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Sentry or Insensible? A Criminal Defendant's Right to be Present at a Confrontation Forfeiture Hearing

Tim Donaldson[1]

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A criminal defendant forfeits the right to confront a prosecution witness at trial when the defendant wrongfully prevents the witness from testifying.[2] The Arizona Court of Appeals has held that "[p]rior to admitting testimony pursuant to this principle, the trial court must hold a hearing at which the government has the burden of proving by a preponderance of the evidence that the defendant was responsible for the witness's absence."[3] Many other jurisdictions also require forfeiture hearings.[4] All of these jurisdictions face the difficult problem that a witness who is too scared to testify against a defendant at trial is likely no less scared to testify against the defendant at a forfeiture hearing.[5] The Seventh Circuit Court of Appeals observed in *United States v. Scott* that "[i]t seems almost certain that, in a case involving coercion or threats, a witness who refuses to testify at trial will not testify to the actions procuring his or her unavailability."[6]

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[2] Giles v. California, 554 U.S. 353, 359-68 (2008); State v. Miller, 316 P.3d 1219, 1227 (Ariz. 2013); State v. Franklin, 307 P.3d 983, 986 (Ariz. Ct. App. 2013); *see also* Reynolds v. United States, 98 U.S. 145, 158 (1878) (recognizing the doctrine); *cf*. State v. Prasertphong, 114 P.3d 828, 834 (Ariz. 2005) (acknowledging the constitutionality of the forfeiture by wrongdoing doctrine while using it as an example justifying the constitutionality of the rule of completeness).

[3] State v. Valencia, 924 P.2d 497, 498 (Ariz. Ct. App. 1996).

[4] *See generally* Tim Donaldson, *A Reliable and Clear-Cut Determination: Is a Separate Hearing Required to Decide when Confrontation Forfeiture by Wrongdoing Applies?* 49 NEW ENG. L. REV. 167, 169-72 (2015) (identifying jurisdictions that have adopted a hearing requirement). The hearing requirement appears to have originated from New York cases applying the forfeiture doctrine. *See generally* United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982); Holtzman v. Hellenbrand, 460 N.Y.S.2d 591, 597 (N.Y. App. 1983). Forfeiture hearings are referred to as *Sirois* hearings in New York after the named defendant in the *Holtzman* matter. New York v. Geraci, 649 N.E.2d 817, 819 n.1 (N.Y. 1995).

[5] *See* People v. Perkins, 691 N.Y.S.2d 273, 275 (N.Y. Sup. Ct. 1999).

[6] United States v. Scott, 284 F.3d 758, 764 (7th Cir. 2002); *see also* United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979) (commenting "that

I. INTRODUCTION

Victor Perkins was prosecuted in the New York Supreme Court for Monroe County on charges arising out of an armed robbery during which he allegedly restrained the victim and threatened her with handguns.[7] After the victim indicated her unwillingness to testify against the defendant as a result of intimidation by his accomplices, the trial court convened a pre-trial hearing to determine whether the transcript of the victim's grand jury testimony could be used in lieu of live testimony due to defendant misconduct.[8] The victim refused to respond to a subpoena for the hearing and alleged through her attorney that she was so traumatized by the threats made against her that she would not testify in the defendant's presence.[9] Over Perkins's objection, the trial judge questioned the victim outside of the presence of the parties to determine whether she had been intimidated.[10] The court recognized that a criminal defendant has a right to be present at a material stage of a trial, but it found such situation distinguishable and reasoned that "[w]here a witness refuses to testify at trial because of a defendant's misconduct, the defendant forfeits his rights of confrontation. . . . This rule should be extended to include a situation in which the defendant's misconduct is so egregious that the witness refuses to testify. . ." at a hearing to determine whether the defendant procured the unavailability of the witness.[11]

often the only evidence of coercion will be the statement of the coerced person, as repeated by government agents") (a separate ruling in *Balano* regarding double jeopardy was *abrogated by* Richardson v. United States, 468 U.S. 317, 325–26 (1984), *as recognized in* United States v. Willis, 102 F.3d 1078, 1081 (10th Cir. 1996)).

[7] People v. Perkins, 691 N.Y.S.2d 273, 273 (N.Y. Sup. Ct. 1999).

[8] *Id.* at 274-77.

[9] *Id.* at 275.

[10] *Id.*

[11] *Id.* at 276. The New York Supreme Court Appellate Division found that

The United States District Court for the Western District of New York wrote that the state trial court's reasoning in *Perkins* was a "particularly egregious example of 'circular logic.'"[12] The District Court recognized that the presence of a defendant is critical to the fairness of hearings where testimony is taken and questions of fact are determined.[13] It further disagreed with the state trial court's conclusion that a hearing concerning alleged witness tampering was not a material stage of a criminal trial.[14] The District Court noted that the very purpose of the hearing was to determine whether the defendant had committed misconduct that forfeited his right to confront the witness.[15] It further explained that the only way the trial court could have concluded that the alleged misconduct was egregious enough to exclude Perkins from its *in camera* examination of the frightened witness was to "*assume* the ultimate fact in issue" that the defendant indeed intimidated the witness.[16] The District Court held that exclusion of Perkins from the trial court's *in camera* examination of the witness abridged his right to confront her, because it directly impacted his ability to cross-examine her at trial.[17]

The Second Circuit Court of Appeals found that the prosecution failed to prove that Perkins procured the absence of the frightened witness and thus held that he did not waive

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the prosecution failed to establish that the defendant procured the unavailability of the traumatized victim and held that the trial court erred when admitting her grand jury testimony, but it did not address the propriety of the hearing procedure used by the Supreme Court and found that any error was harmless. People v. Perkins, 735 N.Y.S.2d 273, 274-75 (N.Y. App. Div. 2001).

[12] Perkins v. Herbert, 537 F.Supp.2d 481, 499 (W.D.N.Y. 2008).

[13] *Id.* at 497-98.

[14] *Id.* at 498-99.

[15] *Id.* at 498.

[16] *Id.* at 498-99.

[17] *Id.* at 499.

his right to confront her at trial.[18] It therefore determined that there was no need to discuss the merits of the District Court's ruling regarding Perkins' right to be present during the trial court's *in camera* examination of the witness.[19] The Second Circuit concluded, however, that any constitutional errors committed during Perkins's trial were harmless, because any erroneously admitted evidence was merely cumulative since there was other evidence sufficiently establishing his guilt.[20]

Nathaniel Grayton was prosecuted for the murder of Isaiah Rodriguez in the New York Supreme Court for Kings County.[21] A witness to the murder refused to testify at trial because she was afraid of the defendant and his friends.[22] She was forced to testify by a material witness order, but claimed on the stand that she couldn't remember the incident despite having earlier given grand jury testimony implicating the defendant.[23] The trial court conducted an interlocutory hearing and ultimately determined that the grand jury testimony could be read in lieu of live testimony, because Grayton committed misconduct that intimidated the witness and thereby prevented her from fully testifying at trial.[24]

Grayton appealed his conviction arguing that his exclusion from the hearing violated his constitutional right to presence.[25] However, the Second Department of the Appellate Division of the New York Supreme Court summarily affirmed his conviction, writing that "[c]ontrary to the defendant's

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[18] Perkins v. Herbert, 596 F.3d 161, 172-73 (2d Cir. 2010).
[19] *Id.*
[20] *Id.* at 177-80.
[21] People v. Grayton, No. 179/02, 2003 WL 1389090, at *1 (N.Y. Sup. Ct. Feb. 5, 2003).
[22] *Id.*
[23] *Id.* at *2.
[24] *Id.* at *2-*5.
[25] Grayton v. Ercole, 691 F.3d 165, 169 (2d Cir. 2012).

contention, his constitutional right to be present at a material stage of the trial was not violated."[26] The procedure used by the Supreme Court in *Grayton* was consistent with then-existing precedent holding that a defendant's absence from such a hearing "did not have a substantial effect upon the defendant's ability to defend himself."[27] Use of a similar procedure was also subsequently reaffirmed by the Appellate Division in *People v. Zuran*.[28]

The United States District Court for the Eastern District of New York expressed concerns about the exclusion of Grayton from a hearing conducted for the purpose of determining whether he tampered with a witness.[29] It observed that criminal defendants generally have a right to be present at hearings where factual issues are determined and noted that the forfeiture hearing held in Grayton's case clearly involved questions of fact.[30] The court wrote that "Petitioner's absence from the hearing stirs Confrontation Clause and Due Process concerns as the hearing dictated Petitioner's cross-examination rights and precluded him from personally defending against accusations of misconduct."[31] The Eastern District Court addressed the decision by the Western District in *Perkins* and wrote that, while it had not been directly contradicted, several analogous cases at least cast some doubt on its rationale.[32] The court ultimately assumed, without deciding, that the defendant had a right to be present at the hearing, but it held that he

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[26] *Grayton*, 801 N.Y.S.2d at 757.
[27] People v. Chicas, 611 N.Y.S.2d 873, 874 (N.Y. App. Div. 1994); *see also* People v. Perkins, 691 N.Y.S.2d 273, 275-76 (N.Y. Sup. Ct. 1999); People v. Babb, 640 N.Y.S.2d 801, 801-02 (N.Y. App. Div. 1996).
[28] People v. Zuran, 826 N.Y.S.2d 133, 134 (N.Y. App. Div. 2006).
[29] Grayton v. Ercole, No. 07-CV-0485 (SLT), 2009 WL 2876239, at *2-*4 (E.D.N.Y. Sept. 8, 2009).
[30] *Id.* at *3.
[31] *Id.*
[32] *Id.* at *3-*4.

waived any such right by failing to timely object to the hearing procedure used in his case by the New York Supreme Court.[33]

The Second Circuit Court of Appeals agreed with the District Court that Grayton waived his right to be present at the forfeiture hearing.[34] Unlike in *Perkins*, it did, however, directly address the presence issue and determined that a criminal defendant has a right to attend a hearing to decide whether the defendant has forfeited his or her right to confront a witness.[35] The Second Circuit acknowledged that the United States Supreme Court had not addressed whether such a hearing constitutes a material stage of a trial to which the right to be present attaches.[36] The court nonetheless recognized that a confrontation forfeiture hearing "is a quasi-criminal proceeding, in which not only the admissibility of evidence is determined, but also whether a defendant has engaged in misconduct towards witnesses."[37] It wrote that a defendant might have a right to be present for that reason alone, but additionally concluded that the right attaches because the hearing bears a substantial relation to a defendant's opportunity to fully defend against the principal criminal charges against him or her.[38] The court explained that cross-examination is critical for insuring the integrity of the fact-finding process in a criminal trial.[39] It acknowledged that the right may be lost by misconduct, but wrote that a hearing for that purpose is not a mere formality.[40] It agreed with Grayton that his exclusion from the trial court's interlocutory hearing amounted to double

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[33] *Id.* at *4-*8.
[34] *Supra* note 25 at 174-78.
[35] *Id.* at 169-74; *see generally* Perkins v. Herbert, 596 F.3d 161, 173 n.11 (2d Cir. 2010).
[36] *Id.* at 169-70.
[37] *Id.* at 170.
[38] *Id.* at 170-71.
[39] *Id.* at 171.
[40] *Id.*

punishment since a defendant's inability to fully face misconduct allegations could well lead to subsequent loss of the essential trial right of confrontation.[41]

The same day that the Second Circuit decided *Grayton*, the New York Supreme Court Appellate Division issued its opinion in *People v. McCune*.[42] The Appellate Division recognized that criminal defendants have a statutory and constitutional right to be present at all material stages of a trial.[43] It further wrote that proceedings where testimony is taken constitute material stages of a trial, because a defendant's presence is needed to confront witnesses and advise counsel of any inconsistencies, errors, or falsehoods in a witness's testimony.[44] The Appellate Division therefore concluded in *McCune* that a forfeiture hearing constitutes a material stage of a trial, because it could possibly lay the groundwork for the loss of a defendant's right to cross-examine a witness during trial and thereby has a substantial effect on a defendant's ability to defend against the criminal charges that have been made.[45]

The New York Supreme Court asserted in *Perkins* that there may be situations where a defendant's misconduct towards a witness is so egregious that forfeiture should apply to a defendant's ability to attend a hearing to decide whether the defendant has lost the right to confront the witness at trial.[46] Its solution of excluding a defendant from a forfeiture proceeding has subsequently been rejected by higher courts in that

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[41] *Id.* at 171-72.
[42] Grayton v. Ercole, 691 F.3d 165 (2d Cir. 2012); People v. McCune, 949 N.Y.S.2d 747 (N.Y. App. Div. 2012).
[43] People v. McCune, 949 N.Y.S.2d 747, 748 (N.Y. App. Div. 2012).
[44] *Id.* at 749.
[45] *Id.*; *see also* People v. Williams, 2 N.Y.S.3d 612, 614 (N.Y. App. Div. 2015).
[46] People v. Perkins, 691 N.Y.S.2d 273, 276 (N.Y. Sup. Ct. 1999).

jurisdiction.[47] However, the right to presence is not absolute and may be lost by misconduct.[48] In addition, the problem encountered in *Perkins* is not isolated to New York. The New Jersey Supreme Court addressed the problem in *State v. Byrd* and tried to reconcile a defendant's right to be present, writing that a confrontation forfeiture "hearing must be conducted in the presence of counsel and defendant, and the defendant can only be excluded from the hearing for extraordinary reasons that must be articulated on the record."[49]

This article addresses a criminal defendant's constitutional right to be present at an evidentiary hearing conducted to determine whether the defendant has intimidated a witness and thereby forfeited the right to confront the witness during trial.

II. THE RIGHT TO BE PRESENT

The right to presence has ancient origin. A 1354 statute enacted during the reign of Edward III confirmed Magna Charta.[50] It further provided that no man could be imprisoned or put to death "without being brought in Answer by due Process of the Law."[51] William Blackstone explained in his *Commentaries on the Laws of England* that an indictment against an accused could not be tried in capital cases under the due process provision of that statute, or in any other case

[47] Grayton v. Ercole, 691 F.3d 165, 169-74 (2d Cir. 2012); People v. Williams, 2 N.Y.S.3d 612, 614 (N.Y. App. Div. 2015); People v. McCune, 949 N.Y.S.2d 747, 748-49 (N.Y. App. Div. 2012).
[48] Snyder v. Massachusetts, 291 U.S. 97, 106 (1933), *overruled on other grounds by* Malloy v. Hogan, 378 U.S. 1, 2-6 (1964).
[49] State v. Byrd, 967 A.2d 285, 303 (N.J. 2009).
[50] The Statute of the Twenty-Eighth Year of King Edward III, 1354, 28 Edw. 3, ¶ 1 (Eng.).
[51] The Statute of the Twenty-Eighth Year of King Edward III, 1354, 28 Edw. 3, ¶ 3 (Eng.).

according to the rules of equity, "unless he personally appears."[52]

An earlier provision in Magna Charta stated that a freeman could only be imprisoned or condemned "by lawful judgment of his Peers, or by the Law of the Land."[53] Edward Coke wrote in his *Institutes on the Laws of England* that the right to a "lawful judgment" implied that one's peers "ought to heare [sic] no evidence, but in the presence, and hearing of the prisoner."[54] Coke opined that this right to presence extended to

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[52] William Blackstone, 4 COMMENTARIES ON THE LAWS OF ENGLAND 313, ch. 24 (Oxford, Clarendon Press 1769); *cf.* Ball v. United States, 140 U.S. 118, 129 (1891) ("At common law no judgment for corporal punishment could be pronounced against a man in his absence. . . ."); Anonymous (1774), 98 Eng. Rep. 715; Lofft 400 (K.B.) ("the Court said they could not award corporal punishment in absentem."); Rex v. Harris and Duke (1689), 91 Eng. Rep. 1075; 1 Ld. Raym. 267 (K.B.) ("[N]o judgment for corporal punishment can be pronounced against a man in his absence. . . ."); Matthew Hale, 2 HISTORIA PLACITORUM CORONAE - THE HISTORY OF THE PLEAS OF THE CROWN 298 (London, E. and R. Nutt, and R. Gosling 1736) ("In capital causes, whether upon indictment or appeal, no verdict can be given by default in the absence of the party."). Common law cases were less concerned with presence when minor charges were involved. *See* Queen v. Templeman, (1700), 91 Eng. Rep. 54; 1 Salk 56 (K.B.); Rex. v. Legingham, (1670) 84 Eng. Rep. 432; 2 Keble 687 (K.B.); Dominus Rex v. Ladsingham, (1670) 83 Eng. Rep. 101 (K.B.), Raymond, Sir T. 193.

[53] Magna Charta, 1297, 25 Edw. 1, ¶ 29 (Eng.). Supreme Court cases and other authorities have opined that the Due Process Clauses in the U.S. CONST. amend. V and U.S. CONST. amend. XIV convey the same meaning as the "law of the land" terminology used in Magna Charta. *See generally* Tim Donaldson, *Kangaroo Proof: Due Process v. Hearsay*, 43 S.U.L. REV. 175, 181 n.49 (2016).

[54] Edward Coke, THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND: CONTAINING THE EXPOSITION OF MANY ANCIENT, AND OTHER STATUTES 49 (London, A. Crooke et al. 1642) (explaining Magna Charta cap. 29). Sir Thomas Powys later identified confrontation as the source of a defendant's right to be present when evidence is received. *See* Fenwick's Case, (1696) (H.C.), *reprinted in* T.B. Howell, 13 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND

questions of law to ensure that a defendant "may heare [sic], whether the case be rightly put . . . ."[55] Coke cited the report of Justice Spelman in *Lord Dacre's Case* in support of his view.[56] Spelman reported therein that the peers had called upon the presiding Lord Steward for advice while deliberating treason charges against Lord Dacre, but the Lord Steward was advised by the justices of England that "he could not do so without the prisoner being present at the bar."[57]

Later judges disagreed with Coke's opinion requiring the presence of a defendant at all conferences on legal matters.[58] Lord Nottingham noted in the *Trial of Lord Cornwallis* that Coke's view was not supported by custom,

OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 538, 638 (London, T.C. Hansard 1816) (arguing that it was a fundamental rule of law "[t]hat no evidence shall be given against a man, when he is upon trial for his life, but in the presence of the prisoner; because he may cross-examine him who gives such evidence; and that is due to every man in justice.").

[55] Edward Coke, THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND: CONTAINING THE EXPOSITION OF MANY ANCIENT, AND OTHER STATUTES 49 (London, A. Crooke et al. 1642); *see also* Edward Coke, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 29-30 (London, A. Crooke et al. 1669).

[56] Edward Coke, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 30 (London, A. Crooke et al. 1669); Edward Coke, THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND: CONTAINING THE EXPOSITION OF MANY ANCIENT, AND OTHER STATUTES 49 (London, A. Crooke et al. 1642).

[57] R. v. Lord Dacre & Greystock (1534) (H.L.), *reprinted in* 1 THE REPORTS OF SIR JOHN SPELMAN 54, 55 (Selden Soc'y ed., 93rd ed. 1976); *see also* Lord Dacre's Case (1534), 84 Eng. Rep. 1080, 1081, Kelyng 56, 57 (H.L.) (a reprint of the report later made by Justice Kelyng in connection with another case).

[58] *E.g.*, Trial of Lord Cornwallis, (1676) (H.L.), *reprinted in* 1 LORD NOTTINGHAM'S CHANCERY CASES 414-15 (Selden Soc'y ed., 73rd ed. 1957).

practice, or Spelman's report in *Lord Dacre's Case*.[59] The justices in *Lord Morley's Case* also did not agree upon the precedent set by *Lord Dacre's Case* and ruled that they could answer legal questions in open court in the absence of a prisoner.[60] However, the precedent set by *Lord Morley's Case* on the issue of presence was equally unclear.[61] The Lord High Steward in the *Trial of Edward Earl of Warwick and Holland* later commented that "[i]t must certainly be in the presence of the prisoner, if you ask the judges opinions."[62] Case authority

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[59] *Id.* at 414 ¶¶ 1-3; *see generally* Trial of Mervin Lord Audley (1631) (H.L.), *reprinted in* John Rushworth, 2 HISTORICAL COLLECTIONS FROM THE YEAR 1628 TO THE YEAR 1638, at 84 (London, N.P. 1706) (reporting that peers had consulted four times with the Lord Chief Justice after the prisoner had been withdrawn and had additionally sent the Lord Chief Justice and two Lords to consult with the Lord Steward).

[60] Lord Morley's Case (1666), 84 Eng. Rep. 1079, 1079-80 ¶ 3, Kelyng 53, 54 (H.L.); Lord Morley's Case (1666) (H.L.), *reprinted in*, T.B. Howell, 6 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 770, 770 ¶ 3 (London, T.C. Hansard 1816) (alternative extended report of *Lord Morley's Case*). *But see* Tryal of Henry Lord Delemere, (1686) (H.L.), *reprinted in* T.B. Howell, 11 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 509, 562-63 (London, T.C. Hansard 1811) (indicating that a different rule applied in cases involving inferior courts in cases of common persons).

[61] *See* Trial of Lord Cornwallis, (1676) (H.L.), *reprinted in* 1 LORD NOTTINGHAM'S CHANCERY CASES, 415 ¶ 4 (Selden Soc'y ed., 73rd ed. 1957) (complaining that the ruling in *Lord Morley's Case* is internally inconsistent).

[62] Trial of Edward Earl of Warwick & Holland (1699) (H.L.), *reprinted in* T.B. Howell, 8 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 939, 1011 (London, T.C. Hansard 1816); *see, e.g.*, Trial of William Viscount of Stafford (1680) (H.L.), *reprinted in* T.B. Howell, 7 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE

on the point was therefore equivocal.[63]

Coke's opinion regarding a defendant's right to be present when factual matters were at issue was however generally accepted. Despite expressing uneasiness about some of Coke's views, Lord Nottingham ruled in the *Trial of Lord Cornwallis* that "all doubts in law arising upon fact ought to be proposed in the presence of the prisoner that he may see the fact is rightly stated."[64] Authorities regarding a defendant's right to be present during the receipt of evidence were even more clear. William Hawkins wrote in *Treatise of the Pleas of the Crown* that "in Cases of Life no Evidence is to be given against a Prisoner but in his Presence."[65] Leonard MacNally later stated more generally in his treatise on *Rules of Evidence on Pleas of the Crown* that "It is a settled rule of law, that no evidence is to be given against a prisoner but in his presence."[66]

YEAR 1783, at 1294, 1526-27 (London, T.C. Hansard 1816) (example where presence of a defendant was secured before delivering legal opinions).

[63] *See* William Hawkins, 2 A TREATISE OF THE PLEAS OF THE CROWN OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER THEIR PROPER HEADS, ch. 44, § 20, at 425 (Savoy, Eliz. Nutt and R. Gosling 1721).

[64] Trial of Lord Cornwallis, (1676) (H.L.), *reprinted in* 1 LORD NOTTINGHAM'S CHANCERY CASES 414-15 (Selden Soc'y ed., 73rd ed. 1957); *see also* Trial of Lord Cornwallis (1676) (H.L.), *reprinted in*, T.B. Howell, 7 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 143, 156 (London, T.C. Hansard 1816) (alternative case report).

[65] William Hawkins, 2 A TREATISE OF THE PLEAS OF THE CROWN OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER THEIR PROPER HEADS, ch. 46, § 1, at 428 (Savoy, Eliz. Nutt and R. Gosling 1721).

[66] Leonard Mac Nally, 1 THE RULES OF EVIDENCE ON PLEAS OF THE CROWN 14, ch. 4 (Dublin, H. Fitzpatrick 1802); *see also* The King v. Crowther, (1785), 99 Eng. Rep. 1009, 111 (K.B.) 1 Term Rep. 125, 127 (sustaining an

A criminal defendant's right to presence extended to some pre-trial proceedings where testimony was taken. The Marian bailment and committal statutes from 1554 to 1555 required justices of the peace to take and record preliminary examinations of prisoners together with information from those who brought in the prisoner.[67] The court in *King v. Woodcock* held that a deposition taken in the absence of a defendant was not authorized under the statutes and therefore stripped of any official sanction.[68] William Russell later wrote in his *Treatise*

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objection against a witness merely affirming prior testimony, and holding that "the witness ought to have been re-sworn in the defendant's presence."); Rex v. Vipont, (1761) 97 Eng. Rep. 767, 768, 2 Burr. 1163, 1165 (K.B.) (ruling that "evidence ought to be taken over again, in a defendant's presence, unless he confesses."); *cf*. King v. Thompson, (1787) 100 Eng. Rep. 10, 13-14, 2 Term Rep. 18, 23-24 (K.B.) (recognizing rule but holding that presence would be presumed unless records in a case showed otherwise); Rex v. Kempson, (1775) 98 Eng. Rep. 1065; 1 Cowp. 241 (K.B.) (same); Rex v. Aikin, (1765) 97 Eng. Rep. 1098, 1099 (K.B.), 3 Burr. 1785, 1785-86 (same). *But see* Dominus Rex v. Baker, (1745) 93 Eng. Rep. 1156; 2 Strange 1239 (K.B.) (indicating that recorded prior testimony need only be read in the presence of a defendant).

[67] An act to take examination of prisoners suspected of any manslaughter or felony, 1555, 2 & 3 Phil. & Mary, ch. 10, ¶ 1 (Eng.).; An act appointing an order to justices of peace for the bailment of prisoners, 1554-55, 1 & 2 Phil. & Mary, ch. 13, ¶ 1 (Eng.); *see generally*, Tim Dondaldson, GRADUAKKY EXPLODED: CONFRONTATION VS. THE FORMER TESTIMONY RULE, 46, 137, 145-49, 168-69, 179-83 (ST. MARY'S, L.J. 2015) (discussing the history of the Marian bailment and committal statutes).

[68] The King v. Woodcock, (1789) 168 Eng. Rep. 352, 353; 1 Leach 500, 502 (K.B.); *see also* The King v. Dingler, (1791) 168 Eng. Rep. 383, 384; 2 Leach 561, 562-63 (K.B.) (rejecting admission of a deposition taken in the absence of a defendant on authority of *Woodcock*); The King v. Paine, (1695) 87 Eng. Rep. 584, 585; 5 Mod. 163, 165 (K.B.) (holding that depositions were not valid under the Marian bailment and committal statutes where a defendant was not present when they were taken); Rex v. Pain, (1695) 90 Eng. Rep. 527; Comb. 358 (K.B.) (same). *But see* The King v. The Inhabitants of Eriswell, (1790) 100 Eng. Rep. 815, 819; 3 Term Rep. 707, 713 (K.B.) (Buller, J.) (opining that pretrial depositions could be validly taken by a coroner in a defendant's absence and used as evidence);

on Crimes and Indictable Misdemeanors that a committal deposition "should be shewn [sic] to have been taken conformably to the statute, for otherwise it would be extrajudicial, and to have been taken in the presence of the prisoner, otherwise he could have no opportunity for cross-examination."[69]

A right to presence has been recognized in this country since its founding.[70] Coke's position requiring the presence of a defendant during the taking of testimony also appears to have been the prevailing view.[71] Zephaniah Swift wrote in his *Digest of the Law of Evidence* that "it is a very important

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Robins v. Wolseley, (1757) 161 Eng. Rep. 391, 398; 2 Lee 421, 442-43 (Arches Ct.) (same).

[69] William O. Russell, 2 A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 660 (2d ed. London, Joseph Butterworth and Son, 2d ed. 1828).

[70] *See* State v. Hurlbut, 1 Root 90 (Conn. 1784) (recognizing that a defendant must be present when a verdict is received); *see also* People v. Perkins, 1 Wend. 91 (1828) (same); People v. Winchell, 7 Cow. 525 (1827) (presence needed for entry of judgment).

[71] *See* William Hening, THE NEW VIRGINIA JUSTICE 244 ¶ 172 (Richmond, Johnson & Warner 1810) ("In cases of life, no evidence is to be given against a prisoner but in his presence."); A NEW CONDUCTOR GENERALIS: BEING A SUMMARY OF THE LAW RELATIVE TO THE DUTY AND OFFICE OF JUSTICES OF THE PEACE, SHERIFFS, CORONERS, CONSTABLES, JURYMEN, OVERSEERS OF THE POOR, &C. & C. 151 (Albany, D. & S. Whiting 1803) (citations omitted):

> It hath always been held as a settled rule, that in cases of life, no evidence is to be given against a prisoner, but in his presence . . . .
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> So also in all summary proceedings before justices of the peace, under a penal statute, the evidence must be given in presence of the defendant; and it must appear on the record of conviction that the evidence was so given, otherwise it will be irregular.

principle of criminal law, that all witnesses must appear, and testify *viva voce* in open Court, in the presence of the prisoner on trial."[72] William Rawle explained in his *View of the Constitution of the United States of America*:

> It would be monstrous if in any country the testimony on which a person might be convicted, should be taken in his absence. Yet it is certain, that in some countries, the testimony in which a person might be convicted of the greatest crimes was often taken without his being present, sometimes even without his knowing who the witnesses were. The evidence thus collected, was embodied in the accusation, and he was required to defend himself against invisible enemies. This severity has indeed been mitigated in modern times, but it is believed to be not yet totally abolished.[73]

The defendant in *Hopt v. People* objected to a criminal procedure by which challenges to jurors for cause were tried by a special panel of three triers outside of the presence of defendant and his counsel.[74] The United States Supreme Court held that the procedure conflicted with express and implied

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[72] Zephaniah Swift, A DIGEST OF THE LAW OF EVIDENCE IN CIVIL AND CRIMINAL CASES AND A TREATISE ON BILLS OF EXCHANGE AND PROMISSORY NOTES 114 (Hartford, Oliver D. Cooke 1810).

[73] William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 127 (Philadelphia, H.C. Carey & I. Lea 1825); *cf*. Kirby v. United States, 174 U.S. 47, 55 (1899) (finding that a trial court erred when admitting the records showing the conviction of a defendant's accomplices, because "he was confronted only with the record of another criminal prosecution, with which he had no connection, and the evidence in which was not given in his presence.").

