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Tennessee Journal of Law and Policy

2017–2018 Editorial Staff

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Publication of contributions does not signify adoption of the views expressed therein by the TENNESSEE JOURNAL OF LAW AND POLICY, its editors, faculty advisors, or The University of Tennessee.
PROFESSOR PENNY WHITE: Good morning. Thank you so much for coming to the annual symposium of the Tennessee Journal of Law and Policy. My name is Penny White, and I have the distinguished opportunity to faculty advise this law [journal], the Tennessee Journal of Law and Policy. And that's why I am here today. I get the experience of working with incredible students at the College of Law. And one of those is Sean Francis, who is this year's Symposium Editor. I'm going to turn it over to Sean who will introduce our keynote address speaker. However, as you all know Micki, I have reminders for you from Micki before we get started.

Reminder number one, because of the crowd some of you will be sending in your big $25 check for CLE fees later. That's fine. But if you don't turn in your attendance report before you leave today, she will not give you credit. So you have that separate attendance report. Be sure and make sure

* Dan Kahan is the Elizabeth K. Dollard Professor of Law and Professor of Psychology at Yale Law School. In addition to risk perception, his areas of research include criminal law and evidence. Prior to coming to Yale in 1999, Professor Kahan was on the faculty of the University of Chicago Law School. He also served as a law clerk to Justice Thurgood Marshall of the U.S. Supreme Court (1990–91) and to Judge Harry Edwards of the United States Court of Appeals for the D.C. Circuit (1989–90). He received his B.A. from Middlebury College and his J.D. from Harvard University.
Micki gets that before you leave.

Secondly, we don't apologize for the crowd, we're delighted by the crowd. But the reason that we do not have an overflow room with this on a television for you and others to watch is that we simply don't have enough space at the College of Law today with all the classes going on to have an overflow room. So I hope you won't be too uncomfortable, and I hope you'll just still be glad that you came even after a crowded day.

So with no more ado, Sean Francis, who has put this thing together.

MR. SEAN FRANCIS: I would like to echo Professor White. The turnout is great. We're very happy to have all of you here. As she said, my name is Sean Francis. I'm the Symposium Editor for the *Tennessee Journal of Law and Policy*.

If I may, I would like to get just a few thank-yous out of the way. Of course, I would like to thank the University of Tennessee College of Law. They provided these facilities here for us to have the symposium. Without them, we would be meeting at a Waffle House somewhere and it would not be nearly as nice, so we appreciate that.

Along that same vein, I would like to thank Micki Fox, the CLE director. You guys know how much work she puts into these things; the registrations, the fees, putting together the credits for you guys, getting the verification for CLE for the credits. All of that is Micki, and more. So we definitely thank her for her help. I would also like to thank Jeff Groah, our audio/visual guy. He's back there in the back making sure everything is working well. If anything goes wrong, you can blame him, so get a good look at his face. It's not my fault.

And then I would also like to thank the Advocacy and Dispute Resolution Center. They're the ones who provided the financial backing for all of this. They funded
the little snacks that we have for you guys. All of the fees and registration that we had for this, all of that was them. So we would like to thank them.

And, finally, we would like to thank the Tennessee Journal of Law and Policy. They provided the manpower behind all of this. They organized all of this. And without them, none of this would have been possible. So if I can have just a short plug for the Journal, it was established in 2004. It produces twice yearly publications on the subject of law as it intersects with decision-making or policy-making. So any of you who work with lawmakers or who are lawmakers, or who work in the policy-making arena, it's a really great resource for all of you. And even if you don't, you're just interested in those topics, I would encourage you to check out the editions that we have out and the future editions that we will publish.

One more short housekeeping note about the schedule today. So the morning session—I'll just go over that now. We'll begin with Professor Kahan's address here in a few minutes after I introduce him. After which, we'll have a short fifteen minute break. And then we'll have a panel of experts and practitioners in the field of law who will come up and react to his speech and answer questions from the audience. So, please, think of your questions as they speak and as Professor Kahan speaks, and feel free to ask as many questions as you might have.

So without any further ado, I would like to introduce Dr. Dan Kahan. He is the Elizabeth K. Dollard Professor of Law and Psychology at the University—at Yale University College of Law. He is also a member of the Cultural Cognition Project, which is a group of scholars who seek to analyze the impact of group values on perceptions and related facts.

And that's what he has generally come here to speak to us about today. So I would like to ask you to join me in welcoming Dr. Dan Kahan.
II. Keynote Address

PROFESSOR DAN KAHAN: It was really just an honor to receive the invitation. And I want to thank the Journal and also Penny for giving me this opportunity. And actually, everybody has been really nice to me since I got here. And I'm sure that that reflects a sort of friendship [indiscernible]. [Laughter.] It's really great to have that kind of relationship with you.

Now, I saw what's been going on here just a little bit in today's politics, and it made me realize that really, if you want to get people to listen to you, you have to make a really bold claim. Right. So I'm going to make three really bold claims. Kind of give me a chance here and don't all rush me [indiscernible] that way. But one of them that's especially bold is that judges and lawyers, they don't see things the way that ordinary people do. Now, you're already kind of saying, come on. And so I'll just add a little proviso. They don't see things the way that the public does, well, except when they do.

Now, the second claim, bold claim, this is generally a good thing, that judges and lawyers think differently from ordinary people. You know, just give me a chance here and I'll qualify it a little. It's generally good, but sometimes it can also be bad. So those are my three very bold claims. And I'm going to make out these claims by going through a series of studies with you. And the first one actually has to acknowledge that it has roots in Tennessee. It's a study that initially we pretested within Justice Koch's fellow members of the Inns of Court in Nashville. So I don't know if that disqualifies him from being on the jury, actually the judge, the work.

Now, the paper that reports the results of this study has a title based off protests, which is an allusion to a famous study conducted in the 1950s where the researchers asked students from two rival colleges to watch the tape of the
football game between their two schools and decide whether the referee had made the right call or the wrong call on certain disputed calls during the game. And what they found is that the students from Dartmouth, they were all convinced that the official must be a referee of Princeton or something, he was so biased. And whereas the students from Princeton, they said, you know, what's going on? Did they bribe the referee? We can't believe he's this unfair. Right. So the students were conforming what they saw on the tape essentially to their institutional affiliation. And this is what's referred to in psychology as identity protective cognition. People are going to selectively credit the information with the arguments of the judgments about the credibility of the speaker, it could be the quality of scientific data, to the interest of some kind of special group. They're going to do that because they want to maintain their standing and status in the group. And if you take positions that are contrary to the other group members, well, then sometimes they might look down on you. Right. So this is identity protective cognition. And what we wanted to do was see whether this might actually apply in law.

But by the way, don't you see the one from Tennessee, he's clearly out of bounds. Right. I mean, I see it, so. But we thought, well, does this identity protective cognition actually influence how fact finders in law are performing their duties? So we took a sample, not of judges and lawyers as we did that day at the Inns of Court with Dean Koch, but just ordinary individuals. Two hundred people who were drawn from a Nashville panel, the kind of people who might be on a jury. And we told them, imagine you are on a jury and it's a suit by political protestors against the police, that a political protestor said that the police violated their First Amendment rights when they ordered them to end their demonstration. And the police on the other hand said that they weren't violating the First Amendment rights of the protestors. The protestors had crossed the line from speech
to intimidation, that they were waving their signs in a menacing fashion at passersby, screaming in their face. That's not protected by the First Amendment. And blocking access to the building that you see in the background.

Now, we have an experimental component in this study. We told half the people that the protest was happening at an abortion clinic and that the protestors were against the right to an abortion. And we told the other half of the sample that this demonstration was at a college recruitment center, and that the demonstrators were expressing their opposition to excluding gay and lesbian individuals from the military. I see we have some younger people, that's well before your time. Actually, that used to be the policy of the United States. It got changed. But we did our—we collected our data before President—then President Obama had changed that.

There were also laws that were specific to each one of the two conditions, right, so that the subject—study subjects for the abortion clinic condition, they were to apply a statute that says it's illegal to interfere with, to obstruct or intimidate or threaten people who are trying to access a facility where abortions are being given. And the police have the power if people—they see people doing that, to disperse them or else arrest them. And then similarly in the recruitment center condition, anybody who was interfering, intimidating, blocking or what have you, the access to a facility where military recruitment is going on, they're breaking the law and the police can stop that too.

Now, there was one other thing that we measured here; the cultural worldviews and problems of our subjects and just preferences about how society should be organized along two different dimensions, individualism, communitarianism, hierarchy, and egalitarianism. And we measure that by having the subjects respond with a graded scale to statements, do they agree with them or disagree with them and how strongly. Things like, it's not the government's business to try to protect people from themselves. It's kind
of an individualistic sensibility, or the government should put limits on the choices the individuals can make so that they don't get in the way of what's good for society. You're more collectivist if you agree with that, that our society would be better off if the distribution of wealth is more equal than to egalitarian. And then something like this, society as a whole has become too soft and feminine. Now, that's kind of a traditionalist view.

So that's how we measured the cultural outlooks. And for our purposes, the communities who have these combinations of values that are reflected in the two-dimensional representation of the cultural worldviews, they're performing the same functions in our experiment as the students' college affiliations did, and they saw a gain, right. These are the groups who share these values with respect to which people are going to be judging by disputed evidence, in order to find that the status of their group in competition with other groups is actually predominant.

You have here the lawsuit by people who have distinctive, very strongly held and contested political positions, and that's going to put pressure on the study subjects to conform what they're seeing when they watch the tape to the outcome that's consistent with what their own group's values are.

And so here's what we saw. In the abortion clinic condition, the egalitarian individualists, they formed rather—well, they formed attitudes that were anti-protestor, like—either like egalitarian—kind of like libertarians. In their view, the police didn't go too far and shouldn't be enjoined from stopping this kind of demonstration in the future because of that, like the abortion protestors, that's what they thought they were, had crossed the line from speech to intimidation.

The higher up communitarians, in contrast, they thought that the police had clearly gone too far. And these are people who have more traditional values. They tend to
subscribe to the pro-life position, and for sure, the officers should be enjoined from doing this thing again in the future. Now, that was the response if they had been assigned to the abortion clinic conditions.

If they were assigned to the recruitment center condition, then they flipped around completely. All right. And we also, of course, have the egalitarian, communitarians, and the higher up individualists, they don't care that much about abortion, but they were clearly very polarized in the military recruitment condition. All right.

And the reason that they came to these conclusions is that they actually thought they were seeing different kinds of things. Right. People who have the—well, in any condition, people with one set of values would disagree with people who had other sets of values of whether, in fact, the protestors were blocking entry to the building and whether they were screaming in the face of onlookers. But across the conditions, right, people with the same values were disagreeing with each other. They are disagreeing with their counterparts in the other condition. If you thought you were watching the abortion condition, then you had very different reactions from somebody who had values like you in the military recruitment center condition.

All right. So people are conforming their impressions to the outcome that is most in line with their group's values. And you can see why this is going to be a problem for the First Amendment. I don't know if you recognize that the—does anybody get those Supreme Court advocate trading cards? Because here's—this is a woman who actually argued a case to the Supreme Court and won, and her name is Shirley.¹ She's from the Westboro Church, which is a hate group, and they're very emphatic, that's exactly what they are, who hate gays, for example. And you see they used to go around to the funerals of soldiers who died fighting in Iraq or Afghanistan and they would say,

well, this is vengeance by God for the United States being too tolerant of homosexual rights. And as you can imagine, that didn't make the parents of the soldiers feel very good.

So one of them sued the Westboro Church, right, for intentional infliction of emotional distress, and they got some big judgment. It was reduced on appeal, but not by much, like five million dollars. And so they're appealing to the Supreme Court, saying this is contrary to the First Amendment to punish us on these grounds. And, in fact, they won. I don't think that that's really a surprise because the theory of the case that they were—that was presented against them, it kind of runs headlong into one of the essential pillars of First Amendment law, the non-communicative harm principle.

See, the Court said: “The record confirms that any distress occasioned by the Westboro's picketing”\(^2\) —I mean, there's clearly distress, right, people are being severely traumatized by what they're doing. It “turned on the content in viewpoint of the message conveyed rather than any interference with the funeral itself.”\(^3\) And you recognize this because you can generalize it. If you regulate people engaged in speech activity, you have to have some goal or interest that can be defined independently of people just not liking the speech. It's not a cognizable harm that they were upset by the content of the speech—I mean, clearly, here the content of the speech is what upset the parents.

If the protestors had been saying, you know, welcome home, thank you, we appreciate your sacrifice, this wouldn't have happened. But if the harm is one that can be defined independently of First Amendment, then there's room for regulation. Interference with the funeral itself, right, they're blocking the procession and may be hitting people over the head with the sign, you can define the harm that's being inflicted there independently of whatever point

\(^2\) Snyder, 562 U.S. at 457.
\(^3\) Id.
they were trying to make by speaking, or even whether they were speaking at all. All right.

So we have—have this important First Amendment principle. It's reflected in the two laws that I showed you. They're trying to identify the kinds of non-communicative harm that people can suffer when they're subject to intimidation and threatening and so forth.

But here's the problem, right, if when fact finders are trying to determine whether the conditions of those laws are consistent with the First Amendment have been satisfied, their perceptions are going to be sensitive to the values of the protestors. They're more readily going to find the non-communicative harm principle to be satisfied when they don't like the message of the protestors than when they do. So in making these kinds of factual determinations under the influence or pressure of identity protective cognition, they're actually recreating a legal regime that determines whether people can engage in protests based on the values that they have. And that's really going to be a—prove to be a problem for the First Amendment. And some people think that's what the Supreme Court or even state courts are doing, they're being too political, maybe because they're reasoning in this way. And, I guess, you know, the question—

Did you say I could ask questions and quiz people or—

PROFESSOR PENNY WHITE: Sure.

PROFESSOR DAN KAHAN: Do you think our study actually supports this anxiety on the part of the public that judges are, in fact, political in their ruling? Do you think it does? I mean, there's one—do you think so?

UNIDENTIFIED VOICE: I don't know.
PROFESSOR DAN KAHAN: Well, I thought you were raising your hand. You need to get into the action here. But you see, you know, the study, I told you, we did it on lay people. I mean, not people with any legal training, much less judges, right. And it's not new to the law that sometimes people are going to be biased politically and that it might even unconsciously affect their judgments. That's why you have strict scrutiny of laws that abridge the First Amendment, whether it's incidentally or not to see, well, were people really motivated by something else that they're not expressing here? We train the prospective lawyers to be able to apply these rules.

Now maybe—maybe the judges are going to be affected in the same way, but it's a question begging given that the judges that have been trained and allowed to experience the kinds of reasoning that lawyers do. They say, well, you must be like the public. And that's exactly what they're going to do, they're kind of checking influences in the public.

The only way we can figure out whether judges are going to react similarly is to do a study with judges in it. All right. So here's the second study. They saw a statutory ambiguity. And in this one, we had members of the public, students, lawyers and judges. Right. It was a fifteen hundred member sample, and we had all of these groups so we could kind of make some comparative judgments. And it's about ambiguous statutes. There are two statutes. One said that you can't deposit junk or debris in a national park. And so here we have a national park. I guess it's running along the Texas-Mexico border and we have people who left water—plastic water containers in this wildlife preserve or this national park with the expectation that they might come back and refill them and drink it. Well, is that depositing debris in the protected area? All right. That's a statutory ambiguity to have to try to figure out whether that's debris. Maybe it's not debris, they're going to drink out of it. But maybe it is
because, I don't know, a coyote might try to eat it and choke or something like this. All right.

In the other—the other ambiguous statute, you have a police officer who admittedly, knowingly distributed confidential law enforcement material to a non-governmental actor—that would never happen now, but it was a hypothetical. And the question is, when the statute says if you knowingly violate the standards and you're guilty, do you have to prove not only that he knew that he was distributing the confidential information to somebody who wasn't a law enforcement official, but knew that a violation would be something for which he could be punished. It's a classic mistake of law problem. Right. We see these kinds of things all the time. And sometimes it comes out one way and it knowingly applies not to the law, but only to the facts. And sometimes the other way, you have to know about the law. So we had that ambiguity too.

Now, again, we had experimental manipulation [indiscernible]. Right. These have to do with the identity of the parties. Right. So in the first case, where the issue is whether leaving the water—refillable water containers in the park is to be depositing debris. In one condition, the study was told that these were construction workers and maybe the people who are going to build President Trump's wall. Right. In the other condition, they were told that these were immigrants' rights activists who were worried that when people were trying to cross the border illegally, they might get thirsty and want to drink from these containers.

And no matter how you feel about the motivations of the actors, whether they're construction workers or immigrant aide workers, it doesn't make any difference to what the outcome is. The question is just whether when you leave the plastic bottle, refillable bottles in the desert, you're depositing debris.

In the second case with the disclosure, we vary the identity of the party to whom the disclosure was being made.
Right. So in one case, we had the officer who knew he was distributing the confidential information, giving it to a pro-life counseling center and saying, watch out, right, there's an abortion rights advocate who is trying to apply under false pretenses to work with you, so you better be careful. And in the pro-choice condition, the same thing, the officer saying—that they're telling the pro-choice facility, watch out, there's an abortion rights advocate who is trying to apply to sabotage your efforts. And, again, that doesn't really have any bearing whatsoever on the legal standard. All right. You have to determine whether his knowing violation is required or not.

But we did expect that that manipulation, as well as the one in the first case, could give a lot of motivation, unconscious most likely, to construe the reading of the statute to the position that was consistent with the identity of the study subjects. And so we're going to see that the relative impact of the manipulation on members of the public, students, lawyers, and judges. And so to start with the public and the judges, here's what we found. That in the layperson's standpoint, you saw again that people were polarizing depending on what condition they were in, and in ways that were congenial—held congenial to their own cultural values. They did that in both of these cases.

Judges, however, they weren't very different from each other. Right. They're converging on a particular outcome, no violation in the littering case regardless of who it is. And the same with the disclosure case. Right. It's a violation of the law regardless of the condition, regardless of their values.

Now, I can have a fancy statistical model, like this, where they put little asterisks down here that say, see, now you know, you better believe me, or something like this. If somebody does that, if they give you a chart like this and tell you that their conclusions have been satisfied, demand your money back. Right. That's what I'm going to do, have you to
demand your money back. So what you have to do is that this kind of information, it's not even by—it is by itself intelligible or easy to understand for somebody who is actually familiar with how these statistical models work. It's come up with some way that represent what the elements of the model mean in practical terms. All right.

So here's what I do. I use a simulation. This is kind of how Nate Silver determines who's going to win the election. I wouldn't say that given that he [indiscernible] job for the last time. Right. But you plug the values into the model that reflects whatever set of conditions you want it to test for. Right. And maybe you say, well, I want a hierarchical individualist that's a judge in the immigrant rights component, the control group would end the littering problem, and the formula—the model will spit out the answer. Right. But it does it with a kind of spitting. It doesn't do it with its hand. It hands out an answer with kind of a shaky hand. Right. So it imposes a little bit of random noise into the estimate reflecting the overall error in the model's various components. And it does that once. And then it does it again and again and again, about a thousand times. And then you can represent what the entire probability distribution is for somebody like that coming up with a conclusion to find a violation. So the hierarchical—if they're a hierarchical individualist in the construction group, you're not very—well, forty percent likely to find that there was a violation, well, plus or minus seven percent.

If you're a hierarchical individualist in the immigrant rights condition, well, then you're much more likely to find a violation. It's seventy-five percent. So that's a difference in thirty-four percentage points. If you're an egalitarian communitarian and you're in the immigrant rights condition, it looks like you're around fifty percent. But you're twenty-seven percentage points behind the hierarchical individualist for whom the conviction outcome was much more culturally congenial than it was to the egalitarian
communitarian.

And the egalitarian communitarian in the construction scenario, twenty-three percentage points difference between what the egalitarian communitarian would have found in the immigrant rights conditions. So they're polarizing. Right. It looks a lot like the last study. And you get similar kinds of results, polarization in the disclosure case. Right.

Now, let's look at the judges. You see, they're all smooshed [sic] up against each other. There's very little difference in what's going on in the littering version of the problem. It doesn't matter to whom—who the parties were to the judges. Right. No significant differences. But they're all basically of a piece—one piece of mind on what the outcome should be in the disclosure case. So those are pretty strong results showing that the public is subject to the identity protective cognition kinds of influences, but the judges aren't. And you can kind of generalize this, call this the identity protective cognition impact.

I mean, how many percentage points more likely is someone to find a violation if the person was assigned to the condition in which a violation would be congenial to that person's cultural outlooks, as opposed to the condition in which the finding of the violation wouldn't be congenial to that person. And it's about twenty-two percentage points for a member of the public—twenty-two percentage points more likely to find it's a violation if it's congenial culturally than non-congenial. And for the judges, that's minus five percent, plus or minus twelve percent. It's not meaningfully different from zero. And you've got a pretty big spread between the members of the public, twenty-seven percentage points more likely to be influenced by the congeniality of the conditions than are the judges.

We could look at the students and lawyers briefly. The lawyers, they look a lot like the judges. Right. They're basically agreeing on what the outcome should be regardless
of their values and regardless of what condition they're assigned to. The students, they're looking a little bit more like members of the public. The effect isn't as big. But, you know, that's why if there are any students here, we charge you this much for your tuition so that you can get to be like the lawyers and the judges and be perfectly neutral. It takes a lot of work, at least three years of law school. So this is the—you can do it too with simulations if you like. So judges and lawyers don't see things the way that ordinary members of the public do.

And I'm going to try a little experiment here because this is relevant. What's the mechanism and what's going on? Why should we understand judges and lawyers to be resisting these kinds of influences? And I guess the question in the first study, can you tell—this is a baby chick. Do you think it's male or female? Can you tell just by looking? Do we have any chick sexers in the audience? Well, you're laughing, but you wouldn't be if the chick sexers all went on strike because that would be really devastating to the poultry industry.

You see, chick sexers, they perform this extremely important function when the baby chick is just a few hours old. They're segregating the male from the female ones. And see, the female ones, well, they're going to have juicier meat. They're going to lay eggs. The male ones, they're going to peck at the female ones and they're not very good for eating and they don't produce the eggs. Well, you keep a few who lead a kind of privileged existence. The others, you're just tossing them away. And they're coming down a conveyor belt, okay. And if it's male, you throw it in that—and these guys are ninety-nine percent accurate.

And what makes this kind of astonishing is there's no visually ascertainable difference between the anatomical parts in question for male and female chicks at this stage of life. And you ask a chick sexer, how do you do this. And if he's honest, he goes, I don't know, you know. Somebody else
might say, well, I do it this way, you know, the male chick, he always tries to distract you. And he says something like how many games out of first place are the Red Sox, or something like that. That's confabulation. That's not what you're doing. And we know how somebody became an expert chick sexer from the tutelage of a chick sexer grand master, right. They went off and the grand master showed them slides, male, female, female, male, male. And so finally they developed this kind of intuitive sense of who is the male and who is the female.

Now, this sounds kind of exotic and weird, but it's not. In fact, it's completely mundane and ubiquitous. This is a psychological mechanism known as pattern recognition where you try to classify a potential instance of some thing, like a baby chick's gender based on a mental inventory that's richly stocked with examples because you've been doing this for a long time, and it's all over the place. That's how we read each other's emotions. It's how people in aerial surveillance when they look at the photos can tell Cuba is putting missiles—Russians are putting missiles in Cuba and maybe it will happen again soon. Right?

But here's—what—this is what happens, you see, when you go to the law school. Well, Karl Llewellyn had a theory very much like this, and this is one of Dean Koch's favorite writers. Karl Llewellyn called it situation sense, right, that you're immersed in the—with the culture of the law. And you start to develop these sensibilities to classify situations and then determine what the right result is. And that's why you get the tremendous convergence among lawyers and judges on admittedly vague kinds of statutes. Right? So that's what law school is. Right. It's the proximate causation, unreasonable restraint of trade, material misrepresentation. You keep showing the slides. You keep showing the examples and eventually students are going to get this kind of thing.

And that's what's going on, at least that's what I—
the theory we had when we did this study, that there's this kind of ingrained professional judgment that judges are going to have because they're immersed in a certain kind of culture that started with going to law school, but continued after that. And, you know, that's judges seeing things different from how ordinary members of the public do. But we still have this little proviso, except when they don't see things differently. And, you know, we also measure the cultural outlooks, as I've said, of the subjects in this study. Usually we use this measure to try to understand why people are fighting about different kinds of risks. And so it turns out that members of these groups, they form kind of clusters of perceptions about risk; environmental risk, guns and gun control, gays in the military, gay parenting, marijuana legalization, HPV vaccination. All the kinds of hot-button issues that you're careful when you first meet somebody and you don't get into that until you know them a little better.

And we did that for the judges in this case. And the public and the students, they both showed the characteristic polarizations on the issue of whether global warming was happening, right, but so did the lawyers and so did the judges. And the public was divided on legalization of marijuana. There's really not that much difference in how students, lawyers, and judges saw things. And so you get a sense, if the reason that judges are able to be neutral is that they have this situation sense that is a consequence of being immersed in the culture of the law. But when you're outside of that domain, there's no reason to expect them to be any different from anybody else. And that was true of our judges. So it's a kind of domain specific immunity. It's not the—it's not that the judges became superheroes because they're always kind of pumping justice in the weight room or something and they're never going to be experiencing any bias. But when they do their job, then they apply the habits of mind that are instinctive to what they're doing. So sometimes they actually do see things the way the public
does.

Now, you can see why this is generally good, because it means that if a judge is assessing the kinds of issues that might arise on remand in Shirley's case, whether the protestors crossed the line on the non-communicative harm principle, they should be able to do that pretty well. And, in fact, that case came out eight to one in the Supreme Court. And just a couple terms later, there was a Supreme Court case in Massachusetts that had a very protective or restrictive, depending on how you look at it, provision on how close people can come to people at the abortion clinic to try to influence them. And they said, no, you can't do that. It was a nine to zero opinion. And they said you've got to follow the kind of standards that are in the Freedom of Access to Clinic[] [Entrances] Act, which is what's on the right. And so that's pretty good. Judges are being pretty neutral. But here it can also be kind of bad sometimes.

And I'll give you an example, from trial administration—and it's another study actually that we did in Scott v. Harris. The issue was whether when the police use deadly force against a fleeing motorist, meaning ramming their car into his and causing it to spin out, it's clearly deadly force. Are they justified in using deadly force under the Fourth Amendment under those circumstances? And there was a video, right, of the chase. And the late Justice Scalia said that's the scariest thing I've seen since The French Connection, right, and he probably hasn't even seen a movie since The French Connection.

