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ARTICLE

KINDLY REMOVE MY CHILD FROM THE BUBBLE WRAP[1]—ANALYZING *CHILDRESS V. MADISON COUNTY* AND WHY TENNESSEE COURTS SHOULD ENFORCE PARENTAL PRE-INJURY LIABILITY WAIVERS

By: Joshua D. Arters &
Ben M. Rose[2]

"I overstepped my parental boundaries at the Aiguille Rock Climbing Center . . . . I signed a waiver absolving it of

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1 Comparing the notion of placing a child in "bubble wrap" to a parent not having the authority to sign a liability waiver on behalf of her child comes from a 2009 editorial in the Orlando New Sentinel after the Florida Supreme Court ruled that parental pre-injury liability waivers were unenforceable. *See infra* note 3.

2 Joshua D. Arters and Ben M. Rose are attorneys in Nashville, Tennessee, and are graduates of the University of Tennessee College of Law. They are counsel of record for the defendant in *Blackwell v. Sky High Sports Nashville Operations*, M2016–00447–COA–R9–CV (Tenn. Ct. App. argued Nov. 16, 2016). In *Blackwell*, a minor filed a lawsuit in Davidson County Circuit Court, by and through his mother, against Sky High Sports Nashville Operations, which is a Nashville business operating in the rapidly-growing "indoor trampoline park" industry. The minor asserted claims related to an injury he allegedly sustained while playing dodgeball at the Sky High Nashville trampoline facility. Sky High Nashville filed a motion with the trial court seeking, among other relief, enforcement of a parental pre-injury liability waiver the minor's mother executed on behalf of the minor. After the trial court denied the motion, the Tennessee Court of Appeals granted Sky High Nashville's application for interlocutory appeal to address the enforceability of the parental pre-injury liability waiver. Much of the substance of this article was presented to the Tennessee Court of Appeals in Sky High Nashville's brief in support of its position and the oral argument held on November 16, 2016. At the time this article was published, the Tennessee Court of Appeals had not yet issued its decision in the *Blackwell* case.

blame if my daughter pulled a Humpty Dumpty from the top of a wall. The Florida Supreme Court recently ruled I didn't have that right. I can make all kinds of decisions for my girl, including life-and-death calls on medical care. But I can't judge the risk she will take scaling a 20-foot wall and decide it is so miniscule that I'm willing to sign a waiver so she can do it—not even if I'm holding the safety line . . . . I appreciate that litigation has made the world a safer place . . . . But I also don't think we should encase kids in bubble wrap and stick them in front of a Wii."[3]

I. Introduction

In today's increasingly litigious society, every parent has likely executed a liability waiver on his or her child's behalf at one time or another. Sending your daughter to play soccer? Liability waiver. Is your son going on a field trip? Liability waiver. Church canoe trip in the Smokies? Liability waiver. These "parental pre-injury liability waivers," as referred to in this article, seem to be virtually everywhere. But are these waivers worth the paper on which they are written? It may come to a surprise to many parents—not to mention the businesses using such waivers—that the traditional answer to that question in Tennessee is "no." In 1989, the Tennessee Court of Appeals held in *Childress v. Madison County* that a parent has no authority to make the decision to waive her child's right to sue someone as a condition of the child's participation in an activity the parent deems worthwhile.[4] Under *Childress*, a parent's relationship to her child—and her authority to make important decisions on her child's

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[3] Mike Thomas, Editorial, *Court Decides: Father Doesn't Know Best*, ORLANDO SENTINEL, Apr. 12, 2009, at B1, http://www.fljustice.org/mx/hm.asp?id=Father_doesnt_know_best.

[4] Childress v. Madison County, 777 S.W.2d 1, 6 (Tenn. Ct. App. 1989).

behalf—is arguably no different than that of a distant court-appointed guardian.[5]

In the nearly three decades since *Childress*, however, there have been developments in Tennessee law, United States Supreme Court jurisprudence, and law in other jurisdictions which strongly suggest that the *Childress* rule is obsolete. For example, since *Childress*, the Tennessee Supreme Court has expressly recognized for the first time that the Tennessee Constitution shields a parent's fundamental decision-making authority from state intrusion absent an affirmative finding of significant harm to the child.[6] Similarly, the United States Supreme Court has held that such parental authority is protected under the United States Constitution, as well.[7] Those parental decisions are firmly rooted in the now commonly applied principle that "fit parents act in the best interests of their children," and that the state cannot overturn a parenting decision even if a court believes that a "better" decision could have been made.[8] Based on that principle, numerous other jurisdictions have enforced parental pre-injury liability waivers since *Childress*. Indeed, this article intends to show why other jurisdictions that have enforced parental pre-injury liability waivers since *Childress* accurately reflect a parent's constitutional decision-making authority, thus emphasizing the outdated, unworkable, and unjustified nature of the rule espoused in *Childress*.

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5 *Id.* (citing 44 C.J.S. *Insane Persons* § 49 (1945); 39 Am.Jur.2d, *Guardian & Ward*, § 102 (1968); 42 Am.Jur.2d, *Infants* § 152 (1969)); *see also infra* note 29.

6 Hawk v. Hawk, 855 S.W.2d 573, 582 (Tenn. 1993) (citing TENN. CONST. art I, § 8).

7 Troxel v. Granville, 530 U.S. 57, 72 (2000) (citing U.S. CONST. amend XIV).

8 *Id.* at 68, 73; Wadkins v. Wadkins, No. M2012–00592–COA–R3–CV, 2012 WL 6571044, at *5 (Tenn. Ct. App. Dec. 14, 2012).

Part II summarizes *Childress* and its relatively abbreviated progeny. Part III discusses the important constitutional framework that has developed since *Childress*, which has expressly recognized that the Tennessee and United States Constitutions protect a parent's decision-making authority from unwarranted state intrusion. In other words, such a framework strongly suggests that a parent's decision to execute a parental pre-injury liability waiver is now constitutionally protected, fundamental in character, and superior to Tennessee's *parens patriae*[9] interests. Part IV evaluates both the strong shift favoring the enforcement of parental pre-injury liability waivers in other jurisdictions, and those courts that have been hesitant to follow.[10]

Finally, Part V discusses why enforcement of parental pre-injury liability waivers is appropriate and legally justified in Tennessee. Specifically, a parent has the authority to bind her minor child to other pre-injury contracts, like arbitration provisions or forum selection provisions, so a parental pre-injury liability waiver should not necessarily be any different. This is particularly true because enforcement neither conflicts with a parent's inability to independently settle her child's *existing* tort claim without court approval, nor a minor child's right to avoid or disaffirm a contract. Rather, enforcement is appropriate in light of a parent's newly recognized constitutional parental authority, and it supports other important Tennessee public policies.

A parental pre-injury liability waiver should therefore be enforced under the same standards that any

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[9] *Parens patriae* is Latin for "parent of his or her country" and describes "the state in its capacity as provider of protection to those unable to care for themselves." *Parens patriae*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[10] *See also infra* Table I for a state-by-state survey of the enforceability of parental pre-injury liability waivers.

other liability waiver is enforced in Tennessee, and courts should allow parents to remove their children from the proverbial "bubble wrap."

II. An Overview of Current Tennessee Law

A. The General Test for Enforcing Any Given Liability Waiver in Tennessee

A preliminary overview of the factors Tennessee courts apply for determining whether any given liability waiver is enforceable is helpful for a clear understanding of parental pre-injury liability waivers. In that regard, the freedom to contract outweighs the policy favoring the enforcement of tort liability, and, therefore, liability waivers are not *per se* invalid.[11] Certainly, Tennessee courts have long enforced liability waivers.[12] However, courts have been wary of such contracts since their

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[11] Planters Gin Co. v. Fed. Compress & Warehouse Co., 78 S.W.3d 885, 892 (Tenn. 2002); Crawford v. Buckner, 839 S.W.2d 754, 756 (Tenn. 1992); Webster v. Psychemedics Corp., 2011 WL 2520157, at *6 (Tenn. Ct. App. 2011).

[12] Cincinnati, N. O. & T. P. Ry. Co. v. Saulsbury, 90 S.W. 624 (Tenn. 1905); *see e.g.*, Houghland v. Security Alarms & Services, 755 S.W.2d 769, 773 (Tenn. 1988) (liability of burglar alarm service was limited by an exculpatory clause); Evco Corp. v. Ross, 528 S.W.2d 20, 23 (Tenn. 1975) (agreed allocation of risk by parties with equivalent bargaining powers in a commercial setting serves a valid purpose where the agreement explains the parties' duty to obtain and bear the cost of insurance); Kellogg Co. v. Sanitors, 496 S.W.2d 472, 473 (Tenn. 1973) (same); Empress Health & Beauty Spa v. Turner, 503 S.W.2d 188, 191 (Tenn. 1973) (customer assumed the risk of injury from negligence of a health spa); Chazen v. Trailmobile, 384 S.W.2d 1 (Tenn. 1964) (commercial lease absolved both landlord and tenant from liability for a loss resulting from fire); Moss v. Fortune, 340 S.W.2d 902 (Tenn. 1960) (renter assumed the risk incident to injury from the hiring and riding of a horse).

inception.[13] Thus, the enforceability of any given pre-injury liability waiver is governed by certain considerations.[14] As a general matter, these considerations are rooted in contract law principles, public policy considerations, or both.[15]

When addressing whether any given pre-injury liability wavier violates public policy, specifically, the majority of jurisdictions, including Tennessee, have modeled their analytical framework after California precedent.[16] In *Olson v. Molzen*, the Tennessee Supreme Court adopted the reasoning in the seminal California case,

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[13] *See* Joseph H. King, Jr., *Exculpatory Agreements for Volunteers in Youth Activities-the Alternative to "Nerf (r)" Tiddlywinks*, 53 OHIO ST. L.J. 683, 710 (1992), https://kb.osu.edu/dspace/bitstream/handle/1811/64603/OSLJ_V53N3_0683.pdf. Although the law is now well-settled that liability waivers are to be construed using a reasonable interpretation rather than a strict approach, Tennessee case law arguably shows the application of different approaches. *Id.*; *see e.g.*, *Empress Health and Beauty Spa*, 503 S.W.2d at 191 (plain, complete, and unambiguous meaning); *Chazen*, 384 S.W.2d at 4 (terms strictly construed); Tate v. Trialco Scrap, 745 F. Supp. 458, 461 (M.D. Tenn. 1989) *aff'd*, 908 F.2d 974 (6th Cir. 1990) (unpublished opinion) (highlighting inconsistencies in Tennessee law on whether a reasonable or strict construction should apply to exculpatory clauses).

[14] *Planters Gin Co.*, 78 S.W.3d at 892–93.

[15] *See, e.g.*, Adams v. Roark, 686 S.W.2d 73, 75–76 (Tenn. 1985) (general contract law: fraud and duress; and public policy: cannot waive gross negligence or intentional conduct); Miller v. Hembree, 1998 WL 209016, at *3 (Tenn. Ct. App. Apr. 30, 1998) (general contract law: rules of construction); Burks v. Belz-Wilson Properties, 958 S.W.2d 773, 777 (Tenn. Ct. App. 1997) (general contract law: ambiguity); *see also* Memphis & Charleston Railroad Co. v. Jones, 2 Head 517, 518–19 (Tenn. 1859) (same). Pre-injury liability waivers are hybrids of contract and tort law and stem from the inevitable junction of two competing interests: (1) the freedom to contract; and (2) one's duty to take responsibility for his or her actions. *See, e.g.*, Blake D. Morant, *Contracts Limiting Liability: A Paradox with Tacit Solutions*, 69 TUL. L. REV. 715, 716–17 (1995).

[16] *See* Olson v. Molzen, 558 S.W.2d 429, 431 (Tenn. 1977).

Tunkl v. Regents of University of California,[17] and promulgated six criteria for determining whether a liability waiver impairs public policy.[18] In short, these criteria consider whether the waiver involves a business that is subject to public regulation, the released party performs a public necessity and/or essential service, the released party has superior bargaining power, and/or the transaction places the person releasing the other from liability in control of the released party.[19] Regardless, a legitimate pecuniary motivation is not contrary to public policy and will therefore not automatically invalidate an exculpatory clause if it is the impetus for including the clause in a contract.[20]

B. *Childress v. Madison County*

In 1989, the Western Section of the Tennessee Court of Appeals in *Childress v. Madison County* held that a parental pre-injury liability waiver that a mother executed on behalf of her mentally handicapped son was against public policy and therefore unenforceable.[21] *Childress* involved an injury sustained by William Childress, a mentally handicapped 20-year-old, while he was training for the Special Olympics at a Y.M.C.A.[22] While under the supervision of Madison County employees, William nearly drowned.[23] William's parents thereafter filed a lawsuit against Madison County and asserted claims on William's behalf.[24]

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17 Tunkl v. Regents of Univ. of Cal., 383 P.2d 441 (Cal. 1963).
18 *Olson*, 558 S.W.2d at 431.
19 *Id.* (citing *Tunkl*, 383 P.2d at 445–46).
20 *See, e.g.*, *Childress*, 777 S.W.2d at 4.
21 *Id.* at 7.
22 *Id.* at 2.
23 *Id.*
24 *Id.*

On appeal, the court evaluated the enforceability of a parental pre-injury liability waiver that the mother executed on William's behalf.[25] After first determining that the waiver did not otherwise violate public policy under *Olson*,[26] the court addressed the first-impression question of whether a parent may execute an enforceable pre-injury liability waiver on behalf of her incompetent child.[27]

The court held that the mother did not have the authority to bind William to the liability waiver because her relationship to him as his parent was essentially the equivalent to that of a legal guardian to a ward.[28] The court reasoned that because a guardian may not generally waive the rights of a ward and because a guardian cannot settle an *existing* lawsuit on behalf of a ward apart from court approval or statutory authority, a parent cannot execute a valid pre-injury waiver as to the rights of her minor or incompetent child.[29] The court placed significant emphasis

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25 *Id.* at 3 (The Tennessee Court of Appeals reversed the trial court's determination that Madison County was not negligent, which consequently implicated the validity of the parental pre-injury liability waiver.).

26 *Id.* at 4. The court first addressed the general public policy criteria outlined in *Olson* and held that the Special Olympics does not normally operate under a public duty and, therefore, does not fall into the public policy exception prohibiting exculpatory clauses. *Id.* (citing *Olson*, 558 S.W.2d at 431). Thus, the court unequivocally held that the liability waiver applied to the mother's claims she asserted on her own behalf. *Id.* at 5–6 (citing Dodge v. Nashville Chattanooga & St. Louis Ry. Co., 215 S.W. 274 (Tenn. 1919) (a party's failure to read does not constitute lack of notice to that party); Dixon v. Manier, 545 S.W.2d 948, 949 (Tenn. Ct. App. 1976)).

27 *Id.* at 6.

28 *Id.* (citing 44 C.J.S. *Insane Persons* § 49 (1945)).

29 *Id.* (citing 39 Am.Jur.2d, *Guardian & Ward*, § 102 (1968); 42 Am.Jur.2d, *Infants* § 152 (1969); Miles v. Kaigler, 18 Tenn. (10 Yerg. 1836) (a guardian cannot settle a minor's existing claim apart from court approval); Spitzer v. Knoxville Iron, Co., 180

on authority related to a guardian's general inability to bind a ward to a contract and waive a ward's *existing* tort claims. [30] Significantly, because there was a lack of authority analyzing parental liability waivers for a minor child's *future* tort claim, the court only relied on two cases regarding a parent's authority to bind her minor child to a pre-injury exculpatory agreement.[31]

S.W. 163 (Tenn. 1915) (same); Tune v. Louisville & Nashville Railroad Co., 223 F. Supp. 928 (M.D. Tenn. 1963) (same)).

30 *Id.* (citing Gibson v. Anderson, 92 So.2d 692, 695 (Ala. 1956) (legal guardian's acts do not estop ward from asserting rights in property); Ortman v. Kane, 60 N.E.2d 93, 98 (Ill. 1945) (guardian cannot wave tender requirements of land sale contract entered into by ward prior to incompetency); Stockman v. City of South Portland, 87 A.2d 679 (Me. 1952) (guardian cannot waive ward's property tax exemption); Sharp v. State, 127 So.2d 865 (Miss. 1961) (guardian cannot waive statutory requirements for service of process on ward); Jones v. Dressel, 623 P.2d 370 (Colo. 1981) (ratification by parent of contract executed by child does not bind child); Whitcomb v. Dancer, 443 A.2d 458 (Vt. 1982) (guardian cannot settle personal injury claim for ward without court approval); Natural Father v. United Methodist Children's Home, 418 So.2d 807 (Miss. 1982) (infant not bound by evidentiary admissions of parent); Colfer v. Royal Globe Ins. Co., 519 A.2d 893 (N.J. Super. 1986) (guardian cannot settle personal injury claim without court approval)).

31 *Id.* at 7 (citing Doyle v. Bowdoin Coll., 403 A.2d 1206, 1208 fn. 3 (Me. 1979); Fedor v. Mauwehu Council, Boy Scouts of Am., 143 A.2d 466, 468 (Conn. 1958)). Significantly, at least two Connecticut cases since *Childress* have enforced pre-injury liability waivers signed by parents against minor children. *See infra*, Saccente v. LaFlamme, No. CV0100756730, 2003 WL 21716586 (Conn. Super. Ct. July 11, 2003); Fischer v. Rivest, No. X03CV000509627S, 2002 WL 31126288 (Conn. Super. Ct. 2002 Aug. 15, 2002). The court in *Childress* suggested that it could be appropriate for the Tennessee legislature or the Tennessee Supreme Court to weigh in on the issue. *Childress*, 777 S.W.2d at 8. However, the Tennessee Supreme Court subsequently denied Madison County's permission to appeal. *Id.*

C. *Rogers v. Donelson-Hermitage Chamber of Commerce* and Subsequent Cases Relying on *Childress*

The last time any Tennessee appellate court has addressed the enforceability of a parental pre-injury liability waiver was only one year after *Childress* when the Middle Section of the Tennessee Court of Appeals decided *Rogers v. Donelson-Hermitage Chamber of Commerce*.[32]

Although the *Childress* court only cited two cases regarding parental pre-injury liability waivers, several other courts had also invalidated parental pre-injury liability waivers before *Childress* was decided. *See, e.g.*, Apicella v. Valley Forge Military Acad. and Junior Coll., 630 F. Supp. 20, 24 (E.D. Pa. 1985) ("Under Pennsylvania law, parents do not possess the authority to release the claims or potential claims of a minor child merely because of the parental relationship") (citing Crew v. Bartels, 27 F.R.D. 5 (E.D. Pa. 1961); Commonwealth v. Rothman, 209 223 A.2d 919 (Pa. Sup. Ct. 1966); Myers v. Sezov, 39 Pa. D & C 2d 650 (1966); Langon v. Strawhecker, 46 Pa. D & C 2d (1969)); Valdimer v. Mount Vernon Hebrew Camps, 172 N.E.2d 283 (N.Y. Ct. App. 1961) ("*A fortiori*, we are extremely wary of a transaction that puts parent and child at cross-purposes and, in the main, normally tend to quiet the legitimate complaint of the minor child. Generally, we may regard the parent's contract of indemnity, however, well-intended, as an instrument that motivates him to discourage the proper prosecution of the infant's claim, if that contract be legal. The end result is either the outright thwarting of our protective policy or, should the infant ultimately elect to ignore the settlement and to press his claim, disharmony within the family unit. Whatever the outcome, the policy of the state suffers.").

[32] Rogers v. Donelson-Hermitage Chamber of Commerce, 807 S.W.2d 242, 242 (Tenn. Ct. App. 1990). Coincidentally, a California case issued in the same month that the *Rodgers* decision was rendered held for the first time—in any jurisdiction—that a parental pre-injury liability waiver was enforceable. *See* Hohe v. Unified Sch. Dist., 224 Cal. App. 3d 1559, 1564–65 (Cal. Ct. App. 1990). *See infra* Section IV(A).

There, Brandy Nichole Rogers, a minor, participated in a horse race event at the annual Andrew Jackson Day celebration at the Hermitage in Nashville, Tennessee.[33] As a condition of Brandy's participation, her parents needed to provide a permission slip.[34] Accordingly, Brandy's mother provided a handwritten note stating: "Brandy Rogers has my permission to race today. Under no circumstances will anyone or anything be liable in case of an accident."[35]

When Brandy crossed the finish line, two vehicles crossed her path, causing her to turn her horse's head to the left to avoid colliding with the vehicles.[36] Unfortunately, the horse fell and rolled over Brandy and caused severe injuries, which ultimately led to her death two days later.[37] Brandy's parents sued the organizers of the horse race and the owners of the land upon which the horse race took place pursuant to Tennessee's wrongful death statute.[38]

The defendants ultimately conceded to the *Childress* rule as it applied to personal injury claims, but argued that it did not apply to the parents' wrongful death claim.[39] In that regard, the defendants argued that the release affected only the parents' rights, as the parents possessed the right to bring the wrongful death claim.[40] In other words, the defendants contended that the enforcement of the release would only bar the parents' right to assert the wrongful death claim and would not limit Brandy's rights,

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33 *Rodgers*, 807 S.W.2d at 243.

34 *Id.* at 243–44.

35 *Id.* at 244. The court reflected on whether the permission slip needed to include specific wording. *Id.* at 243–44. The plaintiffs argued that Brandy told them all that they needed to provide is a simple permission slip, while the defendants asserted that everyone in the race needed to provide a full liability release. *Id.* Ultimately, this constituted a non-issue in the court's determination. *Id.*

36 *Id.* at 244.

37 *Id.*

38 *Id.* at 244–45 (citing TENN. CODE ANN. § 20–5–106(a) (1978)).

39 *Id.* at 246.

40 *Id.*

specifically.[41] The court disagreed, however, and held that the defendants' position "place[d] too much emphasis on where . . . [the] recovery . . . [would] ultimately go, and overlook[ed] the theory of the wrongful death statute and the reasoning of *Childress*."[42] In that regard, the court held that the claim for wrongful death actually belonged to Brandy and that the parents were merely nominated to maintain the action on her behalf.[43] Accordingly, the court held that the parental pre-injury liability waiver that Brandy's mother had executed was unenforceable as to the wrongful death claim pursuant to the *Childress* rule.[44]

Since *Rogers*, *Childress* has not been substantively developed any further, as there have not been any published Tennessee appellate court cases analyzing the *Childress* rule. Similarly, there are only two unpublished cases from United States District Courts in Tennessee that have relied on *Childress* and *Rogers* but contain relatively little substantive analysis of *Childress*.[45]

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41 *Id.*

42 *Id.*

43 *Id.* (stating that "the right of action for wrongful death is that which this child would have possessed had she lived, and any recovery is in her right") (citing Middle Tenn. R.R. v. McMillan, 184 S.W. 20 (Tenn. 1915)).

44 *Id.* at 243. However, the court emphasized that the liability waiver was valid with respect to the mother's claims. *Id*. (citing *Childress*, 777 S.W.2d at 4); *see also Childress*, 777 S.W.2d at 6 (stating that "the trial judge was correct in dismissing this case as to Mrs. Childress individually").

45 *See* Bonne v. Premier Athletics, No. 3:04–CV–440, 2006 WL 3030776, at *5–6 (E.D. Tenn. Oct. 23, 2006); Albert v. Ober Gatlinburg, No. 3:02–CV–277, 2006 WL 208580, at *5–6 (E.D. Tenn. Jan. 25, 2006).

III. A New Constitutional Standard Developed Since *Childress*

In the nearly three decades since *Childress*, both the Tennessee and United States Supreme Courts have expressly recognized a parent's fundamental right to make important decisions for her child pursuant to the Tennessee and United States Constitutions.[46] As a result, the analysis outlined in *Childress* does not fully account for a parent's fundamental decision-making authority. [47] Indeed, as described in this Section, new constitutional precedent strongly suggests that a parent now possesses the constitutional authority to make the decision to sign a parental pre-injury liability waiver, and the state is significantly more limited in overturning that decision by refusing to enforce the contract.

A. Tennessee's New Standard for State Invalidation of Parental Decisions

In *Hawk v. Hawk*—decided four years after *Childress*—the Tennessee Supreme Court recognized for the first time that parents possess a right to make important decisions for their children, and that such a right is a fundamental liberty interest protected by both the Tennessee and United States Constitutions. [48] *Hawk*

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[46] *See Hawk*, 855 S.W.2d at 575 (citing TENN. CONST. art I, § 8); *Troxel*, 530 U.S. at 63 (citing U.S. CONST. amend XIV).

[47] *See Childress*, 777 S.W.2d at 7.

[48] TENN. CONST. art I, § 8; *Hawk*, 855 S.W.2d at 575. At the time of the *Hawk* decision, the United States Supreme Court had not yet expressly recognized the specific character of a parent's fundamental liberty interest protected by the U.S. Constitution—a decision that would come seven years later in *Troxel*. *See Troxel*, 530 U.S. at 63. However, the Tennessee Supreme Court thoughtfully recognized that a parent's authority to make important family decisions is firmly rooted in United States jurisprudence.

involved a parent's constitutional challenge to a Tennessee statute that allowed a court to order visitation to her child's grandparents, if a court deemed such visitation to be as "in the best interests of the minor child."[49] The trial court awarded visitation to the grandparents over the parents' decision to deny such visitation, thereby exercising the state's *parens patriae* power to impose "its own opinion of the 'best interests' of the children over the opinion of the parents[.]"[50]

On appeal, the Tennessee Supreme Court reversed and unequivocally recognized for the first time that parenting decisions are protected from unwarranted state intrusion by Article I, Section 8 of the Tennessee Constitution:

> Tennessee's historically strong protection of parental rights and the reasoning of federal constitutional cases convince us that parental rights constitute a fundamental

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Hawk, 855 S.W.2d at 575; *see also* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."). Moreover, "[f]or centuries it has been a canon of the common law that parents speak for their minor children. So deeply imbedded in our traditions is this principle of law that the Constitution itself may compel a State to respect it." Parham v. J.R., 442 U.S. 584, 621 (1979) (Stewart, J., concurring) (citations and footnotes omitted). Accordingly, "the child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare for additional obligations." Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). In that way, the Tennessee Supreme Court was arguably ahead of its time and accurately predicted the outcome of *Troxel*, recognizing the continuing shift toward strengthening parental privacy. *See Hawk*, 855 S.W.2d at 575.

[49] *Id.* at 577 (footnote omitted).

[50] *Id*.

liberty interest under Article I, Section 8 of the Tennessee Constitution. In *Davis v. Davis*, 842 S.W.2d 588 (1992), we recognized that although "[t]he right to privacy is not specifically mentioned in either the federal or the Tennessee state constitution . . . there can be little doubt about its grounding in the concept of liberty reflected in those two documents." *Id.* at 598. We explained that "the notion of individual liberty is . . . deeply embedded in the Tennessee Constitution . . . ," and we explicitly found that "[t]he right to privacy, or personal autonomy ('the right to be let alone'), while not mentioned explicitly in our state constitution, is nevertheless reflected in several sections of the Tennessee Declaration of Rights . . . ." *Id.* at 599–600. Citing a wealth of rights that protect personal privacy, rights such as the freedom of worship, freedom of speech, freedom from unreasonable searches and seizures, and the regulation of the quartering of soldiers, we had "no hesitation in drawing the conclusion that there is a right of individual privacy guaranteed under and protected by the liberty clauses of the Tennessee Declaration of Rights." *Id.* Finding the right to procreational autonomy to be part of this right to privacy, we noted that the right to procreational autonomy is evidence by the same concepts that uphold "parental rights and responsibilities with respect to children." *Id.* at 601. Thus, *we conclude that the same right to privacy espoused in* Davis *fully protects the right of*

> *parents to care for their children without unwarranted state intervention.*[51]

As a result, the Tennessee Supreme Court established a new standard for determining when parenting decisions warrant the state's oversight and intrusion.[52] Following *Hawk*, a party must show more than the "best interests of the child" to overcome a parent's fundamental right to make parenting decisions.[53] That is, the state may only intrude upon parenting decisions *where such intrusion is* "*necessary to prevent serious harm to a child.*"[54] Significantly, the Tennessee Supreme Court provided insight as to what it considered "serious harm to a child" by comparing such harm to "an individualized finding of parental neglect[.]"[55]

According to the Tennessee Supreme Court, the reason for such a limitation is relatively straightforward. Specifically, requiring a court to make an initial finding of harm to the child before intervening in a parental decision works to "prevent judicial second-guessing of parental decisions."[56] Indeed, the Tennessee Supreme Court recognized that Tennessee courts resolutely support such a

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51 *Id.* at 579 (internal footnotes omitted and emphasis added); *see* TENN. CONST. art I, § 8; Davis v. Davis, 842 S.W.2d 588, 598 (Tenn. 1992) (recognizing the right to procreational autonomy).

