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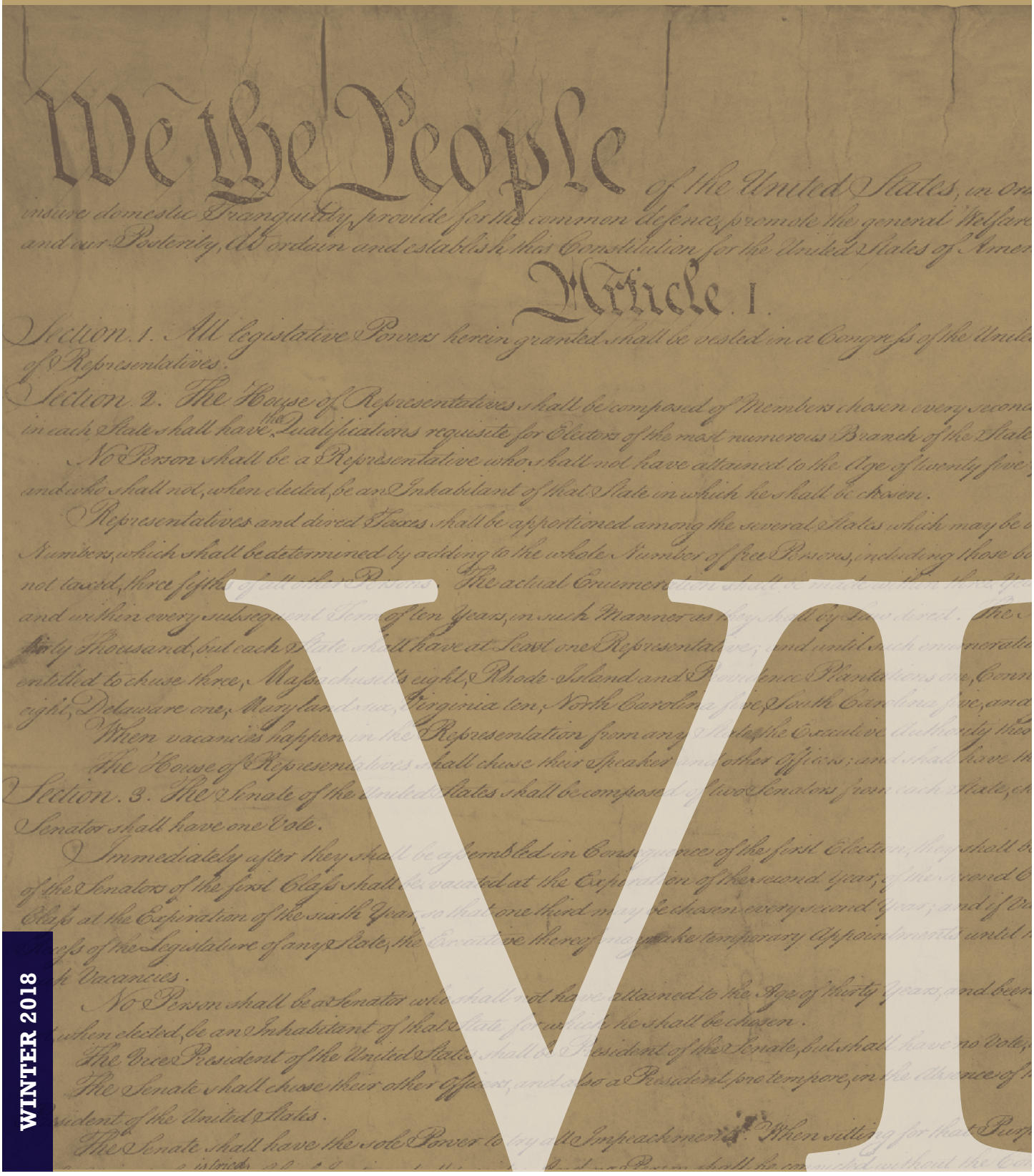

WINTER 2018

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Articles express the opinion of the contributors and not necessarily that of VI Magazine or MACDL. Headlines and other material outside the body of articles are the responsibility of the Editor. VI Magazine accepts letters and unsolicited manuscripts about the practice of criminal defense or the trial of criminal cases.

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Special thanks to Ryan Garry who has served as the Editor of VI Magazine. Ryan has done a terrific job and will be joining MACDL's Executive Committee as Board Secretary. MACDL Board Member Patrick Cotter will be taking over the duties as VI Magazine Editor.

Features

President's Column

Piper Kenney Wold

A hallmark of the Bill of Rights is the notion that a person's liberty should never be taken away without the process being fair. Because defenders understand that our clients' very liberty is at stake, we know that they deserve much more than fairness. Defenders share the belief that every defendant deserves a competent, courageous, zealous advocate who sees the humanity in each and every client, and who acts with integrity.

As criminal defense lawyers, we strive to be this advocate. It is not always an easy undertaking. There are times in which our argument that our client's rights have been violated is unpersuasive. Despite our advocacy, sentences are often disproportional to the offense. Occasionally our clients are less than appreciative. It can be exhausting, stressful and sometimes seemingly thankless.

MACDL has given me a greater sense of community as a criminal defense lawyer. MACDL members enjoy mentorship, collegiality and the opportunity to connect with the folks who are fighting the same battles. For me, this is the most important benefit of being an MACDL member.

But MACDL is more than a support network. The Organization has sought to improve the administration of criminal justice. MACDL was instrumental in revising the expungement and drug sentencing statutes. And a few recent examples of MACDL's efforts include: arguing for the reformation of Ramsey County's trial scheduling process; challenging violations of the 36/48 hour rules; speaking out against unfair bail that is often set for indigent defendants; as well as voicing concern about Hennepin County's termination of the De Novo program. MACDL is demanding a seat at the table similar to what prosecutors have had for years. This is important work. The Organization will continue to push for reform for the betterment of both clients and members.

MACDL members will celebrate their efforts at the Annual Dinner on March 10, 2018. This year, MACDL will honor John Brink with the Distinguished Service Award and present the Honorable Michael J. Davis with the Equal Justice Award. Please join us.

Bruno Law Update

Bruno Law, PLLC, is proud to announce that Stephen Foertsch, Esq, has joined the firm as an associate attorney. Stephen will be handling all criminal defense matters, both State and Federal. Foertsch is a 2013 graduate of William Mitchell College of Law and 2009 graduate of St. John's University. Stephen has served on the MACDL membership and annual dinner committees for the past 3 years and has been MACDL's liaison for St. Cloud and the surrounding area.

The Question of Radicalization of Somali Young Men in Minnesota:

Psychiatric Perspectives on Legal Defense Issues

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The young Somali-American men charged in a series of indictments in 2015 in the District of Minnesota plotted to travel to Turkey or nearby, and from there, continue onwards into ISIS-controlled territory for the purpose of joining ISIS.[1] Their crime – that of conspiring to provide material support to a terrorist organization in the form of themselves as fighters – falls, in many respects into a modern or non-traditional type of crime. It is conduct that was criminalized only relatively recently, ushered in by developments within the sociopolitics of stateless terrorism. This crime is distinct from historically traditional forms of criminal behaviors, such as murder, assault, robbery, or the white collar crimes of fraud and theft. Rather, it is an ideological crime (a crime of declared intent) because, as yet, no actual act of material support has been committed. A primary purpose of the prosecution is preventive, to ensure that no act of material support will in fact occur. As such, inherent in the prosecution are assumptions about who these young men are and who they were planning to be. The psychiatric consultant's contribution is to ask what is it about these young men that we do not know – to contextualize them in the complexity of their life story, families and community, and in so doing, countermand or at least blunt the belief that they present an ongoing threat to society.

The nearest analogies would be considerations of espionage and going off to fight in someone else's war. As such, these crimes appeal to the best and the worst aspects of youth, the best being idealism, and the worst being the violence that finds expression in the anger of alienated youth. Most cultures have incorporated rituals of purification and trials (rites of passage) to acknowledge and welcome youths into their adult communities. In the absence or formal breakdown of such rituals, the youth will create or adapt some rituals of their own. There have always been young men who traveled to join wars in other countries. At times, these have been encouraged or at least condoned by the home country, such as the apocryphal children's Crusade of 1212, or the Frenchmen joining the American revolution of 1776, or the young men who joined the International Brigade to fight against Franco in the Spanish Civil War of 1936.

With this as background, what is it that a psychiatric consultation can offer to the defense of a Somali (or other Muslim refugee) young man on trial for planning to join ISIS? The traditional clinical psychiatric assessment that looks primarily for a diagnosable medical or psychiatric illness should be seen as an essential beginning rather than the endpoint of a psychiatric evaluation. This is

[1] The lead author of this piece was appointed as a defense expert for one of the charged young men. This article, however, does not reference his case in particular, but rather makes general remarks pertinent to the class of defendants.

especially the case when the youth in question is part of a small group of plotters who encourage each other on with bravado and macho boastings. Such youth are socially engaged with peers and do not fit into the loner type who is more likely to have a diagnosable psychiatric disorder. Nevertheless a full psychiatric evaluation needs to be done to assess for major mental illnesses such as schizophrenia, mood disorders and alcohol and drug addictions. With equal weight, medical and neurological conditions such as brain tumors, cerebral malaria, seizure disorders and epilepsy, and especially conditions of risk from the Somali Civil War, namely traumatic brain injuries and developmental sequelae of prenatal and early childhood malnutrition, have to be considered and pursued (Kroll et al, 2011). One would still have to demonstrate a link between the illness and the offense (planning to leave the country to join ISIS), but the groundwork for this is the discovery of a significant psychiatric, medical or neurological abnormality. A tangential alert here is for the psychiatric consultation to be alert to the habit of prosecutorial psychiatric experts to brand cases they come across as being sociopathic, a designation that rarely adheres to accepted definitions or standards for such a damning diagnosis.

Once these general contributory causes of 'criminal' behavior have been investigated and ruled out, the psychiatric consultant has to proceed to the critically important domain of cross-cultural or transcultural considerations. How is the immediate endpoint of planning to join ISIS explained by the life trajectory of this particular young man? Here a narrative of the life history of this individual young man has to be constructed that places him within his cultural history in the fullest, richest sense. Two Western cultural assumptions have to be challenged here. The first is the assumption that Western diagnostic categories and Western presentation of symptoms of mental distress are equally applicable to non-Western cultures and individuals. This is an essentialist statement that there is a truth out there and we Westerners have discovered and embody it. For example, Westerners typically describe mood disturbances, especially depressions, in subjective terms: "I feel sad; I am unhappy." But this type of personal report of feelings as the hallmark of depression is very cultural specific; in most other parts of the globe, depressive illnesses are expressed as body pain (heart ache, joint pains, unbalanced liver).

The second assumption is that the goals and values of mental health are the same in all cultures, and conform to Western goals and values. The Western values for healthy adolescence are autonomy and independence; at the risk of succumbing to overgeneralizations ourselves, the non-Western patterns for healthy adolescence into manhood involve interdependence and loyalty to one's family and clan. This is as good a place as any to sound the warning about assuming that every person in other cultures conforms perfectly to that society's cultural norms; this is a form of cultural stereotyping that ignores individual differences and is often the basis for racial and ethnic prejudices.

Essentially a culturally competent psychiatric assessment inquires into the cultural patterns (including religious) that shape the development of individuals within the context of family and community. In the specific cases under discussion, the social forces that lead to the civil violence in 1991 and its aftermath are very important, especially as these events impact upon the developing child and adolescent. Family disruption, injury and death, destruction of one's home, homeland, and way of life are likewise important issues for assessment, as are the migration processes and what it might be like to spend one's childhood in a refugee camp dependent upon the charity and protection of an often-resentful host country (Bhui et al, 2006). Finally, as many studies have shown, the post-resettlement conditions in which the adolescent continues his development has particular salience if one is to understand how this adolescent took this particular

path at this juncture of his life. Stresses of broken families, poverty, discrimination and perceptions of discrimination and micro-aggressions contribute to a sense of alienation that interacts with the high energy and idealism which arise in adolescence (Ellis et al, 2008). Assimilation in large high schools is a very slow process and is impeded by racism and lack of opportunities for extracurricular activities in many arenas. For example, in the mid-to-late 1990s, the first group of young Somalis in high schools, such as in Minneapolis and San Diego, realized their first daunting hurdle was their inability to express themselves fluently in English. They could neither express their needs and hopes, nor were they accepted into their peers' seemingly joyful world of sports and dating, nor were they able to defend themselves from the locker-room jeers thrown at them. But once those jeers were aimed at the Somali teenage girls, Somali teenage boys felt a stinging humiliation; they were not able to defend their ladies, as their culture would have dictated back in Somalia. As a result, Somali boys regrouped and formed a team that began physically fighting back in honor of the Somali teenage girls. This worked but only temporarily, as some of the young men went too far into the game, thus veering off the academic path and toward gang membership.

Furthermore, the adolescent now has a foot in two worlds, the traditional world of his parents and the attractive world of his host country. If there are universals, it is the intergenerational conflict that is established within each family, as the parental generation sees its fundamental values, duties and codes of behaviors under relentless siege from the language acquisition, different gender roles, secularization in many forms, and exemplars of success influencing the younger generation. Contrary to the earlier case of lack of language fluency, ironically those Somalis who adapted soon by learning the new language, making friends outside their circles and dressing like the mainstream, faced resistance from their fellow countrymen, women, and parents. They were pressured not to stray from home, lest they shed their identity and lose their heritage of language and religion.

Because it has direct relevance to the recent (2016) trials of young Somali men attempting to reach ISIS, we shall briefly touch upon the potential role of the psychiatric consultant in rebutting the testimony to the court of 'deradicalization experts.' We would make a sharp distinction between being an expert in a deradicalization treatment program and being an expert in predicting which defendants are likely to remain radicalized and which to convert back to 'normality.' Parenthetically, many psychologists are very skeptical about the claims for successful deradicalization made by experts, because no outcome studies have been presented at scientific meetings or published in scientific journals.