And then you had Justice Stevens—you know,

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4 Snyder, 562 U.S. 443.
6 McCullen, 134 S. Ct. 2518.
7 Id. at 2357.
Justice Breyer, the same thing, said he almost wet his pants when he saw it.\textsuperscript{10} It was terrifying. And we had one justice, right, Justice Stevens who said, well, that didn't scare me. That's the way it looks when I'm really in a hurry to make it to court when you have to pass somebody on a two-lane road.\textsuperscript{11} You know, some kind of Mr. Magoo or something like that. I knew you guys would get that. And so, you know, all he could do was say thank you to Justice Scalia and to Justice Stevens because they decided that people should just decide for themselves. And this is the first Supreme Court decision with a hyperlink in it.\textsuperscript{12} Watch the video and decide for yourself. They both are convinced it's going to come out this way.

And, again, we have a model. We gave this to fifteen hundred people. And we can simulate how different kinds of jurors would react. Right. So you've got Ron who lives in Arizona, and he doesn't like the government touching his junk, right. But he's still relatively hierarchical and has strong opinions about who should do what in the household and so forth. And then we've got Bernie, who is a—he was even for several years before Bernie ran for president, a professor in Vermont who has very kind of hands-off views about regulations. People should be allowed to use marijuana and so forth. But if people are having trouble, the government should help them—he's got a kind of socialist orientation. Then there's Linda, who's a social worker in Philadelphia and she goes along with Bernie on a lot of issues except drugs. She thinks kids have to have more discipline. And, finally, there's Pat; and Pat, well, is sort of average in social outlook, average in income and average in gender. Pat is the survey mean, right, just an average American who doesn't exist. You see, people have opinions that reflect who they are. And there's nobody who is just a

\textsuperscript{10} See Scott, 550 U.S. at 387 (Breyer, J., concurring).
\textsuperscript{11} See id. at 390 n.1 (Stevens, J., dissenting).
\textsuperscript{12} Id. at 378 n.5 (majority opinion).
little bit of everything. Right. Ron, very likely to agree with the Supreme Court's outcome on the issue—the factual issue that the driver in *Scott v. Harris* was posing a deadly risk to others. Right. Then you've got Linda and Bernie who have a little bit more noise in their simulated values. But they think that's—no, and that's not—they're not very likely to find that outcome. And then there's, of course, Pat. And Pat's closer to Ron.

But here's the issue, right, whether when you have people disagreeing like this, is the disagreement sufficiently strong and you're just going to basically have summary judgment, which is what the Supreme Court ruled in that case, eight to one. Right. That it would be summary judgment because no reasonable juror could watch the tape and come to any other conclusion, but that this guy was a death machine on wheels. Right. No, it's not true. People who have different experiences, different identities, they might come to a different outcome. Maybe they're going to lose, you know, but the question is whether they should have a—at least have a chance to be heard by people in the community who don't agree with them and at least get a chance to maybe tell them why they feel differently. It can't be the case that summary judgment is warranted because the views of people like Bernie and Linda are just not reasonable. These are reasonable people.

And I think this is a consequence of—really of situation sense. The judges don't see things the way members of the public do. And when they have to predict what members of the public might think, they're at a risk of error that they're going to be imposing their own outlooks on that prediction. They need to do a better job on that.

The second problem is I think even more significant. I call it the neutrality communication problem. And, again, I want to go on a little detour here and get into science communication because my lab also studied both kinds of issues. And we wanted to know, well, how do
people form their understandings of scientific incentives on these kinds of issues. So what we did was we showed them, right, three people who look like they're pretty much experts on their subject matters. But they're—well, they all went to good schools. One went to a really great school. It's in my contract. I have to say stupid things like that whenever Yale and Harvard are on the same slide. Right. But they all went to elite schools. They're on the faculty at these prestigious universities. All members of the National Academy of Sciences. And we say, well, do you think that this is a genuine expert on the issue of climate change or, you know, gun control or nuclear waste. Right.

And we picked those issues because we know that people are very divided in these two cultural groups. But we also, again, have an experimental component. We tell half the people that the featured scientist is taking the high-risk position, that climate change is happening and there's consensus on it and we're going to die if we don't do something versus the low risk. Right. The computer models, they're subject to error. It's too early to say. We shouldn't do anything precipitous. Right. The kinds of arguments that they recognize.

The same thing with nuclear waste, high risk to put the waste in deep geologic isolation. No, low risk, that's been determined to be perfectly safe. And the same thing under the concealed—carry concealed guns. They make crime rates go up because more people are armed and there's going to be accidents and there could be deadly confrontations. No, it's going to make the crime rate go down because if you don't know, right, whether anybody you're dealing with is packing heat, you're kind of on your best behavior. You don't want to piss them off or anything. You're laughing so I know they're cultural orientation on that one. Right. Because what happened is that people when they're making these judgments about, is this really an expert on this issue, they're much more likely to form the judgment that the person was
a genuine expert when we depicted the expert as taking the position that was dominant in their cultural group.

All right. These are [indiscernible] seventy-two percentage points more likely to find that this is an expert when you're an egalitarian communitarian if it's in the global warming condition and the person says it's dangerous. Right. Similarly [indiscernible] effects for all of these issues. Now, this is just like, or very similar to, they saw a game. Right. People who have these different kinds of group commitments, they're looking at evidence that they're drawing some issue that divided their group from another. And they're selectively crediting it or not crediting it, depending on whether it's consistent with their group's view. Right.

That's why we have what I call the [indiscernible] communication problem, the persistence of strong partisan disagreement over issues of simple fact, right, that can be determined by empirical methods. And in some cases, have already been extensively studied. Right. Because you're filtering the information in a way that will make what you believe, what you think the facts are support your group's position on these kinds of issues.

Now, you have that because, you see, members of the public don't have the same kind of professional judgment. They don't have the inventory of prototypes that the scientists do. Right. If the scientists are perfectly neutral, then they're not going to be seen that way by members of the public who have these different kinds of outlooks. People aren't going to converge on what the best evidence is.

The same thing is happening, you see, in the law. Right. People see one of these charged issues like involving protests, for example. And for them, their own eyes are telling them, this is what happened. Right. And, you know, it doesn't matter it was eight to one in Shirley's case, nine to zero in McCullen v. Coakley.¹³ Okay. People are going to

say, how could the justices do this? How could the State Supreme Court justices do this? How could a trial court—I can see it with my own eyes, they must be biased. And as these things accumulate, everybody becomes convinced that the courts are political, even if they're not. Right. And not surprisingly, right, whether you think that they're being political on the liberal side, well, yes, if you're a conservative. Or they're being political on the conservative side, yes, if you're a liberal, but not if you're a conservative. So you get the same kind of disagreement about whether the court itself is being political and why.

And this can very positively account for the declining public confidence in courts. The courts are being political. Even if they're not, right. Well, the judges—new proposition here, judges and lawyers need to learn to see what ordinary members of the public see as part of their professional craft, right. The same way—doing good science, is that the same thing as communicating what it means? Because doing good science depends on the kinds of habits that modern scientists have that most of the public don't. So you use the kinds of techniques that I have been showing you to try to figure out how to communicate science so that the validity of it is recognized by people who don't have the kinds of insights that the scientists do.

Well, there's a neutrality communication problem. No matter how impartial courts are being on these kinds of hot-button issues, it is the case that members of the public who don't like the results are going to see it as politically biased. Well, we need a new science of traditional neutrality communication. Just doing good judging doesn't by itself certify to members of the public that it's good judging or that it's neutral. But that's something that we ought to address within our profession, and starting with the education of law students.

So what should we do in that regard? Well, you tell me. You have more understanding of this as judges, as
practicing lawyers—you know what they say about those who can do and those who would rather not because it's so easy and fun to teach law, or something like that. But your intuitions are better than mine. You know, is there something with opinion writing? Is it the kind of common exaggeration that we know that eight—judges in the majority says, eighteen arguments, they all come out this way. A judge says, eighteen arguments, they all come out that way. Right. And maybe in a Supreme Court, which is already selecting the cases based on whether there's disagreement about it in the lower courts. It can't be the case, it's that simple. But they always—the judge is always right that it is that way. Maybe that has an impact on people who will believe that the decision is wrong, that there's no convincing of any kind of uncertainty. I don't know. This is what judges have told me you might want to consider. Or maybe that you would have some kind of additional public outreach so that people could learn more about the decisions in terms that they could understand and evaluate them as to whether they're neutral or not. Maybe a judicial selection criteria should reflect something like this. I don't know.

We should do things in legal education. Well, what? Right. What we really need is the creation of evidence-based capacity and practice in the judiciary. We look—where the judges and lawyers traffic in facts, the system that we attribute to is supposed to ascertain the truth. Well, we should use the kinds of empirical methods that are appropriate for assessing the performance of ourselves to see whether we, in fact, are projecting—teaching people about facts, ensuring that facts govern in the cases that we decide. All right.

So you tell me what would be a good way to help address this question, and then I'll help you by measuring and using the same kinds of methods that I've been talking to you about today. And that brings us to the close with the highlight on Pat, a very important member of our project.

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ARTICLE

TENNESSEE RULE OF CRIMINAL PROCEDURE 36.1’S NEW CLOTHES

HOW THE TENNESSEE SUPREME COURT’S OPINION IN STATE V. BROWN LIMITED THE INHERENT AUTHORITY OF TRIAL COURTS TO CORRECT ILLEGAL SENTENCES BY OVERLOOKING THE Plain LANGUAGE OF RULE 36.1 AND THE “JURISPRUDENTIAL CONTEXT” FROM WHICH RULE 36.1 DEVELOPED

By: Jason R. Smith*

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I. Introduction

On July 1, 2013, Tennessee Rule of Criminal Procedure 36.1 went into effect.\(^1\) The stated purpose for Rule 36.1 was straightforward: “to provide a mechanism for the defendant or the State to seek to correct an illegal sentence.”\(^2\) To further effectuate that purpose, Tennessee Rule of Appellate Procedure 3 was also amended to reflect the right of a defendant or the State to appeal an adverse Rule 36.1 ruling.\(^3\) Both purposes were designed to correct flaws in the prior methods used to correct illegal sentences.\(^4\) But then something strange happened. By late August of 2015, there had been over seventy-five opinions filed by the Tennessee Court of Criminal Appeals dealing with Rule 36.1 motions.\(^5\) Most of these Rule 36.1 motions were “filed by inmates in state or federal custody” long after the challenged sentences “should have been fully served.”\(^6\) Most of these cases involved claims “of an illegal concurrent sentence.”\(^7\)

Why were large numbers of prisoners filing to correct illegal

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\(^3\) Id.

\(^4\) See, e.g., State v. Brown, 479 S.W.3d 200, 208 (Tenn. 2015) (noting that prior to the enactment of Rule 36.1 the State “had no mechanism for seeking to correct illegal sentences”); State v. Moody, 160 S.W.3d 512, 516 (Tenn. 2005) (noting that direct appeal was not authorized for the dismissal of a common law motion to correct an illegal sentence).


\(^6\) Id. at *30.

\(^7\) Id.
sentences that were shorter than what had been statutorily mandated?

The answer to that question laid in subsection (c)(3) of the original text of Rule 36.1, which provided that if “the illegal sentence was entered pursuant to a plea agreement” and “the illegal provision was a material component of the plea agreement,” the trial court was required to give the defendant “an opportunity to withdraw his or her plea” and to reinstate the original charge against the defendant if the defendant chose to withdraw the plea.\(^8\) Additionally, the original text of Rule 36.1 simply stated that an illegal sentence could be corrected “at any time.”\(^9\) Prisoners began challenging sentences that had long ago expired in hopes that they would be allowed to withdraw their pleas and, ultimately, nullify their convictions, which had been used to enhance other sentences. The floodgates had been opened.

The Tennessee Court of Criminal Appeals quickly fractured over how to interpret Rule 36.1. Some members of that court interpreted Rule 36.1 as allowing for the correction of an illegal sentence even after it had expired.\(^10\) Other members of the court concluded that the doctrine of mootness prevented Rule 36.1 from being used to challenge

\(^8\) TENN. R. CRIM. P. 36.1(c)(3) (2013) (amended 2016). This portion of Rule 36.1 reflects the long-standing case law in Tennessee that a defendant is entitled to withdraw a guilty plea when an illegal sentence is “a material element” of the plea agreement. See, e.g., Summers v. State, 212 S.W.3d 251, 258 (Tenn. 2007); State v. Burkhart, 566 S.W.2d 871, 873 (Tenn. 1978). However, the inclusion of the ability to attack the underlying conviction in Rule 36.1 appears to be unique to Tennessee law. See 21A AM. JUR. 2D Criminal Law § 834 (2016) (noting that, generally, a motion to correct an illegal sentence “is not a vehicle for a collateral attack on a conviction” and that “the relief available . . . is correction of a sentence rather than reversal of a conviction”).


an expired sentence. In *State v. Brown*, the Tennessee Supreme Court rejected both of these interpretations and held that Rule 36.1 did not “expand the scope of relief available for illegal sentence claims” from what would have been available if such claims were brought in a petition for writ of habeas corpus and, therefore, did not “authorize the correction of expired illegal sentences.” In essence, the Tennessee Supreme Court concluded that Rule 36.1 implicitly incorporated certain procedural requirements from the state’s habeas corpus law. With that, the floodgates were effectively closed.

This article will examine how the Tennessee Supreme Court’s opinions in *Brown* and its companion case, *State v. Wooden*, interpreted Rule 36.1 inconsistently with the principles of statutory construction and overlooked significant aspects of “the jurisprudential context from which Rule 36.1 developed.” Part II of this article will take a close look at Rule 36.1 and the reasoning of the *Brown* and *Wooden* opinions. Part III will examine the “jurisprudential context from which Rule 36.1 developed” and will discuss how it was actually much broader than described in *Brown*. Part IV will look at the plain language of Rule 36.1 and how it was inconsistent with the Court’s interpretation of the Rule in *Brown*. Part V will discuss how the definition of “illegal sentence” found in Rule 36.1 was not a definition exclusive to “the habeas corpus context” as was asserted in *Brown* and *Wooden*. Part VI will examine the potential “unconstitutional applications of Rule 36.1” described in *Brown* and how that concern did not apply to the facts at issue in *Brown*. Part VII will address the doctrine of

11 Id. at *3.
12 479 S.W.3d 200, 213 (Tenn. 2015).
13 478 S.W.3d 585 (Tenn. 2015).
14 *Brown*, 479 S.W.3d at 211.
15 Id.
16 Id. at 209.
17 Id. at 211.
mootness and how it, likewise, did not apply to the facts at issue in *Brown*. Part VIII will conclude the article by looking at the recent amendment of Rule 36.1 and how it will, for better or worse, bring the text of Rule 36.1 into agreement with the *Brown* and *Wooden* opinions.

II. Rule 36.1, *Brown*, and *Wooden*

A. Rule 36.1

The original text of Rule 36.1 provided that either the defendant or the State could, “at any time, seek the correction of an illegal sentence by filing a motion to correct an illegal sentence in the trial court in which the judgment of conviction was entered.”18 An “illegal sentence” was defined for purposes of Rule 36.1 as a sentence “that is not authorized by the applicable statutes or that directly contravenes an applicable statute.”19 If the motion stated a “colorable claim” alleging an illegal sentence and the defendant was indigent, the original text of Rule 36.1 required the trial court to appoint an attorney to represent the defendant.20 The movant was required to “promptly provide[ ]” notice of the motion to the adverse party.21 The adverse party was given thirty days to file a written response to the motion, after which the trial court was required to “hold a hearing on the motion, unless all parties waive[d] the hearing.”22

Subsection (c) of the original text of Rule 36.1 outlined the possible outcomes of a Rule 36.1 motion. If the trial court ultimately determined that the sentence was not

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19 Id.
21 Id.
22 Id.
illegal, it was required to file an order denying the motion.\textsuperscript{23} Should the trial court determine that the sentence was illegal but that it was not entered pursuant to a guilty plea, it was required to enter “an amended uniform judgment document” reflecting “the correct sentence.”\textsuperscript{24} If the illegal sentence was entered pursuant to a plea agreement, the trial court was then required to determine whether the illegal sentence “was a material component of the plea agreement.”\textsuperscript{25} If the illegal sentence was not a material component of the plea agreement, the trial court was required to enter an amended judgment document reflecting the correct sentence.\textsuperscript{26} Conversely, if the illegal sentence was a material component of the plea agreement, the trial court was required to “give the defendant an opportunity to withdraw his or her plea,” and if the defendant so chose, to enter an order “reinstating the original charge against the defendant.”\textsuperscript{27} Rule 36.1 provided both the State and the defendant with the right to appeal from the trial court’s disposition of a Rule 36.1 motion.\textsuperscript{28}

B. State v. Wooden

The Tennessee Supreme Court examined Rule 36.1 for the first time in the companion cases of State v. Wooden\textsuperscript{29} and State v. Brown.\textsuperscript{30} In Wooden, the defendant filed a Rule 36.1 motion alleging that “the trial court increased his sentence above the statutory presumptive minimum sentence but failed to find enhancement factors justifying the

\textsuperscript{29} 478 S.W.3d 585, 586 (Tenn. 2015).
\textsuperscript{30} 479 S.W.3d 200, 202 (Tenn. 2015).
increase.” 31 The State responded by arguing that the defendant’s “allegations were not sufficient to state a colorable claim for relief under Rule 36.1.”32 In addressing Mr. Wooden’s argument on appeal, the court “determine[d] the meaning of two terms used in Rule 36.1—‘colorable claim’ and ‘illegal sentence.’”33

After noting that “Rule 36.1 does not define ‘colorable claim,’”34 the court referred to the definition of the term used “for purposes of post-conviction relief . . . .”35 Specifically, the court noted that “colorable claim” was defined in the post-conviction context as “a claim, in a petition for post-conviction relief, that, if taken as true, in the light most favorable to petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act.”36 The court concluded that “the term has the same general meaning in both [post-conviction and Rule 36.1] contexts,” and held that “for purposes of Rule 36.1, . . . ‘colorable claim’ means a claim that, if taken as true and viewed in a light most favorable to the moving party, would entitle the moving party to relief under Rule 36.1.”37

With respect to the term “illegal sentence,” the court stated that the Rule 36.1 definition “mirror[ed] that [definition] adopted” in Cantrell v. Easterling, which “defin[ed] the term for purposes of habeas corpus petitions seeking correction of illegal sentences.”38 The court held that “the definition of ‘illegal sentence’ in Rule 36.1 . . . [was] coextensive with, and not broader than, the definition of the term in the habeas corpus context,” and that holding

31 Wooden, 478 S.W.3d at 587.
32 Id. at 589.
33 Id. at 587.
34 Id. at 592.
35 Id.
36 Id. (internal quotation marks omitted) (quoting TENN. SUP. CT. R. 28, § 2(H)).
37 Id. at 593.
38 Id. at 594.
otherwise would require it “to ignore the plain language of Rule 36.1 and of Cantrell.”\textsuperscript{39} The court ultimately concluded that Mr. Wooden’s allegations were “insufficient to state a colorable claim for relief under Rule 36.1”\textsuperscript{40} because even if the trial court erred in enhancing his sentence, it was still “statutorily available for the offense of which he was convicted” and, therefore, not illegal.\textsuperscript{41}

\textbf{C. State v. Brown}

In \textit{Brown}, the defendant filed a Rule 36.1 motion alleging:

[T]hat his sentences [were] illegal because . . . . the trial court failed to award him pretrial jail credit[,] . . . the trial court imposed six-year sentences . . . when his plea agreement called for three-year sentences[,] . . . and[,] [like the defendant in Wooden,] the trial court imposed sentences above the presumptive statutory minimum . . . without finding enhancement factors.\textsuperscript{42}

In the \textit{Brown} opinion, the court framed the issues as “whether Rule 36.1 expand[ed] the scope of relief available for illegal sentence claims . . . [to allow for] correction of \textit{expired} illegal sentences,” and whether the failure to award pretrial jail credit was “a colorable claim for relief . . . under Rule 36.1.”\textsuperscript{43}

Regarding the first issue, the State conceded that “Rule 36.1 [allowed for] the correction of expired illegal

\textsuperscript{39} \textit{Id.} at 594–95.
\textsuperscript{40} \textit{Id.} at 596 (internal footnote omitted).
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} State v. Brown, 479 S.W.3d 200, 202–03 (Tenn. 2015) (internal footnotes omitted).
\textsuperscript{43} \textit{Id.} at 205.
sentences” and agreed with Mr. Brown’s interpretation of Rule 36.1.\textsuperscript{44} The court began its analysis of the issue by noting that the same rules used to construe statutes are used in construing rules of procedure like Rule 36.1.\textsuperscript{45} In regard to interpreting procedural rules, the court stated that courts “need not look beyond the plain language [of the rule] to ascertain [its] meaning” if “the text is clear and unambiguous . . . .”\textsuperscript{46} Put another way, courts “are constrained . . . to construe the language [of a rule] in a way that is natural, ordinary, and unforced.”\textsuperscript{47} Additionally, courts “interpret a procedural rule in light of the law existing at the time the procedural rule was adopted.”\textsuperscript{48} In doing so, “courts may presume that the [drafter] knows the ‘state of the law.’”\textsuperscript{49} After stating these rules, the court then reviewed “the development of Tennessee law regarding the correction of illegal sentences . . . .”\textsuperscript{50}

The court noted that, generally, “a trial court’s judgment becomes final thirty days after entry . . . [or] upon [the] ‘entry of the order denying a new trial’” or another specified post-trial motion,\textsuperscript{51} and that “a trial court has no power to alter a final judgment.”\textsuperscript{52} The court also noted the exception to this rule recognized in the 1978 case State v. Burkhart, where the Tennessee Supreme Court “held that ‘a

\textsuperscript{44} Id. at 210.
\textsuperscript{45} Id. at 205 (citing State v. Johnson, 342 S.W.3d 468, 471 (Tenn. 2011)).
\textsuperscript{46} Id. at 205 (citing Lee Med., Inc. v. Beecher, 312 S.W.3d 515, 527 (Tenn. 2010)).
\textsuperscript{47} Moreno v. City of Clarksville, 479 S.W.3d 795, 808 (Tenn. 2015).
\textsuperscript{48} Brown, 479 S.W.3d at 205 (citing Beecher, 312 S.W.3d at 527).
\textsuperscript{49} Beecher, 312 S.W.3d at 527 (quoting Murfreesboro Med. Clinic, P.A. v. Udom, 166 S.W.3d 674, 683 (Tenn. 2005)).
\textsuperscript{50} Brown, 479 S.W.3d at 205.
\textsuperscript{51} Id. at 205–06 (quoting TENN. R. APP. P. 4(c)) (citing State v. Green, 106 S.W.3d 646, 648–49 (Tenn. 2003); State v. Peele, 58 S.W.3d 701, 704 (Tenn. 2001); State v. Pendergrass, 937 S.W.2d 834, 837 (Tenn. 1996)).
\textsuperscript{52} Id. at 206 (citing Green, 106 S.W.3d at 648–49; Peele, 58 S.W.3d at 704; Pendergrass, 937 S.W.2d at 837).
trial judge may correct an illegal, as opposed to a merely erroneous, sentence at any time, even if it has become final.” 53 However, when the Tennessee Rules of Criminal Procedure became effective in 1979, they did not “specify any procedure for making such requests,” 54 and “the Tennessee Rules of Appellate Procedure, which also became effective in 1979, did not authorize an appeal as of right from a trial court’s decision on a motion to correct an illegal sentence.” 55 Instead, defendants seeking to challenge an illegal sentence followed the procedure that was used in Burkhart, which was to file a motion to correct the illegal sentence in the trial court and then rely “upon the discretionary common law writ of certiorari to seek appellate review of trial court orders . . . .” 56

After reviewing the rule and procedure found in Burkhart, the court examined its 2005 opinion in Moody v. State and concluded that Moody reaffirmed “the rule announced in Burkhart—that an allegedly illegal sentence may be challenged at any time, even after it is final,” but that Moody rejected “the Burkhart procedure.” 57 The court quoted the holding in Moody, stating that “the proper procedure for challenging an illegal sentence at the trial level [was] through a petition for writ of habeas corpus, the grant or denial of which [could] then be appealed under the Rules of Appellate Procedure.” 58 In Brown, the court reasoned that

53 Id. (quoting State v. Burkhart, 566 S.W.2d 871, 873 (Tenn. 1978)).
54 Id. (citing Cantrell v. Easterling, 346 S.W.3d 445, 453 (Tenn. 2011)).
55 Id. at 206 (internal footnote omitted) (quoting State v. Moody, 160 S.W.3d 512, 516 (Tenn. 2005)).
56 Id. at 206 (citing Moody, 160 S.W.3d at 515). In fact, “[t]he common law writ of certiorari [is] codified in Tennessee Code Annotated section 27-8-101,” and is available when the trial court has acted “without legal authority and where no other ‘plain, speedy or adequate remedy’ is available.” Moody, 160 S.W.3d at 515 (quoting TENN. CODE ANN. § 27-8-101 (2000)) (citing State v. Adler, 92 S.W.3d 397, 401 (Tenn. 2002)).
57 Brown, 479 S.W.3d at 206 (citing Moody, 160 S.W.3d at 516).
58 Id.
“[b]y adopting habeas corpus as the mechanism for challenging illegal sentences, the Moody Court implicitly limited the scope of relief for illegal sentence claims to unexpired illegal sentences.” 59 The court reasoned this was because habeas corpus relief is statutorily limited to persons “imprisoned or restrained of liberty” 60 and that it had previously held, in the habeas corpus context, that “[u]se of the challenged judgment to enhance the sentence imposed on a separate conviction is not a restraint of liberty sufficient to permit a habeas corpus challenge to the original conviction long after the sentence on the original conviction has expired.” 61

The Brown opinion asserted that it was “[a]gainst this jurisprudential backdrop” that Rule 36.1 was adopted. 62 The court then turned to the text of Rule 36.1, noting that Rule 36.1 differed “from the procedure applicable to habeas corpus petitions challenging illegal sentences” in that it allowed the State to seek correction of an illegal sentence and that the motion was to be filed in the trial court where the judgment of conviction was entered rather than the county where the defendant was incarcerated. 63 The court asserted that Rule 36.1 was “identical to habeas corpus in other respects” but cited only its conclusion in Wooden to support the proposition that definition of “illegal sentence” in Rule 36.1 was “coextensive with, and actually mirror[ed], the definition [the] Court [had] applied to that term in the habeas corpus context.” 64

The court also reasoned that the phrase “at any time” had “no bearing on whether Rule 36.1 authorizes relief from

59 Id.
60 Id. at 206–07 (quoting TENN. CODE ANN. § 29-21-101(a) (2012)).
61 Id. at 207 (quoting Hickman v. State, 153 S.W.3d 16, 23 (Tenn. 2004)).
62 Id. at 208.
63 Id. at 209 (quoting TENN. R. CRIM. P. 36.1(a)).
64 Id. at 209 (citing State v. Wooden, 478 S.W.3d 585 (Tenn. 2015)).
expired illegal sentences.”65 Instead, the court asserted that
the phrase was designed to convey that illegal sentences
could be challenged even after the judgment became final
and that, like habeas corpus petitions, Rule 36.1 motions
were “not subject to any statute of limitations.”66 The court
further asserted that the phrase “at any time” “simply [did]
not answer the question of whether Rule 36.1 permit[ed] the
correction of expired illegal sentences” because “the text of
Rule 36.1 [was] silent” on this point.67 The court admitted
that “one possible interpretation of this silence [was] that
Rule 36.1 authorize[d] the correction of expired illegal
sentences . . . .” 68 However, the court rejected this
interpretation, finding that it was “not reasonable in light of
the expressed purpose of Rule 36.1, its language, and the
jurisprudential background from which it developed.”69
The court then reasoned that

Rule 36.1 was adopted “to provide a
mechanism for the defendant or the State to seek to correct an illegal sentence.” Neither
the comments to Rule 36.1 nor its text
suggest that it was intended to expand the
scope of relief available on such claims by
permitting the correction of expired illegal
sentences. Had such an expansion been
intended, Rule 36.1 would have almost
certainly included language clearly
expressing that intent, given its inconsistence
with this Court’s prior decisions refusing to
grant habeas corpus relief for expired illegal
sentences. That Rule 36.1 was not, in fact,

65 Id. at 210.
66 Id.
67 Id.
68 Id.
69 Id.
intended to expand the scope of relief for illegal sentence claims is evidenced by the portion of Rule 36.1 defining “illegal sentence” exactly as this Court had already defined that term in the habeas corpus context.\textsuperscript{70}

The court also asserted that interpreting Rule 36.1 to allow for the correction of expired sentences could “potentially produce absurd, and even arguably unconstitutional, results.”\textsuperscript{71} The court argued that if Rule 36.1 allowed the State to correct an illegally lenient sentence after it had been served, defendants would likely argue that such an action would violate constitutional protections against double jeopardy.\textsuperscript{72} The court concluded that the “outcry would be unimaginable” if the State were to “start using Rule 36.1 to jail untold numbers of citizens that by all indications [had] completely served their sentences. . . .”\textsuperscript{73} As such, the court held “that Rule 36.1 [did] not expand the scope of relief [from what was available in a habeas corpus proceeding] and [did] not authorize the correction of expired illegal sentences.”\textsuperscript{74}

In so holding, the court rejected the argument propounded by some members of the Tennessee Court of Criminal Appeals that claims regarding expired sentences were moot. The Court noted that in the habeas corpus context, a challenged conviction’s “collateral consequences may prevent a habeas corpus petition from becoming moot,” but the fact that the claim is not moot does not mean that it

\textsuperscript{70} Id. at 210–11 (internal citation omitted) (quoting TENN. R. CRIM. P. 36.1, Advisory Comm’n Cmt.).
\textsuperscript{71} Id. at 211.
\textsuperscript{72} Id. (citing Commonwealth v. Selavka, 14 N.E.3d 933, 941 (2014)).
\textsuperscript{74} Id. at 211.
will fall “within the scope of habeas corpus jurisdiction.” Because the court had interpreted Rule 36.1 as explicitly limiting the scope of relief for illegal sentence claims to unexpired illegal sentences, the court concluded that “[c]ollateral consequences may prevent a case from becoming moot in the traditional sense of the mootness doctrine, but Rule 36.1 [was] not an appropriate avenue for seeking relief from collateral consequences.”