52 *Hawk*, 855 S.W.2d at 580.

53 *See id.* The Court also affirmed the application of the strict-scrutiny test for the fundamental right to make parenting decisions: "'[w]here certain fundamental rights are involved . . . , regulation[s] limiting these rights may be justified only by a 'compelling state interest' . . . and . . . legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.'" *Id.* at 579 n. 8 (quoting Roe v. Wade, 410 U.S. 113, 155 (1973)).

54 *Id.* at 580 (emphasis added).

55 *Id.* (citing Stanley v. Illinois, 405 U.S. 645 (1972)).

56 *Id.* at 581; *see also* Simmons v. Simmons, 900 S.W.2d 682, 683 (Tenn. 1995) (discussing the *Hawk* standard).

limitation because "[i]mplicit in Tennessee case and statutory law has always been the insistence that a child's welfare must be threatened *before* the state may intervene in parental decision-making."[57]

B. The United States Supreme Court's Recognition of a New Standard

Seven years after the Tennessee Supreme Court's decision in *Hawk*—and eleven years after *Childress*—the United States Supreme Court issued its landmark ruling in *Troxel v. Granville*.[58] Echoing the Tennessee Supreme Court seven years earlier, *Troxel* recognized once and for all that a parent's right to make important decisions for her children free from unwarranted state intrusion is a fundamental liberty interest guaranteed by the Due Process Clause of the Fourteenth Amendment.[59]

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57 *Hawk*, 855 S.W.2d at 581 (emphasis added); *see also* TENN. CODE ANN. § 36–6–101(a)(1) (stating that in a divorce case, the harm from the discontinuity of the parents' relationship compels the court to determine child custody "as the welfare and interest of the child or children may demand"); *Stanley*, 405 U.S. at 658; *Yoder*, 406 U.S. at 234 (denying state action because the First and Fourteenth amendments disallowed the state from forcing Amish children to attend public schools until they reached sixteen years of age); *Pierce*, 268 U.S. at 534–35 (holding that parents' decisions to send their children to private schools were "not inherently harmful," as there was "nothing in the . . . records to indicate that . . . [the private schools] have failed to discharge their obligations to patrons, students, or the state"); *In re* Hamilton, 658 S.W.2d 425 (Tenn. Ct. App. 1983) (holding that state action was appropriate when a child was declared "dependent and neglected" because her father refused cancer treatment for her on religious grounds and such neglect exposed the child to serious harm) (citing State Dep't of Human Serv. v. Northern, 563 S.W.2d 197 (Tenn. Ct. App. 1979)).

58 *See Troxel*, 530 U.S. at 57.

59 *Id.* at 66; *see* U.S. CONST. amend XIV.

Similar to *Hawk*, *Troxel* involved an action for visitation rights brought by the grandparents of two young girls pursuant to a Washington statute which provided that a court may award such visitation over the parents' wishes if the court believes that it "may serve the best interest of the child[.]"[60] After the Washington Supreme Court held that the statute unconstitutionally infringed upon the fundamental rights of parents,[61] the United States Supreme Court granted *certiorari* and affirmed.[62] In doing so, the Court expressly recognized for the first time parents' robust constitutional right to control the upbringing of their children free from unwarranted state oversight:

> [I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.[63]

In addition, *Troxel* confirmed that courts cannot interfere with a parental decision without first finding harm or potential harm to the child.[64] Indeed, it is now clear that after *Troxel*, a court is constitutionally prohibited from overturning a parental decision based on its subjective notion of a child's best interests, even if the court believes that a "better" decision could have been made:

> The problem here is not that the Superior Court intervened, but that when it did so, it gave no special weight to Granville's determination of her daughters' best

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60 *Troxel*, 500 U.S. at 61.
61 *See In re* Custody of Smith, 969 P.2d 21 (Wash. 1998).
62 *Troxel*, 500 U.S. at 63.
63 *Id.* at 66.
64 *Id.* at 71.

> interests. More importantly, it appears that the Superior Court applied exactly the opposite presumption[,] [favoring grandparent visitation].
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> * * *
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> *[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made.*[65]

Thus, the limitation on state intrusion into a parent's decision—even if a court believes that a "better" decision could have been made—is firmly rooted in a presumption that "fit parents act in the best interests of their children."[66] Tennessee courts now recognize and routinely apply these principles.[67]

IV. Courts Dealing With Parental Liability Waivers

After *Hawk* and *Troxel*, the *Childress* rule no longer accurately reflects the relevant body of constitutional law that has developed over the last three decades. At the very least, *Childress* does not consider a parent's fundamental decision-making authority.[68] Significantly, other jurisdictions have strongly shifted toward favoring the enforcement of parental pre-injury liability waivers since *Childress* by considering a parent's constitutionally

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65 *Id.* at 69, 72–73 (emphasis added); *see also* Lovelace v. Copley, 418 S.W.3d 1 (Tenn. 2013) (affirming the principles of *Hawk* as supplemented by *Troxel*).

66 *Troxel*, 500 U.S. at 68.

67 *See, e.g.*, *Wadkins*, 2012 WL 6571044, at *5.

68 *See id.*

protected decision-making authority.[69] These cases make clear that a court's interference with a parent's decision to execute a parental pre-injury liability waiver on behalf of her minor child constitutes an unwarranted intrusion into the parent's constitutional rights.[70]

A. Courts Have Shifted Toward Enforcement.

In 1990—coincidentally in the same month that the Tennessee Court of Appeals issued its ruling in *Rogers*—California[71] became the first state to hold that parental waivers were enforceable in *Hohe v. San Diego Unified School District*.[72] *Hohe* involved a 15-year-old high school student who was injured while under the effects of hypnosis at a school assembly.[73] The student's father had signed a waiver prior to the child's voluntary participation in the assembly, but he sued claiming the parental pre-injury liability waiver was against public policy and therefore unenforceable because of the child's minority status.[74] Citing *Tunkl*, the California Court of Appeals disagreed and held that no public policy necessarily opposes private, voluntary transactions in which one party agrees to shoulder a risk, which the law would otherwise have placed upon the other party—even in the context of a parental pre-injury liability waiver.[75]

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69 *See, e.g.*, *Hohe*, 224 Cal. App. 3d at 1564–65.

70 *See id.*

71 Notably, California was also the state that ultimately designed the general public policy architecture relating to the validity of liability waivers for the majority of jurisdictions, including Tennessee. *See generally Olson*, 558 S.W.2d; *Tunkl*, 383 P.2d.

72 *Hohe*, 224 Cal. App. 3d at 1564–65.

73 *Id.*

74 *Id.*

75 *Id.* (citing *Tunkl*, 383 P.2d at 441).

In pertinent part, the court held as follows:

> The public as a whole receives the benefit of such waivers so that groups such as Boy and Girl Scouts, Little League, and parent-teacher associations are able to continue without the risks and sometimes overwhelming costs of litigation. Thousands of children benefit from the availability of recreational and sports activities. Those options are steadily decreasing—victims of decreasing financial and tax support for other than the bare essentials of an education. Every learning experience involves risk. In this instance Hohe agreed to shoulder the risk. No public policy forbids the shifting of that burden.[76]

The court acknowledged the rule that a minor can generally disaffirm a contract signed by the minor alone, but ultimately held that parental pre-injury liability waivers are clearly enforceable and may not be disaffirmed.[77] In that regard, the court judiciously reasoned that "[a] parent may contract on behalf of his or her children" and that the law which allows minors to disaffirm their own contracts "was not intended to affect contracts entered into by adults on behalf of their children."[78]

Since *Hohe*, other courts have enforced parental pre-injury liability waivers and have principally relied upon the constitutionally protected parental rights expressly recognized after *Childress*. For example, in *Zivich v. Mentor Soccer Club*, the Ohio Supreme Court enforced a

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76 *Id.* at 1564.
77 *Id.*
78 *Id.* at 1565 (citing Doyle v. Guiliucci, 62 Cal. 2d. 606, 609 (Cal. 1965)).

parental pre-injury liability waiver signed by a mother as a condition of her son's participation in a youth soccer club.[79] There, the court first emphasized the important policy interests favoring the enforcement of liability waivers because they enable organizations the opportunity to provide affordable recreational opportunities for minors.[80] Next, the court recognized that the parental authority to bind one's child to such exculpatory agreements is rooted in the parent's fundamental rights:

> [T]he right of a parent to raise his or her child is a natural right subject to the protections of due process. Additionally, parents have a fundamental liberty interest in the care, custody and management of their offspring. Further the existence of a fundamental, privacy-oriented right of personal choice in family matters has been recognized under the Due Process Clause by the United States Supreme Court.
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> [M]any decisions made by parents "fall within the penumbra of parental authority, e.g., the school that the child will attend, the religion that the child will practice, the medical care that the child will receive, and the manner in which the child will be disciplined."[81]

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79 Zivich v. Mentor Soccer Club, 696 N.E.2d 201, 207 (Ohio 1998).

80 *Id.* at 205.

81 *Id.* at 206 (citing Meyer v. Nebraska, 262 U.S. 390 (1923); Santosky v. Kramer, 455 U.S. 745 (1982)).

Indeed, according to the Ohio Supreme Court, invalidating a release is "inconsistent with conferring other powers on parents to make important life choices for their children."[82]

Numerous other jurisdictions have since enforced parental pre-injury liability waivers in a wide variety of contexts, including both commercial and non-commercial settings.[83] For example, in *Fischer v. Rivest*, a Connecticut

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[82] *Id.*; *see also* BJ's Wholesale Club v. Rosen, 80 A.3d 345, 346 (Md. Ct. App. 2013) (noting all of the other laws providing parents the right to make important decisions on their children's behalf); Doyice J. Cotten & Sarah J. Young, *Effectiveness of Parental Waivers, Parental Indemnification Agreements, and Parental Arbitration Agreements as Risk Management Tools*, 17 J. LEGAL ASPECTS OF SPORT 53, 60–61 (2007); King, *supra* note 13, at 716 ("[J]udicial attitudes toward [invalidating] exculpatory agreements signed by parents on behalf of their minor children seem inconsistent with the powers conferred on parents respecting other important life choices.").

[83] *See generally* Kelly v. U.S., 809 F. Supp. 2d 429 (E.D.N.C. 2011) (parental pre-injury liability waiver as a condition of the minor child's participation in the Navy Junior Reserve Officer Training Corps is enforceable against the minor); *Saccente*, 2003 WL 21716586 (parental pre-injury liability waiver as a condition of the minor child's participation in horseback-riding lesson is enforceable against the minor); Fischer v. Rivest, No. X03CV000509627S, 2002 WL 31126288 (Conn. Super. Ct. Aug. 15, 2002) (affirming the parental principles outlined in *Zivich* and enforcing a parental pre-injury liability waiver in the context of youth hockey); Sharon v. City of Newton, 769 N.E.2d 738 (Mass. 2002) (enforcing a parental pre-injury liability waiver in the context of a cheerleading program); Quirk v. Walker's Gymnastics & Dance, No. 005274L, 2003 WL 21781387 (Mass. Super. July 25, 2003) (parental pre-injury liability waiver as a condition of the minor child's participation in gymnastics is enforceable against the minor because "[s]uch releases are clearly enforceable even when signed by a parent on behalf of their child"); *Rosen*, 80 A.3d 345 (parental pre-injury liability waiver as a condition of the minor child's use of a supervised play area offered by a wholesale retail store is enforceable against the minor); Kondrad v. Bismarck Park Dist., 655 N.W.2d 411 (N.D. 2003) (parental pre-injury liability waiver as a condition of the minor child's participation in an after-

court held that a parental pre-injury liability waiver signed by a parent as a condition of his minor son's participation in a hockey league is enforceable against the minor.[84] Citing *Zivich*, the court held that there were persuasive policy reasons to enforce such exculpatory contracts.[85] Noting that there was no essential service or good being

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school child care program is enforceable against the minor); *Zivich*, 696 N.E.2d 201 (parental pre-injury liability waiver in the context of a minor's injury while participating in a youth soccer club); Lehmann v. Har-Con Corp., 76 S.W.3d 55 (Tex. App. 2002) (parents had the authority to execute a prospective liability waiver that binds their minor child's future claims); Walker v. V.I. Waste Mgmt. Auth., 2015 WL 404007 (V.I. Super. Jan. 26, 2015) (parental pre-injury liability waiver as a condition of minor's participation in the Virgin Islands Waste Management Authority's Youth Environmental Summer Program is enforceable against the minor); Osborn v. Cascade Mountain, 655 N.W.2d 546 (Wi. Ct. App. 2002) (parental pre-injury liability waiver as a condition of the minor's participation in skiing is enforceable against the minor).

Notably, at least three other states—Georgia, Idaho, and Mississippi—have cases that imply that a parental pre-injury liability waiver might be enforceable against a minor child. *See, e.g.*, DeKalb Cty. Sch. Sys. v. White, 260 S.E.2d 853 (Ga. 1979) (upholding an athletic eligibility release signed by a parent against a minor child); Smoky v. McCray, 396 S.E.2d 794, 797 (Ga. Ct. App. 1990) (invalidating a parental pre-injury liability waiver because only the minor executed the release and "was fourteen years old and unaccompanied by any adult or guardian"); Davis v. Sun Valley Ski Educ. Found., 941 P.2d 1301 (Id. 1997) (invalidating a parental pre-injury liability waiver because it was not drafted properly); Quinn v. Mississippi State Univ., 720 So.2d 843 (Miss. 1998) (Mississippi Supreme Court held that reasonable minds could differ as to the risks that the plaintiffs were assuming and did not suggest that parental pre-injury liability waivers violate public policy).

84 *Fisher*, 2002 WL 31126288 at *8. Significantly, the Tennessee Court of Appeals in *Childress* relied on a case from Connecticut to support its decision to invalidate the pre-injury liability wavier as to the child. *See Childress*, 777 S.W.2d at 6.

85 *Fisher*, 2002 WL 3116288 at *14.

withheld by the defendant—along with the obvious benefit which recreational and sports activities provide children—the court held that every learning experience involves risks and that no public policy forbids the shifting of the burden to the participant's parents, who have agreed to shoulder such risks.[86]

Similarly, in *Sharon v. City of Newton*, the Massachusetts Supreme Court enforced a parental pre-injury liability waiver signed by a father on behalf of his daughter as a condition of the minor's participation in a cheerleading program.[87] Like the court in *Hohe*, the *Sharon* court addressed the minor's right to avoid a contract, which the court recognized as founded on a policy "to afford protection to minors from their own improvidence and want of sound judgment."[88] The court held that such a policy "comports with common sense and experience and is not defeated by permitting parents to exercise their own providence and sound judgment on behalf of their minor children."[89]

Importantly, however, *Sharon* expressly emphasized the fundamental principles outlined in *Hawk* and *Troxel*—that is, "the law presumes that fit parents act in furtherance of the welfare and best interests of their children, and with respect to matters relating to their care, custody, and upbringing have a fundamental right to make those decisions for them."[90] Indeed, according to the Massachusetts Supreme Court, "[t]o hold that releases of the type in question here are unenforceable would expose public schools, who offer many of the extracurricular sports opportunities available to children, to financial costs and

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86 *Id.* at *6.

87 *Sharon*, 769 N.E.2d at 749.

88 *Id.* at 746 (citing Frye v. Yasi, 101 N.E.2d 128 (Mass. 1951)).

89 *Id.* (citing *Parham*, 442 U.S. 584).

90 *Id.* (citing *Parham*, 442 U.S. 584; Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption, 421 N.E.2d 28 (Mass. 1981); Sayre v. Aisner, 748 N.E.2d 1013 (2001)).

risks that will inevitably lead to the reduction of those programs."[91]

In *Saccente v. LaFlamme*, a Connecticut Superior Court enforced a parental waiver, noting that "the essence of parenthood is the companionship of the child and the right to make decisions regarding his or her care, control, education health, religion and association." [92] *Saccente* made clear that the ability of a parent to execute a liability waiver on behalf of her child "clearly" comports with both the essence of parenthood and emphasized the presumption that "fit parents act in furtherance of the welfare and best interests of their children, and with respect to matters relating to their care, custody, and upbringing have a fundamental right to make those decisions for them[.]"[93] Indeed, the *Saccente* court reasoned that, by executing the parental pre-injury liability waiver, *the parent made "an important family decision cognizant of the risk of physical injury to his child and the financial risk to the family as a whole*."[94] Thus, according to the *Saccente* court, in the context of a "voluntary nonessential activity," courts should not disturb such parental judgment.[95]

In 2011, in *Kelly v. United States*, a United States district court analyzed the effectiveness of a parental pre-injury liability waiver under North Carolina law executed on behalf of a minor high school student in conjunction with the student's participation in the Navy Junior Reserve Officer Training Corps.[96] The plaintiffs cited the traditional rule that parents may not bind their children to pre-injury liability waivers.[97] The *Kelly* court recognized that many

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91 *Id.* at 747.

92 *Saccente*, 2003 WL 21716586, at *6 (citing *Pierce*, 268 U.S. at 534–35; *Meyer*, 262 U.S. at 399).

93 *Id.*

94 *Id.* (emphasis added).

95 *Id.*

96 *Kelly*, 809 F. Supp. 2d at 432.

97 *Id.* at 435.

jurisdictions ultimately reached that conclusion by relying on traditional policy principles—including the same principle cited in *Childress*—that refusing to enforce a pre-injury waiver is supported by the well-settled rule that a parent may not settle a minor's post-injury tort claim without court approval.[98]

The *Kelly* court stressed, however, that such a stringent rule may not be applicable in all scenarios, and particularly in circumstances where parental pre-injury liability waivers are enforced in the context of non-commercial activities.[99] The *Kelly* court held that the North Carolina Supreme Court would uphold a parental pre-injury liability waiver in the context of litigation against "schools, municipalities, or clubs providing activities for children."[100]

Recently, in *BJ's Wholesale Club v. Rosen*, the Maryland Court of Appeals enforced a parental pre-injury liability waiver in a commercial setting: a minor child's use of a supervised play area offered by a wholesale retail center.[101] The *Rosen* court held that the parent made the decision to execute the parental pre-injury liability waiver "in the course of the parenting role."[102] The *Rosen* court recognized that such broad parental authority is reflected by many Maryland laws that are rooted in the "societal expectation that parents should make significant decisions pertaining to a child's welfare" and enable parents to "exercise their authority on behalf of their minor child in the most important aspects of a child's life," like important health decisions,[103] important educational and employment

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98 *Id.*

99 *Id.* at 436.

100 *Id.* at 437.

101 *Rosen*, 80 A.3d at 345.

102 *Id.* at 362.

103 *Id.* 353 (citing MD. CODE ANN., HEALTH-GEN. § 20–101(b); MD. CODE ANN., HEALTH-GEN. §102 (parental consent to having their children give blood); MD. CODE ANN., HEALTH-GEN. § 20–106(b) (parental consent to the use of a tanning bed); MD. CODE ANN.,

decisions, [104] and important familial and societal decisions.[105]

Ultimately, it is important for the purposes of determining the viability of *Childress* to recognize that the constitutional bases upon which the foregoing courts have enforced parental pre-injury liability waivers are nearly mirror images of the constitutional rights recognized in post-*Childress* Tennessee decisions.[106]

HEALTH-GEN. § 18–4A–02(a) (familial consent to immunization of minor family member); MD. CODE ANN., HEALTH-GEN. § 10–610 (parental authority to commit child for mental treatment); MD. CODE ANN., HEALTH-GEN. § 10–923 (parental consent for therapeutic group home services)).

[104] *Id.* (citing MD. CODE ANN., EDUCATION § 7–301(a)(1) (parental choice to homeschool children); MD. CODE ANN., EDUCATION § 7–301(a)(2) (parental decision to defer compulsory schooling for one year if parent determines child is not mature enough); MD. CODE ANN., EDUCATION § 7–305(c) (parent may meet with school superintendent if child is suspended for more than ten days or is expelled from school); MD. CODE ANN., LABOR AND EMPLOYMENT § 3–211(b)(1) (child may not work more than is statutorily permitted without a parent giving written consent); MD. CODE ANN., LABOR AND EMPLOYMENT § 3–403(a)(7) (wage and hour restrictions do not apply when child works for parent)).

[105] *Id.* (citing MD. CODE ANN., FAMILY LAW § 2–301 (parental permission for child to marry); MD. CODE ANN., FAMILY LAW § 4–501(b)(2) (parental decision to use corporal punishment to discipline children); MD. CODE ANN., FAMILY LAW § 4–522(a)(2) (parental authority to apply on behalf of minor to address confidentiality program); MD. CODE ANN., FAMILY LAW § 10-314 (authority to bring action on behalf of minor child for unpaid child support); MD. CODE ANN., NATURAL RESOURCES § 10–301(h) (consent to a child obtaining a hunting license)).

[106] *Compare Sharon*, 769 N.E.2d at 746-47 (a parental pre-injury liability waiver should be enforced because the "*law presumes that fit parents act in furtherance of the welfare and best interests of their children* . . . and with respect to matters relating to their care, custody, and upbringing have a fundamental right to make those decisions for them") (citation omitted and emphasis added); *Saccente*, 2003 WL 21716586, at *6 (citation omitted and emphasis added); *Rosen*, 80 A.3d at 362 (a parent's decision to

B. Analysis of Cases Hesitant to Enforce Parental Pre-Injury Liability Waivers

Several courts since *Hohe* have refused to enforce parental pre-injury liability waivers.[107] The bases for those rulings can summarily be described with two basic and related ideologies: (1) pre-injury waivers are no different that post-injury settlements; [108] and (2) a parent's relationship to her child is essentially identical to the relationship between a guardian and a ward, and, therefore, a parent has no greater rights than any other court-appointed legal guardian.[109]

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execute a pre-injury liability waiver on her child's behalf should not be invalidated because it was "made by a parent on behalf of her child in the course of the parenting role"), *with Hawk*, 855 S.W.2d at 579 ("without a substantial danger of harm to the child," a court may not constitutionally exercise the state's *parens patriae* interest by imposing its own subjective notions of the "best interests of the child"); *Wadkins*, 2012 WL 6571044, at *5 ("*a fit parent [acts] in [their] child's best interest*") (emphasis added).

107 *See, e.g.*, J.T. ex rel. Thode v. Monster Mountain, 754 F. Supp. 2d 1323 (M.D. Ala. 2010) (applying Alabama law); Hojnowski v. Vans Skate Park, 901 A.2d 381 (N.J. 2006); Scott v. Pacific West Mountain Resort, 834 P.2d 6 (Wash. 1992) (en banc); Meyer v. Naperville Manner, 634 N.E.2d 411 (2d Dist. 1994); Cooper v. Aspen Skiing Co., 48 P.3d 1229 (Colo. 2002); Kirton v. Fields, 997 So.2d 349 (Fla. 2008); Galloway v. State, 790 N.W.2d 252 (Iowa 2010); Hawkins v. Peart, 37 P.3d 1062 (Utah 2001). *See infra* Section V for a more complete analysis as to why these decisions do not fully consider important policy considerations.

108 *Meyer*, 634 N.E.2d at 414; *Cooper*, 48 P.3d at 1234; *Kirton*, 997 So.2d at 359 (Anstead, J., specially concurring); *Galloway*, 790 N.W.2d at 257; *Hawkins*, 37 P.3d at 1066.

109 *Monster Mountain*, 754 F. Supp. 2d at 1327–28 (applying Alabama law); *Hojnowski*, 901 A.2d at 387; *Scott*, 834 P.2d 6. In addition, a small minority of cases also have held that these waivers simply violate the general public policy as promulgated in *Tunkl*, but this analysis has been essentially encompassed by the other cases. *See, e.g.*, Wagenblast v. Odessa, 758 P.2d 968, 973 (Wash. 1988) (a

For example, two years after *Hohe*, in *Scott v. Pacific West Mountain Resort*, the Washington Supreme Court invalidated a parental pre-injury liability waiver signed by a mother on behalf of her minor son.[110] Ultimately, the *Scott* court held that such a pre-injury release was invalid because "a parent generally may not release a child's cause of action after injury, it makes little sense, if any sense, to conclude a parent has the authority to release a child's cause of action prior to an injury."[111] Moreover, in addressing the argument that invalidating such waivers could lead to prohibitive costs for those providing minors with opportunities to participate in inherently more risk-related activities, the *Scott* court recycled the traditional argument that pre-injury waivers simply conflict with the fundamentals of tort law—an argument which has been asserted against the freedom to shift liability for prospective negligence in the context of waivers more generally since their very inception.[112]

However, *Scott* was decided long before the landmark United States Supreme Court ruling in *Troxel*. Notably, *Troxel* was also a case originating in Washington and ultimately led to the United States Supreme Court clearly establishing a parent's broad right to raise her own children.[113] At least one post-*Troxel* Washington case has suggested that the principals espoused in *Troxel* could have affected the *Smith* ruling.[114] Indeed, like *Childress*, there is

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standardized form signed by a parent on behalf of a child releasing a school district from liability is a waiver that impairs the public interest as set forth in *Tunkl*).

110 *Scott*, 834 P.2d at 12.

111 *Id.* at 11–12.

112 *Id.* at 12; *see* King, *supra* note 13, at 710 (concern over general liability waivers has historically led to ambiguity and unpredictable application).

113 *Troxel*, 530 U.S. 57, 62–63.

114 *See* Chauvlier v. Booth Creek Ski Holdings, 35 P.3d 383, 388 n. 27 (Wash. Ct. App. 2001) (noting in *dicta* that "*Scott* . . . focused

certainly a question over whether *Scott* offers a complete analysis of whether a parent's rights in a post-*Troxel* world are superior to the state's *parens patriae* powers.

In *Cooper v. Aspen Skiing Company*, the Colorado Supreme Court refused to enforce a parental pre-injury liability waiver—a decision that prompted the Colorado Legislature to immediately respond with expressly superseding legislation, effectively overturning the ruling.[115] In *Cooper*, a father brought a negligence suit individually and on behalf of his minor son against a ski club in connection with a skiing accident that left the minor blinded and with other severe injuries.[116] The trial court granted summary judgment in favor of the defendants on the basis of the parental pre-injury liability waiver signed on the minor's behalf, and the Colorado Court of Appeals affirmed, relying heavily on *Troxel*—which was published only two months before the Colorado Court of Appeals' ruling in *Cooper*.[117]

The Colorado Supreme Court reversed, holding that Colorado's general public policy affords minors significant protections that ultimately preclude a parent's right to contract on behalf of her minor child.[118] In rejecting the

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solely on the issue of *parental power* to sign releases on behalf of their children" (emphasis added)).

115 *Cooper*, 48 P.3d at 1237 *superseded by statute*, COLO. REV. STAT. ANN. § 13–22–107. Indeed, within a year of the Colorado Supreme Court's holding in *Cooper*, the Colorado Legislature responded with legislation explicitly overturning the Colorado high court's holding. *See* COLO. REV. STAT. ANN. § 13–22–107. The Colorado legislation, which remains current today, allows parents to "release or waive the child's prospective claim for negligence" and ultimately declares that parents have a fundamental right to make decisions on behalf of their children, including deciding whether the children should participate in risky activities. *Id.*

116 *Cooper*, 48 P.3d at 1229.

117 *See* Cooper v. U.S. Ski Ass'n., 32 P.3d 502, 504–05 (Colo. App. 2000) *rev'd sub nom. Cooper*, 48 P.3d 1229.

118 *Cooper*, 48 P.3d at 1231.

argument that a parent's right to execute an enforceable parental pre-injury liability waiver is rooted in the parent's right to make other important decisions for her child, the Colorado Supreme Court essentially held that parental pre-injury liability waivers are different.[119] That is, the *Cooper* court held that the refusal to enforce a pre-injury liability waiver against a child signed by that child's parent does not implicate a parent's *traditional* fundamental interests, such as those respective of a child's education, religious upbringing, or with respect to the parent's right to play a "substantial role" in medical decisions for the child.[120] In other words, according to the Colorado Supreme Court, a parent's fundamental right to make other important decisions on behalf of her child does not necessarily include her decision to accept the risk of her child's participation in a worthwhile activity.[121]

The Florida Supreme Court issued a ruling similar to *Cooper* in *Kirton v. Fields* that received a nearly identical public response and that was overruled by statute in less than a year.[122] In *Kirton*, the estate of a deceased minor child brought an action against the operators of an ATV course after the minor child was killed while

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119 *Id.* at n. 11.