[74] Hopt v. People, 110 U.S. 574, 575-77 (1884).

statutory provisions requiring the defendant's presence.[75] It additionally commented that:

> [T]he legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the constitution.[76]

The Supreme Court later wrote in *Lewis v. United States* that "[a] leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner."[77]

The overstatement of principle made in *Lewis* was limited by a majority opinion in *Snyder v. Massachusetts* written by Justice Benjamin Cardozo.[78] In that case, Snyder objected that a jury had been allowed in his absence to view the

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75 *Id.* at 577-78.

76 *Id.* at 579; *see also* Schwab v. Berggren, 143 U.S. 442, 448-49 (1892).

77 Lewis v. United States, 146 U.S. 370, 372 (1892); *see also* Ponzi v. Fessenden, 258 U.S. 254, 260 (1922) (writing that a defendant charged in two jurisdictions "[h]e is entitled to be present at every stage of the trial of himself in each jurisdiction with full opportunity for defense."). *But see* Howard v. Kentucky, 200 U.S. 164, 175 (1906) (holding that a Kentucky procedure allowing a criminal defendant to consent to proceedings in the defendant's absence did not violate due process when no injury results to any substantial rights).

78 Snyder v. Massachusetts, 291 U.S. 97, 117 n.* (1934) (calling the statements about presence in *Hopt*, *Schwab*, and *Lewis* dicta), *overruled on other grounds by* Malloy v. Hogan, 378 U.S. 1, 2-6 (1964); *see also* Illinois v. Allen, 397 U.S. 337, 342-43 (1970) (rejecting the "broad dicta" in *Hopt* and *Lewis*, and instead accepting *Snyder*).

scene of the crime with which he was charged.[79] The Supreme Court assumed for purposes of its decision that due process secured a defendant's right to be personally present "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge."[80] The Court noted that due process did not assure "the privilege of presence when presence would be useless, or the benefit but a shadow."[81] It concluded that Snyder did not have a right to be present when the jurors in his case viewed the crime scene, because his presence would have added little to his defense.[82] The *Snyder* Court held that "the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."[83]

The Supreme Court went on to explain that the viewing in *Snyder* did not constitute a part of a trial in the sense understood by common law.[84] It recognized that knowledge gained by the jurors could be characterized as evidence,[85] but the Court rejected the "tyranny of labels" and cautioned against extending the meaning of the words "evidence" and "trial" to include "stages of the cause at which the function of counsel is

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[79] *Snyder*, 291 U.S. at 103-05.
[80] *Id.* at 105-06; *see also* State v. Shackart, 947 P.2d 315, 332 (Ariz. 1997) ("We have adopted the view that a defendant also has the right to attend those proceedings where 'his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'") (quoting State v. Christensen, 628 P.2d 580, 586 (Ariz. 1981)).
[81] *Snyder*, 291 U.S. at 106-07.
[82] *See Id.* at 108-13.
[83] *Id.* at 107-08; *see also* Faretta v. California, 422 U.S. 806, 819 n.15 (1975) ("It is now accepted, for example, that an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings . . . .").
[84] *Snyder*, 291 U.S. at 113.
[85] *Id.*

mechanical or formal . . . ."[86] However, the *Snyder* Court made clear that it did not consider a defendant's presence dispensable when testimony is taken. It recognized that "[a] defendant in a criminal case must be present at a trial when evidence is offered, for the opportunity must be his to advise with his counsel . . . and cross-examine his accusers."[87]

Post *Snyder* cases on the presence right have focused upon whether a proceeding is considered a material stage of a trial.[88] The Supreme Court wrote in *United States v. Gagnon* that the right to presence is rooted to a large extent in the right to confront witnesses, but, that it is also protected by due process in some situations where a defendant is not confronting witnesses or evidence.[89] The Court nonetheless rejected the *Gagnon* defendants' argument that a trial court had violated their presence rights by interviewing a juror *in camera* to determine whether the juror could maintain impartiality despite expressing concern about defendant Gagnon drawing sketches of the jurors during trial.[90] The Supreme Court assumed for purposes of its opinion that the *in camera* meeting was a "stage of the trial."[91] It ruled however that the interaction was so minor in light of the whole record that the presence of the defendants at the *in camera* meeting "was not required to

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[86] *Id.* at 114-15.
[87] *Id.* at 114.
[88] *See, e.g.*, Grayton v. Ercole, 691 F.3d 165, 169-74 (2d Cir. 2012); People v. McCune, 949 N.Y.S.2d 747, 748-49 (N.Y. App. Div. 2012); *cf*. Price v. Johnston, 334 U.S. 266, 285 (1948) (holding that a defendant has no absolute right to argue or be present at an appeal hearing, and commenting that "[t]he absence of that right is in sharp contrast to his constitutional prerogative of being present in person at each significant stage of a felony prosecution . . . ."), *abrogated on other grounds by* McCleskey v. Zant, 499 U.S. 467, 482-83, 493-96 (1991).
[89] United States v. Gagnon, 470 U.S. 522, 526 (1984); *see also* State v. Levato, 924 P.2d 445, 447 (Ariz. 1996).
[90] *Gagnon*, 470 U.S. at 526-27.
[91] *Id.* at 527.

ensure fundamental fairness or a 'reasonably substantial . . . opportunity to defend against the charge.'"[92]

The Supreme Court held in *Kentucky v. Stincer* that a defendant's presence right was not violated by his exclusion from a hearing held to determine whether his alleged child victims were competent to testify.[93] The Court wrote the due process was provided because of the particular nature of the competency hearing.[94] It emphasized that the questioning at the hearing was directed solely at the ability of the children to testify.[95] The Court rejected the defendant's confrontation claim, but it also resisted the prosecution's suggestion that the competency hearing was merely a pretrial proceeding to which the right of confrontation did not attach.[96] It wrote that "[d]istinguishing between a 'trial' and a 'pretrial proceeding' is not particularly helpful here . . ., because a competency hearing may well be a 'stage of trial.'"[97] The Supreme Court instead found it "more useful to consider whether excluding the defendant from the hearing interferes with his opportunity for effective cross-examination."[98] The Court ultimately determined that the exclusion of the defendant from the competency hearing did not interfere with his opportunity for cross-examination, because the hearing was limited to basic

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[92] *Id.* (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934)); *see also* State v. Christensen, 628 P.2d 580, 586 (Ariz. 1981).
[93] Kentucky v. Stincer, 482 U.S. 730, 739-47 (1987); *see also* State v. Ritchey, 490 P.2d 558, 561 (Ariz. 1971). *But cf*. State v. Harris, 481 P.2d 504, 507 (Ariz. 1971) (writing that a defendant has a right to be present at the determination of a witness's competency, but holding that an *in-camera* competency interview did not deny a defendant's right to confrontation when it was followed by re-examination of the witness in open court).
[94] *Stincer*, 482 U.S. at 745-46.
[95] *Id.* at 746.
[96] *Id.* at 739-40.
[97] *Id.* at 739.
[98] *Id.* at 740.

issues regarding whether the children would be allowed to testify, and the defendant had a full opportunity to cross-examine the witnesses at trial if they were found competent.[99] The Court noted however that "a competency hearing in which a witness is asked to discuss upcoming substantive testimony might bear a substantial relationship to a defendant's opportunity to better defend himself at trial . . . ."[100]

"In short, the whole point of the right to be present . . . is to permit the defendant to contribute in some meaningful way to the fair and accurate resolution of the proceedings against him" or her.[101] Supreme Court cases suggest a two-part analysis:[102] (1) a defendant has a right to be present at a preliminary hearing or proceeding that might materially interfere with the defendant's opportunity to effectively confront witnesses or evidence at trial;[103] and (2) a defendant also has a "right to be present at any stage of the criminal proceeding that is critical to its outcome if his [or her] presence would contribute to the fairness of the procedure."[104] The first part of the test is based upon confrontation considerations.[105] The second part of the test encompasses general due process

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[99] *Id.* at 740-44.

[100] *Id.* at 746.

[101] United States v. Gonzales-Flores, 701 F.3d 112, 118 (4th Cir. 2012).

[102] State v. A.R., 65 A.3d 818, 828 (N.J. 2013) (The New Jersey Supreme Court commented in that its presence cases had fallen into two categories: (1) those circumstances where a defendant's absence deprived him or her of confrontation rights; (2) those where confrontation rights are not implicated but a defendant's participation in his or her defense is nonetheless at issue).

[103] *See Stincer*, 482 U.S. at 739-44.

[104] *Id.* at 745; *see also* Snyder v. Massachusetts, 291 U.S. 97, 105-08 (1934).

[105] *See Stincer*, 482 U.S. at 736-44; *see generally* California v. Green, 399 U.S. 149, 181 n.15 (1970) (Harlan, J., concurring) (citing case examples and commenting that the exclusion of an accused from his trial is one of the "problems treated under the rubric of confrontation.").

concerns.[106]

The confrontation prong of the inquiry examines the impact that a preliminary hearing or proceeding has upon a defendant's ability to test evidence at trial. It may be argued the right of confrontation does not attach to a preliminary hearing.[107] However, the Supreme Court made clear in *Stincer* that this is not the proper line of inquiry with respect to a defendant's right of presence.[108] The Court found it more useful in *Stincer* to examine whether the exclusion of the defendant from a hearing interfered with the defendant's *opportunity* to effectively cross-examine a witness.[109] It noted that the defendant still had an opportunity at trial to fully cross-examine the witnesses questioned in his absence during a competency hearing.[110] Nothing restricted his ability to cross-examine the witnesses at trial, and he was able to ask the same questions that were asked at the competency hearing.[111] In addition, the defendant could renew any objection following a witness's trial testimony and ask the trial court to reconsider

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[106] *See Stincer*, 482 U.S. at 745-47; *Synder*, 291 U.S. at 105-22; *but see* State v. Forde, 315 P.3d 1200, 1217 (Ariz. 2014) (tying fairness to a defendant's Sixth Amendment trial rights, writing: "A defendant has a Sixth Amendment right to attend pretrial proceedings critical to the outcome of the criminal proceeding whenever the defendant's presence 'would contribute to the fairness of the procedure.'" (quoting *Stincer*, 482 U.S. at 745)).

[107] *See*, *e.g.* People v. Robinson, 802 N.Y.S.2d 868, 869-71 (N.Y. Cnty. Ct. 2005); *cf*. Barber v. Page, 390 U.S. 719, 725 (1968) ("The right to confrontation is basically a trial right."); Snyder v. Massachusetts, 291 U.S. 97, 129 (1934) (Roberts, J., dissenting) ("The trial as respects the prisoner's right of presence in the constitutional sense, does not include the formal procedure of indictment or preliminary steps antecedent to the hearing on the merits.").

[108] Kentucky v. Stincer, 482 U.S. 730, 739 (1987).

[109] *Id.* at 739-40.

[110] *Id.* at 740, 744.

[111] *Id.* at 740-41.

any earlier competency ruling.[112] The worst possible outcome for the defendant from the preliminary hearing in *Stincer* was a ruling that the witnesses were competent to testify, which actually secured the defendant's right to confront the witnesses at trial.[113]

The due process prong of the inquiry is fact-specific and more generalized in scope. The Supreme Court wrote in *Snyder* that "[d]ue process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results."[114] It is a case-by-case inquiry that "should be considered in light of the whole record."[115] The *Snyder* Court held that the risk of injustice caused by the prisoner's absence from a crime scene inspection was at most "shadowy" since the defense admitted the jurors were taken to the right place and shown the right things.[116] It emphasized that photographs and diagrams of the crime scene were admitted at trial.[117] The Court acknowledged that the defendant could have given suggestions or advice to his counsel if he had been present during the showing, but it found that the uncontroverted facts in the case established the defendant would not have been an aid to his defense.[118] It wrote that due process does not assure a defendant's right to be present when "[t]here is nothing he could do if he were there, and almost nothing he could gain."[119] The Supreme Court later similarly wrote in *Gagnon* that the defendants in that case could have

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[112] *Id.* at 741-43.
[113] *Id.* at 740-44.
[114] Snyder v. Massachusetts, 291 U.S. 97, 116 (1934).
[115] United States v. Gagnon, 470 U.S. 522, 527 (1984); *see also* Snyder v. Massachusetts, 291 U.S. 97, 115 (1934).
[116] Snyder v. Massachusetts, 291 U.S. 97, 109-10 (1934).
[117] *Id.* at 109.
[118] *Id.* at 113.
[119] *Id.* at 108.

done nothing if they had been present during the judge's *in camera* examination of a juror and would not have gained anything by attending.[120]

Under either prong, special consideration is given if a procedure involves the receipt of testimony.[121] The Supreme Court in *Snyder* recognized the value of a defendant's presence to advise counsel during the questioning of witnesses.[122] It sedulously distinguished a crime scene viewing from a proceeding where testimony is taken by noting that the function of counsel at a viewing was merely mechanical or formal.[123] The Supreme Court later similarly distinguished the competency hearing at issue in *Stincer* by emphasizing its limited nature and that no questions were asked regarding the substantive testimony to be given by the witnesses against the defendant at trial.[124] The *Stincer* Court noted that a competency hearing might have bore a substantial relationship to the defendant's ability to better defend himself at trial if witnesses at such a hearing had been asked to discuss their upcoming substantive testimony.[125]

A defendant's right to be present has been more closely scrutinized and guarded when testimony is taken or evidence

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[120] United States v. Gagnon, 470 U.S. 522, 527 (1984).

[121] *See* State v. Armenta, 541 P.2d 1154, 1155 (Ariz. 1975) (recognizing that the right to be present applies "when portions of the record are repeated at the request of the jury during their deliberations."). Conversely, "the right does not 'extend to in-chambers pretrial conferences, . . . to brief bench conferences with attorneys conducted outside the defendant's hearing, and to various other conferences characterized as relating only to the resolution of questions of law.'" State v. Dann, 74 P.3d 231, 245 (Ariz. 2003) (quoting Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, 5 CRIMINAL PROCEDURE § 24.2(a) (2d ed. 1999)).

[122] *See* Snyder v. Massachusetts, 291 U.S. 97, 114 (1934).

[123] *Id.* at 114-15.

[124] Kentucky v. Stincer, 482 U.S. 730, 745-46 (1987).

[125] *Id.* at 746.

against a defendant is received at a preliminary hearing.[126] The Court of Appeals of New York held in *People v. Turaine* that a defendant had a right to be present at a hearing conducted to determine whether he had threatened a witness in a courthouse holding pen.[127] The court explained in *Turaine* that:

> A defendant has the right to be present at any material state of the trial . . . . Proceedings where testimony is received are material stages of the trial because defendant's presence is necessary so that he or she may confront adverse witnesses and advise counsel of any

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[126] *See* United States v. Hurse, 477 F.2d 31, 33 (8th Cir. 1973); United States v. Clark, 475 F.2d 240, 245-46 (2d Cir. 1973); Ex Parte Stout, 547 So.2d 901, 903 (Ala. 1989); People v. Garcia, 251 P.3d 1152, 1156 (Colo. App. 2010); State v. Ralph B., 131 A.3d 1253, 1260-65 (Conn. App. 2016); McGinnis v. State, 430 S.E.2d 618, 621-22 (Ga. App. 1993); People v. Collins, 539 N.E.2d 736, 744-45 (Ill. App. 1989); State v. Foster, 318 N.W.2d 176, 179 (Iowa 1982); Redman v. State, 337 A.2d 441, 444-45 (Md. Ct. Spec. App. 1975); Robinson v. Commonwealth, 837 N.E.2d 241, 247 (Mass. 2005); State v. Gray, 256 N.W.2d 74, 76-77 (Minn. 1977); State v. Robertson, 755 A.2d 1249, 1255 (N.J. Super. Ct. App. Div. 2000); People v. Anderson, 213 N.E.2d 445, 446-48 (N.Y. 1965); State v. Williams, 250 N.E.2d 907, 913-14 (Ohio App. 1969); Commonwealth v. McLaurin, 437 A.2d 440, 442-45 (Pa. Super. 1981); *cf*. United States v. Law, 528 F.3d 888, 904 (D.C. Cir. 2008) (acknowledging that the right to presence can include a suppression hearing, but holding that it is not required if the hearing involves only matters of law); Olney v. United States, 433 F.2d 161, 163 (9th Cir. 1970) (writing that a suppression hearing can well be a critical stage of a prosecution); United States *ex rel.* Bennett v. Rundle, 419 F.2d 599, 605 (3d Cir. 1969) (commenting that a suppression hearing regarding the voluntariness of a defendant's confession "has more of the characteristics of a testimonial hearing, which is the essence of a trial proceeding. . . ."); Curry v. State, 228 S.W.3d 292, 297-98 (Tex. App. 2007) (holding that confrontation rights apply to suppression hearings). *But see* United States v. Pepe, 747 F.2d 632, 652-54 (11th Cir. 1984); United States v. Gradsky, 434 F.2d 880, 882-83 (5th Cir. 1970); Yates v. United States, 418 F.2d 1228, 1229 (6th Cir. 1969).

[127] People v. Turaine, 577 N.E.2d 55, 56 (N.Y. 1991).

> inconsistencies, errors or falsehoods in their testimony . . . . A preliminary hearing at which adverse testimony is received may be a material part of the trial for similar reasons . . . . Defendant's absence from such hearings could have a substantial effect on his ability to defend . . . .[128]

III. IS A FORFEITURE HEARING A MATERIAL STAGE OF A TRIAL?

The Supreme Court has not expressly recognized a defendant's right to be present at a forfeiture hearing.[129] The Supreme Court wrote in *Davis v. Washington* that it took "no position on the standards necessary to demonstrate such forfeiture . . . ."[130] It did however imply such a right when adopting the forfeiture doctrine over a century earlier in *United States v. Reynolds* by placing significance upon the fact that "[t]he accused was himself personally present in court when the showing was made, and had full opportunity to account for the absence of the witness . . . ."[131]

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[128] *Id.*
[129] Grayton v. Ercole, 691 F.3d 165, 169-70 (2d Cir. 2012).
[130] Davis v. Washington, 547 U.S. 813, 833 (2006).
[131] Reynolds v. United States, 98 U.S. 145, 160 (1878). Although the forfeiture was not formally adopted by the Supreme Court until 1878, it had been recognized in the United States much earlier. *See* Rex v. Barber, 1 Root 76 (Conn. Super. Ct. 1775); Anonymous, A NEW CONDUCTOR GENERALIS: BEING A SUMMARY OF THE LAW RELATIVE TO THE DUTY AND OFFICE OF JUSTICES OF THE PEACE, SHERIFFS, CORONERS, CONSTABLES, JURYMEN, OVERSEERS OF THE POOR, &C. & C. 153 (Albany, D. & S. Whiting 1803); *see generally* Tim Donaldson, *Combating Victim/Witness Intimidation in Family Violence Cases: A Response to Critics of the "Forfeiture by Wrongdoing" Confrontation Exception Resurrected by the Supreme Court in* Crawford *and* Davis, 44 IDAHO L. REV. 643, 652-53 (2008) (citing and discussing United States cases recognizing the forfeiture doctrine before *Reynolds*).

A forfeiture hearing appears to satisfy either prong of the two-part presence test suggested by Supreme Court cases. The Second Circuit Court of Appeals in *Grayton v. Ercole* based a right to be present on potential impairment of a defendant's right of confrontation and due process considerations.[132] The court reasoned that a defendant loses the right to cross-examine a witness at trial if the defendant loses a forfeiture hearing, and the forfeiture hearing therefore has a substantial relation to the fullness of a defendant's opportunity to defend against an underlying criminal charge.[133] It noted that cross-examination is critical for ensuring the integrity of the fact-finding process.[134] Since a forfeiture hearing might eliminate "the truth-seeking engine of cross-examination from the trial," the hearing itself needs to be reliable.[135]

The *Grayton* court distinguished *Kentucky v. Stincer* and *United States v. Gagnon*.[136] It explained that neither *Stincer* nor *Gagnon* involved a situation that impaired a defendant's right to cross-examine witnesses at trial.[137] The Second Circuit Court of Appeals noted that the defendant in *Stincer* retained his right to cross-examine witnesses at trial who were found competent at a hearing held in his absence.[138] It further explained that the brief interaction between a judge and juror in *Gagnon* did not involve any discussion of the evidence presented in the case.[139] It therefore concluded that neither instance bore a reasonably substantial relation to the

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[132] Grayton v. Ercole, 691 F.3d 165, 171-73 (2d Cir. 2012).
[133] *Id.* at 171-74; *see also* People v. McCune, 949 N.Y.S.2d 747, 749 (N.Y. App. Div. 2012).
[134] *Id.* at 171.
[135] *Id.*
[136] *Id.* at 173.
[137] *Id.*
[138] *Id.*
[139] *Id.*

fullness of a defendant's opportunity to defend against a criminal charge.[140] The *Grayton* court wrote that a forfeiture hearing, by contrast, does have a direct impact upon a defendant's ability to defend himself or herself, because the outcome of the hearing will determine whether or not the defendant will be able to cross-examine a witness at trial.[141]

The Second Circuit explained in *Grayton* that the presence of a defendant always contributes to the fairness of a forfeiture hearing, because "the defendant will be in a unique position to know whether he—or someone else on his behalf—has in fact threatened a witness and the circumstances surrounding that misconduct if it occurred."[142] In addition, the defendant may also be personally familiar with the witnesses and aware of reasons they might have to lie and thus able to assist counsel with their cross-examination.[143] The defendant is therefore best equipped to answer factual questions posed in a forfeiture hearing.[144] The Second Circuit wrote in *Grayton* that exclusion of a defendant from a forfeiture hearing "not at a judicial *finding* of misconduct, but at the *allegation* of misconduct" amounts to a deprivation of confrontation and due process rights.[145]

The very purpose of a forfeiture hearing entails potential interference with the defendant's opportunity to test and defend against evidence at trial, because "one who obtains the absence of a witness by wrongdoing forfeits the

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[140] Grayton v. Ercole, 691 F.3d 165, 173 (2d Cir. 2012).
[141] *Id.*; *see also* People v. McCune, 949 N.Y.S.2d 747, 749 (N.Y. App. Div. 2012).
[142] Grayton v. Ercole, 691 F.3d 165, 172 (2d Cir. 2012).
[143] *Id.*; *see also* People v. McCune, 949 N.Y.S.2d 747, 749 (N.Y. App. Div. 2012).
[144] Grayton v. Ercole, 691 F.3d 165, 172 (2d Cir. 2012).
[145] *Id.* at 171.

constitutional right to confrontation."[146] The Supreme Court has held that the Confrontation Clause not only has the ultimate goal of ensuring the reliability of evidence but also mandates that "reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[147] It has also called cross-examination the "greatest legal engine ever invented for the discovery of truth."[148] In contrast, the Supreme Court has commented that forfeiture "extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability."[149] Potential loss of the constitutionally mandated method for testing evidence should implicate the concern raised in *Stincer* about whether the exclusion of the defendant from a hearing might interfere with the exercise of defendant's trial rights.[150] An excluded defendant who loses a forfeiture hearing is prevented from facing an allegedly tampered witness at all, and prejudice may be readily assessed where confrontation is entirely deprived.[151] Therefore, under the test originally established in *Hopt*, a forfeiture hearing should be considered a "stage of the trial when [a defendant's] substantial rights may be affected by the proceedings against him [or her]."[152]

Even if loss of an opportunity to cross-examine a witness at trial was not at stake, a forfeiture hearing could still, in many instances, be critical to the outcome of a case and

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[146] Davis v. Washington, 547 U.S. 813, 833 (2006).
[147] Crawford v. Washington, 541 U.S. 36, 61 (2004).
[148] California v. Green, 399 U.S. 149, 158 (1970); *see also* Kentucky v. Stincer, 482 U.S. 730, 736 (1987); *see generally* John H. Wigmore, 2 A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 1697 (Boston, Little, Brown, and Company 1904).
[149] Crawford v. Washington, 541 U.S. 36, 62 (2004).
[150] *See* Kentucky v. Stincer, 482 U.S. 730, 739-40 (1987).
[151] *See* State v. A.R., 65 A.3d 818, 828 (N.J. 2013).
[152] Hopt v. People, 110 U.S. 574, 579 (1884).

implicate a defendant's right to due process. In some cases, pretrial proceedings can dictate an ultimate result.[153] The extent to which due process considerations apply depends upon the whole record in a matter.[154] There are instances where statements admitted through the forfeiture doctrine have only a cumulative or insignificant impact when considered in the context of all of the other evidence.[155] There may be situations, however, when the evidence is the only direct incriminatory proof or so devastating and prejudicial that it overshadows everything else.[156] In those circumstances, improper admission of the proof might on its own be so manifestly unfair that it violates the fundamental conceptions of justice protected by due process.[157] The fairness of a forfeiture proceeding through which vital trial evidence is admitted would therefore appear in such cases to impact the fullness of a defendant's opportunity to defend against a charge,[158] and due process should require the defendant's presence to the extent that a fair and just hearing would be thwarted by his or her absence.[159]

The presence of a defendant would almost always seem to contribute to the fairness of a forfeiture hearing.[160] A

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[153] Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 434-36 (1979) (Blackman, J., dissenting).
[154] United States v. Gagnon, 470 U.S. 522, 527 (1984); *see also* Snyder v. Massachusetts, 291 U.S. 97, 115 (1934).
[155] *See*, *e.g.*, Perkins v. Herbert, 596 F.3d 161, 177-80 (2d Cir. 2010); *cf.* Rogers v. United States, 422 U.S. 35, 40 (1975) (writing that a violation of the presence requirements of FED. R. CRIM. P. 43 may in some circumstances be harmless error).
[156] *See*, *e.g.*, State v. Byrd, 967 A.2d 285, 306-07 (N.J. 2009).
[157] *See* Perry v. New Hampshire, 132 S.Ct. 716, 723 (2012); *see generally* Tim Donaldson, *Kangaroo Proof: Due Process v. Hearsay*, 43 S.U.L.REV. 175, 181-91 (2016) (discussing evidentiary due process).
[158] *See* Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934).
[159] *Id* at 108.
[160] Grayton v. Ercole, 691 F.3d 165, 172 (2d Cir. 2012); *cf.* State v. Byrd,

forfeiture hearing is an adversarial evidentiary proceeding.[161] The Supreme Court wrote when recognizing the forfeiture doctrine *United States v. Reynolds* that "[s]uch being the rule, the question becomes practically one of fact, to be settled as a preliminary to the admission of secondary evidence."[162] The United States Supreme Court has more recently commented that Fed. R. Evid. 804(b)(6) "codifies the forfeiture doctrine . . . ."[163] The codified doctrine utilizes the Fed. R. Evid. 104(a) in its operation.[164] Rule 104(a) states that a "court must decide any preliminary question about whether . . . evidence is admissible."[165] Advisory Committee comments to the rules provide that a judge acts as a trier of fact "[t]o the extent that these inquiries are factual . . . ."[166]

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967 A.2d 285, 305-07 (N.J. 2009) (condemning an ex parte, *in camera* forfeiture proceeding as anathema in our system of justice).

[161] *See* Commonwealth v. Edwards, 830 N.E.2d 158, 174 (Mass. 2005) (also stating however that "the hearing is not intended to be a mini-trial . . . .").

[162] Reynolds v. United States, 98 U.S. 145, 159 (1878). The Supreme Court also wrote in *Reynolds* that the question of whether a witness was "detained by means or procurement of the prisoner was matter of fact. . . ." *Reynolds*, 98 U.S. at 158 (quoting Lord Morley's Case (1666) (H.L.), *reprinted in*, T.B. Howell, 6 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 770, 771 ¶ 5 (London, T.C. Hansard 1816)).

[163] Davis v. Washington, 547 U.S. 813, 833 (2006); *see also* Giles v. California, 554 U.S. 353, 367 (2008).

[164] See H.R. Doc. No. 105-69, at 23 (1997) (Order Amending Federal Rules of Evidence at 23 (Apr. 11, 1997) (Advisory Committee Note stating that Fed. R. Evid. 804(b)(6) adopts the "usual Rule 104(a) preponderance of the evidence standard.")); *see also* United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982) (stating that a forfeiture hearing is "governed by Fed. R. Evid. 104(a).").

[165] FED. R. EVID. 104(a); *see generally* An Act to Establish Rules of Evidence for certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926, 1930 (1975) (adopting FED. R. EVID. 104).

[166] H.R. DOC. NO. 93-46, at 48 (1973) (Advisory Committee Notes attached to the Communication from Chief Justice of the United States); *see also* PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED

Confrontation forfeiture must be actually proven.[167] The Court of Appeals of New York explained in *People v. Smart* that confrontation forfeiture applies only if a defendant is found responsible for the absence of a witness:

> The People may not admit a witness's grand jury testimony into evidence merely because the defendant expressed hope that the witness would not testify against him or her at trial. Rather, the People must demonstrate by clear and convincing evidence that the defendant engaged in misconduct aimed at least in part at preventing the witness from testifying and that those misdeeds were a significant cause of the witness's decision not to testify.[168]

Predicate facts establishing a defendant's misconduct must be proven by clear and convincing evidence in New York state courts.[169] A preponderance of the evidence standard is however used in Arizona and by most other courts.[170] All jurisdictions that have considered the question require a defendant's wrongdoing be proven by at least a preponderance of evidence.[171]

STATES DISTRICT COURTS AND MAGISTRATES, 46 F.R.D. 161, 188 (1969).

167 *See, e.g.*, State v. Valencia, 924 P.2d 497, 498 (Ariz. Ct. App. 1996) (writing that the "government has the burden of proving [a defendant's wrongdoing] by a preponderance of the evidence . . . ."); People v. Geraci, 649 N.E.2d 817, 824 (N.Y. 1995) ("[T]he court's role on this preliminary question was not one of reviewing but rather of initial fact finding . . .").

168 People v. Smart, 12 N.E.3d 1061, 1067 (N.Y. 2014); *see also* People v. Johnson, 711 N.E.2d 967, 968-69 (N.Y. 1999).

169 People v. Geraci, 649 N.E.2d 817, 821-23 (N.Y. 1995).

170 State v. Valencia, 924 P.2d 497, 498 (Ariz. Ct. App. 1996); *see, e.g.*, United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982); State v. Byrd, 967 A.2d 285, 303-04 (N.J. 2009); New Jersey v. Sheppard, 484 A.2d 1330, 1347-48 (N.J. Super. 1984).