But most damaging to the defense in the Minnesota cases were the claims by the court's deradicalization expert that he was able to predict which defendants were likely to be successfully deradicalized and which were unlikely to be deradicalized. The court's expert witness claimed that he used his observation of the subject's body language and eye contact, as well as the subject's openness in talking about his radicalization and de-radicalization processes to make his predictions On the contrary, the psychological literature is unanimous that subjective assessment of body language and eye contact to draw conclusions about the honesty and sincerity of a person's statements or the risk of recidivism is completely unscientific and without merit. The sociopath can brazenly maintain good eye contact; the innocent person may be anxious and avoid eye contact. There is not a single scientific paper that has reported a study that demonstrates validity to the deradicalization expert's method of prediction of successful or unsuccessful deradicalization . Representation by an expert witness that these are scientifically valid methods reveals either lack of knowledge of the underlying science of psychology of prediction studies or a willful attempt to deceive. Considering that these predictions were factored into the sentencing portion of the trial of young men, such use of junk science is serious indeed.

Summary

It is the task of the psychiatric expert witness in these unusual types of cases to draw a portrait of the defendant that shows him as an individual human being, compassionate, naïve, committed to family, feeling the sting of prejudicial judgments from elements of the host country, and vulnerable to peer pressure and expert propaganda appealing to his particular youthful idealism. If biological factors (head trauma, adverse developmental stresses or absences, multiple losses) are suspected that might suggest limited capacity, these should be pursued, but the cultural factors always remain critically important for the psychiatric consultant for the defense.

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Terrorism is Different:

Experts and Terrorism Representations

JaneAnne Murray and Jean Brandl[1]

In the space of less than two years, the Islamic State of Iraq and the Levant (ISIL) went from the "JV" league[2] to America's greatest foe.[3] The United States has spent over $11 billion attempting to annihilate it in Syria and Iraq.[4] At home, billions more have been spent on surveillance and investigations, deploying elite prosecutors and agents to address the threat of returned and home-grown fighters who may perpetrate attacks like those seen in Brussels, Paris and Manchester.[5] There have been 135 prosecutions of ISIL suspects as of August 2017,[6] and this class of cases remains a significant priority of the Department of Justice.[7] ISIL is in retreat and ISIL-related prosecutions are in decline.[8] Many of its surviving foreign recruits are on their way back home.[9]

Who are the subjects of these prosecutions? A 2017 report from the Center on National Security at Fordham Law School reveals that they are predominantly young Muslim male U.S. citizens, with more than half born in the United States.[10] Their average age is 27, and most are 25 or younger.[11] Often drawn to ISIL through social media, many were experiencing alienation and identity crises at the time of their offense, and could be characterized as "seekers" of religious, political or social attachment.[12] These young men are typically charged with multiple counts of providing material support to a terrorist organization, a charge that currently carries a maximum penalty of 20 years in prison, and even more than that under the relevant federal sentencing guidelines.[13]

Death penalty lawyers have long known that it takes a village to represent an individual in a politically-charged case with serious sentencing exposure.[14] And we are all familiar with the mantra that "death is different." But terrorism, it turns out, is different too. These cases are complicated by multiple factors that make them especially challenging for defense lawyers – including the complex political, historical and cultural context, the often troubled backgrounds and likely youth of the accused, the long sentences they encompass, and the polarizing public attitudes they generate from, alternately, fear and perceptions of discrimination. The legal support

[1] The authors represented two young men from Minnesota accused of conspiring to provide material support to ISIL.

[2] *See* Brian Ross, et al., *ISIS 2 Years Later: From "JV Team" to International Killers*, ABC News, June 29, 2016, available at http://abcnews.go.com/International/isis-years-jv-team-international-killers/story?id=40214844 ("*ISIS 2 Years Later*").

[3] *See America First Foreign Policy*, available at https://www.whitehouse.gov/america-first-foreign-policy.

[4] *See ISIS 2 Years Later*.

[5] *See* Jeanne Sahadi, *What the NSA Costs Taxpayers*, CNN Money, June 7, 2013, available at http://money.cnn.com/2013/06/07/news/economy/nsa-surveillance-cost/index.html.

[6] *See* Karen J. Greenberg (Editor), *The American Exception: Terrorism Prosecutions in the United States – The ISIS Cases March 2014 – August 2017*, Center on National Security, Fordham University School of Law, September 2017 ("Fordham 2017 Report") at 3.

[7] *See* Karen J. Greenberg, *Case by Case: ISIS Prosecutions in the United States, March 2014 – June 2016*, Center on National Security, Fordham University School of Law, July 2016 ("Fordham 2016 Report") at 2 (noting 900 open FBI investigations).

[8] Fordham 2017 Report at 6.

[9] *See, e.g.*, Martin Chulov, et al., *ISIS Faces Exodus of Foreign Fighters as its "Caliphate" Crumbles*, The Guardian, Apr. 26, 2017, available at https://www.theguardian.com/world/2017/apr/26/isis-exodus-foreign-fighters-caliphate-crumbles.

[10] *See* Fordham 2017 Report at 3.

[11] *Id.* at 11.

[12] *See* Fordham 2016 Report at 3.

[13] *See* Fordham 2017 Report at 2; 18 U.S.C. §§ 2339A, 2339B; United States Sentencing Guideline §3A1.4.

[14] *See, e.g.*, American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003), Guideline 5.1 (setting forth requirements for composition of capital defense team).

networks for terrorism lawyers are in their infancy,[15] while simultaneously, terrorism cases invariably raise novel legal issues requiring sophisticated and creative thinking.[16] Moreover, prosecutors and judges may feel intense pressure to put the thumb on the scale in favor of incapacitation.[17] An effective defense strategy must therefore incorporate a range of scholarly and professional expertise. In this article, we focus on sentencing and mitigation issues.

ISIL – A Brief History

On June 29, 2014, The Islamic State of Iraq and the Levant ("ISIL"), the group behind an insurgency that had seized a large swath of oil-rich territory in Iraq and Syria, formally declared the establishment of a "caliphate."[18] A caliphate is a sovereign state led by a caliph or holy leader – a person believed by many Muslims to be the successor to the Prophet Mohammed and the political and religious leader of the entire Muslim community. ISIL renamed itself "Islamic State," and declared its leader, Bakr al-Baghdadi, the caliph. Announcing ambitions ultimately to control the territory stretching from the Mediterranean to the Persian Gulf, the group demanded that Muslims across the world swear allegiance to its leader – and migrate to territory under its control. Underscoring its nation-building aspirations, in a 16-point communiqué, ISIL declared "[p]eople tried secular forms of government: republic, Baathist, Safavids ... It pained you. Now is time for an Islamic state."[19]

ISIL's origins lie in an organization called Jama'at al-Tawhid w'al-Jihad, founded in Iraq in 2003 by Jordanian Abu Musab al-Zarqawi, in the wake of the U.S. invasion.[20] In 2004, al-Zarqawi's organization was renamed al- Qaeda in Iraq (AQI) when Zarqawi joined forces with Osama bin Laden.[21] AQI played an instrumental role in the Iraqi insurgency against the U.S. operations in Iraq. Zarqawi, who styled himself as an "emir" or "insurgent commander,"[22] advocated three core, interconnected, ideas, that find expression in modern-day ISIL: "ideology understood through tactics; anti-Shi'aism; and, foreign recruitment."[23] Zarqawi was killed in a United States airstrike in June of 2006.[24] Thereafter, AQI was renamed the Islamic State in Iraq ("ISI").[25] AQI's influence declined in 2007, but gained traction in 2010 when Abu Bakr al-Baghdadi – reputedly in possession of a doctorate in Islamic studies[26] – took control of the group.[27] At the time, AQI consisted mainly of Iraqi Sunni Muslims, many of whom had served in the military under Saddam Hussein.[28] In late 2011, Baghdadi expanded operations into Syria to establish Jabhat al-Nusra (or the Nusra Front), which

[15] Excellent resources are available on the websites of the ACLU (https://www.aclu.org/issues/national-security), the NACDL (https://www.nacdl.org/nationalsecurity), the Center on National Security at Fordham Law (http://www.centeronnationalsecurity.org), among others.

[16] *See, e.g.*, *Abby Simons, Lawyers for Minnesota Terror Suspects Argue ISIL is not a Terrorist Organization*, Star Tribune, Aug. 8, 2015, available at, http://www.startribune.com/lawyers-for-minnesota-terror-suspects-argue-isil-not-a-terrorist-organization/321094901/.

[17] *See, e.g.*, Marie-Helen Maras, *Risk Perception and Fear after 2004 Madrid and 2005 London Bombings*, in Samuel J. Sinclair, Daniel Antonius, eds., The Political Psychology of Terrorism Fears, H (Oxford University Press, 2013) at 237.

[18] *ISIS Declares the Establishment of a Sovereign State*, Financial Times, June 29, 2014, available at http://www.ft.com/cms/s/0/6ec4fd4c-ff5c-11e3-8a35-00144feab7de.html#ixzz3h9s6I6yq.

[19] Thanassis Cambanis, *The Surprising Appeal of ISIS*, Boston Globe, Jun. 29, 2014, available at http://www.bostonglobe.com/ideas/2014/06/28/the-surprising-appeal-isis/l9YwC0GVPQ3i4eBXt1o0hI/story.html.

[20] Bobby Ghosh, *ISIS:A Short History*," The Atlantic, August 14, 2014 ("*ISIS: A Short History*"), available at http://www.theatlantic.com/international/archive/2014/08/isis-a-short-history/376030/; *see also* Joby Warrick, Black Flags: The Rise of Isis, Anchor Books, 2016); William McCants, THE ISIS APOCALYPSE (St. Martin's Press, 2015) ("ISIS APOCALYPSE").

[21] *See ISIS: A Short History*.

[22] *Id.*

[23] Isaac Kfir, *Social Identity Group and Human (In)Security: The Case of Islamic State in Iraq and the Levant (ISIS)*, September 8, 2014, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2493209.

[24] *ISIS: A Short History*.

[25] *Id.*

[26] Terrence McCoy, *How ISIS Leader Abu Al Baghdadi Became the World's Most Powerful Jihadi Leader*, Washington Post, June 1, 2004, available at http://www.washingtonpost.com/news/morning-mix/wp/2014/06/11/how-isis-leader-abu-bakr-al-baghdadi-became-the-worlds-most-powerful-jihadi-leader/.

[27] *ISIS: A Short History*.

[28] *Id.*

quickly came to be recognized as one of the strongest rebel groups battling President Bashar al-Assad's forces.[29] In April 2013, Baghdadi announced the merger of his forces in Iraq and Syria and the creation of the Islamic State in Iraq and the Levant (ISIL).[30]

Following its declaration of a caliphate, ISIL's rule has been characterized by shocking brutality – including public beheadings, burnings, drownings, crucifixions, abductions, mass killings, repression and killing of gay people, and the sexual enslavement of captured girls and women. It has been roundly condemned by the international community as a terrorist organization. No state or international entity has recognized ISIL's self-proclaimed sovereign status. On May 14, 2014, the U.S. Department of State announced the amendment of the designation of AQI as a Foreign Terrorist Organization (FTO) to add the alias ISIL as its primary name.[31]

But, as several scholars and commentators have pointed out, the terrorist label is an imperfect fit given other aspects of ISIL's structure, territory and stated goals. While the group has adopted harshly violent and repressive tactics, and has engaged in military and insurgency attacks against the Syrian and Iraqi armies, it has also embarked on a systematic process of civilian governance over the eight to ten million people within the territory it controls, building a complex, hierarchical administrative structure modeled on that of typical government.[32] Indeed, according to one journalist, "[f]rom education curriculum and textbooks, to fishing regulations and fines for littering, ISIS has laws and by-laws that are more detailed than some recognized states."[33] ISIL, as one commentator concludes, is "a 'hybrid terrorist organization' – that is, an organization that operates simultaneously in the (illegitimate) military-terrorist sphere and in the (pseudo-legitimate) civilian sphere."[34]

The ISIL Sophisticated Recruitment Efforts

One of the most remarkable and unprecedented features of ISIL's strategic operations is its intensive and sophisticated use of social media to recruit new members and supporters. ISIL's recruitment strategy is not unique to ISIL, its forebear Al-Qaida, or terrorist groups in general. In fact, Al-Qaida leader Ayman Al-Zawahiri claimed half of his organization's battle was "taking place in the battlefield of the media."[35] But, as experts acknowledge, the quality, quantity and reach of ISIL's media warfare is extraordinary. As the Syrian war escalated and Islamic State became ISIL, its public relations strategy emerged: "a focus on Syria, high quality production values, an emphasis on social media networks and an appeal to a wider, pan-Islamic and non-Arabic speaking audience."[36] Along with its flagship online magazine, "Dabiq," ISIL produced and disseminated powerful and emotional videos and images – depicting

[29] *Id.*

[30] *Id.* Al Nusra ultimately split from ISIL and affiliated with Al Qaeda, further fragmenting the Anti-Assad forces. See ISIS Apocalypse at 89-95.

[31] *See Terrorist Designations of Groups Operating in Syria*, U.S. Department of State Media Note, May 14, 2014, available at http://www.state.gov/r/pa/prs/ps/2014/05/226067.htm.