120 *Id.*; *see, e.g.*, *Meyer*, 262 U.S. at 400 (regarding education); *Wisconsin*, 406 U.S. at, 214 (regarding religion); *Parham*, 442 U.S. at 603.

121 *Cooper*, 48 P.3d at 1231.

122 *Kirton* 997 So.2d at 350, *superseded by statute*, FLA. STAT. § 744.301(3). Like *Cooper*, *Kirton* was not the law for very long. The Florida Legislature responded to *Kirton* within a year after its publication and passed FLA. STAT. § 744.301(3), which provides that parents can release commercial providers of activities for children from liability for injuries sustained due to "the inherent risks" of the activity. FLA. STAT. § 744.301(3). The statue provides a rebuttable presumption that a child's injury was caused by an "inherent risk," which may be rebutted by clear and convincing evidence. FLA. STAT. § (3)(c)(2).

operating an ATV.[123] In analyzing the parental pre-injury liability waiver signed on behalf of the minor, the Florida Supreme Court held that the state's *parens patriae* power prevails over a parent's fundamental right to raise his children in the context of a parental pre-injury liability waiver related to *commercial* activity.[124] The court held that, despite *Troxel* and in the court's view of Florida precedent, "[i]t cannot be presumed that a parent who decided to voluntarily risk a minor child's physical well-being is acting in the child's best interest."[125] Rather, in the *Kirton* court's view, "when a parent decides to execute a pre-injury release on behalf of a minor child, the parent is not protecting the welfare of the child, but is instead protecting the interests of the [commercial] activity provider."[126] The *Kirton* court essentially emphasized that commercial entities should be treated differently than non-commercial entities on the logic that the former "can take precautions to ensure the child's safety and insure itself when a minor child is injured while participating in the activity[.]"[127] Ostensibly, the *Kirton* court suggested that commercial entities need to be exposed to potential liability as an "incentive to take reasonable precautions to protect the safety of minor children."[128]

Finally, in the sharply divided case *Woodman v. Kera*, the Michigan Supreme Court held that a parental pre-injury liability waiver was against Michigan public policy

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123 *Kirton*, 997 So.2d at 351.

124 *Id.* at 358. With its emphasis on *commercial* activity, the *Kirton* court arguably implicitly suggested that a parental pre-injury liability waiver executed in the context of non-commercial activity might have otherwise been enforceable under Florida law.

125 *Id.* at 357.

126 *Id.*

127 *Id.* at 358.

128 *Id.*

and therefore unenforceable.[129] In *Woodman*, a child broke his leg when he jumped off a slide at an indoor play area.[130] Ultimately, the court held that under Michigan common law, a parent has no authority to bind his child by contract, just as a guardian cannot contractually bind a minor ward.[131] Moreover, in ostensibly rejecting *Troxel*, the *Woodman* court emphasized that the fundamental character of a parent's decision-making authority "does not alter this bedrock legal principle."[132] In doing so, the *Woodman* court expressly held that *a parent's relationship to his or her child is essentially no different than the parent's relationship to any other non-consenting third party, like his or her "neighbor or a coworker."*[133] Ultimately, the *Woodman* court recycled the commonly cited position with little substantive analysis that, because a parent cannot settle her child's claim post-injury without court approval,

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[129] *Woodman*, 785 N.W.2d at 2. However, as noted by Justice Markman in his concurring opinion, the majority's discussion as to the validity of parental pre-injury liability waivers in *Woodman* is arguably non-binding *dicta*. *Id.* at 19 (Markman, J., concurring). In that regard, the majority's holding that the minor was not bound by the liability waiver was first based upon the court's conclusion that the specific liability waiver at issue did not clearly indicate that the parent was waiving specifically the minor's claims. *Id.*

[130] *Id.* at 3.

[131] *Id.* at 5 (citing Reynolds v. Garber-Buick Co., 149 N.W. 985 (Mich. 1914); Lothrop v. Duffield, 96 N.W. 577 (Mich. 1903); Armitage v. Widoe, 36 Mich. 124 (1877)).

[132] *Id.* Notably, the court evaluated a Michigan statute, which provided a parent the authority to bind a minor child to an arbitration provision in medical care contexts. *Id.* at 8. The court recognized that under Michigan common law specifically, a parent is without the authority to bind her child to an arbitration provision. *Id.* This is in stark contrast to other case law, including law in Tennessee, which has held that minor children may be bound to forum selection clauses selecting arbitral forums. *See infra* Section V(A).

[133] *Woodman*, 785 N.W.2d at 8 (emphasis added).

she should not be allowed to waive her child's prospective tort claims.[134]

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[134] *Id.* Having concluded that Michigan's common law supported invalidating the pre-injury liability waiver, the court went on to conclude that it had no place to change the common law. *Id.* at 16.

Notably, there was a stark division among the justices in *Woodman*, which led to equally sharply divided opinions drafted by several justices. For example, four justices concluded that the basis of the court's ruling should be that the common law simply does not permit a parent to contract on behalf of her child. *Id.* at 2, 9, 15 (majority opinion); *id.* at 17 (Hathaway, J., concurring). In addition, ostensibly only three of those justices concluded that pre-injury liability waivers should be treated the same as post-injury settlement releases. *Id.* at 17 (Hathaway, J., concurring). However, three justices, although concurring that the underlying Court of Appeals opinion should be affirmed on other grounds, would hold that pre-injury waivers signed on behalf of minor children by their parents are not presumptively invalid. *Id.* at 18 (Cavanagh, J., concurring); *id.* at 18 (Markman, J., concurring); *id.* at 45 (Corrigan, J. concurring with Markman, J.).

Among the three justices submitting opinions stating that they would *not* hold a parental pre-injury waiver presumptively invalid was Justice Markman, who was joined by Justice Corrigan, who submitted a scathing concurring opinion outlining the erroneous reasoning of the majority holding. *Id.* at 18 (Markman, J., concurring). Indeed, Justice Markman's concurring opinion offers significant insight into the reasons why courts should enforce parental pre-injury liability waivers. *Id.* Ultimately, Justice Markman criticized the majority on a total of seven separate grounds, including: (1) that the rules regarding a minor's incapacity to contract are not inconsistent with a parent exercising her fundamental authority—which *Troxel* solidified—to act in ways which she deems are in the best interest of the child; (2) that logic of cases from other states which enforce parental pre-injury waivers are persuasive; (3) that other authority exists that supports a public policy in favor of enforcing parental pre-injury waivers; (4) that courts should not intrude in a private party's freedom to contract in this context; and (5) that the result will ultimately open the floodgates of litigation and cause dwindling recreational opportunities for minors by "summarily strik[ing] down tens of thousands of waivers . . . believed to be valid and enforceable by thousands of providers of recreational and sporting opportunities

V. Enforcing Parental Pre-Injury Liability Waivers Is Appropriate and Justified Under Current Tennessee Law and Public Policies.

Notwithstanding some courts' hesitancy to enforce parental pre-injury liability waivers, there are certainly valid justifications now supporting enforcement in Tennessee. At the very least, the *Childress* rule does not consider the limits that a parent's now-recognized fundamental decision-making authority places on the state's power to intervene therein. This is particularly true in light of other laws and public policies supporting enforcement, outlined below, which courts that have been hesitant to enforce parental pre-injury liability waivers respectfully fail to fully appreciate.

A. A Parent Can Choose the Forum in Which Her Minor Child's Claim is Litigated and Even Bind Her Child to Mandatory Arbitration.

A parent is certainly not unable to execute other types of enforceable contracts on her child's behalf. For example, courts have routinely permitted parents to prospectively waive a minor's right to file a lawsuit by executing a mandatory arbitration provision on behalf of her child. One of the first cases that analyzed a parent's authority to prospectively select a forum for her minor child's claims was another California case, *Doyle v. Guiliucci*, dealing with a minor's rights under an insurance contract. [135] The *Doyle* court enforced an arbitration provision in the insurance contract against the minor child, holding that it did not unreasonably restrict the child's

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and the parents of children who partake in such opportunities." *Id.* at 43.

135 *Doyle*, 401 P.2d at 1.

rights because it did "no more than specify a forum for the settlement of disputes."[136] Thus, because a parent has a "right and duty to provide for the care of his child," the parent must be allowed to contract on behalf of her minor child in the context of medical services.[137]

Since *Doyle*, other courts have routinely held that parents have the authority to bind their minor child to arbitration provisions in lawsuits involving general negligence and other tort liability.[138] That is because these courts have reasoned that an arbitration provision is really a forum selection provision and merely "specifies the forum for resolution of the child's claim."[139] Forum selection provisions are enforced against minors outside of arbitration provision contexts because courts uphold arbitration provisions on the basis that they are essentially choice of law provisions.[140] Indeed, "[l]ogically, if a parent

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136 *Id*. at 3.

137 *Id*.

138 *See, e.g.*, Global Travel Mktg. v. Shea, 908 So.2d 392 (Fla. 2005) (father's wrongful death action against a safari operator brought on behalf of his minor son after the minor was killed by hyenas while on a safari is subject to arbitration provision signed by the father); *Hojnowski*, 868 A.2d at 1092 (child's claim for bodily injuries he received at a skateboarding park is subject to an arbitration provision signed by the child's parents); Cross v. Carnes, 724 N.E.2d 828 (Ohio 1998) (child's defamation and fraud claims against the Sally Jessy Raphael Show are subject to an arbitration provision signed by the child's parents); *see also* Leong v. Kaiser Found. Hosps., 788 P.2d 164, 169 (Haw. 1990).

139 *Cross*, 724 N.E.2d at 836; *see also Shea*, 908 So.2d at 403392 (arbitration provision merely "constitutes a prospective choice of forum").

140 *Cross*, 724 N.E.2d at 836; *Shea*, 908 So.2d 392. In addition, although laws generally allow minors to disaffirm their own contracts, those laws are ultimately "not intended to affect contracts entered into by adults on behalf of their children." *Hohe*, 224 Cal. App. 3d at 1565 (citing *Doyle*, 401 P.2d 1). It is also not necessary to make a distinction between commercial versus non-commercial entities in the determination of whether a forum

has the authority to bring and conduct a lawsuit on behalf of the child, he or she has the same authority to choose arbitration as the litigation forum."[141] Importantly, it is immaterial that the selected forum is more preferable to one party over a minor child.[142] Rather, the real test is "whether the contracting parties intended that [a minor] should receive a benefit," thereby subjecting the minor to enforceable obligations.[143]

In *Doe v. Cedars Academy*, a Delaware Superior Court upheld a California forum selection and choice of law provision against a minor's personal injury claims.[144] There, a mother entered into a contract with a private boarding school to enroll her minor son as a student.[145] The mother executed the contract individually and on behalf of her minor son, which included a pre-injury liability waiver, a mandatory California forum selection provision, and a California choice of law provision.[146]

After the minor was allegedly sexually assaulted on campus, his mother sued the private school individually and on behalf of her minor son.[147] The court first held that both the mother and her minor son were generally bound by the contract because the son would not have been able to go

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selection provision executed by a parent is enforceable against her minor child. *Compare Cross*, 724 N.E.2d 828, *with Hojnowski*, 868 A.2d 1087 *and Shea*, 908 So.2d 392.

141 *Cross*, 724 N.E.2d at 836.

142 *Shea*, 908 So.2d at 403; *Cross*, 724 N.E.2d at 836 (citing *Zivich*, 696 N.E.2d 201).

143 *Hojnowski*, 868 A.2d at 1092 (citing Borough of Brooklawn v. Brooklawn Hous. Corp., 11 A.2d 83, 85 (N.J. 1940)).

144 Doe v. Cedars Acad., No. 09C–09–136 JRS, 2010 WL 5825343 (Del. Super. Ct. Oct. 27, 2010).

145 *Id.* at *1.

146 *Id.* at *1–2. The contract also contained an arbitration provision, *id.* at *2, but it was ultimately a non-issue as the court dismissed the case in favor of either California courts or an arbitral forum in the state of California. *Id.* at *7.

147 *Id.* at *2.

to that specific school without his mother contracting for such services.[148] The court held that to conclude that the contract did not apply to the minor would be inconsistent with fundamental parental rights and would be practically unworkable:

> [Not enforcing the contract against the minor would be] tantamount to concluding that a parent can never contract with a private school (or any other service provider) on behalf and for the benefit of her child. *As a practical matter, no service provider would ever agree to a contract with a parent if a child could ignore the provisions of the contract that pertain to him without recourse. Such a result is inconsistent with the law's concept of the family which "rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."*[149]

Because the choice of law and forum selection provisions did not "seriously impair" the plaintiff or the minor son's ability to pursue the cause of action, the court enforced the forum selection and choice of law provisions and dismissed the entire case in favor of California jurisdiction.[150]

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148 *Id*. at *4.

149 *Id.* (emphasis added and footnote omitted) (quoting *Parham*, 442 U.S. at 602).

150 *Id.* at *7 ("Mere inconvenience or additional expense is not sufficient evidence of unreasonableness."); *see also* Sevier Cnty. Bank v. Paymentech Merch. Servs., No. E2005–02420–COA–R3–CV, 2006 WL 2423547, at *6 (Tenn. Ct. App. Aug. 23, 2006) ("A party resisting a forum selection clause *must show more than* inconvenience or annoyance such as *increased litigation*

Recently, in *Williams v. Smith*, the Tennessee Court of Appeals ostensibly arrived at a nearly identical result as those reached in the foregoing authorities and held that a parent may bind her child to a choice of law contract.[151] In *Williams*, the plaintiffs—a minor child and her parents—were involved in a car accident in Tennessee while driving from North Carolina to Missouri in a vehicle owned by North Carolina residents.[152] The vehicle was insured by a Missouri insurance policy and provided coverage of $25,000.00 per person and $50,000.00 per accident.[153] In addition, the relevant policy included a Missouri choice of law provision and provided $50,000.00 per person and $100,000.00 per accident in uninsured motorist coverage.[154] The policy did not provide underinsured motorist coverage, however, and such coverage was not required under Missouri law.[155] Conversely, North Carolina law required a minimum automobile insurance liability limits of $30,000.00 per person and $60,000.00 per accident.[156] Further, under North Carolina law, a driver carrying less than the minimum limits is considered an

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expenses.") (emphasis in original). The court's ruling applied regardless of whether California law could ostensibly be more favorable to Cedars Academy. *See Hohe*, 224 Cal. App. 3d at 1559. The court also emphasized that the forum selection clause was valid and enforceable because the clause was not ambiguous and because the parties "intended to consent to the exclusive jurisdiction of California courts or arbitration panels to litigate their claims." *Cedars Acad.*, 2010 WL 5825343, at *7. The court did not rule on the validity of the liability waiver because the dispositive issue to dismissal was the choice of law and forum selection provisions.

151 Williams v. Smith, 465 S.W.3d 150, 157 (Tenn. Ct. App. 2014).

152 *Id.* at 151–52.

153 *Id.* at 152.

154 *Id.*

155 *Id.*

156 *Id.* (citing N.C. GEN. STAT. ANN. § 20–279.21(b)(2)).

"uninsured motorist."[157] Accordingly, if the insurance policy's choice of law provision were not enforced, North Carolina law would apply, and the plaintiffs' would be permitted to assert a claim for underinsured motorist coverage.[158]

The trial court held that the Missouri choice of law provision was enforceable against the plaintiffs, including the minor, and dismissed the claim for underinsured motorist coverage on the basis of the choice of law provision.[159] The Tennessee Court of Appeals affirmed the trial court, ostensibly sanctioning the notion that a minor may be bound as a non-signatory to a choice of law and/or forum selection provision.[160] Indeed, if the minor in that case was not so bound, the applicable coverage would have been determined under North Carolina law, or arguably through a conflicts of law analysis based on Tennessee common law.[161]

Accordingly, enforcing a contract executed by a parent on her minor child's behalf is certainly not as taboo as one might think. At the very least, such enforcement reflects the well-settled rule that he may be the third-party beneficiary of a contract to which he is a non-signatory.[162]

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157 *Id.* (citing N.C. GEN. STAT. ANN. § 20–279.21(b)(3)).

158 *Id.*

159 *Id*. If Missouri law controlled, there was no underinsured motorist coverage; while if North Carolina law controlled, there was such coverage. *Id*.

160 *See id.*

161 *See generally id*. at 153.

162 *See, e.g.*, Benton v. Vanderbilt Univ., 137 S.W.3d 614, 615–16 (Tenn. 2004); *In re* Justin A.H., No. M2013–00292–COA–R3CV, 2014 WL 3058439, at *9 (Tenn. Ct. App. June 7, 2014); Lopez v. Taylor, 195 S.W.3d 627, 635 (Tenn. Ct. App. 2005); Butler v. Eureka Sec. Fire & Marine Ins. Co., 105 S.W.2d 523, 524 (Tenn. Ct. App. 1937).

B. Enforcing Parental Pre-Injury Liability Waivers Comports With Existing Tennessee Law and Public Policies.

Like several of the cases outlined in Section IV(B), *supra*, the general rule espoused in *Childress* was based upon the following two principles: (1) the rule that a guardian cannot settle a minor's existing tort claim apart from court approval or statutory authority; and (2) the rule that minors cannot waive anything themselves, so their parents cannot waive anything for them.[163] However, a parent's constitutional right to make the "important family decision" to execute a pre-injury liability waiver on her child's behalf is congruent with other Tennessee laws and public policies. In other words, there is no reason to extend the policy behind those two well-settled rules to invalidate a parent's constitutional decision-making authority, because those principles are not mutually exclusive.

1. No Conflict With a Parent's Inability to Settle Her Minor Child's Existing Tort Claims

As *Childress* recognized, Tennessee has long-required court approval for minor settlements.[164] Significantly, the policy for disallowing parents from settling their children's existing tort claims is rooted in the concern that the parent might place her own financial motivations over her child's interests.[165] However, laws permitting state intrusion into a parent's decision to settle her minor's existing tort claim fit precisely within the framework promulgated by *Hawk* and *Troxel*. In other

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163 *Childress*, 777 S.W.2d at 6–7.

164 *See generally* TENN. CODE ANN. § 29–34–105 (2012); Busby v. Massey, 686 S.W.2d 60, 63 (Tenn. 1984); Wade v. Baybarz, 660 S.W.2d 493, 494 (Tenn. Ct. App. 1983).

165 *Id.*

words, enforcing parental pre-injury liability waivers pursuant to *Hawk* and *Troxel* would not disrupt the well-settled rule against the settlement of a minor's existing tort claims apart from court approval.

This is because a parent's decision to settle her child's existing tort claim involves myriad interests that conflict with those of her child—*most significantly, a financial interest*—which naturally rebuts the presumption that she acts in her child's best interests.[166] Stated simply, *Hawk* and *Troxel* certainly permit judicial oversight of a minor settlement based on the obvious conflict of interest created by a parent's potential financial motivations to settle her child's lawsuit, which rebuts the presumption that her decision to settle a claim serves her child's best interests.[167]

When a parent signs a pre-injury liability waiver on her child's behalf, however, her interests do not conflict with her child's—in actuality, they fall squarely in line with her child's interests. Therefore, the constitutional presumption that she acts in her child's best interest remains. As the court in *Zivich* reflected:

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[166] *Zivich*, 696 N.E.2d at 206 ("A parent dealing with an existing claim is simultaneously coping with an injured child; such a situation creates a potential for parental action contrary to that child's ultimate best interests.") (quoting Angeline Purdy, *Scott v. Pacific West Mountain Resort: Erroneously Invalidating Parental Releases of A Minor's Future Claim*, 68 WASH. L. REV. 457, 474 (1993)).

[167] Even Tennessee's minor settlement statute reflects the specific concern that a parent has a financial motivation to settle her minor child's existing claims by requiring more thorough judicial oversight for larger settlements. *See* TENN. CODE ANN. § 29–34–105 (2012) (a minor settlement that is less than $10,000.00 can be approved by a court without a hearing and relying solely on affidavits from legal guardians, while settlements over $10,000.00 require a greater judicial oversight and a hearing before the court).

"The concerns underlying the judiciary's reluctance to allow parents to dispose of a child's existing claim do not arise in the situation where a parent waives a child's future claim.

* * *

A parent who signs a release before her child participates in a recreational activity . . . faces an entirely different situation. First, such a parent has no financial motivation to sign the release. To the contrary, because a parent must pay for medical care, she risks her financial interests by signing away the right to recover damages. Thus, the parent would better serve her financial interests by refusing to sign the release.

A parent who dishonestly or maliciously signs a preinjury release in deliberate derogation of his child's best interests also seems unlikely. Presumably parents sign future releases to enable their children to participate in activities that the parents and children believe will be fun or educational. Common sense suggests that while a parent might misjudge or act carelessly in signing a release, he would have no reason to sign with malice aforethought.

Moreover, parents are less vulnerable to coercion and fraud in a preinjury setting. A parent who contemplates signing a release as a prerequisite to her child's participation in some activity faces none of the emotional

> trauma and financial pressures that may arise with an existing claim. That parent has time to examine the release, consider its terms, and explore possible alternatives. A parent signing a future release is thus more able to reasonably assess the possible consequences of waiving the right to sue."[168]

Accordingly, laws prohibiting a parent from settling her minor child's existing tort claim without court approval do not necessarily conflict with her constitutionally protected right to make the decision to execute a pre-injury liability waiver on her child's behalf, as *Childress* and other courts that are hesitant to enforce parental pre-injury liability waivers suggest.

2. No Conflict With a Minor's Right to Avoid or Disaffirm Contracts

Similarly, enforcing a parental pre-injury liability waiver does not necessarily conflict with the Tennessee law allowing minors to avoid and/or disaffirm contracts, as *Childress* suggests.[169] To be clear, the minor's right in that context is "based upon the underlying purpose of the 'infancy doctrine' which is to protect minors from their lack of judgment[.]"[170] Certainly, the state has an interest in protecting minors "from squandering their wealth through improvident contracts with crafty adults who would take advantage of them in the marketplace."[171]

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168 *Zivich*, 696 N.E.2d at 206 (quoting Purdy, *supra* note 166, at 474).

169 *Childress*, 777 S.W.2d at 6–7; *see, e.g.*, Dodson v. Shrader, 824 S.W.2d 545, 547 (Tenn. 1992) (quoting Human v. Hartsell, 148 S.W.2d 634, 636 (Tenn. Ct. App. 1940)).

170 *Dodson*, 824 S.W.2d at 547 (citing Halbman v. Lemke, 298 N.W.2d 562, 564 (Wis. 1980)).

171 *Id.*

Parenting decisions are fundamentally different, however, because "the law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."[172] Indeed, disallowing a parent to exercise her fundamental right to make a decision to execute an enforceable contract on her child's behalf could be as harmful to her child as it would be practically unworkable.[173]

The California Court of Appeals rejected the contention that the policy behind a minor's right to disaffirm contracts conflicts with enforcing parental pre-injury liability waivers, as early as the *Hohe* case: "[a] parent may contract on behalf of his or her children" and the laws allowing minors to disaffirm their own contracts were "not intended to affect contracts entered into by adults on behalf of their children."[174] During the nearly thirty years since *Childress*, courts have routinely recognized that the public policy permitting minors to avoid and/or disaffirm their contracts is congruent with allowing a parent to exercise her parental authority to execute a pre-injury liability waiver on behalf of her minor child:

> [A minor's right to avoid a contract is founded on a policy] to afford protection to minors from their own improvidence and want of sound judgment [and such a purpose] comports with common sense and experience and is not defeated by permitting parents to exercise their own providence and

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172 *Parham*, 442 U.S. at 602.

173 *Cedars Acad.*, 2010 WL 5825343, at *4 ("As a practical matter, no service provider would ever agree to a contract with a parent if a child could ignore the provisions of the contract that pertain to him without recourse.").

174 *Hohe*, 224 Cal. App. 3d at 1565 (citing *Doyle*, 62 Cal.2d. at 609).

> sound judgment on behalf of their minor children.[175]

Further, Tennessee law already reflects its trust in parenting decisions by granting a parent the authority to make significant, potentially life-altering decisions on behalf her minor child in a number of instances. For example, statutory law provides a parent the authority to refuse medical treatment for her minor child,[176] to consent to an abortion procedure,[177] or to submit her minor child to involuntary mental health or socioemotional screening.[178] Additionally, statutory law allows a parent to submit her minor child to convulsive therapy,[179] to provide consent for her minor child to be legally married,[180] to release her minor child's protected health information,[181] to release her minor child's confidential education records,[182] or to allow, or prohibit, a physician to report a pregnancy believed to be

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175 *Sharon*, 769 N.E.2d at 746 (upholding parental pre-injury liability waiver) (citing *Parham*, 442 U.S. at 602; Frye v. Yasi, 101 N.E.2d 128 (Mass. 1951)); *see also* Elisa Lintemuth, *Parental Rights v. Parens Patriae: Determining the Correct Limitations on the Validity of Pre-Injury Waivers Effectuated by Parents on Behalf of Minor Children*, 2010 MICH. ST. L. REV. 169, 197 (2010) ("Parents have the fundamental right to make decisions for their child and do so every day . . . . There is a presumption that in doing so, parents act in their child's best interest . . . . '[And when executing a liability waiver on behalf of their child], in the circumstance of a voluntary, nonessential activity, [courts] will not disturb this parental judgment.'") (citing *Parham*, 422 U.S. at 602) (quoting *Sharon*, 769 N.E.2d at 747).

176 TENN. CODE ANN. § 34–6–307 (2003).

177 TENN. CODE ANN. § 37–10–303 (2006).

178 TENN. CODE ANN. § 49–2–124 (2016).

179 TENN. CODE ANN. § 33–8–303 (2000).

180 TENN. CODE ANN. § 36–3–106 (2012).

181 TENN. CODE ANN. § 68–1–118 (2001).

182 TENN. CODE ANN. § 49–7–1103 (2005).

the result of statutory rape.[183] Moreover, these rights extend to the often varied situations that a parent may face, such as the right to allow her minor child to donate blood,[184] to have physicians furnish information regarding contraceptive supplies to her minor child,[185] to allow her minor child to be employed,[186] to solicit her minor child's name, photograph, or likeness,[187] to allow her minor child to get a body piercing,[188] to allow her minor child to use a tanning device,[189] or the authority to expose her minor child to clothing-optional beaches.[190] Certainly, the trust that Tennessee law extends to parenting decisions has been long-recognized as contradictory to the invalidation of parental pre-injury liability waivers, or as Professor King observed:

> *[J]udicial attitudes toward [invalidating] exculpatory agreements signed by parents on behalf of their minor children seem inconsistent with the powers conferred on parents respecting other important life choices.*[191]

Indeed, if the law respects a parent's authority to make other significant decisions on behalf of her child in numerous contexts, there is not necessarily any reason to

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183 TENN. CODE ANN. § 38–1–302 (1996); *see also* State v. Goodman, 90 S.W.3d 557, 559 (Tenn. 2002) (holding that a minor child may be removed and/or confined against her will, absent force, threat, or fraud, and such removal/confinement would not constitute kidnapping given parental consent).

184 TENN. CODE ANN. § 68–32–101 (2008).

185 TENN. CODE ANN. § 68–34–107 (1971).

186 TENN. CODE ANN. § 50–5–105 (1999).

187 TENN. CODE ANN. § 47–25–1105 (2005).

188 TENN. CODE ANN. § 62–38–305 (2001).

189 TENN. CODE ANN. § 68–117–104 (2002).

190 TENN. CODE ANN. § 36–6–304 (1996).

191 King, *supra* note 13, at 716; *see also Rosen*, 80 A.3d at 346.

believe that public policy demands invalidating her decision to prospectively waive her child's right to sue so that the child can participate in a worthwhile activity. This is particularly true in light of a parent's newly-recognized fundamental right to make precisely those types of decisions.

Accordingly, laws allowing a minor to avoid or disaffirm a contract certainly do not necessarily conflict with a parent's constitutionally protected right to make the decision to execute a pre-injury liability waiver on her child's behalf.