171 *See generally* Tim Donaldson, *Keeping the Balance True: Proof*

A forfeiture hearing therefore "provides an opportunity, not likely to arise elsewhere, for the People to prove, and the defendant to test, the People's proffered theory that a witness's unavailability is linked to the defendant's misconduct."[172] A judge will decide whether or not confrontation forfeiture has been factually proven.[173] He or she will be doing so based upon evidence adduced at the forfeiture hearing.[174] The hearing therefore provides the only meaningful opportunity for a defendant to refute witness tampering allegations. While a judge could reverse a forfeiture determination on the basis of proof later produced during trial and instruct a jury to disregard a previously admitted out-of-court statement, a defendant would be placed in a difficult position after losing a forfeiture hearing in absentia if he or she had to resurrect an opportunity for personal participation by devoting part of his or her trial defense to a continuing battle against claims of misconduct ancillary to the principal charges in a case. The repeated or continued airing of witness tampering charges before a jury would make the defendant look particularly unsympathetic and defeat the purpose of holding a separate forfeiture hearing away from the jury in the first place.

Question remains, even if a right to presence attaches, whether the right to be present at a pretrial forfeiture hearing is coequal to a defendant's right to be present during trial. The Supreme Court wrote in *United States v. Raddatz* that "the process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at the

Requirements for Confrontation Forfeiture by Wrongdoing, 31 T.M. COOLEY L. REV. 429, 432-42 (2014) (reviewing the proof standards adopted by various jurisdictions).

[172] People v. Johnson, 711 N.E.2d 967, 968 (N.Y. 1999).

[173] *See, e.g.*, FED. R. EVID. 104, advisory committee's note to 1972 amendment.

[174] *See, e.g.*, State v. Valencia, 924 P.2d 497, 498 (Ariz. Ct. App. 1996); People v. Geraci, 649 N.E.2d 817, 821-23 (N.Y. 1995).

trial itself."[175] Suppression hearings are somewhat analogous because of their evidentiary nature, and some courts have held that a defendant does not enjoy the same right to be present at a suppression hearing as he or she does at trial.[176] There is however an important distinction between a suppression hearing and a confrontation forfeiture hearing. A suppression hearing deals with whether otherwise admissible evidence should be excluded because it was unconstitutionally obtained.[177] In contrast, a forfeiture hearing determines whether otherwise inadmissible out-of-court statements may be admitted due to a defendant's misconduct.[178] A defendant has the same means available after losing a suppression hearing that the defendant would have possessed to test unsuppressed evidence at trial. However, a defendant loses the ability to cross-examine the maker of an out-of-court statement after suffering an unfavorable forfeiture ruling.[179] Therefore, while suppression hearings and forfeiture hearings share similarities, only a forfeiture hearing has the potential to directly impair a defendant's opportunity to later cross-examine witnesses at trial.[180]

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[175] United States v. Raddatz, 447 U.S. 667, 679 (1980).
[176] *See, e.g.*, United States v. Gradsky, 434 F.2d 880, 882-83 (5th Cir. 1970); Yates v. United States, 418 F.2d 1228, 1229 (6th Cir. 1969).
[177] *See* United States v. Gradsky, 434 F.2d 880, 883 (5th Cir. 1970) (writing that the issue in an evidentiary hearing on a suppression motion is "not one of guilt or innocence but one of 'taint'"); *see generally* Mapp v. Ohio, 367 U.S. 643, 655-56 (1961) (holding that the exclusionary rule applies in state criminal proceedings); Weeks v. United States, 232 U.S. 383, 393-94 (1914) (recognizing the exclusionary rule), *overruled on other grounds* Mapp v. Ohio, 367 U.S. 643, 655-56 (1961).
[178] *See* Crawford v. Washington, 541 U.S. 36, 62 (2004).
[179] *See* Davis v. Washington, 547 U.S. 813, 833-34 (2006).
[180] *See generally* Kentucky v. Stincer, 482 U.S. 730, 740 (1987) (writing that courts encountering presence questions should consider whether excluding the defendant from the hearing would interfere with a defendant's opportunity for effective cross-examination).

The Supreme Court addressed in *United States v. Hayman* the circumstances under which a prisoner should be brought to a hearing on a motion to vacate, set aside or correct a sentence.[181] The Court held that, unlike a criminal trial where guilt is in question, the need for a defendant's presence at a post-conviction hearing depends upon the nature of the issues raised.[182] However, the *Hayman* Court wrote that "[w]here, as here, there are substantial issues of fact as to events in which the prisoner participated, the trial court should require his production for a hearing."[183] The same reasoning should apply to forfeiture hearings. A defendant is in a unique position to assist counsel when testimony is presented regarding his or her alleged misconduct.[184] Namely, the defendant knows whether the allegations are true. It is the time when a defendant should be given an opportunity to advise with counsel, because it is the occasion where a defendant may most meaningfully assist with his or her own defense.[185] "It is hardly necessary to add that the defendant alone may be able to inform his [or her] attorney of inconsistencies, errors and falsities in the testimony of the officers or other witnesses."[186]

IV. LOSS OF THE RIGHT TO BE PRESENT

Early cases indicated that a criminal defendant could not waive the right to be present.[187] The Supreme Court subsequently held that the right to presence may be waived.[188]

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[181] United States v. Hayman, 342 U.S. 205, 206-24 (1952).
[182] *Id.* at 222-23.
[183] *Id.* at 223.
[184] Grayton v. Ercole, 691 F.3d 165, 172 (2d Cir. 2012).
[185] *See* Snyder v. Massachusetts, 291 U.S. 97, 114 (1934).
[186] People v. Anderson, 213 N.E.2d 445, 447 (N.Y. 1965).
[187] Lewis v. United States, 146 U.S. 370, 372 (1892); Hopt v. People, 110 U.S. 574, 579 (1884).
[188] Frank v. Magnum, 237 U.S. 309, 343 (1915); Diaz v. United States, 223 U.S. 442, 455 (1912); *see also* State v. Armenta, 541 P.2d 1154, 1155 (Ariz.

It can also be lost by a defendant's conduct,[189] but those occasions are arguably limited.[190] A defendant loses the right to be present by voluntarily absenting himself or herself from a trial after it has commenced.[191] A defendant may also forfeit presence by disrupting courtroom proceedings.[192] In that situation, though, the Supreme Court has held that a defendant must first be warned and may reclaim presence as soon as he or she is willing to stop behaving disruptively.[193]

The New Jersey Supreme Court wrote in *State v. Byrd* that a criminal defendant may lose the right to be present at a forfeiture hearing for "extraordinary reasons" that are articulated on the record, but it did not further elaborate upon what might qualify as an extraordinary reason.[194] Witness trauma, standing alone, may not be enough.[195] A defendant may forfeit the right to confrontation by wrongfully exerting psychological pressure to obtain a witness's silence.[196]

1975).

[189] Snyder v. Massachusetts, 291 U.S. 97, 106 (1934).

[190] Fairey v. Tucker, 132 S.Ct. 2218, 2219-20 (2012) (Sotomayor, J., dissenting from denial of cert.).

[191] Diaz v. United States, 223 U.S. 442, 455 (1912); *see also* Crosby v. United States, 506 U.S. 255, 259-62 (1993); Taylor v. United States, 414 U.S. 17, 17-20 (1973); State v. Bohn, 570 P.2d 187, 190 (Ariz. 1977).

[192] Illinois v. Allen, 397 U.S. 337, 343 (1970); State v. Delvecchio, 519 P.2d 1137, 1141 (Ariz. 1974).

[193] *Id.*; *see* Commonwealth v. Scionti, 962 N.E.2d 190, 198-201 (Mass. App. 2012) (recognizing that prior warnings need not be given in extreme cases involving unusual courtroom security risks).

[194] State v. Byrd, 967 A.2d 285, 303 (N.J. 2009).

[195] Witness trauma may however provide sufficient reason for an *in camera* interaction between a judge and reluctant witness that convinces the witness to testify. *See* United States v. Adams, 785 F.2d 917, 920-21 (11th Cir. 1986) (holding that a meeting with a threatened witness in a defendants absence was permissible); LaChappelle v. Moran, 699 F.2d 560, 564-67 (1st Cir. 1983) (writing that an *in camera* meeting between a judge and an embarrassed rape victim was inadvisable but not unconstitutional).

[196] *See, e.g.*, People v. Mahabub, 956 N.Y.S.2d 811, 815-16 (N.Y. City

Forfeiture can be triggered by "use of a relationship in which defendant has a 'controlling' and 'coercive effect' on the witness . . . ."[197] The New Jersey Supreme Court recognized in *Byrd* that a witness may be unable to testify because of psychological injury, but it did not expressly identify this as an extraordinary reason justifying exclusion of a defendant from a forfeiture hearing.[198] It instead wrote the *in camera* procedure used by the trial court in that case constituted a "complete breakdown of the adversarial process."[199] After noting a compelling justification would be needed for any ex parte proceedings, the court in *Byrd* further indicated approval of a lower court ruling that the exclusion of a defendant from a rape shield hearing violated his fundamental right to presence.[200]

The Supreme Court recognizes a court's ability to bar a defendant from a courtroom due to misconduct as a facet of the court's inherent power.[201] It has however cautioned that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion . . . . A primary aspect of that discretion is the ability to fashion an appropriate

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Crim. Ct. 2012); New Jersey v. Sheppard, 484 A.2d 1330, 1345-46 (N.J. Super. 1984).

[197] People v. Turnquest, 938 N.Y.S.2d 749, 756 (N.Y. Sup. Ct. 2012) (citations omitted); *see also* People v. Byrd, 855 N.Y.S.2d 505, 509-10 (N.Y. App. 2008); *cf*. Giles v. California, 554 U.S. 353, 380 (Souter, J., concurring in part), 404-05 (Breyer, J., dissenting) (indicating that an abusive relationship may be used as circumstantial evidence to prove that a defendant intended to silence a witness); *see generally* Tim Donaldson and Karen Olson, *"Classic Abusive Relationships" and the Inference of Witness Tampering in Family Violence Cases after* Giles v. California, 36 LINCOLN L. REV. 45, 79-87 (2008) (reviewing the opinions in *Giles* and sociological studies regarding the effect of relationships marked by coercive controlling violence).

[198] State v. Byrd, 967 A.2d 285, 303 (N.J. 2009).

[199] *Id.* at 306.

[200] *Id.*

[201] Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991).

sanction for conduct which abuses the judicial process."[202] It has also written denial or significant diminution of confrontation calls into question the integrity of the fact-finding process and requires that competing interests must be closely examined.[203] It therefore seems unlikely that the Supreme Court would tolerate blanket exclusion of a defendant from a fact-finding hearing to which a right of presence attached based solely upon the subjective fear of a witness and yet-to-be-proven allegations of misconduct.[204]

The United States Supreme Court's cases involving a defendant's right to confront child victim/witnesses are instructive.[205] It held a procedure unconstitutional in *Coy v. Iowa* by which a defendant was screened from the view of child witnesses while they testified at trial.[206] Even though a defendant was present in the same room during the testimony of the witnesses, the Supreme Court held that the screen violated his right to face-to-face confrontation.[207] It wrote that "face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs."[208]

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[202] *Id.* at 44-45.
[203] Chambers v. Mississippi, 410 U.S. 284, 295 (1973).
[204] *See* Grayton v. Ercole, 691 F.3d 165, 171 (2d Cir. 2012) (reviewing Supreme Court authorities regarding the value of presence and cross-examination, and concluding that "[a] defendant's Sixth Amendment and due process rights cannot evaporate at the moment he is accused, never to be recovered if a court finds misconduct to have occurred - which, of course, it is more likely to do in his absence.").
[205] *See* Maryland v. Craig, 497 U.S. 836 (1990); Coy v. Iowa, 487 U.S. 1012 (1988).
[206] Coy v. Iowa, 487 U.S. 1012, 1020-22 (1988).
[207] *Id.* at 1016-20.
[208] *Id.* at 1020.

The Supreme Court in *Coy* rejected the suggestion that a defendant's right to confrontation was outweighed by a generalized need to protect victims of sexual abuse.[209] It also rejected the idea of a "legislatively imposed presumption of trauma."[210] However, the court acknowledged that "rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests."[211] The Supreme Court left the question of whether exceptions existed for resolution some other day, but it indicated that any conceivable exception would have to be supported by "individual findings that . . . particular witnesses needed special protection . . . ."[212]

Justice Sandra Day O'Connor's concurring opinion in *Coy* suggested that procedures providing something other than face-to-face confrontation would pass muster if they are necessary to further an important public policy.[213] She wrote that protection of child witnesses is an important public policy and the primary focus should be on necessity.[214] Justice O'Connor's concurrence agreed that a generalized legislative finding of necessity would be inadequate but wrote that case-specific findings of necessity may be sufficient.[215] She concluded with joinder in the majority opinion, "[b]ecause nothing in the Court's opinion conflicts with this approach."[216]

Justice O'Connor thereafter wrote the majority opinion in *Maryland v. Craig* upholding a procedure that allowed a child witness to testify outside a defendant's physical presence

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209 *Id.*
210 *Id.* at 1021.
211 *Id.* at 1020.
212 *Id.* at 1021.
213 *Id.* at 1025 (O'Connor, J., concurring).
214 *Id.*
215 *Id.*
216 *Id.*

by one-way closed circuit television.[217] The Supreme Court held in *Craig* that the interest in the physical and psychological well-being of a child abuse victim may be sufficiently important to outweigh a defendant's right of face-to-face confrontation in some cases.[218] It wrote however that the sufficiency of the interest is not presumed and has to be affirmatively established by "an adequate showing of necessity . . . ."[219] The Supreme Court explained in *Craig* that a trial court must hear evidence and make a case-specific finding of necessity.[220] These findings may be constitutionally made without subjecting a witness to initial questioning in the presence of a defendant, but they must nonetheless then be based on other sufficient proof.[221] The Court indicated that a necessity showing would be sufficient only if the trial court finds that (1) the "witness would be traumatized, not by the courtroom generally, but by the presence of the defendant"; and (2) the emotional distress suffered by the "witness in the presence of the defendant is more than *de minimis, i.e.*, more than 'mere nervousness or excitement or some reluctance to testify.'"[222]

The Supreme Court's opinion in *Craig* made a significant addition to Justice O'Connor's analysis in *Coy*.[223]

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[217] Maryland v. Craig, 497 U.S. 836, 840-60 (1990).
[218] *Id.* at 853.
[219] Maryland v. Craig, 497 U.S. 836, 855 (1990).
[220] *Id.* at 855; *see also* Written v. New York, 560 U.S. 959, 960 (2010) (Sotomayor, J., dissenting from denial of cert.).
[221] *See* Maryland v. Craig, 497 U.S. 836, 858-60 (1990).
[222] *Id.* at 856 (quoting Wildermuth v. State, 530 A.2d 275, 289 (Md. 1987)). *But see* Danner v. Kentucky, 525 U.S. 1010, 1011 (1998) (Scalia, J., dissenting from denial of cert.) (reaffirming disagreement with *Craig*, but also asserting that proof of witness trauma in *Danner* did not meet the *Craig* standard).
[223] *Compare Craig*, 497 U.S. at 850 (adopting a three-part analysis) *with* Coy v. Iowa, 487 U.S. 1012, 1025 (1988) (O'Connor, J., concurring) (suggesting a two-part approach).

Justice O'Connor's concurrence in *Coy* indicated that a procedure would be permissible if it (1) furthered an important public policy, and (2) was necessary.[224] Her opinion for the Supreme Court in *Craig* held that (1) an important public policy, (2) necessity, and (3) assurances of reliability must all be shown.[225] *Craig* placed particular emphasis upon preservation of elements of confrontation by the procedures at issue.[226] The Court found it significant that a witness had to be competent and testify under oath, and the defendant was able to view the demeanor of an adverse child witness by video monitor and retained a full opportunity for contemporaneous cross-examination through electronic communication with defense counsel who was physically present while the child testified.[227] *Craig* called the preservation of these elements: "safeguards of reliability and adversariness . . . ."[228]

The Supreme Court's opinions in *Coy* and *Craig* suggest there may be "extraordinary reasons" sufficient to justify holding a forfeiture hearing in a defendant's absence.[229] These extraordinary reasons include voluntary absence and traditional disruptive conduct.[230] Aside from those, there would need to be reasons dictated by an important public policy.[231] Such public policy interests would have to be

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224 *Coy*, 487 U.S. at 1025 (O'Connor, J., concurring).
225 *Craig*, 497 U.S. at 850.
226 *Id.* at 851-52.
227 *Id.* at 841-42 (describing the procedure), 851-52 (explaining the sufficiency of the safeguards).
228 *Id.* at 851.
229 State v. Byrd, 967 A.2d 285, 303 (N.J. 2009); *see generally Craig*, 497 U.S. at 850-57; Coy v. Iowa, 487 U.S. 1012, 1025 (1988) (O'Connor, J., concurring); Illinois v. Allen, 397 U.S. 337, 343 (1970). *But see* Marx v. Texas, 528 U.S. 1034, 1034-38 (1999) (Scalia, J., dissenting from denial of cert.); *Craig*, 497 U.S. at 862-70 (Scalia, J., dissenting) (rejecting the *Craig* majority's "interest-balancing" analysis).
230 *Allen*, 397 U.S. at 343; Diaz v. United States, 223 U.S. 442, 455 (1912).
231 *See Craig*, 497 U.S. at 850, 852-55.

supported by case-specific necessity findings made by a trial court after hearing evidence that a witness would be traumatized by the presence of a defendant.[232] In addition, any procedure used to conduct a hearing in the defendant's personal absence for public policy reasons would have to include safeguards of reliability and adversariness.[233]

V. CONCLUSION

A criminal defendant has a right to be present at material stages of a trial.[234] The right has ancient origin.[235] It is rooted to a large extent in a defendant's right to confront adverse witnesses, but it is also secured by a defendant's right to due process.[236] Supreme Court cases suggest a two-part inquiry to determine whether a defendant has a right to be present at a proceeding ancillary to a trial: (1) a defendant has a right to be present at a proceeding if its outcome might materially interfere with the defendant's opportunity to effectively confront witnesses or evidence at trial; and (2) a defendant has a right to be present if a proceeding is critical to the ultimate resolution of the case and the defendant's presence would contribute to the proceeding's fairness.[237]

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[232] *See Id.* at 850, 855-57.
[233] *See Id.* at 850-52, 857.
[234] *See* Snyder v. Massachusetts, 291 U.S. 97, 105-108 (1934), *overruled on other grounds by* Malloy v. Hogan, 378 U.S. 1, 2-6 (1964); Morehart v. Barton, 250 P.2d 1139, 1143 (Ariz. 2011).
[235] *See, e.g.*, Edward Coke, THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND: CONTAINING THE EXPOSITION OF MANY ANCIENT, AND OTHER STATUTES 49 (London, A. Crooke et al. 1642) (stating that the right is implied by Magna Charta).
[236] *See* United States v. Gagnon, 470 U.S. 522, 526 (1984); State v. Garcia-Contreras, 953 P.2d 536, 538 (Ariz. 1998); State v. Levato, 924 P.2d 445, 447 (Ariz. 1996).
[237] *See* Kentucky v. Stincer, 482 U.S. 730, 739-47 (1987).

A criminal defendant can forfeit the right to confront an adverse witness if the defendant purposefully prevents the witness from testifying at trial.[238] Many jurisdictions, including Arizona, require a trial court to conduct a hearing to determine whether a defendant has committed misconduct warranting confrontation forfeiture.[239] A forfeiture hearing is a fact-finding proceeding.[240] The trial judge presiding over the hearing acts as fact finder.[241] A forfeiture hearing therefore provides an opportunity, not likely to arise elsewhere, for a defendant to test allegations that he or she tampered with a witness.[242]

The Second Circuit Court of Appeals held in *Grayton v. Ercole* that a criminal defendant has a right to be personally present at a confrontation forfeiture hearing.[243] The *Grayton* Court reasoned that a forfeiture hearing has a substantial relation to the fullness of a defendant's opportunity to defend against criminal charges, because the defendant will lose the opportunity to cross-examine a witness at trial if the defendant loses the forfeiture hearing.[244] The Appellate Division of the New York Supreme Court reached the same conclusion in *People v. McCune*.[245] Both courts explained that a defendant's presence is necessary to allow the defendant to advise counsel

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[238] Giles v. California, 554 U.S. 353, 359-68 (2008); State v. Miller, 316 P.3d 1219, 1227 (Ariz. 2013); State v. King, 132 P.3d 311, 319 n.5 (Ariz. Ct. App. 2006).
[239] *See, e.g.*, State v. Valencia, 924 P.2d 497, 498 (Ariz. Ct. App. 1996); *see generally* Donaldson, *supra* note 4.
[240] United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982); People v. Geraci, 649 N.E.2d 817, 821-25 (N.Y. 1995).
[241] FED. R. EVID. 104.
[242] People v. Johnson, 711 N.E.2d 967, 968 (N.Y. 1999).
[243] Grayton v. Ercole, 691 F.3d 165, 169-74 (2d Cir. 2012).
[244] *Id.* at 171.
[245] *See* People v. McCune, 949 N.Y.S.2d 747, 748-49 (N.Y. App. Div. 2012).

about any inconsistencies, errors, or falsehoods contained in the evidence submitted at the hearing.[246] The Second Circuit noted in particular that the defendant is in a unique position to know whether allegations of witness tampering are true.[247]

It is possible for a criminal defendant to lose the right to be present by misconduct.[248] The New Jersey Supreme Court wrote in *State v. Byrd* that a defendant can be excluded from a forfeiture hearing for extraordinary reasons.[249] If a right to presence attaches to a forfeiture proceeding coequal to a defendant's right to be present during trial, those circumstances are likely limited. A defendant may lose the right to presence by voluntary absence.[250] A defendant may be barred from a proceeding for courtroom disruption.[251] However, United States Supreme Court cases indicate that a defendant's right to personally confront witnesses at trial may be curtailed for other reasons only when an individualized showing is made following a hearing that a procedure "is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[252]

It is extremely unlikely that a witness who has been intimidated against testifying at trial will be willing to testify at a forfeiture hearing.[253] This creates a substantial problem for

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246 *Ercole*, 691 F.3d at 172; *McCune* 949 N.Y.S.d at 749.

247 *Ercole*, 691 F.3d at 172.

248 Snyder v. Massachusetts, 291 U.S. 97, 106 (1934), *overruled by* Malloy v. Hogan, 378 U.S. 1, 2-6 (1964).

249 State v. Byrd, 967 A.2d 285, 303 (N.J. 2009).

250 Diaz v. United States, 223 U.S. 442, 455 (1912); State v. Bohn, 570 P.2d 187, 190 (Ariz. 1977).

251 Illinois v. Allen, 397 U.S. 337, 343 (1970); State v. Delvecchio, 519 P.2d 1137, 1141 (Ariz. 1974).

252 Maryland v. Craig, 497 U.S. 836, 850 (1989).

253 United States v. Scott, 284 F.3d 758, 764 (7th Cir. 2002); *see also* People v. Perkins, 691 N.Y.S.2d 273, 274-75 (N.Y. Sup. Ct. 1999).

trial courts when trying to determine whether a defendant has forfeited the right to confront a witness at trial. A judge nonetheless cannot simply accept an allegation and proceed as if the misconduct has already been proven true.[254] A defendant should not be deprived of the right to be present at a forfeiture hearing on the basis of circular logic that assumes the ultimate fact at issue.[255] A forfeiture hearing can result in a defendant's loss of an opportunity to cross-examine a witness at trial; a right repeatedly described by the Supreme Court as the "greatest legal engine ever invented for the discovery of truth."[256] A forfeiture hearing therefore should not be treated as a mere formality, and a defendant should be allowed to contest allegations of witness tampering in person except for extraordinary reasons.[257] "Such a sentry is necessary before the right to presence and to confrontation is lost."[258]

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[254] Grayton v. Ercole, 691 F.3d 165, 171 (2d Cir. 2012).
[255] Perkins v. Herbert, 537 F.Supp.2d 481, 498-99 (W.D.N.Y. 2008).
[256] Kentucky v. Stincer, 482 U.S. 730, 736 (1987); California v. Green, 399 U.S. 149, 158 (1970).
[257] *Ercole*, 691 F.3d at 171; State v. Byrd, 967 A.2d 285, 303 (N.J. 2009).
[258] *Ercole*, 691 F.3d at 171.

THERAPEUTIC JURISPRUDENCE: HOW LEGAL ADVOCACY AND PREVENTIVE LAW SUPPORTS THE PSYCHOLOGICAL IMPACT OF SUDDEN PUBLIC NOTORIETY ON PROFESSIONAL FOOTBALL PLAYERS.

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INTRODUCTION

Philosopher and psychologist William James' famous quote provides, "[t]here is a law in psychology that if you form a picture in your mind of what you would like to be, and you keep and hold that picture there long enough, you will soon become exactly as you have been thinking."[2] This ideal resonates in the mind of professional football player Ray Jacobs ("Jacobs"). As a youth growing up in North Carolina, Jacobs contends the National Football League ("NFL") was something "you just watch, on the television. It was a dream. It was not a reality."[3] Jacobs attended a school with only 500 students and the football team consisted of only twenty-two players.[4] In Jacobs' mind, he was playing a sport he loved to play and he used football as an outlet instead of sitting around the house.[5] Off the field, time consisted of working out in the field at his home, going to church, and attending school, and never did Jacobs believe he would ever have a chance to attend college, much less get an opportunity to play in a professional football league.[6] Jacobs' senior year of college was the first time he recognized the notoriety of playing football. He expressed, "I went from being an unpopular kid to being popular overnight just because of what I can do on the field."[7] At that point, Jacobs' senior coach recognized his skills and gave him the opportunity to attend a football summer camp, where Jacobs proved his abilities by becoming the most

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[2] *Motivational Quotes and Quotations*, MOTIVATIONTODAY.COM (Dec. 8, 2015), http://www.motivationtoday.com/motivational_quotes/motivational_quotes_and_quotations.php.
[3] Telephone Interview with Ray Jacobs, retired NFL and CFL football player (Oct. 9, 2015).
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*

valuable player and outstanding running back.[8] By the time Jacobs returned from camp, he had received four letters of intent from colleges that wanted to bring him in for a meeting.[9] This hallmark moment in Jacobs' life opened his eyes to the fact that football was no longer just an outlet to keep him out of the house, but also a sport that created an opportunity for Jacobs to attend college and, ultimately, pursue his dreams as a professional athlete.

The nexus between psychology and the law is in both the understanding and the regulation of behavior. June Louin Tapp asserts that the relationship between psychology and the law creates a "common boundary,"[10] where both disciplines "have grown to view their relationship and respective responses to understanding human behavior as complementary, interlocked, and coincident."[11] Furthermore, Craig Haney contends that "[a] legal system that embodies erroneous assumptions about people—in terms of their capacities to perform certain acts or their reactions to certain legal standards—will find its ability to elicit appropriate behavior undermined and the quality of its justice seriously questioned."[12] Ian Freckelton argues that gaining psychosocial insights into behaviors and the law helps create a better understanding of how legal practices impact the "[M]ental health and emotional and physical well-being of a range of

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[8] *Id.*

[9] Jacobs, *supra* note 3.

[10] June Louin Tapp, *Psychology and the Law: An Overture*, 27 ANNU. REV. PSYCHOL. 359, 362 (1976), http://www.sociolegal.sjtu.edu.cn/Uploads/Papers/2011/GJI111008012044390.pdf.

[11] *Id.*

[12] Craig Haney, *Psychology and Legal Change: On the Limits of a Factual Jurisprudence,* 4 L. & HUM. BEHAV. 147-63 (1980), http://www.sociolegal.sjtu.edu.cn/uploads/papers/2011/thh110819102523719.pdf.

persons affected . . . ."[13] In turn, these insights can engender a better understanding of the emotional and mental processes for each athlete on the journey to becoming a professional player, where legal advocates can acknowledge the emotional and legal ramifications of becoming a professional football player and structure their advocacy accordingly, to develop a more insightful, comprehensive legal practice to better serve the individual.

Jacobs contends that "it takes a little bit of luck, a lot of hard work, and being in the right place at the right time," to become a professional football player.[14] Moreover, Jacobs' firsthand experiences have shed light on the dynamics of becoming a professional football player, including the joys and downfalls, and a perspective on what NFL and Canadian Football League ("CFL") players need to survive the game and life outside. This paper will argue that by understanding the psychological dynamics of sudden public notoriety of professional football players, the mentality these athletes need to survive the game, and the athletes' need for social support, lawyers utilizing preventive law can (1) serve as the most effective advocates and counselors for professional football players; and (2) provide the necessary legal resources and social support these players need to adjust to and cope with this acute transition.

I. EMOTIONAL IMPACT OF PUBLIC NOTORIETY ON PROFESSIONAL FOOTBALL PLAYERS

A. Emotional Intelligence

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[13] Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence,* 30 T. JEFFERSON L. REV. 575, 576 (2007-08).
[14] Jacobs, *supra* note 3.

Emotional Intelligence ("EI") has been defined by professors Peter Salovey and John Mayer as "[T]he ability to monitor one's own and others' feelings and emotions, to discriminate among them and to use this information to guide one's thinking and actions."[15] Moreover, EI involves the ability to motivate oneself, control impulses, delay gratification, and regulate mood.[16] EI may be used interchangeably with Emotional Quotient ("EQ"), and according to Vaibhav Birwatkar, EQ is defined as "[T]he non-cognitive dimensions of intelligence and refers to the ability to read the political and social environment, to grasp intuitively what others want and need, and what their strengths and weaknesses are."[17] Birwatkar further states that, "[b]eing emotionally intelligent applies not just to how individuals respond to life experiences, but also to other life crises."[18] He also argues that EI " . . . is the ability to use emotions to help solve problems and thus give rise to a more effective life."[19]

One may consider EI to be a key requisite in the success of a professional football player. Research has shown there is a connection between EI and athletic performance.[20] However, although EI has been associated with sports

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[15] Peter Salovey & John D. Mayer, *Emotional Intelligence*, 9 IMAGINATION, COGNITION, & PERSONALITY 185, 189 (1990), http://www.unh.edu/emotional_intelligence/EI%20Assets/Reprints...EI%20 Proper /EI1990%20Emotional%20Intelligence.pdf.