[32] *Id.*, *see also What is Islamic State?*, BBC News, June 29, 2015, available at http://www.bbc.com/news/world-middle-east-29052144; Tim Arrango, *ISIS Transforming Into Functioning State That Uses Terror as Tool*, The New York Times, July 21, 2015, available at http://www.nytimes.com/2015/07/22/world/middleeast/isis-transforming-into-functioning-state-that-uses-terror-as-tool.html?_r=0; Rebecca Collard, *What We Have Learned Since ISIS Declared a Caliphate One Year Ago*, Time Magazine, June 25, 2015, available at http://time.com/3933568/isis-caliphate-one-year/

[33] *See* Boaz Ganor, *Four Questions on ISIS:A "Trend" Analysis of the Islamic State*, Perspectives on Terrorism, June 2015, at 58, available at http://www.ict.org.il/Article/1424/Four-Questions-on-ISIS; *see also* Audrey Kurth Cronin, *Isis Is Not a Terrorist Group* (hereafter "Cronin 2015") Foreign Affairs, March/April 2015, available at https://www.foreignaffairs.com/articles/middle-east/isis-not-terrorist-group; Penny Starr, *State Dept. Official: ISIS No Longer a Terrorist Group But "A Full-Blown Army,"* CNSNews.com, July 23, 2014, available at http://cnsnews.com/news/article/penny-starr/state-dept-official-isis-no-longer-terrorist-group-full-blown-army.

[34] *Id.*

[35] Ayman Al-Zawahri, *Letter from Al-Zawahiri to Al-Zarqawi*, Global Security October 11, 2005 http://www.globalsecurity.org/security/library/report/2005/zawahiri-zarqawi-letter_9jul2005.htm.

[36] Alberto M. Fernandez, *Here to Stay and Growing: Combating ISIS propaganda Networks*, The Brookings Project on U.S. Relations with the Islamic World U.S.-Islamic World Forum Papers 2015, October 2015, at 6, available at https://www.brookings.edu/wp-content/uploads/2016/06/IS-Propaganda_Web_English.pdf (hereafter, "Brookings Report").

ISIL members as dedicated and fearsome warriors;[37] highlighting the ravages of the Syrian war, particularly on children;[38] and illustrating ISIL's role not just as combatant, but also as nation-builder.[39] Harnessing the "free-wheeling, decentralized nature"[40] of YouTube, Twitter, Instagram, Facebook, among other social media platforms, one writer has termed ISIL's "war of ideas"[41] as "high-tech media jihad."[42] As Ambassador Alberto M. Fernandez of the Brookings Institution puts it, "[j]ust as ISIS took advantage of ungoverned space in war-torn parts of Iraq and Syria, it also took advantage of 'ungoverned' virtual space."[43]

At the core of ISIL's successful recruitment efforts is a powerful message to Muslim youth across the world: ISIL embodies not only the one true vision of Muslim identity; it has the capacity to enshrine it in a sustainable concept of Islamic nationhood. Writing in the Boston Globe in June 2014, Thanassis Cambanis explains that despite its "repugnant" tactics, ISIL "has gotten one important thing right: It has created a clear – and to some, compelling – idea of citizenship and state-building in a region almost completely bereft of either."[44] This message is coupled with a sense of urgency. As psychologist John Horgan adds, ISIL is saying to its young audience, "[b]e part of something that's bigger than yourself and be part of it *now*."[45]

It is this focus on the universal ideal of belonging and statehood that is at the heart of ISIL's appeal – particularly, as President Obama has noted, to Muslim youth across the world "who may be disillusioned or wrestling with their identity."[46] To young impressionable minds experiencing alienation from the dominant culture around them, ISIL's message – albeit accompanied by a disturbing brutality – offers an opportunity of a defined and consequential identity. As Peter Neumann, Director of the International Centre for the Study of Radicalization in London, argues: "if you are a Brit or a French guy who has no family connection to Syria, you're not wanting to fight for the Syrian people ... The reason you're going there is because you see Syria as essentially the cent[er] of gravity or the potential birthplace for that Islamic state that you're hoping to create."[47]

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[37] James P. Farwell, *The Media Strategy of ISIS*, Surivival, Vol. 56, No. 6, December 2014, 2015, p. 50 (December 2014 – January 2015).

[38] *See*, *e.g.*, Katrin Bennhold, *Jihad and Girl Power: How ISIS Lured 3 London Girls*, The New York Times, August 17, 2015, available at http://www.nytimes.com/2015/08/18/world/europe/jihad-and-girl-power-how-isis-lured-3-london-teenagers.html?_r=0.

[39] *See* Dominic Casciani, *IS Propaganda Pushes State-Building, Quilliam Study Finds*, BBC, October 6, 2015, available at http://www.bbc.com/news/world-34448557; Charlie Winter, *Fishing and Ultraviolence: So-Called Islamic State Is Known for its Brutality … But It's Also Hooking People in Far Subtler Ways*, BBC, October 6, 2015, available at http://www.bbc.co.uk/news/resources/idt-88492697-b674-4c69-8426-3edd17b7daed.

[40] Brookings Report at 12.

[41] James P. Farwell, *Jihadi Video in the "War of Ideas,"* Survival, Vol. 52. No. 6, December 2010-January 2011, pp. 127-150.

[42] Alex Marshall, *How Isis Got its Anthem*, THE GUARDIAN (US edition), November 9, 2014, available at http://www.theguardian.com/mu-sic/2014/nov/09/nasheed-how-isis-got-its-anthem.

[43] Brookings Report at 12.

[44] *See The Surprising Appeal of ISIS*, Boston Globe June 29, 2014.

[45] *See* Scott Shane and Ben Hubbard, *ISIS Displaying A Deft Command of Varied Media*, The New York Times, August 31, 2014, available at http://www.nytimes.com/2014/08/31/world/middleeast/isis-displaying-a-deft-command-of-varied-media.html ("*ISIS Displaying A Deft Command*") (emphasis added).

[46] *See* President Barack Obama, *Remarks in Closing the CVE Summit*, February 18, 2015, available at https://obamawhitehouse.archives.gov/the-press-office/2015/02/18/remarks-president-closing-summit-countering-violent-extremism (noting link between economic grievances and terror recruitment).

[47] *See* Agence France-Presse, *ISIL chief poised to become world's most influential militant?*, The National, Jun. 5 2014, available at http://www.thenational.ae/world/middle-east/isil-chief-poised-to-become-worlds-most-influential-militant.

Young Muslim Somali-American Men

The impact of ISIL's recruitment strategy can be measured in the huge numbers that have flocked to join it in Syria – estimated at more than 22,000 foreign recruits from more than 100 countries.[48] A number of these – exact statistics are unavailable – have traveled from the United States.[49] For young Muslim men of East-African heritage in the United States, ISIL's seductive nationhood messaging can be particularly appealing. A case in point is the Somali-American population in Minnesota. As research on the refugee Somali community in the United States reveals, the children of these refugees report that they feel torn – they are expected to act "American" at school or at work, but are required to be wholly "Somali" in their own homes. As a result, Somali-American youth find themselves straddling two worlds – one Somali and another American – not fully fitting into either, and thus primed for a third alternative.

Minnesota welcomed thousands of refugees from this war-ravaged region in the 1990s, but today, this close-knit community is home to much dislocation, poverty and unemployment. Raised in a patriarchal culture where men are expected to provide for their family, the male adults struggle to establish an economic foothold, often usurped by their wives, leading to household stress and high rates of divorce.[50] The situation is exacerbated by what one researcher describes as the transition from "dense networks of relationships," which helped to support marriages, into "relatively autonomous units."[51]

Foreign cultures can adapt to U.S. culture in two ways, the social psychologists tell us, dissonant and consonant. In consonant acculturation, parents and children adapt to U.S. culture and society at the same speed and in the same ways. In dissonant acculturation, the youth adapt quickly to American culture, but the parents do not. Dissonant acculturation, common in Somali-American communities, can turn children into "caretakers and translators for their parents" and creates intense generational conflict because the parents feel "powerless and dependent."[52] When this scenario occurs, "youth may get caught (or lost) between the values of the majority culture and those of their parents."[53] Somali teens struggle with trying to follow "two sets of cultural norms and expectations" where they want to identify strongly as Somali, but also want to fit in with Western peers and culture.[54] The educational structure can exacerbate their experiences. There are significant academic disparities between the children of Somali refugees as compared to their mainstream peers – a factor driven by the poorly-performing schools they are forced to attend,[55] the cultural conflicts that can seethe in these schools,[56] and the barriers to first-generation parents' participation in the children's education.[57]

Social psychologist Erik Erikson coined the term "identity crisis" in his landmark work "Childhood and Society," which explained the social significance of childhood and his conclusion that young people face identity confusion from the age of 12-18 as they try to become adults.[58] For immigrant and minority youth, this identity crisis is more pronounced, because "part of th[eir] development

[48] *See* State Department *Background Briefing on Iraq*, May 20, 2015, available at http://www.state.gov/r/pa/prs/ps/2015/05/242665.htm.

[49] *See* Anna Altman, *How Many Foreign Fighters Have Joined ISIS?*, The New York Times, September 16, 2014, available at http://op-talk.blogs.nytimes.com/2014/09/16/how-many-foreign-fighters-have-joined-isis/.

[50] Elizabeth Boyle and Ahmed Ali, *Culture, Structure, and the Refugee Experience in Somali Immigrant Family Transformation*, 48 International Migration 47, 49, 69 (2010) ("*Structure and Refugee Experience*").

[51] *Structure and Refugee Experience* at 54.

[52] Lidwien Kapteijns and Abukar Arman, *Educating Immigrant Youth in the United States: An Exploration of the Somali Case*, 4 Bildhaan: An International Journal of Somali Studies 18, 24 (2008) ("*An Exploration of the Somali Case*").

[53] *An Exploration of the Somali Case* at 23.

[54] Filio Degni, Seppo Pontinen & Mulki Molsa, *Somali Parents' Experiences of Bringing up Children in Finland: Exploring Social-Cultural Change within Migrant Households*, 7 Forum: Qualitative Social Research 2 (2006).

[55] Cawo Abdi, *The Newest African-Americans?: Somali Struggles for Belonging*, 11 Bildhaan: An International Journal of Somali Studies, 90, 99 (2012).

[56] Lauren Gilbert, *Citizenship, Civic Virtue, and Immigrant Integration: The Enduring Power of Community-Based Norms*, 27 Yale Law and Policy Review, 335, 378 (2009).

[57] Anne Alitolppa-Niitamo, *The Generation In-between: Somali Youth and Schooling in Metropolitan Helsinki*, 13 Intercultural Education 275, 279 (2002).

[58] Erik H. Erikson, Childhood and Society (W.W. Norton, 1993).

of identity involves an 'intensified exploration of the meaning of one's ethnicity' and the 'special task to negotiate a balance between two value systems: that of their own group and that of the majority.'"[59] In the Somali community, youth want to honor their families, but they also want to be a part of mainstream society, which creates a "crisis of belonging" because they do not know which group they belong to.[60] If the process of discovering identity is "highly conflicted due to cultural friction with parents or discrimination by the mainstream, it can lead to a host of problems, among them stress, low self-esteem, anger and oppositional behavior, 'ethnic identity crisis,' 'identity deficit' (when a youth no longer knows what to do), or 'marginalization' (the rejection of both domains.)"[61] This conflict is exacerbated by experiences of discrimination, perceived or actual, particularly race discrimination. Research shows that experiences of injustice are a strong cause of "nonnormative actions," which can be remedied when "paths to individual mobility are seen to be open."[62] "Blocked mobility seemed to produce a feeling of unfulfilled ambition among Somali recruits, and, by default, a desire to do something notable and become someone important."[63]

Research on the Developing Brain

Another factor that plays a role in the successful recruitment of young U.S. Muslim men who are drawn to ISIL's cause is their relative immaturity and their susceptibility to powerful peer-group messaging. Decades of research by developmental psychologists and neuroscientists on the development of the adolescent brain,[64] adopted by the Supreme Court in a series of cases beginning in 2005,[65] have highlighted adolescents' impulsivity, vulnerability to peer pressure, and transient identity. Moreover, this "immaturity gap" does not close until they reach their *mid-twenties*.[66] ISIL capitalizes on these three traits in adolescent and young adult recruits.

A wealth of research establishes a disconnect in adolescents between their intellectual ability and their maturity of judgment. While they can distinguish between right and wrong, their ability to exercise good judgment and self-control (i.e. thinking ahead, delaying gratification, estimating risk, restraining impulses, etc.) is limited, and is not fully developed until their early to mid-twenties.[67] Neuroscientific research corroborates the observational findings of social psychologists. The immature judgment and impaired self-control of adolescents have been associated with neurobiological differences between adolescent and adult brains.[68] In fact, building on this neuroscience research, a team of researchers at the

[59] *An Exploration of the Somali Case* at 24.

[60] Matthew Richardson, *Al-Shabaab's American Recruits: A Comparative Analysis of Two Radicalization Pathways, M.A. Thesis, University of Texas at El Paso* (2012) at 49 ("*Two Radicalization Pathways*").

[61] *An Exploration of the Somali Case* at 24. (citation omitted).

[62] Fathali Moghaddam, *The Staircase to Terrorism: A Psychological Exploration*, 60 American Psychologist 161, 163-4 (2005).

[63] *Two Radicalization Pathways* at 47.

[64] *See, e.g.*, Barry C. Feld et. al., *Adolescent Competence and Culpability: Implications of Neuroscience for Juvenile Justice Administration*, in Stephen Morse & Adina Roskies, eds., A Primer on Criminal Law and Neuroscience (New York: Oxford University Press, 2013), at 183 ("*Adolescent Culpability*"); David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 Tex. L. Rev. 1555 (2004); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 Tex. L. Rev. 799, 811 □ 19 (2003) ("*Blaming Youth*").

[65] *See Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012); *Graham v. Florida*, 560 U.S. 48, 76 (2010); *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

[66] *See Adolescent Culpability* at 187 ("The 'immaturity gap' represents the cleavage between adolescents' intellectual maturity – which reaches near-adult levels by age 16 – and psycho-social maturity of judgment, which may not emerge fully for another decade"); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 Developmental Review 76, 81 (2008) ("The differing timetables of these changes—the increase in reward-seeking, which occurs early and is relatively abrupt, and the increase in self-regulatory competence, which occurs gradually and is not complete until the mid-20s, makes mid-adolescence a time of heightened vulnerability to risky and reckless behavior").

[67] *See Adolescent Culpability* at 187 (collecting research); *Blaming Youth* at 811-19.