3. Enforcing Parental Pre-Injury Liability Waivers Furthers Other Important Public Policies.

Finally, enforcing a parental pre-injury liability waiver promotes other important Tennessee public policies. For instance, enforcing a pre-injury liability waiver executed by a parent on behalf of her minor child encourages the availability of affordable recreational activities. The California Court of Appeals emphasized this benefit:

> Hohe volunteered to be part of a [school] activity because it would be "fun." There was no essential service or good being withheld by [the school]. Hohe, like thousands of children participating in recreational activities sponsored by groups of volunteers and parents, was asked to give up her right to sue. *The public as a whole receives the benefit of such waivers so that groups such as Boy and Girl Scouts, Little League, and parent-teacher associations are able to continue without the risks and sometimes overwhelming costs of litigation.*

> *Thousands of children benefit from the availability of recreational and sports activities. Those options are steadily decreasing*—victims of decreasing financial and tax support for other than the bare essentials of an education. Every learning experience involves risk. In this instance Hohe agreed to shoulder the risk. No public policy forbids the shifting of that burden.[192]

Moreover, although parental pre-injury liability waivers have been enforced in cases involving non-commercial settings, even those cases emphasize the primary importance of promoting opportunities for children to "learn valuable life skills . . . to work as a team and how to operate within an organizational structure . . . and to exercise and develop coordination skills."[193] Accordingly, the public policy behind enforcing parental pre-injury liability waivers is nevertheless furthered when commercial activity is involved.[194]

Therefore, a commercial versus non-commercial distinction is not necessarily appropriate when determining the enforceability of a parental pre-injury liability waiver. Indeed, courts have expressly analyzed and rejected the commercial versus non-commercial distinction, emphasizing that such a distinction has no basis in common law:

> Whether a child's judgment renders him less capable of looking out for his own welfare heeds true whether or not he or she is

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192 *Hohe*, 224 Cal. App. 3d at 1564.

193 *Zivich*, 696 N.E.2d at 205.

194 *See, e.g.*, *Saccente*, 2003 WL 21716586, at *5 (Conn. Super. Ct. July 11, 2003) (enforcing a parental pre-injury liability waiver in a case involving a contract for a child's horseback riding lessons).

> playing on a school playground or in a commercial setting. As we have explained, parents are charged with protecting the welfare of their children, and we will defer to a parent's determination that the potential risks of an activity are outweighed by the perceived benefit to the child when she executes an exculpation agreement.[195]

Stated simply, applying a commercial versus non-commercial distinction leads to the flawed and paradoxical conclusion that the law should allow parents to exculpate only non-profit and state entities because such entities either cannot "take precautions to ensure the child's safety and insure [themselves]" from risks of loss, or they simply do not need any incentive to take reasonable precautions as commercial entities purportedly do.[196] Indeed, such logic clearly conflicts with the entire purpose of the *parens patriae* principle itself: that the state has the ultimate responsibility—and the *ability*—to act as provider of protection to those unable to care for themselves.

Moreover, a rejection of the commercial versus non-commercial distinction is supported by scholarly publications analyzing this precise issue:

> [A court which invalidated a parental pre-injury liability waiver] reached a flawed decision which threatens children's organized recreational activities. Such

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195 *Rosen*, 80 A.3d at 360 (enforcing a parental pre-injury liability waiver in a case involving a contract between a mother and a retailer); *see also Lehmann*, 76 S.W.3d at 55 (enforcing a parental pre-injury liability waiver in a case involving a commercial entity); *Osborn*, 655 N.W.2d at 546 (enforcing a parental pre-injury liability waiver in a case involving a contract between a mother and a ski resort).

196 *See, e.g.*, *Rosen*, 80 A.3d at 358.

> activities already suffer from severe pressures. Increased costs and the fear of litigation threaten to drive recreation activities for children out of the market. Given the virtues of and need for children's recreational programs, courts should do what they can to encourage such programs. *Because recreation providers will take care of their customers in order to assure their continued patronage, validating releases that protect a recreation provider would help to keep children's recreational programs available and affordable without diminishing the safety of such programs.*[197]

In addition to an outright rejection of the commercial versus non-commercial distinction, other courts have emphasized that such a distinction would necessarily render an unclear application of the law:

> For example, is a Boy Scout or Girl Scout, YMCA, or church camp a commercial establishment or a community-based activity? Is a band trip to participate in the Macy's Thanksgiving Day parade a school or commercial activity? What definition of commercial is to be applied?

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[197] Purdy, *supra* note 166, at 475–76 (emphasis added). *See generally*, Robert S. Nelson, *The Theory of the Waiver Scale: An Argument Why Parents Should be Able to Waive their Children's Tort Liability Claims*, 36 U.S.F. L. REV. 535 (2002); Cotten, *et al*., *supra* note, 82; Allison M. Foley, *We, the Parents and Participant, Promise not to Sue . . . Until There is an Accident. The Ability of High School Students and their Parents to Waive Liability for Participation in School-Sponsored Athletics*, 37 SUFFOLK U. L. REV. 439 (2004).

> The importance of this issue cannot be overstated because it affects so many youth activities and involves so much monetary exposure. Bands, cheerleading squads, sports teams, church choirs, and other groups that often charge for their activities and performances will not know whether they are a commercial activity because of the fees and ticket sales. How can these groups carry on their activities that are so needed by youth if the groups face exposure to large damage claims either by paying defense costs or damages? Insuring against such claims is not a realistic answer for many activity providers because insurance costs deplete already very scarce resources.[198]

Certainly, the ultimate issue is a threat of litigation that often "strongly deters" the availability of recreational activities for children in *any setting*.[199] Public policy has a strong preference for protecting opportunities to provide children "*affordable* recreation."[200] Therefore, the problem is not whether to allow parental pre-injury liability waivers in a non-commercial versus a commercial setting. Rather, enforcement of parental pre-injury liability waivers is important to diminish the risk of overwhelming costs of litigation that constrains opportunities for children:

> [W]here parents are no longer able to sign preinjury waivers allowing their minor

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198 *Rosen*, 80 A.3d at 360 (citing *Kirton*, 997 So. 2d at 363 (Wells, J., dissenting)).

199 *Id.*; *cf. Zivich*, 696 N.E.2d at 206.

200 *Zivich*, 696 N.E.2d at 205 (emphasis added).

> children to participate in commercial activities, businesses across [that] state have become weary of exposure to total liability. Even businesses whose customer base is comprised mostly of adults have wheezed at the potential legal implications affecting their patrons. These companies also cater to the children accompanying their parents . . . . [Rulings that invalidate parental pre-injury liability waivers] have several long-lasting impacts on the manner in which corporations, both in and out of the state, anticipate risks that were previously immunized by exculpatory agreements. First, corporate risk management offices must undertake a careful analysis of the consequences exposed by the invalidation of parental waivers. Second, corporations will likely need to carry additional insurance to cover lawsuits by minors, which are now unleashed by the blanket of voidance of certain preinjury waivers. This will lead to the eventual rise in prices charged to customers, as businesses receive the bills from the insurance contracts. In the end, the consumer will face a higher cost to engage in certain activities as a result of the delicate balance between the state's role as *parens patriae* and the parent's right to assess the perils awaiting her child.[201]

[201] Jordan A. Dresnick, *The Minefield of Liability for Minors: Running Afoul of Corporate Risk Management in Florida*, 64 U. MIAMI L. REV. 1031 (2010); *see also Fischer*, 2002 WL 31126288, *14 (enforcing a liability waiver signed by a parent against his child in conjunction with his participation in a hockey league because a contrary holding would deprive "thousands of children . . . of the valuable opportunity to play organized sports").

Accordingly, enforcing parental pre-injury liability waivers against minors is not only required by the constitutional authority developed since *Childress*, but also promotes Tennessee public policy.

VI. Conclusion

Certainly, the law has changed since *Childress*, as recognized by other jurisdictions. At the very least, *Childress* fails to fully appreciate a parent's newly-recognized constitutional authority. However, there is certainly good reason to believe that the *Childress* rule now entirely misses the mark. In that regard, a parent's decision to execute parental pre-injury liability waiver is now more accurately considered as constitutionally protected, fundamental in character, and superior to Tennessee's *parens patriae* interests. A parental pre-injury liability waiver should therefore be enforced under the same standards that any other liability waiver that is enforced in Tennessee. [202] Undoubtedly, such parental pre-injury liability waivers allow businesses the ability to provide children with affordable and worthwhile activities in an increasingly litigious society. Tennessee courts should therefore extend a parent the recognition that she makes the decision to execute a parental pre-injury liability waiver with her child's interests in mind.

In short, parents and children would simply be better off if courts recognized a parent's right to remove her child from the "bubble wrap."

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[202] *See Olson*, 558 S.W.2d at 431.

TABLE I: STATE-BY-STATE SURVEY

State	Enforcement	Relevant Case(s) and/or Statute(s)
Ala.	Unlikely	Thode v. Monster Mountain, 754 F. Supp. 2d 1323, 1328 (M.D. Ala. 2010) ("Based on all of the above considerations, the court concludes that, under Alabama law, a parent may not bind a child to a pre-injury liability waiver in favor of a for-profit activity sponsor by signing the liability waiver on the child's behalf. Accordingly, the Release Thompson signed on J.T.'s behalf, based on authority given by J.T.'s parents, does not bar J.T. from asserting a negligence claim against the Monster Mountain Defendants.")
Alaska	Yes	ALASKA STAT. § 09.65.292 ("Except as provided in (b) of this section, a parent may, on behalf of the parent's child, release or waive the child's prospective claim for negligence against the provider of a sports or recreational activity in which the child participates to the extent that the activities to which the waiver applies are clearly and conspicuously set out in the written waiver and to the extent the waiver is otherwise valid. The release or waiver must be in writing and shall be signed by the child's parent.")

Ariz.	Yes (Equine Facilities)	Ariz. Rev. Stat. § 12–533(A)(2) ("An equine owner or an agent of an equine owner who regardless of consideration allows another person to take control of an equine is not liable for an injury to or the death of the person if . . . [t]he person or the parent or legal guardian of the person if the person is under eighteen years of age has signed a release before taking control of the equine.")
Ark.	Unlikely	Williams v. United States, 660 F. Supp. 699, 703 (E.D. Ark. 1987) ("A custodian of a child who advises [the child's] parent of potentially hazardous activity in which his child may participate and receive injury through no fault of anyone does not by doing so effectively disclaim legal responsibility for injuries to the child that the custodian causes . . . . It is inconsistent for the Government to promise 'supervised' activities and then disclaim liability when a child dies because he was lost to observation for an unreasonable period of time by those charged with responsibility of supervision . . . . To permit the Government to assume the care and custody of school children without an underlying policy encouraging the exercise of reasonable care would violate basic principles of fairness.")
Cal.	Yes	Hohe v. San Diego Unified Sch. Dist., 224 Cal.App.3d 1559, 1564 (Cal. Ct. App. 1990) ("The public as a whole receives the benefit of such waivers so that groups such as Boy and Girl Scouts, Little League, and parent-teacher associations are able to continue without the risks and sometimes overwhelming costs of litigation. Thousands of children benefit from the availability of

		recreational and sports activities. Those options are steadily decreasing—victims of decreasing financial and tax support for other than the bare essentials of an education. Every learning experience involves risk. In this instance Hohe agreed to shoulder the risk. No public policy forbids the shifting of that burden.")
		Aaris v. Las Virgenes Unified Sch. Dist., 75 Cal. Rptr. 2d 801, 805 (Cal. Ct. App. 1998) ("It is well established that a parent may execute a release on behalf of his or her child.")
		Eriksson v. Nunnink, 183 Cal. Rptr. 3d 234 (Cal. Ct. App. 2015) (parental pre-injury liability waiver enforced against minor's wrongful death claim).
Colo.	Yes	COLO. REV. STAT. ANN. § 13–22–107 (2003) ("The general assembly further declares that the Colorado supreme court's holding in [Cooper v. Aspen Skiing Co.], 48 P.3d 1229 (Colo. 2002), has not been adopted by the general assembly and does not reflect the intent of the general assembly or the public policy of this state . . . . A parent of a child may, on behalf of the child, release or waive the child's prospective claim for negligence.")
Conn.	Yes	Fischer v. Rivest, 33 Conn. L. Rptr. 119 (Conn. Super. Ct. Aug. 15, 2002) ("The injuries sustained by Gabriel Fischer were tragic. However, if courts did not enforce this type of exculpatory contract, organizations such as USA Hockey, little league and youth soccer, and the individuals who volunteer their time as coaches could well decide that the risks of large legal fees and potential

		judgments are too significant to justify their existence or participation. Thousands of children would then be deprived of the valuable opportunity to play organized sports.")
		Saccente v. LaFlamme, 35 Conn. L. Rptr. 174 (Conn. Super. Ct. July 11, 2003) ("The decision here by her father to let the minor plaintiff waive her claims against the defendants in exchange for horseback riding lessons at their farm is consistent with the rights and responsibilities regarding a child possessed by a parent and recognized by the legislature and cannot be said to be against public policy. The plaintiff's father made a conscious decision on the behalf of his child to go to the defendants' farm for the purpose of obtaining horseback riding lessons for her. This was obviously an independent voluntary decision made upon what he viewed as her best interests.")
Del.	Possibly	Doe v. Cedars Acad., No. 09C–09–136 JRS, 2010 WL 5825343, at *4 (Del. Super. Ct. Oct. 27, 2010) (enforcing a California forum selection provision contained in a parental pre-injury liability waiver because "[t]o conclude that John Doe is not bound by the Agreement's otherwise enforceable terms, as Plaintiffs contend, simply because he is a minor would be tantamount to concluding that a parent can never contract with a private school (or any other service provider) on behalf and for the benefit of her child. As a practical matter, no service provider would ever agree to a contract with a parent if a child could ignore the provisions of the contract that pertain to him without recourse. Such a result is

		inconsistent with the law's concept of the family which 'rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions.'" However, the court declined to address the enforceability of the liability waiver itself: "This Court need not weigh in on behalf of Delaware, however, because even if the pre-injury release is invalid, the presence of the provision would not render the entire Agreement unenforceable.") (footnotes omitted).
Fla.	Yes	FLA. STAT. ANN. § 744.301(3) ("In addition to the authority granted in subsection (2), natural guardians are authorized, on behalf of any of their minor children, to waive and release, in advance, any claim or cause of action against a commercial activity provider, or its owners, affiliates, employees, or agents, which would accrue to a minor child for personal injury, including death, and property damage resulting from an inherent risk in the activity.") *But see* Claire's Boutiques v. Locastro, 85 So.3d 1192, 1200 (Fla. Dist. Ct. App. 2012) ("After [Kirton v. Fields, 997 So.2d 349 (Fla. 2008)], however, the legislature passed a statute to limit its holding by permitting parents to release a commercial activity provider for a child's injuries occurring as a result of the inherent risk of the activity under certain circumstances . . . . Those circumstances do not include releasing the commercial activity provider from liability for its own negligence . . . . [T]he legislature did not intend to permit commercial activity providers to avoid the consequences of their own

		negligence when children are injured, recognizing the essential holding of *Kirton*.") (footnotes and internal citations omitted).
Ga.	Possibly	*See* DeKalb Cty. Sch. Sys. v. White, 260 S.E.2d 853 (Ga. 1979) (enforcing an athletic eligibility release executed by a parent against the parent's minor child).
Haw.	Yes	HAW. REV. STAT. ANN. § 663–10.95(a) ("Any waiver and release, waiver of liability, or indemnity agreement in favor of an owner, lessor, lessee, operator, or promoter of a motorsports facility, which releases or waives any claim by a participant or anyone claiming on behalf of the participant which is signed by the participant in any motorsports or sports event involving motorsports in the State, shall be valid and enforceable against any negligence claim for personal injury of the participant or anyone claiming on behalf of and for the participant against the motorsports facility, or the owner, operator, or promoter of a motorsports facility. The waiver and release shall be valid notwithstanding any claim that the participant did not read, understand, or comprehend the waiver and release, waiver of liability, or indemnity agreement if the waiver or release is signed by both the participant and a witness. A waiver and release, waiver of liability, or indemnity agreement executed pursuant to this section shall not be enforceable against the rights of any minor, unless executed in writing by a parent or legal guardian.") Leong v. Kaiser Found. Hosps., 788 P.2d 164 (Haw. 1990) (enforcing against a minor an arbitration provision

		contained in a contract executed by the minor's parents).
Idaho	Possibly	Davis v. Sun Valley Ski Educ. Found., 941 P.2d 1301 (Id. 1997) (invalidating a parental pre-injury liability waiver because it was not drafted properly). Accoamzzo v. CEDU Educ. Servs., 15 P3d 1153 (Id. 2000) (discussing the enforceability of an arbitration provision).
Ill.	No	Meyer v. Naperville Manner, 634 N.E.2d 411, 414 (Ill. Ct. App. 1994) ("Since a parent generally may not release a minor child's cause of action after an injury, there is no compelling reason to conclude that a parent has the authority to release a child's cause of action prior to the injury.") Wreglesworth ex rel. Wreglesworth v. Arctco, 738 N.E.2d 964, 969 (Ill. App. Ct. 2000) ("Accordingly, we hold that any settlement of a minor's claim is unenforceable unless and until there has been approval by the probate court. Thus under Illinois law, the August 16, 1997, release is unenforceable by the Arctco defendants with regard to Nicholas' claims.")
Ind.	Possibly	Bellew v. Byers, 396 N.E.2d 335, 337 (Ind. 1979) (Claims brought by children were barred where their parent signed a settlement release stating that the parent "[did] hereby release and forever discharge [one alleged joint tortfeasor and wife] . . . from any and all claims, demands, damages, actions, or causes of action of every kind or character arising out of an automobile accident.")

		IND. CODE ANN. § 34–28–3–2 (allowing an emancipated minor to execute valid minor liability waiver). Huffman v. Monroe Cty. Cmty. Sch. Corp., 564 N.E.2d 961, 964 (Ind. Ct. App. 1991), rev'd on other grounds, 588 N.E.2d 1264 (Ind. 1992).
Iowa	No	Galloway v. State, 790 N.W.2d 252, 258 (Iowa 2010) ("We conclude for all of these reasons that the public policy protecting children from improvident actions of parents in other contexts precludes the enforcement of preinjury releases executed by parents for their minor children. Like a clear majority of other courts deciding such releases are unenforceable, we believe the strong policy in favor of protecting children must trump any competing interest of parents and tortfeasors in their freedom to contractually nullify a minor child's personal injury claim before an injury occurs.")
Kan.	Possibly	Betz v. Farm Bureau Mut. Ins. Agency of Kansas, 8 P.3d 756, 762 (Kan. 2000) (After the parent of a minor executed a settlement and release, the minor is not allowed to bring a claim for medical expenses based on the argument that the parent "waived" her right to recover: "Betz may not now seek medical expenses because he no longer holds a cause of action for medical expenses, which was extinguished upon settlement of his daughter's case.")
Ky.	Unknown	
La.	No	LA. CIV. CODE ANN. art. 2004 ("Any clause is null that, in advance, excludes

		or limits the liability of one party for intentional or gross fault that causes damage to the other party . . . . Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party.")
Me.	No	Rice v. Am. Skiing Co., No. CIV.A.CV–99–06, 2000 WL 33677027, at *3 (Me. Super. Ct. May 8, 2000) ("This court cannot conclude that the public policy consideration espoused by the defendants is paramount to the right of the infant to his negligence claim.")
Md.	Yes	BJ's Wholesale Club v. Rosen, 80 A.3d 345, 362 (Md. 2013) ("We have, thus, *never* applied *parens patriae* to invalidate, undermine, or restrict a decision, such as the instant one, made by a parent on behalf of her child in the course of the parenting role. We conclude, therefore, that the Court of Special Appeals erred by invoking the State's *parens patriae* authority to invalidate the exculpatory clause in the Kids' Club Rules agreement.")
Mass.	Yes	Sharon v. City of Newton, 769 N.E.2d 738, 746–47 (Mass. 2002) ("In the instant case, Merav's father signed the release in his capacity as parent because he wanted his child to benefit from participating in cheerleading, as she had done for four previous seasons. He made an important family decision cognizant of the risk of physical injury to his child and the financial risk to the family as a whole. In the circumstance of a voluntary, nonessential activity, we will not disturb this parental judgment. This comports with the fundamental liberty

		interest of parents in the rearing of their children, and is not inconsistent with the purpose behind our public policy permitting minors to void their contracts.")
		Vokes v. Ski Ward, No. 032313B, 2005 WL 2009959, at *1 (Mass. Super. July 5, 2005) ("There is no allegation of fraud, deceit, negligent misrepresentation, duress, lack of capacity, lack of consideration or of any other impediment to the enforcement of the contract. Under those circumstances, the Court finds that there was a valid enforceable release signed by the plaintiff's mother before his participation in the ski school program.")
Mich.	No	Woodman v. Kera LLC, 785 N.W.2d 1, 16 (Mich. 2010) ("The relief impliedly sought by defendant requires the creation of a new public policy for this state by modification of the common law. Although this Court has the authority to create public policy through its management of the common law, we share that authority with the Legislature. This Court has fewer tools for assessing the societal costs and benefits of changing the common law than the Legislature, which is designed to make changes in public policy and the common law. Moreover, defendant has failed to identify *any* existing public policy supporting the change in the common law that it seeks; the existing positive law and common law indicate that enforcing parental waivers is contrary to the established public policy of this state. Accordingly, in matters such as these, I am persuaded that the prudent practice for this Court is

		conservancy of the common law.")
Minn.	Yes	Moore v. Minnesota Baseball Instructional Sch., No. A08–0845, 2009 WL 818738 (Minn. Ct. App. Mar. 31, 2009) (enforcing a parental pre-injury liability waiver in the context of an injury a minor sustained while playing in a youth baseball league).
Miss.	Possibly	Quinn v. Mississippi State Univ., 720 So.2d 843 (Miss. 1998) (The Mississippi Supreme Court held that reasonable minds could differ as to the risks that the plaintiffs were assuming and did not suggest that parental pre-injury liability waivers violate public policy).
Mo.	Possibly	Salts v. Bridgeport Marina, 535 F. Supp. 1038, 1040 (W.D. Mo. 1982) (enforcing parental pre-injury liability waiver in a jet ski rental agreement).
Mont.	No	MONT. CODE ANN. § 28–2–702 ("Except as provided in 27–1–753, all contracts that have for their object, directly or indirectly, to exempt anyone from responsibility for the person's own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent, are against the policy of the law.")
Neb.	Unknown	
Nev.	Unknown	
N.H.	Unknown	
N.J.	No	Hojnowski v. Vans Skate Park, 901 A.2d 381, 389–90 (N.J. 2006) ("Accordingly, in view of the

		protections that our State historically has afforded to a minor's claims and the need to discourage negligent activity on the part of commercial enterprises attracting children, we hold that a parent's execution of a pre-injury release of a minor's future tort claims arising out of the use of a commercial recreational facility is unenforceable.")
N.M.	Unknown	
N.Y.	No	Valdimer v. Mount Vernon Hebrew Camps, 172 N.E.2d 283 (N.Y. 1961) ("[W]e are extremely wary of a transaction that puts parent and child at cross-purposes and, in the main, normally tends to quiet the legitimate complaint of the minor child. Generally, we may regard the parent's contract of indemnity, however well-intended, as an instrument that motivates him to discourage the proper prosecution of the infant's claim, if that contract be legal. The end result is either the outright thwarting of our protective policy or, should the infant ultimately elect to ignore the settlement and to press his claim, disharmony within the family unit. Whatever the outcome, the policy of the State suffers.")
N.C.	Maybe	Kelly v. United States, 809 F. Supp. 2d 429, 437 (E.D.N.C. 2011) ("The court is persuaded by the analysis of those courts that have upheld such waivers in the context of litigation filed against schools, municipalities, or clubs providing activities for children, and concludes that, if faced with the issue, the North Carolina Supreme Court would similarly uphold a preinjury release executed by a parent on behalf of

		a minor child in this context.")
N.D.	Yes	Kondrad v. Bismarck Park Dist., 655 N.W.2d 411, 414 (N.D. 2003) ("It is undisputed that Kondrad's bicycle accident occurred on the school grounds while Kondrad was participating in the BLAST program. This is the very type of situation for which the Park District, under the release language, insulated itself from liability for alleged negligence while operating the after-school care program. Under the unambiguous language of the agreement, McPhail exonerated the Park District from liability for injury and damages incurred by Kondrad while participating in the program and caused by the alleged negligence of the Park District . . . . We hold the Parent Agreement signed by McPhail clearly and unambiguously exonerates the Park District for injuries sustained by Kondrad while participating in the BLAST program and which were allegedly caused by the negligent conduct of the Park District.") (footnote omitted).
Ohio	Yes	Zivich v. Mentor Soccer Club, 696 N.E.2d 201, 205–07 (Ohio 1998) ("Therefore, we conclude that although Bryan, like many children before him, gave up his right to sue for the negligent acts of others, the public as a whole received the benefit of these exculpatory agreements. Because of this agreement, the Club was able to offer affordable recreation and to continue to do so without the risks and overwhelming costs of litigation. Bryan's parents agreed to shoulder the risk. Public policy does not forbid such an agreement. In

		fact, public policy supports it . . . . Therefore, we hold that parents have the authority to bind their minor children to exculpatory agreements in favor of volunteers and sponsors of nonprofit sport activities where the cause of action sounds in negligence. These agreements may not be disaffirmed by the child on whose behalf they were executed.")
Okla.	Unlikely	Holly Wethington v. Swainson, 155 F. Supp. 3d 1173, 1179 (W.D. Okla. 2015) ("Based on the case law in Oklahoma and other jurisdictions, the Court is led to the conclusion that (1) Makenzie's acknowledgment and execution of the Release is of no consequence and does not preclude her claims against Defendant, and (2) the Oklahoma Supreme Court would find that an exculpatory agreement regarding future tortious conduct, signed by parents on behalf of their minor children, is unenforceable.")
Or.	Unknown	
Pa.	Unlikely	Grenell v. Parkette Nat. Gymnastic Training Ctr., 670 F. Supp. 140, 144 (E.D. Pa. 1987) ("In the case before us, however, there was no court involvement in the transaction which occurred between the minor plaintiff and the defendants. Thus, she received none of the protections provided by the aforementioned special rules of procedure which apply to the settlement of minors' claims. Further, the public policy concern of the effective settlement of litigation is not involved here because of the very nature of the exculpatory agreement which the minor plaintiff executed. For these reasons, we

		do not believe that the Pennsylvania courts would bind the minor plaintiff to the agreement which she signed. Thus, we will deny the defendants' summary judgment motion as to those claims asserted by the minor plaintiff.")
		Troshak v. Terminix Int'l Co., No. CIV. A. 98–1727, 1998 WL 401693, at *5 (E.D. Pa. July 2, 1998) (Analyzing an arbitration provision, the court held "that a parent cannot bind a minor child to an arbitration provision that requires the minor to waive his or her right to file potential claims for personal injury in a court of law. If a parent cannot prospectively release the potential claims of a minor child, then a parent does not have authority to bind a minor child to an arbitration provision that requires the minor to waive their right to have potential claims for personal injury filed in a court of law. Accordingly, the court will not stay the claims brought by or on behalf of Richard Troshak, III for personal injury.")
R.I.	Unknown	
S.C.	Unknown	
S.D.	Unknown	
Tenn.	No	Childress v. Madison County, 777 S.W.2d 1, 7 (Tenn. Ct. App. 1989) ("We, therefore, hold that Mrs. Childress could not execute a valid release or exculpatory clause as to the rights of her son against the Special Olympics or anyone else, and to the extent the parties to the release

		attempted and intended to do so, the release is void.") *But see* Blackwell v. Sky High Sports, M2016–00447–COA–R9–CV (Tenn. Ct. App. argued Nov. 16, 2016) (Tennessee Court of Appeals granting application for interlocutory appeal to assess the validity of parental pre-injury liability waiver).
Tex.	No	Munoz v. II Jaz Inc., 863 S.W.2d 207, 210 (Tex. Ct. App. 1993) ("Therefore, in light of this state's long-standing policy to protect minor children, the language, 'decisions of substantial legal significance' in section 12.04(7) of the Family Code cannot be interpreted as empowering the parents to waive the rights of a minor child to sue for personal injuries. Appellants' public policy argument is sustained.") Fleetwood Enters. v. Gaskamp, 280 F.3d 1069 (5th Cir. 2002) (arbitration provision executed by a parent on behalf of a minor was not enforceable under Texas law). Paz v. Life Time Fitness, 757 F. Supp. 2d 658 (S.D. Tex. 2010) (parental pre-injury liability waiver not enforceable against commercial enterprise).
Utah	Yes (Inherent Risks Associated to Equine Facilities; No Release for Negligence)	UTAH CODE ANN. § 78B–4–203 ("(1) An equine or livestock activity sponsor shall provide notice to participants of the equine or livestock activity that there are inherent risks of participating and that the sponsor is not liable for certain of those risks. (2) Notice shall be provided by . . . (b) providing a document or release for the participant, or the

		participant's legal guardian if the participant is a minor, to sign.")
		Hawkins v. Peart, 37 P.3d 1062, 1067–68 (Utah 2001) ("We, too, conclude that public policy renders void the indemnity agreement between Navajo Trails and Hawkins's mother. By shifting financial responsibility to a minor's parent, such indemnity provisions would allow negligent parties to circumvent our newly adopted rule voiding waivers signed on behalf of a minor. Although the indemnity contract theoretically binds only Hawkins's mother, as a practical matter, it could chill Hawkins's pursuit of her legal claims against Navajo Trails since her mother, not Navajo Trails, would be the ultimate source of compensation.")
Vt.	Unknown	
Va.	No	Hiett v. Lake Barcroft Cmty. Ass'n, 418 S.E.2d 894, 897 (Va. 1992) (liability waivers are invalid regardless of whether they relate to the claims of an adult or a minor).
Wash.	No	Scott v. Pacific West Mountain Resort, 834 P.2d 6, 12 (Wash. 1992) ("We hold that to the extent a parent's release of a third party's liability for negligence purports to bar a child's own cause of action, it violates public policy and is unenforceable. However, an otherwise conspicuous and clear exculpatory clause can serve to bar the parents' cause of action based upon injury to their child. Therefore, we hold that Justin's parents' cause of action is barred by the release; Justin's own cause of action is not barred.")