[16] Rosanna Stanimirovic & Stephanie Hanrahan, *Psychological Predictors of Job Performance and Career Success in Professional Sport*, XIX SPORT SCI. REV. 211, 218 (2010).

[17] Vaibhav P. Birwatkar, *Emotional Intelligence: The Invisible Phenomenon in Sports*, 3 EUROPEAN J. SPORTS & EXERCISE SCI. 19, 20 (2014).

[18] *Id.*

[19] *Id.*

[20] *See generally* Birwatkar, *supra* note 17, at 19-31 (investigating and concluding emotional intelligence is associated with optimal sport performance).

performance and positive traits, EI may also play a factor in an individual's ability to cope and transition to the role of a professional athlete. In one study, thirty retired NFL players participated in a study to measure EI for athletes' life successes.[21] Utilizing an EI assessment, the Six Seconds Emotional Intelligence Assessment ("SEI") participants rated themselves in three core areas: self-awareness, self-management, and self-direction.[22] This assessment provided an overall EQ score[23] for the three core areas and eight competencies.[24] The EQ score was correlated with a Life Success ("LS") Scale, where participants rated themselves using a five-point Likert Scale, on eighteen items identified with the following: health, addiction, depression, relationships, pro-social behavior, quality of life, and effectiveness.[25] Although a small sample size was used, the study indicated that there was a high correlation between the EQ score and the LS outcomes.[26] Subsequently, the results indicated that a higher EI is indicative of higher LS outcomes.[27] To put this in perspective, under the variable of 'addiction,' the researchers explained that "[h]aving low emotional intelligence scores is extremely predictive of problems with drugs and alcohol."[28] The research indicated that EI is an essential component for athletes to have successful lives.[29] Performance and success have historically been used to measure EI, however, there is currently little research addressing the adaption of life in the

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[21] Joshua Freedman & Marvin Smith, *Emotional Intelligence For Athletes' Life Success*, SIXSECONDS.ORG (May 1, 2008), http://6seconds.org/sei/media/WP-NFL-EQ.pdf.
[22] *Id.* at 3.
[23] *Id.*
[24] Freedman & Smith, *supra* note 21, at 4.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 5.
[28] *Id.* at 7.
[29] *Id*. at 8.

NFL and the public notoriety that follows. Perhaps one could postulate, based on the study measuring EI and LS outcomes, that the higher the EI a professional athlete has, the more self-aware he is and the better his ability to adapt to and cope with life in the public, as well as to the demands placed on him. In addition to EI, there appears to be other factors that contribute to the adaptation of professional football players' sudden public notoriety.

B. Entitlement, Celebrity Worship, and Hubristic Pride

Many scholars believe that professional athletes possess a sense of entitlement.[30] With entitlement comes the belief that one can do what one wants, whenever one wants, and some scholars even argue that the mentality of a professional male athlete is that "the rules and laws that apply to the rest of society do not apply to him."[31] Psychiatrist Michael Miletic believes that the condition on the field for professional athletes to believe in the power to make changes by their own actions is translated off the field as a sense of entitlement—"[T]hat they

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[30] Laurie Nicole Robinson, *Professional Athletes-Held to a Higher Standard and Above the Law: A Comment on High-Profile Criminal Defendants and the Need for States to Establish High-Profile Courts*, 73 IND. L. J. 1313, 1318 (1998), http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1975&context=ilj. *See also* W. Keith Campbell, Angelica M. Bonacci, Jeremy Shelton, Julie J. Exline & Brad J. Bushman, *Psychological Entitlement: Interpersonal Consequences and Validation of a Self- Report Measure*, 83 J. PERSONALITY ASSESSMENT 29, 29-45 (2004). *See generally* Vinnie Rotondaro, *The Entitled Athlete*, COLUMBIASPORTSJOURNALISM.COM (Jul. 1, 2010), http://columbiasportsjournalism.com/2010/07/01/the-entitled-athlete/ ("Experts say that a sense of entitlement can begin playing a role in an athletes' life as early as Little League, Pop Warner football or AAU basketball. Once a child displays a special ability – shooting a ball, hitting a ball or throwing a ball – he or she is at risk of drawing attention that focuses on solely on athletic ability at the expense of holistic wellbeing").

[31] Robinson, *supra* note 30, at 1318.

are above the law."[32] A professional athlete's sense of entitlement may be reflective of public notoriety, and celebrity worship may influence this sense of entitlement. One thought is that fans of celebrity athletes, both children and adults, identify celebrity athletes as bigger than life.[33] Although celebrity worship leads to maladaptive behaviors among young adults, such as unhealthy obsessions and social-pathological attitudes,[34] it is possible that celebrity worship also leads to maladaptive behaviors in professional football players.

A celebrity athlete's pride may play a factor in this determination. Pride is considered a basic, positive emotion in human beings that fosters a sense of accomplishment and satisfaction in an individual's actions through social approval and recognition.[35] However, according to Dr. Steven Aicinena ("Dr. Aicinena"), [pride] ". . . can be a very damaging emotion for it can serve as the motivation to engage in harmful behavior as individuals seek to bolster and protect their pride."[36] Moreover, Dr. Aicinena describes hubristic pride as exaggerated, reckless, and involving a belief of infallibility that is ". . . associated with arrogance, conceit, narcissism, hostility,

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[32] Robert Lipsyte, *Backtalk; Outside the Norm: The Mind-Set of the Elite Athlete*, NY TIMES (Feb. 6, 2000), http://www.nytimes.com/2000/02/06/sports/backtalk-outside-the-norm-the-mind-set-of-the-elite-athlete.html?pagewanted=all&src=pm (quoting psychiatrist Michael Miletic).

[33] Michael R. Hyman & Jeremy J. Sierra, *Sport Celebrity Idolatry: A Problem?* WESTGA.EDU 1, 2-3 (2009), http://www.westga.edu/~bquest/2009/idolatry09.pdf.

[34] *Id.*; *see also* John Maltby, Liza Day, Lynn E. McCutcheon, Raphael Gillet, James Houran, & Diane D. Ashe, *Personality and Coping: A Context For Examining Celebrity Worship and Mental Health*, 95 BRIT. J. PSYCHOL. 411, 412-425 (2004).

[35] Dr. Steven Aicinena, *When Pride Goes Wrong*, 14 THE SPORT J. 1, 2-11 (2011), http://www.thesportjournal.org/article/when-pride-goes-wrong.

[36] *Id.* at 3.

aggression, and it results in interpersonal problems."[37] Successful athletes are beguiled by hubristic pride because it enables them to engage in harmful behavior in pursuit of their goals.[38] A sense of entitlement often plays into the hubristic pride seduction because others see successful athletes as special and more important than others.[39] Subsequently, hubristic athletes feel entitled to special treatment—they feel they are not required to follow policies and rules, and they lack perspective.[40] In order for successful athletes to reap the benefits of pride as a positive emotion in the pursuit of achieving goals and a sense of accomplishment, hubris must be sidelined to prevent these athletes from believing they deserve special treatment.[41] If this hubristic pride is not sidelined, these maladaptive beliefs may lead professional players into engaging in deviant behavior.

C. Anomie and Deviance

When athletes get drafted and enter the NFL, one of the benefits may be a big money contract. For many of these football players, this is an overnight reality of instant wealth. This acute transition of sudden wealth may impact how professional football players adapt to this sudden change. Durkheim's theory of anomie rests on the notion that when there is an acute transition in solidarity, there will be sociological instability creating pathologies known as anomie.[42] Durkheim's perspective has been utilized to explain

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[37] *Id.*
[38] *Id.* at 5.
[39] *Id.*
[40] *Id.* at 7.
[41] Aicinena, *supra* note 35, at 9.
[42] Stephen R. Marks, *'Durkheim's Theory of Anomie'*, 80 AM. J. SOC. 329, 330-31 (1974). *See also* Mark Abrahamson, *Sudden Wealth, Gratification and Attainment: Durkheim's Anomie of Affluence Reconsidered*, 45 AM. SOC. REV. 49, 50 (1980).

the pathologies resulting from changes in wealth.[43] Wealth gives the impression of infinite success. However, Durkheim argues "at a societal level, that states of anomie were especially likely if an improvement in material conditions occurred rapidly"[44] where "anomie describes the impact of sudden economic change and the subsequent loss of social bonds on human beings."[45] Eric Carter and Michael Carter have described anomie among NFL football players as "[A]n absence, breakdown, confusion, or conflict in the norms of these NFL players' social environments and personal lives—a state of deregulation and malintegration, while on the individual level, a state of meaninglessness or normlessness."[46]

One study addressed whether "anomie exists among professional football players who have experienced sudden wealth" and if deviance is the consequence.[47] Utilizing a Durkheim framework and identifying NFL players' off-the-field deviant and criminal behaviors, 104 current and former NFL players were interviewed with the goal of answering three pivotal questions:

> (1) Can levels of anomie be measured among NFL players, and if so, what factors are associated with anomie? (2) What are the factors that contribute to law-abiding NFL players, who have not been arrested, and what factors contribute to illegal behavior among players who have been arrested? (3) Most

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[43] Marks, *supra* note 42, at 333.
[44] Abrahamson, *supra* note 42.
[45] Eric M. Carter & Michael V. Carter, *Fame, Fortune, and Anomie: A Social Psychological Analysis of Anomie Among National Football League Players*, 42 INT'L REV. SOC. OF SPORT 243, 244-56 (2007), http://www.campbellsville.edu/fame-fortune-and-anomie.
[46] *Id.* at 248.
[47] *Id.* at 244.

> important, are the players who reported themselves as law-breakers the ones who exhibit anomic characteristics?[48]

Results indicated that most of the 104 players interviewed identified with deviant lifestyles attributed to being suddenly wealthy, and most players were "[U]nable to cope with the freedom that came with sudden wealth and fame."[49] The interviews indicated that deviance was correlated with the "stressful life change" when players entered the NFL after college and that "[t]he sense of entitlement that came with wealth gave many of the athletes the idea that they did not have to answer to anyone but themselves."[50] Moreover, the players reporting challenges with life changes brought on by sudden wealth revealed anomie through the interviews.[51] The acute transition from being a college player with no money to becoming an instant millionaire was indicative of a fast-paced life that created unhappiness for some players.[52] One of the most significant findings in this study was that NFL players who had common social ties or a support system were better able to cope with the acute transition into sudden wealth.[53] Players' social ties and social network correlated with "their happiness or unhappiness, and ultimately, their normative or deviant behavior."[54] For these NFL athletes, the sudden change in wealth and lack of a social support network brought anomie and invited participation in deviant behavior.[55] The sudden transition into retirement has also created emotional and personal challenges for some NFL players. This study

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[48] *Id.* at 245-46.
[49] *Id.* at 252.
[50] *Id.* at 253.
[51] Carter & Carter, *supra* note 45, at 253.
[52] *Id.* at 253-54.
[53] *Id.* at 254.
[54] *Id.*
[55] *Id.* at 256.

provides insight into the psychological impact of sudden wealth on professional football players and the consequences.

D. Career Termination

Most professional athletes' careers, on average, are short term.[56] The phrase "N-F-L" has been epitomized in the NFL community to stand for "Not For Long."[57] Similar to the acute transition with entering the NFL, leaving the NFL may also be problematic for players. As noted above, fans idolize professional athletes and they become categorized as role models with expectations from others to act the same way off the field as they do on.[58] Subsequently, athletes' identities are determined by sport participation and "[T]he notoriety pushes many athletes into well-defined, narrowly based roles."[59]

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[56] Greg J. Lotysz & Sandra E. Short, *"What Ever Happened To . . . ." The Effects of Career Termination from the National Football League*. 6 AI: ONLINE J. SPORT PSYCHOL. 47, 48 (2004), http://www.athleticinsight.com/ Vol6Iss3/WhatEverHappened.htm (indicating "the average career in a team sport lasts between 3 to 7 years"). *See also* Carolyn E. Thomas & Kathy L. Ermler, *Institutional Obligations in the Athletic Retirement Process*, 40 QUEST 137, 140 (1988) (stating "athletes retire at 20, or 30, or maybe as late as 35."); Sam Riches, *How We Set Up Our Professional Athletes to Fail*, PACIFICSTANDARDMAG.COM (Feb. 18, 2014), http://www.psmag.com/business-economics/professional-athletes-set-fail-74247 (stating " . . . athletes' careers are likely to end within that initial decade [and] . . . six years [] is about the average length of a career in professional sports.").

[57] James A. Holstein, Richard S. Jones & George E. Koonce Jr., *Is There Life After Football?: Surviving the NFL* (Kindle Edition, 2014), http:// www.nfl.com/ videos/ nfl-videos/ 09000d5d8213b6cb/ Pick-Six-Glanville-NFL-means-Not-For-Long (the N-F-L "not for long" phrase originated during a former coach of the Houston Oilers, Jerry Glanville, discussion with a game official). *See also* Carter & Carter, *supra* note 45, at 254 (One NFL player described life in the NFL as N-F-L "not for long").

[58] Patrick H.F. Baillie & Steven J. Danish, *Understanding the Career Transition of Athletes*, 6 THE SPORT PSYCHOL. 77, 78-90 (1992).

[59] *Id.* at 78.

Idolization, prestige, and success ultimately influence a player's development of an egocentric sense of self, where identity and self-esteem are dependent upon athletic performance.[60] As a result, Patrick Baillie and Steven Danish determined that "[r]etirement, then, poses a threat to this identity."[61] This threat includes a deprivation of the personal satisfactions of playing the sport, the esteem and social attachments, and the companionship provided by the sport.[62]

According to Carolyn Thomas and Kathy Ermler, career endings for professional football players can be dictated by "[A]ge, injury, educational needs, or economic or family pressures."[63] Often, for athletes who suffer career-ending injuries, the outcome is a blow to the belief of being invincible and being unprepared to deal with the emotional and financial consequences.[64] These consequences, according to Baillie and Danish, include "stunted emotional development" and a "skewed perception of the world" because the team provided a shelter from athletes' day-to-day worries in order for the players to put their energy and focus onto the field.[65] Professional football players acknowledge not being prepared for this reality.[66] These players assume the shelter provided by the team carries through during retirement because Baillie and Danish assert that players believe "management will help the athlete into a second career, the *in loco parentis* status that the team assumes in alleviating the day-to-day concerns of the athlete, the unusual work schedule in athletics, and the lack of control most athletes have over the timing of their own

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[60] *Id.* at 82.
[61] *Id.*
[62] Thomas & Ermler, *supra* note 56, at 140.
[63] *Id.* at 141.
[64] *Id.*; *see also* Baillie & Danish, *supra* note 58, at 86.
[65] Baillie & J. Danish, *supra* note 58, at 87.
[66] *Id.*

retirement."[67] When an athlete realizes the end of his career, he experiences feelings such as "shock, denial, depression, and understanding."[68] Some scholars suggest that instead of viewing retirement as an end, it should be viewed as "the loss of an intense and very important relationship."[69] With loss, there is a period of learning to cope and transition to a new stage in life.[70] Without the proper support, counseling, and advocacy, a player may experience a maladaptive adjustment to retirement that may lead to self-destructive behaviors with legal consequences.

E. NFL Players as Targets

It is apparent that when an NFL player engages in illegal conduct off of the field, the public is soon to know of the incident. Because of an NFL player's role model potential, Jacobs contends that when "you're a professional player, you can't take a pinky toe off of the straight and narrow path because the public and the media will eat you alive."[71] Pictures of NFL players (both current and retired) and the description of their illegal activities almost instantaneously will be infiltrated through all media sources.[72] Moreover, with being in the public eye, Wayne Drehs reports that, "[n]o matter where professional athletes are—at home, out with friends, in their cars—they know they are targets, and they perhaps have never been more uneasy about their personal safety than they are

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[67] *Id*. at 89.
[68] *Id.* at 90.
[69] Thomas & Ermler, *supra* note 56, at 141. *See generally* ELIZABETH KUBLER-ROSS, ON DEATH AND DYING (1969) (identifying the stages of grief from loss).
[70] *Id.*
[71] Jacobs, *supra* note 3.
[72] *NFL Athletes in trouble with the law*, CBSNEWS.COM (Dec. 9, 2015), http://www.cbsnews.com/pictures/nfl-athletes-in-trouble-with-the-law/.

right now."[73] Becoming a target, according to one professional football player, happens because "[w]e're high-profile people. They want what you have, and they're willing to do whatever they have to do to get it."[74]

Consequently, this kind of exposure, coupled with the psychological implications of sudden fame and wealth, can result in hypervigilance for some NFL players. Public notoriety puts NFL players in the spotlight, which may engender an exaggerated intensity of behaviors for some players. Without the proper advocacy, these players may not be cognizant of the legal implications of their actions.

II. LEGAL IMPLICATIONS OF SUDDEN PUBLIC NOTORIETY OF PROFESSIONAL FOOTBALL PLAYERS

> *"Law needs to play a predominant role to regulate and curb rule-violators, but as importantly, law needs to play a symbolic role to restore the meaning of fairness and integrity back into sport."*[75]

A. The Legal System Versus the NFL Punishment System/Personal Conduct Policy

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[73] Wayne Drehs, *The Professional Athlete as Target: 'Am I Next?'*, ABCNEWS.COM (Nov. 30, 2007), http://abcnews.go.com/Sports/story?id=3940887&page=1.

[74] *Id.*

[75] Jill Weinberg, *Changing the Culture of Sports Deviance*, LIFEOFTHELAW.ORG (Feb. 28, 2013), http://www.lifeofthelaw.org/2013/02/changing-the-culture-of-sports-deviance/.

Professor Bryan Denham asserts that:

> [l]eagues don't want to deal with any deviant behavior, they'd rather convince themselves it doesn't exist. You have to remember athletes are very much commodities at the pro level and if they get in too much trouble the leagues will set them aside and focus on other athletes. The leagues don't have any vested interest in these guys as people—they are interested in what they produce on the field.[76]

Athletes who engage in behaviors that break these rules do and will have consequences. Outside the legal system, the NFL has set forth a constitution, bylaws, and a Personal Conduct Policy ("PCP").[77]

Article VIII § 8.13(A) of the NFL Constitution authorizes the Commissioner (of the NFL) with disciplinary powers against any member that "has violated the Constitution and Bylaws of the League or has been or is guilty of conduct detrimental to the welfare of the League or professional football . . . ."[78] Additionally, pursuant to the Collective Bargaining Agreement between the NFL Management Council and the NFL Players Association, the Commissioner may take action against a player, and provides "for conduct detrimental to the integrity of, or public confidence in, the game of

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[76] Riches, *supra* note 56.
[77] NAT'L FOOTBALL LEAGUE CONST. & BYLAWS (1970; 2006 Rev.) art. VIII, http://www.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf; NFL PLAYERS ASS'N PERS. CONDUCT POL'Y (2007) [hereinafter "PCP"], https://nfllabor.files.wordpress.com/2013/06/personal-conduct-policy.pdf.
[78] NAT'L FOOTBALL LEAGUE CONST. & BYLAWS, *supra* note 77, at art. VIII, § 8.13(A).

professional football . . . ."[79] And further, it mandates "[t]he Commissioner's disciplinary action will preclude or supersede disciplinary action by any Club for the same act or conduct."[80] Of the professional sport leagues, one scholar asserts that "the NFL has granted its commissioner the broadest disciplinary power . . . ."[81] Therefore, professional football players can no longer rest on the assumption that the league will ignore deviant behavior.

Recently, the NFL has been coined "the NPL . . . National Penal League."[82] The NFL implemented the PCP to address off–the-field behaviors that were "detrimental to the integrity and public confidence" of football.[83] In 2014 the owners updated and unanimously passed this policy to keep it up-to-date.[84] Moreover, the policy is directed toward all members of the NFL, not just the players. It confirms that the Commissioner is the final arbitrator because the Commissioner looks at the long-term interests of what is best for the game.[85]

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79 *See* Collective Bargaining Agreement Between the NFL Management Council and the
NFL Players Association 2011–2020, art. 46 §1 (2006) [hereinafter CBA], https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf.

80 *Id.* at art. 46 §4.

81 Bethany P. Withers, *The Integrity of the Game: Professional Athletes and Domestic Violence*, 1 HARV. J. SPORTS & ENT. LAW 145, 168 (2010).

82 Patrick Rishe, *Breaking Bad: The Economics, Sociology, And Psychology of Law-Breaking Behavior By NFL Players*, FORBES.COM (Sept. 17, 2014), http://www.forbes.com/sites/prishe/2014/09/17/breaking-bad-the-economics-sociology-and-psychology-of-law-breaking-behavior-by-nfl-players/.

83 PCP, *supra* note 77.

84 National Football League, *NFL owners endorse new personal conduct policy*, NFL.COM (Dec. 10, 2014), http://www.nfl.com/news/story/0ap3000000441758/article/nfl-owners-endorse-new-personal-conduct-policy.

85 *Id.*

The new policy involved input from a diverse group of experts, both inside and outside of the NFL, to build on the foundation from previous policies.[86] The revised PCP provides that

> [c]onduct by anyone in the league that is illegal, violent, dangerous, or irresponsible puts innocent victims at risk, damages the reputation of others in the game, and undercuts public respect and support for the NFL. We must endeavor at all times to be people of high character; we must show respect for others inside and outside our workplace; and we must strive to conduct ourselves in ways that favorably reflect on ourselves, our teams, the communities we represent, and the NFL.[87]

Additionally, the revised PCP provides that

> [i]f you are convicted of a crime or subject to a disposition of a criminal proceeding, you are subject to discipline. But even if your conduct does not result in a criminal conviction, if the league finds that you have engaged in conduct [prohibited by the policy], you will be subject to discipline.[88]

However, a caveat to the revised PCP acknowledges the assumption that the NFL ignores deviant behavior of its players by providing "[a]nyone arrested or charged with conduct that would violate this policy will be offered a formal clinical evaluation, the cost of which will be paid by the league, and appropriate follow-up education, counseling or treatment

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[86] *Id*.
[87] *Id*.
[88] *Id.*; National Football League, *supra* note 84.

programs."[89] For the families of the violator, the revised PCP provides that

> [i]n appropriate cases, the league will make available assistance to victims and families, as well as the employee. This assistance may include providing or direction to appropriate counseling, social and other services, clergy, medical professionals, and specialists in dealing with children and youth. These resources will be provided through specialized Critical Response Teams affiliated with the league office and with member clubs.[90]

Although this new policy may be seen as a form of retributive justice, there appears to be an element of restorative justice that works in tandem with retribution. Not only are players subject to discipline, but a clinical evaluation and appropriate counseling and treatment programs for players and their families will also be provided. Moreover, the Commissioner is authorized with plenary power to determine punishment for violators of the NFL Constitution, Bylaws, and the PCP. However, this power does not trump the legal system.[91] Cases that have entered the legal system challenging

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[89] *Id.*

[90] *Id.*

[91] *See generally* Robert Ambrose, *The NFL Makes It Rain: Through Strict Enforcement of Its Conduct Policy, the NFL Protects Its Integrity, Wealth and Popularity*, 34 WM. MITCHELL L. REV. 1069-1113 (2008), http://open.wmitchell.edu/wmlr/vol34/iss3/4 (concluding the NFL and the commissioner have the power to take measures to punish players' off-the-field misconduct because of the nature of the players' offenses and to maintain the integrity of the league).

the Commissioner's authority indicate "significant judicial deference to commissioner determinations."[92]

While the NFL's punishment system is based on what is in the best interest of the sport, the legal system outside the NFL is based on an adversarial system and what is in the best interest of society. One of the striking differences between an NFL player and a typical person is the expectation of NFL players being role models in both systems.[93] Another individual without public notoriety may not have the same expectation placed upon him. Because the integrity of public confidence and the game of professional football are of the utmost importance off the field, "the public expects today's sports figures to act as role models."[94] Where state law once governed off-the-field conduct, the NFL now exercises a broader governance to regulate player conduct on and off the field. Now, the difference in systems may deter athletes from deviant behavior. Recent NFL-player punishment for criminal behavior indicates harsher consequences both legally from the criminal justice system and from the NFL.

A. Player Punishment

> *Take the overweening ambition of some athletes, mix it with the all-American obsession with sports and money, and it's no wonder*

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[92] Janine Young Kim & Matthew J. Parlow, *Off-Court Misbehavior: Sports Leagues and Private Punishment*, 99 J. CRIM. L. & CRIMINOLOGY 573, 579 (2009), http://scholarlycommons.law.northwestern.edu/jclc.
[93] Richard P. Cole, *Law, Sports, and Popular Culture: The Marriage of a Relationship Scorned*, 23 W. NEW ENG. L. REV. 431, 436-37 (2002), http://digitalcommons.law.wne.edu/lawreview/vol23/iss2/6.
[94] *Id*. at 437.

> *we're producing a country of self-entitled "monsters" who think they're above the law.*[95]

1. Michael Vick

Atlanta Falcons quarterback, Michael Vick, was indicted on July 17, 2007, for sponsoring a dogfighting operation called "Bad Newz Kennels."[96] When Vick admitted, through court papers, that he participated in bets and assisted in killing underperforming dogs, the NFL suspended him indefinitely.[97] Vick entered a plea of guilty to dog fighting on November 25, 2008, in violation of the Virginia Code, and agreed to a sentence of a term of three years and a fine of $2,500.[98] At his sentencing, District Judge Henry E. Hudson directed Vick to "apologize to the millions of young people who looked up to you . . . ."[99] Judge Hudson further reprimanded Vick for lying about the extent of his role in the dogfighting operation and sentenced him to twenty-three months in prison.[100] As a professional football player held to

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[95] Michael McCarthy, *Sports, Crime and Money: Athletes Gone Wrong*, CNBC.COM (Aug. 9, 2013), http://www.cnbc.com/id/100942614 (quoting psychoanalyst Dr. Norman Wyloge).

[96] Indictment, United States v. Peace, No. 3:07CR-______ (July 17, 2007), http://aldf.org/downloads/vick_federal_indictment.pdf.

[97] Michael S. Schmidt & Judy Battista, *After Plea, Vick Is Barred Indefinitely By the N.F.L.*, NYTIMES.COM (Aug. 25, 2007), http://query.nytimes.com/gst/fullpage.html?res=9F0CE3DC113CF936A1575BC0A9619C8B63.

[98] Plea Agreement, Commonwealth of Virginia v. Vick, No. CR07-000056 and CR07-000057 (Nov. 25, 2008), http://hosted.ap.org/specials/interactives/_documents/vick_plea.pdf.

[99] Ed Werner, *Apologetic Vick gets 23-Month Sentence on Dogfighting Charges*, ESPN.COM (Dec. 11, 2007), http://sports.espn.go.com/nfl/news/story?id=3148549.

[100] Juliet Macur, *Vick Receives 23 Months and a Lecture*, NYTIMES.COM (Dec. 11, 2007),

role-model status, Vick not only violated the state law, he also compromised the integrity of professional football and violated the PCP. Vick received a criminal conviction, lost his multi-million dollar contract and professional football career, and experienced public shaming for his behaviors.

2. Aaron Hernandez

On July 1, 2013, a grand jury indicted Aaron Hernandez for the murder of Odin Lloyd, just one year after he signed a five-year, $37.5 million contract extension with the New England Patriots.[101] After a lengthy trial, a jury convicted Hernandez of first-degree murder and a weapons charge on April 15, 2015, and sentenced him to life in prison without the possibility of parole.[102] Reporters indicated that "prosecutors praised jurors for looking past Hernandez's status as a celebrated athlete"[103] and they quoted district attorney Thomas Quinn, who stated, "[I]n the end, the jury found that [Hernandez] was just a man who committed a brutal murder."[104] The New England Patriots voided Hernandez's contract guarantees, including $2.5 million in base salaries over two seasons, workout bonuses totaling $1 million, and the rest

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http://www.nytimes.com/2007/12/11/sports/football/11vick.html?pagewanted=all&_r=0.

[101] Indictment, Commonwealth v. Hernandez (July 1, 2013), http://ftpcontent2.worldnow.com/whdh/pdf/hernandez-indictment.pdf. *See also* Michal McCarthy, *supra* note 95.

[102] Travis Andersen & Martin Finucane, *Aaron Hernandez Found Guilty of Murder*, BOSTONGLOBE.COM (Apr. 15, 2015), http://www.bostonglobe.com/metro/2015/04/15/hernandez-jurors-deliberate-for-seventh-day/QUaFD2uTTYn65GsKTEY26O/story.html?p1=Article_Related_Box_Article.

[103] *Id.*

[104] *Id.*

of his signing bonuses.[105] Ian Rapoport reports that "[t]he Patriots believe the Collective Bargaining Agreement covers them because he has engaged in conduct unbecoming after being arrested and charged with first-degree murder in the death of Odin Lloyd."[106] Although the Patriots are disputing paying Hernandez the signing bonus of $3.25 million, Hernandez is also accused of fatally shooting two men in 2012, and the attorney for the families is seeking a court order to freeze all of Hernandez's assets pending a civil lawsuit.[107] Fox News reports that the family's lawyer stated "the Patriots have challenged Hernandez's right to receive the bonus, but he wants a court order in case the team is ordered to pay Hernandez in an arbitration hearing."[108]

NFL Commissioner Roger Goodell addressed the amendment to the policy on players' conduct and behavior and Jim Ferchland reported on Goodell's new policies, stating that players "can only play unless they are reinstated or cleared from their charges . . . [o]therwise, they are not allowed to be present on team facilities."[109] Because the NFL has been under scrutiny for the criminal acts of players, Ferchland further reported that "[t]he NFL has aspirations to make the league prolific, professional, and responsible [and] Goodell wanted to

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[105] Ian Rapoport, *Aaron Hernandez's Contract Guarantees Voided by Patriots*, NFL.COM (June 29, 2013, 12:56 PM), http://www.nfl.com/news/story/0ap1000000215486/article/aaron-hernandezs-contract-guarantees-voided-by-patriots.
[106] *Id.*
[107] Fox News, *Lawyer: Aaron Hernandez Shouldn't Be Paid $3.2 Million Signing Bonus While He Sits In Jail*, FOXNEWS.COM (July 2, 2014), http://www.foxnews.com/world/2014/07/02/lawyer-aaron-hernandez-shouldnt-be-paid-32-million-signing-bonus-while-sits-in.html.
[108] *Id.*
[109] Jim Ferchland, *Criminalized Athletes in the NFL*, STONYBROOKPRESS.COM (May 27, 2015), http://sbpress.com/2015/05/criminalized-athletes-in-the-nfl/.

make it conceivably clear that no violence or other act of assault would be permitted or condoned in the league."[110] The New England Patriots released Hernandez and he now faces life in prison and a pending criminal suit for a double murder in 2012.