[68] *See Adolescent Culpability* at 193-94 (noting the "widespread neurobiological differences in the structural and functional development of prefrontal cortical and subcortical limbic structures in adolescents compared to adults," which "may contribute to the poor judgment, reduced self-control, risk taking and heightened reward-responsiveness characteristic of this developmental period").

University of Chicago has embarked on a multi-year study to do MRI scans of ISIL recruits to understand what part of ISIS' message entices them.[69]

One of the leading researchers in this area, Professor Laurence Steinberg, posits that the factors that lead adolescents to engage in risky activity are social and emotional, not cognitive, and that neuroscience's emerging understanding of brain development in adolescence "suggests that immaturity in these realms may have a strong maturational and perhaps unalterable basis."[70] These findings are particularly noticeable in the context of peer influence. Steinberg observes higher levels of risk-taking at puberty, correlated with increased levels of reward-seeking, especially in the presence of peers.[71] Studies confirm that the mere presence of peers causes adolescents to engage in riskier behavior.[72] But, Steinberg notes, risk-taking declines between adolescence and adulthood because of changes in "the brain's cognitive control system," which "improve individuals' capacity for self-regulation" and "occur gradually and over the course of adolescence and young adulthood."[73] This discordant timetable, that is "the increase in reward- seeking, which occurs early and is relatively abrupt, and the increase in self-regulatory competence, which occurs gradually. . . is not complete until the mid-20s."[74] Notably, adolescent vulnerability to peer influence has been confirmed by neuroscience.[75] Neural imaging studies have shown that, in comparison to adults, the adolescent brain overreacts to social stimuli while it has a reduced mechanism for processing these same stimuli.[76] ISIL exploits youth susceptibility to peer influence through its highly personalized recruitment efforts.[77]

These findings underpin the Supreme Court's recent jurisprudence on the issue of the death penalty and life without parole for juveniles. As the majority explained its proportionality analysis of adolescent culpability in *Roper v. Simmons*, 543 U.S. 551 (2005), juveniles are less culpable because of immaturity and reduced self-control, susceptibility to peer influence and "personalities [that] are more transitory and less well- formed, and thus their crimes provide less reliable evidence of a 'depraved character' incapable of 'redemption than do those of adults.'"[78] These "signature qualities of youth"[79] are precisely the qualities that can cause young Muslim males to embrace ISIL's sophisticated messaging about belonging and nationhood. But their adherence is transient. Consistent with data on adolescent criminal behavior, young jihadi recruits are amenable to abandoning violent extremism, and to programs and religious intervention developed to achieve that objective.[80]

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[69] *See* Robert L. Basick, *UChicago Study Explores How ISIS Lights up the Brains of Recruits*, UChicago, Social Sciences Division, available at https://socialsciences.uchicago.edu/story/uchicago-study--explores-how-isis-lights-brains-recruits.

[70] *See* Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 Developmental Review 76, 81 (2008).

[71] *Id.* at 83.

[72] Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 Developmental Psychol. 626, 626 □ 630 (2005).

[73] *Id.*

[74] Id.

[75] *Adolescent Culpability* at 193; Amanda E. Guyer et. al. *Amygdala and Ventrolateral Prefrontal Cortex Function During Anticipated Peer Evaluation in Pediatric Social Anxiety*, 65 Arch. Gen. Psychiatry 1303. 1307 (2008).

[76] *Adolescent Culpability* at 193; Todd A. Hare et. al., *Biological Substrates of Emotional Reactivity and Regulation in Adolescence During an Emotional Go-Nogo Task*, 63 Biological Psychiatry 927, 932 (2008); Guyer et. al., *supra*.

[77] *See*, *e.g.*, Rukmini Callimachi, *ISIS and the Lonely Young American*, The New York Times, June 27, 2015, available at https://www.nytimes.com/2015/06/28/world/americas/isis-online-recruiting-american.html.

[78] 543 U.S. 551, 569 (2005).

[79] *Roper* 543 U.S. 551, 570 (2005) (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)).

[80] John Horgan, *What Makes a Terrorist Stop Being a Terrorist?*,1 J. for De-radicalization 1, 2 (2014) ("*What Makes a Terrorist*"); Mubin Shaikh, *Countering Violent Extremism Online: An Anecdotal Case Study Related to Engaging ISIS Members and Sympathizers on Twitter*, 98 Soundings 478, 485-86 (2015).

Countering Violent Extremism Research

Any comprehensive defense strategy in a terrorism case must take account of the burgeoning – and not necessarily scientific – body of "countering violent extremism" ("CVE")" literature. Risk assessment and the need for incapacitation loom large in terrorism cases, both as to pretrial detention and any sentence that may be imposed. Importantly, however, there is no generally-accepted, validated risk assessment model for terrorists. This is primarily because there no agreed terrorist profile.[81] As one of the leading psychologists in the field, John Horgan, writes, "[t]he journey into and out of terrorism is as personal as it is complex.[82] The outstanding common characteristic of terrorists, one researcher notes, "is their normality."[83] Successful CVE programs focus on "disengagement,"[84] support for the family,[85] and one-on-one mentoring.[86] As discussed above, the path to violent extremism "often involves a search for identity at a moment of crisis."[87] Thus, instead of categorizing terrorists according to personality, "it makes more sense to step back and look at the events that might prompt individuals to start down the path to radicalization in the first place."[88] Importantly, there is no CVE program in the Bureau of Prisons,[89] and indeed, terrorism researchers have concluded that prisons can prove counter-productive, connecting and further radicalizing those with terrorist leanings and creating troubling "opportunities for networking" and "skills transfers."[90]

Conclusion

A terrorism case can be a daunting representation – with high sentencing exposure, vulnerable clients, and the looming specter of support for incapacitation. But as this article demonstrates, there is a wealth of scholarly and expert research to inform the defense mission, particularly in the context of developing mitigating factors for sentencing, as well as providing the information to build a meaningful lawyer-client relationship.

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[81] *See* Arie Perliger, et al., *The Gap Between Participation and Violence: Why We Need to Disaggregate Terrorist "Profiles,"* International Studies Quarterly (2016) at 1, 2. (noting limited success in academia in developing a terrorist profile, and a "growing consensus among academics asserts that, under specific circumstances, most individuals are capable of violence, including terrorism").

[82] *What Makes A Terrorist* at 4.

[83] *Two Radicalization Pathways* at 9.

[84] *See* Rabasa et al., *Deradicalizing Islamic Extremists*, Rand Corporation (2010) (the "Rand Report") at xiv, available at http://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG1053.pdf (noting that in the context of terrorist rehabilitation programs, repressive measures can backfire, and the goal should not be deradicalization but rather incentivized disengagement).

[85] *See* Rand Report at 186 (noting that rehabilitation programs that include an alleged ex-extremist's family "appear to increase the probability that the individual will remain disengaged").

[86] The most successful of the deradicalization programs across the world have provided credible mentors to the individual participants (*see*, *e.g.*, David Crouch and Jon Henley, *A Way Home for Jihadis: Denmark's Radical Approach to Islamic Extremism*, The Guardian, Feb. 23, 2015, available at http://www.theguardian.com/world/2015/feb/23/home-jihadi-denmark-radical-islamic-extremism-aarhus-model-scandinavia); *see also* Rand Report at xviii ("[t]he best-designed rehabilitation programs … offer … theological and psychological counseling … [and] interaction with a credible interlocutor").

[87] *Two Radicalization Pathways* at 12 (citation omitted).

[88] *Two Radicalization Pathways* at 10.

[89] *See* Stephen Montemayor, *After prison, will Minnesota's ISIS defendants come out better or worse?* Star Tribune, Jul. 1, 2017, available at http://www.startribune.com/after-years-in-prison-will-minnesota-s-isis-defendants-come-out-better-or-worse/432015773/.

[90] *See* Rajan Basra, Peter R. Neumann, and Claudia Brunner, *Criminal Pasts, Terrorist Futures: European Jihadists and the New Crime-Terror Nexus* (ICSR 2016) at 4, available at http://icsr.info/wp-content/uploads/2016/10/ICSR-Report-Criminal-Pasts-Terrorist-Futures-European-Jihadists-and-the-New-Crime-Terror-Nexus.pdf.

Expungement for Undocumented Immigrants

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Undocumented immigrants face the same day-to-day difficulties from criminal convictions on their record, and expungement can provide the second chance to them that clears their record as is available to everyone. However, undocumented immigrants may be deterred from pursuing such relief, questioning if such relief is equally and fully available to them.

Expungement provides a court-ordered sealing of a person's criminal record, including all such records held by government agencies. Expungement of a criminal record is an extraordinary remedy to be granted only upon clear and convincing evidence that it would yield a benefit to the petitioner commensurate with the disadvantages to the public and public safety of sealing the record and burdening the court and public authorities to issue, enforce, and monitor an expungement order.

Undocumented immigrants may question if they will be able to meet this burden. Prior clients have raised concern if their undocumented status will be used against them in making any determination regarding the character and activities of the client. Judicial officers have also raised the specter that undocumented immigrants may not be able to meet their burden of proof of yielding a sufficient benefit to the petitioner under the belief that an expungement cannot help their employment prospects due to their undocumented status.

Experience and caselaw has shown that these concerns should not prevent these undocumented immigrants from pursuing the same opportunity for a clean slate as available to everyone else.

The immigration status of a defendant is not relevant to the proceedings in most expungement proceedings. Any such inquiry of that status should be objected to by counsel as irrelevant and potentially unduly prejudicial to the proceedings. However, some cases come to the Court with the defendant's immigration status already known by the Court. In such instances it is important to ensure the Court is educated on the legal intricacies of their status and potential effect on the expungement proceedings.

Undocumented residency in the United States is not a criminal violation nor does it constitute a criminal act. See Arizona v. United States, 567 U.S. ____ (No. 11-182) (2012). The issue of legal residency is a civil issue for Immigration Courts. Inquiry into such status is not indicative of other criminal violations that may weigh in the consideration of petitioner's expungement request, and a Court's view that such status would be a negative reflection on their character should be opposed as unsupported.

As noted, the petitioner carries the burden to prove sufficient benefit commensurate with the disadvantages of expungement. Employment eligibility and increased employment opportunities are weighty and frequently cited benefits to justify expungement. Judicial officers have previously referenced that such benefit is not available to undocumented immigrants as engaging in employment would be an illegal act for them in the United States.

Minnesota Courts have recognized the opportunity and at times obligation of unauthorized individuals to work in this country. See Zaldivar v. Rodriguez, 819 N.W.2d 187 (Minn. App. 2012). In Zaldivar, the Court upheld a contempt order against the obligor in a child support case for failing to pay child support, even though he was not authorized to work in the United States. See Id. The Court reasoned, "[a]n unauthorized alien who works in the United States without authorization may be subject to criminal prosecution only if he or she knowingly uses forged, counterfeit, altered, or falsely-made documents to obtain employment. 8 U.S.C. Section 1324c(a)(1)-(3) (2006); 18 U.S.C. Section 1546 (a), (b) (2006). Thus, as a practical matter, an unauthorized alien can work in the United States without risk of criminal punishment, even if such employment is inconsistent with an employer's restrictions under federal immigration law." Zaldivar, 819 N.W.2d at 193. Therefore, petitioner can reasonably argue that seeking increased employment opportunities are a compelling basis to request expungement, as recognizing such would not be expressly supporting illegal action.

Undocumented petitioners should also stress any alternative bases of substantial benefits for an expungement in order to better meet their burden. These could include benefits such as housing opportunities, opportunities to engage with their children's school activities, or volunteering opportunities. Another potential basis related to employment is the potential benefit a petitioner may receive in establishing and running a business. United States law does not specifically prohibit undocumented immigrants from owning and running a business. Expungement may benefit the successful operation of a business by clearing a petitioner's record for potential customer inquiry, provide for better insurance options for the petitioner or their business, or open up the opportunity for licensing for specific business activities.

Undocumented immigrants share the need for a clean slate as all others, and their status should not deter them from seeking out the potential benefits. However, undocumented immigrants should consult an immigration attorney about the potential effects an expungement could have on future immigration applications. In any event, a petitioner should retain multiple copies of their criminal proceedings as such records may not be available after the expungement.

A Win-Win:

Turning Your Unlawful Arrest Dismissal into a Civil Rights Prosecution

Adam T. Johnson

It's a great thing if the facts are right: defending a criminal case to the point of dismissal and then changing hats and prosecuting a civil rights claim to the point of settlement or award. Recognizing that *The Sixth* is read predominantly by criminal lawyers – a double entendre of the first order – it seems the appropriate place to offer up a few thoughts on how you might turn your illegally arrested defendant into a plaintiff, and not only that, a private attorney general to boot.

The Statute

The United States Code, specifically, 42 U.S.C. § 1983, was enacted as part of the Civil Rights Act of 1871. The totality of the section reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of and State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[1]

As can be observed, Section 1983 creates a private cause of action at law available to persons who have had their constitutional rights violated by a person acting under color of law. The corollary section so attractive to lawyers is Section 1988, which establishes attorney's fees for a party prevailing in the enforcement of, *inter alia*, Section 1983 claims.[2] Before discussing fees – a swell topic – we will begin by examining two common Section 1983 claims along with some practical points stemming from the body of case law developed around the operative statute.

The Requirement of State Action

Notice that the beginning of the statute limits the class of defendants to persons acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia."[3] This language narrows the scope of persons who may be sued to those who are "state actors" – generally speaking, those who are employed by the government, such as police officers, sheriff's deputies, teachers, school administrators, and municipal or county officers or other government officials acting under color of law. Restaurant managers, hotel clerks, taxi drivers, drunk boat captains – these are all examples of persons who cannot be held liable for civil rights violations for the simple reason that they are not state actors. Private conduct, no matter how discriminatory or wrong, will not establish liability under Section 1983 because the defendant is a not acting "under color of law".