The court then examined the issue of whether failure to award pretrial jail credit was a colorable claim for Rule 36.1 relief and held it was not. The court concluded its opinion by addressing Mr. Brown’s claim that the trial court erroneously imposed six-year sentences rather than three-year sentences as provided by the plea agreement. The court concluded that the mistake was a mere clerical error that could be corrected pursuant to Tennessee Rule of Criminal Procedure 36. Rule 36 also contained the phrase “at any time.” The court reasoned that “[p]ermitting correction of the clerical error pursuant to Rule 36 despite the expiration of [the] sentence [did] not contravene [its]

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75 Id. at 211–12 n.12 (internal quotation marks omitted) (quoting May v. Carlton, 245 S.W.3d 340, 356 (Tenn. 2008) (Koch, J., dissenting)).
76 Id. at 212 n.12.
77 Id. at 212–13. The court did so despite the fact that the awarding of pretrial jail credits is statutorily mandated. TENN. CODE ANN. § 40-23-101(c) (2012). The court reasoned that pretrial jail credits did not alter the sentence itself; rather, they merely affected “the length of time a defendant is incarcerated.” Brown, 479 S.W.3d at 212. The court concluded, therefore, that the denial of pretrial jail credits could never render a sentence illegal. Id. at 213. Instead, a trial court’s failure to award pretrial jail credits could be challenged on direct appeal. Id. at 212–13. It remains to be seen whether this holding forecloses post-conviction or habeas corpus relief for defendants erroneously deprived of pretrial jail credits or is merely limited to Rule 36.1 relief.
78 Brown, 479 S.W.3d at 213.
79 Id.; see also TENN. R. CRIM. P. 36 (stating that a trial court “may at any time correct clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission”).
principal holding that Rule 36.1 [did] not authorize courts to grant relief from expired illegal sentences.” 80 The court further reasoned that “[c]orrecting clerical errors so that the record accurately reflects the sentence imposed [did] not amount to granting relief from expired illegal sentences.” 81 As such, the court remanded the case to the trial court for correction of the clerical error pursuant to Rule 36. 82

III. “Jurisprudential Context” of Rule 36.1

A. Common Law Motions to Correct Illegal Sentences

As noted in Part II, the Tennessee Supreme Court first dealt with the issue of a trial court’s inherent power to correct illegal sentences in the 1978 case of State v. Burkhart. 83 At issue in Burkhart was the trial court’s failure to order, as mandated by statute, two sentences to be served consecutively. 84 Mr. Burkhart was convicted of “burglary in the first degree,” escaped from prison, was subsequently convicted for the escape, and sentenced to one year in prison running from the day of his conviction. 85 When the State Department of Correction realized that this, in effect, would allow the prisoner to serve his two sentences concurrently (contrary to Tennessee Code Annotated section 39-3802), it notified the prisoner that he would have to serve his sentence for the escape after his sentence for burglary concluded. 86 Mr. Burkart petitioned the trial court to prevent the State Department of Corrections from altering the terms of his sentence; however, the trial court, realizing its mistake,

80 Brown, 479 S.W.3d at 213.
81 Id.
82 Id.
83 State v. Burkhart, 566 S.W.2d 871 (Tenn. 1978).
84 Id. at 872.
85 Id.
86 Id.
denied the petition. On appeal, the Tennessee Supreme Court held that the trial court had the inherent power to correct the defendant’s illegal sentence, stating that “the judgment entered in the trial court . . . was in direct contravention of the express provisions of [a statute], and consequently was a nullity.” The court further stated that “the trial judge . . . had both the power, and the duty, to correct the judgment . . . as soon as its illegality was brought to his attention.” The court held that “[a]s a general rule, a trial judge may correct an illegal, as opposed to a merely erroneous, sentence at any time, even if it has become final.”

In *Burkhart*, the court did not state its rationale for holding that a trial court could correct an illegal sentence. However, the court did cite to several cases from other jurisdictions that establish the source of a trial court’s power to correct illegal sentences. In *State v. Culver*, the New Jersey Supreme Court stated that a trial court’s “power to punish criminal offenders . . . would seem naturally to include the power to correct the sentences imposed by it.” The New Jersey Supreme Court then held that when a trial court has imposed an illegal sentence “the court’s jurisdiction to impose a correct sentence [would not expire] until a valid sentence was imposed.” Likewise, the Iowa Supreme Court held in *State v. Shilinsky* that “[u]ntil a valid judgment [is] entered, the [trial] court [does] not exhaust its jurisdiction, and might be required to correct any

87 *Id.*
88 *Id.* at 873.
89 *Id.*
90 *Id.* (citing State v. Leathers, 531 P.2d 901 (Or. 1975); Frazier v. Langlois, 240 A.2d 152 (R.I. 1968); State v. Fountaine, 430 P.2d 235 (Kan. 1967); In re Sandel, 412 P.2d 806 (Cal. 1966); State v. Shilinsky, 81 N.W.2d 444 (Iowa 1957); State v. Culver, 129 A.2d 715 (N.J. 1957)).
91 *Id.*
92 *Culver*, 129 A.2d at 720.
93 *Id.* at 724.
irregularities by pronouncing a valid sentence and entering a valid judgment.”

This is so because, as noted by the Kansas Supreme Court in *State v. Fountaine*, “a void sentence in contemplation of law is non-existent.”

Therefore, as held by the Oregon Supreme Court in *State v. Leathers*, a trial court that has imposed an illegal sentence “has not exhausted its jurisdiction [because] it has in fact failed to pronounce any sentence.”

This reasoning regarding illegal sentences was in line with Tennessee case law of the time, which maintained that “where a judgment is void then there is no judgment and consequently the [trial] court does not lose jurisdiction over the matter.”

Yet, the court’s opinion in *Brown* made no mention of these cases in its discussion of the jurisprudential context of Rule 36.1.

B. Illegal Sentence Claims in the Years Between *Burkhart* and *Moody*

In the years following *Burkhart*, the Tennessee Supreme Court, on at least two occasions in *State v. Mahler*.

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94 *Shilinsky*, 81 N.W.2d at 449 (internal quotation marks omitted) (quoting Nelson v. Foley, 223 N.W. 323, 324 (S.D. 1929)).

95 *Fountaine*, 430 P.2d at 239 (internal quotation marks omitted) (quoting United States v. Howell, 103 F. Supp. 714, 718 (S.D.W. Va. 1952)).

96 State v. Leathers, 531 P.2d 901, 903 (Or. 1975) (internal quotation marks omitted) (quoting State v. Nelson, 424 P.2d 223, 225 (Or. 1967)).

97 Tennessee *ex rel. Underwood v. Brown*, 244 S.W.2d 168, 170 (Tenn. 1951). This reasoning was also in line with the purpose of the original text of Federal Rule of Criminal Procedure 35(a), which provided that a federal district court could “correct an illegal sentence at any time.” *See United States v. James*, 709 F.2d 298, 307–08 (5th Cir. 1983) (noting that Rule 35 was designed to continue the existing decisional law which recognized that a district court’s power to correct an illegal sentence “sprang from the court’s want of jurisdiction to impose [an] illegal sentence in the first place”).

98 State v. Mahler, 735 S.W.2d 226, 228 (Tenn. 1987).
and *McConnell v. State*, 99 addressed illegal sentence claims that had been raised as part of a petition for post-conviction relief. Again, the *Brown* opinion made no reference to these cases in its discussion of the jurisprudential context of Rule 36.1. Meanwhile, the Tennessee Court of Criminal Appeals was more vexed by the question of how to procedurally treat a motion to correct an illegal sentence. For example, in *State v. Reliford*, 100 a panel of the Court of Criminal Appeals addressed a defendant’s appeal from the trial court’s dismissal of his motion to correct his sentences. 101 The *Reliford* opinion noted that there was no direct appeal as of right from the trial court’s dismissal. 102 However, citing the holding of *Burkhart*, the panel reasoned that “[l]ogic dictate[d] that some avenue of appeal [lay] from an adverse ruling of the trial court” and elected to treat the defendant’s appeal as a common law petition for writ of certiorari. 103 Citing to *Mahler* and *McConnell*, the panel concluded that the defendant’s sentence was illegal. 104 Specifically, the panel noted that “[s]entencing is jurisdictional and must be executed in compliance with the applicable legislative mandates” and that trial courts lack “the statutory authority to impose a sentence . . . that deviate[s] from the penalties proscribed by law.” 105

In an opinion filed eleven days after *Reliford*, a separate panel of the Court of Criminal Appeals stated that “the appropriate procedure for challenging a void sentence

101 Id. at *1.
102 Id. at *2.
103 Id.
104 Id. (quoting State v. Mahler, 735 S.W.2d 226, 228 (Tenn. 1987)).
105 Id. at *2 (citing McConnell v. State, 12 S.W.3d 795, 798–800 (Tenn. 2000)).
is a petition for habeas corpus relief.” The panel reasoned that a petition for habeas corpus relief is “the appropriate procedure” because “[i]n cases arising from criminal convictions, the remedy of habeas corpus relief applies when the judgment is void.” However, the panel then stated that “because an illegal sentence may be corrected at any time, [it did] not believe that the defendant’s failure to seek habeas corpus relief necessarily deprive[d] him of appellate review.” Citing to Reliford, the panel concluded that a defendant could “pursue appellate review from the denial of a motion to correct an illegal sentence through the common law writ of certiorari.” The panel ultimately declined to grant the defendant an appeal after concluding, on the merits, that his sentence was not illegal.

Less than a year later, in April 2001, a third panel of the Court of Criminal Appeals addressed the procedural nature of illegal sentence claims in a published opinion, Cox v. State. In outlining its analysis of the issue, the Cox opinion stated that

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108 Id. at *2.


110 Id. at *3–4.

111 Published opinions are controlling authority in Tennessee state courts until they are reversed or modified by a court of competent jurisdiction. TENN. SUP. CT. R. 4(G)(2).

[t]he key to analyzing these collateral attacks on sentences is to appreciate that the phrase “illegal sentence” as used in our caselaw [sic] is a term of art that refers to sentences imposed by a court that is acting beyond its jurisdiction—that is to say, sentences that result from void judgments. The upshot of our analysis [would] be that habeas corpus is the preferred, if not the only, method of collaterally attacking void sentences and that collateral attacks that assert lesser claims of merely erroneous or voidable sentences are generally doomed, unless by nature they fit within some other recognized form of action.113

This panel reasoned that “[t]he distinction made in Mahler and Burkhart between erroneous, voidable sentences . . . and illegal or void sentences . . . call[ed] to mind the scope of the writ of habeas corpus” and that “the phrase ‘illegal sentence’ [was] synonymous with the habeas corpus concept of a ‘void’ sentence.” 114 Noting that “a claim that merely assert[ed] a void sentence, even though it may not assert a void conviction, [was] cognizable as a habeas corpus proceeding,” the panel concluded that “the better method of challenging illegal or void sentences [was] via an application for a writ of habeas corpus.”115 The panel further noted that “illegal or void sentence claims” sounding in a habeas corpus proceeding would “be subject to dismissal [for] fail[ing] to meet the procedural requirements” of such a

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113 Id. at 291.
114 Id. at 291–92 (citing Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993)).
115 Cox, 53 S.W.3d at 292 (citing Stephenson v. Carlton, 28 S.W.3d 910, 911 (Tenn. 2000)).
proceeding.\textsuperscript{116} However, the panel recognized that an illegal sentence claim could be brought in a petition for post-conviction relief.\textsuperscript{117} Likewise, the panel recognized that, while they should “rarely be granted,” appeals via the common law writ of certiorari were available for claims that rose “to the level of illegality or voidness.”\textsuperscript{118}

\section*{C. Habeas Corpus Cases}

It was against this backdrop that the Tennessee Supreme Court issued its opinion in \textit{Moody v. State}. In \textit{Brown}, it is asserted that \textit{Moody} stands as a rejection of “the \textit{Burkhart procedure}” because “[b]y adopting habeas corpus as the mechanism for challenging illegal sentences, the \textit{Moody} court implicitly limited the scope of relief for illegal sentence claims to \textit{unexpired} illegal sentences.”\textsuperscript{119} Underpinning the \textit{Brown} court’s reasoning is the assumption that \textit{Moody} adopted habeas corpus as the exclusive procedural vehicle for challenging illegal sentences. However, a close reading of \textit{Moody} indicates that may not be true.

The court in \textit{Moody} took the “opportunity to clarify the proper procedure for seeking review of illegal sentence claims at both the trial level and on appeal.”\textsuperscript{120} The court held that the \textit{Cox} opinion’s “reliance on \textit{Burkhart} as supporting certiorari review of the denial of a motion to correct an illegal sentence [was] misplaced” because \textit{Burkhart} was decided prior to the adoption of the Rules of Appellate Procedure, which were “intended to replace the appellate court procedure that was governed by scattered provisions of the Tennessee Code and the rules and decisions

\begin{itemize}
\item \textsuperscript{116} \textit{Id.} at 293.
\item \textsuperscript{117} \textit{Id.}
\item \textsuperscript{118} \textit{Id.} at 294.
\item \textsuperscript{119} State v. \textit{Brown}, 479 S.W.3d 200, 206 (Tenn. 2015).
\item \textsuperscript{120} State v. \textit{Moody}, 160 S.W.3d 512, 515 (Tenn. 2005).
\end{itemize}
of the appellate courts.” Note That the Rules of Appellate Procedure did not “authorize a direct appeal of a dismissal of a motion to correct an illegal sentence[.]” Moody clarified “that the proper procedure for challenging an illegal sentence at the trial level [was] through a petition for writ of habeas corpus, the grant or denial of which [could] then be appealed under the Rules of Appellate Procedure.” The fact that the summary dismissal of a habeas corpus petition could be challenged on appeal was one of the key factors in the court’s holding. The court further clarified that because a defendant could use a habeas corpus proceeding to challenge an illegal sentence, “the writ of certiorari [was] not available to review an illegal sentence claim that [had] been presented through a motion.”

However, in so holding, the court noted that “[a] void or illegal sentence also [could] be challenged collaterally in a post-conviction proceeding when the statutory requirements are met.” Concluding the opinion, the court restated its holding that “[a] habeas corpus action [was] the proper procedure for collaterally challenging an illegal sentence,” but then stated that “[a]lthough a trial court may correct an illegal sentence at any time, appellate courts may not review the denial of a motion to correct an illegal sentence through the common law writ of certiorari.” These two aspects of the Moody opinion were not mentioned

121 Id. at 516 (citing State v. Burkhart, 566 S.W.2d 871, 873 (Tenn. 1978)).
122 Id. at 516 (emphasis added) (citing Stephenson v. Carlton, 28 S.W.3d 910, 912 (Tenn. 2000)).
123 Id. at 516 (citing State v. Adler, 92 S.W.3d 397, 401 (Tenn. 2002)).
124 Id. at 516 n.2 (emphasis added) (citing State v. Mahler, 735 S.W.2d 226, 228 (Tenn. 1987)). Post-conviction relief is available “when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” TENN. CODE ANN. § 40-30-103 (2012).
125 Moody, 160 S.W.3d at 516 (emphasis added).
by the court in Brown.126 Contrary to the assertion in Brown that Moody established habeas corpus as the sole procedural vehicle for challenging an illegal sentence, Moody directly stated that illegal sentences could be challenged in a post-conviction proceeding as well as a habeas corpus proceeding.127 Furthermore, Moody also directly stated that, while there was no method for direct appeal from a motion to correct an illegal sentence, trial courts continued to retain their inherent power to correct an illegal sentence at any time.128

Two years after Moody, the Tennessee Supreme Court addressed whether an expired illegal sentence could be challenged in a habeas corpus proceeding in Summers v. State.129 The court began its analysis by restating the rule that “[a] sentence imposed in direct contravention of a statute is void and illegal.”130 The court then declared that “[a] trial court may correct an illegal or void sentence at any time” before reaffirming the holding of Moody that “[a] habeas corpus petition, rather than a motion to correct an illegal sentence, is the proper procedure for challenging an illegal sentence.”131 However, in restating these principles, the court again noted that an illegal sentence could also be challenged in a post-conviction proceeding “when the statutory requirements are met, including the one-year limitations period.”132

The Summers court then addressed the question of whether an expired illegal sentence could be challenged in a habeas corpus proceeding.133 The court noted that a

127 Moody, 160 S.W.3d at 516.
128 Id.
129 Summers v. State, 212 S.W.3d 251, 256 (Tenn. 2007).
130 Id. (citing Stephenson v. Carlton, 28 S.W.3d 910, 911 (Tenn. 2000)).
131 Id. at 256 (citing Moody, 160 S.W.3d at 516).
132 Id. at 256 n.3 (citing TENN. CODE ANN. § 40-30-102(a) (2006); State v. Mahler, 735 S.W.2d 226, 228 (Tenn. 1987)).
133 Id. at 257.
petitioner seeking habeas corpus relief must be “imprisoned or restrained of liberty.”\textsuperscript{134} Such status has been deemed “[a] statutory prerequisite for eligibility to seek habeas corpus relief . . . .”\textsuperscript{135} The court explained that the term “imprisoned” in the habeas corpus statutes referred “to actual physical confinement or detention.”\textsuperscript{136} The court further explained that “restrained of liberty” was “a broader term and encompass[ed] situations beyond actual physical custody[,]” but only if “the challenged judgment itself impose[d] a restraint on the petitioner’s freedom of action or movement.”\textsuperscript{137} As such, the court concluded that habeas corpus relief would not lie “to address a conviction after the sentence on the conviction [had] been fully served.”\textsuperscript{138} However, the court ultimately determined this rule did not bar Mr. Summers’s petition because his total effective sentence had not been served and had not expired.\textsuperscript{139}

In the years following Summers, the court in Cantrell v. Easterling\textsuperscript{140} “returned to the topic of illegal sentences [to] provide a more comprehensive analysis of sentencing errors and a more general definition of illegal sentences.”\textsuperscript{141} Cantrell will be discussed in more detail later in this article, but for purposes of this section it is important to note that in Cantrell the court again stated that a defendant could challenge an illegal sentence in a post-conviction proceeding “when the statutory requirements are met.”\textsuperscript{142}

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\textsuperscript{134} Id. (internal quotation marks omitted) (quoting TENN. CODE ANN. § 29-21-101 (2000)).
\textsuperscript{135} Benson v. State, 153 S.W.3d 27, 31 (Tenn. 2004).
\textsuperscript{136} Summers, 212 S.W.3d at 257 (citing Hickman v. State, 153 S.W.3d 16, 22 (Tenn. 2004)).
\textsuperscript{137} Id. (citing Hickman, 153 S.W.3d at 22).
\textsuperscript{138} Id. (citing Hickman, 153 S.W.3d at 23–24).
\textsuperscript{139} Id. at 258.
\textsuperscript{140} Cantrell v. Easterling, 346 S.W.3d 445, 445 (Tenn. 2011).
\textsuperscript{142} Id. at 453 n.7 (internal quotation marks omitted) (quoting State v. Moody, 160 S.W.3d 512, 516 n.2 (Tenn. 2005)).
\end{flushright}
statements in *Summers* and *Cantrell* demonstrate that, even after the court in *Moody* found that habeas corpus was the “proper procedure” for challenging an illegal sentence, the court continued to recognize the availability of post-conviction proceedings to challenge an illegal sentence. More recently, the court in *State v. Brown* discussed the details of *Moody*, *Summers*, and *Cantrell* at length, but it made no mention of the fact that all three opinions contained similar statements to that effect.

The court’s reasoning in *Brown*, maintaining that “the *Moody* Court implicitly limited the scope of relief for illegal sentence claims to *unexpired* illegal sentences[,]” is highly questionable in light of the fact that the *Moody*, *Summer*, and *Cantrell* decisions never adopted habeas corpus proceedings as the exclusive mechanism for challenging an illegal sentence. Habeas corpus and post-conviction have long been recognized as the two primary procedural avenues available in Tennessee to collaterally attack a conviction and sentence which have become final.” The Tennessee Supreme Court “[has] rejected and will continue to reject efforts to intertwine the two procedures.” For example, the court held in *Taylor v. State* that “the statute of limitations for filing post-conviction petitions in no way precludes the filing of petitions for habeas corpus which contest void judgments.” Similarly, in *Summers*, the court “declin[ed] to incorporate the liberal procedural safeguards of the Post-Conviction Procedure Act

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143 Id. at 206 (citing *Moody*, 160 S.W.3d at 516).
144 Id.
145 Id. at 207.
146 Id. at 208.
147 Id. at 206.
148 Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999) (citing Potts v. State, 833 S.W.2d 60, 62 (Tenn. 1992) (holding that “[t]hese procedural vehicles are theoretically and statutorily distinct.”).
149 Summers v. State, 212 S.W.3d 251, 261 (Tenn. 2007).
150 Taylor, 995 S.W.2d at 84.
into the provisions governing habeas corpus.”\footnote{Summers, 212 S.W.3d at 261.} Rather than habeas corpus being the only method to challenge an illegal sentence, as implied in the \textit{Brown} opinion, there were at least two separate and distinct procedural vehicles to challenge an illegal sentence during the time between the \textit{Moody} decision and the enactment of Rule 36.1.

\textbf{D. Post-Conviction Proceedings and Expired Sentences}

In addition to the fact that habeas corpus was not the sole mechanism for challenging an illegal sentence, a separate factor, related to the ability to challenge an illegal sentence via a post-conviction proceeding as stated in \textit{Moody, Summers, and Cantrell}, undermines the court’s reasoning in \textit{Brown} that “the \textit{Moody} Court implicitly limited the scope of relief for illegal sentence claims to \textit{unexpired} illegal sentences.”\footnote{\textit{Brown}, 479 S.W.3d at 206 (emphasis in original).} In 1977, the Tennessee Supreme Court held in \textit{State v. McCraw} that the term “in custody” found in the Post-Conviction Relief Act meant “any possibility of restraint on liberty.”\footnote{State v. McCraw, 551 S.W.2d 692, 694 (Tenn. 1977).} The court then reiterated several factors concerning the mootness of a habeas petition post-conviction, including the possibility that a conviction could be used in the future to prevent a defendant from engaging “in certain businesses,” losing the right to vote, losing the ability to serve as a juror, and the possibility that the conviction “could impeach the petitioner’s character at any future criminal trial or be used as a basis for infliction of greater punishment on [the] petitioner.”\footnote{\textit{Id.} (citing Carafas v. LaVallee, 391 U.S. 234, 237 (1968); Sibron v. New York, 392 U.S. 40, 55–56 (1965)); \textit{see also} Hickman v. State, 153 S.W.3d 16, 23 (Tenn. 2004) (narrowing the definition of “restrained of liberty” to situations where “the challenged judgment itself imposes a restraint upon the petitioner’s freedom of action or movement.”); Joshua Kaiser, \textit{Revealing the Hidden Sentence: How to Add Transparency}, 58 Tennessee Journal of Law and Policy, Vol. 12, Iss. 1 [2017], Art. 1 [58] http://trace.tennessee.edu/tjlp/vol12/iss1/1}
In 1991, the court declined the State’s “invitation to reverse McCraw.” Shortly after that, a panel of Tennessee Court of Criminal Appeals stated that McCraw stood for the proposition “that one may file a post-conviction petition, even after fully serving a sentence, as long as the petitioner remain[ed] subject to collateral legal consequences due to the challenged conviction.” In fact, the Tennessee Court of Criminal Appeals has reviewed the denial of post-conviction relief because the petitioner’s prior sentences had been used to enhance his current sentence for a federal conviction even though the challenged sentences expired over ten years prior to its review. The Tennessee Court of Criminal Appeals has recognized as recently as 2015 that “a petition for post-conviction relief [was] permitted to attack collaterally an expired sentence when ‘the challenged conviction [was] used to enhance punishment.’”