W. Va.	Unlikely	Johnson v. New River Scenic Whitewater Tours, 313 F. Supp. 2d 621, 632 (S.D. W. Va. 2004) ("[T]he West Virginia Supreme Court's holding in *Murphy* compels the conclusion that a parent may not indemnify a third party against the parent's minor child for liability for conduct that violates a safety statute such as the Whitewater Responsibility Act.")
Wis.	Yes	Osborn v. Cascade Mountain, 655 N.W.2d 546 (Wis. Ct. App. 2002) ("The Osborns also contend that the release Amanda signed was not valid because she was a minor. That is true, but irrelevant. The first release, signed by Joan [on Amanda's behalf], remained in effect.")
Wyo.	Unknown	

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BURGLARY AT WAL-MART: INNOVATIVE PROSECUTIONS OF BANNED SHOPLIFTERS UNDER TENN. CODE ANN. § 39–14–402

By: Jonathan Harwell

"An avidity to punish is always dangerous to liberty. It leads men to stretch, to misinterpret, and to misapply even the best of laws. He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty, he establishes a precedent that will reach to himself."[1] –Thomas Paine

I. Introduction

Consider a shoplifter. He is observed at Wal-Mart putting some steaks into his jacket to take them without paying. He is apprehended by a Wal-Mart loss-prevention employee, who alerts police. Before the police arrive, the shoplifter is given a written notice from Wal-Mart, stating that he is no longer allowed on any Wal-Mart property; that any violations of that restriction could result in prosecution for criminal trespass; and that the notice is in effect until rescinded by Wal-Mart. The shoplifter is then taken to jail and charged with and convicted of misdemeanor theft.

Time passes. The shoplifter's probationary sentence comes to an end. The shoplifter returns to Wal-Mart and again unwisely attempts to put some DVDs into his pocket. He is again apprehended by Wal-Mart employees. This time, however, he is charged not merely with misdemeanor theft, even though the value of the merchandise is less than $500; instead, he is charged also with the Class D felony of burglary. Because of several prior convictions, he now faces twelve years in prison without the possibility of

[1] 3 THOMAS PAINE, THE WRITINGS OF THOMAS PAINE, 1791–1804 151 (Project Gutenberg, 2010) (1895) (ebook).

probation.[2] He tells his defense attorney: "Sure, I shoplifted that stuff, but I don't understand how they can charge me with burglary." His attorney responds, hardly reassuringly: "I don't either."

In the fall of 2015, to the surprise and dismay of both defense attorneys and criminal defendants, this situation suddenly became quite common in Knox County, Tennessee.[3] The novel legal theory behind these prosecutions—although it had apparently never been used before—is relatively straightforward. The Tennessee burglary statute covers, among other situations, the entry of a defendant into a building without the "effective consent" of the property owner, where the defendant subsequently commits a theft.[4] The Office of the District Attorney General has taken the position that although this repeat-shoplifting-after-notice situation has not previously been prosecuted as burglary, the statute clearly authorizes such prosecutions.[5] The initial notice of restriction from Wal-Mart property constitutes a denial of "effective consent" to enter subsequently, and the shoplifting constitutes the requisite theft after entry without consent.[6]

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[2] Burglary is a Class D felony and carries a range of punishment of two to twelve years. TENN. CODE ANN. §§ 39–14–402, 40–35–111(b)(4) (2016). For a standard offender with less than two prior felonies, this would mean a sentence of two to four years (becoming eligible for parole after thirty percent with the possibility of having the sentence suspended). TENN. CODE ANN. § 40–35–501(c) (2016). For a career offender, this would mean an automatic sentence of twelve years (with parole eligibility after sixty percent of the sentence), with no possibility of probation. TENN. CODE ANN. § 40–35–501(f) (2016).

[3] *See* Jamie Satterfield, *Knox County DA, Public Defender at Odds Over New Policy on Shoplifters*, KNOXVILLE NEWS-SENTINEL (Nov. 3, 2015), http://www.knoxnews.com/news/crime–courts/knox–county–da–public–defender–at–odds–over–new–policy–on–shoplifters–ep–1350115307–353301421.html.

[4] TENN. CODE ANN. § 39–14–402(a)(3) (2016).

[5] Satterfield, *supra* note 3.

[6] *See* TENN. CODE ANN. § 39–14–402(a)(3) (2016).

Constitutional criminal law is constantly in flux. On the other hand, substantive criminal law is much more stable, and innovations such as enlarging the scope of historic crimes are rare. Determining whether conduct constitutes a given crime ordinarily involves application of settled principles to variant factual scenarios. It does not generally involve sudden, attempted expansions of the substantive reach of old laws. This article explores the structural history of the burglary statute, as well as two oft-overlooked doctrines of criminal law (the rule of lenity and requirement of fair warning) to argue that this novel theory of burglary liability is not and should not be a valid application of the Tennessee burglary statute, Tenn. Code Ann. § 39–14–402. Part II sets out the statutory structure.[7] Part III summarizes the convoluted history of the relevant provisions,[8] in service of the argument, set out in Part IV, that the burglary statute should be interpreted to apply only to buildings that are not open to the public.[9] Part V presents a separate but related argument, that due process notions of fair warning prevent application of this statute to situations where the defendant could not have been aware in advance that his or her conduct would be prosecuted in this way.[10]

II. The Current Burglary Statute

The first step is to grasp the structure and terms of the current Tennessee statute. Tennessee Code Annotated section 39–14–402(a) provides:

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[7] *See infra* Part II.
[8] *See infra* Part III.
[9] *See infra* Part IV.
[10] *See infra* Part V. This article does not engage with the policy issue of whether it would be a good idea to punish this factual scenario as a Class D felony; the article only considers whether the existing burglary statute actually does so.

> (a) A person commits burglary who, without the effective consent of the property owner:
>
> (1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;
>
> (2) Remains concealed, with the intent to commit a felony, theft or assault, in a building;
>
> (3) Enters a building and commits or attempts to commit a felony, theft or assault; or
>
> (4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.[11]

Section 39–14–402(a)(3) [hereinafter simply "section (a)(3)"] is the focus of this article because it is the provision relied upon in these shoplifting prosecutions.

The other operative term, "effective consent," is defined earlier in the code. Tennessee Code Annotated section 39–11–106(a)(9) states:

> "Effective consent" means assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when:
>
> (A) Induced by deception or coercion;
>
> (B) Given by a person the defendant knows is not authorized to act as an agent;

[11] TENN. CODE ANN. § 39–14–402(a) (2016).

(C) Given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter; or
(D) Given solely to detect the commission of an offense;[12]

As an initial point, it is apparent that this burglary statute—in particular section (a)(3)—is very different from the traditional conception of burglary. Historically, while the precise justifications may be difficult to pinpoint, burglary served to protect individuals in their houses, especially at night. As Sir Edward Coke defined it in 1644:

> A Burglar (or the person that committeth Burglary) is by the Common Law a felon, that in the night breaketh and entereth into the mansion house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not.[13]

Blackstone rather poetically described the harm sought to be addressed by the crime of burglary:

> BURGLARY, or nocturnal housebreaking, *burgi latrocinium*, which by our antient law was called *hamesecken*, as it is in Scotland to this day, has always been looked upon as a very heinous offence: not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion

[12] TENN. CODE ANN. § 39–11–106(a)(9) (2016).
[13] SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 63 (London, W. Clarke & Sons 1809) (1644).

> and disturbance of that right of habitation, which every individual might acquire even in a state of nature; . . . [T]he malignity of the offence does not so properly arise from its being done in the dark, as at the dead of night; when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenceless.[14]

In addition to protecting a specific place at a specific time, burglary was unusual as it was an inchoate crime even before development of a more modern notion of the crime of attempt.[15]

Sections (a)(1) and (a)(2) of the statute define burglary in a somewhat traditional way, preserving the focus on the inchoate nature of burglary through the concept of intent, although they do not focus on the house

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[14] 4 WILLIAM BLACKSTONE, COMMENTARIES *223–24.

[15] Indeed, for this reason the drafters of the Model Penal Code suggested that burglary may no longer be a necessary crime given the development of the law of attempt.

> The critical issues to be confronted in the law of burglary are whether the crime has any place in a modern penal code and, if so, how it should be graded. The first question arises because of the development of the law of attempt. Traditionally, an independent substantive offense of burglary has been used to circumvent unwarranted limitations on liability for attempt. Under the Model Code, however, these defects have been corrected. It would be possible, therefore, to eliminate burglary as a separate offense and to treat the covered conduct as an attempt to commit the intended crime plus an offense of criminal trespass.

MODEL PENAL CODE § 221.1 explanatory note for sections 221.1 and 221.2 (2016).

or the time of day.[16] Section (a)(1) covers the individual who enters with the intent to commit a felony or theft. Section (a)(2) covers the individual who, even if he or she perhaps entered without that intent, subsequently made a decision to remain concealed with the intent to commit a felony or theft.[17]

Section (a)(3), however, has nothing to do with intent. It covers individuals that actually commit (or attempt to commit) a crime after having entered a building

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[16] Tennessee long followed the common law in its definition of burglary, focusing on the intent at the time of breaking. Hooks v. State, 289 S.W. 529, 529 (Tenn. 1926) ("the particular felonious intent alleged is an essential element of the crime"); Stinnett v. State, 217 S.W. 343, 343 (Tenn. 1920) ("the entry of a mansion house is the essential of burglary"). The 1932 Code, for example, defined burglary as "the breaking and entering of a dwelling house, by night, with intent to commit a felony." TENN. CODE 1932, § 10910. Burglary was punished by punishment for five to fifteen years. TENN. CODE 1932, § 10910. Breaking and entering of a dwelling house by day, with intent, was punished less severely, at three to ten years. TENN. CODE 1932, § 10912. Finally, the breaking and entering with intent to commit a felony of a "business house, outhouse, or any other house of another, other than a dwelling house," was also punished with three to ten years. TENN. CODE 1932, § 10913. In the 1955 Code, these various forms were codified as burglary in the first degree (entry with intent into dwelling place in the nighttime), burglary in the second degree (entry into a dwelling place in the daytime with intent to commit a felony), and burglary in the third degree (entry with intent into a "business house, [or other house not a dwelling]"). TENN. CODE ANN. §§ 39–901, 903, 904 (1955).

[17] The function of the concealment-type burglary is beyond the scope of this article. Interestingly, at least in some jurisdictions, it appears possible that this arose as a way of addressing the temporal element—an individual who entered during the day and hid away until nighttime was just as threatening as one who entered for the first time during the nighttime. As the Texas Penal Code once read: "The offence of burglary is constituted by entering a house by force, threats, or fraud, at night, or in like manner by entering a house during the day and remaining concealed therein until night, with intent, in either case, to commit a felony or the crime of theft." Summers v. State, 9 Tex. App. 396, 396 (Tex. Ct. App. 1880).

without authority. This failure to require felonious intent at some point, and instead only to focus on whether a substantive offense is actually committed, is a departure from historical antecedents.[18]

There is a further distinction, which is crucial to the discussion here. Section (a)(1) explicitly states that it covers entry into "a building other than a habitation (or any portion thereof) not open to the public," but section (a)(3) provides only that it covers "a building."[19] This seems an odd difference. Why would the statute limit burglary by entry with felonious intent to certain buildings (those "not open to the public"), while not similarly limiting burglary by entry followed by an attempted felony to those buildings? Yet there is that difference in the language which forms the basis of the prosecution's argument in these cases, allowing so-called "Wal-Mart burglaries" to be brought under section (a)(3) even though they would be categorically impossible under section (a)(1).[20]

Alternatively, is it possible to interpret section (a)(3) as covering the same structures as section (a)(1) by arguing that "a building" in section (a)(3) is merely a shorthand reference to the full phrase set out in section (a)(1)? To give an analogy, a newspaper might refer initially to "Mr. John Edward Smith," but on subsequent references merely state "Mr. Smith," with there being no doubt that it is the same individual as previously identified. Has the legislature here merely done the same thing, assuming that the subsequent provisions will be construed as coextensive with the first one with respect to the structures covered? Can we contend that the difference in the language of section (a)(3) was intended merely to

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[18] *Compare* TENN. CODE 1932, § 10910, *with* TENN. CODE ANN. § 39–14–402 (2016).
[19] TENN. CODE ANN. §§ 39–14–402(a)(1), 39–14–402(a)(3) (2016).
[20] Section (a)(2) also does not contain the "not open to the public" language. TENN. CODE ANN. §39–14–402(a)(2) (2016).

streamline the statute and was never intended to have a substantive effect?

In arguing that this latter approach is indeed the correct way to read the statute, we turn first to the tangled history of the Tennessee burglary statute. Or, rather, for reasons that will become clear, we begin with the history of the Texas burglary statute. Hopefully, this historical excursion will show how penal laws actually get made and will cast doubt on the position that the difference in language has ever been viewed, by its initial drafters or subsequent reviewers and adopters, as being of particular substantive importance.

III. History of the Current Tennessee Burglary Statute

A. Development of the Texas Burglary Statute

1. Initial Proposal and Discussion

The Texas Committee on Revision of the Penal Code[21] met on November 3, 1967, where they discussed, among other things, the proposed burglary statute of Newell Blakely, former dean of the University of Houston Law Center. That draft stated:

> A person is guilty of burglary if
>
> (a) he enters a building or occupied structures with intent to commit a felony or theft (THEREIN) at a time when the building or occupied structure is not

[21] The Legislative Reference Library of Texas has provided online a rich selection materials relating to the revision of the penal code. *See generally* LEGISLATIVE REFERENCE LIBRARY OF TEXAS, http://www.lrl.state.tx.us/collections/PenalCodeIntro.cfm (last visited July 25, 2016).

> open to the public and the actor is not licensed or privileged to enter;
> (b) he remains concealed in a building or occupied structure with intent to commit a felony or theft (THEREIN) at a time when the building or occupied structure is not open to the public and the actor is not licensed or privileged to remain; or
> (c) he enters or remains concealed in a building or occupied structure at a time when the building of [sic] occupied structure is not open to the public and the actor is not licensed or privileged to enter or remain and commits or attempts to commit a felony or theft (THEREIN).[22]

The minutes of that meeting indicate that there was discussion of section (c); in particular, the expansion beyond the common law in section (c) to cover situations of the commission of crimes in buildings without reference to any burglarious intent at the time of entry:

> The committee next turned to Sec. 221.1(1)(c). This sub–division was intended to deal with the man who develops his criminal state of mind subsequent to his entry. Judge Brown said that he was confused about the difference between (b) and (c). The difference is that under (b) the actor enters the building or structure at a time when it is open to the public, and remains concealed therein with the intent to

[22] Minutes of November 3, 1967 meeting at 129–30, http://www.lrl.state.tx.us/collections/Penal_Code_Minutes.pdf#page=104 (last visited July 25, 2016).

> commit a felony or theft, and under (c) he enters the building at a time when it is not open to the public or remains concealed in it when it is not open to the public but develops his intent to commit a felony or theft subsequent to his entry or concealment. There was some question about whether both (b) and (c) were necessary. Judge Roberts pointed out that under (b) the actor remains concealed with the requisite intent, and the state is not required to prove that he did anything, but under (c), the actor enters or remains concealed without criminal intent, but later he either commits or attempts to commit a felony or theft.

The committee agreed that both (b) and (c) ought to be left in Sec. 221.1(1).[23]

Mr. Blakely also raised another issue relating to consent. As the notes indicate, there was discussion of several hypotheticals (which will be referred to again later in this analysis):

> Mr. Blakely said that at the time he wanted to raise the problem under Sec. 211.1(1)(a), which says, "he enters a building or occupied structure with intent to commit a felony or theft at a time when the building or occupied structure is not open to the public and the actor is not licensed or privileged to enter." It is Dean Keeton's [long-time dean

[23] *Id.* at 135. The discussion of the situation of a "shoplifter" in these minutes is confusing, given that the proposal at that point in time included the provision "not open to the public" with reference to all kinds of burglary. *Id.*

of the University of Texas Law School] position that a person is never licensed or privileged to enter with the intent to commit a crime; in other words, a license or privilege is always limited to the purpose stated or implied, or at least some legitimate purpose. Mr. Blakely thought it necessary to include the language "and the actor is not licensed or privileged to enter" because it would cover the case or [sic] a person who has his brother-in-law visiting him for a few days and one night the brother-in-law goes down town and then decides to go back and steal from his brother-in-law's house. When he comes back and goes in the house he does not upset anyone because they are expecting him. Mr. Blakely did not think the brother-in-law ought to be guilty of burglary upon his entry. He is not disturbing anyone and disturbance of habitation is the basic rational for burglary.

Dean Keeton and Mr. Blakely disagreed on the substance. Mr. Blakely did not want the brother-in-law to be guilty of burglary when he entered, but Dean Keeton did. Judge Brown pointed out that there are many cases in his court where a person gains entry into a house on the pretext of using the telephone, but commits a theft while the occupant is in another part of the house.

Dean Keeton brought up the problem of a servant. He asked Mr. Blakely whether a servant who broke in at night would be guilty of burglary. Mr. Blakely said he would if he were not licensed to enter at night. Mr. Blakely said, however, that the

special protection offered by the burglary statute has no place in cases where the occupant expects the actor to enter. Judge Brown disagreed. Mr. Blakely pointed out that under Dean Keeton's theory a man would be guilty of burglary upon entering his own house if, while away from home, he decided to go home and kill his wife. Mr. Blakely pointed out the case of the shoplifter. A shoplifter often intends to steal at the time he enters the store and he walks in and he picks up something. Mr. Blakely questioned whether or not a shoplifter should be guilty of burglary just because he made up his mind *before* entering the store.

Dean Keeton said the question was whether a person who had a privilege by law or a reason to be there should be guilty of burglary because under the circumstances of the particular case he intended to commit an offense or whether he should simply be prosecuted for the offense he committed. He said that at that point he was pretty much disposed to agree with Mr. Blakely's position on the substance, but that the draft did not say what Mr. Blakely wanted it to say.

Mr. Daugherty said he thought the maid who has the right to come in and out of the house all of the time ought not be guilty of burglary when she enters with the intent to commit theft. Dean Keeton called for a vote and the committee agreed that people such as servants, firemen, and policemen who ordinarily would have a legitimate reason for entering, but who by

> happenstance on a particular occasion enter with the intent to commit a crime, should not be guilty of burglary. The draft will have to be worded some way to take care of that problem.[24]

2. 1970 Memorandum

In July 1970, the staff of the Penal Code Revision Project sent a memorandum to the State Bar Committee with a variety of suggestions regarding different sections of the proposed draft. As to burglary, the staff offered two suggestions. First, it suggested the phrase "without the owner's effective consent" be substituted for "without license or privilege."[25]

Intriguingly, the Committee offered the following comment as to the third subsection, which was now denominated subsection (a)(3). It wrote: "The staff recommends deleting Subsection (a)(3). It is not in present Texas law, no other revising state has included it, and the staff cannot imagine a single example of its application."[26]

3. Final Draft and Comments

In October 1970, the State Bar Committee on the Revision of the Penal Code issued its "Final Draft,"[27] but it

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[24] *Id.* at 136–37.

[25] Memorandum from the Texas Penal Code Revision Project to the State Bar Committee on Revision of Penal Code; Observers; Law Enforcement Advisory Committee; Advisory Committee on Corrections; Reporters 223 (Jul. 13, 1970), http://www.lrl.state.tx.us/collections/Penal_Code_Minutes.pdf#page=435.

[26] *Id.*

[27] *See generally* STATE BAR COMM. ON REVISION OF THE PENAL CODE, TEXAS PENAL CODE: A PROPOSED REVISION (October 1970),

did not heed the suggestion of the staff memo to simply remove (a)(3). The proposal included, as section 30.02 ("Burglary"), the following:

> (a) An individual or corporation commits burglary if, without the effective consent of the property owner:
>
> (1) he enters a habitation, or a building (or any portion of a building) not open to the public, with intent to commit a felony or theft; or
>
> (2) he remains concealed, with intent to commit a felony or theft, in a building or habitation; or
>
> (3) he enters a building or habitation and commits or attempts to commit a felony or theft.
>
> (b) For purposes of this section, "enter" means:

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http://www.lrl.state.tx.us/collections/Texas_Penal_Code_1970.pdf (last visited July 25, 2016). The foreword states:

> Committee meetings convened to consider reports, of which there have been 20 to date, lasted at least a day and a half, and sometimes two days; at the meetings committee members subjected the reports and reporters to a grueling review that often resulted in substantial revision of the draft statutes proposed. Meeting discussions were tape-recorded and minutes of the meeting prepared summarizing the discussion and setting out the revisions directed by the committee. Finally, detailed explanatory comments were prepared for each approved section of the draft code.

Id. at viii.

(1) intrusion of any part of the body; or
(2) intrusion of any physical object connected with the body.

(c) Burglary is a felony of the second degree unless it was committed in a habitation, in which event it is a felony of the first degree.[28]

As to sections (a)(1) and (a)(2), the document listed its derivation as from a Wisconsin Statute, a Minnesota Statute, and the Texas Penal Code.[29] As derivation for section (a)(3), it stated merely: "New," reflecting that this was an innovation without precedent.[30] The Committee Comment began by stating:

> With this code's addition of a general criminal trespass offense, Section 30.03, and a general attempt offense, Section 15.01, all conduct covered by the various burglary offenses in present law is punishable as a trespass, as an attempt if the offense intended is not completed, or as the intended completed offense. Thus burglary as a separate offense could be eliminated without eliminating penal sanctions for any conduct now criminal. A separate burglary offense, however, does perform an important criminological function in addition to its trespassory [sic.] and attempt functions; it protects against intrusion in places where people, because of the special nature of the place, expect to be free from intrusion. The

[28] *Id.* at 203.
[29] *Id.*
[30] *Id.*

> provision of this protection is the rationale underlying Section 30.02.[31]

The Comments noted that "[t]he types of intrusions made burglarious . . . are more varied than in present law," as it covers instruments and discharge of missiles into buildings.[32] It also notes that "[m]ore significant[ly]," there is a "change in the manner and time an intrusion must be made," as distinctions between day and night intrusions have been removed.[33] The Comments continued, referring to those hypotheticals discussed above:

> The concept of effective consent makes burglarious not only intrusions without consent but also those made with apparent consent if given because of force, threat, or fraud, if given by one whom the actor knows lacks capacity to consent, or if given to detect the commission of an offense . . . . This concept broadens burglary to cover, for example, one who enters through an open door, held not a burglarious entry in Milton v. State, 6 S.W. 303 (Tex. Ct. App. 1887), or one who enters with consent of the owner or law enforcement officers given to detect an offense, held not burglary in Speiden v. State, 3 Tex. Ct. App. 156 (1877). As in present law, however, one who, with intent to commit a felony or theft, enters a building open to the public or otherwise has consent to enter, such as a servant or brother-in-law, commits no burglary and can be prosecuted only for the commission or attempted

[31] *Id.* at 203–04.
[32] *Id.* at 204.
[33] *Id.*

> commission of the offense he intended, unless he remains concealed after consent to his presence has terminated. Private offices and other portions of a building not open to the public are covered, however; one who enters a storeroom closed to the public in a store otherwise open to the public (with the requisite intent) commits burglary.[34]

The Comments then discuss sections (a)(2) and (a)(3) specifically:

> The concealment feature, Section 30.02(a)(2), is derived from present law, Penal Code arts. 1389, 1391, and covers, for example, one who, with the requisite intent, enters a business while it is open to the public and hides until it closes. Section 30.02(a)(3) includes as burglary the conduct of one who enters without effective consent but, lacking intent to commit any crime upon his entry, subsequently forms that intent and commits or attempts a felony or theft. This provision dispenses with the need to prove intent at the time of entry when the actor is caught in the act.[35]

There was no explanation, nor indeed any acknowledgment, of the change between the 1967 proposal and this one; the removal of the specification that section (a)(2) and section (a)(3), like section (a)(1), applied only to buildings not open to the public.[36]

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[34] *Id*. at 204–05.
[35] *Id.* at 205.
[36] Indeed, the discussion of section (a)(2) directly referred to the "not open to the public" criterion. *Id.* at 205.

4. Subsequent Legislative Action in Texas

A bill was introduced into the Texas legislature encompassing a variation on this proposal. As to burglary, its language was the same as the proposed language, with the exception that section (a)(3) was revised to read "a habitation, or a building (or any portion of a building) not open to the public . . . ."[37] This bill died a quick death, however, and was tabled in May 1971, with the legislature instead proposing a committee to "study and educate the public in the proposed revision of the Texas Penal Code . . . ."[38]

After a period of additional study and coordination, in 1973, another attempt was made, and a bill was signed by the Texas Governor on June 14, 1973.[39] The language as to burglary was very close to that of the 1970 proposal.[40]

B. Development of the Tennessee Burglary Statute

1. Law Revision Commission

In the same time period, the Tennessee legislature also began considering changes to the state's criminal law.

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[37] Tex. H. B. 419, 1971 Leg., 62nd Reg. Sess. (Tex. 1971), http://www.lrl.state.tx.us/legis/billSearch/text.cfm?legSession=620&billtypeDetail=HB&billNumberDetail=419&billSuffixDetail=&startRow=1&IDlist=&unClicklist=&number=100 (last visited July 25, 2016).

[38] Tex. H.C.R. 184, 1971 Leg., 62nd Reg. Sess. (Tex. 1971). To be clear, there is no reason to think that the burglary sections were the cause of the failure of the proposal.

[39] Tex. S. B. 34, 1973 Leg., 63rd Reg. Sess. (Tex. 1973), http://www.lrl.state.tx.us/legis/billSearch/BillDetails.cfm?legSession=63–0&billtypeDetail=SB&billNumberDetail=34&billSuffixDetail=&startRow=1&IDlist=&unClicklist=&number=100 (last visited July 25, 2016).

