addressed their claims. These aggrieved parties screamed foul at the asset sale because this asset was increasing in value, and that value could have been captured during the subsequent reorganization. Something that would have benefited both creditors and equity holders.[55] The court's repeated reference to the concern of Congress that the interests of public investors be considered, could be interpreted as a signal of the court's concern regard-

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51. *Id.*
52. *Id.* ("For these reasons, we hold that the district court was not authorized by § 363(b) to approve the PSA transaction. . . . In any future attempts to specify the terms whereby a reorganization plan is to be adopted, the parties and the district court must scale the hurdles erected in Chapter 11. *See e.g.,* 11 U.S.C. § 1125 (disclosure requirements); *id.* § 1129(a)(7) (best interest of creditors test); *id.* § 1129(b)(2)(B) (absolute priority rule). . . . These considerations reinforce our view that this is in fact a reorganization.").
53. *In re* Lionel Corp., 722 F.2d at 1071.
54. *Id.* at 1065.
55. *Id.* at 1069 (the court's referenced congressional concern that the interests of public investors be taken into consideration by the bankruptcy court in determining whether the proposed justification for the § 363(b) sale satisfied the business in-law justification for the sale).

ing whether the § 363(b) sale shifted negotiating balance between creditors and equity holders, a balance Congress intended to be preserved under the Chapter 11 plan confirmation and reorganization process.[56]

The fact the bankruptcy court in *In re Lionel* had early in the proceedings approved appointment of the Committee of Equity Security Holders meant that respecting the shareholders' interest was important.[57] Appointment of the equity committee addressed congressional concern for both the rights of equity interests and the importance of negotiating balance between these bankruptcy constituencies that would occur during the reorganization process.[58] The decision to appoint an equity committee ensured adequate representation of equity security holders was discretionary.[59] Courts have provided guidance regarding under what circumstances equity interests may *not* be adequately represented in Chapter 11 proceedings, and hence the circumstances under which an equity committee would be needed.[60] The question of whether appointment of an equity committee was necessary to safeguard estate value for Lionel's shareholders is an example of an instance where application of the *business inlaw* justification by the bankruptcy court would be proper. The court's conclusion in *In re Lionel* that the tendered reason given for

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56. *Id.* at 1071.

57. John A. Pintarelli, *Equitable or Equity Committees: Lessons from Recent Cases*, 36 AM. BANKR. INST. J. 32, 32 (2017) (regarding factors a court should consider in determining whether to appoint an equity holders committee: Courts in the Southern District of New York and District of Delaware generally consider similar factors, which include (1) whether debtors are likely to prove solvency; (2) whether equity is adequately represented by stakeholders already at the table; (3) the complexity of the debtors' cases; and (4) the likely cost to the debtors' estates of an equity committee. The U.S. Bankruptcy Court for the Southern District of Texas also added "a practical fifth" factor: whether an official committee would "add something to the case") (citation omitted).

58. *In re* Lionel Corp., 722 F.2d at 1070 ("The plan of reorganization determines how much and in what form creditors will be paid, whether stockholders will continue to retain any interests, and in what form the business will continue. Requiring acceptance by a percentage of creditors and stockholders for confirmation *forces negotiation among the debtor, its creditors and its stockholders*") (emphasis added).

59. 11 U.S.C. § 1102(a)(2) (2005) ("[o]n request of a party in interest, the court *may* order the appointment of additional committees of creditors *or of equity security holders* if necessary to assure adequate representation of creditors or of equity security holders. The United States trustee shall appoint any such committee") (emphasis added); *See also In re* Williams Comm. Grp. Inc., 281 B.R. 216, 220 (Bankr. S.D.N.Y. 2002) ("[t]he Code does not define what constitutes 'adequate representation.' Instead, *the court retains the discretion* to appoint an equity committee based on the facts of each case") (emphasis added).

60. Pintarelli, *supra* note 57, at 32 ("even if it is not entirely clear that equity[ ]holders will receive a recovery through a chapter 11 plan, a bankruptcy court may choose to appoint an equity committee in order to ensure that value is preserved for such parties-in-interest.").

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the § 363(b) sale "ignore[d] the equity interests required to be weighed and considered under Chapter 11"[61] qualifies as a *business in-law* justification for denying approval of the § 363(b) sales transaction. The proposed transaction clearly ran afoul of Code principles that assure creditor priorities and prohibit intentional attacks on proportionality by creditors with superior negotiating leverage over the debtor.

3. A § 363(b) motion is legally insufficient if the transaction involved elements of distributional unfairness.

In considering the issue of distributional unfairness under the proposed *business in-law* legal sufficiency analysis, a distinction must "necessarily be made between unequal distribution"[62] of estate assets to creditors (which often does occur in § 363(b) sale transactions) and inequitable distributions.[63] Unequal distribution is a phenomenon that will occur if assets received from the proceeds of a § 363(b) sales transaction are sufficient to pay senior creditors but only enough to pay junior creditors a pro rata share, but pay nothing to shareholders. There is nothing unfair about such a distribution if the same result would occur under a Chapter 11 reorganization plan.

The § 363(b) transaction in the oft-discussed *In re Gulf Coast Oil Corp.* case involved elements of distributional unfairness unearthed on appeal. The transaction in *Gulf Coast* would have failed the author's *business in-law* justification analysis as the court (after articulation of a lengthy set of factual tests) found there was no "sound business reason" for the transaction.[64]

However, the court also noted elements of distributional unfairness among classes of creditors[65] impacted the sale. This unfairness was demonstrated by the sale proponents' use of the § 363(b) sale to

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61. *In re* Lionel Corp., 722 F.2d at 1071.
62. Todd L. Friedman, *The Unjustified Business Justification Rule: A Reexamination of the Lionel Canon in Light of the Bankruptcies of Lehman, Chrysler, and General Motors*, 11 U.C. DAVIS BUS. L.J. 181, 202 (2010) ("In contrast, certain substantial asset sales that produce unequal outcomes are not inequitable. For example, courts have routinely approved sales that yield nothing for junior creditors and equity holders when they perceive that these parties were unlikely to recover any value in a reorganization.").
63. *Id.* at 201 ("the term 'inequitable sale' as used herein is a transaction that, while objectively fair and in good faith, would have the effect of denying certain creditors a seemingly valuable claim on the reorganized business's assets. In other words, if a legitimate opportunity to create value through reorganization exists, but junior creditors are being denied the opportunity to reorganize the business").
64. *In re* Gulf Coast Oil Corp. 404 B.R. at 423–28.
65. Friedman, *supra* note 62, at 201.

strip the DIPs' assets of all liens and other encumbrances,[66] and also to provide for assumption of certain executory contracts.[67] The motion also implied that creditors and other claimants, stripped of their interests in the DIPs' assets would be protected, because their respective interests would attach to the proceeds of the sale.[68] Such a representation, implicit or otherwise, so the court found, was illusory.[69]

The *Gulf Coast* court pronounced that it was the bankruptcy court's responsibility to determine whether the terms of the *preplan confirmation* § 363(b) sales transaction confers rights that are ordinarily only conveyed through the multiparty negotiation process Congress determined applicable in the plan confirmation process.[70] The distributional scheme reflected in the § 363(b) sale transaction, according to the court, contradicted Chapter 11's distributional scheme.[71]

The substance of the transaction between the DIPs and one of its creditors (Laurus Master Funds) amounted to a foreclosure by a secured creditor that complemented substantial releases, giving that creditor the power to determine which executory contracts of the DIPs were assignable and which might cut off "successor liability" pursuant to those contracts.[72] These were decisions and results Congress intended for the Chapter 11 plan reorganization process.[73]

In point of fact, the *In re Gulf Coast* court gave many other reasons why the proposed § 363(b) sales transaction should not be allowed.[74] It cataloged several other components of the sales transaction that, in the author's opinion, were actually critiques of the legal sufficiency of the sale motion, e.g., these reasons were the mani-

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66. *In re* Gulf Coast Oil Corp. 404 B.R. at 413 ("[t]he motion asks for the property to be sold free and clear of all liens, claims and encumbrances, but implies that creditors with lien rights will be protected because their liens, claims, and encumbrances will be transferred to the sale proceeds. But that protection is illusory.").

67. *Id.* at 414.

68. *Id.* at 413–14.

69. *Id.* at 413.

70. *Id.* at 426.

71. *Id.*

72. *Id.* at 428.

73. *Id.* ("the essence of the proposed transaction is a foreclosure supplemented materially by a release, by assignment of executory contracts (but only the contracts chosen by the secured lender), by a federal court order eliminating any successor liability, and by preservation of the going concern. Congress provided a process by which these benefits could be obtained. That scheme requires bargaining, voting, and a determination by the Court that Bankruptcy Code § 1129 requirements are met.").

74. *Id.*

festation of the author's *business in-law* justification analysis.[75] For example, the *In re Gulf Coast* court referred to § 1129(a)(9)(A)[76] of the Bankruptcy Code as a factor to be evaluated under a sound business judgment test.[77] This Code section provides that, unless otherwise agreed, a plan of reorganization must provide that holders of allowed administrative expenses claims receive cash equal to the allowed amount of their administrative expense claims.[78] However, the *In re Gulf Coast* court noted that a senior creditor (again Laurus Master Funds) would only pay administrative expenses it had agreed to under the § 363(b) sales transaction,[79] resulting in clearly unfair treatment of certain of other administrative expense claimants. More importantly, because some unsecured claims would be paid upon consummation of the § 363(b) sales transactions and others would not be paid, "the Court [could not] conclude that creditors with equal rights are treated alike."[80]

4. A § 363(b) motion is legally insufficient if the transaction abridges constitutionally protected Due Process Rights.

Sales transactions under § 363(b) take advantage of a bankruptcy mechanism that will enable DIPs sale of all or substantially all of its assets through an abbreviated process that could restrict creditors' due process rights.[81] A § 363(b) sales order may be implemented only after "notice and hearing."[82] It follows that a court's approval of such orders must engage the question of the effectiveness of procedures for providing notice to affected constituents. Indeed, some courts have

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75. *Id.* at 427.

76. 11 U.S.C. § 1129(a)(9) (2010) (providing that unless a claimant otherwise agrees, grounds for denying plan confirmation is established if the plan does not provide for payment the allowed amount of 11 U.S.C. § 507(a)(2), which refer to allowed administrative expense identified at 11 U.S.C. § 503(b)).

77. *In re* Gulf Coast Oil Corp., 404 B.R. at 428.

78. 11 U.S.C. §1129(a)(9)(A) (providing that "on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim").

79. *In re* Gulf Coast Oil Corp., 404 B.R. at 428 ("[t]he only administrative expenses that will be paid are those that the purchaser has previously agreed to pay or that the purchaser decides subsequently to pay (such as post-petition trade creditors). The Court cannot make the finding required by § 1129(a)(9) that all of the administrative expenses will be paid.").

80. *Id.*

81. Alla Raykin, *Section 363 Sales: Mooting Due Process?*, 29 EMORY BANKR. DEV. J. 91, 92 (2012) ("By condensing the bankruptcy process, § 363 sales make creditors' due process rights especially vulnerable.").

82. *Id.*

done just that before entering such sales orders.[83] The author advances that all § 363(b) sales orders should be scrutinized for due process defects under the *business in-law* legal sufficiency analysis.[84] The guaranty of fair notice and opportunity for hearing is, in the author's view, constitutionally mandated.[85] The scope and focus of the required procedural mechanisms will vary depending upon the interests of the parties being served and adversely impacted by a proposed sale.[86]

The Supreme Court, in the seminal case *Mathews v Eldridge*,[87] noted that due process was "flexible" and called for "such procedural protections as the particular situation demands."[88] *Eldridge* set out the factors that should guide courts called upon to enter orders on § 363(b) motions. The factors that give rise to *adequate* due process protections are straightforward:

> (1) the existence of a private interest that will be affected by the official action . . .,[(2)] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards . . ., and [(3)] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[89]

This framework is derived, of course, from the Due Process Clause of the Fifth Amendment.[90]

The Bankruptcy Rules distinctly acknowledge the fact that due process rights do exist and must be respected among certain classes of interested parties. For example, the Bankruptcy Rules provide that if property is to be sold free and clear under § 363 of the Bankruptcy Code, the relevant motion must be served on "the parties who have

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83. *See*, *e.g.*, *In re* New Century TRS Holdings, Inc., 528 B.R. 251 (D. Del. 2014), *vacated*, 612 Fed. App'x 147 (3d Cir. 2015) (the District Court determined that publication notice in The Wall Street Journal, a newspaper with national distribution, was not sufficient in that case but publication in USA Today would be more appropriate since it also enjoys a broad circulation among "less than sophisticated, focused readers.").

84. *Id.*

85. Raykin, *supra* note 81, at 131.

86. *See* the U.S. Supreme Court's landmark decision in Mullane v. Central Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) (providing that due process requires "notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

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

88. *Id.* at 334.

89. *Id.* at 335.

90. *See* Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970).

liens or other interests in the property"[91] in the same manner as service of a summons and complaint.[92] There are also the provisions in the Bankruptcy Code and Rules for a twenty-one day notice of a proposed sale of property outside the ordinary course of business.[93]

Nevertheless, with many § 363(b) sale motions, creditor due process protections are routinely compromised because of the lack of clarity in the rules about how and to whom such notice should be given. A notable and recent example is in the (in)famous *In re Motors Liquidation Co.*, (the General Motors sale).[94]

In *General Motors*, the notice issue arose in the context of contingent claims of potential victims of ignition switch failures in General Motors vehicles.[95] In 2009, the "Old" General Motors filed for protection under Chapter 11 of the Bankruptcy Code, but only forty days later, a "New" General Motors emerged from bankruptcy as the purchaser of substantially all of Old GM's assets "free and clear of liens, claims, encumbrances, and other interests . . . including rights or claims . . . based on any successor or transferee liability" pursuant to a § 363 sale order.[96] Amongst those "successor" claims were those brought in 2014 (and thereafter) by victims of the ignition switch failures in vehicles sold by Old GM prior to the 2009 proceeding.[97] In 2015, New GM sought an order claiming that these claims against it were extinguished by the 2009 sale order.[98] Of course, no actual "notice" had been provided to such victims in the 2009 proceeding.[99] Instead, there had been publication of the 2009 notice in national newspapers.[100]

With respect to proper notice to these claimants, the Second Circuit concluded that the ignition switch plaintiffs were not provided with proper notice of the sale as required by the due process clause of

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91. *See* FED. R. BANKR. P. 6004(c), 7004, 9014(b). These rules also spell out the information which must be contained in the notice, including the date of the sale hearing and the time for filing objections.

92. FED. R. BANKR. P. 9014(b).

93. *See* 11 U.S.C. § 363 (2019); FED. R. BANKR. P. 2002(a)(2), 6004(a).

94. Elliott v. Gen. Motors LLC, 829 F.3d 135, 135 (2d Cir. 2016).

95. *Id.* For a detailed examination of the due process implications in this case, *see* Jonathan Welsh, Note, *The Flip of a Switch: Due Process Implications for Bankruptcy Sale Orders after the GM Ignition Switch Case*, 18 U. Ill. L. Rev. 1503 (2018).

96. *Elliott.*, 829 F.3d at 145, 147, 154.

97. *Id.* at 143.

98. *Id.* at 150.

99. *Id.* at 158.

100. *Id.*

the Fifth Amendment.[101] The appellate court cited the general rule that "notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question."[102] It found that Old GM could easily have identified who had purchased the vehicles with faulty switches and given actual notice of the sale order to these "interested" parties.[103] Despite the loud protests of New GM that the speed of the 2009 proceeding was such that preservation of DIP assets outweighed due process concerns, the Second Circuit found that those business judgment issues "did not obviate basic constitutional principles."[104]

Nevertheless, the fact is that the exigencies of speed, when articulated by powerful creditors or the DIP, have routinely given short shrift to realistic notice procedures in the name of "emergencies," real or imagined, despite the occasional nod to constitutionally mandated protections.[105] As *Raykin* so aptly points out, practicalities, or at least, as a namesake, regularly cause due process protections to take on second tier importance:

> [f]ew bankruptcy courts explicitly import the *Mathews* [*Eldridge*] utilitarian calculus, but the case shaped the jurisprudence of procedural due process. The Northern District of Texas Court explicitly applied the analysis in *In re Texas Extrusion Corp*. The court defined the private interest as the appellant's equity interest in the bankruptcy estate, or her husband's property. The court reasoned that since the estate was community property, the appellant received constructive notice through her husband and additional notice to her directly would not have mitigated the chance or erroneous deprivation. Because the interest in finality outweighed the minimal benefits of a finding of inadequate notice, the court held that there was no violation of the appellants' due process rights. Thus, the court held the equitable interests of third parties outweighed the appellant's harm from a technicality, not truly inadequate notice. In *Mullane v. Central Hanover Bank & Trust*, the Supreme Court endorsed such a practical view of due process, declaring personal service of written notice to unknown parties would

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101. *Id.* at 159–61.
102. *Id.* at 159 (citing Schroeder v. City of New York, 371 U.S. 208, 212–13 (1962)).
103. *Id.* at 159–61.
104. *Id.* at 161.
105. *See* Raykin, *supra* note 81, at 91.

> be an unjustified obstacle. Consideration of the rights of all parties need not lead to unreasonable results.[106]

The author contends that constitutional mandates for recognition of procedural safeguards against "official actions," i.e., approvals of sales orders without adequate notice provisions, should not so easily be dismissed in support of an expedited § 363(b) process, especially when bankruptcy precludes post-deprivation relief because of the inability to undo a transaction.[107] As others have argued, due process and bankruptcy relief can and should be rationally harmonized.[108]

Adoption and adherence to the author's *business in-law* calculus give due regard to congressional intent in the creation of § 363 by acknowledging explicitly that a DIP seeking to circumvent Chapter 11 protections must go beyond arguments of business and economic necessity but to equally respect all creditor rights to a fair opportunity to be heard. Nothing less than the Constitution of the United States assures that right.

5. A § 363(b) motion is legally insufficient if the proposed sale is not proffered in good faith.

Courts routinely say that, among other things, approval of a § 363(b) sales order requires a finding that the buyer and the proponent of the sale are acting in "good faith." Though dependent on specific facts, the requirement to find that good faith exists before a sale order is approved is, in the author's view, a question of law. But is this legal sufficiency determination by the court obligatory and, if so, what are its legal roots?[109] That is a question that is answered very differently (or not at all) by many courts. The author posits that a "good faith" inquiry is a legal predicate for approval of a sale motion and that a determination of the existence or lack thereof should be made *sua sponte* by a reviewing court.

The fact is that orders approving sales often contain findings of "good faith" with the intention of rendering a post-closing appeal at-

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106. *Id*. at 132 (emphasis in the original).

107. *See* 11 U.S.C. § 363(m) (2019); Lindsey Freeman, Comment, *BAPCPA and Bankruptcy Direct Appeals: The Impact of Procedural Uncertainty of Predictable Precedent*, 159 U. Pa. L. Rev. 543, 571–72 (2011).

108. *See, e.g.*, Russell A. Eisenberg & Frances Gecker, *Due Process and Bankruptcy: A Contradiction in Terms?*, 10 Bankr. Dev. J. 47, 48–49 (1993).

109. The manner in which courts have answered this question has long troubled commentators. *See, e.g.*, Daniel J. Tyukody, Jr., Comment, *Good Faith Inquiries under the Bankruptcy Code: Treating the Symptom, Not the Cause*, 52 U. Chi. L. Rev. 795, 795–98 (1985).

tacking the sale as moot under 11 U.S.C. § 363(m).[110] Some courts dismiss this defensive strategy.[111] Others embrace it.[112] In historic jurisprudential terms, the finding of "good faith" by a sale proponent has typically been an adjunct to standard § 363(b) "sound business judgment" analysis.[113] The problem is, whether buried beneath the business judgment rubric or more explicitly recognized, courts have failed to provide a consistent set of facts or circumstances that represent valid indicia of good faith.[114] Courts have undeniably engaged in vigorous "good faith" analyses without ever once pointing to the root or source of authority compelling its engagement.[115]

Of course, nothing exists in a vacuum. By that, it should be acknowledged that the Code and bankruptcy relief has a long and rich history of well-developed case law involving "good faith" determinations. For example, "Chapter X of the Bankruptcy Act actually included a nonexclusive set of bad faith indicia, providing for dismissal of a case where: (1) equity holders planned retention of their equity without any capital contributions; (2) there exists a pending foreclosure proceeding; (3) a plan of reorganization could not reasonably be expected; and (4) a prior proceeding is pending in another court and it appears that the interests of creditors and equity holders would be best served in the existing, non-bankruptcy proceeding."[116]

And in traditional Chapter 11 proceedings, relying upon Section 1112(b), bankruptcy courts have asserted the authority to dismiss a Chapter 11 case claiming the case was not filed in good faith.[117] In

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110. *See* T.C. Inv'rs v. Joseph, 290 B.R. 743, 752 (B.A.P. 9th Cir. 2003) [hereinafter *In re* M Capital Corp].

111. *In re* Onouli-Kona Land Co., 846 F.2d 1170, 1174 (9th Cir. 1988) (contending that Ninth Circuit "does not require the bankruptcy court to make an explicit finding of good faith.").

112. *See In re* Abbotts Dairies of Pa., Inc., 788 F.2d 143, 149–50 (3d Cir. 1986) ("[i]n short, we hold that when a bankruptcy court authorizes a sale of assets pursuant to section 363(b)(l), it is required to make a finding with respect to the 'good faith' of the purchaser. Alternatively, such a finding might, in certain very limited circumstances, be made by the district court.").

113. *See In re* Condere Corp., 228 B.R. 615, 630–31, 636 (Bankr. S.D. Miss. 1998).

114. *See, e.g.*, Solow v. PPI Enters. (U.S.), Inc., 324 F.3d 197, 211 n.22 (3d Cir. 2003) [hereinafter *In re* PPI Enters.] (citing *In re* PPI Enters. (U.S.), Inc., 228 B.R. 339, 344 (1998)) ("courts have not identified with any consistency which circumstances of the debtor's filing are indicia of bad faith").

115. *See In re* SGL Carbon Corp., 200 F.3d 154, 159–66 (3d Cir. 1999); Marsch v. Marsch, 36 F.3d 825, 828–29 (9th Cir. 1994) [hereinafter *In re* Marsch]; Platinum Capital, Inc. v. Sylmar Plaza, L.P., 314 F.3d 1070 (9th Cir. 2002) [hereinafter *In re* Sylmar Plaza, L.P.].

116. A. Kenneth Hennesay, Jr., *Fickle Gatekeepers: Application of the "Good Faith" Doctrine in Sylmar Plaza and PPI Enterprises Inspires Little Faith in the Integrity of the Chapter 11 System*, 27 CAL. BANKR. J. 255, 257 (2004).

117. *See* Judith Greenstone Miller, *Amendment to Provide Good Faith Filing Requirement for Chapter 11 Debtors*, 102 COM. L.J. 181, 185 (1997).

Chapter 7 cases, courts have applied a "good faith" standard in connection with applications to sell property under § 363(i).[118]

In § 363(b) cases, the waters have become much murkier, i.e., when does "sound business judgment" end and a necessary finding of "good faith" in the rationale for that judgment begin? To make the point, consider *In re GSC, Inc.*[119] where the bankruptcy court predictably stated that the "overriding consideration for approval of a § 363 sale"[120] is based on the good business reason rule.[121] However, to broach and surpass the requirement for a finding of good faith, the court essentially stated that the author's *business-in-fact* rule reflects the "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[122] Of course, knowledgeable practitioners recognize how to trap the elusive good faith sale prerequisite without producing any facts to support the claim simply say it's so and it will be so.[123]

Not all courts accommodate this sophistry. Some bankruptcy courts recognize they are ill-equipped to make such findings for the obvious reason that parties are not incentivized to develop an evidentiary record that might support an informed judgment. There is also the matter of intentional concealment, e.g., conduct amounting to fraud or collusion among bidders where such information (undermining a court's finding of good faith) stays in the shadows and never comes to light, until a sale has been long completed. For these reasons, some courts refuse to render a good faith finding when approving a § 363(b) sale.

The Ninth Circuit in *In re M Capital Corp.* made this point in clear terms:[124]

> The history of this case should illustrate for litigants and bankruptcy
> courts the care that must be taken to protect truly good faith buyers
> so section 363(m) will have real meaning for them when the record
> supports its applicability. Where good faith has been challenged,

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118. *See In re* Prosser, No. 06-30009 JFK, 2011 WL 832945, at *2 (Bankr. D.V.I. Mar. 4, 2011) (Bankr. D. Del. 2008).

119. *See In re* GSC, Inc., 453 B.R. 132, 139 (Bankr. S.D.N.Y. 2011).

120. *Id.* at 155.

121. *Id.* at 173.

122. *Id.* at 173–74 (citing The Officials Committee of Subordinated Bondholders v. Integrated Resources, Inc., 147 B.R. 650, 656 (Bankr. S.D.N.Y. 1992) [hereinafter *In re Integrated Res., Inc.*]); s*ee also In re* Boston Generating LLC, 440 B.R. 302, 329 (Bankr. S.D.N.Y. 2010).

123. *See* discussion *supra* note 109–116 and accompanying text.

124. *See In re* M Capital Corp., 290 B.R. at 752.

facts must be established to obtain the safety that section offers. Boilerplate good faith findings in orders will not suffice, and courts should avoid the temptation to sign such orders without an evidentiary foundation. Where there is no subsequent challenge to good faith, the error may turn out to be harmless; where there is such a challenge—as here—the error could be fatal. Without such affirmative findings, the ramifications should be obvious: no safe harbor; Section 363(m) places no limits on appellate review and appellate remedies.

This ominous warning has in subsequent years been both ignored and heeded in courts elsewhere around the country.

In *In re Argos Therapeutics*, *Inc.*, the sale motion repeatedly recited the "fact" that the proposed sale was the result of "extended and lengthy good faith negotiations," that the purchase's agreement to buy was "an arm's length transaction" and conducted in "good faith," etc.[125] However, no affidavits, no testimony, and no evidentiary basis was proffered to support these conclusions. Indeed, the requested findings rested on the apparent representations of counsel.

Not all courts buy into this implicit fact finding. The oft cited contrary view is found in the seminal *In re Abbotts Dairies of Pa., Inc.*[126] interpreting Section 363(b)(i) to require a finding by the Bankruptcy Court that the acquirer of a debtor's assets be a good faith purchaser.[127] Offering an explicit outline of the rationale for this fact finding requirement, the Third Circuit stated:

> The requirement that a purchaser act in good faith . . . speaks to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.[128]

Judge Shapero's view is that provided statutory requirements of notice are met, if a request for a sale order is made and no one objects, the court should not *sua sponte* look behind the curtain of the sale motion.[129] Under such circumstances Judge Shapero concluded that there is no need for a good faith finding as he pointedly termed it "a

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125. *See Mot. for Debtor for Entry of Order* at 27, *In re* Argos Therapeutics, Inc. Case No. 18-12714 (Bankr. D. Del. Nov. 30, 2018).

126. *In re* Abbotts Dairies, 788 F.2d 143, 144 (3d Cir. 1986).

127. *Id.*

128. *In re* Rock Indus. Mach. Corp., 572 F.2d 1195, 1198 (7th Cir. 1978).

129. *Id.*

comfort order."[130] In short, there is no need for a *sua sponte* determination of good faith in a sale motion absent a complaint or objection. This view is, in the author's opinion, unfortunately consistent with rulings in other jurisdictions.[131]

So, should the rote routine finding of "good faith" in sale orders be mere window dressing to stave off the finality of orders, or save bad faith, enunciated in § 363(m)? Is it an unnecessary appendage to unopposed sale orders designed only to "give comfort" to litigants . . . without regard to legal necessity (or evidentiary proof)? Or is such a fact-based finding a necessary predicate to meet the legal standards imposed by § 363(b) required to approve a sale out of the ordinary course of business? The author stands on the last mentioned side of this fence.