3. Ray Rice

On February 15, 2014, Ray Rice was cited with misdemeanor assault when he hit his fiancée in an elevator in Atlantic City.[111] Neither party pursued charges. A grand jury indicted Rice for aggravated assault.[112] Although Rice was not convicted of aggravated assault, the NFL Commissioner suspended Rice indefinitely. As noted above, the courts tend to favor the disciplinary decisions made by the Commissioner, but this was not the case for Rice when he appealed his suspension to an arbitrator. In the summary of *In the Matter of Ray Rice*, Former U.S. District Judge Barbara S. Jones concluded that "to change Rice's original suspension from two games to indefinite was 'arbitrary' and an 'abuse' of discretion" because Rice did not lie or mislead the NFL or the Commissioner in the meeting.[113] Goodell made a decision to reevaluate the PCP because the times were changing and he felt he "didn't get it right."[114] After the video of the incident surfaced, Commissioner Goodell changed the two-game

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[110] *Id.*
[111] Decision, In the Matter of Ray Rice (Nov. 28, 2014), http://espn.go.com/pdf/2014/1128/141128_rice-summary.pdf.
[112] *Id.*
[113] *Id.*; *see also* Kevin Lewis, Robert Burton, Horace Holmes & The Associated Press, *Court Overturns Ray Rice Suspension, Freeing Him to Sign with any NFL Team*, WJLA.COM (Nov. 28, 2014), http://wjla.com/sports/baltimore-ravens/ray-rice-wins-appeal-suspension-vacated-immediately-union-says-109394.
[114] *Id.*

suspension to an indefinite one.[115] Rice is now a free agent. Some are arguing that Rice deserves a second chance and Mike Preston reported that "what happened to Rice happens to a lot of successful athletes;" "[h]e couldn't handle the fame and the fortune, and his head just got bigger and bigger, to the point where he alienated teammates and assistant coaches during his last three seasons in Baltimore."[116]

4. Jonathan Dwyer

Jonathan Dwyer, an Arizona Cardinals running back, was charged on September 17, 2014, with aggravated assault after allegedly assaulting his wife during two arguments at their home, and he pleaded not guilty.[117] The NFL's PCP appears evident in this case because although Dwyer was placed on probation for eighteen months, the Arizona Cardinals placed him on the reserve/non-football illness list in September 2014, which meant he was unable to play football for Arizona for the remainder of the season.[118] Dwyer is now a free agent but with the public shaming and stigma associated with

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[115] *Id.*

[116] Mike Preston, *Hopefully, Ray Rice Will Get Another Chance in the NFL*, BALTIMORESUN.COM (July 27, 2015, 3:41 PM), http://www.baltimoresun.com/sports/ravens/bs-sp-preston-column-0728-20150727-column.html. *See also* Justin Block, *Some NFL Team Owners Want Ray Rice to Get a Second Chance*, HUFFINGTONPOST.COM (Aug. 14, 2015, 10:31 AM), http://www.huffingtonpost.com/entry/ray-rice-second-chance_55cde8f9e4b055a6dab00195.

[117] Kody Acevedo, *Arizona Cardinals' Dwyer Pleads Not Guilty in Abuse Case*, AZCENTRAL.COM (Jan. 26, 2015, 8:59 PM), http://www.azcentral.com/story/news/local/phoenix/2015/01/26/second-grand-jury-charges-dwyer-with-aggravated-assault/22361613/.

[118] *Jonathan Dwyer Pleads Guilty to Disorderly Conduct*, SPORTS.YAHOO.COM (Jan. 29, 2015, 1:32 PM), http://sports.yahoo.com/news/jonathan-dwyer-pleads-guilty-disorderly-conduct-201513885--nfl.html.

domestic violence, it will be unlikely that another NFL team will pick him up.[119]

These cases illustrate that professional football players are not immune to legal consequences when they violate the law. It is unclear what underlying psychological factors may have influenced these particular players' deviant behaviors. However, better advocacy and representation of these players may have prevented the gravity of these unfortunate situations.

C. Sports Agent versus Lawyer

> *"I am out here for you. You don't know what it's like to be ME out here for YOU. It is an up-at-dawn, pride-swallowing siege . . . ."*[120]

It is evident professional football players need someone to represent them both on the field and off because of the complexities of contract negotiations and their lack of knowledge of the law. Although agents may represent players and will network and negotiate to land big money for those players, they ultimately may take three percent of the contract deal. Alternatively, lawyers who know the law and who are bound by professional responsibility rules may represent players.

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[119] Neal Coolong, *Jonathan Dwyer Pleads Guilty to Misdemeanor, Gets 18 Months Probation*, BEHINDTHESTEELCURTAIN.COM (Jan. 30, 2015, 6:29 AM), http://www.behindthesteelcurtain.com/nfl-pittsburgh-steelers-news/2015/1/30/7950375/jonathan-dwyer-arrest-domestic-violence. *See also* Jess Root, *Jonathan Dwyer Wants to Return to Team, Cardinals Not Interested*, REVENGEOFTHEBIRDS.COM (Mar. 20, 2015, 9:00AM), http://www.revengeofthebirds.com/2015/3/20/8262571/jonathan-dwyer-wants-to-return-to-team-cardinals-not-interested.
[120] JERRY MAGUIRE! (TriStar Pictures 1996).

Stacy Evans asserts that scholars maintain, "most sports agents' definitions do not indicate the vast skill base that agents must possess in order to effectively represent their clients."[121] Sports agents do not necessarily represent the Jerry Maguire adage, "[S]how me the money."[122] Alternatively, Jeremy Geisel contends that a modern-day agent:

> [a]lso determines his athletes' market value, uses that value to his players' advantage by securing and sustaining endorsement revenue for the players off the field, secures personal appearances for the players, acts as a speaking agent for the players when dealing with the media, and counsels his rookie clients on pre-draft planning and preparation, including scheduling workouts, creating media kits and marketing collateral, and generally easing the players' concerns as draft day approaches.[123]

Subsequently, the agent, as professionally required for a lawyer, according to Robert Garbarino, is to "[d]etermine the client's best interests and try to achieve those objectives."[124] The attraction to agents is the psychological dynamic of

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[121] Stacy B. Evans, *Sports Agents: Ethical Representatives or Overly Aggressive Adversaries?* 17 JEFFREY S. MOORAD SPORTS L.J. 91, 92-100 (2010).
[122] JERRY MAGUIRE, *supra* note 120.
[123] Jeremy J. Geisel, *Disbarring Jerry Maguire: How Broadly Defining "Unauthorized Practice of Law" Could Take the "Lawyer" Out of "Lawyer-Agent" Despite the Current State of Athlete Agent Legislation*, 18 MARQ. SPORTS L. REV. 225, 228 (2007), http://scholarship.law.marquette.edu/sportslaw/vol18/iss1/7 (quoting Robert H. Ruxin, AN ATHLETE'S GUIDE TO AGENTS 10 (4th ed. 2004)).
[124] Robert P. Garbarino, *So You Want to Be a Sports Lawyer, or Is it a Player Agent, Player Representative, Sports Agent, Contract Advisor, Family Advisor or Contract Representative*, 1 JEFFREY S. MOORAD SPORTS L.J. 11, 32 (1994).

empowering their clients by assisting in negotiating the best contract and, ultimately, more money and benefits from the league.[125] Moreover, negotiations for athletes come with extremely high stakes because career time is short and a lifetime of earnings will be made on the field. Therefore, a player wants someone experienced who has industry-specific knowledge. Most general practitioner lawyers do not have this experience.[126]

Some argue that lawyers better serve professional athletes because they have a professional responsibility code to adhere to.[127] Moreover, lawyers are trained in the law including ethical training, which gives them an edge that proves to be more beneficial.[128] In addition, professional players may have more redress and may be better able to safeguard themselves in a case where negotiations or representation goes astray because of the lawyer's strict professional codes.[129] Not only can lawyers provide professional football players with legal representation on the field—including collective bargaining agreements—lawyers are also able to represent athletes off the field in legal matters involving criminal prosecution, family law issues, and tax and business law, and most importantly, they can represent and advocate for their clients when players' careers are over.[130]

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[125] Stacy B. Evans, *supra* note 121, at 97.
[126] Jason Belzer, *Do Professional Athletes Need To Be Represented By Sports Agents?* FORBES.COM (July 27, 2015, 12:00 PM), http://www.forbes.com/sites/jasonbelzer/2015/07/27/do-professional-athletes-need-to-be-represented-by-sports-agents/.
[127] *Id.*; *see generally* MODEL RULES OF PROF'L CONDUCT r. 7.3, r. 1.5 (AM. BAR ASS'N 2015) (soliciting clients is a violation of the rules, including professional athletes, and fees must be reasonable).
[128] Stacy B. Evans, *supra* note 121, at 92.
[129] *Id.* at 100.
[130] Catherine Ho, *The New Law Firm Cash Cow: Professional Athletes?* WASHINGTONPOST.COM (Nov. 10, 2013),

D. Lawyer as an Advisor (Advocacy)

1. Advisor

Pursuant to Rule 2.1 of the Model Rules of Professional Responsibility ("MRPR"), "[I]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[131] Under this rule, a lawyer is compelled to exercise independent and candid advice for a professional football player. A competent lawyer makes recommendations to players to better serve players' objectives. Moreover, the MRPR provide that it is appropriate for a lawyer "[t]o refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."[132] Beyond contract negotiations and criminal matters, lawyers may make recommendations to professional athletes involving social, financial, and moral issues.

2. Preventive Lawyering

Preventive lawyering may create a foundation based upon trust and success between a legal advocate and a professional football player. According to Dennis Stolle et al., "[p]reventive law provides a framework in which the practicing lawyer may conduct professional activities in a manner that

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http://www.washingtonpost.com/business/capitalbusiness/the-new-law-firm-cash-cow-professional-athletes/2013/11/08/9aff0b70-47db-11e3-a196-3544a03c2351_story.html.

[131] MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2015).

[132] *Id.* at r. 2.1 cmt. 2.

both minimizes his or her clients' potential legal liability and enhances their legal opportunities."[133] By utilizing a client-centered approach, both the lawyer and the athlete play a key role in joint decision making by identifying legal strategies to achieve long-term goals.[134] This process involves regular communication and "updates" between lawyer and client to bring awareness and prevent future legal challenges.[135] Stolle et al. also contend this type of "legal check-up" is therapeutic in the sense it "is a structured opportunity for the client to reevaluate his or her current life situation relative to his or her goals, and to think about and plan for the immediate and distant future."[136] Moreover, and perhaps most importantly, according to Forrest Mosten, underlying preventive lawyering is the assumption that "clients derive positive benefit[s] from ongoing relationships with their attorney."[137] By being apprised of a client's life events, Mosten contends "[t]he lawyer can then assist the client to improve decision-making and planning to prevent problems, reduce conflict, and increase life opportunities,[138] [which ultimately] permeates a lawyer's entire outlook toward clients."[139] However, there may be risks with adopting a preventive lawyering approach.

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[133] Dennis P. Stolle, David B. Wexler, Bruce J. Winick & Edward A. Dauer, *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 16-51 (1997), http://scholarlycommons.law.cwsl.edu/cwlr/vol34/iss1/3.

[134] *Id.*

[135] *Id.*

[136] *Id.* at 26.

[137] Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 440-41 (1994), http://www.mostenmediation.com/books/articles/Unbundling_of_Legal_Services_and_the_Family_Lawyer.pdf.

[138] Stolle, *supra* note 133.

[139] *Id.* at 441.

According to Lynda Murdoch, although preventive lawyering and therapeutic jurisprudence as an integrative approach potentially "humanize[s] lawyer-client relationships,"[140] it may also involve lawyers drawing "on the research and scholarship of professionals engaged in other therapeutic roles with clients."[141] Murdoch stresses there are hazards for lawyers adopting this new approach because they will be learning new approaches not typically taught in law school.[142] Although lawyers are typically not trained in therapeutic approaches, Murdoch does offer strategies for therapeutic and preventive lawyering.[143] These strategies include lawyers being more "psychologically-minded"[144] by making themselves aware of individual problems and fostering a commitment to personal growth.[145] These strategies would be conducive to preventive lawyering and the embodiment of a client-centered approach working for an NFL player's best interests.

III. SURVIVING THE GAME: A CASE STUDY ANALYSIS

A. NFL Player Mindset

Jacobs put it eloquently when he stated, "If you're going to act like a spectator, then that's what you're going to

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140 Lynda L. Murdoch, *Psychological Consequences of Adopting a Therapeutic Lawyering Approach: Pitfalls and Protective Strategies*, 24 SEATTLE U. L. REV. 483, 484-97 (2000), http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1673&context=sulr&seiredir=1&referer=https%3A%2F%2Fscholar.google.com%2Fscholar%3Fstart%3D0%26q%3Dpreventive%2Blawyering%26hl%3Den%26as_sdt%3D0%2C3#search=%22preventive%20lawyering%22.

141 *Id*. at 485.

142 *Id.*

143 Lynda L. Murdoch, *supra* note 140, at 494-96.

144 *Id.* at 494.

145 *Id.*

be. If you're going to act like a player, then that's what you're going to be."[146] A modern version of William James' quote, Jacobs' experience and insight into the game and life during and after professional football identifies the mindset as being the key factor in transitioning, coping, and ultimately surviving being a professional football player.

1. EI Analysis

Jacobs identifies hard work as being a key predictor of success as a professional athlete. When Jacobs attended the University of North Carolina on a scholarship, he described himself as a "fish out of water."[147] In high school, Jacobs received notoriety for his skills on the field and contended he did not have to study that hard to maintain a 3.4 GPA. However, transitioning from a school of 500 students to one of 50,000, Jacobs felt lost in a fish bowl. Out of twenty-three football scholarship students, eighteen were placed on academic probation in the first year. Jacobs felt he did not have the knowledge or the guidance to make this transition, and with the strict football player schedule, he felt pressure. In terms of his emotional intelligence (EI), one could argue that in order to survive and succeed at the college level, Jacobs was able to monitor his emotions and use this information to guide his thinking and actions. This was put to the test when Jacobs was suspended for one semester for poor grades and he had to step up his game to return to classes. The football program could not bail Jacobs out because the National Collegiate Athletic Association ("NCAA") controlled the academics portion. Jacobs took classes by correspondence during his suspended semester, where he went to study hall and was proactive in achieving the grades he needed. Through

[146] Jacobs, *supra* note 3.
[147] *Id.*

perseverance, he was able to raise his grades. He was motivated and adhered to a strict schedule to accomplish this.

It may be implied that in college, Jacobs had a high EI to achieve success. Alternatively, one may also argue that this motivation was facilitated by the strict regulations and schedule provided by the NCAA, the school, and the football team. As Jacobs describes, "[T]here are many great football players out there that you will never hear about because they can't do the schooling—you have to make the grades—no exceptions."[148] The research has indicated that the EI of professional football players is an essential component for them to have successful lives.[149] Arguably, the higher the EI the player has, the more self-aware and better able to cope the athlete is when thrust into public notoriety. However, other factors must be considered, including the strict regulations and scheduling of the players—both at the college level and when they reach the NFL. This discipline may help in a player's adaptation to acute public notoriety by helping the athlete balance the demands of being an NFL player and the expectations of the public.

2. Entitlement, Celebrity Worship, and Hubristic Pride Analysis

Jacobs attributes his recruitment into the NFL to believing in himself, being a hard worker, and taking the mindset that he could do it, even though he felt written off. When Jacobs heard chatter that there may be a possibility he could be drafted into the NFL, his first response was, "[R]eally?"[150] According to Jacobs, the "seed becomes planted [of making it into the NFL] when you have a player you worked with and trained with make it, and you 'sized him up',

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[148] *Id.*
[149] *See supra* text accompanying notes 17-29.
[150] Jacobs, *supra* note 3.

you think, 'Heck, if he can make it, I may have a chance.'"[151] The NFL is so far-fetched for many college-level football players, Jacobs asserts you sometimes need players to go before you to become more confident.

Jacobs describes the transition to the NFL as "going into an awe-inspiring unknown."[152] He also believes the media influences this admiration because of the hype and "garbage" reported. However, Jacobs asserts, "[Y]ou don't know how good you really are until you get there [in the NFL] and you size them up." He further states that "[B]eing in a locker room with John Elway, this is a player I see on TV. I never thought I would be here, and it's not until you start winning, then you think, 'Okay, I deserve to be here.'"[153] This may be where the foundation for a sense of entitlement is established and hubristic pride is developed.[154] Miletic claims professional athletes' experiences of the power to make changes on the field translate to a sense of entitlement and a belief they are above the law off of the field.[155] Moreover, because of celebrity athlete worship and the development of celebrity athletes' hubristic pride, professional football players believe they are entitled to special treatment and they are not required to follow policies and rules.[156]

However, Jacobs' experiences offer an alternative explanation. Jacobs explains that when you make it to the NFL, it is imperative that a player gets over being star struck quickly, because if he does not, he will not be there for long.

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[151] *Id.*
[152] Jacobs, *supra* note 3 (providing as a young adult watching certain players on the television, "you think wow, you're in awe.").
[153] Jacobs, *supra* note 3.
[154] *See supra* text accompanying notes 35-41.
[155] *Id.*
[156] *Id.*

Jacobs was now playing with or against all the players he grew up watching and idolizing. No one helped Jacobs with this transition.[157]

The NFL creates a culture for athletes to prove why the league wanted them and why they belong there, because the league does not give them the tools—NFL players are expected to already have them. Jacobs contends that every day the league is grading the athletes on everything—how they talk, how they act, how they look, and how they interact with other players. Jacobs describes the NFL as a family where you must fit in.[158] To survive, NFL players must be of the mindset that they are the "best thing" on the field, and Jacobs stressed, "[Y]ou have to believe it, or [you're] going home." There is no special treatment that may be identified with creating a sense of entitlement—it is more like a game of survival, where a player has to "outwit, outsmart, and outplay" the player beside him in order to secure his spot on the team.[159] Therefore, based on Jacobs' experiences, there is more involved than simply a sense of entitlement and a belief that the player deserves special treatment. NFL players' mindsets appear to play a critical role.

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[157] Jacobs, *supra* note 3 (contending "you have to do this on your own, you cannot be thinking this guy is better than me, and it's either in you or it's not because football is a competitive sport and the competitiveness kicks in to help you survive . . . it's like a pit-bull in front of you, it's do or die, it's either him or me, and the alpha male is going to step up to the plate and that is what makes a professional athlete, it's his ego, and you have to internalize that you belong there.").

[158] *Id.* (stating "you're invited into this family and they want to make sure you are the right fit.").

[159] *Id.* (explaining "when you're in college the coaches say, 'son, if you want to be good, you got to make that play' and in the NFL coaches and the league say, 'son, if you want to be here, you better make that play.'").

The challenge for players seems to be shutting off this mindset.[160] Although productive to surviving in the NFL as a player, this mindset may create challenges off the field. Moreover, the moment a player allows himself to be vulnerable or think he is not good enough, Jacobs contends, "[Y]ou won't be good enough. The league will find somebody else who thinks he is better than you, and you will be going home."[161] This mindset may play into hubristic pride, not necessarily as a maladaptive behavior, but as a survival mechanism for the athlete to keep playing in the NFL. The need to keep a hubristic mindset to survive the NFL may also play a role in deviant behavior off the field.

3. Anomie and Deviance Analysis

The sudden change and requirement for players to believe they are the best may influence anomie and deviance. If players are unable to "shut it off" when they leave the field for fear of losing their spots on the team, it can be said that their beliefs about being better than others could potentially have a negative impact on their lives off the field. Coupled with the sudden acquisition of wealth, this may be a recipe for disaster.[162] Jacobs explains that there is nothing or no one that can prepare a player for this change.[163] There is no time to prepare for this level of change, and often, the players pay the price with negative consequences.

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[160] *Id.* (asserting "you can't shut it off because in order for you to think and act that way, you have to believe you're that good.").
[161] *Id.*
[162] *See supra* text accompanying notes 42-55.
[163] Jacobs, *supra* note 3 (stating "it's like if somebody said to you, you're going to be a millionaire next year, and you're still a kid, would you believe them . . . no, but when you get that check, it's like damn, I'm a millionaire.").

The "I'm better than you" attitude may transfer to adapting and coping problems during retirement.[164] Most players acknowledge they are not prepared for life after football, and Jacobs stresses nothing prepared him for the end of his professional football career. With the mindset of being better than others and the need for this mindset to survive in the league, players would be confronted with finding a new identity outside of professional football. Jacobs contends players look for opportunities to stay in the "game" and recapture those NFL moments.

Jacobs identified the team as an "umbrella" that prevents bad things from happening to players because as a player, Jacobs states, "your job is to focus on the game, not external pressures."[165] The NFL does not want players to deal with external pressures and demands players uphold the highest integrity of the profession. However, when players survive on the team by being "entitled" or "narcissistic," and using what Jacobs describes as a "self-protecting mechanism," it appears to be a real challenge for the integrity of the sport to be upheld when this player mindset transfers off the field. To players, the NFL team becomes family,[166] and, as a family, more support needs to be given to its members in developing coping strategies both on and off the field.

The notion of "family" in the NFL provides an understanding of the loss players experience when their careers end. Similar to the stages of death and dying, if athletes gain a better understanding of the emotional impact of retirement, it might better prepare them for the experiences and lessen the

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[164] *Id.* (asserting "how do you go from being the shit, to overnight not being the shit?").
[165] Jacobs, *supra* note 3.
[166] *See supra* text accompanying note 158.

blow when their careers end.[167] Moreover, scholars indicate that coaches and management need to take a proactive role in the transition into athlete retirement.[168] This role entails preserving athlete autonomy by allowing athlete decision-making, providing pre-retirement counseling programs, focusing on emotional and financial counseling, and cognitive restructuring to assist athletes in a new lifestyle.[169] This may facilitate a positive adjustment in the transition for professional football players to engender a successful retirement.

B. Legal Issues

1. NFL Players as Targets

Part of the challenge for NFL players is that once notoriety is established, players become targets.[170] Jacobs explained that the more money players make, the more people are out to get them. He believes this includes female "football groupies" trying to get pregnant, investors trying to get players into different money schemes, and other jealous players who did not make the NFL and want to see an NFL player's demise.[171] In addition, Jacobs pointed out that most high-money contracts are publicized, and these players become the first targets. However, players like Jacobs, who did not receive high paying contracts, become known as "high-money potential" and are vulnerable to becoming high-valued targets—not for the money the player is making now—but for the money the player will eventually make. This maladaptive

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[167] *See supra* text accompanying notes 69-70.
[168] *See supra* text accompanying notes 56, 58.
[169] *Id.*
[170] *See supra* text accompanying notes 71-74. *See also* Jacobs, *supra* note 3 (identifying himself as an "NFL valued target.").
[171] Jacobs, *supra* note 3.

form of celebrity worship may cause both emotional and legal problems for players.

Jacobs, in discussing the Michael Vick[172] and Ray Rice[173] cases, explained that Vick is not the only person out there who has participated in dog fighting, and Rice is not the only individual in the United States guilty of domestic violence, but because these men are sports celebrities, the league, the media, and the public want to make examples of them. Jacobs believes players are continuously under the microscope and that it is the NFL, the city, the media, and the public that have a false sense of entitlement—they own the players. However, Jacobs explains that there are situations where the football player has deep psychological issues and anything could trigger deviant behavior.[174] If there is a battle of wills, and both the player and society feel entitled, this creates the potential for deviance and legal problems. According to Jacobs, if a player takes one wrong turn, society and the league will shame him.[175] The NFL has revised the PCP to include appropriate counseling and other social services to both the players and their families in times of crisis.[176] Therefore, restorative justice would be an appropriate means to reconcile players' relationships between the league and the communities in which they play. Jacobs believes that if he had a good support system and a good lawyer, they would have saved him a lot of heartache.

IV. SOLUTIONS

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[172] *See supra* text accompanying notes 96-100.
[173] *See supra* text accompanying notes 111-16.
[174] Jacobs, *supra* note 3 (referencing the Aaron Hernandez case). *See also supra* text accompanying notes 101-08.
[175] *See supra* text accompanying notes 117-19.
[176] *See supra* text accompanying notes 89-90.

A. Social Support

As noted above in the Carter and Carter study,[177] NFL players that had common social ties and a support system were better able to cope with the acute transition of sudden wealth. Not only did professional football players' social ties and networks influence happiness in their lives, they also curbed their normative or deviant behavior.[178] This social support system is imperative during and after a player's career. Jacobs uses the phrase "high-valued targets"[179] to describe many professional football players. Essentially, players need support in their lives that will safeguard them from being attacked both professionally and personally. These types of relationships that are built on trust, consistency, and predictability will influence professional athletes' coping in acute transitional situations. Moreover, they will assist by helping keep NFL players grounded in order to sideline hubristic pride and sense of entitlement off the field.

B. Sports Agent versus Lawyer

Part of an effective support system is having a specially trained lawyer working as an agent and a counselor. Jacobs advocates for lawyers because lawyers know the law. Based on the target theory, when players have money and public notoriety, people are hunting for them and looking to get them into trouble.[180] Having a good lawyer, Jacobs claims, "will give you the advocacy and protection many players need."[181] All Jacobs ever wanted to do was play football—he was not prepared for the adverse consequences of fame. Even when

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[177] *See supra* text accompanying notes 53-55.
[178] *Id.*
[179] *See supra* text accompanying notes 71-74.
[180] *See supra* text accompanying notes 71-74.
[181] Jacobs, *supra* note 3.

Jacobs had an agent, he felt he did not get the attention and protection he needed. He believes some agents will sign a player but will not put the effort in if the player does not have the potential for a big money contract. Jacobs had the same agent as a first round draft contender. He felt he slid through the draft as a second round contender because his agent was too busy with the other players and did not have Jacobs' best interest in mind. Although an agent may have the skills required to assist professional football players in landing the best contracts—resulting in more money and benefits from the league financially[182]— a lawyer advocating in various roles for the professional football player better serves the player's interests emotionally, socially, legally, and financially. Moreover, lawyers better serve professional football players because they have a professional responsibility code with which they are required to comply.[183] Subsequently, and most importantly, this protects a football player's best interests because there is redress for the player if the lawyer is noncompliant with this code.

C. Preventive Lawyering

For a professional football player who may face contract negotiations, defamation, and or criminal activity throughout his professional career, preventive lawyering creates an open, professional relationship where the athlete receives continuous support from an advocate who knows the law. By understanding these principles, lawyers are able to have a more versatile practice in representing professional football players. Part of public notoriety is that big money contracts are publicized and the public has free reign to gain access to this material. As a legal advocate, providing legal support and resources may be paramount in preventing an

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[182] *See supra* text accompanying notes 121-26.
[183] *See supra* text accompanying notes 127-29.

unfortunate legal predicament for these players. Moreover, as a more personal relationship develops between the lawyer and the player, this relationship can generate a more empathetic approach in addressing the player's conflicts in his life.

Murdoch also discusses the hazards of adopting this approach.[184] Many lawyers are not trained or educated in therapeutic approaches and they may not feel competent applying this type of approach with a professional football player client. The lawyer needs to take measures to maintain a professional relationship with the client by creating boundaries and maintaining neutrality. This may be a challenging endeavor for lawyers without the theoretical or practical experience and training in therapeutic practices. However, this lack of experience may be rectified through therapy training. According to Murdoch, preventive lawyering may be accomplished through "[p]rofessional training, peer or professional consultation, and personal therapy . . . ."[185] Moreover, Murdoch suggests that understanding therapeutic terms—such as transference and countertransference—and the necessity of professional boundaries, may facilitate lawyers "[t]o integrate therapeutic principles into legal practice with minimal negative consequences, leaving them free to embrace the positive."[186] A lawyer working with professional football players needs to be emotionally sensitive to the impact of instant public notoriety on these athletes.

By understanding the implications of emotional intelligence and the concepts of entitlement, celebrity worship, and hubristic pride on professional football players, a lawyer can integrate therapeutic approaches into his or her legal representation. Approaches not taught in law school that

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[184] *See supra* text accompanying note 142.
[185] *See supra* text accompanying note 143.
[186] *Id.* at 497.

Murdoch identified include: (1) emotional sensitivity; (2) understanding basic concepts of therapy;[187] (3) remaining neutral and emotionally healthy; and (4) preparation for longer client interviews that are more involved and personal.[188] By understanding these principles through training and application, a lawyer becomes more psychologically mindful of an individual player's issues, both professionally and personally. With effective communication and a regular "legal check-up," a lawyer and a professional NFL player can work in tandem to prevent problems and reduce conflict, with the goal of increasing positive life opportunities for the player.[189] This type of legal advocacy engenders a level of openness between the player and the lawyer and establishes a foundation upon which they can jointly decide what is in the best interest of the player.[190]

CONCLUSION

Having a strong support system and a good legal advocate is arguably what professional football players need to cope, adapt, and survive in life and on the field. Understanding the psychological implications for NFL players has provided greater insight into how lawyers can take a more proactive approach through preventive law in working with these players. A conversation with Jacobs has provided a first-hand look into the realities of playing in a professional football league. Keeping players grounded through a positive support system and informed through preventive lawyering that uses objectives to advise and work in players' best interests appears

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[187] *See supra* text accompanying notes 140-42. *See generally* Lynda L. Murdoch, *supra* note 140, at 486-89; 491-93 (including overidentification, transference, and countertransference).
[188] *See supra* text accompanying note 140, at 485.
[189] *See supra* text accompanying notes 133-39.
[190] *Id.*

to be a formula to help professional football players adapt to public notoriety and prevent legal ramifications.

TRICKLE DOWN SOLAR: WHICH STRATEGIES FOR EXPANDING ACCESS TO SOLAR ENERGY MAKE THE MOST CENTS?