[1] 28 U.S.C. § 1983.
[2] 28 U.S.C. § 1988(b).
[3] 28 U.S.C. § 1983.

This does not mean that civil right claims against private parties may never succeed. It is possible for a "private actor" to be held liable to a plaintiff for damages. There are a number of instances in which the courts have held that certain private actors can be recognized as "state actors" and therefore subject to liability for civil rights violations. These include:

- When the performance of a business serves a "public function";[4]
- When the government coerces, influences, or encourages a private party to act in accordance with the government's wishes or desires;[5]
- When a private party is involved with the government in a "joint enterprise"[6] or "symbiotic relationship"; and
- When the private party is "pervasively entwined" with the government.[7]

Definition of "Person"

The definition of "person" may seem obvious, but it bears noting that under Section 1983, "person" also includes cities, counties, and municipalities. This means that an aggrieved party may sue a city itself for any number of constitutional torts suffered so long as an official policy or custom was the moving force behind the constitutional violation.[8] For civil rights claims, the city is not sued under a traditional *respondeat superior* rationale, rather, a city or other government body is usually subject to suit only when the city has an unlawful policy or custom that led to the constitutional violation. These are called *Monell* claims, and while it is fun to say "Monell", there is just not room enough to discuss *Monell* here. Suffice it to say that civil rights claims may be brought against any government actor acting under color of law and against cities in certain circumstances where there exists an unconstitutional policy or custom.

[4] *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

[5] *Harvey v. Plains Twp. Police Dep't*, 635 F.3d 606 (3rd Cir. 2011).

[6] *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

[7] *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001).

[8] *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

Fourth Amendment Claims

Except for constables, everyone likes the Fourth Amendment. It is the principal amendment invoked in all manner of cases involving unlawful stops, seizures, detentions, arrests, and excessive force. It is far and away the most enforced amendment among civil rights practitioners. It is particularly well suited to the civil law concepts of injury and damages, as there will often be some invasion upon a person's privacy, security, or body that results in injury and is therefore compensable. For the sake of time and word count, we'll focus here on two of the more common Fourth Amendment claims: unlawful arrest and excessive force.

Unlawful Arrest

Claims that law enforcement has unlawfully arrested a person are properly characterized as invoking the protections of the Fourth Amendment, which guarantees United States citizens the right to be free from unreasonable searches and seizures. A warrantless arrest will not offend the Constitution so long as the arrest is supported by probable cause.[9] Probable cause will exist when the totality of facts known at the time of the arrest would justify a reasonable person in believing that the individual arrested has committed or is committing a crime.[10] This question is highly fact-dependent, and requires a court to look at all of the surrounding facts and circumstances available for consideration by an officer at the time of the arrest. The probable cause question is a question of law that is determined at the moment an arrest is made. Any *later* developed facts are irrelevant to the analysis.[11] This means that later-discovered exculpatory evidence, say, a video showing that someone else committed the crime, is irrelevant to the probable cause question. What matters are the facts and circumstances known to the officer at the moment the decision to arrest is made.

[9] *Ehlers v. City of Rapid City*, 846 F.3d 1002, 1008–09 (8th Cir. 2017).

[10] *Id.* at 1009.

[11] *Gilmore v. City of Minneapolis*, 837 F.3d 827, 833 (8th Cir. 2016).

The police are afforded protection from suit – called qualified immunity – in cases where actual probable cause may be lacking so long as they had "arguable probable cause" to arrest.[12] The standard of arguable probable cause is less than the probable cause standard used in criminal prosecutions.[13] When an officer is faced with conflicting information that cannot be immediately resolved, he or she may have arguable probable cause to arrest a suspect.[14] Indeed, "[a]rguable probable cause exists even whe[n] an officer mistakenly arrests a suspect believing [the arrest] is based in probable cause if the mistake is objectively reasonable."[15] Under this objective reasonableness test, courts may not "delve into the officers' subjective motivation for their actions."[16]

None of this means that an officer is free to disregard plainly exculpatory evidence.[17] Probable cause to arrest does not exist when a "minimal further investigation" would have exonerated the suspect.[18] Thus exists the standard that officers have a duty to conduct a reasonably thorough investigation prior to arresting a suspect, at least in the absence of exigent circumstances and so long as law enforcement would not be unduly hampered if the agents wait to obtain more facts before seeking to arrest.[19]

A recent case out of St. Paul and decided by the Eighth Circuit Court of Appeals serves as a textbook example of how the arguable probable cause standard operates.[20] In *Hosea v. City of St. Paul*, the undisputed facts known to the officers at the time of David Hosea's arrest were as follows: someone from his residence called 911 and hung up; the officers heard a heated argument inside the residence while standing outside; upon entry the officers saw Hosea's girlfriend, Jennifer Steines, crying on the couch; Hosea was yelling at Steines; Hosea was standing over Steines from only three feet away, obstructing the officers' view of Steines; and Hosea did not immediately comply with the officers' orders to get on the ground. On these observations, Hosea was arrested for domestic assault.

Hosea brought a civil rights claim against the officers for unlawful arrest. He argued that officers lacked probable cause to arrest him because they did not know why Steines was crying, and because the officers later learned that Steines was not in fear of immediate bodily harm (an element of the crime of domestic assault). Both of Hosea's arguments failed. The Eighth Circuit Court of Appeals wrote that, without knowing why Steines was crying, a reasonable officer on the scene could have concluded that she placed the 911 call and was crying because Hosea made her fearful of imminent bodily harm.[21] Second, noted the court, since arguable probable cause is determined at the time of arrest, the after-acquired knowledge regarding the victim's lack of fear was irrelevant to the analysis.[22] Thus, the officers had arguable probable cause to arrest Hosea for domestic assault, and were entitled to qualified immunity on Hosea's unlawful arrest claim.

While unlawful arrest claims may be difficult in light of the protections afforded to the police, it does not mean they are impossible. Police officers are not free to ignore exculpatory evidence, nor are they free to forego the basics of police investigative work in a given case. The case law is clear that the police have a duty to conduct a reasonably thorough investigation prior to arresting a suspect, at least in the absence of an emergency. This does not mean that an officer must conduct a "mini-trial" before making an arrest, but an officer must engage in some degree of minimal investigation if the same might exonerate a suspect. In other words, a police officer may not "close his or her eyes" to facts that would help clarify the circumstances of an arrest.

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[12] *Walker v. City of Pine Bluff*, 414 F.3d 989, 992 (8th Cir. 2005).
[13] *Baribeau v. City of Minneapolis*, 596 F.3d 465 (8th Cir. 2010).
[14] *Borgman v. Kedley*, 646 F.3d 518, 523 (8th Cir. 2011).
[15] *Ehlers*, 846 F.3d at 1008-09.
[16] *Gorra v. Hanson*, 880 F.2d 95, 97 (8th Cir. 1989).
[17] *Gilmore*, 837 F.3d at 833.
[18] *Kuehl v. Burtis*, 173 F. 3d 646 (8th Cir. 1999).
[19] *Id.*, 173 F.3d at 650.
[20] *Hosea v. City of St. Paul*, 867 F.3d 949 (8th Cir. 2017).
[21] *Id.*, 867 F.3d at 956.
[22] *Id.*

Excessive Force

Claims that law enforcement have used excessive force in the course of an arrest, investigatory stop, or other "seizure" of a free citizen are properly characterized as invoking the protections of the Fourth Amendment.[23] Excessive force claims may also arise under the Fifth, Eighth and Fourteenth amendments, in cases involving persons incarcerated in jail or prison, or persons who are in custody as pretrial detainees. For the purposes of this short foray into basic civil rights practice, we are discussing here only those claims for excessive force available under the Fourth Amendment.

In the case of *Graham v. Connor*, the Supreme Court mandated the application of an "objective reasonableness" standard when evaluating claims that government agents used excessive force in violation of the Fourth Amendment.[24] Because the right of an officer to make an arrest or engage in an investigatory stop necessarily carries with it the right to use some degree of physical force or threat of force, an officer's use of force will violate the Fourth Amendment only when the use of force is "objectively unreasonable" under the circumstances.[25] Additionally, the circumstances are to be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.[26] This is because the police are often faced with a fluid, changing environment that requires them to act quickly and without the benefit of hindsight that lawyers get away with.

Once it has been established that an officer's use of force was objectively unreasonable under the circumstances, the next question is whether the person subject to the force was injured. A claim for a constitutional violation will only exist if a person has suffered an injury in some measurable way. If an officer acted unreasonably, but caused no injury, there will not be a claim for monetary compensation. As the courts have said, "not every push or shove violates the Fourth Amendment."

[23] *Andrews v. Neer*, 253 F.3d 1052 (8th Cir.2001).

[24] *Graham v. Connor*, 490 U.S. 386 (1989).

[25] *Chambers v. Pennycook*, 641 F.3d 898 (8th Cir. 2011).

[26] *Graham*, 490 U.S. at 396.

A line of cases developed in the Eighth Circuit held that that claims for excessive force required a plaintiff to show what is called "actual injury".[27] Another line of cases held the "actual injury" standard to mean that a *de minimis* use of force was insufficient to support a claim for excessive force.[28] These cases were harmonized in *Chambers v. Pennycook*, where the Eighth Circuit reiterated that the appropriate inquiry is "whether the force used to effect a particular seizure is 'reasonable.'"[29] In *Chambers*, the court stated, "[T]here is no uniform requirement that a plaintiff show more than *de minimis* injury to establish an application of excessive force," and expressly rejected the proposition that "evidence of only de minimis injury necessarily forecloses a claim of excessive force under the Fourth Amendment."[30] Ultimately, held the court, "[t]he degree of injury should not be dispositive, because the nature of the force applied cannot be correlated perfectly with the type of injury inflicted."[31] Without getting too much further into the weeds, suffice it to say that a claim for excessive force may lie even where the injury is slight or injurious in some way other than physical.[32]

The Importance of Prevailing in the Criminal Case

Make sure you beat the criminal case. That's not just my opinion. While principles of collateral estoppel do not necessarily apply (although they can if certain issues are litigated in the criminal case), "long-established common-law principles" applicable to Section 1983 will operate to defeat an action if the plaintiff was convicted for the offense for which he or she was arrested.[33] In *Malady v. Crunk*, the Eighth Circuit adopted the Second Circuit's reason in *Cameron v. Fogarty*, where the latter court stated:

[27] *Dawkins v. Graham*, 50 F.3d 532, 535 (8th Cir.1995).

[28] *See e.g., Wertish v. Krueger*, 433 F.3d 1062, 1067 (8th Cir.2006); *Hunter v. Namanny*, 219 F.3d 825, 832 (8th Cir.2000); *Curd v. City Court*, 141 F.3d 839, 841 (8th Cir.1998); *Hollingsworth v. City of St. Ann*, 800 F.3d 985 (8th Cir.2015).

[29] *Chambers v. Pennycoo*k, 641 F.3d 898, 906 (8th Cir.2011).

[30] *Id.*

[31] *Id.*

[32] *Wilson v. Lamp*, 142 F.Supp.3d 793, 805-806 (N.D. Iowa, Nov. 3, 2015).

[33] *Malady v. Crunk*, 902 F.2d 10, 11 (8th Cir. 1990).

> [T]he common-law rule ... was and is that the plaintiff can under no circumstances recover if he [or she] was convicted of the offense for which he [or she] was arrested.... This rule 'represents the compromise between two conflicting interests of the highest order-the interest in personal liberty and the interest in apprehension of criminals,' and constitutes a refusal as a matter of principle to permit any inference that the arrest of a person thereafter adjudged guilty had no reasonable basis....
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> ....
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> ... [W]e conclude that the proper accommodation between the individual's interest in preventing unwarranted intrusions into his [or her] liberty and society's interest in encouraging the apprehension of criminals requires that § 1983 doctrine be deemed, in the absence of any indication that Congress intended otherwise, to incorporate the common-law principle that, where law enforcement officers have made an arrest, the resulting conviction is a defense to a § 1983 action asserting that the arrest was made without probable cause.[34]

Take note that the doctrine arising from *Malady* applies to claims for unlawful arrest. It would not automatically prevent a plaintiff from prevailing on a claim alleging excessive force even if the same plaintiff is convicted of the offense for which the arrest was made. Apart from a *Malady* problem and issues of collateral estoppel, there are other reasons for waiting until the criminal case is over. Not the least of these is avoiding a civil deposition of your client during the pendency of a criminal prosecution. And besides, you have plenty of time. Since a plaintiff in Minnesota has six years to bring a claim under Section 1983, there should be ample time to commence suit once the criminal case is concluded.[35]

Some Final Points on Damages and Attorneys' Fees

Civil rights claims under Section 1983 are attractive because, independent of the intellectually stimulating nature of the work, the law allows for a prevailing plaintiff to petition for attorneys' fees and costs.[36] Like other statutorily-created causes of action, Section 1983 has a corresponding attorney fee provision that can be relied upon by a plaintiff following an award for damages. The relevant language from the United States Codes is as follows: "In any action or proceeding to enforce a provision of [Section 1983]… the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs…."[37] Note that the law provides for judicial discretion in the allowance of attorneys' fees: a prevailing party is not entitled as a matter of right to their attorneys' fees and costs.

Who qualifies as a "prevailing party" should seem obvious enough, but there are some complexities in the caselaw that warrant discussion. A plaintiff is a prevailing party "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."[38] This would exclude, in many cases, a plaintiff who secures a victory as to liability but is awarded only nominal damages by a jury.[39] Indeed, "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all."[40] In order to receive attorney's fees, a plaintiff who recovers nominal damages must achieve more than a technical or *de minimis* victory.[41]

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[34] *Id.* at 11-12.

[35] *Egerdahl v. Hibbing Community College*, 72 F.3d 615, 618 (8th Cir. 1995) (citing Minn. Stat. § 541.05).

[36] 28 U.S.C. § 1988(b).

[37] 28 U.S.C. § 1988(b).