The author contends that a good faith finding should be more than window dressing. It is a fundamental legal necessity grounded in the public policies advanced by Congress by its enactment of § 363(b). This view is supported by a recent decision from the Southern District of New York.[132] In *In re Cooper* the District Court sanctioned the bankruptcy court's approval of a § 363(b) sale order and, thereby, preserved a sale order. Historically, § 363(m) would have ended the matter as the sale would have been final and not appealable absent a proffer of evidence of bad faith in the making of the sale motion. First, note that the Southern District of New York ("SDNY") handles an inordinate share of the largest bankruptcy asset sales in the country. Thus, when this court says that, despite the obligatory and perfunctory good faith finding with the approval of the sale motion, and despite § 363(m), it might consider upsetting the sale on appeal anyway, that is big news. Especially, when the challenge to the sale was based on extrinsic evidence of disqualifying knowledge possessed by the debtor. This case implies that the finality of a sale order is suspect unless there is a *substantive* (in legal terms) evidentiary basis to support the boilerplate assertion of a factually unsupported finding of "good faith."

Another Southern District of New York case was illustrative.[133] The sales order authorized a sale of substantial assets of the debtor,

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130. *Id.*

131. *See In re* Burd, 202 B.R. 590, 591 (Bankr. N.D. Ohio 1996).

132. *See In re* Cooper, 592 B.R. 469, 472 (Bankr. S.D.N.Y. 2018).

133. *See* Order, *In re* Sears Holding Corp., Case No 18-23538 (RDD), Doc 2507, at 13–14 (Bankr. S.D.N.Y. Feb. 08, 2019).

Sears Holding, pursuant to § 363(b). However, rather than the rote recitation of the existence of "good faith" (being implicit in a "sound business judgment" determination), the sales order consumed nearly a page reciting specific factual findings supporting the good faith of the parties to the contemplated transactions. The order referred to, among other things, the existence of "competitive bidding procedures," the full disclosure of "all material agreement or arrangements entered into by the Buyer" and the fact that the assets being acquired were "not controlled by any agreement among potential bidders and neither the Debtor."[134]

This robust finding of fact, clearly offered to support the court's good faith finding, was something far more than a "comfort order." Nor did these facts emerge on an appeal of an order invoking § 363(m). This factually supported "good faith" finding, without an objection as a predicate, is the essence of the good faith element of the author's "*business in law*" analytic framework. Whether imposed by local court rule or practitioner recognition, it may well be that failing to provide an approving court with meat to attach to the bones of a sale order risks the loss of the "safe harbor" the Code has often proffered on the shoulders of good faith finding.

The author's *business-in-law* approach, compelling a *sua sponte*, factually supported, finding of good faith before a sale motion is approved, is fully supported by the public policies that underpin § 363. As one commentator observed "[I]t becomes apparent that in the face of the tensions inherent in these transactions, good faith may be the cement that holds the bankruptcy structure together."[135] "Cement," as it were, is a metaphor for a healthy respect for the principles and public policies that undergird any legislative enactment. The incorporation of a *business-in-law* test would endeavor to constrain the fragmented patchwork of sale approval standards applied by courts across the country and command a more effective harmonization of practice with the rule of law. As the Third Circuit has cogently explained,

> [a]lthough the Bankruptcy Code contains many provisions that have the effect of redistributing value from one interest group to another, these redistributions are not the Code's purpose. Instead, the purposes of the Code are to preserve going concerns and to maximize the value of the debtor's estate. . . . Under the circumstances, to satisfy the good faith requirement, a debtor must "do more than

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134. *Id.* at 13.
135. Uziel, *supra* note 39, at 1209.

> merely invoke some distributional mechanism in the Bankruptcy Code. It must seek to create or preserve some value that would otherwise be lost—not merely distributed to a different stakeholder—outside of bankruptcy.[136]

Thus, "going through the motions" to facilitate an expedited transfer of assets from the DIP should not be the sole focus of the exercise. Instead, through conscientious application of the "business in law" test, courts would be compelled to articulate a sound *legal* basis for the grant of a § 363(b) sale motion. At the same time, transaction constituents would enjoy a greater degree of confidence in the finality of their participation. With this approach, the basic equitable underpinnings of the Code will be accorded the respect they deserve as Congress intended.

III. CONCLUSION

The *business in-fact* and the *business in-law* analysis advocated by the author provides a compelling basis for concentrating courts' thoughtful, *sua sponte,* consideration of whether to approve § 363(b) sales transactions. Rather than limiting its consideration to an eclectic number of fact-based tests to decide whether the § 363(b) sales transaction should be approved, the author's *business in-fact* and *business in-law* co-equal components, demonstrate a cohesive analytical framework for making a more reliable and Code compliant determinations. The most important component, and heretofore missing test (at least explicitly), is the *business in-law* justification analysis. This would be a legal sufficiency check on the *business in-fact* justification proffered by proponents of the § 363(b) transactions.

This binary analysis is assuredly a compound formula requiring that both *business in-fact* and *business in-law* justifications be proffered and found satisfactory before the § 363(b) sale motion may be approved. The court must find that, in addition to a sound business reasons why estate assets should be sold under § 363(b), it must be assured that a DIP's effort to sell or transfer assets that might impact constituents not directly participating in the transaction is not infected by conflicts of interests, inadequate procedural due process, derogation of creditors' priorities or plain bad faith, despite the appearance of a "sound business reason" for the transaction to occur.

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136. *See In re* Integrated Telecom Express, Inc.*, 384 F.3d 108, 128–29 (3d Cir. 2004).

Under the author's proposed *business in-law* test, the § 363(b) sales transaction will fail if the transaction constitutes a *sub rosa* reorganization plan disguised as a sale,[137] or the transaction unfairly modifies the distribution scheme established under Chapter 11. The procedural process associated with the § 363(b) sales transaction may miss the constitutionally mandated due process mark by failing to provide affected parties notice appropriate for the circumstances and appropriate opportunity to be heard. Finally, the *business in-law* analysis requires the court, sua sponte, to elicit sufficient facts from the proponent of the § 363(b) sales transaction so that the court may make a determination, before affected parties' appellate rights become moot, that proponents of the sale are acting in good faith in proposing a transaction and are not colluding with the purchaser or other bidders to negatively affect value received by the sale.

Finally, the broad framework of the second component, the *business in-law analysis*, allows the courts more freedom to comprehensively assess whether the § 363(b) sales transaction under consideration undermines Congressional intent to enhance the prospects of restructuring bankrupt firms' finances to enable them to continue operating as a going concern either through reorganization or a "going concern" sale enabling them to pay creditors fairly, produce return on investments for shareholders if they exist and continue providing jobs for their employees. That is, of course, the whole point of §363(b) sales transactions. Getting there should be far more straightforward than historical bankruptcy jurisprudence reveals.

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137. *See* Wilkerson, *supra* note 21 and discussion and accompanying text at notes 47–52.

Take a (Cognitive) Load Off: Using Principles of Adult Education Theory to More Effectively Integrate a Drafting Unit into a First-Year Legal Writing Course and Ensure Student Success

Kenneth R. Swift*

Mr. Hart, here is a dime. Take it, call your mother, and tell her there is serious doubt about you ever becoming a lawyer.

—Prof. Kingsfield in The Paper Chase[1]

From the ruthless fictional Harvard Law School classroom of Prof. Kingsfield to the oft-quoted orientation speech to incoming 1Ls—"look to your left and look to your right, one of you will not be here at the end of the year"—law school has historically been seen as an unbending institution where students either met the unwavering standard or were shown the door. While the attrition quote, in various forms, has been credited to many, there was some truth behind the quote. As late as 1973, the attrition rate in law schools exceeded one-third.[2]

Those days are long past, and a student leaving law school because of failing grades is rare. At a 1L orientation you are much more likely to hear the attrition quote morphed into: "Look to your left, look to your right . . . you are looking at people who will be friends and professional colleagues for the next thirty years if you treat them

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right."[3] Unlike Kingsfield's "let them fall where they may" attitude, most modern law professors are deeply concerned with their students' well-being and educational success. Most law schools have made significant curricular changes in the last decade, and many law professors study adult education and learning theory to provide law students a quality legal education. Among the changes have been curricular reforms to incorporate a broader range of practical skills throughout the curriculum, particularly in the first year.

This article will explore the intersection of curriculum reform and modern adult learning theory by looking at ways to effectively incorporate transactional drafting into a first-year Legal Writing course. The article will begin with an overview of legal education reform over the past two-plus decades, focusing on the infusion of practical skills into the law school curriculum. Part Two of the article will discuss the author's own difficulty in effectively incorporating transactional drafting into his first-year Legal Writing course. Part Three will explore adult learning science. This portion will begin with an overview of adult learning theory and then focus more heavily on Cognitive Load Theory as well as the difference between novice and expert learners. Part Four will present methods the author has used to implement principles of Cognitive Load Theory to effectively incorporate more transactional drafting into the author's first-year Legal Research and Writing course. The final section will hypothesize a process in which principles of Cognitive Load Theory can be utilized more to prepare students to read and understand case law effectively at the start of their law school careers.

I. A BRIEF OVERVIEW OF LEGAL EDUCATION REFORM

The genesis of modern reform in legal education can arguably be traced back to two events from the early 1990s. One was a report issued from the American Bar Association Task Force on Law Schools and the Profession that was critical of how law schools prepared students for the actual practice of law.[4] The other was the establishment of the Institute for Law Teaching and Learning (the Institute), which

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3. Nancy Levit & Douglas O. Linder, *The Summer Before Law School*, NAT'L JURIST (Jul. 6, 2011, 3:23 PM), http://www.nationaljurist.com/prelaw/summer-law-school.

4. *See generally* AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT].

was formed by a group of law professors and grew out of, at least in part, a study from the 1980s that showed a growing dissatisfaction with the quality of undergraduate teaching.[5] This study also made seven recommendations for best practices to improve education and teaching at the undergraduate level.[6] The Institute took those findings and applied them to legal education in its quest to improve teaching at law schools—work which continues to this day.[7]

The report, commonly referred to as the MacCrate Report after the chair of the task force, Robert MacCrate, recommended that law schools change their curricula to "systematically integrate the study of skills and values with the study of substantive law and theory."[8] The report "identifie[d] ten fundamental lawyering skills, four fundamental values, and sixty-four recommendations for reform."[9] The report also focused on the role of those who teach legal skills, noting that "[m]aturing professional skills programs have become increasingly sophisticated in content, in articulating the theoretical underpinnings of lawyer skills and in teaching methodologies,"[10] and that the teaching of legal skills requires permanent faculty which would contribute to the growing pedagogy in skills teaching.[11] From that perspective, the MacCrate Report was "a manifesto for clinicians and the legal theory connected to clinical professors."[12]

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5. Gerald F. Hess, *Seven Principles for Good Practice in Legal Education*, 49 J. Legal Educ. 367, 367 (1999) (*citing* Arthur W. Chickering & Zelda F. Gamson, *Applying the Seven Principles for Good Practice in Undergraduate Education*, Wash. Ctr News, (1991) and The Seven Principles in Action: Improving Undergraduate Education (Susan R. Hatfield, ed., 1995)).

6. Hess, *supra* note 5, at 367. The seven principles are that good legal education: "[(1)] encourages student-faculty contact, [(2)] encourages cooperation among students, [(3)] encourages active learning, [(4)] gives prompt feedback, [(5)] emphasizes time spent on tasks, [(6)] communicates high expectations, [and (7)] respects diverse talents and ways of learning." *Id.*

7. *About*, Inst. for L. Teaching & Learning, http://lawteaching.org/about.

8. Stephen M. Johnson, *Teaching for Tomorrow: Utilizing Technology to Implement the Reforms of MacCrate, Carnegie, and Best Practices*, 92 Neb. L. Rev. 46, 50 (2013) (quoting MacCrate Report, *supra* note 4, at 128).

9. *Id.*

10. Bryant G. Garth, *From MacCrate to Carnegie: Very Different Movements for Curricular Reform*, 17 Legal Writing: J. Legal Writing Inst. 261, 264 (2011) (quoting MacCrate Report, *supra* note 4, at 128).

11. *Id.* at 264–65.

12. *Id.* at 265. The call for reform and for law schools to focus more on practical legal skills was not new and dated back to at least the 1930s when one commentator argued that law school should become "lawyer schools." Kristen Holmquist, *Challenging Carnegie*, 61 J. Legal Educ. 353, 354 (2012) (quoting Jerome Frank, *Why Not a Clinical Lawyer School?*, 81 U. Pa. L. Rev. 907 (1933)). *See generally* John Dickinson, *Legal Education and the Law School Curriculum*, 79 U. Pa. L. Rev. 424 (1931); Karl Llewellyn, The Bramble Bush: The Classic Lectures on the Law and Law School (Oxford Univ. Press 2008) (1930).

While the MacCrate Report did play a role in increasing the status of skills teachers, it had little significant impact on law school curriculum, as was noted in the 2007 release of a report titled *Educating Lawyers: Preparation for the Practice of Law*, issued by the Carnegie Foundation for the Advancement of Teaching.[13] The document, commonly referred to as the Carnegie Report, was based on site visits and interviews with law students and faculty, and concluded that a great deal of reform was necessary despite the strengths of mainstream legal education.[14] The Carnegie Report, alongside a contemporaneous report published by the Clinical Legal Education Association titled *Best Practices for Legal Education*,[15] provided the impetus for significant change within many law schools. "Two scholars have suggested that the Carnegie Report is 'perhaps the most influential document in current debates about the future of legal education.'"[16]

The Carnegie Report was unique in that it brought an outsider's perspective to the evaluation of legal education.[17] While legal educators participated, the report was not "inspired by legal education insiders with a particular agenda."[18] Furthermore, the report not only focused on general education theory, but also on empirical research from the social sciences,[19] becoming widely cited by those calling for law school reform outside of the legal academy.[20]

The Carnegie Report categorized the goal of a legal education into three apprenticeships: the "intellectual or cognitive apprenticeship"; the "practical apprenticeship"; and "the apprenticeship of identity and purpose."[21] The practical apprenticeship focused on developing the tools shared by competent lawyers, including legal

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13. William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law 47 (2007) [hereinafter Carnegie Report].

14. *See id.* at 16–17.

15. *See* Roy Stuckey et al., Best Practices for Legal Education: A Vision and a Roadmap 5 (2007) [hereinafter Best Practices]. The report concluded that "most law schools are not committed to preparing students for practice."

16. Mark F. Kightlinger, *Two and a Half Ethical Theories: Re-Examining the Foundations of the Carnegie Report*, 39 Ohio N.U. L. Rev. 113, 123 (2012) (quoting Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 Clinical L. Rev. 57, 70 (2009)).

17. Garth, *supra* note 10, at 266.

18. *Id.*

19. *Id.*

20. *See* Kightlinger, *supra* note 16, at 120–29 nn.22–75 (surveying a variety of different sources which referenced the Carnegie report).

21. Louis N. Schulze, Jr., *Alternative Justifications for Academic Support II: How "Academic Support Across the Curriculum" Helps Meet the Goals of the Carnegie Report and Best Practices*, 40 Cap. U. L. Rev. 1, 3 (2012).

writing and drafting, client counseling and other lawyering skills.[22] The report's authors noted that previous studies of legal education "have universally concluded that most law school graduates lack the minimum competencies required to provide effective and responsible legal services."[23]

The Carnegie Report coincided with the downturn in the economy and combined to create "an incentive for law firms to pay more attention to the actual skills of those they hire – not simply their class ranking or the law school from which they graduated."[24] In particular, lower ranked law schools—facing a decline in both applications and employment opportunities for their students—began to focus more on delivering practice-ready graduates. Just a few years after the Carnegie Report was released, curriculum reform was spreading quickly, "fueled by the logic of the Carnegie [R]eport, competition among law schools, and a new interest by employers in what the people they hire can bring to the workplace."[25]

One skill area that is beginning to see the impact of the Carnegie Report is transactional drafting.[26] Traditionally, the first year of law school has been primarily or, in many cases, entirely litigation focused.[27] This is undoubtedly because of the prevalence of the case method employed in first-year law school classrooms across the country.[28] However, schools are beginning to offer more transactional drafting offerings. The total is likely to continue to increase, as in the latest Association of Legal Writing Directors' (ALWD) survey in which more than forty percent of schools reported that demand for drafting courses exceeded availability.[29]

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22. *Id.* at 11–12 (quoting CARNEGIE REPORT, *supra* note 13, at 162).
23. *Id.* at 17 (citing BEST PRACTICES, *supra* note 15, at ix).
24. Garth, *supra* note 10, at 268.
25. *Id.*
26. *See* JODI WILSON & JUDY ROSENBAUM, REPORT OF THE ANNUAL LEGAL WRITING SURVEY 25, 30 (2015); *see also* JO ANNE DURAKO, 2000 SURVEY RESULTS ASSOCIATION OF LEGAL WRITING DIRECTOR/LEGAL WRITING INSTITUTE 10–12 (2000) (In 2000, forty-eight law schools offered a course in Transactional Drafting (question 35), only nineteen of which allowed that course to satisfy an upper-level writing requirement (question 33). While in 2015, 115 law schools offered a course in Transactional Drafting (question 36), 101 of which allowed that course to satisfy an upper-level writing requirement (question 33)).
27. Carol Goforth, *Transactional Skills Training Across the Curriculum*, 66 J. LEGAL EDUC. 904, 907 (2017) (noting that "most law schools continue to emphasize litigation").
28. *See, e.g.*, Brandon R. Ceglian, *Bridging the Gap Between Law School and Law Practice*, 37 COLO. LAW. 59, 61 ("The case method . . . is a tried-and-true method of helping first-year students understand and apply precedent.").
29. ASSOC. LEGAL WRITING DIRS. & LEGAL WRITING INST., ALWD/LWI ANNUAL LEGAL WRITING SURVEY REPORT OF THE 2016–2017 SURVEY 49 (2018), https://www.alwd.org/images/resources/2016-2017%20Survey%20Report.pdf [hereinafter ALWD 2018 Report].

Transactional drafting is also taking a more prominent role in the required curriculum. Of the 177 schools in the 2015 ALWD that required an upper-division writing course, the majority allowed students to meet that requirement with a drafting course.[30] Most significantly for this article, 67 schools included drafting in their first-year legal writing course.[31] One commentator argued that incorporating drafting into the first-year legal writing curriculum should become standard to ensure that all students have some exposure in their first year to this "critically important lawyering skill."[32]

II. THE AUTHOR'S EARLY EXPERIENCE WITH INCORPORATING TRANSACTIONAL DRAFTING

My teaching career has been long enough to span from well before the MacCrate and Carnegie reports, through the general increase in understanding of the importance of skills and experiential learning and the infusion of those skills in the law school curriculum. Not surprisingly, the discipline of legal writing grew along with the increased awareness of the importance of practical skills in legal education. In fact, the legal writing academy has been a leader in curriculum reform and legal education pedagogy.[33]

For the first many years of my teaching career, my legal writing course was a full year, two credits per semester course. The structure left little time to even cover the fundamentals of objective and persuasive writing, legal structure, legal reasoning, and all of the related, necessary skills to turn a 1L into a competent legal writer—let alone to

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30. Assoc. Legal Writing Dirs. & Legal Writing Inst., ALWD/LWI Report of the Annual Legal Writing Survey 25 (2015), https://www.alwd.org/images/resources/2015%20Survey%20Report%20(AY%202014-2015).pdf [hereinafter ALWD 2015 Report]. The exact number is difficult to determine because the survey breaks up drafting courses into four different types. One type, transactional drafting, meets the upper division requirement by 101 schools. The other types are slightly less: dedication drafting (93 schools); general drafting (81); legislative drafting (54). Thus, a minimum of 101 schools allow drafting courses to meet the requirement, although it seems likely the total is somewhat higher as there are likely schools who do not offer a course called transactional drafting but allow one or more of the other type courses to meet the requirement.

31. *Id.* at 13.

32. Goforth, *supra* note 27, at 924–26.

33. *See, e.g.*, Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 San Diego L. Rev. 347, 350–51 (2001); Kristen K. Robbins-Tiscione, *A Call to Combine Rhetorical Theory and Practice in the Legal Writing Classroom*, 50 Washburn L.J. 319, 320 (2011); Kari Mercer Dalton, *Their Brains on Google: How Digital Technologies Are Altering the Millennial Generation's Brain and Impacting Legal Education*, 16 SMU Sci. & Tech. L. Rev. 409, 410 (2013); *see generally* James B. Levy, *Teaching the Digital Caveman: Rethinking the Use of Classroom Technology in Law School*, 19 Chap. L. Rev. 241 (2016).

cover additional skills. As the need to incorporate more skills into the curriculum became apparent, a credit was added to our first semester, and a year or two later another credit was added to the second semester.

With the added credit hours and accompanying class time, I was able to begin incorporating additional skills into my course. Some skills were legal-writing related, such as client letters, demand letters, emails, and research topics beyond the basic secondary sources, case law, and statutes. Other items covered included those that might fall under the "lawyering skills" umbrella, such as client interviews, negotiation, and alternative dispute resolution.

A few years later, after a successful round of lobbying from the legal writing department, the school added a required third semester of legal writing, bringing the total number of credits to eight. Appellate advocacy was moved to the third semester and replaced with trial-court level writing, which resulted in several additional available weeks in the second semester. The legal writing department decided to incorporate a contract-drafting unit into the first-year curriculum.

I was a proponent of adding in the transactional component and looked forward to developing the curriculum, even though I did not have much experience teaching contract drafting and had minimal practice experience in the discipline. From the start, I thought of contract drafting as a wholly different skill than legal writing and presented the unit in just that way. In fact, I "sold" my students on the unit as a chance to do something completely different, and opined that students, who may have struggled in legal writing and legal analysis, may find that they have more inherent skill in contract drafting.

The first time I taught the unit, which was placed in the last few weeks of the second semester, everything seemed fine, and the students were relatively engaged in the classroom activities, which were primarily hands-on group activities. The achievement level on the short end of the unit exercise (a contract edit), however, was not high, as even the basic skills we covered in class did not seem to be transferred by students to the assignment. I chalked the results up to it being the end of the first year, with finals looming, and perhaps in part to my inexperience with the subject matter.

The results in the next couple of years were the same as in the first. I became more proficient in the subject matter, as I had developed a separate upper-level transactional drafting course. Still, the first-year contract-drafting unit felt disengaged from the rest of the

first-year course, and almost as though it was just an add-on or busywork to finish off the semester.

In the intervening time, two fortuitous events occurred that provided me with insight into why the contract drafting component of my first-year course was not as successful as I had hoped. The first occurred solely by accident. As noted above, I was asked to develop a contract-drafting course as one of two options for the required third semester (appellate advocacy being the other option) of our Legal Writing curriculum. Since the course was part of our overall Legal Writing curriculum, I did not want it to be a pure contract-drafting course. Beyond my plan to include some traditional legal research and client letter drafting, I also wanted the course to connect to, and flow from, the first year.

To accomplish this, the first unit of the semester focused on the drafting of a complaint. Students did the same type of research into statutes (in that case court rules) that they had to complete for their first-year legal writing assignments. Students also read a few cases to determine the applicable legal claims that would be the basis for the complaint; again, this was similar to the type of analysis they had to complete in the first year. This first unit lasted the first two or three weeks of the semester, and then we turned to more traditional contract drafting skills and assignments. The course content and structure were well received, so I continued to use the same curriculum without giving too much thought as to why this course was flourishing while the first-year contract drafting unit was not.

The second fortuitous event occurred when I began researching an article on the best practices in developing asynchronous online courses. As part of my research, I began studying the science of adult legal education and cognitive learning theory. Among the topics covered was the importance of connecting new material to existing knowledge and how this connection reduces the cognitive load on non-expert learners. The more I read, the more I began to understand the differences in my approach to first-year contract drafting and my upper division course and why the latter was more effective: students in the upper division course were making connections to materials and skills they had covered in their first year.

III.   ADULT LEARNING SCIENCE AND COGNITIVE LOAD THEORY

AN OVERVIEW OF ADULT LEARNING SCIENCE

Put in simple terms, "adults learn by paying attention, processing information, and using it."[34] Attention gathering, obviously critical to the learning process, can be a difficult first step[35] with students challenged by other stimuli in the classroom, such as laptops and phones.[36] Further, the brain is constantly stimulated by the five senses: smell, taste, touch, sight, and sound.[37] Much of the stimuli encountered by the brain is necessarily ignored,[38] and at any one point, only certain stimuli will actually enter into the senses, a process known as "selective attention."[39] Imagine for a moment that you are at a state fair, walking through a midway with your family. People are talking, there is music playing, carnival barkers are enticing you to their games, lights are flashing, and rides are whirling all about. If you stop to play one of those carnival games, you will find that your attention is focused solely on that squirt gun game or ring toss, and you are able to, at least for a few moments, focus your attention. This selective attention allows us to focus on or away from stimuli based on an assessment of its meaningfulness.[40] Sometimes that meaningfulness will be found intrinsically, such as wanting to win the game. Other times, the meaningfulness is extrinsic, such as listening to a presentation in order to build important skills. While both would seem to be equally motivating, studies have shown that meaningfulness based upon extrinsic importance is generally more difficult to maintain.[41]

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34. Shailini Jandial George, *Teaching the Smartphone Generation: How Cognitive Science Can Improve Learning in Law School*, 66 ME. L. REV. 163, 173 (2013) (citing Hillary Burgess, *Deepening the Discourse Using the Legal Mind's Eye: Lessons from Neuroscience and Psychology that Optimize Law School Learning*, 29 QUINNIPIAC L. REV. 1, 23 (2011)).

35. *See* Levy, *supra* note 33, at 241.

36. *See, e.g.*, Dalton, *supra* note 33, at 431 (asserting that massive exposure to digital technologies has altered modern law students' ability to concentrate and read on a deep level).

37. *See id.*; *see also* Levy, *supra* note 33, at 256 (explaining that information "enter[s] the brain as raw sensory data") (citing WINIFRED GALLAGHER, RAPT: ATTENTION AND THE FOCUSED LIFE 25, 146, 163 (2010); JOHN J. RATEY, A USER'S GUIDE TO THE BRAIN 185–95 (2001)).

38. Levy, *supra* note 33, at 256–57 (noting that the brain has nowhere near the capacity to handle every sight and sound in our immediate vicinity) (citing WINIFRED GALLAGHER, RAPT: ATTENTION AND THE FOCUSED LIFE 25, 146, 163 (2010); JOHN J. RATEY, A USER'S GUIDE TO THE BRAIN 185–95 (2001)).

39. *See* George, *supra* note 34, at 173.

40. *Id.* at 174 (citing JOHN MEDINA, BRAIN RULES: 12 PRINCIPLES FOR SURVIVING AND THRIVING AT WORK, HOME, AND SCHOOL 32 (Pear Press, 2008)).

41. *Id.* (citing DANIEL KAHNEMAN, THINKING, FAST AND SLOW 41 (2011)).