More importantly, the Tennessee Supreme Court in State v. Hickman recognized that “the language ‘imprisoned or restrained of liberty’ used in . . . the habeas corpus statute[s] was not co-extensive with the ‘person in custody’

Legitimacy, and Purpose to “Collateral” Punishment Policy, 10 HARV. L. & POL’Y REV. 123, 163 (2016) (analyzing the NICCC data and finding that Tennessee has 888 “post-release hidden” sentencing laws, fifty-eight percent of which have mandatory or automatic execution and eighty-three percent of which remain in effect for the remainder of the defendant’s life). Based on these findings, perhaps it is time to reexamine the issue of whether collateral consequences of a conviction can justify a habeas corpus challenge even after the conviction has “expired” given the life-long effects and voluminous number of collateral consequences in this state. Such a question, however, is beyond the scope of this article.

language of the [post.conviction statutes]." 159 The court reaffirmed that the term “in custody” “has long been broadly construed to permit persons to collaterally challenge, by means of a post.conviction petition, a judgment of conviction that later may be used to enhance a sentence on another conviction,” and that “[s]uch challenges have been allowed even if the sentence on the challenged conviction has been served or has expired at the time of the post-conviction petition is filed.” 160 The Brown court cited Hickman for the proposition that “habeas corpus relief may not be granted after [the] expiration of a sentence,” 161 but the court’s discussion did not refer to Hickman’s statement that a petitioner “may be ‘in custody’ for purposes of the Post-Conviction Procedure Act, but he is neither ‘imprisoned’ nor ‘restrained of liberty’ for purposes of seeking habeas corpus relief.” 162 Similarly, the Brown court did not discuss the fact that an expired sentence could be collaterally challenged in a post-conviction proceeding.

Until Brown, the court had never held that habeas corpus was the exclusive procedural vehicle to challenge an illegal sentence; instead, the court had consistently recognized two separate and distinct procedural mechanisms for challenging illegal sentences. In habeas corpus proceedings, the statutory pleading requirements “are mandatory and must be followed scrupulously.” 163 Post-conviction proceedings, on the other hand, have much more “liberal procedural safeguards” 164 and defendants can use them to collaterally attack a conviction or sentence even after the sentence has expired—the exact type of claims

159 Hickman, 153 S.W.3d at 23 n.4.
160 Id. (emphasis added) (citing State v. McCraw, 551 S.W.2d 692, 694 (Tenn. 1977)).
162 Hickman, 153 S.W.3d at 23 n.4.
164 Summers v. State, 212 S.W.3d 251, 261 (Tenn. 2007).
brought in the flood of Rule 36.1 litigation.\textsuperscript{165} This weakens the court’s reasoning in \textit{Brown} that Rule 36.1 did “not expand the scope of relief [beyond that which is available in a habeas corpus proceeding] and [did] not authorize the correction of expired illegal sentences.”\textsuperscript{166} The drafters of Rule 36.1 were presumed to know this “state of the law” when drafting Rule 36.1,\textsuperscript{167} but the \textit{Brown} court overlooked a significant portion “of the law existing at the time” Rule 36.1 was adopted.\textsuperscript{168} With this jurisprudential context in mind, this article now turns to the text of Rule 36.1.

IV. Plain Language of Rule 36.1

While admitting that the view that Rule 36.1 authorized “the correction of expired illegal sentences” was

\textsuperscript{165} Admittedly, it would be difficult to challenge an expired illegal sentence in a post-conviction setting due to the one-year statute of limitations. \textit{See} \textsc{Tenn. Code Ann.} § 40-30-102(a) (2012). The challenge would have to involve a misdemeanor sentence or the petition would have to show a statutory or due process reason for tolling the statute of limitations. \textit{Id.} § 40-30-102(b) (listing the statutory bases for tolling the statute of limitations); Bush v. State, 428 S.W.3d 1, 23 (Tenn. 2014) (listing instances where the Tennessee Supreme Court has tolled the post-conviction statute of limitations on due process grounds). Additionally, the case law is unclear as to exactly what constitutional right is at issue when an illegal sentence is challenged in a post-conviction proceeding. \textit{Mahler} and \textit{McConnell} address alleged illegal sentences in the post-conviction context without addressing this issue. In at least one opinion, the Tennessee Court of Criminal Appeals held that, in the context of a guilty plea, failure to inform the petitioner he was agreeing to an illegal sentence constituted ineffective assistance of counsel which caused the defendant to unknowingly and involuntarily enter into a guilty plea. \textit{See}, \textit{e.g.}, Meriweather v. State, No. M2008-02329-CCA-R3-PC, 2010 WL 27947, at *2 (Tenn. Crim. App. Jan. 7, 2010).

\textsuperscript{166} \textit{Brown}, 479 S.W.3d at 211.


\textsuperscript{168} \textit{Brown}, 479 S.W.3d at 205.
“one possible interpretation,” the court in Brown rejected that interpretation as unreasonable “in light of the expressed purpose of Rule 36.1, its language, and the jurisprudential background from which it developed.” In looking at the text of Rule 36.1, the court stated that the phrase “at any time,” as used in Rule 36.1, had “no bearing” on the issue of whether Rule 36.1 authorized the correction of expired illegal sentences. Instead, the court argued that the phrase “at any time” simply meant (1) that an illegal sentence could be corrected after it became final and (2) that there was no statute of limitations on Rule 36.1 motions. Also, in looking at the text of Rule 36.1, the court stated that the rule differed “from the procedure applicable to habeas corpus petitions challenging illegal sentences” in “at least two ways.” First, the rule allowed the State to challenge an illegal sentence. Second, it required the motion to be filed in the trial court where the judgment of conviction was entered rather than the county where the petitioner was incarcerated. Finally, the court reasoned that, had the drafters of Rule 36.1 intended for it to differ from the court’s “prior decisions refusing to grant habeas corpus relief for expired illegal sentences,” they “almost certainly” would have “included language clearly expressing that intent . . . ”

The court’s reasoning in Brown regarding the phrase “at any time” has led one Tennessee Court of Criminal Appeals judge to question how that term could “mean one thing in the text of Tennessee Rule of Criminal Procedure 36 and yet mean an entirely different thing in the text of Rule 36.1?” The court concluded at the end of the Brown

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169 Id. at 210.
170 Id.
171 Id.
172 Id. at 209.
173 Id. at 211.
opinion that Rule 36, addressing clerical errors, did apply to expired sentences because Rule 36 did not “authorize courts to grant relief from expired illegal sentences.” However, nowhere in Rule 36 or Rule 36.1 is there any language to suggest the two rules are different because one could be used to grant relief “from expired illegal sentences.” Similar to the language found in the original text of Rule 36.1, Rule 36 stated that trial courts “may at any time correct clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission.” This has been a long-standing rule in Tennessee and is similar to prior Tennessee case law holding that “where a judgment is void then there is no judgment and consequently the [trial] court does not lose jurisdiction over the matter.” In light of this, there appears to be no textual reason to interpret the phrase “at any time” differently in Rule 36.1 from how the court treated the phrase in Rule 36.

In addition to its unique interpretation of the phrase “at any time,” the court in Brown also downplayed the differences between habeas corpus procedure and Rule 36.1. As previously stated, the pleading requirements in habeas corpus proceedings “are mandatory and must be followed scrupulously.” To that end, petitioners seeking habeas corpus relief are required to state in their petitions that they

175 Brown, 479 S.W.3d at 213 (emphasis in original).
177 See Bailey v. State, 280 S.W.2d 806, 807 (Tenn. 1955) (noting that trial courts have the power “to correct every mistake apparent on the face of the record”); State v. Disney, 37 Tenn. 598, 601 (1858) (“[A]fter the record is made up, and the term [of court] closed, [the record] admits of no alteration, by the same court, unless for some mistake patent upon the face of the record, or proceedings in the case.”).
178 State ex rel Underwood v. Brown, 244 S.W.2d 168, 170 (Tenn. 1951).
179 Archer v. State, 851 S.W.2d 157, 165 (Tenn. 1993).
are “illegally restrained of liberty” and to attach a copy of the alleged void judgment “or a satisfactory reason given for its absence.” Furthermore, the habeas corpus statutes provide a method of summary dismissal “[i]f, from the showing of the petitioner, the plaintiff would not be entitled to any relief, the writ may be refused . . . .” Put another way, “when a habeas corpus petition fails to establish that a judgment is void [upon the face of the judgment or record], a trial court may dismiss the petition without a hearing[]” or the appointment of counsel.

The original text of Rule 36.1, on the other hand, had no mechanism for summarily dismissing claims and allowed for the appointment of counsel and an evidentiary hearing if the motion merely stated “a colorable claim” and was not limited to proof on the face of the record. These differences were in addition to the ones outlined by the court in Brown. To that end, the original text of Rule 36.1 was much more in line with the “liberal procedural safeguards” of post-conviction proceedings, which, likewise, required the trial court to appoint counsel and hold an evidentiary hearing when a petition states a colorable claim. In fact, the court in Wooden actually adopted the definition of “colorable claim” used in the post-conviction context for use in Rule 36.1 proceedings. In light of this, the court’s interpretation of the plain language of Rule 36.1 failed to construe the rule “in a way that is natural, ordinary,
and unforced.” In fact, court could only point to one similarity between a Rule 36.1 motion and a habeas corpus proceeding—the definition of “illegal sentence.”

V. Definition of Illegal Sentence

A key factor the court cited in Brown to support its conclusion that Rule 36.1 “was not . . . intended to expand the scope of relief for illegal sentence claims” was that Rule 36.1 defined “‘illegal sentence’ exactly as [this] Court had already defined that term in the habeas corpus context.”

But, the court’s reasoning in this regard suffered from the same flaw as its reasoning regarding the jurisprudential context of Rule 36.1: it assumed that the definition of “illegal sentence” found in Rule 36.1 had exclusively been applied in “the habeas corpus context.” However, a closer examination of that definition and its development in Tennessee case law proves that is not the case.

The original text of Rule 36.1 defined an “illegal sentence” as “one that [was] not authorized by the applicable statutes or that directly contravene[d] an applicable statute.” The Brown opinion refers to its companion case, Wooden, for the proposition that Rule 36.1’s definition of “illegal sentence” was “coextensive with, and actually mirror[s], the definition this Court has applied to that term in

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188 Moreno v. City of Clarksville, 479 S.W.3d 795, 808 (Tenn. 2015).
189 Brown, 479 S.W.3d at 209. While not cited to in Brown, the language in subsection (c)(3) of Rule 36.1 dealing with illegal sentences when used as material components of a plea agreement is similar to language used in the court’s habeas corpus cases. See Summers, 212 S.W.3d at 258–59. However, for a demonstration of the principle that a defendant can withdraw his guilty plea in such a situation pre-dating Moody and its progeny, see State v. Burkhart, 566 S.W.2d 871, 873 (Tenn. 1978).
190 Brown, 479 S.W.3d at 211.
191 Id.
the habeas corpus context.” In Wooden, the court held that the definition of “illegal sentence” found in Rule 36.1 “mirror[ed] [the one] adopted by this Court in [Cantrell v. Easterling] . . . .” In Cantrell, the court held that an illegal sentence was “one which [was] ‘in direct contravention of the express provisions of [an applicable statute], and consequently [is] a nullity.’” The Cantrell court also added that it would “include within the rubric [of] ‘illegal sentences’ those sentences which [were] not authorized under the applicable statutory scheme.” In essence, the definition of “illegal sentence” found in Rule 36.1 and Cantrell concerns two types of sentences: (1) sentences in direct contravention of an applicable statute and (2) sentences “not authorized by the applicable statutes.”

In State v. Burkhart, the court defined an illegal sentence as one “in direct contravention of the express provisions of [an applicable statute] . . . .” and made no mention of sentences not authorized by the applicable statutes. However, in State v. Leathers, one of the cases cited by the court in Burkhart, the Oregon Supreme Court defined an “illegal sentence” as a sentence “beyond the bounds of [the trial court’s] sentencing authority . . . .” that would subsequently be “void for lack of authority and thus totally without legal effect.” Likewise, the court in State v. Mahler, a post-conviction case pre-dating Cantrell by over two decades, recognized the Burkhart definition of an illegal

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193 Brown, 479 S.W.3d at 209 (citing State v. Wooden, 478 S.W.3d 585 (Tenn. 2015)).
194 Wooden, 478 S.W.3d at 594.
195 Cantrell v. Easterling, 346 S.W.3d 445, 452 (Tenn. 2011) (alteration in original) (quoting State v. Burkhart, 566 S.W.2d 871, 873 (Tenn. 1978)).
196 Id. (citing Davis v. State, 313 S.W.3d 751, 759 (Tenn. 2010)).
198 Burkhart, 566 S.W.2d 871, 873 (Tenn. 1978).
199 State v. Leathers, 531 P.2d 901, 903 (Or. 1975) (citations omitted).
sentence and that there had also been cases “where sentences were imposed which were higher or lower than that authorized by the statute designating the punishment for the crime.” \(^{200}\) The Mahler court determined that such sentences were “held subject to being later vacated or corrected.” \(^{201}\) The court reaffirmed this principle in McConnell v. State, another post-conviction case. \(^{202}\)

The Tennessee Court of Criminal Appeals in State v. Reliford cited McConnell for the proposition that a sentence, which “the trial court lacked the statutory authority to impose,” was an illegal sentence. \(^{203}\) Reliford, which predated Cantrell by over a decade, involved a challenge to an illegal sentence brought in the trial court via a common law motion to correct an illegal sentence and subsequently brought to the intermediate appellate court via the common law writ of certiorari. \(^{204}\) McConnell was also cited by the Tennessee Supreme Court in Stephenson v. Carlton for the proposition that a sentence with “no statutory basis” was “illegal” and that a guilty plea agreement could not “salvage an illegal sentence or otherwise create authority for the imposition of a sentence that [had] not been authorized by statute.” \(^{205}\) Stephenson was cited by the Tennessee Supreme Court in Davis v. State for the proposition that trial courts lack jurisdiction to impose a sentence not authorized by the

\(^{200}\) State v. Mahler, 735 S.W.2d 226, 228 (Tenn. 1987).

\(^{201}\) Id. (citing State v. Hamlin, 655 S.W.2d 200, 201 (Tenn. Crim. App. 1983)).


\(^{204}\) Id.

applicable statutes.\textsuperscript{206} The \textit{Cantrell} court then cited \textit{Davis} when it articulated the two-part definition.\textsuperscript{207}

The definition of “illegal sentence” in \textit{Cantrell} and Rule 36.1 was not unique to the habeas corpus context, as the court suggested in \textit{Wooden} and \textit{Brown}.\textsuperscript{208} Rather, that definition had been used by Tennessee courts in examining illegal sentence claims in post-conviction proceedings, in proceedings utilizing the common law motion to correct an illegal sentence, and in habeas corpus proceedings. In fact, the only aspect of the \textit{Cantrell} definition that differed from the original definition of an illegal sentence found in \textit{Burkhart} was the inclusion of sentences not authorized by the applicable statute. However, the Tennessee Supreme Court first recognized those types of sentences as illegal in the post-conviction context (several years before \textit{Cantrell}), not the habeas corpus context as asserted in \textit{Wooden} and \textit{Brown}.\textsuperscript{209} As such, the definition of “illegal sentence” found in Rule 36.1 was not a definition adopted solely from the “habeas corpus context” but, instead, was simply the definition of “illegal sentence” found generally in Tennessee law and applied across all the procedural vehicles used to challenge illegal sentences prior to \textit{Moody} and \textit{Cantrell}.\textsuperscript{210}

\section*{VI. Double Jeopardy and Rule 36.1}

In addition to the text and jurisprudential context of Rule 36.1, the \textit{Brown} court also said that interpreting Rule 36.1 to allow for the correction of expired illegal sentences “could potentially produce absurd, and even arguably

\textsuperscript{206} Davis v. State, 313 S.W.3d 751, 759 (Tenn. 2010).
\textsuperscript{207} Cantrell v. Easterling, 346 S.W.3d 445, 452 (Tenn. 2010).
\textsuperscript{208} State v. Brown, 479 S.W.3d 200, 211 (Tenn. 2015).
\textsuperscript{209} See generally Brown, 479 S.W.3d 200; Wooden, 478 S.W.3d 585.
\textsuperscript{210} See generally Brown, 479 S.W.3d 200; Wooden, 478 S.W.3d 585; Cantrell v. Easterling, 346 S.W.3d 445 (Tenn. 2010); Moody v. State, 160 S.W. 3d 512 (Tenn. 2005); State v. Burkhart, 566 S.W.2d 871 (Tenn. 1978).
unconstitutional results.”\textsuperscript{211} Chiefly, the court stated that under such an interpretation of Rule 36.1 “the State would be entitled to correct an illegally lenient sentence, even after the sentence had been fully served.”\textsuperscript{212} The Brown court imagined that “[a] defendant faced with the prospect of returning to prison after already serving his sentence would undoubtedly raise many objections . . . including constitutional objections[,]”\textsuperscript{213} and that “the ‘outrcy’ would be unimaginable were ‘the State [to] start using Rule 36.1 to jail untold numbers of citizens that by all indications have completely served their sentences . . . .’”\textsuperscript{214} The court stated that it would not interpret Rule 36.1 to allow for the correction of expired illegal sentences because such an interpretation had “the potential to result in unconstitutional applications” of the rule.\textsuperscript{215}

There are several problems with the Brown court’s analysis with respect to the danger of Rule 36.1 being applied unconstitutionally. First, to the extent that the court differentiated between illegally lenient sentences and other illegal sentences in Brown, its reasoning was in direct contravention of the court’s prior holding that a trial court “lacks jurisdiction to impose an agreed sentence that is illegal, even an illegally lenient one.”\textsuperscript{216} Put another way, an illegally lenient sentence is just as void as any other type of illegal sentence. Additionally, the question of whether a government’s attempt to correct an expired illegally lenient sentence would violate constitutional protections against double jeopardy is not as straightforward as the court

\textsuperscript{211} Brown, 479 S.W.3d at 211.
\textsuperscript{212} Id. (emphasis in original).
\textsuperscript{213} Id. (citing Commonwealth v. Selavka, 14 N.E.3d 933, 941 (Mass. 2014)).
\textsuperscript{215} Id.
\textsuperscript{216} Summers v. State, 212 S.W.3d 251, 258 (Tenn. 2007) (citing McConnell v. State, 12 S.W.3d 795, 799 (Tenn. 2000)).
presented it in Brown. Admittedly, at least one jurisdiction has issued a blanket pronouncement that such an action would violate double jeopardy protections. However, other jurisdictions have taken a more nuanced view of the issue, noting that the issue requires the weighing of a defendant’s interest in finality of the sentence against a state’s interest in the correction of the illegality and, moreover, that the passage of time is a key factor in determining whether a defendant has a legitimate expectation of finality in an illegal sentence. Further still, at least one jurisdiction has concluded that despite a sentence being already served by a defendant, a “[d]efendant [cannot] have a legitimate expectation of finality in the severity of the original sentence because it was illegally lenient . . . .”

217 Brown, 479 S.W.3d at 211.
218 See State v. Ortiz, 79 So. 3d 177, 178 (Fla. Dist. Ct. App. 2012) (quoting Sneed v. State, 749 So. 2d 545, 546 (Fla. Dist. Ct. App. 2000)) (stating that “where a sentence has already been served, even if it is an illegal sentence, the court lacks jurisdiction and would violate the Double Jeopardy Clause by resentencing the defendant to an increased sentence”).
219 See State v. Trieb, 533 N.W.2d 678, 681 (N.D. 1995) (citing United States v. Rourke, 984 F.2d 1063, 1066 (10th Cir. 1992); DeWitt v. Ventetoulo, 6 F.3d 32, 35 (1st Cir. 1993)) (noting that a defendant “cannot acquire a legitimate expectation of finality in a sentence which is illegal, because such a sentence remains subject to modification” but recognizing that in some cases correction could be “so unfair that it must be deemed inconsistent with fundamental notions of fairness” and providing a balancing test).
220 Commonwealth v. Selavka, 14 N.E.3d 933, 941, 944 (Mass. 2014) (emphasis added) (recognizing that “a defendant’s legitimate expectation of finality may well be diminished when his sentence is illegal” but concluding that “even an illegal sentence, with the passage of time, acquire[s] a finality that bars further punitive changes detrimental to the defendant”).
221 People v. Thompson, No. 4609/99, 2009 WL 348370, at *3, *5 (N.Y. Sup. Ct. Feb. 11, 2009) (also noting that the defendant’s “expectation of finality” was further “undermined by the additional legal circumstance that New York courts have the inherent power to correct an illegal sentence”).
The question of whether the State could seek to correct an expired, illegally lenient sentence, however, was not dispositive to the claim at issue in Brown. The motion to correct an illegal sentence at issue in Brown had been brought by Mr. Brown, not the State. It is well established that “[w]hen the accused himself procures a judgment to be set aside upon his own initiative and he voluntarily accepts the result, then he cannot by his own act avoid the jeopardy in which he stands and then assert it as a bar to a subsequent jeopardy.” As such, the question of whether use of Rule 36.1 by the State to correct an expired, illegally lenient sentence was not before the court and, therefore, not necessary for the determination of Mr. Brown’s case. Accordingly, the court should not have considered in its analysis the possible “constitutional objections” of a theoretical defendant in that situation. Ultimately, there was no constitutional impediment to Mr. Brown’s argument that he could use Rule 36.1 to correct his expired illegally lenient sentences.

VII. Mootness

Prior to the court’s decision in Brown, a panel of the Tennessee Court of Criminal Appeals concluded that the expiration of Mr. Brown’s sentences rendered his motion to correct them moot. Citing the mootness doctrine, the

224 Owens v. State, 908 S.W.2d 923, 926 (Tenn. 1995) (observing that “under Tennessee law, courts do not decide constitutional questions unless resolution is absolutely necessary for determination of the case and the rights of the parties” and that “courts should avoid deciding constitutional issues” if “a case can be resolved on non-constitutional grounds”).
panel concluded that Mr. Brown’s motion to correct his expired illegal sentences failed to present a “live controversy” and that the case could “no longer provide relief” to Mr. Brown. To support this reasoning, the panel cited to cases from other jurisdictions that had “concluded that a challenge to the legality of a sentence [became] moot once the sentence [had] been served.” However, the cases to which the panel’s decision referred cited little to no authority to support this reasoning. One of the cases contained a vigorous dissent, which noted that even after a sentence is served the sentence “still exists” unless it has been expunged and that there are “[a] countless number of situations [that] occur where a prison sentence has collateral consequences[]” that can plague a defendant in the future.

Despite the fact that the Tennessee Supreme Court had previously referred to an expired illegal sentence claim brought in a habeas corpus proceeding as moot, the court in Brown rejected the mootness argument of the Tennessee Court of Criminal Appeals. The court noted that the question of whether a defendant was imprisoned or restrained of liberty was a “separate and distinct” question from the issue of whether a “challenged conviction’s

226 Id. at *5–6.
227 Id. at *6 (citing State v. Ortiz, 79 So. 3d 177, 179 (Fla. Dist. Ct. App. 2012); Barnes v. State, 31 A.3d 203, 207 (Md. 2011); Sanchez v. State, 982 P.2d 149, 150–51 (Wyo. 1999)).
228 See Barnes, 31 A.3d at 210 (citing only Sanchez to support its reasoning); Sanchez, 982 P.2d at 150–51 (citing no authority to support its conclusion). Additionally, the rules in all of these other jurisdictions, unlike Rule 36.1, did not provide a method to attack a defendant’s underlying conviction. See MD. CODE ANN., Crim. Proc. § 4-345(a) (West 1984); WYO. R. CRIM. PROC. 35; FLA. R. CRIM. P. RULE 3.800.
229 Barnes, 31 A.3d at 212 (Eldridge, J., dissenting).
230 See Summers v. State, 212 S.W.3d 251, 257–58 (Tenn. 2007) (stating that the court would have accepted the State’s argument that the defendant’s illegal sentence claim was moot if the defendant had fully served his total effective sentence).
231 Brown, 479 S.W.3d at 211 n.12.
collateral consequences [could] prevent . . . [it] from becoming moot.”232 The court concluded that “[c]ollateral consequences [could] prevent a case from becoming moot in the traditional sense of the mootness doctrine” but that Rule 36.1, in light of the opinion’s interpretation of the rule, was “not an appropriate avenue for seeking relief from collateral consequences.”233 While this article has laid out a strong case against the court’s view that Rule 36.1 was not an appropriate vehicle for challenging the collateral consequences of an expired illegal sentence, I agree with the court’s reasoning regarding the inapplicability of the mootness doctrine to expired illegal sentence claims.

The court has stated in the past that showing a defendant is imprisoned or restrained of liberty is “[a] statutory prerequisite for eligibility to seek habeas corpus relief . . . .”234 Further, the court has declined to include restraints on a defendant’s liberty that it deemed “merely a collateral consequence of the challenged judgment” as cognizable in a habeas corpus proceeding.235 As previously discussed, the court has also held that an expired sentence may be challenged in a post-conviction proceeding.236 In so holding, the court stated that “a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction.”237 As noted by the dissenting opinion in Barnes and the Tennessee Supreme Court in McCraw, there are numerous possible collateral consequences that flow from an expired illegal sentence. As such, the mootness doctrine would not apply to bar expired illegal sentence claims under Rule 36.1.