[40] *See id.*

The State of Tennessee Law Revision Commission was created in 1963 as an independent research agency of the state, composed of nine attorneys serving staggered terms.[41] It surveyed the existing state criminal law as well as that of other jurisdictions.[42] A rough draft of a proposed code was prepared based on the Illinois criminal law.[43] The Commission then decided, however, that it needed a "model . . . that was more compatible with the particular needs of Tennessee."[44] It therefore settled on the Proposed Revision of the Texas Penal Code, which had been published in 1970, which served as the "organizational backbone" of the Law Revision Commissions draft.[45] The Law Revision Commission published its *Proposed Final Draft* in November 1973.[46]

With respect to the burglary statute, at least, the 1970 Texas proposal was followed very closely. [47]

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[41] LAW REVISION COMM'N, TENNESSEE CRIMINAL CODE AND CODE OF CRIMINAL PROCEDURE, PROPOSED FINAL DRAFT vii (1973).

[42] *See generally* Floyd Dennis, Project Attorney, "Work Document 39–6(1) Criminal Code (Substantive), 39–6 Offenses Against Property" (surveying statutes in various jurisdictions).

[43] LAW REVISION COMM'N, CRIMINAL CODE: TENTATIVE DRAFT ii (1972).

[44] *Id.*

[45] *Id.*

[46] *See generally* LAW REVISION COMM'N, *supra* note 42.

[47] When compared to the 1970 Texas draft, the Tennessee Law Revision Commission proposal presented few changes: (1) a change from "individual or corporation" to "individual, corporation, or association"; (2) a change from "a habitation, or a building (or any portion thereof) not open to the public" to "a habitation or a building other than a habitation (or any portion thereof) not open to the public"; and (3) making first-degree burglary cover only "occupied habitation[s]" and not all habitations. *Id.* at 122. That is, the Law Revision Commission proposal read:

> (a) An individual, corporation, or association commits burglary if, without the effective consent of the property owner:

Strikingly, the Law Review Commission proposal also copied, nearly verbatim, the Comments of the Texas proposal, with only a few emendations (such as replacing Texas case law citations with Tennessee citations).[48] This included the introduction about the reason for retaining a separate burglary statute; the paragraph quoted above about "one who, with intent to commit a felony or theft, enters a building open to the public or otherwise has consent to enter, such as a servant or brother–in–law, commits no burglary"; and the explanation of section (a)(3) stating that it "dispenses with the need to prove intent at the time of entry when the actor is caught in the act."[49]

Copies of an initial draft of the Law Revision Commission proposal were distributed to over 1000 "interested Tennesseans," and the proposed final draft was

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(1) he enters a habitation, or a building (or any portion of a building) not open to the public, with intent to commit a felony or theft; or
(2) he remains concealed, with intent to commit a felony or theft, in a building or habitation; or
(3) he enters a building or habitation and commits or attempts to commit a felony or theft.

(b) For purposes of this section, "enter" means:
(1) intrusion of any part of the body; or
(2) intrusion of any physical object connected with the body.

(c) Burglary is a felony of the second degree unless it was committed in an occupied habitation, in which event it is a felony of the first degree.

Id.

[48] *Compare id.* at 124, *with* STATE BAR COMM. ON REVISION OF THE PENAL CODE, *supra* note 28, at 206.

[49] *Id.* The only significant changes in the comments were the addition of several sentences about self-propelled vehicles as habitations and the deletion of a short paragraph stating that a "claim of right defense to theft" is also a defense to burglary. *Id.*

sent to all subscribers to the Tennessee Code Annotated for feedback.[50] In 1973, the legislature appointed a special committee to review these efforts and to report to the General Assembly.[51] Meetings between this committee and the Law Revision Commission were held, as were public hearings.[52] The Law Revision Commission identified one primary argument against the revision: claims that "the lawyers and judges in Tennessee could not cope with so massive a change in the criminal statutes."[53] For whatever reason, the criminal code was not revised at that time.

2. Sentencing Commission

Some fifteen years later, efforts began again and this time met with success. In the late 1980s, the Tennessee Criminal Code was comprehensively revised based on the research and submission of the Tennessee Sentencing Commission, which drafted a proposed new code, drawing on the work of the Law Revision Commission.[54] In particular, the Sentencing Commission's 1989 Proposed Criminal Code included the following definition of burglary, which closely followed the Law Revision Commission's proposal (although limiting it to "a person" and not a corporation or association):

> Section 39–14–402. Burglary.
>
> (a) a person commits burglary who, without the effective consent of the property owner:

[50] STATE OF TENN. LAW REVISION COMM'N, SPECIAL REPORT TO THE 89TH GENERAL ASSEMBLY ON CRIMINAL LAW REVISION 10 (1975).
[51] *Id.* at 11.
[52] *Id.*
[53] *Id.* at 11.
[54] *See generally* TENNESSEE SENTENCING COMM'N, PROPOSED REVISED CRIMINAL CODE (1989).

(1) Enters a habitation, or a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony or theft; or
(2) Remains concealed, with the intent to commit a felony or theft, in a building or habitation; or
(3) Enters a building or habitation and commits or attempts to commit a felony or theft.
(4) Enters any freight or passenger car, automobile, truck, trailer or other motor vehicle with intent to commit a felony or theft.

(b) For purposes of this section, "enter" means:
(1) Intrusion of any part of the body; or
(2) Intrusion of any object in physical contact with the body or any object controlled by remote control, electronic or otherwise.

(c) Burglary under Section (a)(1), (2) and (3) is a class D felony unless it was committed in an occupied habitation, in which event it is a class C felony. Burglary under section (a)(4) is a Class E felony.[55]

The Comments to the 1989 Proposed Criminal Code explained the primary changes, again copying nearly verbatim the commentary attached to the 1970 Texas

[55] *Id.* at 153–54.

proposal that was then included in the Law Revision Commission draft.[56] This included the key paragraph:

> As in present law, however, one who, with intent to commit a felony or theft, enters a building open to the public or otherwise has consent to enter, such as a servant or brother–in–law, commits no burglary and can be prosecuted only for the commission or attempted commission of the offense intended, unless the offender remains concealed after consent to his or her presence has terminated.[57]

It also included an explanation of the purpose of the innovation of section (a)(3):

> Subsection (a)(3) includes as burglary the conduct of one who enters without effective consent but, lacking intent to commit any crime at the time of the entry, subsequently forms that intent and commits or attempts a felony or theft. This provision dispenses with the need to prove intent at the time of entry . . . .[58]

3. Enacted Version

Consequently, the legislature enacted in 1989 the recommendation of the Sentencing Commission.[59] The enactment of the burglary statute followed the Sentencing Commission's 1989 proposal, except that in section (c) it

[56] *See id.* at 154–57.
[57] *Id.* at 156.
[58] *Id.*
[59] 1989 Tenn. Pub. Acts 6.

removed the word "occupied."[60] Aggravated burglary was defined as "burglary of a habitation," and punished as a Class C felony, as set forth in section 39–14–403. [61] Especially aggravated burglary, a Class B felony, was burglary of "a habitation or building other than a habitation," where the victim suffered serious bodily injury, as set forth in section 39–14–404.[62]

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[60] The language thus read:

> Section 39–14–402. Burglary.
> (a) a person commits burglary who, without the effective consent of the property owner:
> (1) Enters a habitation, or a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony or theft; or
> (2) Remains concealed, with the intent to commit a felony or theft, in a building or habitation; or
> (3) Enters a building or habitation and commits or attempts to commit a felony or theft; or
> (4) Enters any freight or passenger car, automobile, truck, trailer or other motor vehicle with intent to commit a felony or theft.
> (b) For purposes of this section, "enter" means:
> (1) Intrusion of any part of the body; or
> (2) Intrusion of any object in physical contact with the body or any object controlled by remote control, electronic or otherwise.
> (c) Burglary under Section (a)(1), (2) and (3) is a class D felony if the burglary was committed in a building other than a habitation. Burglary under section (a)(4) is a Class E felony.

1989 Tenn. Pub. Acts 1223.
[61] *Id.*
[62] *Id.* at 1224.

4. 1990 Modification

A year later, the legislature amended the burglary statutes to distinguish habitation burglary from building burglary.[63] After these amendments, building burglary was covered by Tennessee Code Annotated section 39–14–402; habitation burglary was covered by section 403; and burglary with serious bodily injury was covered by section 404. There were no other substantive changes made.

5. 1995 Update

Five years later, in 1995, the legislature again made a few minor changes to the statute to produce its final form.[64] This change consisted of two relatively minor alterations from the prior version of the statute: (1) it changed the language from "felony or theft" to "felony, theft or assault" throughout; and (2) it made two changes to subsection (4) (adding "boat, airplane" and adding "or commits or attempts to commit a felony, theft or assault").[65] Section 39–14–402 has remained unchanged since 1995.

IV. Discussion of Interpretation of Statute

A. How Should We Consider the Information Regarding the Development of the Burglary Statute?

The United States Supreme Court has recently emphasized that, while the precise language of a statute is certainly not to be disregarded, it is not the only relevant

[63] 1990 Tenn. Pub. Acts, 704–05.
[64] 1995 Tenn. Pub. Acts 879.
[65] *Id.*

criterion for construction.[66] While language may seem, on its face, to be "plain," ambiguity may arise when that language is considered in context:

> If the statutory language is plain, we must enforce it according to its terms. But oftentimes the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." So when deciding whether the language is plain, we must read the words "in their context and with a view to their place in the overall statutory scheme." Our duty, after all, is "to construe statutes, not isolated provisions."[67]

Here, where the language of the burglary statute at least poses some questions of interpretation, it is necessary to consider both the overall structure of the statute, as well as its legislative history.[68]

The burglary statute differs from ordinary legislation in several respects. First, and this is perhaps not unusual, it was but a small part of a large piece of legislation—the comprehensive re–writing of the entire criminal code for the state. The legislators who voted on the adoption of the criminal code may not have thought much about the burglary section, if indeed they considered it at all. Second, it was copied wholesale from a proposed code of another state. Because of this, it is not clear that anyone in Tennessee actually considered the precise wording of the burglary statute on this point. Nothing is

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[66] King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (citations omitted).
[67] *Id.*
[68] State v. Flemming, 19 S.W.3d 195, 197 (Tenn. 2000) ("Provisions of the criminal code should be 'construed according to the fair import of their terms, including reference to judicial decisions and common law interpretations, to promote justice, and effect the objectives of the criminal code.'").

necessarily wrong with this, but it does complicate questions of legislative "intent."

There is another way, however, that this differs from ordinary legislation in a helpful fashion. In preparing the draft for consideration by the legislature, the Sentencing Commission published copious commentary explaining various goals and considerations. To be sure, this commentary was (at least as to the burglary statute) copied almost verbatim from the Texas code, but it was nonetheless published and available to the legislature at the time the revised code was enacted. The Court of Criminal Appeals has considered the comments attached to the proposed revised code to be relevant to determining "legislative intent," given that they were "available to the 96th General Assembly prior to the enactment."[69] Thus, while as a practical matter no one in Tennessee may have focused on this point, and the votes of the legislators almost certainly were not driven with these concerns in mind, we can use the comments included in the proposed criminal code as a persuasive interpretive guide to the statute. It may be something of a fiction, but it is a convenient and useful one that allows us to go beyond the mere words of the statute to an explanation of its purpose and the understanding of its proponents.

B. What Is the Purpose of Section (a)(3)?

Based on this history, and in particular, the comments to the 1989 Proposed Criminal Code, we can try to address two primary questions.

First, why does section (a)(3) exist? The short answer is that it exists because several people in Texas thought it was an important addition to the law of burglary

[69] State v. Levandowski, No. 03C01–9503–CR–00076, 1996 WL 315807, at *7, *8 n.13 (Tenn. Crim. App. June 5, 1996), *aff'd*, 955 S.W.2d 603 (Tenn. 1997).

and because, when the Tennessee Sentencing Commission decided to copy the Texas Penal Code, no one in Tennessee decided to take it out. The germ of section (a)(3) came in the 1967 Texas draft, where it was ostensibly offered to deal with the situation of a defendant who entered a building not open to the public and who developed the intent to commit the felony after the initial entry.[70] There was initial confusion amongst the Texas drafters as to whether this constituted an addition to the other available prongs of burglary.[71] Indeed, by 1970, the staff of the Texas Penal Code Revision Project specifically contended that this provision was not in the present law, had not been adopted by other states, and it "[could not] imagine a single example of its application."[72] This initial proposal had no difference in the language between the different sections, as all required that the building not be open to the public.

Despite this criticism, this section remained in the 1970 Texas proposal, under the now-familiar streamlined language "enters a building or habitation and commits or attempts to commit a felony or theft."[73] The comments noted that this is a novel provision, and went on to suggest that the purpose of section (a)(3) is primarily an evidentiary one: "This provision dispenses with the need to prove intent at the time of entry when the actor is caught in the act."[74] This is a reasonable purpose—it hardly seems appropriate that a defendant could evade conviction for a burglary charge after, say, breaking into a house and stealing valuables by arguing that he developed the intention of stealing the valuables only after he had broken into the house. The Tennessee Sentencing Commission

[70] *See* Minutes, *supra* note 22.
[71] *Id.* at 135.
[72] Memorandum, *supra* note 26, at 440.
[73] STATE BAR COMM. ON REVISION OF THE PENAL CODE, *supra* note 28, at 222.
[74] *Id.* at 224.

copied this provision and also the commentary, indicating that it, too, believed that section (a)(3) solved this limited problem of reducing the burdens on the prosecution in those cases where the defendant had actually committed an offense (and had not merely been intending to commit an offense).[75]

C. Why Does Section (a)(3) Say Only "A Building" and Not "Not Open to the Public"?

Second, there is the question of why (a)(3) does not use the qualifier "not open to the public." That is, why is different language used in (a)(1) than in (a)(3)? On this point, one must acknowledge the ordinary principle of statutory interpretation that legislature is presumed to choose its words with care, and that a decision to include or exclude words must have been done for some reason. As the Tennessee Supreme Court has written:

> A basic rule of statutory construction is that the legislature is presumed to use each word in a statute deliberately, and that the use of each word conveys some intent and has a specific meaning and purpose . . . . Consequently, where the legislature includes particular language in one section of the statute but omits it in another section of the same act, it is presumed that the legislature acted purposefully in including or excluding that particular subject.[76]

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[75] *Compare id.*, *with* TENNESSEE SENTENCING COMM'N, *supra* note 55, at 156 (1989) ("This provision dispenses with the need to prove intent at the time of entry.").

[76] Bryant v. Genco Stamping & Mfg. Co., 33 S.W.3d 761, 765 (Tenn. 2000) (citations omitted).

Here, the history is totally silent on this drafting decision. The initial 1967 Texas draft, in fact, did contain such language, making this third section coextensive with the first section as to the structures covered.[77] The 1970 Texas final draft, however, did not, and it was that draft which was copied by the Tennessee versions.[78] (Strangely, the failed 1971 bill in Texas re-introduced such language, but it disappeared again by the time of the enacted 1973 law).[79] There is no indication in the commentary that there was any reason for this exclusion. That is, there is no acknowledgment that, due to this fact, section (a)(3) potentially covers different structures than section (a)(1), nor is there any explanation for why that is the case.

Several pieces of evidence support the conclusion that section (a)(3) was not intended, and should not be interpreted, to cover a broader range of buildings than (a)(1). First, the fact that the purpose of section (a)(3) was an evidentiary one—to make it easier to prove the case when a defendant was caught red-handed—supports a narrow interpretation of section (a)(3). If section (a)(3) was intended to make it easier to prove cases that otherwise would be brought under section (a)(1), then there is no reason for section (a)(3) to cover a different set of structures (entry into buildings open to the public) than section (a)(1) does.

Second, to the extent that the comments addressed the issue, there seems to be no understanding that section (a)(3) could be interpreted to cover different places than section (a)(1). On the contrary, the comments assume that it should not be interpreted in such a manner. As noted above, the introductory commentary, in explaining the reason why

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[77] Minutes, *supra* note 22.
[78] STATE BAR COMM. ON REVISION OF THE PENAL CODE, *supra* note 28, at 203.
[79] *Compare* Tex. H. B. 419, 1971 Leg., 62nd Reg. Sess. (Tex. 1971) *with* Tex. S. B. 34, 1973 Leg., 63rd Reg. Sess. (Tex. 1973).

there even should be a burglary statute, included the explanation that burglary "protects against intrusion in places where people, *because of the special nature of the place*, expect to be free from intrusion. The provision of this protection is the rationale underlying this section."[80] This hardly evidences any understanding that, because of the way section (a)(3) is phrased, it can be interpreted potentially to cover all buildings and not just habitations and private buildings. A Wal-Mart can hardly be considered a place with a "special nature" of privacy. If, as stated, that is the purpose of the burglary statute, interpreting it to cover buildings open to the general public does not further that purpose.

The third important piece of evidence on this issue comes from the language of the comments to the 1989 Proposed Code quoted above (again, language first included in the 1970 Texas draft and then adopted by the Law Review Commission and the Sentencing Commission):

> As in present law, however, one who, with intent to commit a felony or theft, enters a building open to the public or otherwise has consent to enter, such as a servant or brother-in-law, commits no burglary and can be prosecuted only for the commission or attempted commission of the offense intended, unless the offender remains concealed after consent to his or her presence has terminated.[81]

Read carefully, this passage states that one who enters "a building open to the public" and commits a theft offense

[80] TENNESSEE SENTENCING COMM'N, *supra* note 55, at 154.
[81] *Id.* at 156.

"commits no burglary" and can be convicted only of theft.[82] Crucially, it does not say that such a person can be convicted only under section (a)(3); it says, rather, that that person cannot be convicted of burglary at all.[83] This provides strong support for the conclusion that the drafters of this provision did not intend for the statute to be (and, indeed, did not realize that it might be) interpreted to cover buildings that are open to the public.

D. The Balance of the Evidence Supports the Conclusion that Section (a)(3) Applies Only to Buildings Not Open to the Public. Any Lingering Doubt Should be Removed by the Rule of Lenity.

The situation of this statute on this point can thus be summed up as follows: (1) it is a statute subject to multiple interpretations; (2) one such interpretation (the prosecution's interpretation) is more consistent with ordinary interpretation of the statutory language, because it treats a difference in language between two sections as being intentional and meaningful; (3) the prosecution's interpretation, however, produces a contrast in the statute that makes little or no policy sense; (4) there is no indication in the explanatory commentary that the drafters intended to produce this differential treatment and enlarge the statute beyond its stated purpose; and (5) there are

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[82] *Id.*

[83] *Id.* Readers of these comments (in 1989 or the present) will perhaps be puzzled as to why "servant" and "brother-in-law" were used as examples. As noted above, those examples relate to questions asked in the first committee discussion of the earliest Texas draft and relate to specific factual scenarios. Minutes, *supra* note 22, at 136–37. The fact that these examples remained in the commentary long after their context disappeared certainly suggests that there was no thorough-going consideration of the commentary by the Law Revision Commission or the Sentencing Commission.

strong indications through the commentary that the drafters believed that burglary was categorically unavailable for a building "open to the public."

How, then, should this situation be resolved? The principles of statutory interpretation support the conclusion that, although the language of the statute is important, that language should not be used to support an irrational conclusion, particularly where that conclusion is completely in contrast to the overall structure and legislative history. To adopt the prosecution's interpretation here would be to elevate a minor difference in phrasing to produce an outcome at odds with all of the lengthy commentary regarding the statute and unjustified by any policy purpose. The better interpretation is that the limitation "not open to the public" should be applied to section (a)(3) as well as section (a)(1).

Further, if there is any lingering doubt, that doubt must be resolved in favor of the defendant under the rule of lenity.[84] That doctrine is "rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his or her conduct is prohibited."[85] "[T]o ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not 'plainly and unmistakably' proscribed."[86] Where there is ambiguity or uncertainty in defining a statue, the rule of lenity requires the ambiguity to be resolved in favor of the defendant. As the Supreme Court has explained:

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[84] State v. Smith, 436 S.W.3d 751, 768 (Tenn. 2014) ("[T]he 'rule of lenity' requires the ambiguity to be resolved in favor of the defendant.").

[85] State v. Hawkins, 406 S.W.3d 121, 137–38 (Tenn. 2013) (quoting State v. Marshall, 319 S.W.3d 558, 563 (Tenn. 2010)).

[86] Dunn v. United States, 442 U.S. 100, 112–13 (1979) (citing United States v. Gradwell, 243 U.S. 476, 485 (1917)).

> In various ways over the years, we have stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."[87]

Even more pertinently, the Tennessee Court of Criminal Appeals has written:

> [W]hen the fair import of the language of a penal statute, in the context of the legislative history and case law on the subject, still results in ambiguity, the rule of strict construction would apply to limit the statute's application to those persons or circumstances clearly described by the statute.[88]

That language from *Horton*—where the "language" of a statute, in the "context of the legislative history and case law," provides an ambiguity—applies perfectly to this situation.[89] Here, where there are substantial arguments on

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[87] United States v. Bass, 404 U.S. 336, 347 (1971) (citation omitted).
[88] State v. Horton, 880 S.W.2d 732, 735 (Tenn. Crim. App. 1994).
[89] *Id.* Sadly, the "rule of lenity" is one that is frequently cited but seldom applied. Since 1990, there have been roughly fifty appellate cases that have used the word "lenity" in Tennessee. The majority of these relate to the single issue of how to define the unit of prosecution. *See, e.g.*, State v. Watkins, 362 S.W.3d 530, 543 (Tenn. 2012) ("Courts apply the 'rule of lenity' when resolving unit-of-prosecution claims . . . ."). On several occasions the courts have cited the rule of lenity not as a tie-breaker but rather as a final supporting argument, after essentially appearing to resolve the issues on other grounds. *See, e.g.*, State v. Alford, 970 S.W.2d 944, 947 (Tenn. 1998) (stating that the rule of lenity supports the conclusion that insurer was not a "victim" for restitution purposes); State v. Odom, 928 S.W.2d 18, 30 (Tenn. 1996)

both sides, it is ultimately unnecessary to decide exactly which side slightly wins the debate. If the rule of lenity is to be taken seriously,[90] to be used not merely as a last resort in those exceedingly rare (if not imaginary) situations of exact equipoise, it should apply here.[91] Unless legislative

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(stating that the rule of lenity supports the conclusion that the court must instruct on non-statutory mitigating factors); State v. Edmondson, No. M2005–01665–CCA–R3CD, 2006 WL 1994534, at *5 (Tenn. Crim. App. July 18, 2006), *aff'd*, 231 S.W.3d 925 (Tenn. 2007) (stating that carjacking must occur in the presence of a victim); *Horton*, 880 S.W.2d at 736 (stating that rule of lenity supports a logical reading of multiple offender statute).

In only five cases can it be said that the rule of lenity actually contributed significantly to the resolution of the case. *See Hawkins*, 406 S.W.3d at 137 (applying the rule of lenity to a claim that the defendant's tossing a shotgun over a fence constituted concealing evidence); *Marshall*, 319 S.W.3d at 563 (applying the rule of lenity to the theft of services statute); State v. Levandowski, 955 S.W.2d 603, 605 (Tenn. 1997) (stating that the false report statute does not cover responses to inquiries); State v. Magness, 165 S.W.3d 300, 308 (Tenn. Crim. App. 2004) (applying the rule of lenity to the weight of methamphetamine); State v. Conway, 77 S.W.3d 213, 224 (Tenn. Crim. App. 2001) (applying the rule of lenity to the interpretation of the ten-year look-back period for prior D.U.I. offenses). Of these, arguably only *Conway* and *Hawkins* really turn on the rule of lenity.

[90] *See* John L. Diamond, *Reviving Lenity and Honest Belief at the Boundaries of Criminal Law*, 44 U. MICH. J.L. REFORM 1, 39 (2010) ("The lenity doctrine should not be viewed as an obsolete historical anachronism nor restricted to grievously ambiguous language, but should instead allow courts to engage the other two branches of government to better insure that a prosecution is with notice, fairly applied, and consistent with legislative intent.").

[91] Strangely, in two cases between the years of 1999 and 2000, one judge of the Tennessee Court of Criminal Appeals took the position that, after passage of the revised code, strict construction of penal statutes is no longer required in Tennessee. State v. Kilpatrick, 52 S.W.3d 81, 86 (Tenn. Crim. App. 2000) ("Criminal statutes are to be fairly interpreted, and strict construction is not required[.]"); State v. Kendrick, 10 S.W.3d 650, 654 (Tenn. Crim. App. 1999) ("Strict construction is no longer required in ascertaining the meaning and application of a penal statute[.]"). This position seems to have faded from view.

history and the overall structure of the statute are to be disregarded entirely, at the very least they produce doubt about the prosecution's preferred interpretation which must be resolved in favor of the defendant.[92]

Perhaps the easiest way to see the force of this contention that there is a significant doubt as to the propriety of the State's position is not in legal, but in practical, terms. Ever since the burglary statute was passed in 1989, individuals have engaged in shoplifting. Likewise, stores have banned people from entering based on prior behavior, and people have disregarded those orders. Yet it appears that until 2015, none of these situations were apparently prosecuted in the state of Tennessee as burglary. There are two possible explanations for this lack of prosecutions. The first is that, although it was clear that this situation constituted burglary, every elected district attorney in the state (or their subordinates) decided to treat these repeat shoplifters with mercy, and to not charge them with burglary even though it was apparent that they had committed that crime. The other possibility is that, as has been argued herein, the application of the statute to this situation is simply not clear. This second alternative, given the institutional pressures on and predilections of prosecutors, seems far more realistic. Prosecutors are not in the business of blanket leniency. Thus, under the rule of lenity, the state should not be able to prosecute entries into businesses open to the public as burglary.

V. Due Process Concerns

A. Introduction

There is another issue to address as well. As noted above, despite the fact the statute has been in effect since

[92] Of course, if the legislature disagrees with this interpretation, it is free to amend the statute.

1989, and has existed unchanged since 1995, the spate of prosecutions in 2015 for repeat shoplifters in Knox County apparently constituted the first such application of the statute to this scenario. At the very least, there are no appellate opinions dealing with the subject and, in litigation on the issue to date, the state has not identified any prior uses. This, therefore, poses a serious issue of whether these 2015 prosecutions can proceed without violating principles of fair warning.

B. Prior Decisions

There are few relevant appellate decisions in Tennessee discussing section (a)(3). Notably, none of these cases address the issue of whether the "open to the public" language should apply to (a)(3).

However, there is a limited body of authority discussing the concept of "effective consent" as it applies to burglary. Specifically, the courts have considered the "effective consent" aspect of the burglary statute on three occasions. In *State v. Ferguson*, the defendant was charged with burglary for entering a self-service laundromat on three occasions and stealing money from video game machines and a soap dispenser.[93] He entered during regular business hours when the laundromat was open for business and unlocked.[94] He was convicted after a jury trial and appealed, challenging the sufficiency of the evidence against him as to whether he had "effective consent" to enter.[95] On appeal, the State's theory as to why the defendant did not have effective consent was that the owner only allowed people to enter to play video games or do

[93] 229 S.W.3d 312, 312–13 (Tenn. Crim. App. 2007).
[94] *Id.* at 313.
[95] *Id.* at 314.

laundry, and not to commit thefts.[96] The court rejected this expansive argument, stating:

> We conclude that the plain language of the statute dictates that the Defendant had the effective consent to enter the laundromat. The North Main Laundry facility, which was often unattended, was open and unlocked for persons to enter the premises. The owners of the laundromat were authorized to set their business hours and supervision methods and elected to permit entry during the hours of 5:30 a.m. to 12:30 a.m. without any specific entry restrictions. "Effective consent" also includes apparent consent, and we conclude that it was apparent to a person who approached the laundromat during the hours it was open for business that the person had the owner's consent to enter. The Defendant entered the facility during these hours, and thus the owners gave effective consent in fact for the entry.[97]

As to the argument that the owners did not consent to "loiterers or other criminal actors" entering, the court noted that "the laundromat did not employ any type of entry restrictions during regular business hours."[98] Even had there been personnel on duty, there was no reason to believe that the defendant's entry would have been barred.[99] The Court, therefore, reversed the conviction.[100]

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[96] *Id.* at 315.
[97] *Id.* at 316 (footnote omitted).
[98] *Id.*
[99] *Id.*
[100] *Id.* at 317.