As law faculty have experienced and opined, keeping and maintaining a student's selective attention in the classroom is even more difficult in light of the ubiquity of technology.[42] This includes the so-called "Google effect,"—if students believe that information will be available later online, they will not work to learn at that point in time.[43]

Now, once the professor has the student's attention, the information provided will enter the brain through short-term memory.[44] However, only a limited amount of information can be stored in short-term memory at any given time,[45] and neuroscience has shown that information may be stored in short-term memory for only about thirty seconds.[46] Then, the information is either forgotten or moved into long-term memory in a process known as encoding.[47] The good news is that while short-term memory is limited, long-term memory is considered virtually limitless.[48] As great as that sounds, there is still a major hitch: information stored in long-term memory must be brought back to short-term memory for use of further learning.[49] As such, to

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42. *See, e.g.*, Steven Eisenstat, *A Game Changer: Assessing the Impact of the Princeton/UCLA Laptop Study on the Debate of Whether to Ban Law Student Use of Laptops During Class*, 92 U. DET. MERCY L. REV. 83 (2015); Kevin Yamamoto, *Banning Laptops in the Classroom: Is It Worth the Hassles?*, 57 J. LEGAL EDUC. 477, 485–86 (2007).

43. Patrick Meyer, *The Google Effect, Multitasking, and Lost Linearity: What We Should Do*, 42 OHIO N.U.L. REV. 705, 716 (2016) (citing Betsy Sparrow et al., *Google Effects on Memory: Cognitive Consequences of Having Information at Our Fingertips*, 333 SCI. 776 (2011); Daniel M. Wegner & Adrian F. Ward, *The Internet Has Become the External Hard Drive for our Memories*, SCI. AM. (Dec. 1, 2013), http://www.scientificamerican.com/article/the-internet-has-become-the-external-hard-drive-for-our-memories/?print=true).

44. *See* George, *supra* note 34, at 174.

45. *See id.* Scientists historically believed that about seven pieces of information could be stored in short-term memory at any one time. *Id.* However, recent research may indicate an even smaller storage capacity. NICHOLAS CARR, THE SHALLOWS 124 (W. W. Norton & Company 2010) (highlighting new evidence which suggests an ability to process only two to four elements at once); George, *supra* note 34, at 174 (citing George A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, 63 PSYCHOL. REV. 81, 90 (1956)) (classifying immediate memory as "absolute judgment" and explaining the ability to maintain judgment for seven stimuli); *see also* Jennifer Lee et al., *The Impact of Media Multitasking on Learning*, 37 LEARNING MEDIA & TECH. 94, 95–96 (2012).

46. George, *supra* note 34, at 174 n.84.

47. *Id.* at 174; *see also* Levy, *supra* note 33, at 258 (noting that the discarding of information from short-term memory means "information that does not make it past students' short-term memory—either because they did not attend to it very well or their attention was interrupted—is gone and cannot be learned.").

48. Floyd et al., *Beyond Chalk and Talk: The Law School Classroom of the Future*, 38 OHIO N.U.L. REV. 257, 265, 268 (2011) (citing Richard C. Atkinson & R. M. Schiffrin, *Human Memory: A Proposed System and Its Control Processes*, 2 THE PSYCHOLOGY OF LEARNING AND MOTIVATION 13, 16–17 (Kenneth W. Spence and Janet T. Spence, eds., 1968)).

49. George, *supra* note 34, at 175.

use and apply what has been learned, there must be a constant exchange of information between long-term and short-term memory.[50]

Thus, here is the crux of education: information stored in long-term memory is only useful if it can be "found" and brought back to the short-term.[51] One type of learning which accomplishes this is "automaticity."[52] This is information that has been learned through repetition and memorization, such as your phone number or even more complex information that has been repeated over and over.[53]

Most information, and certainly the type of information connected with law students learning legal skills, analysis, and principles for the first time, is stored and retrieved because it has been connected to other, previously-learned information by a process referred to as "chunking" or "schemata."[54] This leads to one of the key neuroscientific principles for legal educators: the more easily information can be readily connected to existing information, the more likely it is learned and retrievable.[55]

Cognitive Load Theory and Novice Versus Expert Learners

Working memory is where "all conscious cognitive processing occurs"[56]—where learning takes place. While the long-held theory was that people could keep about seven pieces of information in working memory at any given time, when processing novel information it is now thought that the total may be only two or three.[57] Regardless of

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50. *Id*.

51. *Id*. at 174–75.

52. Russell A. Dewey, *Psychology: An Introduction*, PSYCH WEB, http://www.psywww.com/intropsych/ch07-cognition/automaticity.html (last visited Oct. 8, 2017) ("*Automaticity* is the ability to do something without thinking about it. It occurs with virtually all *overlearned* behavior.").

53. George, *supra* note 34, at 174; *see also* Levy, *supra* note 33, at 258 ("To truly become 'learned,' however, it usually requires that the neurons comprising the relevant pathways be fired again and again through practice and effort to reinforce and strengthen them."); Elizabeth A. Usman, *Making Legal Education Stick: Using Cognitive Science to Foster Long-Term Learning in the Legal Writing Classroom*, 29 GEO. L. J. 355, 362 (2016) (noting that "retrieval cues" are strengthened through repetition).

54. George, *supra* note 34, at 174.

55. *Id.* at 174–75; *see also* Cynthia Ho et al., *An Active-Learning Approach to Teaching Tough Topics: Personal Jurisdiction as an Example*, 65 J. LEGAL EDUC. 772, 782 (2016) (citing GRUNERT O'BRIEN ET AL., THE COURSE SYLLABUS: A LEARNING-CENTERED APPROACH 4 (Wiley, 2d ed. 2009)) (summarizing active-learning research).

56. Fred Paas et al., *Cognitive Load Theory and Instructional Design: Recent Developments*, 38 EDUCATIONAL PSYCHOLOGIST 1, 2 (2003).

57. Serge A. Martinez, *Why Are We Doing This? Cognitive Science and Nondirective Supervision in Clinical Teaching*, 26 KAN. J.L. & PUB. POL'Y 24, 40–41 (2016).

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the number, the effort exerted by working memory is referred to as the "cognitive load."[58]

Cognitive Load Theory (CLT) considers the interaction between information structures, the brain's cognitive architecture, how "information is presented to learners[,] and [how] the learning activities required of learners [imposes] a cognitive load."[59] The theory originated in the 1980s,[60] led by an article from John Sweller, an Australian educational psychologist, which focused on cognitive load during problem-solving.[61] Educational psychologists using CLT sort the load on the memory into three categories.

The first category is the *intrinsic* cognitive load, which is the necessary working memory for the demands of the task.[62] The intrinsic load is fixed with the complexity of the task and takes into account not only the bits of information acquired by the task itself, but the extent that the information must be interactively compared and "process[ed] simultaneously in working memory."[63] The intrinsic load cannot be altered by instructional manipulations, but only lessened by breaking a more complex task into smaller components.[64]

The two other cognitive load categories are variable. *Extraneous* cognitive load is unnecessary to the learning process and is sometimes referred to as *ineffective* cognitive load.[65] For example, ineffective or incomplete instructions will make completing a task or solving the problem unnecessarily more difficult. Many cognitive load theorists focus on "devising alternative instructional designs and procedures that reduce extraneous cognitive load . . .."[66] On the flipside, the third cognitive load category, *germane* cognitive load, positively affects learning.[67] Unlike extraneous cognitive load, which uses working memory resources to engage in search, germane cognitive load uses resources to enhance schema acquisition.[68] Germane cognitive load includes increases in student motivation and attention, which results

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58. *Id*. at 40.
59. Paas, *supra* note 56, at 2.
60. *Id*. at 1.
61. *See generally* John Sweller, *Cognitive Load During Problem Solving: Effects on Learning*, 12 COGNITIVE SCIENCE 257 (1988).
62. Paas, *supra* note 56, at 1.
63. Andrew Carter, *The Reader's Limited Capacity: A Working-Memory Theory for Legal Writers*, 11 J. ALWD 31, 42–43 (2014).
64. Paas, *supra* note 56, at 1.
65. *Id.* at 2.
66. *Id*.
67. *See id.*
68. *Id*.

in the devotion of additional cognitive resources to the task that is the focus of the intrinsic cognitive load.[69]

What is ultimately important under CLT is the cumulative impact of the three categories on working memory. When constructing a lesson, a professor must seek to optimize cognitive load, so that there is neither too little nor too much of a cognitive load. While the former may seem unlikely in the law school classroom, one commentator noted: "[t]oo little information in working memory leads to too little cognitive load, allowing students to focus on distractions or believe that the information is too 'Mickey Mouse,' which also leads to less learning, even of the very information that the student may have considered too easy."[70] While too little cognitive load is an important consideration, this article focuses on reducing cognitive load to more effectively integrate the teaching of drafting skills in a 1L Legal Writing course. More specifically, this article focuses on reducing cognitive load by integrating the drafting portion effectively.[71]

An expert can learn a related skill more quickly than a novice learner. A professional pianist will be able to learn how to play the guitar far more quickly than someone who has never played a musical instrument before, even if the pianist has never picked up a guitar in her life. A professional computer programmer will be able to learn a new programming language much more quickly than a first-timer. A lawyer who has spent her entire fifteen-year career in a public defender's office will be able to more effectively handle her first construction litigation case than a newly minted lawyer.

The reason why experts are able to pick up new skills quicker than novice learners is because the expert has developed "schemas" to organize and chunk information to existing knowledge. Schemas are information held in long-term memory which, when accessed by the working memory, can reduce cognitive load. As learners become more expert by gaining "more information and experience, their increasingly comprehensive schemas allow them to process problems more quickly and efficiently, and eventually, automatically."[72]

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69. *Id.*
70. Burgess, *supra* note 34, at 40.
71. The primary alternative method to reduce cognitive load would be, as referenced above, to reduce the complexity of any one exercise for assignment.
72. Martinez, *supra* note 57, at 41.

On the other hand, novice learners have "fewer and less complex schemas."[73] However, importantly, these learners *will still interpret new knowledge based upon their existing knowledge*,[74] but without the automatized information and connections of an expert. Automatization is the "amount of work a person must put into conjuring up schema and remember the details of the schema."[75] One commentator demonstrated the difference in an expert versus novice learner by using the context of a property professor and law student each sitting in on a torts lecture:

> The property professor would have several advantages over a novice law student listening to the same discussion, however, because the property professor would have the foundational concepts of law automatized, whereas the novice law student would have to focus on each new concept. The property professor would have words such as plaintiff, appellant, opinion, holding, etc., automatized, so these concepts would take little or no working memory to understand the bigger discussion about intentional torts. The student, however, might have to stop and focus on each of these words, remember the definition of the word, relate the definition back to the topic, and then adapt their understanding of the topic accordingly.[76]

As the commentator further explained, the law student would then be faced with the choice of either mentally searching for the relevant definitions, during which the student might miss important information, or continuing to listen to the professor without understanding certain terms, which would make it more difficult to encode the information into the student's long-term memory.[77]

IV. EFFECTIVELY USING PRINCIPLES OF COGNITIVE LOAD THEORY TO INCORPORATE TRANSACTIONAL DRAFTING

This article argues that a professor can use principles of Cognitive Learning Theory to more effectively integrate a drafting unit into a 1L Legal Writing course. This can be accomplished by nudging the novice learner closer to an expert learner through linking to and developing schemas which the student previously developed in the course. As

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73. Jennifer E. Spreng, *Spirals and Schemas: How Integrated Courses in Law Schools Create Higher-Order Thinkers and Problem Solvers*, 37 U. La Verne L. Rev. 37, 51 (2015).
74. *Id*. at 50.
75. Burgess, *supra* note 34, at 41.
76. *Id.*
77. *Id.*

discussed below, utilizing consistent course terminology and skill linking, along with consistent core course concepts such as document creation and storytelling, will reduce the cognitive load on students and allow for more effective and efficient learning of drafting skills.

Skill Transfer and Exercise Progression

One method to draw a connection between legal writing and drafting is to develop a progression of exercises which connects a seemingly new drafting skill with a skill which the student has developed in the legal writing portion of the course. Developing an exercise progression helps the student connect new information into an existing schema already in long-term memory, which reduces the student's cognitive load.[78]

One connection I utilize throughout the course from legal writing assignments through drafting assignments is the concept of word choice. From the start of the first semester, the lectures refer consistently to word choice and the impact even a single word can have on legal analysis. The very first item I have my students write in the fall of their first year is a rule of law section utilizing two cases, which, for most students, is their first attempt at trying to extract, paraphrase, and synthesize law from legal sources. Invariably, there are examples of sentences where a single word choice significantly and negatively impacted the meaning of a rule of law. This focus continues throughout the legal writing instruction, and students understand that they need to edit their writing on a word-choice level.

As such, the concept of word choice is a common concept and developed schema to the students as we transition into the second semester drafting unit. Hopefully, by the time students reach the drafting portion of the course, the skill of carefully choosing and editing word choices approaches automaticity. To transition this skill into the drafting portion of the course, I normally begin with a real-life example or story which illustrates the importance of word choice,[79] and

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78. *See generally supra* notes 57–77 and accompanying text.

79. One of my favorite such stories—one that is well received by my students—involves my son when he was just an infant:

> When my son was about a year old, we discovered that he loved cinnamon and sugar on his breakfast toast. My wife had a nice little teddy bear dispenser of cinnamon and sugar and would scatter it on the toast and say "mommy is sprinkling it with love." It was all very sweet. In fact "love" was one of the very first words that my son actually learned how to use; he would point to his toast and say "love."

> Well, my son soon learned that he could pick up his toast and lick off the cinnamon and sugar without actually eating the bread. So, soon we were having to tell our infant son

then review the concept of word choice in legal writing documents, usually with a few examples of rules from the final memo of the previous semester.

Next, we continue to link to the developed schema with a litigation-based analysis by looking at how a simple word choice can change the tone of a sentence. For this exercise students are given a sentence that might appear in the facts portion of a trial memo or motion and asked to focus on a single word. For example:

> You represent the plaintiff in a personal injury action involving a motor vehicle accident. You initially describe the impact this way:
>
> *Defendant ran through the stop sign and <u>hit</u> the left side of the plaintiff's vehicle.*

Students are asked to consider as many different synonyms for the underlined word as they can conceive and then pick one that illustrates the significance of the impact more vividly.[80]

We then transition this concept and schema to the drafting unit. I begin by presenting a case or two where the dispute and the court's analysis revolved around a single word that was imprecisely chosen and drafted. This draws a connection between a familiar concept and drafting (often students do not consider that the documents that they might draft could potentially end up in litigation). Then, students are presented a number of sentences taken from contracts or other transactional documents and asked to identify a word (or sometimes a short phrase) that creates ambiguity or lack of clarity and rewrite each sentence with a different word choice.

The key through this exercise progression is that the students recognize that they are connecting to prior knowledge—to an existing legal writing schema.[81] The more proficient students are at making this connection, the quicker they will learn, and eventually master, this skill.[82]

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that "he can't have any more love." And we would have to tell him at restaurants that "we don't have any love for you here" (which often brought some quizzical looks from servers and surrounding patrons). As it turns out, we made a poor word choice with "love."

80. For example, "smashed" or "rammed" create an image of a more violent collision.

81. Elizabeth M. Bloom, *Creating Desirable Difficulties: Strategies for Reshaping Teaching and Learning in the Law School Classroom*, 95 U. DET. MERCY L. REV. 115, 123 (2018) (citing Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 WILLAMETTE L. REV. 315, 325–26 (1997)).

82. *See* Bloom, *supra* note 81, at 123.

Document Creation Process

Another way to reduce the cognitive load on students is to utilize, as they proceed through a drafting problem, the same process for document development in drafting a contract as the students were taught, and utilized, for their legal writing documents. By using the same basic process, terminology, and steps for both legal writing and drafting documents, students will be able to more readily chunk the new information into their existing knowledge. To accomplish this consistency in my course, I began to use a process in the legal writing portion of the course that I had previously only used with my drafting students and incorporated it from the beginning of the year with my legal writing students.

The process, modified from a process developed by Fajans, Falk, and Shapo,[83] has five steps: gathering information, brainstorming, testing, initial drafting, and proofreading. The purpose and function of each step, which the students are accustomed to through the legal writing process, is applied to the drafting process. This connection with previously developed schemas reduces the overall cognitive load on the student completing his first drafting assignment.[84]

For each step, a connection is made between the process as applied in a legal writing assignment to the drafting assignment. For example, in the "gathering information" step on a legal writing assignment, students learn to understand the importance of knowing all of the relevant facts and how that intial knowledge is critical to understanding how to proceed with research and development of the document. On the legal writing assignment, students are then taught to continue basic information gathering through the research and use of secondary sources to understand the basic legal principles that control the issues. Similarly, in a drafting assignment students understand that they must have a complete understanding of all of the parties' agreed-upon terms that must be incorporated into the document. The students are also taught the research and use of broad forms and checklists to begin understanding the necessary issues and elements that need to be addressed in the document. While the context and tools are a bit different, the concepts and processes used are the same.

The gathering information step leads a student, creating either a legal writing or drafting document, into the brainstorming phase of

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83. *See generally* Elizabeth Fajans et al., *Writing for Law Practice* (Foundation Press 2015).
84. *See generally supra* notes 54–75 and accompanying text.

the process. In this part of the process, the legal writing student must identify precise legal issues that are raised by the facts and develop pointed research into the primary sources that control the issue in their jurisdiction. The drafting student must also identify potential legal issues raised by the facts and potentially perform research into applicable statutes and case law. Additionally, the drafting student in the brainstorming phase must recognize issues raised by incomplete or imprecise facts and perform additional research into clauses and forms which will help guide the student through the issues. Importantly, the drafting student is able to connect to the schema that research and analysis are cyclical and repetitive, meaning the writer or drafter must go back and forth between researching and writing to reach a final product. This is a concept repeated multiple times throughout the legal writing portion of the course and students are able to use their prior knowledge to develop a drafting document.

After the student develops the initial draft of the transactional document, the next steps are the testing and proofreading phases. Testing refers to the process of reviewing and analyzing the content of the document, while proofreading refers to the traditional steps of reviewing the writing and presenting the document (spelling, grammar, sentence structure, etc.). From the start of the legal writing portion of the course, these are separated. Separating out these processes has proven to be helpful to students, because using the broad term of "proofreading" to refer to both the content and the presentation was too broad, and many students ended up focusing on one or the other, but not both. Again, the skills and terminology the students have learned and applied throughout the legal writing portion of the course are transferred into the drafting portion.

Just like the legal writing portion of the course, the testing phase for both types of documents can be presented as a process of comparison and critical reading. For the legal writing document, the student is taught to compare between sections of the analysis to ensure proper support and foundation for the arguments and analysis presented. For example, the rule of law section must be compared to the arguments to ensure both that the rule is fully developed to support the application of the law to the facts and that the argument is incorporating all relevant rules. Similarly, the drafting students must look at each paragraph and clause of the document and compare it to other sections of the document to avoid internal inconsistencies and omissions which might create ambiguity.

Additionally, the testing phase for both types of documents rely upon critical reading in the form of reviewing the document through the lens of the "adverse reader." For the legal writing document, this means reviewing arguments as an opposing counsel would in order to reveal gaps and weaknesses in the argument. For the drafting student, this means reviewing the document to discover gaps and potential ambiguities that might cause litigation or the opportunity for one party to act inconsistently with the purpose of the document. Using similar terminology for both types of documents allows the drafting student to comprehend this part of the editing process readily.

For both the legal writing and drafting student, the final phase in creating a document is proofreading. While this has always been an important concept of legal writing documents, highlighting this phase for the drafting students emphasizes that contracts and other transactional documents must also be carefully proofread to both enhance professionalism and avoid ambiguity.

By referencing a known process and terminology, the drafting student will be utilizing a known schema from his long-term memory.[85] This will reduce the cognitive load, allowing for more of the student's working memory to be dedicated to the problem-solving and new drafting skills inherent in the assignment. Additionally, the more times this schema is utilized, the more it becomes automatized for both legal writing and drafting assignments.

Storytelling

Another common theme which can be developed throughout both the legal writing and drafting portions of the course is the attorney's role as a storyteller. The applicability and importance of storytelling is clear whenever a student drafts a statement of facts for a trial or an appellate document.[86] As one author noted, that "[t]he real im-

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85. *See* Chelsi Hayden, *Effectively Mentoring New Attorneys: Connecting Law School Experiences to Law Practice*, 86-APR J. Kan. B. Ass'n 19 (2017) (noting that when mentoring new attorneys: "Retrieving previously learned information is easier when there is a connection between the prior learning environment and the current task.").

86. *See* Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 Rutgers L.J. 459, 460 (2001) (citing Albert Tate, Jr., The Art of Brief Writing: What a Judge Wants to Read, in The Litigation Manual: Special Problems and Appeals 235–36 (John G. Koeltl & John Kiernan, eds., 3d ed. 1999)). *See also id.* at 465 (quoting David Ball, Theater Tips and Strategies For Jury Trials 66 (Joseph C. Jaudon et al. eds., 1994)) ("Story is the strongest non-violent persuasive method we know. Tell me facts and maybe I will hear a few of them. Tell me an argument and I might consider it. Tell me a story and I am yours. That is why every persuasive enterprise from the Bible to television commercials relies on story.").

portance of the facts is that courts want to do substantial justice, and they are sensitive to the 'equities.' Consequently, the objective of the advocate must be to write [a] statement [of facts] that the court will want to decide the case [in favor of the advocate] after reading just that portion of the brief."[87]

The teaching of storytelling in the legal writing portion of the course need not be limited to just the statement of facts. Students are taught that litigation documents are opportunities to tell stories and utilize the structure of narrative to present the law more effectively. For example, when presenting a case to demonstrate how a court applied the law to a set of facts (often referred to as a case illustration or rule example) students will learn that an effective writer will take the time to concisely provide the facts of the case so that the reader can understand the context of the court's decision.[88] Even the rule of law section can be used as an opportunity to tell a story: "[the] rule by which a decisionmaker can grant a remedy, impose a punishment, or confer some benefit has the underlying structure of a [ ] story."[89]

The concept of storytelling is one that can be carried from the legal writing portion into the drafting portion of the course to further reduce the students' cognitive load. For this connection to take place, first students must understand that the role of a transactional lawyer is "to construct a cohesive narrative that represents a particular series of events that informs the future actions of the parties."[90] When students begin to see a contract as a narrative rather than just a collection of definitions, terms, and clauses, they will more effectively apply the skills they have learned in legal writing.

One storytelling skill that can be transferred from legal writing into transactional drafting is point of view.[91] Students are taught that, when drafting a statement of facts in a persuasive document, they should tell the story from their client's perspective because the parties to an employment dispute, divorce, or breach of contract, etc., are

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87. Tate, Jr. *supra* note 86, at 236 (*quoting* Frederick B. Weiner, Essentials of an Effective Appellate Brief, 17 Geo. Wash. L. Rev. 143, 145 (1949)).

88. Kenneth R. Swift, *The Writer's Corner: Presenting Case Law Effectively*, 60 Bench & B. Minn. 26, 27 (2003).

89. Stephen Paskey, *The Law Is Made of Stories: Erasing the False Dichotomy Between Stories and Legal Rules*, 11 Legal Comm. & Rhetoric 51, 52 (2014) (emphasis in the original).

90. Susan M. Chesler & Karen J. Sneddon, *Telling Tales: The Transactional Lawyer as Storyteller*, 15 Legal Comm. & Rhetoric: JALWD 119, 122 (2018).

91. *See, e.g.*, Foley & Robbins, *supra* note 86, at 478.

each going to have a different perspective on the dispute.[92] In the legal writing portion of the course, students are taught that an attorney's responsibility in the statement of facts segment is to present the client's perspective, and that skill is transferrable to the drafting portion of the course. The connection to this schema can be shown to the students in the transactional portion of the course in the organization and focus.

The student can be taught that the order and emphasis of certain sections in a contract can create a narrative, just like a statement of facts. Chesler and Sneddon use the example of choices made in a will. For a younger person with small children, the focus of the will might be on caregiving and providing for the child should something happen before the child reaches majority.[93] For an older testator, the focus of the will might be on distribution of assets to their family or even to a charitable function of their choice.[94] Yet another way for students to connect to the point of view is through the use of recitals at the start of the contract which can set a tone and purpose for the entire document.[95]

Another storytelling skill that can connect legal writing and transactional drafting is "humanizing."[96] To humanize a client in a statement of facts for a memorandum or brief, students are taught to utilize party names rather than generic labels or roles (Sonya Smith rather than employee or plaintiff), and perhaps even some otherwise irrelevant biographical facts.[97] Similarly, a transactional document that uses generic role references, such as "Lessor and Lessee" or "Seller and Buyer", will "alienat[e] the parties from their own transaction."[98] Instead, because the contract is going to govern the parties' future relationship, the transactional drafter should utilize the names of the parties, because this will instill "ownership in the parties of their

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92. *Id.* at 478–79 (discussing how different the movie *Rocky* would have been if the story had been told from the perspective of Apollo Creed). *See also* Kimberly Y.W. Holst, *The Fact of the Matter*, 26 No. 1 PERSPECTIVES: TEACHING LEGAL RESEARCH AND WRITING 21, 22–24 (2018) (demonstrating how the synopsis of different films changes with different framing).

93. Chesler & Sneddon, *supra* note 90, at 130–131.

94. *Id.* at 131.

95. Marie A. Moore, *Every Contract Tells a Story (or Should)*, PROB. & PROP. 64, 64 (Jan./Feb. 2014) (demonstrating how recitals could be used to show how a client is more interested in the other party's product than it is from the money and how that could influence a court's interpretation of contract provisions in the future).

96. *See* STEVEN D. STARK, WRITING TO WIN: THE LEGAL WRITER 81-82 (Doubleday 1999) (explaining how to humanize one's client in the statement of facts).

97. Foley & Robbins, *supra* note 86, at 473.

98. Chesler & Sneddon*, supra* note 90, at 128.

rights and obligations" during the life of the contract.[99] These story-telling techniques, just like the other skills and core course concepts discussed above, are transferable from the legal writing to the drafting portion of the course. By linking these concepts, students will more readily attach the new concepts to their existing knowledge, which will expedite the students' learning.

V. USING CLT PRINCIPLES TO DEVELOP EFFECTIVE LEGAL READERS

Bloom's Taxonomy provides a structure for the skills students need, beginning in the first year, to develop the critical-thinking skills necessary to be an effective lawyer: Knowledge, Comprehension, Application, Analysis, Synthesis, and Evaluation.[100] In American legal education, particularly in the first year, the starting points for Bloom's Taxonomy, Knowledge, and Comprehension, are incumbent upon a student's ability to read appellate judicial opinions, because the case method, taught using the Socratic method, are the curriculum tools used in the first year of nearly every law school in the United States.[101]

To effectively participate in the Socratic classroom and use the case method effectively, students must know how to read and analyze an appellate opinion. The student must be able to identify the rules, which provide the basis for the court's opinion and which the professor using the Socratic method will ask the student to apply to other hypothetical facts.[102] The student must be able to discern the difference between a fact and the court's application of the law to the

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99. *Id*. The authors further note that "Transactional documents are more than the mere memorialization of past events. The transactional documents will inform and guide future behavior. To that end, the parties should feel a connection to the documents that embody their current obligations and future responsibilities." *Id*. at 129.

100. Benjamin S. Bloom et al., Taxonomy of educational objectives: the classification of educational goals: handbook I: cognitive domain 2 (Benjamin S. Bloom ed., 1956).

101. *See* Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 Seattle U. L. Rev. 1, 28 (1996) (reporting that out of 383 first-year law professors, 370 (97 percent) "used the Socratic method at least some of the time in first-year classes"); *see also* Jamie R. Abrams, *Reframing the Socratic Method*, 64 J. Legal Educ. 562, 563 (2015) ("Core features of the modern case-based Socratic method in law schools include its (1) inquisitional format; (2) use of appellate cases; and (3) objective to teach students to 'think like lawyers.'").