232 Id. (internal quotation marks omitted) (quoting May v. Carlton, 245 S.W.3d 340, 356 n.22 (Koch, J., dissenting)).
233 Id.
236 See, e.g., State v. McCraw, 551 S.W.2d 692, 694 (Tenn. 1977).
237 Id. (quoting Sibron v. New York, 392 U.S. 40, 57 (1965)).
VIII. Conclusion

In Brown, the Tennessee Supreme Court overlooked a significant portion of the “jurisprudential context” from which Rule 36.1 originated, interpreted the plain language of Rule 36.1 in a way that was not “natural, ordinary, and unforced,” and unnecessarily raised a constitutional issue that had not been presented for the court’s review. The court based its reasoning upon the assumption that because of its opinion in Moody, habeas corpus was the sole procedural vehicle for challenging an illegal sentence and Rule 36.1 thereby implicitly incorporated the habeas corpus statutes’ procedural ban on challenging expired illegal sentences. This reasoning overlooked the fact that the court had repeatedly stated that some illegal sentences could be challenged in a post-conviction proceeding, a proceeding that has long been held to allow for challenges to expired sentences. Furthermore, the court’s interpretation of the plain language of Rule 36.1 discounted the fact that the rule more closely resembled a post-conviction proceeding, rather than a habeas corpus proceeding. Likewise, the one portion of Rule 36.1 the court cited as being identical to habeas corpus case law, the definition of the term “illegal sentence,” actually predated Moody and has been used by courts outside the habeas corpus context. Additionally, the court’s constitutional concerns and the doctrine of mootness both proved to be irrelevant to the issues presented in Brown. All of this leads to the conclusion that the court erred in interpreting Rule 36.1 to not allow for the correction of expired illegal sentences.

Nevertheless, Brown and its companion case Wooden will likely be mere footnotes in Tennessee’s jurisprudential history. On December 29, 2015, roughly four weeks after Brown and Wooden were filed, the Tennessee Supreme Court entered an order that replaced the original

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238 Moreno v. City of Clarksville, 479 S.W.3d 795, 808 (Tenn. 2015).
text of Rule 36.1 in its entirety, effective July 1, 2016.239 The order removed the phrase “at any time” from Rule 36.1 and replaced it with a requirement that, except for one narrow exception, the motion “must be filed before the sentence set forth in the judgment order expires.”240 Rule 36.1 now requires the moving party to include “a copy of the relevant judgment order(s)” with the motion, allows the movant to include “other supporting documents,” and requires the movant “to state whether the motion is the first motion to correct the illegal sentence.”241 The new Advisory Commission Comment to Rule 36.1 states that the rule’s definition of “illegal sentence” “incorporates the definition . . . set forth in Cantrell.”242 The new version of Rule 36.1 also permits summary denial of motions that do not set forth a colorable claim.243

The new Rule 36.1 also “limit[s] the circumstances under which relief may be granted where the defendant has entered into a plea bargain which contains an illegal sentence.”244 Trial courts are now required to deny motions when the defendant has “benefitted from the bargained-for illegal sentence.”245 As an example, the new Advisory Commission Comment states that when a defendant has received illegal concurrent sentences, that defendant cannot bring a motion to correct the illegal sentences.246 Rule 36.1 additionally provides, in new subsection (d), a narrow exception to the rule’s prohibition on challenging expired illegal sentences.247 Subsection (d) allows the State “to seek

242 Id.
245 Id.
246 Id.
to correct a judgment order that failed to impose a statutorily required sentence of lifetime community supervision” if the motion is “filed no later than ninety days after the sentence imposed in the judgment order expires.”

In essence, the amendment to Rule 36.1 wiped out the original version and replaced it with a new version explicitly in line with the court’s interpretation of the original Rule 36.1 in Brown and Wooden. The amendment to Rule 36.1 replaced the liberal procedural safeguards, similar to those of post-conviction proceedings found in the original text of the rule, with more stringent procedural requirements reminiscent of those found in habeas corpus proceedings. Also, the addition of subsection (d) is interesting, given the court’s statements in Brown allowing for the correction of expired illegal sentences that “could potentially produce absurd” results. These additions are especially interesting in light of the court’s concern that allowing the State to correct expired sentences had “the potential to result in unconstitutional applications” of the rule. Based on the court’s reasoning in Brown, any use by the State of subsection (d) would be open to an obvious constitutional challenge on double jeopardy grounds.

Also troubling is the new Rule 36.1’s language regarding defendants’ having “benefitted from the bargained-for illegal sentence.” This portion of the new rule seemingly ignores the precedent that a trial court “lacks jurisdiction to impose an agreed sentence that is illegal, even

249 “The [Tennessee] [S]upreme [C]ourt has the power to prescribe by general rules the forms of process, writs, pleadings and motions, and the practice and procedure in all of the courts of [Tennessee] in all civil and criminal suits, actions and proceedings.” TENN. CODE ANN. § 16-3-402 (2009).
an illegally lenient one.”\textsuperscript{251} Additionally, while it is true that these defendants may have served shorter sentences on the front end, most of the defendants challenging illegal sentences under Rule 36.1 were incarcerated in state or federal prison, and their new sentences were enhanced by prior convictions infected with the challenged illegal sentence. It is hard to imagine that a defendant “benefits” from continuing to be exposed to such a collateral consequence. Moreover, the Tennessee Supreme Court adopted the amendments to Rule 36.1 without much thought to these issues or the shortcomings of the \textit{Brown} and \textit{Wooden} decisions. Perhaps, after the issuance of the \textit{Brown} and \textit{Wooden} opinions, the court was reminded of the ancient maxim, “[b]lessed be the amending hand.”\textsuperscript{252}

\textsuperscript{251} Summers \textit{v.} State, 212 S.W.3d 251, 258 (Tenn. 2007).

SAFE HAVEN CONUNDRUM: THE USE OF SPECIAL BAILMENTS TO KEEP PETS OUT OF VIOLENT HOUSEHOLDS

By: Joan MacLeod Heminway* and Patricia Graves Lenaghan**

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Introduction

Family violence¹ is a continuing social problem that breeds new complexity at every turn. Just as we seem to get a modicum of control over the sheltering of at-risk mothers and children (among other human victims), we find that family pets²—dependent creatures endangered by the same

¹ This article uses the terms “family violence” and “domestic violence” interchangeably to denote repeated conduct involving abuse, including physical and verbal aggression, in a marital, familial, or other or setting characterized by cohabitation.
² This article addresses protection for a specific subset of nonhuman animal dependents—those commonly treated as family members in U.S. households. The word “pet” is used in this article instead of the term “companion animal” unless the context requires the use of the latter. “Companion animal” may be interpreted more narrowly, even if more favorably. See, e.g., Kathy Matheson, Pet? Companion animal? Ethicists

[80]
violent behavior that threatens their human caretakers—often are left unprotected or under-protected by both law and society. In most cases, pets are unable to be sheltered with human victims of domestic violence due to shelter restrictions.\textsuperscript{3} Although the heroic efforts of Allie Phillips—through her Sheltering Animals & Families Together (SAF-T)\textsuperscript{TM} initiative—and others aim to change the bias against the communal sheltering of abuse victims and their pets (and are enjoying success),\textsuperscript{4} many targets of family violence cannot find shelter with their pets. Restrictions on the sheltering of abuse victims with their pets result in difficult choices for human victims who cohabit with pets. Those choices potentially affect the well-being of both the humans and their pets in leaving (and, in some cases, returning to)


\textsuperscript{4} See \textit{Sheltering Animals & Families Together\textsuperscript{TM}, You Can Do More!}, http://alliephillips.com/saf-tprogram/ (last visited July 30, 2017). The number of SAF-T shelters (“shelters . . . equipped to accept families of domestic violence along with their pets”) is updated regularly and continues to grow; over 100 shelters now are listed on the SAF-T Shelters website. See \textit{SAF-T Shelters, You Can Do More!}, http://alliephillips.com/saf-tprogram/saf-t-shelters/ (last visited July 30, 2017).
their violent households.\(^5\) Federal lawmakers have twice introduced legislation to help address this issue, but neither attempt progressed beyond the committee phase.\(^6\)

Animal safe haven programs have stepped up to serve some of this unmet need.\(^7\) These programs agree to take in the cats, dogs, and (in some cases) other pets of domestic violence victims who decide to seek refuge in a shelter. This solution is not without problems, however. Pets are separated from their owners at the very time they may need each other most. Moreover, safe havens typically only offer temporary care to pets, and the time limits on these arrangements may not mesh well with the transitioning of victims to new, independent housing situations after their shelter stays are over. Finally, a victim may decide to return to the abusive household and take the animal with her, subjecting the animal, as well as herself, to renewed abuse.

This article ultimately addresses the last of these three identified weaknesses of safe haven programs—which we refer to as the safe haven conundrum—and suggests a solution rooted in traditional notions of property and contract law and consistent with related public policy. In the process of doing so, the article panoramically describes the overall societal and legal context in which the issue arises. This background is important to many social and legal issues.

\(^{5}\) See Fields, supra note 3; Scaccia, supra note 3.


involving nonhuman animals, not just the protection of animals threatened by violent households.

With the foregoing in mind, this article proceeds in additional parts. Part I outlines important connections between human and animal violence (known among many in the field as “The Link” ⁸) that underlie the institutionalization and operation of animal safe haven programs. Part II places nonhuman animals—particularly pets—in their legal context, underscoring the notion that animals continue to be viewed under the law as property, albeit an evolving and specially protected form of property. The legal conception of pets, as described in Part II, is sometimes in tension with related social constructions of the human/pet relationship—including human/pet relationships that exist in the context of domestic violence. For example, when an abuse victim shelters a pet in a safe haven program during his or her stay in a domestic violence shelter, property ownership conventions must be observed and may collide with public policy considerations at several decision-making junctures.

One significant juncture at which this tension manifests itself is highlighted and deconstructed in Part III of this article. A pet owner who is a sheltered victim of family violence may put his or her pet in a safe haven shelter and then later decide to return to the abusive household. In that event, the victim not only potentially re-victimizes and endangers herself but also her animal. Elements of our social services system are designed to help and look after human victims of domestic violence in making and living through this decision; and if a victim is a parent (most commonly a

⁸ See What is the Link, http://nationallinkcoalition.org/what-is-the-link/ (last visited July 30, 2017) (referring numerous times to “The Link” and observing that “[a]nimal abuse, cruelty and neglect are often considered isolated incidents wholly separated from other forms of family violence. Today, professionals involved with victims of family violence are not surprised when they learn that often these acts are linked, and that various agencies are working with the same families . . . .”).

[83]
woman) who leaves and returns to a home with children, other elements of our social services system exist to protect those children. No social services exist, however, to protect the pet of a domestic violence victim when the owner determines to return the animal to a household in which an abuser resides and abuse may recur. Part III of the article highlights this issue and suggests that a special form of bailment—a conditional bailment—may help to protect animals at this critical juncture. This suggestion then is described and critiqued. Following Part III, we offer a brief conclusion.

I. Domestic Violence and Animal Abuse

A. Unfortunate Connections: Linkages Between Human and Nonhuman Animal Violence

The role of pets in family violence has remained relatively unexplored in academic literature. A study

9 See generally Janet E. Findlater & Susan Kelly, Child Protective Services and Domestic Violence, 9 THE FUTURE OF CHILDREN 84 (1999) (describing then current and aspirational relationships between child protective services and domestic violence protection and prevention). Our reference to female victims reminds us to expressly acknowledge that women are not the only targets of family violence. Where references are made to battered women and female victims of domestic violence, we offer them as nonexclusive illustrations of what has historically been the majoritarian fact pattern—i.e., abuse by men of their female cohabitants. Nevertheless, it is important to acknowledge that victims of domestic violence are not homogeneous in sex, gender, age, or other characteristics, and their unique attributes may contribute to both the fact and impact of their victimization.

conducted by the Humane Society of the United States in 2000 found that 21% of animal cruelty cases were intertwined with other family violence.\footnote{11} “Experts estimate that from 48 percent to 71 percent of battered women have pets who also have been abused or killed.”\footnote{12} As a general matter, available evidence indicates that “[v]iolence exhibited by one family member against another rarely involves a single act of abuse against one type of victim.”\footnote{13}

Moreover, data from existing studies on the connection between animal and human abuse should be treated with caution. In critiquing his own work and that of others in this area, Dr. Frank R. Ascione, a nationally recognized expert in the interaction between human and animal violence, notes that studies of animal cruelty and family violence against women do not “include comparison samples of non-battered women or battered women who are not currently in shelters.”\footnote{14} Furthermore, the sample sizes of all these studies are inevitably quite small. As a leading

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Upadhya, Comment, The Abuse of Animals As a Method of Domestic Violence: The Need for Criminalization, 63 EMORY L. J. 1163, 1167 (2014) (“Although the commission of animal cruelty has long been identified as a potential risk factor for subsequent criminality, and as a possible indicator of psychological disorders, only in the past three decades has scholarship focused on the link between the two forms of abuse.” (footnotes omitted)). Of course, humans are also animals. For simplicity’s sake, we often refer to nonhuman animals simply as “animals” in this article.


\footnote{12} Animals & Family Violence, https://awionline.org/content/animals-family-violence.


\footnote{14} Ascione, Women’s Reports, supra note 10, at 125.
researcher in the field, Ascione stresses that his own 1998 study (described below) cannot prove causation but is instead “descriptive.”\(^{15}\) Even where links between animal and human violence exist, it is far too easy to confuse correlation with causation. It is thus impossible to use Ascione’s results to extrapolate to a national comparison.\(^ {16}\) However, a number of small-scale studies have reached similar results in various areas of the country.\(^ {17}\)

In sum, despite the relative paucity of research on the links between animal and human violence and the shortcomings of the small amount of research that has been done, existing studies do provide basic information that supports connections between violence to animals and humans. These studies are useful to the discussion of our ideas about the sheltering of animals exposed to domestic violence or a significant risk of future domestic violence. As one commentator observed, “[t]he link between abuse against animals and abuse against humans is long documented both in psychological and sociological studies as well as anecdotal reports.”\(^ {18}\) Taken as a whole, these studies and reports reveal some disturbing connections and trends.

1. The Triad: Domestic Violence, Child Abuse, and Animal Abuse

In Ascione’s groundbreaking study in 1998, thirty-eight women at a domestic violence shelter in Utah were interviewed by shelter staff concerning their pets.\(^ {19}\) Many expressed appreciation that someone had finally

\(^{15}\) *Id.* at 127.

\(^{16}\) *Id.* at 126.

\(^{17}\) *Id.*

\(^{18}\) Gilbreath, *supra* note 7, at 5.

\(^{19}\) Ascione, *Women’s Reports, supra* note 10, at 123.
acknowledged concern for their pets. Of the 74% who owned pets, 71% reported that their abuser had either harmed or threatened to harm their pets.

Jane Ann Quinlisk’s statewide study of shelters in Wisconsin found similar percentages—about 86% of the seventy-two respondents owned pets, of whom 68% reported that their abusers were also abusive to their animals. Although there were lower rates of pet ownership in Flynn’s study in South Carolina due to the socio-demographic composition of that state, Flynn also found a connection between animal abuse and woman battering. Forty percent of the 107 respondents owned pets, of whom 46.5% reported that their abusers harmed or threatened to harm their pets.

Animal abuse is not merely an indicator of spousal abuse; it also has implications in the development of children. Several studies suggest that children mimic the behavior that is modeled by the adults in their lives. Some report that children who witness domestic violence are more likely to become perpetrators of domestic violence or victims of domestic violence, depending on their gender. Similarly, children who witness animal abuse may be more likely to abuse animals themselves. In Ascione’s study, for example, 32% of the victims who had children reported that

20 Id. at 124.
21 Id. at 125.
23 Flynn, Woman’s Best Friend, supra note 13, at 170–71.
24 Id. at 167.
26 Quinlisk, supra note 22, at 170.
27 Ascione, Woman’s Reports, supra note 10, at 127.
their children had also harmed the pets.\textsuperscript{28} Of those instances, the adult batterer had either harmed or threatened to harm the animal 71\% of the time.\textsuperscript{29} In Quinlisk’s Wisconsin survey, abuse of the pet by an adult perpetrator occurred in the presence of the children 76\% of the time.\textsuperscript{30} Fifty-four percent of those respondents stated that their children had later copied the behavior on the pet.\textsuperscript{31} In Flynn’s study, two women reported instances where their children abused the pet; one believed that her child was mimicking the behavior of the adult abuser.\textsuperscript{32} Some researchers have attempted to demonstrate, with mixed and sometimes controversial results, that animal abuse during childhood can predict future violence against other humans under a “violence graduation hypothesis.”\textsuperscript{33} Other researchers have suggested a “deviance generalization hypothesis,” positing that “animal abuse is simply one of many forms of antisocial behavior that can be expected to arise from childhood on.”\textsuperscript{34} Most of these researchers likely agree that animal abuse by children is a “serious antisocial behavior”\textsuperscript{35} that sometimes indicates a broader proclivity to violence.\textsuperscript{36}

\textsuperscript{28} Id. at 125.
\textsuperscript{29} Id.
\textsuperscript{30} Quinlisk, supra note 22, at 169.
\textsuperscript{31} Id.
\textsuperscript{32} Flynn, Woman’s Best Friend, supra note 13, at 167.
\textsuperscript{33} Arnold Arluke et al., The Relationship of Animal Abuse to Violence and other Forms of Antisocial Behavior, 14 J. INTERPERSONAL VIOLENCE 963, 963–64 (1999).
\textsuperscript{34} Id. at 965.
\textsuperscript{35} Clifton P. Flynn, Why Family Professionals Can No Longer Ignore Violence Toward Animals, 49 FAM. REL. 87, 88 (2000) [hereinafter Flynn, Family Professionals].
\textsuperscript{36} Margit Livingston, Desecrating the Ark: Animal Abuse and the Law’s Role in Prevention, 87 IOWA L. REV. 1, 44–45 (2001).
2. A Silent Epidemic: Society Ignores the Link Between Human and Nonhuman Violence

These studies strongly suggest a correlation between domestic violence, childhood violence, and animal abuse. For a multitude of reasons, however, society tends to discount or disregard batterer threats against pets. Pets are valued less than humans in weighing societal concerns, so that any violence against pets meets with less shock than violence against human victims. Furthermore, a misguided belief that animal abuse is rare has become entrenched and exists alongside the assumption that “crimes against animals are . . . isolated incidents,” not part of a larger pattern of violent activity. As a society, we have not yet fully appreciated the integral role that pet abuse plays in the cycle of human violence.

To a limited extent, connections between human and animal social welfare movements are beginning to be acknowledged in the United States through newly established institutions, including (at least in East Tennessee) Family Justice Centers. A Family Justice

38 Id.
40 See id. at 239; Family Crisis Unit, http://knoxsheriff.org/family/index.php (last visited July 30, 2017) (“The Family Justice Center is the hub of more than 60 partnering agencies working together to provide assistance and education pertaining to domestic violence, child abuse, elder abuse, animal abuse and cyber investigations.”). Recent institutions that acknowledge connections between human and nonhuman violence may be conceptualized as a modern reimagining of social movements from the nineteenth century. In the late nineteenth century, the private movement to protect abused children was intertwined with the animal welfare movement; private societies would simultaneously handle both human and nonhuman service needs. *Id.* In the early twentieth century, however, this common service system split

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Center is “the co-location of a multi-disciplinary team of professionals who work together, under one roof, to provide coordinated services to victims of family violence,” including allowing the victims to “talk to an advocate, plan for their safety, interview with a police officer, meet with a prosecutor, receive medical assistance, receive information related to shelter, and receive help with transportation.”  

Family Justice Centers are a relatively new phenomenon, based on the San Diego model. The growth in Family Justice Centers over the past fifteen years was fueled by a $20 million funding initiative announced by President George W. Bush in October 2003; the Knoxville, Tennessee Family Justice Center was seed-funded with a grant from the United States Department of Justice through the President’s Family Justice Center Initiative and included an animal abuse component (supported by the work of the Animal Abuse Task Force of the Community Coalition on Family Violence) at its initiation. There are currently more than...
seventy operational Family Justice Centers in the United States; Family Justice Centers also exist in five foreign countries.\textsuperscript{44} A number of these centers, like Knoxville’s, opened with financial support from the U.S. Department of Justice. By linking public and private advocates across the spectrum of human and animal violence initiatives, Family Justice Centers hold promise to bind social welfare groups in a powerful way.

3. Abusers Manipulate Bonds Between Human and Nonhuman Victims

Academic studies of pets and family violence do not merely describe a link between domestic violence and animal abuse. They also help to explain, in a more comprehensive way, why domestic violence exists. Animal abuse was previously a missing link in the family violence puzzle. The key to the link between animal abuse and domestic violence is that animals are part of the “intimate home environments of human beings.”\textsuperscript{45}

A 1983 study showed that people regard their pets as beloved family members.\textsuperscript{46} In that study, 87\% of respondents considered pets to be family members, and 79\% celebrated their pets’ birthdays.\textsuperscript{47} In a 1995 study by the American Animal Hospital Association, 70\% of respondents who had owned a pet indicated that they thought of those

\textsuperscript{44} For a list of centers with web links, see http://www.familyjusticecenter.org/affiliated-centers/family-justice-centers/ (last visited March 26, 2017).
\textsuperscript{45} Faver & Strand, supra note 39, at 238.
\textsuperscript{46} Id. at 240.
\textsuperscript{47} Dianna J. Gentry, Including Companion Animals in Protective Orders: Curtailing the Reach of Domestic Violence, 13 YALE J.L. & FEMINISM 97, 102 (2001).
pets as children.48 Today, more people have pets than have children.49 Humans tend to view their animals as “social actors who are capable of interacting symbolically.”50 In 2016, pet owners spent an estimated $62.75 billion dollars on their pets.51 U.S. veterinary expenses tripled between 1991 and 2001, an early indicator of the increasing value placed on pets.52

Given this evidence of a strong human-pet bond, it is no surprise that it extends to subjects of family violence. In one study, Flynn conducted interviews with ten battered women at a shelter in South Carolina who owned pets.53 The women described their pets as family members, including two respondents who brought photos of their pets with them to the interview, behaving like “proud parents.”54 Three women even referred to their pets as “children.”55

Although this bond is touching, it has sinister implications when recognized by an abuser. A pet’s status as a family member makes the pet vulnerable to abuse.56 The connection between animal abuse and other forms of domestic violence is not simply a sign of a general violent disposition on the part of the abuser, however. Instead, this

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50 Id.
53 Flynn, Symbolic Interaction, supra note 49, at 103.
54 Id. at 105.
55 Id.
56 Id. at 107.
correlation appears to result from the batterer’s concerted strategy to take advantage of the intimate family environment for his or her own purposes. Abusers batter pets to establish their power, instill fear, and encourage the “habit of compliance” among their human victims. 57 Abusers recognize that harming or threatening a human victim’s pet is a viable strategy to coerce the human victim to do what the abuser wants. 58 Customized versions of the Duluth Model of Power and Control, frequently used to illustrate locus of authority and influence in domestic violence settings, identify the elements of this concerted strategy. 59

As part of the family, pets exist within the same environment that permits violence to occur against human victims. This violence is fostered by the privacy associated with the home and the position of “power and control” that abusers can exercise over pets due to their “dependent status” and “smaller physical stature.” 60 Even more importantly, abusers react with jealousy to the strong emotional attachments that exist between their human victims and pets. 61

58 Faver & Strand, supra note 39, at 238.
60 Flynn, Symbolic Interaction, supra note 49, at 107.
61 Flynn, Woman’s Best Friend, supra note 13, at 172. This article also postulates that there are two key reasons why domestic violence victims may form unique emotional attachments to their pets. First, battered women may identify with pets that have been similarly abused, and second, pets may serve as emotional substitutes who fill the need of

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Abusers manipulate these bonds between human abuse victims and their pets. Because these pets are so important to the human subjects of domestic violence, abusers can harm and threaten the pets in order to further harm and coerce their human victims. Abusers can use the pet to convince the victim to come home or drop criminal charges. Analysts identify this strategy among abusers as a negative surrogacy, where the abuser targets the animal to hurt and control the human victim in a phenomenon known as “triangling.” In one of Flynn’s studies, female victims of family abuse cited their emotional attachment to the pet as being part of the reason why their abusers targeted the animals. One woman insightfully stated, “[the pet] was like an extension of me, you know? And . . . maybe he abused the dog ‘cause [sic] he . . . didn’t want to go to jail for abusing me . . . .” Another stated of her abuser, “I think he uses the dog big time to hurt us . . . .” Similar examples of abusers using violence against pets to hurt human victims play out in communities across the country. The Knoxville News Sentinel, for example, reported on felony animal abuse charges filed against a man who broke the neck of his companionship for battered women, who are often socially isolated by their abusers. Id. at 168–74.

62 Faver & Strand, supra note 39, at 238.
63 Flynn, Woman’s Best Friend, supra note 13, at 172.
64 Id. at 174.
66 Id. at 110.
67 Id. at 109.
68 Articles summarizing published reports of incidents and legal actions involving the link between animal abuse and domestic violence are regularly published in the LINK-Letter, a newsletter produced by the National Link Coalition. These articles are available on the National Link Coalition’s website at http://nationallinkcoalition.org/resources/link-letter-archives.
stepdaughter’s Jack Russell terrier puppy in order to “torment” his estranged wife.  

Even in situations where the abuser does not threaten or harm the pet, targets of family violence are often emotionally scarred by their pets’ reactions to the abuse that the pets witness. One woman described being upset because her dog “panics” and “starts shivering” when the abuser yells at her. In sum, all abuse, whether it be of a human or a pet, contributes to the “climate of . . . terror” that perpetuates further violence.

4. Community Action in Response to Abuse

Society at large has begun to take notice of the connection between human and nonhuman victims of abuse. Academic studies are one indicator of this emerging acknowledgment of this linkage. Changes to legal process and even law itself are others. In addition, there has been a focus on enforcement efforts against perpetrators of animal cruelty in the hopes that they will help diminish violence against humans. This enforcement rationale suggests that

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71 Id. at 117.

72 Id. at 113.

73 A bibliography of academic studies in this area is available at http://animaltherapy.net/animal-abuse-human-violence/bibliography/.

74 GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 122–25 (Temple University Press 1995) (citing a variety of judicial opinions concerning animal cruelty to distinguish direct and indirect duties). Francione concludes that, although some judicial opinions interpret animal cruelty statutes as creating duties owed directly to the animals, others emphasize a “dual purpose” where the duty owed to the animal is indirect. Id. at 122. The author reiterates that, “the primary rationale for the anticruelty statutes is essentially that cruelty to animals has a detrimental impact on the moral development of human beings.” Id. at
one potent reason why society cares about animal rights is because animal interests are intertwined with human interests.\(^75\)

One important change in this area is the growing emphasis on including animals in orders of protection.\(^76\) In Tennessee, for example, a protective order may “direct the care, custody or control of any animal owned, possessed, leased, kept, or held by either party or a minor residing in the household.”\(^77\) The Tennessee statute also insists that animals be placed in the direct custody of the petitioner or in animal foster care, emphasizing that the animal should never be placed in the custody of the respondent to the protective order.\(^78\) Although the Tennessee Code does not extend protection to first responders who help the abuse victim remove pets from the household, such aid is available through the internal guidelines of various law enforcement offices.\(^79\)

125. An emphasis on indirect duties is also prevalent in some theories of animal ethics. See, e.g., PETER CARRUTHERS, THE ANIMALS ISSUE 146 (Cambridge University Press 1992) (“[S]ome ways of treating animals are morally wrong . . . but only because of what those actions may show us about the moral character of the agent. This will then be a form of indirect moral significance for animals that is independent of the fact that many rational agents care about animals, and hate to see them suffer.”).\(^75\) Livingston, supra note 36, at 5.