Similarly, in *State v. Flamini*, the Tennessee Court of Criminal Appeals reversed a burglary conviction for lack of evidence.[101] There, the defendant robbed a gas station convenience store and was convicted of burglary.[102] The court wrote:

> In this case, the property in question was a convenience store and gas station open to the public 24 hours a day. Ms. Rutledge testified that the store did not maintain a list of prohibited persons and that "people just kind of walk in and out as they please." Clearly, the defendant possessed the property owner's consent to enter the store. That he intended to commit a robbery therein does not, in any way, alter that consent. The record establishes that the defendant sought dismissal of the burglary charge on this exact basis, and after the prosecutor asserted that the defendant's intent to commit robbery revoked the owner's consent, the trial court denied the motion. The court should have granted the motion because the prosecutor's position was wholly untenable . . . . If the statute were read in the manner suggested by the prosecutor, every felony committed within a building or habitation would also constitute burglary. Our legislature did not intend such a result.[103]

[101] No. E2008–00418–CCA–R3–CD, 2009 WL 1456316 (Tenn. Crim. App. May 26, 2009).
[102] *Id.* at *6.
[103] *Id.* (citations omitted).

Finally, in *State v. March*, the defendant was convicted of taking stamps and checks from a church's office.[104] On appeal, the defendant argued that as he had consent to enter the church at any time because his family performed custodial duties at the church.[105] The Court of Criminal Appeals rejected this argument, concluding that the consent did not extend to the secure office:

> Although church officials were aware that the Defendant assisted his parents with their duties opening and closing the church and maintaining the premises, the Defendant acted outside the consent granted to his parents to enter the premises, and at least derivatively allowed to him. He entered the financial office and the locked file cabinet, even though the duties performed by the Defendant's parents with the Defendant's assistance were not financial in nature, and although he had no authority to write checks on behalf of the church.[106]

Contrasting this evidence with the evidence presented in *Flamini* and *Ferguson*, the court concluded:

> In *Ferguson*, the defendant stole money from coin-operated machines in a laundromat, and in *Flamini*, the defendant robbed the clerk at a convenience store. In both cases, this court noted that the businesses were open to the public when the crimes occurred and held that the defendants

[104] No. W2010–01543–CCA–R3–CD, 2012 WL 171894 (Tenn. Crim. App. Jan. 20, 2012).
[105] *Id.* at *6.
[106] *Id.* at *7.

> could not be guilty of burglary because they had effective consent to enter the businesses. In the present case, the financial office and secretary's office at the church were kept locked when not in use, meaning they were not accessible to members of the public who attended church services or functions, unlike the retail areas of the laundromat and convenience store in *Ferguson* and *Flamini*. The proof shows that access to the two offices was limited, that the Defendant entered them without effective consent, and that the Defendant committed thefts from the offices. The evidence is sufficient to support his convictions for two counts of burglary.[107]

The Court therefore affirmed the conviction.

C. Reasonable Understanding

The State's position in these shoplifting cases requires interpreting the statute in two specific ways. First, as discussed at length above, it requires that section (a)(3) be interpreted as applying even to buildings that are "open to the public." Second, it requires that "effective consent" be interpreted as not applying when a business provides an individual with a notification that he or she is not allowed on the premises, even if those premises do not physically restrict entry or check identification at the door. Given the case law discussed above regarding "effective consent," that is not a foregone conclusion. Indeed, the tenor of much of the discussion in those cases centers on physical barriers and whether employees check identification at the door, which would not apply to a Wal-Mart, which has

[107] *Id.*

automatically opening doors and no personnel screening out prospective customers.

D. Doctrine of Fair Warning

This situation—where an old statute has suddenly been repurposed for new use—is one that the doctrine of fair warning, and the related doctrine of vagueness, is supposed to handle. As the United States Supreme Court has explained, there is a "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime . . . ."[108] Even more importantly, "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." [109] Case law provides, as the standard for decision, that the analysis must be based on "a person of common intelligence."[110] As the Tennessee Court of Criminal Appeals has summarized:

> The fair warning requirement embodied in the due process clause prohibits the states from holding an individual criminally responsible for conduct which he could not have reasonably understood to be proscribed. *United States v. Harriss*, 347 U.S. 612, 74 S. Ct. 808, 98 L.Ed. 989 (1954). Due process requires that the law give sufficient warning so that people may avoid conduct which is forbidden. *Rose v. Locke*, 423 U.S. 48, 96 S. Ct. 243, 46 L.Ed.2d 185 (1975).[111]

[108] Bouie v. Columbia, 378 U.S. 347, 350 (1964).
[109] *Id.* at 351 (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)).
[110] State v. Burkhart, 58 S.W.3d 694, 697 (Tenn. 2001) (citing Grayned v. Rockford, 408 U.S. 104, 108 (1972)).
[111] State v. Whitehead, 43 S.W.3d 921, 928 (Tenn. Crim. App. 2000).

Similarly, the overlapping doctrine of vagueness provides that a penal statute cannot be applied "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits."[112] Relying on some of the same principles covered by the fair warning doctrine, the Tennessee Supreme Court recently explained that under the Due Process Clause of the Fourteenth Amendment and Article I, Section 8 of the Tennessee Constitution:

> [A] criminal statute cannot be enforced when it prohibits conduct "'in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Id.* (quoting *Leech v. Am. Booksellers Ass'n,* 582 S.W.2d 738, 746 (Tenn. 1979)). The primary purpose of the vagueness doctrine is to ensure that our statutes provide fair warning as to the nature of forbidden conduct so that individuals are not "held criminally responsible for conduct which [they] could not reasonably understand to be proscribed." *United States v. Harriss,* 347 U.S. 612, 617, 74 S. Ct. 808, 98 L.Ed. 989 (1954). In evaluating whether a statute provides fair warning, the determinative inquiry "is whether [the] statute's 'prohibitions are not clearly defined and are susceptible to different interpretations as to what conduct is actually proscribed.'" *Pickett,* 211 S.W.3d at 704 (quoting *State v. Forbes,* 918 S.W.2d 431, 447–48 (Tenn. Crim. App. 1995)); *see*

[112] Hill v. Colorado, 530 U.S. 703, 732 (2000).

> *also State v. Whitehead*, 43 S.W.3d 921, 928 (Tenn. Crim. App. 2000).[113]

Finally, the Tennessee Court of Criminal Appeals recently wrote:

> To determine whether a statute is unconstitutionally vague, a court should consider whether the statute's prohibitions are not clearly defined and are thus susceptible to different interpretations regarding that which the statute actually proscribes.[114]

Unfortunately, despite the strong language of these cases, the doctrine is rarely actually used to prohibit prosecutions.[115] If the rule of lenity is applied sparingly in

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[113] State v. Crank, 468 S.W.3d 15, 22–23 (Tenn. 2015); *see also* Johnson v. United States, 135 S. Ct. 2551, 2557 (2015).

[114] Mitchell v. State, No. M2014–02298–CCA–R3–HC, 2015 WL 6542894, at *12 (Tenn. Crim. App. Oct. 29, 2015) (citing *Whitehead*, 43 S.W.3d at 928).

[115] *See Crank*, 468 S.W.3d at 23. In *Crank*, the Tennessee Supreme Court explained:

> [T]his Court has recognized the "inherent vagueness" of statutory language, *Pickett*, 211 S.W.3d at 704, and has held that criminal statutes do not have to meet the unattainable standard of "absolute precision," State v. McDonald, 534 S.W.2d 650, 651 (Tenn. 1976); *see also* State v. Lyons, 802 S.W.2d 590, 592 (Tenn. 1990) ("The vagueness doctrine does not invalidate every statute which a reviewing court believes could have been drafted with greater precision, especially in light of the inherent vagueness of many English words."). In evaluating a statute for vagueness, courts may consider the plain meaning of the statutory terms, the legislative history, and prior judicial interpretations of the statutory language. *See Lyons*, 802 S.W.2d at 592 (reviewing

the case law, the doctrine of fair warning and void-for-vagueness gets even less use. Yet, properly understood, and if the language of these cases is to be taken seriously, it is a perfect fit for the situation presented by these burglary cases.

It is fair to say that individual criminal defendants prior to late 2015 were unlikely to realize that they were committing the crime of burglary. Even attorneys and experienced judges quite possibly would not have characterized this series of events as burglary (and reacted with surprise and perplexity when such charges started appearing). Indeed, even had an attorney researched the law and precedent, that attorney would have reported that there were no indications that this scenario had ever been charged as burglary in Tennessee and would be unlikely to be considered burglary. In that situation, the doctrine of fair warning should prevent application of the burglary statute.

VI. Conclusion

It is not unusual for litigants to present novel and innovative theories that, when accepted, change the direction of the law. That is the essence of the common law and is fully accepted as a way for the civil law to evolve. A different set of concerns apply, however, where the consequences include the loss of liberty. The doctrines of

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> prior judicial interpretations of similar statutory language); *Smith*, 48 S.W.3d at 168 ("The clarity in meaning required by due process may . . . be derived from legislative history.").

Id.

There is an obvious tension in these decisions. Is a person of "common intelligence" somehow also supposed to be well-versed in legislative history and judicial precedent?

both lenity and fair warning protect, in slightly different ways, an underlying notion of fairness to defendants. It seems fundamentally unfair to punish someone, particularly to imprison someone, for doing something that they did not realize was wrong. It also seems fundamentally unfair to punish someone who did something they knew was wrong but thought was relatively minor as if they had committed a major crime. This is the same basic instinct that rejects ex post facto laws.[116] On either a retributive theory or a deterrence theory of punishment, it seems crucial that an individual realize that certain actions violate a law before he or she can be punished for violating it.

To be sure, this insight is counterbalanced by another principle, that "ignorance of the law is no excuse."[117] The resulting compromise, which is theoretically unsatisfying but at least workable, is to focus on whether a reasonable person would know, or at least can know, that the law applied to this situation, or whether a reasonable person would be uncertain. As Justice Holmes once wrote:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the

[116] Rogers v. Tennessee, 532 U.S. 451, 476 (2001) (Scalia, J., dissenting) ("[T]he notion of a common-law crime is utterly anathema today, which leads one to wonder why that is so. The obvious answer is that we now agree with the perceptive chief justice of Connecticut, who wrote in 1796 that common-law crimes 'partak[e] of the odious nature of an ex post facto law.'").

[117] *See* Elonis v. United States, 135 S. Ct. 2001, 2009 (2015).

> warning fair, so far as possible the line should be clear.[118]

Thus, even if the state's interpretation of the statute is technically correct in some metaphysical sense (which, as argued above, it is not), it would nonetheless violate of our traditions of fair warning and lenity to impose that interpretation on an unsuspecting defendant. Expansions of the criminal law should happen through the orderly legislative process, rather than through the creativity of a prosecutor stretching well-established laws.

[118] McBoyle v. United States, 283 U.S. 25, 27 (1931).

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CLOSING THE CRIME VICTIMS COVERAGE GAP: PROTECTING VICTIMS' PRIVATE RECORDS FROM PUBLIC DISCLOSURE FOLLOWING *TENNESSEAN V. METRO*

By: Daniel A. Horwitz

I. Introduction

In March of 2016, the Tennessee Supreme Court ruled 4–1 that law enforcement's investigative files are categorically exempt from public disclosure under the Tennessee Public Records Act ("TPRA") throughout the pendency of a criminal case.[1] The underlying lawsuit pitted a vast media coalition spearheaded by *The Tennessean* against both law enforcement officials and a rape victim who intervened to protect her privacy interests under the pseudonym "Jane Doe."[2] Ultimately, the court's holding represented a resounding victory for law enforcement and a significant setback for Tennessee's news media, which lost on every substantive claim presented.[3] At present, however, how the court's ruling will affect crime victims' ability to protect their private records from public disclosure after criminal proceedings have concluded is not yet clear.

Tennessean v. Metro represented the first occasion that the Tennessee Supreme Court has considered when, if ever, crime victims' private records are protected from public view under the TPRA. Notably, although the case's central holding—that law enforcement's investigative records are shielded from disclosure "during the pendency of [a case's] criminal proceedings and any collateral challenges to any convictions"—provides some measure of protection to crime victims,[4] significant questions remain

[1] Tennessean v. Metro., 485 S.W.3d 857, 873 (Tenn. 2016).
[2] *Id.* at 859.
[3] *Id.* at 874.
[4] *Id.* at 873.

unsettled. Specifically, the court's ruling in *Tennessean* potentially establishes a three-part "coverage gap" that creates substantial uncertainty as to whether crime victims' private records are exempt from public disclosure in the following instances:

> (1) if their cases do not result in a plea or a conviction;
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> (2) if they are not victims of a sexual offense; or
>
> (3) if the records that they seek to protect from public disclosure—no matter how personal or private in nature—are not specifically exempted from disclosure by statute.[5]

In a future case, however, the Tennessee Supreme Court is likely to hold that these three categories of records are exempt from disclosure under the TPRA as well. Specifically, the court is likely to find that such records are shielded from public view pursuant to Article I, section 35 of the Tennessee Constitution and Tennessee Code Annotated section 40–38–102(a)(1)—two of Tennessee's relatively new "victims' rights" provisions—which collectively establish that crime victims have legally cognizable rights to be protected from "intimidation," "harassment," "abuse," "indignity," and "lack of compassion" throughout Tennessee's justice system.[6]

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[5] *See generally id.*

[6] *See* Brief for Domestic and Sexual Violence Prevention Advocates as Amici Curiae in Support of Intervenor Jane Doe and Partially in Support of Petitioners *The Tennessean*, et al. at 6–37, Tennessean v. Metro., 485 S.W.3d 857 (2016) (NO. M–2014–00524–SC–R11–CV/); Opening Brief of Intervenor—Appellee Jane Doe at 9–26, Tennessean v. Metro., 485 S.W.3d 857 (2016) (NO. M–2014–00524–SC–R11–CV).

II. The Tennessee Public Records Act

As a general matter, all governmental records in Tennessee are considered public records under the Tennessee Public Records Act unless the records are specifically exempt from disclosure by law.[7] Notably, when the TPRA was first adopted in 1957, it only provided for two such exemptions—one for medical records of patients in state hospitals, and another for military records involving national and state security.[8] In the half century since, however, the Tennessee legislature has systematically added more than forty additional statutory exemptions to the TPRA, rendering it one of the most exception-laden public records statutes in the nation.[9]

As importantly, the TPRA has also been amended to include a "catch-all" provision that creates several additional exemptions to disclosure.[10] This provision establishes that even if certain governmental records are not protected from disclosure by the TPRA itself, they are nonetheless exempt from disclosure if there is an

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The arguments presented in this article reflect many of the arguments that were made to the Tennessee Supreme Court in *Tennessean* both by amici curiae supporting Jane Doe and by Jane Doe herself. *See id.*

[7] Memphis Pub. Co. v. City of Memphis, 871 S.W.2d 681, 684 (Tenn. 1994) (noting that section 10–7–505(d) of the Tennessee Code "expressly sets up a presumption of openness to records of governmental entities" and that "the burden is placed on the governmental agency to justify nondisclosure of the records").

[8] Act of Mar. 18, 1957, ch. 285, § 2, 1957 Tenn. Pub. Acts 932, 932 (codified as amended at TENN. CODE ANN. §§ 10–7–503 to –506 (2016)); *see also* Swift v. Campbell, 159 S.W.3d 565, 571 (Tenn. Ct. App. 2004) ("As originally enacted, the public records statutes excepted only two classes of records from disclosure. These records included the medical records of patients in state hospitals and military records involving the security of the United States or the State of Tennessee.").

[9] *See* TENN. CODE ANN. § 10–7–504(a)–(s) (2016).

[10] TENN. CODE ANN. § 10–7–503(2)(A) (2016); *see also Swift*, 159 S.W.3d at 571–72.

exemption that is "otherwise provided by state law."[11] Significantly, for purposes of this catch-all provision, "state law" has been interpreted expansively to include state statutes, the Tennessee Constitution, Tennessee common law, rules of court, and administrative rules and regulations.[12]

With respect to shielding crime victims' records from public disclosure, *Tennessean* recognized that section 10–7–504(q)(1) of the TPRA expressly exempts some crime victims' records from public disclosure once a defendant has been convicted or pleaded guilty.[13] Separately, the court held that while criminal proceedings are pending in a given case, Tennessee Rule of Criminal Procedure 16 similarly exempts victims' records from disclosure under the TPRA's catch-all provision.[14] In light of these holdings, however, the court's majority opinion did not address two separate and potentially broader sources of protection for crime victims. Specifically, the court declined to consider arguments raised by both Jane Doe and several amici curiae that the following two provisions protect victims' private records from public disclosure as well:

> (1) Article I, section 35 of the Tennessee Constitution, which affords crime victims a constitutional right "to be free from intimidation, harassment and abuse throughout the criminal justice system"; and
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> (2) Tenn. Code Ann. § 40–38–102(a)(1), which affords crime victims a statutory

[11] TENN. CODE ANN. § 10–7–503(2)(A) (2016).
[12] *Swift*, 159 S.W.3d at 571–72 (collecting cases).
[13] *See Tennessean*, 485 S.W.3d at 859.
[14] *Id.*

> right to "[b]e treated with dignity and compassion."

Thus, whether these provisions operate to fill the tripartite coverage gap left open by *Tennessean*'s majority opinion has yet to be determined.

III. Case Summary

Tennessean v. Metro arose out of a public records request filed by *The Tennessean* in October of 2013.[15] The paper's request sought access to law enforcement records concerning a high-profile rape that took place at Vanderbilt University and resulted in the arrest and prosecution of four of Vanderbilt's star football players.[16] Among other things, *The Tennessean* requested access to text messages and videos that had been sent or created by third-party sources.[17] Of particular interest to the media coalition were records involving former Vanderbilt football coach James Franklin, who had contacted the victim by cell phone four days after she was raped while she was undergoing a medical examination.[18]

Ultimately, the Metropolitan Government of Nashville ("Metro") denied *The Tennessean's* public

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[15] *Id.* at 860.
[16] *Id.*
[17] *Id.*
[18] Tony Gonzalez, *Attorneys: James Franklin Contacted Victim in Vanderbilt Rape Case*, THE TENNESSEAN (Apr. 30, 2014), http://www.tennessean.com/story/news/crime/2014/04/29/james-franklin-allegation-surfaces-vandy-filing/8476049/ ("The filing also includes a new allegation about interactions between the alleged victim and former head football coach James Franklin and former director of performance enhancement Dwight Galt—both now at Pennsylvania State University. Referring to records, the attorneys said the victim was contacted by Franklin and Galt during a medical examination four days after the rape to explain "that they cared about her because she assisted them with recruiting.").

records request, causing the paper to petition for access to the requested records in Davidson County Chancery Court.[19] Thereafter, the victim in the case intervened, arguing that certain records implicating her personal privacy—such as her private cell phone records and a video recording of her rape—were exempt from public disclosure under Tennessee's victims' rights laws.[20] After a full hearing, the trial court ruled that some, but not all, of the records that *The Tennessean* had requested were public records and had to be disclosed.[21]

Eventually, the case reached the Tennessee Supreme Court.[22] Upon review, four of the court's five justices held that while criminal proceedings remained pending, the Metro Nashville Police Department's entire investigative file was exempt from public disclosure under Tennessee Rule of Criminal Procedure 16, which governs discovery during criminal prosecutions. Additionally, with respect to the victim's records, the majority opinion explained: "Our ruling today protects Ms. Doe's privacy concerns by shielding all of the investigative records from disclosure during the pendency of the criminal proceedings and any collateral challenges to any convictions."[23] The court also noted that:

> At the conclusion of the criminal proceedings, Tennessee Code Annotated section 10–7–504(q)(1) grants protection to Ms. Doe by providing that when a defendant has plead guilty or been convicted of and sentenced for a sexual offense or violent sexual offense specified in Tennessee Code

[19] *Tennessean*, 485 S.W.3d at 860.
[20] *Id.* at 860–61.
[21] *Id.* at 862.
[22] *See generally id.*
[23] *Id.* at 873.

> Annotated section 40–39–202, the following information is confidential and shall not be disclosed: the victim's name; home, work and email addresses; telephone numbers; social security number; and any photographic or video depiction of the victim.[24]

Because it was unnecessary to its holding, the majority declined to address whether any of the records sought by *The Tennessean* would also have been protected from disclosure under one or more of Tennessee's victims' rights provisions. This separate argument, however, was adopted in full by Justice Wade in dissent, who wrote:

> Both [A]rticle I, section 35 and section 40-38-102(a)(1) . . . qualify as "state law" for purposes of the catch-all exception to disclosure under the TPRA. Exceptions must be recognized pursuant to the catch-all provision when, as here, there is a significant risk that the disclosure of documents will contravene rights guaranteed by provisions in the Tennessee Code and the Tennessee Constitution.[25]

IV. Victims' Protections and Potential Gaps in Coverage

With respect to protecting victims' privacy, the significance of *Tennessean* lies in what it potentially leaves exposed. Under the majority's opinion, records that a crime victim has provided to law enforcement are only protected from disclosure by Tennessee Rule of Criminal Procedure

[24] *Id.*
[25] *Id.* at 881 (Wade, J., dissenting) (citations omitted).

16 during the pendency of a criminal case.[26] Thereafter, if—but only if—a defendant is "convicted of, and has been sentenced for a sexual offense," then Tennessee Code Annotated section 10–7–504(q)(1) further provides that:

> [T]he following information regarding the victim of the offense shall be treated as confidential and shall not be open for inspection by members of the public:
>
> (A) Name, unless waived pursuant to subdivision (q)(2);
>
> (B) Home, work and electronic mail addresses;
>
> (C) Telephone numbers;
>
> (D) Social security number; and
>
> (E) Any photographic or video depiction of the victim.[27]

Crucially, however, if only these two protections—Rule 16's "pending criminal case" exemption and section 10–7–504(q)(1)'s "post-sentencing for a sexual offense exemption"—shield victims' records from disclosure under the TPRA, then three broad categories of crime victims will be left unprotected once criminal proceedings have concluded.

The first category of victims who would be left without the ability to safeguard their private records from public view are those whose cases do not result in a conviction. By its own terms, section 10–7–504(q)(1)

[26] *Id.* at 859.
[27] TENN. CODE ANN. § 10–7–504(q)(1) (2016).

applies only "[w]here a defendant has plead[ed] guilty" or "has been convicted."[28] Significantly, however, by some estimates, less than four percent of rapes result in a conviction.[29] Consequently, if section 10–7–504(q)(1) is the only provision that protects crime victims' private records from public disclosure after criminal proceedings have concluded, then the approximately ninety-six percent of rape victims whose cases do not result in a conviction have no ability to protect their records from disclosure at all.

Second, even in those rare instances when a conviction is secured, section 10–7–504(q)(1) applies only to victims whose perpetrators are found guilty of committing "a sexual offense or [a] violent sexual offense."[30] Excluded from this category, for example, are victims of domestic violence, who represent a significant proportion of all crime victims.[31] This omission is similarly critical, because domestic violence victims often will not report their abuse to law enforcement unless they are confident that their private information will be protected.[32]

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[28] *Id.*

[29] *See, e.g.*, UK CENTER FOR RESEARCH ON VIOLENCE AGAINST WOMEN 2, https://opsvaw.as.uky.edu /sites/default/files/07_Rape_Prosecution.pdf (last visited July 22, 2016) ("Since most rapes are not reported to police, the [National Violence Against Women Study] estimated that only 3.4% of all rapes ultimately lead to a conviction for the offender.").

[30] TENN. CODE ANN. § 10–7–504(q)(1) (2016).

[31] TENNESSEE BUREAU OF INVESTIGATION CJIS SUPPORT CENTER, DOMESTIC VIOLENCE 2013–2015 at 1 (2016), https://www.tn.gov/assets/entities/tbi/attachments/Domestic_Violence_2015_-_Secured.pdf ("A total of 232,031 domestic violence offenses were reported to TIBRS from 2013 to 2015.").

[32] *See* Viktoria Kristiansson, *Walking a Tightrope: Balancing Victim Privacy and Offender Accountability in Domestic Violence and Sexual Assault Prosecutions (Part II)*, STRATEGIES: THE PROSECUTOR'S NEWSLETTER ON VIOLENCE AGAINST WOMEN, May 2013, at 7, http://www.aequitasresource.

As one scholar has explained, for example: "If domestic violence . . . victims do not feel that their private information will remain so under confidentiality and privilege laws, victims may be hesitant to reveal their trauma . . . ."[33]

Third, even when a victim's perpetrator is both convicted and convicted of a qualifying sexual offense, the final category of victims who are potentially left out of *Tennessean*'s protections are sexual assault victims who seek to prevent the public from accessing records that are not specifically exempted from disclosure by Tennessee Code Annotated section 10–7–504(q)(1). As noted above, following a defendant's conviction, section 10–7–504(q)(1) exclusively prohibits disclosure of a victim's "name," "home, work and electronic email addresses," "telephone numbers," "social security number," and "photographic or video depiction[s] of the victim."[34] Omitted from these restrictions, however, are myriad highly sensitive and deeply personal records that victims also have a significant interest in keeping private—such as their diaries, e-mails, voicemail, social media records, and text messages.[35] In *Tennessean* itself, for example, the victim sought to prevent the public from accessing the private text messages that she had exchanged with her mother after she learned that she had been raped while unconscious the night before.[36] If section 10–7–504(q)(1) serves as the sole, comprehensive list of exemptions protecting victims' records from public

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org/Issue_10_Walking_A_Tightrope_Balancing_Victim_Privacy_and_Offender_Accountability_in_Domestic_Violence_and_Sexual_Assault_Prosecutions_Part_II_May_2013.pdf.

[33] *Id.*

[34] TENN. CODE ANN. § 10–7–504(q)(1) (2016).

[35] *Cf. id.*

[36] Oral Argument at 14:47, Tennessean v. Metro., 485 S.W.3d 857 (Tenn. 2016), http://www.tncourts.gov/courts/supreme-court/arguments/2015/05/28/tennessean-et-al-v-metropolitan-government-nashville-and.

disclosure following a criminal conviction, however, then these profoundly private records would all become available for public scrutiny the moment that criminal proceedings come to an end.

Because the records that Jane Doe sought to protect in *Tennessean* were not yet subject to being revealed due to the pending nature of the criminal proceedings in her case, the court's majority opinion did not address any of these potential gaps in coverage. Recognizing its many interstices, however, Justice Wade cautioned: "When the criminal prosecution concludes, the protections of Rule 16 expire. At that point, absent any other exception, the public records pertaining to the rape will be subject to public disclosure, including data from the victim's cell phone and video recordings of the alleged rape."[37] Further, Justice Wade emphasized several of the aforementioned limitations of section 10–7–504(q)(1), noting:

> [T]his provision applies only if the defendants either plead guilty or are convicted at trial. [Additionally], the materials exempt from disclosure are limited. For example, the statute would not protect statements by or about the victim; written descriptions of photographs and videos of the victim; or most content of the victim's cell phone.[38]

Accordingly, Justice Wade held in dissent that: "I believe that the victim of the alleged rape is entitled to an adjudication of her claim that public disclosure of the police records would violate her statutory and

[37] *Tennessean*, 485 S.W.3d at 882 (Wade, J., dissenting).
[38] *Id.*

constitutional rights [under Tennessee's victims' rights provisions]."[39]

V. Looking Forward

Based on *Tennessean*'s holding with respect to Tennessee Rule of Criminal Procedure 16, the records that Jane Doe sought to protect were not yet at risk of being revealed because criminal proceedings were still pending in her case.[40] As a result, *Tennessean*'s majority opinion did not consider her argument that Article I, section 35 of the Tennessee Constitution—which affords crime victims a constitutional right "to be free from intimidation, harassment and abuse throughout the criminal justice system"—constitutes an independent exemption to disclosure under the TPRA.[41] Nor did it address her

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[39] *Id.* at 877.

[40] *See id.* at 873.