102. *See* Valerie J. Munson, *Orienting the Disoriented: The Design and Implementation of an Optimal Law School Orientation Program*, 44 W. St. L. Rev. 73, 75 (2017).

facts.[103] The student must be able to understand the court's reasoning and how prior decisions guided the application of the law to the facts.[104] Students are asked to use case analysis as they are quickly moved up Bloom's Taxonomy, sometimes immediately, into Application, Analysis, and Synthesis.[105]

Whether this approach was ever pedagogically sound, today's students are less capable of jumping into the case method and Socratic classroom than prior classes because their critical reading skills are weaker. "'Reading for law school is notably different than other disciplines' because students need to examine what they read and understand its relationship to prior readings as well as its impact on current and future problems."[106] Yet today's incoming students tend to be weak readers, as "[t]hey do not know how to read text closely and have limited practice in reading complex or lengthy pieces of writing. Nor are they accustomed to reading works that demand deep thinking and reflection."[107]

One aspect contributing to the reading issue for today's students are the changes brought upon by reading using computers, laptops, and phones.[108] Students today are far less likely to read a text from beginning to end and, instead, tend to jump from text to text using hyperlinks.[109] Further, students will tend to scan text for the informa-

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103. Many commentators have opined that incoming students lack the critical thinking skills necessary for success as a law student. *See* Barbara A. Kalinowski, *Logic Ab Initio: A Functional Approach to Improve Law Students' Critical Thinking Skills*, 22 J. Legal Writing Inst. 109, 110 (2018); Rebecca Flanagan, *The Kids Aren't Alright: Rethinking the Law Student Skills Deficit*, 2015 BYU Educ. & L.J. 135, 144—145 (2015).

104. Flanagan, *supra* note 103, at 144.

105. *See* Susan Stuart & Ruth Vance, *Bringing A Knife to the Gunfight: The Academically Underprepared Law Student & Legal Education Reform*, 48 Val. U. L. Rev. 41, 52–53 (2013) (noting that "basic cognitive processes also include an array of, sometimes recursive, behaviors of differing difficulty and sophistication in the categories of remembering, understanding, application, analysis, evaluation, and creation").

106. Patricia Grande Montana, *Bridging the Reading Gap in the Law School Classroom*, 45 Cap. U.L. Rev. 433, 445 (2017).

107. *Id.* (citing Ian Gallacher, "Who Are Those Guys?": The Results of a Survey Studying the Information Literacy of Incoming Law Students, 44 Cal. W. L. Rev. 180–86 (2007)) (studying the literacy skills of 740 students from seven different law schools and finding, among other things, that incoming law students read substantially more than the national average, but will experience some reading problems in their first year).

108. *See generally*, Patrick Meyer, *The Google Effect, Multitasking, and Lost Linearity: What We Should Do*, 42 Ohio N.U.L. Rev. 705, 711 (2016) (noting that a majority of US college students who responded to a survey found online reading of academic material to be more distracting and physically uncomfortable).

109. *See* Kari M. Dalton, *Their Brains on Google: How Digital Technologies Are Altering the Millennial Generation's Brain and Impacting Legal Education*, 16 Sci. & Tech. L. Rev. 409, 409–10 (discussing the proclivity to click on hyperlinks or be distracted by technology while reading).

tion they think is necessary.[110] As necessary as this method may be in other areas of their lives to handle the constant barrage of information, which comes their way by all forms of technology and communication, it is insufficient to comprehend the dense, analytical text of the law school curriculum. Additionally, students tend to enter the legal academy without problem-solving skills.[111] The lack of in-depth critical reading and problem-solving skills, combined with the prevalence of the academically underprepared Millennial student to be overconfident in his ability,[112] results in a law student who is unable to adequately participate in the Socratic first-year classroom. As two commentators noted: "emerging empirical evidence reveals that fewer students possess the basic higher-order cognitive processes that the academy has assumed are the threshold educational attributes necessary for success in law school."[113]

Most schools attempt to alleviate some of these deficiencies through formal orientation programs for first-year students. However, "[o]rientation faces historical and structural impediments . . . in becoming an integral part of the regular curriculum and academic program."[114] Orientation, even if mandatory, is often seen by the student as separate from the academic program because many professors do not participate in orientation. Further, most professors post a reading assignment before orientation begins, signaling to the student that the professor thinks the orientation is not important and the assignment itself competes with the student's time and attention during orientation.[115]

That is not to say that orientation does not play an important role in transitioning students into law school. In particular, orientation can create context, which is important to Millennial students who "are

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110. *See id.* at 429–30.

111. Stuart & Vance, *supra* note 105, at 43.

112. Ruth Vance & Susan Stuart, *Of Moby Dick and Tartar Sauce: The Academically Underprepared Law Student and the Curse of Overconfidence*, 53 Duq. L. Rev. 133, 142–43 (2015) ("A number of cultural and social factors are in play in feeding that overconfidence . . . such as her egocentrism and her narcissism. She has also long been told that she is a consumer-student who is competent enough to determine whether or not she is being taught according to her own tastes and perceived needs.") (citing Catherine J. Wasson & Barbara J. Tyler, *How Metacognitive Deficiencies of Law Students Lead to Biased Ratings of Law Professors*, 28 Touro L. Rev. 1305, 1316 (2012) ("Perhaps just as important is her social motivation to be overconfident because it signals to society that one is competent."); Cameron Anderson et al., *A Status-Enhanced Account of Overconfidence*, 103 J. Personality & Soc. Psychol. 718, 730 (2012)).

113. Stuart & Vance, *supra* note 105, at 43.

114. *Id.*

115. *Id*.

motivated to learn when they see a stronger connection between the task and their goal . . . [and] . . . respond best [to] activities that connect them to the real-life and authentic situations."[116] Orientation can provide syntactical context about the legal system, including court structure and hierarchy of authority.[117] Context can also be created often through experiential exercises, which tie the cases and statutes the students will be reading in class to the practice of law, an important connection for Millennial students.

A chief feature of virtually every law school orientation is an introduction to reading and briefing appellate case law.[118] Traditionally, students are given a single case to read and additional cases used in a discussion of reading and briefing a case. Subsequently, students use this information to submit a case brief. Many orientations include feedback on the case brief, either in writing or in a conference.[119] This is an important step for the Millennial student who may be overly optimistic about her skills and needs an accurate assessment of her ability.[120]

The question is whether reading a single case, or perhaps two, is sufficient to prepare today's incoming law students for success. When pondering this question, there are a few fairly universal truths:

1. Under the Socratic/case method used in the first year of law school, the ability to read and decipher relevant information and analysis from a case is the starting point for effective learning;

2. It takes virtually every student significant time to become a moderately proficient reader of case law;

3. The following items cause the average beginning law student significant anxiety:
   A. The possibility of being "called on" in class;
   B. That the material covered in the readings is going to be part of the exam/grade;
   C. The professors' different approaches and terminology for case law;
   D. Confusion in class; and

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116. Lustbader, *supra* note 81, at 340.

117. *See id*. at 345.

118. *See* Valerie J. Munson, *Orienting the Disoriented: The Design and Implementation of an Optimal Law School Orientation Program*, 44 W. St. U. L. Rev. 73, 74 (2017).

119. *See id*. at 77.

120. Lustbader, *supra* note 81, at 361-62.

      E.   The anxiety of wondering if law school is worth the significant personal and financial commitment.

Approaching the critical skill of reading cases under a cognitive load theory, items one and two pertain to the intrinsic cognitive load,[121] the core skill. The items under number three are part of the extraneous cognitive load,[122] which hinders the student's ability to learn the critical core skills of reading and analyzing case law. The ultimate goal should be to move a student's case law reading and analysis skills closer to automaticity in a shorter period of time than what currently occurs. Automaticity is what allows the second-semester law student, and certainly the second and third-year law student, to move through material in the classroom much more quickly.

    To achieve this goal, under the hypothetical start to the 1L year, steps would be taken to remove extraneous cognitive load off of the beginning law student, so that the student can develop the case law reading skills necessary to learn and thrive in the Socratic classroom more quickly:

    1.   The first two weeks of the 1L first semester would be dedicated solely to reading cases and the classes would be taught in a non-Socratic lecture and presentation format.[123] This would remove the significant extraneous load of the Socratic method and accompanying fear of being called on in class. Ideally, these first two weeks would come before the start of the semester for upper-division students, so that those students could provide in-class and small group support.[124]

    2.   The cases for these first two weeks would pertain generally to the course subject matter; however, the student would not be responsible for the material covered in the cases or in the class for the final exam, nor would the class directly impact the final grade

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121. *See supra* notes 62–64 and accompanying text.

122. *See supra* notes 65–67 and accompanying text.

123. One or more legal writing classes at the start of this two-week period would allow the LRW professor to cover foundational information necessary for the IL to fully understand case law, such as court structure, binding and persuasive sources, and federalism. The legal writing professor could also introduce and explain the process noted in step three, below.

124. Because these courses would count toward the ABA class hour requirement, schools could use the available open dates throughout the regular semester to perhaps have fewer classes during midterms or even fewer classes over the last four weeks of the semester, to allow students to prepare for their first set of finals.

in any way.[125] The goal for each class would be to, to the extent possible, ensure that each student has mastered each case covered and is aware of the information that should have been extracted from reading the case. Pre- and post-class quizzing, with accompanying correct answers, could provide significant guidance. Approaching the first two weeks this way would remove the extraneous load caused by the average student's anxiety of wondering if he is "getting it" and understanding the "big picture" and accompanying anxiety over whether he has made a significant personal and financial error in deciding to attend law school.

3.   For these first two weeks, at least, professors would agree on a common process and terminology for approaching each case covered in class. This common process would be a key component to moving the students more quickly towards automaticity, as she would be repeating the exact same process, with the exact same terminology, time and time again, over a two-week period.[126] Further, because of items one and two, above, her sole focus would be on this process, which is a critical component to removing extraneous cognitive load.

A student who goes through this two-week process will be equipped to learn and participate in the Socratic classroom much better. From the very start the student will not only have significantly improved case law reading skills, but will feel much more comfortable with those skills when asked to participate in the Socratic process of breaking down and applying cases under questioning. While course content coverage is always a concern, and therefore professors may scoff at "losing" two weeks of substance, once students are more pro-

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125. While there could be concerns over covering as much material in the course as the professor would prefer, and believe to be necessary, the students' stronger reading skills from the beginning of the course should allow the professor to cover more material in less amount of time, thus making up the difference.

126. One example of process and terminology:

  A. Parties and Dispute: A brief statement of the dispute at hand and parties involved;

  B. Procedural History;

  C. Factual Holding: Which party (if any) prevailed;

  D. Legal Holding: The law the court used to reach its decision. Foundational Law could be a term used to refer to the foundational principles underlying the more precise rules the court applied;

  E. Key Facts: The facts which led the court to its decision (if applicable).

Items C through E would be repeated as necessary for cases with multiple issues.

ficient and comfortable reading and analyzing case law, the professor can reasonably expect the course to move along a bit more quickly.

VI.   CONCLUSION

Reforms in legal education over the last twenty years, driven in part by changes in the legal market, have resulted in an increased focus on skills training for law students. This movement has also spurred many law professors to study the neuroscience of adult learning and incorporate that understanding into scholarship and teaching. Legal Writing professors can utilize this understanding to incorporate a drafting unit into their first-year courses more effectively. By taking steps to reduce extraneous cognitive load and by connecting core concepts and skills from the legal writing to the drafting portion of the course, they would enhance the efficiency and depth of student learning. Further, all of academia could take steps to help students become more proficient in the critical skill of reading and analyzing case law by reducing extraneous cognitive load at the start of the students' law school career.

COMMENT

Justice for All: The Sixth Amendment Mandates Purging All Racial Prejudice from the Black Box

R. Jannell Granger

Special thanks to Professor Lenese Herbert

ABSTRACT

Pena-Rodriguez v. Colorado provided, "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule [codified in Federal Rules of Evidence 606(b)] give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." To qualify, the Court required that the statements display "overt racial bias that cast serious doubts on the fairness and impartiality of the jury's deliberation and resulting verdict." However, for several reasons, the Supreme Court's standard was short-cited and ill-suited for addressing the racial biases that aid the incarceration of minorities, specifically in the context of this comment, black people.[1] First, the Court failed to provide a concise standard for consistently reviewing racially biased statements, which, regrettably, led to varying application of justice in subsequent lower decisions. Second, by requiring the statements to be "overt," the Court failed to

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1. While *Pena-Rodriguez v. Colorado* was a case dealing with a Hispanic man, the Supreme Court held that there was a racial-bias exception with constitutional grounding to the no-impeachment rule. However, this comment aims at how this rule specifically affects Black defendants. For the purposes of this paper, Black will include African Americans, Black Africans, Black Caribbean, Black Latinx, and all others who are residing in America and face the danger associated with being Black in America.

recognize the presence of implicit biases that impede on an individual's Sixth Amendment right to an impartial jury. Both of these short-comings enable the continued perpetuation of injustice and race-based incarceration of black people, thus precluding black people from experiencing the full protections of the Sixth Amendment. This comment proposes a reversible error standard of review for all trial courts to follow and addresses the covert discrimination the Court failed to recognize in *Pena-Rodriguez*: If, during deliberations, a juror makes a race-based statement that has no legitimate relevance to the defendant's guilt, then there is an irrebuttable presumption that the statement influenced, at a minimum, one juror's ability to be impartial, as required by the Sixth Amendment, including but not limited to the statement's utterer.

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INTRODUCTION

*"I don't know if he ever killed anybody, but that n***** got just what should have happened."*[2]

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2. Kim Bellware, *Georgia Just Executed An Intellectually Disabled Man Whose Sentencing Was Tainted By Racism*, HUFFINGTON POST, https://www.huffingtonpost.com/entry/kenneth-fults-execution_us_570d65b5e4b0ffa5937d5a6e (last updated Apr. 14, 2016).

Kenneth Fults pleaded guilty to the murder of Cathy Bounds in 1996, and after a three-day sentencing hearing, the jury voted[3] to sentence Kenneth to death.[4] Eight years later, Thomas Buffington, a white juror from the sentencing, signed a sworn statement admitting that he voted for the death penalty because "that's what that n***** deserved."[5] Despite evidence of racial animus among the jury, on April 12, 2016, 47-year-old Kenneth Fults was killed by lethal injection.[6] The U.S. Supreme Court rejected Fults' appeal for mercy nearly four hours before the scheduled execution.[7] At the time, there was no *Pena-Rodriguez* ruling that required the no-impeachment rule to give way in the presence of overt-racial bias, such as this.

Stories like Fults' are neither unheard of nor atypical. The American justice system has a long history of allowing racial animus towards black people . . . and disallowing justice for black people.[8] For years, America has attempted to address and eliminate overt racism through legal remedies.[9] However, America continuously fails to understand and acknowledge the evolution of its society and how the racism that permeates has never been merely strictly overt but is multi-layered, faceted, and may even masquerade as innocent ignorance, requiring different approaches if eradication is to be successful.[10] Though our laws have been formed to target such overt racism, their silence regarding covert, implicit racism continues to protect the

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3. The final stage of a criminal trial is sentencing, if the Defendant pleaded guilty or was found guilty by a judge or jury. Most states have special laws regarding the imposing of a sentence in a death penalty case. In some cases, a judge can impose the death penalty, but in most cases, it is decided by a jury; *see contra* Woodward v. Alabama, 571 U.S. 1045 (2013).

4. *See* Bellware, *supra* note 2.

5. *Id.*

6. *Id.*

7. *Id.*

8. *See* Vera Institute of Justice, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera (May 2018), https://www.vera.org/publications/for-the-record-unjust-burden ("Racial disparities in the criminal justice system are no accident, but rather are rooted in a history of oppression and discriminatory decision making that have deliberately targeted black people and helped create an inaccurate picture of crime that deceptively links them with criminality."); African Americans were subjected to slave codes, which denied them the rights or freedoms enjoyed by whites. Up until the 1900s, African Americans were also subject to Jim Crow Laws, which had the effect of maintaining forms of dis- crimination in legal, social, and economic forums. Racial Discrimination in the Criminal Justice System 66 *in Interaction Between Ethics and the Criminal Justice System Part I*, https://www.sagepub.com/sites/default/files/upm-binaries/46946_CH_3.pdf.

9. *See generally* Shelley v. Kraemer, 334 U.S. 1 (1948); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Batson v. Kentucky, 476 U.S. 79 (1986); Bailey v. Patterson, 369 U.S. 31 (1962).

10. *See* Jillian Olinger & Kelly Capatosto, *Chipping Away at Implicit Bias*, Kirwan Inst. (Aug. 23, 2017), http://kirwaninstitute.osu.edu/chipping-away-at-implicit-bias/.

very scourge the laws are intended to eradicate.[11] This failure both reaches and infects the criminal justice system of jury deliberations and verdicts.

While the expectation is for jurors to render fair judgements, this expectation is sometimes hindered by the harsh reality: jurors harbor individual biases, which include race-based thinking, that affect impartial deliberations and are a threat to a defendant's right to an impartial jury. Despite this harsh reality, the American justice system has placed a large quantity of faith in the jury system,[12] and instead of protecting the defendant's constitutional right, efforts have been directed at protecting the jurors' deliberations regarding defendants' fates.

Specifically, jury deliberations are hermetically sealed in a so-called "black box." The black box is created via the courts limiting inquiry into the jury room discussions and, thus far, attempts to eliminate or thwart external influence on jury decision-making and deliberation after the close of the case and before rendering a verdict. The black box theory intends to protect jury deliberations from outside influences, but, as a side effect, limits impeachment regarding what occurred during the deliberation process. These protections are codified in rule 606(b) of the Federal Rules of Evidence, which provides, "during an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment."[13] Codification of the no-impeachment rule sought to protect jurors' deliberative process; however, the rule is silent regarding protection of criminal defendants against the corrupting biases that the jurors harbor and bring into the concentrating vault, that is the black box.

In 2017, the Supreme Court in *Pena-Rodriguez v. Colorado* began to pry open the black box and held that the Sixth Amendment allows juror impeachment to invalidate race-based verdicts.[14] The Court determined that the right to an impartial jury outweighed the

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11. While it is human nature to be biased in some aspect, it is unfair to accept the naturalness of implicit bias, because it prevents certain groups, specifically African Americans, from enjoying the full protection of the Constitution.

12. Powers v. Ohio, 499 U.S. 400, 411 (1991) ("The Jury acts as a vital check against wrongful exercise of power by the state and its prosecutors.").

13. Fed. R. Evid. 606.

14. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017).

"no-impeachment rule" of FRE 606(b) if a juror provides evidence of "overt racial bias."[15] Specifically, *Pena-Rodriguez*'s test requires — 1) a showing that one or more jurors made a statement exhibiting *overt* racial bias, casting doubt on the impartiality of the jury, and 2) the statement must show that racial animus was a *significant* motivating factor in the juror's vote to convict.[16]

Though *Pena-Rodriguez* was a useful step in limiting race-based jury deliberations and verdicts, it was also insufficient. Only the most overt (some might even say regressive) race-based statements are violative of the Sixth Amendment. Without defining what constitutes an "overt racial bias," the Supreme Court ultimately offered lower courts a "no-standard" standard, creating a playground for inconsistencies among courts when determining whether a criminal defendant was deprived of an impartial jury due to racial prejudice.

Additionally, the Court's *Pena-Rodriguez* test fails to recognize how covert race-based sentiments or determinations are also violative of the Sixth Amendment's assurance of an impartial jury. The requirement that the juror's statement be clear and overt to cast doubt on the impartiality of the jury ignores the reality that most biases are not exhibited in overt racial name-calling, but are tacit or implicit.[17]

This comment argues that the *Pena-Rodriguez* ruling is limited and does not protect black people against race-based jury verdicts as the Court intended because the Court only addresses overt racism and ignores the prevalence of implicit bias. To ensure the full protections of the Sixth Amendment, the Court should establish a reversible error standard that evaluates "overt racial bias" and encompasses covert racial bias to provide uniformity in trial courts when examining claims of racially motivated verdicts.

Part I of this comment examines the history of the no-impeachment rule within the American justice system and the policy behind its existence. **Part II** is a synopsis of the *Pena-Rodriguez* decision. **Part III** analyzes how the lower courts have interpreted "overt racial bias" and examine the inconsistencies in the application of the *Pena-Rodri-*

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15. *Id.* at 867–68. ("It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons. . . The jury is to a 'criminal defendant's fundamental protection of life and liberty against race or color prejudice. Permitting racial prejudice in the jury system damages 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'").

16. *Id.* at 859.

17. Anthony Greenwald & L.H. Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 954, 954–55 (2006).

guez decision. **Part IV** analyzes the policy behind expanding the *Pena-Rodriguez* standard and proposes a reversible error standard that addresses implicit biases. **Part V** examines additional safeguards necessary to ensure the protection of black defendants' right to an impartial jury. Finally, **Part VI** concludes the examination of the "black box".

I.   "NO-IMPEACHMENT" RULE:

A.   The Origin: *Nemo turpitudiem suam alligans audietur*[18]

The prohibition against post-verdict juror testimony is derived from the English case *Vaise v. Delaval*.[19] In *Vaise*, Chief Justice Mansfield determined that juror affidavits were inadmissible to impeach their own verdicts when a defendant attempted to prove that the jury had improperly reached a verdict.[20] The decision was grounded in the doctrine *nemo turpitudiem suam alligans audietur*, which disallows an individual to be heard to invoke his/her own guilt.[21] Subsequently, American courts adopted Mansfield's decision as the Mansfield Rule–a court cannot receive an affidavit from a juror alleging that one of the jurors engaged in juror misconduct. This served as the foundation for the inadmissibility of all juror testimony for the purpose of impeaching a verdict.[22]

B.   America's Adoption of the Mansfield Rule

During the nineteenth century, courts, both federal and state, began to modify the Mansfield Rule. In 1852, the Supreme Court in *United States v. Reid* barred a verdict from being challenged after learning that a newspaper was sent to and read by a juror.[23] While in *Wright v. Illinois & Mississippi Telegraph Co.*, the Supreme Court of Iowa held that juror affidavits alleging that an award for damages was calculated by averaging the individual suggestions of the jurors could be used to challenge the validity of the final verdict.[24] Referred to as

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18.   A witness shall not be heard to allege his own triumph.

19.   Vaise v. Delaval, (1785) 99 Eng. Rep. 944 (K.B.).

20.   *Id.*

21.   John L. Rosshirt, *Evidence — Assembly of Jurors' Affidavits to Impeach Jury Verdict*, 31 Notre Dame L. Rev. 484 (1956).

22.   *See* Dorr v. Fenno, 29 Mass. 521, 525 (1832) ("The [Mansfield] rule is now perfectly well settled in both countries and may be laid down to be, that the [t]estimony of jurors is inadmissible to show their own misbehavior . . . .").

23.   United States v. Reid, 12 How. 361, 361–62 (1851).

24.   Wright v. Ill. & Miss. Telegraph Co., 20 Iowa 195, 210 (1866).

the Iowa Rule, the decision in *Wright* determined that jurors could testify about objective facts and events that occurred during the deliberations, as long as they did not testify about their subjective beliefs, thoughts, or motives.[25] The Iowa Rule, which pried open the jury box and loosened the reins of the Mansfield Rule, was adopted by a minority of state and federal courts.[26]

In 1915, the Supreme Court adopted the no-impeachment rule in *McDonald v. Pless*, explicitly rejecting the Iowa rule.[27] The Court held that juror testimony about objective events in the jury room could not be utilized to challenge a verdict.[28] The Court reasoned that, even if the jury acted unjustly, the defendant could obtain relief only if the facts could have been proven by a witness who was competent to testify as to set aside a verdict.[29] Meaning, jurors were no longer available to testify on the events that occurred during the deliberations with or without their subjective beliefs, as the Iowa Rule once provided.

Nearly fifty years after the Iowa Rule, the black box had been, once again, slammed shut because of policy considerations supporting the common law rule against the admission of jury testimony to impeach a verdict: freedom of deliberation, finality of verdicts, and protection of jurors against harassment.[30] The Court in *McDonald v. Pless* explained that allowing juror impeachment "would open the door to the most pernicious arts and tampering with jurors."[31] However, the Court, in an aside, also acknowledged that in the gravest and most important cases, it may be impossible to exclude juror testimony without violating the principles of justice.[32]

Not soon after, the no-impeachment rule was codified as Rule 606(b) of the Federal Rules of Evidence. The version signed into law reads:

Competency of juror as witness

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court

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25. *Id.*

26. *See* Perry v. Bailey, 12 Kan. 539, 544–47 (1874); Josephson v. Meyers, 180 Conn. 302, 310 (1980).

27. *See generally* McDonald v. Pless, 238 U.S. 264, 269 (1915).

28. *Id.*

29. *Id.* at 267.

30. *Id.* at 267–68.

31. *Id.* at 268.

32. *Id.* at 268–69.

must give a party an opportunity to object outside the jury's presence.

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.[33]

During 606(b)'s codification, the House of Representatives attempted to enact a no-impeachment rule similar to the Iowa Rule, as a more lenient rule would promote justice.[34] However, the Senate proposed a narrower rule in hopes of encouraging the confidentiality of deliberations and avoiding possible harassment of the jurors.[35] Even in its earliest stages, there is evidence of the contention between protecting jury deliberation and protecting the criminal defendant's right to an impartial jury.

C. Pre-*Pena-Rodriguez* Application of the Codified No-Impeachment Rule

Following the codification of the no-impeachment rule under FRE 606(b), the Supreme Court held in *Tanner v. United States* in 1987 and *Warger v. Shauers* in 2014 that the Sixth Amendment of the Constitution did not mandate an exception to the no-impeachment rule.[36] The *Tanner* Court reasoned that the safeguards in place during the trial protected the defendant's Sixth Amendment right to an

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33. FED. R. EVID. 606.
34. Tanner v. United States, 483 U.S. 107, 123 (1987) (citing H.R. 5463, 93d Cong. 2d Sess (1974)).
35. *Id*. at 123–25 (citing S. Rep. No. 93-1227, at 13–14 (1974)).
36. *Id*. at 126–27; Warger v. Shauers, 135 S. Ct. 521, 528–29 (2014).

unimpaired jury.[37] Therefore, the Court reasoned, there was no need for a constitutional exception to Rule 606(b) to allow jurors to provide testimony as evidence of jurors under the influence of alcohol and drugs during the trial.[38] The first safeguard, the *voir dire* examination, is designed to ensure the prospective juror is suitable to carry out the responsibility of serving in the jury.[39] The second safeguard is the opportunity for the court, counsel, and court personnel to observe the jurors during the trial.[40] The third safeguard is the opportunity for jurors to observe each other and report any "inappropriate behavior" before the jury returns a verdict to the court.[41] The fourth safeguard is the opportunity for either party to impeach the verdict by evidence of juror misconduct so long as the evidence is not offered by a juror.[42]" In their eyes, these safeguards are sufficient.[43] However, as Justice Marshall and the dissent noted, reliance on these safeguards is misguided.[44] *Voir dire* cannot disclose misconduct that occurs *during* the trial.[45] Also, certain misconduct, such as implicit bias, is not readily verifiable through non-juror testimony.[46] However, the majority, consistent with past decisions, determined that the protection of the jury box outweighed the need to enforce the protections of the Sixth Amendment.

Likewise, the *Warger* Court rejected a Sixth Amendment exception to Rule 606(b), concluding that the rule did not allow juror testimony to pursue an inquiry into the validity of the verdict during the post-verdict stage.[47] In *Warger v. Shauers*, Warger's attorney was contacted, following the verdict, by a jury member who had gained the sympathy of other jurors by informing them that her daughter had been in a similar automobile accident to the one on trial, and how a certain verdict would have affected her daughter.[48]

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37. *Tanner*, 483 U.S. at 127.

38. *Id.* at 125.

39. *Id*. at 127.

40. *Id*.

41. *Id*. (citing Lee v. United States, 454 A.2d 770, 772 (D.C. Cir. 1982)).