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ABSTRACT

The Obama Administration is clearly committed to expanding solar energy throughout the nation, thereby helping to reduce the nation's carbon footprint and promoting energy independence. However, in July 2015, the administration announced new policy initiatives that effectively commingle its efforts to promote solar energy with a quite different goal—providing low-income assistance. These new initiatives, though clearly noble and well-intended, are difficult to justify as a policy matter because they attempt to pursue two partially inconsistent objectives—encouraging clean energy and redistributing wealth—in inefficient ways. This article more closely examines the implications of the Obama Administration's new solar initiatives for low-income citizens and provides a clear recommendation: separate these two laudable goals and incentivize investments in solar energy more directly through different programs, leaving wealth redistribution to the income tax system.

I. INTRODUCTION

In July 2015, the Obama Administration announced a new solar energy initiative aimed at increasing low- and moderate-income Americans' access to the economic benefits of solar power. This multi-faceted initiative (the "Obama Solar Initiative") includes programs that promote on-site installation of solar panels on federally subsidized housing, simplify solar loan programs, and expand community solar deployment. The initiative is part of the president's larger Climate Action Plan—an all-encompassing set of policies aimed at reducing the nation's greenhouse gas emissions and dependency on fossil fuels. While promoting nationwide solar energy deployment is a noble objective, there are reasons to doubt that these new policies are the most cost-effective means of achieving that goal.

Are these programs a good use of taxpayer funds, or might some other solar energy policy approach be more justifiable?

The goals outlined in the Obama Solar Initiative suggest that providing low-income families with access to the potential cost savings of solar power is an optimal means of reducing the nation's carbon footprint. In reality, promoting solar and assisting low-income housing residents are potentially somewhat inconsistent goals. Accordingly, attempts at furthering both under the same program are likely to generate inefficiencies and other problems. If the government wants to accomplish two goals, it can accomplish them separately or through overlapping strategies. This article will show that separate is better. It is clear that the Obama Solar Initiative's proposed policies are not more cost-effective than providing welfare assistance to low-income families by directly increasing rent subsidies or otherwise directly redistributing wealth to them through the income tax system. Similarly, promoting solar through broad incentives, such as tax credits or grants, is likely to be more cost-effective than seeking to further that goal through special government-administered programs available only to a small subset of citizens.

Although the Obama Solar Initiative is a laudable attempt to assist low-income citizens under the promise of solar energy, it would be substantially more cost-effective to separate these two policy goals. This article provides clear insight into why separation would be a more optimal policy approach. Part II of this article describes the recent growth of the solar industry and the predominant types of solar development and explains why some citizens have been unable to participate in this burgeoning market. Part III highlights the legislative actions and policies that the Obama Administration is implementing in connection with its new solar initiative. Part IV analyzes these proposed policies, weighing them against alternatives. Part V ultimately concludes that there are other, arguably more efficient means of promoting solar energy, including policies that harness market incentives to encourage investments in distributed solar technologies.

II. SOLAR ENERGY MARKETS: THE ESSENTIAL COMPONENTS

Solar power has come a long way in the past decade. Increasingly, there are reasons to believe that solar could eventually become one of the nation's primary sources of power. Solar replaces fossil fuel consumption, reduces greenhouse gas emissions, and has a positive impact on climate change. Utility-scale solar deployment and high-capacity energy storage increase city and state resilience and are major national security tools, and the free and infinite availability of sunlight makes solar power economically beneficial for consumers and the nation. It comes as no surprise that the United States ("U.S.") has an interest in seeing the solar market grow,[2] but what federal policies and initiatives would most efficiently promote solar energy development within low- and moderate-income housing markets? And should the federal government even be focused in the short run on making rooftop solar energy affordable for low- to moderate-income households? Analyzing these questions requires a general understanding of the solar industry, the major types of solar distribution strategies, and the economic realities facing low-income American families.

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[2] *See* Solar Action Alliance, *Looking at the Rise of Solar Power in Germany*, Solar Action Alliance.org, https://solaractionalliance.org/looking-at-the-rise-of-solar-power-in-germany/; Jennifer Duggan, *China sets new world record for solar installations*, THE GUARDIAN (Jan. 30, 2014), http://www.theguardian.com/environment/chinas-choice/2014/jan/30/china-record-solar-energy; *and* Danny Lewis, *France Is Paving More Than 600 Miles of Road With Solar Panels*, SMITHSONIAN.com (Feb. 4, 2016), http://www.smithsonianmag.com/smart-news/france-paving-more-600-miles-road-solar-panels-180958035/?no-ist.

A. The Emergence of Solar Power

Solar energy technologies have massive potential as a source of clean, renewable electric power. Solar energy's history spans from the seventh century B.C. to today.[3] Early humans first started utilizing the power of the sun by concentrating its heat with glass and mirrors to light fires.[4] Of course, modern technologies can do much more, enabling the use of solar radiation to supply hot water or to generate electricity capable of powering everyday appliances or even solar-powered vehicles.[5] As these technologies improve, solar energy becomes an increasingly appealing means for advancing United States energy independence, bolstering energy security, creating jobs, and combatting climate change.[6]

Solar energy installations over the past decade have grown at a truly blistering pace. The U.S. generates about twenty times as much electricity from the sun today as it did when President Obama took office.[7] In 2015, the U.S. generated twenty-nine times more electricity from solar power than it had the year prior to Obama's presidency.[8] Although solar power is

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[3] *The History of Solar Energy*, ENERGYINFORMATIVE.org (Aug. 14, 2013), http://energyinformative.org/the-history-of-solar-energy-timeline/ (explaining that "knowledge around this phenomenon has only been around for about two centuries.").
[4] *See* U.S. Department of Energy, *The History of Solar*, ENERGY.GOV (2001), https://www1.eere.energy.gov/solar/pdfs/solar_timeline.pdf.
[5] *See id.*
[6] *See* The White House, *Accelerating the Transition to Clean Energy*, (Aug., 2015), https://www.whitehouse.gov/sites/default/files/accelerating_clean_energy.pdf (page 3 begins to introduce solar power and explains the Whitehouse's commitment to the program, in depth).
[7] *See id.*
[8] *See* Brooks Jackson, *Obama's Numbers,* FACTCHECK.ORG (Jan. 12, 2016), http://www.factcheck.org/2016/01/obamas-numbers-january-2016-update/.

still not the predominant source of domestic energy production,[9] there are now over 22,780 megawatts of solar power generating capacity in the United States—enough to power 4.6 million average American homes.[10]

Particularly impressive has been the growth of "distributed" solar power—installations of solar panels on the rooftops of homes and businesses. Since 2005, the number of residential homes with solar panels has increased over 1000%.[11] In 2011, residential solar panel installations were projected to save average households around $20,000 across a twenty-year span.[12] As the photovoltaic efficiency ratio of panels has increased, solar cells have become more efficient at converting sunlight into electricity.[13] These improvements in efficiency have made distributed solar energy an ever more appealing investment for homeowners. Similarly, growth in solar securitization has given solar providers access to more capital, allowing the cost of rooftop solar installations to decrease even further. Thanks to these changes and other federal initiatives, the cost to install solar energy systems is expected to continue to

[9] *Solar*, INSTITUTEFORENERGYRESEARCH.COM, http://instituteforenergyresearch.org/topics/encyclopedia/solar/.
[10] *See* Solar Energy Industries Association, *Solar Industry Data*, SEIA.ORG (Dec. 17, 2014), http://www.seia.org/research-resources/solar-industry-data.
[11] *See* Timothy Cama, *Obama Pledges $120 Million Toward Solar Power, Clean Energy*, THEHILL.COM (Sept. 16, 2015), http://thehill.com/policy/energy-environment/253779-obama-pledges-120m-toward-solar-power-clean-energy.
[12] *See* Zachary Shahan, *How Much Are Solar Panels? Wrong Question. Ask How Much Solar Panels Can Save You*, CLEAN TECHNICA (Feb. 3, 2014), http://cleantechnica.com/2014/02/03/much-can-solar-panels-save/.
[13] *See* Christiana Honsberg & Stuart Bowden, *Solar Cell Efficiency Records*, PVEDUCATION.ORG, http://www.pveducation.org/pvcdrom/solar-cell-operation/solar-cell-efficiency (demonstrating how photovoltaic efficiency is calculated).

fall in the coming years.[14] However, while the potential for solar is clear,[15] many consumers are unaware of it and remain on the sidelines of the growing solar market.[16]

B. Primary Strategies for Distributed Solar Power

Distributed solar power is as versatile as its potential applications. Because all it takes to generate solar power is a photovoltaic cell and some sunlight, there is virtually no limit to where solar power can be deployed. Small PV cells can be installed on streetlights, bus stations, and vending machines; even smaller cells can be installed on hiking backpacks, bicycles, and portable devices. The potential applications of these technologies are virtually endless. But in the short run, some of distributed solar power's most promising growth areas are rooftop solar and community solar. The following is a discussion of these two distinct strategies for solar deployment.

1. Residential-Scale Solar Energy

Residential-scale solar energy most commonly takes the form of a PV system mounted on the rooftop of a residential

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[14] *See* U.S. Department of Energy: Office of Energy Efficiency & Renewable Energy, *About the SunShot Initiative*, ENERGY.GOV (2015), http://energy.gov/eere/sunshot/about-sunshot-initiative ("The U.S. Department of Energy SunShot Initiative is a collaborative national effort aimed to drive down the cost of solar electricity to $0.06 per kilowatt-hour by the year 2020.").

[15] *See* Robert Current, *Solar Energy, Warm and Fuzzy, or Bad Investment?*, 2 ARIZ. J. ENVTL. L. & POL'Y 1 (2011) (providing examples where homeowners are looking to save money).

[16] *See 10 Things to Know Before Going Solar*, SOLARENERGY.NET, http://solarenergy.net/solar-power-resources/10-things-to-know-before-going-solar/ (last visited Feb. 9, 2016) (explaining what a homeowner should know about getting into solar market).

structure.[17] Rooftop PV systems on residential buildings typically feature a capacity of five to twenty kilowatts. The standard home needs to produce around twenty to twenty-four kilowatt-hours of solar power per day to satisfy the demand of the home.[18]

Rooftop solar installations are booming within the residential market. Already, more than 784,000 U.S. homes and residential businesses have gone solar.[19] However, a majority of these installations involve relatively high-income households; the less affluent households have minimal participation and tend to be less aware of distributed solar energy's potential benefits.[20] One reason for this disparity is the fact that "early adopters" of distributed solar technologies generally had to cover the full cost of the panel and installation up front. Increasingly, solar financing and leasing options from solar providers are helping to reduce this problem.[21] However, even with these programs, more affluent households fare better because rooftop solar companies typically will lease solar energy systems only to homeowners meeting certain credit score standards.[22]

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[17] *See* Margaret Rouse, *Photovoltaic Cell*, TECHTARGET.COM (Sept. 2005), http://whatis.techtarget.com/definition/photovoltaic-cell-PV-Cell (providing a thorough explanation of PV).
[18] *See* Charles Cicchetti & Jon Wellinghoff, *Solar Battle Lines*, PUB. UTIL. FORT. (Dec. 2015).
[19] *See Solar Industry Data*, *supra* note 10.
[20] *See* Tim McDonnell, *Solar Power Is Mostly for the Affluent. Here's Obama's Plan to Spread the Wealth Around*, MOTHER JONES (July 7, 2015), http://www.motherjones.com/blue-marble/2015/07/obama-just-made-it-easier-low-income-communities-go-solar (stating that approx. ninety-five percent of solar households earn more than $40,000).
[21] *See* SolarCity, *SolarCity's SolarLease,* SOLARCITY.COM, http://www.solarcity.com/residential/affordable-solar-lease.
[22] My Fico, *What is a Credit Score?* MYFICO.COM, http://www.myfico.com/crediteducation/creditscores.aspx.

Although some solar providers have relaxed their credit requirements in recent years, other obstacles to getting rooftop solar remain, preventing many homeowners from installing such systems. According to the U.S. Department of Energy ("DOE"), only about half of electric customers can install solar panels.[23] Reasons a willing homeowner may not be able to install solar include the presence of trees or buildings nearby that would shade the system or other obstructions to sunlight;[24] building code restrictions; zoning restrictions; homeowner association rules; aesthetic concerns;[25] and roof size, angle, and configuration. The low price of grid-supplied electricity in an area can also prevent solar installations from being appealing or profitable long-term investments.[26]

State legislators have attempted to address these challenges by making the financing of rooftop solar installations more practical for the average homeowner. Programs such as Commercial Property Assessed Clean Energy ("PACE") financing, for example, make solar installations more manageable by reducing the payback rates for the upfront

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[23] *See* Gregory Korte, *White house pushes community solar power as rooftop alternative*, USATODAY (Nov. 17, 2015), http://www.usatoday.com/story/news/politics/2015/11/17/white-house-pushes-community-solar-power-rooftop-alternative/75950054/.

[24] *See Residential Solar Energy Installation - 13 FAQs And The Answers*, SOLAR FOR ENERGY (Apr. 16, 2010), http://www.solar-for-energy.com/residential-solar-energy-installation.html#Is%20shade%20a%20problem%20to%20the%20system; *see also* E. Taylor, *Photovoltaics: Getting Started*, PVPOWER.COM (Nov. 3, 2009), http://www.pvpower.com/photo voltaicsgettingstarted.html.

[25] *See* Evelyn Rubin, *Everything You Wanted To Know About Solar Power and Were Afraid To Ask*, SEEKINGALPHA (Sept. 5, 2006), http://seekingalpha.com/article/16341-everything-you-wanted-to-know-about-solar-power-and-were-afraid-to-ask.

[26] *See Residential Solar Energy Installation* and E. Taylor, *supra* note 24.

capital.[27] As of January 2015, thirty-one states had passed PACE legislation of some kind.[28] Such financing programs can be particularly valuable when paired with Investment Tax Credits ("ITCs"), which provide new purchasers of solar energy users one-time tax credits equal to thirty percent of the cost of their solar installations.[29] Congress recently extended the ITC to 2020.[30]

Of course, a citizen who does not own the roof over his or her head is largely excluded from participating in these sorts of solar incentive programs.[31] As of September 2015, the National Multifamily Housing Council estimated that nearly thirty-seven percent of residential homes are renter-occupied.[32] It is clear that a significant portion of the population is unable to participate in the residential solar market. Community solar programs are a promising means of helping this segment of the nation's population to go solar.

2. Community-Scale Solar Energy

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[27] *See* Benjamin Metcalf, *Memorandum for Administrative Guidance for Multifamily Property Assessed Clean Energy (PACE) in California*, HUD.GOV (Jan. 29, 2015), http://portal.hud.gov/hudportal/documents/huddoc?id=MF_PACE_CA_Memo.pdf (allows owners to make their installation payments through their property's property taxes, the drawback is that the program is dependent on state legislative action).

[28] *See id*.

[29] *See* 26 U.S.C. § 25(D) (2013).

[30] *See* Sec. 304, Consolidated Appropriations Act, 2016, PL 114-113 (Dec. 18, 2015), 129 Stat 2242 (this Act extended the ITC until 2020 and includes a phase-out period).

[31] *See* Kate Galbraith, *For Renters, Solar Comes in Shares*, NYTIMES (Mar. 15, 2010), http://green.blogs.nytimes.com/2010/03/15/for-renters-solar-comes-in-shares/?_r=0.

[32] National Multifamily Housing Council, *Quick Facts: Residential Demographics*, NMHC.ORG (Sept. 2016), http://nmhc.org/Content.aspx?id=4708.

Community solar refers to the ability of multiple users who lack the on-site production of solar to consume solar electricity from an off-site facility.[33] This idea of shared solar can help Americans take advantage of solar energy's many benefits, regardless of their housing situations.[34] Community solar is still a relatively new concept and is increasingly attracting groups, companies, and even utilities to develop experimental systems to take it to market.[35] There are currently fifty-two community solar projects under development in at least seventeen states, and at least ten states encourage their development through policy and programs.[36] Among other things, many community solar supporters view it as a way to provide lower-income residents with more direct access to solar electricity.[37] As of January 2014, the total generating capacity of community solar power in the United States was approximately fifty megawatts.[38]

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[33] *See* Kristin Bailey, *Insecurity for Community Solar: Three Strategies to Confront an Emerging Tension Between Renewable Energy Investment and Federal Securities Laws*, 10 J. TELECOMM. & HIGH TECH. L. 123, 126 (2012) (the reasons why a user is unable to participate within a solar market is often a result of the user's lack of "proper on-site solar resource, fiscal capacity or building ownership rights . . . .").
[34] *See* Anna Brockway, *Shared Solar Projects Powering Households Throughout America*, ENERGY.GOV (Jan. 31, 2014), http://energy.gov/eere/articles/shared-solar-projects-powering-households-throughout-america.
[35] *See* Galbraith, *supra* note 31.
[36] *See* Diane Cardwell, *Buying Into Solar Power, No Roof Access Needed*, NYTIMES (June 19, 2014), http://www.nytimes.com/2014/06/20/business/energy-environment/buying-into-solar-power-no-roof-access-needed.html.
[37] *See* Ucilia Wang, *What is Community Solar? It's Coming to California,* FORBES (Jan. 15, 2015), http://www.forbes.com/sites/uciliawang/2015/01/30/what-is-community-solar-its-coming-to-california/#78d76222e6c7.2715e4857a0bd30a4f12e6c7.
[38] Brockway, *supra* note 34.

A major reason that governments are promoting the deployment of community solar is that it allows members of communities to benefit from solar power even if they cannot (or prefer not to) install solar panels on their own property.[39] If structured properly, such projects can often allow participants to benefit from solar technologies and actually lower their electric utility bills. It has been estimated that over the next five years, the community solar market will grow at a compound annual growth rate of almost sixty percent.[40] A recent report projects that community solar in the United States will increase its market size by 600% by 2017 and by half a billion watts annually by 2020.[41]

In the United States, the community solar model is also catching the attention of local utility companies.[42] Utilities are increasingly offering community solar programs to customers. These programs typically allow customers to purchase a set amount of electricity at a fixed rate for an extended period of time. Generally, the rate is slightly higher than the current retail rate, however, it may provide protection and stability against rising utility rates.[43]

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[39] *See* Shahan, *supra* note 12.

[40] *See* Mike Munsell, *Community Solar Market to Grow Fivefold in 2015, Top 500MW in 2020*, GREENTECH MEDIA (June 23, 2015), http://www.greentechmedia.com/articles/read/us-community-solar-market-to-grow-fivefold-in-2015-top-500-mw-in-2020.

[41] *See* Corey Honeyman, *U.S. Community Solar Market Outlook 2015-2020*, GREENTECHMEDIA (June 2015), http://www.greentechmedia.com/research/report/us-community-solar-market-outlook-2015-2020?utm_source=blast1&utm_medium=GTMREmail&utm_campaign=Community2015.

[42] *See* Solar Energy Industries Association, *Shared Renewables/Community Solar*, SEIA.ORG, http://www.seia.org/policy/distributed-solar/shared-renewablescommunity-solar (last visited Feb. 9, 2016).

[43] *See* Jason Coughlin, Jennifer Grove, Linda Irvine, Janet F. Jacobs, Sarah Johnson Phillips, Leslie Moynihan & Joseph Wiedman, *A Guide to Community Solar: Utility, Private, and Non-profit Project Development*,

3. Billing Methods for Community-Scale Solar Power

It is important to know that solar projects vary in how a consumer will receive the economic benefits. There are several different billing methods that focus on capturing the economic benefits for the consumer. The different billing programs range from offering one aggregate bill for the project participants, to assigning a pro-rated monetary credit on an individual's bill.[44] An efficient billing method is mandatory to show consumers how they can capture the economic benefits that stem from a solar project. This article will focus on two billing strategies: net metering and virtual net metering.[45]

a. Net Metering

Net metering ("NM") allows people to generate their own electricity from a solar system, and the unused energy is exported back to the grid.[46] Then, the utility company pays consumers for allowing their excess energy to power nearby homes or manage overall electricity demand.[47] The payment for the excess energy is generally reflected on the consumer's monthly utility bill.[48] NM is a standard billing method for solar projects, however, there are several issues associated with

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prepared for the National Renewable Energy Laboratory U.S. Department of Energy (May 2012), http://www.nrel.gov/docs/fy12osti/54570.pdf.

[44] *See* Solar Nation, *Can Switching to Solar Panels Save Me Money?*, SOLARNATION.ORG (2015), http://www.solar-nation.org/can-switching-to-solar-panels-save-me-money.

[45] *See* Coughlin, *supra* note 43.

[46] *See Credits and Incentives Provide Green for Going Green*, 25-Jul JMTAX 30, 31, 2015 WL 3941483, 5.

[47] *See* Coughlin, *supra* note 43.

[48] *See* Jocelyn Durkay, *Net Metering: Policy Overview and State Legislative Updates*, NCSL.ORG (Sept. 26, 2014), http://www.ncsl.org/research/energy/net-metering-policy-overview-and-state-legislative-updates.aspx.

traditional NM.[49] As of January 2016, forty-one states have active net metering programs.[50]

b. Virtual Net Metering

Virtual net metering ("VNM") allows multiple tenants to share the electricity output from a single solar source by allocating credits to multiple tenants' individual utility bills in the same way the credits would appear under traditional NM.[51] In community solar models, the credit amount is typically in proportion to the resident's portion of ownership within the community solar system. In multi-tenant, multi-metered housing communities, the credit amount can be allocated to the individual tenants and the building's common areas.[52] VNM allows the multifamily owner to avoid the costs of installing separate solar systems for each tenant, which means more potential savings for the community.[53] Like traditional NM, VNM is dependent on state legislation.[54] In 2012, only nine states had virtual net metering policies passed, but as of 2015, the number of states had increased to sixteen.[55]

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[49] *See* Kayci Hines, *Solar Shift: An Analysis of the Federal Income Tax Issues Associated with the Residential Value of Solar Tariff*, 5 ARIZ. J. ENVTL. L. & POL'Y 388, 391 (2015) (to see issues facing traditional net metering).
[50] *See* DSIRE, *Net Metering Map*, DSIREUSA.ORG (Jan. 2016), http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2016/01/Net_Metering_012016.pdf.
[51] *See* Coughlin, *supra* note 43.
[52] *See* Coughlin, *supra* note 43*; see also* Cooperative Community Energy, *CPUC Expands Virtual Net Metering*, CCENERGY.COM (last updated Jan. 2, 2014), http://www.ccenergy.com/latest-news/virtual-net-metering.
[53] *See* Coughlin, *supra* note 43.
[54] *See* John Farrell, *Updated: States Supporting Virtual Net Metering*, INSTITUTE FOR LOCAL SELF-RELIANCE (Nov. 2015), https://ilsr.org/virtual-net-metering/ (default regulations disallow the use of a single solar system to offset multiple meters).
[55] *See id*.

C. Solar Energy and Low-Income Households

The existing incentive programs for distributed solar tend to primarily target households that are able to provide for themselves by putting a roof over their heads, and thus, arguably exclude the large number of Americans who are unable to fully support themselves. As of December 2014, there were nearly 1.2 million households living in government-sponsored housing in the United States.[56] Public housing programs were established to provide decent and safe rental housing for eligible low-income families, the elderly, and persons with disabilities. Public housing comes in all sizes and types, from scattered single-family houses to high-rise apartments for elderly families. The U.S. Department of Housing and Urban Development ("HUD") administers federal aid to a local Public Housing Agency ("PHA") that manages the housing for low-income residents at rents they can afford.[57] HUD furnishes technical and professional assistance in planning and managing these developments.[58]

When an individual or family qualifies for housing assistance, the PHA will pay a housing subsidy payment directly to the landlord.[59] The payment is provided by federal funding and is in the amount of rent in excess of thirty percent of the qualified family's total adjusted monthly income, up to an

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[56] *See* U.S. Department of Housing and Urban Development, *Public Housing*, HUD.GOV, http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph.
[57] *See id.*
[58] *See id.*
[59] *See* U.S. Department of Housing and Urban Development, *Utility Allowances*, HUD.GOV, http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/phecc/allowances (last visited Feb. 9, 2016).

established limit.[60] The established limit varies based on state or program terms.[61] Factored into this total is an allocation for the family's utility costs. In determining that allocation, the PHA considers the method by which a housing community's utilities are metered.

Within the multifamily housing sector, there is no uniform electricity metering configuration, since there are different methods of electricity metering configurations in regard to the Obama Solar Initiative. The most common forms of metering electricity usage at multifamily residential properties are master-metered, check-metered, and individually metered.[62]

Utility consumption in master-metered communities is measured at the building or property level as a whole.[63] In a master-metered community, the PHA pays the local utility company for the community's usage each month. Under these circumstances, the tenant bears no burden in choices or changes in energy efficiency.

Utility consumption at check-metered communities is metered by separate sub-meters at individual dwelling units.[64] In a check-metered community, the PHA pays the utility company for utilities used, but also sets a total utility allowance that the family is not to exceed.[65] A surcharge is applied to the individual dwelling if the utility consumption exceeds the allocated utility

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[60] *See supra* note 56; s*ee also* Section 8 of the *Housing Act of 1937* (42 U.S.C. § 1437f) (for more information on Section 8 housing vouchers visit the HUD website at http://portal.hud.gov/hudportal/HUD?src=/topics/ housing_choice_voucher_program_section_8).
[61] *See id.*
[62] *See* U.S. Department of Housing and Urban Development, *supra* note 60.
[63] *See id.*
[64] *See id.*
[65] *See id.*

consumption level.[66] While a check-metered complex is not entirely efficient, the surcharge is an effective tool for encouraging tenants to monitor their utility consumption.

In individually metered communities, the utility provider measures the utility consumption of each unit separately. If the community is individually metered, then the PHA requires each family to establish its own, individual account with the utility company.[67] Under these circumstances, a family is responsible for paying its electric bill directly to the utility company.[68] In exchange, the PHA provides the family with a utility allowance through a reduction in the household's monthly rent.[69]

Aspects of the Obama Solar Initiative highlight a need to assist low- to middle-income families via solar power. However, it appears these policies would not reflect solar savings within certain low-income and Section 8 housing projects because of how the utilities are metered. There are other mechanisms in place to care for tenants within the low-income community.

III. THE OBAMA SOLAR INITIATIVE: RENEW 300

The United States encourages the growth of green technologies and is actively involved in spurring the development of clean power sources from the top down. At the same time, the Obama Administration demonstrates a desire to stimulate solar from the bottom up by helping homeowners, tenants, communities, and industries actively engage in the

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[66] *See id.*
[67] *See id.*
[68] *See id*.
[69] Upland Housing Authority, *Section 8 Utility* Allowances, UPLANDHOUSING.GOV, http://www.uplandhousing.com/Section8UtilityAllowances.htm.

distribution and consumption of solar power.[70] These initiatives have captured the attention of the public and state governments and have been faced with mixed reviews.

In 2015, the Obama Administration introduced the Clean Power Plan (the "Plan").[71] The Plan aims to significantly reduce carbon pollution within the electric power sector by encouraging clean energy innovation, development, and deployment.[72] In particular, the Plan sets to reduce carbon dioxide emissions by thirty-two percent from 2005 emission levels by 2030.[73]

The initiatives announced following the Plan are extensive and quite lofty. There is a clear indication of the government's commitment to the solar industry. The announcements included: $1 billion in additional loan guarantee authority for distributed energy projects; $24 million for eleven projects in seven states to develop innovative solar technology; an approval for a transmission line that will support bringing online a 485-megawatt photovoltaic facility expected to power more than 145,000 homes; and several independent commitments from local governments, utilities, and businesses to drive energy efficiency in more than 300,000 low-income households and invest more than $220 million in energy-saving activities for veterans and low-income customers.[74]

Other announcements included efforts to make solar power easier and faster to install, raise a skilled solar workforce,

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[70] *See id.*; *see also* Cama, *supra* note 11.
[71] *See* Office of the Press Secretary, *Fact Sheet: President Obama to Announce Historic Carbon Pollution Standards for Power Plants*, THE WHITE HOUSE (Aug. 3, 2015), https://www.whitehouse.gov/the-press-office/2015/08/03/fact-sheet-president-obama-announce-historic-carbon-pollution-standards.
[72] *See id.*
[73] *See id.*
[74] *See id.*

encourage the research and development of disruptive solar technologies, make solar more affordable for everyday consumers, and increase access for low- to moderate-income Americans.[75] The last was announced in the White House press release as follows:

> In the Climate Action Plan, the President set a goal of installing 100 megawatts (MW) of solar and other types of renewable energy in federally subsidized housing. The Administration has already surpassed that goal, through commitments to install more than 185 MW of renewable energy. Today, we are announcing that the Administration is tripling its current goal and setting a new goal to install 300 MW of renewable energy on affordable by 2020, as well as expanding the goal to include community and shared solar installations.[76]

HUD calls the plan Renew300, and it is the White House's way of achieving two potentially conflicting goals under the same strategy.[77] It is the 300 MW version of the similar initiative employed in the President's 2013 Climate Action Plan. Because 185 MW have already been committed,

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[75] *See* Office of the Press Secretary, *FACT SHEET: President Obama Announces New Actions to Bring Renewable Energy and Energy Efficiency to Households across the Country*, THE WHITE HOUSE (Aug. 24, 2015), https://www.whitehouse.gov/the-press-office/2015/08/24/fact-sheet-president-obama-announces-new-actions-bring-renewable-energy.

[76] *See id.*

[77] *See* Office of Economic Resilience, Office of Community Planning and Development, U.S. Department of Housing and Urban Development, *Renew300: Increasing Renewable Energy for Low Income Families,* HUD50.HUD.GOV (2015), http://portal.hud.gov/idc/groups/public/documents/document/renew300.pdf.pdf (the official informational flyer published by HUD following the White House's announcement of the 300 megawatt initiative).

the announcement for Renew300 simply builds off of the existing goal by seeking an additional 115 MW and including community solar as a valid option. The following subsections provide a review of this initiative.