[41] TENN. CONST. art. I, § 35. Although the terms of Article I, section 35 reference "the criminal justice system" only, several arguments support the conclusion that its terms are not restricted to criminal proceedings. *See* Brief for Domestic and Sexual Violence Prevention Advocates as Amici Curiae in Support of Intervenor Jane Doe and Partially in Support of Petitioners *The Tennessean*, *supra* note 6, at 10–13. *But see* Media Coalition/Appellants' Response to Brief of Intervenor-Appellee Jane Doe at 2, Tennessean v. Metro., 485 S.W.3d 857 (2016) (NO. M–2014–00524–SC–R11–CV/) (arguing that the rights afforded to victims by the Tennessee Constitution and the Victims' Bill of Rights "are limited to the criminal justice system and do not apply to Public Records Act requests."); Application of Petitioners for Permission to Appeal at 4 n.4, *Tennessean*, 485 S.W.3d 857 (2016) (NO. M–2014–00524–SC–R11–CV/) (arguing that "[t]he alleged victim has identified no substantive rights applicable in a *civil case* under the Public Records Act to preclude the disclosure of public records."). First, records of criminal proceedings are "inextricably intertwined with the criminal justice system" even when sought in a civil case. Brief for Domestic and Sexual Violence Prevention Advocates as Amici Curiae in Support of Intervenor Jane Doe and Partially in Support of Petitioners *The Tennessean*, *supra* note 6, at 11. Second, "in order to be of any value at

argument that Tennessee Code Annotated section 40–38–102(a)(1)—which affords crime victims a statutory right to "[b]e treated with dignity and compassion"—provides such an exemption as well.[42] In a future case, however, the Tennessee Supreme Court is likely to hold that these provisions operate to fill the coverage gaps referenced above for three reasons.

First, the only two jurists in Tennessee who have squarely addressed the arguments that Article I, section 35 and Tennessee Code Annotated section 40–38–102(a)(1) exempt crime victims' private records from public disclosure under the TPRA have wholeheartedly embraced them, providing the beginnings of precedent to support that conclusion.[43] Second, while declining to confront the matter directly, *Tennessean*'s four-member majority expressed significant concerns about the potentially devastating consequences that could result from allowing crime victims' private records to become public, suggesting

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all, the rights guaranteed to victims by Article I, section 35 must be held to extend to civil actions." *Id.* at 12. Such a holding also would not be at all unique. For example, although the Fifth Amendment to the United States Constitution provides that: "No person shall be . . . compelled in any criminal case to be a witness against himself . . . .", the U.S. Supreme Court has explained that its protections may be asserted "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Id.* (quoting Kastigar v. United States, 406 U.S. 441, 444–45 (1972)). Additionally, given that *Tennessean* itself makes clear that Tennessee Rule of Criminal Procedure 16 applies in civil cases, there is no logical reason why the rights guaranteed by Article I, section 35 of the Tennessee Constitution should not similarly apply in civil proceedings. *Id.* at 13.

[42] TENN. CODE ANN. § 40–38–102(a)(1) (2016).

[43] *See Tennessean*, 485 S.W.3d at 881–82 (Wade, J., dissenting); *see also* Tennessean v. Metro., No. M2014–00524–COA–R3–CV, 2014 WL 4923162, at *6 (Tenn. Ct. App. Sept. 30, 2014) (McBrayer, J., dissenting).

that such arguments are likely to carry purchase.[44] Third, there is strong evidentiary support for the conclusion that exposing crime victims' private records to the public could result in victims experiencing intimidation, harassment, abuse, indignity, or lack of compassion in many instances—five consequences that Article I, section 35 and Tennessee Code Annotated section 40–38–102 expressly aim to prevent.[45]

A. Uniformity of Prior Judicial Decisions

To date, the only two judges in Tennessee who have squarely considered litigants' arguments that Article I, section 35 and Tennessee Code Annotated section 40–38–102 independently exempt crime victims' private records from public disclosure have wholeheartedly embraced them, providing the beginnings of precedent to support such a holding.[46] As indicated above, in *Tennessean* itself, Tennessee Supreme Court Justice Gary Wade held without equivocation that: "Both [A]rticle I, section 35 and section 40–38–102(a)(1) . . . qualify as 'state law' for purposes of the catch-all exception to disclosure under the TPRA."[47] Further, Justice Wade made clear that these provisions are considerably more expansive than Tennessee Code Annotated section 10–7–504(q)(1) in that they protect a larger body of records from disclosure and also "apply both during and after the prosecution."[48]

Significantly, in this regard, Justice Wade's opinion also mirrored Judge Neal McBrayer's separate opinion in the Tennessee Court of Appeals. There, in a similarly

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[44] *See Tennessean*, 485 S.W.3d at 873–74.
[45] TENN. CONST. art. I, § 35; TENN. CODE ANN. § 40–38–102 (2016).
[46] *See supra* note 43 and accompanying text.
[47] *Tennessean*, 485 S.W.3d at 881 (Wade, J., dissenting) (citing Swift v. Campbell, 159 S.W.3d 565, 571–72).
[48] *Id.* at 882.

victim-protective dissent, Judge McBrayer held that "victim's rights under Article 1, § 35 of the Tennessee Constitution and Tennessee Code Annotated sections 40–38–101 through 506 . . . constitute 'state law' exceptions to the Public Records Act." [49] Additionally, because both Justice Wade's and Judge McBrayer's colleagues resolved the case on alternative grounds in both instances, no other judge has yet weighed in on this question. Accordingly, among the admittedly small number of Tennessee jurists who have addressed the matter to date, the conclusion that Tennessee's victims' rights provisions independently exempt crime victims' private information from public disclosure is currently unanimous.

B. The Majority's Concern for Victims' Privacy

Tennessean's majority opinion and Justice Kirby's separate concurring opinion also indicate that the four remaining justices were similarly attuned to crime victims' privacy interests. For example, although unnecessary to its holding, *Tennessean*'s majority opinion editorializes: "The General Assembly wisely enacted [an] exception to the Public Records Act to protect the release of a victim's private information and any photographic or video depictions without the necessity of a court proceeding."[50] Curiously, the court's majority opinion also goes out of its way to criticize Justice Wade's comparatively victim-protective dissent for being insufficiently attuned to victims' privacy concerns, bemoaning that: "The dissenting justice expresses concern for Ms. Doe and her right to be treated with 'dignity and compassion,' Tenn. Code Ann. §

[49] Tennessean v. Metro., No. M2014–00524–COA–R3–CV, 2014 WL 4923162, at *6 (Tenn. Ct. App. Sept. 30, 2014) (McBrayer, J., dissenting).
[50] *Tennessean*, 485 S.W.3d at 873–74.

40–38–102(a)(1), yet would throw open the police department's investigative records for all to see."[51]

Further, Justice Kirby's separate concurring opinion emphasizes that absent a robust exemption to protect victims' private records, "[v]ictims of sexual crimes could find their personal information, as well as videos and photos of their ordeal, readily available to those who would post the information online or otherwise further torment them."[52] Importantly, as detailed in the following section, these are also among the specific concerns that Tennessee's victims' rights provisions aim to address. Thus, with victims' privacy concerns weighing heavily on the minds of the majority's justices as well, the notion that the Tennessee Supreme Court would leave open the three glaring coverage gaps referenced in this article's introduction seems unlikely.

C. The Likelihood of Intimidation, Harassment, Abuse, Indignity, or Lack of Compassion

Most importantly, the argument that exposing crime victims' private information to the public could contravene the rights guaranteed to victims by Article I, section 35 and Tennessee Code Annotated section 40–38–102 is remarkably persuasive in many instances. In particular, a significant body of social science evidence supports the conclusion that releasing sexual and domestic violence victims' private information to the public would frequently result in such victims experiencing "intimidation," "harassment," "abuse," "indignity," or "lack of

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[51] *Id*. at 873 n.24. Given Justice Wade's express holding regarding victims' rights and his additional observation that trial courts have the authority "to issue protective orders placing discoverable materials under seal when necessary . . . to protect the rights of the victim," however, such criticism was unfounded and seriously misplaced. *Id*. at 881 n.3 (Wade, J., dissenting).

[52] *Id.* at 874 (Kirby, J., concurring).

compassion"[53]—five consequences that Article I, section 35 and Tennessee Code Annotated section 40–38–102 expressly prohibit.[54] Thus, given that each of these consequences provides an independent basis for exempting a crime victim's records from public disclosure, it is likely that at least one of them will be identified as an exemption under the TPRA's catch-all provision in a future case.

Despite their alarming frequency, crimes involving sexual assault and domestic violence are among the most chronically underreported crimes in the country.[55] In 2000, only an estimated one-quarter of all physical assaults, one-fifth of all rapes, and one-half of all stalking offenses perpetrated against females by intimate partners are reported to law enforcement.[56] Significantly, a critical factor that contributes to such underreporting is "fear of reprisal if [victims] report."[57]

Fear of reprisal is precisely the type of intimidation that is prohibited by Article I, section 35.[58] Moreover, there

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[53] *See infra* notes 55–77 and accompanying text.

[54] TENN. CONST. art. I, § 35; TENN. CODE ANN. § 40–38–102(a)(1) (2016).

[55] U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION 11 (2003), http://www.bjs.gov/content/pub/pdf/cv03.pdf.

[56] PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE & CTRS. OF DISEASE CONTROL & PREVENTION, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE, FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 51 (2000), https://www.ncjrs.gov/pdffiles1/nij/181867.pdf.

[57] RICHARD FELSON & PAUL-PHILIPPE PARÉ, THE REPORTING OF DOMESTIC VIOLENCE AND SEXUAL ASSAULT BY NONSTRANGERS TO THE POLICE 8 (2005) (citations omitted) (citing Simon I. Singer, *The Fear of Reprisal and the Failure of Victims to Report a Personal Crime*, 4 J. QUANTITATIVE CRIMINOLOGY 289, 289–302 (1988), https://www.ncjrs.gov/pdffiles1/nij/grants/209039.pdf.

[58] *See* TENN. CONST. art. I, § 35. Tennessee Code Annotated section 40–38–102(a)(2) further provides that: "All victims of crime and prosecution witnesses have the right to: . . . Protection and support with prompt action in the case of intimidation or retaliation from the

is reason to believe that such fear constitutes the rule, rather than the exception. In total, "almost nine out of ten American women (86%) [believe that] victims would be less likely to report rapes if they felt their names would be disclosed by the news media."[59] Consequently, without being able to rely on a public records exemption, "[t]he prospect of having to reveal [private] information . . . [may] make it less likely that the victim will cooperate in the proceedings or choose to report the crime in the first instance."[60] Thus, "[i]f domestic violence and sexual assault victims do not feel that their private information will remain so under confidentiality and privilege laws, victims may be hesitant to reveal their trauma . . . ."[61]

Unfortunately, harassment significantly contributes to such underreporting as well.[62] Claims against athletes, in particular, have generated many well-documented instances of harassment when a victim's identity is publicly known[63]—a consequence that Article I, section 35 of

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defendant and the defendant's agents or friends." TENN. CODE ANN. § 40–38–102(a)(2) (2016).

[59] NAT'L VICTIM CTR., RAPE IN AMERICA: A REPORT TO THE NATION 6 (1992), http://victimsofcrime.org/docs /Reports%20and%20Studies/rape-in-america.pdf?sfvrsn=0.

[60] Nat'l Crime Victim Law Inst., *Protecting Victims' Privacy: Moving to Quash Pretrial Subpoenas Duces Tecum for Non-Privileged Information in Criminal Cases*, VIOLENCE AGAINST WOMEN BULLETIN (Sept. 2014) at 1, https://law.lclark.edu/live/files/18060-quashing-pretrial-subpeonasbulletinpdf.

[61] Kristiansson, *supra* note 32.

[62] *See, e.g.*, Andre Rouillard, *The Girl Who Ratted*, HUFFINGTON POST (June 17, 2014), http://www.huffingtonpost.com/andre-rouillard/the-girl-who-ratted_b_5168203.html (documenting extensive harassment experienced by rape victim).

[63] *See, e.g.*, Associated Press, *Roethlisberger Accuser Receives "Over 100" Threats*, THE NEWS CENTER (Aug. 6, 2009), http://www.thenewscenter.tv/sports/headlines/52599607.html?device=phone&c=y ("The woman who has accused Pittsburgh Steelers quarterback Ben Roethlisberger of raping her at a Lake Tahoe hotel-casino where she worked told authorities she has received dozens of

Tennessee's Constitution similarly forbids.[64] Notably, such harassment also took place during the criminal proceedings at issue in *Tennessean* itself—making this concern all the more salient when it comes to protecting Tennessee's crime victims from further molestation throughout the judicial process.[65]

Regrettably, the abusive practice of "victim blaming" also remains frighteningly persistent in society, and it is especially pervasive in the context of sexual assault cases. As one court recently explained:

> Historically, an exaggerated concern for female chastity and a regrettable inclination to blame the victim for sexual assaults, along with society's general respect for sexual privacy, have resulted in an atmosphere in which victims of sexual assault may experience shame or damage to reputation. It would be callous to pretend that this atmosphere has entirely dissipated, or to insist that victims of such assault lack privacy interests because most people today

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threatening and harassing phone calls."); Mark Memmott, *Two Steubenville Girls Arrested After Allegedly Threatening Rape Victim*, NPR (Mar. 19, 2013, 10:44 AM), http://www.npr.org/blogs/thetwo-way/2013/03/19/17472
8448/two-steubenville-girls-arrested-after-allegedly-threatening-rape-victim ("The 16-year-old girl raped by two Ohio high school football players in a crime that has attracted wide attention has also been the victim of online harassment, the state's top prosecutor said late Monday.").

[64] *See* TENN. CONST. art. I, § 35.

[65] *See Prosecutor: Someone Trying to Intimidate Vanderbilt Rape Victim*, WSMV (Feb. 24, 2014, 8:33 PM), http://www.wsmv.com/story/24810836/someone-trying-to-intimidate-alleged-vandy-rape-victim-prosecutor-says (last updated Aug. 25, 2014 8:34 PM).

> understand that the attacker, not the victim, should be stigmatized and ashamed.[66]

Sadly, the genesis of victim blaming in sexual assault cases is probably the law itself[67]—a vestige of "special requirements for rape prosecutions" that once included, for example, rules such as "the requirement of a cautionary instruction to all juries, alerting them that rape complaints are easy to fabricate" and "rules of evidence deeming the complainant's past sexual conduct or reputation for chastity relevant to her credibility or her consent to sexual intercourse."[68] Perhaps most despicably, courts once applied "the requirement of 'utmost resistance'" to rape prosecutions, which provided that in order to sustain a conviction, "[n]ot only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration

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[66] Doe v. Del Rio, 241 F.R.D. 154, 159 (S.D.N.Y. 2006).

[67] The origin of "victim blaming" appears to be attributable to a historical belief that sex outside of marriage was presumptively criminal. As Professor Anne M. Coughlin has explained:

> Since, under our ancestors' system, the underlying sexual activity in which a rape complainant engaged (albeit, by her own testimony, unwillingly) was criminal misconduct, her complaint logically could be construed as a plea to be relieved of responsibility for committing that crime. A court would be receptive to such a plea only if the woman could establish that, although she had participated in a sexual transgression, she did so under circumstances that afforded her a defense to criminal liability.

Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 8 (1998) (footnote omitted).

[68] JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS 867 (6th ed. 2008).

of her person, and this must be shown to persist until the offense is consummated."[69]

Fortunately, however, in recent decades, courts across the United States have shed these biases and have come to recognize that sexual assault represents an especially egregious crime that can undermine the dignity of victims.[70] Commendably, Tennessee law in particular is not blind to the indignity of sexual assault or to the public's interest in preventing invasions of survivors' privacy.[71] Additionally, there is evidentiary support for the conclusion that identifying victims publicly and releasing records of their assaults can lead to re-victimization and recurring trauma that may further chill reporting[72]—repercussions

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[69] Brown v. State, 106 N.W. 536, 538 (Wis. 1906).

[70] *See, e.g.*, Braswell v. State, Nos. A–2448, A–2529, 1991 WL 11650678, at *7 (Alaska Ct. App. Feb. 6, 1991) (noting that "sexual assault violates the victim's personal sanctity and dignity"); People v. Luna, 204 Cal. App. 3d 726, 749 (1988) (noting "the revolutionary change that has taken place in our society, including changes with respect to the credibility and dignity we extend to adult women and children who are the victims of sexual assault"); Deborah S. v. Diorio, 583 N.Y.S.2d 872, 881 (N.Y. Civ. Ct. 1992), *aff'd*, 612 N.Y.S.2d 542 (N.Y. App. Div. 1994) ("While more rape victims are choosing to 'come out' [publicly] . . . that choice of dignity must remain with the victim, who must cope with: post-rape trauma; nightmares; possible unwanted pregnancy; terrifying concern about infection with the HIV virus; and loss of a sense of personal security.").

[71] *See, e.g.*, State v. Johnson, No. W2011–01786–CCA–R3–CD, 2013 WL 501779, at *12 (Tenn. Crim. App. Feb. 7, 2013) ("An assault charge, which would be the resulting conviction if there was no 'sexual contact' element, would not . . . protect the dignity of the victims of such egregious acts."); TENN. R. EVID. 412 cmts. (noting that Tennessee Rule of Evidence 412 endeavored to protect "the important interests of the sexual assault victim in avoiding an unnecessary, degrading, and embarrassing invasion of sexual privacy").

[72] *See, e.g.*, National Crime Victim Law Institute, *Allowing Adult Sexual Assault Victims to Testify at Trial Via Live Video Technology*, VIOLENCE AGAINST WOMEN BULLETIN, Sept. 2011, at 1–2, https://law.lclark.edu/live/files/11775-allowing-adult-sexual-assault-victims-to-testify ("[R]ecalling horrifying and personal details of the rape forces

that are plausibly among the indignities that section 40–38–102(a)(1) aimed to prevent, as well.[73]

In light of these concerns and others, "[o]ver the last thirty years, every state has enacted some form of victims' rights legislation and nearly two-thirds have passed amendments to their state constitutions granting victims' rights in the criminal justice process."[74] This wave of reform was precipitated in no small part by the fact that "many studies indicate[d] that victims [we]re often more affected by their treatment throughout the course of their limited involvement in the prosecutorial process than by the crime itself."[75] Accordingly, courts across the nation have begun to treat crime victims—and sexual assault and domestic violence victims in particular—with significantly greater compassion in an effort to "protect them from a second victimization by the judicial process."[76]

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the victims to relive the crime mentally and emotionally, leading some to feel as though the sexual assault is recurring and to re-experience a lack of control and terror." (citations omitted) (internal quotation marks omitted)); National Crime Victim Law Institute, *Protecting Victims' Privacy: Moving to Quash Pretrial Subpoenas Duces Tecum for Non-Privileged Information in Criminal Cases*, VIOLENCE AGAINST WOMEN BULLETIN, Sept. 2014, at 1, https://law.lclark.edu/live/files/18060-quashingpretrial-subpeonasbulletinpdf (noting that "[t]he prospect of having to reveal [personal] information to anyone . . . may cause a victim to feel re-victimized and make it less likely that the victim will cooperate in the proceedings or choose to report the crime in the first instance").

[73] The federal Crime Victims' Rights Act, which bears many similarities to Tennessee's Crime Victims' Bill of Rights, also reflects these concerns. *See* 18 U.S.C.A. § 3771(a)(8) (2015) (guaranteeing crime victims "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy").

[74] Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims' Rights Act, and the Victim's Right to Be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 83 (2010) (footnote omitted).

[75] *Id.* at 82 (footnote omitted).

[76] State in Interest of K.P., 709 A.2d 315, 325 (N.J. Ch. 1997).

In Tennessee, this reform effort culminated in the enactment of substantive victims' rights provisions including Article I, section 35 of the Tennessee Constitution and Tennessee Code Annotated section 40–38–102(a)(1), which afford crime victims several important, legally cognizable rights throughout the judicial process.[77] Accordingly, with the overarching goal of protecting crime victims against mistreatment deeply ingrained within Tennessee's constitutional and statutory text, the likelihood that Tennessee's victims' rights provisions will be disregarded in a future case when it comes to filling the coverage gaps left open by *Tennessean*'s majority opinion seems vanishingly small.

Conclusion

Whenever Tennessee's victims' rights provisions conflict with a criminal defendant's federal constitutional rights—such as the right to confrontation or the right to a public trial[78]—there is no doubt that victims' rights must bend. As far as the Tennessee Public Records Act is concerned, however, there is also no doubt that Tennessee's victims' rights provisions operate to exempt victims' private records from public disclosure in many instances.

Tennessean expressly recognized two such exemptions: Tennessee Rule of Criminal Procedure 16, which functions to protect crime victims' records from

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[77] *See* TENN. CONST. art. I, § 35; TENN. CODE ANN. § 40–38–102(a)(1) (2016).

[78] *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defen[s]e.").

disclosure throughout the pendency of a criminal case, and Tennessee Code Annotated section 10–7–504(q)(1), which protects certain limited categories of records concerning sexual assault victims from disclosure following a defendant's conviction.[79] However, pursuant to Article I, section 35 of the Tennessee Constitution and Tennessee Code Annotated section 40–38–102(a)(1), five additional consequences—the likelihood of intimidation, harassment, abuse, indignity, or lack of compassion following the release of a victim's private records to the public—also provide independent bases for exempting crime victims' records from public disclosure both before and after a criminal prosecution has concluded.[80] Consequently, in a future case, it is likely that the three categories of crime victims who were left unprotected by *Tennessean*—(1) victims whose cases do not result in a plea or a conviction, (2) victims whose perpetrators are not convicted of a sexual offense, and (3) victims whose private records are not specifically exempted from disclosure by statute—will ultimately find that their private records are protected from public view under Tennessee's victims' rights provisions as well.

[79] *Tennessean*, 485 S.W.3d at 859.
[80] *See* TENN. CONST. art. I, § 35; TENN. CODE ANN. § 40–38–102(a)(1) (2016).

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POLICY NOTE

EMPLOYMENT LAW—*SMITH V. ROCK-TENN. SERVICES*—EMPLOYER HELD LIABLE FOR SAME-SEX SEXUAL HARASSMENT IN THE WORKPLACE

By: Kaitlyn Dean

Title VII of the Civil Rights Act of 1964 has been relevant for decades, but some of its full implications are still developing in light of shifting gender norms in American culture.[1] Recently, in *Smith v. Rock-Tenn. Services*, the Sixth Circuit held that hostile work environment claims are not limited to cases in which the harasser and the victim are of the opposite sex and that the jury's inference of sex discrimination was not unreasonable based on the plaintiff's evidence.[2]

In Title VII claims, Supreme Court precedent allows for an inference of sex discrimination to be drawn from the evidence but also notes that such an inference can be difficult to draw in same-sex situations.[3] The Court suggests that, especially between males, the line between "male-on-male horseplay" and "discriminatory conditions of employment" can be easily blurred.[4] Despite several documented incidents of unwanted touching and repeated pleas by the male plaintiff for the harassment to stop,[5] the defendant in *Smith* argued that the behavior of the male aggressor was "mere 'horseplay,' beyond the reach of Title VII"[6] and, thus, could not have created a hostile work environment.

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[1] 42 U.S.C. § 2000e–2(a)(1).
[2] Smith v. Rock-Tenn. Servs., 813 F.3d 298 (6th Cir. 2016).
[3] *Id.* at 307 (citing Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998)).
[4] *Id.*
[5] *Id.* at 303–04.
[6] *Id.* at 308.

The defendant's argument highlights a common narrative in our society: that abusive, sexual behavior between males is somehow less abhorrent because it can be easily premised with phrases such as "horseplay," or, "boys will be boys." The *Smith* decision makes it clear that the Sixth Circuit will not tolerate hostile work environments simply because employers choose to mischaracterize sexual harassment as horseplay or ordinary male socializing. As the *Smith* court pointed out, this is a self-serving mindset for responsible parties.[7]

This precedent will not only impact similar Title VII cases currently pending in Tennessee, but will also put employers on notice to take sexual harassment allegations in the workplace more seriously. Employer liability is a requirement for a Title VII claim, meaning a plaintiff must show that the employer "manifested indifference or unreasonableness in light of the facts the employer knew or should have known."[8] The *Smith* opinion establishes that an employer's omissions in light of a sexual harassment allegation are just as important as actions that are taken and that meager attempts to halfway follow policy are not sufficient to escape a Title VII action.[9] While this could potentially lead to stricter workplace regulations, employers may save themselves trouble and money by adopting and adhering to more stringent policies.

The implications for workplace policy in light of *Smith* are undoubtedly important. Ideally, however, the significant impact of this case and similar cases is that other male recipients of sexual harassment, at work and in general, will find it less stigmatizing to come forward. As

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[7] Smith v. Rock-Tenn. Servs., 813 F.3d 298, 308 (6th Cir. 2016).
[8] *Id.* at 311 (citing Waldo v. Consumers Energy Co., 726 F.3d 802, 814 (6th Cir. 2013)).
[9] *Smith*, 813 F.3d at 312.

we have recently seen in Tennessee, fostering this type of "boys will be boys" environment can have disastrous consequences, and the Court's rejection of the horseplay argument in *Smith* was a step in the right direction.[10] Delegitimizing male-on-male sexual harassment as an acceptable social norm will incentivize victims to speak up.

A major case unfolding in Chattanooga reflects how situations can escalate when sexual harassment between males is treated as a casual rite of passage. In December 2015, while on a school-related athletic trip, three upperclassmen from Ooltewah High School assaulted their freshman teammate and sodomized him with a pool cue.[11] The attack caused serious internal damage to the victim's organs, and he was hospitalized for more than a week.[12]

Hamilton County has taken the crime seriously, and the adults, who were supposedly supervising the students, have been charged with failure to report child abuse.[13] Also in response to the assault, the Hamilton County District Attorney's Office launched an investigation into the culture of abuse within the athletic programs at Ooltewah.[14] The underlying cultural problem at Ooltewah, however, seems pervasive and similar to the accepted culture at Rock-Tenn. Services. No one in either setting took issue with the environment that was being fostered, and no one in a leadership position took any legitimate steps to stop the sexual harassment. The detective who was originally assigned to the Ooltewah case, Rodney Burns, even stated

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[10] *Id.* at 308.
[11] Sarah Kaplan, *Rape of a Basketball Player, Accusations of Abuse and Bullying Tear Apart High School*, WASHINGTON POST, Jan. 22, 2016, https://www.washingtonpost.com/news/morning-mix/wp/2016/01/22/.
[12] *Id.* at 1.
[13] *Id.*
[14] *Id.* at 4.

in a juvenile court hearing that the case "is much smaller than what it's blown up to be."[15] Burns went on to say that the attack "was something stupid that kids do . . . [,] but it wasn't done for sexual gratification or really sexual in nature."[16] Even in a situation where a minor was violently raped and seriously injured, Burns's default response was to characterize the act as archetypal male behavior.[17] While this case is still unfolding, the defendant's arguments will likely compare to the defendant's arguments in *Smith*—that this was just typical male behavior that happened to go too far.

The rejection of the defendant's misguided argument in *Smith* will ideally lead to more inclusive work environments and stricter adherence to zero-tolerance sexual harassment policies. The compensatory damages that the Sixth Circuit upheld in favor of the *Smith* plaintiff cost Rock-Tenn. Services three-hundred thousand dollars;[18] therefore, it is likely employers will be more incentivized to have clear, meaningful procedures in place should a harassment situation arise. More importantly, *Smith* has potentially opened the door for a more dynamic discussion on what is normal, acceptable "horseplay" between males. While the Ooltewah debacle may present a more extreme case of sexual harassment than presented in Rock-Tenn., the root problem is the same. Further, the classification of sexual harassment as male-on-male "horseplay" is an issue that will not be resolved until more workplaces, schools, and courts reject the false narrative that sexual harassment and abuse between males is acceptable because "boys will be boys."

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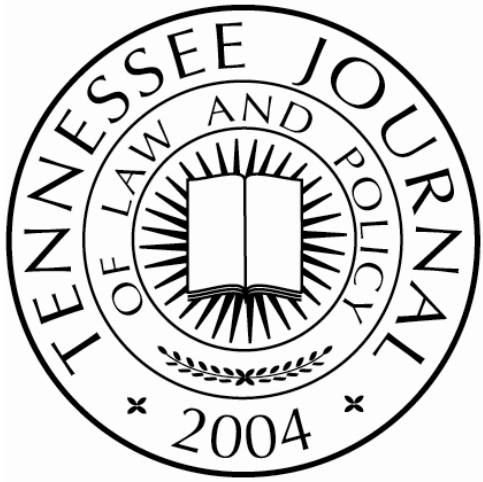
[15] Kendi Anderson, *Detective Charged with Aggravated Perjury Could Face Harshest Penalty in Ooltewah Rape Case*, CHATTANOOGA TIMES FREE PRESS, May 21, 2016, http://www.times freepress.com/news/local/story/2016/may/21/.
[16] *Id.* at 2.
[17] *Id.*
[18] Smith v. Rock-Tenn. Servs., 813 F.3d 298, 306 (6th Cir. 2016).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