42. *Id*.

43. *See generally* Taurus Myhand, Note, *Will The Jury System Survive the Pena-Rodriguez Exception to Rule 606(b)?*, 23 Tex. J. on C.L. & C.R. 103, 110–11 (2018).

44. *Tanner*, 483 U.S. at 141–42.

45. *Id*. at 142.

46. *Id.*

47. *Warger*, 135 S. Ct. at 524.

48. *Id.* at 522.

Warger claimed that the alleged misconduct should result in a new trial,[49] but the Court found the statement inadmissible based on Rule 606(b).[50] Relying on Congressional intent, the Court determined that had Congress intended to, it could have prescribed a broader version of the no-impeachment rule that would have allowed inquiry into jury impartiality.[51] However, according to Rule 606(b), there is a strict prohibition against the use of *any* evidence of juror deliberation, subject only to the express exceptions for extraneous information and outside influences.[52] The Court relied heavily on legislative history to 1) confirm that the choice of language was no accident[53] and 2) identify congressional intent,[54] which was to only allow the enumerated exceptions under Rule 606(b). Thus, the Court rejected the use of an affidavit by a juror that discussed evidence of another juror who displayed personal bias during deliberation and was dishonest regarding this bias during the *voir dire* examination.[55]

Warger argued that to avoid constitutional concerns, the Court must interpret Rule 606(b) in a manner that guarantees an impartial jury, which would require the Court to allow the affidavit that was evidence of impartiality.[56] Similar to *Tanner*, the Court emphasized that *voir dire* has been an essential means of protecting the right to an impartial jury and avoiding such constitutional concerns.[57] The Court rationalized that "even if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring the court's attention any evidence of bias before the verdict is rendered, and to employ non-juror evidence even after the verdict is rendered."[58] The Court relied on the presence of *voir dire* to presume that any hint of impartiality had been resolved prior to the rendering of a verdict, and consistently, the Court minimized the prevalence and presence of bias.[59] Additionally, the Court found itself bound by Congress' apparent intent to adopt restrictive federal rules, which would not allow the Court to contravene absent some constitutional excep-

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49. *Id.*
50. *Id.*
51. *Id.* at 523.
52. FED. R. EVID. 606.
53. *Warger*, 135 S. Ct. at 523.
54. *Id*. at 527.
55. *Id.* at 524.
56. *Id.* at 528.
57. *Id.* at 529.
58. *Id.*
59. *Id.* at 523.

tion.[60] The Court refused to create an exception to Rule 606 absent clear congressional intent or actual constitutional concern.

It was not until the *Pena-Rodriguez* decision that the Court realized that clear congressional intent was not required. The Constitution under the Sixth Amendment requires the no-impeachment rule to be set aside in the presence of racially bias statements made during the jury deliberation process.[61] The Sixth Amendment requires that the accused shall enjoy the right to a trial by an *impartial* jury.[62] Impartiality cannot be present if racial bias and animus exist that undermines the fairness of the justice system, which the Court in *Pena-Rodriguez* finally contended.[63] Because the Constitution trumps the Federal Rules of Evidence and congressional intent, the Court determined that there was no need for an exception when the ultimate authority, the Constitution, bars such action. Therefore, the Court need not wait for Congress to do what the Constitution requires to be done.

II. *PENA-RODRIGUEZ V. COLORADO*: BABY-STEPPING IN THE RIGHT DIRECTION

In 2017, the Supreme Court in *Pena-Rodriguez v. Colorado* held that the jury no-impeachment rule must give way to a criminal defendant's Sixth Amendment right to an impartial jury.[64] Such is the case when racial animus plays a dominant role in the jury's decision to convict. Racial bias implicates unique historical, constitutional, and institutional concerns,[65] and the Supreme Court began acknowledging that the need to provide the criminal defendant an impartial jury outweighs the need to protect the jury's deliberation.

Following the conviction of Pena-Rodriguez, two jurors contacted defense counsel, alleging that another juror had made anti-Hispanic statements about Defendant.[66] Miguel Angel Pena-Rodriguez, a Hispanic man who allegedly assaulted two teenage girls in the bathroom of a Colorado horse-racing facility, was identified by both teenage sisters as the assaulter.[67] The State charged Pena-Rodriguez with harassment, unlawful sexual contact, and attempted sexual assault on a

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60. *Id.* at 530.
61. *Pena-Rodriguez*, 137 S. Ct. at 858.
62. U.S. Const. amend. VI.
63. *Pena-Rodriguez*, 137 S. Ct. at 859.
64. *Id.* at 858.
65. *Id.* at 868.
66. *Id.* at 857.
67. *Id.* at 861.

child.[68] Before the jury was empaneled, members of the venire were repeatedly encouraged to reveal any impartiality concerns.[69] None of the empaneled jurors expressed any reservations based on race or any other bias.[70]

Following the discharge of the jury, petitioner's counsel entered the jury room to discuss the trial with the jurors.[71] Two jurors remained to speak with counsel in private, where they revealed that during deliberations, Juror H.C. stated that Pena-Rodriguez was guilty because he was Mexican and "Mexican men take whatever they want,"[72] "Mexican men had a bravado that caused them to believe that they could do whatever they wanted with women,"[73] and "nine times out of ten Mexicans were guilty of being aggressive towards women."[74] H.C. based his opinion on his prior employment as an enforcement officer.[75]

In response to these statements, Pena-Rodriguez moved for a new trial; however, the Colorado trial court held that testimony about jury deliberations is inadmissible under Colorado Rule of Evidence 606(b) because, like the corresponding Federal Rule of Evidence 606(b), jury testimony is barred from challenging a verdict.[76] The Colorado Court of Appeals and Colorado Supreme Court affirmed, relying heavily on the decisions in both *Tanner* and *Warger* which rejected constitutional challenges to the federal no-impeachment rule as applied to evidence of juror misconduct or bias.[77] Thus, the verdict was deemed final, and Pena-Rodriguez was sentenced to two years of probation and was required to register as a sex offender.[78] The United States Supreme Court granted certiorari to finally address whether the no-impeachment rule in the context of allegations of racial bias undermines our nation's constitutional duty to an impartial jury, free from racially motivated decision making.[79]

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68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 862.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 862–63; *see also* Brief of Constitutional Accountability Center as Amicus Curiae in Support of Petitioner, p. 4, Pena-Rodriguez v. Colorado 137 S. Ct. 855 (2016) ("When the Framers drafted our enduring charter, they enshrined the right to an impartial jury trial in the

With a 5-3 vote, the United States Supreme Court reversed and remanded the case,[80] holding that the Sixth Amendment requires that the no-impeachment rule be set aside when one or more of the jurors exhibit racial bias that cast serious doubt on the fairness and impartiality of the jury.[81] The Court noted how this country's history of racial discrimination and the need to alter the systemic distrust in the justice system outweighed the policy behind the common law no-impeachment rule.[82] In chronicling the history of the no-impeachment rule, Justice Kennedy admonished that "it must become the heritage of our nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons."[83] Overt racial prejudice is so detrimental to the justice system that an exception to the no-impeachment rule is required to purge racial prejudice from the administration of justice.[84]

From 1880, when the Court interpreted the Fourteenth Amendment to prohibit the exclusion of jurors on the basis of race, to 1973, when the Court held that the Constitution requires that the individuals who sit on juries are free of racial bias, the Supreme Court has consistently recognized the need to protect a criminal defendant's fundamental rights to "life and liberty against race or color prejudice."[85] Consistent with this need, the Court in *Pena-Rodriguez* held that "the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of a juror's statement and any resulting denial of the jury trial guarantee."[86] In order to fall into the exception of the no-impeachment rule, two elements must be met: 1) a showing that one or more jurors made a statement exhibiting *overt* racial bias, casting doubt on the impartiality of the jury and 2) a showing that racial animus was a *significant* motivating factor in the juror's vote to convict.[87]

Sixth Amendment, viewing it as critical to a system of ordered liberty. . . The Constitution's explicit requirement that jurors be "impartial" prohibits jury service by those who have racial biases or prejudices that would affect their ability to dispassionately assess the evidence presented in court.").

80. *Pena-Rodriguez*, 137 S. Ct. at 871.

81. *Id.* at 859.

82. *Id.* at 871.

83. *Id.* at 867.

84. *Id.* at 868.

85. *Id.* at 867–68 (citing Strauder v. West Virginia, 100 U.S. 303, 305–09 (1880) and Ham v. South Carolina, 409 U.S. 524 (1973)).

86. *Id.* at 869.

87. *Id.*

Despite the Court's recognition of the Sixth Amendment's applicability against the no-impeachment rule, the *Pena-Rodriguez* Court also made it clear that not every racially animus comment justifies removing the bar on the impeachment of jurors.[88] In part, the Court was acknowledging that a fair and impartial verdict will not always be available for black people, and that the need for such is only narrowly required.[89] Statements made with an overt racial bias that cast "serious doubt on the fairness and impartiality"[90] of the result may be sufficient to protect a criminal defendant, if trial courts determine—based off no clear standard—that the defendant is deserving. The Court did say that to qualify, the bias needs to be, at minimum, a significant motivating factor in the entire jury's deliberation.[91] However, instead of creating a clear standard for determining what constitutes a significant motivating factor, the Court foolishly invested in the trial courts the autonomy of substantial discretion in determining whether the *Pena-Rodriguez* threshold had been met.[92] The failure of the Court to set forth a clear standard led to inconsistencies in application within lower courts.

III. THE LOWER COURTS' INCONSISTENT APPLICATION OF THE *PENA-RODRIGUEZ* STANDARD

While *Pena-Rodriguez* reinforced the importance of an impartial jury by recognizing a need for an exception when faced with *certain* race-based verdicts, broad discretion has been afforded to lower courts because of the Court's failure to create a clear standard of what constitutes a triggering of the Sixth Amendment. Notwithstanding *Pena-Rodriguez*, courts remain reluctant to forego the no-impeachment rule despite the evidence of racial biases that render a juror partial against the Defendant. The Court's failure to create a clear standard has led to widespread variations in the application of *Pena-Rodriguez*. Courts cannot agree on what racist statements are *racist enough* to violate the Constitution's requirement of an impartial jury.

The District Court in Minnesota applied the *Pena-Rodriguez* standard, finding that a racially-biased remark denied the defendant, Michael Smith, the right to trial by an impartial jury under the Sixth

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88. *Id.*
89. *Id.* at 867.
90. *Id.* at 869.
91. *Id.*
92. *Id.*

Amendment.[93] In 2012, Smith, a black man, was found guilty on one count of being a felon in possession of a firearm and one count of illegally possessing a short-barreled shotgun.[94] Prior to the trial, the court conducted voir dire of the jury venire, where the venire members were "sworn to tell the truth, were encouraged to be forthright, and were invited to speak with the Court and the parties at sidebar about any sensitive topics."[95] The venire members disclosed information concerning their experiences with, and attitudes toward, the police, North Minneapolis, and black people.[96] Smith specifically proposed voir dire questions regarding his race and the ability of jurors to be unbiased towards him.[97] The Court inquired upon prospective jurors' experiences with black people and whether any juror believed that black people were more likely to possess guns than others.[98] Once selected, each member of the jury venire swore to be fair and impartial and to follow the court's instructions.[99] Smith was convicted.[100]

Years after the verdict was rendered, the United States District Court in Minnesota received an email from a juror, "D.B.", who had recently become aware of the Supreme Court's decision in *Pena-Rodriguez*.[101] D.B. had reached out because of a racial remark made during the jury deliberations of *Smith*,[102] and he believed that it could have influenced the ruling.[103] A few months later, Smith filed a motion for a new trial, alleging that a juror made improper racial statements during jury deliberations.[104] In support of Smith's motion for a new trial and request for a hearing, the affidavits of two jurors were provided. In D.B.'s affidavit, D.B. recalled a statement made by juror W.B. during deliberation: "You know he's just a banger from the hood, so he's got to be guilty," to which no jurors, including D.B.,

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93. United States v. Smith, No. CR 12-183, 2018 WL 1924454, at *1, *15 (D. Minn. Apr. 24, 2018).

94. *Id.* at *1.

95. *Id.* at *1.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at *2.

100. *Id.* at *4.

101. *Id.*

102. Racial bias seeped into the jury deliberation despite the presence of a thorough safeguard such as voir dire. This case further refutes the argument that procedural safeguards in the jury selection process are sufficient to protect the criminal defendant. Absent *Pena-Rodriguez*, Smith would not have been adequately protected.

103. *Smith*, supra note 93, at *4.

104. *Id.*

responded.[105] However, D.B. did admit that, because of the statements made by W.B., he began to reconsider Smith's credibility in light of his race and where he lived versus solely examining the evidence.[106] In the affidavit of the second juror, A.J., he recalled that during deliberations, a middle-aged white male juror made a comment suggesting that because Smith is a black person with a previous criminal record living in North Minneapolis, he must be guilty.[107]

Using the *Pena-Rodriguez* framework, the Court first considered whether the statement that Smith was a "banger from the hood and was guilty" clearly and overtly indicates racial bias or hostility.[108] The Court determined that when considered without context, the term "banger" –slang for "gangbanger"– does not explicitly invoke race.[109] There was no evidence presented at trial that identified Smith as a gang member.[110] However, the Court reasoned that "banger" combined with "hood" in reference to an inner-city African American neighborhood, employed racial stereotypes that black men from the inner city are gang members, clearly indicating racial bias and animus as a significant and motivating factor in the juror's vote to convict.[111] The Court also noted the commenting juror's encouragement of other jurors to use similar racial stereotypes to find the defendant guilty.[112] The Court found overt racial bias that influenced the jurors' deliberation process; thus, the no-impeachment rule gave way to the Sixth Amendment's guarantee of the right to trial by an impartial jury, and the defendant's motion for a new trial was granted.[113]

However, *Smith* seems to be an anomaly with regard to the application of the *Pena-Rodriguez* exception, and most courts are more reluctant to find that the racial animus displayed by the juror is sufficient to give way to the no-impeachment rule. About five weeks after the jury verdict was issued for Raymond Baker, a man found

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105. *Id.*
106. *Id.*
107. *Id.* at *5.
108. *Id.* at *9.
109. *Id.* at *10.
110. *Id.*
111. *Id.*; *see also* Yurii Horton & Raagan Price et al., *Poverty & Prejudice: Media and Race*, EDGE (June 1, 1999), https://web.stanford.edu/class/e297c/poverty_prejudice/mediarace/portrayal.htm ("[G]angster culture has become so popular through such media as gangster rap that many of the blaxploitation movies of the 1990s have huge crossover audiences. . .. The only true exposure. . .people get to blacks is through these movies and the music. Therefore, their view of black culture and black people is skewed by such movies.").
112. *Smith*, supra note 93, at *11.
113. *Id.* at *15.

guilty of participating in a conspiracy to distribute and possess with intent to distribute more than 100 grams of heroin, Juror No. 10 contacted Baker's trial counsel.[114] The juror then expressed concerns about racial bias involved in the deliberation process because one of the other jurors stated that he knew the defendant was guilty the first time he saw him, which was before he was sworn in as a juror.[115] Baker's trial counsel requested permission to inquire further of the jurors, but the district court stated, "the proffered resulting testimony would be inadmissible for purposes of challenging the validity of the verdict."[116]

The Court of Appeals agreed, stating that the *Pena-Rodriguez* holding, recognizing that the Constitutional right to an impartial trial trumps the no-impeachment rule, is narrowly applied.[117] While Baker argued that the unnamed juror's statement of the defendant being guilty upon first glance is indicative that the juror determined Baker's guilt "based on racial stereotypes or animus," the court emphasized the need for such statements of bias to be *overt*.[118] It was not sufficient that the juror determined the guilt of the defendant by simply looking at him. The court did not inquire about what look the defendant had that rendered him guilty in the eyes of the juror. If asked, it is doubtful the juror could justify his "immediate knowing" absent reference to the defendant's race. However, the *Pena-Rodriguez* rule was read literally, which constrained the ability to interview jurors post-verdict in order to inquire about covert biases that may have rendered a verdict unconstitutional. There was no overt racial animus, so there was no Sixth Amendment issue, according to the court.[119] Additionally, the court justified its refusal to inquire extensively into the statements leading to the verdict by asserting the need to protect jurors, reemphasizing the importance of keeping the jury box closed. Thus, the court affirmed Baker's conviction and ignored the possibility that racial bias, and not the facts, had been the determination of guilt.[120]

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114. United States v. Baker, 899 F.3d 123, 128 (2d Cir. 2018).

115. *Id.* at 128–29.

116. *Id.* at 129.

117. *Id.* at 133.

118. *See* Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017) (noting that "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry.").

119. *Baker*, 899 F.3d at 133–34.

120. *Id.* at 134.

In *Williams v. Price*, another trial court determined a juror using n***** during deliberations was not sufficient to cast serious doubt on the impartiality of the jurors.[121] Although a juror referred to a fellow juror as a "n***** lover," because the slur was not directed at the defendant, *Pena-Rodriguez* did not apply.[122] According to the court, such a statement does not tend to show that racial animus was a significant motivating factor in the juror's decision to convict, as it was in *Pena-Rodriguez*.[123] This approach added an additional element to the *Pena*-Rodriguez standard, requiring that overtly racist statements be directed at the criminal defendant. Such a requirement ignores that the use of the phrase "n****** lover" implies a general racial animus towards Black people that would greatly influence a juror's decision to convict.[124] Whether or not the word is aimed at a black person does not change the implications associated with the use of the word. However, the court incorrectly ignored that the racial hostility directed towards a fellow juror is indicative of a juror's use of that same racist sentiment to determine the guilt of a black defendant.

Similarly, in *United States v. Robinson*, the Sixth Circuit Court of Appeals determined that *Pena-Rodriguez* was not applicable to the juror's statement that she "found it strange that the colored women are the only two that can't see and that she thought they were protecting defendants because they felt they 'owed something' to their 'black brothers.'"[125] The Sixth Circuit determined that despite the clear indication of racial bias or hostility, the comments did not show that animus was a "significant motivating factor" in the juror's own vote to convict.[126] In neither instance did the jurors suggest that they voted to convict defendants because they were Black, precluding the admission of juror testimony under the Sixth Amendment.[127] However, had the *Pena-Rodriguez* standard accounted for the implications that the ju-

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121. Williams v. Price, No. 2:98CV1320, 2017 WL 6729978, at *8–9 (W.D. Pa. Dec. 29, 2017).

122. *Id.* at *9.

123. *Id.*; The impact of the *Pena-Rodriguez* rule is likely going to be limited, because of the rule's threshold requirement and the Supreme Court's decision to give the lower courts autonomy in implementing the rule. Virginia Weeks, *Fairness in the Exceptions: Trusting Juries on the Matters of Race*, 23 Mɪ. J.R.L. 189, 198–99 (2018).

124. Kennedy, Randall L, *Who can Say "Nigger"? And Other Considerations*, 26 J. ᴏғ Bʟᴀᴄᴋs ɪɴ Hɪɢʜᴇʀ Eᴅ. 86, 87 (2000). The word n***** has served as a way of referring derogatorily, contemptuously, and often menacingly to blacks. It is undoubtedly the best-known racial insult in America, and n***** is a key word in the lexicon of race relations.

125. United States v. Robinson, 872 F.3d 760, 771 (6th Cir. 2017).

126. *Id.*

127. *Id.*

ror's statements suggested, the court would have determined that the animus was a significant factor in the juror's vote to convict.

The courts' determinations in *Price* and *Robinson* ignore how racial bias is always a significant factor in people's day-to-day decision-making process.[128] According to the Kirwan Institute for the Study of Race and Ethnicity,[129] "research from the neuro, social and cognitive sciences shows that hidden biases are distressingly pervasive, that they operate largely under the scope of human consciousness, and that they influence the ways in which we see and treat others, even when we are determined to be fair and objective."[130] Everyone possesses implicit biases. No one is immune from them, not even people with avowed commitments to impartiality.[131]

Accordingly, the jurors in *Price* and *Robinson* cannot make such statements that are clearly indicative of racial prejudice and be expected to leave those prejudices aside while making their determinations to convict. Race-based biases are present in both cases, which, as established earlier, are known and proven determinative factors that supplant impartiality or fairness regarding its denigrated/raced targets. By determining that statements such as "n***** lover" are not sufficient to show racial animus influencing a juror's decision to convict, the court is choosing to be ignorant to the extent that implicit bias influences how we make decisions.[132]

As shown, the trial judge is vested with substantial discretion in deciding if the *Pena-Rodriguez* threshold has been met. Because "not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar,"[133] lower courts have applied *Pena-Rodriguez* unintelligibly by recognizing some statements as sufficient to allow further inquiry, while others not. The Court, in declining to address how much evidence of racial bias is necessary for the no-impeachment bar to give way, has allowed the lower courts to pro-

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128. Mahzarin R. Banaji & Anthony G. Greenwald, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE 55 (2013) ("Every day, automatic preferences steer us toward less conscious decisions, but they are hard to explain because they remain impervious to the probes of conscious motivation.").

129. The Kirwan Institute for the Study of Race and Ethnicity at The Ohio State University has been studying evidence of implicit bias since 2003. Bailey Maryfield, *Implicit Racial Bias*, JUSTICE RESEARCH & STATISTICS ASSOCIATION 4 (Dec. 2018).

130. *Id.*

131. *Id.*

132. Implicit bias's impact "on a person's decisionmaking and behaviors does not depend on that person's awareness of possessing these attitudes or stereotypes." Jerry Kang & Judge Mark Bennet et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1129 (2012).

133. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017).

vide justice inconsistently. While the Seventh Circuit has historically required that racial bias pervade the jury room,[134] the Ninth Circuit has determined that one racist juror is sufficient to justify a need for a new trial.[135] Because determining what meets the racial bias standard has been left to the lower courts, presumably the standard will vary between jurisdictions and provide for inconsistencies in granting constitutional rights, as shown above. What will constitute as a sufficient disruption to a defendant's fair trial in one jurisdiction will not be sufficient in another. This leaves for inconsistencies of application across the nation for determining when a citizen's Sixth Amendment right is being impeded. For this reason, I propose a new standard for determining whether racial comments made during the deliberation process require the no-impeachment rule to give way to the heft of the Sixth Amendment.

IV. ACKNOWLEDGING AND ERADICATING *ALL* RACIALLY BIASED VERDICTS THROUGH THE REVERSIBLE ERROR STANDARD

Before proposing the new standard, it is important to define racism in the context of this comment so that it will be clear what the proposed standard is aimed to address. Racism can be defined in one or two ways: "[o]ne definition is restrictive–racism, which is only identified when it results from the intentionally harmful conduct of conscious and deliberate racists. The other definition is expansive. Under this definition, racism can result from deliberate or unintended actions of persons who are either conscious or unconscious racists. The expansive definition suggests that racism's cause is structural and that its existence is not dependent upon bad actors, but upon institutions and social practices. Eliminating racism, then requires changing institutions and social practices."[136] For the purpose of this comment, we will be adhering to the expansive definition, which recognizes that racism depends upon the institutions that reinforce and protect it. One of these institutions is the jury system. The criminal justice sys-

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134. *See* Shillcutt v. Gagnon, 827 F.2d 1155, 1158–59 (7th Cir. 1987) (holding that Rule 606(b) cannot be applied where racial prejudiced affected the outcome of the verdict).

135. *See* United States v. Henley, 238 F.3d 1111, 1120–21 (9th Cir. 2001) (holding that Rule 606(b) does not preclude the admission of racially biased statements made by a juror outside the deliberation room to show that the juror lied during *voir dire*); *contra* Warger v. Shauers, 574 U.S. 40 (2014).

136. Kenneth B. Nunn, *The R-Word: A Tribute to Derrick Bell*, 22 U. FLA. J.L. & PUB. POL'Y 431, 436–37 (2011).

tem as an institution has allowed individual jurors to bring their biases into the deliberation process by not inhibiting the entry of individually held racism.

In the past, politics and law would unabashedly stand on racist ideologies and platforms.[137] This enabled such ideologies to become deeply engrained in the "justice system," becoming an institutional part of America's *justice for some*.[138] Fortunately, the work of civil rights activists has contributed to overt racism becoming socially unacceptable, but the work did not remove racisms ever surreptitious presence in our society. Modern racism is people expressing racial bias in more nuanced and "facially neutral" ways as opposed to explicitly. Structures and systems allow this racism to present itself as covert biases that are determinative of the treatment of Black people.[139] Racism is not "less real or pernicious" because it takes a subtler form than before,[140] and prejudice is not always explicitly expressed.[141] Instead race-based bias often only comes to light when justifying ideologies or stereotypes, and thus, is able to hide and manifest in the dark–the literal silent killer. However, implicit bias testing has shed light on the silent presence of widespread covert racism in America, in addition to overt racism.[142]

The Court in *Pena-Rodriguez*, as it has historically done, only addressed overt racial animus. While this may have been a step, it is simply that–a mere *step*. Unfortunately, overt racial prejudice is not the only form of racial prejudice, and the Court's holding in *Pena-Rodriguez* fails to recognize this reality.[143] By interpreting the Sixth

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137. *Id.* at 436; Governor George Wallace, Segregation Now, Segregation Forever (Jan. 14, 1963); 9 PRESIDENT WOODROW WILSON, A HISTORY OF THE AMERICAN PEOPLE 58 (1902) ("The white men of the South were aroused by the mere instinct of self-preservation to rid themselves, by fair means or foul, of the intolerable burden of governments sustained by the votes of ignorant negroes and conducted in the interest of adventurers.").

138. *See generally* Korematsu v. United States, 323 U.S. 214 (1944); Barr v. E. Bay Sanctuary Covenant, 588 U.S. 7 (2019); *see also* Katie Benner, *Eric Garner's Death Will Not Lead to Federal Charges for N.Y.P.D. Officer*, N.Y. TIMES (July 16, 2019), https://www.nytimes.com/2019/07/16/nyregion/eric-garner-case-death-daniel-pantaleo.html?searchResultPosition=1.

139. *See* Christian B. Sundquist, *Uncovering Juror Racial Bias*, 96 DENV. L. REV. 309, 341 (2019) (". . . 'genuine prejudices' are often not explicitly expressed as they are 'restrained by beliefs, values and norms that suppress' such expression in modern society.").

140. Rose v. Mitchell, 433 U.S. 545, 558–559 (1979) (noting that 114 years after the Civil War, racism is not less real, but has instead taken a more subtle form).

141. Jeff Nesbit, *America, Racial Bias Does Exist*, U.S. NEWS & WORLD REP.: AT THE EDGE (Jan. 13, 2015), https://www.usnews.com/news/blogs/at-the-edge/2015/01/13/america-racial-bias-does-exist.

142. *Id.*

143. Michael Pittaro, *Implicit Bias Within the Criminal Justice System*, PSYCHOL. TODAY: THE CRIME & JUST. DR. (Nov. 21, 2018), https://www.psychologytoday.com/us/blog/the-crime-

Amendment to only disallow overt racial animus, the Court continues to ignore a system that thrives on implicit biases. This in turn leads to the failure of appropriately excavating and addressing the subtle biases that disallows *justice for all*.

Given the insufficiency of the current *Pena-Rodriguez* test, that simply requires a showing of a clearly overt racial statement casting doubt on the impartiality of the jury and a showing that racial animus was a significant motivating factor,[144] I propose a reversible error standard. The reversible error standard of review provides trial courts with uniformity regarding which statements, whether overt or covert, cast serious doubt on the impartiality of the jury. Also, it will clarify when racial animus is a significant motivated factor.

The legal system has recognized the need of the reversible error standard when trials are wrought with mistakes. The reversible error standard of review is applied when an error is so significant that the verdict needs to be vacated. Under this proposed standard of review, the first question the court must ask is whether the juror's statement was racially explicit or rooted in a racial stereotype. Any statement that reflects the juror's inability to provide a thorough and reasoned determination casts doubt on the legitimacy of the deliberation.