A. On-Site Solar on Federally Subsidized Housing

The White House hopes to drive solar energy installations across the affordable housing stock, in part to assist low-income families. There are a number of financial challenges that low-income families face on a daily basis. From purchasing enough food to last for the week to scrounging up enough change to afford public transportation, these challenges encompass almost every aspect of life and have a direct impact on a family's cost of living—but the cost of utilities is of particular concern. Data show that the proportion of their income spent on energy is about four times greater than the national median,[78] while their necessary energy demand is comparable to that of any other American.[79]

Because low-income tenants cannot afford the higher price of newly constructed housing, they are often stuck paying higher electric bills.[80] For various reasons, federally subsidized housing is typically older and comes without the energy

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[78] *See* McDonnell, *supra* note 20.

[79] *See* Michael Carliner, *Reducing Energy Costs in Rental Housing: The Need and the Potential*, JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, Research Brief 13-2, p.1 (Dec. 2013), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/carliner_research_brief_0.pdf (stating that the actual necessity for energy consumption across households on a per person basis remains relatively constant, regardless of income-status).

[80] *See* Carliner, *supra* note 79 (providing a research brief of energy efficiency in multifamily housing, which shows that inefficient housing makes the cost of energy higher for low-income tenants).

efficiency improvements of modern construction.[81] The result is that energy in affordable housing communities costs almost forty percent more than it does in private homes.[82] Because it is the low-income renter, not the landlord, that pays the difference, low-income tenants are at an energy disadvantage because of the mere fact that they live in federally subsidized housing. Even the most proactive energy conservation by the tenant can prove inconsequential when, for example, the heating system and insulation are so out-of-date that the low-income tenant must use the oven or space heater to heat the home.[83] Because decisions to upgrade energy efficiency rest with the property owner, not the landlord, low-income tenants have few options in making their utility circumstances more affordable.[84]

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[81] *See* Eric K. Arnold, *How Green Is The Hood Part Two: Bringing Solar And Energy Efficiency To Oakland's Affordable Housing*, OAKLAND LOCAL (Nov. 26, 2013), http://oaklandlocal.com/2013/11/how-green-is-the-hood-part-two-bringing-solar-and-energy-efficiency-to-oaklands-affordable-housing/ and *see* Eric K. Arnold, *'A Terrible Irony' Affordable Housing Unaffordable Energy*, NEWAMERICAMEDIA.ORG (Nov. 26, 2013), http://newamericamedia.org/2013/11/budget-cuts-derail-efforts-to-green-affordable-housing.php (providing that affordable housing is often provided in buildings built before 1970 and that, according to Jeremy Hays, chief strategist at Green For All, apartments built before 1970 use 55% more energy than those built after 1990).

[82] *See Superefficient Affordable Housing: Solutions to Hurdles*, THE ROCKY MOUNTAIN INSTITUTE, p.4, (Jan. 31, 2013), file:///C:/Users/USER/Downloads/2013-03_SHISolutionsToHurdles.pdf (citing D&R International, *2011 Buildings Energy Databook*, prepared for the US DEPARTMENT OF ENERGY, table 2.1.14, (Mar.2012) http://buildingsdatabook.eren.doe.gov/docs%5CDataBooks%5C2011_BEDB.pdf).

[83] *See* John Leland, *For Some Tenants, Only Thing Heating Up Is A Temper*, NYTIMES (Jan. 7, 2014), http://www.nytimes.com/2014/01/08/nyregion/for-some-tenants-only-thing-heating-up-is-a-temper.html?_r=0.

[84] Lack of ownership in the appliances, lighting fixtures, or roof space, for example, restricts the low-income tenant's options to change their energy inefficient circumstances. Decisions to increase energy supply via solar panels, decrease energy demand via appliance upgrades, or maximize

Lack of property ownership is a significant factor in the framework of the Renew300 initiative. When the federal government must support above-average energy costs for a class of underprivileged renters, any initiative with the potential to reduce the expense to taxpayers would seem to be plausible.[85] Energy efficiency improvements, such as installing insulation, green appliances, LED lighting, modern heating and cooling systems, and advanced pipes, cost ten times less than the actual cost to subsidize the electric bill, and thus could be a practical answer.[86]

On-site solar panel installation across the federal housing stock could also help reduce the cost of utilities for low-income tenants. Some experts claim that a typical solar installation would be enough to cover more than half of the low-income tenant's energy demands.[87] A reduction by half of a tenant's energy demand means fifty percent savings on utility bills. If the tenant does not have to bear the cost of the panel, then the cost of living could be brought closer to the median for the low-income family—thereby saving the family, the government, and the taxpayers money in the long term. This is the premise of Renew300.

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energy efficiency via smart batteries, rest on the property owner, not the tenant.

[85] *See Programs and Activities to Support Renewable Energy and Energy Efficiency in Low-and Moderate-Income Communities*, THE WHITE HOUSE (Aug. 2015), https://www.whitehouse.gov/sites/default/files/low-income_and_energy_efficiency_programs.pdf.

[86] *See Superefficient Affordable Housing: Solutions to Hurdles*, THE ROCKY MOUNTAIN INSTITUTE, p.4 (Jan. 31, 2013), http://www.rmi.org/cms/Download.aspx?id=10268&file=2013-03_SHISolutionsToHurdles.pdf&title=Superefficient+Affordable+Housing%3A+Solutions+to+Hurdles.

[87] *See* McDonnell, *supra* note 20.

To overcome past hurdles, the White House charged HUD with assisting housing authorities and private affordable housing providers in committing to installing solar on their properties in an effort to advance Renew300. HUD offers affordable housing providers with assistance in finding local financing options, solar providers, and the best government incentives available[88]—all of which were major obstacles for housing providers in the past. The last of these resources is at the core of Renew300. The White House understands that government financial incentives are effective motivators. In addition to financial incentives, the White House must rely on state implementation of solar-favorable legislation. Sometimes, passing legislation that helps on-site solar deployment in this sector can be as easy for a state as adopting the legislation that has already passed in another state. Legislation that helps to deploy solar on federally subsidized housing includes laws that require a buyer to fall under legal definitions of "low-income housing," as well as laws that award incentives for reducing tenant rates through solar, and regulations that adjust federal subsidy payout amounts based solar installation.

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[88] *See* U.S. Department of Housing and Urban Development, *Renewable Energy Resources*, HUD EXCHANGE, https://www.hudexchange.info/programs/renewable-energy/resources/ (last visited Feb. 9, 2016) (the HUD website offers links to tools, such as satellite imaging that determines rooftop sunlight exposure and savings calculators that figure total potential energy savings, which can be utilized in determining the viability of solar installation and links to the Database of State Incentives for Renewables & Efficiency USA and U.S. Department of Energy Federal Financing Guide sites, which list every potential state and federal incentive, deduction, loan, and grant available in the country for solar installation projects. The online lists themselves can be accessed at http://www.dsireusa.org/ and http://energy.gov/eere/slsc/downloads/guide-federal-financing-energy-efficiency-and-clean-energy-deployment).

A prime example is California's Multifamily Affordable Solar Housing ("MASH") program.[89] MASH is a state-level program that factors into Renew300 by drawing a socioeconomic distinction between low-income families and incentivizing multifamily housing providers based on their property's status as a "low-income" community.[90] Overall, the program has been effective at increasing solar deployment in this sector by causing over thirteen MW of on-site solar to be installed in 2009.[91] Another benefit is that it helps low-income families save money on their utility bills because MASH awards the housing provider in proportion to the benefit to the tenant.[92] The numbers demonstrate that policies such as MASH can be effective motivators for deploying solar in the low-income housing sector and equally effective at saving low-income

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[89] *See Decision Establishing Multifamily Affordable Solar Housing Program within the California Solar Initiative*, D.08-10-036, (Cal. P.U.C. Oct. 16, 2008) http://www.gosolarcalifornia.ca.gov/affordable/2008-10-20_CPUC_DECISION_92455.pdf.

[90] *See* The California Public Utilities Commission, *Multifamily Affordable Solar Housing (MASH) Handbook*, ENERGYCENTER.ORG (Mar. 27, 2015), https://energycenter.org/sites/default/files/docs/ext/dg-re/csi-electric/MASH%20Handbook%20Final%202015.03.27.pdf (provides comprehensive guidance to the program and the total amount budgeted).

[91] *See* Robert Chan, *Multi-family Affordable Solar Housing (MASH) and Low Income Solar*, PACIFIC GAS & ELECTRIC (Jan. 25, 2010), http://www.pge.com/includes/docs/pdfs/shared/solar/solareducation/mash_program_jan%202010.pdf (providing the total number of applications received and waitlisted and number of megawatts committed).

[92] *See* Pacific Gas and Electric Company, *Multifamily Affordable Solar Housing Program Fact Sheet*, CALIFORNIA CENTER FOR SUSTAINABLE ENERGY AND SOUTHERN CALIFORNIA EDISON (2009), http://www.naruc.org/international/Documents/Multifamily%20Solar%20Housing%20Fact%20Sheet.pdf (providing that the incentive amount is based in proportion to the amount that tenants benefit: $3.30 per watt for watts that benefit only common areas; and $4.00 per watt for watts that benefit individual tenant units).

families on their monthly expenses. These two results are exactly what the White House aims to achieve under Renew300.

However, attention to on-site solar legislation should not come without due attention to off-site solar options. Many of the policies that benefit residential owners and multifamily models are not written with community solar counterparts. The Obama Solar Initiative was arguably expanded specifically for *community solar's* deployment;[93] legislators should be diligent in ensuring their policies also address the unique challenges associated with community solar distribution strategies.

B. Off-Site Solar via Community and Shared Solar

Renew300 includes energy generated by community and shared solar installations. The inclusion is historic—it is the first time "community solar" has been directly incorporated into a federal initiative.[94] This new focus on community solar could have a significant positive effect on this emerging method of solar deployment and on the low-income families that will be able to take advantage of its economic benefits.[95]

Similar to the on-site portion of Renew300, the White House expects the goal of Renew300 to be reached via the legislative efforts of individual states. However, the White

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[93] In comparing the 2013 Climate Action Plan to the Renew300 announcement in 2015, the inclusion of community solar is, in many ways, the only meaningful difference.

[94] *See* THE WHITE HOUSE, https://search.whitehouse.gov/search?utf8=%E2%9C%93&affiliate=wh&query=%22community+solar%22 (last visited Feb. 9, 2016).

[95] *See* Elizabeth Sherwood-Randall, *SEIA Applauds National Commitment to Increase Solar Access for all Americans,* SEIA.ORG (Nov. 17, 2015), http://www.seia.org/news/seia-applauds-national-commitment-increase-solar-access-all-americans (quoting a statement made by the DOE Deputy Secretary following the White House announcement made on Nov. 17).

House is contributing substantially more toward community solar deployment than it is to on-site deployment. Over sixty-eight cities, states, and businesses have joined together to promote community solar for low- and moderate-income households.[96] In dollar amounts, the total government commitment exceeds $545 million in investments in twenty-one states.[97] The largest commitment was the $15 million earmarked exclusively for state legislative purposes.[98] It is clear that community solar deployment is still in legislative infancy.

While there is some overlap between legislation that benefits on-site solar deployment and off-site community solar, such as VNM, it is unclear how programs such as the ITC, PACE, and MASH apply to community solar. Community solar deployment, regardless of its role within Renew300, requires legislation that removes prohibitions on certain community solar

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[96] *See* Office of the Press Secretary, *FACT SHEET: Administration Announces 68 Cities, States, and Businesses Are Working Together to Increase Access to Solar for All Americans*, THE WHITE HOUSE (Nov. 17, 2015), https://www.whitehouse.gov/the-press-office/2015/11/17/fact-sheet-administration-announces-68-cities-states-and-businesses-are (the National Community Solar Partnership is a collaboration between the Department of Energy (DOE), the Department of Housing and Urban Development (HUD), the Department of Agriculture (USDA), the Environmental Protection Agency (EPA), representatives from solar companies, NGOs, and state and local community leaders, working together toward the same goal).

[97] *See* Sherwood-Randall, *supra* note 95 (because of Renew300, more than 20,000 low- and moderate-income households should be able to take advantage of the economic benefits of community solar).

[98] *See* Office of the Press Secretary, *FACT SHEET: Building On Progress – Supporting Solar Deployment and Jobs*, THE WHITE HOUSE (Apr. 17, 2014), https://www.white house.gov/the-press-office/2014/04/17/fact-sheet-building-progress-supporting-solar-deployment-and-jobs (introduces the "Market Pathways" funding opportunity, which provides that the $15 million is to be used by legislators to overcome regulatory barriers and spur market growth).

models, permits low-income renters to participate in community solar, despite their landlords, and limits interference from public utility companies. At least fourteen states have legislation that supports community solar in one way or another,[99] but it is unclear how the legislation applies directly to Renew300.

Colorado's Community Solar Gardens Act of 2010, for example, includes policies on investor-owned "shares," utility and energy-provider purchasing, and community solar-scale VNM.[100] Under the Act, Colorado residents can buy into as much as 120% of their own power usage in solar power.[101] This act is an obvious stimulus for the community solar market, but the legislation is broad and makes no socioeconomic distinction for low-income families.

While the idea that solar could reduce the cost of living for underprivileged families and simultaneously help the solar industry is commendable, efforts to actively achieve it raise some concerns. Of all the efforts announced by the White House, increasing solar access for low- and moderate-income Americans would seem to be among the least cost-efficient methods of spurring solar growth and energy independence. Unfortunately, Renew300 seeks to do this. The first issue is that programs such as MASH, which implicate Renew300, limit the scope of solar distribution and are highly cost-inefficient.

IV. A SINGLE STRATEGY FOR PURSUING TWO DISTINCT POLICY GOALS?

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[99] *See* Vote Solar, *USA Shared Energy Map,* SHARED RENEWABLES HQ (2016), http://www.sharedrenewables.org/community-energy-projects/.
[100] *See* Colorado Community Solar Gardens Act, H.B. 10-1342.
[101] *See* COLO. REV. STAT. ANN. § 40-2-127(2)(b)(iii), (5)(a)(ii) (West, 2015).

Basic economic theory suggests that the most cost-efficient approach for achieving widespread solar distribution and social welfare assistance would be through mutually exclusive strategies. Although public welfare programs can be a controversial political topic, this article does not question their validity.[102] The White House makes frequent references to monetary savings for American consumers, and there is an emphasis placed on helping tenants within the low-income housing sector.[103] If subsidies are a part of the equation, then it is essential that they be distributed with the most cost-efficient strategy.

Strategies for improving the financial circumstances of particular groups include purpose-specific assistance, such as discounts on utility bills and direct cash assistance in the form

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[102] Improving the financial circumstances of those less fortunate has been a role of the United States long before the existence of today's modern welfare programs; *see The History of Welfare,* WELFAREINFO.ORG (2015), http://www.welfareinfo.org/.

[103] *See The President's Climate Action Plan,* THE WHITE HOUSE (June 2013), https://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf; *see also Remarks by the President at National Clean Energy Summit*, THE WHITE HOUSE (Aug. 25, 2015), https://www.whitehouse.govthe-press-office/2015/08/25/remarks-president-national-clean-energy-summit; *Programs and Activities*, *supra* note 85; *see* Office of the Press Secretary, *FACT SHEET: Administration and California Partner to Drive Renewable Energy and Energy Efficiency in Multifamily Housing*, THE WHITE HOUSE (Jan. 29, 2015), https://www.whitehouse.gov/the-press-office/2015/04/03/fact-sheet-administration-announces-actions-drive-growth-solar-energy-an (mentioned 5 times); Office of the Press Secretary, *FACT SHEET: Administration Announces New Initiative to Increase Solar Access for All Americans*, THE WHITE HOUSE (July 7, 2015), https://www.whitehouse.gov/the-press-office/2015/07/07/fact-sheet-administration-announces-new-initiative-increase-solar-access (mentioned 6 times); and *FACT SHEET: President Obama Announces New Actions to Bring Renewable Energy and Energy Efficiency to Households across the Country, supra* note 71 (mentioned 14 times).

of refunds on income taxes. Strategies for spurring solar energy development include financial incentives, such as grants and tax credits, which can encourage consumers and solar companies to participate in the energy market.

Renew300 is an effort to expand the solar industry while sending trickle-down financial assistance to Americans within a specific class. However, there is evidence suggesting that the strategies of Renew300 are not efficient. The rest of this section discusses multiple strategies for economic assistance and provides evidence demonstrating which strategies offer the most cost-effective outcomes.

A. Direct Assistance to Low-Income Renters

The most cost-efficient method for providing financial assistance to low-income tenants is direct, non-specific government handouts. There are a number of financial challenges that a low-income family faces on a daily basis. Therefore, the variety of methods that the government could employ in assisting these families is great. Tax breaks, discount programs, subsidies, and other welfare programs are just a few of the options. Some methods include general handouts, while others are more purpose-specific. There are benefits to either type, but in general, those that are not purpose-specific provide the most benefit for the individual and society.

1. Government Assistance for Utility Bills

One method of assisting low-income tenants is to provide direct utility assistance. As identified in the section above, low-income tenants need particular help affording the cost of utilities. Utility discounts and utility assistance are forms of purpose-specific welfare. Purpose-specific welfare focuses on a specific aspect of cost of living (such as food, housing, utilities, transportation, or other basic necessities), and is typically created following a legitimate socioeconomic crisis. The Supplemental Nutrition Assistance Program, also known as "food stamps," for example, was created with the limited scope of helping low-income families afford food. The Section 8 Housing Voucher program was created to provide low-income families with private housing rental assistance following serious issues in public housing in the 1960s. When it came to concerns of rising energy costs in the 1970s, a purpose-specific program emerged from that crisis, too: the Low Income Home Energy Assistance Program ("LIHEAP"), which provides low-income families with direct assistance on their utility bills.

Increasing federal funding to LIHEAP and lowering its thresholds for qualification may be effective strategies for assisting more low-income tenants. LIHEAP is a federally funded program that provides direct government assistance to low-income families for their cost of energy.[104] The program works by appropriating funds to the states where individual assistance amounts are determined. In Arizona, for example, a low-income family can receive between $75 and $640 per twelve-month period to help with the cost of utilities.[105] When the assistance is awarded, it goes either to the family directly, or to the utility company, depending on the policies of the state. The total LIHEAP budget for fiscal year 2015 was a little over $3 billion, and is slightly less for fiscal year 2016, which shows that a significant amount of funding is already allocated to tenants for the cost of utilities.[106] Because the states set their own

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[104] 42 U.S.C. § 8621 (2015), et seq. (2015).

[105] *See* Arizona Department of Economic Security, *LIHEAP Policy & Procedure Manual SFY15*, DES.AZ.GOV (June 2014), https://des.az.gov/sites/default/files/LIHEAP_Policy_ Manual_SFY15%281%29.pdf (providing Arizona's 2014 state manual on LIHEAP applications).

[106] *See* U.S. Department of Health and Human Services, *FY 2016 Initial LIHEAP Release DCL State Funding Table*, ACF.HHS.GOV (2016), https://www.acf.hhs.gov/sites/

thresholds for qualification, the federal government should consider making any additional funding contingent on states' action to lower such thresholds and distribute the funds directly to the families.

Another purpose-specific method is to provide additional funding to states' respective utility assistance programs. Many states and public utilities offer their own utility assistance programs,[107] such as the California Alternate Rates for Energy ("CARE") program.[108] Under the CARE program, qualified low-income families can receive up to twenty percent off their electric bill.[109] This program is similar to the Energy Support Program offered by public utility company Arizona Public Service ("APS") in Arizona, which allows low-income families to receive between twenty-six and sixty-five percent off their electric bill, depending on household size, income, and amount of energy used.[110] The type of assistance can vary by state, but usually manifests as straight percentage discounts, discounts based on total usage, rates based on percentage of income, flat credits, waivers of customer charges, or other forms

default/files/ocs/2016_initial_liheap_release_dcl_statefundingtable.pdf (providing the official federal budget for LIHEAP for fiscal year 2016).

[107] *See* Steven Ferrey, *The Law of Independent Power* § 10:17 (34th ed. 2014) (providing a comprehensive review of low-income electric rate discount programs in the United States).

[108] *See* 1994 Cal. Legis. Serv. Ch. 947 (S.B. 491); *see also* CAL. PUB. UTIL. CODE § 739.1.

[109] This information can be found on the CARE/FERA program application form provided by Pacific Gas and Electric Company, https://www.pge.com/includes/docs/pdfs/shared/customerservice/brochuresforms/careferaappreseng.pdf.

[110] *See* Arizona Public Services, *limited income programs*, APS.COM, https://www.aps.com/en/residential/accountservices/assistanceprograms/pages/limited-income-home.aspx (last visited Feb. 9, 2016).

of assistance.[111] In Oregon, low-income families are offered a creative form of assistance—unused kilowatt hours that are accumulated by net metering are collected and allocated toward reductions in their bills.[112] As of 2002, twenty-six states provided some form of utility discount to low-income families, fourteen of which guarantee the assistance, even if the low-income family is a high-usage household.[113] The numbers show that the White House could divert funds intended for Renew300 to state utility discount programs instead, and thereby take a more direct approach to "trickle-down" assistance. These programs are particularly helpful for low-income families that do not already receive Utility Allowances under Section 8.

2. A Better Approach: Wealth Distribution Through the Income Tax System

Considering that financial challenges span every aspect of low-income families' cost of living, providing non-specific cash assistance makes the most sense. Cash subsidies increase discretionary spending for low-income families and stimulate the economy. Assistance that broadly reduces a family's cost of living can work as effectively as increasing wages in bringing the family out of poverty. Since 1938, all but two presidents have signed a minimum wage increase into law,[114] demonstrating

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[111] *See* Margot Saunders et al., *Access to Utility Service*, NATIONAL CONSUMER LAW CENTER, 367-77 (1996) (providing a detail survey of the different types of utility assistance offered by the states).

[112] *See* Or. Rev. Stat. § 757.300(3)(d) (2013) (providing that "any remaining unused kilowatt-hour credit accumulated during the previous year shall be granted to the electric utility for distribution to customers enrolled in the electric utility's low-income assistance programs," or used in certain other limited ways set forth in the provision).

[113] *See* Saunders, *supra* note 111.

[114] *See* Liberty Equality Fraternity and Trees, *Since 1938, Only Three Presidents Have Never Signed a Minimum Wage Increase,* DAILY KOS (Mar. 7, 2014), http://www.dailykos.com/story/2014/3/7/1282880/-Since-1938-Only-Three-Presidents-Have-Never-Signed-a-Minimum-Wage-

that a direct increase to a low-income family's income is not an unreasonable measure. Confidence that tax dollars are not wasted on non-essential goods or poverty-perpetuating habits comes at the expense of positive changes in consumer behavior. Freedom in spending allows families to keep the difference between a tax rebate and total energy consumption; it encourages families to conserve energy and pursue solar-powered housing. Tax rebates offer freedom in spending and cost efficiencies that legal rulemaking and purpose-specific assistance cannot offer.[115] Exchanging tax credits and purpose-specific government subsidies for general tax rebates is a more effective method of providing assistance to low-income families.

The White House should be direct with its wealth distribution approaches. The income tax system already has an influence on the distribution of income, but policymakers often do not acknowledge this influence, or else underutilize the system to achieve distributive objectives.[116] In addition, wealth distributive effects are generally ignored in policy making, despite their clear presence.[117] This is a problem because taking a policy approach to distribution, such as Renew300, creates

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Increase (which includes President Obama on the list, but who had actually signed an increase the month prior: *see contra* Michele Richinick, *It's official, Obama signs minimum wage order*, MSNBC (Feb. 12, 2014), http://www.msnbc.com/morning-joe/its-official-obama-signs-minimum-wage-order).

[115] Current tax measures reduce the tax liability of low-income families and ensure that low-income families keep 100% of their taxable income. Any income taken in taxes is returned through the tax refund process. The drawback is inability to benefit from tax credits, which require tax liability.

[116] *See* Jon D. Hanson & Melissa R. Hart, Law and Economics, in A Companion to Philosophy of Law and Legal Theory 311, 330 (Dennis Patterson ed., 1996) (providing that distribution goals are often claimed as being outside the scope of tax systems).

[117] *See* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 993 (2001).

inefficiencies in the distribution itself, as well as in those created by the disincentive to change poverty-perpetuating behavior.[118] The solution is to defer to the income tax system, which is more efficient at distributing wealth than policy initiatives.[119] This recommendation applies not only to replace the distributive effect of "trickle-down" solar savings, but also to existing utility assistance programs and other purpose-specific federal subsidies.

B. Increasing Growth in the U.S. Solar Market.

The most cost-efficient method for increasing solar distribution is direct cash tax rebates on solar purchases. When it comes to growing or supporting a large technology and energy-based industry such as solar, there are a variety of methods the federal government can employ. Tax rebates, tax credits, and federal grants are just a few examples. As with many other industries, the federal government has employed many of these strategies since solar's inception. Subsidies for early research and development ("R&D") and tax breaks for the solar market leaders are examples of the strategies that have brought the solar industry to the point it is today. Some of these strategies have been cost effective, while others have not. This section focuses on the strategies that would be most cost-efficient for increasing solar installations from either the supply or demand-side of the economic equation.

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[118] *See* Aanund Hylland & Richard Zeckhauser, *Distributional Objectives Should Affect Taxes but Not Program Choice or Design*, 81 SCAND. J. ECON. 264 (1979); *see also* Steven Shavell, *A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?*, 71 AM. ECON. REV. 414 (1981).

[119] *See* Kaplow & Shavell, *supra* note 117; *see also* Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficent Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 677 (1994).

1. Grants: Funding Early Research and Development of Emerging Tech

Federal grants are excellent strategies for funding early R&D for emerging technologies. Without continued grants and similar federal funding in private sector R&D, solar technology would not be where it is today.[120] Private investments in R&D often provide little return for investors—especially in the short term.[121] Although a certain technology may yield substantial benefits for society in the future, the uncertainty and lack of immediate commercial application often cause underinvestment in early R&D.[122] If society relied solely on the private sector, many socially beneficial endeavors, such as solar technology, would never be undertaken.[123] The government, on the other hand, has an interest to see technologies develop on behalf of society, and can afford the risk the private sector avoids—even if the research leads to a dead-end.

Arguably, one example of this is the United States natural gas and crude oil industry.[124] Developing technology

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[120] *See* Lila Feisee, *The Role of the Private Sector in Biotechnology: Research and Development*, 12 HEALTH MATRIX 357, 360 (2002) (providing a review of government subsidies for early research and development to a technology-based industry that is comparably similar to solar).

[121] *See The Pivotal Role of Government Investment in Basic Research*, ASSOCIATION OF AMERICAN UNIVERSITIES (May 2010), https://www.aau.edu/WorkArea/DownloadAsset.aspx?id=10828 (describing how the government funds the initial, ground-laying research needed for widely-beneficial technologies).

[122] *See id.*

[123] *See id.*

[124] *See* Michael Klare, *How Obama Became the Oil President*, MOTHER JONES (Sept. 12, 2014), http://www.motherjones.com/environment/2014/09/how-obama-became-oilpresident-gas-fracking-drill (providing a general synopsis of the funding and policy breaks that the White House provided to the domestic fracking industry during the Obama Administration).

needed for domestic fracking was a high-risk investment, but resulted in economic benefits for the entire country.[125] Over $137 million was provided to develop the drilling technologies, and an additional $10 billion was given in tax breaks to the industry as a whole.[126] Without this support, the shale and fracking industry would not be as successful as it is today.

To date, several billion dollars have been provided to fund R&D for solar projects within the private sector.[127] Current efforts in solar R&D are reflected in the Department of Energy's SunShot initiative. In 2015, the White House announced a $24 million commitment to disruptive technologies in solar, spanning across eleven projects.[128] One example is a transparent

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[125] *See* Institute for Energy Research, *Hydraulic Fracturing Saved Consumers Up to $248 Billion Last Year*, IER (Nov. 6, 2014), http://instituteforenergyresearch.org/analysis/hydraulic-fracturing-saved-consumers-248-billion-last-year/; *see also* ICF International, *U.S. Oil Impacts: The Impacts of Horizontal Multi-Stage Hydraulic Fracturing Technologies on Historical Oil Production, International Oil Costs, and Consumer Petroleum Product Costs*, ICF INTERNATIONAL FAIRFAX (Oct. 30, 2014), http://www.api.org/~/media/Files/Policy/Hydraulic_Fracturing/ICF-Hydraulic-Fracturing-Oil-Impacts.pdf (providing a synopsis of the rapid growth of domestic shale and crude oil production and some of the benefits the growth has provided for American consumers).

[126] *See* Kevin Begos, *Fracking Developed With Decades of Government Investment*, THE HUFFINGTON POST (Sept. 23, 2012), http://www.huffingtonpost.com/2012/09/23/fracking-developed-government_n_1907178.html; *see also* Michael Shellenberger & Ted Nordhaus, *A boom in shale gas? Credit the feds.*, THE WASHINGTON POST (Dec. 16, 2011), https://www.washingtonpost.com/opinions/a-boom-in-shale-gas-credit-the-feds/2011/12/07/gIQAecFIzO_story.html.

[127] For an in-depth review of the history of funding in solar R&D, *see* Charles E. Jennings, Robert M. Margolis & John E. Bartlett, *A Historical Analysis of Investment in Solar Energy Technologies (2000-2007)*, NATIONAL RENEWABLE ENERGY LABORATORY (Dec. 2008), http://www.nrel.gov/docs/fy09osti/43602.pdf.

[128] *See FACT SHEET: President Obama Announces New Actions to Bring Renewable Energy and Energy Efficiency to Households across the Country*, *supra* note 71.

solar cell under development at Michigan State University that integrates photovoltaic technology with glass.[129] The potential applications implicate photovoltaic capability in cell phones, automobile sunroofs, skyscraper windows, optical head-mounted displays, and countless other commercial applications. While these applications promise a bright future for solar power, the primary purpose of R&D in solar today is in continued increases in photovoltaic efficiency.[130] With continued funding in initiatives such as SunShot, photovoltaic efficiency is projected to increase and result in grid parity by 2020.[131] This is why federal grants are effective strategies for R&D; a grant can be issued for the public good, such as to improve the photovoltaic efficiency of solar panels, without any expectation of results or a return.