77 TENN. CODE ANN. § 36-3-606(a)(9) (2016).

78 Id.

79 Telephone interview with Jackie Roberts, Case Coordinator, Family Justice Center in Knoxville, Tenn. (June 20, 2008). As part of their standard operations, Knoxville police officers “standby” for fifteen minutes while the victim retrieves personal belongings from the house. For safety reasons, this standby procedure is never utilized at night. Id.
In other rule making, state legislatures are increasing penalties for animal abuse. All fifty states currently have felony provisions for animal cruelty. In Tennessee, a perpetrator’s first animal cruelty offense is a Class A misdemeanor, punishable by no more than 11 months and 29 days of incarceration, along with a fine not to exceed $2,500. Any subsequent offense is a Class E felony, requiring incarceration for one to six years and a fine up to $3,000. Tennessee has a separate statute, however, to deal with aggravated animal cruelty, which occurs when a person “intentionally kills or intentionally causes serious physical injury to a [pet]” in a manner that exhibits “aggravated cruelty” that has “no justifiable purpose.” Aggravated cruelty is a Class E felony.

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82 Id. § 40-35-111(e)(1).
83 Id. § 39-14-202(g)(2).
84 Id. § 40-35-111(b)(5).
85 Id. § 39-14-212(a).
86 Id. § 39-14-212(d).
Another important area of animal protection legislation is cross-reporting as among child and adult protective services and animal abuse responders. 87 Tennessee requires that any agency or government employee involved in “child or adult protective services” report suspected animal abuse to the appropriate animal protection authority. 88 In order to make cross-reporting as potent as possible, states also need to require humane society investigators to report to social workers when they suspect child abuse or domestic violence. 89 Other states have extended mandatory reporting into other professions, such as by requiring veterinarians to report suspected animal abuse. 90 Many states, for example, either require veterinarians to report suspected animal abuse or provide immunity if veterinarians report such information, prescriptions that resemble child abuse reporting requirements. 91

As a logical extension of these legislative efforts, Tennessee law also provides for an animal abuse registry akin to sex offender registries provided for by law in Tennessee and elsewhere. 92 At the time work on this article was completed, the registry included information on eight

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87 The National Link Coalition produces summaries of state cross-reporting requirements (mandatory and permissive), based on the nature of required reporters (e.g., child protection, adult protective services, animal care and control, and veterinary professionals) and type of abuse. These summaries are available at http://nationallinkcoalition.org/resources/articles-research.
88 Id. § 38-1-402(a).
90 Gentry, supra note 47, at 104.

[98]
convicted animal abusers. Although Tennessee was the first state to adopt legislation of this kind, municipalities in other states have started to implement animal abuse registries. The effect of these still-young initiatives is unclear, but they do represent another socio-legal response to the link between human and animal abuse.

In perhaps the most novel development, Connecticut has recently passed legislation (“Desmond’s Law”) allowing animals to have court-appointed advocates to represent them in abuse and cruelty cases. Either the prosecutor or the defense attorney may request the animal advocate, and the judge has discretion as to whether to make the appointment. At this time, seven lawyers and a law professor are approved as volunteer advocates. The passage of the law appears to be connected to concern over both the link between animal abuse and violence against people and the paucity of animal abuse cases resulting in a conviction.

95 See id. (“The registries are part of widening efforts in the United States to punish and track animal abusers, who, research has shown, commit violence against people at higher rates than normal.”). Bills introducing state animal abuse registries were introduced in a number of state legislatures during the 2017 legislative sessions. New State Animal Abuser Registries Proposed in 2017, https://www.navs.org/new-state-animal-abuser-registries-proposed-2017/#.WYiRDq3MxAY.
Beyond legislation, the judiciary has begun to highlight the presence of animal abuse in cases involving domestic violence (especially child abuse), exposing the interrelationships among the three types of household violence. In one Kentucky case, the judge permitted joinder of interrelated child abuse and animal cruelty charges when the defendants allegedly sexually abused their children and used their pets for sexual gratification. In another brutal case out of Oregon, a jury convicted Charles Smith of murdering his pregnant wife by tying her hands and feet behind her back and leaving her to die of exposure in a remote area. At trial, the state presented evidence of Smith’s long history of violence against both women and animals, including how he threw a kitten into a burning woodstove and beat his wife’s puppy to death.

Beyond the research initiatives on the link between animal abuse and human aggression and the legislative, regulatory, and judicial activity that they have engendered, practical issues have emerged in handling matters at the intersection of animal and human violence. For example, there is widespread concern about the adequacy of social services offered to victims of domestic violence. A particularly salient concern is the fact that most domestic violence shelters do not take in the animals of human domestic violence victims.

B. No Room at the Inn: Most Domestic Violence Shelters Do Not Accept Pets

As an extension of the emerging interest in the connection between domestic violence and animal abuse, researchers have begun to highlight and criticize the failure

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97 Gentry, *supra* note 47, at 104.
98 *Id.* at 104–05.
99 *Id.* at 105.
100 Faver & Strand, *supra* note 39, at 243.
of domestic violence shelters to evaluate or address the importance of pets in the lives of domestic violence victims. Most domestic violence shelters do not accept pets, due to “health regulations, space limitations, additional costs, and potential liabilities.” Concerned members of the community have begun to change this norm, but the situation persists.

Researchers stress that shelter staff should inquire about pets at intake and take seriously the victims’ emotional turmoil about leaving their pets. In Wisconsin, Quinlisk found that large, urban shelters asked abuse victims about their pets during intake, while small, rural shelters did not. Quinlisk stressed that even if a shelter has no program to take in pets of domestic violence victims, merely expressing concern and helping them “brainstorm” about their options for their pets is helpful. Over two-thirds of those surveyed whose pets had been abused expressed concern for the safety of those pets. In another study by Flynn, all of the abuse

101 Id.; see also Frank R. Ascione, The Abuse of Animals and Human Interpersonal Violence: Making the Connection, in CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE 50, 56 (Frank R. Ascione & Phil Arkow eds., 1999) (83% of directors at surveyed domestic violence shelters acknowledged an “overlap” between domestic violence and animal abuse, but only 28% of those shelters routinely ask their clients about animal abuse); Flynn, Symbolic Interaction, supra note 49, at 123 (suggesting that shelter staff should inquire about pets at intake and consider establishing foster programs or on-site housing programs for pets, particularly because some women delay seeking shelter due to concern for their pets).


103 See supra note 4 and accompanying text.

104 Flynn, Symbolic Interaction, supra note 49, at 123.

105 Quinlisk, supra note 22, at 173.

106 Id.

107 Flynn, Woman’s Best Friend, supra note 13, at 170.
victims who were interviewed wished that the shelter could accommodate their animals.\textsuperscript{108}

Some victims of family violence delay coming to a domestic violence shelter out of concern for their animals, which indicates the gravity of the failure to shelter the pets of battered women. In Ascione’s study, 18\% of those surveyed delayed seeking shelter out of concern for their pets’ safety.\textsuperscript{109} Similarly, eight women, or 18.6\% of respondents, in one of Flynn’s studies delayed seeking shelter for themselves due to their pets.\textsuperscript{110} All of them acknowledged that their pets had also been victims of abuse; five of them delayed coming to the shelter for over two months.\textsuperscript{111} A staff member at the shelter told the researcher that one woman who had come to the shelter on three separate occasions during his study returned home each time because she feared for the safety of her pet.\textsuperscript{112}

Yet, as striking as these numbers and stories may be, research involving abuse victims in domestic violence shelters likely understates the overall risk to those victims because there most certainly are victims who never seek shelter at all (at least in part because of a fear that their pets will be abused or killed if they leave the household).\textsuperscript{113} This shortcoming in the empirical data on abuse victims is likely to persist because the study population is difficult to identify. Even interviewing unsheltered domestic violence victims whose abusers are arrested would not completely overcome

\begin{thebibliography}{9}
\bibitem{108} Flynn, \textit{Symbolic Interaction}, \textit{supra} note 49, at 118.
\bibitem{109} Ascione, \textit{Women’s Reports}, \textit{supra} note 10, at 125.
\bibitem{110} Flynn, \textit{Woman’s Best Friend}, \textit{supra} note 13, at 170.
\bibitem{111} \textit{Id}.
\bibitem{112} \textit{Id.} at 172.
\bibitem{113} \textit{See} Samantha Cowan, \textit{No Dog Left Behind: Pet-Friendly Domestic Violence Shelter Makes It Easier to Leave}, \textit{TAKEPART} (Oct. 17, 2015), http://www.takepart.com/article/2015/10/17/domestic-violence-pets (“The institute’s findings support past studies, which have found that up to 50 percent of women delay leaving abusive situations out of concern for their pets.”).
\end{thebibliography}
the deficiency (although that certainly would be a valuable contribution). Regardless, however, it seems likely that domestic violence victims who delay leaving an abusive situation may actually be risking their own lives to protect their pets, making animal sheltering a key concern for all social workers and human services professionals.\(^\text{114}\)

Having said that, this research on human domestic abuse victims and their pets reveals that the humans are not the only ones at risk in this situation. If a human victim of family violence leaves a domestic violence situation without securing the safety of a pet, the pet is at a significant risk of abuse. In Flynn’s in-depth interviews with domestic violence victims, he explored the fears that women had when they were separated from their pets while at the domestic violence shelter.\(^\text{115}\) Some women had been fortunate enough to leave their pets with family or friends, while six were compelled to give their pets away or take them to a local animal shelter, which typically would require surrender of ownership of the animals.\(^\text{116}\) Slightly over half of the women had left their pets with their abusers.\(^\text{117}\) One of those women worried that her husband was not feeding her dog, while another received threats from her husband that he would take their dog away from her.\(^\text{118}\) It is noteworthy, however, that temporary fostering was open to these women, and Flynn concluded that the women who deeply feared that their abusers would hurt their pets put them in foster care before

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\(^{114}\) Quinlisk, *supra* note 22, at 173.


\(^{117}\) Flynn, *Woman’s Best Friend*, *supra* note 13, at 170.

coming to the domestic violence shelter.\textsuperscript{119} Even though the women who left their pets at home recognized that these pets might be abused or neglected, they expressed guilt at taking their pets away from abusers who also had also developed relationships with the pets.\textsuperscript{120} The psychological and emotional impacts of the many disruptions in a violent household are fraught with complexity.

C. Promising New Developments with Undesirable Side Effects

In reaction to the grave dangers that develop due to the lack of safe shelter for battered women’s pets, novel arrangements are beginning to crop up to address the problem. A growing number of domestic violence shelters and social services organizations are taking part in efforts to aid animals that are affected by domestic violence.\textsuperscript{121} Domestic violence shelters have begun to welcome pets, despite the practical and legal barriers to doing so.\textsuperscript{122} In Columbus, Ohio, social workers developed an innovative program in which the pets of battered women are taken to a women’s prison, where the inmates care for them.\textsuperscript{123} These and other similar efforts should be encouraged and supported. But until they are more universally and uniformly available, other (potentially less desirable) options will continue to play strong roles.

\textsuperscript{119} Id. at 120.
\textsuperscript{120} Id. at 119–20.
\textsuperscript{121} Faver & Strand, supra note 39, at 243.
Significant among those options, community-based sheltering in so-called “safe haven” programs may be the most common, though not very widespread. Safe haven programs typically are formed when domestic violence shelters partner with “animal shelters, animal care and control agencies, veterinary clinics, and private boarding kennels” in order “to provide temporary housing for victims’ pets.”\(^{124}\) Ascione’s 1999 survey identified 113 safe haven programs nationwide, the youngest of which were still in the conceptual phase\(^ {125}\) and the oldest of which had been operating for ten years.\(^ {126}\) The animal welfare agencies involved in these programs estimated that they sheltered a total of 2,000 to 50,000 animals per year.\(^ {127}\) Safe haven shelters are now more widely known and are more regularly noted and currently documented by various organizations.\(^ {128}\) This article focuses its core attention and proposal on pets sheltered apart from their owners in safe haven programs.

The general attributes and operations of a safe haven program are explained in the “Starting a Safe Havens for Animals Program” brochure that is available on the website of the Humane Society of the United States\(^ {129}\) and in the “Safe Havens for Pets” brochure produced by Ascione.\(^ {130}\) The Humane Society brochure prefers that domestic violence shelters serve as the “primary referring agency for animals who require temporary foster care,” but it encourages safe haven programs to consider accepting referrals from other sources, such as the police and animal shelters.\(^ {131}\) Personnel need to be available at all times for animal intake because many domestic violence victims must

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\(^{124}\) HSUS, SAFE HAVENS, supra note 102, at 2.
\(^{125}\) See ASCIONE, SAFE HAVENS, supra note 116, at 3.
\(^{126}\) See id. at 5.
\(^{127}\) See id. at 6.
\(^{128}\) See supra note 7 and accompanying text.
\(^{129}\) HSUS, SAFE HAVENS, supra note 102.
\(^{130}\) ASCIONE, SAFE HAVENS, supra note 116.
\(^{131}\) HSUS, SAFE HAVENS, supra note 102, at 3.
flee their homes during the night. 132 Moreover, the brochure strongly suggests that veterinarians should immediately check the animals. 133 Safe haven programs commonly use animal shelters, foster homes, veterinary clinics, and private kennels to house the animals. 134 In Ascione’s survey of safe haven programs, for example, only three domestic violence shelters (roughly 14% of the shelters interviewed) indicated that they could shelter pets at their own facilities. 135 Most programs offer sheltering services for fourteen to thirty days. 136 Due to safety concerns and the stress of visits, it is unadvisable to allow the human victim to visit her pet during sheltering. 137

The brochures also address procedures through which the victims reclaim their pets. In many (if not most) cases, the expectation is that the women and their pets will move to a new home where they are more likely to be free from abuse. However, some women decide to return to their abusers. The Humane Society brochure acknowledges that this outcome is “frustrating” and advises shelter personnel to “educate the victim about the dangers of returning” to a “potentially harmful situation.” 138 However, the brochure does no more to elaborate on the serious risks that humans and pets face when they return to an abusive home. Instead, the brochure concludes that “the program will have to allow the victim to reclaim the pet and return to the abuser if the victim so chooses.” 139

Ascione’s “Safe Havens for Pets” brochure reaches the same conclusion. 140 Ascione reminds us that “[l]eaving a
batterer is often a process rather than a one-time decision” and that “[w]omen should not be coerced into remaining away from batterers by preventing them from retrieving pets from a SHP program.”

He recognizes that this policy sometimes produces “horror stories,” recounting an incident where a woman came to the safe haven shelter with her batterer to reclaim her pet. Nonetheless, scholars and social workers typically do not challenge the premise that abused women should be able to reclaim their pets regardless of their intentions. Moreover, as Part II illustrates, the law’s conception of pets as personal property supports a domestic violence victim’s right to reclaim her animal.

This article suggests that we should rethink this assumption. By allowing domestic violence victims to reclaim their pets and return with them to an abusive household, safe haven programs perpetuate the cycle of human and animal violence. The safe haven movement, designed to solve a pressing social problem—ensuring the temporary safety and welfare of pets of human abuse victims—raises compelling philosophical, legal, and ethical issues. However, a solution to this safe haven conundrum—an issue at the intersection of the emotional and psychological needs and legal rights of humans, on the one hand, and the socio-legal aspects of animal protection, on the other—may be possible. A potential solution lies in the combination of traditional property and contract law concepts with current legal and public policy support for animal protection.

II. Animals, Property, and Rights: Legal Rules Relevant to a Resolution of the Safe Haven Conundrum

If the law is to provide a solution to the safe haven conundrum, it is important to understand current legal rules.

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141 Id.
142 Id. at 68.
relating to animals. This Part identifies certain relevant legal rules relating to animals and summarizes salient aspects of the history and development of those rules. The Part also makes certain observations about those legal rules in light of their nature, history, and development.

A. Animals as Property in the Current Legal Paradigm

Because pets are classified as property under the current legal paradigm, a brief overview of certain elements of property law is necessary to any disposition of the safe haven conundrum. From a legal standpoint, property is a bundle of rights related to a given object, making it a fundamental organizing principle of any legal system. American law traditionally treats animals as property in the

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143 Property status has, of course, been an important part of the conceptualization of animals for centuries, if not millennia. Aristotelian and Stoic philosophies espoused teleological anthropocentrism—the belief that the physical world was designed for use by humans, as exemplified by the concept of the Great Chain of Being. Steven M. Wise, How Nonhuman Animals were Trapped in a Nonexistent Universe, 1 ANIMAL L. 15, 19–24 (1995). Various developments—including, but not limited to, the rise of modern science and the environmental movement—have tempered enthusiasm for the notion of human dominion over the natural world. Id. at 34–41. Nonetheless, commentators continue to debate whether modern concepts such as evolution truly detract from the position that human interests are superior to animal interests. Compare Thomas G. Kelch, Toward a Non-Property Status for Animals, 6 N.Y.U. ENVT'L. L.J. 531, 559–64 (1998) (arguing that “[t]he gulf between humans and other animals evaporated in the Darwinian revolution” and that “the ranking of humans in evolution” does not “give[e] humans special status and rights”) with CARRUTHERS, supra note 74, at 143–45 (arguing that “human beings are continuous with the rest of the natural world, having evolved, like any other species of animal, through a process of natural selection,” but that only humans are “rational agents” who deserve “direct rights”).

same way that a book or chair is property.  

We can buy and sell our pets, and they can also be the subject of bailment agreements and the object of theft.

Historically, states have viewed animals as “personal property without any special value.” In 1857, for example, a Tennessee court affirmed a human owner’s property rights in a dog. With this mindset, some states were reluctant to create a definition of “pet” or “companion animal” in their statutory codes. The law typically “denies all justice to all nonhuman animals”; legal rights inuring to an animal’s benefit generally are exercised by the animal’s owner or legal guardian or the state, while legal duties in relation to an animal are owed to the animal’s owner or legal guardian or the state via statute.

145 Hankin, supra note 52, at 317.
146 Id. at 321.
148 Wheatley v. Harris, 36 Tenn. 468, 468 (1857) (“[T]he law upon the point of the master’s property in a dog is well settled.”).
149 See Guben, supra note 147, at 59. But see TENN. CODE ANN. § 44-17-403(b) (2016) (stepping away from this traditional view by defining a “pet” as “any domesticated cat or dog normally maintained in or near the household of the owner”); id. § 39-14-201(3) (defining a “non-livestock animal” as “a pet normally maintained in or near the household . . . of its owner . . . other domesticated animal, previously captured wildlife, an exotic animal, or any other pet, including but not limited to, pet rabbits, a pet chick, duck, or pot bellied pig that is not classified as ‘livestock’ . . . .”).
150 Wise, supra note 143, at 17; Favre, Equitable Self-Ownership, supra note 144, at 480–81, 494 (describing the unique situation of wildlife). The state does not possess title in wildlife, but instead it “has the right to decide the conditions under which humans can obtain title” in wildlife, so that unless they are in captivity, wild animals possess self-ownership. Id. at 481. While some progress has been made in this area over the course of the time that this article was researched and written, the property law norms applicable to questions involving animals and law are well entrenched. See, e.g., Matter of Nonhuman Rights Project, Inc. v. Stanley, 49 Misc. 3d 746, 746 (N.Y. Sup. Ct. 2015) (granting standing [109]
Yet, these conceptions of animals do not harmonize well with the modern reality of pet ownership. As noted in Part I.A.3, victims of family violence may describe their pets as family members, echoing the mentality of many in society at large. We view pets on an entirely different plane than we view inanimate property.151 As Kathy Hessler suggests:

People do not plan memorial services, or invest in serious medical treatment for their books or lawnmowers. They don’t plan to pay more in insurance premiums than the purchase price or replacement cost of the property they seek to protect. Individuals do not leave money for their bicycles in their wills, or seek visitation arrangements for their televisions upon the termination of their marriages. Yet individuals attempt to do all these things and more for their companion animals.152

Law, as the embodiment of social values, should reflect this distinction.

Persistent social norms, however, sanction the human domination of animals, which tends to create to a nonprofit organization to commence a proceeding for a writ of habeas corpus on behalf of two chimpanzees held as research subjects but ultimately denying habeas corpus relief).

151 See, e.g., Matter of Nonhuman Rights Project, Inc., 49 Misc. 3d at 766 (“[S]ome animals, such as pets and companion animals, are gradually being treated as more than property, if not quite as persons, in part because legislatures and courts recognize the close relationships that exist between people and their pets, who are often viewed and treated by their owners as family members.”); Travis v. Murray, 42 Misc. 3d 447, 451 (Sup. Ct. 2013) (“Where once a dog was considered a nice accompaniment to a family unit, it is now seen as an actual member of that family, vying for importance alongside children.”).

ambiguity and ambivalence in prevailing legal structures. In many cases, the law and legal process remain virtually straitjacketed by the fact that animals are property, and property cannot have rights.\textsuperscript{153} Animal cruelty is typically a crime under state law,\textsuperscript{154} and our laws generally proscribe unnecessary harm to animals.\textsuperscript{155} Yet this proscription is a weak form of protection, in part because of the way in which we balance human interests against animal interests to make a determination of necessary harm.\textsuperscript{156} In this balancing act, “animals almost never prevail, irrespective of what might be the relatively trivial human interest at stake and the relatively weighty animal interest involved . . . .”\textsuperscript{157} Even where the interests of animals may or should prevail, their abuse is hard to detect, and the penalties for their abusers still pale in comparison to penalties for some human violence or other related crimes, compelling prosecutors to seek punishment for something other than animal cruelty.\textsuperscript{158} While it may be

\begin{footnotes}
\footnote{153} See FRANCIONE, \textit{supra} note 74, at 4; \textit{Matter of Nonhuman Rights Project, Inc.}, 49 Misc. 3d at 765 (‘For purposes of establishing rights, the law presently categorizes entities in a simple, binary, ‘all-or-nothing’ fashion. ‘Persons have rights, duties, and obligations; things do not.’”).

\footnote{154} See infra Part II.C.1.

\footnote{155} See FRANCIONE, \textit{supra} note 74, at 4.

\footnote{156} Id.

\footnote{157} Id.

\footnote{158} Human violence often accompanies animal violence and is punishable at higher felony levels. \textit{Compare} TENN. CODE ANN. § 39-13-212(b) (2016) (stating that charge accompanying the least culpable mental state for homicide, criminally negligent homicide, is punished as a Class E felony) \textit{with id.} § 39-14-212(d) (dictating the most severe form of animal cruelty in Tennessee is punished as a Class E felony). Furthermore, other violations such as tax evasion and gambling often accompany cock and dog fighting, and penalties for those crimes are more stringent. \textit{Compare id.} § 67-1-1440(g) (criminalizing tax evasion is a Class E felony) \textit{and id.} § 39-17-504(c) (1989) (classifying aggravated gambling promotion as a Class E felony) \textit{with id.} § 39-14-203(c)–(d) (categorizing dog fighting as a Class E felony, being a spectator at a dogfight as a Class B or C misdemeanor, and cock fighting as a Class A misdemeanor). Thus, scarce prosecutorial resources are

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easier to identify and successfully prosecute crimes other than animal cruelty in some of these cases, the focus of enforcement efforts on other criminal activity accompanying animal abuse and away from animal abuse itself may tend to reify and entrench perceptions that animals and animal abuse are unimportant (or always less important than human life and criminal activity—like tax evasion or gambling—implicating only human victims). Legislative initiatives defining domestic violence to include animal cruelty—enabling prosecutors to file for either or both crimes\textsuperscript{159}—highlight the importance of animal welfare but may or may not change these perceptions. In general, the legal conception of animals as property drives, supports, and embeds these and other related patterns in law enforcement and the use of legal process. As a result, overall, a pure property law approach to animals has increasingly proven unworkable in a contemporary context.

B. Changing Perceptions of Animals in the Legal Order

In light of increasing ethical, social, and legal tension in balancing animal and human interests, commentators have suggested a variety of new legal paradigms for pets.\textsuperscript{160} At one extreme lies the “animal rights” perspective, which suggests that we should remove property status from animals...
altogether, thus making them full-fledged legal right-holders.  

Gary L. Francione, for example, rejects accommodation with the traditional paradigm by framing the issue as a choice between two polar opposites: animals “are either persons, beings to whom the principle of equal consideration applies and who possess morally significant interests in not suffering, or things, beings to whom the principle of equal consideration does not apply and whose interests may be ignored if it benefits us. There is no third choice.”

According to Francione, improving the treatment of animals within a property framework is insufficient—we must instead recognize the moral significance of animals by affording them “equal consideration.” This standard would apply to any animal that is sentient and can suffer. In practice, this framework would end the usage of animals as “resources” so that the “institutional exploitation of animals for food, biomedical experiments, entertainment, or clothing” would cease. Although the animal rights perspective is both simple and, to many, compelling, significant criticisms have been levied against it.

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161 Kelch, supra note 143, at 532.
163 GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? 100–01 (Temple University Press 2000) [hereinafter FRANCIONE, YOUR CHILD OR THE DOG?].
164 Id. at 82, 159.
165 Id. at 102. Francione does accept that “conflicts may require accommodation of some sort” and that an animal’s legal rights may be “overridden by appropriate moral considerations,” such as that a human appropriately preferring to help another human over an animal “in situations of true emergency.” FRANCIONE, supra note 74, at 4, 10; see also FRANCIONE, YOUR CHILD OR THE DOG?, supra note 163, at 157–59.
166 Among other things, commentators find the comparison that animal rights activists make between racism, sexism, and the current role of animals to be “inappropriate,” “distasteful,” and not cogent, while also arguing that the animal rights position devalues human life. For further
A countervailing viewpoint advocates the status quo. Animals have no rights beyond the “protections they have incident to the economic, aesthetic, and humanitarian interests of human beings.” The “aggregate” of human characteristics, including “the ability to express reason, to recognize moral principles, to make subtle distinctions, and to intellectualize” makes “humans fundamentally, importantly, and unbridgeably different from animals.”

Many advocates of this position argue that the social contract, as the underpinning of our legal system, is predicated on a consent of the governed that can only arise from these unique intellectual capabilities. Therefore, exploration of these critiques, see David Schmahmann & Lori Polacheck, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747, 757, 780 (1995). Comparisons between the current role of animals in our society and ancient and modern slavery, as well as analogies to societal prejudices against women and immigrants, are common in the animal rights literature. See, e.g., Favre, *Equitable Self-Ownership*, supra note 144, at 477–78, 491; Kelch, *supra* note 143, at 534; Wise, *supra* note 143, at 16.