[38] *Piper v. Oliver*, 69 F.3d 875, 877 (8th Cir.1995).

[39] *Id.*

[40] *Milton v. Des Moines*, 47 F.3d 944, 945 (8th Cir.1995).

[41] *Piper*, 69 F.3d at 877.

But things don't end there. Recall that the touchstone of the inquiry is not whether a plaintiff receives a nominal or more than nominal award, but whether the relief on the merits of the claim materially alters the legal relationship between the parties.[42] Under this standard a Minnesota plaintiff was recently entitled to over $300,000 in attorneys' fees after a jury awarded her a nominal amount of $1 in damages. In *Jenkins v. University of Minnesota*, the plaintiff, Ms. Jenkins, filed a Section 1983 suit against the University, Ted Swem, and two University employees, alleging sexual harassment by Mr. Swem against her.[43] At trial, the jury returned a verdict in Ms. Jenkins' favor on her claim of a hostile work environment, but awarded her only $1 in damages. Regarding attorneys' fees, Mr. Swem argued that Ms. Jenkins' victory was only "technical", and that an award of attorneys' fees would be unreasonable. Rejecting this argument, Chief Judge Tunheim wrote:

> Here, the Court finds that Jenkins's victory is not merely technical because it fundamentally changed the relationship between Jenkins and Swem. Swem has maintained, and the presumption throughout litigation is, that Swem's conduct was not impermissible under § 1983. However, the jury's verdict in this case confirms that Swem's conduct was illegal, which changes the relationship between the parties. Preventing sexual harassment to enable broad participation of all genders in the workforce is an important public goal.
>
> …
>
> The jury's judgment that Swem engaged in impermissible conduct is neither technical nor *de minimis*. Accordingly, although the Court will consider the degree of success in determining the reasonableness of the attorneys' fees, the Court rejects Swem's argument that Jenkins's victory was only technical or *de minimis* and did not entitle her to attorneys' fees in any amount.[44]

Chief Judge Tunheim's recent decision is a reminder that, even in a nominal damages award case, attorneys' fees may still be had so long as the relationship between the parties changes in some meaningful way, and which implicates the furtherance of an important public goal.

[42] *Id.*

[43] *Jenkins v. University of Minnesota*, Civ. No. 13-1548 (D. Minn. Oct. 13, 2017).

[44] *Id.*, slip op. at 2.

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Due Process Denied:

Title IX Deficiencies

Ryan Pacyga

Defending a person accused of sexual assault is no small task. While there have been many necessary improvements to the criminal justice system to assist victims of sexual assault, protections to accused persons has not been matched. Participation in voir dire of prospective jurors on criminal sexual conduct cases confirms that the average juror wants to protect potential victims of sexual assault and believe their accusations. The battle in jury trials is won or lost on the ability to find and seat jurors that will truly enforce the presumption of innocence and burden of proof beyond a reasonable doubt. That presumption, coupled with the fair administration of the rules of evidence and due process, gives the accused in a criminal case a fighting chance.

Those same protections are hard to find when the venue moves to an educational institution. Colleges and universities feel often adhere to pressure that comes in two forms: public image and big money. Colleges are worried that they will come under public scrutiny if they are not appearing to do everything they can to protect and believe alleged victims of sexual assault. What is more, Title IX is tied to federal funding, and colleges must report their statistics on sexual assault investigations. The cumulative pressure to appear tough, to believe allegations, and to keep the federal funding has led to the modern-day equivalent of the Salem Witch Trials.

Let me be clear: protecting victims of sexual assault and punishing perpetrators of sexual assault is necessary and just. Victims deserve a fair and impartial investigation with a fair punishment doled out on offenders.

But what about the accused?

I have represented a number of students in Title IX sexual assault and/or harassment investigations ranging from high school to graduate school. While there are some constants, the range of protections afforded to accused students varies widely from school to school.

Case study

In one case, I represented an athlete accused of taking part in a sexual assault of a cheerleader student. Law enforcement declined charges, but the school proceeded with a Title IX investigation, eventually making an investigative finding that ten athletes took place in sexually assaulting or harassing the cheerleader.

Despite confirmation from the school that it does not force accused students to meet with the school investigator or to present for an interview, the school's athletic department made the coach round up the players and told them they would not practice anymore unless and until they presented for the Title IX interview. The school never informed those accused athletes that they did not have to present for or participate in interviews.

What followed were a number of accusatory interviews, none of which were recorded. I later found that in at least one instance, the school interviewer actually copied and pasted alleged excerpts from an interview rather that writing what was actually said.

The accusing cheerleader refused to provide her medical records to the school investigator. I have represented several accused students through investigations, and when an accused student does not produce records

or answer questions, the investigator always makes an adverse credibility finding. Yet they did not determine the accuser to be uncooperative or to lack credibility. The accusing cheerleader gave multiple, conflicting accounts of the situation. Yet the school interviewer, without any foundation, attributed the discrepencies to trauma rather than leave that determination to a fact-finding panel.

The school's policies indicated that each accused student is afforded three hours for a hearing. That would have allowed 30 hours total for the hearings, so each accused student could make a full presentation to defend their right to remain in school (and in some cases, keep their athletic scholarships). Yet in our case, the school determined, without any recourse, that it would greatly reduce the time allotted for each accused student to present his case.

When you walk into the room, one of the first things you notice is a large screen that walls off the accused student(s) from the accuser. This creates a subconscious, if not conscious, inference that the accused student did something so horrible that it would be too traumatic for the alleged victim to even see the accused student. This is all smack dab in front of the panel and exists that way throughout the entire contested hearing.

For the contested hearing, the school had a policy that three volunteer panelists would act essentially as a jury. The problem is that these panelists were trained by the person that wrote the school's investigatory report and found that the ten accused students violated school rules. Several accused students testified that what the investigator wrote in the report was not what the accused students said in their unrecorded interviews. Imagine trying to convince a panel that the very person that trained them was a) not telling the truth about what was said in the interviews; and b) was incorrect in the conclusion that each accused student had violated the rules and deserved to be suspended or expelled. What is more, the panel is provided with a full copy of the investigator's investigation and findings before the hearing begins. The panelists do not come into the hearing with a blank slate.

Moreover, there is no opportunity to voir dire the assigned volunteer panelists. With rare and extreme exception, you are stuck with whoever is assigned to the panel. A unanimous decision is not required, so 2-1 carries the day. The burden of proof is preponderance of the evidence. There is no presumption of innocence instruction, and there is no right to remain silent instruction.

More troublesome, the accusing cheerleader had had sexual intercourse with a 17-year-old recruit, and it was on video. While she initially claimed that it was consensual, she later changed her story and said that it was not. The video/audio recording was the best evidence and demonstrated just how consensual the encounter was. Yet when our defense team tried to introduce it as evidence, the school determined it was not admissible because the school determined she was a victim and was not accused of any wrongdoing.

The alleged victim testified and made claims that law enforcement told her that the reason there were no criminal charges is that you pretty much have to tie someone down in order to be charged with criminal sexual conduct. There is no way the officer said that, but the accused student was informed that city would not let the officer testify in the Title IX hearing, so she was free to distort the facts of the criminal investigation knowing that she could not be impeached by the officer. There is no subpoena process.

The school spent the money to hire an expert from out of state to testify about how trauma can cause inconsistencies in an alleged victim's recitation of the facts. Yet the accused students were not provided with any funding to present their own experts.

The school provided the alleged victim with a lawyer and advocate, free of charge, through the criminal investigation, school investigation, civil no contact hearings and process, and of course the panel hearing and subsequent appeal. The accused students were not provided with the same.

Ultimately, my client and several other accused athletes were fully cleared by the panel and subsequent appeal. The alleged victim was impeached with several contradictions

and her testimony was flat out rejected in several respects. While the school went after at least one accused student for being untruthful in the process, it never came back around at the alleged victim for the same type of conduct.

What is even scarier is that the school I used in this example actually provides more protection for accused students than many other schools do. When the athletes' teammates peacefully protested in an effort to bring attention to due process problems, the school ridiculed them for protesting and later fired their coach for a lack of leadership. The school is hardly an example of a place that promotes the free exchange of ideas and peaceful demonstration for calling attention to social issues, at least when the rights of the accused is the platform.

Good Guidance

Fortunately, some recent changes have come about.

U.S. Education Secretary Betsy DeVos has studied the issue and has commented on flaws in the current Title IX sexual misconduct process for all involved parties. Recently, she issued temporary guidelines and rolled back some prior guidelines in an effort to achieve a more fair and balanced process. This came about, in part, due to legal commentators criticizing the 2011 Dear Colleague Letter and 2014 Questions and Answers on Title IX and Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education. Essentially, the critics, faculty at Penn Law School, indicated the system placed "improper pressure upon universities to adopt procedures that do not afford fundamental fairness."

While the full list of changes is discussed in the September 2017 U.S. Department of Education Office for Civil Rights "Q&A on Campus Sexual Misconduct," the highlights are discussed below.

Interim measures: The department now mandates that colleges offer individualized services as appropriate to *either or both the reporting and responding parties* involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending. This includes for example counseling, modifications of work or class schedules, no contact restrictions, and many other accommodations. A school may not rely on fixed rules or operating assumptions that favor one party over another, nor may a school make such measures available to only one party.

Mandatory published grievance procedures: ensuring an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence.

Timelines: The former guidelines required an investigation to be completed within 60 days. This presented several problems including putting the defense at a tactical disadvantage for conducting an independent investigation and creating a conflict between the right to remain silent in a criminal investigation, which often is still open within the 60-day timeline. Now, there is no fixed time frame under which a school must complete a Title IX investigation. A school must make a good faith effort to conduct a fair, impartial investigation in a timely manner, and extension of deadlines for good cause is permitted. In the past, there has been pressure from colleges towards accused students to answer to the allegations, even when the criminal investigation is not complete. Navigating between Fifth Amendment privileges and a potential adverse inference in a Title IX investigation was, in some cases, a Hobson's choice. With the new guidelines, there is plenty of authority to wait on presenting for an interview until the criminal investigation is complete.

What is an "equitable investigation?": Among other things, any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms. Gag orders are now frowned upon. If a school opens an investigation, the school should provide written notice to the responding party of the allegations including sufficient details and with sufficient time to prepare a response before any initial interview.

Informal resolution: The prior guidance letters said that mediation was not appropriate, even on a voluntary basis in cases alleging sexual assault. Now, if all parties voluntarily agree and if the school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.

Standard of proof: Colleges now have the option to use either preponderance of the evidence or clear and convincing evidence. On paper this is a major change from the 2011 Dear Colleague letter that required preponderance of the evidence. But while colleges now have discretion as to which standard to implement, I do not foresee many colleges moving to a clear and convincing evidence standard.

Appeals: Under the prior guidelines, colleges were encouraged to have an appeals process available to both parties. Under the new guidelines, colleges do not have to allow appeals. If the college does allow appeals, they can decide whether to permit both parties to appeal, or only the accused. This is important for the accused because under the prior guidelines an accuser could appeal a not-guilty finding, putting the accused through the excruciating process twice.

Fear of Fairness?

Looking forward, there will be a public comment period with additional consideration for potential revisions. While there is still more room for due process protections for accused students, the new guidance is a step in the right direction and a welcome change for those facing or defending college sexual assault allegations. Critics of the recent changes say they are fearful that the changes will represent a step backwards in recognizing and advocating for sexual assault victims. It appears, however, that the new guidance and public comment period were put in place with an aim towards creating a fair and equal process for all involved parties.

Title IX Tips

If you get a call from a student or their parent about a potential school investigation for an alleged sexual assault or harassment, you have several things to consider. First, is there or could there be a criminal investigation as well? If so, you should deal with that first when possible. Your client enjoys a Fifth Amendment privilege and can remain silent during a criminal investigation (and of course a criminal case if charges are filed). Your client may face an adverse inference (in fact or realistically speaking) in a Title IX investigation or proceeding.

Whether you have your client talk to law enforcement or not requires a case-by-case analysis. Under the old Title IX policies, a lawyer and client faced a lot of pressure to speed along through the parallel Title IX investigation because of the 60-day rule. My policy was to push back against the 60-day rule and hold firm against presenting a client for a Title IX interview unless and until the law enforcement and/or prosecution decision was reached to decline charges. Colleges always ended up respecting that issue in my experience.

Under the new rule, there is no fixed time frame under which a school must complete a Title IX investigation. Your client's Fifth Amendment rights should be respected while a criminal investigation is open. Do not let colleges tell you your client only has 60 days to respond or pressure you to trade in the right to remain silent for fear of an adverse inference in Title IX proceedings.

If law enforcement or prosecutors decline charges, you should let the Title IX investigator know right away. If you get the impression the accuser's story is different in the law enforcement investigation than what they told the Title IX investigator, try to get the reports sent to the Title IX investigator. Same advice if there were favorable defense witnesses in the law enforcement interviews that for whatever reason have decided not to participate in the Title IX investigation.

In my view, the criminal investigation is always paramount. There have been a few instances where law enforcement or prosecutors took another look at an investigation after previously declining charges. This could happen, for example, if you have your client give an interview to a Title IX investigator. So always be mindful of the most important protection you must provide for your client.

Another task you should take up immediately is locating the particular college's student misconduct and sexual assault/harassment policies. Every school has different policies and procedures. Most can be found online through the school. If you have questions, you can call the Title IX coordinator for the college to help you find a copy of all current and applicable policies. Pay particular attention to definitions, as well as timing and notice requirements. Compare the policies with current Title IX mandated policies and laws.

Another reason for the extension in time is to afford ample opportunity for the accused student to conduct their own investigation. This can be challenging because there is no subpoena power to compel witnesses to attend a hearing or even produce third-party documents. In many cases affidavits are admissible for the investigation and even the evidentiary hearing/trial (for lack of a better term). Have your defense investigator get an affidavit from a defense witness as soon as you can if you worry they may not show up to a later hearing.