A. Was the juror's statement overtly racist, or was the statement covertly racist with underlying racial stereotypes?

This first question expands the Court's requirement of a showing of an *overt* racial statement that casts doubt on the impartiality of the jury. The reason for such a broad initial question is because any time a statement is made on the basis of racial stereotypes, whether it be overt or covert, the statement casts doubt on the impartiality of the jury. When a stereotypical statement is made during the jury deliberation process, it undermines the concept of an impartial and fair trial, because the juror is allowing biases–whether implicit or explicit–to influence their decision. Not only are these biases influencing the individual juror's decision, but once the statement is uttered, it now has the propensity to impact other jurors. The statement need not be as

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and-justice-doctor/201811/implicit-bias-within-the-criminal-justice-system ("[B]lack men are significantly more likely to be stopped and questioned by the police and subsequently arrested, and far more likely to receive a harsher sentence in comparison to white men. This is also true for black women, who are four times more likely than white women to be sentenced to prison and for a longer term. Research also supports the fact that black men are twice as likely to be sentenced to death for capital crimes in comparison to white males.").

144. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017).

overt as "n****r." Instead, when there is a hint of racial animus,[145] any language that suggests that the race of the defendant is influencing the juror's decision, the proposed standard can be triggered. This reversible error standard is sufficiently broad to review statements such as "you know how they are." Thus, if a statement has a hint of racial stereotypes, the integrity and impartiality of the jury's deliberation must be called into question.

The jury's duty is to determine the facts of the case without prejudice or fear. They should not be "improperly influenced by anyone's race, ethnic origin, or gender," and should decide the case "solely from fair consideration of the evidence."[146]

The presence of racial animus alone is not sufficient to impeach the juror's deliberation process. The burden is now on the prosecution to make a showing that the racial statement was legitimately relevant to the defendant's guilt, and thus was not an unjustified race-based comment.

B. Did the case involve a race component, and was the juror's
statement legitimately relevant to the defendant's guilt?

The second question of whether the racial statement was legitimately relevant to the defendant's guilt is important when recognizing that there are bias-related crimes that may require the discussion of race to a certain extent. In such cases, jury instructions limit the extent to which race is used during the deliberation by setting a framework for how race shall be considered within that context. When race is a fact of consequence to the determination of the matter, then it is expected that race will be discussed, but this understanding does not mean that statements with the taint of racial animus will be permissible. Discussing race as an element of the crime, such as "[defendant]'s [name of criminal act] of the victim was committed because of [defendant]'s prejudice against victim's [race]", does not require or justify the use of racial stereotypes to satisfy the element of the offense.[147] Thus, this second question recognizes the need to discuss race in certain contexts, but continues to reinforce the boundaries of question

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145. For the purpose of this comment, implicit bias, overt racism, covert racism, and racial prejudice all constitute racial animus. Racial animus does not only include intentionally racist statements. Racial animus looks at the statements from the view of the defendant and the potential harm the defendant may face. Thus, racial animus is a broad definition of any unjustified race-based statements or insinuations.

146. 1 Criminal Jury Instructions for DC Instruction 2.102 (2019).

147. 1 Criminal Jury Instructions for DC Instruction 8.104 (2019).

one: the use of racial stereotypes to deliberate a defendant's guilt undermines the integrity and impartiality of the jury.

Under the second question, there must be determinations as to whether the racial statement made was necessary to fully assess the guilt of the defendant, and whether the juror only stated what was necessary to do so. The court should participate in a balancing test in weighing factors such as the alleged crime, the animosity of the statement, whether the statement was directed towards the defendant's race, and whether there was a less prejudicial way to raise the question of race. If the necessity of the juror's statement outweighs the potential prejudice associated with the statement, then the court may find that the prosecution satisfied its burden. If, however, despite the prosecution satisfying its burden, the court finds that there was a less prejudicial way of addressing the aspect of race in the crime and that the juror exceeded the scope necessary to properly deliberate the issue, then the court should find the statement within the scope of impeachability.

C. Did the race-based statement influence the decision-making process of at least one juror?

While *Pena-Rodriguez* requires the statement to have been a *significant motivating factor*, it should stand to reason and is not insignificant that, even if the statement was not determinative in the deliberation, the presence of such a statement has tainted the process and undermined its legitimacy under the Sixth Amendment. Therefore, the third question is less of a question and more of a presumption. If the answer to the first two questions are yes, then there is a irrebutable presumption that the statement was a factor in at least one juror's decision to convict the defendant. The "at least one juror" requirement could be satisfied by the individual who made the statement, because evidence of the statement is evidence that biases are influencing the *just* decision-making of that juror. If an overt racial statement or a tacit statement based on racial stereotypes is made, and such statement is not necessary to determine the defendant's guilt in a race-based crime, then there is a irrebutable presumption that the jury deliberation process was undermined, allowing for impeachment.

It is important to note that the standard of review does not require the statement to be directed at the defendant or for the statement to be in context of the crime being charged. In fact, it is clear that the rule has been broadened to include any statement that taints

the impartiality of the jury. The purpose of this breadth is to recognize that racially based statements–whether directed at the defendant, a juror, or an outsider–are reflective of the speaker's inability to leave biases, which undermine the defendant's Sixth Amendment right to an impartial jury, at the door.

V.   SECURING (OVER)DUE PROCESS FOR BLACK PEOPLE

On Monday, March 18, 2019, the Supreme Court refused to review Georgia death row prisoner's petition for certiorari review.[148] Keith Tharpe, a black man, was convicted of murder and sentenced to death.[149] Years later, Tharpe's attorneys obtained an affidavit from one of Tharpe's jurors, attesting that he held racist beliefs.[150] The signed affidavit stated:

> In my experience I have observed that there are two types of black people: 1. Black folks and 2. N*****s . . . . Because I knew the victim and her husband's family and knew them all to be good black folks, I felt Tharpe, who wasn't in the 'good' black folks category in my book, should get the electric chair for what he did.[151]

The juror's repugnant comments were rife with racial slurs and confirmed that his decision to sentence Tharpe to death was based on race.[152] However, even after *Pena-Rodriguez*, the Court denied Tharpe's petition for certiorari, indirectly affirming his death sentence.[153] This reaffirms the limitations surrounding *Pena-Rodriguez*: *Pena-Rodriguez* fails to acknowledge the detrimental harm that results from implicit biases; *Pena-Rodriguez* fails to provide a standard for consistent application for lower courts; and *Pena-Rodriguez* fails to define racial statements that justify reviewing the rendered verdict.

Justice Sotomayor recognized how the racist sentiments expressed by a juror "entrusted with a vote over Tharpe's fate" sug-

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148. *Supreme Court Refuses to Review Juror's Racial Bias in Death Penalty Case*, EJI (Mar. 19, 2019), https://eji.org/news/supreme-court-refuses-to-review-jurors-racial-bias-in-death-penalty-case.

149. *Id.*

150. *Id.*

151. *Id.*

152. Tharpe v. Warden, 898 F. 3d 1342, 1348 (11th Cir. 2018) (Wilson, J., concurring).

153. *Id.* While Tharpe argued that he could not have raised his racial-bias claim in a motion for a new trial or on direct appeal because he did not know of the predicate facts of the claim, he failed to preserve this argument. He did not make this argument before the District Court until a footnote in his reply brief, and the District Court did not address it. Thus, the Court of Appeals focused solely on the ineffective assistant argument.

gested a horrifying risk that racial bias swayed Tharpe's sentence.[154] In the end, Tharpe's fate was not determined by the facts presented, but instead by the blackness of his skin. When Tharpe went on trial, the Constitution promised him the fundamental protection of life and liberty against racial prejudice as affirmed in *Pena-Rodriguez*. There is strong evidence that this promise went unfulfilled.[155] Keith Tharpe's claim was not reviewed and the juror's racist statement was not deemed a violation of Tharpe's Sixth Amendment right.[156] Despite the presence of a *Pena-Rodriguez* decision, Tharpe was outside the scope of the privileges recognized through the decision. Tharpe's situation reinforces how racism can deprive the defendant of the rights afforded and how the "justice" system protects this deprivation. Tharpe is not an outlier, and his fate simply further buttresses how far we are from eradicating the justice system of racial prejudice.[157]

Not even the standard proposed in this comment could have protected Tharpe's Sixth Amendment rights. For this reason, addressing the widespread presence of prejudice within the justice system will require more than a reversible error standard. The new standard will allow for a more encompassing remedy when racial-bias statements have tainted the verdict. However, to truly eradicate racial bias from the jury system, it starts before an impartial verdict. It begins with improved jury selection and improved jury instruction.

With regard to jury selection, research shows that juries make better decisions when they are racially diverse.[158] Psychologist Samuel Sommers invited 200 adults to participate in a mock jury experiment.[159] Each jury consisted of six participants that were either diverse or all-white.[160] Jurors watched a video trial where a Black defendant faced charges of sexual assault, and afterwards the juries convened to discuss the details about the assault.[161] Diverse juries were more thorough in their evaluation of the evidence, which was evident in the fact that diverse juries deliberated twelve minutes longer, dis-

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154. Statement of Sotomayor, J., Tharpe v. Ford, 586 U.S. 7 (2019) (No. 18–6819) Decided March 18, 2019.

155. *Id.* at 4.

156. *Id.* at 3–4.

157. *Id.*

158. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. 597, 599 (2006).

159. *Id.* at 602.

160. *Id.* at 600.

161. *Id.* at 602.

cussed more facts of the case, and made fewer factual errors than all-white juries.[162] Psychologist Sommers noted that the difference in results is because when white jurors interact with diverse groups, they become more careful in the manner they valuate evidence that could trigger their own racial bias.[163]

I note Sommers observation of the benefits experienced by white jurors as a result of diversity in light of the interest convergence theory of Derrick Bell. "The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[164] Because competent jury deliberations is an interest of whites that converges with Black people's interest in enjoying an impartial jury, then maybe the need of diversity in the jury will be recognized and achieved. The present data suggests that racial heterogeneity can have decision-making benefits and can lead white people to demonstrate improved performance. Thus, if the argument for equal treatment is not sufficient, then the overall social benefits should be.

Thurgood Marshall eloquently articulated in the U.S. Supreme Court ruling *Peters v. Kiff*: "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable."[165] Social science research supports Justice Marshall's observations and has found that diverse juries are more likely to "get it right" than non-diverse juries.[166] Diversity promotes debates, that encourages jurors to examine facts and evidence more carefully.[167] Also, diverse juries have an edge in fact-finding, especially when it involves social norms and judgments.[168]

Unfortunately, based on statewide jury selection records, prosecutors remove about twenty percent of African-Americans available in the jury pool, compared with about ten percent of whites.[169] Prose-

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162. *Id.* at 604–05.

163. *Id.* at 601.

164. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 523 (1980).

165. Peters v. Kiff, 407 U.S. 493, 503 (1972).

166. Christina Marinakis, *What are the Benefits of Having Diversity in a Jury Panel?*, Litig. Insights (Sept. 30, 2015), https://www.litigationinsights.com/benefits-diversity-jury/.

167. *Id.*

168. *Id.* (e.g., negligence depends on what jurors think is "reasonable").

169. Lisa Snedeker, *North Carolina Jury Sunshine Project findings now available for journalists covering 2018 elections*, Wake Forest U. Sch. L. (July 30, 2018), http://news.law.wfu.edu/

cutors in urban areas, tending to have larger minority populations, remove nonwhite jurors at a higher rate than other prosecutors.[170] In the end, the consistent result is Black people occupying a smaller percentage of seats in the Black Box. By refining the voir dire proceedings and ensuring that Black people are not intentionally being barred or that those who express racist sentiment are not being let in, the need to trigger the *Pena-Rodriguez* recognition of the Sixth Amendment will decrease. The majority in *Tanner* was correct when they acknowledged that such safeguards can *contribute* to the prevention of racial bias.[171] However, they were wrong in presuming it was sufficient.

In addition to improved jury selections, jury instructions must be improved in order to provide jurors with notice on what constitutes racial bias statements that need to be reported. Justice Kennedy recognized the difficulty in calling someone out for displaying racial bias,[172] which is why it is imperative that universal jury instructions are implemented as guidelines for when jurors should come forward with allegations of jury racial bias. The success of the *Pena-Rodriguez* decision is contingent upon jurors knowing what constitutes a racial bias that impinges on a criminal defendant's Sixth Amendment right. Additionally, it would further emphasize the Court's and the justice system's intolerance for racism–whether implicit or overt–influencing the outcome of the trial.

While many courts quickly address general bias in their jury instructions, not all courts go as far as to explain what constitutes "bias."[173] Additionally, courts have a duty to differentiate racial bias from general bias.[174] Not only should all courts explain that racial bias should not influence the juror's decision, but it should addition-

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2018/07/north-carolina-jury-sunshine-project-findings-now-available-for-journalists-covering-2018-elections/.

170. *Id.*

171. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 866 (2017).

172. *Id.* at 869 ("The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations. It is one thing to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case, as would have been required in *Warger*. It is quite another to call her a bigot.").

173. *See, e.g.,* 9TH CIR. MANUAL MODEL JURY INSTR. CRIM. § 3.1 (2010); 10TH CIR. CRIM. PATTERN JURY INSTR. § 1.04 (2011); ILL. PATTERN JURY INSTR. CRIMINAL § 1.01 (2018); MASS. CRIM. MODEL JURY INSTR. § 2.200 (2009); *see also* UD. COUNCIL CAL. CRIM. JURY INSTR. § 200 (2017)CAL. CRIM. JURY INSTR. § 200 (2017); 1-II CRIM. JURY INSTR. FOR D.C., INSTRUCTION 2.102 (2017).

174. *Pena-Rodriguez*, 137 S. Ct. at 869 (noting that while all forms of improper bias pose challenges to the trial process, there is a sound basis for treating racial bias with added precaution).

ally place an affirmative duty on all jurors to report any statements that allude to an improper influence on an individual's decision making process, emphasizing that a verdict will be overturned if it is found that the jury allowed racial animus to influence their decision making process.[175] The jury instructions[176] should explain thoroughly the criminal defendant's Sixth Amendment right and how failure to report such racially hostile statements can result in a constitutional deprivation.[177] Improved jury instructions coupled with improved jury selection could proactively address what the proposed reversible error is intended to remedy.

VI.   IN CONCLUSION: THE BLACK BOX MUST BE PURGED OF RACISM

In *Pena-Rodriguez,* the Court held that the Sixth Amendment displaces the no-impeachment rule when a criminal defendant's verdict is the result of overt racial bias.[178] The Court recognized the stark history of race and its debilitating effect on people of color's ability to obtain justice.[179] While the Court's decision in *Pena-Rodriguez* was a step towards prying open the jury box in order to combat the racism that cripples the criminal justice system, the decision alone is not enough because it fails to provide a standard for lower courts to abide

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175.   Natalie A. Spiess, *Pena-Rodriguez v. Colorado: A Critical, But Incomplete, Step in the Never-Ending War on Bias*, 95 Denv. L. Rev. 809, 838 (2018) ("Support for informing jurors about their ability to report instances of misconduct dates all the way back to the codification of Rule 606(b) in 1975. Although the Advisory Conference chose the Senate's broader no-impeachment rule over the House's narrow option, in doing so, the Advisory Conference also remarked that '[t]he Conferees believe that jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations.'").

176.   *Id.* at 840.   A jury instruction meeting this standard would look similar to this:

"It is your duty to base your verdict solely upon the evidence, without relying on prejudice or bias. You should not allow bias or any kind of prejudice based upon race or ethnicity to influence your decision. If you [have reason to believe] that another juror is relying on racial bias to determine whether the defendant is guilty, you are obligated to report that misconduct to either the judge or an attorney. If you report another juror for this misconduct, your identity and what you said will remain confidential.

This misconduct can be reported after a verdict has been entered, so long as it is reported within a reasonable time. If, after further evaluation, the racial bias in question is found to be both severe enough and directly linked to the juror's vote to convict, the verdict can be challenged and even overturned [in order to protect the constitutional right of the criminal defendant]." An instruction similar to this would contribute to ensuring that *Pena-Rodriguez* is impactful and is more than an unenforced and unregulated good intention.

177.   Modifying jury instructions in order to inform jurors that they are forbidden from relying on racial bias when convicting a criminal defendant is *easily* achievable. *Id.* at 839.

178.   *Pena-Rodriguez*, 137 S. Ct. at 869.

179.   *Id.* at 868.

by and it limits the protection against covert racial bias. As Stokely Carmichael stated,

> "Racism is both overt and covert. It takes two, closely related forms: individual whites acting against individual blacks, and acts by the total white community against the black community. We call these individual racism and institutional racism. The first consists of overt acts by individuals, which cause death, injury or the violent destruction of property. This type can be recorded by television cameras; it can frequently be observed in the process of commission. The second type is less overt, far more subtle, less identifiable in terms of specific individuals committing the acts. But it is no less destructive of human life."[180]

To truly limit racial bias's utter and final destruction of already-challenged Black criminal defendants' lives, the *Pena-Rodriguez* decision must be paired with other initiatives. It fails to account for muted, covert, yet nonetheless virulent racism. It also fails to offer a uniform standard to ensure that the criminal defendant–whether in Mississippi or California–is afforded the same Sixth Amendment protection against racially motivated verdicts. Creating a standard of review that recognizes both explicit and implicit biases, while also providing consistency for the lower courts, will enable the *Pena-Rodriguez* protection to expand and truly be impactful. Additionally, the racial bias standard of review coupled with additional safeguards, such as jury instruction clarifying the duties of the jury when faced with racial animus, will further eradicate the justice system of the historical and debilitating plague of racism. As Justice Sotomayor correctly noted, we cannot look away from the magnitude of the potential injustice that procedural barriers shield from judicial review. Instead, I urge us to tear down those barriers so that Black people can experience all the benefits that the Constitution affords to their white counterparts.

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180. STOKELY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION 4 (1992).

NOTE

The Minority Report: How the Use of Data in Law Enforcement Breeds Privacy Concerns among African Americans

Fleur G. Oké

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INTRODUCTION

Data driven decisions are quickly replacing, and arguably have already replaced, human driven decisions. Big data, a relatively new

term[1], has advanced systems of information management and information collection, especially in law enforcement. Defined as the act of gathering and storing large amounts of information for eventual analysis,[2] big data has penetrated local law enforcement systems as a means of better preventing crimes. In general, big data usage breeds a more effective way of cataloging human behavior, a more effective means of finding patterns in collected data, and as a corollary, a more accurate way of predicting future human behavior. In other words, big data, or big data analytics, turns a large amount of information into useful, actionable information. Big data solves data heavy problems through efficiency by shortening the time-consuming process of forming a hypothesis, gathering data, testing the data, and reaching a conclusion. Originally used to understand and predict consumer behavior— is this person more likely to purchase this blender because he purchased this toaster —big data can now predict any human behavior including future criminal behavior.

The ability to predict future human behavior is especially valuable in law enforcement. In law enforcement, "predictive policing," or the use of predictive analytics, to anticipate prevent and reduce crime is endorsed as a neutral method of counteracting unconscious or even conscious biases inherent in human decision-making and policing.[3] This method of policing is becoming an increasingly popular method for police departments to prevent and solve crimes.[4] PredPol, one of the first predictive policing tools on the market, uses an algorithm to predict crimes so that police can patrol and surveil specific areas more

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1. *Big Data*, SAS INSTITUTE (last visited Apr. 20, 2019), https://www.sas.com/en_us/insights/big-data/what-is-big-data.html.

2. *Id.*

3. *See* Caroline Haskins, *Dozens of Cities Have Secretly Experimented with Predictive Policing Software*, MOTHERBOARD (Feb. 6, 2019), https://motherboard.vice.com/en_us/article/d3m7jq/dozens-of-cities-have-secretly-experimented-with-predictive-policing-software.

4. Police departments in Utah, California, Georgia, Washington, and Illinois have incorporated predictive policing into their law enforcement strategies. *See id.* Santa Cruz reportedly saw burglaries drop by 11% and robberies by 27% in the first year of using predictive policing software. *See* Ellen Huet, *Server and Protect: Predictive Policing Firm PredPol Promises to Map Crime Before it Happen*, FORBES (Mar. 2, 2015), https://www.forbes.com/sites/ellenhuet/2015/02/11/predpol-predictive-policing/#32cd59f04f9b. Chicago's Strategic Subject List of people most likely to be involved in a shooting had, as of mid-2016, predicted more than 70% of the people shot in the city, according to the police. *See* Monica Davey, *Chicago Police Try to Predict Who May Shoot or Be Shot*, N.Y. TIMES (May 23, 2016), https://www.nytimes.com/2016/05/24/us/armed-with-data-chicago-police-try-to-predict-who-may-shoot-or-be-shot.html.

heavily.[5] The articulated benefits of predictive policing are faster investigation, smarter policing, and effective deterrence.[6]

In criminal sentencing, although not expanded upon in this article, big data is used in risk assessment tools to predict a defender's likelihood to reoffend.[7] These assessments calculate the likelihood of an individual with the offender's background to commit another crime based on an evaluation of actuarial data .[8] This data may include an offender's past criminal experience as well as other biographical and psychological information.[9]

In general, predictive analytics use the data inputs they are given and filter that data through a complex algorithm to create an output. Predictive policing uses a compilation of different analytical tools depending on whether the goal is to predict the location of future crimes or to predict future offenders. Where the goal is to predict the location of a future crime, a police department, using predictive policing software, may use crime mapping data to predict "hot spots" or areas where crimes are more likely to occur.[10] Crime mapping data rests on the premise that geography has a major influence on crime.[11] The placement of alleys, buildings, and open spaces, for example, may affect the likelihood of criminal activity.[12]

Where the goal is to predict future offenders or those who are likely to reoffend, predictive technologies use risk assessment tools. Risk assessment technologies begin with data sets that reflect individual characteristics such as data on past arrests, criminal associations,

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5. Haskins, *supra* note 3.

6. *See generally* Sarah Brayne*, Big Data Surveillance: The Case of Policing*, 82 Am. Soc. Rev. 977 (2017); Andrew Guthrie Ferguson*, Big Data and Predictive Reasonable Suspicion*, 163 U. Pa. L. Rev. 327 (2015); Elizabeth E. Joh, *Policing by Numbers: Big Data and the Fourth Amendment*, 89 Wash. L. Rev. 35 (2014); Andrew D. Selbst, *Disparate Impact in Big Data Policing*, 52 Ga. L. Rev. 109 (2017).

7. *See* Katherine Freeman, *Algorithmic Injustice: How the Wisconsin Supreme Court Failed to Protect Due Process Rights in State v. Loomis*, 18 N.C. J.L. & Tech. On. 75, 80 (2016).

8. Former Attorney General Eric Holder voiced his concerns about the use of risk assessment algorithms during the sentencing process. *See* Katherine Freeman, *Algorithmic Injustice: How the Wisconsin Supreme Court Failed to Protect Due Process Rights in State v. Loomis*, 18 N.C. J.L. & Tech. On. 75, 83 (2016).

9. *Id.* at 75.

10. Dylan J. Fitzpatrick et al., *Keeping Score: Predictive Analytics in Policing*, 2 Ann. Rev. Crim. 473, 474, 476 (2019).

11. *Mapping and Analysis for Public Safety*, Nat'l Inst. Just., https://nij.ojp.gov/topics/articles/mapping-and-analysis-public-safety (last modified Apr. 17, 2018).

12. *Id.*

past violence, and gang affiliations.[13] Specifically, risk assessment algorithms are designed to take large amounts of information about an offender's past criminal experience, biographical and psychological information to compute a score that ranks an offender at various risk levels.[14] The score is then used to make parole decisions, rehabilitation program placements, and sentencing decisions.[15]

A discussion of predictive systems in law enforcement would be incomplete without an acknowledgement of the Steven Spielberg film, *Minority Report*.[16] *Minority Report* reflects a dystopia of Washington D.C. in the year 2054, where there is no murder because potential offenders are arrested before they commit the crime.[17] Rather than using big data and predictive technologies, the *Minority Report* world uses three visionaries who previsualize crimes by seeing visions of the future. In fact, the police felt so comfortable arresting people for what they have not yet done, that the PreCrime program was on the verge of nationwide adoption. A member of the Department of Justice, assigned to audit and investigate the PreCrime system before nationwide adoption, raised an important point regarding the dangers of predicting crime. He states, "you understand the legalistic drawback to PreCrime methodology . . . we arrest individuals who've broken no law."[18] A support technician for the PreCrime division responds, "[b]ut they will."[19] This interaction reflects the legal issue that this article explores: how the side effects of data-driven solutions to preventing crime—privacy harms and bias and disparate impact—can effectively be reduced.

Ideally, an effective predictive system would need to produce better results than traditional policing, which is proactive in nature, without introducing side effects that are against the public interest. However, data-driven solutions to preventing crime have been shown to allow intrusive breaches on an individual's privacy and have been shown to reproduce existing biases and patterns of racial discrimina-

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13. Jason Tashea, *Risk-assessment algorithms Algorithms Challenged in bail, Bail, Sentencing and parole Parole Decisions*, ABA JOURNAL (Mar. 1, 2017), http://www.abajournal.com/magazine/article/algorithm_bail_sentencing_parole.
14. *Id.*
15. Freeman, *supra* note 7.
16. MINORITY REPORT (Twentieth CentCentury Fox 2002).
17. *Id.*
18. *Id.*
19. *Id.*

tion.[20] Close monitoring of those predicted to become future offenders allows law enforcement to invade an individual's privacy even before he has committed a crime. These side effects must be directly addressed. Given continued advances in technology and big data analytics, it would be unrealistic to propose a solution abolishing its widespread adoption in law enforcement.[21] Rather, my solution is to heavily scrutinize these technologies before and during their use. Through regular auditing of the technologies, increased methods of transparency, and utilizing algorithms we could predict officers likely to engage in misconduct to assure accountability among police officers.

With this solution in mind, this note proceeds in four parts. **Part I** provides a sketch of predictive criminal justice in predictive policing. Specifically, this section describes how predictive policing operates and how it is used by cities. **Part II** describes the discriminatory effects of using technology in criminal justice. It first discusses the history of surveillance of African Americans in American society, beginning from slavery to present, then discusses how predictive policing serves as another means of increasing surveillance of these communities. **Part III** examines the legal challenges of predictive policing. This section considers the weak Fourth Amendment protection as it relates to privacy in predictive policing. Finally, **Part IV** discusses solutions to curing the side effects inherent in predictive criminal justice, including increasing transparency of how the systems operate and using algorithms that predict which officers are likely to engage in misconduct alongside traditional predictive technologies.