167 Schmahmann & Polecheck, *supra* note 166, at 759.
168 Id. at 752.
169 Id. at 754–55; *see also* CARRUTHERS, *supra* note 74, at 36, 194 (using contractualism to argue that morality is “a human construction[] created by human beings . . . to govern . . . relationships . . . in society[,]” and that humans owe no direct moral duties to animals because animals do not possess reason). Although some species have the ability to recognize “the beliefs and desires of others,” rationality also requires “a conception of social rules, and of what it might be for all to act under the same social rules.” Id. at 139. Compare JAMES B. REICHMANN, S.J., *EVOLUTION, ANIMAL ‘RIGHTS,’ AND THE ENVIRONMENT* 252 (Catholic University of America Press 2000) (“The human’s rationality totally penetrates and is suffused throughout his animality; it is not a distinct ‘quality’ added to it. This union of rationality and animality clearly differentiates the human from all other sentient beings whose animality is not a rational animality.”) with Richard A. Posner, *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 57–58 (Oxford University Press, Cass R. Sunstein & Martha C. Nussbaum, eds. 2004) (arguing that rights are not based on “cognitive capacity,” but instead that “legal rights...
only humans can directly benefit from the rights bestowed by that social contract—the only practical measure of rights is human interests. The creation of full-fledged animal rights would be an unprecedented and destabilizing shift in our legal system that would demand the courts to enforce the interests of a new and vague constituency. This viewpoint ignores, however, how the current legal paradigm has already proven insufficient to handle the modern role of pets—an insufficiency that creates inefficiencies. Furthermore, the Kantian social contract that is often emphasized in this viewpoint is not the only justification for rights.

Finally, moderate activists urge a more nuanced approach between these two rubrics. Although the most radical animal rights advocates suggest changing pets’ status “to one approaching that of persons,” many suggest we should continue to conceive of pets as property, albeit with some significant qualifications. Elimination of title in pets are instruments for securing the liberties that are necessary if a democratic system of government is to provide a workable framework for social order and prosperity. The conventional rights bearers are with minor exceptions actual and potential voters and economic actors. Animals do not fit this description . . . .”)

Schmahmann & Polecheck, supra note 166, at 759, 760.

Id.

David Favre, Judicial Recognition of the Interests of Animals—A New Tort, 2005 MICH. ST. L. REV. 333, 334 (2000). Various justifications for human rights exist and are considered in the context of animals. See id. at 335. Kant assigned rights due to the dignity arising from rationality and self-awareness, but this conception has been criticized for excluding humans who do not have full rationality, unless the species is considered in the aggregate instead of individually. See also id. at 338 (stating that legal analysis should be based on a balancing of “conflicting interests”); Kelch, supra note 143, at 538–40 (the ability of a living being to experience pain and suffering makes it worthy of certain moral considerations); CARRUTHERS, supra note 74, at 13–26 (describing theism, intuitionism, utilitarianism, and contractualism as possible bases for moral duties).

Hankin, supra note 52, at 385.

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is “neither advisable nor feasible,” but it should be recognized that a pet is not the same sort of property as is an inanimate object. 174 Within this viewpoint, Carolyn Matlack’s formulation of pets as “sentient property” has garnered attention. 175 Matlack’s definition encompasses any animal that is warm-blooded and domesticated, recognizing these animals as “living, feeling companions,” but not giving them any status that approaches personhood. 176

In a vein similar to Matlack, animal welfarists argue that “it is morally acceptable, at least under some circumstances, to kill animals or subject them to suffering as long as precautions are taken to ensure that the animal is treated as ‘humanely’ as possible.” 177 This would involve a balancing of human and animal interests within what tends to be a utilitarian framework. 178 Peter Singer argues that “we should give equal consideration to similar amounts of suffering, irrespective of the species (or order) of the beings who suffer” so that consideration is based on the individual, not the species. 179 Furthermore, his framework suggests that humans tend to deserve a “higher degree of consideration” because our mental capacities make us capable of profound suffering. 180 Thus, animal welfarists show it is possible to

174 Favre, *Equitable Self-Ownership*, *supra* note 144, at 484, 495.
175 Hankin, *supra* note 52, at 386.
176 Id. Compare this approach to that of animal rights advocate Joan Dunayer, who argues that all sentient beings “warrant full and equal moral consideration.” JOAN DUNAYER, SPECIESISM 4 (2004).
177 FRANCIONE, *supra* note 74, at 6.
178 Id. at 6–7.
180 Peter Singer, *The Significance of Animal Suffering*, 13 BEHAV. & BRAIN SCI. 9, 10 (1990) (“to be human is to possess certain characteristics distinctive of our species, such as the capacity for self-awareness, for rationality, and for developing a moral sense . . . . It is not arbitrary to say that beings with these capacities live fuller lives than beings without them . . . .”).

[116]
tout our unique human attributes while nevertheless demanding better treatment of nonhuman animals.

David Favre has articulated a salient legal compromise between property in animals and animal rights. Favre’s approach, like ours, is rooted in traditional notions of property law. He proposes that property interests in animals be divided into legal and equitable aspects, with legal title belonging to the human owner and equitable interest belonging to the animal itself, providing the animal with a hybrid form of self-ownership similar to a trust.¹⁸¹ The courts would balance the competing interests between the legal title holder (the animal’s guardian) and the animal (equitable owner of itself) in order to reach the fairest outcome.¹⁸² Only the animal’s interests in fundamental life-supporting activities would be considered.¹⁸³ With the stronger legal standing available to the animal under this legal framework, a more stringent and serious balancing of interests would occur between human and animal.

C. Current Tensions Between the Legal and Social Conceptualization of Animals

As suggested by the enthusiastic proponents of a variety of new paradigms, there is increasing tension between traditional legal conceptions of animals and the change that is occurring in society concerning animal well-being. Despite welfare-oriented leaps forward in jurisprudence, traditional legal conceptions of animals as property persist; however, these conceptions become progressively less descriptive and trenchant as the societal interaction of animals and humans changes. As animals are treated more like humans in society, animals are being

¹⁸² *Id.* at 501.
¹⁸³ *Id.* at 498.
treated more like humans in the law. Both legislatures and courts are part of this change momentum.

Specifically, with social realities—especially those involving human bonding with pets—bearing down, the law has shifted towards acknowledging animal welfare in several major respects. First, statutes against animal cruelty have proliferated and strengthened over the past several decades, although enforcement may not always be vigilant. Second, the law is shifting away from using fair market value as a measure of damages in veterinary malpractice actions, pet death cases, and emotional distress cases. Third, pet custody battles are growing in number and ferocity, forcing a reluctant legal system to address the issue.

   Within the Framework of Property Rights

   All states have statutes criminalizing animal cruelty, and the level of concern in animal cruelty statutes is not generally replicated for inanimate property.184 Furthermore, the majority of states now categorize some forms of animal cruelty as misdemeanors and even felonies instead of petty offenses, whereas few states punished violators at the misdemeanor and felony level in the early 1990s.185

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184 Hankin, supra note 52, at 324. Some judicial reasoning treats animal cruelty as a type of vandalism or as a charge that complements vandalism. See, e.g., People v. Baldacchino, No. C046420, 2005 WL 3249943, at *5 (Cal Ct. App. 2005) (noting that California has a general vandalism statute that is followed by more specific statutes that include topics such as vandalism of a church, certain types of damage to buildings, and animal cruelty, and urging that charges should be brought under one of the more specific statutes when possible); People v. Guido-Silva, No. A106831, 2005 WL 2203274, at *6 (Cal. Ct. App. 2005) (considering a case where the defendant was charged with both animal cruelty and vandalism in relation to the death of a race horse and holding that to be guilty of vandalism, the defendant’s actions had to be a “proximate cause of damage to or destruction of the horse”).

185 Hankin, supra note 52, at 367.
In addition to these harsher penalties, offenders in certain jurisdictions, including Tennessee, must forfeit custody of the animals that were the subject of the conviction. In Tennessee, “any governmental animal control agency, law enforcement agency, or their designee” receives custody of animals seized under the animal cruelty statute. Under Tennessee law, the court may also curtail or prohibit the person’s custody of animals for a period of time that it deems reasonable. In a 2005 North Carolina case, the Animal Legal Defense Fund sued and gained custody of dogs based on an anti-cruelty statute similar to Tennessee’s statute. This marked the first time that a private organization was able to “enjoin an owner’s conduct and gain the right to control the animals’ welfare” through the use of an anti-cruelty statute. Thus, some of this state legislation has made pets more akin to children in the eyes of the law.

The tension between property and human treatment is heightened in cases in which defendants charged with animal cruelty use their right to property as a defense to the search and seizure of the animals. Alleged perpetrators have defended against animal cruelty charges on the basis that the animals were seized during warrantless searches of the defendant’s property. In order to avoid a property debate, some courts focus on the evidentiary value of the animals instead of their suffering, effectively meeting the perpetrator’s property argument with a property-oriented response.

187 Id. § 39-14-210(f).
188 Id. § 39-14-202(e).
189 Guben, supra note 147, at 68.
190 Id.
192 Id. at 202–03.
evidence (rather than the victim) of a crime, several exceptions to the warrant rule come into play, such as the plain view exception.\(^{193}\)

Other exceptions to the warrant requirement place more value on the animal’s life. Some courts have been willing to proceed under the exigent circumstances exception to the warrant requirement, which allows for warrantless seizures when immediate action is necessary to preserve life or evidence, thereby preventing the frustration of an important governmental interest.\(^{194}\) Although they allow the seizure to stand, courts have hesitated when the peril of a nonhuman animal, rather than a human, forms the basis of the emergency.\(^{195}\)

The Michael Vick case is a well-known—albeit highly unusual—example of a custody transfer resulting from animal mistreatment. It is therefore analogous to the animal surrender and placement options available on a more routine basis in other locales. Vick’s pit bulls were seized in April 2007 based on suspicions of his involvement in a dog fighting ring.\(^ {196}\) Although fighting dogs are usually euthanized, animal sanctuaries and rehabilitation centers throughout the country took custody of most of the pit bulls after Vick agreed to pay almost a million dollars for their evaluation and care.\(^ {197}\) This outcome is anomalous and was only available in this instance because Vick offered such a large sum for the care of the animals.

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\(^{193}\) Id.

\(^{194}\) Id. at 203.

\(^{195}\) Id. at 203–04.


\(^{197}\) Id. at A7.
2. Pets in Tort Law: Moving Beyond Fair Market Value When a Pet is Harmed or Killed

When a wrongdoer harms or kills a pet, the traditional response by civil courts has been to award the owner damages based on the fair market value of the animal, which is often negligible (particularly if the pet is a mixed-breed animal or of unknown descent) and certainly pales in comparison to the worth of the pet to the owner based on value attributable to companionship and related emotional attachment. The traditional damages framework is beginning to recede, however. Critics of that framework argue that the use of a fair market value in calculating damage awards, which emphasizes economic cost at the expense of sentimental worth, leads to both “under-compensation and under-deterrence.” Because the value of pets to many humans in the United States today cannot be adequately represented in economic terms through a fair market valuation, the availability of non-economic damages is integral if the common law is to meet the tort goals of “compensation, deterrence, and the reflection of societal values.” For the legal system to remain relevant, common law tort actions must keep pace with changing social values.

In 2000, Tennessee became the first state to provide an owner with a statutory remedy for non-economic damages in legal actions involving the death or injury of a

199 See Dryden, supra note 191, at 199.
200 Hankin, supra note 52, at 325 (internal footnote omitted).
201 Waisman & Newell, supra note 48, at 46.
202 Id. at 51 (quoting Dearborn Fabricating & Engr. Corp. v. Wickham, 532 N.E.2d 16, 17–18 (Ind. App. 1988)).
The relevant statute is known as the T-Bo Act, named after a Shih Tzu owned by Tennessee Congressman (and previously state senator) Steve Cohen. While in his yard, T-Bo was seriously injured by a large dog that was running loose and died after “three days of frantic trips to the night emergency clinic and veterinarian . . . .” After this loss, Cohen realized that the damage awards for pets do not correspond to the value of a pet’s companionship, prompting him to introduce the T-Bo Act. Cohen explained the impetus for the bill by lamenting that the only damages available to him upon T-Bo’s death were for “repairs, as if it were a clock or desk” and for the cost of buying a similar dog as a replacement. Thus, the T-Bo Act stipulates that an owner can receive up to $5,000 in non-economic damages for “the loss of reasonably expected society, companionship, love, and affection” when a pet is harmed or killed. Tennessee’s statutory approach starkly contrasts to the common law in states like New York, which does not recognize “an independent cause of action for loss of the companionship of a pet.” The Tennessee statute is particularly noteworthy because it recognizes the capability

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203 See TENN. CODE ANN. § 44-17-403 (2000); Hankin, supra note 52, at 338.
206 Id. at 225 (quoting Waisman & Newell, supra note 48, at 70).
207 TENN. CODE ANN. § 44-17-403(a) (2016).
208 Id. § 44-17-403(d). In pet death cases, courts in some states consider how much the owner has expended on the pet in the past in order to gauge how much the owner values the pet. See Hankin supra note 52 at 330–31 (quoting Mitchell v. Heinrichs, 27 P.3d 309, 314 (Alaska 2001)).
of animals to be *pets* and the tendency of humans to form strong emotional bonds with those pets, thus beginning to address some of the shortcomings of the traditional legal paradigm which, as earlier noted, fails to recognize the companionship function of animals by providing a definition of “pet” or “companion animal” within the statutory law.\(^\text{210}\)

While recovery under the T-Bo Act is limited in terms of both the eligible claimants and the amount of damages that may be awarded, it is nonetheless an impressive and progressive first step. In 2003, Colorado representatives introduced a bill that allowed for up to $100,000 in damages for loss of pet companionship.\(^\text{211}\) The bill was withdrawn, however, very shortly after being introduced.\(^\text{212}\) Since that time, state legislators have continued to introduce, and some state legislatures have passed, related legislation.\(^\text{213}\)

The judiciary also has played a role in changing the legal conception of animals as property in tort actions. In the courts, we witness the same tension between old and new views with which the legislatures contend. For example, when grieving pet owners invoke the tort theory of

\(^{210}\) See *supra* note 149 and accompanying text.


emotional distress or loss of companionship (consortium) in litigation, they move firmly beyond the realm of fair market value. Many jurisdictions struggle with the issue of whether an owner may sue under the tort theory of emotional distress if the distress arises from harm to a companion animal.\textsuperscript{214} Some jurisdictions allow recovery for the \textit{intentional} infliction of emotional distress upon the pet owner, but not for negligent distress arising from harm to an animal.\textsuperscript{215} These jurisdictions reason that “the affection of a master . . . is a very real thing.”\textsuperscript{216} Other state courts disallow recovery for both intentional and negligent infliction of emotional distress, reasoning that “owners cannot recover for emotional connections to their property.”\textsuperscript{217} Despite the advent of statutes providing for non-economic damages for harm to pets, pet owners or caretakers may need or desire access to “private, civil measures which deter wrongful acts and compensate the victims.”\textsuperscript{218} Among other things, recoveries in these private actions may yield larger damage awards against wrongdoers than these statutes permit. For instance, while the T-Bo Act caps damages at $5,000, some courts in other states have permitted compensatory damages in emotional distress cases that are ten times that amount.\textsuperscript{219}

\textsuperscript{214} Hessler, \textit{supra} note 152, at 44–45 (citing \textsc{tenn. code ann.} \textsection{} 44-17-403 (West 2000); Womack v. Von Rardon, 135 P.3d 542, 543, 546 (Wash. Ct. App. 2006)).


\textsuperscript{216} La Porte v. Associated Indeps., Inc., 163 So. 2d 267, 269 (Fla. 1964) (“the affection of a master for his dog is a very real thing”).

\textsuperscript{217} Waisman & Newell, \textit{supra} note 48, at 65.

\textsuperscript{218} \textsc{tenn. code ann.} \textsection{} 44-17-403 (2016).

\textsuperscript{219} \textit{Id.} \textsection{} 44-17-403.
3. Pets in Family Law: Pet Custody Battles

Pet custody battles also raise questions that implicate the traditional legal conception of animals as property. Kathy Hessler suggests that divorcing couples use mediation to determine custody of their pets in order to avoid the court system, which is often unsympathetic and refuses to mediate between the parties concerning any sort of visitation rights pertaining to pets. Unfortunately, if private mediation fails, the couple may nevertheless find themselves in the courthouse. In a Pennsylvania case, for example, a divorcing couple made a written agreement that purported to give custody of the couple’s dog to the wife while reserving visitation rights to the husband, although “[t]he ‘Agreement’ was never incorporated or merged into the Divorce Decree.” The ex-husband later sued when the ex-wife violated this “Agreement.” In dismissing the complaint, the trial court emphasized that “any terms set forth in the Agreement are void to the extent that they attempt to award custodial visitation with or shared custody of personal property.” Most courts assert that disputes over pets are simply property disputes, so that any consideration of the “best interests” of the animal is inappropriate.

If judicial reasoning continues to evolve, however, courts may become sympathetic to parties filing claims for the resolution of animal custody issues. For instance, Alaska enacted a new statute in 2017 that permits courts to amend divorce or marriage dissolution agreements to include ownership of an animal, taking into consideration the well-being of the animal. Other state legislatures have followed

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220 Hessler, supra note 152, at 49.
222 Desanctis, 803 A.2d at 231.
223 Id. at 232 (citing 23 PA. CONS. STAT. § 3502).
224 Paek, supra note 211, at 505.
225 See Alaska Legislation Allows Courts to Consider Pet Well-Being
in proposing and passing similar legislation.\textsuperscript{226} Tennessee law may be evolving in this regard. In one Tennessee case, for example, the judge ruled that dogs at issue in one dispute should remain in the house and neighborhood where they had spent their entire lives, echoing the type of reasoning often used in child custody cases.\textsuperscript{227} The judge appeared to be sympathetic to the views of many animal welfare activists who urge that custody battles for pets should be “based on . . . who has formed a closer bond to the animal, or who can provide a better home for it,”\textsuperscript{228} instead of focusing on property ownership as determined through receipts for purchase and veterinary care.\textsuperscript{229}

Determining ownership of an animal for purposes of custody disputes is often difficult. In cases involving married parties, community property issues complicate already murky applications of traditional property law. While the assignment of ownership based on the best interests of the


\textsuperscript{228} Hankin, \textit{supra} note 52, at 387.

\textsuperscript{229} Britton, \textit{supra} note 227, at 4 (quoting Ranny Green, ‘Legal Beagle’ Offers Problem-Solving Tips, \texti{SEATTLE TIMES}, Aug. 25, 1996, at H5 (quoting statements made by Linda Cawley, one the nation’s first and pet law experts)).
animal could be an appropriate method to resolve custody disputes in domestic violence situations, in most jurisdictions, the traditional approach to ownership determinations is still the law. Accordingly, traditional property ownership concepts continue to be the basis for educating abuse victims as they consider fleeing from a violent home. For example, one informational sheet published by The Humane Society of the United States (“HSUS”) instructs battered women that they can prove ownership of their pets by producing “[a]n animal license, proof of vaccinations, or veterinary receipts” in their names.

D. Bailment and Damages for Conversion of Property in a Safe Haven Context

Bailments involving animals raise particularly thorny issues at the intersection of the traditional and progressive conceptions of animals as property. Bailment is the “delivery of personal property by one person (the bailor) to another (the bailee) who holds the property for a certain purpose, [usually] under an express or implied-in-fact contract.” A bailment is neither a gift nor a conveyance of title; the bailee takes possession of the property, but title and

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230 Gentry, supra note 47, at 115 (citing Raymond v. Lachmann, 695 N.Y.S.2d 308, 309 (N.Y. App. Div. 1999)). Yet, we must carefully avoid standards that could result in ownership being assigned to the abuser, such as if ownership were based on who had formed the closest bond with the animal.


232 BLACK’S LAW DICTIONARY 162 (9th ed. 2009); see, e.g., Merritt v. Nationwide Warehouse Co., 605 S.W.2d 250, 252 (Tenn. Ct. App. 1980) (“A bailment is a delivery of personality for a particular purpose or on mere deposit, on a contract expressed or implied, that after the purpose has been fulfilled, it shall be re-delivered to the person who delivered it or otherwise dealt with according to his direction or kept until he reclaims it.”); 1 TENN. JURIS., Bailments § 2 n.18 (2004) (providing a list of Tennessee cases that affirm this definition).
the right to recover possession remain with the bailor. Thus, Tennessee law (like the law of other U.S. jurisdictions) holds that property delivered by a bailor to a bailee “shall be re-delivered to the person who delivered it or otherwise dealt with according to his direction or kept until he reclaims it.” The bailor has a cause of action against the bailee for conversion if the bailee “fails or refuses,” inconsistent with the bailment contract, “to return [the property] . . . .” Tennessee also recognizes that while a bailment is contractual in nature (centering on an express or implied agreement between the bailor and the bailee) a legally valid and enforceable contract is not required to create a legally valid and enforceable bailment. For instance, a quasi-contract might suffice, and a bailment may be created by operation of law in certain circumstances. There are various types of bailment. Of particular importance in animal care is a gratuitous bailment for the benefit of the bailor, which is in the nature of a caretaking arrangement for the property of the bailor in which “the bailee receives no compensation.” Animals involved in bailments are typically treated the same way inanimate, insentient property is treated, in accordance with the traditional conception of animals as property. Pet owners enter into myriad bailment situations concerning their pets (including by, for example, leaving a pet at a veterinary hospital for a surgery or boarding a pet at a kennel during a vacation). Many of these arrangements are bailments for the mutual benefit of the bailor and the bailee, since the bailee receives compensation for services that

233 BLACK’S LAW DICTIONARY 162 (9th ed. 2009).
235 8A AM. JUR. 2D Bailments § 239 (2014).
236 Aegis Investigative Group, 98 S.W.3d at 163.
237 Id.
238 BLACK’S LAW DICTIONARY 162 (9th ed. 2009).
239 FRANCIONE, supra note 74, at 52.
include the bailment. Of particular importance to this article, a human victim of domestic violence enters into a bailment arrangement (a gratuitous bailment for the benefit of the bailor) when she asks a safe haven shelter to house and care for her pet for a limited amount of time while she is in a shelter that admits only humans. The solution we offer in Part III of this article works with this property law conception.

Bailments involving animals, like custody battles involving animals, raise issues about ownership; bailors are typically owners or agents of owners, while bailees often want to ascertain the bailor’s ownership before accepting the subject property for safekeeping. Significant uncertainty exists in this area of the law as applied in this context, as revealed by the responses in Ascione’s survey of shelters that provided services for the pets of domestic violence victims. After a brief description of responses he received, Ascione concluded that “specific recommendations are not possible given the current lack of consensus about how to deal with pet ownership issues.” The lack of clear legal guidance Ascione observed persists and does a disservice to both human and nonhuman victims of violence.

Ascione’s specific findings revealed different levels of awareness and various understandings of pet ownership questions. One animal shelter in Ascione’s survey indicated that ownership only became an issue if pets were not reclaimed or would otherwise need long-term arrangements. Most shelters reported that they informed women that they would lose ownership of their pets if they failed to reclaim them at the end of the agreed-upon sheltering time, many even requiring the women to sign a

See ASCIONE, SAFE HAVENS, supra note 116 and accompanying text. Proof of ownership of personal property can be tricky.
Id. at 40.
Id. at 38.
form acknowledging this possibility. Some shelters assumed that the animal became the property of the shelter upon entry, which indicates a possible misunderstanding by the shelter of the nature of a bailment; while other shelters thought that they would have to return the pet to the abuser if he came for it.

Moreover, shelters surveyed by Ascione were split on whether a woman could relinquish a pet when she was a co-owner or the abuser was the sole owner of the animal. Among the animal shelters that responded to Ascione’s survey, 30% believed that a co-owner could relinquish a pet, while 40% believed that she could not. Under the law, in a cotenancy of either real or personal property, cotenants have “unity of possession” under “more than one distinct title” so that each cotenant has full title and the right of possession, making it so that no cotenant can exclude any other cotenant from the property. Accordingly, if a pet is co-owned by a victim of domestic violence and her abuser, neither, alone, can relinquish ownership of the pet.

Legal ownership is especially important in the safe haven sheltering context when a victim and her abuser contest pet ownership and a shelter must decide upon a course of action. A woman can relinquish a pet or place it in a sheltering program if she is the sole legal owner. However, legal ownership of an animal is not always easily discerned, which could have ramifications when a victim of violence attempts to remove a pet from an abusive home or when the pet is being sheltered.

Ownership in the safe haven context is a combined issue of law and fact that may require judicial resolution.

244 Id. at 36.
245 Id. at 38–39.
246 Id. at 38.
247 Id.
248 20 AM. JUR. 2D Cotenancy and Joint Ownership § 1 (2014).
249 ASCIONE, SAFE HAVENS, supra note 116, at 40.
Exclusive possession over an extended period of time creates a rebuttable presumption of ownership. But in a typical domestic violence situation, abusers, human victims, and pets are living together in a single household. Legal guidance is sparse when the animal in question has been in the possession of both parties who claim ownership. In a case involving a prized show dog that was being shown by the defendants with the plaintiff’s permission, an Illinois court found that a certificate of registration that listed the defendants as co-owners created only a presumption of co-ownership that was rebutted by the “demeanor of witnesses” that suggested that the plaintiff had never intended to relinquish sole ownership of the dog when the certificate was created. Thus, written documents are not a foolproof way to establish ownership. A legal determination as to ownership could depend instead on other facts and the credibility of the parties in asserting them.

Current law provides so little guidance in part because of the paucity of judicial opinions in this area of the law in a safe haven or analogous context. Few Tennessee cases have dealt with bailment in an animal abuse situation. One noteworthy case, however, is Largin v. Williamson County Animal Control Shelter. In Largin, Williamson County officials seized animals from the plaintiff’s home as part of animal abuse proceedings that the state had initiated against her. The plaintiff was eventually convicted of animal abuse and subsequently initiated a proceeding against the animal shelter when it refused to return the animals to the plaintiff. The plaintiff alleged that, by refusing to return the animals, the defendant animal shelter

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committed conversion and/or negligent bailment. \(^{254}\) The trial court dismissed the case on a technical matter based on a failure to state a claim upon which relief could be granted, \(^{255}\) because the complaint did not allege that the tort was caused by a government employee behaving negligently within the scope of his employment as is required under Tennessee law. \(^{256}\) In reviewing the matter, the appellate court (like the trial court) never reached the validity or enforceability of the bailment itself. Instead, it affirmed the lower court’s dismissal based on the procedural requirements of Tennessee law. \(^{257}\)

As inadequate and incomplete as property law may be in this context, it continues to govern the legal relationship between humans and their pets. As a result, under current safe haven arrangements, a human domestic violence victim (as bailor) who shelters her animal in a safe haven program (as bailee) has a legitimate expectation under the law that she will recover possession of her animal on request. This arrangement exists solely for the benefit and subject to the control of the human victim. The health, welfare, and overall interests of the nonhuman animal, objectively determined, are not accounted for in current bailments of this kind. This creates a conundrum for the safe haven: even if safe haven shelter or social services professionals reasonably believe that an animal is in danger of being abused if he or she is returned to the owner, bailment law provides that the animal must be returned. This legal conclusion troubles us and motivates this article.