Find out what will happen if your client chooses not to present for a Title IX interview. Check the policies and ask questions. If you choose to have your client present for the interview, attend with them. You can certainly instruct your client not to answer certain questions. I have and it has not hurt my clients, especially if the question is only tangentially relevant or goes beyond the scope of the investigation. Ask the Title IX investigator to record the interview so there is no dispute if the process progresses to a contested hearing.

If the initial college investigation makes a determination that a violation of sexual assault or harassment occurred, you must be aware of the school's procedures for an appeal. The appeal is usually in the form of a panel hearing, much like a trial would be. There is a huge difference though: the rules of evidence we are all used to in criminal cases generally do NOT apply in Title IX hearings. Hearsay is often allowed. There is little if any foundation requirement. Affidavits are often admissible. And as mentioned above, sometimes the best evidence is not allowed because the school has already picked its horse in the race. Nonetheless, be ready to admit as much evidence as you can and get used to the idea that you can usually present more evidence and in more creative ways than you can in a criminal case. While I wish the rules of evidence applied, if the other side does not have to abide by the rules of evidence, then neither do you. It must be fair for both sides so you must be ready to deal with what often feels like a kangaroo court. Do not be caught off guard by that.

Conclusion

Students accused of sexual assault or harassment face potential penalties including suspension or expulsion with a transcript that will permanently reflect the discipline. Recent changes in the Title IX process are a step closer to providing fundamental due process for accused students. Even with these changes, you and your client may face a host of prejudicial presumptions and inequalities. Justice can be achieved, but you must proceed with caution and be as prepared as possible.

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Marijuana Can No Longer Be a Schedule I Controlled Substance

Ryan Garry

Today's weed ain't your father's. The classification of marijuana as a Schedule I Controlled Substance is both irrational and arbitrary and violates the Equal Protection Clause under both Minnesota and United States Constitutions. This article is the short (yes short) version of a memorandum I filed for a client charged with marijuana possession/sale in Ramsey County, wherein I challenging the classification of marijuana as a Schedule I controlled substance. The district court never addressed the issue as the Judge dismissed the case on a Fourth Amendment search violation. The argument in this article evolves from prior challenges brought by Peter Wold and Aaron Morrison in federal court. Unknown and yet to be determined is the state remedy to a particular client when the legislature or courts realize that marijuana, which now has undisputed medicinal value, is classified incorrectly. It is clear that marijuana no longer meets the criteria set forth in the definition of a Schedule I controlled substance. *See* Minn. Stat. § 152.02, subdiv. 7. In short, scientific studies show that it does not have a high potential for abuse, it has currently accepted medical use in Minnesota and 29 other states (estimate), and there is accepted safety for use with medical supervision.

Prior to the legalization of medical marijuana in Minnesota, state and federal courts remained steadfast in determining that marijuana should remain listed as a Schedule I Controlled Substance. *See, e.g.*, *State v. Vail*, 274 N.W.2d 127 (Minn. 1979); *State v. Thiel*, 846 N.W.2d 605 (Minn. Ct. App. 2014), *U.S. v. Pickard*, 100 F.Supp.3d 981 (E.D. Cal. April 17, 2015). In 2014, the Minnesota Court of Appeals wrote that "the legislative and executive branches of government had not determined that marijuana has a medical use . . . and did not recognize the use of marijuana for medical purposes outside of a limited research group testing the usefulness of marijuana in alleviating the side effects of chemotherapy." *Thiel*, 846 N.W.2d at 615. The Minnesota Court of Appeals' conclusions in *Thiel* must now be readdressed given the legislature's determination that marijuana *now* has medical value.

After *Thiel*, Minnesota legalized marijuana as a medical treatment for limited but expanding conditions. On July 1, 2015, Minnesota marijuana dispensaries opened their doors to patients who have been diagnosed by a qualified doctor. Peter Cox, *Medical Marijuana Dispensaries Open for Minnesota Patients*, MPR News (July 1, 2015).[1] To date, 29 states have legalized marijuana in some form, ranging from complete legalization to medical use legalization. *See* Minnesota Department of Health, *Minnesota Medical Cannabis Program: A Guide for Patients*.

As in many areas of the law, what once was . . . is not what should be. Incorrect legal conclusions are only realized in hindsight. As Justice Scalia ruled regarding the residual clause of the Armed Career Criminal Act, "it has been said that the life of the law is experience. Nine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise." *Johnson v. U.S.*, 135 S.Ct. 2551, 2560 (2015). While the Armed Career Criminal Act has nothing to do with the legalization of marijuana, what is acknowledged in *Johnson* is that Scalia again recognized that what once was thought right is now wrong . . . a failed enterprise.

All state cases addressing classification of marijuana were decided before Minnesota legalized marijuana for medicinal use. *See, e.g.*, *Thiel*, 846 N.W. 2d 605. Ironically, Minn.

[1] *Available at* http://www.mprnews.org/story/2015/07/01/medical-cannabis (last visited Aug. 24, 2015)

Stat. 152.02, subdiv. 2 still lists marijuana in a classification that states, there is "no currently accepted medical use." *See* Minn. Stat. § 152.02, subdiv. 7 ("the Board of Pharmacy shall place a substance in Schedule I if it finds that the substance has … a high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for use under medical supervision."). This classification is clearly erroneous as Minnesota statutes now allow use of "medical marijuana." *See* Minn. Stat. § 152.22 subdiv. 6 (defining medical cannabis).

Level of Scrutiny

The United States Constitution guarantees the right to "equal protection of the laws." U.S. Const. amend. XIV, § 1. The Minnesota Constitution does not contain an explicit equal-protection provision, but "our state constitution embodies principles of equal protection synonymous to the equal protection clause of the Fourteenth Amendment to the United States Constitution." *Thiel*, 846 N.W.2d at 612 (citing *State v. Russell*, 477 N.W.2d 886, 889 n.3 (Minn. 1991)). The constitutionality of a statute is reviewed de novo. *State v. Wolf*, 605 N.W.2d 381, 386 (Minn. 2000). Statutes are presumed to be constitutional, and a court "will exercise its power to declare a statute unconstitutional with extreme caution and only when absolutely necessary." *Thiel*, 846 N.W.2d at 612 (citing *State v. Larsen*, 650 N.W.2d 144, 147 (Minn. 2002)). The party challenging the constitutionality of the statute "must demonstrate, beyond a reasonable doubt, that the statute violates a provision of the constitution." *Thiel*, 846 N.W.2d at 612 (quoting *State v. Grossman*, 636 N.W.2d 545, 548 (Minn. 2001)).

In determining whether a regulation violates the Equal Protection Clause of the Fifth Amendment, courts first determine the level of scrutiny to apply. *Kahawaiolaa v. Norton,* 386 F.3d 1271, 1277 (9th Cir. 2004) (citation omitted). "Laws alleged to violate the constitutional guarantee of equal protection are subject to one of three levels of scrutiny by the courts; strict scrutiny, intermediate scrutiny, or rational basis review." *Id.* (citation omitted).

Strict scrutiny applies "when the classification is made on 'suspect' grounds," such as race or ancestry, or if the classification infringes on a fundamental right, such as privacy, voting, or freedom to associate. *Id.* Intermediate scrutiny applies, on the other hand, when a law discriminates based on a quasi-suspect classification. *Id.* Classifications based on sex and legitimacy, as well as children of undocumented aliens denied public education, have been reviewed under intermediate scrutiny. *See United States v. Virginia,* 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (sex): *Lehr v. Robertson,* 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983) (legitimacy); *Plyler v. Doe,* 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (children of undocumented aliens). When no suspect or quasi-suspect class is involved and no fundamental right is burdened, courts apply a rational basis test to determine the legitimacy of the classification. *Kahawaiolaa*, 386 F.3d at 1277–78.

Under the Equal Protection Clause of the United States Constitution, a classification passes rational-basis scrutiny "if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose." *Thiel,* 846 N.W.2d at 614 (analyzing the case of *Exxon Corp v. Eagerton*, 462 U.S. 176, 196, 103 S.Ct. 2296, 2308, 76 L.Ed.2d 497 (1983)).

However, rational-basis scrutiny under the Minnesota Constitution is "more stringent" in that Minnesota courts are "unwilling to hypothesize a rational basis to justify a classification, as the more deferential federal standard requires," and "require a reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals." *Thiel*, 846 N.W. 2d at 614 (citing *Russell*, 477 N.W.2d 886).

Cannabis does not meet the requirements for a Schedule I controlled substance

Minnesota's classification scheme is based on the 1970 *Uniform Controlled Substances Act* (CSA), which listed marijuana as a Schedule I controlled substance, as little was known about its long-term effects. *State v. Vail,* 274 N.W.2d 127, 135 (1979). The CSA, enacted in 1970, organized substances into five schedules based on certain factors. *See* 21 U.S.C. § 812(b). The criteria concern current medical uses, potential for abuse, and possible physical or psychological dependency effects. *See Id.*

Schedule I controlled substances include heroin, cocaine, LSD and morphine. *Id.* at Sch. I(b)(10), (14)–(16), (c)(10), (12). Schedule V controlled substances are at the low end, and include any compound containing not more than 200 milligrams of codeine per 400 grams …among others. *Id.* § 812(b)(5). "Unlike Schedule I drugs, federal law permits individuals to obtain Schedule II, III, IV, or V drugs for personal medical use with a valid prescription." *Americans for Safe Access v. Drug Enforcement Admin.*, 706 F.3d 438, 441 (D.C. Cir. 2013); *see also* 21 U.S.C. § 829(a)–(c).[2]

As noted, when the CSA was enacted, Congress classified marijuana as a Schedule I controlled substance. *See* 21 U.S.C. §§ 801, 812(b)(1). It did so based, in part, on the recommendation of the Assistant Secretary of Health, Education, and Welfare. *See Gonzales v. Raich*, 545 U.S. 1, 14, 125 S.Ct. 2195, 2204, 162 L.Ed.2d 1 (2005); *Nat'l Org. for Reform of Marijuana Laws (NORML) v. Bell*, 488 F.Supp. 123, 135 (D.D.C. 1980) (noting "[t]his recommendation came in a letter . . ."); *United States v. Kiffer*, 477 F.2d 349, 356 (2d Cir. 1973) (citing H.R. Report 91–1444.). In 1970, the Secretary of Health, Education, and Welfare urged "'that marijuana be retained within Schedule I at least until the completion of certain studies now underway to' determine the physical and psychological dependency effects of the drug. Apparently, the potential for abuse and the absence of significant medical value were the determining grounds for placement of marihuana in the first schedule." *United States v. Kiffer*, 477 F.2d 349, 356 (2d Cir. 1973) (citations omitted), *cert. denied* 414 U.S. 831 (Oct. 9, 1973). It was a temporary measure.

The specific statutory findings required for Schedule I listing include the following. First, the drug or other substance "has a high potential for abuse," second that the drug or other substance has "no *currently accepted medical use* in treatment in the United States," and third that "there is a lack of accepted safety for use of the drug or other substance under medical supervision." 21 U.S.C. § 812(b)(1) (emphasis added). These findings are clearly at odds with present day marijuana legalization.

Since 1970, scientific studies regarding the effects of marijuana on the human physiology and psychology have exploded, but despite these studies on marijuana's medicinal value, the plant has not been rescheduled by either the Minnesota legislature or board of pharmacy. *Vail,* 274 N.W.2d at 135; Minn. Stat § 152.02, subdiv. 8. Ironically, "in response to growing public and scientific opinion against imposing Schedule I penalties on marijuana users, the legislature has repeatedly amended Minn. Stat. Section 152.15 to reduce penalties. L.1971, c. 937, s 17; L.1973, c. 693, ss 10-13; L.1976, c. 42, ss 1, 2." *Vail*, 274 N.W.2d at 135; *see also* 1989 Minn. Laws, ch. 298, art. 3 § 14 (codified at Minn. Stat. §§ 152.027, subdiv. 4 (1989)) (adding crime of *petty misdemeanor* possession or sale of small amount of marijuana).

Unlike the federal courts, Minnesota's more stringent rational basis review requires a reasonable connection between the actual effect of the classification and the statutory goals. As this article argues, there is no reasonable connection between the actual (not theoretical) effect of placing marijuana as a Schedule I substance versus the statutory goals. The weight of current medical knowledge demonstrates that marijuana does not satisfy the three criteria necessary to keep it classified as a Schedule I Controlled Substance, namely (1) high potential for abuse, (2) no medical use or value, and (3) no accepted use under medical supervision.

[2] Again, you can obtain THC-based drug prescriptions with a prescription.

In assessing a substance's potential for abuse, a court must evaluate the psychological impact a drug may have on the individual. In this regard, the salient inquiries are: (1) is the drug physically addictive and (2) does the drug cause damage to the health of the user.

Cannabis is a non-toxic, non-lethal substance. There have been *no* reported deaths resulting from an overdose of marijuana, and in fact, based on the physiological properties of the plant an overdose would be nearly impossible. *Denney Declaration*, at p. 3.[3] Joycelyn Elders, M.D., and former U.S. Surgeon General wrote in a 2004 editorial published in the Providence Journal, "Unlike many of the drugs we prescribe everyday, marijuana has never been proven to cause a fatal overdose." ProCon.org, *Death from Marijuana v. 17 FDA-Approved Drugs: (Jan 1, 1997 to June 30, 2005)*.[4] Unlike marijuana, the National Institutes of Health has found that "Acetaminophen overdose is one of the most common poisonings worldwide. *See* U.S. National Library of Medicine, National Institutes of Health, *Acetaminophen Overdose* (attached) (hereinafter referred to as "*Acetaminophen Overdose*"). Additionally, on August 2, 2013, the FDA released a statement warning that overuse of acetaminophen could cause serious rashes and even death. *See* FDA, *FDA Warns of Rare Acetaminophen Risk* (hereinafter referred to as "*FDA Warning*"). Despite the significant harm caused by this over the counter medication prescribed daily by doctors, it is entirely excluded from the scheduling scheme.