By awarding grants to the most cost-efficient private sector applicants, this type of subsidization focuses mainly on the supply side of the demand equation. Other supply-side support includes subsidies to solar manufacturers and developers to help compete while their cost efficiency matures prior to reaching "grid parity."[132] Once grid parity is achieved, the need for supply-side subsidization diminishes. Accordingly, the ITC was extended only until 2020, and includes a phase-out period, where it is presumed the government hopes tax credits will no longer be needed to support the industry. For now, if economic benefits of solar exist, they are artificial. However,

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[129] *See* Tom Oswald & Richard Lunt, *Solar Energy That Doesn't Block the View*, MICHIGAN STATE UNIVERSITY (Aug. 19, 2014), http://msutoday.msu.edu/news/2014/solar-energy-that-doesnt-block-the-view/.

[130] Photovoltaic efficiency is the percentage of sunlight that a solar cell is capable of converting into electric current.

[131] *See* U.S. Department of Energy, *SunShot Initiative*, ENERGY.GOV (2015), http://www.nrel.gov/pv/performance_reliability/pdfs/2015_pvmrw_102_kinsey.pdf (providing a mission statement of the initiative, which is to reach the point when the cost of solar produced power becomes equal or less than the cost of grid-produced power).

[132] *See id.*

upon grid parity, there is no doubt regarding the economic benefits of solar.

2. Spurring Market Demand Through Tax Credits

Offering similar incentives to the demand-side of the market stimulates the market from the bottom up. Examples of bottom-up incentives include tax credits, rebates, and creative financing, such as the ITC and PACE. The ITC rewards consumer installation of panels and PACE helps reduce the cost of upfront capital. In essence, both help reduce the cost of solar installations for the consumer. While the ITC has been effective in residential solar distribution, it has done little for the deployment of community solar.[133] If the government is serious about deploying solar as efficiently as possible, it should consider incorporating community solar into incentives, such as the ITC.

Legislation that extends the ITC to community solar participants could have a significant impact on community solar deployment. In 2010, Colorado Senator Mark Udall and Arizona House Representative Gabrielle Giffords introduced the Solar United Neighborhoods ("SUN") Act, which would have amended the Internal Revenue Code ("IRC") to allow a thirty percent tax credit for solar installations that are not on the owner's property.[134] In July 2015, the Internal Revenue Service ("IRS") issued a private letter ruling that allowed *one* consumer to claim the ITC for participation in a community solar project

[133] *See* 26 U.S.C. § 25(D)(d)(2) (2013) (requiring that the panel must be on the claimant's dwelling; the owner would be claiming the credit under the commercial ITC); *see also* 26 U.S.C. § 48 (2013).

[134] *See Solar Uniting Neighborhoods (SUN) Act of 2010*, 111th CONG., 2nd Session, S 3137, (2010) (amending 26 U.S.C. § 25(D)(d)(2) (2013), *supra* note 133) (the bill was reintroduced in 2011, and again in 2013 but has not been passed).

in Vermont.[135] While the ruling only applied to the sole person in that case, the case suggests a model of participation that could apply to community solar in future rulings.[136]

However, the federal government is not the only government that can implement tax credit incentives—state governments can, as well. Utah legislators, for example, provide a state-level renewable energy tax credit of up to $2000, which works similarly to the federal ITC, but that includes express application to participation in community solar.[137] Although the private letter ruling mentioned above may eliminate the need for federal adoption of community solar tax credits, such as those implemented in Utah, it would be in the federal government's interest to rewrite the tax code to eliminate any ambiguity.

From an economic perspective, tax credits can be effective incentives because they encourage the most cost-effective participants to engage in the distribution. Those who are less efficient can still participate, but will ultimately sit on the sidelines. There is no socioeconomic distinction on its face and deference to participants is equal. The drawback is that tax credit participation is dependent on tax liability. If the most cost-efficient participants have little tax liability, their contributions are limited. In addition, those with no tax liability,

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[135] *See* PLR 11186015, https://www.irs.gov/pub/irs-wd/201536017.pdf (the private letter ruling by the IRS that applies the ITC to community solar in that case).

[136] *See* Clean Energy States Alliance, *Private Letter Ruling on the Eligibility of an Individual Panel Owner in an Offsite, Net-Metered Community-Shared Solar Project to Claim the Section 25D Tax Credit*, CESA.ORG (Sept. 1, 2015), http://www.cesa.org/resource-library/resource/private-letter-ruling-on-the-eligibility-of-an-individual-panel-owner-in-an-offsite-net-metered-community-shared-solar-project-to-claim-the-section-25d-tax-credit (participants could expect that (1) if the project is set up similarly to Vermont, and (2) the participant participates similarly to the taxpayer in the case, then the ITC should be able to apply to them, too).

[137] *See* Utah Code Ann. § 59-10-1014 (West 2010) (state law granting credit similar to the federal ITC).

such as low-income families, are excluded entirely. An alternative is tax rebates or tax refund credits, which are awarded despite tax liability and would, therefore, provide the most participation and the least deference. All consumers who are in a position to benefit will capitalize on the opportunity proportionally to their positions.

3. The Benefits Pay No Attention to Socioeconomic Class

The benefits of tax credits are that they allow equal opportunity participation and give no deference to socioeconomic class. The economic benefits of the energy sector inherently distribute without regard to class. Hydroelectric power generating systems, for example, give *all* consumers within their grids lower electric bills.[138] Similarly, the surge in domestic shale production saved American consumers several billion across all socioeconomic classes. The drop in gas prices at the pump, for example, has saved anyone with an automobile nearly $700 per year.[139] Forcing market growth in an attempt to redirect greater economic benefits to a lower socioeconomic class, as attempted by Renew300, causes inefficient implementation and results.

In terms of economic efficiency, inattention to socioeconomic class ensures the most cost-efficient deployment of resources. Broad incentives to the solar industry, such as tax credits, help to harness market forces and incentivize the persons

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[138] *See* Liz Hartman*, Top 10 Things You Didn't Know About Hydropower,* ENERGY.GOV (Apr. 27, 2015), http://energy.gov/articles/top-10-things-you-didnt-know-about-hydropower (in comparing consumers living in different states: those powered with hydroelectric and those powered predominantly by fossil fuels).

[139] *See How Fracking is Saving You Gas Money*, THE AMERICAN INTEREST (Apr. 10, 2015, 8:28 AM), http://www.the-american-interest.com/2015/04/10/how-fracking-is-saving-you-gas-money.

best suited to manufacture and install solar. Only those individuals with a cost-benefit equation[140] sufficiently favorable to the incentive programs would increase production. All others would stay on the sidelines. In economics, this is the most efficient outcome because it results in an optimal allocation of the resources associated with solar deployment. The implication in the solar industry is that the areas that will benefit the most are the sunniest regions of the nation and the regions where the peak prices of energy are the highest, compared to regions with fewer days of sunlight and cheap energy costs. Arguably, regions with little sunlight, but that still have cheap power, do not need solar power in the first place.

Overall, the energy sector can be a highly effective, non-welfare-oriented avenue for reducing the cost of living for Americans. Lower energy prices benefit all citizens, regardless of economic status. With solar power and grid parity as the new frontier in energy-generated economic benefits, they may serve as effective mechanisms for initiatives that aim to accomplish more than simply reducing the nation's carbon footprint. If the government aimed to distribute the economic benefits of solar in a way that gave deference to a specific socioeconomic class, then the government successfully modified its policies.

C. Promoting Solar with a Focus on Trickle-Down Effects?

Although one way to assist solar growth and underprivileged families in tandem is to overlap efforts—for example, by encouraging solar installation on federally subsidized properties—such strategy is inefficient in

[140] *See Cost-Benefit Analysis*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("An analytical technique that weighs the costs of a proposed . . . project against the expected advantages, economic or otherwise; a way of calculating the methods or plans that will bring the most advantages for the smallest cost, especially in business.").

comparison to better alternatives. President Obama is correct that "[a] lot of Americans are going solar . . . not because they're tree huggers . . . but because they're cost-cutters. They like saving money."[141] Assuming that all possible factors come together and make solar power an economically beneficial option, the President's statement is true only in its application to homeowners and not low-income families that rent. Nonetheless, the White House is attempting to convert any potential economic benefits of solar power to an opportunity for low-income tenants to save money.[142] As discussed in Part III of this article, evidence suggests that if federally subsidized homes were more energy efficient, then the federal government would not have to pay out as much in direct utility assistance to subsidized families.

Renew300 is not the first dual-purpose initiative attempted regarding federally subsidized housing and energy efficiency. In 2013, the White House announced an initiative, the Better Buildings Challenge, to make buildings in multifamily housing at least twenty percent more energy efficient by 2020.[143] The initiative presents like an earlier version of Renew300. According to the Department of Energy, the multifamily housing extension to the Better Buildings Challenge saved families over $400 annually on their heating

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141 President Obama at National Clean Energy Summit, *supra* note 103.

142 *See The President's Climate Action Plan*, *supra* note 103, at 9 ("Energy efficiency is one of the clearest and most cost-effective opportunities to save families money.").

143 *See Multifamily Residential Sector Fact Sheet*, US DEPARTMENT OF ENERGY (last visited Oct. 1, 2016), http://portal.hud.gov/hudportal/documents/huddoc?id=BBC_MFFactSheet.pdf*; see generally President Obama's Plan to Win the Future by Making American Businesses More Energy Efficient through the "Better Buildings Initiative"*, THE WHITE HOUSE (Feb. 3, 2011), https://www.whitehouse.gov/the-press-office/2011/02/03/president-obama-s-plan-win-future-making-american-businesses-more-energy (the original initiative).

and cooling bills in the first year, and was projected to save those families nearly $480 million in total by 2030.[144] However, "trickle-down solar" and "trickle-down energy efficiency" are not interchangeable.

1. Trickle-Down Solar Savings Are Inconsistent

Encouraging landlords to install solar panels on their federally subsidized properties results in inconsistent benefits for residents, most of which skew toward no benefit at all—particularly in the most heavily subsidized housing communities. Although there is potential for solar savings to exceed any government-provided utility assistance, the extent to which solar installations on affordable housing benefit low-income families depends on the actual transfer of cost savings from the landlord to the tenant.[145]

A handful of cases of solar installation on multifamily properties demonstrate this inconsistency.[146] In some circumstances, the cost savings of solar transfer to the tenant. In

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[144] *See The President's Climate Action Plan*, *supra* note 103, at 9; *FACT SHEET: Administration Announces New Initiative to Increase Solar Access for All Americans, supra* note 103.

[145] The way to measure this benefit is by the installation's actual effect on rent or utility bills, depending on the type of metering of the property; a reduction in rent should prove that the solar panels were effective in saving low-income families money. In the multifamily rental industry, "rent" and "utilities" may be used interchangeably under certain circumstances. Affordable housing providers of multi-metered communities have the discretion to "include utilities with rent" (for marketing reasons and attracting tenants, this strategy may be favorable) and so many low-income families pay *only* "rent." Similarly, many Housing Authorities in charge of issuing Section 8 Housing Voucher payments require the landlord to apply this model to their rent rates. Despite the wording, a portion of all-inclusive rent *does* go toward the cost of utilities in those circumstances.

[146] Solar panel installations occurred prior to the initiative in the 2013 Climate Action Plan.

other circumstances, the cost savings either remain with the landlord or revert back to the government. Consider the following examples of solar installations on multifamily, affordable housing communities. These examples demonstrate why reliance on trickle-down solar savings is unpredictable and inefficient to provide assistance to low-income tenants.

Some models serve as perfect examples of solar power cost savings transferring directly to the tenant. Heritage View Homes in Cleveland, Ohio, serves as an excellent example because the cost savings of approximately ten percent per month transfer directly to the tenants.[147] The architect responsible for the community stated, "We thought [the panels are] important because the savings will really be passed on to the tenants . . . so we feel really good about that."[148] At Plaza East Apartments in San Francisco, California, residents receive fifty percent of the energy generated free of charge.[149] An affordable housing quadruplex in Durham, North Carolina, transfers the cost savings to the tenants, who each receive $425 per year.[150] Weinberg Commons in Washington, D.C. is a "zero-net" community, meaning its solar panels and insulation allow it to

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[147] *See Cleveland: Public Housing Goes Green*, WKYC.COM (Nov. 28, 2011), http://www.wkyc.com/story/news/2013/10/22/3163419.
[148] *Id.*
[149] Jennifer Dockery, *Solar Installation Provides Free Power to Tenants*, 1 NOVOGRADAC JOURNAL OF TAX CREDITS, 68 (Mar. 8, 2010), https://www.novoco.com/periodicals/articles/solar-installation-provides-free-power-tenants. *See generally San Francisco Affordable Housing Sites Power On Solar Energy*, BUSINESS WIRE (Jan. 26, 2010, 6:53 PM), http://www.businesswire.com/news/home/20100126007315/en/San-Francisco-Affordable-Housing-Sites-Power-Solar.
[150] Justin Quesinberry, *Durham Affordable Housing Units Get Solar Panels Installed*, WNCN.COM (Nov. 6, 2015, 12:32 PM), http://wncn.com/2015/11/06/durham-affordable-housing-units-get-solar-panels-installed.

consume almost zero outside energy.[151] As a result, the thirty-six low-income households living there save almost 100% on electricity.[152] At Guadalupe-Saldana Net Zero Subdivision in Austin, Texas, eight affordable housing units are powered entirely by solar and transfer the cost savings to the tenants.[153] At River Garden Apartments, in New Orleans, Louisiana, because of the solar panels installed, the residents only pay about ten cents per kilowatt-hour, saving about fifty dollars per month on utility bills.[154]

In other models, it is unclear whether the tenant benefits from solar power cost savings. At Sheridan Station in Washington, D.C., for example, the local housing authority states that the 114-unit building's panels save about thirty percent of the "building's energy use," but does not specify whether "building's energy use" includes the energy used by the tenants, or just the common areas.[155] Similarly, Fairweather Apartments in Salem, Massachusetts expected in 2011 to save $5,400 per year in its building's annual electricity load due to

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151 Abigail Hauslohner, *New Housing Complex in Southeast Could Be a First for Sustainability*, THE WASHINGTON POST (Nov. 6, 2015), https://www.washingtonpost.com/local/dc-politics/new-housing-complex-in-southeast-could-be-a-first-for-sustainability/2015/11/06/cdeb7dd0-84c8-11e5-a7ca-6ab6ec20f839_story.html.
152 *Id.*
153 M. Barclay, *Ribbon Cutting for Affordable Sustainable Housing in Austin*, PRAXIS: WORDPRESS (Sept. 19, 2013), https://uumcpraxis.wordpress.com/2013/09/19/ribbon-cutting-for-affordable-sustainable-housing-in-austin.
154 Susan DeFreitas, *New Orleans Home to Largest Solar Neighborhood in SE*, EARTHTECHLING (Nov. 18, 2012), http://earthtechling.com/2012/11/new-orleans-home-to-largest-solar-neighborhood-in-se.
155 *DCHA Cuts the Ribbon on Sheridan Station*, DISTRICT OF COLUMBIA HOUSING AUTHORITY, http://www.dchousing.org/doc.aspx?docid=201509281358513345 (last modified Sept. 28, 2015).

solar panels,[156] but did not differentiate between the usage by the building's common areas and the individual units.[157]

Finally, some communities serve as perfect examples of those in which there were no solar power cost savings for the tenant. At Harmony Square in Newark, New Jersey, for example, the solar panels on the roof power the common areas, but not individual units, and therefore do not transfer the cost savings to the tenants.[158] The New York City Housing Authority ("NYCHA") specified that the cost savings from energy-efficiency improvements to all its public housing will revert back to NYCHA to pay for the cost of the improvements and contribute to the cost of future improvements.[159] The rationale for this policy is that NYCHA already pays its tenants' utility bills in full, so the tenants would receive no further benefit from the savings.[160] Under this model, the housing authority gets to capture the savings and reinvest them,[161] making the taxpayers and private contractors employed to complete the improvements the true benefactors of the deployment. While the system implemented by NYCHA does not necessarily hurt the financial

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156 Matthew K. Roy, *A Celebration of Solar Power*, THE SALEM NEWS (Apr. 26, 2011), http://www.salemnews.com/news/local_news/a-celebration-of-solar-power/article_0d84beae-be91-54c5-826b-95a9d28a093e.html.
157 *Id*.
158 *DCA & HMFA Mark Ribbon Cutting for Apartments@Harmony Square in Newark*, NEW JERSEY HOUSING AND MORTGAGE FINANCE AGENCY (Apr. 4, 2012), http://www.state.nj.us/dca/hmfa/media/news/2012/approved/20120404.html.
159 Mireya Navarro, *New York Plans Upgrades for Housing Projects to Reduce Emissions and Utility Costs*, N.Y. TIMES (Apr. 9, 2015), http://www.nytimes.com/2015/04/10/nyregion/new-york-plans-upgrades-for-housing-projects-to-reduce-emissions-and-utility-costs.html. *See* Jessica Daily (@jldailey618), *NYCHA Will Go Green with $100M of Improvements*, NYCURBED (Apr. 10, 2015, 10:15 AM), http://ny.curbed.com/2015/4/10/9971904/nycha-will-go-green-with-100m-of-improvements.
160 *See* Navarro, *supra* note 159.
161 *Id*.

situation of the tenants, ultimately it serves as a prime example of why there may be better routes, other than solar and trickle-down savings, for providing financial assistance to low-income families.

2. Low-Income Subsidies Interfere with Trickle-Down Savings

Within the framework of solar power and energy bills, savings should effectively trickle-down from solar implementation. But the low-income subsidy system interferes with the genuine value of trickle-down savings because the tenant does not bear the complete burden of his or her energy consumption. Therefore, the tenant cannot receive the full benefit of the solar savings. Subsidized tenants are cost-elastic to their electricity consumption because without responsibility for using excess power, their ability to benefit diminishes.[162] In addition, because the landlord has discretion over whether to transfer solar power savings to the tenant's rent, solar power savings do not guarantee savings for the tenant. In cases where the savings transfer through programs like California's Multifamily Affordable Solar Housing program, described above, the savings trickledown to the housing authority, not the tenant. In the NYCHA case, for example, the tenants' savings were already maximized.

An inherent weakness of the Section 8 Housing Choice Voucher Program is that the potential savings for a low-income family is based on its income, not its expenses. When a housing authority determines the low-income family's rent based on thirty percent of the family's income, then changes in cost of

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[162] When the local housing authority pays the electric bill on the tenant's behalf and the electricity usage drops from solar, the tenant does not see a reduction because the tenant is already receiving the maximum benefit, pre-solar.

living transfer to the government, not the tenant. As long as the family's income remains unchanged, then the family would not spend more when the cost of electricity increases. The family cannot realize the financial benefits of solar when the family's utility bills are fully subsidized.[163]

As indicated in this section, capturing energy cost savings requires responsibility for the utility bill. Subsidized utility bills do not allow the subsidized family to actualize its energy savings.[164] Even if the landlord transfers the cost savings, the low-income, subsidized family risks losing that money to the government organization that pays the utility and/or rent bill. On the other hand, when the family's cost of energy drops due to solar, the savings remain with the government. In order for a low-income family to fully capture the value of the solar savings, it must bear exposure to the changes in energy prices. But if one intended to save taxpayers money and reduce government subsidy spending, then the subsidy system is probably best left unchanged.

V. A BETTER APPROACH FOR INCREASING SOLAR DISTRIBUTION

The solar industry does not need socioeconomic deference to succeed; rather, success is more likely without it. Within the framework of wealth distribution strategies, no approach effectively provides the solar industry with a greater share of the energy market than simply allowing wealth distribution strategies to focus on their intended outcome: distributing wealth by the most efficient means possible. The income tax system, as explained above, provides a prime

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[163] *See* James A. Mueller & Amit Ronen, *Bridging the Solar Income Gap* 2, 13, 16 (Jan. 2015) (working paper) (on file with GW Solar Institute), http://solar.gwu.edu/sites/default/files/GWSI-Bridging%20the%20Solar%20Income%20Gap%20Working%20Paper.pdf.

[164] *See* McDonnell, *supra* note 20.

alternative. Not only does it serve as the most direct means to distribute wealth, but it also empowers low-income families to make solar-participative decisions at their sole discretion.

Similarly, within the framework of solar-favorable legislation, no approach effectively provides low-income families with a greater reduction in their cost of living than to simply allow solar-favorable legislation to benefit all consumers. Direct funding to the solar industry, tax credits, and programs such as PACE, provided to individuals and states with equal deference, are prime alternatives on the other end. Not only do these alternatives enable the disbursement of solar power to the most affordable areas, but they also provide low-income households in those areas with the greatest opportunity to save.

If the funding is awarded based on legislative need, then states that have "dragged their feet" in solar progressivism will inevitably "suck up" the funds. For example, spending $15 million in federal aid to help states, such as Georgia, catch up to New York in terms of solar progressivism is highly inefficient. The proportion of businesses, consumers, and low-income families that could benefit from the funding—if it all went to New York—is greater, per dollar, than it would be if it all went to Georgia.

This inefficiency described applies directly to the methods employed by Renew300. Federally subsidized housing providers do not offer an ideal infrastructure for solar deployment. In addition, they are not in the business of solar participation. Even if solar installations attract prospective renters and save government subsidized housing payments, the inefficiency outweighs the benefit. Renew300 incentivizes non-federally subsidized housing providers to offer affordable housing and redirects solar installations to areas with high concentrations of low-income families, which may not be in the sunniest or the most power-demanding regions of the country. The industry needs programs that give equal deference to income and solar potential considerations.

The energy sector is competitive and dominated by utility giants. In the face of the major utility company interests and fossil fuel forces, focusing on socioeconomics weakens the primary effort. Solar power's ascension in the energy sector realm depends on continued support from the federal government in the most efficient means possible. The Obama Administration's initiative merely convolutes the true value of an industry still competing for energy independence.

Elon Musk, a visionary and the chairman of SolarCity, believes the solar market is underrated and underutilizes its full potential. Addressing the energy sector during a recent speech at Paris-Sorbonne University, Mr. Musk stated:

> The important thing to appreciate is if let's say the only thing we had was solar energy, that that was the only power source, if you just took a small section of Spain, you could power all of Europe. It's a very small amount of area that's actually needed to generate the electricity we need to power civilization or in the case of the U.S., a little corner of Nevada or Utah, power the entire United States.[165]

[165] Elon Musk, Chariman, SolarCity, CEO, SpaceX, CEO, Tesla Motors, Inc., Conversation avec Elon Musk à Paris 1 Panthéon-Sorbonne [Conversation with Elon Musk at Pantheon-Sorbonne University] (Dec. 2, 2015), uploaded by UnivParis1, 31:35, YouTube (Dec. 3, 2015), https://www.youtube.com/watch?v=BMskI6G9ty0 (transcript at http://www.autoblog.com/2015/12/05/full-text-of-elon-musks-paris-cop21-speech). Note that this statement is made regarding solar power as the sole method of electricity generation absent of any oil, coal, or natural gas sources.

This rather simple vision appears to be out of reach due to the inability of industry to create a system tailored towards the goal of energy independence.

The government must allow leaders and innovators in the solar industry to introduce technology and delivery platforms that harness the power of the sun most efficiently. As companies introduce these technologies, consumers will invest based on their own motivations for self-sufficiency. Although utility providers contest consumer grid independence, a mature solar market will have grid parity, self-sufficiency, and multiple degrees of resiliency. But these outcomes cannot be realized with the distraction of cost-inefficient mechanisms for solar growth. The solar market's maturity depends on deployment that provides sufficient returns for reinvestment. Narrowing deployment in order to fulfill a socioeconomic agenda is counterproductive to maturing solar markets. The authors propose the following plan.

A. Allow Companies and Private-Investment Groups to Advance the Market

Between public utility monopolies and private community solar farm investors, private investor groups have significantly more capability to contribute to solar deployment. Between affordable housing providers and private investor groups, private groups are, again, more capable. Utility companies play a significant role, because, under Renew300, states may default to utility-sponsored community solar models as the preferred method to deliver off-site power generation to low-income families.[166] This preference harms the solar industry because it perpetuates anti-community solar legislation in favor

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[166] *See* Nichola Groom, *Arizona Sets Precedent for Solar Systems with Monthly Fee*, CHICAGO TRIBUNE (Nov. 14, 2013), http://articles.chicagotribune.com/2013-11-14/news/sns-rt-us-solar-arizona-20131114_1_net-metering-solar-customers-aps.

of public utility monopoly models. Policies such as those in New York, however, best demonstrate that private-power-generation-favorable policies provide the most benefit to the solar industry. These policies encourage the most participation, and, as a result, spur the greatest deployment.

In a true free-market system, the solar industry would not be encumbered by utility companies or legislation that favors them. However, a certain balance is reasonable, as cities need the stability and assurance provided by the grid in order to operate. Resilience is an important factor to consider. Allowing consumers to test different solar technologies, while disconnected from the grid, could lead to a series of issues. But these concerns at the municipal level should not come at the expense of solar development or manifest as outright refusal to deploy new technology. Solar power, once mature, will be an important component to domestic resilience.

Utility companies, on the other hand, disagree. The threat of solar power is to the utility company as the myth of global warming is to the fossil fuel industry (sarcasm intended). Solar distribution poses a direct threat to the financial models and profit margins of traditional utility providers. The issues the utility companies raise derive from fear and self-interest, not legitimacy. Solar has the capability to capture and cripple their business and to take over as the energy leader. Their resistance to change has made the cost of adaptation more expensive. As such, they have deployed non-free-market methods to hinder an otherwise free-market-driven industry.

Understandably, utility companies have an interest in protecting their respective shares of electricity markets.[167]

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[167] *Contra* Troy A. Rule, *Solar Energy, Utilities, and Fairness*, 6 SAN DIEGO J. CLIMATE & ENERGY L. 115, 143 (2015) ("Some solar energy industry advocates have contended that it would be unfair to allow regulated utilities to compete in private rooftop solar markets.").

However, the fact that solar-favorable companies and special interest groups must fight an uphill battle against utility companies in the solar development platform ultimately harms consumers. In Nevada, for example, two major private solar providers have pulled out of the state market.[168] Nevada's decision to increase net metering costs to consumers helped the public utility and harmed consumers where it counts most—their wallets. Any policy that implicates Renew300 by putting solar distribution within the control of public utilities will likely have the same effect: higher rates for consumers and zero progress for private solar development. Rather, the authors contend that the government must support private efforts.

The $1 million the Obama Administration proposed to apply toward advancing clean energy reflects the government's interest in solar as an integral component of the nation's green energy revolution. Providing funds through grants and tax breaks to the private sector engaged in early R&D, as the government did for the fossil fuel and domestic shale industries, maximizes the potential for solar power's long-term benefit. Stated simply: fund entrepreneurs to spur new technology and growth will follow.[169]

B. Where Government Policies Can Prepare for Energy Independence

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[168] *See New York Serves as a Model in How to Reform Electric Utilities*, LASVEGASSUN (Jan. 31, 2016), http://lasvegassun.com/news/2016/jan/31/new-york-serves-as-a-model-in-how-to-reform-ele (reporting on the negative impact Nevada's policies have on the solar distribution).

[169] Kellan Howell & Stephen Dinan, *Solyndra Misled Government to Get $535M Solar Project Loan*, THE WASHINGTON TIMES (Aug. 26, 2015), http://www.washingtontimes.com/news/2015/aug/26/solyndra-misled-government-get-535-million-solar-p ("many of [the Energy Department's] efforts in the loan guarantee arena have been successful in advancing new technologies and expanding energy markets.").

Each section of this article contains research and analysis related to policies and strategies that attempt to regulate the solar market into existence. Multiple programs, such as the ITC, incentivize owners to participate in solar deployment.[170] However, if solar companies were unhindered by state regulations in bringing their technology to market, then the federal government would not need to provide such incentives. While the federal government cannot mandate state legislation, it can encourage legislative action. The federal government recommending legislation under Renew300, however, is not effective encouragement. The solar industry needs mandates that cover all sectors without the distraction of social welfare. If done right, social welfare will follow. Otherwise, the solar industry's growth will continue on a very slow and expensive path.

The final proposed step is to empower consumers and the public to participate in solar. Cost-effective empowerment encompasses two strategies within the prong of wealth distribution: (1) direct funding to low-income families through the income tax system; and (2) making utility liability accessible to low-income families by reducing funding for their utility allowances and discounts. In other words, allow consumers to carry the complete burden of their energy consumption and subsequently provide them with the financial freedom to control that consumption. Once a tenant is held accountable for his or her energy use, the intended solar savings will encourage the user to make responsible, energy efficient choices. Families that appreciate the additional income from solar savings may then take appropriate steps to consume less energy or contribute more to solar deployment initiatives. The benefit to those families is exactly what the White House intends: reduced cost of living for those who need it most, and, among them, those who want it the most. Under this method, the economic benefits of solar will

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[170] *See* 26 U.S.C. § 25(D) (2013) (the internal revenue code regulating the tax credit).

flow to those who seek it, without disregarding the additional suggested presumption that a low-income family can save money without participating in solar. In the end, the separate approach proposed here accomplishes both goals most efficiently.

VI. CONCLUSION

In President Obama's Climate Action Plan, the administration identifies solar energy distribution as a potentially transformative force in the energy sector, a force that could free the nation from dependency on fossil fuels. This intention has been the focus of the government on the solar industry since the industry's earliest stages. Unfortunately, the administration has lost its focus and is attempting to use a support program for emerging solar markets as a means to promote income equality and social welfare. The administration's plan, Renew300, is a dual-purpose initiative, which seeks to increase solar deployment and reduce the electricity bills of low-income citizens through the same basic program that provides solar energy installations for federally subsidized housing communities. Although this program has laudable goals, basic economic principles favor a different approach. Welfare assistance serves a legitimate purpose, but attempting to provide it indirectly through a system aimed at promoting renewable energy will only create cost inefficiencies. Likewise, the broader economic benefits of solar power arguably justify subsidies to the solar industry, but attempting to direct those subsidies only to low-income citizens is an inefficient means of seeking to bolster these growing markets. Policies aimed at promoting distributed energy technologies are better premised on free-market principles, allowing the success of the solar industry to trickledown to consumers without deference to any socioeconomic distinctions. In other words, a far more effective policy strategy would be to provide direct assistance to the underprivileged and the solar industry separately. Under this approach, consumers, states, businesses, and utilities will each benefit in proportion to their contributions to the growth of the solar energy industry, and low-income citizens will end up better off as well.

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