I.   PREDICTIVE CRIMINAL JUSTICE

A.   Policing and Surveillance Enhanced with Technology

To ground this discussion, it is important to first begin with a working definition of predictive policing. Predictive policing is the use of predictive analytics in the context of policing and law enforce-

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20. New York University, *Predictive policing is tainted by 'dirty data,' study finds*, Phys (Apr. 10, 2019), https://phys.org/news/2019-04-policing-tainted-dirty.html. A study of a risk assessment algorithm used in Florida's sentencing revealed that it disproportionately targeted African Americans as more likely to reoffend. *See* Julia Angwin et al., *Machine Bias*, ProPublica (May 23, 2016), http://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

21. Research shows that big data technologies and its use is unlikely to slow anytime soon. *See* Cynthia Harvey, *Big Data Trends*, Datamation (Jan. 24, 2018), https://www.datamation.com/big-data/big-data-trends.html.

ment.[22] "Predictive analytics is the use of data, mathematical algorithms, and machine learning to identify the likelihood of future events based on historical data."[23] In the context of law enforcement and policing, predictive analytics identifies the likelihood of where crimes will occur and who is likely to commit those crimes.[24] These predictions—of where crimes will occur and who is likely to commit those crimes—rely on variables such as demographic trends, parolee populations, and economic trends.[25] The prediction of *where* crimes will occur is referred to as place-based predictive policing, while predictions of *who* is likely to commit crimes is labeled person-based targeting.[26]

a. Person-based Predictive Policing

Person-based predictive policing can be divided into three broad categories: (1) methods for predicting offenders, (2) methods for predicting perpetrators' identities, and (3) methods for predicting victims of crimes.[27] Methods for predicting offenders identify individuals at risk of offending in the future.[28] Methods for predicting perpetrators' identities are used to create profiles that accurately match likely offenders with specific past crimes.[29] Finally, methods for predicting victims of crimes are used to identify groups, or in some cases, individuals who are likely to become victims of crimes.[30] In general, person-based predictive policing is premised on the belief that violent crime is concentrated among a small percentage of individuals in a popula-

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22. *Overview of Predictive Policing*, Nat'l Inst. of Justice, http://www.nij.gov/topics/law-enforcement/strategies/predictive-policing/Pages/welcome.aspx (last modified June 9, 2014).

23. *Data mining and Predictive predictive analytics: What is the difference??*, Expert Sys. (Dec. 2, 2016), https://www.expertsystem.com/data-mining-predictive-analytics-difference/.

24. Nat'l Inst. of Justice, *supra* note 22.

25. *Id.*

26. Andrew Ferguson, *How data-driven police threatens human freedom*, https://www.economist.com/open-future/2018/06/04/how-data-driven-policing-threatens-human-freedom.

27. Walter L. Perry et al., Predictive Policing: The Role of Crime Forecasting in Law Enforcement Operations, xiv (2013), https://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR233/RAND_RR233.sum.pdf.

28. *Id.*

29. *Id.*

30. *Id.*

tion.[31] Consequently, police resources should be focused on those individuals in order to reduce crime.[32]

Person-based predictive policing uses a wide range of analytical approaches and data inputs. For example, within one of the three aforementioned categories, person-based predictive policing may focus on data reflecting a person's past criminal history and social network.[33] Data reflecting a person's past criminal history includes his past arrests and past encounters with the police in general.[34] Data reflecting a person's social network include his, associations with people who have committed crimes,[35] and co-arrest data.[36] Person-based predictive technologies may also use the age of an individual's most recent arrest, incidents where the individual was the victim of a shooting, incidents where the individual was a victim of an assault or battery, and arrests depending on the type of crime committed.[37] Both criminal history and social network have been viewed as predictive of a person's likelihood to commit a crime. However, criminologists have long theorized that social networks are especially predictive of future criminal behavior.[38] For example, researchers sponsored by the National Institute of Justice used various research methods, including network analysis of gangs and gang members, to develop a strategy to deter gun violence in Boston.[39] Social network analysis has been used to understand homicide areas and turf boundaries, among other group-focused crimes.[40] This method focuses on observing and mod-

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31. *Id. See also* Josh Kaplan, *Predictive Policing and the Long Road to Transparency*, SOUTH SIDE WKLY. (July 12, 2017), https://southsideweekly.com/predictive-policing-long-road-transparency/; Sarah Brayne, *The Criminal Law and Law Enforcement Implications of Big Data*, 14 ANN. REV. L. & SOC. SCI. 293, 297 (2018).

32. PERRY, *supra* note 27, at xviii; *see* Sarah Brayne, *The Criminal Law and Law Enforcement Implications of Big Data*, 14 ANN. REV. L. & SOC. SCI. 293, 298 (2018).

33. Kaplan, *supra* note 31.

34. *Id.*

35. *Id*.

36. Michael Sierra-Arévalo & Andrew V. Papachristos, *Social Networks and Gang Violence Reduction*, 13 ANN. REV. LAW SOC. SCI. 373, 384 (2017) (authors suggest collecting and analyzing co-arrest data and other ties to determine various relationship structures).

37. Josh Kaplan, *Predictive Policing and the Long Road to Transparency*, SOUTH SIDE WKLY (July 12, 2017), https://southsideweekly.com/predictive-policing-long-road-transparency/.

38. Sarah Brayne, *The Criminal Law and Law Enforcement Implications of Big Data*, 14 ANN. REV. L. & SOC. SCI. 293, 298 (2018).

39. *See generally*, David M. Kennedy et al., *Reducing Gun Violence: The Boston Gun Project's Operation Ceasefire*, NIJ (2001), https://www.ncjrs.gov/pdffiles1/nij/18841.pdf.

40. Jacqueline Cohen & George Tita, *Diffusion in Homicide: Exploring a General Method for Detecting Spatial Diffusion Process*, 15 J. QUANTITATIVE CRIMINOLOGY 4 (1999), https://link.springer.com/content/pdf/10.1023%2FA%3A1007596225550.pdf.

eling the relationships among actors.[41] More practically, social network analysis affects how people act and think.[42]

Michael Sierra-Arévalo and Andrew Papachristos, sociologists from the Yale Department of Sociology, reviewed the use of social network analysis in gang research and gang violence reduction strategies.[43] One of the theories "behind this approach was that most shootings involve a social network of retaliation between rival groups who respond in" foreseeable ways.[44] "A shooting of a gang member would lead to a retaliatory act[;] [this] would then continue the cycle of violence."[45] Sierra-Arévalo and Papachristos believe that by actually measuring, rather than assuming, "the underlying structure of street gangs, gang violence reduction efforts [ ] can more effectively and strategically identify the groups and individuals driving gang violence."[46] This approach, they conclude, is much more effective than traditional stop-and-frisk policing.[47] Rather than focusing on law enforcement intervention, Sierra-Arévalo and Papachristos argue that social service providers, teachers, and other community experts can play an important role in targeted interventions of individuals at high risk of crime victimization and crime perpetuation.[48]

One pilot program implemented in Chicago applied social network analysis in an effort to determine its effects on reducing gun violence. The predictive model used social network data—in the form of co-arrests—in "previous homicide victims to predict the likelihood of someone becoming a victim of a homicide."[49] The model was based on the body of literature that found a strong correlation between victimization and social connections to others who were victims of homicide.[50] Based on the literature, by using advanced analytics, police departments would be able to more effectively identify future

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41. Michael Sierra-Arévalo & Andrew V. Papachristos, *Social Networks and Gang Violence Reduction*, 13 Ann. Rev. Law L. & Soc. Sci. 373, 375–376 (2017).

42. *Id*. at 376.

43. *Id*.

44. Andrew Guthrie Ferguson, *Predictive Prosecution*, 51 Wake Forest L. Rev. 705, 713 (2016).

45. *Id*.

46. Michael Sierra-Arévalo & Andrew V. Papachristos, *Social Networks and Gang Violence Reduction*, 13 Ann. Rev. Law Soc. Sci. 373, 374 (2017).

47. *Id.* at 375.

48. *Id.* at 381, 384.

49. Jessica Saunders et al., *Predictions put into Practice: a Quasi-experimental Evaluation of Chicago's Predictive Policing Pilot* (Aug. 12, 2016), https://link.springer.com/article/10.1007/s11292-016-9272-0.

50. *Id.*

crime targets for preemptive intervention. "However, there [were] little experimental evidence from the field [that] demonstrate[es] whether implementing an advanced analytics predictive model, [accompanied by a] prevention strategy[,] works to reduce crime."[51] This study sought to fill that void.

Funded by the National Institute of Justice ("NIJ") and in collaboration with the Illinois Institute of Technology, the Chicago program aimed to efficiently target limited community resources towards persons at risk for participation in gun violence, either as perpetrators or as victims. Individuals with the highest algorithmic risk scores for gun violence were placed on a Strategic Subjects List ("SSL"), colloquially known as the "heat list."[52] From a pool of prior arrestees provided by the Chicago Police Department, the program identified 426 people at high risk of gun violence and gave them a score.[53] The higher the score, the more threatening the individual may be. These individuals "were then referred to local police commanders for preventive intervention."[54] Although encouraged to make contact with the SSL subjects, local police commanders were left wide discretion as to what actions their units should take.[55] Though the study identified those of higher risk, the prevention part of predictive policing was not well developed because law enforcement lacked information about what to do with the predictions.[56] Due to the lack of direction, district commanders simply "recommend[ed] [that] their officers [ ] increase 'contact' with individuals on the list in varying forms and levels of effort."[57] The interventions ranged from home visits by police officers, also known as custom notification, or invitations to community meetings.[58] If face-to-face meetings were not possible, police officers left custom notification letters detailing the individual's prior contact with the criminal justice system and warned them of the consequences

51. *Id.* at 348.

52. Andrew Guthrie Ferguson, *The Police Are Using Computer Algorithms to Tell If You're a Threat*, TIME (Oct. 3, 2017), http://time.com/4966125/police-departments-algorithms-chicago/.

53. Saunders, *supra* note 49, at 355.

54. *Id.* at 347.

55. *Id.* at 367. Intervention strategies took three forms. First, officers were assigned to make contact with the SSL subjects on varying schedules, usually through home visits. Second officers were provided information about the identities of the SSL subjects and make contact "if noticied" by central command, especially if subjects were acting suspiciously. Finally, other officers reported a combination of both approaches. *See id.* at 356.

56. *Id.* at 367.

57. *Id.*

58. Ferguson, *supra* note 52.

of continued criminal behavior.[59] An official definition of "Custom Notification" comes from a Special Order from the Chicago Police Department:

> The Custom Notification Letter will be used to inform individuals of the arrest, prosecution, and sentencing consequences they may face if they choose to or continue to engage in public violence. The letter will be specific to the identified individual and incorporate those factors known about the individual inclusive of prior arrests, impact of known associates, and potential sentencing outcomes for future criminal acts.[60]

Essentially, if an individual on the heat list is offered a choice, they either take advantage of social services to prevent involvement in future violence or face additional law enforcement surveillance or punishment. Ultimately, the results of the program found that "individuals on the SSL [were no] more or less likely to become a victim of a homicide or shooting than those in the comparison group."[61] However, individuals on the SSL were found to be "more likely to be arrested for a shooting."[62] In practical effect, the personalized score automatically displays on an officer's dashboard, thus notifying the officer of the relative risk of a suspect. Chicago police officers have stated that the SSL gives them a manageable place to focus their attention.[63]

Los Angeles has a similar practice; their person-based targeting is known as operation LASER (Los Angeles' Strategic Extraction and Restoration program).[64] LASER began in 2011 and was federally funded through the Smart Policing Initiative, a Bureau of Justice Statistics sponsored initiative that supports law enforcement agencies in building effective data-driven law enforcement tactics.[65] LASER was first implemented in a low-income, historically high-crime division in

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59. Jeremey Gorner, *Chicago police use 'heat list' as strategy to prevent violence*, Chi. Tri. (Aug. 21, 2013), https://www.chicagotribune.com/news/ct-xpm-2013-08-21-ct-met-heat-list-20130821-story.html.

60. *See* Chi. Police Dep't, Custom Notifications in Chicago, Special Order S10-05, at IV.D (Oct. 6, 2015), http://directives.chicagopolice.org/directives/ (Search "Special Order S10-05"); Brayne, *supra* note 38, at 298.

61. Saunders, *supra* note 49, at 362.

62. *Id.* at 363.

63. The Editorial Board, *Who Will Kill or Be Killed in Violence-Plagued Chicago? The Algorithm Knows*, Chi. Trib. (May 10, 2016, 5:00 PM), http://www.chicagotribune.com/news/opinion/editorials/ct-gangs-police-loury-algorithm-edit-md-20160510-story.html.

64. Wired, *How Cops Are Using Algorithms to Predict Crimes*, YouTube (May 22, 2018), https://www.youtube.com/watch?v=7lpCWxlRFAw.

65. Bureau of Justice Statistics, *Smart Policing Initiative*, https://www.bja.gov/Publications/SmartPolicingFS.pdf (last visited Apr. 21, 2019); Brayne, *supra* note 38, at 298.

the district of the South Bureau L.A. police department.[66] LASER uses previous crimes and arrests to determine who will perpetrate violent crimes.[67] The program generates a list of "chronic offenders" by gathering daily data from patrols, field interview cards, traffic citations, release-from-custody forms, crime and arrest reports, and criminal histories.[68] The program then uses a point system that allocates a certain amount of points depending on the activity that a person has engaged in.[69] For example, five points are given for a violent crime history or for gang affiliation, and one point is given for every police contact.[70] Those with the highest scores are subsequently closely monitored.[71] These police practices can place individuals, who are already perceived as suspicious under stronger surveillance, while appearing to be neutral and objective.

The crucial question is, how do these algorithms actually score a person's criminal record, social connections, and intensity of criminal history, among other considerations. Because police officers generally have no knowledge of the workings of the predictive analytics, they cannot challenge the results or be alerted when the system emits a false negative, incorrectly identifies someone as a non-offender, or a false positive, incorrectly identifying someone as a potential offender.[72]

a.   Place-based Predictive Policing

Turning to place-based predictive policing, algorithmic methods ingest data on the time, location, and type of past crimes in order to deliver forecasts of where and when crime is most likely to occur. This method is used to identify "hot spots" or high crime areas. For example, a Memphis police department program called Blue CRUSH began in 2006 and uses statistical modeling of past crime data to identify these "hot spots." Police are then directed to these hot spots to

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66. Brayne, *supra* note 38, at 298.

67. Wired, *supra*, note 64.

68. *Id*.

69. *Id.*

70. Sarah Brayne, *The Criminal Law and Law Enforcement Implications of Big Data*, 14 Ann. Rev. L. & Soc. Sci. 293, 298 (2018).

71. Wired, *supra*, note 64.

72. Saunders, *supra* note 49, at 366–67. The pilot program in Chicago acknowledged that regardless of how "well" a model performs, there will always be a concern with false negatives and false positives. *See* Jessica Saunders et al., *Predictions put into Practice: a Quasi-experimental Evaluation of Chicago's Predictive Policing Pilot* (Aug. 12, 2016), https://link.springer.com/article/10.1007/s11292-016-9272-0.

conduct sweeps, make arrests, and display a heightened presence in order to deter crime.[73]

One algorithmic approach to place-based crime prediction is based on research showing that certain property crimes encouraged similar crimes in a predictable manner.[74] PredPol heavily relies on this assumption.[75] A burglary in one neighborhood might encourage additional burglaries in that same neighborhood, and similarly, an auto theft at a particular time in one area might suggest future thefts in the same area.[76] Research has shown that crime does not occur randomly, but rather, it concentrates in particular places.[77] From these findings, place-based predictive policing software uses data from past crimes to predict certain property crimes. As a result, police officers may increase patrol of these neighborhoods. This increase in police presence is meant to deter crime.[78] The weakness of this model is that it interprets elevated police action as elevated risk.

Another algorithmic approach to place-based crime prediction is crime mapping. Crime mapping, as discussed previously, rests on the premise that geography has a major influence on crime. Risk Terrain Modeling ("RTM"), a form of crime mapping developed at Rutgers University School of Criminal Justice, looks at environmental factors such as bars, liquor stores, and urban fixtures to predict the location of crime.[79] These spatial features of the landscape seem to have an effect on the occurrence of crime incidents. RTM assesses the impor-

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73. IBM, *Memphis Police Department Reduces Crime Rates with IBM Predictive Analytics Software*, http://www-03.ibm.com/press/us/en/pressrelease/32169.wss (last visited Apr. 17, 2019).

74. [(2004) ("[T]he risk of victimization can be treated as communicable. [That is, following a burglary at one home the risk of burglary at nearby homes is amplified]. . . The pattern has been labelled the 'near repeat' phenomenon, and [the results have clear implications for crime prevention and for the prediction of future patterns of crime].") Kate J. Bowers & Shane D. Johnson, *Who Commits Near Repeats? A Test of the Boost Explanation*, 5(3) W. CRIMINOLOGY REV. 12 (2004).

75. Danielle Ensign et al., *Runaway Feedback Loops in Predictive Policing*, 2 (Sorelle A. Friedler & Christo Wilson eds. 2017), http://proceedings.mlr.press/v81/ensign18a/ensign18a.pdf.

76. Bowers & Johnson, *supra* note 74.

77. Spencer Chainey et al., *The Utility of Hotspot Mapping for Predicting Spatial Patterns of Crime*, 21 SECURITY J. 4, 5 (2008) ("Crime also does not occur randomly. It tends to concentrate at particular places for reasons that can be explained in relation to victim and offender interaction and the opportunities that exist to commit crime.").

78. Jen Clark, *Facing the threat: Big Data and Crime Prevention*, IBM (Aug. 22, 2017) ("At-risk areas are highlighted on-screen, while recommendations for evasive action (such as deploying a high visibility police patrol car to take stock of the situation and deter criminals) are displayed alongside").

79. Joel M. Caplan et al., *Risk Terrain Modeling for Strategic and Tactical Action*, CRIME MAPPING & ANALYSIS NEWS, https://crimemapping.info/article/risk-terrain-modeling-strategic-tactical-action/ (last visited Apr. 20, 2019).

tance of each spatial feature relative to another in creating an ideal setting for crime.[80] It is based on the notion that spatial factors can influence the seriousness and longevity of criminal behavior.[81] RTM was developed to fill the gap in the understanding of why persistent hot spots existed.[82] "Hot spots tell you where crime is clustering, but not necessarily why."[83] Joel Caplan, Associate Professor at Rutgers University School of Criminal Justice and one of the creators of RTM, urges police officers to focus on places, not people, to prevent crime.[84] The focus of RTM is creating conditions that deter crime from occurring and removing or displacing those conditions that increase criminal activity.

Crime Mapping Case Studies: Glendale and Atlantic City

One example of success from the use of RTM occurred in Glendale, Arizona. Local police applied RTM to reduce cellphone robberies; they found that this type of crime "clustered near convenience stores, which had kiosks offering instant cash for phones."[85] Upon this finding, the police asked store owners to move the kiosks to the front of the store, near windows and surveillance cameras. As a result, robberies fell by 42 percent.[86] Another example occurred in Atlantic City, New Jersey. Due to the adoption of RTM, the Atlantic

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80. *Id.*

81. RTM is seen as "a statistically valid way to articulate crime-prone areas at the micro-level according to the spatial influence of many features of the landscape, such as bars, parks, schools, ATMs, or fast food restaurants. . ." *See id.*

82. NAT'L INST. OF JUST., *Effectiveness of Risk Terrain Modeling for Allocating Police Resources* (June 9, 2014), https://www.nij.gov/topics/law-enforcement/strategies/predictive-policing/Pages/risk-terrain-modeling-for-allocating-resources.aspx ("there is a gap in the understanding of why persistent hot spots exist and where specific enforcement tactics would be most successful. Especially important is the ability not only to forecast where certain crimes are most likely to occur, but also to model how those future hot spots will react to different police tactics and choose the most cost-effective approach to enforcement.").

83. The official site of Risk Terrain Modeling declares that "all too often people focus on hotspots without giving equal consideration to the spatial attributes that make these areas opportunistic in the first place. While there are social, situational, political, cultural, and other factors related to the variety of crime outcomes, there is also a spatial component. Hotspots are merely signs and symptoms of places that are highly suitable for crime. RTM advances this by providing the spatial diagnosis." *Id.*

84. TEDx Talks, *Focus on Places, Not People, to Prevent Crime — Joel Caplan — TEDx-StocktonUniversity*, YOUTUBE (Apr. 25, 2016), https://www.youtube.com/watch?v=5hKWLY1lZrs&t=23s.

85. Samantha Melamed, *Can Atlantic City's Bold Experiment take Racial Bias out of Predictive Policing?*, THE PHILADELPHIA INQUIRER (Aug. 10, 2017), https://www.philly.com/philly/news/crime/atlantic-city-risk-terrain-modeling-rutgers-predictive-policing-joel-caplan-20170810.html.

86. *Id.*

City police boasts a 20 percent reduction in violent crimes and a 17 percent reduction in arrests.[87] The Atlantic City police also found that there was increased risk of drug related activity in places with convenience stores, laundromats and vacant properties. Upon this finding, the police theorized that drug users solicited at convenience stores, conducted their transactions at unsupervised laundromats, and used vacant properties as stash houses.[88] As a solution, instead of sending in more patrols, the police treated the landscapes by putting sign-in sheets inside convenience stores and laundromats, so patrols could log their visits, by helping business owners get security cameras, and tending to the vacant buildings.[89]

Although person-based and place-based predictions are both under the predictive policing umbrella, person-based predictions raise more chilling issues of liberty, privacy invasion, and in terms of risk assessment in sentencing, it raises issues of due process. This difference makes place-based predictions more favorable to the public interest.

II.   SIDE EFFECT: SUSCEPTIBILITY OF PREDICTIVE CRIMINAL JUSTICE TO DISCRIMINATION

A.   Past History

This section will discuss the first side effect of predictive criminal justice, bias, and the role that race has played in the American criminal justice system. Race has traditionally had a strong effect in criminal justice, and predictive criminal justice seems to exacerbate these effects. Historically, governments have used policing and surveillance as a means of control. During the 18th century, New York City used lantern laws as a form of surveillance, which made it easy for whites to identify, observe and control blacks. Lantern laws demanded that African Americans carry candle lanterns with them if they were out after sunset and not in the company of a white person. They laws were named ordinances "For Regulating Negroes and Slaves in the Night Time."[90] The law prescribed various punishments for those who did

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87. The Police Chief Henry White Jr. stated optimistically, "[w]e were able to reduce crime without contributing to mass incarceration." *See id.*

88. *Id.*

89. *Id.*

90. *See* City of New York, *A Law for Regulating Negroes and Slaves in the Night Time* (Apr. 22, 1731), https://digitalcollections.nypl.org/items/8ebdde86-d7f2-c140-e040-e00a18060af7. As Simone Browne, professor in the Department of African and African Diaspora Studies at University of Texas at Austin, puts it, these lantern laws "made it possible for the black body to be

not carry lanterns, and any white person could stop those who walked without a lit candle after dark.[91] One such punishment was being whipped at the desire of the slave master.[92] Clearly, African Americans have lived for centuries with surveillance practices aimed at maintaining a racial hierarchy, and technology is only making such surveillance easier. With the advent of technology and predictive algorithms, surveillance has become more effective.

Perhaps the most damaging form of structural surveillance and disproportionate policing was the racist system established by the Jim Crow Laws. Enacted in the Southern United States during the late 19th century, the Jim Crow Laws intended to reverse the rights gained by African Americans following the end of the Civil War and Reconstruction.[93] During this time, public and private arrangements aimed at separating blacks from whites operated as a comprehensive system of racial control.[94]

More recently, the Black Lives Matter (BLM) movement has been subject to heavy surveillance. According to hundreds of documents obtained by the news organization, *The Intercept*, through a Freedom of Information Act request, the Department of Homeland Security has been monitoring the Black Lives Matter movement since

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constantly illuminated from dusk to dawn, made knowable, locatable, and contained within the city." *See* Ethan Chiel, *New York City has been shining surveillance lights on its black population for the last 300 years*, SPLINTER (May 19, 2019), https://splinternews.com/new-york-city-has-been-shining-surveillance-lights-on-i-1793856900.

91. Specifically the law stated: "if any such Negro, Mulatto or Indian Slave or Slaves, as aforesaid, shall be found in any of the Streets of this City, or in any other Place, on the South side of the Fresh-Water, in the Night-time, above one hour after Sun-set, without a Lanthorn and lighted Candle in it, so as the light thereof may be plainly seen (and not in company with his, her or their Master or Mistress, or some White Person or White Servant belonging to the Family whose Slave he or she is, or in whose Service he or she then are). That then and in such case it shall and may be lawful for any of his Majesty's Subjects within the said City to apprehend such Slave or Slaves . . . and forth-with carry him, her, or them before the Mayor or Recorder, or any of the Aldermen of the said City . . . until the Master, Mistress or Owner of every such Slave or Slaves, shall pay to the Person or Person who apprehended and committed every such Slaves or Slaves, the sum of . . . " *See* City of New York, A Law for Regulating Negroes and Slaves in the Night Time (Apr. 22, 1731), https://digitalcollections.nypl.org/items/8ebdde86-d7f2-c140-e040-e00a18060af7.

92. The law further stated that "every Slave or Slaves that shall be convicted of the Offence aforesaid, before he, she or they be discharged out of Custody, shall be Whipped at the Publick Whipping-Post (not exceeding Forty Lashes) if desired by the Master or Owner of such Slave or Slaves." *Id.*

93. New World Encyclopedia, *Jim Crow Laws*, http://www.newworldencyclopedia.org/ent ry/Jim_Crow_laws (last visited Apr. 27, 2019).

94. *Id.*

anti-police protests erupted in Ferguson, Missouri in summer 2014.[95] The documents indicate that the department frequently collects BLM's location data and monitors its social media presence.[96] Clearly, race policing and surveillance have co-existed in American criminal justice. Inserting predictive technology and big data analytics into the mix has proven to increase rather that decrease the disproportionate treatment of African Americans in the criminal justice system.

B. Predictive Criminal Justice Perpetuates Past Discrimination

Bias in Predictive Policing

Policing in general is not immune from bias because it is an inherently discretionary field. Police officers have the discretion to choose whom to arrest, where to patrol, and when to use force. Racial bias has been documented in pedestrian stops, drug enforcement, arrests, and in use of force, including the decision to fire a weapon.[97] Determining how explicit and implicit biases produce these outcomes is hard to clearly define. However, there is no doubt that these unequal outcomes exist.

To help discern when disparate impact occurs in the use of predictive technologies, it is helpful to think of the life cycle of data, which Professor William McGeveran, a specialist in information law and data privacy, discusses in his book.[98] Generally, data flows in four phases, data collection, data usage, data storage, and data disclosure.[99] In the case of algorithmic data, however, there must be a stage for designing the algorithm and determining what data should be collected; thus design, collection, usage, storage, and disclosure are potential stages at which disparate impact may occur. The storage and disclosure stages of data are not applicable in the predictive policing context.

First, at the design stage, the engineer of the algorithm must define the problem in a way that a computer can understand. He "must

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95. George Joseph, *Exclusive: Feds Regularly Monitored Black Lives Matter Since Ferguson*, The Intercept (July 24, 2015), https://theintercept.com/2015/07/24/documents-show-department-homeland-security-monitoring-black-lives-matter-since-ferguson/.

96. *Id.*

97. Frank R. Baumgartner et al., *Targeting Young Men of Color for Search and Arrest During Traffic Stops: Evidence from North Carolina, 2002–2013*, 5 Pol., Groups, & Identities 107 (2016), http://fbaum.unc.edu/articles/PGI-2016-Targeting.pdf. .

98. *See generally* William McGeveran, Privacy and Data Protection Law (1st ed. 2016).

99. *Id.* at 325.

determine how to solve the problem at hand by [converting that problem] into a question about the value of some target variable."[100] This first step requires an engineer to "understand[ ] the project objectives and requirements from a business perspective [and] then convert[ ] this knowledge into a data mining problem definition and a preliminary plan designed to achieve the objectives."[101] "Through this [seemingly] subjective process of translation, [engineers] may unintentionally [translate] the problem in such a way that happens to systematically disadvantage [certain] classes."[102] Scholars have argued, however, that the bias may not be in the algorithm, but rather in the data that is funneled into the algorithm.[103] Potential sources of bias lie outside of the algorithm, at later stages of the life cycle of data—collection and use. The collection stage is the point at which there are many sources of bias. For example, bias may appear in the form of biased data inputs, skewed training data, missing variables, and selection of biased target variables.[104] Accordingly, a purely technical solution, or a simple alteration of the algorithm itself, would be incomplete.[105]

During the collection stage, the algorithm must take input data as truthful because the data is the only information the algorithm has about the world.[106] However, biased input data can lead to discriminatory results. As scholars Solon Barocas and Andrew Selbst put it:

> This can mean two rather different things, though: (1) if data [input] treats cases in which prejudice has played some role as valid examples to learn from, that rule may simply reproduce the prejudice involved in these earlier cases; or (2) if data [input] draws inferences from a biased sample of the population, any decision that rests on these inferences may systematically disadvantage those who are under-or overrepresented in the dataset. Both can affect the [output] in ways that lead to discrimination.[107]

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100. Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CAL. L. REV. 671, 678 (2016).