"Further, cannabis use does not cause harm to any major organs, and recent studies suggest that even chronic marijuana smoking does not cause cancer of the lungs or upper airway." *Denney Declaration*, p. 3. It has long been established that marijuana is not physically addictive, and there are minimal, if any, withdrawal symptoms associated with the cessation of marijuana use. *Id*.

In a *Minnesota Department of Health* news release on May 28, 2015, under the Minnesota law passed in 2014, patients with certain conditions, such as certain cancers, glaucoma, HIV/AIDS, Tourette Syndrome, ALS, seizures, some muscle spasms, Crohn's disease, and some terminal illnesses, qualify for medical marijuana in Minnesota. Minnesota Department of Health, *Medical Cannabis Law Changes Clarify Use in Health Care Facilities* (May 28, 2015)[5]; The AntiMedia, *Federal Government Finally Admits Cannabis Can Help Kill Cancer Cells*, MintPress News (Apr. 11, 2015) ("While the government has now openly admitted that cannabis can fight cancer, it should be noted that it knew this to be true as far back as 1974.").[6]

To assess whether marijuana has a medical use in a federal jurisdiction, the DEA applies a five-part test: "(1) the drug's chemistry must be known and reproducible; (2) there must be adequate safety studies; (3) there must be adequate and well-controlled studies proving efficacy; (4) the drug must be accepted by qualified experts, and (5) the scientific evidence must be widely available." *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1135 (D.C. Cir. 1994); *Americans for Safe Access v. DEA*, 706 F.3d 438, 450–52 (D.C. Cir. 2013).

"Scientists have identified over 480 natural components found in the Cannabis sativa plant, and have classified 66 as 'cannabinoids' which have further been broken down into six subclasses." *U.S. v. Pickard*, *Declaration of Christopher Conrad* and Curriculum Vitae (hereinafter referred to as "*Conrad Declaration*"), p. 2.[7] In fact, cannabis is possibly the most studied plant in history. *See generally Conrad Declaration*. Marijuana, "the only component

[3] This was an attachment to my brief – I am happy to email it to you.

[4] http://medicalmarijuana.procon.org/view.resource.php?resourceID=000145 (last visited Aug. 24, 2015).

[5] http://www.health.state.mn.us/news/pressrel/2015/cannabis052815.html (last visited Aug. 24, 2015).

[6] http://www.mintpressnews.com/federal-government-finally-admits-cannabis-can-help-kill-cancer-cells/204274/ (last visited Aug. 24, 2015).

[7] Christopher Conrad is an expert witness on marijuana-related issues and has testified in cases across the nation. He has also been asked to consult with government agencies regarding medical marijuana laws. This document was borrowed from *U.S. v. Pickard*, 2:11-cr-00449-KJM-16 (E.D. Cal.) (filed Nov. 20, 2013) and *U.S. v. Taylor*, 1:14-cr-00067-RJJ (W.D. Mich.) (filed June 24, 2014), federal district court cases challenging the constitutionality of maintaining marijuana as a Schedule 1 substance.

known to have a psychoactive effect, has already been synthetically reproduced in the prescription drug Marinol." *Id.*, at p. 2; *see also Denney Declaration*, at p. 9. Marinol has been approved by the FDA for treatment of a syndrome associated with cancer and AIDS as well as anorexia. *Denney Declaration*, at p. 9.[8]

Interestingly, the government has cultivated and distributed marijuana for over 35 years through the Compassionate Investigational New Drug Program ("IND"), which authorizes marijuana to be grown at the University of Mississippi and sent to enrolled patients in the form of marijuana cigarettes. *Conrad Declaration*, at p. 2. It is believed that up to 35 participants were accepted at the programs peak and the government continues to distribute 300 marijuana cigarettes each month to the four remaining patients. *Id.*

Expert Witness

The expert witness that my client retained testified that, "the strongest scientific evidence for the use of cannabis has been treating chronic pain, most notably with patients whose pain did not subside or respond to other drugs, i.e. narcotics. The expert stated in an affidavit filed prior to our contested hearing determined, "[t]here is also substantial evidence for the use of cannabis to treat multiple sclerosis symptoms, such as nerve pain, muscle spasms, and urinary disorders, since the D9-tetrahydrocannabinol is seen to have effects on the central nervous system and immune cells." *Id.* Even the most famous hospital in the world, the *Mayo Clinic*, recognizes the medical value of marijuana. The expert testified that the "*Mayo Clinic* has addressed the use of marijuana, (D9-THC) for the treatment of several diseases and illnesses." *Id.*

Unfortunately, keeping marijuana classified as a Schedule I drug severely limits access to scientist and researchers. Before legalization in Minnesota and other states, the federal government had a "virtual monopoly" on legal growing and cultivating marijuana, and getting access to it required three difficult levels of approval. Ariana Eunjung Cha, *Marijuana Research Hampered by Access from Government and Politics, Scientists Say*, Washington Post (Mar. 21, 2014).[9] Marijuana is still among the most rigidly controlled substances under federal law. *Id.* For scientists, this means there are extra steps to grow, transport, and secure it—delays that can extend research by years. *Id.* In November of 2014, the *American Medical Association* defined its stance against medical marijuana, but it also encouraged more clinical research and asked the government to reconsider marijuana's classification as a Schedule I drug. *Id.* A lower-level classification would make marijuana much more accessible to researchers and scientists. *Id.*

In 2015, Surgeon General Vivek Murthy stated, "we have some preliminary data showing that for certain medical conditions and symptoms that marijuana can be helpful." Tim Devaney, *Surgeon General: Medical Marijuana "Can Be Helpful,"* The Hill (Feb. 4, 2015) (emphasis added).[10] To continue to classify marijuana as a schedule I controlled substance (i.e., that marijuana has no currently accepted medical use) is ridiculous. Thus, to keep it in a category that classifies it as such is irrational and arbitrary.

As my expert witness pointed out in her declaration, and testified in court, doctors now have options to take medical courses to be better informed and educated in treating their patients. For example, the *Society of Cannabis Clinicians* was created to educate and promote high-quality research

8 There are countless stories of individuals and parents of children who look to medical marijuana to solve medical issues where traditional medicine has failed. For example, Jessica Hauser is a mother of a 2-year-old boy who had infantile spasms since he was 7 months old, and was diagnosed with a type of epilepsy. Mike Longaecker, *Family Tries Marijuana Treatment for Baby Wyatt's Seizures*, Twin Cities. Com Pioneer Press (Aug. 3, 2014). The boy had up to 200 seizures a day. *Id.* Their family used to make month-long trips to Oregon where her child could receive care. *Id.* Eventually, she found herself aligned with a medical marijuana advocacy group that urged law-makers and Governor Mark Dayton to change the state law. *Id.* Her son now receives treatment in Minnesota. *Id.*

9 Available at http://www.washingtonpost.com/national/health-science/marijuana-research-hampered-by-access-from-government-and-politics-scientists-say/2014/03/21/6065eb88-a47d-11e3-84d4-e59b1709222c_story.html (last visited Aug. 24, 2015).

10 Available at http://thehill.com/regulation/administration/231717-surgeon-general-backs-medical-marijuana (last visited Aug. 24, 2015).

in cannabis treatment. *Id.* "[C]onstant evaluation and supervision of the patient is crucial . . . [and] guidelines are implemented and followed to ensure the safety and efficacy for the patient. Knowing the full history of the patient's illness, performing a full examination to determine the current state of the illness, as well as the full disclosure from the patient is crucial." *Id.*

The prosecution of marijuana offenses is based on an arbitrary classification, and violates the Equal Protection Clause

A prosecution based on an arbitrary classification may violate the Equal Protection Clause of the Fifth Amendment. *U.S. v. Carolene Products Co.*, 304 U.S. 144 (1938). A law is subject to Equal Protection challenge as overinclusive where one item is placed within a prohibited class without rational distinction. *Carolene Products Co.*, 304 U.S. at 153–54. The "constitutionality of a statue, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition. *Id.* at 154. The Supreme Court has observed, "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *Id.* at 153.

Here, the facts relating to the three Schedule I criteria as applied to marijuana, on which Congress initially relied in 1970, have changed so substantially since 1970 that the statute is no longer based on evidence that exists today. Marijuana no longer meets the criteria set forth in the definition of Schedule I controlled substance. *See* Minn. Stat. § 152.02, subdiv. 7. It does not have a high potential for abuse, it has currently accepted medical use in Minnesota and nearly 29 other states, and there is accepted safety for use with medical supervision.

The oxymoron condition of marijuana's current Schedule I classification assumes it has "no accepted medical use" … yet recent Minnesota legislation explicitly refers to "medical marijuana/cannabis." *See* Minn. Stat. §§ 152.21–.37. We must challenge how a substance can be classified under Schedule I defining that it has "no medical value" and then also be listed in the most recent law whereby the legislature uses the term "medical marijuana/cannabis."

These two different statutes cannot co-exist. Minnesota statutes state:

> When a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions be irreconcilable, the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted at a later session and it shall be the manifest intention of the legislature that such general provision shall prevail.

Minn. Stat. § 645.26, subdiv. 1; *see also Grossman v. Aerial Farm Services, Inc.,* 401 N.W.2d 676, 678 (Minn. Ct. App. 1987) (more specific statute of limitations controlled over a more general statute of limitations). Under Minnesota's classification of marijuana as a Schedule I Controlled Substance, the law clearly states that marijuana has no medical use. However, the relatively newly enacted legislation with respect to marijuana in Minnesota allows for "medical marijuana." The fact that marijuana is still classified in the highest category of Controlled Substances is irrational, based on arbitrary classification, and conflicts with other enacted legislation.

As stated previously, state and federal courts have addressed the Equal Protection issues discussed above in cases before its legalization. In the case of *U.S. v Pickard*, 100 F.Supp.3d 981 (E.D. Cal. April 17, 2015), which addressed these very issues, United States District Court Judge Mueller in California stated that she found witnesses for the defense and prosecution equally credible, indicating that if she had applied a more stringent standard of review, then she may very well have ruled for the defense. *See* Jeremy Daw, *Final Arguments in Schedule 1 Hearing; Decision Expected*

in March, THELEAFONLINE (Feb. 12, 2015);[11] *see also Pickard*, 100 F.Supp.3d 981. Judge Mueller used a rational basis test. *Pickard*, 100 F.Supp.3d at 1005. Unlike the limiting federal law, Minnesota defendants are entitled to the more "stringent" review that Minnesota courts require, and under the more stringent rational basis review, Minnesota courts must find that there is no rational basis for marijuana to be a Schedule I controlled substance.

Judge Mueller indicated that under such a "rational basis with a bite" analysis, the case's seven defendants would fare much better than under the standard "rational basis" test, because instead of having to show that cannabis' Schedule I status has no rational relationship to any legitimate government interest, they would merely have to demonstrate that its classification bears no "substantial" relationship to any "important" government interest — a significantly more favorable standard. *See* Daw, *supra*; *see also Pickard*, 100 F.Supp.3d 981.

The prosecutor in the *Pickard* case continually reminded the judge that if an idea were "imaginable" or even "debatable," then that by itself meant that it was rational. Daw, *supra*. The prosecutor in the case also stated, "If Congress heard all the testimony you have heard in this hearing, they may very well decide not to put marijuana in Schedule I." Daw, *supra*. But because one could "conceive" or even "imagine" a basis for keeping a drug now legalized for medical use in a majority of states in a Schedule that declares it to have no medical use whatsoever, the prosecutor argued that it should stay there. *See* Daw, *supra*.

In contrast to the federal court's test in *Pickard*, Minnesota courts do not hypothesize. This issue cannot merely be imaginable or debatable. There must be "a reasonable connection between the actual, not just theoretical, effect of the classification and the statutory goals." *Thiel,* 846 N.W. 2d at 614; *Russell,* 477 N.W.2d at 888–89.

Nearly 30 years ago in *State v. Vail*, the Supreme Court of Minnesota addressed similar equal protection challenges, stating, "In view of the continued debate over possible short and long-term physical and psychological effects, it cannot fairly be said that continued apprehension and reluctance of the state board of pharmacy to reschedule marijuana is so arbitrary and unreasonable as to render it unconstitutional." 274 N.W.2d at 136 (1979). To rule that because there is still a debate in 2015 and that there should be no change in the law is not a sufficient rational reason to keep marijuana as a Schedule I controlled substance. The change must occur.

Despite the growing body of research advocating for the medical use of marijuana, United States Supreme Court decisions dated in the 1970s and 1980s are still being cited by the government today. Our argument is that there is an "ongoing vigorous dispute as to the physical and psychological effects of marijuana, its potential for abuse, and whether it has any medical value, supports the rationality of the continued Schedule I classification." *State v. Hanson*, 364 N.W.2d 786, 790 (Minn. 1985); *see also U.S. v. Fogarty*, 692 F.2d 542, 548 (8th Cir. 1982). It is now time for Minnesota courts to stop saying that the law is rational … because there is a debate. The reality is that there is no debate in Minnesota—the debate was settled when the legislature legalized marijuana for medicinal use in 2015. Thus, there is no rational basis for the selective state-based prosecution policy. The decision to prosecute may not be "based upon an unjustifiable standard such as . . . arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *see also Wayte v. U.S.*, 470 U.S. 598, 608 (1985).

In conclusion, since July 1, 2015, marijuana no longer fits the Schedule I criteria and there is no rational basis given the acceptance of medical marijuana in Minnesota. To classify this drug as the most dangerous of all controlled substances is irrational and arbitrary. We are allowing children and adults to ingest this drug for medicinal use. The legislature passed Minnesota statutes 152.21–.37, which allow for use of "medical marijuana"—something that directly contradicts Minnesota's controlled substance I classifications.

Good luck.

[11] http://theleafonline.com/c/politics/2015/02/final-arguments-schedule-hearing-decision-expected-march (last visited Aug. 24, 2015).

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