We have determined that public policy and legal considerations provide a basis for rethinking the way in which bailment relationships between domestic violence

\(^{254}\) *Largin*, 2006 WL 2619973, at *1.

\(^{255}\) *Id.* at *2.

\(^{256}\) *Id.* at *4* (citing Gentry v. Cookeville Gen. Hosp., 734 S.W.2d 337, 339 (Tenn. Ct. App. 1987)).

victims and safe haven shelters are constructed. Documented connections between human and animal violence have focused attention on the need to include animals in the equation as a component and resolution of the family violence problem (or at least as a means of mitigating the effects of family violence). The legal system already has reacted to this phenomenon with the inclusion of animals in protective orders, an increase in criminal penalties for animal abuse, and the adoption of human-animal abuse cross-reporting statutes. In addition, the law has begun to react to the changing nature of the human-pet bond by providing for non-economic tort damages for the death of a pet. Because bailment agreements are contractual, it is possible to better incorporate this changing socio-legal landscape into bailment relationships between human domestic violence victims and safe haven shelters. Part III explores this idea under the laws of the State of Tennessee, the state in which we are licensed to practice. Analogous arguments may be persuasive in other U.S. jurisdictions.

III. Special Bailments as a Solution to the Safe Haven Conundrum

A. A Proposal and its Legal Basis

Because bailments are in the nature of contracts, the bailor and bailee may create a “special bailment.” While a general bailment requires that the property be “redelivered upon request,” in a special bailment the “delivery to the bailee is upon some condition or term, or stipulation affecting and operating upon the redelivery.” If a pet-

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258 See supra Part I.A.4.
259 Id.
260 See supra Part II.C.2.
261 1 TENN. JURIS., Bailments § 2 (2004); see also Aegis Investigative Group v. Metro. Gov't of Nashville & Davidson County, 98 S.W.3d 159, 162–63. (Tenn. Ct. App. 2002) (emphasis added) (“A bailment is a
owning human domestic violence victim and a safe haven shelter together agree that the victim’s pet will be cared for by the shelter for a temporary period and that the shelter will return the pet, subject to the fulfillment of a specified term or the satisfaction of an express condition, that conditional bailment agreement should be enforced if challenged in court.

Exceptions to a court’s enforcement of a special bailment agreement of this kind under Tennessee law may include contract formation or enforcement defenses or public policy considerations. For example, the lack of legal capacity of the bailor pet owner (because of minority status or sufficiently impaired mental capacity) may render the bailment agreement void or voidable.\textsuperscript{262} In addition, the court may not enforce a safe haven bailment agreement: if the bailor pet owner enters into the agreement under legally recognized duress or subject to undue influence\textsuperscript{263} or is parted from her animal as a result of fraud;\textsuperscript{264} if the delivery of personality for a particular purpose or on mere deposit, on a contract expressed or implied, that after the purpose has been fulfilled it shall be re-delivered to the person who delivered it or otherwise dealt with according to his direction or kept until he reclaims it.”); Merritt v. Nationwide Warehouse Co., 605 S.W.2d 250, 252 (Tenn. Ct. App. 1980) (same); Rhodes v. Pioneer Parking Lot, Inc., 501 S.W.2d 569, 570 (Tenn. 1973) (same).

\textsuperscript{262} See Lowery v. Cate, 64 S.W. 1068, 1070 (Tenn. 1901) (noting that infancy is a good defense to a claim of breach of contract).


\textsuperscript{264} The effect of fraud on contracts and other transactions in Tennessee has been described as follows:

Fraud vitiates and avoids all human transactions, from the solemn judgment of a court to a private contract. It is as odious and as fatal in a court of law as in a court of equity. It is a thing indefinable by any fixed and arbitrary definition. In its multiform phases and subtle shapes, it baffles definition. It is said, indeed, that it is part of the equity doctrine of fraud not to define it, lest
agreement is found to be unconscionable; or if the conduct between the parties gives rise to a valid claim of estoppel.

In most cases, the availability of these formation and enforcement defenses can be limited by effective controls on the actions taken by the bailor and bailee. Valid and binding contracts typically are enforced in Tennessee consistent with public policy.

Unless a private contract tends to harm the public good, public interest, or public welfare, or to conflict with the constitution, laws, or judicial decisions of Tennessee, it

the craft of men should find ways of committing fraud which might evade such a definition. In its most general sense, it embraces all “acts, omissions, or concealments which involve a breach of legal and equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.” A judicial proceeding in rem, while generally binding upon all persons, is no more free from the fatal taint of fraud than a proceeding in personam, or an individual contract. When once shown to exist, it poisons alike the contract of the citizen, the treaty of the diplomat, and the solemn judgment of the court.

Smith v. Harrison, 49 Tenn. 230, 242–43 (Tenn. 1871) (internal citation omitted).

In our view, the defense of unconscionability is unlikely to be raised (or, if raised, survive a motion for summary judgment) in a court action involving safe haven bailment agreement, since the bargain between the pet owner and the shelter is not likely to be so one-sidedly favorable to the shelter—or oppressive to the pet owner—that a court could find the agreement unconscionable. See Haun v. King, 690 S.W.2d 869, 872 (Tenn. Ct. App. 1984) (describing, in similar terms, the unconscionability defense in Tennessee) (citing Hume v. United States, 132 U.S. 406 (1889); Christian v. Christian, 365 N.E.2d 849 (N.Y. 1977)).

does not violate public policy. The reverse is also true: A contract with a tendency to injure the public violates public policy.\textsuperscript{267}

In determining the sources of Tennessee public policy, the Tennessee Supreme Court has stated

\begin{quote}
[p]ublic policy in Tennessee “is to be found in its constitution, statutes, judicial decisions and applicable rules of common law.” Although the determination of public policy is primarily a function of the legislature, the judiciary may determine public policy in the absence of any constitutional or statutory declaration.\textsuperscript{268}
\end{quote}

Public policy in Tennessee supports the use of a special bailment as a solution to the safe haven conundrum. Property rights are strong in Tennessee, but Tennessee law has evolved to incorporate animal welfare into legal questions involving pets in domestic violence situations. Specifically, the Tennessee constitution provides “[t]hat no man shall be . . . deprived of his . . . property, but by the judgment of his peers or the law of the land.”\textsuperscript{269} However, the Tennessee General Assembly and Tennessee courts have provided that human animal owners may be deprived of their animals under certain circumstances. For example, human subjects of protective orders in Tennessee may be

\begin{thebibliography}{99}
\bibitem{Spiegel} Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W.2d 528, 530 (Tenn. 1991) (internal citations omitted) (citing Home Beneficial Ass’n v. White, 177 S.W.2d 545, 546 (Tenn. 1944); Nashville Ry. & Light Co. v. Lawson, 229 S.W. 741, 743 (1921); Holt v. Holt, 751 S.W.2d 426, 428 (Tenn. Ct. App. 1988)).
\bibitem{Alcazar} Alcazar v. Hayes, 982 S.W.2d 845, 851 (Tenn. 1998) (internal citations omitted) (quoting Swann v. Pack, 527 S.W.2d 99, 112 n.17 (Tenn. 1975)).
\bibitem{TennConst} TENN. CONST. art. I, § 8.
\end{thebibliography}

[136]
dispossessed of some or all of their ownership rights in a family pet.\footnote{270} Moreover, a person convicted under Tennessee’s animal cruelty statutes may be required by the court to forfeit possession and ownership of the subject animal.\footnote{271} In these cases, the court also “may prohibit the person convicted from having custody of other animals for any period of time the court determines to be reasonable, or impose any other reasonable restrictions on the person's custody of animals as necessary for the protection of the animals.”\footnote{272} In \textit{State v. Webb}, the Tennessee Court of Criminal Appeals upheld the constitutionality of the reasonableness of the trial court’s imposition of a ten-year prohibition on ownership of any animals by the defendant, a person convicted of animal cruelty.\footnote{273} Moreover, as the background provided in Parts I and II of this article amply shows, Tennessee law is evolving to incorporate animal welfare concerns in a variety of contexts—especially those involving pets, including pets in domestic violence situations.\footnote{274}

Accordingly, we propose that safe haven shelters enter into written bailment agreements\footnote{275} that expressly

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\textsuperscript{270} TENN. CODE. ANN. § 36-3-606(a)(9) (2016).
\textsuperscript{271} \textit{Id.} §§ 39-14-202(e), -212(e) (2016).
\textsuperscript{272} \textit{Id.} § 39-14-202(e) (2016); \textit{see also id.} § 39-14-212(e) (2016) (“The court may prohibit the defendant from having custody of other animals for any period of time the court determines to be reasonable, or impose any other reasonable restrictions on the person's custody of animals as is necessary for the protection of the animals.”).
\textsuperscript{274} \textit{See, e.g., supra} notes 207 & 208 and accompanying text.
\textsuperscript{275} Many safe haven shelters already use written agreements to settle ownership of the pets during sheltering. In Francione’s survey, for example, fourteen safe haven shelters (66.7% of the survey) had a policy providing that owners of sheltered pets “would lose custody or ownership of their pets if they failed to retrieve [them].” \textit{See ASCIONE, SAFE HAVENS, supra} note 116. At six of the shelters (30% of survey), “ownership was formally transferred to the animal welfare agency” upon the commencement of sheltering, while at three other shelters (15% of

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condition the return of pets to their owners on an objective determination that the pet is not returning to a household that puts the pet at significant risk of physical, mental, or emotional harm. That objective determination may be made by the shelter itself or by an independent third party (acting in the nature of “animal protective services” or a guardian ad litem) and, in either case, should be based on information supplied to it in good faith by or on behalf of the owner in accordance with an established protocol. Because shelter personnel may be considered to be interested parties in the decision-making process (perhaps having formed their own human-animal bonds with the pets under their care), it is preferable that an independent third party be designated to make the risk determination. The decision maker, the timing and nature of notices between the parties, the standard governing the decision, the evidentiary burdens, and the rest of the decision-making process should be delineated expressly in the written bailment agreement. The shelter should determine its own release policy. Existing forms of bailment used in this context can be modified to include a condition of this kind.

survey), pets were re-licensed so as to no longer appear in the woman’s name. Id. at 37–38.

276 The condition is intended to be a tailored analog to court determinations of the “best interests of the child” in legal proceedings involving child welfare. See generally CHILD WELFARE INFORMATION GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD (2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf (summarizing the standard for “best interests” and its definition and use in various states); Tennessee Department of Children’s Services, Your Client’s Rights (noting that a parent may lose rights to a child “involuntarily if the Judge of a Chancery, Circuit or Juvenile Court finds there are legal grounds for termination and that termination is in the child’s best interest.”) (last visited Aug. 8, 2017).

277 To help in creating that policy, we recommend reviewing and considering the general information provided id. at 36–40 (describing the results of Ascione’s study pertaining to owner knowledge of release policies and pet ownership issues upon release).
The procedure employed by safe haven shelters to effectuate the special bailment should be carefully designed and executed in a manner that best ensures the agreement will be determined to be valid and enforceable if challenged. Accordingly, we recommend that the safe haven shelter, at a minimum, engage in the following steps in entering into and exercising its rights under the bailment agreement:

- The safe haven shelter should ensure that the pet owner who signs the agreement has the legal capacity to enter into a contract. She must be of the requisite age and have the requisite mental competence under applicable state law in order for a court to determine her to have the requisite legal capacity. Obtain documentary proof, if it is available or can be obtained.

- Similarly, shelter personnel should ensure that the pet owner does not feel threatened or intimidated into signing the agreement by any words spoken or actions taken directly or indirectly by the safe haven shelter or any intermediary (e.g., a social worker working with the pet owner).

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278 See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 12(2) (1981) (stating that a “natural person” has “full legal capacity to incur contractual duties” unless she is: “under guardianship,” an “infant,” “mentally ill or defective,” or “intoxicated”); 17 C.J.S. Contracts § 31 (“It is essential that the parties to a contract have the capacity to contract. . . . The capacity to contract involves a person’s inability to understand the terms of an agreement, and not his actual understanding.”); 17 C.J.S. Contracts § 175 (“The test of mental capacity to contract is whether the person in question possesses sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the act or transaction . . . . [T]o invalidate his contract . . . it is sufficient to show that he or she was mentally incompetent to deal with the particular contract in issue.”); Roberts v. Roberts, 827 S.W.2d 788, 791 (Tenn. Ct. App. 1991) (stating that “[n]o published Tennessee authority is found which defines degree of mental capacity required to invalidate a contract,” but quoting with approval the above language from 17 C.J.S. Contracts § 133(1)(e) (now 17 C.J.S. Contracts § 175)).
The pet owner and representatives of the shelter should discuss and document all facts about violence to the pet, threats made against the pet, violent behavior directed toward the pet, in addition to basic health and care information.

Shelter personnel should read and describe the standards associated with release of the pet to the owner.279 Clarify that the animal may not be returned to the owner under the circumstances outlined in the agreement and that the owner surrenders ownership of the pet to the shelter under those circumstances. Offer standard examples of situations that allow for return of a pet to its owner and of situations that do not allow for return.

These steps (and, as necessary or desired, others specific to the shelter) should be set forth in a written protocol that is used by the shelter each time it enters into a safe haven agreement with a pet owner. Other steps specific to the pet owner and related circumstances may be added to the protocol in discrete cases. Any additions of this kind should be documented in writing and included with the file for the resulting agreement.

B. Possible Extralegal Concerns with the Proposal

We readily acknowledge that the proposal we outline in Part III.A is not without drawbacks. Paramount among them are the effects of the agreement (and the execution of its terms and provisions) on the mental and emotional state of the human pet owner—a victim of domestic violence. In addition, our proposal may raise personal and professional concerns for the social workers serving these domestic

279 Of course, the shelter should review all of the terms of the bailment with the pet owner to ensure that she understands all aspects of the arrangement.
violence victims. This section briefly addresses these two anticipated critiques of our proposal.

Based on the touching human-pet bond described supra Part I, one could argue that it is in the human victim’s best interests to retain full ownership of—and complete control over the residence of—her pet. Often, the pet is the only source of unconditional love and constancy that the woman has.\textsuperscript{280} Furthermore, research on domestic violence has revealed that leaving a domestic violence situation is a process, meaning that these human victims rarely make a sudden and complete break from their abusers. In a study conducted in 1983, for example, 50\% of the victims who fled to a shelter returned to their abusers.\textsuperscript{281} Instead of seeing this return as a “failure[,”] however, the authors of the study cast the stay at the shelter as “part of the process of gaining independence.”\textsuperscript{282} These women return to their violent homes with new insights and knowledge, so that the time at the shelter was in fact quite useful.\textsuperscript{283} One could therefore argue that it would be detrimental for these women to lose their pets in this situation. Perhaps some women would refuse to come to the shelter at all, denying themselves a chance to begin the process of growth and understanding that could ultimately help them leave their abusive situations. Even when safe havens and abuse victims create valid special bailment agreements, a victim could experience a host of unhealthy reactions if the situation were to develop so that the victim had to relinquish her pet. These unhealthy reactions could include an increased sense of isolation, anger toward the safe haven system, or distrust of the social workers tasked with helping these abuse victims. For these

\textsuperscript{282} \textit{Id.}
\textsuperscript{283} \textit{Id.}
and other reasons, we appreciate that a special bailment might not be the best option for every abuse victim and that the invocation of the special bailment would need to be considered on a case-by-case basis.

The process suggested in our proposal also may put additional pressure on social workers working with victims of family violence and create tensions with their obligation of confidentiality to their clients. Clinical social workers typically have stressful jobs.284 Studies find that the stress social workers suffer may subject them to a significant risk of secondary post-traumatic stress disorder.285

Social workers who provide services for domestic violence victims may experience unique types of stress, including vicarious traumatization.286 The unhealthy physical and emotional reaction to the stresses of clinical social work and related fields—which is associated with secondary post-traumatic stress disorder and vicarious traumatization—has also been termed “compassion fatigue.”287 This term was first used to describe “burnout in

286 Clemans, supra note 285, at 13.
287 FIGLEY & ROOP, supra note 284, at 11.
nurses exposed to traumatic work-related experiences”288 but has now also been applied to doctors, social workers, veterinarians, and animal shelter workers. Their work requires these professionals “to feel the emotional needs and experiences” of their clients (human or animal), but this empathic response makes the caregiver susceptible to trauma. 289 Symptoms of compassion fatigue include “[a] sense of powerlessness,” “fear,” “numbness,” and the feeling of being on “[a]n emotional roller coaster.”290

Compassion fatigue is the result of “prolonged exposure to suffering” coupled with “traumatic memories” of “unresolved conflicts and distress” related to the suffering of clients.291 A study of animal-care workers conducted by the HSUS between 2003 and 2004 found that about 68% of animal shelter workers surveyed were at “high” or “extremely high” risk of developing compassion fatigue, which could manifest itself through symptoms such as self-doubt, numbness, fear, depression, hyper-vigilance, and sleep disturbances.292 Similarly, a 2008 survey conducted by the National Association of Social Workers indicates that 25% of social workers in child welfare/family practices “experience sleep disorders,” 37% report psychological problems, and 65% suffer from fatigue.293 Undoubtedly, social work and related fields produce highly stressful work environments. Accordingly, when reasonable, efforts should be made to avoid creating new policies that would further burden these workers.

288 Id. at 22 (citing C. Joinson, Coping with Compassion Fatigue, 22 NURSING 116, 116-22 (1992)).
289 FIGLEY & ROOP, supra note 284, at 12.
290 Id. at 5.
291 Id. at 13.
292 Id. at 23, 48. The study also noted that this percentage of at-risk animal shelter workers (about 68%) was much higher than the percentage of at-risk veterinarians (about 30%), presumably because there is more trauma present in animal shelters. Id. at 53.
293 NAT’L ASSOC. SOC. WORKERS, supra note 284, at 5.
Moreover, social workers, like psychologists and attorneys, have a professional obligation to keep client relations and communications confidential absent consent from the client or other compelling professional reasons.\textsuperscript{294} Tennessee law treats this confidential information as privileged to the same extent that psychologist-patient and attorney-client confidences are privileged.\textsuperscript{295} In all likelihood, a pet owner who chooses to place her pet in safe haven under our proposed form of special bailment would need to give consent to her social worker to supply necessary information to the person charged with determining whether the owner’s pet can be returned to her under the terms of the bailment agreement (the shelter or the third-party decision maker).\textsuperscript{296} Under applicable ethical rules governing social workers, this requires that the social worker inform the client, “to the extent possible, about the disclosure of confidential information and the potential consequences, when feasible before the disclosure is made.”\textsuperscript{297} Workers must offer this information in addition to general counseling about “the nature of confidentiality and limitations of clients’ right to confidentiality.”\textsuperscript{298} Although there is some precedent in the cross-reporting context for exempting

\textsuperscript{294} NAT’L ASSOC. SOC. WORKERS, CODE OF ETHICS § 1.07 (1996) [hereinafter NASW CODE OF ETHICS].
\textsuperscript{296} The express exception allowing for disclosure of confidential information does not strictly apply here, since the “serious, foreseeable, and imminent harm” anticipated under the conditional bailment is not “to a client or other identifiable person,” but rather to a pet. See NASW CODE OF ETHICS § 1.07(c) (“The general expectation that social workers will keep information confidential does not apply when disclosure is necessary to prevent serious, foreseeable, and imminent harm to a client or other identifiable person.”).
\textsuperscript{297} Id. § 1.07(d).
\textsuperscript{298} Id. § 1.07(e).
certain communications from these confidentiality strictures, the management of confidential information is already complicated and burdensome for social workers, and a special bailment like that proposed here would add to that complexity and burden.

C. Potential Extralegal Benefits of the Proposal

Yet, the proposal we make in Part III.A also may assist social workers and their clients in dealing with the difficult circumstances and decisions emanating from domestic violence. For example, the existence of a special bailment may provide the social worker with a means of helping the client to relieve additional stress associated with providing care to a pet as he or she attempts to better care for herself and may provide the social worker with healthy additional leverage in communications with client victims of domestic violence. This section addresses these two potential benefits.

First, the removal of the animal victim from the cycle of violence could reduce the emotional trauma for both human and non-human victims. Domestic violence victims experience an emotional roller coaster that is similar in origin and manifestation to the phenomenon known as compassion fatigue, as described above in Part III.B. Several studies, for example, have described the “climate of fear”

experienced by the victims of violence.\textsuperscript{300} One study found that women who chose to go to a shelter were actually more fearful than their counterparts who were not at shelters.\textsuperscript{301} Women who reach out for help—the sort of women who shelter their pets while they themselves are in a shelter—are in a state of extreme fear. Battered women have been described as being in “a numbed shock,” while they may also experience a wide and varying range of emotions ranging from happiness and excitement to anger and fear.\textsuperscript{302} These emotional reactions raise questions about the ability of these human victims to care for their pets and may suggest that, at least in certain circumstances, the separation of human and pet could help break the cycle of fear and numbness or otherwise provide some emotional relief.

Similarly, the special bailment agreement could provide healthy leverage that hastens the human victim along the path of emotional evolution that will ultimately compel the victim to leave the violent situation. Before victims become willing to sever a violent relationship, they must move from rationalization of the violence—a stage where the victims view the violence as “normal, acceptable, or at least justifiable”—to victimization, a stage where “a variety of catalysts” have forced the victim to “redefine[e] abuse” and no longer regard the abuse as acceptable.\textsuperscript{303} The catalysts that lead a victim to stop rationalizing the violence include: “a [sudden] change in the level of violence[,] . . . a change in resources [for the victim,] . . . a change in the relationship [with the batterer,] . . . [the onset of] despair[,] . . . [an increase in the public nature of the violence,] . . . and

\begin{itemize}
\item \textsuperscript{300} Alfred DeMaris & Steven Swinford, \textit{Female Victims of Spousal Violence: Factors Influencing Their Level of Fearfulness}, 45 \textit{FAM. REL.} 98, 98 (1996).
\item \textsuperscript{301} \textit{Id.} at 103.
\item \textsuperscript{302} Ferraro & Johnson, \textit{supra} note 281, at 334–35.
\item \textsuperscript{303} \textit{Id.} at 328, 331.
\end{itemize}
[being confronted with] external definitions of the violent relationship." 304

The possible removal of a pet could trigger several of these dimensions of the victimization stage. One obvious example would be with respect to “the interjection of external definitions of abuse.” 305 Ferraro and Johnson describe how victims react positively to “genuine concern” shown to them by others. 306 This reasoning could be extended to a situation that involves the potential removal of the pet. The removal of the pet would highlight the level of concern that is felt by outside observers of the situation, which in turn might alter the paradigm in which the human victim views the violence. Similarly, despite a lack of “systematic research,” researchers emphasize that a child’s desire to leave an abusive situation has a dramatic impact upon a mother in her contemplation of leaving a violent home. 307 Although pets cannot vocalize desires to leave abusive circumstances, the forced relinquishment of the pet could be analogous to a child’s request not to return to a violent home.

Women often are propelled to act when they reach a point of despair and lose all hope that a situation will improve. 308 Observers note that the victim must hit rock bottom before she will leave a domestic violence situation. 309 The possible or actual relinquishment of a pet could push a woman closer to the realization that she herself is a victim and that her situation will not improve unless she removes herself from the violent household. Specifically, a social worker could use the special bailment agreement as a tool in educating a domestic violence victim to the danger of

304 Id. at 331.
305 Id. at 332.
306 Id. at 333.
307 Id.
308 Id. at 332.
309 Id.
returning herself, as well as any dependent children or nonhuman animals, to a violent household. Many social workers express frustration that they cannot adequately portray to domestic violence victims the risks associated with a return to the very household in which they experienced violence. 310 The assessment and communication of potential harm to both children and pets—as well as potential harm to the victim herself—may help a victim of domestic violence in assessing the merits and risks of returning to a living situation in which violence can be expected.

To confirm what we earlier stated, we appreciate that our special bailment proposal is not an airtight solution or panacea for all of the problems associated with animal abuse and domestic violence in a safe haven setting. Nonetheless, we believe that implementation of our proposal could be another way to help “move the ball down the field.” If save haven shelters and social workers were given the tools and ability to actively and realistically consider special bailments as an option to implement on a case-by-case basis, the mere act of thinking through the utility and appropriateness of the bailment alternative could, itself, have a positive impact on specific cases and on the overall state of human and animal welfare.

Conclusion

The issues involved in family violence situations are multifaceted. As we learn more about them and begin to work at resolving them, additional issues present themselves for resolution. In the past twenty years or so, a number of these emerging issues have arisen out of our increasing awareness of the link between animal violence and human

310See, e.g., HSUS, SAFE HAVENS, supra note 102, at 6 (acknowledging that a woman’s choice to return to an abusive home is “frustrating” to shelter staff).
violence in the home. As humans have developed closer, family-like relationships with their pets, these animals have been unmistakably and unwittingly brought into the cycle of family violence. Among other things, we now know that all of these living, sentient beings are at risk of harm as dependents or cohabitants of a perpetrator of domestic violence.

Both the social service system and the law have responded to changes in the social and moral conception of animals and their role in family violence. The development and operation of safe haven programs for the pets of domestic violence victims who are transitioning temporarily to shelter life is one of those responses. Overall, the installation of safe haven shelters for pets in these circumstances has been a positive development. However, the potential that a domestic violence victim will reclaim her pet and return the pet to a violent household highlights a shortcoming in the social services system’s response to family violence: nonhuman animal family members are left without advocates in the process. Although domestic violence victims and their children are assisted and protected by specialized counselors, the pets in these households continue to be treated not as family members but rather as inanimate, insentient property under the control of an owner. While this has been the historic legal conception of pets, law has begun to acknowledge that this conception is outdated and incomplete.

We suggest that practices, in addition to positive law, need to evolve further to protect pets involved in family violence situations and disputes. In particular, we propose that safe haven shelters use a conditional bailment when they take in and care for the pets of domestic violence victims. This bailment would prevent return of the pet to its owner if the pet would be at significant risk of physical, mental, or emotional harm. Through the condition and the essential related procedures, animals that have witnessed or been
victims of domestic violence receive some protection—protection at a level commensurate with their position as nonhuman family members.