101. Pete Chapman et al., *Crisp-DM 1.0: Step-by-Step Data Mining Guide*, SPSS 10 (2000), https://www.the-modeling-agency.com/crisp-dm.pdf.

102. Barocas & Selbst, *supra* note 100, at 678.

103. Pauline T. Kim, *Auditing Algorithms for Discrimination*, 166 U. PA. L. REV. ONLINE 189, 191 (2017).

104. *Id.* at 194.

105. For an argument that a technical solution will suffice to assure accountability, *see generally* Joshua A. Kroll et al., *Accountable Algorithms*, 165 U. PA. L. REV. 633 (2017).

106. Barocas & Selbst, *supra* note 100, at 682.

107. *Id.* at 680–81681. Solon Barocas is a Postdoctoral Research Associate, Center for Information Technology Policy, Princeton University and Andrew Selbst is a Scholar in Residence at the Electronic Privacy Information Center. *Id.* at 671 nn.a1 & aa1.

Where the goal is to predict the location of future crime—place-based predictive policing—the most common input data is the existence of past crimes, often collected by the police themselves. One issue with collecting past crime data is that many crimes go unreported. According to the Bureau of Justice Statistics, from 2006 to 2010, fifty-two percent of all violent victimizations, or an annual average of 3,382,200 violent victimizations, were not reported to the police.[108] Incomplete representative samples of actual crimes introduce sampling bias.[109] Consequently, incomplete crime data can significantly impair an algorithm's ability to predict future crime. It is important to note that an algorithmic model need not have race as an input in order to create an output that correlates with race; it need only use input data that are good real-world proxies for race.[110]

At the "use" stage of the predictive policing data cycle, biased input at the collection stage yields privacy concerns in African American communities. The use stage of data involves the processing of data to generate new information or insights and an organization's use of the data in its processed form.[111] Although advertised as unbiased, there is material empirical data justifying the concern that the use of algorithmic methods for predictive policing exacerbates bias and amplifies unequal treatment. For example, if the input data omits data about a certain group of people, the output will generate results that fail to account for a portion of the population.[112] Poor relations between law enforcement and certain communities may explain this gap. For instance, neighborhoods with distrust in law enforcement may underreport crime; as a result, the predictive algorithm is fed incomplete data.[113] Surely, it is imperative that data inputs are carefully selected, and algorithms are carefully designed to account for these gaps. Distortions may also occur when input data is based on historical data of

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108. *See generally,* U.S. Dep't of Justice, Bureau of Justice Statistics, NCJ 238536, Victimizations Not Reported to the Police, 2006–10 (2012), https://www.bjs.gov/content/pub/pdf/vnrp0610.pdf. .

109. Andrew D. Selbst, *Disparate Impact in Big Data Policing*, 52 Ga. L. Rev. 109, 134 (2017).

110. Moritz Hardt, Assistant Professor Department of Electrical Engineering and Computer Sciences University of California, argues that due to redundant coding, "[t]here are almost always ways of predicting unknown protected attributes from other seemingly innocuous features." *See* Moritz Hardt, *Approaching Fairness in Machine Learning*, Moody Rd (Sept. 6, 2016), http://blog.mrtz.org/2016/09/06/approaching-fairness.html.

111. McGeveran, *supra* note 98, at 381.

112. Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 Duke L.J. 10731043, 1076–77 (2019).

113. *Id*. at 1077.

police activity, which has traditionally been correlated with racial stereotypes and presumptions.[114] Thus, if police activity is predicted by race, then subsequent policing will be unevenly distributed by race and will result in increased exposure to arrest, excessive force and incarceration for black people.[115]

One study, performed by Kristian Lum and William Isaac of the Human Rights Data Analysis Group, showed how predictive policing (specifically PredPol) yields disparate impacts by creating runaway feedback loops.[116] Runaway feedback loops occur when police are repeatedly sent back to the same neighborhood in a way that exacerbates the initial distortions of input data.[117] A similar study was performed in Oakland, California with the goal of predicting drug crimes, and the ensuing report mentions that predictive policing algorithms only observe crime in neighborhoods that the police patrol.[118] Additionally, decisions made by the algorithm influence the data that is fed to it in the future. For example, once a decision has been made to patrol a certain neighborhood, crime discovered in that particular neighborhood will be fed into the algorithm for the next round of decision-making.[119] Consequently, a feedback loop occurs and the predictions do not predict the true crime rate. Lum and Isaac's study on PredPol's algorithm also found that predictive policing of drug crimes results in increasingly disproportionate policing of historically over-policed neighborhoods.[120] In extreme cases, "[increased] police contact will create additional opportunities for police violence in over-policed areas."[121] In a world where police brutality is constantly in the news, it is especially important that police understand the limits of predictive analytics and actively guard against its discriminatory outcomes.

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114. *Id.*

115. Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2429–35 (2017).

116. *See* Kristian Lum & William Isaac, *To Predict and Serve?*, SIGNIFICANCE MAG., Oct. 7, 2016, at 14.

117. DANIELLE ENSIGN ET AL., RUNAWAY FEEDBACK LOOPS IN PREDICTIVE POLICING 1 (Sorelle A. Friedler & Christo Wilson eds.,. 2017).), http://proceedings.mlr.press/v81/ensign18a/ensign18a.pdf.

118. *See id.*

119. *Id*.

120. *See* Lum, *supra* note 116, at 19.

121. *Id.* (citing Amy E. Lerman and Vesla Weaver, *Staying Out of Sight? Concentrated Policing and Local Political Action*, 20 ANNALS OF THE AM. ACAD. FOR POL. AND SOC. SCI. 202 (2014)). *Id.*

III.   LEGAL CHALLENGES

A.   Side Effect: Privacy and Weak Fourth Amendment Protection in Predictive Policing

As Justice Stewart stated in the landmark case of *Katz v. United States*, "the Fourth Amendment protects people rather than places."[122] Thus, Fourth Amendment protections are more relevant in person-based predictive policing cases. Nonetheless, the Fourth Amendment provides weak legal protection to individuals subject to increased surveillance. It has traditionally been seen as the primary means to protect citizens from intrusive policing.[123] The hallmark of the Fourth Amendment is that it protects against arbitrary arrests, and is the basis of the law regarding search warrants, stop-and-frisk, forms of surveillance—actions that are central to policing and privacy law.[124] In stop-and-frisk, the Fourth Amendment permits brief investigative stops only when an officer has reasonable suspicion, a particularized and objective basis, that the person stopped has engaged in criminal activity.[125] Reasonable suspicion takes into account the totality of circumstances and depends on both the content of information possessed by law enforcement and the reliability of said information.[126]

In *Katz*, the Court held that a defendant had a "reasonable expectation of privacy" in a phone booth, but once outside the phone booth, he loses this protection.[127] Scholars have argued that this doctrine "should not hold its traditional force once the police deploy the

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122. Katz v. United States, 389 U.S. 347, 347 (1967).

123. However, as Andrew Ferguson, a national expert on predictive policing, has observed, the Fourth Amendment's reasonable suspicion requirement is inherently a "small data doctrine," rendering it useless when it comes to data mining. *See* Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. Pa. L. Rev. 327, 338 (2015). In his book, *Privacy and Data Protection Law*, Professor William McGeveran, a specialist in information law and data privacy, brings up relevant questions regarding Congress' role in creating laws that keep pace with technology. Professor McGeveran states, "Justice Alito's concurrence in *Riley* expresses the hope that Congress might legislate to redefine the scope of police investigative power in light of new technologies. Would law enforcement [technologies] be handled by statute better than by constitutional rules?" *See* McGeveran, *supra* note 98, at 43.

124. Callie Haslag, Note, *Technology or Privacy: Should You Really Have to Choose Only One?*, 83 Mo. L. Rev. 1027, 1029 (2018) ("The Fourth Amendment provides the first major source for protecting privacy from law enforcement infringement.").

125. United States v. Arvizu, 534 U.S. 266, 277–78 (2002) (The Supreme Court applied the Fourth Amendment standard, "[Taking the circumstances] together, we believe they sufficed to form a particularized and objective basis for [the officer] stopping the vehicle, making the stop reasonable within the meaning of the Fourth Amendment.").

126. United States v. Cortez, 449 U.S. 411, 417 (1981) ("[T]he totality of the circumstances—the whole picture—must be taken into account.").

127. *Katz*, 389 U.S. at 361.

tools of big data."[128] As evidenced by the Chicago Strategic Subjects List and its use of Custom Notification contacts,[129] police have wide discretion to single out certain people for investigation based on predictive tools. Analogizing Chicago's heat list to the *Katz* reasonable expectation standard, once a person has been arrested or has any social connection to a gang member, he loses his reasonable expectation of privacy because his prior arrests and disfavored social connections add him to the "heat list" and subject him to further monitoring and surveillance by the police. Such a system raises the question posed in Steven Spielberg's, Minority Report. Rather than stating, "we *arrest* individuals who've broken no law,"[130] predictive policing changes the narrative to "we *monitor* people who've broken no law."[131] A natural response, as was the response in Minority Report, could be, "*but they will*" break the law because (1) they have had prior arrests, (2) their social networks are tainted by connections to gang members, and (3) they have any other factor that the predictive algorithm has deemed as forecasting future criminal behavior.[132]

In contrast to predictive policing, traditional policing derives reasonable suspicion through observing activities in the real world and gathering information from sources. The process was more reactive and particularized. Now, predictive policing is generalized and prospective. As Andrew Ferguson clarifies, predictive criminal justice "has the potential to change the reasonable suspicion calculus because more personal or predictive information about a suspect will make it easier for police to justify stopping a suspect."[133] For example, an officer may know information about a suspect—if he is placed as a drug dealer on Chicago's "heat list"—but that does not mean that he is actively dealing drugs at the moment that an officer observes him. As a solution, Ferguson proposes that courts require a direct link be-

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128. Elizabeth E. Joh, *Policing by Numbers: Big Data and the Fourth Amendment*, 89 WASH. L. REV. 35, 62 (2014).
129. *See* discussion *supra* Part IA.
130. *See* discussion *supra* Introduction.
131. It is important to note that some scholars differentiate between being monitored and being searched for Fourth Amendment purposes. Harvard Professor, Lawrence Lessig describes monitoring as "that part of one's daily existence that others see or notice and can respond to, if response is appropriate. As I walk down the street, my behavior is monitored. . . . The searchable is the part of your life that leaves, or is, a record. Scribblings in your diary are a record of your thoughts. Stuff in your house is a record of what you possess." *See* Lawrence Lessig, *Code: And Other Laws of Cyberspace, Version 2.0* 202 (2d ed. 2006), http://codev2.cc/download+remix/Lessig-Codev2.pdf
132. *See* discussion *supra* Introduction.
133. Ferguson, *supra* note 123, at 351.

tween predictive data about a suspect and police suspicion arising from direct observation.[134] Such a requirement should prevent police officers from blindly following predictive policing results.

> When considering privacy specifically, two privacy interests are at stake in non-particularized searches radiating from predictive policing: Fourth Amendment privacy protection could be viewed one way as the protection from the unjustified burden to those would be searched unnecessarily.[135] Privacy protection under the Fourth Amendment could be viewed another way as a protection of a dignity interest. In that sense, dignity interest is only matched if the police have a good reason to search *before* they search.[136] In the predictive policing context, the dignity interest is very loosely protected where the "good reason" is that an area is designated as a "hot spot" or a high crime area. For example, in Philadelphia, a video showed two men detained by police because they greeted one another in a high crime neighborhood.[137] According to the officers, greeting others in the high crime neighborhood was a sufficiently abnormal behavior to be worthy of suspicion.[138] If the mere labeling of a high crime area satisfied reasonable suspicion, then computerized determinations of "hot spots" can significantly impact the privacy of those who live and work in the targeted areas. No Supreme Court case has dealt with the question of reasonable suspicion stemming solely from an algorithmic determination, however, a predictive system's determination of a high crime area or a high-risk individual may prompt an officer to easily correlate his observations with the findings of the predictive system. This poses grave danger to the individual privacy interests that the Fourth Amendment was meant to protect.

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134. *Id.* at 388 ("With big data suspicion, it is important for the individualized and particularized information to relate to the particular action observed. If a police officer identifies a suspect and learns information about the suspect's arrests, convictions, or associations that has nothing to do with the observed actions (if the officer observed any actions at all), then the new information should be irrelevant to the reasonable suspicion calculus. Only when those particularized factors can be connected to observed actions that signify criminal activity should they affect the analysis.").

135. *See* Lessig, *supra* note 131, at 211.

136. *Id.*

137. Morgan Winsor & Rande Iaboni, *16 minute Video of Philly Cops in Controversial Stop Sparks Criticism, Probe*, CNN (Oct. 17, 2013), https://www.cnn.com/2013/10/17/us/video-police-stop-philadelphia/index.html.

138. *Id*.

IV. RESPONDING TO TECHNOLOGY-SUPPORTED DISCRIMINATION

Responding to the discussed side-effects of predictive criminal justice requires that local communities implement procedures before adopting predictive technologies and employ accountability measures during their operation. Before and during the use of predictive technologies, police departments must address the transparency issues inherent in using complex algorithms. During the use of these technologies, police departments must allow for regular audits of the algorithms to ensure that the results are not biased. Finally, with police misconduct on the rise, police departments must also employ algorithms that predict which officers are likely to engage in misconduct or use excessive force. Such use will "flip the target" and allow the police officers to be held accountable for their actions as well.

A. Transparency

One of the biggest issues with predictive criminal justice is its lack of transparency. In general, transparency involves outside scrutiny of decision processes. With predictive technologies, ordinary citizens cannot examine the algorithms that now control police patrol routes, suspect lists and sentencing decisions. From a law enforcement perspective, however, exposing the existence of surveillance schemes may undermine their effectiveness if anyone can evade them.[139] As Deputy Commission of Intelligence and Counterterrorism explains, "terrorists and criminals do their due diligence and they literally study and adapt to evolving security measure."[140] Thus, police would naturally avoid transparency in order to keep their tactical advantage. However, unless police address the transparency problem, communities will continue in their distrust of law enforcement. Similarly, without concrete solutions to the transparency problem, police will have no other way of gaining community trust. In the sentencing context, courts must allow defendants a way to challenge the results of these algorithms in order to protect their rights to due process.

In response to transparency issues, some predictive policing companies have advertised themselves as more transparent. Some have

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139. Andrew Guthrie Ferguson, *Illuminating Black Data Policing*, 15 Ohio St. J. Crim. L. 503, 510 (2018).

140. Noah Hurowitz, *NYPD Terrorism Boss Blasts Council Surveillance Oversight Bill as 'Insane'*, DNAInfo (June 14, 2017, 2:46 PM), https://www.dnainfo.com/new-york/20170614/civic-center/surveillance-act-nypd-council-oversight-terrorism-commissioner/.

gone as far as releasing their basic code and describe how their codes remove bias.[141] As an initial matter, however, communities should focus more broadly on building communities through quality schools, job creation, drug treatment, and mental health care, rather than high tech management and control.[142]

Auditing

Auditing must be applied to predictive policing technologies as another method for promoting transparency. Regular auditing techniques reveal significant information about how computer systems operate. The auditing process would involve examining inputs and outputs to detect when a decision process systematically disadvantages particular groups.[143] Auditing the actual algorithm may not itself be sufficient, because causes of bias often lie not in the code, but broader social processes.[144] The proposed form of auditing would not only involve scrutinizing the algorithm itself, but also detecting patterns in the algorithm's output to determine when and how often the outputs are biased against particular groups.

In practical terms, cities that decide to use predictive analytics in its law enforcement efforts and state courts that decide to use risk assessment algorithms in sentencing must hire external, qualified auditors to conduct field experiments of the effects of these algorithms. Auditing must constitute a mandatory and routine part of policing and sentencing practice, just as is patrolling "hot spots" or high crime areas. ProPublica's investigation into an algorithm used in sentencing is the quintessential example of algorithmic auditing. The results found that the blacks who did not go on to re-offend were assigned medium or high-risk scores more often than whites who did not go on to re-

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141. CivicScape, a technology company that sells crime-predicting software to police departments, said its openness comes from inviting discussion about the types of data its models use. *See* Joshua Brustein, *The Ex-Cop at the Center of Controversy Over Crime Prediction Tech*, BLOOMBERG TECH. (July 10, 2017, 5:00 AM), https://www.bloomberg.com/news/features/2017-07-10/the-ex-cop-at-the-center-of-controversy-over-crime-prediction-tech. The company decided against using arrests for marijuana possession at all, since widespread research showing racial disparities in these arrests. *Id.*; *see also* Dave Gershgorn, *Software Used to Predict Crime Can Now Be Scoured for Bias*, QUARTZQUARTZ (Mar. 22, 2017), https://qz.com/938635/a-predictive-policing-startup-released-all-its-code-so-it-can-be-scoured-for-bias/.

142. Steve Dubb, *Michelle Alexander Warns of Digital Surveillance as Next-Gen Jim Crow*, NONPROFIT Q. (Nov. 13, 2018), https://nonprofitquarterly.org/2018/11/13/michelle-alexander-warns-of-digital-surveillance-as-next-gen-jim-crow/.

143. Pauline T. Kim, *Auditing Algorithms for Discrimination*, 166 PA. L. REV. 189, 191 (2017).

144. *Id.*

offend.[145] Regular auditing can reveal such discrepancies in the algorithm's output.

<u>Community Involvement</u>

On the public side, increased community involvement may reduce the community distrust of law enforcement. Currently, there is too little public engagement regarding the adoption of predictive policing. Allowing public involvement in the decision to adopt these policing technologies may increase cooperation between the police and the communities they are charged with protecting. For example, every city should have formal written policies in place detailing the approved use of new big-data policing technologies. These formal written policies should be in the form of, as one scholar articulated, Algorithmic Impact Statements ("AIS").[146] Modeled after the Environmental Impact Statements of the National Environmental Policy Act, AIS will ensure that before implementing predictive technologies, police departments carefully consider its discriminatory impacts and information regarding the technologies are available to the communities that police departments serve.[147]

Requiring Algorithmic Impact Statements would not be an anomaly. Environmental Impact Statements have inspired other types of impact statements throughout government agencies. For example, administrative agencies are required to conduct Privacy Impact Statements when using systems that include personally identifiable information.[148] Similarly, Racial Impact Statements are used to evaluate potential disparities of proposed legislation prior to adoption and implementation.[149]

Similar to Environmental Impact Statements, Algorithmic Impact Statements would include (1) an evaluation of all reasonable alternatives to employing the algorithm, (2) an evaluation of the consequences of not using the algorithm, (3) a police department's preferred alternative among the algorithm design choices, and (4) ap-

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145. *See* discussion *supra* Part IIB.
146. Selbst, *supra* note 109, at 109, 169.
147. *Id.*
148. Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy Decisionmaking in Administrative Agencies*, 75 U. CHI. L. REV. 75, 76 (2008).
149. Seven states–Illinois, Kentucky, Minnesota, Mississippi, New York, Oklahoma, and Vermont–have introduced legislation this year to require racial impact statements. *See* SENTENCING PROJECT, *State Advocacy News: Expanding Racial Impact Statements* (Mar. 1, 2019), https://www.sentencingproject.org/news/7002/. .

propriate mitigation measures.[150] The first requirement in the AIS would include an evaluation of the various design choices and their resulting disparate impact. The second requirement would follow if an algorithm's disparate impact is unavoidable and perhaps too pervasive. In such case, the police must consider not adopting the technology in its police practices. If there is a risk that these technologies will result in harm, then not adopting the technologies must be preserved as an alternative solution. The third requirement would require police departments to compare and contrast different designs and prevent them from using the first design that they encounter. Finally, including appropriate mitigation measures require police to consider how they can reduce biased input data and biased results. These statements would then be available for public comment and city leadership engagement. In addition to impact statements, police departments should engage impacted communities about the risks and rewards of new predictive technologies with official answers to concerns about transparency, racial bias, and constitutional rights. These processes would solve the issue of lack of transparency and distrust between police departments and their communities. It allows communities to participate in the decision-making process of how they are policed, while at the same time reassuring that they are not disproportionately impacted.

B. Flip the target

As a means to increase community trust in law enforcement in general and trust in the use of technology in law enforcement more specifically, police departments may consider using technology as an accountability measure for their own actions while on duty. Police brutality has created a widespread distrust in law enforcement.[151] The

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150. 40 C.F.R. § 1502.14. Environmental Impact statements require: (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated, (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits, (c) Include reasonable alternatives not within the jurisdiction of the lead agency, (d) Include the alternative of no action, (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference, and (f) Include appropriate mitigation measures not already included in the proposed action or alternatives. *Id.*

151. The statistics about police brutality are shocking. Police officers are indicted in fewer than one percent of killings, but the indictment rate for civilians involved in a killing is ninety percent. *See* Reuben Fischer-Baum, *Allegations of Police Misconduct Rarely Result in Charges*, FiveThirtyEight (Nov. 25, 2014, 9:43 AM), https://fivethirtyeight.com/features/allegations-of-

instances of police misconduct and excessive use of force are so perva-sive[152] that the use of algorithms to predict police misconduct may help.[153] The issues of transparency, including community involvement and algorithmic auditing, must still be applied to police misconduct algorithms. More importantly, however, the use of algorithms to pre-dict police misconduct in conjunction with police use of algorithms to predict crime hot spots and potential suspects, may help reduce the distrust between police departments and the communities that they serve. Citizens may find comfort in knowing that their police officers are held to similar accountability standards.

Efforts to create these algorithms are already in effect. A team of researchers from the University of Chicago worked with the Char-lotte-Mecklenburg Police Department with the goal of devising a bet-ter way to predict and head off police misbehavior that put the public and officers at risk.[154] "Over the course of several ride-alongs, focus groups, and field interviews with officers, the data scientists developed a feel for some of the challenges of modern policing" in order to cre-ate more accurate algorithms.[155] These practices must be applied to modern policing.

Surprisingly, the idea of using statistical models to predict police misconduct is not new, and past efforts have often met with resistance. In fact, in 1996, the Chicago Police Department constructed such an algorithm, only to abandon it under pressure from the officers' union, the Fraternal Order of Police—the city's powerful and well-funded police union.[156] The neural network program or BrainMaker, as the

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police-misconduct-rarely-result-in-charges/.25, 2014). Fifty-two percent of police officers report that it is not unusual for law enforcement officials to turn a blind eye to the improper conduct of other officers. *See* U.S. Dep't of Justice, *Police Attitudes Toward Abuse of Authority: Findings From a National Study*, NIJ (May 2000), https://www.ncjrs.gov/pdffiles1/nij/181312.pdf. People who are African-American/Black are twice as likely to be killed by a police officer while being unarmed compared to a Caucasian/White individual. *See* Jon Swaine et al., *Black Americans Killed by Police Twice as likely to be Unarmed as White People*, The Guardian (June 1, 2015), https://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis.

152. *See id.*

153. Rob Arthur, *We Now Have Algorithms to Predict Police Misconduct*, FiveThirtyEight (Mar. 9, 2016), https://fivethirtyeight.com/features/we-now-have-algorithms-to-predict-police-misconduct/.

154. Michael Gordon, *CMPD's Goal: To Predict Misconduct before it can Happen*, The Charlotte Observer (Feb. 26, 2016), https://www.charlotteobserver.com/news/local/crime/inside-courts-blog/article62772592.html.

155. *See* Arthur, *supra* note 153.

156. *See* Taras Grescoe, *The Brain and the Badge; A $795 Computer Program may be Chi-cago's Best Weapon Against Police Corruption-But Many Officers are Suspicious*, Chi. Trib. (June 30, 1996).

algorithm was called, made quarterly sweeps of officer conduct.[157] The BrainMaker used the files of fired officers and compared it with the files of officers with clean records. The program then gradually picked out the patterns that distinguished a fired bad cop from a good cop.[158] Similar to person-based predictive policing, the program assigned each officer a number from zero to one—one for an officer who was already fired and the nearer an officer was to zero, the cleaner his record.[159] Officers who were close to one were called in for questioning and warned to clean up their act.[160]

Along with each officer's history of complaints, the neural network identified personal stressors linked to bad behavior. If an officer had recently divorced or gone into serious debt, for example, he was flagged by the algorithm as more likely to commit misconduct in the future.[161] Not surprisingly, this system was met with resistance from police officers and their union, the Fraternal Order of Police.[162] The union president, Bill Nolan, called the system "absolutely ludicrous" and said police officers were being punished for crimes they had not yet committed.[163]

Nevertheless, employing a system that is able to identify police officers at risk of serious misconduct may help mitigate future misconduct. For instance, in 2014, a white officer shot Laquan McDonald sixteen times, killing the 17-year-old boy.[164] Prior to that incident, the officer had nineteen citizen complaints and two misconduct lawsuits against him, and yet he was not flagged as a high-risk officer.[165] An algorithmic model could have predicted that officer's future misconduct. Research has shown that the number of prior complaints against police officers are strongly correlated with future misconduct.[166] Po-

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157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. Arthur, *supra* note 153.

162. Harold Kunz, the head of legal affairs for the Fraternal Order of Police, expressed, "I don't know of anything yet that can predict the future. And I don't know that I would want anybody, let alone a computer, to say to me, 'Mr Kunz, you may be a behavior problem in the future.'" Grescoe, *supra* note 156.

163. Arthur, *supra* note 153.

164. David Taylor, *Chicago Police officer who shot black teen 16 times found guilty of murder*, THE GUARDIAN (Oct. 5, 2018), https://www.theguardian.com/us-news/2018/oct/05/chicago-laquan-mcdonald-jason-van-dyke.

165. Chava Gourarie, *Inside The Invisible Institute's fight for police accountability*, COLUM. JOURNALISM REV. (Jan. 29, 2016), https://www.cjr.org/united_states_project/inside_the_invisible_institutes_fight_for_police_accountability.php.

166. *See* Arthur, *supra* note 153.

lice departments can combine this data with other police officer attributes to build a predictive model which identifies officers with a high-risk of misconduct—hopefully preventing killings such as those of Laquan McDonald and countless other unarmed citizens from taking place. These models must be used in conjunction with predictive policing; police departments should not use one without using the other. Such practices can help foster trust in law enforcement policies.

V. CONCLUSION

As the goal of stopping crime before it happens becomes more alluring, systems of predictive policing and machine learning are rapidly being adopted across the country. With many police departments adopting predictive policing algorithms, predictive criminal justice will become commonplace. Algorithms, however, are complex, difficult to understand, and often only understood by the company selling the algorithmic program. While the use of these algorithms in criminal justice may appear to solve issues concerning the efficient use of resources, the hidden side effects—privacy invasions and due process violations—mandate that these algorithms be heavily audited, tested, monitored, and scrutinized. This article seeks to add to the discussion regarding the privacy and due process issues related to the increased use of predictive policing. These byproducts can be mitigated by implementing procedures that increase transparency, procedures that regularly audit the technologies, and employing algorithms that hold police officers accountable. Of course, technology is invaluable to everyday life, but the law is often ill-equipped to keep pace with new developments. If we insist on using these technologies when life and liberty are at stake, we must not blindly follow its results and must actively ensure that these technologies are not disproportionately harming certain populations.